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Francovich v. Italian Republic: Should Member States be Directly Liable for Nonimplementation of European Union Directives

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Francovich v. Italian Republic: Should Member States be Directly Liable for Nonimplementation of European Union Directives?

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I. INTRODUCTION

When CDN Electronica SnC in Vicenza (CDN), an Italian electronics company, went bankrupt, its employees were unable to collect wages they were due.¹ CDN's insolvency caused a depletion of CDN's funds leaving many of their

1. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5406, 2 C.M.L.R. 66, 73 (1993). See *infra* notes 109-186 and accompanying text (discussing and examining the case in its entirety).

financial obligations unmet.² As a result, Mr. Francovich, an Italian citizen and employee of CDN, received only sporadic payments of wages he was due.³ Frustrated with CDN's inability to fulfill its financial obligation to him, Mr. Francovich brought suit to recover his earned wages. Although a judgment was rendered against CDN, the company was insolvent and Mr. Francovich recovered nothing.⁴ Consequently, Mr. Francovich sued the State of Italy on a theory of state liability for directive nonimplementation.⁵ Mr. Francovich asserted that Italy's failure to implement Directive 80/987 rendered his claim worthless and, therefore, Italy should compensate him.⁶

As a member state of the European Union (EU), Italy is bound to implement EU directives into the Italian national system of laws.⁷ Directives are laws created by the European Parliament for adaptation and implementation by member states.⁸ In cases of directive nonimplementation, the question generally posed is whether a directive creates any individual rights enforceable by the national courts. A secondary but equally important question posed by *Francovich v. Italian Republic*, is whether the legal quality of a directive depends upon implementation by a member state. *Francovich v. Italian Republic* answers these questions. First, directives create rights for individuals in the presence of direct effect.⁹ Second, that member states can be held directly liable for nonimplementation of directives.¹⁰

Utilizing the case of *Francovich v. Italian Republic*,¹¹ this casenote examines the remedies available to nationals when their member state fails to implement an EU Directive. Part II provides a legal background to the European Union, directives, and the theory of direct effect.¹² Building upon the workings of the European Union and the theory of direct effect, Part III puts *Francovich v. Italian Republic* in context, tracing the evolution of case law on the theory of direct

2. *Francovich v. Italian Republic*, 1991 E.C.R. at 5406, 2 C.M.L.R. at 73.

3. *Id.*

4. *Id.*, 2 C.M.L.R. at 74.

5. *Id.* See *infra* notes 161-186 and accompanying text (discussing the theory of state liability for directive nonimplementation).

6. *Id.*, 2 C.M.L.R. at 74.

7. See *infra* notes 23-50 and accompanying text (delineating the role of directives in the European Union [hereinafter EU] and describing the responsibility of member state signatories to the Treaty Establishing the European Economic Community with respect to directives).

8. See *infra* notes 23-50 and accompanying text (explaining directives and the duties incumbent upon member state signatories to the EEC TREATY under article 189).

9. *Francovich v. Italian Republic* does not establish the theory of direct effect but upholds the precedence of prior case law establishing and refining the concept of direct effect. See *infra* notes 51-59 (defining direct effect). To understand this evolution, see *infra* notes 60-88 and accompanying text (describing the evolution of case law on direct effect).

10. This is quite a notable holding which should have a great impact on member state efficacy in directive implementation. See *infra* notes 187-203 and accompanying text (examining the legal ramifications of the case of *Francovich v. Italian Republic*).

11. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. at 5357, 2 C.M.L.R. at 66 (1993).

12. See *infra* notes 18-59 and accompanying text.

effect.¹³ Focusing on the subject of controversy, Part IV provides an analysis of Directive 80/987 and the protection its implementation would have insured Italian employees.¹⁴ Part V discusses the facts, procedural history, and decision of *Francovich v. Italian Republic*.¹⁵ Part VI then addresses the legal ramifications of *Francovich v. Italian Republic* on member state liability for directive nonimplementation within EU law.¹⁶ Finally, Part VII concludes with a look towards further possible evolution of case law with respect to member state liability for directive nonimplementation.¹⁷

II. LEGAL BACKGROUND

A. *European Union*

Created in 1957, the purpose of the European Community (EC) is to promote free movement of goods, persons, capital and services among member states.¹⁸ In 1987, the Single European Act (SEA)¹⁹ was passed to help effectuate harmonization between member states in order to achieve the goals of the EC.²⁰ The SEA called for a transformation of relations among member states into a European Union and changed the name of the union of member states from the European Community to the European Union.²¹ Within the SEA, member states recognized "the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law. . . ."²²

13. See *infra* notes 60-88 and accompanying text.

14. See *infra* notes 89-108 and accompanying text.

15. See *infra* notes 109-186 and accompanying text.

16. See *infra* notes 187-203 and accompanying text.

17. See *infra* notes 204-209 and accompanying text.

18. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Mar. 25, 1957, 298 U.N.T.S. 11. In 1957, the signing of the EEC TREATY created the European Community [hereinafter EC]. See PAOLO MENGGOZZI, EUROPEAN COMMUNITY LAW (Patrick Del Duca trans., 1990). The EEC Treaty created a legal system which includes EC member states and their citizens. Case 26/62, Van Gend EN Loos v. Nederlandse Belastingadministratie, 1963 E.C.R. 1, 2 C.M.L.R. 105 (1963).

19. The Single European Act, July 1, 1987, 30 O.J. Eur. Comm. (No. 169) pmb1. (1987) [hereinafter SEA].

20. *Id.* The Single European Act amended the EEC Treaty. The Single European Act was an attempt to further effectuate the EEC Treaty, "to improve the economic and social situation [of the EC] by extending common policies and pursuing new objectives . . . to ensure a smoother functioning of the Communities. . . ." *Id.*

21. *Id.* The name change can be interpreted as an attempt to delineate the realization by the European Parliament of the importance of cohesiveness and unity among member states in order to effectively ensure fulfillment of the goals established by the member states in the EEC Treaty. *Id.*

22. *Id.*

B. Directives

European Union Directives created by act of the European Commission, facilitate harmonization of certain policies and laws between member states of the European Union in order to achieve the EU goals of a single common market.²³ In order to facilitate harmonization, directives set forth rules to regulate areas of Union concern with respect to free movement of goods, persons, capital and services among EU member states.²⁴ These directives bind the member states to which they are addressed.²⁵ However, the effectiveness of directives within each of the member states depend on implementing legislation.²⁶

A directive's provisions are not automatically integrated into any of the member states' legal systems, but must be directly implemented through state legislation.²⁷ Article 189 states that directives merely formulate results to be achieved, leaving the form, manner, and method with which to achieve the directive's goals to member state authorities.²⁸

The legal effects of a directive are a matter of interpretation by the courts of each individual member state and the European Court of Justice. Although member states in theory are bound by the EEC Treaty as signatories to implement directives, in practice they may or may not implement enforcing legislation.²⁹ As a result of the freedom of member states regarding directive implementation, many member states ultimately fail to implement directives.³⁰ Since member state

23. Within the EC system, the national courts of each member state apply the provisions of community law presented in the form of directives to cases within their jurisdiction. EEC TREATY, *supra* note 18, art. 189. "Where Community authorities have by directive imposed on Member States the obligation to pursue a particular course of conduct the useful effect of such act would be weakened if individuals were prevented from relying on it before their national courts." Case 51/76, *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen*, 1977 E.C.R. 113, 126-127, 1 C.M.L.R. 413, 429 (1977). Thus, the individual national courts are left to ensure that EC rules have full effect and, through their enactment, function to protect the rights which they confer on individuals through their creation. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, 3 C.M.L.R. 263.

24. EEC TREATY, *supra* note 18, arts. 3 & 189.

25. MENOZZI, *supra* note 18, at 90. "[T]he binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each member state to which addressed.'" Case 152/84, *M.H. Marshall v. Southampton and South-west Hampshire Area Health Authority Teaching*, 1986 E.C.R. 723, 749, 1 C.M.L.R. 688, 700 (1986).

