agreements with the United Kingdom. Accordingly, this jurisdiction has provided the plaintiff in an intellectual property case with a powerful weapon in the enforcement of its rights. It can bring one action against multiple defendants in respect of multiple infringements of an identical global right and it can expect that any judgment entered will enjoy currency in a number of jurisdictions. However, this potential to consolidate cross-border infringement claims is limited by the effect of Articles 16(4) and 19 and the requirements in Article 6(1) and RSC Order 11, rule 1(1)(c)[27] that the English and foreign intellectual property rights in the infringement actions in which the court is seised pursuant to those provisions be virtually identical (as explained in *Coins Control Ltd*), and, at least in cases in which the alternative forum is a non-Convention State,[28] the application of the doctrine of *forum non conveniens*. The result of these limitations is that a defendant can, in cases in which jurisdiction was obtained pursuant to the Conventions, forum shop between the places where the suit was commenced and where the intellectual property right is registered, by deciding whether to attack the validity of a registered intellectual property right in its defence. Accordingly, a plaintiff who commences infringement proceedings in England when the right was registered elsewhere does so at some peril. Correspondingly, in cases in which jurisdiction can be obtained pursuant to the Conventions, a plaintiff can forum shop: it has the potential to commence proceedings in every Convention State in which its right was infringed in respect of each of those infringements.

STUART DUTSON*

CAUSATION IN *FRANCOVICH*: THE NEGLECTED PROBLEM

A. Introduction

When the European Court of Justice gave judgment in *Francovich*[1] it was hailed as a triumph, not necessarily for its erudite reasoning, but because it allowed an individual to claim damages from a member State for its failure to comply with Community law obligations, thus providing a method of redress where previously none existed. Although the scope of the remedy was unclear and appeared superficially

27. RSC Ord.11, r.1(1)(c) provides for extraterritorial service where the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto. The test applied to determine whether this rule is applicable is whether the party sought to be served could, if within the jurisdiction, have been joined in the original action: *Société Commerciale de Réassurance* v. *Eras International Ltd* [1992] 1 Lloyd's Rep. 570, 592 (CA).

28. Cf. *Harrods (Buenos Aires)*, *supra* n.12.

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1. Case C-6 and 9/90, *Francovich* v. *Italy* [1991] E.C.R. I-5357.

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limited to the facts of the case,[2] it represents the final element necessary to establish a coherent doctrine for the effective protection of an individual's Community law rights.[3]

The Court in *Francovich* formulated the famous threefold test,[4] which received further elaboration in *Factortame (III)*.[5] Although not all elements of the test were thoroughly developed by the Court,[6] it did specify that the remedy would not lie unless the breach was "manifest and serious",[7] a question upon which much of the academic discussion has centred.[8] However, an equally problematic issue remains, one which the Court places within the national court's jurisdiction: the establishment of the necessary causal link between the breach and the loss sustained by the individual.[9]

Notwithstanding the jurisprudence of the national jurisdiction, any decision made must also ensure that the individual's rights are effectively protected. The exact definition of this, however, is unclear.[10] The Court's early case law appears to indicate that the notion of "effectiveness" incorporates two elements: the remedy awarded to the individual must "effectively"[11] protect that individual's Community law rights ("effective protection" proper), and the method by which the

2. The *Francovich* remedy could be seen as merely a gap-filling exercise to allow the individual to obtain a remedy for the non-implementation of a non-directly effective directive: note the German, Irish and Netherlands' argument in Joined Cases C-46 and 48/93, *Brasserie du Pêcheur SA* v. *Federal Republic of Germany* and *R.* v. *Secretary of State, ex p. Factortame Ltd (Factortame (III)* [1996] E.C.R. I-1029, para.18; this was firmly disregarded by the Court at para.19.

3. There is copious academic literature on this subject, *inter alia*: Steiner, "From Direct Effect to *Francovich*" (1993) 19 E.L.Rev. 3; Caranta, "Governmental Liability after *Francovich*" [1993] C.L.J. 272; Ross, "Beyond *Francovich*" (1993) 56 M.L.R. 55; Craig, "*Francovich*, Remedies and the Scope of Damages Liability" (1993) 109 L.Q.R. 595; Bebr, "*Francovich* v. *Italy*, *Boniface* v. *Italy*" (1992) 29 C.M.L.Rev. 559; Curtin, "State Liability under Private Law: A New Remedy for Private Parties" (1992) 21 I.L.J. 74.

4. *Supra* n.1, at para.40.

5. *Supra* n.2. Confirmed in Case C-392/93, *R.* v. *HM Treasury, ex p. BT* [1996] E.C.R. I-1631 and Case C-5/94, *R.* v. *MAFF, ex p. Hedley Lomas* [1996] 2 C.M.L.R. 391; Cases C-178/94, 179/94, 188/94, 189/94 and 190/94, *Dillenkofer* v. *Germany* [1996] 2 C.M.L.R. 469.

6. *Factortame (III)*, *supra* n.2, at para.51.

7. *Idem*, para.45. Note that when *Brasserie du Pêcheur* was referred back to the Bundesgerichtshof for decision, it declared that there was no "manifest and serious breach" of Community law: 24 Oct. 1996-III Z.R. 127/91.

8. Wooldridge and D'Sa, "ECJ Decides *Factortame (III)* and *Brasserie du Pêcheur*" (1996) 7 E.B.L.R. 161; Emiliou, "State Liability under Community Law: Shedding More Light on the *Francovich* Principle" (1996) 21 E.L.Rev. 399; Van Gerven, "Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*" (1996) 45 I.C.L.Q. 507.

9. The ECJ held (*supra* n.2 at para.65) that national courts should determine this issue in accordance with national rules taking into account the principle of non-discrimination: Case 33/76, *Rewe* [1976] E.C.R. 1989; Case 45/76, *Comet* [1976] E.C.R. 2043; Case 14/83, *Von Colson* [1984] E.C.R. 1891.

10. *Supra* n.2, at para.20.

11. This affects the substantive content of the remedy: *Francovich* and *Factortame*, *supra* nn.1, 2; see Case C-271/91, *Marshall (II)* [1993] E.C.R. I-4367; see Ross, "Redefining Effective Enjoyment" (1990) 15 E.L.Rev. 476.

