National applications of *Francovich* and the construction of a European administrative *jus commune*  
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**EC law; Legal systems; Member States; National courts; State liability**  

This article concerns the domestic judicial response to the Francovich doctrine of state liability for breaches of Community law. It analyses numerous national courts’ judgments dealing with various aspects of the reception and application of the Francovich doctrine (acceptance of the principle as valid for all branches of the state; application of the three main elements of the doctrine; damage and compensation issues; jurisdictional and procedural matters; and application outside the Community scope). It highlights various factors which affect the domestic reach of the doctrine, such as the strength of national legal and political traditions; the degree of fit between national rules and Community law; concerns for coherence, legal certainty, democracy, and the protection of individuals’ interests; the sensitivity of substantive issues at stake; the degree of Community guidance available and the margin of appreciation left to national courts; the familiarity of national lawyers with Community law; the good or bad faith of decision-makers; and peer pressure and judicial empowerment. It concludes on the dynamics of the judicial construction of an European *jus commune*, and legal integration in Europe.  

**Introduction**  
Fifteen years ago, in *Francovich*,¹ the European Court of Justice (hereinafter “the Court”) introduced the principle of state liability for breaches of European Community (EC) law committed by Member States. This was no small revolution, since in most European countries, state liability, especially for legislative or judicial breaches, was a rare occurrence. Applying this new Community doctrine therefore required an overhaul of national remedies systems, but few national legislatures adopted the necessary measures.² The matter therefore landed in the hands of the national courts. Their task was not an easy one.  

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First of all, the prevalence of a doctrine according to which “the King could do no wrong” constituted a strong obstacle to the application of the doctrine to legislative activities, despite them often being responsible for the implementation problems which Francovich tried to address. Secondly, the hybrid nature of the Community regime of state liability, which borrows from the administrative, constitutional and civil law traditions of many of the Member States as well as from the international law regime of state responsibility, was not, at least at first, always well grasped by national jurists trained within a particular legal system, and who saw the doctrine as a threat to the coherence of national tort regimes. The incomplete nature of the doctrine does not help either. Indeed, the Francovich case established the principle and basic conditions, and the 1996 Brasserie judgment only provided limited further guidance on these conditions and other elements of the regime. Thus, Community law only creates a general mandatory framework, which leaves many details to be defined at national level. Whilst this builds flexibility in the regime, in accordance with the principles of subsidiarity (Art.5 EC) and legal pluralism, it poses problems for the uniform application of the doctrine.

Writing in 2000, Tallberg noted:

“One of the cases that indeed have been decided by national courts, the dominant (…) picture is one of hesitancy or even reluctance. In relatively few cases have the claimants actually been awarded compensation; more often, their claims have been dismissed on procedural or substantive grounds.”

The aim of this article is to investigate this claim, and to find out whether this is still the case, or whether national courts have now assumed their Community responsibility more fully, whilst national legislators pursue their ostrich strategy. It also attempts to identify which factors facilitate or, on the contrary, impede the reception and application of the Community doctrine of state liability. Such study is essential to assess its real and practical scope.

This article thus offers an analysis of selected national courts’ decisions regarding state liability, organised around the different dimensions of the reception and application of the doctrine (acceptance of the principle in relation to all branches of the state; application of the three main elements of the doctrine; damage and compensation issues; jurisdictional and procedural matters; and application outside the Community scope). These elements are examined against various explanatory factors, such as the strength of national legal and political traditions; the degree of fit between the national rules and Community law; concerns for coherence, legal certainty; democracy, and the protection of individuals’

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5 Cited above, fn.2, at p.116.
interests; the sensitivity of some substantive issues; the degree of Community guidance available and the margin of appreciation left to national courts; the familiarity of national lawyers with Community law; the obvious good or bad faith of governments; and peer pressure and judicial empowerment.

The investigation confirms that national courts were, at first, reluctant to embrace the Francovitch doctrine and apply it fully, particularly in relation to legislative and judicial activities. Such resistance is nonetheless gradually fading, and gives way to more faithful, and even extensive, applications of the doctrine. Amongst explanatory factors, tradition, goodness of fit and concerns for coherence and individuals' protection have a particular impact on the national applications of the doctrine.

The article concludes on the relevance of the study to understanding the dynamics of legal integration in Europe, and highlights the modalities of the construction of a European administrative jus commune.

The reception of the principle of state liability for breaches of Community law: traditions, judicial powers, individuals' protection and quality of fit

The Court considers the principle of state liability for breaches of Community law as "inherent in the system of the EC Treaty" and applicable in relation to acts or omissions of any organ of the state. One single regime therefore covers all types of activities carried out by administrations and governments, local authorities, public bodies, legislatures, and even judiciaries. In most Member States, there exist differentiated regimes, depending on the origin of the breach. Domestic courts were thus reluctant to adopt the Community unconditional and all-embracing approach. The application of the doctrine to breaches committed by administrative organs, local authorities and public bodies posed little problem of principle, due to the existence of similar mechanisms in most Member States. Yet, some application difficulties arose from the "misfits" between national and Community rules. As for legislative and judicial acts, they were, at least in earlier cases, often exempted from Francovitch, which must be related to the strength of traditions of separation of powers and judicial independence.

State liability for administrative and governmental acts or omissions: dealing with the "misfits"

All European legal systems must provide for the possibility to sue governments or administrations in damages for their harmful and wrongful acts or omission. The

7 Joined Cases C 690 & 990, Francovitch and Bonifacci v Italy, cited above, at [35] and [37].
8 Joined Cases C 469/93 & 489/93, Brasserie du Pecheur and Factortame (No.3), cited above, at [32].
11 Case C-469/93 and C-489/93, Brasserie du Pecheur and Factortame (No.3), cited above.
13 But Luxembourg’s Court of Appeal nonetheless stated that the Community principle of state liability was a “key principle” of Luxembourg’s law and jurisprudence. Court d’appel (Luxembourg), April 21, 2004, Vallée SA v Luxembourg, 920040 Pas. Lux. 276, summary in English in [2005] 8 Euro. C.L. 42. See also Italian Court of Cassation, 2003 decision (Gronchi), discussed below, at fn.39.
14 Recommendation (84) 15E of the Council of Europe’s Committee of Ministers relating to public liability.
Francovich doctrine was thus generally easily accepted in relation to individual or regulatory administrative activities. Yet, as national rules regarding the extent and modes of engagement of such liability vary greatly, practical problems of application arose. National judges had to decide whether Francovich claims should constitute an independent form of action, or be brought within the domestic tort regimes, and if so, which regimes applied. Furthermore, national courts had to cope with disparities between the relevant national rules and the Community regime.

(a) Francovich claim, new or old clothes?

In some Member States, such as Luxembourg or Austria, liability for breaches of Community law can constitute an independent cause of action. In many Member States however, tort claims involving Community law must be brought within the existing framework of domestic torts. This "domestic integration" approach reflects a desire to preserve the integrity of traditional torts regimes, whilst accommodating the new Community rule. However, it can pose problems for national judges and applicants alike, who may be confused as to which regime apply to a Francovich claim.

Take England for example, where such claims must be brought under the traditional public law heads of tort of negligence, breach of statutory duty, or misfeasance in public office. The choice of the most pertinent is not always obvious. This led some national legal systems to introduce new heads of tort, such as that of "actionable breach of a Directive" in Ireland.

Sometimes, national courts were even forced to change the regime applicable to claims based on Community law, for the regime applied was too restrictive and did not match the Francovich requirements. For example, the French Conseil d'Etat (CE) which had since 1984 accepted that individuals who had been harmed by administrative decisions contrary to Community law were entitled to damages, had to change the basis of such liability from a no-fault regime (égalité devant les charges publiques) only available for abnormal and severe loss, to the less restrictive fault-based regime.

(b) Maintaining coherence

National courts are faced with two lawful alternatives to cope with disparities between the national and Community rules, whilst maintaining the integrity of the national legal order and legal certainty. Either they apply national rules, which is possible where these

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15 According to the Luxembourg Appeal Court (see above, fn.13), failure to act by a state's administration constitutes a cause of action against the state. For the Austrian Supreme Court, the Oberster Gerichtshof (OGH), where there is no relevant national law, Community law is directly applicable and forms the legal basis for claiming damages. Oberster Gerichtshof. July 25, 2000, 1 Ob 146/00 b; [2001] Ecleos 100, summary in English in [2001] 4 Euro. C.L. 37.
are not less favourable than Community ones, or they apply Community rules across the board, that is to both Community and domestic claims.

The Belgian Court of Cassation overturned an appeal decision which, strictly applying Brasserie, had rejected liability for lack of sufficiently serious breach. Since under Belgian law an administrative authority is liable for failure to comply with international law having direct effect, the highest civil court held that Belgian administrative acts must be assessed in the light of the general criteria of Belgian civil liability law, which were broader than the Community ones.

Vice versa, national rules may become "infected" by Francovich elements. For example, one observes a change in the relationship illegality-fault or a shift of emphasis from the duty to the breach in English law, as a result of Francovich influence.

Francovich liability for administrative breaches is now well accepted and increasingly well integrated into the domestic legal orders. However, applicants in some Member States will be in a more favourable position, where more favourable national rules are applied. Francovich is thus more a minimum standard than a harmonising principle.

State liability for breaches by local authorities: burden-sharing or shifting

Here again, due to the pre-existence of national liability rules, national courts have no difficulty admitting liability for local authorities’ harmful breach of EC law. They nevertheless avoid burdening the central state, preferring to impose compensation on the local authority responsible for the breach, following a principle of parallelism between power and responsibility.

(a) Faithful applications

Mr Colpinger had suffered serious injuries in a traffic accident with a County Council’s tipper truck. Had the truck been fitted with rear under-run protection as provided by an EC Directive, not implemented in Ireland in due time, his injuries would have been minor and he would not be paralysed. The Irish High Court, referring to the Community ruling Costanza on the duties of local authorities in the context of direct effect, extended of its own initiative this case law to state liability, and found the Council liable.

