

Fordham International Law Journal

Volume 15, Issue 4

1991

Article 9

Francovich and Bonifaci v. Italy: EEC Member State Liability for Failure to Implement Community Directives

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Francovich and Bonifaci v. Italy: EEC Member State Liability for Failure to Implement Community Directives

James E. Hanft

Abstract

This Comment argues that the Francovich judgment logically proceeds from the Treaty and general principles of Community law. Part I discusses the state of Community law prior to the Francovich decision. Part II examines the factual background of the decision, the judgment of the Court, and the opinion of Advocate General Mischo. Part III argues that the principle of liability in damages for a breach of Community law is a logical extension of the Treaty and the Court of Justice caselaw. This Comment concludes that private law remedies or their equivalent must be made available for breaches of Community law and that any conflicting liability schemes in the Member States must be brought into conformity with the Francovich judgment.

**FRANCOVICH AND BONIFACI v. ITALY: EEC MEMBER
STATE LIABILITY FOR FAILURE TO
IMPLEMENT COMMUNITY
DIRECTIVES**

INTRODUCTION

One of the major difficulties facing the European Economic Community (the "Community" or "EEC") is the enforcement of its directives.¹ A directive is binding upon each Member State as to the result to be achieved, but leaves the form and method of implementation to the discretion of the national authorities.² When a Member State fails to implement a Community directive, the Commission of the European Communities may bring suit against the Member State before the Court of Justice.³ If the Court of Justice determines that a Member State has failed to fulfill its obligations under the Treaty Establishing the European Economic Community,⁴ the Member State will be required to take measures necessary to comply with the judgment.⁵

Proceedings to enforce compliance with EEC obligations are widely invoked, yet their effects can be minimal because a deliberately disobedient Member State can refuse to comply with the judgment.⁶ Directives may have a dangerously elastic

1. See Deirdre Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights*, 27 COMMON MKT. L. REV. 709, 711 (1990).

2. Treaty Establishing the European Economic Community, art. 189, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty or Treaty]. Article 189 provides that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.* art. 189. The Member State must achieve the result sought by the directive within the time period prescribed by the directive. *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, 70, [1982] 1 C.M.L.R. 499, 512.

3. EEC Treaty, *supra* note 2, art. 169; see Alan Dashwood and Robin White, *Enforcement Actions under Articles 169 and 170 EEC*, 14 EUR. L. REV. 388, 389 (1989) (discussing Member State's obligations under Article 169, which allows Commission to institute action against Member State for failing to fulfill its obligations under EEC Treaty); see also *infra* part I.C (discussing Article 169 proceedings). Infringement proceedings have occurred more frequently after 1977 due to the policies of the Commission. Dashwood and White, *supra*, at 411 n.59. However, a resolution of the problem through infringement proceedings may take years. *Cf. id.*

4. EEC Treaty, *supra* note 2.

5. *Id.* art. 171.

6. Curtin, *supra* note 1, at 711. In 1990, 334 infringement procedures were

quality, as Member States may vote to adopt a directive with which they are uncomfortable knowing that the penalty for failing to implement it is minimal or non-existent.⁷ This non-compliance of the Member States threatens both the solidarity of the EEC and the rights of individuals under Community law.⁸ Non-compliance with Community provisions results in discrimination against nationals of non-compliant Member States, as these individuals are unable to take advantage of the rights that Community law can confer upon them.⁹ The Court of Justice has taken incremental steps to reduce the impact of non-compliance.¹⁰ One such action by the Court was to allow certain Treaty articles and directives to have a "direct effect" within the Member State.¹¹ An article or directive may have a direct effect only if it is unconditional, sufficiently precise, and confers rights upon the individual.¹² Once these conditions are met, an individual could then rely directly upon the provisions of the article or directive; however, a requirement of compensation in damages was not expressly granted by the Court of Justice.¹³

In *Andrea Francovich and Danila Bonifaci v. Italy*,¹⁴ the Court of Justice held Member States liable to individuals for damages caused by the Member States' failure to implement a Community directive that is not sufficiently precise so as to confer rights directly upon individuals.¹⁵ This obligation to make res-

opened on the basis of Article 169 of the EEC Treaty. *Id.* at 710. More than half the infringement proceedings over the course of the three years ending in 1990 have concerned failures by Member States to implement directives into national law. *Id.*

7. See G. Federico Mancini, *The Making of a Constitution for Europe*, 26 *COMMON MKT. L. REV.* 595, 602 (1989). A Member State reluctant to implement a certain directive may exploit the discretion granted it by partially implementing the directive while excluding the terms deemed repugnant. Nicholas Green, *Directives, Equity and the Protection of Individual Rights*, 9 *EUR. L. REV.* 295, 298 (1984).

8. Curtin, *supra* note 1, at 711.

9. Nicholas Green & Ami Barav, *Damages in the National Courts for Breach of Community Law*, 1986 *Y.B. OF EUR. L.* 55.

10. See *infra* part I.B (discussing Court of Justice's protection of Community rights).

11. See *id.*

12. See *id.*

13. See *infra* note 76 and accompanying text (describing right to compensation for breach of Community law).

14. Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported) (references are from unofficial translation by the author).

15. *Id.* slip op. ¶ 48.

titution, the Court stated, was both express and inherent in the Treaty.¹⁶ *Francovich* grants individuals the right to enforce unimplemented directives before their national courts, thereby providing an indirect method of compelling Member States to implement directives within the prescribed time period.¹⁷

This Comment argues that the *Francovich* judgment logically proceeds from the Treaty and general principles of Community law. Part I discusses the state of Community law prior to the *Francovich* decision. Part II examines the factual background of the decision, the judgment of the Court, and the opinion of Advocate General Mischo. Part III argues that the principle of liability in damages for a breach of Community law is a logical extension of the Treaty and the Court of Justice caselaw. This Comment concludes that private law remedies or their equivalent must be made available for breaches of Community law and that any conflicting liability schemes in the Member States must be brought into conformity with the *Francovich* judgment.

I. THE STATE OF COMMUNITY LAW PRIOR TO FRANCOVICH

Article 5 of the Treaty requires Member States to take all general or particular measures that are appropriate to fulfill their Community law obligations.¹⁸ In addition, Member States must abstain from any measures that are likely to jeopardize the attainment of the Treaty obligations.¹⁹ When a Member State fails to fulfill these obligations, the Commission may bring proceedings against the Member State under Article 169.²⁰ Although individuals and undertakings have no standing to bring such proceedings,²¹ the Court of Justice has read

16. *Id.* ¶¶ 35-36.

17. *Id.*

18. EEC Treaty, *supra* note 2, art. 5. The goals of the Treaty are set out in Articles 2 and 3. *Id.* arts. 2, 3. The goals of the Treaty include the establishment of a common market, the promotion of economic development, an increase in economic stability, the acceleration of the raising of the standard of living, and promoting closer relations among the Member States. *Id.*

19. *Id.* art. 5.

20. *Id.* art. 169. Article 169 provides that "[i]f the State concerned does not comply with the opinion [of the Commission] within the period laid down by the Commission, the latter may bring the matter before the Court of Justice." *Id.*

21. *Id.*

the provisions of the Treaty broadly to expand rights and give Community law its full effect.²² Individual rights are enforced by the national courts of the Member States according to the procedures and remedies provided under national law.²³

A. Member States' Obligations Under the EEC Treaty

The Community requires Member States to fulfill their Treaty obligations by giving full effect to Community law.²⁴ Article 189 of the Treaty authorizes the institutions of the Community to adopt regulations, issue directives, make decisions, and formulate recommendations or opinions.²⁵ A regulation is binding in its entirety and directly applicable in all Member States.²⁶ A directive, on the other hand, is binding upon each Member State as to the result to be achieved, but leaves the form and method of implementation to the discretion of the national authorities.²⁷ A decision is binding upon those to whom it is addressed, generally the parties to the decision.²⁸

A Member State can breach its obligations under the Treaty when the Member State fails to implement a regulation, directive, or a decision.²⁹ These obligations arise from several sources, including Article 5, which imposes on each Member

22. See, e.g., *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105 (creating doctrine of direct effect for certain Treaty articles); see also *Von Colson and Kamann v. Land Nordrhein Westfalen*, Case 14/83, [1984] E.C.R. 1891, 1909, [1986] 2 C.M.L.R. 430, 453 (requiring national courts to interpret national legislation in manner consistent with provisions of directive in question); *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, 70, [1982] 1 C.M.L.R. 499, 512 (expanding direct effect doctrine to include certain directives); *infra* part I.B (discussing Court of Justice's expansion of individual rights).

23. E.g., *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1977] 1 C.M.L.R. 533, 550.

24. See, e.g., EEC Treaty, *supra* note 2, arts. 5, 169-171; *Commission v. Italy*, Case 39/72, [1973] E.C.R. 101, [1973] C.M.L.R. 439 [hereinafter *Slaughtered Cows*].

25. EEC Treaty, *supra* note 2, art. 189.

26. EEC Treaty, *supra* note 2, art. 189; see, e.g., *Slaughtered Cows*, [1973] E.C.R. at 116, [1973] C.M.L.R. at 457.

27. EEC Treaty, *supra* note 2, art. 189; see, e.g., *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499.

28. EEC Treaty, *supra* note 2, art. 189.

29. *Id.* art. 171; see *infra* part I.C (discussing Article 169 proceedings).

State a general obligation of Community loyalty.³⁰ Article 5 requires Member States to fulfill their Treaty obligations, facilitate the achievement of the Community's tasks, and abstain from any measures likely to undermine the attainment of the Treaty objectives.³¹ The obligations under Article 5 depend on, and may be used in conjunction with, provisions of the Treaty or secondary legislation.³²

In *Commission v. Italy* ("Slaughtered Cows"),³³ the Court of Justice held that a Member State that does not give effect to a regulation has failed to fulfill the obligations that it has assumed by virtue of its adherence to the EEC Treaty.³⁴ In *Slaughtered Cows*, Italy failed to give effect to a Community regulation creating a system of premiums for slaughtering cows in order to control milk production.³⁵ The Court stated that regulations come into force solely by virtue of their publication in the *Official Journal* of the European Communities, and at that moment are immediately and entirely binding on all Member States.³⁶ Thus, the Court continued, Member States must respect Community rules in order to profit from the advantages

30. EEC Treaty, *supra* note 2, art. 5; see John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645, 647 (1990). Mr. Temple Lang states that "Article 5 imposes a positive obligation on Member States to take all measures, legislative, administrative and judicial, which are necessary to give full effect to Community law." *Id.*

31. EEC Treaty, *supra* note 2, art. 5. Article 5 provides that Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Id.

32. See *Geddo v. Ente Nazionale Risi*, Case 2/73, [1973] E.C.R. 865, 878, [1974] 1 C.M.L.R. 13, 41, (discussing scope of Article 5 when used in conjunction with provisions of regulation and Treaty articles regarding internal tax, imposed on national products alone, designed to provide funds to aid national production); see also *Leclerc v. Au Blé vert*, Case 231/83, [1985] E.C.R. 1, 33, [1985] 2 C.M.L.R. 524, 540 (holding that Member State's obligations under Article 5, used in conjunction with Articles 3(f) and 85, are not specific enough to preclude Member State from enacting legislation on competition in retail prices for books provided that other Treaty articles are satisfied).

