

University of Miami International and Comparative Law Review

Volume 3
Issue 1 *THE UNIVERSITY OF MIAMI YEARBOOK
OF INTERNATIONAL LAW VOLUME 3*

Article 2

10-1-1995

Francovich: Light at the End of the Marshall Tunnel

Rene Valladares

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Rene Valladares, *Francovich: Light at the End of the Marshall Tunnel*, 3 U. Miami Int'l & Comp. L. Rev. 1 (1995)

Available at: <https://repository.law.miami.edu/umiclr/vol3/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

**FRANCOVICH:
LIGHT AT THE END OF THE MARSHALL TUNNEL**

*RENE VALLADARES**

- I. INTRODUCTION
- II. THE DOCTRINE OF DIRECT EFFECT
 - A. *The Problem With Directives*
 - B. *The Commission's Proceedings Against Italy Regarding Directive 80/987*
 - C. *The Development of the Doctrine of Direct Effect*
 - D. *Horizontal Direct Effect*
- III. THE LACK OF HORIZONTAL DIRECT EFFECT OF DIRECTIVES
 - A. *The Direct Effect of Directives*
 - B. *The Marshall Ruling*
 - C. *The Marshall Anomalies*
 - D. *Seeking Solutions to Marshall*
- IV. FRANCOVICH

* Assistant Federal Public Defender for the District of Nevada; J.D. University of Florida, 1987; LL.M. in International Law, University of Miami, 1993. The author wishes to dedicate this article to Franny Forsman, President of the State Bar of Nevada.

- A. *The Facts*
- B. *The Lack of Direct Effect of Directive 80/987*
- C. *The Foundation of Member-State Liability*
 - 1. The Commission
 - 2. The Advocate-General
 - 3. The Court
- D. *The Conditions of State Liability*
 - 1. The Advocate-General
 - 2. The Court
- E. *Francovich: The Solution to Marshall's Denial of Horizontal Direct Effect of Directives*
- F. *Exhaustion of Remedies*

V. CONCLUSION

I. INTRODUCTION

In November 1992, at a ceremony celebrating the 40th anniversary of the Court of Justice of the European Communities, the President of the European Commission, Mr. Jacques Delors, praised the *Francovich* ruling and the effect it will have in furthering individual rights.¹ According to Mr. Delors, the *Francovich* case gave individuals the right to compensation for any infringement of Community law for which a Member-State is responsible.²

1. *EC: Court of Justice Celebrates 40th Anniversary*, AGENCE EUR., Dec. 12, 1992.

Mr. Delors was referring to the *Francovich & Bonifaci v. Italy* ruling handed down by the Court of Justice of the European Communities on November 19, 1991.³ The *Francovich* Court held that the Italian Government was liable for the damage suffered by Mr. Francovich as a result of its failure to implement Community Directive 80/987, which is aimed at protecting employees in the case of their employer's insolvency.⁴

The critical importance of the *Francovich* decision was immediately perceived by the academic community.⁵ Even prior to the ruling, commentators stated that *Francovich* would finally ensure that "Community law arrives in Westminster and in all law courts."⁶ *Francovich* was considered to be of such consequence that the report prepared by the High-Level Group on the Operation of the Internal Market urged the European Commission to issue an

penalties under Article 171 of the Maastricht Treaty could have in protecting an individual's rights.

3. Joined Cases C-6 & 9/90, *Francovich & Bonifaci v. Republic (Italy)*, 2 C.M.L.R. 66 (1993) [hereinafter *Francovich*].

4. Council Directive 80/987/EEC, of October 20, 1980 on the Approximation of the Laws of the Member-States Relating to the Protection of the Employees in the Event of the Insolvency of their Employer, 1980 O.J. (L 283/23) 1.

5. Peter Duffy commented that "[i]t is no exaggeration to state that *Francovich* takes its place amongst the most important decisions of the Court of Justice." Peter Duffy, *Damages Against the State: A New Remedy for Failure to Implement Community Obligations*, 17 EUR. L. REV. 133, 138 (1993).

6. David Pannick, *Swimming Against the Euro Tide*, THE TIMES, Aug. 6, 1991. Cases such as *Francovich* underscore the need for individuals conducting business in Europe to keep abreast of legal developments in the Community, Colin Bourn & Allen C. Neal, *European Winds of Change*, 142 NEW L. J. 1131 (1992). Further, lawyers who fail to advise clients confronted with *Francovich* type issues that they might have a cause of action against the State could incur liability themselves. Sylvia H. Geraghty, *EC Law is Here to Stay*, 89 L. SOC'Y. GAZETTE 23 (1992).

interpretative document on its implication.⁷ The need for this interpretation was regarded by the High-Level Group as one of the 39 steps toward single market harmony.⁸

The *Francovich* ruling has generated a great deal of speculation as to its future significance. Some writers even argue that the impact of the case could be such that new institutional structures, such as specialized tribunals for hearings against the State, should be formed.⁹ At the same time, other writers warn of the potential *Francovich* has in opening the litigation floodgates, such that limitations on its scope must be developed. For instance, commentator Peter Duffy argues that it would be an onerous burden to impose liability on the States "every time an error is made in implementing Community obligations or when a reasonable difference exists over their scope."¹⁰ In fact, it is clear from Advocate-General Mischo's opinion that he was very concerned with the number of suits that could arise out of *Francovich* and he proposed to limit its retroactive application.¹¹ Further, commentators such as Phil McDonnell argue that rigorous enforcement brought by *Francovich* could create a chilling effect as far as potential legislation is concerned.¹² Member-States may be more apt to vote against a proposal if they feel that potential

7. *The 39 Steps to Single Market Harmony*, THE REUTERS EUR. COMMUNITY REP., Oct. 29, 1992.

8. *Id.*

9. Malcolm Ross, *Beyond Francovich*, 56 MOD. L. REV. 55, 69 (1993).

10. Duffy, *supra* note 5, at 133. See also Peter Duffy, *Can You Sue the State to Get Your EC Rights?*, THE TIMES (London), Dec. 10, 1991.

11. *Francovich*, 2 C.M.L.R. at 105.

12. Phil McDonnell, *Member-States Held Financially Liable for Breaches of EC Law*, LLOYDS LIST, Jan. 3, 1992.

liability may be incurred for not implementing the legislation.¹³

The controversy over *Francovich's* scope stems not only from abstract ideological differences over the limits of Community jurisdiction but also from the succinct nature of the Court's ruling.¹⁴ The Advocate-General submitted a comprehensive opinion which addressed many areas inadequately covered by the Court. The Advocate-General's opinion and the Court's ruling, however, differ in important areas such as the standard of liability governing the actions of the Member-States and the retroactive effect of the decision. Consequently, the Advocate-General's opinion can only be used cautiously as an interpretative tool.¹⁵

Perhaps *Francovich's* most important contribution is the impact it could have on cases where Community directives lack direct effect because the litigants stand in a horizontal relationship toward each other. *Francovich* could be a workable solution to the inequities caused by the lack of horizontal direct effect of directives.

13. *Id.*

14. Recognizing the sketchy nature of the court's ruling, former Advocate-General Sir Gordon Slynn cautioned that, although *Francovich* could give enormous backing to Brussels' efforts to police laggard governments, it could take years to work the details of the ruling. For instance, he pointed out that the ruling was silent regarding the amount of damages a Member-State could incur, or whether a Member-State could defend its failure to implement Community law by arguing justification. David Buchan, *Judges Thrust into Battle to Defend Maastricht Line*, FIN. TIMES, Feb. 20, 1992.

15. Although the Advocate-General's submissions are not binding, they are always considered with great care by the Court and are instrumental in studying the development of Community law. The duty of the Advocate-General is spelled out in Article 166 of the Treaty Establishing the European Economic Community which reads in relevant part: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164." Treaty Establishing the European Economic Community [hereinafter EEC Treaty] art. 166.

This individual rights problem has been a black eye for the Community. The effectiveness of *Francovich* could easily be diluted if the Court holds that a prerequisite to a finding of liability is a prior determination of Member-State breach under Article 169.¹⁶ Likewise, the protection afforded by *Francovich* to individuals claiming rights under directives which lack direct effect would be eroded if the Court holds that all available remedies must be exhausted prior to suing the State. To understand these issues, the evolution of the protection of individual rights bestowed by Community law must be examined.

