

IS PRIVATE ENFORCEMENT OF EU LAW THROUGH STATE LIABILITY A MYTH? AN ASSESSMENT 20 YEARS AFTER *FRANCOVICH*

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1. Introduction

It is a truism that the implementation of the law of the European Union chiefly occurs in a decentralized fashion by the authorities of the Member States. The resulting potential for divergent interpretations and complete or partial failures to give full force to EU law in the Member States' legal orders constitutes the main challenge to its uniform application and efficiency. For this reason, the availability of well-functioning and effective enforcement mechanisms is crucial. The Treaties only explicitly stipulate public enforcement through the infringement proceedings provided for in Articles 258–260 of the Treaty on the Functioning of the European Union. Private means of enforcing EU law, such as the doctrine of direct effect or the rules on Member State liability for infringements of EU law, first needed to be developed by the Court of Justice.¹

While public enforcement initiated by the European Commission or another Member State is usually motivated by a desire to ascertain the full application of European Union law, private enforcement by way of disputes brought by individual claimants to the Member State courts is usually privately motivated by a desire to obtain a remedy. Nonetheless, the remedies developed by the ECJ, in particular Member State liability, which made its first appearance just over 20 years ago in *Francovich*,² are regarded as (private) mechanisms for the enforcement of EU law. The argument is that remedies provided to private parties, who use them to pursue their own interests, act as a vehicle to achieve greater overall compliance with European Union law. This is particularly evident from the ECJ's reasoning in *Francovich*. Apart from the protection of individual rights, the Court put an emphasis on the contention that without Member State liability in case of a failure to transpose a Directive in time, the full effectiveness of European

1. Starting with Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

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

Union law would be impaired.³ The Court additionally referred to the duty of loyal cooperation laid down in Article 4(3) TFEU,⁴ which is a duty relating to the relationship between the Union and the Member States. Thus by providing a route to obtain individual compensation and at the same time helping ensure the full effectiveness of EU law, Member State liability is given a dual purpose.⁵ Caranta even went so far as to suggest that individual judicial protection in such cases was “no more than an implication of the principle of full effects of [EU] law, as such to be used more to exact obedience from Member States than to protect citizens.”⁶ As is well known, the Court in *Brasserie du Pêcheur* extended the remedy beyond the context of directives to any sufficiently serious breach of EU law and first pronounced the still valid test for a State liability claim: the rule of EU law breached must be intended to confer rights upon individuals, there must be a sufficiently serious breach of that rule and a direct causal link between the breach and the damage sustained.⁷ In *Köbler*, the ECJ later extended the doctrine of Member State liability to also cover breaches by the judiciary where the infringement of European Union law was manifest.⁸

The introduction and expansion of the State liability remedy arguably helps to compensate for the weaknesses of public enforcement by the European Commission. The criticism levied against the infringement procedure is well rehearsed, so it suffices here to flag up the main points. Although about half of all infringement procedures initiated by the European Commission in 2010 originated in complaints by individuals or companies,⁹ the European Commission enjoys unlimited discretion as to which cases to bring before the ECJ¹⁰ enabling the Commission to pursue a policy of selective enforcement.¹¹ This is coupled with a lack of transparency during the pre-litigation stage of

3. *Ibid.*, para 33; Caranta, “Judicial protection against Member States: A new *jus commune* takes shape”, 32 *CML Rev.* (1995), 725; Schockweiler, “La responsabilité de l’autorité nationale en cas de violation du droit communautaire”, 28 *RTDE* (1992), 42.

4. Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029, para 39.

5. Steiner, “From direct effects to Francovich: Shifting means of enforcement of Community law”, (1993) *EL Rev.*, 11.

6. Caranta, *op. cit. supra* note 3, 725.

7. *Brasserie du Pêcheur*, cited *supra* note 4, para 4.

8. Case C-224/01, *Köbler v. Austria*, [2003] ECR I-10239, para 53.

9. European Commission, “28th Annual Report on Monitoring the Application of EU Law (2010)”, COM(2011)588 final, 3.

10. Case 247/87, *Star Fruit v. Commission*, [1989] 291, para 11; the European Ombudsman is making efforts to make the Commission more accountable in this respect, for instance by asking it to give reasons, e.g. in its decision on complaint 3307/2006/(PB)JMA against the European Commission, available at <www.ombudsman.europa.eu>.

11. Rawlings, “Engaged elites citizen action and institutional attitudes in Commission enforcement”, 6 *ELJ* (2000), 10.

infringement proceedings as regards access to documents, the non-disclosure of the Commission's reasoned opinion or pleadings submitted to the Court of Justice.¹² This has led the European Parliament to express its concern that the Commission's alleged leniency would endanger the rule of law.¹³ Furthermore, the procedure has a reputation for being elitist rather than participatory even though improvements regarding the European Commission's treatment of individual complaints have mitigated this.¹⁴ The effectiveness of infringement proceedings is considerably hampered in that they merely result in a declaratory judgment so that Member States will not necessarily discharge their duty under Article 260(1) TFEU to remove the infringement. Even the threat of pecuniary penalties, for the imposition of which the Commission can apply, does not guarantee compliance.¹⁵ In addition, public enforcement by the Member States under Article 259 TFEU is virtually never used.¹⁶

While many of the weaknesses of the infringement procedure have been addressed over the years, private enforcement is still regarded as having the potential to substantially complement it. The underlying rationale of this assumption has been pronounced by the ECJ very early on in *Van Gend en Loos* with regard to direct effect:

“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [Art. 258 and 259 TFEU] to the diligence of the Commission and the Member States.”¹⁷

Focusing on the cases decided in the twenty years following the *Francovich* decision, this article attempts to test the assumption that the remedy of Member State liability is a useful and welcome additional tool to enhance

12. This lack of transparency was criticized by the European Parliament in its “Report on the 25th annual report from the Commission on monitoring the application of Community law (2007)”, A6-0245/2009, paras. 13 et seq.

13. European Parliament, “Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (2003 and 2004)”, A6-0089/2006, para 13; a similar criticism was voiced by Smith, “Enforcement, monitoring, verification, outsourcing: The decline and decline of the infringement process”, (2008) EL Rev., 777.

14. Harlow and Rawlings, “Accountability and law enforcement: The centralised EU infringement procedure”, (2006) EL Rev., 447.

15. Craig and De Búrca, *EU Law*, 5th ed. (OUP, 2011), p. 414; Chalmers, Davies and Monti, *European Union Law*, 2nd ed. (CUP, 2010), p. 345; Wennerås, “Sanctions against Member States under Article 260 TFEU: Alive but not kicking?”, 49 CML Rev. (2012), 145.

16. So far, there have only been four such cases: Case 141/78, *France v. United Kingdom*, [1979] ECR 2923; Case C-388/95, *Belgium v. Spain*, [2000] ECR I-3123; Case C-145/05, *Spain v. United Kingdom*, [2006] ECR I-7917; Case C-364/10, *Hungary v. Slovakia* (pending).

17. *Van Gend en Loos*, cited *supra* note 1.

Member State compliance with their obligations under EU law. For this purpose, the application of the law on Member State liability by the courts of England¹⁸ and Germany is scrutinized. The first part of this article presents and examines statistical data which shows that only few cases have been successful so far. The second part provides a detailed discussion as regards the grounds for the denial of such claims by both English and German courts and an assessment of the soundness of these decisions. It will be shown that the suitability of *Francovich* claims as a means of private enforcement is overestimated and it is suggested to primarily regard the remedy as a means of compensating private parties for tort suffered.

2. Twenty years of *Francovich*: Some statistical findings

2.1. *Method*

Before presenting the statistical findings on the treatment of the *Francovich* line of case law in English and German courts, it is necessary to establish on which methodical basis these findings were made. In November 2011, the *Francovich* decision “celebrated” its 20th anniversary. This article is based on the developments during those twenty years. Consequently, it only takes into account decisions handed down before the end of 2011. The reason for choosing the jurisdictions of Germany and England for this exercise is that taken together the two account for almost half of all references made to the ECJ in questions related to Member State liability. By the end of 2011, the ECJ had decided thirty-three preliminary references involving questions of Member State liability.¹⁹ Seven of these cases originated in

18. Note that the United Kingdom comprises three legal systems: England and Wales, Scotland and Northern Ireland. This article limits itself to comparing Germany with England and Wales.