33. Case 39/72, [1973] E.C.R. 101, 116, [1973] C.M.L.R. 439, 457.

34. *Id.* at 116, [1973] C.M.L.R. at 457.

35. *Id.* at 109, [1973] C.M.L.R. at 452.

36. *Id.* at 114, [1973] C.M.L.R. at 456; see EEC Treaty, *supra* note 2, art. 189 (defining regulations and their function).

of the Community.³⁷ A Member State that fails to give effect to a regulation disrupts the equilibrium between the advantages and obligations of the Community, resulting in discrimination against individuals.³⁸ In failing to give effect to a regulation, the Member State thereby fails to fulfill its obligations under the Treaty.³⁹

Treaty obligations also can arise from Community measures that are not directly applicable.⁴⁰ Because Article 5 imposes a positive obligation on each Member State to take all measures necessary to give full effect to Community law,⁴¹ national authorities must ensure compliance with both Community law and national measures that implement Community obligations.⁴² In addition, national judiciaries must set aside national rules that prevent Community law from having full force and effect.⁴³ Member States are not free to carry out Community law duties in a manner such that the duties will be incom-

37. *Slaughtered Cows*, [1973] E.C.R. at 116, [1973] C.M.L.R. at 457.

38. *Id.*

39. *Id.*

40. *See, e.g.*, Ursula Becker v. Finanzamt Münster-Innenstadt, Case 8/81, [1982] E.C.R. 53, 70, [1982] 1 C.M.L.R. 499, 512 (holding that Member State may not rely on its own failure to perform obligations that harmonization of value added taxes directive requires); Pubblico Ministero v. Ratti, Case 148/78, [1979] E.C.R. 1629, 1641-42, [1980] 1 C.M.L.R. 96, 109-10 (holding that Member State may not apply its non-compliant national law against person who has complied with directive regarding harmonization of labeling laws for solvents).

41. EEC Treaty, *supra* note 2, art. 5; Temple Lang, *supra* note 30, at 647. Article 5 applies to all national authorities, executive, legislative and judicial, to state enterprises, to regional and local authorities, and to private bodies to which State powers have been delegated. Foster v. British Gas plc, Case C-188/89, [1990] E.C.R. —, —, [1990] 2 C.M.L.R. 833, 857.

42. Commission v. Netherlands, Case 96/81, [1982] E.C.R. 1791, 1803-04, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8841, at 7949 (discussing national laws and need for modification in context of Community directive on quality of bathing water); Openbaar Ministerie v. Bout, Case 21/81, [1982] E.C.R. 381, 389, [1982] 2 C.M.L.R. 371, 380 (restricting Member State's powers to formulate fishery conservation policy after Community measures have been taken); *see* Procureur de la République and Comité National de Défense contre l'Alcoolisme v. Alex Waterkeyn, Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, 4360-61, [1983] 2 C.M.L.R. 145, 164 (discussing binding nature of Article 171 after Article 169 judgment with regard to French breach of Article 30 of Treaty by regulating advertising of alcoholic beverages in discriminatory manner).

43. Regina v. Secretary of State for Transport, *ex parte* Factortame Ltd., Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1, 29; Amministrazione Delle Finanze Dello Stato v. Simmenthal S.p.A., Case 106/77, [1978] E.C.R. 629, 643, [1978] 3 C.M.L.R. 263, 282-83; Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, 1134,

pletely or ineffectively applied by national courts.⁴⁴ This obligation to give full effect to Community law requires that national courts enforce rules that are not directly applicable within the Member State.⁴⁵ Moreover, where possible, each national court must interpret its national laws such that they remain within the wording and purpose of the applicable Community law.⁴⁶

B. *The Court of Justice's Protection of Community Rights*

In *Van Gend en Loos v. Nederlandse Administratie der Belastingen*,⁴⁷ the Court of Justice established the "direct effect" doctrine by holding that a Treaty article can confer rights upon which individuals and undertakings may rely before their national courts.⁴⁸ For a Treaty article to have "direct effect," it must be unconditional, sufficiently precise, and not require further implementation by the Member State.⁴⁹ When these requirements are fulfilled, the article in question will possess

[1972] C.M.L.R. 255, 283; *Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, 593-94, [1964] C.M.L.R. 425, 455.

44. *Harz v. Deutsch Tradax GmbH*, Case 79/83, [1984] E.C.R. 1921, 1942-43, [1986] 2 C.M.L.R. 430, 453-54 (examining implementation requirements of equal treatment of men and women directive); *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, 1906-09, [1986] 2 C.M.L.R. 430, 451-53 (examining implementation requirements of Directive 76/207 on equal treatment of men and women and concluding that directive does not confer on female applicant right to contract of employment with discriminating employer).

45. *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, 70, [1982] 1 C.M.L.R. 499, 512; *Pubblico Ministero v. Ratti*, Case 148/78, [1979] E.C.R. 1629, 1641-42, [1980] 1 C.M.L.R. 96, 109-10.

46. *Murphy v. Bord Telecom Eireann*, Case 157/86, [1988] E.C.R. 673, 690, [1988] 1 C.M.L.R. 879, 886; *Von Colson*, [1984] E.C.R. at 1909, [1986] 2 C.M.L.R. at 453-54. The Court in *Von Colson* stated that "[i]t is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law." *Id.* The Court in *Murphy* was interpreting Directive 75/117 on equal pay for men and women concerning female workers receiving less pay for work of higher value. *Murphy*, [1988] E.C.R. 673, [1988] 1 C.M.L.R. 879. The Court further elucidated that "[i]t is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable Community law and, to the extent that this is not possible, to hold such domestic law inapplicable." *Id.* at 690, [1986] 2 C.M.L.R. at 886.

47. Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

48. *Id.* at 12, [1963] C.M.L.R. at 129. The Court in *Van Gend en Loos* held Treaty Article 12 to have a direct effect. *Id.* at 12-13.

49. *Id.* at 13.

an "internal effect" within the Member State and will be "directly applicable."⁵⁰

The Court in *Van Gend en Loos* concluded that the direct effect of Treaty provisions arises because of the particular legal nature of the EEC Treaty.⁵¹ The Court stated that the Community constitutes a "new legal order" of international law that not only imposes obligations on individuals but also confers rights that become part of the individuals' legal heritage.⁵² These rights arise not only where expressly granted by the Treaty but also on the basis of obligations that the Treaty imposes.⁵³

National courts are obliged under Community law to protect rights that Member State citizens derive from the direct effect of the provisions of Community law.⁵⁴ Thus, the domestic legal system must establish courts having jurisdiction and

50. Andrew Durand, *Enforceable Community Rights and National Remedies*, 1987 DENNING L.J. 43, 48.

51. *Van Gend en Loos*, [1963] E.C.R. at 12, [1963] C.M.L.R. at 129.

52. *Id.*; see *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, 593, [1964] C.M.L.R. 425, 455.

53. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 106/77, [1963] E.C.R. 1, 12, [1963] C.M.L.R. 105, 129; see Deirdre Curtin, *The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context*, 15 EUR. L. REV. 195, 197 (1990). Ms. Curtin noted that

[i]nstead of the hitherto recognised position that provisions of directives can be directly effective in their own right, direct effect was envisaged more or less as a 'side-effect' or 'reflex' occasioned by the failure on the part of a Member State to implement its Treaty obligations by correctly implementing the directive in question. According to this approach, a directive does not directly confer rights upon individuals; these arise only indirectly out of the obligations imposed upon Member States.

Id.

54. *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1977] 1 C.M.L.R. 533, 550 (rendering decision in regards to Treaty article and a regulation); see Temple Lang, *supra* note 30, at 651 (interpreting Court's holding in *Nordsee Deutsche Hochseefischerei*, Case 102/81, [1982] E.C.R. 110, 111, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8821, at 7734); see also *Commission v. Italy*, Case 48/71, [1972] E.C.R. 527, 532, [1972] C.M.L.R. 699, 708 [hereinafter *Second Art Treasures*]. In *Second Art Treasures*, the Court reviewed an action brought by the Commission for Italy's failure to comply with a judgment of the Court. *Id.* The Court stated that

Community law, declared as *res judicata* in respect of the Italian Republic, is a prohibition having the full force of law on the competent national authorities against applying a national rule recognized as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable Community law to be fully applied.

Id.

the procedures needed to protect these rights.⁵⁵ These courts must ensure that the rights are fully protected.⁵⁶ Community law requires that national courts set aside any provision of national law that conflicts with Community law, regardless of whether it is adopted prior or subsequent to the Community rule.⁵⁷ Community law also directly requires that national judiciaries ensure effective judicial protection of rights conferred by Community law, even if the analogous necessary powers do not exist in national law.⁵⁸ These powers include protecting the rights of individuals against public authorities and other bodies that, pursuant to state measures, are responsible for providing public services.⁵⁹ Individuals may seek, for example, the repayment of taxes imposed by a valid national law that conflicts with Community law.⁶⁰

55. *Rewe*, [1976] E.C.R. at 1997-98, [1977] 1 C.M.L.R. at 550.

56. *Bozzetti v. Invernizzi SpA*, [1985] E.C.R. 2301, 2317-18, [1986] 2 C.M.L.R. 246, 262 (involving regulations on milk and milk products).

57. *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263 (interpreting Treaty articles); *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425 (interpreting Treaty articles). In *Simmenthal*, the Court stated that

[a]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

Simmenthal, [1978] E.C.R. at 644, [1978] 2 C.M.L.R. at 283.

58. *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. 2433, 2473-74, [1990] 3 C.M.L.R. 1, 29 (interpreting Treaty articles). In *Factortame*, the Court reiterated its holding in *Simmenthal* that any national legal or judicial practice that might hinder the effectiveness of Community law by withholding from a national court the "power to do everything necessary" forthwith to set aside any conflicting national law is itself incompatible with Community law. *Factortame*, [1990] E.C.R. at 2473-74, [1990] 3 C.M.L.R. at 29; see *Simmenthal*, [1978] E.C.R. at 644, [1978] 3 C.M.L.R. at 283.

59. *Foster v. British Gas plc*, Case C-188/89, [1990] E.C.R. —, [1990] 2 C.M.L.R. 833. In *Foster*, the Court stated that

[a] body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effects may be relied upon.

Id. at —, [1990] 2 C.M.L.R. at 857.

60. See e.g., *Amministrazione delle Finanze dello Stato v. San Giorgio*, Case 199/

Following reasoning similar to that employed in *Van Gend en Loos*, the Court of Justice subsequently expanded the direct effect doctrine to apply to situations involving unimplemented or improperly implemented directives for which the prescribed implementation period has expired.⁶¹ For a directive to have direct effect, the provisions of the directive must be unconditional, sufficiently precise, and define rights that the individuals can assert against the Member State.⁶² The Court based this holding on the premise that a Member State may not rely, as against individuals, on its own failure to perform the obligations that the directive entails.⁶³ This doctrine became known as "vertical direct effect" because the provision may only be relied on against the Member State.⁶⁴ The Court, however, has not allowed a private individual to invoke a directive against another private individual, which has become known as

82, [1983] E.C.R. 3595, 3612, [1985] 2 C.M.L.R. 658, 690; Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1977] 1 C.M.L.R. 533; Comet BV v. Produktschapvoor Siergewassen, Case 45/76, [1976] E.C.R. 2043, [1977] 1 C.M.L.R. 533.