II. THE DOCTRINE OF DIRECT EFFECT

A. *The Problem With Directives*

Article 189 of the Treaty Establishing the European Economic Community empowers the European Communities Council of Ministers and the Commission of the European Communities to regulate Member-States through the use of five different vehicles: regulations, directives, decisions, recommendations, and opinions.¹⁷ This Article specifies the scope of applicability and the binding nature of each vehicle. Regulations have general application and are binding and directly applicable on

16. *Id.*

17. Art. 189 of the EEC Treaty states in relevant part:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. * * *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member-States. * * *A directive shall be binding, as to the result to be achieved, upon each Member-State to which it is addressed, but shall leave to the national authorities the choice of forms and methods. *Id.*

all Member-States. Directives, on the other hand, are binding on the Member-State to which they are addressed, but Member-States can choose the form and method of implementation.¹⁸

Directives are a useful legislative tool because they allow Member-States some flexibility in choosing the methods used to implement them into national law. The strength of directives, however, cloaks their weakness. Directives are often not implemented into national law because Member-States come under pressure from special interest groups. Frequently they are inadequately transposed or not transposed on time.¹⁹ The failure to implement directives is a widespread problem. The rate of Member-State non-compliance with their duty to implement directives is very high and "risks developing into a credibility problem for the Community."²⁰ This problem is compounded by the fact that an individual cannot seek direct redress from the Court of Justice against a Member-State which has failed to transpose a directive into national law.²¹ If the four corners of the EEC Treaty are examined, the only way an individual can exert pressure upon a Member-State which has not implemented a directive is indirectly, through an Article 169 proceeding. Under Article 169, the

18. Labeling an act under one of the Article 189 categories will not stop the court from examining the substance of the act. The Court will, on occasion, reject the formal designation of the act and relabel it if necessary. Professor T.C. Hartley suggests that it is unclear how far the court is willing to engage in relabeling, and that so far, the Court has limited this practice for the purpose of determining issues of *locus standi*. See generally T. C. HARTLEY, THE FOUNDATION OF EUROPEAN COMMUNITY LAW (1981).

19. *Id.*

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

21. An individual can, however, file a complaint with the Commission alleging that a Member-State has failed to comply with Community law. Commission Regulation 26/6, 1992 O.J. (C 224).

Commission can bring an action against a Member-State before the Court of Justice if certain cumbersome procedural requirements are fulfilled.²²

If the Court finds that a Member-State has failed to fulfill its Community obligations, the State is required by Article 171 to comply with the judgment of the Court.²³ Article 171, however, lacks bite. It does not provide the Court with an effective weapon to discipline a Member-State which fails to implement a directive. This lack of an effective deterrent "gives directives a dangerously elastic quality."²⁴ Article 171, as amended by the Maastricht Treaty, could go a long way towards making Article 169 proceedings more effective. The Maastricht Treaty reads:

If the Member-State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the

22. Article 169 of the EEC Treaty reads:

If the Commission considers that a Member-State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

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

This procedure is closely related to Article 171, which states that if the Court finds a Member-State in breach of its Treaty obligations, the State shall be required to comply with the Court's judgment.

23. For a discussion of the shortcomings of Article 171 proceedings, see Curtin, *supra* note 20, at 711-12.

24. *Id.* at 711. Curtin argues that due to the lack of effective sanctions, a Member-State can agree to the enactment of a directive knowing that "the price to pay for possible failure to transpose is non-existent or minimal."

Court of Justice. In so doing it shall specify the amount of lump sum or penalty to be paid by the Member-State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member-State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.²⁵

The ineffectiveness of Article 169 proceedings is illustrated in *Commission of the European Communities v. Italian Republic*.²⁶ In that case, the Court found that the Italian Government had breached its duty to implement Directive 80/987, the same Directive which Mr. Francovich and Mrs. Bonifaci invoked in their cases against Italy. The *Commission v. Italy* case played a critical role in the *Francovich* decision, and it is necessary to examine it closely.²⁷

B. *The Commission's Proceeding Against Italy Regarding Directive 80/987*

The Italian government failed to implement Directive 80/987 which was aimed at protecting employees in the event of employer insolvency. The deadline to implement the Directive was October 23, 1983. On April 24, 1985, the Commission sent a letter to Italy notifying it that it had not complied with the Directive and requested a response within two months of that date.²⁸ The Italian government failed to respond, and the Commission, pursuant to Article 169, issued a reasoned opinion in which it concluded that

25. See Maastricht Texts of the EEC Treaty, 1 C.M.L.R. 573 (1992).

26. Case 22/87, *Commission of the European Communities v. Italian Republic*, 1989 E.C.R. 143 (1989).

27. *Id.* at 164.

28. *Id.* at 145.

Italy had not complied with the provisions of the Directive. The Commission gave the Italian government one month to properly transpose the Directive into national law.²⁹

Italy argued to the Commission that it was having difficulties concerning the adaptation of national legislation and that it needed additional time to implement the Directive. The Commission declined the request for additional time and took the matter to the European Court of Justice on January 28, 1987.³⁰ On February 2, 1989, almost four years after the Commission had notified Italy that it had failed to implement the Directive, the Court held that Italy had failed to fulfill its obligations under the EEC Treaty and ordered it to pay costs.³¹ On November 19, 1991, the day the Court decided the *Francovich* case, Italy had not yet implemented the Directive, despite the Article 169 judgment against it almost three years earlier.

This example of the inadequacy of Article 169 proceedings is hardly an isolated one. In its "Ninth Annual Report on the Oversight of the Application of Community Law," the Commission noted that 83 Court rulings on the implementation of EC law had been ignored by the Member-States in 1991 alone.³² The Commission expressed the view that it expected *Francovich* would improve Member-State compliance with Court rulings.³³ The Commission also stated that Article 171, as amended by the

29. *Id.*

30. *Id.* at 143.

31. *Id.* at 144.

32. EUROWATCH, April 17, 1992. Clearly these wholesale violations of Community law seriously erode the "fundamental principle of a Community based on the rule of law." See also, Curtin, *supra* note 20, at 711.

33. EUROWATCH, *supra* note 32.

Maastricht Treaty, would serve as a powerful enforcement tool.³⁴ However, Article 171 of the Maastricht Treaty is not a panacea for Member-State non-compliance. As Professor Szyszczak points out, individuals who have suffered losses are not compensated by Article 171.³⁵ Further, Article 171 proceedings would add a second layer of protracted procedural prerequisites to the already cumbersome ones spelled out in Article 169.³⁶

Non-compliance with the Court's rulings is not the only problem with Article 169 proceedings. The Commission is overloaded with work, and political reasons often prevent it from initiating proceedings against offending Member-States, even when Community law violations are blatant.³⁷ Further, the Commission's system of monitoring Member-States' compliance with their duty to implement Community directives is alarmingly shallow since it does not examine the substantive content of the State's implementation measures.³⁸

The inadequate protection of individual rights in Articles 169 and 171 made the Article 177 preliminary reference proceedings the principal vehicle for protecting Community bestowed rights.³⁹ The procedure outlined in Article 177 actively

34. *Id.*

35. Erica Szyszczak, *European Community Law: New Remedies, New Directions? Joined Cases C-6-90 and C-9-90, Francovich and Bonifaci v. Italy*, 55 MOD. L. REV. 690, 691 (1992).

36. Bebr, *Non-Contractual Liability of the Community*, 29 COMMON MKT. L. REV. 557, 582 (1992).

37. Curtin, *supra* note 20, at 710.

38. *Id.*

39. Case 26/62, *N.V. Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 E.C.R. 1, 1 C.M.L.R. 105 (1963) [hereinafter *Van Gend en Loos*].

involves individuals and the national courts in the development of Community law, thereby fostering the concept of the Community as a participatory system.⁴⁰ Under Article 177, a national court faced with a case involving issues of Community law can request the Court of Justice to give a preliminary ruling on the matter.⁴¹ Part of the effectiveness of Article 177 is the fact that ultimately the national courts decide the case, and governments have a harder time politically ignoring rulings from their own courts than those from Brussels.⁴² Thus, the Court of Justice, using the Article 177 references from the national courts, developed its jurisprudence of

40. PIERRE PESCATORE, *THE LAW OF INTEGRATION* 90-92 (1974). Judge Pescatore argues that the system of cooperation set out in Article 177 between the European Court and the national courts is the "decisive breakthrough" toward integration.

41. Article 177 of the EEC Treaty states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

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

Where such a question is raised before any court or tribunal of a Member-State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

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

42. Alan Dashwood, *The Principle of Direct Effect in European Community Law*, 16 J. COMMON MKT. STUD. 229, 244 (1978). Professor Dashwood maintains that "the possibility of being sued before a national court provides a better guarantee of Member-State compliance with Community obligations than the more remote threat of proceedings under Article 169."

individual protection, beginning with the doctrine of direct effect and culminating with the principle of non-contractual liability as embodied in *Francovich*.⁴³

C. *The Development of the Doctrine of Direct Effect*

To say that a Community provision is directly effective means that it grants individuals rights which must be upheld in the national courts, even though the provision has not been implemented into national law.⁴⁴ Direct effect provides the individual with a " shield to ward off attempts by a Member-State to increase restrictions, and a sword to cut down any restrictions which might remain."⁴⁵ Aside from giving the individual a role in the enforcement of Community law, the doctrine of direct effect has facilitated the creation of a common market by helping to remove barriers to trade, which aids in the harmonization of national legal systems and controls anti-competitive behavior.⁴⁶ The doctrine of direct effect was developed by the Court through the Article 177 preliminary reference procedure.

The use of the Article 177 preliminary reference procedure to determine the propriety of a Member-State's behavior initially met with resistance from the Member-States. In *Van Gend en Loos*, several Member-States charged that Article 177 was being used for

43. *Francovich*, 2 C.M.L.R. at 66.