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individual obtains that remedy cannot be made "excessively difficult"[12] by national procedural rules. This suggests that the Court has two approaches, one relating to substance ("effective protection" proper), the other to procedure ("excessively difficult"), implying a more stringent test for interference by the Court in domestic procedural rules than that for major substantive issues.[13] The jurisprudence does not reveal a consistent approach,[14] however; it merely illustrates that it is difficult to establish whether an issue is substantive or procedural because this is dependent on the context of the particular case.[15] This obfuscation complicates causal questions, as causation incorporates both substantive and procedural issues thus straddling both areas.[16] Although *Factortame (III)* indicates that these two individual elements should no longer be considered separately,[17] it does not go further and suggest any single coherent definition of "effectiveness".[18] However, the case could also be viewed as establishing a minimum standard of protection that the individual plaintiff should expect, at least on this particular set of facts.[19] The question must be, therefore, whether this is indicative of an attempt to establish a general minimum Community standard of protection which comes under the heading of "effectiveness" and, if it is, what relationship exists between the fixed Community remedy established in *Francovich* and the domestic procedural rules of national systems.

This article seeks to concentrate on the issue of causation, to illustrate that leaving the national courts to apply the *Francovich* remedy using domestic rules on causation, without further guidance, leaves the individual without any remedy, which obviously will not provide effective protection whatever its requirements.[20] It is our intention to use English rules on causation[21] as a microcosm to illustrate potential difficulties arising from this lack of guidance. This will be particularly

12. Case C-312/93, *Peterbroeck* v. *Belgium* [1995] E.C.R. I-4599; Case C-431/93, *Van Schijndel* [1995] E.C.R. I-4705; see Heukels, Casenote on *Van Schijndel* (1996) 33 C.M.L.Rev. 337; Case C-2/94, *Denkavit* [1996] 2 C.M.L.R. 504.

13. See *Van Schijndel, ibid.* Cf. Case C-213/89, *R.* v. *Secretary of State for Transport, ex p. Factortame* [1990] E.C.R. I-2433; *infra* Section B and Ross, *op. cit. supra* n.13, at p.478.

14. Case C-208/90, *Emmott* [1991] E.C.R. I-4269; cf. Case C-338/91, *Steenhorst Neerings* [1993] E.C.R. I-5475 and Case C-62/93, *BP Supergas* v. *Hellenic Republic* [1995] E.C.R. I-1883; see also *Marshall (II)*, *supra* n.11.

15. Case C-221/89, *Factortame* [1991] E.C.R. I-3905: it could be argued that the availability of the injunction in the case was really a procedural issue, and that the ECJ was merely taking out a procedural barrier.

16. The test acts as a filter to reduce the number of claims which the national court has to adjudicate and, second, the content of those rules is dictated by substantive questions of law: see Williams, "Causation in the Law" [1961] C.L.J. 62; McGregor, "Variations on the Enigma" (1970) 33 M.L.R. 378; Boon, "Causation and the Increase of Risk" (1988) 51 M.L.R. 508; Stapleton, "The Gist of Negligence" (1988) 104 L.Q.R. 389; Price, "Causation: the Lords' Lost Chance?" (1989) 38 I.C.L.Q. 735.

17. See *Factortame (III)*, *supra* n.2, at para.90 and A.G. Jacobs in *Denkavit*, *supra* n.12, at paras.62–74.

18. However, see *Denkavit*, *ibid*, for an attempt by A.G. Jacobs to correlate the two notions.

19. The ECJ specifically indicates that the use of misfeasance in public office as a cause of action in *Factortame (III)* would not be adequate: *supra* n.2, at para.73.

20. See *infra* Sections B and C.

21. English rules on causation are governed by the law of tort: see generally Winfield and Jolowitz, *Tort* (1994); Markesinis and Deakin, *Law of Tort* (3rd edn, 1995).

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acute in a tripartite situation where the individual is suing another entity for damages but has also joined the State as a defendant because a failure to comply with Community obligations has led to the individual suffering loss.[22] Similarly, the causal link between the damage suffered by the plaintiff and the State action detailed in the *Francovich* remedy seems not to carry the same interpretation as the causation requirements in the English courts:[23] in particular, Advocate General Léger in *Hedley Lomas* highlights the possibility of the individual contributing to the occurrence of the damage, thus breaking the chain of causation,[24] a view which is repeated by the Court in *Factortame (III)*.[25] In English law this would be a matter of quantum of damage rather than causation. The difference in meaning must adversely affect the *Francovich* remedy.[26]

The article will be divided into three sections: first, a consideration of the true scope of the doctrine of effective protection to ascertain exactly what the national court is supposed to achieve when it applies the doctrine. Although English rules will be used as the basis for discussion, it is clear that they are merely illustrative of a greater Community-wide problem.[27] Second, with particular reference to the English law rules on causation, specific problems ensuring the "effectiveness" of the *Francovich* remedy will be discussed. As the availability of this remedy is problematic if causation is left solely to national court rules, the article will finally consider Article 215 of the EC Treaty. As State liability is a European creation to be applied uniformly throughout the Community, common sense would suggest the necessity of standard procedural criteria.[28] The Court refers to Article 215 in relation to breach in *Factortame (III)*.[29] Can we similarly extrapolate its rules on causation to establish a Community standard which could be used instead of the sole reliance on national rules?[30] It seems that this is, however, equally difficult.

B. Effective Protection: a Single Coherent Doctrine?

The development of effective protection can, on one perspective, be viewed as an *ad hoc* affair on the part of the European Court, led primarily by the need to ensure that EC law was used and enforced within each member State. Early cases illustrate the inherent conflict within this approach: that is, ensuring that the indi-

22. This would necessitate the proof of a manifest and serious breach on the part of the State: *Factortame (III)*, *supra* n.2.
23. See detail on English law of tort *infra* Section C.
24. *Hedley Lomas*, *supra* n.5, at para.189.
25. *Supra* n.2, at para.79.
26. See *infra* Section B.
27. Van Gerven, *op. cit. supra* n.8.
28. This may be a manifestation of the principle of subsidiarity as it has sometimes been applied by both the Commission and the Court: see Commission's interpretation of the principle in Case C-91/95P, *Tremblay* v. *Commission* (judgment 24 Oct. 1996); and the ECJ's interpretation in Joined Cases C-319/93, C-224/94, C-40/94, C-399/93, *Dijkstra & Luttikius* [1995] E.C.R. I-4471 and 4515, para.26.
29. *Supra* n.2, at para.29.
30. It is clear that the remedy created by *Francovich* and *Factortame (III)* is a Community law remedy. If the issue of causation is left to the national courts, it is evident that problems of uniformity will result; however, this discussion is beyond the scope of this article: see generally Honore, "Causation and Remoteness of Damage", in T. Tunc (Ed.), *International Comparative Law* (1983), p.xi, chap.7; Van Gerven, *op. cit. supra* n.8.