Specific difficulties can nonetheless arise in federal states, where important legislative powers are conferred upon the regions, over which the central state has no control.

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21 Cour de Cassation, January 14, 2000, No.98.0477.F.
22 Belgian Civil Code, Art.1382 only requires a fault, a damage and a causal link.
24 The Austrian Supreme Court considered the Tyrol province as solely liable for having and applying a provincial law clearly incompatible with the basic principles of free movement of persons and freedom of establishment. Oberster Gerichtshof, June 10, 2000, 1 Ob 12/00n. See also Oberster Gerichtshof, cited above, fn.15. The national court may also apportion liability only partially on the local authority. See Lubsen v Netherlands State and the City of Abcoude, District Court of Utrecht, October 25, 1995; [1995] Jurisprudentie Bestuursrecht 305, note by Lefevere.
(b) Special difficulties in federal states

The Bundesgerichtshof (BGH), the Federal Court of Germany, ruled that no Francovich liability could apply where some states (Länder) had charged fees for health inspection, in violation of a Council Decision. The BGH considered that the implementing federal legislation was itself compatible with the Decision. The case was remitted to the appeal court for determination of the Länder's liability, to be examined under domestic law.  
This outcome appears inconsistent with Community case law. Indeed, if nothing prevents domestic law from holding local authorities partially or totally liable to pay compensation to individuals to which their actions have caused a damage, it is the Community regime which is applicable, and not the—perhaps more restrictive—national one.

The fact that national liability rules pre-existed Francovich seems to have greatly helped the acceptance of state liability for wrongs committed by local authorities. However, considerations relating to increasing judicial control over the administration also seem to have played a role, with national courts using Community law to increase their ability to hold the administration accountable.

State liability for violations committed by public law bodies: burden-shifting and extension to private law bodies

Since domestic rules on the matter already existed, national courts generally admitted that individuals should be compensated for breaches of EC law committed by public law bodies. Like for local authorities, the burden to compensate is usually imposed on the public law body itself, and the central state is absolved. For example, the German Bundesgerichtshof held that it was for the harbour management body, and not the state, to compensate for the loss suffered by the applicant.

One national court went even further, by holding a private law body responsible for wrongful implementation of a Directive. Ireland had transposed an EC Directive by means of an agreement with the defendant, the Motor Insurers' Bureau of Ireland (MIBI), a private law association. This agreement provided for wide exemptions, which violated the Directive, a fact of which MIBI was aware. An Irish Circuit Court considered that, due to the methods of transposition adopted, MIBI was a partner of the state and should be associated with it for the purpose of establishing liability. It ordered MIBI to pay compensation.

Whether such outcome is in line with Community law is open for debate. Indeed, it allows the state to limit its liability by blaming problems of transposition onto private parties involved in the process. However, it also acknowledges the complexity of national
implementation mechanisms, and the growing interactions between the public and private sectors in regulatory matters, something which Community case law does not tackle as yet. National courts have thus used Community law to fill gaps in the judicial control of private actors involved in the transposition of Community law.

State liability for breaches by the legislator: fading resistance to the idea that the King can do wrong

Many liability claims arise from the endemic problem of non- or delayed transposition of Directives, caused by legislative inertia or resistance. Member States’ courts were however reluctant to hold the state liable for such legislative wrongs, largely because of national restrictive rules on the matter. In some Member States (e.g. the United Kingdom or Germany), the state simply could not be liable for legislative breaches. Even in France, Italy, Luxembourg or the Netherlands, where the idea of compensating individuals for damage caused to them by legislation was not so controversial, it would usually occur without the need to find a legislative fault, on the basis of strict no-fault liability.

(a) Judicial deference to legislative powers

Some national courts avoided even considering state liability by relying on a principle of non-interference with the legislative power, based on an old-fashioned and strict conception of the separation of powers.

(i) The Greek Council of State and the protection of legislative freedom

The Greek Council of State is opposing fierce resistance to the application of state liability to legislative activities.32 However, it must be noted that this resistance arises in connection with a highly sensitive subject-matter in Greece, i.e. the monopoly of the state over higher education, which also led to challenges to the supremacy of EC law.33

The recognition of foreign higher education diplomas is a controversial issue in the Hellenic Republic, for it is viewed as a means for private education institutions to break the state’s monopoly on higher education. Indeed, private institutions are setting up education establishments abroad, or provide for a significant portion of courses to be completed abroad, and then seek the benefits of EC rules on diploma recognition, so as to compete with the selective state higher education system. For this reason, the Greek State had not transposed the Recognition of Diploma Directive,34 a failure attested by the Court of Justice in a 1995 ruling.35 The Greek Council of State, deciding on a liability case, stated that it was for the legislative and executive to choose the appropriate means of fulfilling the obligations imposed by the Directive, and that courts had no jurisdiction to

34 Directive 89/48 on the general system for the recognition of the higher education diplomas awarded on completion of professional education and training in at least three years duration, [1989] O.J. L 19/16.
intervene in the matter. It made no reference whatsoever to Community case law, despite the applicant’s argument in that sense and the 1995 Community ruling. By denying its own competence, it avoided the liability issue and shielded away from sanctioning the government and parliament for a clear violation of Community law.

(ii) The Italian Cassation Court and the end of complete legislative freedom?

In 2003, the Cassation Court delivered a ruling in complete defiance of Francovich.\(^{36}\) M. Della Minola bought some books through door-to-door selling. A few days later, he asked for the termination of the sale contract, as allowed by the Door-Step Selling Directive.\(^{37}\) However, the Directive had not been transposed in Italy, and the seller refused. M. Della Minola eventually paid the price (750,000 Liras), but then brought an action for damages for 2 million Liras against the state before the Giudice di Pace (magistrate dealing with minor affairs), who gave right to the request. The decision was appealed to the Court of Cassation, which quashed the decision, on the basis of the constitutional principle of government’s and parliament’s free legislative power. This outcome is obviously in contradiction with the Francovich case law, and with the principle of supremacy of Community law, which requires Member States’ courts to set aside national rules, even constitutional ones, which conflict with Community law.\(^{38}\)

Perhaps suddenly made aware of this, six weeks later, the same court completely changed its position. M. Gronchi, a medical graduate, brought an action for damages claiming more than 48 million Lira compensation against the state, for having been deprived of the possibility to participate in remunerated specialisation courses, as provided by EC Directives, which had not been transposed in Italy. The Florence Tribunal rejected the claim, but the Appeal Court accepted it. The Cassation Court confirmed the appeal judgment and recognised the right to compensation as a right inherent to Community law, making lengthy references to Community case law on state liability and national remedies.\(^{39}\)

Yet, the express recognition that the legislator could be at fault did not come easily.

(b) Can the King do wrong?

Even in flagrant cases of non-transposition of EC law by the national legislator, many courts were uncomfortable with the idea that “the King could do wrong”, and found ways around such an admission.

(i) The French reluctance to recognise fault-based liability


The French Ministry for the Economy refused to grant price rises for Arizona’s tobacco products, on the basis on a legislative act. The company sued for 6 million French Francs of damages, for breach of a Community Directive. The Council of State granted 230,000 French Francs compensation to the company, but blamed the breach on the minister who did not fulfil his Community obligation to disobey the national statute, and not on the legislator itself. A few months later, the Paris Administrative Appeal Court, in the Dangeville case, also resorted to such “avoidance tactic,” when it ordered the state to pay compensation to the plaintiff (who had to pay VAT on the basis of a legislative act in breach of a Community Directive). It found the state liable as a whole, without specifying which organ of the state was responsible for the breach.

State liability for legislative acts existed in French administrative law before Francovich. However, it was based on the principle of “rupture of equality before public burden” and only available for abnormal and special damage caused by legislation, following a no-fault regime, providing that the legislator did not intend to exclude such reparation. Since Francovich calls for something more akin to a fault-based regime, it put pressure on the French courts to modify this case law, to avoid a dual regime for responsabilité du fait des lois, depending on whether a claim fell under the Community umbrella or not. The acceptance of principle of fault-based liability for legislative wrongs came with a case decided in 2004 by the first instance administrative court of Clermont-Ferrand.

A 1996 Law granted support for the clothing sector through a reduction of social security contributions, without prior approval by the Commission, which was incompatible with EC law on state aid. The French State thus had to claim back the aid granted to the company SA Fontanille, which brought an action for damages against the state, on the basis of both no-fault and fault liability. The administrative court rejected the first ground because the provisions on state aids applied to all the companies and no serious special loss could be established, but accepted to examine the fault-based liability claim.

(ii) The Italian Cassation Court: unlawful act as a source of obligation?

In 1997, the Italian Corte di Cassazione (C.Cass.) accepted that the loss sustained by employees due to failure to transpose the Directive on the protection of workers in the

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44 Tribunal Administratif Clermont Ferrand, September 23, 2004, AIDA 2005, 385, note Weisse-Marchal, cited in J. Bell, “French Administrative Law and the Supremacy of European Laws” (2005) 11 European Public Law 487 at p.490. The court found no fault, since the claim of breach of legitimate expectations was unfounded. It is worth noting that here the applicant was not a victim of the breach of Community law but a beneficiary.

event of their employers insolvency created a right to compensation, but this liability did not flow from an unlawful act of the state. Nevertheless, a year later, it took the opposite view according to which such compensation "[flew] directly and immediately from the civil liability of the State within the meaning of section 2043 of the Civil Act" (i.e. unlawful act as a source of obligations). The following summer, the Pretore of Milan accordingly condemned the state to compensate for loss of benefits an employee who became redundant due to the failure of the Italian legislator to transpose the Directive on the protection of employees' rights in the event of transfers of undertakings.