44. HARTLEY, *supra* note 18, at 183.

45. Dashwood, *supra* note 42, at 233. Dashwood also suggests that for the individual the principle of direct effect not only provides protection but also provides an enhanced perception of Community law. *Id.*

46. *See id.* at 233.

purposes other than those delineated by the EEC Treaty.⁴⁷ In that case, a Dutch administrative tribunal (the Tariefcommissie) referred two questions based upon Article 177 to the European Court of Justice.⁴⁸ The first question shaped the doctrine of direct effect: whether Article 12 of the EEC Treaty has an effect within the territory of a Member-State. In other words, whether, on the basis of this Article, citizens of the Member-States can enforce individual rights which the court of the Member-State should protect.⁴⁹

The Belgian and Dutch governments objected to the referral on jurisdictional grounds, arguing that Article 177 was being used to camouflage a complaint by an individual of a Treaty violation. The governments argued that this bypassed the procedures set out in Articles 169 and 170 of the EEC Treaty, procedures which did

47. *Van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 E.C.R. 1, 6; 1 C.M.L.R. 105, 128 (1963). In preliminary rulings, the Commission, the Government of the Member-States, and the Council (if involved) have the opportunity of submitting their observations and making oral arguments regardless of whether they have an interest in the case. These observations are extremely valuable because they elaborate the facts of the case and present differing points of view. EEC, art. 20; R.P.Ct.JUST., art. 103, 104. See HENRY G. SCHERMERS AND DENIS WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 482 (1992); Mortelmans, *Observations in the Cases Governed by Article 177 of the EEC Treaty: Procedure and Practice*, 16 COMMON MKT. L. REP. 557 (1979).

48. *Van Gend en Loos*, 1963 E.C.R. at 17. This case involved the reclassification of ureaformaldehyde for customs purposes which resulted in an increase in the duty payable on the importation of the product into the Netherlands. The importer-plaintiff protested the increase on the grounds that it violated Article 12 of the Treaty. The *Francovich* case has been termed "the ultimate consequence of *Van Gend en Loos*." Bebr, *supra* note 36, at 583.

49. *Van Gend en Loos*, 1963 E.C.R. at 17. Article 12 of the EEC Treaty states that "Member-States shall refrain from introducing, as between themselves, any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already levy in their trade with each other."

not provide a mechanism for individuals to complain to the Court about Member-State non-compliance with Community duties.⁵⁰ The Court disagreed and stated that "the vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169 and 170 to the diligence of the Commission and the Member-States."⁵¹ The Court emphasized that limiting the sanctions for Treaty violations by Member-States to those procedures in Articles 169 and 170 removed individual rights from direct judicial protection.⁵²

As to the merits of the question posed in *Van Gend en Loos*, the plaintiff and the Commission argued that Article 12 had direct internal effect within the legal structure of the Member-States. Consequently, it must be respected by the national authorities even if not specifically implemented into national law.⁵³ They maintained that direct effect was the corollary of the structure of the European Community, which imposed radically different obligations than those imposed by traditional international documents or by international customary law.⁵⁴

The Dutch, Belgian, and German governments contended that the Tariefcommissie's question should be answered in the negative. Their position was based on a literal interpretation of the text of Article 12 which, according to the governments, only imposed obligations on Member-States but conferred no rights on

50. *Van Gend en Loos*, 1963 E.C.R. at 6.

51. *Id.* at 8.

52. *Id.* The Court pointed out that reliance on Article 169 would "risk being ineffective if it had to be exercised after the enforcement of a national decision which misinterpreted the requirements of the [EEC] Treaty."

53. *Id.* at 20.

54. *Id.*

individuals.⁵⁵ The Court rejected this position and examined the Tariefcommissie's question in light of the purpose of the EEC Treaty and the structure of the Community created by it. The Court concluded that this legal structure involved not only Member-States but also individuals.⁵⁶ In what became the foundation for the doctrine of direct effect and later the foundation for the *Francovich* principle of Member-State liability, the Court stated:

[t]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within certain fields, and the subjects of which comprise not only Member-States but also their nationals. Independently of the legislation of Member-States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by Treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member-States and upon the institutions of the Community.⁵⁷

In another case, *Amministrazione delle Finanze v. Simmenthal*, the Court entrusted the national courts with the protection of this new legal order created by the Community, holding that a national court's task is to protect rights conferred

55. *Id.* at 12.

56. *Id.*

57. *Id.*

upon individuals by Community law.⁵⁸ The national courts' obligation to guard over the rights of individuals became the second most important foundation for the *Francovich* principle of Member-State liability.

D. *Horizontal Direct Effect*

Van Gend en Loos only established that EEC Treaty provisions could have direct effect against a Member-State. This became known as "vertical direct effect." In *Defrenne v. Sabena*, the Court faced the question of whether unimplemented Treaty provisions could impose obligations on individuals; in short, whether they could have "horizontal direct effect."⁵⁹ This issue arose out of an Article 177 reference dealing with Article 119 of the EEC Treaty which establishes the principle of equal pay for equal work for both sexes. Ms. Defrenne, an air hostess working for Sabena, a private company, attempted to receive compensation for the salary differential between what she and her male counterparts received.⁶⁰ To this end, she invoked the provisions of Article 119. The government of Ireland countered by pointing out that the Court's cases which had found that a provision was directly effective were limited to the public law sector and did not affect the private law sphere.⁶¹ The United Kingdom argued that allowing Article 119 to be invoked by one individual against another was unfair because it meant imposing obligations on individuals as a

58. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, 643; 3 C.M.L.R. 263, 284 (1978) [hereinafter *Simmenthal*].

59. Case 43/75, *Gabrielle Defrenne v. Sabena*, 1976 E.C.R. 455; 1 C.M.L.R. 98 (1976) [hereinafter *Defrenne*].

60. *Id.* at 457.

61. *Id.* at 461.

consequence of the default of a Member-State. According to the United Kingdom, this would be inconsistent with "normal principles of equity."⁶²

The Commission agreed with both governments' position that Article 119 could not create obligations between individuals.⁶³ Advocate-General Trabucchi, however, rejected this conclusion, indicating that the purpose of Article 119 was to avoid discrimination regarding rates of pay, whether it was caused by laws or regulations of the Member-States, or produced by individual contracts or collective agreements.⁶⁴ The Court, after examining the purpose of Article 119, held that the "prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."⁶⁵

In both *Francovich* and *Defrenne*, the intervening Governments made subsidiary arguments requesting the Court to limit the retroactive application of its ruling. This issue merits discussion as the results in each case were radically different. In *Defrenne*, the Irish and British governments argued that the retroactive application of the judgment could have devastating results on the economies of the Member-States.⁶⁶ The United Kingdom maintained that "[a] decision attributing direct applicability to Article 119 could throw the social and economic

62. *Id.* at 460.

63. *Id.* at 462-463.

64. *Id.* at 489.

65. *Id.* at 476.

66. *Id.* at 460, 465.

situation in the United Kingdom into confusion."⁶⁷ Likewise, the Irish Government argued that "to attribute direct effect to Article 119 retroactively would be to impose a burden on the Irish economy which it is not in a position to support."⁶⁸

Advocate-General Trabucchi had no tolerance for these assertions and stated that "arguments of this kind, however pressing on grounds of expedience, have no relevance in law."⁶⁹ The Court was more receptive to the governments' entreaties and held that, with the exception of claims which had been already commenced, its ruling did not have retroactive applicability.⁷⁰ The Court agreed in principle with the Advocate-General's statement that fiscal matters should have no relevance in judicial decisions. However, it reasoned that the retroactive application of the judgment would be an injustice.⁷¹ The Court felt that many companies had been led to believe that by the inaction of the Member-States and the

67. *Id.* at 460.

68. *Id.* at 465.

69. *Id.* at 492. Advocate-General Trabucchi thought that the financial consequences of this decision would not reach critical proportions because Article 119 is limited exclusively to claims regarding equal pay. This could explain the difference between his position and that of Advocate Mischo in *Francovich*. Unlike *Defrenne*, the scope of applicability of *Francovich* could be extremely broad.

70. *Id.* at 481.

71. *Id.* at 480. The Court's limitation of the temporal effect of its ruling has been criticized as the unwarranted claim to exercise the power not to apply a law which it recognizes as being valid and legally binding, a power regarded as being the prerogative of the legislature. *Id.* Professor Dashwood disagrees with this criticism and points out that the United States Supreme Court has engaged in this type of practice in cases such as *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). Dashwood, *supra* note 42, at 238.

Commission, these discriminatory practices were perfectly legal.⁷² To hold otherwise would violate the principle of legal certainty.⁷³

In *Francovich*, the tables were turned: the Advocate-General argued that the Court should limit the retroactive application of the judgment on considerations of legal certainty. The Court held otherwise.⁷⁴ This is especially significant since, through the years, the number of claims based on *Francovich* could exceed those stemming from *Defrenne*. It is clear that unlike the private companies in the *Defrenne* scenario, which arguably were misled by the inaction of the Member-States and the Commission, the Member-States in a *Francovich* scenario have only themselves to blame for failing to abide by Community law.

In 1986, in the *Marshall v. Southampton and South-West Hampshire Area Health Authority (teaching)* case, the Court weakened the potential significance of *Defrenne* by holding that directives could not, unlike Treaty provisions and regulations, have horizontal direct effect.⁷⁵ Arguably, the inequities which resulted

72. *Van Gend en Loos*, 1963 E.C.R. at 480. To the Court, the inaction of the Member-States was their failure to implement Article 119 into national law. The inaction of the Commission was its failure to prosecute the laggard States. *Id.*

73. *Id.* at 481. The principle of legal certainty is one of the most important principles recognized by the Court. According to Professor T.C. Hartley, legal certainty is recognized in most legal systems but "in Community law it plays a much more concrete role in the form of various sub-concepts which are regarded as applications of it. The most important of these are non-retroactivity, vested rights and legitimate expectations." HARTLEY, *supra* note 18, at 139. For a discussion of the application of the principle of legal certainty to the field of equal treatment of the sexes, see ANTHONY ARNULL, *THE GENERAL PRINCIPLES OF EC LAW AND THE INDIVIDUAL* 225-234 (1990).