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vidual's Community rights are protected, whilst reassuring member States that the Court is not interfering significantly in domestic legal systems.[31] However, a lack of coherence renders application of the notion by national courts problematic within their own legal systems. There are, however, a number of ways to explain the diverse jurisprudence: first, the Court will not interfere with those rules it deems to be procedural in nature and, conversely, it will set aside those rules it deems to be substantive.[32]

This bifurcated approach to "effectiveness" is, however, too simplistic. The Court has sought removal of domestic procedural rules where they interfere with the individual's "effective enjoyment" of Community rights, thus creating "new" national remedies where previously none existed.[33] This judicial approach must be much broader than the narrow distinction between procedural and substantive rights as it involves merely the removal of the procedural bar to create the remedy: *Marshall (II)*[34] saw the removal of the statutory maximum level of the damages that the individual was permitted to claim in an unfair dismissal action. Although one interpretation of this could be that the Court was indeed creating a new substantive remedy at national level, the alternative is that it was simply removing a procedural bar so that the individual was, in fact, still receiving compensation, but that this was more commensurate with her perceived loss. It has been argued in relation to interim injunctions that the Court did require national courts to create new substantive remedies at the domestic level where previously none existed.[35] However, this could alternatively be explained on the basis that the Court was merely facilitating an individual's "effective enjoyment" of his or her Community rights by removing the procedural rule that prevented the individual from obtaining an injunction against the Crown. Therefore, the boundary between procedure and substance may be simply a matter of perspective.

Thus, although on one interpretation the Court may be encouraging domestic courts to create new *substantive* remedies at national level, the notion of "effectiveness" cannot be confined merely to the creation of substantive remedies because the dividing line between procedure and substance is uncertain. This is particularly acute when the national court tries to ascertain whether the remedy it is awarding to the individual does indeed effectively protect that individual's Community rights, especially as the European Court has suggested a differentiated approach.[36] The problem is crucial for an issue like causation which could fall into either category. It could be viewed as a national procedural rule which is only one

31. See *Emmott* and *Steenhorst*, *supra* n.14.

32. See *Van Schijndel*, *supra* n.14: the ECJ remarked that it was for the parties alone to take the initiative to raise matters of Community law and that it would only be in exceptional cases that the ECJ would require domestic courts to raise the matter on their own initiative: para.21. See also Hoskins, "Tilting the Balance: Supremacy and National Procedural Rules" (1996) 21 E.L.Rev. 365.

33. See Szyszczak, "European Community Law: New Remedies, New Directions?" (1992) 55 M.L.R. 399.

34. *Supra* n.13; see also *Emmott*, *supra* n.14 subject to the limitation discussed by Advocate General Jacobs in *Denkavit*, *supra* n.12, at para.71.

35. See Ross, *op. cit. supra* n.13.

36. *Supra* n.2; also Szyszczak, "Making Europe More Relevant to its Citizens" (1996) 21 E.L.Rev. 351.

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hurdle that the individual must overcome in order to prove his or her case. Here the Court will not interfere. Alternatively, causation could be seen as a substantive requirement which, if not successfully fulfilled by the individual, may actually lead to a complete failure to obtain a remedy, thus actively preventing "effective enjoyment" of Community rights.[37] In contrast to the position regarding procedural rules, the Court has interpreted EC law as requiring national courts to remove such barriers.

A second, perhaps more coherent, definition of "effectiveness" can be seen in the recent line of cases following *Factortame (III)*.[38] The Court here is arguably blurring the distinction between procedural and substantive rules and replacing it with a minimum standard of protection which the individual can expect when the national court awards him or her a remedy. Although the Court starts with the usual rhetoric[39] that the individual must obtain a remedy in accordance with the "domestic rules on liability", reiterating the familiar "non-discrimination" rule, it then goes further and details specific instances when the individual would not be effectively protected by national law.[40]

The two previous theories have not made a distinction between cases involving State liability and those not. Following Advocate General Jacobs's opinion in *Denkavit*,[41] however, a distinction can be drawn between the standard of "effectiveness" where there is a possibility of a remedy of damages against the member State and the different case where there is not necessarily a manifest and serious breach which would occasion a consequent award of damages for State liability. In certain circumstances, even if the individual would not also be entitled to damages under State liability, he or she may still be entitled to have procedural bars set aside if the effective protection of his or her Community law rights was made "excessively difficult" by national procedural rules. Although the Advocate General specifically refers to time limits in his argument,[42] this may also be the case for other domestic rules like causation. This leads to an undesirable situation where the national court is applying different tests depending on whether or not there is a manifest and serious breach of Community law.

Notwithstanding these difficulties, the application of "effectiveness" to questions of causation is unlikely to leave national courts having to make complex assessments as to the degree to which the individual needs to be recompensed to satisfy the effectiveness requirement. Instead, the question is the way causal rules operate: if there is no causal link between the applicant's loss and the breach the applicant has no remedy—unlike *Marshall (II)* and *Von Colson*[43] where the question was not availability of the remedy but the amount the plaintiff was entitled to

37. This will be even more acute if different national rules have different perceptions of the place that causation plays: see Van Gerven, *op. cit. supra* n.8 and Honore, *op. cit. supra* n.30.

38. See Emiliou, *op. cit. supra* n.8.

39. *Factortame (III)*, *supra* n.2, at para.67.

40. The ECJ specifically states that misfeasance in public office as a cause of action would make the enjoyment of the Community right "excessively difficult": *idem*, para.72.

41. *Supra* n.12.

42. *Idem*, para.78.

43. *Marshall (II)*, *supra* n.11, at para.24, and *Von Colson*, *supra* n.9, at para.28.

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recover. It is our contention that causal rules will operate in the majority of cases so as to exclude the applicant's claim, thus eroding the idea of State liability as a viable remedy.

Although there may be many problems inherent in leaving the issue of causation to national rules, this article seeks to concentrate solely on the difficulties encountered by a plaintiff bringing an action in England and Wales[44] for damages against the State following *Francovich*.