(c) The scope of parliamentary immunities

A recent decision of the Belgian Court of Cassation casts some shadow on the possibility to engage state liability for legislative breaches. The case, which bears no direct connection to EC law, concerns the moral damage caused by a report of a parliamentary commission on sects. The court held that parliamentary immunities, which aim at the protection of parliamentarians' freedom of expression, prevent a liability action where the fault would consist of opinions expressed by parliamentarians.

State liability for legislative activities is thus still a problematic issue. A picture of general acceptance is nevertheless gradually emerging, although it takes more time in countries endowed with strong tradition of parliamentary supremacy and separation of powers or where sensitive domestic issues are concerned. The main factor behind this acceptance seems to be that national courts are gradually understanding their new Community role which consists in supervising the implementation and application of Community law by legislative authorities. It is likely that most of them welcome this empowerment. Probably the best symbol of this evolution is the House of Lords' famous Factortame ruling.

State liability for judicial breaches: still hesitations

It is only recently that the Court confirmed that Francovich is applicable to judicial acts, under certain conditions. Still, holding the state responsible for breaches committed by the judiciary is a contentious matter.

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49 Discuss below, fn.83.
50 Cases C-224/01, Köhler v Republic of Austria [2003] E.C.R. I-10239 and C-173/03, Traghetti del Mediterraneo (TDM) v Repubblica Italiana [2006] E.C.R. not yet reported. A state should be liable for damages caused to an individual by a "manifest infringement" of Community law attributable to a national court, even where such an infringement results from judicial interpretation or an assessment of facts or evidence, and even where the fault is not intentional and does not constitute gross misconduct. Such manifest infringement is presumed where the decision involved is taken in manifest disregard of Community case law.
(a) State liability and judicial independence

In some countries, like Belgium\textsuperscript{53} or Spain,\textsuperscript{54} it is possible to engage state liability for any judicial acts. However, in many countries (e.g. in France,\textsuperscript{55} or the Netherlands),\textsuperscript{56} this possibility is restricted to judicial activities, excluding the content of decisions. Besides, it would be limited to situations of \textit{faute lourde} or \textit{dénial de justice}. To explain this limitation, the \textit{Avocat Général} at the French Cour de Cassation put forward:

"the protection of the independence and freedom of thought of the judiciary, who may be hampered (...) or rendered overcautious for fear of incurring liability and engaging state funds."\textsuperscript{57}

However, in 2002, before the Community clarification, the French highest administrative court took an important step towards increasing liability for judicial breaches. Mr Maguiera brought an action claiming compensation for damage caused by excessive delays in deciding a simple case, in breach of Art.6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Conseil d'État, deciding on the case, extended judicial liability to damages arising from a breach of international conventions (applicable a fortiori to Community law). It also withdrew the restrictive condition of \textit{faute lourde} for breaches arising from judicial activities,\textsuperscript{58} whilst maintaining it where the act touched at "the heart of the judicial activity," which probably encompasses the substance of a decision. This approach appears conform to Community law, since \textit{faute lourde}, which relates to the gravity of the behaviour of a public authority, can be compared to the community "manifest infringement," which is deemed to occur only in exceptional cases where the judiciary is concerned.

Since Community clarification has occurred in 2003, various national courts have taken a stand on the matter, although a strict one.

(b) Excess of formalism

National courts are often unwilling to carry out substantial review of their counterparts' assessments. In 2003, the Verfassungsgerichtshof (VfGH), the Austrian Constitutional Court, heard an action for damages against the state for judicial breach. At stake was the refusal of the Verwaltungsgerichtshof (VwGH), the administrative court, to make an Art.234 EC reference for preliminary ruling (\textit{Köbler}-type scenario).\textsuperscript{59} The constitutional court considered that non-referral was not per se a sufficiently serious breach. It considered that the VwGH could reasonably conclude that the correct application left


\textsuperscript{54} Spanish Constitution, Art.221, and Arts 292–297 of the \textit{Ley Organica del poder judicial} of July 1, 1985.


\textsuperscript{56} HR, December 3, 1971, NJ 1971, 137, and March 17, 1978, NJ 1979, 204 (state liability for judicial acts only when the judicial act constitutes an infringement of a fundamental principle, in a way inconsistent with Art.6 ECHR).


\textsuperscript{58} Conseil d'État, June 28, 2002, Ministère de la Justice v Maguiera, No.239575, see also June 28, 2002, Ministère de la Justice v M X, No.239575, both available at www.conseil-etat.fr.

\textsuperscript{59} Verfassungsgerichtshof, October 13, 2004, A5/04.
no doubt and did not require a reference. The VfGH’s decision was influenced by the fact that the VwGH’s did not ignore its duty to refer, but decided not to proceed with a reference after due consideration had been given to the matter, as evidenced by the VwGH very detailed reasoning. However, this limitation of the VfGH’s review to the existence of the reasoning may not be sufficient, for Community law requires that the national court hearing the liability claim should check that the non-compliance with an obligation to make a reference was not taken in manifest disregard of Community case law. The VfGH should thus review the assessment made by the VwGH, and not limit itself to the existence of reasoning on the matter, something which the VfGH refused to do, under cover of the national jurisdictional rule precluding such review of the substance of the VwGH’s assessment.

(c) Competence matters

Judicial liability raises numerous competence problems, which will be examined later. These difficulties are nevertheless addressed by national judges. The constitutional court of Austria, for example, held that a tort action for damage caused by a judicial decision in breach of Community law must be possible whenever state liability followed directly from Community law, and that ordinary courts should be competent to hear such claims.

State liability for judicial breaches is only slowly making its way into national liability rules. Resistance is due to the threat it poses for the principles of res judicata and judicial independence, as well as the jurisdictional problems it creates. Besides, the lack of Community guidance until recently certainly did not help application. Yet, some courts, such as the Spanish Supreme Court, have taken advantage of these new powers to review their counterparts’ decisions.

In any case, even where national courts accept the principle of state liability for all state organs, which they increasingly do, the road is still full of obstacles for aggrieved individuals, for national courts may still apply the Community conditions restrictively.

The characterisation of the breach: the national courts’ margin of manoeuvre

Community case law identifies various factors, which should be taken into consideration in evaluating whether a breach is sufficiently serious so as to engage liability. Yet, many national judges still struggle with this characterisation exercise, as the concept of “sufficiently serious breach” does not fit the classic categories of intentional or negligent conduct or traditional notions of fault.

Generally, national courts are more likely to find a sufficiently serious breach in clear situations of non- or late transposition of Directives, as well as where the Court has

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60 See below, section on “Jurisdictional matters: limits and conflicts of jurisdictions”.
62 Tribunal Supremo, January 23, 2004, No.51/2004. For a detailed analysis of the Spanish decision falling outside the scope of Community law, see below under section “National courts’ extensive use of the Francoovich doctrine”.
63 Joined Cases C 46/93 & 48/93, Brasserie du Pecheur and Factortame (No.3), cited above, at [55]–[56].

already established the breach in previous rulings, as Community law leaves them little margin of appreciation in such cases. More difficulties arise when it comes to incorrect transposition, for there they have some leeway.

Lack of or late transposition of Directives: acceptance of the existence of a sufficiently serious breach

In most countries, the principle of state liability for non-implementation of Directives was accepted without too much difficulty, in particular in countries where state liability for legislative acts existed prior to Francovich.

As early as 1995, the High Court of Ireland awarded substantial damages to plaintiffs who had suffered from the non-implementation of an Equal Treatment Directive, whilst the District Court of Utrecht awarded damages for the late implementation of the same Directive. In 2001, a French local administrative court held the state liable for late transposition of an environmental Directive. In 2002, the Spanish Supreme Court awarded compensation to consumers and consumers associations, for damages caused by the delayed implementation of the Timeshare Property Directive.

National courts have often adopted plaintiff-friendly qualifications of the breach, or show diligence in alerting the parties to the possibility of a Francovich claim.

(a) The importance of “friendly qualifications”

A Belgian first instance tribunal qualified a situation where a law had been adopted, but not the Royal Decree implementing it, as one of late transposition (and not incomplete transposition) of the Package Travel Directive. In doing so, it triggered the application of the Community rule according to which a mere failure to timely implement the Directive constitutes a sufficiently serious breach, and condemned the state to pay damages. This qualification definitely took a plaintiff-friendly stand, since it removed from them the burden to establish the existence of a sufficiently serious breach, which a situation of incorrect implementation usually requires. This decision must be contrasted with the following one.

In 1999, the High Court of England and Wales condemned the state to pay damages for failure to implement an Equal Treatment Directive. The difference in pensionable age between men and women under English law meant that Ms Scullion could no
longer receive an Invalid Care Allowance for looking after her invalid daughter. At the end of legal proceedings which she won, she was awarded arrears of benefits. She brought another action to recover lost interest. The High Court took four factors into account to assess the nature of the breach: (i) the absence of legal advice sought by the government; (ii) the fundamental nature of the principle of equal treatment; (iii) the fact that particularly vulnerable members of society were foreseeably and gravely affected; and (iv) the absence of consultation with the EC Commission. The Court also mentioned the numerous judgments clarifying EC law. The breach was therefore found to be sufficiently serious to give rise to state liability.

One may wonder why the English court felt the need to carry out such a thorough assessment of the nature of the breach, involving national tort concepts, where Community law only requires a mere illegality to engage the state liability. An explanation may be found in the general lack of familiarity of English judges with the idea that a mere illegality can constitute a basis for liability per se. Another one relates to the general restrictive rules regarding public authorities liability in England. English judges, when applying state liability, probably feel that they need to justify their decisions very thoroughly since they depart from the national modus operandi.

(b) Directing applicants towards a Francovich claim

In 1995, the Spanish High Court\textsuperscript{72} decided a case concerning the late implementation of a Directive on the free movement of workers. The court held that the relevant provision was not capable of conferring direct effect, but suggested that the plaintiffs filed a damage claim instead.

