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New Legal Effects Resulting from the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgement

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Abstract

This Article examines a decision of the Court of Justice of the European Communities that is likely both to ensure much greater protection for the rights of citizens and companies in the European Community, and to bring about a higher level of compliance with Community law by EC Member States. In brief, the Court ruled that in certain circumstances a Member State is liable to pay compensation to private parties if it has failed to implement a directive. To see how the Court of Justice reached this conclusion, and to assess the judgment's importance, it is necessary to summarize previous case law, to explain how this case arose, and to discuss the judgment and its implications

ARTICLES

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John Temple Lang *

CONTENTS

Introduction	2
I. Background: Applicable Rules and Case Law	2
A. The Rules Already Established	3
B. The <i>Factortame</i> Decision	7
II. Analysis of the <i>Francoovich</i> Decision.....	10
A. The Conclusions of Advocate General Mischo	10
1. On the Question of Principle	10
2. On Conditions for Damage Claims	17
B. The Judgment of the Court of Justice	19
1. On the Question of Principle	19
2. On Conditions for State Liability	20
III. Comments on the <i>Francoovich</i> Judgment	21
A. On the Principle of State Responsibility.....	21
B. On Fundamental Rights.....	27
C. On Specific Conditions for State Liability	28
IV. Implications of the <i>Francoovich</i> Judgment	30
A. Damages for Breach of Directly Applicable Rules	30
B. Directives and Rights of Private Parties	31
1. Who May Be Sued Under the <i>Francoovich</i> Principle	36
2. Damages Available to Parties Under the <i>Francoovich</i> Principle	38
C. Interpretation of National Measures Implementing a Directive	42

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V.	Other Legal Consequences of the Failure to Implement Directives	43
A.	Obstruction of Community Law Rights.....	43
B.	The <i>Francovich</i> Principle and Treaties	45
C.	Claims Against Private Parties Under the <i>Francovich</i> Principle	46
D.	The <i>Francovich</i> Judgment in a Constitutional Setting.....	47
VI.	<i>Francovich</i> and the European Economic Area.....	52

INTRODUCTION

In November 1991, the Court of Justice of the European Communities ("Court" or "Court of Justice") rendered a decision that is likely both to ensure much greater protection for the rights of citizens and companies in the European Community ("EC" or "Community"),¹ and to bring about a higher level of compliance with Community law by EC Member States.² In brief, the Court ruled that in certain circumstances a Member State is liable to pay compensation to private parties if it has failed to implement a directive.³ To see how the Court of Justice reached this conclusion, and to assess the judgment's importance, it is necessary to summarize previous case law, to explain how this case arose, and to discuss the judgment and its implications.

I. BACKGROUND: APPLICABLE RULES AND CASE LAW

The plaintiffs in *Francovich & Bonifaci v. Italy*⁴ (*Francovich*) argued that Italy was liable for failing to implement a directive.⁵ The EC Council adopted Directive 80/987 in 1980 (the

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

2. *Francovich & Bonifaci v. Italy*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported) [hereinafter *Francovich*].

3. *Id.*, slip op. ¶ 48. In general, a directive is a binding EC measure that is intended to be carried out by whatever national measures the Member States consider appropriate. EEC Treaty, *supra* note 1, art. 189. Specifically, Article 189 states that "[a] directive shall bind any Member State to which [it is] addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means." *Id.*

4. Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

5. *Id.*, slip op. ¶¶ 5-6.

“Directive”).⁶ The Directive was intended to benefit the employees of a company that becomes insolvent, in particular to ensure that arrears of pay are ultimately satisfied.⁷ In February 1989, the Court ruled that Italy had failed to fulfill its obligation to implement the Directive.⁸

Francovich and others later sued the Italian State because they had been unable to recover arrears of pay due to them.⁹ They first argued that the Directive required the establishment of a guarantee fund, possibly State-financed.¹⁰ They argued, therefore, that the State should be treated as having rejected the option for a privately financed fund, and as having implicitly decided to set up a State-financed fund.¹¹ If this argument had been accepted, the State would have been liable in accordance with the Directive. The Court rejected this argument for reasons which are not relevant in this Article.¹²

The second important issue arose as to whether the plaintiffs could sue the Italian State for compensation for its failure to implement the Directive.¹³ In order to address this issue, certain established rules of Community law need to be recalled.

A. *The Rules Already Established*

Some Community law rules are “directly applicable” because they bind all who come within their terms without the need for any national implementing measures.¹⁴ National courts must apply these rules.¹⁵ Other Community law rules, such as directives, are not directly applicable; they must be implemented by national measures.¹⁶ Such national measures can be legislative, executive, or administrative, provided that

6. O.J. L 283/23 (1980).

7. *Id.*

8. *Commission v. Italy*, Case 22/87, [1989] E.C.R. 143.

9. *Francovich*, slip op. ¶¶ 5-6.

10. *Id.* ¶¶ 23-25.

11. *Id.*

12. *Id.* ¶¶ 25-26.

13. *Id.* ¶¶ 7, 9.

14. EEC Treaty, *supra* note 1, art. 189; *see, e.g.*, *Commission v. Italy*, Case 39/72, [1973] E.C.R. 101, [1973] C.M.L.R. 439 [hereinafter *Slaughtered Cows*].

15. *See, e.g.*, *Slaughtered Cows*, [1973] E.C.R. 101, [1973] C.M.L.R. 439.

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

they bring about the appropriate result.¹⁷ In general, therefore, national courts apply the national measures, which give effect to the directives, rather than the directives themselves, which bind only the Member State. However, directives have *some* "direct effects," that is, legal effects that national courts must recognize irrespective of whether or how the directives have been implemented.

Before the *Francovich* judgment, the case law of the Court established several principles. First, the Court of Justice has repeatedly stated that directives have direct effects in national courts in the sense that they can be relied upon against the state or state bodies (the criteria for which are set out in *Foster v. British Gas plc*¹⁸) irrespective of whether the directive has been implemented.¹⁹ The relevant provision of the directive must be clear and unconditional, and it must define rights that individuals may assert against the Member State at issue.²⁰ This is because a state, including its national courts, cannot be allowed to rely on its own failure to implement a directive in order to take a legal position that it could not take if the directive had been properly implemented.²¹ In other words, in litigation against the state, a private party may rely on the directive *as if* it had been properly implemented.²²

This first principle is important because it shows that in *some* kinds of litigation against the state, the citizen has limited

17. See John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645, 647 (1990). I have previously stated 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.*

18. *Foster v. British Gas plc*, Case C-188/89, [1990] E.C.R. 3313, [1990] 2 C.M.L.R. 833, 840-41, *aff'd*, [1991] 2 C.M.L.R. 217 [hereinafter *Foster*]; see *Johnston v. Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240.

19. *Becker*, [1982] E.C.R. at 71, [1982] 1 C.M.L.R. at 512-13; *Pubblico Ministero v. Ratti*, Case 148/78, [1979] E.C.R. 1629, 1642, [1980] 1 C.M.L.R. 96, 110; *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, 1348, [1975] 1 C.M.L.R. 1, 15-16. The Court in *Becker* 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.

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

21. *Id.*

22. *Marshall v. Southampton and South-West Hampshire Area Health Auth.*, Case 152/84, [1986] E.C.R. 723, 747-50, [1986] 1 C.M.L.R. 688, 700 [hereinafter *Marshall*].

rights under a directive whether or not it has been implemented.²³ In practice, these cases are usually either (1) proceedings brought by the state against a private party in which the latter used the directive as a defense, or (2) proceedings in which individuals claimed the right to equal treatment from state bodies.²⁴ The second kind of situation, wherein women claimed the right to equal treatment from state bodies, gave rise to the *Foster* case.²⁵ In litigation between private parties, a directive or other non-directly applicable rule of Community law cannot be relied on unless it has been implemented.²⁶ An exception may lie in some rare cases where the state, although not formally a party to the proceeding, is really the interested party.²⁷

Second, the Court repeatedly has stated that, under Article 5 of the Treaty Establishing the European Economic Community ("EEC Treaty"),²⁸ national courts must, as far as possible, interpret national measures intended to implement a directive in such a way as to be compatible with and to carry out all the terms of the directive.²⁹ This interpretation should be given even if it would not otherwise be the normal interpreta-

23. *Id.* at 748-49, [1986] 1 C.M.L.R. at 710-11; *Becker*, [1982] E.C.R. at 71, [1982] 1 C.M.L.R. at 521.

24. *See, e.g.*, *Harz v. Deutsche Tradax GmbH*, Case 79/83, [1984] E.C.R. 1921, 1942-43, [1986] 2 C.M.L.R. 430, 453-54 (discussing implementation requirements of Directive 76/207 for equal treatment of women and men); *von Colson v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, 1906-09, [1986] 2 C.M.L.R. 430, 451-53 (same).

25. *See Foster*, Case C-188/89, [1990] E.C.R. 3313, [1990] 2 C.M.L.R. 833, *aff'd*, [1991] 2 C.M.L.R. 217.

26. *Marleasing SA v. Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] E.C.R. 4135, [1992] 1 C.M.L.R. 305; *Marshall*, [1986] E.C.R. at 749, [1986] 1 C.M.L.R. at 711.

27. *See John Temple Lang, The Duties of National Courts Under the Constitutional Law of the European Community, Lasok Lecture at Exeter (1987).*

28. *See EEC Treaty, supra* note 1, art 5. Article 5 provides that Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.

Id.

29. *Commission v. Netherlands*, Case 96/81, [1982] E.C.R. 1791, 1803-05, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 7940, 7949; *Openbaar Ministerie v. Bout*, Case 21/81, [1982] E.C.R. 381, 389, [1982] 2 C.M.L.R. 371, 380; *Procureur de la République & Comité National de Défense contre l'Alcoolisme v.*

tion of the national measures in question, and regardless of whether the national measures were enacted before or after the adoption of the directive.³⁰

The third principle established by the Court's case law before *Francovich* requires that national courts must provide all appropriate remedies under national law to protect rights given by directly applicable rules of Community law.³¹ The machinery for protecting rights given by Community law is the national legal machinery. However, the available procedures must not make it impossible to exercise the Community law rights.³² The procedures must also be no less favorable than those protecting corresponding rights under national law.³³ This principle was most often applied in cases in which taxpayers claimed repayments of taxes which were contrary to Community rules because they were protectionist, that is, taxes were imposed at higher rates on imported goods than on domestic goods.³⁴ However, the principle was not confined to

Waterkeyn, Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, 4360-61, [1983] 2 C.M.L.R. 145, 164 [hereinafter Waterkeyn].

30. *Marleasing*, [1990] E.C.R. 4135, [1992] 1 C.M.L.R. 305; *Officier van Justitie v. Kolpinghuis Nijmegen*, Case 80/86, [1987] E.C.R. 3969, [1989] 2 C.M.L.R. 18; *Harz v. Deutsche Tradax GmbH*, Case 79/83, [1984] E.C.R. 1921, 1942-43, [1986] 2 C.M.L.R. 430, 453-54; *von Colson v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, 1906-09, [1986] 2 C.M.L.R. 430, 453.

31. *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1977] 1 C.M.L.R. 533, 550 [hereinafter *Rewe*]; see *Commission v. Italy*, Case 48/71, [1972] E.C.R. 527, 532, [1972] C.M.L.R. 699, 708. 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. at 532, [1972] C.M.L.R. at 708.

32. *Rewe*, [1976] E.C.R. at 1997-99, [1977] 1 C.M.L.R. at 550. The domestic legal system must establish courts having jurisdiction in addition to the procedures necessary in the protection of these rights. *Id.*

33. *Id.*; see *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; *Costa v. ENEL (Ente Nazionale Energia Elettrica)*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425.