C. *Causation: the Inherent Difficulties of Establishing* Francovich *Liability in English Law*

Non-contractual liability in English law is governed by the law of tort. This is set firmly within the common law tradition and relies heavily on judge-made law guided by the doctrine of precedent.[45] Success for the individual bringing the case depends on successfully satisfying a series of legal tests which are regarded as distinct, although the facts that allow success in one test may also be used to satisfy another.[46] The plaintiff must prove that he or she was within the range of possible individuals who could have been harmed by the defendant's actions, that the damage inflicted was of the type expected, and that the defendant caused the loss or damage sustained by the plaintiff. It is with this element that we are concerned here. Tort divides the causation enquiry into two hurdles: first, the "but for" test: whether the defendant's action was, in fact, a cause of the damage suffered; and second, "remoteness": whether the defendant's action was a cause of the loss in the sense that it was a "necessary condition to produce that loss".[47] This is often seen as a test of foreseeability.

Tort is about compensating the plaintiff. The primary role causation plays is to act as a filter so that only those defendants deemed directly responsible for the loss caused to the plaintiff are held liable for that loss. Whereas State liability has undertones about ensuring effectiveness by rendering non-compliance less attractive,[48] domestic policy does not contain those same imperatives. It may thus be that the case law drawing the boundaries of causation within the domestic sphere is not appropriate to State liability actions.

Traditional tortious theory requires the individual to prove, first, that "but for" the act or omission he or she would not have suffered the damage,[49] sometimes referred to as "causation in fact"; and, second, that the damage suffered is not too remote from that which would have been expected from the chain of events[50]—or, as Winfield states, "whether the defendant's act is sufficiently important to justify

44. Scotland has its own separate legal system which has different rules for non-contractual liability: see Philips, "Lost Chances in Delict: All or Nothing?" (1995) 5 Juridical Rev. 401.

45. See Winfield and Jolowitz, Markesinis and Deakin, both *op. cit. supra* n.21. On the doctrine of precedent in English law generally, see R. Cross and J. W. Harris, *Precedent in English Law* (4th edn, 1991).

46. This can be the case with causation: see *Overseas Tankship (UK) Ltd* v. *Morts Dock and Engineering Co. Ltd, The Wagon Mound (No.1)* [1961] 1 All E.R. 404 (PC).

47. Winfield and Jolowitz, *op. cit. supra* n.21, at p.155.

48. *Factortame (III)*, *supra* n.2.

49. Winfield and Jolowitz, *op. cit. supra* n.21, at p.147.

50. Winfield and Jolowitz and Markesinis and Deakin both *supra* n.21.

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imposing liability on him".[51] The difficulty for State liability therefore is that the individual will receive a financial award from the State only when there is a causal link between the damage caused to the individual and the State's act. Proving this link is difficult if the individual and the State are not in a direct relationship, for example where the State implements legislation in contravention of Community law,[52] but the individual's damage is "caused" by a company acting in reliance on that legislation. Here, unless the necessary link could be established, under English causal rules the State will not be deemed to be a contributor to the individual's loss.[53] Even if a relationship is deemed to exist and an award of damages is made against the State, it will be orientated to the damage suffered by the plaintiff as the purpose of the tortious rules is merely to compensate the individual. Although this may give the individual an adequate remedy, it may not deter the State from acting in that way again.[54] As damages are assessed by reference to the plaintiff's loss it is arguable that, where such loss is small, the only way that the appropriate level of damages could be achieved would be by way of an award of exemplary damages.[55] Such an award would be problematic in the law of tort, even if the correct causal relationship could be established.[56]

1. "But for test"

Under the first limb of the causation test the national court places the emphasis on the historical events leading up to the loss incurred by the plaintiff,[57] so that it is necessary to establish whether, on a balance of probabilities, the State was in some way responsible for the loss incurred. This raises no difficulties in a "pure" *Francovich* situation: here it is possible to argue that "but for" the Italian government's failure to implement the Council directive on time,[58] Francovich would not have incurred the loss he did, as his outstanding wages would have been paid out of the fund which the directive envisaged being established.[59] It was the State which had to arrange for the establishment of the body, it failed to do so, and so Francovich lost out financially. Clearly, no other party intervened to "break" the causal chain of events.[60] These factors are crucial in the causation assessment, and it will be argued that only in such a bipartite factual situation will it be possible for the State

51. Winfield and Jolowitz, *op. cit. supra* n.23, at p.148.
52. *Harvey* v. *Institute of the Motor Industry (No.2)* [1995] I.R.L.R. 416.
53. This was held to be the case despite the fact that the State was the sole shareholder in a public company. The company was deemed to be dealing at arm's length with the State, and therefore should be liable for any breach: *Doughty* v. *Rolls-Royce* [1992] 1 C.M.L.R. 1045.
54. The ECJ recognised that in certain circumstances an award of exemplary damages should be available, but left the rules to the national courts: *Factortame (III)*, *supra* n.2, at para.89. The award of such damages would be unlikely in English law.
55. The ECJ has also made it clear elsewhere that compensating the victim may not be enough: *Von Colson*, *supra* n.9.
56. The law on the availability of exemplary damages is uncertain in the UK.
57. *McGhee* v. *National Coal Board* [1972] 3 All E.R. 1008, 1011 (*per* Lord Reid).
58. *Francovich*, *supra* n.1, at p.5361.
59. Subject to the decision in Case C-479/93 *Andrea Francovich* v. *Italian Republic* [1995] E.C.R. I-3843.
60. Francovich may not now be able to recover damages in this situation: *ibid.*

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to incur liability directly under the tort rules in this area. Even if national rules have the potential to include a three-party situation, the national courts here appear to be reluctant to find the State liable in any circumstances despite the existence of State fault.[61] An Employment Appeal Tribunal even went so far as to declare that as a matter of principle it thought it would be more desirable for liability to be placed on employers rather than the State.[62]

It is axiomatic that the State will also be liable under the first limb of the causation test for an omission, perhaps a complete failure, to implement a directive, as this comes directly within the sphere of the *Francovich* factual situation. However, the answer may not always be so simple under English law. There are two main problems: first, if the damage would, on a balance of probabilities, have occurred anyway,[63] and, second, if the State's inaction is only one of a number of causes of the damage. In both these cases, the State incurs no liability.[64] In the former situation the State's failure to implement the directive may be merely one factor which leads to the individual's loss.