The application of Article 5 has limits. The Commission could not use it, for example, to create new obligations for the Member States such as to adopt specific measures, absent a Treaty provision or institutional act. *Brother Industries v. Commission*, Case 229/86, [1987] E.C.R. 3757, 3763.

61. *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, 71, [1982] 1 C.M.L.R. 499, 512-513; *Pubblico Ministero v. Tullio Ratti*, Case 148/78, [1979] E.C.R. 1629, [1980] 1 C.M.L.R. 96. *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, 1348, [1975] 1 C.M.L.R. 1, 15-16. In *Van Duyn*, the Court held that

it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and the latter were prevented from taking it into consideration as an element of Community law.

[1974] E.C.R. at 1348, [1975] 1 C.M.L.R. at 16. The rationale the Court used was subsequently shifted in *Ratti* and *Becker*. Sacha Prechal, *Remedies After Marshall*, 27 COMMON MKT. L. REV. 451, 453 (1990). In *Becker*, the Court stated that "a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails." [1982] E.C.R. at 71, [1982] C.M.L.R. at 512.

62. *Becker*, [1982] E.C.R. at 71, [1982] 1 C.M.L.R. at 512-13.

63. *Id.* at 71, [1982] 1 C.M.L.R. at 512.

64. See Prechal, *supra* note 61, at 451.

“horizontal direct effect.”⁶⁵

The Court of Justice has also required national courts to interpret national legislation in a manner consistent with the provisions of the directive in question.⁶⁶ The Court appears to be urging national courts to interpret national law in a manner such as to give directives “maximum effect.”⁶⁷ When a directive cannot confer a direct effect and national law cannot be construed to give the directive its intended effect, the only recourse for an individual or undertaking is to request that the Commission institute an Article 169 proceeding.⁶⁸

C. Article 169 Proceedings

The Commission may, at its discretion, institute a proceeding under Article 169 against a Member State when the Commission considers that the Member State failed to fulfill its obligations under the EEC Treaty.⁶⁹ Proceedings are initiated

65. *Marshall v. Southampton and South West Hampshire Area Health Authority*, Case 152/84, [1986] E.C.R. 723.

66. *Dorit Harz v. Deutsche Tradax GmbH*, Case 79/83, [1984] E.C.R. 1921, 1942-43, [1986] 2 C.M.L.R. 430, 453; *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, 1909, [1986] 2 C.M.L.R. 430, 453-54.

67. *Cf. Curtin*, *supra* note 1, at 221.

68. See *infra* part I.C (discussing Article 169 proceedings).

69. EEC Treaty, *supra* note 2, art. 169. Article 169 provides that

[i]f the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Id.

The Commission has discretion in bringing Article 169 actions, and since 1977 has prosecuted infringements more vigorously than in the past. See A.C. Evans, *The Enforcement Procedure of Article 169: Commission Discretion*, 4 EUR. L. REV. 442 (1979) (discussing EEC Commission's discretion); Ulrich Everling, *The Member States of the European Community Before Their Court of Justice*, 9 EUR. L. REV. 215 (1984) (discussing frequency of infringement prosecution). Mr. Everling notes that “255 actions for infringement of the Treaties were brought from 1953 to 1983. . . . They account for about one-fifth of all direct actions, the total of which moreover—leaving aside cases brought by officials—corresponds to the preliminary ruling cases Of the 255 actions, 139 (*i.e.* about 55 per cent) were brought in 1981 to 1983 alone.” *Id.* at 219. Another Member State may also bring a similar action under Article 170. EEC Treaty, *supra* note 2, art. 170. One commentator finds that “[c]omplaints from individuals, companies, trade associations and governments provide the Commission's

by informal contacts with the Member State in order to try to remedy the situation without bringing a suit.⁷⁰ Proceedings formally begin with the dispatch of a reasoned opinion from the Commission to the Member State.⁷¹ The reasoned opinion recounts the subject matter of the dispute and supplies information needed for the Member State to prepare a defense.⁷² The Member State may reply to this opinion.⁷³ If no settlement is forthcoming, the Commission must provide a coherent statement of the reasons that led it to conclude that the Member State has failed to fulfill its obligations under the EEC Treaty.⁷⁴ If the recalcitrant Member State fails to comply with the Commission opinion within the stipulated time period, the Commission has the discretion to bring suit against the Member State before the Court of Justice.⁷⁵

When the Court of Justice renders a judgment against a Member State in an Article 169 proceeding, it is limited to issuing a declaration that the Member State has failed to fulfill an obligation under the Treaty.⁷⁶ The Court of Justice can neither impose sanctions nor require the Member State to act or refrain from acting to eliminate the infringement.⁷⁷ Member States are bound, however, by Article 171 of the Treaty that requires each Member State to take the measures necessary to comply with an Article 169 judgment.⁷⁸ If a Member

main source of information about possible infringements." Dashwood & White, *supra* note 3, at 396. "The task of monitoring the transposition of directives into national law is made easier by the inclusion in the text of a requirement, which is now standard, that the Member States notify the Commission of the implementing measures they have taken." *Id.*

70. Dashwood & White, *supra* note 3, at 396.

71. *Id.*

72. See *Commission v. Belgium*, Case 85/85, [1986] E.C.R. 1149, [1987] 1 C.M.L.R. 787; *Commission v. Italy*, Case 274/83, [1985] E.C.R. 1077, [1987] 1 C.M.L.R. 345; *Commission v. Italy*, Case 51/83, [1984] E.C.R. 2793, [1986] 2 C.M.L.R. 274.

73. Dashwood & White, *supra* note 3, at 397.

74. *Commission v. Germany*, Case 325/82, [1984] E.C.R. 777, 793, [1985] 2 C.M.L.R. 719, 750; *Commission v. Italy*, Case 7/61, [1961] E.C.R. 317, 327, [1962] C.M.L.R. 39, 54 [hereinafter *Pork Products*].

75. *Pork Products*, [1961] E.C.R. 317, [1962] C.M.L.R. 39; see Dashwood & White, *supra* note 3, at 396-98 (discussing procedure of Article 169 suits).

76. Dashwood & White, *supra* note 3, at 405. Only six out of every hundred recorded infringements reaches the state of a judgment by the Court of Justice. *Id.* at 411.

77. *Id.* at 405-06.

78. EEC Treaty, *supra* note 2, art. 171. Article 171 states that "[i]f the Court of

State refuses to comply with the judgment, the Commission's only legal recourse is to bring another Article 169 proceeding for the Member State's infringement of Article 171.⁷⁹

D. *The Availability of Damages for Breach of Community Law by a Member State*

1. Recognition of Liability Under Community Law for Breaches of Community Law

Commentators have argued that the Court of Justice has recognized a right to compensation for a loss suffered as a result of breach of Community law.⁸⁰ The Court has consistently stressed that national courts must ensure the legal protection that citizens derive from the direct effect of the provisions of Community law.⁸¹ The Court of Justice has stated further that

Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice." *Id.*; see Procureur de la République and Comité National de Défense contre l'Alcoolisme v. Alex Waterkeyn, Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, 4361, [1983] 2 C.M.L.R. 145, 164; see also Commission v. Italy, Case 69/86, [1987] E.C.R. 773, [1986-1988 Transfer Binder] Common Mkt Rep. (CCH) ¶ 14,425, at 17,987; Commission v. Italy, Case 160/85, [1986] E.C.R. 3245, [1986-1988 Transfer Binder] Common Mkt Rep. (CCH) ¶ 14,399, at 17,680; Commission v. Italy, Case 131/84, [1985] E.C.R. 3531, [1986] C.M.L.R. 693.

79. Dashwood & White, *supra* note 3, at 406-07.

80. See, e.g., Curtin, *supra* note 1, at 732; Green & Barav, *supra* note 9, at 61. Drs. Green and Barav observed that "[l]egal writers have deduced a right to compensation for breach of Community law from the very definition of direct applicability. Judicial authorities on this matter are, however, scant and the only direct pronouncement on this point by the European Court is to be found in *Russo v. AIMA*. This case could be regarded as establishing the right to compensation for a loss suffered as a result of breach of Community law." *Id.* (citing Carmine Antonio Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (AIMA), Case 60/75, [1976] E.C.R. 45, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8338). Ms. Curtin also noted that "[t]he proposition that damages should be awarded under national law to those individuals who suffer loss as a result of a Member State's breach of Community law received some support in *Russo v. AIMA*." Curtin, *supra* note 1, at 732 (citing *Russo*, [1976] E.C.R. 45, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8338).

81. See, e.g., Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1977] 1 C.M.L.R. 533, 550-51. In *Rewe*, the Court stated that

in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favorable than those relating to similar actions of a domestic nature.

a Member State is liable for damages caused by an infringement of directly applicable Community law when the Member State would be liable under a national law that is comparable to the Community provision at issue.⁸² The Court has also declared that the direct effect of a provision of Community law "may be relied upon" when suing the Member State for damages in a national court.⁸³

The provisions of Community law having direct effect create enforceable Community rights for individuals and undertakings, whereas an Article 169 proceeding does not.⁸⁴ The rights that are for the benefit of individuals flow from directly effective provisions of Community law, not from an Article 169 judgment.⁸⁵ The Court of Justice stated that the purpose of an Article 169 judgment is to lay down the duties of the Member State when the Member State fails to fulfill its Treaty obligations.⁸⁶ The national courts are not permitted, therefore, to condition the availability of remedies for breaches of Community rights upon a prior judgment by the Court.⁸⁷ The Court

Id. at 1997-98, [1977] 1 C.M.L.R. at 550-51.

82. *Russo*, [1976] E.C.R. at 56, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7169. The Court in *Russo* stated that

[i]t is for the national court to decide on the basis of the facts of each case whether an individual producer has suffered such damage. If such damage has been caused through an infringement of Community law the State is liable to the injured party of the consequences in the context of the provisions of national law on the liability of the State.

Id. at 56, [1976 Transfer Binder] Common Mkt. Rep. (CCH) at 7169; *see Granaria Bv v. Hoofdprodukschap Voor Akkerbouwprodukten*, Case 101/78, [1979] E.C.R. 623, [1979] 3 C.M.L.R. 124; *Jean-E. Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559, 569 (deciding case in context of European Coal and Steel Community, one of three Treaties comprising European Community).

83. *Foster v. British Gas plc*, Case C-188/89, [1990] E.C.R. —, [1990] 2 C.M.L.R. 833. The Court in *Foster* concentrated upon whether or not Directive 76/207 on the equal treatment of men and women could be relied on against British Gas Corporation. The Court made no reference to a remedy in damages for a violation of directly effective Community law. *See id.* In the preliminary ruling, however, the Court stated that the directive "may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State." *Id.* at —, [1990] 2 C.M.L.R. at 858.