34. See, e.g., *Amministrazione delle Finanze dello Stato v. San Giorgio SpA*, Case 199/82, [1983] E.C.R. 3595, 3612, [1985] 2 C.M.L.R. 658, 690 [hereinafter *San Giorgio*]; *Rewe*, [1976] E.C.R. at 1997-98, [1977] 1 C.M.L.R. 533, 534; *Comet BV v. Produktschap voor Siergewassen*, Case 45/76, [1976] E.C.R. 2043, [1977] 1 C.M.L.R. 533.

tax refund cases.³⁵

B. *The Factortame Decision*

A fourth principle can be explained by reference to the judgment in *Regina v. Secretary of State for Transport, ex parte: Factortame Ltd. (Factortame)*.³⁶ In *Factortame*, the Commission of the European Communities ("Commission") challenged the compatibility of certain United Kingdom ("UK") fisheries measures with Community law.³⁷ The Commission applied to the Court and asked for interim measures ordering the suspension of the UK legislation.³⁸ The Court granted the interim measures requested.³⁹ Concurrently, the UK courts had been asked provisionally to suspend the application of the UK measures.⁴⁰ There was no precedent in UK domestic law for suspending the operation of an Act of Parliament as an interlocu-

35. See, e.g., *San Giorgio*, [1983] E.C.R. at 3612, [1985] 2 C.M.L.R. at 688; *H. Ferwerda B.V. v. Produktschap voor Vee en Vlees*, Case 265/78, [1980] E.C.R. 617, 629, [1980] 3 C.M.L.R. 737, 751; *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce*, Case 130/79, [1980] E.C.R. 1887, [1981] 1 C.M.L.R. 451; *Amministrazione delle Finanze dello Stato v. Denkavit Italian S.r.l.*, Case 61/79, [1980] E.C.R. 1205, 1226, [1981] 3 C.M.L.R. 694, 710; *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.*, Case 811/79, [1980] E.C.R. 2545, 2554, [1981] 1 C.M.L.R. 316, 322; *Amministrazione delle Finanze dello Stato v. S.a.s. Mediterranea Importazione, Rappresentanze, Esportazione, Commercio (MIRECO)*, Case 826/79, [1980] E.C.R. 2559, 2574; *Lippische Hauptgenossenschaft e.G. & Westfälische Central-Genossenschaft e.G. v. Bundesanstalt für landwirtschaftliche Marktordnung*, Joined Cases 119 & 126/79, [1980] E.C.R. 1863, 1878-79; *Pigs & Bacon Comm'n v. McCarran*, Case 177/78, [1979] E.C.R. 2161, 2192, [1979] 3 C.M.L.R. 389, 427; *Rewe*, [1976] E.C.R. at 1997-98, [1977] 1 C.M.L.R. at 550; *Comet*, [1976] E.C.R. at 2051, [1977] 1 C.M.L.R. at 552; *Opinion of Advocate General Slynn, Commission v. Italy*, Case 104/86, [1988] E.C.R. 1799, 1809, [1989] 3 C.M.L.R. 25, 28; *Opinion of Advocate General Reischl, Hans Just I/S v. Danish Ministry for Fiscal Affairs*, Case 68/79, [1980] E.C.R. 501, 522-23, 531, [1981] 2 C.M.L.R. 714, 733; *Opinion of Advocate General Warner, Iannelli & Volpi S.p.A. v. Meroni*, Case 74/76, [1977] E.C.R. 557, 592, [1977] 2 C.M.L.R. 688, 712. The opinion of Advocate General Reischl is particularly clear in *Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (AIMA)*, Case 60/75, [1976] E.C.R. 45, 62-63, as is the Court's opinion in *Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559, 569, that applies Article 86 of the ECSC Treaty to oblige Member States "to make reparation" when a legislative or administrative measure adopted by the authorities of said state is contrary to Community law.

36. Case C-213/89, [1990] E.C.R. 2433, 2473-74, [1990] 3 C.M.L.R. 1, 29 [hereinafter *Factortame*]; cf. *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, Case 158/80, [1981] E.C.R. 1805, 1838, which should now be regarded as overruled.

37. *Factortame*, [1990] E.C.R. at 2467, [1990] 3 C.M.L.R. at 25.

38. *Id.* at 2469, [1990] 3 C.M.L.R. at 26.

39. *Id.* at 2475, [1990] 3 C.M.L.R. at 30.

40. *Id.* at 2470, [1990] 3 C.M.L.R. at 27 (citing *Commission v. United Kingdom*

tory measure (or indeed otherwise) and the UK measures had not then been definitely held to be incompatible with Community law.⁴¹ The UK courts considered whether to continue to apply the UK measures.⁴² However, the European Court of Justice stated that Community law may require national courts to suspend the operation of national legislation which appears contrary to Community law, even if, under national law, the national court has no power to suspend the operation of legislation.⁴³ The Court of Justice stated that

it is for national courts in application of the principle of co-operation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law . . . any 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, even temporarily, Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.⁴⁴

The Court added that the full effectiveness of Community law also would be impaired if a national law rule prevented grants of interim relief to ensure the effectiveness of the final judgment.⁴⁵ The effectiveness of the system by which national courts refer questions to the Court of Justice under Article 177 of the EEC Treaty⁴⁶ would be impaired if they could not suspend national legislation while the Court of Justice dealt with the questions.⁴⁷

The opinion of Advocate General Tesauo in *Factortame* is clear and important.⁴⁸ Directly applicable Community rules

of Great Britain and Northern Ireland, Case 246/89 R, [1989] E.C.R. 3125, [1991] 3 C.M.L.R. 706).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2473, [1990] 3 C.M.L.R. at 29.

45. *Id.*

46. See EEC Treaty, *supra* note 1, art. 177.

47. See *Factortame*, [1990] E.C.R. at 2473, [1990] 3 C.M.L.R. at 29.

48. Opinion of Advocate General Tesauo, *Factortame*, *id.* at 2450-65, [1990] 3 C.M.L.R. at 5-25.

immediately confer upon individuals enforceable legal rights which may be relied upon before national courts.⁴⁹ The issue in *Factortame* concerned the extent to which these rights entitled the individuals involved to ask for interim measures, based on Article 5 of the EEC Treaty.⁵⁰ If the means provided by national law fail to give "complete and effective" protection for the Community law right, the national court must protect it "of its own motion."⁵¹ After some general remarks about interlocutory or interim relief, Advocate General Tesouro concluded that "the need to have recourse to legal proceedings to enforce a right should not occasion damage, to the party in the right . . . the purpose of interim protection is to achieve . . . the effectiveness of judicial protection."⁵² As a national court must finally give precedence to Community law in case of conflict, it must also be able, when the necessary preconditions are satisfied, to give interim protection.⁵³ A national law which makes it impossible in practice to give effective judicial protection for a right given by Community law must not be applied.⁵⁴ The national court's duty to afford effective judicial protection of rights conferred on the individual by Community law, where the relevant requirements are satisfied, cannot fail to include the provision of interim measures for the rights claimed, pending a final determination.

It is therefore clear, even before *Francovich*, that the Court has stated that Community law gives rights which must be protected effectively by national courts, even if national law does not itself protect these rights.⁵⁵ Although substantive and procedural rules apply to the proceedings to enforce these rights, they must not prevent the right from being effectively protected. Obviously, there is scope for controversy over the extent of the rights guaranteed by Community law and the extent to which national rules can limit the scope of such rights. The Court has ruled repeatedly that national authorities have a

49. *Id.* at 2454, [1990] 3 C.M.L.R. at 10.

50. *Id.*, [1990] 3 C.M.L.R. at 11; see EEC Treaty, *supra* note 1, art. 5.

51. Opinion of Advocate General Tesouro, *Factortame*, [1990] E.C.R. at 2454-55, [1990] 3 C.M.L.R. at 11.

52. *Id.* at 2456-57, [1990] 3 C.M.L.R. at 14.

53. *Id.* at 2465, [1990] 3 C.M.L.R. at 25.

54. *Id.*

55. See *supra* notes 13-21 and accompanying text (explaining "directly applicable" Community laws).

duty to enforce Community rules, and must do so effectively and with as much vigilance as they apply to the corresponding rules of national law.⁵⁶

II. ANALYSIS OF THE FRANCOVICH DECISION

A. *The Conclusions of Advocate General Mischo*

1. On the Question of Principle

Advocate General Mischo, like the Court, rejected the argument based on the directive itself. This point need not be discussed at present. As his analysis of the case law was very detailed, he summarized the results of his analysis:

1. Although, in the present state of Community law, it is in principle each Member State's legal system which determines the legal procedure which allows the full effect of Community law to be achieved, this national power is limited by the obligation of Member States, which results from Community law, to guarantee that full effect.
2. This applies not only to the rules of Community law which have direct effect, but to all rules which confer rights on individuals and companies. The absence of direct effect does not mean that the objective of Community law is not to confer rights on individuals and companies, but means only that the rules are not sufficiently precise and unconditional.
3. When a directive has not been transposed into national law, or has been incorrectly transposed, a Member State deprives Community law of the effect which is required. It commits a violation of Article 5 and Article 189(3) of the Treaty which lay down the binding nature of directives and oblige member states to take all measures necessary to carry them out.
4. When the Court, in a judgment on the basis of Articles 169-171 of the Treaty, has found that there has been a

56. *Deutsche Milchkontor GmbH v. Germany*, Joined Cases 205-15/82, [1983] E.C.R. 2633, 2665-66, [1984] 3 C.M.L.R. 586, 612; *Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung*, Case 54/81, [1982] E.C.R. 1449, 1463-64; *BayWa AG v. Bundesanstalt für landwirtschaftliche Marktordnung*, Joined Cases 146, 192 & 193/81, [1982] E.C.R. 1503, 1533; *Commission v. Germany*, Case 94/87, [1989] E.C.R. 175, [1989] 2 C.M.L.R. 425; *Commission v. Germany*, Case C-217/88, [1990] E.C.R. 2879, [1981] 1 C.M.L.R. 1.; *Amministrazione delle Finanze S.r.l. v. Meridionale Industria Salumi, Fratelli Vasanelli & Fratelli Ultrocchi*, Joined Cases 66, 127 & 128/79, [1980] E.C.R. 1237, 1270-72, [1981] 1 C.M.L.R. 1, 11-13.

breach of this obligation, the principle of *res judicata* and Article 171 oblige the Member State to take all the measures appropriate to eliminate its breach and to restore the result required by Community law, without being able to rely on any obstacle of any kind to doing this. On this basis the state can also be obliged to pay compensation for the loss it has caused to individuals and companies by its unlawful behavior.

5. On the basis of Community law, the liability of Member States arises at least when the conditions are fulfilled for the liability of the Community for breach of Community law by one of the Community institutions. In the case of a directive which should have been implemented by a legislative measure, it is enough that the relevant provisions of the directive are intended to protect the interests of individuals and companies. The requirement that there must be a sufficiently clear breach of a higher rule of law should be regarded as to be fulfilled when the Court has made a finding of a breach by the state in a judgment based on Articles 169-171.
6. In the present state of Community law, a claim for compensation before a national judge against a Member State is governed by the national law rules as far as other aspects are concerned, in particular the assessment of the loss suffered and procedural questions. This is however subject to two principles: the national rules must not be less favorable than those concerning similar claims based on national law, and they must not be applied in such a way as to make it practically impossible to obtain compensation for the loss suffered. This means at the minimum that the most complete legal means in the national legal system should be applied in such a way as to fulfill these requirements, and even that an appropriate legal method should be created if it does not exist.
7. A claim for compensation is different in nature from a claim for payment based on the provisions of a directive which has direct effect. This does not mean that a roundabout means is being used to achieve the same result as if the provisions of the directive had direct effect. The loss can be assessed by the national judge "*ex aequo et bono*." He can use the provisions of the directive, however, as a point of reference.
8. In the light of the uncertainty which has existed until

now about the liability of Member States to pay compensation for breach of Community law, and of the financial consequences which the Court's judgment could cause as a result of breaches which have occurred in the past, the effects of the Court's judgment should be limited in time (i.e. should apply only for the future).⁵⁷

57. Opinion of Advocate General Mischo, Francovich, Joined Cases C-6 & 9/90, ¶ 33 (Eur. Ct. J. Nov. 19, 1991) (not yet reported) (unofficial English translation). The Advocate General's opinion, in its original French, reads as follows:

33. Etant donné la longueur des développements qu'il est nécessaire de consacrer aux multiples aspects que comporte ce problème, je vous présente d'abord, dans une première partie, un résumé des conclusions auxquelles je suis parvenu, et ensuite, dans une deuxième partie, le détail de raisonnement suivi, qui est fondé pour l'essentiel sur votre jurisprudence.

A. Résumé

1. Si, en l'état actuel de droit communautaire, il appartient en principe à l'ordre juridique de chaque Etat membre de déterminer le procédé juridique permettant d'atteindre la pleine efficacité du droit communautaire, cette compétence étatique trouve toutefois une limitation certaine dans l'obligation même des Etats membres, découlant du droit communautaire, d'assurer cette efficacité.

2. Ceci ne vaut pas seulement pour les dispositions de droit communautaire qui ont un effet direct, mais pour toutes les dispositions qui ont pour but de conférer des droits aux particuliers. L'absence d'effet direct, en effet, ne signifie pas que l'effet recherché par le droit communautaire n'est pas de conférer des droits aux particuliers, mais seulement que ceux-ci ne sont pas suffisamment précis et inconditionnels pour pouvoir être invoqués et appliqués tels quels.

3. En cas de non-transposition ou de transposition incorrecte d'une directive, un Etat membre prive le droit communautaire de l'effet voulu. Il commet en même temps une infraction aux articles 5 et 189, alinéa 3, du traité, qui affirment le caractère obligatoire de la directive et l'obligent à prendre toutes les mesures nécessaires à son exécution.