The second obstacle is where the State's failure to act is merely one of a number of causes of loss. Here it is unclear whether it is possible to show that the State's inaction directly contributed to the loss suffered by the individual. National courts have recognised that it will not be possible to allocate the loss solely on the application of the "but for" test,[65] and so in "appropriate circumstances"[66] if the State inaction "materially" increases the risk to the individual, the burden of proof can be reversed and the State must prove that it did *not* contribute to the loss.[67] Following *Wilsher*,[68] however, the court must consider every possible causal factor in turn so that the State will be liable in this manner only if its inaction has increased the risk that a causal factor will contribute to the injury.

Although *Francovich* involved a complete omission by the State to implement a directive, the principle extends to cover the situation where the State does implement the relevant Community rules but fails to give effect to their spirit, where this is clear from the wording of the directive:[69] this is just a further formulation of the failure to implement.[70] Thus, the same causation issues arise and so, on a straightforward application of the "but for" test, had the State not transposed the directive incorrectly, the employer, for example, would not have acted in

61. *Biggs* v. *Somerset County Council* [1995] I.C.R. 811 (confirmed on appeal [1996] 2 All E.R. 734). Note *R.* v. *Secretary of State for the Home Department, ex p. Gallagher* [1996] 2 C.M.L.R. 957 on the application of the State liability principles.

62. *Harvey*, *supra* n.53, at p.420.

63. *Barnet* v. *Chelsea & Kensington Hospital Management* [1968] 2 W.L.R. 422.

64. *Wilsher* v. *Essex Area Health Authority* [1988] 2 W.L.R. 557.

65. *McGhee*, *supra* n.57; see also Weinrib, "A Step Forward in Factual Causation" (1975) 38 M.L.R. 518.

66. Boon, *op. cit. supra* n.16, at p.513.

67. This appears to be the interpretation placed on the use of the *ratio* in *McGhee*, *supra* n.57, by the House of Lords in *Wilsher*, *supra* n.64.

68. *Wilsher*, *ibid.*

69. On States' obligations in regard to Community legislation, see Wyatt and Dashwood, *EC Law* (1993), chap.4. On incorrect implementation see *BT*, *supra* n.5; also E. Steyger, *Europe and its Members: A Constitutional Approach* (1995), pp.16–19.

70. Some commentators have argued that the *Francovich* judgment has even more far-reaching implications; see Ross, *op. cit. supra* n.3.

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reliance on it and so the individual would not have suffered loss. Similar problems relating to multiple causes may also arise here.

An interesting correlation to the State's inaction in Community rules could occur in the realms of competition law: here, under Article 90(1) of the EC Treaty, the State is under an obligation in relation to public undertakings, or to those to which it has granted "special or exclusive rights", "neither [to] enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in ... Articles 85 to 94".[71] If all the requisite elements of Article 90(1) are fulfilled, and the State fails in its obligation to ensure there is no consequent breach of the competition rules, *Francovich* damages may be available.[72] The difficulty here would be how it would correspond with the factual causation test: for example, if a company wished to enter the market in which a privatised utility was still dominant, and was prevented due to the State's failure to monitor that undertaking's operating practices effectively, would the rules on causation allow that company to recover? This would be unlikely, first, because the company may have failed to enter the market anyway despite the utility's actions and, second, because there is really no quantifiable loss:[73] what has occurred is that the company has merely lost the chance to enter the market.

Whether the company could rely on a plea of "lost chance" is uncertain, especially following the House of Lords judgment in *Hotson* v. *East Berkshire AHA*.[74] Here there was an attempt to argue that, as it was not possible to prove on a balance of probabilities that the injury "more likely than not" caused the plaintiff's injury, could the damage be reformulated so that it was the "lost chance" of *avoiding* the damage that would become the basis of the claim?[75] This was, however, rejected by the Court of Appeal[76] on the ground that, although there did appear to be a general 25 per cent chance that the plaintiff would contract the disease in question, he had not been able to prove that *he personally* had that 25 per cent chance.[77] The House of Lords[78] did not decide the case on this basis. Some commentators have argued[79] that this path of recovery is still possible for plaintiffs. If this is the case, it could be a useful formulation for claims under *Francovich*, because the plaintiff is trying to prove that due to State action/inaction, he or she has lost the chance of being protected by Community law or has lost the chance of

71. However, liability of the member State may be problematic following a return to a more formalistic interpretation of Art.90(1) in Case C-2/91, *Meng* [1993] E.C.R. I-5751; see Reich, "The 'November Revolution' of the Court of Justice: *Keck*, *Meng* and *Audi* Revisited" (1994) 31 C.M.L.Rev. 459.

72. Ross, *op. cit. supra* n.3, at p.67; see *Von Colson*, *Rewe* and *Comet*, all *supra* n.9.

73. See *infra* Section D.

74. [1987] 2 All E.R. 908 (HL); cf. *Chaplin* v. *Hick* [1911] 2 K.B. 786 confirmed by *Allied Maples Group plc* v. *Simmons & Simmons* [1995] 1 W.L.R. 1602, 1610 (*per* Stuart-Smith LJ).

75. Hill, "A Lost Chance for Compensation in the Tort of Negligence by the House of Lords" (1991) 54 M.L.R. 511, 511; Lunney, "What Price a Chance?" (1995) 15 L.S. 1; Rees, "Loss of Chance in the Law" (1996) 59 M.L.R. 188.

76. *Hotson* v. *East Berkshire AHA* [1987] 1 All E.R. 210, 223 (CA).

77. Hill, *op. cit. supra* n.75, at p.515: Hill differentiates the type of chance, distinguishing a "personal chance" which would allow the plaintiff to recover from a mere "statistical chance" which would not—cf. Rees's (*op. cit. supra* n.79) philosophical approach.

78. *Hotson*, *supra* n.74, at p.915 (*per* Lord Mackay).

