Addressing Issues of Protective Scope within the *Francovich* Right to Reparation

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EU Law – Member State liability in damages – Issues of protective scope about exactly which individuals/interests are protected – Conditions for Member State liability – Intention to confer rights criterion – Tendency towards a 'checklist' approach by the Court of Justice of the European Union – Potential implications for scope of Member State liability – Finding appropriate balance between protecting individuals and punishing public bodies – Example of free movement rights – Example of environmental legislation – Example of employment legislation

Introduction

According to the Court of Justice of the European Union in *A.G.M.-COS.MET*, the purpose of a Member State's liability under the *Francovich* case law,[1] 'is not deterrence or punishment but compensation for the damage suffered by individuals as a result of breaches of [EU] law by Member States'.[2]

* Liverpool Law School, University of Liverpool. I am very grateful to the editors and reviewers for their invaluable comments on an earlier draft.

[1] ECJ 19 November 1991, ECLI:EU:C:1991:428, *Francovich* v *Italian Republic*.

[2] ECJ 17 April 2007, ECLI:EU:C:2007:213, *A.G.M.-COS.MET Srl*, para. 88. *See also* e.g. ECJ 26 January 2010, EU:C:2010:39, *Transportes Urbanos*, para. 36. Punishment or deterrence is thus more a matter for lump sum fines and penalty payments under Art. 260 TFEU. Note that the dual theme of individual compensation plus Member State deterrence/punishment has regularly been discussed in the *Francovich* literature, e.g. C. Plaza Martin, 'Furthering the Effectiveness of EC Directives and the Judicial Protection of Individual rights Thereunder', 43 *ICLQ* (1994) p. 26; C. Harlow, '*Francovich* and the Problem of the Disobedient State', 2 *ELJ* (1996) p. 199; P. Craig, 'Once More Unto the Breach: The Community, The State and Damages Liability', 113 *LQR* (1997) p. 67; R. Van den Bergh and H.-B. Schäfer, 'State Liability for Infringement of the EC Treaty: Economic Arguments in Support of a Rule of "Obvious Negligence"', 23 *ELRev* (1998) p. 552; G. Anagnostaras, 'The Principle of State Liability for Judicial Breaches: The Impact of European Community Law', 7 *European Public Law* (2001) p. 281. Similar debates also apply to private law

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Since *Francovich* is concerned primarily with the effective protection of individuals, rather than penalising Member States for their wrongdoing as an end in itself, we might expect issues about the protective scope of the right to reparation under EU law to be central to the Court's deliberations as well as our own discursive analysis – by which we mean, the process of identifying precisely which legal interests EU law seeks both to protect and to compensate for through its system of non-contractual liability. Defining the protective scope of EU law, specifically for the purposes of establishing *Francovich* liability, thus implies asking a series of important questions. Does the claimant enjoy a right that should be protected through the award of compensation at all? If so, what is the nature and content of that right? In particular, what is the personal scope of the relevant provision: which class of individuals is intended to benefit from protection under EU law? And equally, what is the material scope of the relevant provision: against which losses are those beneficiaries meant to be protected?

Finding appropriate answers to such questions is crucial to the good functioning of any system of non-contractual liability – which makes finding an appropriate location and formulation for the questions themselves of at least equal importance. That brings us to the main purpose of this article: how are protective scope issues incorporated into the existing EU legal structures of the *Francovich* action? Addressing that issue requires us to begin by recalling and clarifying certain fundamental elements of the EU's rules on the non-contractual liability of the Member States: the criteria of an intention to confer rights, sufficiently serious breach and direct causal link, together with consequential issues such as the nature and extent of reparation or the procedural conditions under which *Francovich* actions must be conducted.

The remainder of this paper then identifies three main problems in how protective scope issues are handled within a *Francovich* action. First, one would expect the 'intention to confer rights' criterion to provide the natural forum for most protective scope issues to be considered within the context of a *Francovich* claim. But in practice, it is striking to note the limited extent of the Court's engagement with this key criterion: there is surprisingly little by way of explicit discussion of protective scope issues in 25 years of *Francovich* case law; on the contrary, the Court often seems to adopt a checklist or tickbox approach to the 'intention to confer rights' requirement. Secondly, that tickbox approach can combine with more deep-rooted conceptual issues about how EU law understands and deals with 'rights', especially when it comes to mere rights of standing to invoke EU law before the national courts, without the individual also becoming the beneficiary of some subjective personal right. Thirdly, some important protective scope issues are not actually suitable to be addressed within

liability in damages: e.g. P. Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?', 33 *ELRev* (2008) p. 23.