4. Au cas où la violation de cette obligation est constatée dans un arrêt de la Cour rendu au titre des articles 169 à 171 du traité, l'autorité de la chose jugée ainsi que l'article 171 du traité imposent à l'Etat membre du prendre, sans pouvoir opposer aucun obstacle de quelque nature qu'il soit, toutes les mesures propres à éliminer le manquement et à restaurer l'effet voulu du droit communautaire. A ce titre il peut également être obligé de réparer les dommages qu'il a causés aux particuliers de fait du son comportement illégal.

5. En vertu du droit communautaire, la responsabilité de l'Etat membre doit être susceptible d'être engagé au moins dans les cas dans lesquels sont réunies les conditions qui engageraient la responsabilité de la Communauté en raison de la violation du droit communautaire par l'une de ses institutions. Dans le cas d'une directive, qui aurait dû être transposée au moyen d'un acte normatif, il suffit dès lors que les dispositions pertinentes de la directive aient pour but de protéger les intérêts des particuliers. La condition d'une violation suffisamment caractérisée d'une règle supérieure de

The Advocate General stated that the Court must decide the general issue of whether Member States were liable for non-implementation of a directive by virtue of Community law. His views, which were ultimately accepted by the Court, were contrary to the views of the four Member States which had submitted arguments. They had denied that states were bound by Community law to pay compensation even for breach of *directly* applicable rules of Community law.⁵⁸ The gap between these arguments and the view finally adopted by the Court is considerable.

The Advocate General began by referring to a series of cases in which the Court had said that, under Article 5 of the EEC Treaty,⁵⁹ national courts must provide effective protection for rights under EC law.⁶⁰ These cases concerned rights

droit doit en effet être considérée comme établie dans l'hypothèse où la Cour a constaté le manquement de l'Etat membre dans un arrêt prononcé au titre des articles 169 à 171.

6. En l'état actuel du droit communautaire, l'action en responsabilité ainsi intentée devant le juge national à l'encontre d'un Etat membre relève, pour ce qui concerne les autres aspects et notamment l'évaluation du préjudice subi et les modalités de procédure, des règles du droit national, sous la double réserve que celles-ci ne sauraient être moins favorables que celles qui concernent des réclamations semblables de nature interne et qu'elles ne sauraient être aménagées de manière à rendre pratiquement impossible la réparation du préjudice subi. Ceci implique au minimum que les voies de droit les plus adéquates existant dans l'ordre juridique national doivent être interprétées de façon à respecter ces exigences, et même qu'une voie de droit appropriée doit être créée s'il n'en existe pas.

7. L'action en responsabilité est d'une nature différente de l'action en paiement au titre des dispositions d'une directive ayant un effet direct. Il ne s'agit pas d'aboutir, par une voie détournée, au même résultat que si les dispositions de la directive avaient un effet direct. Le préjudice peut être évalué par le juge national "ex aequo et bono." Les dispositions de la directive peuvent cependant lui servir de point de référence.

8. Compte tenu de l'incertitude qui a régné jusqu'à présent en ce qui concerne la responsabilité des Etats membres en cas de manquement au droit communautaire et des conséquences financières que votre arrêt pourrait entraîner pour des manquements intervenus dans le passé, il y a lieu de limiter dans le temps les effets de votre arrêt.

Id. ¶ 33.

58. *Id.* ¶¶ 32-36.

59. Temple Lang, *supra* note 17 at 645-81; see NV Samenwerkende Elektriciteitsproduktiebedrijven, Case T-39/90, slip op. ¶ 57 (Eur. Ct. J. Dec. 12, 1991) (not yet reported). Article 5 of the EEC Treaty obliges national authorities, including courts, to take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaty. EEC Treaty, *supra* note 1, art. 5.

60. Opinion of Advocate General Mischo, *Francovich*, ¶¶ 37-52. The most im-

given by rules which are directly applicable without an implementing measure, unlike directives.⁶¹ In fact, many of these cases concerned the rights to obtain repayment of taxes imposed contrary to EC rules. However, for this purpose the Advocate General rejected any distinction between repayment of sums paid and claims for unascertained amounts as damages. The *Foster* judgment showed this distinction to be unjustified.⁶²

The four Member States argued that EC law imposed no duty to pay damages, and that national laws could freely determine if and under what conditions damages would be recovered.⁶³ The Advocate General appropriately rejected this argument. The Court has stated in many cases that EC law gives the right, and that national law governs only the means of exercising it, through, for example, procedural rules or choice of court rules.⁶⁴ The Court has expressly said that national law must *not* make it impossible in practice to exercise rights given by EC law, which national courts are obliged to protect.⁶⁵

Therefore, a national authority could not plead that it need not pay damages under EC law merely because it would not have to pay damages under national law in the same or similar circumstances. In fact, a national legislature under national law is almost never in the position that it is in under EC law when it is obliged to adopt a directive. The Advocate Gen-

portant of the many cases he cited seem to be *Bozzetti v. Invernizzi SpA and Ministero del Tesoro*, Case 179/84, [1985] E.C.R. 2301, [1986] 2 C.M.L.R. 246; *San Giorgio*, Case 199/82, [1983] E.C.R. 3595, [1985] 2 C.M.L.R. 658; *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; *San 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); *Rewe*, Case 33/76, [1976] E.C.R. 1989, [1977] 1 C.M.L.R. 533.

61. *See supra* note 60.

62. *E.g.*, Opinion of Advocate General Mischo, *Francovich*, ¶ 41; *see Foster*, Case C-188/89, [1990] E.C.R. 3313, [1990] 2 C.M.L.R. 833, *aff'd*, [1991] 2 C.M.L.R. 217. *Foster* concerned a claim for damages by some female employees for having been obliged to retire at the age of 60, while the age for compulsory retirement for men was 65. [1990] E.C.R. 3313, [1990] C.M.L.R. 833. The judgment in *Foster* also assumed that compensation could be recovered from a state enterprise for breach of a directive. [1990] E.C.R. 3313, [1990] C.M.L.R. 833. Unlike most of the other cases cited by the Advocate General, *Foster* was *not* concerned with a directly applicable rule. It was also a case in which compensation was the only remedy which could be effective. *Id.*

63. *E.g.*, Opinion of Advocate General Mischo, *Francovich*, ¶¶ 36, 43.

64. *See generally id.* ¶¶ 36-52.

65. *Id.* ¶¶ 46-49; *see, e.g.*, *Rewe*, Case 33/76, [1976] E.C.R. 1989, [1977] 1 C.M.L.R. 533.

eral said that, when obliged to implement a directive, a national legislature is in a position close to that of a national government obliged to execute a law.⁶⁶

The Advocate General then discussed the judgments in *Factortame*⁶⁷ and *Zuckerfabrik Suederdithmarschen AG and Zuckerfabrik Soest GmbH v. Hauptzollamt Itzehoe (Zuckerfabrik)*.⁶⁸ In *Factortame*, as already explained, the Court stated that EC law obliges national courts to exercise powers, including powers which do not exist under national law, when they are necessary to give a remedy which is needed to protect the Community law right.⁶⁹

In *Zuckerfabrik*, the Court stated that national courts have the power to suspend national administrative measures when the grounds for suspension are themselves Community law arguments regardless of whether the administrative measures are based on Community law or on national law.⁷⁰ National courts should perform this measure essentially in circumstances corresponding to those in which the Court itself will suspend acts of the Community institutions.⁷¹ Community law, not national law, defines the circumstances under which interlocutory relief should be given in order to protect a provisionally established substantive right based on Community law.⁷² The Advocate General, therefore, stated that when the right is based on EC law, the protection given by national law to that right should be at least as effective as the protection given to a national law, irrespective of whether the issue is the compatibility of national law with EC law or the validity of national secondary measures based on EC law.⁷³ Any such differences would prejudice the fundamental requirement of uni-

66. See Opinion of Advocate General Mischo, *Francovich*, ¶¶ 46-49.

67. *Factortame*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1.

68. *Zuckerfabrik Suederdithmarschen AG and Zuckerfabrik Soest GmbH v. Hauptzollamt Itzehoe*, Joined Cases C-143/88 & C-92/89, [1991] E.C.R. 534 [hereinafter *Zuckerfabrik*].

69. Opinion of Advocate General Mischo, *Francovich*, ¶ 53; *Factortame*, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1; see *supra* notes 35-53 and accompanying text (discussing *Factortame* decision).

70. See Opinion of Advocate General Mischo, *Francovich*, ¶¶ 54-56 (discussing *Zuckerfabrik*).

71. *Id.*

72. *Id.*

73. *Id.*

form application of EC law.⁷⁴ The Advocate General concluded that EC law gives a right to claim damages for breach of a *directly* applicable rule of EC law.⁷⁵ If this had not been so, *a fortiori*, no right to damages would be given in the case of non-directly applicable rules such as directives.

The Advocate General began his discussion of state responsibility in cases of non-directly applicable rules by recalling that the Court had stated that proceedings by the Commission against Member States for failure to fulfill their obligations, even after the obligation had been fulfilled belatedly, can have a useful purpose such as establishing the basis for the liability of the state vis-à-vis other Member States, the Community, or private parties.⁷⁶ The Court had also recognized that it might be necessary for national authorities to take supplementary steps when the Court finds that the state had not fulfilled its obligations, other than merely recognizing the Court's ruling as *res judicata*.⁷⁷

The Advocate General then made the crucial argument that, by failing to implement a directive, a Member State fails to give Community law the effect that it is supposed to have: to give rights to individuals and companies.⁷⁸ Such a failure can be corrected, at least in part, by permitting individuals to recover damages.⁷⁹ He found this principle in an old judgment of the Court in *Humblet v. Belgium*.⁸⁰ He also concluded from the judgment in *Procureur de la République & Comité National de Défense contre l'Alcoolisme v. Waterkeyn (Waterkeyn)*⁸¹ that private parties do *not* need to wait for a judgment of the Court before claiming their rights in national courts; this principle is important in assessing the consequences of the *Francovich* judgment.⁸² He added that even if there is a national law rule that the legislature cannot be sued for damages, not only would that rule be overridden by Community law, but it would be

74. *Id.*

75. *Id.* ¶ 62.

76. *See generally id.* ¶¶ 57-69.

77. *Id.* ¶ 58.

78. *Id.* ¶ 60.

79. *Id.* ¶¶ 60-62.

80. *Id.* ¶ 63; *Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559.

81. Joined Cases 314-16/81 & 83/82, [1982] E.C.R. 4337, [1983] 2 C.M.L.R. 145.

82. Opinion of Advocate General Mischo, *Francovich*, ¶ 64.

irrelevant in the case of many directives which can be implemented fully by national measures other than legislation.⁸³ He concluded, therefore, that when a state is found to have failed to implement a directive—even one without direct effects—the Member State is bound to give the private parties, whose rights the directive was intended to protect, “adequate judicial means of asserting their rights” by claims for damages against the state, if necessary.⁸⁴

The Advocate General then raised the issue of whether a distinction should be drawn between directives which are intended, when implemented, to create duties only for private parties, and directives which, when implemented, are intended to create obligations for the state.⁸⁵ In the first case, the state is responsible only for its failure to implement the directive. It is not responsible for anything else, such as the failure to pay an employee’s salary, the failure to pay a woman the same salary as a man, or the negligent production of a defective or dangerous product.⁸⁶ All the previous arguments were based on the principle that all failures to implement directives are automatically violations of Articles 5 and 189 of the EEC Treaty and should be remedied by the state if loss has been caused to a private party.⁸⁷

2. On Conditions for Damage Claims

Having concluded that Member States could be liable to pay damages for failure to implement directives, the Advocate General then considered the circumstances in which this liability would arise.⁸⁸ He suggested that the duty to pay damages should arise in circumstances corresponding to those in which the Community would be obliged to pay compensation for breach of Community law by a Community institution under Article 215 of the EEC Treaty.⁸⁹ On this point the Court correctly did not agree with his conclusions. The failure of a state

83. *Id.* ¶¶ 64-65.

84. *Id.* ¶ 66.

85. *Id.* ¶ 67-68.

86. *See supra* note 24 and accompanying text.

87. *See* Opinion of Advocate General Mischo, *Francovich*, ¶ 68.

88. *See generally id.* ¶¶ 70-81.

89. *See id.* ¶ 71. Advocate General Mischo stated that a damage award from a national judge should be comparable to the Court’s damage award for a violation of the same Community law. *Id.*

to implement a directive is a concrete, readily identifiable, formal violation of Community law for which no justification is permitted. There is therefore no reason to say that, if a state is liable at all for non-implementation of a directive, it should be liable only when the other requirements for the non-contractual liability of the Community are also fulfilled.