19. *Francovich and Bonifaci*, cited *supra* note 2: this decision gave rise to two follow-up references, which have not been counted separately: Joined Cases C-94 & 95/95, *Bonifaci and Berto*, [1997] ECR I-3969 and Case C-373/95, *Maso*, [1997] ECR I-4051; *Brasserie du Pêcheur and Factortame*, cited *supra* note 4; Case C-392/93, *British Telecom*, [1996] ECR I-1631; Case C-5/94, *Hedley Lomas*, [1996] ECR I-2553; Joined Cases C-178, 179, 188, 189 & 190/94, *Dillenkofer and others*, [1996] ECR I-4845; Joined Cases C-283, 291 & 292/94, *Denkavit*, [1996] ECR I-5063; Case C-127/95, *Norbrook Laboratories*, [1998] ECR I-1531; Case C-261/95, *Palmisani*, [1997] ECR I-4025; Case C-319/96, *Brinkmann*, [1998] ECR I-5255; C-140/97, *Rechberger*, [1999] ECR I-3499; Case C-302/97, *Konle*, [1999] ECR I-3099; Case C-424/97, *Haim*, [2000] ECR I-5123; Joined Cases C-397 & 410/98, *Metallgesellschaft and Hoechst*, [2001] ECR I-1727; Case C-150/99, *Stockholm Lindöpark*, [2001] ECR I-493; Case C-118/00, *Larsy*, [2001] ECR I-5063; Case C-63/01, *Evans*, [2003] ECR I-14447; *Köbler*, cited *supra* note 8; Case C-222/02, *Paul*, [2004] ECR I-9425; Case C-173/03, *Traghetti del Mediterraneo*, [2006] ECR I-5177; Case C-470/03, *A.G.M.-COS.MET*,

German courts²⁰ and nine in English courts.²¹ In view of the size of the legal systems of England and Germany and on the basis of the large number of references originating there, one can assume that there is sufficient litigation in these countries to allow for conclusions to be drawn as regards the overall success of Member State liability under EU law. A further reason for choosing these two jurisdictions was that neither of them avails of a domestic system of State liability which would be able to deal with situations typically triggering Member State liability under EU law. English law does not have a separate State liability regime. Rather, claimants are restricted to making claims based on ordinary torts, such as negligence, misfeasance in a public office or breach of a statutory duty. There is no general principle that action ultra vires or invalid administrative acts alone give rise to a claim.²² Thus when it comes to the failure to comply with EU law obligations, the conditions for these torts will usually be hard to satisfy. This is evident from the decision of the Court of Appeal in *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* which held that not every infringement of EU law constitutes a tort.²³ Moreover, English law does not provide for a tort-based claim for violations brought about by the legislature.²⁴

German tort law on the other hand provides for compensation where an official breaches an official duty.²⁵ However, this is only the case where the duty breached is incumbent upon the State in relation to a third party. This restriction has led the German courts to deny any claims based on legislative action, since the legislature only ever acts in the interest of the public and not

[2007] ECR I-2749; Case C-511/03, *Ten Kate*, [2005] ECR I-8979; Case 446/04, *Test Claimants in the FII Group Litigation*, [2006] ECR I-11753; Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, [2007] ECR I-2107; Case C-278/05, *Robins*, [2007] ECR I-1053; Case C-445/06, *Danske Slagterier*, [2009] ECR I-2119; Case C-452/06, *Synthon*, [2008] ECR I-7681; Case C-118/08, *Transportes Urbanos*, [2010] ECR I-635; Case C-568/08, *Combinatie Spijker Infrabrouw*, judgement of 9 Dec. 2010, nyr; Case C-243/09, *Fuß*, judgement of 14 Oct. 2010, nyr; Case C-279/09, *DEB*, judgement of 22 Dec. 2010, nyr; Case C-94/10, *Danfoss*, 20 Oct. 2011, nyr. The cases of *Francovich and Bonifaci* and *Brasserie du Pêcheur and Factortame* were counted as two cases respectively because the references had been made by different courts.

20. *Brasserie du Pêcheur*, cited *supra* note 4; *Denkavit*, *Dillenkofer*, *Haim*, *Paul*, *Danske Slagterier*, *DEB*, all cited *supra* note 19.

21. *Factortame*, cited *supra* note 4, *British Telecom*, *Hedley Lomas*, *Metallgesellschaft*, *Evans*, *Robins*, *Test Claimants in the FII Group Litigation*, *Test Claimants in the Thin Cap Group Litigation*, *Synthon*, all cited *supra* note 19; the case of *Norbrook* originated in Northern Ireland and not in England, so it was not included here.

22. Craig, *Administrative Law*, 6th ed. (Sweet&Maxwell, 2008), p. 957.

23. *Bourgoin S. A. and Others v. Ministry of Agriculture, Fisheries and Food*, [1986] QB 716.

24. Steiner, *op. cit. supra* note 5, 14.

25. Para 839 BGB (German Civil Code).

in the interest of individuals.²⁶ Furthermore, German law contains a fault requirement, i.e. the official must have acted intentionally or negligently. As a result, the mere fact that an official has acted illegally does not suffice to establish a claim based on this tort. In addition, there is an even more restricted liability of the State for violations by the judicial branch where a responsibility for judgments handed down only arises where the judge commits a criminal offence when handing down judgment.²⁷

Thus, neither English nor German law themselves provide a claim in many cases where individuals are seeking reparation for damages resulting from breaches of European Union law. This is because typical State liability claims are based on legislative misconduct, e.g. problems with the implementation of directives or the adoption of legislation contrary to EU law. Furthermore, such claims will often be unable to establish fault, as the legal situation may have been complex so that an official's illegal action may be excusable. Since neither German nor English law can accommodate these typical cases, one should expect ample litigation based on the EU law remedy.

The sample consists of cases which either directly or indirectly decided on a claim of Member State liability. Cases in which a court merely mentioned the possibility of such a claim in passing were not considered, e.g. where a court denied a claim based on an allegedly directly effective directive but mentioned that there might potentially be a claim against the State under *Francovich*.²⁸ Likewise, cases in which a court held that it had no jurisdiction to hear a State liability case were not counted.²⁹ The same is true for cases in which declarations were sought that there was a breach of EU law in order to prepare a State liability claim.³⁰ In contrast, cases concerning legal aid in view of a later State liability claim were included since the courts are asked to make an assessment as to the chances of success such a claim might have.³¹ Decisions which were appealed have only been counted as one case (even though there may have been multiple decisions). Where an appeal was pending at the end of 2011, the decision of the last court deciding was taken into consideration. Cases are considered successful where Member State liability was actually established and damages had to be paid.

The following results should be assessed with the limitations of this study in mind. The first limitation is that the study is based on cases, which have been

26. Cf. the reference made by the Federal Court of Justice in *Brasserie du Pêcheur*, BGH III ZR 127/91.

27. § 839(2) BGB.

28. E.g. in *Churchill Insurance Co Ltd v. Wilkinson*, [2010] EWCA Civ 556.

29. E.g. in *Mann v. Secretary of State for Education and Employment*, [1998] Eu.L.R. 388.

30. E.g. in *R. v. Secretary of State for Employment Ex p. Seymour-Smith (No.1)*, [1997] 1 W.L.R. 473; OVG Rheinland-Pfalz 6 A 11131/10; OVG Nordrhein-Westfalen 4A17/08.

31. E.g. KG Berlin 9 W 50/08; LG München 15 O 23548/08.

made publicly accessible either through databases³² or in other forms such as collections and digests of case law. This means that there may be a limited number of judgments which were never reported and therefore were not considered. Moreover, the number of cases settled outside court is unclear. It is very likely that such settlements have occurred in the past. This is for instance evidenced by the events following the ECJ's *Dillenkofer* decision,³³ when about 7,800 individuals were paid compensation totalling about 10 million euro.³⁴ It is highly likely that some of the references made by English or German courts, where there has been no follow-up decision by the referring domestic court, resulted in settlements.³⁵ For a government, the incentive to agree to such a settlement is great where it sees itself losing the case. It may avoid a judgment from being published and thereby prevent copycat claims. Furthermore, it may save on legal costs and a quick out-of court settlement may incentivize the claimant to accept a smaller sum than the actual damage sustained.

The other limit is that the results only concern two Member States and cannot therefore be determinative of the situation in other Member States. It is submitted that in view of the low number of preliminary references from other Member States, except perhaps Italy, it is likely that the situation in those other Member States does not differ greatly. But it is hoped that the results presented here motivate further study. One might in particular focus whether and in how far established national State liability regimes have contributed to the enforcement of EU law. One candidate might be the Netherlands where it is not necessary to establish a sufficiently serious breach in order to establish liability for failure to implement an EU Directive.³⁶ Other countries which warrant further in-depth study are Italy and Greece, against which the Commission has initiated high numbers of infringement cases over the past twenty years.³⁷ This would suggest that a large number of breaches of EU law have happened in these countries and consequently a large number of State liability claims may have been made, too. Nonetheless it is suggested that the results found here are strong indicators of the situation in all Member States.