26. EEC TREATY, *supra* note 18, art. 189:

Directives are part of a two stage system of legislation. At the first stage, the subject matter of the law to be harmonized and the time limit for implementation by the Member-States are determined. At the second stage, the Member-States have to translate the directives addressed to them into national law within the time limit applicable to them.

Case 123/84, *Kloppenbergh v. Finanzamt Leer*, 1 C.M.L.R. 873.

27. EEC TREATY, *supra* note 18, art. 189. Under Article 189 of the EEC Treaty, a directive will not cause a modification of internal law in the absence of an implementing act. *Id.*

28. *Id.*

29. See *infra* notes 200-202 and accompanying text (discussing nonimplementation of directives).

30. The prevalence of laxity by member states in directive implementation can be appreciated by examining the volume of cases brought in the European Court of Justice resulting from nonimplementation by member states of directives under Article 189 of the EEC TREATY. EEC TREATY, *supra* note 18, art. 189.

noncompliance greatly weakens the effectiveness of directives and in turn the European Union,³¹ the European Court of Justice continually struggles with ways to ensure member state compliance with directives. The case of *Francovich v. Italian Republic* addresses a new approach by the Court to ensure directive implementation. This approach is member state liability for directive nonimplementation.³²

According to Article 189 of the EEC Treaty,³³ there is a distinction between different sources of EU law; small regulations are directly applicable without need for implementation by member states,³⁴ while directives, in order to become effective, require implementation by the member states to whom they are addressed.³⁵ As a result of the language of Article 189, the European Court of Justice has traditionally held that a directive does not create individual rights in the absence of national legislative implementation.³⁶ This reasoning arises from the language of Article 189 which states that a directive only binds the member states to which addressed, and additionally requires action by individual member states as to the form and methods of the directive's implementation before any individual rights are created.³⁷

The EEC Treaty provides that each member state of the European Union must implement EU directives into their own system of national laws.³⁸ According to Article 164 of the EEC Treaty, the European Court of Justice ensures that member states observe EU law in their interpretation and application of the EEC Treaty.³⁹

To help insure implementation of EU directives, the European Court of Justice has stated that "a member state which has not adopted the implementing measures required by an EU directive within the prescribed period may not plead its own failure to perform its obligations under the directive against its own nationals."⁴⁰ This holding underscores the gravity of member states' shirking their

31. See *infra* notes 187-203 and accompanying text (describing the legal ramifications of member state noncompliance in directive implementation).

32. See *infra* notes 161-186 and accompanying text (addressing state liability for nonimplementation).

33. EEC TREATY, *supra* note 18, art. 189.

34. Regulations, like directives, are a type of EU law. For information on the operation of regulations and their legal effect upon member states, see DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 66-69 (1993).

35. EEC TREATY, *supra* note 18, art. 189. Article 189 defines and lays out the distinctions within EEC law between regulations and directives, particularly the need for member state action through legislation in order to effectuate implementation of directives. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* The member states of the European Union who are all signatories to the SEA are: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal and the UK. SEA, *supra* note 19. In signing the SEA these member states have accepted the original principles of the EEC Treaty and the changes established by the SEA committing themselves as members to the goals and obligations of the European Union. *Id.*

39. EEC TREATY, *supra* note 18, art. 164.

40. Case 221/88, *European Coal and Steel Community v. Acciaierie e Ferriere Busseni SpA*, 1990 E.C.R. 495.

responsibility by not implementing directives. Essentially, member states guilty of nonimplementation are left without protection from nationals claiming noncompliance.⁴¹

The EEC Treaty provides that the law of the European Union shall be supreme over the laws of member states.⁴² Directives effectuate adherence and compliance with EU law in each of the individual member states.⁴³ Directives serve as "acts which are designed to produce legal consequences for one or more member states in so far as such states are obligated to put into effect the result that is set forth in the act."⁴⁴ Further, directives are created on behalf of member states and not individuals.⁴⁵ The creation of directives allows pertinent results to be achieved within the European Union. Thus, directives ensure parity of results while allowing individual member states to determine their means of application.⁴⁶

Under Article 189 of the EEC Treaty, member states must take all measures necessary to achieve the result prescribed by a directive.⁴⁷ When a question of nonimplementation arises, the European Court of Justice examines the member state's method of implementation, and evaluated the concomitant result.⁴⁸ In making this determination, the European Court of Justice also considers the form, substance, and function of the member state's measures taken in response to the directive, examining their overall context and effect within the European Union.⁴⁹ If a member state fails in its obligation to implement a directive, it is liable to an injured party if three conditions are met: (1) the directive grants legal rights to individuals; (2) the content of those rights can be ascertained from the provisions of the directive; and (3) a causal link between the breach of the state's obligation and the harm suffered by the injured parties can be established.⁵⁰

41. *Id.*

42. EEC TREATY, *supra* note 18, arts. 5 & 169. Article 5 states that member states are obligated to take all appropriate measures in order to ensure fulfillment of obligations arising out of the Treaty prohibiting measures which could jeopardize the objectives of the Treaty. *Id.* art. 5. Article 169 lays out the repercussions for member states not adhering to the Treaty, which includes possible action by the European Court of Justice. *Id.* art. 169. Therefore, taken together, the language of Article 5 and Article 169 of the EEC Treaty can be interpreted to mean EEC law is supreme. The European Court of Justice has had occasion to directly address the issue of supremacy of EU law. One case, *Commission v. Italy*, established that with respect to EC law, "no appeal to provisions of internal law of any kind whatever can prevail." Case 48/71, *Commission v. Italy*, 1972 E.C.R. 527, 535. In addition, in *Costa v. ENEL*, the court stated, "the EEC Treaty has created its own legal system which on the entry into force of the Treaty became an integral part of the legal system of the Member States and which their courts are bound to apply." Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 602, 3 C.M.L.R. 425, 456 (1964).

43. EEC TREATY, *supra* note 18, art. 189.

44. R.H. LAUWAARS, *LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS* 37 (1973).

45. *Id.* at 36. "Directives can only bring into being rights for individuals as a reflex of the obligations imposed upon the States." *Id.*

46. EEC TREATY, *supra* note 18, art. 189.

47. *Id.*

48. Case 33/70, *Spa S.A.C.E. v. Ministry for Finance of the Italian Republic*, 1970 E.C.R. 1213, 1223-24, C.M.L.R.123, 132 (1971).

49. *Id.*

50. Cases C-6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5373, 2 C.M.L.R. 66-67 (1993).

C. *Direct Effect*

In order to find a directive directly effective, the European Court of Justice has stated that the directive must contain "clear and unconditional legal norms and . . . not leave normative discretion to the member states."⁵¹ If a directive manifests a clear intent to place a duty upon member states to carry out a specific purpose, it is directly effective.⁵² Utilizing the language of the directive, the Court must attempt to determine the reasons for establishing the directive and the implications of its implementation.⁵³ If the Court finds the purpose and intent of a directive sufficiently clear, and the directive is not implemented within the timetable prescribed, the European Court of Justice can effectuate compliance by ruling it directly effective.⁵⁴ It is important to note that if a directive has been implemented before the prescribed period, an individual cannot argue direct effect in the national courts of their member state.⁵⁵ By implementing a directive within its prescribed time period, a member state fulfills its obligation to the EU and the issue becomes one that must be dealt with on the national level.⁵⁶

The concept of direct effect stems from the goals of the European Union in establishing a single common market. According to the EEC Treaty, directives serve to establish the desired single common market of the European Union by effectuating and facilitating subsequent legislation among the member states on the topics of the directives.⁵⁷ Direct effect allows directives to become binding in the absence of additional member state legislation.⁵⁸ The recognition of direct effect was the first step in the evolution of EU case law attempting to ensure fulfillment of EU directives and, thus, the goals of the EU.⁵⁹

51. Case 41/74, *Yvonne van Duyn v. Home Office (Van Duyn)*, 1974 E.C.R. 1337, 1354-55, 1 C.M.L.R. 1, 15 (1975). *Van Duyn* clarified the test for direct effect. *Id.* The Court interpreted Article 189 of the EEC Treaty as saying, if a directive has "clear and unconditional legal norms and does not leave normative discretion to the members states," it is directly effective, meaning there is no need for member state implementation in order for the directive to have binding effect. *Id.*

52. Case 9/70, *Franz Grad v. Finanzamt Traunstein (Grad)*, 1970 E.C.R. 825, 837, C.M.L.R. 1, 24 (1971).

53. *Id.* "[I]n each particular case, it must be ascertained whether the nature, background and wording of the provision in question, are capable of producing direct effects in the legal relationships between the addressee of the act and third parties." *Id.* at 826.

54. Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, 1 C.M.L.R. 499 (1982).

The question of the direct effect of a directive can arise only where a Member State has failed in its duty to implement the directive and a person claims the right to defend himself against the activities of the Member State by relying on the provisions of the directive.

Case 270/81, *Felicitas Rickmers-Linie KG & Co. v. Finanzamt fur Verkehrsteuern*, 1982 E.C.R. 2771, 2779, 3 C.M.L.R. 447, 460 (1982).

55. WYATT & DASHWOOD, *supra* note 34, at 72. "National legislative implementation of a directive constitutes both the due performance of a Community obligation, and the exercise of a sovereign choice to exclude the direct application of the directive itself by the national courts." *Id.*

56. See *supra* notes 23-30 and accompanying text (generally describing Directives).

57. EEC TREATY, *supra* note 18, art. 189.

58. See *infra* notes 60-85 and accompanying text (analyzing the cases of *Grad & Ratti*).

59. See *infra* notes 60-88 and accompanying text (outlining the evolution of case law on direct effect).

III. EVOLUTION OF CASE LAW ON DIRECT EFFECT

Several cases have addressed the concept of direct effect, and they serve as examples of the manner in which the court determines whether a directive has direct effect.⁶⁰ In *Franz Grad v. Finanzamt Traunstein (Grad)*,⁶¹ the Court established that directives can vest rights in individuals.⁶² *Grad* dealt with an obligation imposed upon member states by Directive 62/227⁶³ and Directive 69/463,⁶⁴ dealing with the harmonization of member state legislation with respect to turnover taxes.⁶⁵ In the case, *Grad* asked the Court whether the obligation of Directive 67/227⁶⁶ and its deadline for completion vested rights in individuals which the national court had to uphold and protect.⁶⁷ In order to respond to *Grad's* question, the Court utilized the concept of direct effect.⁶⁸ Through *Grad*, the Court established the idea that the efficacy of directives presents a matter of statutory interpretation.⁶⁹

In the case of *Pubblico Ministero v. Tullio Ratti (Ratti)*,⁷⁰ the Board of Directors of the undertaking of Silvam of Senago, represented by Ratti, a board member, decided to package its solvents and affix labels to their containers in conformance with Directive 73/73 and Directive 77/728, which set out requirements for varnish and solvent labeling to promote trade and free movement of goods.⁷¹ Since Italy had a stricter law for labeling, the Italian government pro-

60. In addition to the cases discussed *infra* notes 61-76, see Case 36/75, *Roland Rutili v. Minister for the Interior*, 1975 E.C.R. 1219, 1 C.M.L.R. 140 (1976), Case 51/76, *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen*, 1977 E.C.R. 113, 1 C.M.L.R. 413 (1977), Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, 1 C.M.L.R. 499 (1982), and Case 255/81, *R.A. Grendel GmbH v. Finanzamt fur Körperschaften in Hamburg*, 1982 E.C.R. 2301, 1 C.M.L.R. 379 (1983).

61. Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, C.M.L.R. 1 (1971).

62. *Id.* The interpretation that directives can vest rights in individuals has been viewed as the traditional interpretation of Article 189 of the EEC Treaty. EEC TREATY, *supra* note 18, art.189.

63. Council Directive No. 62/227, 1965-1966 O.J. SPEC. ED. 67.

64. Council Directive No. 69/463, 1969 O.J. SPEC. ED. 551.

65. See *supra* notes 63-64.

66. Council Directive No. 62/227, 1965-1966 O.J. SPEC. ED. 67.

67. Case 9/70, *Franz Grad v. Finanzamt Traunstein (Grad)*, 1970 E.C.R. 825, 828, C.M.L.R. 1, 22 (1971). On March 1, 1969, Mr. Franz Grad transported 25.3 tons of preserved fruit from Hamburg to Austria. *Id.* The German customs office imposed a tax on *Grad* for the carriage of the goods. *Id.* *Grad* claimed the tax infringed on EEC law, particularly Directive 65/271 and Directive 56/227. *Id.* The two directives prohibit member states from applying turnover taxes concurrently with specific taxes and they force member states to abolish turnover taxes by January 1, 1992. *Id.* at 827-28.

68. *Id.* at 841. The Court found direct effect for the prohibition on concurrent taxes since the directives granted clearly delineated specific rights to individuals. *Id.* With respect to the abolishment of turnover taxes, the Court found no direct effect since member states had until January 1, 1972 to fulfill the requirement of abolition. *Id.* at 842.

69. *Id.* at 842. In *Grad*, the Court interpreted the specificity of the rights granted by the Directives, focusing on whether they were clearly applicable to individuals. *Id.* Utilizing their statutory interpretation, the Court made a finding of direct effect. *Id.* The Court then examined the tax on carriage and found it was not prohibited until the passage of the prescribed date of January 1, 1972. *Id.* Thus, the Court's interpretation of a directive becomes the ultimate control over its efficacy. *Id.*

70. Case 148/78, *Pubblico Ministero v. Tullio Ratti (Ratti)* 1979 E.C.R. 1629, 1 C.M.L.R. 96 (1980).

71. *Id.* at 1631-32, 1 C.M.L.R. at 108.

secuted Ratti for infringement of Italian law.⁷² Ratti claimed the directives in issue were directly effective, and consequently granted him personal rights that the Italian courts have an obligation to protect.⁷³ Ratti specifically argued that under the test of *Van Duyn*,⁷⁴ the directives imposed detailed and complete obligations leaving no margin in the discretion of the member states.⁷⁵ Ratti demonstrated the precise and detailed obligations of member states under the directives by citing provisions concerning requirements for the size, color, shape, and position of the label.⁷⁶ Italy claimed that member states had two years to implement the Directives so that Italian law applied until the two year implementation period expired.⁷⁷ The Court agreed with the position of Ratti and found direct effect due to the clear and precise obligations laid out for the member states in the directive.⁷⁸

The cases of *Ratti* and *Grad* offer a useful contrast. In *Ratti*, Italy passed laws to comply with EC Directives 73/73 and 77/728, and met all of the requirements necessary to insure effective implementation of the directives before the prescribed time period for implementation passed.⁷⁹ Thus, the Court found the directive directly effective although the prescribed time period for implementation had not yet passed. In *Grad*, although the laws implementing the directive were put in place, the laws conflicting with the directive were repealed before the prescribed time period for the directive's implementation had expired.⁸⁰ Therefore, the Court found no direct effect.⁸¹ If left in place, the German law *Grad* was contenting would have violated the specific rights granted to individuals in the directives.⁸² Yet the Court found it fully within the power of Germany to repeal its established laws and create an alternative approach to fulfilling the requirements of the directives before the expiration of their implementation period.⁸³

When no direct effect is found, as in *Grad*, individuals are left without the right to a private cause of action. In such case, a directive can only be enforced by

72. *Id.*

73. *Id.* at 1633, 1 C.M.L.R. at 109.