If a Community legislative measure is challenged, which in the Advocate General's view might be comparable to the national measure needed to implement a directive, the Community is liable *only* if the Community has exercised its discretion as legislator in such a way as to commit a clear violation of a higher rule of law protecting individuals, clearly and seriously exceeding its powers.⁹⁰ Such a strict prerequisite for liability is appropriate when damages are sought from a legislature for its choice of legislative policy. There would be no justification for making it a prerequisite for liability for failure to implement a directive, which is a simple failure to fulfill a precise non-discretionary commitment clearly imposed by Article 189 of the EEC Treaty.⁹¹

The Advocate General tried to overcome this difficulty by proposing that in all cases in which the Court had held that a state failed to implement a directive, the state would be regarded as having infringed a fundamental rule of the Treaty.⁹² This assertion is no doubt correct, but it makes it unnecessary to refer to the Court's case law on the non-contractual liability of the Community. The Advocate General then weakened his own argument by adding, correctly, that the implementation of a directive, involving no discretion as to the result, was *not* comparable to the policy choices made by the Community legislature.⁹³

The Advocate General then suggested that the effects of the Court's judgment should be applied only prospectively.⁹⁴ Thus, private parties should be able to recover damages only for losses suffered after the date of the judgment, except in favor of plaintiffs who had issued proceedings before that

90. *Id.* ¶¶ 72-74.

91. *See* EEC Treaty, *supra* note 1, art. 189.

92. Opinion of Advocate General Mischo, *Francovich*, ¶¶ 74, 76; *see* Commission v. Germany, Case 70/72, [1973] E.C.R. 813, 829, [1973] C.M.L.R. 741, 764.

93. *See* Opinion of Advocate General Mischo, *Francovich*, ¶ 76.

94. *Id.* ¶¶ 82-87.

date.⁹⁵ Such a time limitation has been previously adopted by the Court.⁹⁶ In this respect, the Court did not follow his advice.

B. *The Judgment of the Court of Justice*

1. On the Question of Principle

The Court's judgment in *Francovich* first considered and rejected the argument based on the terms of the Directive itself, and then turned to the question of whether a Member State could be liable for damages for a loss caused by its failure to implement a directive.⁹⁷ The relevant part of the judgment is short and clear. Unlike the Advocate General, the Court did not try to build its conclusion elaborately from its previous case law.⁹⁸

The Court stated that the EEC Treaty had created its own legal order which is integrated with the legal systems of Member States, and which binds their courts.⁹⁹ The subjects of the Community legal order are not only Member States but also its citizens.¹⁰⁰ Just as the Community legal order creates duties for private parties, it gives them rights which are part of their legal heritage (*patrimoine juridique*).¹⁰¹ These rights arise not only as a result of explicit provisions of the Treaty, but also as a result of the obligations that the Treaty imposes in a clearly defined way on private parties, Member States, and Community institutions.¹⁰² National courts must apply, within their jurisdictions, the rules of Community law, and must ensure their

95. *Id.* ¶ 86.

96. *Id.*

97. See *Francovich & Bonifaci v. Italy*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1990) (not yet reported); see also Reports on European Union, 8 E.C. BULL., Supp. 9/75, at 18 (1975), where the Court stated that the protection of the rights of individuals under EC law "presupposes that in the event of failure by a State to fulfill an obligation, persons adversely affected thereby may obtain redress before their national courts." *Id.*

98. See generally *Francovich*, slip op.

99. *Id.* ¶¶ 35-36.

100. *Id.* ¶ 36; see *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, 12, [1963] C.M.L.R. 105, 129.

101. See *Francovich*, slip op. ¶ 36.

102. *Id.* ¶¶ 35-36.

full effect.¹⁰³ They must protect the rights that the rules give to private parties.¹⁰⁴

So far, the Court was essentially summarizing its previous case law, but it went on to say that the full effectiveness of Community rules would be called into question, and the protection of the rights that it recognizes would be weakened, if private parties did not have the possibility of obtaining compensation when their rights were infringed by a breach of Community law by a Member State.¹⁰⁵ The possibility of claiming damages from a Member State is particularly indispensable when, as in the *Francovich* case, the full effect of the Community rules depends upon action by the state and when, as a result, private parties cannot claim, in national courts, the rights that Community law gives them.¹⁰⁶ It follows, the Court stated, that the principle of state responsibility for loss caused to private parties by infringement of Community law for which states are responsible is inherent in the system of the Treaty.¹⁰⁷

The Court then gave a second, separate argument for its conclusion.¹⁰⁸ It stated that the Member States' obligation to pay compensation for loss was also based on Article 5 of the EEC Treaty.¹⁰⁹ Article 5 imposes obligations which include the duty to put an end to the unlawful consequences of a breach of Community law.¹¹⁰ At this point the Court, like the Advocate General, cited the *Humblet* judgment.¹¹¹

2. On Conditions for State Liability

The Court next considered the conditions which must be fulfilled for a state to be liable.¹¹² These conditions depend on the nature of the breach of Community law which causes the

103. *Id.* ¶ 36. This would include the obligation to eliminate the unlawful consequences of a violation of Community law. *Id.*

104. *Id.*

105. *Id.* ¶ 33.

106. *Id.* ¶ 34.

107. *Id.* ¶¶ 35-36.

108. *Id.* ¶ 36.

109. *Id.*

110. EEC Treaty, *supra* note 1, art. 5.

111. *See Humblet v. Belgium*, Case 6/60, [1960] E.C.R. 559.

112. *See Francovich*, slip op. ¶ 38.

loss.¹¹³ When, as in the *Francovich* case, the Member State fails to fulfill its Article 189¹¹⁴ obligation to take the necessary measures to bring about the result required by the directive, the need to ensure the full effectiveness of the Community rule requires a right to damages when three conditions are met.¹¹⁵ First, the directive must give rights to private parties.¹¹⁶ Second, the content of these rights must be identified on the basis of the directive.¹¹⁷ Third, there must be a causal link between the violation of the state's obligation and the loss suffered by the plaintiff.¹¹⁸ If these conditions are fulfilled, there is a right to compensation.¹¹⁹ These conditions were fulfilled in the *Francovich* case.¹²⁰

Subject to these principles, national law determines which courts have jurisdiction and what procedural rules are applicable.¹²¹ These national law rules must not be less favorable than those applicable to corresponding claims under national law, and must not make it practically impossible or excessively difficult to recover damages.¹²² The Court noted but did not rely upon the fact that it had previously declared that Italy had failed to fulfill its obligation to implement the directive.¹²³ It seems clear, therefore, that such a decision is not a prerequisite for a claim for compensation of this kind in a national court, and there is no reason why it should be.

III. COMMENTS ON THE FRANCOVICH JUDGMENT

A. *On the Principle of State Responsibility*

The language of the Court is extremely and, no doubt, intentionally broad. It was clearly intended to apply to all breaches by a Member State of any rule of Community law. In effect, therefore, the Court has extended the rule that damages

113. *Id.*

114. See EEC Treaty, *supra* note 1, art. 189.

115. See *Francovich*, slip op. ¶ 39.

116. *Id.* ¶ 40.

117. *Id.*

118. *Id.*

119. *Id.* ¶ 39.

120. See *id.*

121. *Id.* ¶ 42.

122. *Id.* ¶ 43.

123. *Commission v. Italy*, Case 22/87, [1989] E.C.R. 143, [1989] 1 C.M.L.R.

can be recovered against a state for breach of directly applicable rules to all rules of Community law when the breach is due to action or inaction by the state, irrespective of which organ of the state has failed to act.¹²⁴ The right to obtain compensation applies whether the damages are precisely known or must be calculated by the courts.¹²⁵ The right is not limited to recovering sums collected by tax authorities contrary to Community law.¹²⁶ As far as directives or any provision of the Treaty that requires implementation by a Member State are concerned, the right to damages arises when the Community rule is not implemented at all, or when it is inadequately or incorrectly implemented.¹²⁷

When a Member State has infringed Community law, damages are not the only remedy available. The national remedies which are most appropriate to produce an effective remedy must be used.¹²⁸ If no effective national remedy is available, Community law obliges the national court to disregard any national rule preventing the appropriate remedy from being given.¹²⁹ Community law apparently obliges the national court to create a remedy that fulfills the obligations of the state under Community law.¹³⁰ The national court is bound to achieve the result required by Community law, just as the national legislature is bound.¹³¹

The *Francovich* judgment demonstrates that *Factortame* was particularly important in this respect. *Francovich* shows that the private parties in *Factortame* could have obtained compensation if they had ultimately won their case on Community law grounds. In *Factortame*, however, the parties were granted a more effective remedy than compensation would have been.¹³²

124. See *Francovich*, Joined Cases C-6 & 9/90 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

125. *Id.*

126. *Id.*

127. *Id.* ¶ 46.

128. *Francovich*, slip op. ¶ 42.

129. *Id.*; see generally *Factortame*, Case C-213/89, [1990] E.C.R. 2433, 2452, [1990] 3 C.M.L.R. 1, 8 (stating compensation is *not* always a satisfactory alternative to interim measures); see also *Italsolar spA v. Commission*, Case C-257/90-R, [1991] 2 C.M.L.R. 335; *Compagnia Italiana Alcool v. Commission*, Case C-358/90R, [1990] E.C.R. 4887.

130. *Francovich*, slip op. ¶ 42.

131. *Id.*

132. See *Factortame*, [1990] E.C.R. at 2437, [1990] C.M.L.R. at 29.

It could be argued that the result in *Factortame* might have been different had the *Francovich* judgment come first. This assertion does not appear to be likely because the Advocate General in *Factortame* stated that the absence under English law of any right to compensation was open to criticism in light of the duties of national courts to give full effect to Community law.¹³³ The Court was, therefore, aware that Community law might give a right to compensation in the circumstances of the *Factortame* case, and arrived at its conclusion despite that.

A claim against a state for damages arising from a breach of Community law by failure to implement a directive, or by inadequate or incorrect implementation, is quite distinct from any claim that might be made against the state on the basis of a directive, or on the basis of any national measure implementing a directive. This is not merely an academic point; different procedural rules, for example, or different periods of limitation might apply to different types of claims. General principles of Community law determine the substantive rules for claims for compensation for non-implementation or incorrect implementation, while the provisions of the directive itself govern claims in accordance with it.

By the *Francovich* and *Factortame* judgments, the Court has provided comprehensive and greatly improved protection for the rights of private parties under Community law. The implications of the previous case law of the Court for claims for damages against Member States for breach of directly applicable Community law rules had *not* been fully understood.¹³⁴

No doubt the Court has also ensured a much better level of voluntary compliance with EC law by national authorities of Member States. If they were previously lax in implementing or tempted to postpone implementation of directives, national authorities should now know that they will be obliged to pay compensation for loss caused by their inaction. This principle should ensure that EC measures are implemented more promptly and fully, and accorded greater respect than they have had in the past.

The *Francovich* judgment should not cause surprise. It would be surprising only if it were assumed that an EC Mem-

133. *See id.* at 2463, [1990] 3 C.M.L.R. at 22.

134. Temple Lang, *supra* note 16, at 645-81.

ber State ought to be able to infringe its obligations under EC law with impunity even if it thereby causes loss to individuals. The Court was surely right to reject this proposition, and to do so on the basis that Member States are subjects of Community law with duties under Community law owed to private parties, as well as to other Member States and the Community institutions.¹³⁵ When a Member State fails to fulfill its obligations under Community law, its own national courts must, as far as possible, remedy the failure and protect, even against their own state, Community law rights which the Member State has failed to protect.¹³⁶ The fact that Community law prevails over national law implies all appropriate remedies as well as substantive results.

Apart from the failure of some lawyers to regard Member States as subjects of Community law, why was the *Francovich* judgment thought surprising? One reason was the majority judgment of the English Court of Appeal in *Bourgoin v. Ministry for Agriculture, Fisheries and Food*.¹³⁷ In that case, the majority decided that a Member State is not liable for loss caused by breach of a directly applicable rule of Community law unless the conditions for the liability of the Community under Article 215 were met.¹³⁸ However, the case is unsatisfactory for various reasons. Of the four judges who gave judgments in the High Court and Court of Appeal, two held that states *are* automatically liable. The two judges who stated that states are liable only if the conditions of Article 215 are fulfilled did not consider fully whether they were in fact fulfilled, and simply assumed that they were not.¹³⁹ The reasons given by the two judges who considered that breach of a directly applicable Community law rule made a state liable were much more convincing, even before *Francovich*, than were the reasons given by the majority in the Court of Appeal.¹⁴⁰ The case was settled immediately after the judgment of the Court of Appeal, by the

135. See *Francovich*, Joined Cases C-6 & 9/90, slip op. ¶¶ 35-36 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

136. *Id.* ¶ 42.

137. [1986] 1 Q.B. 716.

138. *Id.* at 787.