84. *Procureur de la République and Comité National de Défense contre l'Alcoolisme v. Alex Waterkeyn*, Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, 4361, [1983] 2 C.M.L.R. 145, 164.

85. *Id.*

86. *Id.*

87. *See Curtin, supra* note 1, at 731.

has stated, however, that a finding against a Member State in an Article 169 proceeding may establish "the basis of liability" of the Member State for individuals.⁸⁸

The courts and tribunals of the Member States are responsible for the administration and enforcement of Community law.⁸⁹ Individuals adversely affected by violations of Community law have recourse in their own courts and tribunals, except in those cases in which the Court of Justice has exclusive jurisdiction.⁹⁰ When a question of Community law arises before a national court or tribunal, Article 177 allows the national court or tribunal to request a preliminary ruling from the Court of Justice if the national court or tribunal considers that its judgment depends on such a preliminary decision.⁹¹ The Court of Justice has employed Article 177 references from national

88. *Commission v. Italy*, Case 154/85, [1987] E.C.R. 2717, 2737, [1988] 2 C.M.L.R. 951, 958; *Commission v. Italy*, Case 309/84, [1986] E.C.R. 599, [1987] 2 C.M.L.R. 657 (deciding Article 169 action for delaying payment of premiums for abandonment of areas under vines); *Slaughtered Cows*, Case 39/72, [1973] E.C.R. 101, [1973] C.M.L.R. 439 (considering Article 169 action for failing to implement regulation concerning premiums for slaughtering cows). In deciding an Article 169 action against Italy regarding the hindering of parallel imports of motor vehicles from other Member States, the Court in *Commission v. Italy* held that

the object of an action under Article 169 is established by the Commission's reasoned opinion, and even when the default has been remedied after the time-limit prescribed by paragraph 2 of the same article, pursuit of the action has an object. That object may consist in particular in establishing the basis of liability that a Member State could incur towards those who acquire rights as a result of its default.

[1987] E.C.R. at 2737, [1988] 2 C.M.L.R. at 958.

89. EEC Treaty, *supra* note 2, art. 177; *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, 1997, [1977] 1 C.M.L.R. 533, 550-551; see *Green & Barav*, *supra* note 9, at 56.

90. *Rewe*, [1976] E.C.R. 1989, 1997, [1977] 1 C.M.L.R. 533, 550-51; see *Green & Barav*, *supra* note 9, at 57. The Court of Justice has exclusive jurisdiction to review the validity of acts of the Commission and the Council under Article 173 and jurisdiction to give preliminary rulings under Article 177. EEC Treaty, *supra* note 2, arts. 173, 177.

91. EEC Treaty, *supra* note 2, art. 177. Article 177 states that [t]he Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before a court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the ques-

courts to expand the rights of individuals under Community law.⁹² The procedures and rules that apply in enforcing Community provisions, however, must be comparable to those procedures and rules that would apply for a similar national law.⁹³ National legal sanctions for the infringement of Community law must have a "real deterrent effect" and must be "such as to guarantee full and effective judicial protection."⁹⁴

2. Member State Recognition of Liability for Breaches of Community Law

Each of the Member States acknowledges the principle that the State is liable under national law for the unlawful acts of a public authority, provided that the damage was caused by the public authority in the exercise of its functions.⁹⁵ A majority of the national legal rules of the Member States require proof of fault by a public authority to establish the liability of the state.⁹⁶ In the remaining Member States, an illegal act by

tion is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Id.

92. *See, e.g.*, Ursula Becker v. Finanzamt Münster-Innenstadt, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499; Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

93. Rewe Handelsgesellschaft Nord mbH & Rewe-Markt Steffen v. Hauptzollamt Kiel, Case 158/80, [1981] E.C.R. 1805, [1982] 1 C.M.L.R. 449 [hereinafter *Butter Buying Cruises*]. In *Butter Buying Cruises*, passengers on cruise ships had the opportunity to buy goods without tax, thereby distorting competition. *Id.* The Court held that

the system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.

Id. at 1838, [1982] 1 C.M.L.R. at 483.

94. Harz v. Deutsch Tradax GmbH, Case 79/83, [1984] E.C.R. 1921, 1941, [1986] 2 C.M.L.R. 430, 452; *see* Josephine Steiner, *How to Make the Action Suit the Case: Domestic Remedies for Breach of EEC Law*, 12 EUR. L. REV. 102, 103 (1987).

95. Curtin, *supra* note 1, at 732; *see, e.g.*, Bourgoin SA v. Ministry of Agriculture, Fisheries and Food, [1986] 1 Q.B. 716 (C.A.).

96. *See* Curtin, *supra* note 1, at 733. These countries are Denmark, Germany, Ireland, Luxembourg, the Netherlands, Portugal and the United Kingdom. *Id.* at 733

an authority is virtually equivalent to a fault.⁹⁷ An illegal act is an act contrary to the law or a violation of a superior rule of law while a fault is generally defined as the failure to fulfill a duty owed to another.⁹⁸

The United Kingdom provides an example of a Member State that conditions the liability of the state upon a demonstration of fault by a public authority.⁹⁹ A major difficulty posed by the integration of EEC law into the domestic framework of the United Kingdom has been the proper selection of a means of recourse for the plaintiff attempting to bring a Community law enforcement action.¹⁰⁰ Under U.K. law, a plaintiff's choice to proceed by means of private law or public law is crucial both to the cause of action and remedy.¹⁰¹ The remedies sought in U.K. courts for breach of directly applicable Community provisions depend on the correct categorization of the rights involved which, in itself, is determined by the manner in which the breach occurred.¹⁰² Failure to make a correct selection between private and public law can result in dismissal of the action.¹⁰³

A public law action is enforceable only by way of judicial review.¹⁰⁴ When deciding a case under public law, courts may grant certiorari, mandamus, prohibition, declaration, or an injunction.¹⁰⁵ The court may also award damages, but this award

n.112; see, e.g., *Pine Valley Developments Ltd. v. The Minister for the Environment, Ireland and the Attorney General*, [1987] I.R. 23; *Bourgoin*, [1986] 1 Q.B. 716.

97. See Curtin, *supra* note 1, at 733. These countries are Belgium, France and Luxembourg. *Id.* at 733 n.113; see, e.g., *Ministre du Commerce extérieur v. Société Alivar*, [1984] L'Actualité Juridique—Droit Administratif [A.J.D.A.] 396, reprinted in 1984 *Revue Trimestrielle de Droit Européen (R.T.D.E.)* 341.

98. MacKenzie Stuart, *The "Non-Contractual" Liability of the E.E.C.*, 12 *COMMON MKT. L. REV.* 493, 506 (1975).

99. Curtin, *supra* note 1, at 733 n.112.

100. H.W.R. WADE, *ADMINISTRATIVE LAW* 617 (4th ed. 1977). Unless acting within the scope of their powers, the public authorities are liable in the same manner as any other person in tort or contract. *Id.*

101. See *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716 (C.A.); see generally WADE, *supra* note 100, at 617 (discussing remedies under U.K. law).

102. See Supreme Court Rules, S.I. 1965, Order 53 (stating cases appropriate for public law actions); Green & Barav, *supra* note 9, at 96.

103. Green & Barav, *supra* note 9, at 83.

104. See Supreme Court Rules, S.I. 1965, Order 53 (outlining rules regarding judicial review).

105. *Id.* R. 1. Rule 1 states the cases that are appropriate for application for judicial review. *Id.* "Certiorari and prohibition are complementary and discretionary

has several safeguards to protect against frivolous or vexatious claims.¹⁰⁶ These safeguards include the requirement of actual permission by the trial court to proceed and an acknowledgment that the remedies provided are at the discretion of the trial court.¹⁰⁷ Conversely, under a private law right, there is no requirement that the claimant obtain the court's permission to proceed, and a remedy is not subject to the court's discretion.¹⁰⁸

Under U.K. law, the torts of breach of statutory duty and misfeasance in public office provide an action in private law for litigants seeking damages for a breach of Community law.¹⁰⁹ The defendant breaches a statutory duty by violating a statute that created a duty owed to the plaintiff.¹¹⁰ The breach must cause the plaintiffs' damages and the damages must be of a type that the statute was intended to prevent.¹¹¹ The tort of misfeasance in public office involves proof of the improper

remedies" *WADE, supra* note 100, at 525. "Certiorari issues to quash a decision which is ultra vires or vitiated by error on the face of the record. Prohibition issues to forbid some act or decision which would be ultra vires." *Id.* Mandamus provides a "means of enforcing the performance of public duties by public authorities of all kinds." *Id.* at 597. "Certiorari and prohibition deal with wrongful action, [whereas] mandamus deals with wrongful inaction." *Id.* A declaratory judgment "states the rights or legal position of the parties as they stand, without changing them in any way." *Id.* at 499. An injunction forbids some "unlawful act." *Id.* at 490.

106. Supreme Court Rules, S.I. 1965, Order 53, R. 7. Rule 7 states that (1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if—

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

Id.

107. *Id.* R. 3(1). Rule 3(1) states that "[n]o application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule." *Id.*

108. *See id.*

109. *See Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716 (C.A.); *Green and Barav, supra* note 9, at 112.

110. *See Garden Cottage Foods v. Milk Marketing Bd.*, [1983] All E.R. 770; *W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT* 160-162 (11th ed. 1979).

111. *ROGERS, supra* note 110, at 160-62

performance of a lawful act.¹¹² The tort of misfeasance requires proof that the offending party acted either with malice or knowledge of the invalidity of the act in question.¹¹³

The dicta of several U.K. decisions indicate that violations of Community law give rise to a cause of action in private law.¹¹⁴ In *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*,¹¹⁵ however, the Court of Appeal held that a breach of Article 30 of the Treaty sounded only in public law.¹¹⁶ In *Bourgoin*, the plaintiffs were a group of French turkey producers, exporting to the United Kingdom, who suffered a loss as a result of an embargo on imports introduced by the U.K. Ministry of Agriculture.¹¹⁷ The embargo prompted the Commission to bring an Article 169 action in which the Court of Justice found the embargo to be a breach of Article 30 of the Treaty.¹¹⁸

The plaintiffs subsequently brought suit alleging that the embargo constituted, among other things, breach of statutory duty and misfeasance in public office.¹¹⁹ The issue raised in

112. WADE, *supra* note 100, at 636.

113. Green & Barav, *supra* note 9, at 109; see *Bourgoin*, [1986] 1 Q.B. at 740 (Mann J. in trial court) (describing malice and knowledge as alternatives with no sensible distinction).

114. In *Garden Cottage Foods*, on appeal to the House of Lords, against an interim injunction, Lord Diplock expressed the view that a violation of the directly applicable Article 86 by a body such as the Milk Marketing Board gave rise to an action in private law, sounding in damages, for breach of statutory duty. [1984] 1 App. Cas. 130, 144. In *An Bord Bainne Co-operative Ltd v. Milk Marketing Bd.*, Justice Neill of the High Court stated in dictum concerning *Garden Cottage Foods*, [1984] 1 App. Cas. 130, that

although the House of Lords did not give a *final* decision that a breach of Article 86 gives an individual a cause of action in English law, the speeches provide compelling support for the proposition that contraventions of EEC regulations which have 'direct effects' create direct rights in private law which the national courts must protect.