32. For England, the study relied on Westlaw, LexisNexis and BAILII; for Germany it relied on <juris.de> and Beck-online.

33. *Dillenkofer*, cited *supra* note 19.

34. Cf. the answer given by the Federal Government in the Bundestag, Deutscher Bundestag Plenarprotokoll of 16 Oct. 1996, 13. Wahlperiode, 130.Sitzung.

35. For details see *infra*.

36. Cf. Besselink, case note on *Waterpakt* (Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 21 March 2003, Civil Chamber, No. C01/327HR.1 *Stichting Waterpakt, Stichting Natuur en Milieu, Vereniging Consumentenbond and three others v. State of the Netherlands*), 41 CML Rev. (2004), 1430.

37. European Commission, "28th Annual Report on Monitoring the Application of EU Law (2010)" SEC(2011)1094 final, Annex I.

This suggestion finds support in a study on the application of State liability law by national courts comprising more countries, which is available on the website of the Asser Institute.³⁸ In particular with a view to the repeat offenders Greece and Italy the study does not reveal huge amounts of national litigation. For Greece, it only cites one case, which it considers a blatant defiance of ECJ case law, and for Italy it refers to a total of six cases decided between 1998 and 2004.

2.2. *Results*

2.2.1. *Success rate in England*

In the twenty years following *Francoovich*, twenty-two cases concerning Member State liability were decided by English courts.³⁹ English courts made references to the ECJ in three further cases, for which no further decision by the domestic courts could be traced.⁴⁰ These three cases have been added to the total number, resulting in twenty-five decisions overall. Out of these twenty-five cases, seven resulted in convictions by an English court. The three further cases in which a reference had been made but where no further decision followed, were probably settled out of court. In two of these, *Hedley*

38. See <www.asser.nl/Default.aspx?site_id=7&level1=12219&level2=12237> [accessed 25 June 2012].

39. The total number of decisions is 35 (including decisions by lower courts, which were appealed); the (final) decisions are: *Boyd Line Management Services Ltd v. Ministry of Agriculture, Fisheries and Food (No.1)*, [1999] Eu. L.R. 44; *FJ Chalke Ltd v. Revenue and Customs Commissioners*, [2009] EWHC 952 (Ch); *Byrne v. Motor Insurers' Bureau*, [2008] EWCA Civ 574; *Cooper v. Attorney General*, [2010] EWCA Civ 464; *Evans v. Secretary of State for the Environment, Transport and the Regions*, [2001] EWCA Civ 32; *R. v. Secretary of State for Transport Ex p. Factortame Ltd (No.5)*, [2000] 1 A.C. 524; *R. v. Secretary of State for Transport Ex p. Factortame Ltd (No.6)*, [2001] 1 W.L.R. 942; *R. v. Secretary of State for the Home Department Ex p. Gallagher*, [1996] 2 C.M.L.R. 951; *Sayers v. Cambridgeshire CC*, [2006] EWHC 2029 (QB); *R. v. Department of Social Security Ex p. Scullion*, [1999] 3 C.M.L.R. 798; *Spencer v. Secretary of State for Work and Pensions*, [2008] EWCA Civ 750; *Moore v. Secretary of State for Work and Transport*, [2008] EWCA Civ 750; *Phonographic Performance Ltd v. Department of Trade and Industry*, [2004] EWHC 1795 (Ch); *Harmon CFEM Facades (UK) Ltd v. Corporate Officer of the House of Commons*, 67 Con. L.R. 1; *Bowden v. South West Water Services Ltd*, [1998] 3 C.M.L.R. 330; *R. (on the application of MK (Iran)) v. Secretary of State for the Home Department*, [2010] EWCA Civ 115; *R. (on the application of Negassi) v. Secretary of State for the Home Department*, [2011] EWHC 386 (Admin); *Three Rivers DC v. Bank of England (No.3)*, [2003] 2 A.C. 1; *Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners*, [2010] EWCA Civ 103; *Test Claimants in Thin Cap Group Litigation v. Revenue and Customs Commissioners*, [2011] EWCA Civ 127; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners*, [2007] UKHL 34; *R v. Ministry of Agriculture, Fisheries and Food Ex p. Lay and Gage*, [1998] C.O.D. 387.

40. These are *Robins*, *Hedley Lomas* and *Synthon*, all cited *supra* note 19.

Lomas and *Synthon*, the ECJ had found a sufficiently serious breach⁴¹ so that they have been counted as successful. In the remaining case of *Robins*, the establishment of a sufficiently serious breach was left to the referring court, but the ECJ had pointed to the “considerable discretion” available to the Member State.⁴² Thus it is unlikely that this case would have been successful. Fifteen of the twenty-five cases dealt with the failure to either implement or apply a directive properly,⁴³ six cases concerned violations of primary law,⁴⁴ three cases concerned regulations⁴⁵ and one case dealt with a *Köbler* claim.⁴⁶ In four of the cases concerning directives, Directive 84/5/EEC was at issue.⁴⁷ The claimants in thirteen cases under review pursued commercial interests and most were companies; in twelve cases the claimants were individuals, of whom one was a representative of a pressure group. In one of these twelve cases, one of about four-hundred claimants was a District Council.⁴⁸ Overall, this results in a total of nine successful cases out of a total of twenty-five, which amounts to a success rate of 36 percent.

2.2.2. Success rate in Germany

During the same period German courts decided thirty-four cases directly or indirectly⁴⁹ based on the *Francovich* line of case law.⁵⁰ In addition, there are three cases in which German courts made a reference but where no further decision can be traced. This raises the total number of cases to thirty-seven.

41. *Hedley Lomas* and *Synthon*, cited *supra* note 19.

42. *Robins*, cited *supra* note 19, para 74.

43. *Chalke*; *Byrne*; *Evans*; *Gallagher*; *Sayers*; *Scullion*; *Spencer*; *Moore*; *Phonographic*; *Bowden*; *Negassi*; *Three Rivers*, all cited *supra* note 39; *Hedley Lomas*; *Robins* and *Synthon*, all cited *supra* note 19.

44. *Factortame No. 5*; *Factortame No. 6*; *Harmon*; *Test Claimants in the FII Group Litigation*; *Test Claimants in Thin Cap Group Litigation*; *Sempra*, all cited *supra* note 39.

45. *Boyd*; *MK*; *Lay and Gage*, all cited *supra* note 39.

46. *Cooper*, cited *supra* note 39.

47. Second Council Directive 84/5/EEC of 30 Dec. 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, O.J. 1984, L 8/17; see the cases *Byrne*; *Evans*; *Spencer*; *Moore*, all cited *supra* note 39.

48. *Three Rivers DC*, cited *supra* note 39.

49. E.g. legal aid proceedings.

50. OLG Frankfurt, 1 U 244/07; LG Berlin 23 O 44/08; BGH III ZR 140/09; LG Berlin 23 O 503/07; BGH III ZR 48/01; LG Bonn 1 O 186/98; LG Bonn 1 O 5/99; BGH III ZR 233/07; BGH III ZR 294/03; KG Berlin 9 W 50/08; LG München 15 O 23548/08; BGH III ZR 144/05; BGH IX ZR 210/10; LG Bonn 1 O 320/93 (settled out of court); OLG Köln 7 U 23/97; BGH III ZR 127/91; BGH III ZR 358/03; LG Düsseldorf 2b O 286/08; BGH III ZR 4/05; KG Berlin 9 U 10/08; LG Bonn 1 O 364/98; OLG Karlsruhe 12 U 286/05; BGH III ZR 337/09; OVG Berlin-Brandenburg 4 B 13/11; OVG Hamburg 1 Bf 90/08; LG Hannover 14 O 57/10; OLG München 1 U 5279/10; OLG München 1 U 392/11; LG Bochum 5 O 5/11; LG Köln 5 O 385/10; KG Berlin 9 U 233/10; BGH III ZR 59/10; BVerwG 2 B 93/11; OLG Düsseldorf 18 U 111/10.