139. See *id.*

140. See John Temple Lang, *The Duties of National Courts Under the Constitutional Law of the European Community*, Lasok Lecture at Exeter (1987); see also Reports on European Union, *supra* note 97, 8 E.C. BULL., Supp. 9/75, at 18.

payment of about £3,500,000 to the plaintiffs.¹⁴¹ The judgment of the majority in the Court of Appeal should now be considered overruled by *Francovich*, because the first reason given by the Court in *Francovich* corresponds precisely to the main argument of the dissenting judge in the Court of Appeal.¹⁴²

Another reason for the surprise at the result in *Francovich* was the widespread failure to note the significance of the Court's case law permitting refunds of taxes collected in breach of Community law. Additionally, some assumed that the Court would not say that there is a right to damages for failure to implement non-directly applicable rules until the case law had gone further in more obvious respects.¹⁴³

The *Francovich* and *Factortame* judgments make it clear that Community law may impose on national courts a duty to give remedies other than damages against their own states when these are needed to protect rights given by Community law directives.¹⁴⁴ If existing national law prohibits activities that would be permitted by the directive if it were implemented (assuming that the directive is in force, precise and unconditional), a private party has several possibilities. It may go ahead and risk legal proceedings against it by the state, planning to defend itself using the argument, outlined above, that, in litigation, the state cannot take advantage of its own failure to implement the directive. A similar result would be achieved by seeking judicial review and annulment of any administrative action based on the national law and inconsistent with the directive.

In light of *Francovich*, a private party instead may ask the national courts for a declaration that it is entitled to act in accordance with the directive. Such a declaration could be given against the state. The same result could be achieved, if it were more appropriate under national law, by an injunction to the relevant state authority ordering it not to interfere with the activities of the plaintiff permitted by the directive." In general, now that it is clear that private parties can use directives in

141. *Bourgoin*, 1 Q.B. 716.

142. Compare *id.* with *Francovich*, slip op. ¶¶ 33-36.

143. See, e.g., Becker, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499.

144. See *supra* notes 3 and 44 and accompanying text.

claims that they make against the state, there is no reason why they have to wait until loss and inconvenience have been suffered, or serious legal risks taken, before suing in whatever way may be appropriate. However, until the directive is implemented, a private party apparently cannot assert against other private parties rights which it would have if the directive were properly implemented.¹⁴⁵ There also does not seem to be any other way in which a private party can achieve this result.

The *Francovich* principle is not limited to acts or omissions of the legislature. Acts or omissions by any of the executive or administrative parts of government may also give rise to claims for damages or other appropriate remedy.¹⁴⁶

How effective does Community law require the remedy to be? The Court has not answered this question comprehensively, and no doubt it would be very difficult to do so. But we suggest that the conclusions of Advocate General Tesauero in *Factortame* indicate that the remedy given should be available reasonably promptly and should, as far as practically possible, put the plaintiff in the same position as if its rights under Community law had been fully respected.¹⁴⁷ This goes further than the Court's statement that the national law must provide as effective a remedy for violation of Community law as for breach of national law *and* that national rules must not make it impossible in practice to exercise the Community law right.¹⁴⁸ Reasonable promptness may be essential for the protection of any right, and the test of merely not making it impossible or very difficult can hardly be adequate. Such an ineffectual test might allow the private party to suffer substantial loss, and the private party would then have a second claim for compensation for that loss, on the basis of *Francovich*. It would not make sense that plaintiffs should be obliged to make two claims, and therefore, the test suggested above is the correct one. In most legal systems when rights are infringed, the courts do every-

145. Marshall, Case 152/84, [1986] E.C.R. 723, 734, [1986] 1 C.M.L.R. 688, 700.

146. See *Francovich*, Joined Cases C-6 & 9/90, slip op. ¶ 34 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

147. See Opinion of Advocate General Tesauero, *Factortame*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1.

148. See, e.g., *Rewe*, Case 33/76, [1976] E.C.R. 1989, 1997-98, [1977] 1 C.M.L.R. 533, 550-51.

thing possible in practice to restore the plaintiff to the position in which he would have been had his rights not been infringed.¹⁴⁹ There is no obvious reason for saying that Community rights should be significantly less protected. But, if this is correct, it will be necessary to define the rights given by Community law more precisely, so as to see whether particular rules of national law permit them to be completely and effectively protected.

Once again, the Court summons the help of national courts to consolidate, apply, and enforce the Community law system. Every national judge is now a Community law judge.¹⁵⁰ The *Francovich* judgment is just one more concrete practical result of the cooperation and symbiosis between the Court and national tribunals.

B. On Fundamental Rights

The *Francovich* judgment also implies that, in the sphere of Community law, national courts have a duty to award damages and other remedies against their own state's authorities for a breach of Community law principles on fundamental rights. This assertion requires explanation. The Court has repeatedly stated¹⁵¹ that Community law includes principles of "fundamental human rights," drawn from the European Convention on Human Rights ("Human Rights Convention")¹⁵² and from the national constitutional laws of Member States. These principles bind the Community institutions. Moreover, it is now

149. *See id.*

150. *Tetra Pak Rausing SA v. Commission*, Case T-51/89, [1990] E.C.R. 303, [1991] 4 C.M.L.R. 334 (Ct. First Instance); Brian Walsh, *Reflections on the Effects of Membership of the European Communities in Irish Law*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION* (F. Capotorti et al. eds., 1986); PIERRE PESCATORE, *LIBER AMICORUM* 807 (1987); *Jongeneel Kaas BV v. Netherlands*, Case 237/82, [1984] E.C.R. 483, 520, [1985] 2 C.M.L.R. 53, 79.

151. *See, e.g.*, *Staatsanwalt Freiburg v. Keller*, Case 234/85, [1986] E.C.R. 2897, [1987] 1 C.M.L.R. 875; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240; *Commission v. Germany*, Case 116/82, [1986] E.C.R. 2519; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42; *National Panasonic, Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169; *Testa, Maggio, & Vitale v. Bundesanstalt für Arbeit*, Joined Cases 41, 121 & 796/79, [1980] E.C.R. 1979, [1981] 2 C.M.L.R. 552.

152. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *Human Rights Convention*].

clear that they also bind Member States in the sphere of Community law. This sphere includes: when Member States implement Community measures, when Member States adopt measures affecting rights given or protected by Community law or in areas specifically regulated by Community law, and when Member States take measures on behalf of the Community, as its trustees or agents of necessity.¹⁵³ There is nothing very surprising about this conclusion either. The Human Rights Convention contains provisions for payment of compensation by a state for its infringements of the Convention.¹⁵⁴ At least some national constitutional laws also provide for payment of compensation for breach of constitutional rights by state authorities.¹⁵⁵ Whether the fundamental rights principles in Community law are regarded as directly applicable or not, *Francovich* shows that individuals can obtain compensation for loss if they are infringed, and *Factortame* shows that they can obtain other remedies if they are appropriate.

C. *On Specific Conditions for State Liability*

The Court made it clear that three conditions, the necessary and sufficient requirements for a claim for damages, apply to claims for loss due to failure to implement a directive.¹⁵⁶ The requirements would not necessarily be the same in other cases. The first condition is that the directive must give rights to private parties.¹⁵⁷ Some directives may be intended only to regulate relations between administrations or to protect the general interest in, for example, a cleaner environment, without necessarily creating rights for any particular individuals or companies. Other directives are only concerned with the du-

153. John Temple Lang, *The Sphere in which Member States Are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles*, in *LEGAL ISSUES OF EUROPEAN INTERGRATION* 91(2) (1992).

154. See Human Rights Convention, *supra* note 152, art. 13. Article 13 of the Human Rights Convention requires "an effective remedy." *Id.*

155. See *e.g.*, *Meskill v. C.I.E.*, 1973 I.R. 121; *Educational Co. of Ireland v. Fitzpatrick*, 1961 I.R. 345; *S.P.U.C. v. Grogan*, 1990 I.L.R.M. 350. In the United States, the Eleventh Amendment to the Constitution provides for state immunity but this has been set aside by Congress in the case of, for example, violations by states of the Fourteenth Amendment, 42 U.S.C. § 1983. Injunctions are given by federal courts preventing states from infringing federal laws.

156. See *Francovich*, Joined Cases C-6/90 & C-9/90, slip op. ¶ 39 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

157. *Id.* ¶ 40.

ties of private parties, and do not necessarily create corresponding rights for others. Presumably, the directive must, on its correct interpretation, give rights to private parties of a class of which the plaintiff is one, or in circumstances in which the plaintiff is situated.¹⁵⁸ It is not enough that the directive gives rights to *someone*. It is not important, however, whether the rights intended to be given by the directive are against the state or against private parties.

The second condition requires that the content of the rights given to private parties by the directive must be identified and clear on the basis of the directive.¹⁵⁹ The rights given must be stated precisely enough in the directive itself for courts to determine whether they have been infringed, and, if so, precisely in what respect, and in what quantum of damages.¹⁶⁰ It is not enough that some rights have been given if it is unclear what those rights are.

A directive that, on the relevant point, was conditional on a choice to be made by the implementing state would not give identifiable rights. Furthermore, a directive that was too vague might not give rights that were clear enough to be enforced by courts without implementing measures. The second condition, therefore, is similar to, though not the same as, one of the requirements for a directive to have direct effects in litigation against the state. Directives concerned with harmonization of law do not necessarily create rights for individuals; this depends on what laws are being harmonized. Where a directive gives wide discretion to national authorities as to how it may be implemented, the directive may give certain minimal rights to individuals. The directive may leave it up to the states to decide whether to give wider rights.

The third condition is common in any claim for damages: there must be a causal relationship linking the breach of the right and the loss caused to the person claiming compensation.¹⁶¹ This implies that the nature and extent of the right given by the directive will influence or determine the kinds of

158. *See id.*

159. *Id.*

160. *See id.*

161. *Id.*

loss for which compensation can be claimed, and the quantum of damages.

It will be seen that the terms of the directive are very important, indeed all-important, for all three conditions. However, directives have not yet been drafted with these issues in mind, and many directives may not clearly answer the questions that arise from the Court's three conditions. If a directive is not clear in any relevant respect, the question of its interpretation can be referred by a national court to the Court in Luxembourg under Article 177.¹⁶²

Presumably, the same three conditions apply when the plaintiff claims damages for incorrect or inadequate implementation of a directive. The plaintiff then has to show that an identifiable right given by the directive to individuals or companies, of which the plaintiff is one, has not been translated into national law. But this is less important than it might seem, because of the rule that national measures intended to implement a directive must, if possible, be interpreted so as to fulfill the state's obligations under the directive. Only if such an interpretation is not possible will a claim against the state for damages for insufficient or incorrect implementation arise. The case of *Marleasing SA v. Comercial Internacional de Alimentacion SA* shows that the Court is willing to go very far to oblige national courts to interpret legislation in accordance with directives.¹⁶³

IV. IMPLICATIONS OF THE FRANCOVICH JUDGMENT

A. Damages for Breach of Directly Applicable Rules

Obviously, the *Francovich* judgment indirectly but clearly confirms that private parties may sue a Member State for any action which infringes a directly applicable rule of Community law, and which causes loss to them.¹⁶⁴ Directly applicable rules are defined as those which are both unconditional *and* clear and precise enough to be applied by national courts.¹⁶⁵ It fol-

162. See EEC Treaty, *supra* note 1, art. 177.

163. See *supra* notes 26 and 30 (citing *Marleasing*).

164. See *Francovich*, slip op. ¶ 27.

165. Becker, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499; *Francovich*, slip op. ¶ 11 (reaffirming Court's holding in *Becker*, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499).

lows that the first two conditions of *Francovich*, if they are regarded as applicable by analogy in cases of breach of directly applicable rules, will always be fulfilled. They seem to add little to the previous case law of the Court on those rules, although they clarify what might otherwise have been in doubt. The *Francovich* judgment will, however, have the very important effect of calling the attention of lawyers to the case law on directly applicable rules. A big increase in the number of claims for damages for breach of those rules certainly can be expected.

Many directly applicable rules prohibit protectionist differences in treatment resulting from national legislation. Article 90 of the EEC Treaty is an increasingly important article,¹⁶⁶ which has been held to be directly applicable in this situation.¹⁶⁷ This article prohibits state measures, even in the case of state enterprises and enterprises with special or exclusive rights, which authorize, require, encourage, or approve behavior which infringes on the Treaty, including (but not limited to) the competition rules.¹⁶⁸ The possibility of suing the state, as well as the enterprise infringing the competition rules, for compensation for loss caused by breach of Article 90 now clearly exists, and should help to discourage such breaches.

B. Directives and Rights of Private Parties

When does a rule of Community law, although not directly applicable, give rights to private parties? In most Member States there is case law on the question of whether national legislation imposing duties was also intended to create private

166. See John Temple Lang, *Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty*, in 1984 FORDHAM CORP. L. INST. 543 (Barry Hawk ed., 1985); Jean-François Verstryngne, *The Obligations of Member States as Regards Competition in the EEC Treaty*, in 1988 FORDHAM CORP. L. INST. 17-1 (Barry Hawk ed., 1989); Pierre Pescatore, *Public and Private Aspects of Community Competition Law*, in 1986 FORDHAM CORP. L. INST. 381-430 (Barry Hawk ed., 1987); see also PTT Netherland, Cases C-48/90 and C-66/90 (Eur. Ct. J. Feb. 12, 1992) (not yet reported); Hofner and Elser, Case C-41/90 (Eur. Ct. J. Apr. 23, 1991) (not yet reported); France v. Commission, Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported).