74. *Francovich*, 2 C.M.L.R. at 66.

75. Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Authority (teaching)*, 1986 E.C.R. 723, 1 C.M.L.R. 688 (1986) [hereinafter *Marshall*].

from denying horizontal direct effect to directives were an important catalyst in the development of the *Francovich* principle of non-contractual liability of the Member-States.⁷⁶

III. THE LACK OF HORIZONTAL DIRECT EFFECT OF DIRECTIVES

A. *The Direct Effect of Directives*

The issue of whether directives could have direct effect has been hotly debated in the academic community. This debate stemmed from the wording and structure of Article 189, which textually suggests that individuals do not enjoy rights under directives unless they are transposed into national law.⁷⁷ Article 189 states that regulations have general applicability and are binding in their entirety. In contrast, directives are only binding upon the Member-States to which they are addressed, and they are only binding as to the results to be achieved. Further, Article 189 specifically states that regulations also enjoy direct applicability, and is silent as to other forms of secondary legislation.⁷⁸

76. See ARNULL, *supra* note 73, at 255; Anthony Arnall, *The Direct Effect of Directives: Grasping the Nettle*, 35 INT'L & COMP. L. Q. 939 (1986); SCHERMERS AND WAELBROECK, *supra* note 47, at 153.

77. See generally Dashwood, *supra* note 42.

78. *Id.* Although regulations are usually directly effective there are exceptions. See opinion of Advocate-General Reischl in Case 148/78, *Pubblico Ministero v. Ratti*, 1 C.M.L.R. 96 (1980). If a regulation is directly effective, national implementation is impermissible. See Case 50/76, *Amsterdam Bulb B.V. v. Produktschap voor Siergewassen*, 1977 E.C.R. 137. In that case the Court stated:

[T]he direct application of a Community regulation means that its entry into force and its application in favour or against those subject to it are independent of any measure of reception into national law * * *.

In *Van Duyn v. Home Office*, the Court held that even though Article 189 was silent on the matter, directives could have direct effect.⁷⁹ The Court buttressed its ruling on the binding effect of directives and on the principle of effectiveness of Community law.⁸⁰ The Court stated that:

where the Community authorities have, by directive, imposed on Member-States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.⁸¹

In later cases such as *Pubblico Ministero v. Ratti*⁸² and

[Therefore,] the Member-States may neither adopt nor allow national organizations having legislative power to adopt any measure which would conceal the Community nature and effects of any legal provision from the person to whom it applies.

79. Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337.

80. *Id.* The binding nature of directives and the principle of effectiveness of Community law were concepts that cropped up in *Francovich* to support the principle of liability of the Member-States.

81. *Id.*

82. *Ratti*, 1979 E.C.R. at 1642. In *Ratti*, the Court stated:

It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned * * * .
Consequently a Member-State which has not adopted the

Becker v. Finanzamt Münster-Innenstadt,⁸³ the Court reasoned that the real rationale for the direct effect of directives was based on the estoppel principle.⁸⁴ This change was precipitated by the desire to prevent the States from reaping the benefits of their failure to fulfill their obligations under Community law.⁸⁵ In the *Oberkreisdirektor v. Moormann* case the Court rooted the estoppel principle on the third paragraph of Article 189 and on Article 5, which imposes a duty of cooperation between the Member-States.⁸⁶

B. *The Marshall Ruling*

The shortcoming of using the estoppel principle as a rationale for the direct effect of directives was that it failed to address the question of whether one individual could invoke an unimplemented directive against another.⁸⁷ For many years the

implementing measures required by the directive in the prescribed period might not rely, as against individuals, on its failure to perform the obligations which the directive entails.
Id. at 110.

83. Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53, 1 C.M.L.R. 512 (1982).

84. See Sacha Prechal, *Remedies After Marshall*, 27 COMMON MKT. L. REV. 451, 453 (1990). The shift in emphasis from the principle of effectiveness to the estoppel principle was the primary reason why the Court decided in *Marshall* that directives could not have horizontal direct effect.

85. *Id.*

86. Case 190/87, *Oberkreisdirektor des Kreises Borken and Vertreter des öffentlichen Interesses beim Oberverwaltungsgericht für das Land Nordrhein-Westfalen v. Handelsonderneming Moormann B.V.*, 1988 E.C.R. 4689.

87. See A.J. Easson, *Can Directives Impose Obligations on Individuals*, 4 EUR. L. REV. 67 (1979). This Article examines why directives should or should not have horizontal direct effect. The main arguments against the horizontal

question of whether directives could give rise to horizontal direct effect lingered. This issue was critical because directives govern a vast area of relationships between individuals: directives in the field of equal treatment of men and women; safety at work directives; company law directives; directives governing the liability for defective products; and directives relating to the safeguarding of employee rights in the event of transfer of undertakings or, like in the *Franovich* case, in the event of insolvency of their employer.⁸⁸

Commentators who took the view that directives could impose obligations upon individuals argued that to give horizontal direct effect to Treaty provisions but not to directives would lead to absurdities.⁸⁹ Professor A. J. Easson has illustrated these potential anomalies by comparing Article 119, which establishes the principle of equal pay for equal work, with Directive 76/207 which implements the principle of equal treatment for men and women

direct effect of directives were: (1) Directives are addressed to Member-States. The counter argument is that Treaty provisions that are also addressed to States have been found to have horizontal direct effect. (2) The estoppel principle. According to this principle a State cannot be allowed to plead its own failure to implement a directive. Therefore, directives can confer rights on individuals only against the State. Nevertheless, Treaty provisions that impose obligations on Member-States can give rise to horizontal direct effect. (3) Article 191 of the EEC Treaty does not require directives to be published in the Official Journal. In practice, however, directives are always published.

The key arguments in favor of the horizontal direct effect of directives were: (1) the test to determine whether directives have direct effect is the same as the one developed for Treaty provisions; (2) to hold that directives may impose obligations on individuals would increase their effectiveness; and (3) to hold that directives do not have horizontal direct effect would create anomalies. See also A.J. Easson, *The Direct Effect of Directives*, 28 INT'L. COMP. L.Q. 319 (1979); C.W.A. Timmermans, *Directives: Their Effect Within the National Legal System*, 16 COMMON MKT. L. REV. 533 (1979).

88. See Prechal, *supra* note 84, at 451.

89. See A.J. Easson, *Can Directives Impose Obligations*, *supra* note 87; SCHERMERS AND WAELBROECK, *supra* note 47, at 151-53. But see Timmermans, *supra* note 87, at 554-555.

regarding access to employment, vocational training, and promotion.⁹⁰ Easson observed that if directives lacked horizontal direct effect, Directive 76/207 could only be enforced by employees in the public sector. Meanwhile, Article 119 would apply in both the public and private sector. Thus, "[i]t would seem absurd to permit a claim based upon discrimination in respect of pay to be enforced but to disallow one based upon discrimination as regards promotion."⁹¹

Despite the compelling reasons for granting horizontal direct effect to directives, the Court ended the academic debate in *Marshall*.⁹² In that case, the United Kingdom maintained that an unimplemented directive could not be relied upon by one private party against another.⁹³ The Advocate-General, Sir Gordon Slynn, agreed. He reasoned that directives could not have horizontal direct effect because they create obligations on Member-States and not individuals,⁹⁴ therefore a "directive comes into play *only* to enable rights to be claimed by individuals against the State in default."⁹⁵

90. See Easson, *Can Directives Impose Obligations*, *supra* note 87, at 76 (1979); Council Directive 76/207/EEC, 1976 O.J. (L39/40).

91. Easson, *Can Directives Impose Obligations*, *supra* note 87, at 77.

92. *Marshall*, 1986 E.C.R. at 723.

93. *Id.* at 727.

94. *Id.* at 734. See also opinion of Sir Gordon Slynn in Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53, 1 C.M.L.R. 512 (1982).

95. *Marshall*, 1986 E.C.R. at 734. Sir Gordon Slynn also argued that directives should not have direct effect because they do not need to be published in the Official Journal. *Id.* Article 191 of the EEC Treaty states that "regulations shall be published in the Official Journal of the Community," directives, on the other hand, only "shall be notified to those to whom they are addressed" According to Sir Gordon Slynn's rationale, it would be unfair to hold individuals responsible for directives which they might not even be aware

According to Sir Gordon Slynn, if the Court held that directives could have direct effect, the distinction created by Article 189 between regulations and directives would be rendered meaningless.⁹⁶ He also pointed out, rather nonchalantly, that in this type of situation "if the Member-State is in default it is for the Commission to proceed under Article 169 of the EEC Treaty."⁹⁷ The Court's opinion took an uncharacteristically narrow and literal interpretation of Article 189.⁹⁸ The Court stated that:

it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member-State to which it is addressed.' It follows that a directive may not be relied upon as such against a person.⁹⁹

The Court and the Advocate-General reasoned in *Marshall* that directives could not have horizontal direct effect because the principle of estoppel does not apply.¹⁰⁰ A private company, unlike

of. *Id.*

96. *Id.*

97. *Id.* at 735.