Overall, national courts are willing to hold their state liable for non-implementation of Directives.\textsuperscript{73} This relatively good application of Francovich must be linked to the clear guidance provided by Community law on the matter since 1991, and to the fact that it involves intentional breaches of Community law, which would lead to liability under most domestic tort rules. The situation is different for incorrect transposition.

*The seriousness of incorrect transposition: the importance of discretion and good faith*

Situations of incorrect or mistaken implementation are more delicate to handle, since failure to transpose properly can be inadvertent, and result from the complexity of Community legislation. In Brasserie,\textsuperscript{74} the Court granted a margin of appreciation to the national courts, which they often use to shelter the state from liability.

The Gallagher case concerned administrative law remedies available to aliens against decisions of expulsion under the Prevention of Terrorism Act 1989. The decision was flawed by a minor procedural error, which the Court of Appeal held not to constitute a sufficiently serious violation of the relevant EC Directive, in particular in the context

\textsuperscript{72} Audiencia Nacional, November 29, 1995.


\textsuperscript{74} Joined Cases C 46/93 & 48/93, *Brasserie du Pecheur and Factortame (No.3)*, cited above.
where the law was still in formation. The court referred in particular to the British Telecom ruling,\textsuperscript{75} and distinguished this case, where the state had a margin of discretion, from Hedley Lomas,\textsuperscript{76} where the Member State had no such discretion and committed a blatant breach of the Treaty.\textsuperscript{77} This application is applying strictly Community case law, which identifies the margin of discretion as an essential element of appreciation of the seriousness of the breach.

\textit{The seriousness of a breach of the Treaty: the establishment of the breach}

National courts have been inclined to find a sufficiently serious breach of the Treaty where a Community ruling clearly establishes the existence of such breach.\textsuperscript{78} In less "established" situations of wrongful interpretations, national courts' attitudes vary.

(a) "Established" breaches

Three famous sagas illustrate that in cases of clear breaches, national courts tend to conclude to liability.

(i) The French Tobacco saga

Less than a year after Francovich, the French Conseil d'Etat held the French State liable to pay compensation to tobacco manufacturers for their loss, which resulted from the incompatibility of French law with the EC Treaty, the correct interpretation of which had been clarified in previous enforcement actions. Although not referring to Francovich, the Council of State rightly considered the breach as being of a nature such as to engage the state liability.\textsuperscript{79}

(ii) The Factortame saga

The British Government passed through Parliament an Act amending the Merchant Shipping Act 1988, which aimed at preventing Spanish owned vessels from fishing in the United Kingdom's territorial waters, by imposing nationality, residence and domicile requirements, found by the Court to be in breach of Art.43 EC.\textsuperscript{80} Persons deprived of registration sued for damages, and a preliminary reference was made, which led to the famous Brasserie/Factortame (II) judgment.\textsuperscript{81} Deciding on the case, the High Court held that the breach of the Treaty by the parliamentary Act was a sufficiently serious breach giving rise to liability,\textsuperscript{82} which was confirmed by the Court of Appeal and the House of Lords.\textsuperscript{83} Lord Slynn stressed the clarity and significance of the provision breached, as well

\textsuperscript{78} But sometimes, national courts even their discretion not to refer to prevent the delivery of a clear adverse decision finding such breach. E.g. Audiencia nacional, June 25, 1997.
\textsuperscript{82} \textit{Factortame (No.5)} [1998] 1 C.M.L.R. 1353; [1998] 1 All E.R. 736, HC.

as the intentional nature of the breach. Lord Hope of Craig added that the government, by using legislation, deliberately intended to undermine the protection of individuals’ interests and shield itself from judicial supervision.

This saga suggests various factors, which prompted national judges’ acceptance and application of the state liability doctrine, despite the adverse national tradition of parliamentary sovereignty. One of them is the goodness of fit between national rules and Community rules, as in this case, the judges could resort to familiar concepts such as mens rea to find liability. Another decisive element seems to have been the governmental attempts to escape judicial control by means of a legislative instrument. Here both concerns relating to individuals’ protection and judicial oversight must have played a part.

(iii) The Canal Satélite Digital saga

In 2003, the Spanish Supreme Court made a bold move by condemning the state to pay more than €26.4 million, the highest amount of damages ever awarded to a private party in a Spanish public liability case, in a case involving a violation of the Treaty and a Directive.84

One day after the commercial release of a new digital satellite television service in Spain by CanalSatélite Digital (CSD), the Spanish Government enacted emergency legislation to urgently transpose Directive 95/47, which aimed at facilitating the development of advanced television services in Europe.85 The national law introduced an obligation for operators to register with the Spanish telecommunications regulatory authorities (TMC), to submit decoders for approval and to obtain certification to market products. The day after the entry into force of the new statute, the Ministry sent out inspectors and started administrative infringement proceedings against CSD, whose decoders lacked certification. This had a devastating financial effect on the company, since the hypermarkets, the main distribution channel for CSD products, refused to sell them until the legal situation was clarified, and consumers were reluctant to subscribe until uncertainty was lifted. CSD applied for registration of its decoders lawfully manufactured and commercialised in other Member States, but its application was dismissed as its decoders did not comply with Spanish specifications.

CSD complaint to the Commission of a violation by Spain of the Treaty provisions on the free movement of goods and services and Directive 83/189.86 The Commission initiated Art.226 EC infringement proceedings. The Spanish Government then reacted by modifying the law,87 which led the Commission to close the procedure. CSD brought an action for annulment of the Spanish legislation, which led the Supreme Court to request a preliminary ruling, which confirmed the incompatibility of the Spanish legislation

87 Royal Decree-Law 16/1997.
with Community law. The Supreme Court finally concluded that Spain had breached Community law.

CSD then pursued an administrative action for damages for breach of Community law, claiming one €100 million in compensation for the loss and damage suffered. The case ended in the Supreme Court, which referred with details to Community case law on state liability. That court however considered that Community law only set minimum standards, and that "an individualized, illegal harm and (...) a causal link between the infringing act and the harm" (as provided by Spanish law) were sufficient to engender state liability. Yet, it still examined whether there was also a sufficiently serious breach, on the basis of the various factors set out in Community case law (gravity of the breach, lack of discretion, the manifest character of the breach, Community guidance on the matter, the intentional nature of the breach, the ignorance of the normative hierarchy and the lack of justification). Most probably, the additional application of the more demanding Community criterion was a way to strengthen the judgment and fend off criticism ("double liability"). Like in Factortame, the obvious bad faith of the government seems to have been a determining factor, as well as the fact that domestic rules were more favourable to the finding of liability. The protection of individuals was also an explicit consideration.

(b) Wrongful interpretations: hesitations

Some national courts have been hesitant to condemn states where the rule violated was not timely clarified or for mistaken interpretations made in good faith.

The German Federal Court adopted a very restrictive (if not incorrect) reading of the Community ruling in Brasserie. Considering that the claim for damages relied essentially on the refusal by the German authorities to authorise the marketing of beer due to the additives it contained, it stated that there was no sufficiently serious breach, since the situation in relation to additives had not been clarified before the Community ruling on the matter. The claims were thus dismissed.

The French Cour de Cassation came to a similar outcome in the Peynoird case. Peynoird brought an action for the repayment of dock dues and other fees paid in 1992 in contravention of Community law, confirmed by two later Community rulings. The court admitted the principle of state liability, but stated that at the time of the event, the action in question did not constitute a sufficiently serious breach, due to "the uncertainty as to the legitimacy of the dues (...) in relation to Community law".

The High Court of Justice of England and Wales considered that a bona fide wrongful interpretation could not constitute a sufficiently serious breach. Applicants brought

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89 Tribunal Supremo, December 10, 2002.  
90 Joined Cases C 469/93 & 48/93, Brasserie du Pêcheur and Factortame (No.3), cited above.  
proceedings against the Agriculture Ministry (MAFF) over the transfer of milk quotas. A reference to the Court confirmed that MAFF’s interpretation of the relevant legislation was contrary to Community law.94 Regarding the seriousness of the breach, Lanthan J. stated:

“The respondent acted bona fide, and made an excusable mistake as to the interpretation of a legislative provision which was not clear or precise (…). Although the Advocate General and the Court did not accept this argument, it was not an untenable argument. In my view, the legitimate expectation of the applicants was not so clear and obvious as to mean that the respondents’ failure to recognise it amounted to a serious breach of Community law.”95

However, other national judges were willing to condemn the state even where it may have acted in good faith. Without reference to Community case law, the Amsterdam District Court held that the state acted negligently and committed a tort against the city of Amsterdam by adopting the Social Security Act in breach of EC law.96

National courts thus tend to use the leeway offered by Community case law as to what constitutes a sufficiently serious breach to avoid findings of liability. They also have a tendency to apply Francovich through the lenses of domestic concepts, resorting to more familiar concepts of mens rea, intentional or negligent conduct. The good application of Community law therefore depends on its fitting the national rules.

Overall, there seems to be an increased willingness of national courts to find a breach giving rise to liability. There is still some resistance though, even in situations which do not call for the exercise of discretion by national authorities, in particular when legislative activities are at stake. Traditions of judicial reference to the legislature, and perhaps also some resistance to the invasion of Community law, both substantive and remedial, into the national domain, may explain it.