74. *Id.* at 1634, 1 C.M.L.R. at 110. *See supra* note 51 (explaining the direct effect test of *Van Duyn*).

75. Case 148/78, *Pubblico Ministero v. Tullio Ratti (Ratti)* 1979 E.C.R. 1629, 1634, 1 C.M.L.R. 96 (1980).

76. *Id.*, 1 C.M.L.R. at 110-11.

77. *Id.*, 1 C.M.L.R. at 96.

78. *Id.* at 1642, 1 C.M.L.R. at 110.

79. *See supra* notes 70-78 and accompanying text.

80. *See supra* notes 61-69 and accompanying text.

81. *See supra* notes 51-59 and accompanying text (discussing direct effect).

82. *See supra* notes 51-59 and accompanying text (delineating the standards for direct effect).

83. Case 255/81, *R.A. Grendel GmbH v. Finanzamt fur Körperschaften (Grendel)*, 1982 E.C.R. 2301, 2308, 1 C.M.L.R. 379 (1983). "[A] Community Provision cannot be said to have direct effect before the enactment of the provision of national law which is indispensable to its perfection." *Id.*

means of an action brought in the European Court of Justice by the Commission⁸⁴ or by a member state under Articles 169-171 of the EEC Treaty.⁸⁵

If not revoked, the implementation of a directive before the prescribed time period creates direct effect.⁸⁶ The Court, however, has failed to address whether there can be a finding of direct effect when implementation does not occur after the prescribed implementation time period. In *R.A. Grendel GmbH v. Finanzamt fur Korperschaften in Hamburg*, the Court dispensed with the issue saying, "[i]f it proves impossible to implement a directive within the time fixed for doing so, the only action compatible with Community law which a Member State can adopt is to take the appropriate initiatives to obtain an extension of time."⁸⁷ This language suggests that the Court will find direct effect if a directive, in the absence of an extension of time, is not implemented within the prescribed time period.

In light of the above precedents, *Francovich v. Italian Republic* extends the application of direct effect, taking it to its next level of evolution. *Francovich v. Italian Republic* seeks to answer the question that previous cases failed to answer: can there be a finding of direct effect after the prescribed time period for a directive's implementation has passed? *Francovich v. Italian Republic* addresses Italy's failure to implement, within the prescribed period, an EU directive protecting the interests of employees when their employer becomes insolvent. The case specifically examines the effect of Italy's nonimplementation of Directive 80/987 on the individual rights of Italian citizens. After discussing the theory of direct effect and state liability for directive nonimplementation, the Court ultimately finds Italy liable to the complainant employees.⁸⁸

IV. ANALYSIS OF DIRECTIVE 80/987

At the center of the controversy in *Francovich v. Italian Republic* is Directive 80/987⁸⁹ which equalizes EU member state laws relating to protection of employees in the event of their employers' insolvency.⁹⁰ The Directive seeks to guarantee payment of employees' outstanding wage claims upon the insolvency

84. The European Commission is a body of the European Union established by the EEC Treaty. EEC TREATY, *supra* note 18, art. 3. The Commission consists of representatives of each of the member states of the European Union. *Id.* The Commission formulates EU law and is responsible for monitoring its enforcement. EEC TREATY, *supra* note 18, art. 155.

85. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 208 (1981).

86. *See infra* notes 60-78 and accompanying text (providing examples of cases involving direct effect).

87. Case 255/81, *R.A. Grendel GmbH v Finanzamt fur Korperschaften in Hamburg*, 1982 E.C.R. 2301, 2316, 1 C.M.L.R. 379 (1983).

88. Case 6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. S357, 2 C.M.L.R. 66, 115 (1993). *See infra* notes 126-186 and accompanying text (analyzing the Court's discussion of direct effect and state liability for directive nonimplementation).

89. Council Directive No. 80/987, 1980 O.J. (L 283) 23 [hereinafter *Directive*].

90. *Id.*

of their employer.⁹¹ It also seeks to balance economic and social development in the EU by accounting for the varied economies of member states.⁹²

Section I of the Directive establishes the applicability of the Directive.⁹³ Article 1 limits the Directive's application to employees' claims arising from contracts of employment or from existing employment relationships.⁹⁴ Certain claims may be excluded due to "the special nature of the employees' contracts of employment, employment relationships, or the availability of other protection equivalent to that of the Directive."⁹⁵ Article 2 defines insolvency within the meaning of the Directive as occurring in two specific instances:⁹⁶ (1) when a request has been made under the appropriate member state laws for the instigation of proceedings involving an employer's assets to satisfy creditors;⁹⁷ and (2) when an authority competent to do so under member state laws has instigated proceedings involving an employer's assets or has established that the employer's undertaking or business has been definitively closed down with insufficient assets to warrant initiation of proceedings for recovery.⁹⁸

Section II explains the role of guarantee institutions in carrying out the Directive.⁹⁹ Article 3 requires member states to "ensure that guarantee institutions guarantee . . . payment of employees' outstanding claims resulting from contracts of employment or employment relationships. . . prior to a given date."¹⁰⁰ Each member state may choose the date of payment.¹⁰¹ The date can be the date of the onset of the employer's insolvency, the date of the notice of dismissal issued to the employee concerned on account of the employer's insolvency, or the date of discontinuation of the contract of employment or the employment relationship due to the employer's insolvency.¹⁰² Once a date is chosen, Article 4 gives member states the option of limiting the liability of the guarantee institutions discussed in Article 3.¹⁰³ The process used depends upon the calculation date

91. *Id.*

92. *Id.* The Directive allows certain categories of employees within specific member states to be excluded from the scope of the Directive. *Id.* § I, art. 1. These categories include employees having a contract of employment or an employment relationship of a special nature and employees covered by other forms of guarantees. *Id.* The exceptions recognize the existence of guarantees already in place and the presence of special contracts or relationships that might not be able to continue if they are held bound to the Directive. *Id.* These exceptions apply to specific member states with the recognition that member states are in different positions and achievement of complete parity among member states should not be forced when it will result in hardship. *See id.*

93. Directive, *supra* note 89, § I. Section 1 includes Articles 1 and 2. *Id.*

94. *Id.* art. 1.

95. *Id.*

96. *Id.* art. 2.

97. *Id.*

98. *Id.*

99. Directive, *supra* note 89, § II. Section II consists of articles 3, 4, and 5. *Id.*

100. *Id.* art. 3.

101. *Id.* art. 3.

102. *Id.*

103. *Id.* art. 4.

chosen by the member state pursuant to Article 3.¹⁰⁴ Rules for organization, financing, and operation of the guarantee institution, according to Article 5, must be promulgated by the member states.¹⁰⁵ Member states must also ensure that employers contribute to the institutions and that the institutions' assets are independent of the employer's operating capital, thereby remaining inaccessible in insolvency proceedings against the employer.¹⁰⁶ Furthermore, in order to ensure their payment, member states may exempt contributions due under national social security schemes, supplemental schemes, or intercompany schemes.¹⁰⁷

Taken in its entirety, Directive 80/987 works to protect employees upon employer insolvency by guaranteeing payment of their outstanding wage claims. Created to promote equality among the laws of member states, the Directive explicitly recognizes and accounts for differences among member states in their economies and employment structures until equality is achieved. The Directive also allows certain categories of employees to be exempted from protection under the Directive.¹⁰⁸ The Directive equalizes member state laws protecting employees upon employer insolvency and seeks to uniformly protect EU workers. Thus, due to its explicitness and the important functions the Directive serves, effective implementation of Directive 80/987 is quite important.