98. *Id.* The Court, unlike the Advocate-General, did not put as much emphasis on the fact that Article 191 of the EEC Treaty does not impose a publication requirement for directives.

99. *Id.* at 749. For later cases supporting this proposition, see Case C-106/89, *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, 1 C.M.L.R. 305 (1992), and Case 80/86, *Criminal Proceedings against Kolpinghuis Nijmegen B.V.*, 1987 E.C.R. 3969 (1987).

100. *Supra* note 95, at 749.

the government, is not responsible for implementing Community law, and thus it cannot be said that it is estopped from reaping the benefits of failing to implement Community law.¹⁰¹

The abnormalities created by the *Marshall* decision probably have played an important role in the development of the principle of Member-State liability framed in *Francovich*.¹⁰²

C. *The Marshall Anomalies*

Many commentators feel that the *Marshall* holding resulted in "serious and inequitable consequences for the enforcement by individuals of their Community law rights,"¹⁰³ and that "the rights of the individual and the requirements of legal certainty would have been better served had the Court accepted that directives were capable of producing horizontal direct effect."¹⁰⁴ Professor Anthony Arnall sharply criticized the Court's rationale that directives could not give rise to horizontal direct effect because the language of Article 189 made directives binding only on Member-States. He argued that in *Van Gend en Loos* the Court had faced, and rejected, similar arguments narrowly rooted in the language of a Treaty provision.¹⁰⁵ In that case the Court focused on the

101. *Id.*

102. See ARNULL, *supra* note 73, at 255; Arnall, *The Direct Effect of Directives*, *supra* note 76; Prechal, *supra* note 84, at 472-73; SCHERMERS AND WAELBROECK, *supra* note 47, at 153.

103. Prechal, *supra* note 84, at 451. Prechal argues that "notwithstanding the liberal application of the concept of direct effect by the Court of Justice, the fact remains that *Marshall* causes some anomalies and tensions". *Id.* at 456. See also HARTLEY, *supra* note 18, at 209.

104. Arnall, *supra* note 76.

105. *Id.* at 944.

effective functioning of the Community system and not on linguistic nuances.¹⁰⁶

The *Marshall* opinion was bitterly criticized because of the artificial distinctions it created between individuals who worked for the State and those who worked for private companies.¹⁰⁷ It appeared arbitrary that individuals could or could not assert rights granted to them by Community directives depending on the classification of their employer. These issues were further complicated by the thorny problem of determining who was a state or a private employee for the purposes of deciding whether a provision could give rise to direct effect.¹⁰⁸ Another disrupting effect of *Marshall* was the possibility that Member-States could be subjected to pressure from special interest groups trying to delay the implementation of directives. This would expose Member-States to Article 169 proceedings, but in view of the inadequacy and protracted nature of these actions a State could easily yield to

106. *Id.* In *Van Gend en Loos*, the Court rejected the argument of the Dutch Government that since Article 12 of the EEC Treaty was addressed to Member-States, it conferred no rights on individuals. See generally, *Van Gend en Loos*, 1963 E.C.R. 1.

107. ARNULL, *supra* note 73, at 254. Arnnull maintains that:

[T]he view taken by the Court in *Marshall* of the circumstances in which directives are capable of producing direct effect means that the rights of the individual may now depend solely on the status of the organization against which he or she seeks to enforce them. This seems a wholly arbitrary distinction. *Id.* at 254.

108. Prechal, *supra* note 84, at 457-62.

powerful lobbies.¹⁰⁹ It was clear that an adequate substitute for the denial of horizontal direct effect of directives had to be found.¹¹⁰

D. *Seeking Solutions to Marshall*

Marleasing S.A. v. La Comercial Internacional de Alimentación S.A. corrected some of the anomalies generated by the *Marshall* ruling.¹¹¹ This case arose in the context of a dispute between Marleasing S.A. and La Comercial Internacional de Alimentación.¹¹² La Comercial was incorporated by three entities including the Company Barbiesa S.A. Marleasing, a creditor of Barbiesa, argued that La Comercial was created to put Barbiesa's assets outside the reach of its creditors and sought a declaration of nullity of La Comercial's founding contract under the Spanish Civil Code based on lack of lawful cause.¹¹³ La Comercial argued that the First Council Directive 68/151, which had not been transposed into Spanish law, listed exhaustively the situations when nullity of a company could be declared and that lack of cause was not one of those grounds.¹¹⁴ The Juzgado de Primera Instancia e Instrucción at Oviedo, requested from the Court a preliminary ruling on the direct effect of this Directive.¹¹⁵

109. ARNULL, *supra* note 76, at 944.

110. ARNULL, *supra* note 73, at 254.

111. Case C-106/89, *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, 1 C.M.L.R. 305, 308 (1992)[hereinafter "La Comercial"].

112. *Id.* at 308.

113. *Id.*

114. *Id.* at 309.

115. *Id.*

The Court reiterated that directives could not have horizontal direct effect.¹¹⁶ However, it held that national courts were under the duty to interpret national law in light of the purposes, goals, and wording of the particular directive which governed the subject matter of the litigation. This was the case regardless of whether the national law was passed prior or subsequent to the directive in question.¹¹⁷ Through this technique of construction, a national court could give effect indirectly to a directive which lacked direct effect.¹¹⁸ This came to be known as indirect effect.

The principle of indirect effect can be traced to *Von Colson and Kamann v. Land Nordrhein-Westfalen*.¹¹⁹ In that case, Ms. Von Colson was denied employment at a prison for reasons relating to her gender. The German court hearing her case found that she had been discriminated against, but invoked a German law, which purported to implement Directive 76/207, to limit her damages to the travel expenses she incurred for the purposes of the job interview.¹²⁰ When the case was referred to the Court of Justice, it

116. *Id.* at 322. The Court, noting its ruling in *Marshall*, stated:

[w]ith regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and consequently, a provision of a directive may not be relied upon as such against such a person. *Id.* at 322.

117. *Id.*

118. *Id.* at 322-323.

119. Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 1 C.M.L.R. 430 (1986) [hereinafter *Von Colson*].

120. *Von Colson*, 1984 E.C.R., at 1894.

held that a Member-State's obligation to achieve the results of a directive is binding on all authorities of the Member-State including the Courts.¹²¹ The Court then stated:

in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.¹²²

Consequently, to give effect to the purpose of Directive No. 76/207, the compensation given to Ms. Von Colson had to be adequate in relation to the damage she suffered, and not merely nominal.

Although the protection afforded by the principle of indirect effect can produce results similar or even equivalent to direct effect, it is limited by the flexibility of the national provision in question,¹²³ the discretion left to the national courts and by general principles of

121. *Id.* at 1909.

122. *Id.* The question as to how far national courts can go in using directives as aids in the interpretation of national law is not clear. The Court in Case 80/86, *Criminal Proceedings against Kolpinghuis Nijmegen B.V.*, 1987 E.C.R. 3969, 3970 (1987) [hereinafter *Kolpinghuis*], held that the obligation of a national court to refer to the content of a relevant directive when it is interpreting its national law is limited by the principle of legal certainty and non-retroactivity. Therefore, independent of national legislation, a directive cannot "have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."

123. Such as the principle of legal certainty and non-retroactivity discussed in *Kolpinghuis*. *Id.*

community law.¹²⁴ The principle of indirect effect has been perceived as being too dependent on the willingness and capacity of the national court to identify its Community obligation.¹²⁵ Arguably, the principle of indirect effect leaves the protection offered by Community directives "to rest solely on the correctness and enthusiasm of national courts in developing their national laws."¹²⁶ Further, this enthusiasm will vary not only between the courts of the different Member-States but between the different courts in one State. In light of this, the possibility of imposing liability on the Member-States for damages stemming from their failure to implement directives was debated.¹²⁷ Professor Henry Schermers stated that:

[i]n order to avoid a difference in treatment of the individuals who want to invoke a directive against the State and those who want to invoke it against other citizens, the most elegant solution is probably to declare that Member-States are liable to the injured party if damage has been caused through an infringement of Community law.¹²⁸

124. Prechal, *supra* note 84, at 469. See *Kolpinghuis*, 1987 E.C.R. at 3987.

125. Ross, *supra* note 9, at 56.

126. *Id.* at 57. See also Szyszczak, *supra* note 35, at 696; ARNULL, *supra* note 73, at 255.; Arnall, *The Direct Effects of Directives*, *supra* note 76, at 945-46.

127. Prechal, *supra* note 84, at 466-468. The theoretical basis for imposing damages on the State for the failure to fulfill its obligations had been examined in the literature prior to *Francovich*, see e.g., Amy Barav, *Damages in the Domestic Courts for Breach of Community Law by National Public Authorities*, in *NON-CONTRACTUAL LIABILITY OF THE EUROPEAN COMMUNITY* 149 (Henry B. Schermers et al., eds., 1987); Curtin, *supra* note 20, at 729-737.