The intention to confer rights on individuals: a real hurdle in countries with “subjective” liability traditions

Community law stipulates that the Community provision breached should intend to confer rights on individuals, identifiable on the basis of that provision.97 This should not be assimilated to direct effect, for Francovich liability was designed to palliate the lack of direct effect of many Directive provisions. It is however unclear whether a general aim of protection would suffice to fulfill that condition.98

The concept of conferral of rights, unknown in countries following objective liability principles, recalls the notion of “protective norm” (Schutznorm) usually associated with

95 Lay and Gage, May 15, 1995, QBD.
97 Joined Cases C 46/93 & 48/93, Brasserie du Pecheur and Factortame (No.3), cited above.
the existence of specific protected interests (like the Rechtsgüter of the German 823 BGB), as well as with the “protective duty” notion of English negligence law. The Court nevertheless considered as unacceptable the German rule according to which there can be compensation only if the legislator is under a duty to the plaintiff or an identifiable group (839 BGH) and the German exclusive hierarchy of “protected interests” which excludes damage for Vermögensschaden.\textsuperscript{99}

This is thus an area where the apparent goodness of fit between Community law and national rules is determinant of its application. The conferral of rights poses particular problems in countries which follow a subjective liability tradition, whilst it is redundant in countries adopting an objective tradition.

\textit{Application dependent on national liability traditions}

The differentiated impact of the conferral of rights requirement is revealed by the Banking Supervision cases, which involved similar litigation in three countries with different state liability traditions (i.e. the United Kingdom, Germany and France).

(a) The British case

In the famous Three Rivers saga, the High Court of England and Wales used a restrictive approach to the conferral of rights to reject the liability of the British public authorities.\textsuperscript{100} Depositors in the Bank of Credit and Commerce International (BCCI), placed in liquidation, sued the Bank of England for damages caused by the lack of supervision of BCCI, in breach of the First Banking Directive.\textsuperscript{101} They based their claim on Francovich or, alternatively, on the English law tort of misfeasance in public office. The court held that the Directive did not impose a supervisory duty capable of founding a damage claim for breach of Community law. It considered that since the plaintiffs could not establish a sufficient right or interest in relying upon a directly effective provision of the Directive, they could not rely upon Francovich liability either. This was confirmed by the Court of Appeal\textsuperscript{102} and the House of Lords.\textsuperscript{103} The House of Lords considered the question as acte clair, and refrained from referring the case to the Court. This clarity was nonetheless far from obvious, as expressed in Auld L.J. dissenting Opinion on appeal, who considered that the First Banking Directive imposed clearly defined obligations on both Member States and supervisory bodies, thus giving rise to Community law based rights to damages for depositaries. Besides, the reasoning is also flawed in that it assimilates conferral of rights with direct effect.

\textsuperscript{99} Joined Cases C 46/93 & 48/93, Brasserie du Pecheur and Factortame (No.3), cited above.
(b) The German case

The German Federal Court adopted a restrictive view of the notion of conferral of rights too.\textsuperscript{104} The case dealt with whether EC Directives granted savers and investors a specific right, according to which all measures taken in respect of the supervision of banks were to be carried out specifically in their interests. None of the Directives conferred direct rights on savers and investors and the implementing legislation did not grant savers or investors direct protective rights against control bodies. However, under Art.34 of the German Constitution, individuals could bring claims against the state where its authorities had caused damage. Section 839 of the Civil Code (BGB) nevertheless also required the existence of a provision directly granting protection to individuals. The court did nonetheless not find such protective norm, and dismissed the action.

(c) The French case

The Paris Administrative Court of Appeal came to a similar outcome, but following a completely different route. A BCCI Overseas customer started proceedings against the French Commission for Banking, claiming compensation for loss of funds deposited in his account. He argued that the commission had failed its duty of surveillance and control over credit establishments and its jurisdictional and disciplinary duties. The court abandoned the restrictive notion of faute lourde (gross fault) applicable until then to missions of surveillance and control, to apply instead the more liberal notion of faute simple (fault).\textsuperscript{105} However, the court found that neither were realised in casu and dismissed the action.\textsuperscript{106} In the French case, the main issue was thus not the conferral of rights, but the existence of a sufficient breach itself.

These alternative approaches clearly reflect the way Francovich is applied through the filter of national legal traditions of public tort.

\textit{Subjective v objective liability traditions and conferral of rights}

The fulfilment of the condition of rights conferral takes a particular salience in countries which have a subjective approach and where a protective norm is necessary (e.g. Germany, the Netherlands, or the United Kingdom). In contrast, it is unproblematic in countries such as France or Spain, where a mere illegality is usually sufficient to engage the state liability (i.e. objective approach).

In 1993, a Dutch District Court rejected state liability, because EC law only required Member States to define “building land” and that could not confer rights to individuals.\textsuperscript{107}


\textsuperscript{105} Whilst maintaining the requirement of faute lourde for the exercise by a body of its disciplinary and jurisdictional function.

\textsuperscript{106} El Shik (1999) A.J.D.A. 951, Cour administrative d’appel de Paris. This new standard of fault for regulatory authorities was nevertheless overturned by a later decision of the Conseil d’Etat, which reintroduced the faute lourde requirement for supervisory functions (Kechichian [2002] A.J.D.A. 136, Conseil d’Etat).

\textsuperscript{107} City of Haaksbergen v Netherlands State, in Dutch in [1994] Bouwrecht 145, District Court of Almelo.
although it could be argued that the description of “building land” aiming at determining whether or not a person was eligible for a fiscal exemption could constitute a right.

Similarly, in 1996, the Hague District Court declared that a Euratom Directive, aimed at protecting persons against radiation when medically treated through the presence of a physicist, did not intend to protect—and therefore could not confer rights to—a clinical physicist, who, due to late transposition, had not been able to find a job and had brought a claim under Dutch tort law for loss of income.\(^{108}\) By contrast, the conferral of rights requirement poses no problem in countries following an objective approach to liability. In the **CanalSatélite Digital** case, the Spanish Supreme Court considered that the direct effect of the Community provisions at stake had already been recognised in a Community ruling and thus intended to confer rights to individuals.\(^{109}\) Here again, the association of direct effect with conferral of rights is misleading, although it is true that a provision capable of direct effect is a fortiori capable of conferring rights. The reverse is not necessarily true though.

**Environmental protection and rights conferal**

The conferral of rights proviso poses particular difficulties in the field of environmental law, where interests are in essence “diffuse,” and individual rights difficult to identify.

Non-governmental organisations (NGOs) and individuals brought a tort action against the Dutch State under Dutch tort law, for incorrect implementation of the Nitrates Directive.\(^{110}\) The Netherlands had failed to adopt the necessary action programme. The Hague District Court considered that the obligation of adoption of action programme had direct effect and conferred rights to both individuals and environmental NGOs, and delivered an injunction ordering the state to comply with that obligation.\(^{111}\) The Court of Appeal quashed this judgment\(^{112}\) and the Dutch Supreme Court rejected the appeal in cassation,\(^{113}\) without requesting a preliminary ruling, despite the advice in this sense of its Advocate General Langemeyer.\(^{114}\)

The **Bowden** case offers another example.\(^{115}\) A mussel fisherman, driven out of business by the pollution of his fishing waters, claimed a breach of statutory duty consisting in the non-implementation of a series of EC Directives. The High Court of England and Wales dismissed the argument that the Directives conferred rights. It stated that:


\(^{111}\) **Waterpakt**, District Court of The Hague, in Dutch in [2000] 24 *Tijdschrift voor Milieu en Recht*, note by Jans and Verschuuren. On injunction as a remedy under **FranCOVICH**, see above, section “Extension to injunctions or implementation orders”.


\(^{114}\) In the meanwhile, the Court of Justice had established the state failure to implement the Directive correctly and timely. Case C-322/00, **Commission v Netherlands** [2003] E.C.R. I-11257.

\(^{115}\) **Bowden v South West Water** [1998] 3 C.M.L.R. 330, QBD, Cornwath J.
“improvements in water quality for bathers, and in the treatment standards of waste water, [might] assist (…) interest groups, but that [was] not enough to give them a right of action.”\textsuperscript{116}

The Court of Appeal, after reference to Community case law, held however that one Directive, the Shellfish Waters Directive,\textsuperscript{117} did grant rights to fishermen\textsuperscript{118} and held that a right to compensation existed if the Directive had not been implemented properly.

There is overall a lack of uniform application of the concept of conferral of rights, due to the absence of clear Community guidance and different national liability traditions which Community rules do not match.

Causation and contributory negligence: national variations

In countries where an objective approach to liability prevails, causation elements constitute the main obstacles for individuals claiming full compensation.\textsuperscript{119} In that respect, it is regrettable that the ECJ did not give much guidance on the matter.\textsuperscript{120} It only states that the causal link must be "direct"\textsuperscript{121} and suggests use of a simple "but-for" test,\textsuperscript{122} which is ill suited to deal with the complexity of causation matters.\textsuperscript{123} There is therefore a threat of differentiated applications, national courts being tempted to follow their well-developed domestic causation rules.

Failing causal links

There have been a number of reported cases where a lack of causal link led to the dismissal of claims.

Ireland had not formally transposed an EC Directive on compensation under the framework of the fight against bovine tuberculosis, introducing instead an extra-statutory scheme. Rooney was a cow breeder, who refused to hand over an infected cow for culling, as long as no statutory regime was in place. The authorities imposed restrictions on the movement and sales of cattle originating from his farm. Rooney brought an action for damages under Community law. The court applied a "but-for" test, together with the duty to show reasonable diligence to mitigate the damage, and dismissed the applicant's argument, according to which, had the Directive been correctly transposed, every other thing equal, his behaviour would have been different.\textsuperscript{124}

\textsuperscript{116} At [55].
\textsuperscript{118} Bowden [1999] 3 C.M.L.R. 180, CA.
\textsuperscript{119} D. Fairgrieve, cited above, fn.23, at pp.165–188.
\textsuperscript{120} On this, see F. Smith and L. Woods, "Causation in Francovich: The Neglected Problem" (1997) 46 I.C.L.Q. 925.
\textsuperscript{121} Brasserie, cited above, fn.1.
\textsuperscript{123} In most legal systems, the assessment of causation consists of various elements, in addition to the conditio sine qua non, (e.g. the French conditions of directness and certainty, the English requirement of "reasonable foreseeability", etc.).
The High Court of Northern Ireland, in a case where the Working Time Directive had not been transposed, also concluded on a missing causal link. The applicant, threatened by redundancy, had accepted a night shift, before asking for her transfer back to a day shift. Her employer refused and she resigned. The High Court, referring to Community case law, considered that since the applicant could not establish that, had the Directive been transposed, she could have forced her employer to transfer her onto a day shift and keep her job, she was not entitled to damages.