79. Hill, *op. cit. supra* n.75, at p.516; cf. Stapleton, *op. cit. supra* n.16.

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suing the body with whom he or she has a tortious relationship. This formulation of the factual causation test would overcome some of the vagaries of the "but for" test as referred to earlier in this discussion, and should certainly allow State liability where a strict application of the "but for" test would appear to negate such a finding.[80]

2. *Remoteness*

Although the issue of remoteness would not be a consideration for the tort of breach of statutory duty, it is included here for the sake of completeness. It is, however, interesting to note that this will not be a major hurdle for the plaintiff to overcome when claiming a remedy against the member State. Once an individual has successfully overcome the "but for" test, he or she must then prove that the cause of that loss was a "necessary condition to produce that loss".[81] This is traditionally seen as a test of "reasonable foreseeability", so that the individual will be able to claim for breach only in cases where the loss is not deemed too remote.[82]

In particular, the individual must go on to show that the *kind* of damage suffered was foreseeable.[83] The question here is: should the State still be responsible for the loss because it failed to implement the directive which started off the chain of events? The answer here may depend on what we see as being the purpose of State liability, in particular the emphasis to be put on the deterrent aspect of the remedy.

Additionally, the individual must prove that the State was the "proximate cause" of the loss. Although the tortious rules relating to causation of fact and remoteness are dealt with as distinct issues, it is clear that there will be a considerable degree of overlap in the relevance of issues to the individual factual situations already detailed. Clearly, if the situation involves the possibility of more than one defendant, the court must establish which action can be seen as the "proximate cause" of the damage.[84] In the case of State liability it will be difficult to establish conclusively that the State is the proximate cause unless there is a clear and uninterrupted chain between the State's action and the individual's loss. In the cases which are the subject of the recent decisions[85] it would appear that there is a clear causal link between the State's action and the loss suffered by the individual. Issues relating to remoteness, especially type of damage, raise fewer difficulties than the determination of the "but for" test: yet, as more potential defendants are introduced into the equation, the State may be viewed as too remote to be held responsible for the damage caused.

80. The facts of *Hotson* would traditionally fit within the difficulties engendered by multiple causes, and also the problem of whether the damage would still have occurred without the doctors' negligence.

81. Winfield and Jolowitz, *op. cit. supra* n.21, at p.155.

82. *Wagon Mound*, *supra* n.47: this test has caused considerable difficulties and has generated considerable academic comment. See Davies, "The Road From Morocco: *Polemis* Through *Donoghue* to No-Fault" (1982) 45 M.L.R. 534; Honore, *op. cit. supra* n.30.

83. *Wagon Mound*, *ibid*, and *Tremain* v. *Pike* [1969] 3 W.L.R. 1556.

84. See generally Winfield and Jolowitz, *op. cit. supra* n.21, at chap.26 and Markesinis and Deakin, *op. cit. supra* n.21, at p.342.

85. *Factortame (III)*, *supra* n.2 and *Hedley Lomas*, *supra* n.5.

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3. Other problems

Thus, the difficulty of leaving causal questions to the national courts is that the law of tort might not achieve the desired result. This is compounded by the flexibility that the rules inherently have, potentially allowing national courts to find State action/inaction too distant unless there is a blatant link of the type in *Francovich* itself. Another concern relates to the method of dealing with contributory negligence. Advocate General Tesauro states the general proposition that the causation issue should be left to the national courts,[86] and then argues that the conduct of the plaintiff will also play a part in the determination of this issue, thus apparently equating the finding of the causal link with contributory negligence.[87] The difficulty thus engendered is that the plaintiff's action could be deemed to be a *novus actus* breaking the chain of causation rather than constituting contributory negligence. In this case, under English law, the State, as defendant, is completely exonerated from liability as the *novus actus* is deemed to be a complete defence as compared with contributory negligence, which goes only to the consideration of mitigation and consequential reduction of compensation.[88] This approach may limit the number of successful claims, as has occurred in the jurisprudence on Article 215(2) of the EC Treaty.[89]

The preceding analysis of the rules on causation in the law of tort has sought to highlight the difficulties which are apparent in determining State liability. Not only are the legal hurdles numerous but they are not designed to deal with the tripartite relationship likely to be found in State liability cases. It may be necessary to modify these rules to take into account the need to ensure that the individual's rights are "effectively protected". However, the difficulty here is that this would substantially alter the way in which the English causation rules work. Essentially, the result would be two different sets of causation rules: one solely for State liability, and the usual rules for domestic cases. One possible solution to this problem may be to recognise that the *Francovich* remedy is a creature of Community law, as the Court has already laid down basic standards of protection, and incorporate the rules on causation which the Court has formulated in the context of Article 215(2).[90]

D. Article 215(2) of the EC Treaty

There has been much discussion over the degree to which Article 215(2) is analogous to the *Francovich* situation, but this has centred on the questions of breach and culpability. We will not revisit these arguments but, bearing in mind the centrality of causation to any tort,[91] a starting point for a coherent system of

86. *Factortame (III)*, *idem*, para.97.

87. *Idem*, para.98 Advocate-General's Opinion. This approach is also taken by the ECJ in this case, at para.79.

88. Markesinis and Deakin, *op. cit. supra* n.21, at p.183. See also Zweigert and Kotz, *Introduction to Comparative Law*, Vol.II (2nd edn, 1987).

89. See *infra* Section D.

90. Suggested by the ECJ in *Factortame (III)*, *supra* n.2, at para.41.

91. Zweigert and Kotz, *op. cit. supra* n.88. See also in relation to Art.215(2) Case 36/62, *Société des Aciéries du Temple* v. *High Authority* [1965] E.C.R. 938, para.8. Also A.G. Tesauro in *Factortame (III)*, *idem*, para.97.

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rules must be the identification of any themes in the Court's jurisprudence regarding Article 215(2). In this there are two main areas of concern: the degree to which the use of Article 215 could form the basis of a single coherent body of unified causation rules for the *Francovich* remedy;[92] and the extent to which they could provide an effective remedy if they were used merely in their current form.

1. A coherent body of causation rules for the "Euro" remedy

The Court does not consider the question of causation in its judgments under Article 215(2) in great detail, partly because there are relatively few cases in which the Court finds there has been breach of a superior rule of law; even where breach is found, there is little explanation of the Court's reasoning and even the Advocate Generals' opinions add little to our understanding.[93] This makes it difficult to identify coherent guidelines in this area.

It is clear, though, that for the Court causation can mean many issues: the categories used in English law[94] are all intermixed under the broad term "causation" at European level. In *Finsider*, for example, the Advocate General refers to a "but for" test:[95]

> If it appears that the harm would have occurred even in the absence of fault on the Commission's part—because of failure by undertakings to comply or because the Commission thought that the quotas should be reduced—then harm is not linked to fault.