167. Article 90 was held to be directly applicable in, for example, *State v. Sacchi*, Case 155/73, [1974] E.C.R. 409, ¶ 18, [1974] 2 C.M.L.R. 177; *BRT v. SABAM*, Case 127/73, [1974] E.C.R. 313, 318, [1974] 2 C.M.L.R. 233, 238; *Porto di Genova*, Case C-179/90, slip op. ¶ 23 (Eur. Ct. J. Dec. 10, 1991) (not yet reported).

168. EEC Treaty, *supra* note 1, art. 90.

rights (*schutznormtheorie*). However, this concept is not directly relevant to directives under Community law, which are intended to be implemented by other measures. The answer depends on the terms of each directive, and cannot be answered definitely merely by reference to general principles. However, some comments may be useful.

If the directive requires the adoption of measures giving procedural or other rights to private parties, the directive itself fulfills the first *Francovich* condition. If other Community rules associated with the directive—for example, previous directives on the same subject, or an associated regulation—give rights to individuals, the directive almost certainly does so also. If the directive applies in a sphere of law in which national laws *already* give rights to private parties, so that there is no need for Community law to do so expressly, or if national law gives rights for breach of national measures such as those needed to implement the directive, then the directive is likely to give private rights. This principle is important, because in most Member States, the failure to fulfill duties imposed by legislation is often actionable as a tort or private wrong (breach of statutory duty in English and Irish law, and almost the whole French law of *delicts*). The directive need not be the only source of the rights which it regulates or confers. In other words, a directive may give rights not only because of its own provisions but because it is to be implemented by measures that themselves would be regarded, under all or most national laws, as giving private rights. It does not make a difference whether private parties' rights were created first by the directive or whether similar rights existed previously under the laws of some or all Member States.¹⁶⁹ If this situation were not so, the effects of non-implementation of the directive would be fundamentally different in different Member States, depending on whether some similar rights were given by the previous law.

Also, an anomalous and irrational distinction would be drawn between failure to implement directives harmonizing and modifying existing rights and failure to implement directives creating new rights. There would be no reason to limit the *Francovich* principle to the latter type of situation, because the nature of the failure by the Member State would be the

169. *Id.*

same in both cases. If the directive is only concerned with cooperation between public authorities or by public authorities with the Community institutions, it is not likely to create any rights for individuals. If a directive is intended to be enforced primarily in national courts by action at the national or regional level by, for example, environmental protection organizations, it should be regarded as giving them rights. If the directive is written so as to protect exclusively the general public interest in, for example, a less polluted environment, it is unlikely to create rights for private parties. However, if the subject-matter of the directive is inherently of special interest to identifiable individuals or companies, such as the competitors of a company receiving state aid, the immediate neighbors of a polluter, or the creditors of a bank or pension fund, the fact that there is a general interest in reducing pollution, in undistorted competition, or in the soundness of financial institutions, should not mean necessarily that no private rights are created. Some directives lay down minimum standards that entitle the goods or services that comply with them to be offered throughout the Community. Other directives go further and prohibit Member States from imposing additional requirements, even on goods or services within their borders. Both kinds of directives can create private rights. Almost all directives in the areas of social affairs and free movement of persons appear to create rights for individuals. Most directives on freedom to provide services and freedom of establishment also create rights for individuals.

Private rights, especially in the environmental area, are often protected by general duties, for example, to minimize pollution, or to carry out environmental impact assessments. Such duties may be designed to set standards, for breach of which plaintiffs can sue under general rules of law, or provide information that plaintiffs can use to protect their interests, relying on other more generally applicable procedures. As argued above, a directive must be interpreted in the context of national laws, not merely in its context in Community law. In fact, many if not most directives are *not* correctly implemented *unless* the implementing measures give private parties legally enforceable rights.¹⁷⁰ This is necessary both because rights

170. *Commission v. Belgium*, Case C-249/88, [1991] E.C.R. 1275; *Emmott v.*

may have little value unless they are legally enforceable, and because rights given by Community law cannot be interpreted by the Court under Article 177 of the EEC Treaty unless they can be claimed in national courts with power to ask the Court to interpret them. Such rights have to be enforceable by someone, and the directive in question necessarily fulfills the first of the three *Francovich* conditions.

An obvious example of a directive intended to give rights to private parties, and non-implementation of which would fulfill the three *Francovich* criteria, is the directive on manufacturers' liability for defective products.¹⁷¹ Failure to implement this directive would mean that private parties might be unable to recover damages from manufacturers in circumstances contemplated by the directive.¹⁷² A claim could clearly be made against the state.

To determine when a non-directly applicable rule gives private rights, it is useful to look at a rule that, although directly applicable, at first sight does not appear to do so. Articles 92-94 of the EEC Treaty allow state aid to industry only in certain conditions, and when authorized by the Commission.¹⁷³ These rules might be regarded only as a general obligation to avoid distortions of competition. But the Court has held that they are directly applicable¹⁷⁴ and that a competitor may challenge a Commission decision authorizing state aid.¹⁷⁵ The Court has also stated that national courts must ensure that

Minister for Social Welfare, Case C-208/90, [1991] 3 C.M.L.R. 894; Zuckerfabrik, Joined Cases C-143/88 & C-92/89, [1991] E.C.R. 534; Union Nationale Des Entraîneurs et Cadres Techniques Professionnels du Football v. Heylens, Case 222/86, [1987] E.C.R. 4097, [1989] 1 C.M.L.R. 901; Commission v. Belgium, Case 239/85, [1986] E.C.R. 3645, 3658-59; Johnston v. R.U.C., Case 222/84, [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240; Harz v. Deutsche Tradax GmbH, Case 79/83, [1984] E.C.R. 1921, [1986] 2 C.M.L.R. 430; von Colson v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430; Commission v. Netherlands, Case 96/81, [1982] E.C.R. 1791, 1804; Commission v. Belgium, Case 102/79, [1980] E.C.R. 1473, 1486, [1981] 1 C.M.L.R. 282, 293-94.

171. Directive on manufacturers liability, Council Directive No. 85/374, O.J. L 210/29.

172. *Id.*

173. See EEC Treaty, *supra* note 1, arts. 92-94.

174. Some of the provisions of Articles 92-94 of the EEC Treaty were held to be directly applicable in, for example, Lorenz v. Germany, Case 120/73, [1973] E.C.R. 1471.

175. COFAZ v. Commission, Case 169/84, [1986] E.C.R. 391, [1986] 3 C.M.L.R. 385.

state aid is not given unless the Commission first has been duly notified, even if the Commission might ultimately authorize it.¹⁷⁶ The High Court in England had ruled that a competitor can bring an action for infringement of Articles 92-94, for breach of statutory duty, if aid that has not been authorized puts it at a competitive disadvantage.¹⁷⁷ If state aid has been unlawfully given, the correct course of action is for aid to be repaid in full. If this measure is done, no loss to any competitor should have occurred.

The case law on state aid, therefore, leads to two conclusions. What appears to be a general rule against distortions of competition may give rise to private rights for competitors, even if they could not necessarily have shown precise, specific loss as a result of the unlawful aid. Competitors have a right to see the Community rules respected regardless of the exact amount of their possible loss. They do not have to wait until they suffer identifiable loss before they can sue. Even if a plaintiff cannot prove any specific loss, it may obtain an injunction to prevent the unlawful aid from being given. In other words, the most effective remedy should be given promptly. In fact, it might often be difficult to show any causal link between the granting of state aid to the competitor and loss to another. It may be *easier* to justify an injunction against the state to prevent the granting of state aid than to obtain damages after the aid is given, because of the causal link requirement of *Francovich*. The difficulty of proving a causal link to any identifiable quantum of damages is an argument in favor of giving an injunction to prevent the granting of the aid, or an argument for requiring the aid to be refunded.

It may also be useful to look at the directives on public contracts.¹⁷⁸ Broadly, these directives require non-discriminatory invitations to be published before a variety of public sup-

176. *Federation Nationale du Commerce Extérieur*, Case C-354/90 (Eur. Ct. J. Nov. 21, 1991) (not yet reported).

177. *See Factortame*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1.

178. The basic directives on public contracts are Council Directive No. 71/305, O.J. Eng. Spec. Ed. 1971, at 682 and Directive No. 77/62, O.J. L 13 (1977); *see* Council Directive No. 80/767/EEC of July 22, 1980 adapting and supplementing in respect of certain contracting authorities; Directive No. 77/62, O.J. L 215/1 (1980); Council Directive No. 89/665 (1989) on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public work contracts, O.J. L 395/33 (1989); Council

ply and public service contracts are allocated by public authorities in the Community. They also require Member States to adopt procedures to give contractors the right to object to the allocation of a contract if it is not in accordance with the relevant directive. If, however, a contractor discovers too late that the allocation was not lawful, it now seems clear from the *Francovich* judgment that it can sue the public authority for breach of the directive, even if the national implementing measure does not give it a right to sue.

One of the many questions left open by the *Francovich* judgment is the question of how far environmental protection directives¹⁷⁹ should be interpreted as creating private party rights. There is no inherent reason why they should not do so, but they are, in practice, often written in terms of imposing duties on public authorities or on polluters rather than creating rights. These issues are important because many environmental directives have not been fully implemented. Environmental protection bodies, anxious to ensure the protection of particular areas or to ensure the adoption of a particular measure but not necessarily able to show that they are themselves suffering any particular loss, will no doubt raise these issues and seek to have environmental directives written in a form which unquestionably creates private rights. Indeed, one solution to this problem might be to deliberately encourage the enforcement of Community environmental directives by environmental conservation bodies in national courts. This measure would involve a desirable decentralization of the enforcement of Community law, and the authorities really responsible for failure to implement or to obey directives could be made liable or obliged to take appropriate action by their own courts.

1. Who May Be Sued Under the *Francovich* Principle

The *Francovich* case was concerned with the simple case in which the national legislature of the Member State had failed to implement a directive, and the state was held liable for com-

Directive No. 90/531 (1990) on the procurement procedures of entities operating in sectors including water, energy, and others. O.J. L 297/1 (1990).

179. See generally Rolf Wagenbaur, *The European Community's Policy on Implementation of Environmental Directives*, 14 *FORDHAM INT'L L.J.* 455 (1990-91).

pensation.¹⁸⁰ However, depending on the subject matter of the directive and the constitutional structure of the Member State in question, the measures needed to implement a directive may be the responsibility of a regional legislative, a local administrative, or executive authority.¹⁸¹ The fact that it is always the Member State which is the defendant in proceedings brought in the Court in Luxembourg by the Commission or by another Member State under Articles 169-170 of the EEC Treaty for failure to fulfill the state's obligations does not answer the question which authority can be sued for compensation in a national court.¹⁸² The obvious answer is that the authority which had the duty to implement and to respect the directive can be sued for compensation in a national court. The identification of this authority is governed by national law, not Community law. The fact that Community law gives the right to damages (or says that a right to damages must be given under national law) does not mean that Community law determines which national authority should be named as defendant.

The question of who may be sued under *Francovich* is most likely to arise in Member States with essentially federal structures, in which the national or federal authorities may not have power to adopt whatever measures are needed to implement the directive. In that case, it seems natural to say that the provincial or regional authorities who have the power should be sued for compensation if they fail to exercise it. If both the national or federal authorities and the provincial or regional authorities have the power to implement the directive in question, then either or both could be sued.

This question is important in Member States with essentially federal structures because regional authorities, which are not involved in the adoption of Community directives, are often reluctant, slow, or inefficient in implementing them. Therefore, in order to make the Community legal system more effective, it may be important to establish that a regional or provincial government is liable to pay compensation, in ac-

180. *Francovich*, Joined Cases C-6 & 9/90, slip op. ¶ 7 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

181. See *Fratelli Costanzo SpA v. Comune di Milano*, Case 103/88, [1989] E.C.R. 1839, [1990] 3 C.M.L.R. 239 (holding that local authorities are bound by directives like national authorities).

182. See EEC Treaty, *supra* note 1, arts. 169-70.

cordance with the *Francovich* principle, when it has exclusive jurisdiction to implement a directive and fails to do so.