128. See SCHERMERS AND WAELBROECK, *supra* note 47, at 153.

In the same vein, Sacha Prechal pointed out that:

[i]t is quite conceivable that, if it appears from a preliminary ruling or from a subsequent national judgment that a Member-State has not or has not correctly implemented a directive, an individual, who can not successfully bring a case against his or her private counterpart in consequence of Marshall, could start proceedings against the state, claiming, for instance, damages.¹²⁹

IV. FRANCOVICH

A. *The Facts*

Mr. Francovich was employed with an Italian company which went bankrupt and owed him part of his salary. He instituted proceedings against his former employer before the Pretura di Vicenza, and was awarded a judgment of six million lire. The judgment could not be enforced, due to the insolvency of the company. Mr. Francovich relied on Directive 80/987 in an attempt to obtain from the Italian government the guarantees and ancillary compensation the Directive provided. Similarly, Mrs. Bonifaci and 33 other employees were owed over 235 million lire by their insolvent employer. They brought proceedings in the *Pretura di Bassano del Grappa* against the Italian government, based on Directive 80/987, for payment of their outstanding salary, or for compensation for the damages they sustained due to Italy's failure to implement the Directive. In both cases, the national courts referred three identical questions to the European Court, and the

129. Prechal, *supra* note 84, at 466.

cases were joined.¹³⁰ The Court only responded to the first question which read:

Under Community law in force, can an individual who has suffered as a result of the failure by the State to implement Directive 80/987, *which failure has been established by a judgment of the Court of Justice*, require that State to comply with those provisions contained in it which are sufficiently precise and unconditional by relying directly on the Community rules against the Member-State in default in order to obtain the guarantees which that Member-State has to ensure, and, in any event, is he entitled to claim damages suffered in respect of provisions which do not have that status?¹³¹

While the first part of this question asked whether certain provisions of the Directive were directly effective, the second part dealt with the broader sweeping issue of whether Member-States could be financially liable for damages arising out of their failure to implement directives even if they lacked direct effect. Advocate-General Mischo put the aggravated nature of this case in perspective when he lamented that "rarely has our Court had to give judgment in a case where the loss caused to the individuals concerned by a failure to implement a directive has been as scandalous as here."¹³² The Court of Justice in the *Commission v. Italy* case found the Italian Government in violation of its EEC Treaty obligations due to its failure to implement Directive 80/987. Several years later, at

130. *Francovich*, 2 C.M.L.R. at 66.

131. *Id.* at 76 (emphasis added).

132. *Id.* at 74.

the time of the *Francovich* hearings before the European Court, Italy had taken no steps to comply with the *Commission v. Italy* ruling, and Directive 80/987 remained unimplemented.¹³³

B. *The Lack of Direct Effect of Directive 80/987*

For a directive to be directly effective, it must be clear and unconditional and must not leave normative discretion to the Member-States.¹³⁴ To determine whether Directive 80/987 was sufficiently clear and unconditional to give rise to direct effect, the Court examined three aspects of its provisions: the determination of the Directive's beneficiaries, the content of the Directive's guarantee, and the identity of the institutions liable for that guarantee.

The determination of the Directive's beneficiaries is addressed in Article 1(1) which reads: "this Directive shall apply to employees' claims arising from contracts of employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)."¹³⁵ The Court held

133. *Id.* at 73.

134. Case 41/74, *Van Duyn v. Home Office* 1974 E.C.R. 1337. This test applies to directives as well as all the other regulatory vehicles listed in Article 189.

135. Council Directive 80/987, 1987 O.J. (L 283) 2. Article 2(1) specifies the criteria to determine when an employer is considered to be in a state of insolvency. Italy argued that *Francovich* could not rely on the Directive because it was unclear that his former employer was formally declared insolvent. According to Advocate-General Mischo Italy's argument was irrelevant because that determination had to be made by the national courts.

Article 2(2) refers to national law for the definitions of employer and employee. Article 1(2) gives the Member-State the discretion to exclude from the coverage of this Directive certain categories of employees which were set out in the Annex to the Directive. Under this Annex, Italy could only exclude two classes of employees: (1) employees already protected by law from economic

that this provision determined sufficiently precisely and unconditionally who could be considered a beneficiary under the Directive.¹³⁶

As far as the content of the Directive's guarantee, Article 3 provided that the Member-State had to ensure payment of employees' outstanding claims resulting from contracts of employment or employment relationships. Although the Directive gives the Member-States some discretion in selecting the way in which the guarantee payment is to be calculated,¹³⁷ or in reducing its amount,¹³⁸ the Court stated that a "minimum guarantee" could be calculated. This minimum guarantee could be computed by referring to the option which implied the least financial burden for the guarantee institution. As far as the content of the guarantee, the provisions of the Directive were sufficiently precise and unconditional.

The determination of the identity of the guarantee institution under Directive 80/987 was a much more complicated question which ultimately blocked the direct effect of the Directive. The critical provision was Article 5(B) which states: "employers shall contribute to financing (the guarantee institution), unless it is fully

crisis, and (2) crews of sea going vessels.

136. *Francovich*, 2 C.M.L.R. at 77 (1993).

137. Council Directive 80/987, 1987 O.J. (L 283) 3. Article 3(2) of the Directive gave the Member-States three choices from which to determine the beginning of the guarantee institution's obligation: (1) at the onset of the employer's insolvency; (2) at the time of the notice of dismissal issued to the employee; or (3) at the time the contract of employment or employment relation was discontinued.

138. Council Directive 80/987, 1987 O.J. (L 283) 4. Article 4(1) and 4(2) gave the Member-States the option to limit the liability to periods of 3 months or 8 weeks according to certain methods set out in that Article. Article 4(3) allows a Member-State to set a ceiling of liability in order to avoid the payment of sums exceeding the social objectives of the directive.

covered by the public authorities.¹³⁹ The Commission maintained that this section provided for the possibility that the public authorities would fully cover the financing of the guarantee institutions, and, therefore, the Member-State could not deny the direct effect of the Directive by alleging that it could have required others to bear the financial obligation imposed upon it. The Court disagreed with the Commission and held that the obligation to award the payments rested not with the Member-State, but with the guarantee institution. According to the Court, the fact that the public authorities could decide to cover in full the financing of the system did not mean that the Member-State could be identified as the institution liable for the outstanding payment.¹⁴⁰

The Court concluded that individuals could not rely on the rights conferred by Directive 80/987 in proceedings against the State before national courts. The Court then moved to the second part of the first question posed by the Italian courts: the issue of Member-State liability for failure to implement a directive. The EEC Treaty provides for the non-contractual liability of the Community institutions, but is silent regarding Member-State

139. Council Directive 80/987, 1987 O.J. (L 283) 5. The remainder of Article 5, which embodies the identity of the guarantee institution, reads:

Member-States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(A) The assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency.

* * * *

(C) The institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.

140. *Francovich*, 2 C.M.L.R. at 82.

liability.¹⁴¹ Therefore, if such a principle was to develop, it was to be developed as judge-made law.¹⁴² The Court had been confronted with the issue of non-contractual liability of Member-States in the *Enichem Base v. Commune Di Cinisello Balasamo* case.¹⁴³ However, since the Directive in the *Enichem* case lacked direct effect, the Court declined to examine the question of the financial liability of the Member-States.¹⁴⁴ If the Court had followed that reasoning in *Francovich*, it would have ended its analysis when it decided that Directive 80/987 lacked direct effect.

C. *The Foundation of Member-State Liability*

1. The Commission

The Commission supported Mr. Francovich's liability claim but suggested that the Court should focus on the Directive in question and refrain from issuing a principle of general

141. Art. 215 of the EEC Treaty states in relevant part:

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member-States, make good any damage caused by its institutions or by its servants in the performance of their duties.

142. See *Bebr*, *supra* note 36, at 571.

143. Case 380/87, *Enichem Base v. Commune Di Cinisello Balasamo*, 1989 E.C.R. 2491 [hereinafter *Enichem*].

144. A possible difference between *Francovich* and *Enichem* is the fact that Directive 80/987, although lacking direct effect as whole, did create rights for the benefit of employees. On the other hand, the Directive in *Enichem* did not give rise to any rights for individuals. Barav, *supra* note 127. See also Szyszczyk, *supra* note 35, at 697.

applicability.¹⁴⁵ In fact, at the hearing, the Commission stressed that the Court should not address the general question of whether the failure to implement a directive which does not have direct effect may give rise to liability.¹⁴⁶ It is unclear why the Commission took such a narrow position. Perhaps the Commission felt that formulating a general principle of liability would upset the delicate working balance between the Member-States and the Community Institutions. Or perhaps the Commission was acting out of self interest and was fearful that an expansion of the doctrine of liability might in turn ease the strict standards necessary to prove liability on the part of the Community Institutions. Another explanation for the Commission's timid approach to the question of State liability is that it may have wanted to focus on having Directive 80/987 declared directly effective. It is clear from the Commission's argument that it did in fact make a very strong pitch to the Court to have this Directive held as directly effective. The rationale behind this hypothesis was that if Directive 80/987 were directly effective it would result in an expansion of the doctrine of direct effect. In fact, the Court's holding that the content of the rights spelled out in this Directive was clear and unconditional has been considered an important extension to the principle of direct effect in and of itself.¹⁴⁷

145. See Szyszczak, *supra* note 35, at 694.

146. The Commission's approach toward *Francovich* has been schizophrenic. Although the Commission urged the Court to contain the scope of the *Francovich* ruling, once the case was decided, the President of the Commission hailed the ruling as a cure for Member-State non-compliance with their Community obligations. *EC: Court of Justice Celebrates 40th Anniversary*, *supra* note 1.