Equally, the Court has discussed issues relating to what in England is called remoteness.[96] Despite the academic tradition in England of distinguishing between the two issues, in practice this is not so easy. Does it therefore matter if the Court does not distinguish the two? The problem is that the lack of clarity exacerbates the difference in approach between the English courts (and possibly other national courts) and the European Court. Assuming Article 215(2) jurisprudence does become the basis for causation in State liability claims, this might lead to errors when the national courts have to apply causation rules which are deceptively similar to, but not the same as, national rules, which themselves are not uniform across Europe. Thus, despite the superficial attraction in terms of ensuring uniformity of trans-European application of causation rules, such uniformity may be endangered. It may be that the Court should consider whether it would not be better to adopt clear, precise and consistent guidelines for the national courts rather than to leave them to operate on the basis of Article 215(2) jurisprudence to limit the incidence of this problem.

92. The ECJ thought Art.215 should be able to play some role in this remedy: *Factortame (III)*, *idem*, para.28.

93. E.g. A.G. Tesauro in Case C-308/87, *Grifoni* [1990] E.C.R. I-1203, para.30.

94. Distinction between causation in fact and remoteness. Germany also adopts this bifurcated view. There is also overlap between *novus actus*, contributory negligence and the requirement for mitigation. It seems that the ECJ is adopting an approach similar in parts to that used in France. See Honore, *op. cit. supra* n.30. Questions relating to actual and certain damage also intrude: Case T-478/93, *Wafer Zoo* v. *Commission* [1995] E.C.R. II-1479.

95. Cases C-363 and 4/88, *Finsider* v. *Commission* [1992] E.C.R. I-359.

96. E.g. Case 310/81, *EISS* v. *Commission* [1984] E.C.R. 1341, Case 239/78, *Dumortier Frères* [1979] E.C.R. 3091, and Case T-168/94, *Blackspur DIY Limited* v. *Council* [1995] E.C.R. II-2628 (Blackspur has appealed).

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2. Effectiveness

Looking at whether Article 215(2) will facilitate individuals' "effective enjoyment" of their Community rights several points arise: the use of the plaintiffs behaviour as an intervening cause; the approach concerning multiple causes; and the interpretation of remoteness.

The Court's judgments concerning the impact of claimants' actions on causation restrict their ability to claim damages successfully. The basic principle is not controversial: that the acts of a claimant can constitute an intervening action breaking the causal link between the defendant's action and the harm the claimant suffers. This seems to be accepted throughout the Community[97] although the boundary between it and contributory negligence, which, in England, relates to quantum, is unclear. Seeing the claimant as the intervening cause normally bars him or her completely from a remedy and he or she will usually have to bear substantial costs too. In view of considerations of effectiveness and the level of culpability required to show liability in the first place, this distinction will have to be carefully considered.

In *Continental Can*[98] the Court discussed the possibility of a claimant constituting an intervening cause. Here, the claimants had entered into a contract relying on a Council regulation which included a draft of a second regulation to be enacted after the United Kingdom's accession to the Community. The Act of Accession itself contained provisions to deal with unusual market circumstances which the (draft) regulation did not contain. The circumstances foreseen by that Act occurred and the Council subsequently enacted a regulation in a form different from that envisaged by the first regulation. The plaintiffs consequently suffered loss on the contract. What is in question here, however, is not the claimant's action but its failure to take action. The Court said:[99]

> One must ask not only whether the conduct in fact caused the wrong impression on the applicant's part that the compensatory amounts would remain fixed in spite of Article 55(6), but also whether it could and should have caused such an error in the mind of the prudent person.

Thus, this case was not even looking at what the claimant itself did or should have done, but what the Court thought a reasonable person should have done. Moreover, this test was very strictly applied. Applying the approach in this case to other facts, we might have thought that a prudent Mr Francovich should have realised that his company was on the verge of insolvency and that the Italian government had not implemented the relevant directive: he could have avoided loss by looking for another job.

The difficulty seems to be that the same policy reasons justifying the high burden of proof in the *Schöppenstedt*[100] test have also influenced the Court when

97. Joined Cases C-104/89 and C-37/90, *Mulder and Others* v. *Commission* [1992] E.C.R. I-3061, para.33.

98. Case 169/73, *Compagnie Continental* [1975] E.C.R. 117.

99. *Idem*, para.22.

100. Case 5/71, *Aktien Zuckerfabrik Schöppenstedt* v. *Council* [1971] E.C.R. 975. The ECJ held that liability does not arise in the case of legislative action involving measures of economic policy, "unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred": para.11.

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determining causation in Article 215(2) cases. The argument is that, in making policy decisions, some elements of the population are likely to benefit at the expense of others no matter what the policy. In view of the wide impact of legislative acts, once an action is allowed the class of applicants is likely to be large. Similarly, finding a causal link between a legislative act of a Community institution and damage to an individual may lead to many further successful litigants. Contrast the position in *Grifoni*,[101] which concerned a personal injury claim rather than a claim based on a legislative act. Grifoni, an experienced contractor, was inspecting the roof of an EAEC building, there were no safety rails and he fell off the roof. Causation was shown despite his failure to take any precautionary measures himself. Rather than excluding his claim completely as might have been indicated by previous decisions, the Court reduced his damages by 50 per cent on the basis of contributory negligence.

Mulder,[102] a case assessed under the *Schöppenstedt* formula, might, however, be seen as indicating a break with previous authority regarding legislative acts. There, the Advocate General approved the idea that a plaintiff's action could constitute a *novus actus*,[103] but did not argue that this had happened here. Instead, the plaintiffs' failure to limit their loss was considered under quantum of damage. This different approach was not, however, discussed by the Court. Moreover, one case does not signal a change in the Court's approach, as more recent cases indicate.[104]

It is questionable if this strict approach is suitable for State liability claims.[105] Member States are implementing Community obligations and therefore do not usually have the wide range of considerations to balance which justify the strict approach under Article 215(2) regarding legislative actions. Furthermore, bearing in mind the requirement of a "manifest and serious" breach of duty before liability under *Francovich* is established, only limited numbers of claims will succeed and these will be in circumstances of reasonably clear State wrongdoing. In view of this, and taking into account the need to protect individuals' rights, it would seem more appropriate that these factors affect quantum of damage rather than determine liability. Further, the distinction between quantum and causation assumes increased importance when one considers the possible factual permutations. There is a difference between the situation where the act of the plaintiff in part causes the accident and, at the other end of the scale, where the plaintiff's omission results in increased loss. From the Court's jurisprudence on Article 215, however, there is no indication that it makes any such distinction.[106] Recently, in *Blackspur*,[107] the Court of First Instance suggested that there was no causal link between the applicants' loss and the Commission's wrongdoing because the plaintiffs failed to enter into replacement contracts. This confuses the incident causing loss with