Finally, the Austrian Constitutional Court rejected the action of a lawyer who claimed compensation for damages caused by SPAMs (non-requested commercial emails), allegedly due to the incorrect transposition of a EU Directive. Not only the lawyer could not establish the financial damage caused by spamming, it also could not prove that the defective implementation of the Directive had led to increased spamming.

**Plaintiff-friendly approaches**

Where other arguments fail, states try to escape liability by arguing a lack of causal link, failure to mitigate or contributory negligence. However, these arguments, where made in the last resort and in bad faith, have usually been set aside by domestic courts.

A Spanish court rejected the state’s argument that liability should be shared between the state and the sellers of time-share property in a case of late implementation of the EC Directive. Indeed, the court considered that since the purpose of the Directive was exactly to prevent sellers from demanding advanced payment from buyers, it was the delayed implementation which was the cause, not the sellers’ behaviour, which should have been different had the Directive been implemented on time.

A Dutch District Court declared that citizens were not able to know their rights sufficiently clearly when a Directive had not been correctly transposed, and thus could not be blamed for not having relied on direct effect instead.

In the *CanalSatellite Digital* case, the Spanish Supreme Court, after reference to Community case law, considered that CSD had showed more than reasonable diligence in mitigating the loss, by resorting to all national and Community available actions. It also rejected the assertion by Spain that the damages were not caused by the legislation but by administrative acts. Indeed, it was the Spanish legislation which created a situation of legal uncertainty, influencing hypermarkets and consumers’ attitude and causing the financial injury.

Finally, a German court considered that a right to compensation was not excluded where other available actions could not have been successful.

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127 Verfassungsgerichtshof, March 17, 2006, A8/05.
129 *Lubsen v Netherlands State and the City of Abcoude* [1995] Jurisprudentie Bestuursrecht 305, District Court of Utrecht.
Failing Community guidance, national courts apply domestic criteria to causation matters. Sometimes, they have used causation to filter some Community cases out, but, more often than not, they have assessed causation in light of the protection of individual interests, heavily sanctioning states which tried to take advantage of their own wrongdoing. The relatively good application of this criterion is facilitated by a certain convergence between European legal traditions around causation issues.

**Damage and compensation: varying practices**

Community law says little on issues of damage and compensation. This leads to diversified applications inspired by different legal traditions.

*Compensatable damages: a variety of approaches*

Some damage awards are compensatory in nature, others not (nominal, contemptuous or exemplary/punitive damages). Community law only imposes compensatory award for monetary losses and loss of profits. This requirement was problematic in countries like England or Germany, where the recovery of pure economic loss (or *reiner Vermögensschaden*) not linked to personal injury or damage to property, where the harm was caused negligently (and not intentionally), was limited by various devices. Nevertheless, in one of the *Factortame* follow-ups, the High Court held that economic losses were recoverable.

That court also considered that interests on arrears of benefits should be paid, in addition to payment of arrears, and so did a Dutch court. Referring to Community case law, it declared that lost interest was a necessary component of the right to compensation, thereby going further than the Court, which allows for their exclusion when the interests claim is ancillary.

It was expected that compensation for lost chances would pose problems to English courts due to the reluctance of English law to recognise such damage. Unsurprisingly, in 1996, the Court of Appeal of England and Wales decided a plaintiff was not entitled to compensation for lost chance. The fact is that compensation for loss of profits poses delicate questions of assessment and probability.

This, however, did not rebuke the Spanish Supreme Court which, in the *CanalSatélite Digital* case, not only recognised that loss of profits should be compensated, but in

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132 e.g. requirement to show duty of care in English law (*Murphy v Brentwood DC* [1991] A.C. 398) or the infringement of the “right to an established operative business” and the “business oriented conduct” of the defendant under German law (RGZ 58, 24; 94, 248; 141, 336; BGHZ 29, 65).

133 *R. v Secretary of State for Transport Exp v. Factortame Ltd (No.7) [2001] 1 W.L.R 942; [2001] 1 C.M.L.R 46, QBD.*

134 *R. v Department of Social Security Exp. Scullion*, cited above, Sullivan J.


136 *Lubsen v Netherlands State and the City of Aalsmeer* [1995] Jurisprudentie Bestuursrecht 305, District Court of Utrecht, note by Lefevere.


139 *CanalSatélite Digital v State Attorney* [2003] RJ 8844, Tribunal Supremo.
fact calculated the compensation to be awarded essentially on the basis of the loss of profit caused by the legal uncertainty created by the Spanish legislation. The award for loss of profit is still remarkable since in this case, CSD had not ceased its commercial operations during the period in which the contested legislation was in force.

Compensation for damages other than pecuniary, such as moral damage, or non-compensatory awards pose more problems.

Harm to feelings (dommage moral) has always been considered by French lawyers as compensable harm. This is applied a fortiori to claims based on Community law. In the Maguiera case,\textsuperscript{140} the French highest administrative court confirmed the appeal court's decision which granted Maguiera 30,000 Francs compensation for all material and moral damage caused to him as a result of the malfunction of the French judicial system.

Also, the High Court of Ireland granted 250,000 Irish Pounds compensation for pain and suffering, as well as 60,000 Irish Pounds for loss of consortium, to a victim of a road traffic accident whose injuries had been partially caused by non-compliance of the County Council with a non-implemented Directive.\textsuperscript{141}

However, the High Court of England was not so generous in the Factortame litigation, when it excluded compensation for injury to feeling (distress) and aggravated damages. It stated that damages for distress could only be awarded where the claimant’s self-esteem was an important part of the damage, and where the loss could have been inflicted by a private person, which was not the case here as the tort had been committed by the legislature.\textsuperscript{142}

Not every legal system readily acknowledges non-compensatory damages, and where it does, such damages are usually limited to specific situations.\textsuperscript{143} Particularly controversial is the question of punitive damages. In an early case of gender discrimination, which occurred as a result of the non-transposition of an EC Directive, the High Court of Ireland, although it awarded substantial damages, refused to grant punitive damages.\textsuperscript{144} In Factortame (No.5), the High Court of England and Wales also excluded punitive or exemplary damages, since these damages were not awarded for a breach of national statutory duty either\textsuperscript{145} (“negative equivalence”).

Despite adverse national legal traditions, national courts have been willing to follow Community guidance and offer compensation for economic losses caused by a violation of the clear Community law.\textsuperscript{146} Whilst these are now more routinely awarded for Francoovich claims, the availability of other types of damages depends largely on national tort traditions. The diversity of application is a result of the margin of manoeuvre granted by Community case law.

\textsuperscript{140} Ministre de la Justice v Maguiera, No.239575, June 28, 2002, Conseil d’Etat.


\textsuperscript{142} R. v Secretary of State for Transport Ex p. Factortame Ltd (No.7), cited above.

\textsuperscript{143} D. Fairgrieve, cited above, fn.23, at p.189.

\textsuperscript{144} Tate v Minister for Social Welfare [1995] 1 C.M.L.R. 825, HC.

\textsuperscript{145} Factortame (No.5) [1998] 1 C.M.L.R. 1353; [1998] 1 All E.R. 736, HC.

\textsuperscript{146} It is true that in most cases where compensation would be awarded, the requirement of a sufficiently serious breach would usually mean that the breach was intentional and therefore justifies the award of compensation for economic losses.

Assessing the compensation: a diversity of approaches

Community law only instructs that compensation must be “commensurate to the damage”.147 As expected, national courts rely on traditional principles recognised in their own legal systems. Courts in France or Spain follow the principle of “full” compensation or *restitutio in integrum*,148 whilst others opt for “adequate” compensation, as both of them can be covered by the wording “commensurate”.

The question of quantum cannot be fully addressed here, for lack of comparative information. Whilst the Spanish *Canaldigital Satelite* case suggests that some national courts are ready to condemn the state to high compensation under *Francovich*, nothing guarantees that all national courts will show such relaxed attitude towards the state’s purse.

Questions related to the damage and compensation is one area where national courts have a rather large margin of manoeuvre, and where national traditions as well as judicial practices and preferences impact on the practical application of state liability.

Jurisdictional matters: limits and conflicts of jurisdictions

Community law leaves it to the national level to govern jurisdictional matters, which can pose some application problems. First of all, there are still national courts which decline judicial competence over liability claims involving legislative activities, despite the clear Community statement that all state organs are potentially liable.149 Fortunately, not all courts feel so restricted and some even found in *Francovich* a convenient basis to restore their jurisdiction taken away by the legislator. There remains the problem of identifying which court is competent to hear *Francovich* claims.

Restoring jurisdiction

National courts can use *Francovich* to restore their control over governmental activities or to increase the protection of individuals’ interests. One example is the *Factortame* case, where the court defeated the government’s attempt to shield itself from judicial control by using a parliamentary Act.150 In another example, the Belgian Cassation Court circumvented an attempt by the legislator to limit compensation in situations arising before the late transposition of the Directive. It held the state liable to pay the indemnity which would have been received by agents, had the Directive not been implemented five years too late.151 The court dismissed the legislative intentions and gave effect to the Community doctrine of state liability instead.