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the context of the 'intention to confer rights' criterion at all – yet nor are they guaranteed to be picked up within the remaining legal structures of the *Francovich* analysis. That is particularly true of the idea that *Francovich* is meant to serve as a public law remedy; it is not well suited to providing effective judicial protection in the context of private law disputes.

We conclude by speculating that such problems may well be ameliorated through the good sense and pragmatism of those national judges expected to administer the *Francovich* remedy in practice – but also by suggesting that it would be preferable for the unity and coherence of EU law that basic protective scope issues secure a more explicit and systematic deliberation within the legal structures of the *Francovich* action itself.

The relevant legal structures of the Francovich action

According to the Court, three criteria must be satisfied for a Member State to be required to make good losses caused to individuals: first, the rule of law infringed must have been intended to confer rights on individuals; secondly, the breach must be sufficiently serious (for which purpose, the Court provides a list of relevant factors to be taken into consideration by the competent national tribunal); and thirdly, there must be a direct causal link between the breach of the obligation resting on the Member State and the loss or damage sustained by the injured party.[3] Those three conditions are sufficient to establish the Member State's liability to make reparation as a matter of EU law: domestic rules should not render it more onerous for individuals to obtain redress, though the Member States remain at liberty to make it easier to do so.[4]

For present purposes, there are two important points to note about this basic framework: first, the fact that the intended right and the breached obligation need not necessarily be the same; secondly, the prominent role afforded to national procedural autonomy in the full operation of the *Francovich* action. As we shall see, both those points may well have important consequences either for, or resulting from, the manner in which EU law handles protective scope issues under the *Francovich* case law.

The intended right and the breached obligation are not necessarily one and the same

Our first point concerns the idea – which is easily and often overlooked – that the 'right' which provides the basis for an individual's claim under *Francovich* is not

[3] E.g. ECJ 5 March 1996, ECLI:EU:C:1996:79, *Brasserie du Pêcheur* and *Factortame III*; ECJ 8 October 1996, ECLI:EU:C:1996:375, *Dillenkofer*.

[4] E.g. *Francovich*, *supra* n. 1; *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3; ECJ 13 June 2006, ECLI:EU:C:2006:391, *Traghetti del Mediterraneo*; ECJ 14 March 2013, ECLI:EU:C:2013:166, *Leth*.

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necessarily the same as the 'obligation' whose breach provides the basis for the Member State's eventual liability. To be fair, in most cases, the standard formulation used by the Court clearly suggests that the relevant 'right' and 'obligation' are merely two sides of the same coin. As originally expressed in *Brasserie de Pêcheur* and repeated countless times since, the *rule of law infringed* must be intended to confer rights.[5] And true enough: in most cases, there is a perfect concurrence of identity between the right relied upon by the claimant and the obligation breached by the Member State. Consider (for example) a *Francovich* action based upon a straightforward infringement of the right to free movement of goods or services though the erection of an unlawful barrier to trade by the national legislative or executive authorities.[6]

But the situation is not always just so. In certain cases, there is a distinction between (on the one hand) the substantive right which the individual was intended to enjoy under EU law and which entitles them to seek reparation under *Francovich*; and (on the other hand) the substantive obligation which the Member State has been found to breach and which leads them to incur liability under EU law. Indeed, it is quite possible that the intended right which acts as the initial trigger for seeking reparation is not addressed to the Member State at all, while the obligation whose infringement serves to bring the Member State's liability to fruition need not be directly concerned with the protection of any individual.