2. Damages Available to Parties Under the *Francovich* Principle

A very closely related question also arises in unitary states. The question is illustrated by the example, given above, of a public authority that fails to fulfill its obligations under one of the directives addressing public contracts. Because the public authority is a state body against which the directive can be pleaded even if it has not been implemented, the authority would be liable for damages whether or not the directive was implemented. It seems that it would also be liable whether or not the national implementing legislation gave a right to damages, because it would be responsible, in the specific case, for both the infringement of the directive and for the loss suffered by the plaintiff. In other words, it is suggested that the *Francovich* principle gives a right to damages for breach of a directive by a public authority in a specific case, even if the national legislature has correctly implemented the directive. If this portrayal is correct, then a claim for damages could be made against any state authority or body against which the directive could be pleaded for any other purpose, even if the authority lacked the legislative power to implement the directive.¹⁸³

A directive can be implemented by legislative, executive, or administrative measures, provided that legal rights are created as a result.¹⁸⁴ If a state can also be sued for not taking the legislative or other measures needed to implement a directive, the public authorities in a state can be sued if they fail to carry out the directive in a specific case. If the directive has been implemented and the national law gives a right to sue for failure to respect the national measures, the question of whether Community law would also give a right to damages is not likely to arise. But if the directive has not been implemented, or if

183. See Foster, Case C-188/89, [1990] E.C.R. 3313, [1990] 2 C.M.L.R. 833, *aff'd*, [1991] 2 C.M.L.R. 217.

184. See *supra* notes 16-17 and accompanying text (discussing implementation of a directive).

national law gives no right to damages (and no other appropriate remedy), then it seems that Community law gives a remedy.

The question also arises when the failure by national authorities is a failure to *enforce* the national measures implementing the directive against private parties, and not otherwise a breach by them of their obligations under the directive itself. National authorities have obligations under Article 5 to enforce Community measures,¹⁸⁵ or national measures needed to give effect to Community directives. They must do this in an effective way, and they must do it as vigilantly as they apply their corresponding national legislation. Where the rights of those whom the directive is intended to protect are to be safeguarded primarily by the vigilance of public authorities rather than by their own private vigilance, Article 5 may give a right to sue for compensation if the authorities' supervision fails and loss results.¹⁸⁶ In such a case, the crucial issue for a plaintiff would be whether it had a right to be protected by an effective degree of enforcement by the national authority in question, as distinct from being protected by the directive and the implementing measures themselves. This might be important in the case of directives intended, for example, to ensure the financial soundness of banks, insurance companies, or pension funds.

In *Francovich*, the plaintiff had clearly suffered financial loss, for which an appropriate amount of compensation would be an adequate remedy.¹⁸⁷ But what kinds of loss (*dommage*, in French) are enough to give rise to claims under *Francovich*? The High Court in England has held in *Twynford Parish Council v. Secretary of State for the Environment*,¹⁸⁸ that a private party who had not "suffered" as a result of a breach of a directive could not rely on the breach against the state.¹⁸⁹ Still, that ruling was *before* the *Francovich* judgment; the injury claimed was merely that the proper procedures for obtaining an environmental im-

185. As to the duty of national authorities to apply EC law, see *Germany v. Commission*, Case C-8/88, [1992] 1 C.M.L.R. 409, ¶¶ 13, 20, (Eur. Ct. J. June 12, 1990).

186. See EEC Treaty, *supra* note 1, art. 5.

187. See *Francovich*, Joined Cases C-6 & 9/90, slip op. ¶¶ 35-37 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

188. *Twynford Parish Council v. Secretary of State for the Environment*, [1992] 1 C.M.L.R. 276 (Q.B. 1990) (U.K.).

189. *Id.*

pact assessment under Directive 85/337¹⁹⁰ were not followed, and no prejudice was alleged. The High Court considered that the directive had not in fact been infringed: it merely stated that if the proper procedure had been followed, a proper environmental impact statement and a non-technical summary of it would have saved the plaintiffs some time, trouble, and money. However, the High Court stated that this assertion was "speculative."¹⁹¹ The case law of the Court on state aid is relevant on this point: without a doubt identifiable loss is necessary for compensation to be awarded, but private parties may defend their rights by appropriate proceedings even before they have suffered loss, and, in such proceedings, they are entitled to insist that Community law be fully obeyed.

There are other issues that arise under the *Francovich* principle that must be answered ultimately by Community law, not national law. For example, what is the amount of damages which should be paid by a state authority for loss due to non-implementation of a directive? Does Community law give a right to interest? For many reasons, in practice there may be a considerable time between the loss being incurred and the payment of compensation, and the Community law remedy would be inadequate if there is no right to interest. It is the duty of the national courts under Article 5 to provide either a prompt award of compensation *or* interest.¹⁹² It would be most undesirable for Member States to be able to save themselves money by delaying payment of compensation for as long as possible, which could be the result if Community law did not give a right to receive interest.

Can consequential loss be recovered? There will certainly be cases in which plaintiffs have made plans on the basis of directives and found that they could not carry them out, or that they could carry them out only with a lower rate of profit, because the directives have not been implemented. Directives give a variety of rights in a wide variety of circumstances: all those rights are protected if the three *Francovich* conditions are fulfilled, and there is no obvious reason to exclude any kind of consequential loss from the protection of the *Francovich* princi-

190. Council Directive No. 85/337, O.J. L 175/40 (1985).

191. *Twyford*, [1992] 1 C.M.L.R. 276.

192. See EEC Treaty, *supra* note 1, art. 5.

ple. No doubt when the issue arises the Court will look at the national laws on consequential loss in the different Member States.

Is the state liability absolute? It seems unlikely that a state could plead, in the case of inadequate or incorrect implementation of a directive, that it had interpreted the directive reasonably or that it had acted on the Commission's interpretation, since the duty to implement directives is an absolute one to which negligence issues are irrelevant. Since a directive's correct interpretation can be relied upon against the state in all other kinds of litigation in national courts,¹⁹³ it seems unlikely that it could not be relied on in claims for damages for incorrect or inadequate implementation. National measures that are said to meet the requirements of a directive must be interpreted, if possible, in accordance with the directive, even if they were enacted before the directive and were, therefore, not written with the directive in mind.¹⁹⁴ Therefore, it seems that the question of whether the state had implemented a directive is an objective one in which the subjective intention or attitude of the state is irrelevant. Also, in cases such as *Foster*, although the defendant company is not responsible for the state's failure to implement the directive being relied on by the plaintiff, it is liable anyway.¹⁹⁵ It could be said that the defendant company could have voluntarily implemented the directive as far as its own activities were concerned, but making it liable for its failure to do so comes close to saying that it has an absolute liability, irrespective of negligence.

Private parties have no right to sue a Member State directly in the Court of Justice for breach of Community law, or to sue the Commission to force it to sue a Member State.¹⁹⁶ Recently, however, this difficulty has been greatly reduced in

193. See, e.g., EEC Treaty, *supra* note 1, arts. 5, 169-71; *Slaughtered Cows*, Case 39/72, [1973] E.C.R. 101, [1973] C.M.L.R. 439.

194. Smith, *The Francovich Case: State Liability and the Individual's Right to Damages*, 3 EUR. COMPETITION L. REV. 129-32 (1992) raises other issues. Would a *de minimis* rule apply? The obvious answer is, if identifiable loss has occurred, compensation should be paid. Are damages available as well as other remedies? The answer is, if another remedy is given insofar as loss is thereby prevented, no damages can be claimed.

195. See *Foster*, Case C-188/89, [1990] E.C.R. 3313, [1990] 2 C.M.L.R. 833, *aff'd*, [1991] 2 C.M.L.R. 217.

196. See, e.g., *Emrich v. Commission*, Case C-247/90, [1990] E.C.R. 3913.

importance. Provided that the Community law rule is one which creates private rights, those who are entitled to those rights may sue the state in national courts for whatever remedy is most appropriate to protect those rights, if they have already suffered loss, or any other appropriate remedy that they have standing to claim. If the relevant Community law rule is not one which gives private rights, potential plaintiffs can hardly claim to have a legitimate grievance under current Community law.

C. Interpretation of National Measures Implementing a Directive

It has already been mentioned that national courts are bound by Community law to interpret national measures implementing a directive as far as possible so as to give effect to the directive.¹⁹⁷ As a result of the *Francovich* judgment, a national court in such a situation has an additional argument to take into account.¹⁹⁸ If the court decides that the national measure (which it interprets, while the Court in Luxembourg is the ultimate interpreter of the directive) cannot be interpreted so as to give effect to the directive in some respect, it may thereby make its own state liable to pay compensation to any private party who suffers loss as a result.¹⁹⁹ This should influence not only the courts themselves. It means that national governments may have an interest in being represented in litigation between private parties over the interpretation of national measures implementing directives, to persuade the national court to interpret the national legislation in such a way

197. See *supra* note 29 and accompanying text (discussing interpretation of national measures to give effect to directives).

198. See *Francovich*, Joined Cases C-6 & 9/90, slip op. ¶¶ 35-37 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

199. *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.

that the directive is fully implemented and the state is not liable for defective implementation.²⁰⁰ National courts should perhaps notify governments when asked to make rulings that would mean that the Member State in question is in breach of Community law, just as some courts notify the government if the compatibility of legislation with the national constitution is questioned. In some situations it might be appropriate to sue the state and the private defendants at the same time.

V. OTHER LEGAL CONSEQUENCES OF THE FAILURE TO IMPLEMENT DIRECTIVES

A. Obstruction of Community Law Rights

As already mentioned, national law procedural rules generally apply to claims for the protection of rights given by Community law, provided that these national laws are no less favorable than those that apply to national law rights, and that they do not make it practically impossible to exercise Community law rights.

In *Emmott v. Minister for Social Welfare*, the Irish authorities had failed to implement a directive.²⁰¹ In general, Member States must adopt whatever measures are needed to give full, clear, and precise effect to directives so that when the directives give rights to individuals and companies, the individuals and companies know their rights fully and may claim them, if necessary, in national courts. But, as the Court stated in *Emmott*, private parties cannot fully know their rights prior to a directive's implementation, even if the Court has ruled that the Member State has failed to fulfill its duty to implement that particular directive and even if some of the provisions of the directive are unconditional and precise enough to be relied on against the state in a national court.²⁰² Only measures giving correct effect to a directive can put an end to this uncertainty. Until such measures have been enacted (no matter how long it takes), the state cannot rely on any rule of national law that prevents a plaintiff, who has delayed in making a claim, from succeeding in its action against the state.²⁰³

200. *Id.*

201. [1991] 3 C.M.L.R. 894.

202. *See id.*

203. *See id.*

This result could be based on the simple unfairness of a state relying on one rule of national law against a private plaintiff when it has failed to adopt the national measures needed to establish the rights which the plaintiff claims. But it seems that the Court regarded the case as an example of the principle that a state must not take advantage of its own failure to implement a directive or make it impossible in practice to claim a Community law right in national courts.²⁰⁴ The latter principle is well established in connection with rights under directly applicable rules of Community law,²⁰⁵ and it now applies to rights under directives. *A fortiori*, a Member State cannot rely on its own unlawful act to defeat a claim under a directive.²⁰⁶

Any effort by a Member State to limit or to avoid liability under the *Francovich* principle may therefore, in itself, be contrary to Community law, and thus ineffective.²⁰⁷ It was noted above that the Court did not accept the Advocate General's suggestion to make the *Francovich* principle apply with effect only from the date of the judgment.²⁰⁸ The combined effect of this decision by the Court (which is not mentioned in the judgment) and the *Emmott* case gives private parties a large number of claims in respect of facts that have already occurred. Therefore, the ability of private parties to obtain compensation from Member States and state bodies will become more important than it has been in the past. Unfortunately, it is not equally easy in all Member States to obtain compensation, or indeed to obtain other remedies against the state. In some Member States, court proceedings are too slow and, therefore, may not provide satisfactory or efficient remedies.

204. *Francovich*, slip op. ¶ 31; *Costa v. ENEL (Ente Nazionale Energia Elettrica)*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425; *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, 12, [1963] C.M.L.R. 105, 129.

205. See, e.g., *Commission v. Italy*, Case 104/86, [1988] E.C.R. 1799, [1989] 3 C.M.L.R. 25 (stating national legislation may not impose a burden of proof on plaintiffs to show by documentary evidence that they have not passed on to their customers taxes improperly levied; duty to repeal legislation incompatible with Community law in order to eliminate uncertainty about Community law rights); *San Giorgio*, [1983] E.C.R. 3595, [1985] 2 C.M.L.R. 658; *Rewe*, Case 33/76 [1976] E.C.R. 1989, [1977] 1 C.M.L.R. 533.

206. *Cotter and McDermott v. Minister for Social Welfare*, Case C-377/89, [1991] E.C.R. 1178, ¶¶ 21, 26, [1991] 3 C.M.L.R. 507.

207. *Francovich*, slip op. ¶ 37.