One of these cases is *Fuß*,⁵¹ in which the national proceedings were still pending by the end of 2011 before the Halle Administrative Court.⁵² But from other decisions based on *Fuß*, which were successful,⁵³ one can infer that *Fuß* itself was also a successful case. The two other references, *Denkavit* and *Haim*, are considered unsuccessful. In *Denkavit*⁵⁴ the ECJ did not find a sufficiently serious breach so that it can be assumed that the case was not pursued any further. In *Haim*, the ECJ held that the relevant breach of EU law occurred at a time when the situation had not yet been elucidated by the Court.⁵⁵ Despite leaving the final decision on this point to the referring court, this was a strong indicator that the breach was not serious, so that it is unlikely that the claim was successful or successfully settled. Out of this total of thirty-seven cases, eight resulted in convictions or in settlements out of court.⁵⁶

Twenty-three of the German cases concerned directives,⁵⁷ nine cases concerned primary law⁵⁸ and three cases were *Köbler* claims.⁵⁹ Of all claimants, seventeen were companies and twenty-two were individuals, some of whom pursued commercial interests. As in England, German courts had to deal with a number of repeat claims concerning the same alleged breach. Five unsuccessful claims concerned the German ban on bets on sporting competitions.⁶⁰ The ECJ's judgment in *Fuß* triggered a number of follow-up cases of firemen requesting compensation for time worked in excess of the limits laid down in the Working Time Directive.⁶¹ Thus in Germany there was

51. *Fuß*, cited *supra* note 19.

52. VG Halle, 5 A 180/10 HAL.

53. *Fuß*, cited *supra* note 19.

54. *Denkavit*, cited *supra* note 19.

55. *Haim*, cited *supra* note 19, para 47.

56. Notably, following the case of Dillenkofer, about 7800 individual claims were settled by the Federal German Government, cf. the answer given by the Federal Government in the *Bundestag*, Deutscher Bundestag Plenarprotokoll of 16 Oct. 1996, 13. Wahlperiode, 130.Sitzung.

57. LG Berlin 23 O 44/08; BGH III ZR 140/09; LG Berlin 23 O 503/07; BGH III ZR 48/01; LG Bonn 1 O 186/98; LG Bonn 1 O 5/99; BGH III ZR 233/07; BGH III ZR 294/03; KG Berlin 9 W 50/08; BGH III ZR 144/05; BGH IX ZR 210/10; LG Bonn 1 O 320/93 (settled out of court); OLG Köln 7 U 23/97; BGH III ZR 358/03; LG Düsseldorf 2b O 286/08; BGH III ZR 4/05; KG Berlin 9 U 10/08; LG Bonn 1 O 364/98; BGH III ZR 337/09; OVG Berlin-Brandenburg 4 B 13/11; OVG Hamburg 1 Bf 90/08; KG Berlin 9 U 233/10; BGH III ZR 59/10; BVerwG 2 B 93/11; *Denkavit*, cited *supra* note 19; *Fuß*, cited *supra* note 19.

58. LG München 15 O 23548/08; BGH III ZR 127/91; LG Hannover 14 O 57/10; OLG München 1 U 5279/10; OLG München 1 U 392/11; LG Bochum 5 O 5/11; LG Köln 5 O 385/10; OLG Düsseldorf 18 U 111/10; *Haim*, cited *supra* note 19.

59. OLG Frankfurt, 1 U 244/07; BGH III ZR 294/03; OLG Karlsruhe 12 U 286/05.

60. LG Hannover, 14 O 57/10; OLG München 1 U 5279/10 and 1 U 392/11; LG Bochum 5 O 5/11; LG Köln, 5 O 385/10.

61. OVG Berlin-Brandenburg, 4 B 13/11; OVG Hamburg 1 Bf 90/08; it is likely that more cases are still pending and that a large number of cases have been settled out of court, cf. the

a success rate of 22 percent. The main findings are summarized in the following tables.

Table 1: Success rate of State liability proceedings 1992–2011

Cases brought in	Overall number	Successful	Success rate
England	25	9	36%
Germany	37	8	22%

Table 2: Alleged violations (percentage of total)

Cases brought in	Directives	Primary law	Regulations	Köbler
England	15 (60%)	6 (24%)	3 (12%)	1 (4%)
Germany	25(68%)	9 (24%)	0	3(8%)

Apart from the low overall number of State liability cases over the last twenty years, it is noteworthy that in both England and Germany the vast majority of cases dealt with issues surrounding the transposition of directives. Late transposition in particular was also identified by the European Commission as one of the key problems when it comes to the compliance with EU law.⁶² The directive is thus the legislative instrument that is most likely to lead to litigation. It will be shown in the second part of this article that national courts are only willing to award damages in cases concerning directives where the violation was clear, which reduces the suitability of the *Francovich* claim for private enforcement.

2.3. Contrast: Infringements proceedings

Before analysing the results presented in the preceding section, it is worthwhile contrasting the results with infringement proceedings brought by the European Commission under Article 258 TFEU. In 2010, the European Commission initiated 1289 new infringement cases⁶³ while it was dealing

press release by the trade union ver.di, which suggests that there are thousands of claims pending: <gemeinden.bb.verdi.de/berlin_-_fb_7/copy_of_fachgruppe_5_-_feuerwehr/data/Feuerwehreinsatz-gegen-Mehrarbeit.pdf> accessed 29 Apr. 2012.

62. COM(2011)588, cited *supra* note 9, 5.

63. SEC(2011)1094 final, cited *supra* note 37, Annex I.

with almost 2100 active cases at the end of that year.⁶⁴ Of the newly detected cases, thirty-one concerned Germany and seventy-five concerned the United Kingdom.⁶⁵ Of the overall number of cases under examination in 2010, 104 concerned Germany and 110 concerned the United Kingdom.⁶⁶ Even though more cases overall were initiated against the United Kingdom, only one was subsequently referred to the ECJ in 2010 whereas seven were referred against Germany.⁶⁷ This suggests that the United Kingdom cooperates better with the European Commission in removing the infringements at the pre-litigation stage. This may help explain why the United Kingdom has been the subject of infringement proceedings the Court of Justice to a much lesser extent than Germany.

During the period from 1992 until 2010, ninety-seven litigious cases were brought against the United Kingdom and two-hundred against Germany.⁶⁸ The success rate of such proceedings is high. In the nine-year period between 2002 and 2010, for which statistics are available on the ECJ's website,⁶⁹ fifty-nine judgments were rendered against the United Kingdom. Only thirteen of them were dismissed, resulting in a success rate of 78 percent of cases. Seventy-six judgments were rendered in cases brought against Germany, of which only nine were dismissed, resulting in a success rate of 88 percent. Before entering into a deeper analysis of these statistics, the sheer contrast in numbers stands out. There was far more public enforcement litigation against the United Kingdom and Germany than *Francovich* cases; and the success rate of the former was considerably higher.

Table 3: comparison of proceedings (1992–2011)

Cases brought against	Under Article 258 (success rate) ⁷⁰	State Liability (success rate)
Germany	200 (88%)	37 (22%)
United Kingdom	97 (78%)	25 (36%) ⁷¹

64. COM(2011)588, cited *supra* note 9, 3.

65. SEC(2011)1094 final, cited *supra* note 37, Annex I, Table 1.3 A.

66. *Ibid.*

67. *Ibid.*, Annex II, Table 2.1.

68. Court of Justice of the European Union, Annual reports 1992–2010.

69. *Ibid.*, Annual reports 2002–2010.

70. Based on success rate of judgments between 2002–2010.

71. Figures for England and Wales only.

When looking at these figures, one needs to be aware that only a small fraction of infringement proceedings initiated by the European Commission actually result in proceedings before the ECJ. In most cases, the infringement is removed before the case reaches the Court.

Table 4: Infringement proceedings initiated by the Commission 2006–2010⁷²

Cases brought against	Formal notice	Reasoned Opinion	Referral to ECJ
Germany	236	98	47
United Kingdom	304	109	26

Of course, these statistics do not reveal why the cases were resolved before they had reached the stage of being referred to the ECJ. One explanation would be that the Member States managed to convince the Commission that there was no infringement after all. However, this seems unlikely. The more probable explanation is that the Member States removed the infringement. This is particularly likely because most proceedings are initiated because of failures to communicate the transposition of directives,⁷³ which in itself constitutes an infringement.⁷⁴

The main question for this paper is, of course, in how far *Francovich* is likely to have contributed to the enforcement of European Union law. In view of the statistics presented, the number of infringement proceedings in the Court of Justice was almost five times greater than that of *Francovich* cases decided in the domestic courts.⁷⁵ If one also takes into account the much larger number of infringement proceedings initiated by the Commission, which were not referred to the Court, the number of State liability cases is dwarfed. This would suggest that in the overall picture of enforcement, *Francovich* type cases are only of limited importance. Of course, it should be borne in mind that not all types of infringements are suitable to be pursued through State liability

72. SEC(2011) 1094 final, cited *supra* note 37, Annex II, Table 2.1.

73. European Commission, “28th Annual Report on Monitoring the Application of EU Law (2010)”, SEC(2011)1094 final, Annex I, Table 1.1.