The point is most obvious when it comes to non-contractual liability claims against the Member State based upon the latter's failure to transpose a directive correctly or indeed at all. Consider the situation in *Francovich* itself.[7] The substantive right intended under EU law was for the employees of an insolvent undertaking to be paid certain of their outstanding wages through a guarantee fund created pursuant to Directive 80/987.[8] But the actual obligation breached by Italy consisted in the duty under Article 288 TFEU to implement Directive 80/987 into national law within the applicable deadline. The latter obligation is addressed solely to the Member States and can hardly be described as intended to confer rights on individuals in any direct or specific way; at any rate, the Member State's obligation to transpose under Article 288 TFEU is entirely distinct from the right to payment of outstanding wages as provided for under the substantive provisions of Directive 80/987.

This distinction between 'right' and 'obligation' was in fact recognised in the original *Francovich* formulation of the three conditions required to incur liability: the result prescribed by the relevant directive should entail the grant of rights to

[5] *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3, especially at para. 51.

[6] As in *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3 itself.

[7] *Francovich*, *supra* n. 1.

[8] Directive 80/987 [1980] OJ L283/23. *See now* Directive 2008/94 [2008] OJ L283/36.

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individuals; it should be possible to identify the content of those rights on the basis of the provisions of the relevant directive; and finally, there should be a causal link between breach of the Member State's obligation to transpose under Article 288 TFEU (on the one hand) and the harm suffered by the claimant (on the other hand).[9] It was only in the subsequent *Brasserie* ruling that the Court conflated the idea of the rule of law which had been infringed by the Member State, with the rule of law which was intended to confer rights upon the claimant.[10] That was perhaps unsurprising, given the factual and legal situation at stake in *Brasserie* itself.[11] It is interesting to note that in *Dillenkofer*, where the Court's primary concern was to reconcile the apparent differences which had emerged between the *Francovich* and *Brasserie* formulae into a single unified test for incurring liability, the judgment was still careful to separate explicitly the right which EU law had intended to confer upon the claimant, from the Member State's obligation to transpose the relevant directive into national law.[12] But even if the more nuanced and accurate approach from *Francovich* and *Dillenkofer* still emerges occasionally in a few other judgments,[13] the case law has largely adopted the *Brasserie* terminology as a matter of course, even in disputes based upon the non- or incorrect transposition of EU directives into national law.[14]

However, it is not only in disputes involving the non- or incorrect transposition of EU directives where it is possible to separate the claimant's intended rights from the Member State's breached obligations. Consider also a case like *Köbler*.[15] As is

[9] *See Francovich*, *supra* n. 1, especially at paras. 38-41.

[10] *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3, especially at para. 51.

[11] I.e. where the free movement of goods indeed provided both the necessary right and the relevant obligation.

[12] *Dillenkofer*, *supra* n. 3, especially at paras. 20-27.

[13] E.g. ECJ 24 July 2003, ECLI:EU:C:2003:417, *Viegas*; ECJ 4 July 2006, ECLI:EU: C:2006:443, *Adeneler*. Note also the 'hybrid' formulation used, e.g. in ECJ 25 February 1999, ECLI:EU:C:1999:98, *Carbonari*; ECJ 3 October 2000, ECLI:EU:C:2000:526, *Gozza*.

[14] E.g. ECJ 26 March 1996, ECLI:EU:C:1996:131, *R v HM Treasury, ex p British Telecommunications*; ECJ 17 November 1996, ECLI:EU:C:1996:387, *Denkavit International*; ECJ 10 July 1997, ECLI:EU:C:1997:351, *Palmisani*; ECJ 10 July 1997, ECLI:EU:C:1997:348, *Bonifaci*; Case C-373/95, *Maso*, ECLI:EU:C:1997:353; ECJ 18 July 2001, ECLI:EU:C:2001:34, *Stockholm Lindöpark*; ECJ 4 December 2003, ECLI:EU:C:2003:650, *Evans*.