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149 See above, section “State liability for breaches by the legislator: . . . .”
150 *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.5)*, HL, cited above.
Identifying the competent court

Determining which court is competent to hear a claim for liability of the state is not always a simple matter, in particular where legislative or judicial acts are at stake. In Austria, there were two provisions for deciding which court should have jurisdiction over Francoovich claims: Arts 23 (state liability) and 137 (pecuniary claims) of the Austrian Constitution. For some time, it was thought that both the Supreme Court and the Constitutional Court could have jurisdiction over Francoovich claims for damages resulting from legislative or judicial activities.152 The matter was finally settled in 2001 by the Austrian Constitutional Court, which held that jurisdiction over Francoovich claims should follow the national allocation of competences under the Constitution. The ordinary courts should hear cases where the damaging public action was taken either as part of the exercise of executive powers, or on the basis of private law. However, where the violation was linked to a “legislative infringement,” the Constitutional Court would have jurisdiction.153 In 2003, the Constitutional Court also assumed jurisdiction over damage claims resulting from a judicial decision.154

Lack of competence of specialised courts

Another problem is caused by the fact that in various countries, damage claims cannot be heard by specialised courts such as industrial or labour courts, but must be directed towards general ordinary or administrative courts. For example, a Spanish judge in social matters dismissed a claim brought against the state for breach of a Directive, as under domestic law the damage action should have been brought before the administrative court.155 Similarly, the English Court of Appeal ruled that industrial tribunals did not have jurisdiction to entertain Francoovich claims, which must be brought before ordinary courts.156

Questions of jurisdiction are thus potentially able to undermine the effective application of state liability, when claims are dismissed for having been brought before the wrong court, in particular if national law does not “stop the clock”. However, jurisdictional problems do not appear to have led to the exclusion of too many cases.

Procedural matters: adjustments to guarantee “effective” liability

Community law leaves it completely to the national courts to organise procedural matters, providing that effectiveness and equivalence are guaranteed.157 Still, procedural

152 Presentations by Judges Gerstenecker and Holzinger at the conference on state liability during the Agents’ Meeting, Vienna, May 2–3, 2006.
154 See above, fn.152.
requirements may undermine the ability of individuals or companies to sue for damages, limit the amount of compensation to be awarded, affect litigation costs and so on. Overall, national courts have been willing to interpret or adjust national rules in favour of individuals bringing Francovich claims, so as to guarantee the effectiveness of the remedy. Procedural rules regarding time-limits pose particular problems though.

Various procedural obstacles: identification of the organ of the state to sue, abuse of process, striking out, choice of cause of action, remuneration rules, etc

The first procedural hurdle is to identify whom to sue. In 2000, the Austrian Supreme Court dismissed an action brought against the state, for the claim should have been made against the province responsible for the breach. In 2004, an Italian tribunal declared an action inadmissible, for it had been directed against the Italian State in the name of the President of the Council and not against the Education Ministry. It is true that Community law does not wish to interfere with internal procedural matters. However, if the effect of having brought the claim against the wrong person were to deprive the individual from finally exercising his right (e.g. if delays for bringing a claim carry on running), it would not be acceptable.

Domestic rules on abuse of process may also prevent individuals from succeeding in a damage claim. In relation to Community law, the question arises whether the fact that a litigant has not complained to the Commission or brought a judicial review action against the domestic acts, constitutes such abuse of process. The national response is illustrated in the Phonographic Performance Ltd (PPL) case, where the court rejected the abuse of process argument.

The “fitting” of Francovich claims within the traditional causes of action recognised in national law can also have procedural consequences. For example, in England, the question came up as to whether a Francovich claim should be characterised as a breach of statutory duty. The classification was important for it determined the time-limits applicable to bring an action and whether additional parties and losses could be added to the proceedings. The government had refused to repeal certain provisions of national law incompatible with an EC Directive. This caused damage to PPL which brought an action for damages, but the Government argued that it was time-barred. The court found that liability was best understood as a breach of statutory duty. A limitation period of six years therefore applied and the action was held admissible.

Striking out rules could also prevent cases from going ahead. In 2002, a British court, in a case dealing with allowance for guest beers in pubs, decided not to “strike out” a claim.

158 Oberster Gerichtshof, June 10, 2000, 1 Ob 12/00x.
160 “[37] (...) The [claims instituted by PPL] cannot be predicated that they are an abuse just because they involve a consideration of the duties of the Crown under European law and might have been brought by an application for judicial review.” Phonographic Performance Ltd v Department of Trade and Industry [2004] EWCH 1795 (Ch); [2004] 3 C.M.L.R 31; [2004] 1 W.L.R. 2893; [2005] 1 All E.R. 369; note by Jolowicz in [2005] C.L.J. 293.
161 ibid.
162 Under British law, vexatious, scurrilous, or ill-founded claims or defences consisting of bare denial or setting out no coherent statements can be struck out (Civil Proceedings Rules, r.3.4), or summarily dismissed if the court considers that the is no real prospect of succeeding on the claim (r.24.2).
even though the chances of the company recovering damages were extremely thin. One must note that European law, both ECHR and EU, have had a significant impact on restricting the judicial practice of striking out claims in tort actions, in particular those based on policy grounds.

In one of the Factortame rulings, the Court of Appeal had to decide whether an unusual agreement which provided for the remuneration of public accountants out of damages to be awarded in a tort action was valid. As eloquently put by Lord Philips Master of the Rolls:

"[T]he Claimants had been brought low by the initial wrong done to them and by the costs and stress of prolonged litigation in which no quarter was given. They were faced with an extraordinarily complicated task in proving the damage that they had suffered and there was a real risk that lack of funds might result in their losing the fruits of their litigation."

The court thus concluded that the agreement was valid, and refused the argument of public policy usually invoked to invalidate such agreements in modern English law.

Overall, domestic courts have appeared willing to apply or adjust traditional procedural rules to guarantee the effectiveness of Francovich claims, instead of using them for rejecting cases. Concerns regarding the protection of citizens’ interests are probably most influential in this development.

Time-limits and prescription

Time limitations circumscribe the availability and scope of national remedies, by either limiting the time-period within which an applicant may bring a claim or by restricting the period over which compensation for loss can be granted. According to Community law, national time-limits must be set aside if they affect the effectiveness of EC law. Particular problems arise in relation to state liability claims, due to the unclear or continuous nature of violations of EC law.

(a) Restrictive time-limits

Concerning the time-limits themselves, some national rules appear at first sight unduly restrictive. For example, the short time-limit of one year to bring a liability claim relied on by the Spanish High Court in the Timeshare Property case meant than only 7 out of 24 claims brought by consumers and consumers association for late implementation of the Directive led to compensation. Such restrictive time-limits should have been

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165 D. Fairgrieve, cited above, fn.23, at pp.78–79.
set-aside by the national court as unduly restricting the effectiveness of the tort remedy in situations of non-implementation.

(b) Time-limits and continuous violations

In many cases of Community law violations, in particular in the case of late transposition of Directives, the continuous nature of the violation can pose problems for the application of time-limits.

By and large, national courts have been relatively generous in applying limitation periods. In a case involving a persistent violation of Community law, the Italian Cassation Court, usually not the most EU friendly court, chose as the starting date the one most favourable to the applicant, in line with the most demanding Community case law on national remedies.\(^{169}\)

Other courts got around the problem of persistent violations by ingeniously qualifying the breach as a continuous breach, thereby delaying the commencement of the limitation period. In a Dutch case, the applicant, a Danish organisation defending the interests of Danish pig breeders and slaughter houses, claimed that the German legislation in place from 1993 until 1999 prohibited the marketing in Germany of non-castrated male pigs from Denmark, in breach of an EC Directive, and asked for compensation. The first instance court granted only partial compensation, in application of a prescription period of three years. The OLG, hearing the case on appeal, found that the right of the applicant was not prescribed, since Germany’s action constituted one single continuous act, and not repeated violations.\(^{170}\) By qualifying the breach in such a manner, it neutralised the prescription clause, thereby favouring the plaintiffs.

A similar approach was adopted by the British court in the PPL case. The Crown contended that the action was barred under applicable English rules. PPL, for its part, argued that the breach of duty was a continuing one giving rise to a fresh cause of action on each occasion that PPL suffered damage. The court agreed with PPL.\(^{171}\)

However, not all national courts were so sympathetic to victims. Following the Community ruling in Dillenkofer,\(^{172}\) 9,000 suits with a total amount of claims in excess of 20 million Deutsch Marks were launched. However, only applicants who had bought a travel package after the expiry of the deadline for implementation, and before the late transposition of the Directive by Germany, obtained compensation.\(^{173}\) Dillenkofer himself was not awarded damages, for he had bought the package before the expiry of the deadline for implementation, even though the actual travel was scheduled for after that date.\(^{174}\)


\(^{170}\) See above, fn.131.

\(^{171}\) Phonographic Performance Ltd v Department of Trade and Industry, cited above.


\(^{173}\) Schoisswohl, comment in Francovich Follow Up (T.M.C. Asser Institute) at www.eel.nl/documents/ Francovich%20Follow-Up.Sept04.pdf (national courts).

(c) Rules on restrospective effect

National time-limits can also be restrictive in the sense that they frame the retrospective effects of claims. A judgment of the Utrecht District Court is quite remarkable in the sense that it set aside the old Dutch Civil Code rule which limited the retrospective scope of the claim made by the applicant, so as to guarantee the effectiveness of the tort remedy sought.175

To conclude, although there is a great diversity in the way the Francovich doctrine travels through the national procedural rules, these are usually applied to guarantee the effectiveness of the remedy.

The impact of other Community principles or remedies on Francovich claims

The scope of Francovich can be affected by the availability or application of other Community doctrines or remedies, such as indirect effect or the preliminary reference procedure.