[1984] 1 C.M.L.R. 519, 528 (Eng. High Ct.), *aff'd*, [1984] 2 C.M.L.R. 584 (Eng. C.A.).

115. [1986] 1 Q.B. 716 (C.A.).

116. *Id.* at 787.

117. *Id.* at 749-50.

118. *Commission v. United Kingdom*, Case 40/82, [1982] E.C.R. 2793, [1982] 3 C.M.L.R. 497. Article 30 of the Treaty prohibits quantitative restrictions on imports. EEC Treaty, *supra* note 2, art. 30.

119. *Bourgoin*, [1986] 1 Q.B. at 751. The plaintiffs in *Bourgoin* argued that Article 30 has direct effect in Community law and creates rights in individuals which must be protected under domestic law. *Id.* at 752. The plaintiffs continued by stating that Article 30 is a statutory duty by virtue of section 2(I) of the European Communities Act 1972 and thus an action for breach of that duty lies for an individual who suffers damage as a result of the breach. *Id.* In rejecting the plaintiffs' argument, the Court

the Court of Appeal was whether the rights conferred by Article 30 were enforceable in private law or in public law.¹²⁰ The Court of Appeal concluded that although Article 30 was capable of giving rise to rights in both private and public law, a breach of Article 30 by a Member State sounded only in public law.¹²¹ The appropriate remedy, according to the Court, was judicial review of the acts alleged to be in breach of Article 30.¹²² A breach of Article 30, then, does not give rise to an action for damages for breach of statutory duty.¹²³ The Court disagreed with the argument emphasized by the dissent that a breach of Article 30 giving rise to a right only in public law was inconsistent with the principle of direct effect, which creates rights that national courts must protect.¹²⁴

The enforcement of Community law in national courts is subject to the various legal and procedural rules existing within the Member States.¹²⁵ Determining the correct national

of Appeal noted that "[s]o far as Community law is concerned there is nothing in the decisions of the European Court which positively or specifically requires that for a breach by a member state of article 30, a remedy in damages must be available to an individual who suffers damage by the breach." *Id.* at 780.

120. *See id.*

121. *Id.* at 787. Leave was granted to the House of Lords but the case was settled so that the Court of Appeal judgment is now final. Durand, *supra* note 50, at 45.

The Court of Appeal distinguished two prior cases: *Garden Cottage Foods Ltd v. Milk Marketing Bd.*, [1984] App. Cas. 130, and *An Bord Bainne Co-op Ltd v. Milk Marketing Board*, [1984] 1 C.M.L.R. 519 (Eng. High Ct.). The Court of Appeal distinguished *Garden Cottage* on the grounds that nothing in the prior holding suggested that a breach by a Member State of a negative obligation in relation to a law could be categorized as a breach of statutory duty giving rise to a cause of action in private law. *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716, 787 (C.A.). The Court of Appeal found the reference to individual rights to be without significance since an individual right can be public or private, and, in the Court's opinion, Article 30 creates individual rights both in public law and private law. *Id.* The Court distinguished *An Bord Bainne* stating that the plaintiff's claim that the U.K. government is in breach of an obligation not to impose a measure was "wholly different from a claim under Article 86 . . ." *Id.* at 787-88.

It was unanimously agreed that the tort of misfeasance in public office was viable provided, at the very least, that the Ministry of Agriculture intended to protect the domestic producer and to damage the plaintiff. *See id.*

122. *Bourgoin*, [1986] 1 Q.B. at 787. The leading majority opinion stated that "[a]n individual right may be a right in private law or public law; article 30 in my judgment creates individual rights both in public law and private law. A breach simpliciter of the article sounds only in public law. A breach amounting to abuse of power sounds in private law." *Id.*

123. Steiner, *supra* note 94, at 107.

124. *Bourgoin*, [1986] 1 Q.B. at 763.

125. *See Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskam-*

law under which to enforce Community law is an imprecise art and, thus, enforcement of Community law can be of questionable adequacy.¹²⁶ In *Bourgoin*, the English Court of Appeal held that remedies for Community rights arising under Article 30 are public law rights that are subject to the discretion of the trial court.¹²⁷ Prior to *Francovich*, the Court of Justice had not specifically defined the scope of Community rights or the proper remedies for a breach of those rights, but had left the determination of procedures and remedies to the national law as applied in the national courts.¹²⁸

II. FRANCOVICH AND BONIFACI v. ITALY

In *Francovich*, the Court of Justice considered the rights and remedies that an individual may claim under an unimplemented directive that was incapable of producing a direct effect.¹²⁹ The plaintiffs sought to hold Italy liable for its failure to implement a directive.¹³⁰ The action was referred under Article 177 to the Court of Justice under the theory that the directive produced direct effect or, in the alternative, that the Member State was liable because of its failure to implement the directive.¹³¹ The Court first found that the directive did not produce direct effect.¹³² The Court then held that the unimplemented directive created an enforceable Community right for which damages can be an appropriate remedy.¹³³ Lastly, the Court asserted that the conditions under which a right to restitution exists depend on the nature of the violation, and that it is incumbent upon the Member State to make compen-

mer für das Saarland, Case 33/76, [1976] E.C.R. 1989, 1997, [1977] 1 C.M.L.R. 533, 550-51.

126. See Green & Barav, *supra* note 9, at 83 (discussing choosing between public and private law actions and the remedies available, for enforcement of Community law before national courts).

127. *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716, 787 (C.A.); see *supra* notes 104-108 and accompanying text (discussing remedies and trial court's discretion).

128. See *supra* part I.D.1 (discussing present state of Community law concerning damages).

129. *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

130. *Id.* slip op. ¶ 7.

131. *Id.* ¶ 7.

132. *Id.* ¶ 27.

133. *Id.* ¶¶ 35-37.

sation available to the same extent that compensation would be available under a similar national law.¹³⁴

A. *Factual and Procedural Background*

In *Francovich*, Italy failed to implement Directive No. 90/987 (the "Insolvency Directive")¹³⁵ that harmonizes national laws concerning the protection of employees in the event that their employer becomes insolvent.¹³⁶ The directive requires that Member States take measures to guaranty the payment of employees' outstanding claims resulting from contracts of employment or employment relationships.¹³⁷ In fulfilling the requirements of the directive, Member States may choose one of three dates upon which to begin the guaranty of protection.¹³⁸ The Member States may also limit the guarantee institutions' liability.¹³⁹ Italy failed to implement the directive within the allotted period of time.¹⁴⁰ In response, the Commission brought an Article 169 proceeding against Italy.¹⁴¹ In the proceeding, the Court of Justice declared that Italy had failed to meet its obligations under the Treaty by failing to implement the directive by the fixed date.¹⁴²

134. *Id.* ¶¶ 40-42.

135. Council Directive No. 80/987/EEC, O.J. L 283/23 (1980).

136. *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19. 1991) (not yet reported); see *Commission v. Italy*, Case 22/87, [1989] E.C.R. 143, 164.

137. Council Directive No. 80/987, art. 1, O.J. L 283/23, (1980). Article 1 states that "[t]his Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)." *Id.*

138. *Id.* art. 3, O.J. L 283/23, at 24 (1980). Article 3 states that

[a]t the choice of the Member States, the date referred to in paragraph 1 shall be:

- either that of the onset of the employer's insolvency;
- or that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency;
- or that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.

Id.

139. *Id.* arts. 3, 4, O.J. L 283/23, at 24 (1980). Article 4 states that "Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3." *Id.* art. 4, O.J. L 283/23, at 24 (1980).

140. *Italy*, [1989] E.C.R. 143, 164.

141. *Id.*

142. *Id.* at 173.

The plaintiffs in *Francovich* brought suit against the Italian government to recover their unpaid salaries, basing their claim on the guarantees foreseen by the Insolvency Directive.¹⁴³ Faced with questions of Community law, two Italian national courts referred three similar questions to the Court of Justice under Article 177.¹⁴⁴ The first question raised two issues that the court examined separately.¹⁴⁵ The first issue was whether the directive defined rights that have direct effect.¹⁴⁶ The second issue was the liability of the Member State for damages arising from violations of Community law.¹⁴⁷ The second and third questions concerned the guaranties of salary repayment the State must provide if the directive directly confers rights upon individuals.¹⁴⁸

143. Andrea Francovich and Danila Bonifaci v. Italy, Joined Cases C-6 & 9/90, ¶ 5-6 (Eur. Ct. J. Nov. 19, 1991) (not yet reported). Mr. Francovich, the principle plaintiff in the lawsuit, had worked for the company C.D.N. Elettronica s.n.c. and only received sporadic payments of his salary. Since then he brought suit in the Pretura, which had sentenced the defendant company to the payment of a sum of about six million Lire. Mr. Francovich could not recover this sum from the company so he brought suit against the Italian state on the guaranties that were supposed to be created by Directive No. 80/987, or otherwise, indemnification. *Id.* slip op. ¶ 5.

Ms. Bonifaci and 33 other company workers of Gaia Confezioni s.r.l, declared bankrupt on April 5, 1985, were creditors for an increasing sum of 253 million Lire, which had been admitted as a liability of the company. More than five years after the company declared bankruptcy, the workers still had not received any compensation due to them. The assignee in bankruptcy had told them that an equal distribution among them was unlikely. The creditors brought suit against the Italian republic demanding that the Italian republic pay them money owed in back salary, at least for the last three months or, otherwise, to pay them indemnification. *Id.* ¶ 6.

144. EEC Treaty, *supra* note 2, art 177. Article 177 allows national courts to refer questions to the Court of Justice when those questions concern matters of interpretation of the Treaty. *Id.* The Italian courts that referred the questions were the Pretura of Vicenza (in case 6/90, Francovich) and the Pretura of Bassano del Grappa (in case 9/90, Bonifaci). *Francovich*, slip op. ¶ 1.

145. *Francovich*, slip op. ¶ 9.

146. *Id.*

147. *Id.*

148. *Id.* ¶ 7. The national courts referred the following questions to the Court:

1. By virtue of the Community law in effect, can an individual who has been damaged by non-execution by the Government of directive 80/987—non-execution confirmed by judgment of the Court of Justice—demand performance by this Government of the provisions of said directive, which are sufficiently precise and unconditional, by citing Community regulations directly against the defaulting Member State in order to obtain the guaranties that this State is obliged to provide, and, in any case, request restitution for the losses suffered as regards provisions that do not enjoy this prerogative?

2. Must the combined provisions of Articles 3 and 4 of directive No. 80/987 of the Council be interpreted as meaning that if the State has not

B. Judgment of the Court of Justice

The Court of Justice held Italy liable for the plaintiffs' damages caused by Italy's failure to implement the Insolvency Directive within the prescribed period of time.¹⁴⁹ The Court began by stating that individuals could not rely upon the Insolvency Directive on the ground that it had direct effect.¹⁵⁰ In making this determination, the Court of Justice relied on its decision in *Ursula Becker v. Finanzamt Münster-Innenstadt*,¹⁵¹ in which it held that a directive only can have direct effect when the provisions appear to be "unconditional and sufficiently precise," and when those provisions "define rights" that individuals are able to assert against the Member State before the national courts.¹⁵² In applying this principle, the Court in *Francovich* examined the identity of the beneficiaries, the contents of the guaranty, and the identity of the party providing the guaranty.¹⁵³ The Court found that the directive identified the beneficiaries and, by employing the minimum guaranty specified by the directive, was unconditional and sufficiently

exercised its power to set the limits specified in Article 4, this State is obligated to pay the charges of the salaried employees to the extent established by Article 3?