[15] ECJ 30 September 2003, ECLI:EU:C:2003:513, *Köbler*. *Cf. Traghetti del Mediterraneo*, *supra* n. 4; ECJ 24 November 2011, ECLI:EU:C:2011:775, *Commission v Italy*; ECJ 16 July 2015, ECLI: EU:C:2015:471, *Diageo Brands*; ECJ 9 September 2015, ECLI:EU:C:2015:565, *Ferreira da Silva e Brito*; ECJ 6 October 2015, ECLI:EU:C:2015:662, *Târşia*. From an extensive literature, *see further*, e.g. A.-S. Botella, 'La responsabilité du juge national', 40 *RTDE* (2004) p. 283; C. D. Classen, Casenote on *Köbler*, 41 *CMLR* (2004) p. 813; M. Breuer, 'State Liability for Judicial Wrongs and Community Law: The Case of *Gerhard Köbler v Austria*', 29 *ELRev* (2004) p. 243; G. Anagnostaras, 'Erroneous Judgments and the Prospect of Damages: The Scope of the Principle of Governmental Liability for Judicial Breaches', 31 *ELRev* (2006) p. 735; B. Beutler, 'State Liability for Breaches of

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well known, the dispute centred around the conduct of a national court of last instance which had failed to comply with its obligation to make (or rather, to maintain) a preliminary reference to the European Court of Justice under Article 267 TFEU. Austria objected to the possibility of liability on the grounds that that provision was an instrument of judicial cooperation between the domestic and EU courts and was not intended to confer any rights upon individuals.[16] In order to counter that argument, the Court held that the substantive right intended under EU law, which provided the trigger for the claimant's action, actually consisted in the right of migrant workers to equal treatment with home workers as regards their terms and conditions of employment in accordance with Article 45 TFEU. When it came to the obligation which the Member State was alleged to have infringed, the Court likewise focused on the Austrian Supreme Court's failure to uphold the claimant's right to equal treatment on grounds of nationality as regards their terms and conditions of university employment. But for the purpose of determining whether that infringement could be considered 'sufficiently serious', the main factor to be taken into consideration was the contravention by the Austrian Supreme Court of its obligations relating to the preliminary reference procedure under Article 267 TFEU.

Viewed from a perspective which treats the relevant 'right' and 'obligation' as interchangeable, one can sympathise with Court's dilemma in *Köbler*. Article 267 TFEU was undoubtedly central to Austria's infringement of EU law in this dispute, for the purposes of identifying a 'sufficiently serious breach'. But to have then also identified Article 267 TFEU as the basis for the claimant's entitlement to sue, for the purposes of the 'intention to confer rights', would have risked either ruling out any possibility of compensation from the outset (because of the consistent case law insisting that Article 267 TFEU is merely an instrument of judicial cooperation); or instead transforming the very nature of Article 267 TFEU within the EU legal order (i.e. precisely into an explicit source of individual rights). The Court's solution to that dilemma was to identify equal treatment on grounds of nationality as both the intended right for the claimant and the incriminating obligation of the Member State.

Yet viewed from a perspective which separates the qualifying 'right' from the relevant 'obligation', this solution appears both artificial and unnecessary. It feels artificial because the substantive right to equal treatment, and the corresponding obligation to provide it, was addressed primarily to the authorities responsible for

Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?', 46 *CMLR* (2009) p. 773.

[16] *Cf.* ECJ 6 October 1992, ECLI:EU:C:1982:335, *CILFIT*. More recently, e.g. ECJ 12 February 2008, ECLI:EU:C:2008:78, *Kempter*; ECJ 16 December 2008, ECLI:EU:C:2008:723, *Cartesio*.

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determining the terms and conditions of employment for university staff; that right/obligation was addressed to the national judiciary only at such a high level of abstraction as one could say the same of *any* legal right capable of being vindicated through judicial process. But more importantly, the Court's preferred solution feels unnecessary because it would have been entirely proper in *Köbler* to identify the right to equal treatment under Article 45 TFEU as the claimant's intended right for the purposes of *Francovich*; then to treat the national court's duty to make (maintain) a preliminary reference under Article 267 TFEU as the Member State's relevant obligation for the purposes of assessing the 'sufficiently serious breach' requirement. Just as with the obligation to transpose directives into national law under Article 288 TFEU, so too it is immaterial whether the duty to request preliminary guidance from the Court under Article 267 TFEU is *itself* intended to confer any rights on individuals.

Be that as it may, and even taking the Court's reasoning on its own terms, *Köbler* remains a useful illustration of our underlying point of principle: within the legal structures of *Francovich*, the right which initially qualifies the claimant to seek compensation, and the obligations which are relevant to assessing the Member State's eventual culpability, are not necessarily one and the same.