147. See Bebr, *supra* note 36, at 571.

2. The Advocate-General

Whatever the reasons the Commission had for taking such a narrow position, Advocate-General Mischo attacked it vigorously. He argued that "one cannot avoid the need to decide once and for all, that is to say, not just in the context of this case, whether Member-States can be held liable for their failure to implement a directive."¹⁴⁸ Next, the Advocate-General proceeded to examine the submissions of the governments which intervened.¹⁴⁹ The Italian, British, and German governments maintained that Community law offered no basis for the principle that States could be liable to individuals for losses due to the non-implementation of directives.¹⁵⁰ The crux of the Member-States' position was that the determination of their liability was a matter of national law and not Community law. They argued that the Court's case law had left it up to the national courts to determine the methods and procedures that governed a liability claim against a Member-State. Consequently, the *principles* which govern whether a liability action existed should be determined by national law and not Community law.¹⁵¹

To support their position, the intervening Governments pointed to the *Russo* case, in which the Court stated: "if damage has been caused through an infringement of Community law, the State is liable to the injured party for the consequences in the

148. *Francovich*, 2 C.M.L.R at 84.

149. *Id.* at 85.

150. See Case 60/75, Carmine Antonio Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo, 1975 E.C.R. 47 [hereinafter *Russo*]. In *Francovich*, the Dutch Government argued that a Member-State could be liable under Community law for the failure to implement a directive, but since there was no Community legislation on the matter, it was up to a national judge to decide whether liability existed according to national law. 2 C.M.L.R. 66.

151. *Francovich*, 2 C.M.L.R. at 86-87 (emphasis added).

context of the provisions of national law."¹⁵² The Advocate-General argued that the Member-States were reading this sentence out of context, since *Russo* made it clear that the Member-States have to take responsibility for the damage suffered by individuals stemming from their breaches of Community law.¹⁵³

The Advocate-General based the principle of Member-State liability on the principle of effective protection of Community bestowed rights and on the obligation of the Member-States to ensure the full effectiveness of Community law. Advocate-General Mischo reasoned that the national courts are under the duty to effectively protect Community rights of individuals. This obligation extends to providing an adequate remedy for Community law violations even in those situations where, as in the *Regina v. Secretary of State for Transport, ex parte: Factortame Ltd.* case, the national courts lack the power to grant such a remedy.¹⁵⁴ This means that if "payment of compensation is the sole means in the particular circumstances of ensuring effective protection, the Member-State is under an obligation by virtue of Community law

152. *Id.* Advocate-General Mischo argued that in light of the question posed by the national court in *Russo*, the Court would have indicated in clear terms if it in fact intended to leave it up to the national courts to establish the principles determining whether actions in damages for breaches of Community law could lie against the State. *Id.*

153. *Francovich*, 2 C.M.L.R. at 87.

154. Case C-213/89, *Regina v. Secretary for Transport, ex parte: Factortame Ltd*, 1990 E.C.R. I-2466. In *Factortame*, the House of Lords found that if the plaintiffs were not granted interim relief from the application of an English Act designed to stop "quota jumping" by Spanish vessels, they would suffer irreparable damage. Interim relief was denied based on an old common law rule which stated that this type of relief could not be granted against the Crown and because Acts of Parliament were presumed to be valid. On an Article 177 reference, the European Court held that if a national court deciding a matter of Community law considers that it is prevented by a national rule from granting interim relief, it must set that rule aside.

to make available to individuals an appropriate remedy enabling them to claim compensation."¹⁵⁵

The Advocate-General emphasized in his opinion that a Member-State deprives Community law of its intended effect particularly when it fails to implement directives which do not have direct effect. Individuals who are bestowed rights under this type of directive are in a very precarious situation. The only protection they may be able to secure is through the uncertain principle of indirect effect. The Advocate-General stated that in situations where directives confer rights on individuals, but are not directly effective, "the basic requirement that Community law be applied uniformly would at least be respected in part if individuals deprived of their rights by [the Member-State's] failure to implement a directive could recover compensation in an approximately equivalent amount."¹⁵⁶ The Advocate-General's rationale clearly encompasses those cases where an individual cannot invoke an unimplemented directive because the opposing party is a private party. Thus, the principle of Member-State liability would afford protection to those individuals who, due to the lack of horizontal direct effect of directives, cannot invoke rights granted by a directive against another one. The Advocate-General's opinion appears to indicate that *Francovich* could solve many of the problems generated by *Marshall's* denial of horizontal direct effect of directives.

155. *Francovich*, 2 C.M.L.R. at 86. The Advocate-General also based the principle of Member-State liability on the obligation States have to ensure that Community law is fully effective. This obligation, in turn, is rooted in the same EEC Treaty provisions as the foundation for the direct effect of directives: the principle of cooperation spelled out in Article 5 and in the third paragraph of Article 189 which states that a directive is binding and obliges a Member-State to carry it out.

156. *Id.* at 96.

3. The Court

The Court's portion of the opinion dealing with State liability is remarkably short and sweeping. The Court, citing to the *Van Gend en Loos* case, discussed the new legal order created by the EEC Treaty which imposed obligations on Member-States as well as individuals and conferred rights on the latter. These rights were not only derived from the textual provisions of the EEC Treaty, but also from its purpose and spirit. The Court then referred to the duty imposed on national courts in *Simmenthal* to protect the rights individuals derive from the legal order created by the EEC Treaty. According to the Court the effective protection of individuals would be "undermined if individuals were not able to recover damages when their rights were infringed by a breach of Community law attributable to a Member-State."¹⁵⁷

To support the principle of Member-State liability, the Court also invoked the principle of cooperation found in Article 5, and the obligation Member-States have under the third paragraph of Article 189, to take all necessary steps to achieve the results required by a directive. The Court concluded that "the principle of State liability for damages to individuals caused by a breach of Community law for which it is responsible is *inherent in the scheme of the Treaty*."¹⁵⁸

D. *The Conditions of State Liability*

1. The Advocate-General

The Advocate-General and the Commission took the position that the financial liability of the Member-States should be measured by the same standards as those governing the Community

157. *Id.* at 114.

158. *Id.* (emphasis added).

institutions.¹⁵⁹ The standard of liability he favored is extremely difficult to meet. Community non-contractual liability attaches only if there has been a sufficiently serious breach of a superior rule of law for the protection of the individual, and the institution concerned manifestly and gravely disregards the limit on their powers.¹⁶⁰ It is easy to see that only a few claims can satisfy this high standard. In addition, this standard is difficult to apply. Questions arise as to what exactly is a "sufficiently serious breach;" what is a "superior law for the protection of the individual;" and what exactly constitutes a "manifest disregard" of power.

To make his position more palatable, the Advocate-General stated that when the Court holds in an Article 169 proceeding that a State has failed to implement or has incorrectly implemented a directive, the State can be considered as having infringed a fundamental rule of the EEC Treaty.¹⁶¹ From the standpoint of trying to remedy the inequities stemming out of *Marshall's* denial of horizontal direct effect, this would be fatal. Not only is the

159. The section of the Advocate-General's opinion dealing with the conditions of Member-State liability has been criticized for its lack of cogency as well as for proposing a standard of liability that is very difficult to meet. See Bebr, *supra* note 36, at 565; John Temple Lang, *New Legal Effects Resulting From the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgment*, 16 *FORDHAM INTER. L. J.* 2, 18 (1993).

160. See Szyszczak, *supra* note 35, at 695: "under this head of liability very few claims have been met as a result of the proviso added to the wording of Art. 215 EEC by the Court, that liability will only arise where there has been a flagrant breach of a superior rule of law designed to protect the individual." For the text of Art. 215 see EEC Treaty, *supra* note 141.

161. See Lang, *supra* note 159, at 18. The Advocate-General then seems to change his mind and argues that the failure of a State to implement a directive cannot be compared with the Community Institutions acting in a legislative capacity. This contradicts the test he put forth initially. After this change of heart, it is difficult to even discern what test the Advocate-General espoused.

Advocate-General's test too difficult to meet, but its alternative, to have to wait for an Article 169 ruling, would create delays with consequent strains on financial resources. This would effectively deter many potential *Francovich*-plaintiffs from pursuing a claim of damages against the State.

2. The Court

The Court did not impose the strict conditions recommended by the Advocate-General.¹⁶² Instead, the Court fashioned a three-pronged test:

the first of these conditions is that the result required by the Directive includes the conferring of rights for the benefit of the individuals. The second is that the content of these rights may be determined by reference to the provisions of the Directive. Finally, the third condition is the existence of a causal link between the breach of the obligation of the State and the damage suffered by the persons affected.¹⁶³

The Court and the Advocate-General also disagreed as to *Francovich's* retroactive application. The Italian government had asked the Court to limit the retroactive application of its ruling. Advocate-General Mischo agreed with Italy, fearing that the range of applicability of the case could be extremely broad. According to Advocate-General Mischo, *Francovich* could result in an overwhelming number of claims creating extremely serious

162. Interestingly, the conditions of liability imposed on the Member-States are easier to meet than those of the Community institutions when the Treaty specifically provides for the non-contractual liability of the latter, but not of the former. This bears witness to the enormous creative power of the Court.