Consistent interpretation as a shelter from liability

National courts have occasionally shied away from applying Francovich, through resorting to the Community doctrines of consistent interpretation and supremacy. In the Alderson case on the application of the British Transfer of Undertakings (Protection of Employment) or “TUPE” Regulations, transposing the Acquired Rights Directive,176 it was argued that the TUPE regulation wrongly excluded from its scope non-commercial ventures, contrary to the Directive’s broad definition of undertakings. The court dismissed the liability claim by neutralising the breach through consistent interpretation of the TUPE regulation.177

Escaping liability by avoiding making a preliminary reference

A persistent problem is the reluctance of some national courts to seek guidance from the Court, including in matters of state liability, in order to avoid adverse answers. A notorious example of this is the Three Rivers case already discussed.178 However, British courts have not always displayed such bad will. In the Evans case, the Court of Appeal dismissed an appeal against a decision of a lower court to refer two questions to the Court for preliminary rulings. Mr Evans had been injured by a “hit and run” driver and had brought proceedings against the relevant body (i.e. the Motor Insurers’ Bureau) for compensation. His appeal was dismissed. He then brought a damage claim against the state for incorrect transposition of the relevant EC Directive. The Court of Appeal considered a reference should be made for:

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“[d]espite the disproportion between the costs expended on litigation arising from a simple road traffic accident (...) and the sums originally in issue (...), the reference [could not] be stigmatised as merely theoretical, or hypothetical.”  

The avoidance of a reference for a preliminary ruling, as well as “abuse” of the consistent interpretation doctrine, may undermine the effectiveness of a Francovich claim. However, these obstructions seem to remain occasional.

**National courts’ extensive use of the Francovich doctrine**

One of the most interesting developments relating to the national application of *Francovich* is that the doctrine is slowly expanding beyond its original remit, thereby contributing to the formation of an administrative *jus commune* in Europe. First, *Francovich* has been applied to purely domestic cases, displacing or transforming national liability rules. Secondly, *Francovich* liability appears to have been extended to breaches of the European Economic Area (EEA) Agreement. Thirdly, it has also been argued that the *Francovich* reasoning should be applied to injunctions.

**Extension to purely domestic situations**

The pull towards an extension of *Francovich* to national situations was hinted at by the British Court of Appeal in *Factortame* which stated that:

“[n]ow that it [state liability for a legislative act] is undoubtedly available in circumstances which contain a Community element, it may be right on some future occasion to re-examine that tradition” [according to which compensation for damages caused by the legislature are not compensated].

Plaintiffs soon started arguing for an extension of *Francovich* to situations arising outside the Community scope, based on a “reverse discrimination” argument. First attempts failed, but finally a Spanish plaintiff succeeded in a case brought for damage caused by a decision of the Constitutional Court. The case involved no Community law element whatsoever, but the court referred to Community case law to support its finding that the judges of the Spanish Constitutional Court were liable to compensate the moral damage caused to a potential applicant for a law clerk position. The applicant, a practicing lawyer, unsuccessfully brought two actions challenging the procedure for the recruitment of law clerks at the Constitutional Court. He then asked for the protection of his fundamental rights (*recurso de amparo*), addressed to the Constitutional Court, which he argued, should be replaced by a formation guaranteeing impartial examination. The Constitutional Court unanimously declared these requests inadmissible. The applicant then brought a tort action before the Spanish Supreme Court, claiming that the constitutional judges were liable to pay him compensation, for either civil fraud or gross fault. The Supreme Court

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180 R. v Secretary of State for Transport Ex p. Factortame Ltd (No.5), CA, cited above, at [34].
noted that the constitutional judges could not be liable under the judicial liability regime, inapplicable to them. However, they could be liable under the common tort regime provided by Art.1902 of the Civil Code, which requires the existence of an illegality, damage, and causation. The Supreme Court found that the judges were guilty of déni de justice, contrary to Art.1(7) of the Civil Code. It accused them of serious professional negligence involving “inexcusable” ignorance. After having established the existence of a moral damage and causation, it condemned each of the constitutional judges to a €500 fine.

This case provides a typical example of how Community case law can be used by activist national courts to increase their control over the activities of other state’s organs, including the highest national courts of their domestic legal order. Such extensive use may be partially explained by the political sciences’ “empowerment model” applied to the reception of Community doctrines by national courts, and more specifically by the “competition between courts” approach proposed by Alter. However, another explanation could be provided by a general pressure on domestic legal systems to ensure better protection of citizens from harmful and unlawful state activities.

Anyhow, not all national courts follow this model of behaviour. The Austrian Supreme Court refused categorically to engage on that path. The case concerned a Polish citizen who had been denied employment benefits, because at the time of her application, the Unemployment Insurance Act required applicants for such benefits to be Austrian nationals. The complainant brought an action for state liability for failure to duly prepare draft legislation in conformity with constitutional requirements. The Court dismissed the case, on the basis that the preparation of legislation belonged to the legislature, and was not subject to state liability. The judges admitted that Community law provided state liability for legislative action, but found that outside the scope of Community, the liability of Austria for a tort caused by the legislative did not exist. Here the national court was not prepared to set aside national rules for Community rules, where it is under no Community obligation to do so.

*Extension to European Economic Area*

Courts of EFTA states have extended the application of *Francovich* to damages caused by breaches of the EEA Agreement. The Swedish Supreme Court engaged first on that road, although using an indirect route, whilst the Norwegian Supreme Court directly applied EC case law to an EEA case.

In 1994, the Swedish Supreme Court heard a case involving damage caused by the incorrect transposition of an EC Directive, which Sweden, then an EFTA member, was committed to transpose. The court found that since *Francovich* had been decided on the basis of a principle “inherent” to the Treaty, and since the EEA Agreement did not

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possess any of the specific features of the EC legal order, one could not base a duty to compensate on Francovich, as it did not constitute relevant case law. The Supreme Court nonetheless turned to the EFTA case law. Considering that one could only depart from EFTA courts’ decisions where there were particularly important reasons for doing so, it decided that the EFTA case law recognising an obligation to compensate as inherent to the EEA Agreement suggested that there was a duty to compensate under the EEA Agreement too.

A year later, the Norwegian Supreme Court did not pull any punches when it directly applied the Brasserie criteria, in addition to the EFTA case law, to hold the Norwegian State liable for an erroneous transposition of EC Directives. The court considered that such obligation is supposed by the EEA Agreement and its transposition legislation. Interestingly, the court observed that Iceland Supreme Court also came to the same conclusion, suggesting that some kind of peer pressure may be at work between national courts.

Extension to injunctions or implementation orders

Community law only provides for the remedy of compensation, whilst in some legal systems, like in England, tort remedies include injunctions. Dutch Advocate General Langemeier, in the Waterpakt case, contended that, following Francovich, national courts could grant injunction to adopt primary legislation. The Dutch Supreme Court did not follow him, and held that judges could not intervene in political (legislative) decision-making and order the state to implement Directives. It considered that denying a private party the right to order the state to implement a Directive in the case of non-performance was perfectly compatible with Francovich, since the Community Court did not have the power to order the adoption of legislation either.

One must note here that, although the power of injunction towards the administration would increase pressure on the states to fulfil their Community obligations, its application to the legislator would be problematic, due to the politically contingent and complex nature of legislative decision making.

These various attempts to extend the scope of Francovich are revealing of the impact of the doctrine on the rules governing public bodies liability in Europe, through the mediation of national judges.

Conclusions: the dynamics of legal integration and the construction of a European administrative jus commune

This critical review of national courts’ applications of the *Francovich* doctrine of state liability is illuminating. Contrary to Tallberg’s earlier observations,¹⁹⁰ the dominant picture today is that of a relatively faithful application of the doctrine, even in its most controversial features, i.e. liability for legislative and judicial breaches. Even the flexibility allowed by the Community “framework” approach does not seem to be abused, or at least not in a way such as to deprive the doctrine of its effectiveness. Instead, national courts have imaginatively integrated the doctrine with domestic tort rules to maintain a coherent system of public tort. Of course, there are inevitable pockets of resistance. However, this is usually not so much directed against the principle of state liability itself, but against the intrusion of EC law into national “reserves”.

It is also true that there is some diversity in the domestic application of the doctrine, which may be seen as impairing uniform application. However, this diversity is more often the consequence of a lack of Community guidance than of hostility to the doctrine.

It is difficult to draw general conclusions, for every national decision is adopted in specific circumstances. Yet, it is clear that national traditions of judicial deference, separation of powers and parliamentary sovereignty have been determinant over the timing and degree of acceptance of the doctrine. Moreover, the level of Community guidance as well as that of “goodness of fit” between national and Community rules on state liability strongly influence the application of the doctrine.

In addition, the need for coherence of the national legal order and legal certainty play a significant role in the adjustment of national rules around European standards. It also leads to the infiltration of national liability elements into the application of the *Francovich* formula, which as it takes place in the interstices left by the Court, does not threaten the whole edifice. Rather, it improves the integration of the doctrine within national legal arrangements, thereby providing for smoother application.

One should also be aware that the increasing familiarity of national courts with the doctrine, which has been gradually and sensitively developed by the Court, contributes to a better application of the doctrine.

Moreover, it is worth noting that the application of *Francovich* is facilitated by a trend across Europe towards improving the conditions of engagement of public authorities’ liability, in order to provide increased protection of individuals’ interests against harmful state activities. This leads national lawmakers, including national courts, not only to apply *Francovich* instead of more restrictive national rules, but also to use foreign models, such as *Francovich* (but also other domestic systems or the ECHR), to develop national rules in that direction.

Furthermore, one should not overlook the fact that in a few cases, the doctrine is used by national courts to develop their supervision of other state organs, following a model of judicial empowerment or competition between courts.

¹⁹⁰ See above, fn.5.
All this suggests that both rational and normative explanations must be combined to acquire a more comprehensive understanding of the reception and application of state liability by domestic judicial actors, and, by extension, of legal integration in Europe.

Finally, one should stress that, when Francovich goes back home, it moulds itself into the national tort rules and procedures, in a way which is promising for the future of legal integration in Europe. The Francovich doctrine and its national uses provide a great illustration of the pluralist mode of construction of the European legal order,\(^{191}\) in a spirit of “unity in diversity.”

\(^{191}\) As advocated, inter alia by M. Maduro, cited above, fn.4.