101. *Supra* n.93.
102. *Supra* n.97.
103. *Idem*, para.38.
104. E.g. Case T-572/93, *Odigritria* v. *Council* [1995] E.C.R. II-2025; Cases C-258 and 259/90, *Pesquerias De Bermeo & Naviera Laida* v. *Commission* [1992] E.C.R. I-2901.
105. See the Bundesgerichtshof in *Brasserie du Pêcheur*, *supra* n.7.
106. *Mulder* and *Grifoni* (*supra* nn.97, 93) may be rare examples.
107. *Supra* n.96. This is a case involving unsatisfactory plaintiffs, however, and there may well be other reasons for stating that their claim should not succeed.

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the obligation to mitigate and should not be transferred to State liability actions. Fault on the part of the plaintiff should have to be clear to break the causal link, especially in circumstances where the legislation was designed to protect the plaintiff.[108]

In addition, the Court's failure to distinguish between actions and omissions when assessing *novus actus* under Article 215(2) means that a plaintiff is less likely to succeed.[109] It is harder for a potential plaintiff to calculate the results of failure to act than to foresee the consequences of a wrongful act, especially if the chain of causation might be broken as a result. Further, the question remains how far potential plaintiffs will be expected to go before they have satisfied the obligation to act to show that they have not broken the chain of causation. Under Article 215(2) this seems to be an onerous requirement. For State liability one possible requirement would be the exhaustion of other remedies in national courts. This would, however, put another hurdle in the way of plaintiffs and the authors therefore concur with the reservations about this approach expressed by Advocate General Léger.[110]

Although causation in fact proves a significant stumbling block to many claimants under Article 215, the rules relating to foreseeability have also been applied strictly. Both *Dumortier*[111] and *Blackspur* suggest that the Court is taking a very narrow approach indeed. Assuming that a company became insolvent as a result of unlawful Community actions, surely a foreseeable, and even direct, consequence of that insolvency would be costs arising immediately out of the insolvency? This has not been the approach that the Court has taken. Similarly, in *EISS*,[112] bank charges incurred on a bank account which became overdrawn as a result of non-payment of money by the Commission were held to be too remote. This again limits the effectiveness of the *Francovich* remedy.

Overall, the case law on Article 215 applied merely in its current form is less likely than English domestic law to provide effective support for *Francovich*. Both the confusion, potentially leading to conflicting decisions within national systems, and the narrow approach adopted by the Court will limit the usefulness of the Article to State liability. The latter arises out of the concern the Court has exhibited to limit financial consequences of Community wrongful acts, especially legislative acts. By contrast, the functions of State liability are different: ensuring effectiveness of the Community order whilst also protecting individuals' rights. The policy approach under Article 215(2) thus seems inappropriate for State liability. Further, the Advocates General have commented that, as regards the question of breach, the *Schöppenstedt* formula has been too rigorously applied. The same seems also to be true of questions regarding causation. Perhaps one other conclusion that can be drawn from this discussion is that the law regarding Community non-contractual liability also needs overhauling.

108. This approach was suggested in *Stavely Iron and Chemical Co.* v. *Jones* [1956] A.C. 607, 628 (*per* Lord Tucker).
109. E.g. *Continental Can*, *supra* n.98.
110. *Hedley Lomas*, *supra* n.5, at para.192.
111. *Supra* n.96.
112. *Ibid.*

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E. Conclusion

Causation is an important question affecting the scope of tortious causes of action and delimiting the cases in which a plaintiff may succeed. Causation is therefore a pivot about which the rights and interests of plaintiffs and defendants are balanced. The question posed here relates to how that balance in the State liability action should be weighted. Currently, this seems to be in favour of the defendant, which, in view of the conflicting consequences of "sufficiently serious breach" and the imperatives of effectiveness, may not be appropriate. This article has illustrated that, within England and Wales, causal rules may exclude State liability claims because of the interrelationship of the tripartite factual pattern with the "but for" test and that, although European guidelines are necessary, those under Article 215(2) of the EC Treaty are at present too strict. Action is therefore necessary, but whether this will be most appropriately dealt with by reassessing Article 215(2) or facing the question directly in the next State liability case is another question.

FIONA SMITH and LORNA WOODS*

LIABILITY OF MEMBER STATES IN DAMAGES: THE PLACE OF DISCRETION

A. Introduction

In *Francovich*[1] the European Court of Justice set out the conditions of liability of member States in the case of non-transposition of directives: first, the directive must confer rights on individuals; second, it must be possible to determine the content of those rights from the provisions of the directive; and third, there must be a causal link between the breach of the State's obligation and the damage suffered.

In a recent line of cases (*Brasserie du Pêcheur and Factortame (No.4)*, *British Telecom*, *Hedley Lomas*, *Dillenkofer*)[2] the Court has confirmed that there is a general principle of liability for breach of Community law. In other words, liability is not limited to non-transposition of directives and may exist, for example, in relation to defective transposition of directives and for breaches of Treaty provisions. The recent cases have also sought to bring member State liability more in line with the principles governing the non-contractual liability of the Community

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1. Cases C–6 and 9/90, *Francovich* v. *Italy* [1991] E.C.R. I–5357, [1993] 2 C.M.L.R. 66.

2. Cases C–46 and 48/93, *Brasserie du Pêcheur* v. *Germany*, *R.* v. *Secretary of State for Transport, ex p. Factortame* [1996] 1 C.M.L.R. 889; Case C–392/93, *R.* v. *HM Treasury, ex p. British Telecommunications Plc* [1996] 2 C.M.L.R. 217; Case C–5/94, *R.* v. *Ministry of Agriculture, Fisheries and Food, ex p. Hedley Lomas (Ireland) Ltd* [1996] 2 C.M.L.R. 391; Cases C–178, 179, 188 and 190/94, *Dillenkofer* v. *Germany* [1996] 3 C.M.L.R. 469. Henceforth, *Brasserie* (except where one of the cases is being specifically referred to, which should be obvious from the context), *British Telecom*, *Hedley Lomas* and *Dillenkofer*.

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