When it comes to the basic legal structures of the *Francovich* action, our discussion so far therefore suggests that liability arises from the combination of two distinct yet closely inter-related criteria: the existence of an intended right for the claimant; and the determination of a culpable breach of its obligations by the Member State. Those two conditions will often refer to precisely the same provisions of EU law, but that need not necessarily or at least entirely be the case. It is more important that the two requirements stand in a sufficiently proximate relationship to each other – an assessment which can for present purposes be adequately expressed through a 'but for' test: *but for* Italy's breach of its obligation correctly to implement Directive 80/987 within the applicable deadline, the claimants in *Francovich* may have enjoyed their otherwise distinct right to unpaid wages; *but for* Austria's breach of its obligation to request preliminary guidance under Article 267 TFEU, the claimant in *Köbler* may have benefited from his otherwise distinct right to equal treatment.[17]

It is that interaction between two conceptually separable criteria which provides the basis for something greater than the sum of their individual parts: a new and autonomous right to reparation under EU law, derived from but independent of both the original intended right and the original breached

[17] Note that we are not referring here to the 'direct causal link' criterion, which is concerned rather with the relationship between the Member State's breach of EU law and the damage suffered by the claimant.

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obligation.[18] Moreover, this methodology is essential if *Francovich* is to fulfil its function of compensating individuals for the losses they suffer as a result of the Member State's infringement of its Treaty obligations. After all, if the Court were to insist that the intended right and the breached obligation were indeed the direct converse of each other, that would lead to an excessively restrictive liability system – whereby claimants in a position analogous to *Francovich* or *Köbler* could have no chance of claiming reparation in respect of their losses, despite a clear line of responsibility connecting their intended rights to the Member State's default.

The prominent role allotted to national procedural autonomy within the Francovich action

The second important point to note about the basic legal framework of the *Francovich* system is that the autonomous core of the right to reparation, generated through the combination of an intended right and a culpable breach, is then supplemented by rules which are heavily conditioned by the influence of national law.[19] Consider the requirement of a direct causal link between the Member State's breach and the harm suffered by the claimant – the third criterion laid down directly by EU law in order to establish the Member State's liability to compensate. The case law has proven ambiguous about whether the national court

[18] Though an autonomous EU right/action which still needs to be located neatly within the various national systems of non-contractual public liability: consider, e.g. N. Emiliou, 'State Liability under Community Law: Shedding More Light on the *Francovich* Principle?', 21 *ELRev* (1996) p. 399; T. Downes, 'Trawling for a Remedy: State Liability under Community Law', 17 *Legal Studies* (1997) p. 286; A. Barav, 'State Liability in Damages for Breach of Community Law in the National Courts', in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997); C. Lewis, 'Damages and the Right to an Effective Remedy for Breach of European Community Law', in C. Forsyth and I. Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press 1998); P. Eeckhout, 'Liability of Member States in Damages and the Community System of Remedies', in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998).

[19] The impact of *Francovich* upon the principle of national procedural autonomy has been much discussed in the literature – particularly in the immediate aftermath of the ruling, e.g. A. Barav, 'Damages against the State for Failure to Implement EC Directives', 141 *NLJ* (1991) p. 1584; G. Bebr, Casenote on *Francovich*, 29 *CMLR* (1992) p. 557; D. Curtin, 'State Liability under Community Law: A New Remedy for Private Parties', 21 *ILJ* (1992) p. 74; E. Szyszczak, 'European Community Law: New Remedies, New Directions?', 55 *MLR* (1992) p. 690; R. Caranta, 'Governmental Liability after *Francovich*', 52(2) *CLJ* (1993) p. 272; C. Lewis and S. Moore, 'Duties, Directives and Damages in European Community Law', *Public Law* (1993) p. 151; M. Ross, 'Beyond *Francovich*', 56 *MLR* (1993) p. 55. But also in the later literature, e.g. J. Steiner, 'The Limits of State Liability for Breach of European Community Law', 4 *European Public Law* (1998) p. 69; T. Tridimas, 'Member State Liability in Damages for Breach of Community Law: An Assessment of the Case Law', in Beatson and Tridimas *supra* n. 18; M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004).

