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Once Upon a Time—*Francovich*: From Fairy Tale to Cruel Reality?

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Introduction

Once upon a time there was a Union of Kingdoms in Europe within which no principle of state liability for the infringement of the law in its legal order existed; thus, citizens suffering a loss due to the illegal behaviour of their own countries, known as Member States, were left with no remedy or compensation for damages arising from the poor behaviour of their Member State. Then one day, a wonderful and magic day, a man called Mr Francovich, who had only received sporadic payments in lieu of his wages before his employer had become insolvent, had a brave idea: together with 33 other people, including Mrs Bonifaci, who had not only lost their jobs due to the insolvency of their employer but had been waiting in vain for more than five years for their overdue salaries to be paid, decided to consult a clever lawyer. This man, resourceful as only lawyers can be, found out that many years ago the wise and venerable King, called Council, had adopted a Directive according to which the Member State in question, let us call it Italy for argument's sake, a nice southern European country, had committed itself to create a guarantee system for the payment of outstanding claims from employment contracts. Sadly, the Member State had failed to implement this obligation, an oversight which had led Mr Francovich and Mrs Bonifaci into such an unsatisfactory predicament. The lawyer pleaded the case before the national court, but the national court, not knowing whether it could make the Member State responsible for failing to establish the guarantee system for the payment of the overdue salaries, stayed the proceedings and asked the augurs in Luxembourg, those governing the rules in the Union of Kingdoms. After pondering the matter thoroughly, the wise augurs delivered their judgment: the Member State should be held liable for not implementing the Directive and had to compensate the plaintiffs for all the damage suffered. Oh what incredible joy! Once again David had beaten Goliath! The doors of heaven seemed open on that glorious day. A man was not only a mere subject but had also rights which could even be claimed and enforced against Member States. And then, from that wonderful 11 November 1991, thanks to the wise men of Luxembourg, all the citizens of the Union of Kingdoms lived in peace and harmony until the end of time …

Although it may have been a useful exercise in order to recall the facts and legal questions in that particular judgment, it is really amazing how little legal disputes suit the

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fairy tale format. I wonder whether the attempt to transform a judgment into a fairy tale is worthwhile, or whether it has ever been previously attempted, since the outcome seems rather prosaic. However, the more important issue is not the *form* of telling, but the *message*: in that respect, I believe that *Francovich*[2] created far too many expectations regarding state liability, expectations which may well be considered to have been subsequently frustrated by further developments, especially considering that the Court of Justice has built the state liability doctrine under Community law on nearly the same principles governing the liability of the European institutions pursuant to Article 288(2) EC Treaty. I imagine Mr Francovich and Mrs Bonifaci certainly thought they were in heaven, exactly as Hansel and Gretel when they laid themselves down in the small beds after having had a good meal of milk and pancakes, with sugar, apples and nuts at the witch's cottage in the forest; but then, after the subsequent judgments, they must have felt like Hansel in the cage in which he was imprisoned by the old witch.[3]

When revisiting *Francovich* more than 15 years after the judgment was first handed down, three thoughts come to my mind: first, despite the undeniable value of the decision at the time, there is a need to read it in the light of previous case law, in order to ascertain its real place in terms of the development of Community law. Secondly, certain elements of the judgment may be criticised even if the whole solution appears to be right. Thirdly, the case law subsequently delivered by the Court of Justice has pushed the *Francovich* judgment into the background, dramatically limiting the scope it seemed to have had in the beginning.

Francovich in the Light of Previous Case Law: The Logical Next Step

The arguments upon which the reasoning of the Court relies in that judgment were certainly not taken without due consideration. Indeed, in paragraph 30 and beyond, the Court made a certain link, though perhaps not the most accurate one, with its previous case law, especially as regards two fundamental principles which it had previously established: the liability of Member States when an infringement had been declared by the Court following Article 226 EC procedure, and the principle of effectiveness of Community law.