163. See Szyszczak, *supra* note 35, at 695. Szyszczak praises the Court for not shrouding the Member-States with the protective veil fabricated by the Advocate-General.

financial consequences for the Member-States. The Advocate-General pointed out that prior to *Francovich*, the issue of State liability was uncertain and therefore the Member-States could have reasonably believed that their liability would be entirely governed by national law. In light of this, he believed that the retroactive application of the ruling should be limited.¹⁶⁴ The Court, however, disregarded the Advocate-General's advice and did not limit the retroactive effect of this ruling.

E. *Francovich: The Solution to Marshall's Denial of Horizontal Direct Effect of Directives*

Francovich could be the solution to the anomalies created by *Marshall's* denial of horizontal direct effect of directives. Mr. Francovich was able to sue a Member-State for damages he sustained at the hand of another individual due to the non-implementation of Directive 80/987. This was the case regardless of the fact that, due to the lack of horizontal direct effect of directives, he could not invoke the Directive against his employer. The Court noted that individuals claiming rights from a directive which lacked direct effect merit special protection:

the possibility of obtaining damages from the State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State, and consequently individuals cannot, in the absence of

164. The Advocate-General also argued that it could have been reasonable for Member-States to believe that they were not liable for the failure to implement Directives which lacked direct effect.

such action, enforce the rights granted to them by Community law before the national courts.¹⁶⁵

The Advocate-General wondered whether a Member-State could incur financial liability where a private party has to suffer loss vis-à-vis another due to the State's failure to implement a directive. The Advocate-General stated:

After all, in this case the State is only responsible for the failure to implement the Directive and not for the facts which are the direct cause of the damage suffered by the citizen, such as, for example, the non-payment of salary, the insufficient remuneration of a female employee, or the defective nature of a product.¹⁶⁶

Dr. Barav speculates that one of the most important consequences of *Francoovich* is that it will fill the void left by *Marshall's* denial of horizontal direct effect of directives.¹⁶⁷ This position is also espoused by Professor Malcolm Ross.¹⁶⁸ Likewise, commentator Daniel Preiskel stated that the:

165. *Francoovich*, 2 C.M.L.R. at 114. This statement is echoed by Ross, *supra* note 9, at 60, who comments that "the clearest value of the remedy provided in *Francoovich* is where the interest of the individual would not be protectable by other means; it thus provides a new weapon where direct effect is lacking."

166. *Francoovich*, 2 C.M.L.R. at 99. The Advocate-General points out that in cases where an unimplemented directive imposes obligations on a Member-State, or a body which must be treated as such, the State commits two faults: it fails to implement the directive and simultaneously fails to observe the obligations imposed by the directive.

167. Barav, *supra* note 127.

168. Ross, *supra* note 9, at 58.

Francovich Judgment now means that any private party who has suffered loss vis-à-vis another third party as a result of a State's failure to implement a Directive or indeed any other breach of Community law, may recover this loss not by suing the third party, but by way of judicial review against the State.¹⁶⁹

F. *Exhaustion of Remedies*

An issue which was not addressed by the Court or the Advocate-General was whether a potential *Francovich*-plaintiff must exhaust local remedies prior to suing the State for damages. In particular, it is unclear what the relationship is between the *Francovich* principle of State liability and a national court's obligation to interpret national legislation in light of the purposes of a directive.¹⁷⁰ The proponents of the argument that national remedies must be exhausted point to the Court's statement that obtaining damages against the State is particularly important when individuals cannot enforce their Community rights in the national courts. Thus, if an individual has an alternative remedy, he ceases to be part of this protected class and must exhaust other remedies prior to suing the State for damages. The advocates of this position maintain that where defective or incomplete national law has been passed implementing directives, a national court can engage in *Marleasing*-type construction of existing national law. Therefore, prior to suing the State for damages, this route must be

169. Daniel Preiskel, *Right of Action Against the State for Un-implemented EC Directive: The Francovich Judgment*, 20 INT'L. BUS. LAW. 294 (1992). See also, Duffy, *supra* note 5, at 135; Szyszczak, *supra* note 35, at 697.

170. See Peter Duffy, *Can You Sue the State to Get Your EC Rights?*, THE TIMES, Dec. 10, 1991; but see Ross, *supra* note 9, at 58-60.

exhausted.¹⁷¹ The problem with this argument is that due to the evolving jurisprudence of *Marleasing*, it could be risky for a plaintiff to take her chance on the national court applying the doctrine of indirect effect correctly.¹⁷² Professor Ross argues that there is no reason for removing a *Francovich* claim against the State simply because there might be an indirect action against a private party. The *Francovich* rule of Member-State liability "was enunciated by the Court to be inherent in the Treaty and should thus not be capable of being displaced by an alternative remedy."¹⁷³

V. CONCLUSION

A question that arises from *Francovich* is whether its ruling is circumscribed by directives, such as Directive 80/987, which demand a high degree of State involvement in their execution. Although the guarantee institutions set out in this Directive can be financed by the employer, it can also be financed by the Member-State. Further, the Member-States are required to set up the guarantee institutions and lay down detailed rules for their operation. Therefore, regardless of how the financing of the guarantee institutions is set up, the State is always intimately involved in the execution of the guarantee provided by the Directive. This is not the case, for instance, with Directive 76/207, the gender discrimination Directive, which does not require the State to be as intimately involved with the execution of its guarantee in situations where the State is not the employer. An argument can

171. See, e.g., Ross, *supra* note 9, at 59.

172. *Id.*

173. Therefore a plaintiff in this type of situation should have a "genuine choice in the same way that he or she might in other matters of non-contractual liability pursue any one of several joint defendants, but be only able to recover one sum for the loss involved." *Id.*

be made that the *Francovich* ruling only applies to those directives which demand heavy state involvement in their execution.

This argument, however, does not appear to be valid. The Court's ruling extends to *all directives* as long as they fulfill the relatively simple test outlined by the Court: that they bestow rights on individuals; that the content of these rights can be determined from the directive itself; and that there is a causal link between the state's conduct and the damage suffered by the individual. Whether a directive has direct effect is irrelevant. The Court actually held that Directive 80/987 lacked direct effect. In fact, according to the Court, the *Francovich* ruling was particularly important to those individuals who claim rights under directives which lack direct effect. This is particularly true when a private party has suffered loss vis-à-vis a third party as a result of a state's failure to implement a directive. While an individual cannot claim rights under an unimplemented directive against another because of the lack of horizontal direct effect of directives, *Francovich* offers the powerful solution of obtaining damages from the real culprit: the Member-State which has failed to fulfill its Community obligations.

Under *Francovich*, an individual could enjoy her Community rights whether she worked for the public or private sector, without having to rely on the uncertain doctrine of indirect effect. Further, national courts would not have to engage in the tortuous analysis of who is a State employee and who is not. Nevertheless, several problems are built into the *Francovich* ruling which underscore its fragility and might help explain why the case has been so favorably acclaimed in the academic community, but so far has failed to create the avalanche of suits predicted by the Italian Government. First, the facts of the case are extreme. As Advocate-General Mischo pointed out, Italy's conduct was "scandalous." Not only was there a prior Article 169 ruling finding that Italy failed to comply with its duty to implement Directive 80/987, but years later, when *Francovich* was argued before the Court of Justice, the Government had taken no steps toward implementation. This poses the question of whether the *Francovich* ruling is limited to cases where the State's misconduct is as blatant

as here. The Advocate-General's opinion placed great emphasis on the gravity of a State's conduct. Unfortunately, this part of his opinion lacks clarity, and we are left wondering what test he ultimately used to determine Member-State liability. The Court did not engage in a thorough analysis of whether the gravity of the State's conduct is a relevant factor in determining liability. The Court merely stated that if a directive met the above referenced three-pronged test, liability would attach. As long as a Member-State violates its Community obligations and that breach injures rights conferred by the Community, liability should attach regardless of the degree of negligence by the State.

Another issue which remains unclear from the *Francovich* ruling is whether a prior Article 169 ruling, finding non-compliance with Community obligations, is necessary prior to a finding of Member-State financial liability. The Advocate-General's opinion is lamentably unclear on this issue. He seems to say that Article 169 findings are necessary when an individual is suing the State in relationship to an unimplemented directive which lacks direct effect. The Court is silent on the matter, but its statement that Member-State liability is "inherent in the scheme of the Treaty" indicates that a prior Article 169 ruling is unnecessary. This should be the correct result. To tie *Francovich* causes of action to prior Article 169 rulings would rob *Francovich* of its effectiveness. This is especially the case where individuals claim rights under directives that lack direct effect. *Francovich* could not become an effective substitute to the denial of horizontal effect if this requirement is made. Further, individuals with *Francovich*-type causes of actions cannot be required to exhaust other remedies simply because national courts could embark on *Marleasing*-type construction of national legislation. A *Francovich* litigant should be given the opportunity of deciding whether she wants to sue for damages under *Francovich*, or invoke a Community provision in a national court and have the national judge engage in purposeful construction of national law in light of a Community provision. *Francovich* could be a very effective tool in protecting individual rights and in correcting Member-State non-compliance with their Community

obligations. Perhaps the most important result of the *Francovich* ruling is that it could address many of the problems stemming from the denial of horizontal direct effect of directives. Nevertheless, *Francovich's* future effectiveness could be easily jeopardized by imposing artificial barriers in the path of individuals seeking its protection.