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was merely expected to apply a concept created and defined at the level of EU law, albeit that the detailed content of that concept still remained to be spelt out more fully by the Court in future rulings; or whether instead the national courts were free to apply their own domestic rules on causation, subject only to scrutiny by the Court itself to ensure that those domestic rules met certain minimum criteria expected under EU law.[20] However, the Court in *Danfoss* explicitly stated that the applicable rules of causation are indeed determined in the first instance by national law, subject to compliance with the principles of equivalence and effectiveness.[21]

The same approach – a presumption of national autonomy, rebuttable on the basis of the principles of equivalence and effectiveness, as well as other mandatory requirements imposed by EU law, such as the right to effective judicial protection under Article 47 of the Charter[22] – applies to all other consequential aspects of the right to reparation once the substantive conditions required to establish liability have been confirmed. That includes: the extent of recoverable losses and, in particular, the precise heads of damage available;[23] the very nature of the reparation offered by the Member State (for example, through retroactive performance of its obligations, with damages provided only in respect of supplementary losses);[24] the imposition of a duty to mitigate one's own losses, including the requirement to exhaust adequate alternative remedies;[25] the internal distribution of liability to make compensation between the various public

[20] Consider, e.g. *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3; Case C-5/94, *Hedley Lomas*, EU:C:1996:205; ECJ 24 September 1998, ECLI:EU:C:1998:429, *Brinkmann*; ECJ 15 June 1999, ECLI:EU:C:1999:306, *Rechberger*; ECJ 12 December 2006, ECLI:EU:C:2006:774, *Test Claimants in the FII Group Litigation*; *A.G.M.-COS.MET*, *supra* n. 2; *Leth*, *supra* n. 4. *See further*, e.g. W. van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*', 45 *ICLQ* (1996) p. 507; E. Deards, '*Brasserie du Pêcheur*: Snatching Defeat from the Jaws of Victory', 22 *ELRev* (1997) p. 620; F. Smith and L. Woods, 'Causation in *Francovich*: The Neglected Problem', 46 *ICLQ* (1997) p. 925; T. Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?', 38 *CMLR* (2001) p. 301.

[21] ECJ 20 October 2011, ECLI:EU:C:2011:674, *Danfoss*.

[22] *See*, in particular, ECJ 22 December 2010, ECLI:EU:C:2010:811, *DEB*.

[23] E.g. *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3; *Palmisani*, *supra* n. 14; ECJ 8 March 2001, ECLI:EU:C:2001:134, *Metallgesellschaft*; *A.G.M.-COS.MET*, *supra* n. 2.

[24] E.g. *Bonifaci*, *supra* n. 14; *Maso*, *supra* n. 14; *Carbonari*, *supra* n. 13; *Gozza*, *supra* n. 13; *A.G.M.-COS.MET*, *supra* n. 2; ECJ 25 November 2010, ECLI:EU:C:2010:717, *Fuβ*.

[25] E.g. *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3; *Dillenkofer*, *supra* n. 3; *Stockholm Lindöpark*, *supra* n. 14; *Metallgesellschaft*, *supra* n. 23; *Test Claimants in the FII Group Litigation*, *supra* n. 20; ECJ 13 March 2007, ECLI:EU:C:2007:161, *Test Claimants in the Thin Cap Group Litigation*; ECJ 23 April 2008, ECLI:EU:C:2008:239, *Test Claimants in the CFC and Dividend Group Litigation*; ECJ 24 March 2009, ECLI:EU:C:2009:178, *Danske Slagterier*; *Transportes Urbanos*, *supra* n. 2; *Fuβ*, *supra* n. 24. On which, *see further*, e.g. G. Anagnostaras, 'State Liability and Alternative Courses of Action: How Independent Can an Autonomous Remedy Be?', 21 *YEL* (2002) p. 355.