In its judgment of 16 December 1960, *Humblet vs Belgium*,[4] the Court indicated that within the framework of the obligations for Member States arising from Article 228 EC to take all appropriate measures to ensure the fulfilment of their obligations under Community law, they had to nullify and make good the unlawful consequences of a breach of Community law. The recognition of the right to obtain compensation from Member States after an infringement procedure underlies the statement of the Court in its judgment of 7 February 1973,[5] declaring the admissibility of an action for infringement

[2] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR I-5357.

[3] *Fairy Tales of the Brothers Grimm*, illustrated by Kay Nielsen with an introduction by Bryan Holme (New York, The Viking Press, 1979), 23 and 24.

[4] Case C-6/60 [1961] ECR 1128.

[5] Case 39/72 *Commission v Italy* [1973] ECR 101.

brought by the Commission even after the Member State had put an end to the infringement;[6] the declaration of the infringement by the Court could still be of interest for individuals as regards the responsibility of Member States for the time in which it was breaching Community law, since 'even if the breach was remedied after the expiry of the time-limit laid down by the Commission … there is still an interest in continuing the proceedings …, interest which may consist in establishing a basis for the liability which a Member State may incur, in particular … towards individuals', as was explained in a later judgment of 20 February 1986.[7]

But in *Waterkeyn*, 14 December 1982,[8] the Court considered it necessary to deal in greater detail with the question of the rights conferred to individuals by a judgment declaring an infringement by a Member State. It stated that the right to compensation of the person who had suffered loss or damage did not arise from that declaration of infringement, but from the direct effect of the breached community law provisions. Properly understood, *Waterkeyn* does not set aside the importance of infringement judgments before national courts. This means that the rights invoked take their origin in the EC piece of legislation in question and not from the judicial declaration of the infringement.[9] In any event, this argument leads to the principle of effectiveness of Community law.

The Court has indeed established the link between the direct effect of the rights granted to individuals under Community law and the task of the national judiciary to protect adequately those rights by ensuring the direct effect of the conferring provisions.[10] Hence, it is for national law to establish the procedures and to designate the bodies entrusted with the task of protecting the rights of individuals under provisions of Community law which have direct effect, taking into account the principle of equivalence, according to which the procedural requirements to enforce rights deriving from Community law shall not be less favourable than those applicable to similar actions of a domestic nature.[11] Moreover, the consequences for national judges of the non-conformity of a national provision with direct applicable Community law were already well known long before *Francovich*, since in *Simmenthal*, 9 March 1978,[12] the Court had imposed the duty on national courts not to apply domestic provisions which infringe Community law.

But still the right to obtain compensation for damages caused in such circumstances had not yet been suggested. In that context, a judgment of 12 January 1976, *Russo v Aima*,[13] deserves some attention, as the Court said that where an individual had suffered a loss due to the intervention of a Member State which had to be regarded as being incompatible with EC agricultural market organisation, it was for that Member State to take responsibility for the consequences according to the provisions governing the liability of the state under national law. While relying on the national legal orders in order to make good the damage, the Court indirectly acknowledged the existence of a common principle

[6] D Simon and A Barav, 'La responsabilité de l'administration nationale en cas de violation du droit communautaire' (1987) 305 *Revue du Marché Commun* 166.

[7] Case 309/84, *Commission v Italy* [1986] ECR 599.

[8] Joined Cases 314/81, 316/81 and 38/82, *Procureur de la République v Waterkeyn* [1982] ECR 4337.

[9] Simon and Barav, p 167.

[10] Cases 33/76 *Rewe* and 45/76 *Comet* [1975] ECR 1989 and 2043.

[11] Case C-78/98 *Shirley Preston and others v Wolverhampton Healthcare NHS Trust and others* [2000] ECR 3201.

[12] Case 106/77 [1978] ECR 629. See also case 34/67 *Lück* [1968] ECR 360.

[13] Case 69/75 [1976] ECR 45.

of state liability in all Member States. In later cases, however, the Court did not carry out a comparative study of state liability in the different legal orders of Member States and even Advocate General Léger acknowledged the lack of common principles in that field.[14]

The fact that it took more than 15 years until that principle was declared inherent in the system of the Treaty (*Francovich*, paragraph 35) was probably due to the very limited number of cases submitted to the Court where this issue was at stake. But the delay in officially declaring the inherence of that principle in the Community legal order cannot hide the presence of all necessary elements to reach such a declaration in the development of the case law mentioned above, thus showing how *Francovich* constituted the inexorable next step towards the recognition of the state liability principle under Community law.