74. Case 96/81, *Commission v. Netherlands*, [1982] ECR 1791.

75. Table 3; of course, the number of infringement proceedings has dropped significantly from almost 3000 new cases in 2004 to slightly over 1200 in 2010, cf. SEC(2011) 1094 final, cited *supra* note 37, Annex I, Table 1.1.

claims, e.g. violations which do not affect the position of the individual. But even if one accounted for a considerable percentage of infringement cases to fall into that category, they would almost certainly still greatly outnumber State liability claims.

As will be shown in the next part of this contribution, the criteria for a State liability claim are very difficult to establish. In view of this and the resulting low success rate of such claims compared with the success rate of proceedings under Article 258 TFEU, it is usually worthwhile for the government to run the risk of proceedings. Thus it is at least unlikely that the total number of cases settled exceeds the number of overall judgments in these matters. For this reason, one can conclude that the coffers of the Member States' treasuries have not been opened, as was feared by early commentators on *Francovich*.⁷⁶ Another concern, which had been voiced by Harlow amongst others, is that the claim for State liability might primarily benefit corporations and other claimants with a commercial interest.⁷⁷ The numbers have revealed that only in about half of the cases have the claimants pursued commercial interests.

3. Analysis of German and English cases

As shown in the preceding section, actions for Member State liability initiated in Germany and England are more often than not unsuccessful. It is thus apposite to examine why this is the case, in particular whether the conditions for State liability are applied in the same manner in both countries and whether any patterns of avoidance can be found. In order to enable such analysis, it is necessary to establish the ground rules. As mentioned in the introduction, a claim for Member State liability must satisfy three conditions: the rule infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a causal link between the breach and the damage.⁷⁸ As is shown in the following table, the vast majority of claims fail because the national court was unable to establish a sufficiently serious breach.

76. Harlow, "Francovich and the problem of the disobedient State", (1996) *ELJ*, 216.

77. *Ibid.*, 205.

78. *Brasserie du Pêcheur*, cited *supra* note 4, para 51.

Table 5: Reasons why claims failed in court

	Total no. of unsuccessful cases	Lack of rule conferring rights on individuals	No sufficiently serious breach	No causal link	Procedural hurdle/no damage/unclear
England	16	1 (6%)	10 (63%)	1 (6%)	4 (25%)
Germany ⁷⁹	29	3 (10%)	18 (62%)	5 (17%)	3 (10%)

It will be shown that the criteria developed by the ECJ and applied by the national courts are not suited to foster compliance with the law of the European Union. Member State liability should thus be chiefly regarded as a remedy for individuals whose rights under EU law have been gravely disregarded by the Member States and not as a valuable tool for the private enforcement of European rules.

3.1. *Rule conferring rights on individuals*

The finding of whether the rule concerned confers rights on individuals is naturally a matter of interpreting European Union law. The Court's approach is chiefly purposive and generally wider than national concepts like the German *Schutznorm* theory, which requires that an applicant must be a member of a limited group of people distinguishable from the public at large.⁸⁰ But the Court of Justice has so far not provided a comprehensive theory of rights in EU law.⁸¹ As a consequence, the Court's approach when reaching its findings differs slightly from case to case, which is illustrated by the following examples. In *Fuß* the Court invoked an explicit reference to the safety and health of workers in Article 6(b) of the Working Time Directive 2003/88 to conclude that the minimum requirements contained therein conferred rights on workers.⁸² However, explicit reference to the individual in

79. In KG Berlin 9 U 233/10 the court was unable to find any one of the three conditions present; this case was counted as a case where the rule did not confer rights on individuals because the court only explored the other two conditions in an obiter dictum.

80. Prechal, "Protection of rights: How far?", in Prechal and Van Roermund, *The Coherence of EU Law* (OUP, 2008), 158.

81. For an overview of the case law see Prechal, *ibid.*, 159; Prechal, *Directives in EC Law*, 2nd ed. (OUP, 2005), pp. 97 et seq.

82. *Fuß*, cited *supra* note 19, paras. 49 and 33.

the wording of a provision is not always necessary but can be sufficient. In *Brasserie* the Court held it to be manifest that Article 34 TFEU, which contains a prohibition on quantitative restrictions and measures having equivalent effect, is nonetheless capable of being intended to confer rights on individuals.⁸³ This can be contrasted with *Ten Kate Holding* where it relied on a literal approach to conclude that Article 265 TFEU did not impose an obligation on a Member State to initiate proceedings against an EU institution for failure to act.⁸⁴ The Court also held that Article 4(3) TFEU did not confer individual rights against a Member State since it only concerned mutual duties between the Member States and EU institutions.⁸⁵ This argument was less clearly based on a literal interpretation but also pointed to earlier case law where this had been established.

The requirement is not fulfilled in such a manifest way in all cases, however. It is clear from *Paul* that the ECJ is prepared to conduct a much deeper analysis. The Court was asked to decide whether certain directives conferred rights on depositors to a proper supervision of banks. The Court employed three methods of interpretation. First, it adopted a literal approach holding that the directives do not expressly grant such a right to depositors.⁸⁶ Second, it employed a systematic argument by referring to the limits of the EU's competence under Article 64(2) TFEU to adopt harmonizing measures on the movement of capital. Only measures which were necessary could be adopted. Given that an individual right to effective supervision was not strictly necessary to achieve the objective of the directives, such a right was held not to be conferred by them.⁸⁷ Third, the Court considered the purpose of the provisions by stating that the directives only laid down a minimal protection for depositors, which would also be guaranteed where supervision was defective.⁸⁸ It followed that a right to supervision was not necessary. This reasoning in *Paul* shows that the first condition for the State liability claim is not always easy to determine and that national courts need to employ the full canon of interpretative methods in order to decide on this point. The case suggests that it is not enough if a directive makes reference to individuals in its preamble but that it is necessary for this to be backed up by more specific provisions so that the class of persons protected under the rule at issue can be identified.⁸⁹ Interestingly, in *Danske Slagterier* the ECJ applied a more lenient test by referring to the fact that one of the objectives of the Directive in

83. *Brasserie du Pêcheur*, cited *supra* note 4, para 54.

84. *Ten Kate*, cited *supra* note 19, para 27.

85. *Ibid.*, para 28.

86. *Paul*, cited *supra* note 19, para 41.

87. *Ibid.*, paras. 42–43.

88. *Ibid.*, para 44.

89. Prechal, *op. cit. supra* note 80, 167.

question was the free movement of goods so that the Directive had to be regarded as a concretization of the rights conferred under Article 28 TFEU, with the result that the provisions in question were deemed to confer rights on individuals.⁹⁰ The following discussion of two cases from Germany and one from England will show that, perhaps unsurprisingly, there are considerable variations in the quality of national court decisions on the matter.

In cases related to the *Paul* proceedings, the *Landgericht* (Regional Court) Bonn adopted a sound and convincing approach and concluded that Article 7 of Directive 94/19/EC on deposit guarantee-schemes⁹¹ conferred rights on individual depositors.⁹² The *Landgericht* pointed in particular to the right of compensation for individuals explicitly provided for in the Directive. It rejected a competence-based argument by the German State, which pointed to the fact that the Directive was not based on the EU's competences in the field of consumer protection in what are now Articles 115 and 169 TFEU,⁹³ but rather on Article 60 TFEU. It held that the Directive's legal basis in Article 60(2) TFEU does not necessarily mean that the Directive does not pursue other goals, such as the protection of individuals, as well. The *Landgericht* based its findings in particular on the recitals of the Directive, which explicitly refer to consumer protection.

The *Landgericht's* reasoning is evidence of a sound understanding of the relevant legal principles. Yet there are cases where a similar degree of understanding appeared to be lacking. An example is a case decided by the *Kammergericht* (Higher Regional Court) Berlin on whether Article 13(B)(f) of the Sixth VAT Directive 77/388/EEC conferred rights on individuals.⁹⁴ This provision states that "betting, lotteries and other forms of gambling" are exempt from VAT subject to limitations laid down by each Member State. The ECJ had previously held that Germany was in violation of that Directive as it had exempted public casinos from VAT whereas privately-owned casinos were subject to VAT.⁹⁵ In subsequent State liability proceedings, the *Kammergericht* held that the provision did not confer rights on individuals but aimed to accomplish neutral taxation. Interestingly, this conclusion was reached despite the fact that the ECJ had previously held the provision to be directly effective.⁹⁶ The question whether it is a condition for the direct effect of a directive that a provision confers rights on individuals was long the

90. *Danske Slagterier*, cited *supra* note 19, paras. 21 et seq.