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authorities of each Member State;[26] and more technical procedural issues such as the limitation periods which apply to exercising the right to reparation,[27] or the availability of legal aid for *Francovich* claimants.[28]

Locating protective scope issues within the legal structures of the Francovich action: the 'intention to confer rights' and its limits

Having recalled and clarified the basic architecture of the right to reparation under EU law, it should be obvious that the question of 'protective scope' is not addressed *as such* within the existing *Francovich* framework, i.e. as a single bundle of issues, to be dealt with comprehensively, using the same legal tools, at some particular point in the legal analysis. Instead, the various more specific questions that might arise under the general rubric of 'protective scope' must each be mapped onto and addressed within the particular legal structures of the *Francovich* action as presently constituted. For example, at which stage of a *Francovich* analysis do we determine whether any given EU provision creates an individual right and, more specifically, a right that should be protected through a system of non-contractual public liability? At what stage in its analysis, and using which particular tools, does the Court define the precise category of persons who should benefit from any given provision of EU law for the purposes of *Francovich*? At what point, and according to which principles, does the Court elaborate upon the exact nature and extent of the material interests which fall within the ambit of protection under EU law?

The 'intention to confer rights' criterion as the natural forum for analysing protective scope issues

One might naturally assume that the 'intention to confer rights' requirement furnishes the primary forum for exploring those protective scope issues within the *Francovich* right to reparation. After all, the 'intention to confer rights' acts as the initial gateway into liability, through an explicit concern to identify the entitlement of any given claimant to seek redress under EU law – allowing the 'sufficiently serious breach' criterion then to concentrate on the extent of

[26] E.g. ECJ 1 June 1999, ECLI:EU:C:1999:271, *Konle*; ECJ 4 July 2000, ECLI:EU:C:2000:357, *Haim*; ECJ 28 June 2001, ECLI:EU:C:2001:368, *Larsy*; *Köbler*, *supra* n. 15; *A.G.M.-COS.MET*, *supra* n. 2; *Fuß*, *supra* n. 24. On which, *see further*, e.g. G. Anagnostaras, 'The Allocation of Responsibility in State Liability for Breach of Community Law: A Modern Gordian Knot?', 26 *ELRev* (2001) p. 139.

[27] E.g. *Palmisani*, *supra* n. 14; *Danske Slagterier*, *supra* n. 26.

[28] E.g. *DEB*, *supra* n. 22. Consider also, e.g. *Ferreira da Silva e Brito*, *supra* n. 15.

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the Member State's culpability in breaching its EU law obligations (which as we know might well be distinct from the claimant's putative rights) and leaving all other issues, relevant especially to exercise of the right to reparation, to be governed by the presumption of national procedural autonomy (subject to the oversight of EU law).

True enough, various judgments do indeed engage directly with the 'intention to confer rights' criterion – allowing us to understand how the sorts of protective scope issues raised by the *Francovich* action have in practice been handled by the Court. For example, when it comes to the question of whether the claimant enjoys any EU law right which deserves in principle to be protected, the case law usefully reveals some of the methodological tools at the Court's disposal. Consider cases like *Dillenkofer* and *Rechberger*: the Court specifically enquired whether the relevant consumer protection directive entails the grant of rights to individuals, by examining its preamble and objectives, as well as the nature of the duties the directive seeks to impose upon undertakings – treating the implicit creation of specific consumer rights as a direct corollary of the formulation under EU law of various precise commercial obligations.[29] Consider also the leading case of *Peter Paul*: through a detailed examination of the relevant directives, the Court concluded that EU law was not intended to confer rights upon individual depositors in the event of the defective supervision of credit institutions by the responsible national authorities – taking into account, for example, the lack of any express provision in EU law conferring rights on depositors; the fact that such rights were not necessary to achieve the underlying aim of EU harmonisation, which was limited to securing mutual recognition as regards the authorisation and supervision of credit institutions; the obligation of the national authorities to take into account a plurality of interests, including the overall stability of the financial system; and the fact that EU law had created a dedicated deposit guarantee scheme which offered a degree of protection for individuals, including as regards problems arising from defective regulatory supervision.[30]

Or again: when it comes to the question of defining the precise content of the claimant's EU law right, the case law illustrates the Court's capacity to identify and address pertinent protective scope issues.[31] Consider rulings that deal with the personal scope of an EU law right, that is, whether the claimant falls within an identifiable class of intended beneficiaries: disputes such as *Dillenkofer* show the Court referring to the definition of 'consumers' under the relevant EU directive,

[29] *Dillenkofer*, supra n. 3; *Rechberger*, *supra* n. 20. Consider also, e.g. ECJ 2 April 1998, ECLI:EU:C:1998:151, *Norbrook*.