3. In the event of a negative answer to question No. 2, may it please the Court to establish the minimum guaranty that the State should, by virtue of Directive No. 80/987, give an entitled worker so that the salary share due him or her can be deemed performance of the directive itself.

Id. ¶ 7 (unofficial translation).

149. *Id.* ¶ 48. The Court of Justice answered the questions posed to it as follows:

1) The provisions of directive No. 80/987/EEC of the Council, dated October 20, 1980, concerning the harmonization of the legislations of the Member States relative to the protection of salaried workers in the event of the insolvency of the employer that define the workers' rights, must be interpreted to mean that the parties cannot enforce these rights against the State before the national jurisdictions in the absence of application measures implemented within the required time limits;

2) A Member State is obliged to pay restitution for damages arising for individuals out of the non-transposition of directive No. 80/987/EEC.

Id. (unofficial translation).

150. *Id.* ¶ 27.

151. Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499; *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90, slip op. ¶ 11 (Eur. Ct. J. Nov. 19, 1991) (affirming Court's holding in *Becker*).

152. *Becker*, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499; see *supra* notes 47-63 and accompanying text (discussing direct effect doctrine).

153. *Francovich*, slip op. ¶ 12.

precise with regard to the content of the guaranty.¹⁵⁴ The Court held, however, that the provisions of the directive do not specify the identity of the party that owes the guaranty.¹⁵⁵ The Court thus held that the Member State cannot be considered the debtor merely on the ground that it did not implement the directive within the specified period.¹⁵⁶ Relying on the *Becker* standard, the Court concluded that the directive does not have direct effect.¹⁵⁷

The Court then rephrased the second part of the first question to consider Italy's obligation to compensate the plaintiffs for damages arising as a consequence of Italy's failure to implement the Insolvency Directive in a timely fashion.¹⁵⁸ The Court broadened the question by considering the liability of Member States for damages arising out of violations of Community law.¹⁵⁹ The Court found that the liability for damages resulting from a violation of obligations under Community law arises out of both the general system of the Treaty and Article 5 of the Treaty.¹⁶⁰ The Court relied on the principles it established in *Van Gend en Loos* reiterating that the Community constitutes a new legal order for which the Member States have limited their sovereign rights, and that "Community law . . . not only imposes obligations on individuals but . . . confer[s] upon them rights which become part of their legal heritage."¹⁶¹ The Court also relied on Article 5 of the Treaty,

154. *Id.* ¶¶ 20-22. Article 4, paragraph 3 of the directive allows Member States to establish a ceiling for the payment of guaranty in order to avoid the payment of sums exceeding the social-welfare purpose of the directive. Council Directive No. 80/987, O.J. L 283/23 (1980). The Court noted that a Member State that has failed to meet its obligation to transpose a directive cannot frustrate the rights that the directive creates for the benefit of individuals on the basis of its power to limit the amount of the guaranty that it could have exercised had it taken the steps necessary for the implementation of the directive. *Francovich*, slip op. ¶ 21.

155. *Id.* ¶ 26.

156. *Id.* ¶ 26.

157. *Id.* ¶ 27.

158. *Id.* ¶ 28.

159. *Id.* ¶ 29.

160. *Id.* ¶¶ 35-36. The Court stated that "[t]he possibility of restitution payable by the Member States is particularly vital when, as in this particular case, the full effect of Community regulations is conditioned upon action by the State, and when, consequently, in the absence of such action individuals cannot enforce before the national jurisdictions the rights recognized as theirs by Community law." *Id.* ¶ 34 (unofficial translation).

161. *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90,

which requires Member States to take all measures necessary to ensure performance of obligations imposed by Community law.¹⁶²

The Court further stated that the conditions under which Community law creates a right to restitution depend on the nature of the Community law violation in issue.¹⁶³ The Court found that when three conditions are satisfied, individuals have a right to restitution for a Member State's failure to abide by its obligation under Article 189.¹⁶⁴ First, the result prescribed by the directive must involve "the granting of rights to individuals."¹⁶⁵ Second, the rights must be "identifiable on the basis of the provisions of the directive."¹⁶⁶ Third, a causal link must exist "between the violation of the obligation incumbent upon the State and the damage suffered by the injured persons."¹⁶⁷

When these three conditions are satisfied, the Court requires that damages be made available for a breach of Community law to the same extent as damages would be available against a Member State for a similar action under national law.¹⁶⁸ The Court held that, absent Community harmoniza-

slip op. ¶ 31 (Eur. Ct. J. Nov. 19, 1991); *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425; *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, 12, [1963] C.M.L.R. 105, 129.

162. *Francovich*, slip op. ¶ 36. The Court noted that these obligations included the obligation to eliminate the unlawful consequences of a violation of Community law. *Id.* see *Jean-E. Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559, 569 (regarding the analogous provision of Article 86 of the ECSC Treaty).

The Advocate General's conclusions were based upon the principle that the non-transposition of a directive constitutes an ipso facto violation of Articles 5 and 189 of the Treaty. Opinion of Advocate General Mischo, *Francovich*, slip op. ¶ 68. This violation is an illegality, equivalent to a fault, so that the Member State must make reparations for the damages. *Id.*

163. *Francovich*, slip op. ¶ 38.

164. *Id.* ¶ 39.

165. *Id.* ¶ 40 (unofficial translation).

166. *Id.* (unofficial translation).

167. *Id.* (unofficial translation).

168. *Id.* ¶ 42. The Court stated that

[s]ubject to this condition, it is in the context of the national law of liability that it is incumbent upon the State to make restitution for the consequences of the prejudice caused. In the absence of Community regulations, it is up to the internal legal order of each Member State to designate the competent jurisdictions and to establish the procedural methods of recourse to justice designed to ensure full safeguarding of the rights that individual subjects have under Community law

Id. (citations omitted) (unofficial translation).

The Advocate General asserted that Community law cannot require the Member

tion, the internal legal order of each Member State must designate the courts and methods of recourse and ensure the full protection of the rights that individuals have under Community law.¹⁶⁹ In so holding, the Court relied on previous judgments which held that it is incumbent upon national jurisdictions to ensure the full effect of these provisions and to protect the rights that they confer upon individuals.¹⁷⁰ Basing the holding on the first question referred, the Court found no need to rule on the second and third questions.¹⁷¹

C. *The Opinion of Advocate General Mischo*

In addressing the first question, the Court of Justice generally followed the opinion of Advocate General Mischo. The Advocate General, however, provided a more detailed analysis than did the Court of Justice.¹⁷² Examining the past judgments of the Court regarding Member States' failure to fulfill

State to formulate remedies for a breach of Community law when similar remedies do not exist at the national level, although the Treaty does presuppose the existence of such legal remedies. Opinion of Advocate General Mischo, *id.* ¶ 49.

169. Andrea Francovich and Danila Bonifaci v. Italy, Joined Cases C-6 & 9/90, slip op. ¶ 42 (Eur. Ct. J. Nov. 19, 1991). The Advocate General also suggested that the grant of damages by a national judge for a Member State's violation of Community law should be at least equivalent to the Court's award of damages for a violation of the same Community law by an institution of the Community. Opinion of Advocate General Mischo, *id.* ¶ 71. The Advocate General stated that this proposition follows not only from the rules developed by the Court, based on Article 215(2) of the Treaty, but also from general principles common to all the laws of the Member States. *Id.* Support for this proposition was given in *Asteris AE v. Greece and European Economic Community*, Case 106-20/87, [1988] E.C.R. 5515, [1990] 1 C.M.L.R. 575, where in denying the liability of the Community for an illegal act of one of its institutions, the Court stated that "an action for damages against the Greek State would have to be on different grounds from the actions dismissed by the Court." *Id.* at 5541, [1990] 1 C.M.L.R. at 590. The Advocate General clarified that a national judge need not "establish the liability of the State for violations of Community law in the cases where the Community has no non-contractual liability for a violation of Community law by one of its institutions." Opinion of Advocate General Mischo, *Francovich*, slip op. ¶ 72 (unofficial translation). The Advocate General then restated the circumstances that would engage the liability of the Community and concluded that the non-transposition or incorrect transposition of a directive satisfies the requirements. *Id.* ¶¶ 75-77.

170. See *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1; *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

171. *Francovich*, slip op. ¶ 47.

172. See Opinion of Advocate General Mischo, *id.* ¶¶ 75-77.

their Treaty obligations, the Advocate General observed that in cases involving provisions of Community law with direct effect, private parties derive rights not from the judgment in failure, but from the directly effective provisions themselves.¹⁷³ The Court of Justice has stated that an order pursuant to Article 169 may be the "basis of liability" of a claim by an individual against a Member State for its failure.¹⁷⁴ The Advocate General further stressed that although the Court's judgment that a Member State has failed in its Treaty obligations has only a declaratory effect, the Member State is still bound by the obligation incumbent upon it by virtue of Article 171 to execute the judgment and, therefore, to remedy the damages arising from its failure.¹⁷⁵ In proposing that Member States are liable for non-implementation of a directive, even one without direct effect, the Advocate General stated that an Article 169 adjudication, although not a requirement, confirms the Mem-

173. *Id.* ¶ 64; see *Procureur de la République and Comité National de Défense contre l'Alcoolisme v. Alex Waterkeyn*, Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, [1983] 2 C.M.L.R. 145. The Court in *Waterkeyn* stated that

if the Court finds in proceedings under Articles 169 to 171 of the EEC Treaty that a Member State's legislation is incompatible with the obligations which it has under the Treaty the courts of that State are bound by virtue of Article 171 to draw the necessary inferences from the judgment of the Court. However, it should be understood that the rights accruing to individuals derive, not from that judgment, but from the actual provisions of Community law having direct effect in the internal legal order.

Id. at 4361, [1983] 2 C.M.L.R. at 164.

174. *Commission v. Italy*, Case 154/85, [1987] E.C.R. 2717, [1988] 2 C.M.L.R. 951; *Commission v. Italy*, Case 309/84, [1986] E.C.R. 599, [1987] 2 C.M.L.R. 657; *Commission v. Italy*, Case 39/72, [1973] E.C.R. 101, [1973] C.M.L.R. 439; see *supra* note 88 and accompanying text. The Advocate General stated that because there is a possibility of incurring liability, the Court might want to indicate that the illegality of the Member State's conduct alone is not sufficient to engage liability on the part of the Member State but that other conditions must also be fulfilled. Opinion of Advocate General Mischo, *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90, slip op. ¶ 76 (Eur. Ct. J. Nov. 19, 1991).