91. Directive 94/19/EC, O.J. 1994, L 135/5.

92. LG Bonn 1 O 186/98; LG Bonn 1 O 55/99.

93. Ex Arts. 100 and 129(a) TEC.

94. KG Berlin 9 U 233/10.

95. Joined Cases C-453 & 462/02, *Linneweber and Akritidis*, [2005] ECR I-1131.

96. *Ibid.*, para 38.

subject of academic debate.⁹⁷ Prechal has convincingly argued that a provision can be directly effective without conferring rights.⁹⁸ At the same time she concedes that the direct effect of a provision usually indicates that there is a right conferred upon individuals.⁹⁹ In fact, in a number of cases the ECJ had explicitly stated that a provision in question conferred rights on individuals precisely because it had direct effect.¹⁰⁰ What is remarkable about the *Kammergericht*'s judgment is that in its decision on the very point the ECJ had explicitly stated that individuals can rely on provisions "in so far as they define rights which individuals are able to assert against the State".¹⁰¹ There was thus a strong indication from the ECJ that the provision in question was intended to confer rights on individuals. The fact that the *Kammergericht* swiftly dismissed the arguments advanced by the claimant at least suggests a general unwillingness on the part of the court to grant damages, if not actually a misapplication of the ECJ's ruling.

The requirement that a provision of EU law must confer rights on individuals also featured prominently in the English *Three Rivers* litigation. The plaintiffs claimed that the Bank of England had failed to comply with its supervisory duties under the First Banking Directive 77/780/EEC¹⁰² as a result of which the plaintiffs lost their deposits in a fraudulent bank. The plaintiffs failed to convince the courts at all instances that the Directive was intended to confer rights on individuals. Lord Hope, who gave the leading speech in the House of Lords, based his argument on the recitals of the Directive and the wording of its articles and concluded that the Directive did not confer rights on individuals.¹⁰³ Furthermore, he considered its purpose to be the coordination of the rules on banking supervision. The *Paul* decision, handed down by the ECJ four years later, showed that the House of Lords arrived at the correct conclusion. The *Three Rivers* case is chiefly instructive because it revealed a reluctance on the part of the House of Lords to refer the question to the ECJ.¹⁰⁴ Lord Hope concluded that the question was "*acte clair*" despite having dedicated sixteen page of his judgment to that very point and despite the strong dissenting opinion by Auld LJ in the Court of Appeal.¹⁰⁵

97. For an overview cf. Prechal, *op. cit. supra* note 81, 99–106.

98. *Ibid.*

99. *Ibid.*, 126.

100. E.g. in *Stockholm Lindöpark*, cited *supra* note 18, para 35.

101. *Linneweber and Akritidis*, cited *supra* note 95, para 33, where the ECJ referred to its earlier cases, such as Case 8/81, *Becker*, [1982] ECR 53.

102. Directive 77/780/EEC, O.J. 1977, L 332/30.

103. *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 3)*, [2000] 2 W.L.R. 1220.

104. This was also criticized by Fairgrieve and Andenas, "Misfeasance in public office, governmental liability, and European influences", (2002) ICLQ, 775.

105. *Three Rivers DC*, cited *supra* note 103, 2 W.L.R. 15.

That the question was evidently not *acte clair* is obvious from the reference in *Paul*. The *Three Rivers* decision thus reveals another weakness in the conception of Member State liability as a tool for private decentralized enforcement. Such enforcement can only work where Member State courts view EU law remedies in the wider context of enforcement, which would incentivize more references to the ECJ in critical cases such as *Three Rivers*.

The criterion that the provision breached must be intended to confer rights on individuals has been shown not to be unproblematic. The main reason for this is the lack of clear guidance from the ECJ as to what constitutes a right under EU law. It is therefore not surprising that the national courts have had difficulties in applying this criterion. Coupled with a lack of enthusiasm for awarding State liability damages and for referring borderline cases to the ECJ, this has the potential to hamper the suitability of *Francovich* claims as a means of enforcing European Union law.

3.2. *Sufficiently serious breach*

As shown in table 5, the most difficult condition for a claimant to establish is that of a sufficiently serious breach.¹⁰⁶ The main criterion is whether the Member State had any discretion granted to it by EU law when the breach was committed. The more discretion is given to a Member State, the less likely is the existence of a sufficiently serious breach.¹⁰⁷ The court dealing with the question must, in the ECJ's own famous words, take the following factors into account:

“... the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or [EU] authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a [EU] institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to [EU] law.

On any view, a breach of [EU] law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of

106. There is an additional problem with the sufficiently serious breach requirement in that the language versions differ: in French it is *une violation suffisamment caractérisée*; in German it is *ein hinreichend qualifizierter Verstoß*; in Italian it is *una violazione sufficientemente caratterizzata*.

107. To that effect cf. *Hedley Lomas*, paras. 28–29; *Haim*, paras. 38–43; *Rechberger*, para 50, all cited *supra* note 19.

the Court on the matter from which it is clear that the conduct in question constituted an infringement.”¹⁰⁸

In *Dillenkofer*, the Court held that in cases such as in *Francovich*, where a directive has not been transposed in time, the breach of EU law is always considered sufficiently serious.¹⁰⁹ Outside these clear-cut cases, the key question is whether a Member State has manifestly and gravely disregarded the limits of its discretion.¹¹⁰ A decisive factor for this assessment is the clarity and precision of the rule infringed.¹¹¹

Generally speaking it is for the national court to assess whether a breach of EU law is sufficiently serious.¹¹² The following discussion of German and English cases will show that national courts are reluctant to find a sufficiently serious breach. Only in evident situations, such as the complete failure to transpose a directive into national law within the transposition period, or where, in response to a preliminary reference, the ECJ has itself found a sufficiently serious breach, will such a finding normally be made.¹¹³ In other cases, the courts will often point to a lack of clarification by the ECJ. There is a pattern in both English and German cases that where “only” an incorrect transposition of a directive is at question, courts do not find a sufficiently serious breach unless the legal situation had previously been clarified by the ECJ.¹¹⁴ Courts will often rely on the ECJ’s decision in *British Telecommunications*¹¹⁵ in order to argue that the Member State’s error in transposing the directive was excusable. In particular, they tend to point to a lack of guidance from the case law of the ECJ on the very question.¹¹⁶ It is true that the ECJ’s case law on the sufficiently serious breach requirement is at times difficult to follow and lacks guidance. But one can also witness a general unwillingness of national courts to award the remedy. The following examples will confirm these findings and will also point out some cases in which the

108. *Brasserie du Pêcheur*, cited *supra* note 4, paras. 56–57.

109. *Dillenkofer*, cited *supra* note 19, para 29; *Brinkmann*, *supra* note 19, para 28.

110. *A.G.M.-COS.MET*, cited *supra* note 19, para 81.

111. *Synthon*, cited *supra* note 19, para 39.

112. *Konle*, cited *supra* note 19, para 59.

113. OVG Hamburg 1 Bf90/08; OVG Berlin-Brandenburg 4 B 13.11; BGH III ZR 59/10; *R v. Department of Social Security, ex parte Scullion*, [1999] C.M.L.R. 798; *Byrne v. Motor Insurers’ Bureau and another*, [2008] EWCA Civ 574.

114. See cases in note 113 and 116 *supra* and *infra*.

115. *British Telecommunications*, cited *supra* note 19.

116. *Ibid.*, para 44; BGH III ZR 233/07; BGH III ZR 127/91; BGH III ZR 337/09; OLG München 1 U 392/11 and 1 U 5279/10; LG Köln 5 O 385/10; KG Berlin 9 U 233/10; BVerwG 2 B 93/11; *Chalke and Another v. Commissioners for Her Majesty’s Revenue and Customs*, [2009] EWHC 952 (Ch).

national courts reached questionable results suggesting deficient knowledge of European Union law and a reluctance to refer borderline cases to the ECJ.

An obvious misunderstanding of *Dillenkofer*¹¹⁷ is evident in a decision by the *Landgericht* Düsseldorf concerning the non-implementation of the Working Time Directives 93/104/EC¹¹⁸ and 2003/88/EC¹¹⁹ by the respondent State of North Rhine Westphalia.¹²⁰ The *Landgericht* came to the conclusion that this did not constitute a sufficiently serious breach as the content of the Directive was not clearly identifiable. In this case the *Landgericht* confused the requirement in *Francovich* that the content of the rights contained in a directive must be identifiable¹²¹ with the requirement of a sufficiently serious breach. Rather it is a factor for assessing whether the directive confers rights on individuals.¹²² It is a logical prerequisite that for a directive to confer rights on individuals, these rights must be identifiable. Nonetheless, the overall denial of a claim in State liability by the *Landgericht* was correct since the plaintiff had failed to try and enforce his actual right to work less in the first place, so a national procedural requirement stood in the way of success.