Some Critical Remarks Concerning the Judgment

As we know, before considering the existence and scope of Member States' liability for damages resulting from breach of their obligations under Community law, the Court first examined the direct effect of the provisions of Directive 80/897.[15] In order to ascertain whether the provisions of that piece of Community legislation were unconditional and sufficiently precise, the Court analysed the identity of the person entitled to the guarantee, the content of the latter and the identity of those under obligation to provide it. Having considered the first and the second requirements, the Court held that with regard to the third condition, there was not sufficient clarity to identify the person liable to provide the guarantee, a circumstance which did not allow finding the state liable on the sole ground that it had failed to take transposition measures within the prescribed period.[16]

Having said that, it is still worth recalling the argument put forward by the Commission according to which the possibility provided for in the Directive that the guarantee institutions might be entirely financed by the public authorities, made unacceptable the thwarting of the effects of the Directive by the Member States by merely asserting that they could have required other persons to bear partially or completely the financial burden resting upon it. Although the Court rejected that submission, I am not alone in upholding its correctness.[17] This could have led the Court to find the Directive provisions directly effective, thus making the state directly liable. Certainly, Member States enjoy discretion under Article 5 of the Directive, but it can be easily deduced from the same provision, subsection (b), that public authorities have to be involved in the financing of the guarantee institutions, since employers only have to 'contribute to the financing . . . unless it is fully covered by the public authorities'. It is clear from the wording of this provision that whatever the margin of appreciation regarding the establishment of the guarantee institution might be, public authorities had to provide, in any event, a substantial part of the financing. It may appear as if the Court desperately wanted to deny the direct effect of

[14] Opinion given in Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, paras 96–100.

[15] Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (OJ 1980 L 283, p 23).

[16] *Francovich*, paras 23–26.

[17] R Alonso García, 'La responsabilidad de los Estados miembros por infracción del Derecho comunitario' (Madrid, Civitas, 1997), 19.

the provision in question, in order to be free to settle the principle of state liability for infringement of Community law for the very first time.

A second issue I would like to address again[18] is the requirement in *Francovich* that the directives capable of giving rise to state liability have to grant rights to individuals. In my view, there is no justification for limiting state liability to these kinds of directives and it would therefore be more accurate to extend that fundamental principle to all kind of directives, thus placing the burden of proof on the individual that the breach of whichever directive by a Member State has affected his legitimate interests and caused him damage or loss. The reduction of the scope of the state liability principle to the directives conferring directly applicable rights to individuals seems to lack any justification and creates an artificial distinction between various kinds of Community legislation, since the breach of a directive not granting rights can nevertheless affect other rights conferred by domestic law.

Francovich in the Light of Subsequent Case Law

The subsequent judgments developing *Francovich* are well known and do not need an extensive explanation in this short Chapter. It is commonly accepted now that in *Brasserie du Pêcheur*,[19] with the nuances introduced not much later, especially by *British Telecommunications*,[20] *Lomas*,[21] *Dillenkofer*,[22] *Norbrook Laboratories*,[23] *Haim*[24] and *Köbler*,[25] the Court has toned down the *Francovich* doctrine in the cases where the breach of Community law arises from an action of Member States, whether of a legislative, administrative or judicial nature. In those cases, the conditions governing state liability are threefold: the rule infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the state and the damage or loss sustained by the injured parties.[26]

Especially the second condition, the seriousness of the breach of Community law, distinguishes itself from *Francovich*, though one can infer from *Brasserie du Pêcheur* that the Court considered this condition as being implicitly fulfilled in the former judgment.[27] The introduction, or the explicit mention, of that requirement was justified by the Court with the need to give the same treatment to state liability as to the liability of the Community institutions under Article 288(2) EC Treaty.