175. See *Commission v. Germany*, Case 70/72, [1973] E.C.R. 813, 829, [1973] C.M.L.R. 741, 764. This conclusion also devolves from the Court's decision in *Jean-E. Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559, where the Court emphasized the declaratory character of its Article 169 judgments in failure and added that

[i]n fact if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty [which is equivalent to Article 171 of the EEC Treaty], to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued.

Id. at 569.

ber State's failure to fulfill its Treaty obligations and its liability for damages.¹⁷⁶

The Advocate General argued that the compensation of an individual for violations of directly effective Community law has its foundations in Community law itself.¹⁷⁷ The Advocate General maintained that a Member State deprives the Community law of its intended effect by failing to implement a directive.¹⁷⁸ The Advocate General contended that this applies to Community law that is directly applicable as well as to the provisions of a directive that do not have direct effect.¹⁷⁹ The absence of direct effect does not signify that the effect sought by the directive is not to confer rights on individuals, but only that these rights are not sufficiently precise and unconditional as to apply without the intervention of the Member State.¹⁸⁰ A directive is binding as to its result, and this result can be to confer rights on private parties.¹⁸¹ These rights must be protected so that a Member State cannot rely on the irresponsibility of its legislature to shirk its obligation to give full effect to Community law.¹⁸² This obligation includes making reparation for the wrongs suffered by private parties as a result of a Member State's violation of its Community obligations.¹⁸³ Based upon the premise that unimplemented and imprecise directives still

176. Opinion of Advocate General Mischo, *Francovich*, slip op. ¶ 66.

177. *Id.* ¶ 42. The Advocate General recounted that "the right to repayment of amounts charged by a Member State in breach of the rules of Community law is the consequence and complement of the rights conferred on individuals by the Community provisions." *Id.* ¶ 40 (quoting *Barra v. Belgium and the City of Liège*, Case 309/85, [1988] E.C.R. 355, 376, [1988] 2 C.M.L.R. 409, 418). The Advocate General stated that there is no distinction between an action in reimbursement and an action in damages and therefore an individual should be compensated for breaches of Community law. Opinion of Advocate General Mischo, *Francovich*, slip op. ¶ 41.

178. Opinion of Advocate General Mischo, *Francovich*, slip op. ¶ 60.

179. *Id.*

180. *Id.*

181. *Id.* The Advocate General further noted that without a direct effect, the fundamental necessity of a uniform application of Community law would find itself less respected if the private parties, deprived of their rights because of a failure to transpose a directive, demanded an approximately equivalent compensation. *Id.* ¶ 61.

182. *Id.* ¶ 65.

183. *Id.* ¶ 65. This conclusion follows from the Court's decision in *Procureur de la République and Comité National de Défense contre l'Alcoolisme v. Alex Waterkeyn*, Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, [1983] 2 C.M.L.R. 145, where the Court stated that "[a]ll the institutions of the Member States concerned must, in accordance with that provision, ensure within the fields covered by

confer Community rights, both the Court of Justice and the Advocate General concluded that Community law requires a Member State to be liable in damages for its own failure to implement a directive in a timely fashion.¹⁸⁴

III. *THE FRANCOVICH JUDGMENT'S REQUIREMENT OF DAMAGES UNDER NATIONAL LAW FOR A MEMBER STATE'S BREACH OF COMMUNITY LAW IS A LOGICAL EXTENSION OF THE TREATY AND COURT OF JUSTICE CASE LAW*

Prior to *Francovich*, no direct remedy was available for individuals when a Member State failed to implement a directive.¹⁸⁵ The Court of Justice had allowed directives to have direct effect when the directive met the Court's requirements of being sufficiently precise and conferring rights.¹⁸⁶ If the directive was insufficiently precise, however, the directive could not have a direct effect, and an individual who was injured by the Member State's failure to implement a directive was left with-

their respective powers, that judgments of the Court are complied with." *Id.* at 4360, [1983] C.M.L.R. at 164. The consequence of this is that

under Article 169 of the Treaty the Member States are liable no matter which organ of the State is responsible for the failure, and that a Member State is responsible for the failure, and that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits under Community directives.

Commission v. Italy, Case 52/75, [1976] E.C.R. 277, 285, [1976] 2 C.M.L.R. 320, 330.

In *Humblet*, the Court expressly declared that the obligation to revoke the national bill contrary to Community law and to amend the effects that it produced, results from the treaty which has force of law in the Member States following its ratification and which is supreme over national law. *Jean-E. Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559. The Court also affirmed strenuously that "[i]t follows that by reason solely of the judgment declaring the Member State to be in default, the State concerned is required to take the necessary measures to remedy its default." *Commission v. France*, Joined Cases 24 & 97/80, [1980] E.C.R. 1319, 1333.

184. *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

185. See *supra* part I.D (discussing availability of remedy in damages prior to *Francovich*).

186. *Ursula Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499.

out a remedy.¹⁸⁷

Under *Francovich*, unimplemented directives that cannot confer direct effect can create enforceable Community rights after the expiration of the period allowed for implementation of the directive.¹⁸⁸ The Court interpreted the Treaty as requiring a remedy in damages for a violation of these Community rights.¹⁸⁹ *Francovich* logically arises out of the Treaty and general principles of Community law, and requires that national courts recognize the Member States' liability for failing to implement a directive.¹⁹⁰ Although all the Member States recognize some type of Member State liability, Community law requires that private law remedies or their equivalent be made available for breaches of Community law.¹⁹¹ As a result of this requirement, other Member State national rules similar to the English Court of Appeal's ruling in *Bourgoin* will most likely contravene Community law.¹⁹²

A. *The Francovich Judgment Follows From Prior Court of Justice Case Law*

Prior to *Francovich*, absent an Article 169 proceeding, a Member State's breach of its Treaty obligations in the form of non-implementation of a directive within the prescribed period was not recognized by the Court of Justice.¹⁹³ *Francovich* holds

187. See *supra* part I.D (discussing availability of damages for a Member State's breach of Community law).

188. *Francovich*, slip op. ¶ 37.

189. *Id.*

190. See *Rewe-Handelsgesellschaft Nord mbH & Rewe-Markt Steffen v. Hauptzollamt Kiel*, Case 158/80, [1981] E.C.R. 1805, [1982] 1 C.M.L.R. 449. In *Rewe*, the Court stated that

the binding effect of a directive implies that a national authority may not apply to an individual a national legislative or administrative measure which is not in accordance with a provision of the directive which has all the characteristics necessary to render possible its application by the court.

It follows from these considerations that a person may rely before the national courts on his rights under the regulation.

Likewise, a national authority may not apply to a person legislative or administrative measures which are not in accordance with an unconditional and sufficiently clear obligation imposed by the directive.

Id. at 1837-38, [1982] 1 C.M.L.R. at 483.

191. See *supra* notes 104-108 and accompanying text (comparing private and public law remedies in context of U.K. law).

192. See *infra* notes 238-247 (analyzing U.K. law in light of *Francovich*).

193. Cf. *supra* parts C & D.I (discussing Article 169 proceedings and the Court of Justice's recognition of Member State liability).

that Member States breach their Treaty obligations as of the moment that they fail to implement a directive within the prescribed period.¹⁹⁴ This holding follows from the Court's judgment in *Slaughtered Cows* as well as provisions of the Treaty.¹⁹⁵ The Court held in *Slaughtered Cows* that a Member State fails to fulfill its obligations under the Treaty when it fails to give effect to regulations which, under the Treaty, have general effect throughout the Community.¹⁹⁶ Failure to give effect to a regulation has the same result as not implementing a directive, *i.e.*, failing to carry out the mandates of Article 189.¹⁹⁷ Both failures are a breach by the Member State of a Treaty provision.¹⁹⁸ The extension of this reasoning to directives is reinforced by the Court's judgments in Article 169 proceedings that Member States fail to fulfill their Treaty obligations when they fail to implement directives within the prescribed periods of time.¹⁹⁹ Article 189 of the Treaty provides that a directive shall be binding upon each Member State to which it is addressed.²⁰⁰ A Member State defeats the mandatory language of Article 189 when it fails to implement a directive within the prescribed period of time.²⁰¹ In light of Article 5 principles of solidarity, Member States fail to take all appropriate measures to ensure fulfillment of the Member States' Treaty obligations when they fail to implement directives.²⁰²

Member States are liable for damages caused by their

194. See *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

195. *Slaughtered Cows*, [1973] E.C.R. at 116, [1973] C.M.L.R. at 457; see EEC Treaty, *supra* note 2, art. 189.

196. *Slaughtered Cows*, [1973] E.C.R. at 116, [1973] C.M.L.R. at 457.

197. *Cf. id.* (discussing effect of Regulations under Article 189).

198. *Cf. id.* Holding that the failure to give effect to regulations at the time of issuance as a breach of Treaty obligations while simultaneously holding that no breach exists as of the time when the period prescribed for implementation of a directive has expired leads to an anomalous conclusion. *Cf. id.* at 116, [1973] C.M.L.R. at 457; *supra* parts I.A & I.B. The result would be that one sentence within Article 189 is enforceable with regard to regulations; however, another sentence within that same article is unenforceable with regard to directives. *Cf. Slaughtered Cows*, [1973] E.C.R. at 116, [1973] C.M.L.R. at 457.

199. See, *e.g.*, EEC Treaty, *supra* note 2, art. 169; *Commission v. Italy*, Case 22/87, [1989] E.C.R. 143.

200. EEC Treaty, *supra* note 2, art. 189.

201. See *Curtin supra* note 1, at 714; *Green, supra* note 7, at 296.

202. EEC Treaty, *supra* note 2, art. 5; see *Temple Lang, supra* note 30, at 647-48 (discussing Article 5 duties).

breaches of Community law.²⁰³ The Court of Justice has already held that the direct effect of a provision of Community law can serve as a basis for an action in damages against a Member State.²⁰⁴ The extension of this principle to directives that cannot confer direct effect is a logical consequence of this earlier case law.²⁰⁵ The only difference between directives that can and cannot produce direct effect lies in the precision of the provisions.²⁰⁶ Because both types of directives confer Community rights upon individuals, directives without a direct effect should be treated in the same fashion as those directives that possess direct effect.²⁰⁷ Directives that cannot confer direct effect, simply because imprecise language is employed, should not remain incapable of serving as a basis for an action in damages against the Member State.²⁰⁸

The liability of Member States in damages also follows from prior cases involving the repayment of charges levied in violation of Community law.²⁰⁹ The Court of Justice has held that the repayment of charges made in accordance with national law that is contrary to Community law is a consequence of the rights conferred on individuals by Community provisions.²¹⁰ As Advocate General Mischo pointed out in his opinion in *Francovich*, no crucial difference exists between an action

203. See *supra* part I.D.1 (describing Member State liability for breach of Community law).

204. See *supra* note 80 (discussing right to compensation for loss resulting from breach of Community law).

205. Opinion of Advocate General Mischo, Andrea Francovich and Danila Bonifaci v. Italy, Case C-6 & 9/90, slip op. ¶ 60 (Eur. Ct. J. Nov. 19, 1991).

206. See, e.g., Ursula Becker v. Finanzamt Münster-Innenstadt, Case 8/81, [1982] E.C.R. 53, 71, [1982] 1 C.M.L.R. 499, 512-13.