The decision of the English Court of Appeal in *R v. Secretary of State for the Home Department, Ex p. Gallagher* exposes some confusion surrounding the meaning of “discretion” in the *British Telecommunications* case.¹²³ Gallagher, an Irish citizen, was expelled from the United Kingdom by the Home Secretary on grounds of public policy. Article 9 of Directive 64/221/EEC provides that an expulsion on such grounds may only happen after an opinion by a competent authority had been obtained before which the person concerned enjoys rights of defence and assistance.¹²⁴ The Prevention of Terrorism (Temporary Provisions) Act 1989 did not contain such a requirement and, accordingly, the Home Secretary never obtained an opinion as provided for by the Directive. The Court of Appeal concluded that, while there was a breach, there had been discretion in the implementation of the Directive. The Court of Appeal admitted that the Directive did not leave a large degree of discretion to the Member State but that nonetheless it was given some discretion. Regrettably, the Court of Appeal did not specify where that discretion lay. It is true that, as the Court of Appeal had pointed out, the law of State liability was still at a formative stage when the decision in *Gallagher* was handed down. Nonetheless, it is remarkable that the Court of Appeal

117. *Dillenkofer*, cited *supra* note 19.

118. Directive 93/104/EC, O.J. 1993, L 307/18.

119. Directive 2003/88/EC, O.J. 2003, L 299/9.

120. LG Düsseldorf 2b O 286/08.

121. *Francovich*, cited *supra* note 2, para 40.

122. Prechal, *op. cit. supra* note 81, 284.

123. *R v. Secretary of State for the Home Department*, [1996] 2 C.M.L.R. 951.

124. Directive 64/221/EEC, O.J. 1964, 56/850.

considered that there was discretion. The Directive was unambiguous as to the requirement of an “opinion” prior to expulsion. The only discretionary decisions to be taken by a Member State regarding the opinion would have been the designation of the body responsible for issuing it and by which procedure it should be governed. But this was of no relevance to the question before the Court of Appeal. It was clear that Member States had no discretion as to whether an opinion had to be obtained prior to expulsion. Since the Act did not contain the requirement that an opinion be sought prior to expulsion the transposition was obviously incorrect and should have been considered a sufficiently serious breach.

The English High Court’s (Queen’s Bench Division) decision in the case of *(R) Negassi v. Secretary of State for the Home Department* confirms that even in seemingly clear cases national courts are reluctant to find a sufficiently serious breach where the incorrect transposition of a directive is concerned.¹²⁵ The case concerned access to work for asylum seekers under Article 11 of the Reception Directive 2003/9/EC.¹²⁶ The applicant, an asylum seeker, had been refused permission to work in the United Kingdom as he had previously unsuccessfully applied for asylum, with the argument that Article 11 of the Directive only granted access to work to first applicants. This construction of Article 11 was held to be incorrect. In determining whether the breach was sufficiently serious, the court considered another case where the UK Supreme Court had held that the interpretation of Article 11 was *acte clair* and therefore no reference to the ECJ was necessary.¹²⁷ Counsel for the applicant argued that as a result, the breach of Article 11 was sufficiently serious. The court did not accept this, however. The judge pointed out that the European Commission had very probably been aware of the United Kingdom’s implementation but had not done anything about it. The court accepted that this was a borderline case. Remarkably it held that for this reason there was no sufficiently serious breach and explicitly pointed out that the hurdle for an applicant seeking damages is a high one. This case shows a clear reluctance on part of the High Court to find a sufficiently serious breach, even though the Supreme Court had considered this to be evident.¹²⁸ Most interesting is its explicit argument that the European Commission had been silent on the matter even though it should have been aware of the way in which the United Kingdom had implemented the Directive. This implies that the court would have expected the Commission to initiate proceedings under Article 258 TFEU. From the fact

125. *(R) Negassi v. Secretary of State for the Home Department*, [2011] EWHC 386 (Admin).

126. Directive 2003/9/EC, O.J. 2003, L 31/18.

127. ZO [2010] UKSC 36.

128. In addition the court found that there was no causal link between breach and damage.

that the Commission did not do so, the High Court appears to have inferred that the breach was not serious. This line of reasoning demonstrates that the High Court clearly did not regard Member State liability as a mechanism for the enforcement of EU law, but only as a remedy for the compensation of damage suffered by a private party.

This is confirmed by the German *Bundesgerichtshof's* (Federal Court of Justice) decision on whether Germany had incorrectly implemented Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.¹²⁹ Germany excluded broadcasters from the distribution of proceeds from a levy on copying appliances and recording mediums. While under German law the reproduction of material is legal for personal use, the producers of appliances for making such copies and of mediums for the storage of copies must pay a levy, which is then distributed to the producers of works. Article 2(e) of the Directive explicitly includes broadcasters as rightholders. Article 5 provides for exceptions to the rightholder's right to exploit their work, but any exception must not unreasonably prejudice the legitimate interests of the rightholder. It is difficult to understand how the *Bundesgerichtshof* came to the conclusion that a blanket exclusion of a whole group of rightholders from the distribution of the levy could come within this narrow exception. The court further argued that even if this were not the case, a breach would not be sufficiently serious. On the face of it, blanket exclusion appears to unreasonably prejudice the interests of broadcasters and would therefore constitute a clear breach of the Directive. This case shows that the *Bundesgerichtshof* was both unwilling to find a sufficiently serious breach and to make a reference to the ECJ for a clarification of the matter.

This brief survey of the case law regarding the sufficiently serious breach requirement shows a pattern that courts are unlikely to find a sufficiently serious breach in cases, which deal with the incorrect implementation or application of EU law. Only where there was a failure to transpose a Directive in time or where the ECJ had previously established a breach will such a finding be made. This is coupled with a conspicuous reluctance to make preliminary references in borderline cases, which are instead decided in favour of the Member State.

3.3. *Causation and national procedural hurdles*

The ECJ does not normally give guidance on the national courts' decision regarding the requirement of a causal link between the breach and the

129. Directive 2001/29/EC, O.J. 2001, L 167/10.

damage.¹³⁰ This is because it is usually a question of fact.¹³¹ As shown in the above table, a number of cases have failed in the national courts because the alleged damage was not caused by the breach. In the case of *Negassi* discussed above, the High Court made the additional argument that the applicant would not have found work in the United Kingdom even if the Directive had been applied correctly.¹³² Surprisingly, the judge did not forward any evidence for this but based it on a mere assumption that no work would have been available for the applicant. The follow-up to the ECJ's *Danske Slagterier* decision¹³³ by the *Oberlandesgericht* (Higher Regional Court) Köln is also instructive.¹³⁴ Germany had violated its obligations under several Directives regarding the importation of pork stemming from non-castrated male pigs and rejected numerous consignments of pork from Denmark.¹³⁵ *Danske Slagterier*, an association of Danish slaughterhouses, thus claimed damages because Germany had seriously breached EU law. After a reference to the ECJ had been made, the *Bundesgerichtshof*, which had referred the case to the ECJ, handed the case back to the *Oberlandesgericht Köln* for further fact-finding. The *Oberlandesgericht* found against *Danske Slagterier* because the alleged damage was not caused by Germany's breach of the EU Directive at issue, since the plaintiff was unable to prove that the reduction in the production of pork from uncastrated male pigs was caused by the illegal German behaviour. This is because the decision to reduce the production of that meat had been decided before the Directive entered into force. Thus it was not caused by failure to transpose it.

A similar argument was made by the same court in one of the cases following *Dillenkofer*.¹³⁶ It is recalled that the claimants in *Dillenkofer* were holiday-makers stranded in their holiday destinations after their travel operator had gone insolvent. Germany had transposed the Package Holiday Directive 90/314/EEC¹³⁷ late so that they were not covered by the protection provided for, which included security of repatriation. In the case before the *Oberlandesgericht* the package holiday contract in question had been concluded before the transposition period for the package travel directive had

130. *Brasserie du Pêcheur*, cited *supra* note 4, para 65.

131. For rare exceptions cf. *Rechberger*, para 74 and *Brinkmann*, para 29, both cited *supra* note 19.

132. See *supra* note 125.

133. *Danske Slagterier*, cited *supra* note 19.