Soon after the *Francovich* judgment, but before the *Brasserie du Pêcheur* judgment, I warned of the risks Community law could incur by aligning state liability to the same

[18] D Ruiz-Jarabo Colomer, 'El juez nacional como juez comunitario' (Madrid, Civitas, 1993), 181.
[19] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* [1996] ECR I-1029.
[20] C-392/93 [1996] ECR I-1631.
[21] Case 69/75 [1976] ECR 45.
[22] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer et al* [1996] ECR I-4845.
[23] C-127/95 [1998] ECR I-1531.
[24] C-424/97 [2000] ECR I-5123.
[25] C-224/01 [2003] ECR I-10239.
[26] *Haim*, para 36, and *Köbler*, para 51.
[27] *Brasserie du Pêcheur*, para 45; see also Alonso García, p 36.

principles as liability of Community institutions, due to the rigidity and the narrowness of the interpretation given to the conditions to which the liability of the Community institutions is bound.[28]

First of all, as Advocate General Léger pointed out in his opinion in *Hedley Lomas*, there is a fundamental difference between both kinds of liability: within the scope of Community law, the institutions act as a primary legislator while Member States are confined by the norms of Community law taking also into account the principle of primacy.[29] Therefore, the discretion enjoyed by Member States does not seem comparable to that of the Community institutions. Hence, the way in which Member States make use of their margin of discretion and the degree of this margin should be taken into account when assessing the seriousness of the breach of Community law, and attention should also be paid to the hierarchy of norms in the national legal orders. Thus, a breach committed by an administrative decision or by regulatory measures should not be treated in the same manner as a breach arising from an act of the national parliament; in the first two hypotheses, a simple transgression could be considered sufficient to trigger the liability of the public body, but not in the case of the infringement by a national law (meaning an act of national Parliament), due to its nature and historical significance.[30]

Secondly, it has been accurately pointed out[31] that the overlap between the conditions of state liability and those defined by the case law concerning the liability of the Community institutions does not seem to be complete. Thus, under Article 288(2) EC Treaty, the damage alleged by the applicants must go beyond the bounds of the economic risks of the activity in the sector concerned,[32] a requirement which was not included in *Brasserie du Pêcheur* as a prerequisite for establishing state liability. Even if I do believe that a distinction should be maintained, this one reveals the Court's incapacity, or unwillingness, to completely unify the criteria of liability for breach of Community law as regards Member States and the Community institutions, probably for reasons related to the limited cross-fertilisation between Article 288(2) and state liability.[33]

By using the same approach towards liability of Community institutions, and especially with regard to the condition of the serious breach of a community rule, the Court has increased the difficulties for individuals seeking to obtain damages, since the interpretation of that condition, but also of the third one (the causal link),[34] seems so uncertain that one can wonder whether it has provided a real remedy for those who have suffered loss and damage as a result of the incorrect application of community law.[35]

It is clear from the preceding ideas, that in the way the case law after *Francovich* has shaped the system, the role of national courts has been enhanced, due to the fact that

[28] Ruiz-Jarabo Colomer, p 180.

[29] Opinion of Advocate General Léger in *Hedley Lomas*, paras 101 *ff*.

[30] A Barav, 'Responsabilité et irresponsabilité de l'État en cas de méconnaissance du droit communautaire', in *Gouverner, administrer, juger—Liber amicorum Jean Waline* (Paris Dalloz, 2002), 441.

[31] T Tridimas, *Principles of EU law* (Oxford, EC Law Library, 2006), 512.

[32] Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609.

[33] W van Gerven, 'Taking Article 215(2) EC seriously', in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Oxford, Hart Publishing, 1998), 35.

[34] See Cases C-319/96 *Brinkmann Tabakfabriken* [1998] ECR I-5255 and C-140/97 *Rechberger* [1999] ECR I-3499.