V. ANALYSIS OF THE CASE

A. Facts

Francovich v. Italian Republic consolidates two cases brought against Italy for recovery of unpaid wages, *Francovich v. Italian Republic* and *Bonifaci v. Italy*.¹⁰⁹ In both cases, employees sued Italy on a theory of directive nonimplementation as a result of Italy's failure to implement Directive 80/987.¹¹⁰ In the first case, Mr. Francovich, an employee of CDN Electronica SnC in Vicenza (CDN), brought action against CDN to recover unpaid wages.¹¹¹ Because Mr. Francovich received only sporadic payments of his wages from CDN, he brought proceedings before the Pretore di Vicenza¹¹² in order to recover his unpaid wages.¹¹³ By judgment of

104. See *id.* art. 3.

105. *Id.* art. 5.

106. *Id.*

107. *Id.* art. 6.

108. Directive, *supra* note 89, annex. See *supra* note 92 (specifying those employees exempt from the Directive).

109. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 2 C.M.L.R. 66 (1993).

110. *Id.* at 5406-07, 2 C.M.L.R. at 73-75.

111. *Id.* at 5406, 2 C.M.L.R. at 73.

112. *Id.* The Pretore is the judge of the Pretura. The Pretura is the Magistrate's Court in Italy. C.c. art. 8 (Italy). Article 8 has been amended by law no. 374 dated November 21, 1991, but this amendment has not yet come into force. The Pretura has civil jurisdiction up to 20,000,000 lire and penal jurisdiction in cases involving up to three years imprisonment. *Id.* The Pretura has exclusive first instance in all labor matters and

January 31, 1985, the Pretore di Vicenza ordered CDN to pay six million lire to Mr. Francovich, however, the company's insolvency left the claim unsatisfied.¹¹⁴ Mr. Francovich, therefore, sought to recover judgment from Italy under a theory of directive nonimplementation.¹¹⁵

In a similar case, Danila Bonifaci and thirty-three other employees brought proceedings before the Pretore di Bassano del Grappa¹¹⁶ on April 20, 1989 against Gaia Confezioni which had been declared insolvent on April 5, 1985.¹¹⁷ When the employment relationship was discontinued, Gaia Confezioni owed Bonifaci and its other employees more than 253 million lire in back wages.¹¹⁸ More than five years after the insolvency, the plaintiffs had been paid nothing and were told that even a partial distribution of their wages was highly unlikely.¹¹⁹ Thus, like Francovich, the employees brought an action against Italy under a theory of directive nonimplementation.¹²⁰

In the first case, Mr. Francovich claimed entitlement to guarantees under Directive 80/987, or in the alternative, damages from the Italian state.¹²¹ In the second case, Bonifaci brought proceedings against Italy claiming that, in view of its obligation to implement Directive 80/987, Italy should be ordered to either pay their back wages, or in the alternative, damages.¹²² Due to the similarity of the two cases, they were consolidated and referred to the European Court of Justice for a preliminary ruling under Article 177.¹²³ Under this procedure, the Court considered the issue of Italy's liability as a member state for nonimplementation of Directive 80/987 in violation of Article 189 of the EEC Treaty.¹²⁴

B. *Opinion of the European Court of Justice*

In *Francovich v. Italian Republic*, the European Court of Justice dealt with two possible responses to Italy's failure to implement Directive 80/987. First, the

in certain special proceedings. *Id.*

113. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5406, 2 C.M.L.R. 66, 73 (1993).

114. *Id.*

115. *Id.*, 2 C.M.L.R. at 74.

116. For a brief explanation of Pretore, see *supra* note 112.

117. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5406, 2 C.M.L.R. 66, 75 (1993).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5406, 2 C.M.L.R. 66, 75 (1993).

123. *Id.* at 5405, 2 C.M.L.R. 74. Article 177 of the EEC Treaty gives the European Court of Justice jurisdiction to give preliminary rulings on interpretation of the EEC Treaty, the validity and interpretations of acts of institutions of the Community, and interpretation of statutes of bodies established by acts of the Council. EEC TREATY, *supra* note 18, art. 177.

124. *Id.* at 5405, 2 C.M.L.R. 74. The Court had already recorded Italy's failure to implement Directive 80/987 in Case 22/87, E.C. Commission v. Italy, 1989 E.C.R. 143. *Id.*

Court addressed whether the Directive had direct effect, and second, whether there was state liability on the part of Italy for its failure to implement Directive 80/987. Although the court examined and seemingly found the presence of direct effect, the court created an ambiguity, thereby utilizing this case as an opportunity to address the issue of state liability for directive nonimplementation.¹²⁵

1. Direct Effect

Directive 80/987 specifically provides for payment of unpaid wage claims guaranteeing a minimum level of protection to employees in the EU in the event of their employers' insolvency.¹²⁶ As a result of Italy's failure to implement the Directive, Italian employees were not protected when their employer became insolvent.¹²⁷ The Court agreed with Mr. Francovich's assertion that Italy should be liable for the damage that resulted from its nonimplementation of the Directive 80/987.¹²⁸

Even though a member state fails to fulfill its obligations to take all measures necessary to achieve the result prescribed by a directive, "if the conditions of the directive are unconditional and sufficiently precise, they may be relied upon in the absence of implementing measures to define rights which individuals are able to assert against the state."¹²⁹ The Court used three tests to determine whether the rights given to employees in Directive 80/987 were unconditional and sufficiently precise. These tests examined the identity of the persons entitled to the guarantee, the content of the guarantee, and the identity of the person responsible for providing the guarantee.¹³⁰ In order to determine the identity of the persons entitled to the guarantee, the court looked to the explicit language of the Directive.¹³¹ Directive 80/987 guarantees employees' claims arising from contracts of employment or employment relationships existing against insolvent employers.¹³² The Court acknowledged the precision and clarity of the Directive's articulated goal, and found the Directive clearly defines insolvency,¹³³ employment, and

125. See *infra* notes 145-150 and accompanying text (examining the court created ambiguity preventing a finding of direct effect).

126. Directive, *supra* note 89, art. 3.

127. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5405-06, 2 C.M.L.R. 73 (1993).

128. *Id.* at 5418, 2 C.M.L.R. at 83.

129. Case 8/81, *Becker v. Finanzamt Munster-Innenstadt (Becker)*, 1982 E.C.R. 53, 1 C.M.L.R. 499 (1982). *Becker* reiterates the test from *Van Duyn* for direct effect *Id.* For an explanation of the direct effect, see *supra* note 51 and accompanying text (setting forth the requirements for a finding of direct effect).

130. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5408, 2 C.M.L.R. 110.

131. *Id.*

132. Directive, *supra* note 89, art. 1(1). See *supra* notes 94-95 and accompanying text (discussing article 1).

133. Directive, *supra* note 89, art. 2(1). See *supra* notes 96-98 and accompanying text (exploring article 2)

employee,¹³⁴ and expressly delineates those employees excluded from the Directive.¹³⁵ As a result of this clarity, the European Court of Justice found the provisions of the Directive sufficiently precise to enable a member state's national court to determine whether a claimant is entitled to benefit from the guarantees of the Directive.¹³⁶

According to the Directive, member states must ensure payment of outstanding claims resulting from contracts of employment or employment relationships.¹³⁷ Member states must choose one of three dates from which payment of those claims must be ensured.¹³⁸ According to the Court, this discretion to choose the date of payment does not affect the precise and unconditional nature of the result required.¹³⁹ The Court found that for purposes of the Directive, the date of payment can be determined by using the date which will result in the least liability for the guarantee institution.¹⁴⁰ Therefore, the content of the guarantee was held to be sufficiently precise and unconditional due to the specificity of the Directive in bestowing a duty upon member states to ensure payment of outstanding claims resulting from employment contracts or employment relationships.¹⁴¹

However, in the examination of the identity of the persons liable to provide the guarantee established under the Directive, the European Court of Justice found some ambiguity.¹⁴² Each member state must promulgate rules for the organization, financial support, and operation of an appropriate institution to guarantee the required payment to employees.¹⁴³ Yet, the Directive fails to identify the party liable to provide the guarantee.¹⁴⁴ Consequently, although the provisions of the Directive are sufficiently precise and unconditional as to the persons entitled to the guarantee and the content of that guarantee, the provisions do not identify the person liable to provide the guarantee.¹⁴⁵ Interestingly, according to the Court, the

134. *Id.* art. 2(2). See *supra* notes 96-98 (discussing article 2). Article 2 specifically provides that in order to determine what constitutes an employer and an employee, national law is to be used. *Id.*

135. *Id.* art. 1(2). See *supra* notes 94-95 and accompanying text (discussing article 1).

136. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5408, 2 C.M.L.R. 66, 110.

137. For a complete analysis of Directive 80/987, see *supra* notes 89-108 and accompanying text.

138. *Id.* See *supra* note 102 and accompanying text (setting forth the three payment options.)

139. Cases C-6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5409-10, 2 C.M.L.R. 66, 111 (1993).

[T]he right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directives alone.

Id. (citing Case 71/85, *Netherlands v. FNV*, 1986 E.C.R. 3855, 3 C.M.L.R. 767 (1987) and, Case 286/85, *McDermott v. Minister for Social Welfare*, 1987 E.C.R. 1453, 2 C.M.L.R. 607 (1987) as its precedent).

140. *Id.* at 5410, 2 C.M.L.R. at 111.

141. *Id.* at 5410-11, 2 C.M.L.R. at 111.

142. *Id.* at 5411-12, 2 C.M.L.R. at 113.

143. See *supra* notes 105-106 and accompanying text (analyzing Directive Article 5).

144. Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. 5357, 5412, 2 C.M.L.R. 66, 113 (1993).

145. *Id.*

Directive's ambiguity as to who is liable to provide the guarantee does not affect the nature of the Directive.¹⁴⁶

Although the Court did not articulate such a finding, it seems a finding of direct effect would have been appropriate here.¹⁴⁷ Such a finding would have been consistent with the Court's view of the clarity and precision of the rights created for individuals and the obligations of the member states.¹⁴⁸ The Court's failure to ultimately find direct effect strongly suggests that the court created an unnecessary ambiguity.

If the Court had found direct effect, it would have merely been applying the established theory of *Becker v. Finanzamt Munster-Innenstadt*,¹⁴⁹ which would have allowed a remedy for the complainants. Instead, the Court used *Francovich v. Italian Republic* and the theory of direct effect as a stepping stone to address state liability to individuals harmed by directive nonimplementation. By circumventing a finding of direct effect, the Court surreptitiously utilized the case to take enforceability of directive implementation to a new level. Thus, it could be argued that the Court essentially created an ambiguity in order to consider state liability for nonimplementation of directives as a principle of law.¹⁵⁰

146. *Id.* at 5410, 2 C.M.L.R. at 111.

In this case the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of insolvency of their employer. The fact that Articles 3 and 4(1) and (2) give the member-States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional result of the results required.

Id.

147. *Id.* at 5412, 2 C.M.L.R. at 113.

[E]ven though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

Id.

148. *See supra* notes 130-146 and accompanying text (discussing the rights and obligations).

149. Case 8/81, *Becker v. Finanzamt Munster-Innenstadt*, 1982 E.C.R. 53, 1 C.M.L.R. 499 (1982). *See supra* notes 51-59 and accompanying text (describing the theory of direct effect).

150. *See infra* notes 174-177 (addressing the Advocate General's response to the court's creation of an ambiguity).

Like the Court, the Advocate General¹⁵¹ found the provisions of the Directive precise in identifying those employees protected and intended to benefit.¹⁵² As to the scope of the rights, the Advocate General agreed that it is impossible to know which solution Italy would have adopted had it implemented the Directive.¹⁵³ The Court, however, assumed that although it is unclear which option Italy would have chosen, the minimum guarantee of the Directive could be determined by using the date which would result in the least liability for the guarantee institution.¹⁵⁴ The Advocate General disagreed with the Court's reasoning, finding the provision imprecise since it is unclear which date Italy would have chosen.¹⁵⁵ According to the Advocate General, it is not possible to find a minimum obligation as the Court claims because the liability limit is dependant upon the date chosen by the member state for payment.¹⁵⁶

Since Italy did not implement the Directive, it is impossible to know which date would have been selected.¹⁵⁷ Therefore, the Advocate General did not find the provisions defining the scope of the rights of the directive unconditional and sufficiently precise, due to the broad discretion left to member states.¹⁵⁸ The Advocate General did agree with the Court's finding that the provisions of the Directive are not sufficiently precise and unconditional in order to determine the guarantor.¹⁵⁹ Thus, the Advocate General ultimately agreed with the Court's finding that Directive 80/987 may not be used to define rights which individuals may assert against the state through the theory of direct effect.¹⁶⁰

151. The European Court of Justice has thirteen judges who are assisted by six Advocates General. P.S.R.F. MATHUSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 2, 70-71 (5th ed. 1990). An Advocate General is chosen from

[P]eople whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries. An Advocate General serves in an independent capacity by carrying out his own personal examination of the case and expressing personal opinions. The Advocate General's opinion does not necessarily reflect the views of the European Court of Justice; however it often contains clues to the reasoning which led to the decision of the Court.

Id. The Advocate General in *Francovich v. Italian Republic* classified the case as serving a dual role: first, it ruled on the possible direct effect of 80/987 and its provisions, and second, it determined member state liability for failing to implement a binding directive. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5372, 2 C.M.L.R. 66, 74 (1993).

152. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5374, 2 C.M.L.R. 66, 76-77 (1993).

153. *Id.* at 5377, 2 C.M.L.R. at 78.

154. *Id.* at 5410, 2 C.M.L.R. at 78.

155. *Id.* at 5377, 2 C.M.L.R. at 78.

156. *Id.*

157. *Id.* at 5374, 2 C.M.L.R. at 78.

158. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5377, 2 C.M.L.R. 66, 81 (1993).

159. *Id.* at 5377-78, 2 C.M.L.R. at 78.

160. *Id.* at 5378-79, 2 C.M.L.R. at 78.

2. State Liability for Nonimplementation

In bypassing the issue and not finding direct effect, the Court moved on to consider the issue of state liability for nonimplementation of Directive 80/987. Article 5 of the EEC Treaty¹⁶¹ requires member states to take all appropriate measures to ensure fulfillment of obligations arising out of the EEC Treaty by facilitating the achievement of the European Union's tasks and goals.¹⁶² Member states must implement those laws and administrative provisions necessary to comply with Directives handed down by the EU within the prescribed implementation period.¹⁶³

Directives further EU goals by protecting citizen rights and harmonizing member state rules.¹⁶⁴ In order to protect the rights of individuals, directives must be enforced.¹⁶⁵ When these rights are violated, the European Court of Justice has held that individuals must be able to obtain remedies for infringement of their rights.¹⁶⁶ As a result, member states must be held responsible for breach of European Union law.¹⁶⁷ "The principle of State liability for harm caused to individuals by breaches of [Union] law for which the State can be held responsible is inherent in the system of the Treaty."¹⁶⁸ The EEC Treaty requires member state action in order to facilitate the effectiveness of EU law and ensure the fulfillment of EU goals. Therefore, in the absence of member state action, individuals cannot attempt to enforce rights established by the European Union.¹⁶⁹

Pursuant to Article 189 of the EEC Treaty, a directive binds each member state to which it is addressed as to the result to be achieved.¹⁷⁰ Because Italy failed to

161. EEC TREATY, *supra* note 18, art. 5.

162. *Id.*

163. *Id.* art. 11.

164. See *supra* notes 23-50 and accompanying text (explaining the purpose and role of directives in the European Community).

165. EEC TREATY, *supra* note 18, arts. 5 & 189.

166. Case 6/60, *Humblet v. Belgium*, 1960 E.C.R. 559. "[T]he full effectiveness of Community rules would be impaired and the protection of rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a member-State can be held responsible." Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5414, 2 C.M.L.R. 66, 114 (1993).

167. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5414, 2 C.M.L.R. 66, 114 (1993).

The full effectiveness of [Union] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [Union] law for which a Member State can be held responsible.

...

The possibility of obtaining redress from the Member State is particularly indispensable where . . . the full effectiveness of [Union] rules is subject to prior action on the part of the State and where, consequently, in absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by [Union] law.

Id.

168. *Id.*

169. *Id.*

170. EEC TREATY, *supra* note 18, art. 189.

implement Directive 80/987, Italian employees were not in a position to collect their unpaid wages if their employer became insolvent.¹⁷¹ Consequently, under Article 189 and the theory of nonimplementation, the Court found Italy directly liable to its nationals for impairing the results to be achieved by Directive 80/987.¹⁷² Thus, Italy was held directly liable for the harm suffered by its nationals resulting from Italy's failure to implement Directive 80/987.¹⁷³

Although ultimately agreeing with the Court, the Advocate General challenged the Court's indirectness in addressing the issue of member state liability for directive nonimplementation.¹⁷⁴ According to the Advocate General, nonimplementation was the underlying concern of the persons bringing the case.¹⁷⁵ Therefore, utilizing the ideology of EU law, the Advocate General stressed the importance of the Court directly addressing whether an individual harmed by a member state's failure to implement a directive has the right to compensation for the loss suffered as a result of nonimplementation.¹⁷⁶ The Advocate General stressed the importance of focusing specifically on whether member states can incur liability for failure to implement a directive that has caused harm to an individual separate and apart from the issue of direct effect.¹⁷⁷ Thus, it can be argued the Advocate General took a less cautious approach than the Court, focusing solely on member state nonimplementation without regard to the precedence and evolution of case law on direct effect. The Advocate General's approach essentially fails to provide the safeguards of direct effect's three prong test,¹⁷⁸ thereby exposing member states to a greater risk of liability. In fact, one could construe the interpretation of *Francovich v. Italian Republic* by the Advocate General to mean that when several elements of direct effect are found, member states will be liable for directive nonimplementation.

As the Advocate General explained, a member state's failure to implement a directive deprives EU law of its desired effect and breaches Article 5 and Article 189 of the EEC Treaty.¹⁷⁹ Where such breach occurs, Article 171¹⁸⁰ requires a member state to take all appropriate measures to remedy its default and create the effect desired by EU law.¹⁸¹ Accordingly, the Advocate General held that nonimplementation of a directive is an unlawful act which must be remedied by

171. Directive 80/987 specifically grants to employees the right to guaranteed payment of unpaid wage claims upon their employers insolvency. *See supra* note 91 and accompanying text.

172. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5416, 2 C.M.L.R. 66, 115 (1993).

173. *Id.*

174. *Id.* at 5381, 2 C.M.L.R. at 82.

175. *Id.*

176. *Id.*

177. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5381; 2 C.M.L.R. 66, 84 (1993).

178. *See supra* notes 50-59 and accompanying text (discussing direct effect and its three prong test).

179. EEC TREATY, *supra* note 18, arts. 5 & 189.

180. *Id.* art. 171.

181. *Id.*

the state where it has caused harm to an individual,¹⁸² particularly where it has been confirmed by a judgment of the European Court of Justice in infringement proceedings.¹⁸³ Directive 80/987, which protects the interests of individual employees in the event of an employer's insolvency, specifically addresses the harm to the individual in this case.¹⁸⁴ The Advocate General determined that because the interests of individual employees were not protected in the face of their employer's insolvency, Italy was obligated, under EU law, to remedy the harm suffered by the employees as a direct result of Italy's failure to implement Directive 80/987.¹⁸⁵ The Advocate General limited Italy's liability to harm suffered prior to this judgment.¹⁸⁶

VI. LEGAL RAMIFICATIONS

In *Francovich v. Italian Republic*, the Court made quite a progressive step in assuring directive implementation by member states. By allowing member state nationals to recover losses from their member states for nonimplementation of an EU directive, the Court brought the law of directive implementation one step further.

Although, in theory, directives are binding, the European Court of Justice is not in a position to force member states to implement them. The EEC Treaty establishes a system where the EU Commission merely enacts directives to establish an end, and member states are left to determine the means by which the established goals are achieved.¹⁸⁷ As signatories to the EEC Treaty, member states have the ultimate responsibility to ensure the fulfillment of the goals of the European Union through directive implementation.¹⁸⁸ Therefore, implementation

182. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5382, 2 C.M.L.R. 66, 102 (1993).

183. Case 22/87, *E.C. Commission v. Italy*, 1989 E.C.R. 143. *Commission v. Italy* legally recognized Italy's failure to implement Directive 80/987 in infringement proceedings. *Id.*

184. In this case, the harm to be prevented by Directive 80/987 is exactly the harm that occurred. Employers went bankrupt and as a result employees were left without recourse to get wages that were due to them. For analysis of Directive 80/987, see *supra* notes 89-108 and accompanying text (analyzing Directive 80/987).

185. Case 6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5382-83, 2 C.M.L.R. 66, 104 (1993).

186. *Id.* at 5402, 2 C.M.L.R. at 105.

187. EEC TREATY, *supra* note 18, art. 189.

188. Case 26/62, *Van Gend en Loos v. Nederlandse Belasting administratie*, 1963 E.C.R. 12, 2 C.M.L.R. 105 (1963).

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

Id.

of EU directives by member states is vital to the operation and effective function of the European Union.¹⁸⁹

Although directives give specific goals, different manners of implementation can mean the creation of different individual rights. Consequently, the purpose of the EU to establish uniformity and harmonization, often becomes undermined.¹⁹⁰ In addition, because directives require implementation on the part of member states, laxity and delinquency in member state adherence to the EEC Treaty frequently occurs.¹⁹¹

Francovich v. Italian Republic is significant because it expands the ability of the European Union to enforce its directives.¹⁹² Previously, in order to enforce an EU Directive, an individual could sue claiming direct effect or the EU Commission could sue a member state for noncompliance with the treaty obligation of Article 169.¹⁹³ The *Grad* case established that, to be directly effective, a directive must be clear, unambiguous, and legally perfect.¹⁹⁴ Once direct effect has been established, individuals have the right to collect for their member state's failure to implement the directive.¹⁹⁵ The rationale is that "[European Union] law must be effectively and uniformly applied throughout the whole of the [European Union]. . . . [T]he fact that a [Union] rule is, as regards its form, directed to the states does not of itself take away from individuals who have an interest in it the right to require it to be applied in the national courts."¹⁹⁶

Francovich v. Italian Republic expands the rights of individuals against member states by allowing individuals to collect damages incurred by a member

189. One of the purposes in the passage of the SEA was "[to] enabl[e] . . . institutions to exercise their powers under conditions most in keeping with Community interests." SEA, *supra* note 19, at pmbl. This language can be interpreted as empowering the Commission to enforce more stringently the implementation of directives in order to uphold and promote the interests of the European Union. *Id.*

190. Daniel Vignas, *The Harmonization of National Legislation and the EEC*, 15 EUR. L. REV. 358, 364 (1990).

Nonimplementation of directives is the biggest obstacle in the achievement of harmonization of laws between member states. [H]armonization of laws is to be carried through by means of directives . . . that is by means of an instrument addressed to Member States, [who] are obliged to transpose it into their own laws by way of harmonization: harmonization is aimed at reducing differences [between member states] so as to make such laws approximate if not well-nigh equivalent.

Id.

191. The problem with nonimplementation of directives can be appreciated by examining the volume of cases brought under the theory of direct effect, in an attempt to have a directive binding upon a member state despite the absence of implementing legislation. *See supra* notes 51-59 and accompanying text (explaining the theory of direct effect); *see also* notes 60-88 and accompanying text (exploring the applicability of direct effect as exemplified in past cases before the European Court of Justice).