207. See Opinion of Advocate General Mischo, *Francovich*, slip op. ¶ 60.

208. See *id.*

209. See, e.g., Amministrazione delle Finanze dello Stato v. San Giorgio, Case 199/82, [1983] E.C.R. 3595, 3612, [1985] 2 C.M.L.R. 658; Comet BV v. Produktschap voor Siergewassen, Case 45/76, [1976] E.C.R. 2043, [1976 Transfer Binder] Common Mkt Rep. (CCH) ¶ 8383, at 7882; Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1976 Transfer Binder] Common Mkt Rep. (CCH) ¶ 8382, at 7870.

210. *San Giorgio*, [1983] E.C.R. at 3612, [1985] 2 C.M.L.R. at 688. The Court in *San Giorgio* stated that

entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes.

in reimbursement and an action in damages.²¹¹ This implies that the availability of damages should be a consequence of the rights conferred on individuals by Community law, including the rights that the unimplemented directive would confer.²¹²

B. *The Consequences of Francovich*

1. The *Francovich* Judgment Requires the National Courts to Provide an Effective Remedy in Damages

Francovich requires that Member States compensate individuals for damages arising out of the non-transposition of a directive within the prescribed period when the directive confers rights upon individuals.²¹³ The language employed by the Court of Justice, however, may also represent a broader principle.²¹⁴ The Court in *Francovich* has created a new Community right that comes into existence when a Member State fails to implement a directive.²¹⁵ The remedy for this right must be appropriate, complete, and effective.²¹⁶ The lack of a suitable remedy under national law, or the ineffectiveness of a particular remedy within an existing national rule is irrelevant.²¹⁷ As the Court held most recently in *Francovich*, procedures and remedies must be adapted as far as necessary to fully protect the rights produced by Community law.²¹⁸ National courts are thus under a Community obligation to place individuals in the same position as that in which they would have been had their

Id.; see *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716, 763.

211. Opinion of Advocate General Mischo, *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases 6 & 9/90, slip op. ¶ 41 (Eur. Ct. J. Nov. 19, 1991); see *Bourgoin*, [1986] 1 Q.B. at 763-65.

212. See *Carmine Antonio Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (AIMA)*, Case 60/75, [1976] E.C.R. 45, 56.

213. *Francovich*, slip op. ¶¶ 39-40.

214. See *id.* ¶ 41. In referring to the conditions under which a Community law violation would give rise to a cause of action in damages, the Court stated that "[t]hese conditions are sufficient to generate for individuals a right to obtain restitution, which is based directly on Community law." *Id.* (unofficial translation).

215. *Id.*

216. See, e.g., *Harz v. Deutsch Tradax GmbH*, Case 79/83, [1984] E.C.R. 1921, 1941, [1986] 2 C.M.L.R. 430, 452; Temple Lang, *supra* note 30, at 650.

217. *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. 2433, 2473-74, [1990] 3 C.M.L.R. 1, 29; Temple Lang, *supra* note 30, at 650.

218. *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer Saarland*, Case 33/76, [1976] E.C.R. 1989, 1997, [1977] 1 C.M.L.R. 533, 550-51.

right not been violated.²¹⁹

The *Francovich* judgment provides a workable system of effective cooperation with the national courts. The courts of the Member States are experienced in the administration and enforcement of laws of the general type produced by the Community.²²⁰ The enforcement of Community law by the national courts contributes authority and legitimacy to unpopular decisions by the Court of Justice.²²¹ Such enforcement of Community rights through the national jurisdictions creates a reinforced internalization of Community law that serves to optimize the effect of directives in the national legal orders.²²² The availability of damages for Member State breaches of Community law provides the Community with an enforcement power for Article 169 proceedings, albeit in an indirect way, through suits by private individuals before national courts and tribunals.²²³ The Court of Justice, through an Article 177 reference, can determine the directives that may be relied upon as creating such a Member State obligation.²²⁴ A potential advantage of reliance on Article 177 references as compared to Article 169's infringement proceedings, in instances involving unimplemented directives, is the removal of control over en-

219. Curtin, *supra* note 1, at 738.

220. John Bridge, *Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States*, 13 EUR. L. REV. 28, 31 (1988).

221. See Temple Lang, *supra* note 30, at 653.

222. See PIERRE PESCATORE, *THE LAW OF INTEGRATION: EMERGENCE OF A NEW PHENOMENON IN INTERNATIONAL RELATIONS BASED ON THE EXPERIENCE OF THE EUROPEAN COMMUNITIES* 104 (Christopher Dwyer translation 1974); Curtin, *supra* note 1, at 739. Judge Pescatore writes that

[t]he Member States must . . . expect . . . a challenge to their responsibility before the domestic courts; but beyond these courts they will, through the medium of references for preliminary rulings, find themselves before the Community Court, which through the intermediary of the national judge determines in the last analysis the nature, the scope and the content of the obligations imposed on the States. . . . Hitherto the Member States could yield to the temptation to take the liberties with Community law which a State can all too easily allow itself in relation to the requirements of international law; hitherto they could consider that such liberties would, at the most, involve external repercussions. Within their internal order, on the other hand, they could rely on complete impunity. In the Community system, they will now be taken in the rear, and will be required to answer for their behaviour before their own courts.

PESCATORE, *supra*, at 104.

223. Curtin, *supra* note 1, at 739.

224. EEC Treaty, *supra* note 2, art. 177.

forcement from the Commission, where politics may be a controlling factor, to individuals.²²⁵ Injured citizens and undertakings in the Member States would predictably seek judicial resolution of a variety of problems, regardless of their political implications.²²⁶

The limitations of the *Francovich* holding arise mainly from the disparity of applicable standards and procedures within the Community.²²⁷ *Francovich* requires that a breach of Community law through non-implementation of a directive must be remedied within the national jurisdictions by applying national remedies and procedures with respect to Member State liability.²²⁸ These national rules on Member State liability are unlikely to be uniform.²²⁹ In the absence of harmonization in this area, the nature and effectiveness of the available remedies for enforcement of Community law is likely to vary from Member State to Member State.²³⁰ Inequality and unfairness in the protection of individual rights conferred by Community law is a likely result.²³¹ The experience of the Community demonstrates that proper implementation of directives does not always produce the desired results.²³² Such results are not only due to misunderstanding, negligence, or reluctance on the part of the Member States.²³³ Some of the difficulties also may be attributed to Community legislation that is ambiguous as a result of its origins in political and legal compromise.²³⁴

225. HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 245 (1986); see PESCATORE, *supra* note 222, at 104-05. Judge Pescatore notes that "Governments and Parliaments must understand that liberties taken with Community Law, by maintaining or re-establishing protection, discrimination or obstacles to trade, will finally be no longer worthwhile, since in the end the advantage will be outweighed by the consequences in the form of repayment." *Id.*

226. RASMUSSEN, *supra* note 225, at 245.

227. See Bridge, *supra* note 220, at 32.

228. Andrea Francovich and Danila Bonifaci v. Italy, Cases C-6 & 9/90, slip op. ¶ 42 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

229. See *id.*

230. See *id.*

231. *Id.*

232. See Prechal, *supra* note 61, at 472.

233. *Id.*

234. *Id.*

2. Under U.K. Law, Private Law Remedies Must Be Awarded for a Breach of the Treaty Giving Rise to Enforceable Community Rights for the Benefit of Individuals

Each of the national jurisdictions recognizes some type of liability on the part of the Member States for their own unlawful acts under national law.²³⁵ The interpretation of the Member State's liability under national law, however, will not always be consistent with Community law requirements.²³⁶ Any such conflicting liability schemes must be brought into conformity with Community law.²³⁷

The *Francovich* judgment requires that national private law remedies or their equivalent be made available for breaches of Community law.²³⁸ As a result, *Francovich* conflicts with the Court of Appeal's decision in *Bourgoin*, with respect to a breach of statutory duty claim. In *Bourgoin*, the Ministry of Agriculture imposed an embargo which the Court of Justice subsequently held to be in breach of the Treaty.²³⁹ The Court of Appeal concluded that although Article 30 was capable of giving rise to rights in both private and public law, a breach of Article 30 by a Member State only sounded in public law, for which the appropriate remedy was judicial review.²⁴⁰

It is likely that the *Francovich* judgment supersedes the Court of Appeal's decision in *Bourgoin*.²⁴¹ In *Francovich*, the Court of Justice held that a Member State's breach of Commu-

235. Curtin, *supra* note 1, at 732.

236. See, e.g., *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716 (C.A.) (noting the various interpretations of the proper remedies for Community rights).

237. See *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. 2433, 2473-74, [1990] 3 C.M.L.R. 1, 29 (holding that Community law vests national judiciaries with powers necessary to ensure protection of rights conferred, even if analogous powers do not exist under national law); *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263 (holding that national courts must set aside any provision of national law that conflicts with Community law).

238. See *supra* notes 104-108 (comparing private and public law remedies in context of U.K. law).

239. *Commission v. United Kingdom*, Case 40/82, [1982] E.C.R. 2793, [1982] 3 C.M.L.R. 497.

240. *Bourgoin*, [1986] 1 Q.B. at 787.

241. Curtin, *supra* note 1, at 734-35 n.120.

nity law vests individuals with a right to obtain damages.²⁴² The Court of Justice has repeatedly affirmed that effective redress must be available under national laws and judicial procedures.²⁴³ The *Francovich* judgment suggests that U.K. courts no longer retain the discretion to apply purely public law remedies for a breach of Community law where the result would only be a declaration of illegality for the future.²⁴⁴ The existing public law remedies under *Bourgoin* would not effectively protect Community rights as required by the *Francovich* judgment.²⁴⁵ Contrary to the rule of *Bourgoin*, all U.K. law must allow a private law remedy for both a breach of Community law under the Treaty and a breach of Community law as a consequence of non-implementation of a directive.²⁴⁶ This result is proper because public law remedies are discretionary and do not protect Community rights to the same extent as do private law remedies which are not left to the discretion of the national court.²⁴⁷

CONCLUSION

Through *Francovich*, the Court of Justice has taken a further step at redressing the ineffective application and enforcement of Community rights in the case of the non-implementation of directives. The effective protection of Community rights has traditionally been important under Community law and Court of Justice jurisprudence. The *Francovich* judgment creates Community rights for individuals. In requiring a remedy in damages for a breach of this right, the Court of Justice effectively compels Member States to comply with Community law, thus ensuring implementation of directives. The Court's creation of this right and remedy is an important extension of the Community's techniques for achieving a unified Europe.

James E. Hanft *

242. *Andrea Francovich and Danila Bonifaci v. Italy*, Joined Cases C-6 & 9/90, slip op. ¶ 37 (Eur. Ct. J. Nov. 19, 1991).

243. *Id.*

244. *See* *Garden Cottage Foods Ltd. v. Milk Marketing Bd.*, [1984] 1 App. Cas. 130 (Opinion of Lord Diplock); Curtin, *supra* note 1, at 734.

245. *Francovich*, slip op. ¶ 33.

246. *See supra* notes 104-108 (discussing private and public law remedies).

247. *Id.*

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