[35] P Aalto, 'Twelve years of Francovich in the European court of Justice: A survey of the case-law on the interpretation of the three conditions of liability' in S Moreira de Sousa and W Heusel (eds), *Enforcing Community law from Francovich to Köbler: Twelve years of the State liability principle* (Trier, Academy of European Law, vol 37, 2004), p 76.

national judges are responsible for the final decision making the necessary assessments of the damage, the seriousness of the breach of Community law and the causal link. Apart from the inherent difficulties of each case, it is questionable whether the judgments of the Court provide national courts with sufficient guidance in order to accomplish their task. Look at, for instance, the summary of the Court's decision in *Norbrook Laboratories*, according to which 'a breach is sufficiently serious where a Member State, in the exercise of its legislative powers, has manifestly and gravely disregarded the limits on its powers … and, second, that where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced or sometimes no discretion, the mere infringement of Community law being sufficient to establish the existence of a sufficiently serious breach'.[36] Thus, in the absence, first, of the recognition by the Court of horizontal direct effect on directives, which, as you may remember, is actually the latent conflict in this debate, and, second, in the absence of more accurate guidelines in Community case law, it inevitably will be for national courts to decide using their own criteria; certain divergences between the Member States seem then unavoidable when examining the conditions of the seriousness of the breach of Community law and the causal link between the latter and the damage caused, according to the law and tradition in the judiciary systems of Member States. If national courts have often proved to be reluctant to accept basic principles of Community law such as primacy, one can hardly expect a different attitude towards the application of state liability.[37] But this slight fragmentation has to be accepted as a consequence of the moving from a system of rather objective liability of Member States, as *Francovich* seemed to create, to a model based on more subjective elements. One can only hope that further questions for preliminary rulings will smooth the path for national courts.

Conclusion

No one can deny, and it is certainly not the intention of this article, the importance of *Francovich* as a key element in the case law of the Court of Justice, and especially how it has advanced one of the most relevant principles deriving from the rule of law (in the sense of *État de droit*), the liability of Member States for breach of Community law as a systemic principle of its legal order. Probably the success of the judgment lies in the clever way it strengthens the effectiveness of Community law, most certainly the principal objective, while sanctioning a Member State for its behaviour and, at the same time, granting more rights to individuals.

However, reducing *Francovich* to a matter of effectiveness would seem too short-sighted. Its consequences could have been more far-reaching in terms of guaranteeing individual rights, if the Court had not undertaken subsequently the attempt to align state liability to the same criteria as the liability of the Community institutions. By doing so, the Court has clearly limited the scope of the Member States' liability, introducing a set of

[36] Case C-127/95, *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531, para 109.

[37] For instance, as regards France, L Bernardeau, 'Le principe consacré par l'arrêt *Francovich* et le droit administratif français ou "les avancées dans une possible impasse"', in Moreira de Sousa and Heusel (eds), pp 145 *ff*. See, however, the recent developments in the Décision du Conseil d'État of 8 February 2007 (*Arcelor*).

conditions which are difficult to apply, and relegated *Francovich* to the realm of cruel reality: its scope amounts only to its narrowest meaning, that is, the case of complete failure of Member States to implement directives into national law.[38] Thus, in light of the preceding thoughts, one can only agree with Advocate General Mischo, who delivered the opinion on the *Francovich* case, and who, looking back at the judgment, wrote '… *cette jurisprudence n'est pas allée trop loin*'.[39]

But, rather than feeling sad because of the final destiny of the *Francovich* judgment, I would suggest taking the same attitude as Oscar Wilde did when he used to tell fairy tails to his sons Vyvyan and Cyril Holland. The former explains in a delightful book called *Son of Oscar Wilde*, how his father, when he was tired of playing with him and his brother, kept them quiet by telling them fairy stories. Cyril once asked his father why he had tears in his eyes when he told them the story of the Selfish Giant, and he replied that 'really beautiful things always made me cry'.[40]

[38] So also A Barav, 'The effectiveness of judicial protection and the role of the national courts' in *Judicial protection of rights in the Community legal order* (Brussels, Bruylant, 1997), 285.

[39] J Mischo, 'L'émergence du principe de la responsabilité de l'État' in Moreira de Sousa and Heusel (eds), p 58.

[40] M Mac Liammóir 'An introduction to the author', in Oscar Wilde, *The Happy Prince and other stories* 28th edn (London, Puffin Classics, 2003), p ix.