208. See *supra* notes 94-96 and accompanying text.

B. *The Francovich Principle and Treaties*

The European Community exercises considerable treaty-making powers.²⁰⁹ Treaties made by the Community in accordance with Article 228 of the EEC Treaty bind Member States.²¹⁰ A treaty made by the Community may be implemented by a Community measure such as a regulation or a directive. If this is done, the obligations of Member States and the duties of national courts are primarily governed by the Community measures. However, some treaties made by the Community are not implemented by any Community measures, and then the Member States must act to give effect to the treaties. Because treaties made by the Community are part of Community law,²¹¹ it seems that private parties could sue a Member State if the Member State failed to implement such a treaty, i.e., if the *Francovich* conditions were fulfilled. The question would be likely to arise only if the relevant provisions of the treaty were not directly applicable,²¹² but were intended to give rise to rights to private parties. If relevant provisions were directly applicable, no national implementing legislation, other than consequential repeals, would be needed. If relevant provisions were not directly applicable, the *Francovich* requirements would not be met. These questions may be important under the European Economic Area Agreement signed in 1992,²¹³ between the Community and the states that are members to the European Free Trade Area ("EFTA"): Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland.²¹⁴ In essence, this agreement applies a body of law, cor-

209. On the treaty-making powers of the Community, see EEC Treaty, *supra* note 1, art. 228; Opinion 1/76, Draft Agreement Establishing a European Laying-Up Fund For Inland Waterway Vessels, 1977 ECR 741; DAVID O'KEEFE & HENRY G. SCHERMERS, *MIXED AGREEMENTS* (1983); see also the series *Agreements and Other Bilateral Commitments Linking the Communities with Non-Member Countries*, and the series *Multilateral Conventions and Agreement* (updated annually by the EC Commission).

210. See O'KEEFE & SCHERMERS, *supra* note 209.

211. *Haegeman v. Belgium*, Case 181/73, [1974] E.C.R. 449, [1975] 1 C.M.L.R. 515.

212. *S.Z. Sevince v. Staatssecretaris Van Justitie*, Case C-192/89, [1990] E.C.R. 3461, [1992] 2 C.M.L.R. 57; *Demirel v. Stadt Schwäbsh Gmünd*, Case 12/86, [1987] E.C.R. 3719, [1989] 1 C.M.L.R. 421; *Hauptzollamt Mainz v. C.A. Kupferberg*, Case 104/81, [1982] E.C.R. 3641, [1983] 1 C.M.L.R. 1.

213. European Economic Area Agreement (EEA) (currently in draft form only).

214. *Id.*

responding to Community law, to the EFTA States, and gives private companies and individuals in all the nineteen countries substantially the same rights as they have under Community law.²¹⁵ Thus, at a stroke, a very large body of rights is created.

Francovich has reduced substantially what had been regarded as a difference between directly applicable rules and not-directly applicable rules. It has also significantly *increased* the difference between Community directives and normal treaties to which Member States are parties.²¹⁶ In most Member States, treaties cannot be effectively relied upon by private parties against the state until they are implemented and not merely ratified. Directives, on the other hand, now represent commitments which are fully enforceable in national courts against the Member State concerned.²¹⁷

C. *Claims Against Private Parties Under the Francovich Principle*

As already mentioned, a directive cannot be relied upon against private parties: only the national measure can be relied upon to implement the directive. Still, directly applicable Community rules can be relied upon against private parties, and *Francovich* indirectly confirms that directly applicable Community law gives rights which national courts must enforce for breach of, among other things, Community antitrust law by

215. *See id.*

216. *See Francovich*, Joined Cases C-6 & 9/90, slip op. ¶ 7 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

217. *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 trans., 1974). 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, 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.

Id.

awarding appropriate remedies against private parties.²¹⁸

Some national courts have already awarded damages or granted injunctions in such cases.²¹⁹ The same principles would apply to other directly applicable rules, but few of them impose duties on private parties which would give rise to corresponding private rights.

D. *The Francovich Judgment in a Constitutional Setting*

The Court has several times stated that it is dealing with a constitution. In a case about standing to challenge the lawfulness of an act of the European Parliament,²²⁰ the Court stated:

[i]t must . . . be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.²²¹

In its first opinion on the proposed European Economic Area Agreement (the "EEA Agreement"), the Court stated that "[t]he EEC Treaty, although concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on law."²²²

In the *Francovich* case, the Court had to decide whether the omission by a Member State to carry out its obligations under

218. *Francovich*, slip op. ¶ 37.

219. See John Temple Lang, *EEC Competition Actions in Member States' Courts—Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law*, in 1983 FORDHAM CORP. L. INST. 219 (Barry Hawk ed., 1984). Picard, *Remedies in National Law for Breach of Articles 85 and 86 of the EEC Treaty: A Review*, 2 LEGAL ISSUES OF EUR. INTEGRATION 1-37 (1985). The *Francovich* judgment has shown that the distinction between private law rights and public law rights, discussed in *Bourgoin v. Minister for Agriculture*, *supra* notes 137-42, is irrelevant for this purpose.

220. *Les Verts v. Parliament*, Case 294/83, [1986] E.C.R. 1339, 1365, [1987] 2 C.M.L.R. 343, 371.

221. *Id.*

222. See *Francovich*, slip op. ¶ 21; see John Temple Lang, *The Direct Effects of European Community on Individuals and Companies*, The Sixth Lord Fletcher Lecture, at 54 n.38 (Law Society London 1984).

the Treaty gave rise to any legal remedy.²²³ The Court must have been aware of the constitutional significance of what it was deciding, in particular because of the division of powers between the Community and its Member States.

The European Community has relatively few exclusive powers;²²⁴ most of its powers are concurrent with powers of Member States.²²⁵ This situation exists primarily because many of its powers are concerned with getting rid of protectionist features of national rules and with harmonization of national legislation. Neither of these tasks necessitate exclusive Community powers. The Community has exclusive powers only in certain areas such as commercial policy (primarily, but not exclusively external visible trade), and conservation of marine biological resources. In addition, since Community law always prevails over national law, every Community measure creates an area of what is, in effect, exclusive Community power, since only the Community can alter the Community measures.²²⁶

But the great majority of all the powers of the Community are concurrent powers.²²⁷ So many powers are concurrent that there is a far greater likelihood of interference by national measures with the operation of Community measures than exists in conventional federations. Every directive is a Community measure, adopted in the area of concurrent powers, because each directive needs to be implemented by national measures that the state remains free to amend, provided that the result remains consistent with the directive.²²⁸

It is largely in areas of concurrent powers that state measures interfering with Community measures have given rise to the Court's rich case law on the reciprocal duties of national authorities and Community institutions to cooperate with one

223. Opinion 1/91, dated Dec. 14, 1991, ¶ 21.

224. See, e.g., *Bulk Oil (Zug) AG v. Sun Int'l*, Case 174/84, [1986] E.C.R. 559, [1986] 2 C.M.L.R. 732; *Commission v. United Kingdom*, Case 804/79, [1981] E.C.R. 1045, 1072-76.

225. See EEC Treaty, *supra* note 1, art. 5.

226. John Temple Lang, "European Community Constitutional Law: The Division of Powers between the Community and Member States" (The 1988 Lord MacDermott Lecture), 39 N. IR. LEGAL Q. 209, 217 (1988).

227. See, e.g., EEC Treaty, *supra* note 1, arts. 5, 169-71.

228. See EEC Treaty, *supra* note 1, art. 189.

another.²²⁹ This case law is much more elaborate and far reaching than that on, for example, the apparently similar provision in the German federal constitution.²³⁰ The problem of concurrent powers has also given rise to the need to say what legal results follow when this cooperation fails.

Essentially, the Court in *Francovich* has stated that even when this cooperation fails, there is a legal remedy, and not simply a political problem, and that the rights of individuals are as fully protected as legal remedies can protect them.²³¹ The Court was most concerned with the legal protection of individuals' rights,²³² but the *Francovich* judgment also will have the effect of improving the implementation of Community law. Because so much Community law consists of either directives or Community measures which, although directly applicable, need to be acted on or applied by national authorities, the possibility of claims for damages for failure to implement Community measures will undoubtedly contribute, in due course, to more efficient implementation by state authorities. The Community relies very heavily—much more heavily than in most federations—on Community law being applied by national authorities. So it is extremely important that there are effective legal remedies against national authorities if they do not do everything they should do.

The *Francovich* judgment is a salutary safeguard against Member States trying to postpone fulfillment of their obligations under Community law, or misusing their powers in order to try to find ways of avoiding carrying out their obligations. There does not seem to be any measure corresponding to Community directives in any federation. Directives have features which are closer to international agreements than to federal legislation. It is, therefore, not surprising that the issue that arose in *Francovich* does not seem to have arisen, at least in the same form, in other federations. Community law has had to solve questions arising from directives which do not seem to have come up elsewhere. Therefore, from the viewpoint of

229. John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645-81 (1990).

230. *Id.*

231. *Francovich*, Joined Cases C-6 & 9/90, slip op. ¶¶ 35-36 (Eur. Ct. J. Nov. 19, 1991) (not yet reported).

232. *See id.*

comparative constitutional law, *Francovich* is an historic judgment.

It will be seen that the *Francovich* judgment uses the technique that the Court has used to solve many of the constitutional problems of the Community, which is to rule that the courts of Member States are obliged to enforce Community law, in spite of the action or inaction of national parliaments and governments, and when necessary, in spite of conflicting national law.²³³ The Court has, therefore, mobilized national courts to support Community law. In particular, when national authorities infringe upon Community law, this reduces the unpopularity that the Court might otherwise arouse, because, whenever possible, the appropriate findings are made by national courts rather than by the Court in Luxembourg. The result is that the Community is much more integrated legally than it is politically.

By relying on national courts, the Court has given rights to private parties even where Community law is intended to be carried out through national measures. The result is that private rights are not *wholly* dependent on national implementation. The *Francovich* judgment has, therefore, answered the question "How does the Court of Justice enforce its judgments?" The answer: "By relying on national courts to apply, when necessary, Community law against national authorities, and when appropriate, to award compensation."

The solidarity that the Court has established with national judges is extremely important, because Community law requires judicial review by *all* national courts of the compatibility of national measures with Community law. The *Francovich* judgment has closed what might have been a serious gap in Community law.

The experience of the Community has shown that economic integration needs an independent body, such as the Commission, to formulate policy in the interests of all Member States, and to enforce the Treaty against states when necessary. Clearly, the Court also considers that active enforcement by national courts is also essential to make economic measures effective. This is certainly so in the European Community, where the powers of states are still very great, and where the

233. *Id.* at ¶¶ 40-42.

application of Community law is still largely in the hands of national authorities. With such a constitutional framework, it is natural that the Court should rely on the national courts, which are the national authorities best suited to interpret and apply Community law, and best equipped to oblige other national authorities to obey it. The result is a new kind of political construction, a kind of confederation in which the state authorities enforce and apply the law of the confederation, and award compensation, even against their own state.

The constitutional law of the Community is now interconnected with the constitutional law of Member States. The governments of the states vote in the main Community legislative institution, the Council. Community measures have various effects in national law without any action by national legislatures. In the EC sphere, there are no longer any dualist states. In the area of exclusive Community powers, the national authorities can no longer exercise powers their constitutions formerly gave them. Community law has increased the powers of national courts in many Member States, because Member States must now declare inapplicable all national rules which are incompatible with Community law, and since *Francovich*, award compensation against their own state authorities if the authorities fail to comply with Community law.

Community law has created, in effect, two procedures for judicial review by the Court on the compatibility of national legislation with Community law, under Articles 169-170 and 177 of the EEC Treaty, respectively. In the EC law sphere, both Community measures and national measures must comply with principles of fundamental rights drawn from, among other sources, the European Convention on Human Rights. So, in the Community, the powers of every Member State are limited, whatever its national constitutional law may say, and national courts have wide duties to act accordingly. For Member States that already had a written constitution, limited government, and judicial review for compatibility with their constitutions, this does not represent a very great change. It is a much more substantial change in a Member State like the United Kingdom, a Member State with no written constitution, no judicial review for constitutionality, and (in theory, at least) unlimited parliamentary sovereignty.

VI. FRANCOVICH AND THE EUROPEAN ECONOMIC AREA

The agreement setting up the European Economic Area requires the EFTA States to introduce into their national laws a very large proportion of the whole body of the Community law, with the exception of the Common Agricultural Policy and some other legislation not relevant here. As the "*acquis communautaire*" to be introduced into the EFTA States includes the case law of the Court, and as the EEA Agreement includes an article which corresponds to Article 5 of the EEC Treaty,²³⁴ the *Francovich* principle will be part of the laws of the EFTA States from the date on which the EEA Agreement comes into force. This means that the EFTA States need to implement all the directives which are referred to in the EEA Agreement by that date (unless the parties have agreed to specific transitional periods), or run the risk of being sued for damages for any loss that may be caused as a result.

234. Article 3 of the EEA Agreement; see Finnish Association for European Law, *THE LAW AND PRACTICE AND THE ADMINISTRATION OF JUSTICE IN THE EEC—NORDIC REGION* (Sundstrom ed., 1992); Irish Centre for European Law, *CREATING A EUROPEAN ECONOMIC SPACE: LEGAL ASPECTS OF EC-EFTA RELATIONS* (Robinson & Findlater eds., 1990); *EC-EFTA: MORE THAN GOOD FRIENDS?* (Jamar & Wallace eds., 1988).