134. OLG Köln 7 U 29/04; the decision was handed down in March 2012 so that it does not feature in the above statistics.

135. For more detailed facts, cf. *Danske Slagterier* cited *supra* note 19, para 11 et seq.

136. OLG Köln 7 U 23/97.

137. Directive 90/314/EEC, O.J. 1990, L 158/59.

expired, so that it would not have been covered even if a timely transposition had taken place.

The survey of case law conducted for this study has not been able to establish a difference in the approach to causation between German and English courts. This is perhaps due to the relative simplicity of State liability claims when it comes to causation.

Restrictions on the State liability claim based on national procedural rules, such as the domestic rules on procedure, evidence, limitation, and the calculation of damages, are also in the domain of the domestic courts. They are of course subject to the limits placed by the Court on the national procedural autonomy of the Member States, which require that they must not be less favourable than those applying to similar claims under domestic law (equivalence) and they must not be so framed as to make it impossible or excessively difficult to obtain reparation (effectiveness).¹³⁸ Naturally, procedural rules differ from one Member State to another, so that two comparable claims in two different Member States may see different outcomes. For instance, the limitation period for State liability claims in Germany is three years whereas it is six years in England.¹³⁹ While the case law on the matters of causation and national procedural rules is not overly instructive, it is nonetheless important to bear in mind that, in particular, differences in national procedure can severely affect the suitability of Member State liability for the enforcement of EU law.¹⁴⁰

4. Conclusions

This article aimed to test the assumption that the remedy of Member State liability for infringements of European Union law, first introduced by the ECJ in *Francovich*, should be regarded as a mechanism for the private enforcement of European Union law. A statistical analysis of decisions by English and German courts revealed that not many *Francovich* claims have been brought so far and that very few have been successful. As indicated above, the findings do not provide proof of the situation in other Member States, but they can be regarded as strong indicators. Nonetheless, more comprehensive research,

138. *Brasserie du Pêcheur*, cited *supra* note 4, para 83; *Palmisani*, para 23 et seq.; *Transportes Urbanos*, para 33 et seq.; *Norbroom*, para 111; *Fuß*, para 62; *Combinatie Spijker*, para 91, all cited *supra* note 19.

139. § 195 BGB (German Civil Code); s 2 Limitation Act 1980 (c 58), cf. *Spencer v. Secretary of State for Work and Pensions*, [2008] EWCA Civ 750.

140. On the variety of approaches regarding the calculation of damages in the Member States, cf. Granger, "National applications of *Francovich* and the construction of a European administrative *ius commune*", (2007) *EL Rev.*, 180.

including all Member States, would certainly be welcome.¹⁴¹ In addition, it would be worthwhile examining the disciplining effect, which the possibility of a State liability claim may or may not have on the Member States when it comes to the implementation of directives in particular. An internal guide on the transposition of directives by the British Department for Business warns of legal challenges in national courts in cases of incorrect implementation, explicitly referring to Member State liability.¹⁴² This suggests that the British government was aware of the potential costs which may result from *Francovich* claims. Interestingly, the latest version of this guide no longer makes reference to the danger of *Francovich* claims.¹⁴³ Moreover, Member States still regularly violate their duty to transpose Directives in time, so that the deterrent effect (if it exists) of such claims may not be great enough to prompt Member States to get better organized in order to ensure a correct and timely implementation of EU law. In some cases the potential disadvantage of being exposed to a State liability claim may be outweighed by the benefits which a government may believe to result from late transposition.¹⁴⁴

Both the statistical findings and the analysis of national court decisions made in this article suggest that Member State liability is not a successful means of enforcing European Union law. The reasons for this can be summarized as follows. The overall number of *Francovich* claims in the national courts of England and Germany remains low. Over the past twenty years, there were fewer than two cases per year on average in each of these legal systems and the success rate remains relatively low. Even if one takes into account, as Granger has convincingly suggested, that there was an initial reluctance by applicants to seek and by courts to award the new and unfamiliar remedy, it would need a significant rise in applications in the future to make a difference.¹⁴⁵ This article has attempted to answer the question why Member State liability is so rarely successful. It is suggested that a number of factors come into play, on the basis of which the limits of Member State liability as a private enforcement mechanism can be shown. The conditions for State liability set by the ECJ are very hard to satisfy and have not been clearly defined by the Court. It is particularly difficult to establish a sufficiently serious breach outside the clear-cut categories of non-transposition cases and

141. A start was made by Granger, *ibid*, who unfortunately did not provide a statistical analysis.

142. Department for Business, Enterprise and Regulatory Reform, "Transposition guide: How to implement European directives effectively", Sept. 2007, para 3.16.

143. HM Government, "Transposition guide: How to implement European Directives effectively", Apr. 2011.

144. The European Commission detected 855 new non-communication cases in 2010, cf. SEC(2011) 1094 final, cited *supra* note 37, Annex I, Table 1.1.

145. Granger, *op. cit. supra* note 140, 158.

of cases where the breach persisted despite it having been established by the ECJ. Where merely an “incorrect” transposition of a Directive is alleged, the Directive’s vagueness, which is often compounded by differences in wording in the different languages, provides a valid excuse. This means that State liability is unfit to act as an enforcement mechanism in these types of cases. This must be coupled with the decentralized nature of *Francovich* proceedings. In addition, there is no evidence that Member State courts have taken the private enforcement aspect of Member State liability on board and regard themselves as EU courts.¹⁴⁶ On the contrary, one can witness a reluctance to make requests for preliminary references in borderline cases, which would be necessary for effective enforcement to work. Furthermore, it appears from the cases discussed and from the low success rates both in England and Germany that national courts tend to decide borderline cases in favour of the State. For these reasons, the attempt to empower citizens to enforce EU law by giving them a remedy in State liability has not been very successful.¹⁴⁷

The findings in this study confirm an earlier study conducted by Slepcevic on the possibilities and limits of private enforcement of compliance with the Natura 2000 Directives.¹⁴⁸ He concluded that access to the courts and a common interpretation by the national courts are two crucial factors for successful enforcement.¹⁴⁹ In State liability proceedings, access to the remedy is severely limited by the strict legal requirements set up by the ECJ. Furthermore, the interpretation of EU law by national courts is not always uniform, a situation for which the ECJ is itself partly to blame. Undoubtedly, however, *Francovich* is a tool for individual compensation, albeit not a very reliable one. Where complainants have managed to establish the conditions and got around limitations laid down in domestic law, such as limitation periods, their claims will be successful. This can be seen in the case of *Dillenkofer* in the aftermath of which more than 7000 claims were settled as well as in the case of *Factortame*, where a number of companies were able to secure compensation. One can also conclude from some of the cases following in the footsteps of *Fuß* that many individuals have been able to obtain compensation on the basis of this judgment.

It is thus submitted that one should reconsider conceptualizing Member State liability as a mechanism for the enforcement of European Union law. It should instead be regarded as a remedy first and foremost for individuals.

146. This role was re-emphasized by the ECJ in Opinion 1/09 [2011], paras. 68–69.

147. Prechal, *op. cit. supra* note 81, 276 also doubts whether private parties are capable of playing a role similar to that of the Commission in enforcement proceedings.

148. Slepcevic, “The judicial enforcement of EU law through national courts: possibilities and limits”, 16 *Journal of European Public Policy* (2009), 378.

149. *Ibid.*, 389–390.

While Tallberg's analysis that the Member States have emasculated Member State liability could be regarded as an exaggeration,¹⁵⁰ the same must be said of Albers-Llorens' designation of Member State liability as the "ultimate indirect mechanism to secure Member States compliance".¹⁵¹ It is thus suggested to turn Caranta's early analysis quoted in the introduction to this article on its head.¹⁵² Rather than regarding individual judicial protection in such cases as incidental, private enforcement ought to be regarded as no more than an implication of the remedy providing compensation for individual claimants where they happen to fulfil the strict requirements laid down by the Court of Justice. This result would also be in line with the development of Member State liability by the ECJ in parallel to the liability of the Union under Article 340 TFEU,¹⁵³ the chief purpose of which is the protection of individual interests.

150. Tallberg, "Supranational influence in EU enforcement: The ECJ and the principle of State liability", 7 *Journal of European Public Policy* (2000), 117.

151. Albers-Llorens, "The principle of State liability in EC law and the supreme courts of the Member States", (2007) *Cambridge Law Journal*, 271.

152. Caranta, *op. cit. supra* note 3, 725.

153. Cf. *Brasserie du Pêcheur*, cited *supra* note 4, para 53.