192. *See supra* notes 197-198 and accompanying text (delineating the additional remedies for nonimplementation made available by *Francovich* which increase the ability of the European Union to enforce its directives).

193. EEC TREATY, *supra* note 18, art. 169.

194. *See supra* notes 61-69 (explaining the *Grad* case). *See also* notes 51-59 and accompanying text (describing the theory of direct effect).

195. Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825, C.M.L.R. 1 (1971).

196. Case 26/62, *Van Gend en Loos v. Nederlandse Belasting administratie*, 1963 E.C.R. 1, 6-7, 2 C.M.L.R. 105, 129 (1963).

state's failure to implement a directive if an implementation period is prescribed within the directive.¹⁹⁷ An individual is thus given an opportunity to establish a claim for liability against a member state for noncompliance regardless of whether the directive is directly effective. *Francovich v. Italian Republic* simplifies the process for finding member state liability for nonimplementation of EC directives by giving individuals an opportunity to attack member states for EEC Treaty noncompliance.¹⁹⁸ This expansion of remedies for the individual seems to further compel member states to follow the EEC Treaty and avoid delinquency in directive implementation.

There is irony in the fact that member states must be induced to comply with directives handed down by a Commission which they played a role in creating and maintaining. "[T]hrough Anglo-Saxon eyes the European [Union] is not in political or legal terms a federal system [but] under the Treaty all member State[s] have agreed to give full effect to [Union] law."¹⁹⁹ *Francovich v. Italian Republic*, seems to stand for the European Court of Justice's recognition that directives are ineffective if not implemented. *Francovich v. Italian Republic* represents a realization that member states must be held responsible for their obligations under the EEC Treaty and be held liable for directive nonimplementation as an impetus to force adherence to EU law. In order to meet the goals outlined in the EEC Treaty, directive compliance must be enforced if the system of the European Union that has been created by its member state participants is to reach its true potential.

The European Union was established through the EEC Treaty, setting up a rule of law for its signatory member states to follow. To become a part of the European Union, member states are required to recognize and follow the rules of the EEC Treaty, giving up some of their national sovereignty.²⁰⁰ *Francovich v. Italian Republic* recognizes that although member states may have accepted the rule of law of the EEC Treaty and the holding of *Simmenthal v. Commission*,²⁰¹ in practice member states fail to adhere to those rules. In *Francovich v. Italian Republic*, the European Court of Justice recognized the urgent need for enforcement and implementation of EU directives by member states.²⁰² This

197. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5416, 2 C.M.L.R. 66, 115 (1993).

198. See *supra* note 161 and accompanying text (citing Article 5 of the EEC Treaty as authority to require member state compliance with Treaty obligations). See also Cases C-6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5413-17, 2 C.M.L.R. 66, 115 (1993).

199. Nicholas Stewart, *The Relationship Between the European Court of Justice and the Courts of the Member States of the European Communities*, Vol. 5, 2 INT'L L. PRACTICUM 42, 43 (1992).

200. Case 92/78, 1979 E.C.R. 777, 3 C.M.L.R. 263 (1978).

Every national court must in a case within its jurisdiction apply [Union] Law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provisions of national law which may conflict with it whether prior or subsequent to the [Union] rule.

Id.

201. *Id.*

202. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. 5357, 5415-16, 2 C.M.L.R. 66, 113-14 (1993).

recognition implies an empowerment of the European Court of Justice in the enforcement of the goals of the European Union.

The EEC Treaty creates an underlying framework in order to accomplish harmonization and unification among member states. Such a foundation is useless if not built upon. Directives ensure that member states work together to equalize life among member states and guarantee the progress and evolution of European unification.²⁰³ Without directive compliance, the EU essentially loses its gamut of control, and unification and harmonization between member states become meaningless ideals. *Francovich v. Italian Republic* is an attempt by the European Court of Justice to urge compliance with EU Directives. This case holding threatens member states who do not comply with the EEC Treaty and implement directives. It warns that if states do not make directives binding then the Court will find a way to effectuate the directives and impose member state liability. *Francovich v. Italian Republic*, underscores the importance of member state compliance in the implementation of EU directives.

VII. CONCLUSION

In *Francovich v. Italian Republic*, the European Court of Justice recognizes that effective means to ensure implementation of EU Directives must be established. Enforcement of member state compliance with the EEC Treaty and its obligations has been a slow process. *Francovich v. Italian Republic* sends a message to member states that the patience of the European Court of Justice is waning. Member states must shape up, take responsibility and fulfill the obligations that they have agreed to and accepted as rule of law. Cases like *Francovich v. Italian Republic* bring the European Union closer to a system where all of its decisions and directives will both, in theory and in practice, become implemented by member states. Only then will Europe be able to have a truly unified system of laws.

Europe will soon realize the stated goals of the European Union, free movement of goods, capital, persons, and services.²⁰⁴ The European Union is also currently enmeshed in the process of working to achieve a common market and common monetary system.²⁰⁵ Further integration within the European Union requires the presence of a functioning European Union not only in theory, but also in practice. In order to truly achieve the goals of European unification, cooperation among EU member states is essential. It is time for member states to appreciate the responsibilities and obligations that they have as members of the European Union. An effective and unified means of ensuring applicability of EU

203. See *supra* notes 23-24 and accompanying text (explaining the purpose of directives).

204. See *supra* notes 18-22 and accompanying text (defining the purpose and goals of the European Union).

205. SEA, *supra* note 19, at pmb1. "[T]he heads of State or of Government approved the objective of the progressive realization of economic and monetary union." *Id.*

laws must occur in order to ensure that member states work together to effectuate the goals of the EEC Treaty for the benefit of the European Union and its people. Only actual compliance with EU directives will bring to fruition a truly functional and effective system of binding laws within the European Union.

As *Francovich v. Italian Republic* demonstrates, the current system of directive implementation by EU member states is not effective.²⁰⁶ Due to the consistent and repetitive failure of member states to implement EU directives, many goals of the EU seem to be stymied.²⁰⁷ *Francovich v. Italian Republic* recognizes that attempts to ensure effective directive implementation and to discourage delinquency must take on more force if the goals of the EU are to be fulfilled and upheld.

Francovich v. Italian Republic represents the continuing evolution of EU case law concerning available remedial measures for directive nonimplementation by EU member states. In *Francovich v. Italian Republic*, the court takes a step in the right direction encouraging directive implementation by allowing state liability for nonimplementation of EU directives by member states. However, the Court failed to address the issue directly. Instead, the Court bypassed finding direct effect when all of the requisite elements were present and created an ambiguity in order to address state liability for directive nonimplementation. Only by skirting the presence of direct effect did the court turn to the matter of state liability for directive nonimplementation.

Now that state liability for directive nonimplementation has been established, the Court must take the next logical step and advocate directive implementation by finding member states directly liable for nonimplementation of EU Directives without reliance on the theory of direct effect. The EU rule of law requires implementation of directives by member states.²⁰⁸ It is time for the European Court of Justice to ensure that member states adhere to EU law, not only in theory, but in practice. Before the concept of a unified Europe will have any viability, member states will have to learn to not only accept in theory, the European Union rule of law, but to adhere to it in practice.²⁰⁹

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206. See *supra* notes 26-30 and accompanying text (discussing problems in the European Union with respect to directive implementation).

207. See *supra* note 20 and accompanying text. (citing the purpose of the SEA). The SEA was passed to help facilitate Treaty compliance among member states in order to make the achievement of the goals of the European Union more efficient and effective. SEA, *supra* note 19.

208. EEC TREATY, *supra* note 18, art. 189.

209. "Regarding the application of [EU] law in the member states, it can be argued that direct application (and trumping) is essential to developing the internal cohesion and coherence that will achieve the goals of a true customs union and (perhaps) federal system." John H. Jackson *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L. L. 310, 320 (1992).