[30] ECJ 12 October 2004, ECLI:EU:C:2004:606, *Peter Paul*.

[31] Beginning of course with *Francovich*, *supra* n. 1, itself. Note related rulings such as ECJ 9 November 1995, ECLI:EU:C:1995:372, *Francovich II*; ECJ 18 October 2001, ECLI:EU:C:2001:551, *Gharehveran*; ECJ 25 February 2016, ECLI:EU:C:2016:116, *Dimosio*.

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for the purposes of verifying entitlement of seek *Francovich* damages against the Member State for non-transposition.[32] Consider also judgments that concern the material scope of an EU law right. In particular, the Court has on several occasions explored whether it is possible to identify with sufficient precision the minimum content of an intended right from the relevant provisions of EU law; if so, the fact that there may be some uncertainty about other aspects of the individual's entitlements, arising from the conferral of limited discretionary choices upon the Member State, will not be fatal to a *Francovich* claim.[33]

Not only should we see the 'intention to confer rights' as a natural forum for the initial discussion of protective scope issues. One might also assume that how the Court chooses at the outset to define the nature and extent of the claimant's 'intended right' should play a potentially crucial role in shaping the subsequent character of the entire *Francovich* assessment: for example, influencing the range of factors that may be relevant to whether the breach was 'sufficiently serious'; determining the circumstances to be taken into account when calculating the direct causal link; or conditioning the proper range of losses that should be considered potentially recoverable.

True enough, there is again evidence in the case law of the Court considering how the subsequent legal structures of the *Francovich* action should be informed by and adjusted to the sorts of protective scope issues dealt with under the initial 'intention to confer rights' criterion. A prime example is the ruling in *Leth*, which we will return to consider in greater detail below.[34] Suffice for now to observe how the Court here decided that the Environmental Impact Assessment Directive is intended to generate an individual right to have the environmental effects of qualifying projects assessed by the competent authorities and to protect against pecuniary damage which is the direct economic consequence of such effects.[35] But what the Court gave with one hand, it promptly took away with the other: for the subsequent purpose of verifying the direct causal link necessary under a successful *Francovich* claim, the Court stressed that the Member State's failure to conduct an obligatory assessment could not of itself be held responsible for any decrease in the value of the claimant's property arising from the environmental effects of the disputed project, since the purpose of the Directive is only to require an assessment rather than to determine its outcome. In other words: the specific nature of the claimant's intended right as defined by the Court had a decisive impact upon the nature of the causal link which the national courts were entitled to expect in order to vest a fully-fledged right to reparation under EU law.

[32] *Dillenkofer*, *supra* n. 3.
[33] E.g. *Dillenkofer*, *supra* n. 3; *Norbrook*, *supra* n. 29; *Rechberger*, *supra* n. 20.
[34] *Leth*, *supra* n. 4.
[35] Directive 85/337, OJ 1985 L 175/40 (now Directive 2011/92 [2012] OJ L26/1).

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The same sort of joined-up thinking is evident in other contexts. For example, if the Member State choses to make reparation through the retroactive application of the relevant EU legislation, that can include the exercise of any discretionary powers that entitle the Member State to limit the scope or content of the claimant's intended rights, though it is without prejudice to payment of compensation in respect of supplementary losses incurred by the claimant which are specifically protected under EU law but not remedied by retroactive compliance alone.[36]

The Court's tickbox approach to the 'intention to confer rights' criterion and its potential implications

Notwithstanding such useful insights into the Court's understanding of and approach towards the 'intention to confer rights' requirement, it is evident that – in the great majority of *Francovich* cases referred to Luxembourg – this criterion is treated as a relatively straightforward hurdle for the claimant to surmount. Indeed, when it comes to most of the decided cases on *Francovich*, protective scope issues are not the subject of any more specific or detailed judicial discussion at the stage of the 'intention to confer rights' assessment.[37] Is this because the 'intention to confer rights' and with it the protective scope issues relevant to a *Francovich* claim are genuinely unproblematic in most disputes? Or is it possible that the Court's treatment of the 'intention to confer rights' is not always so probing of potential protective scope issues as one might expect?

To some degree, the answer may well lie in a simple change of judicial linguistics. After all, the original formulation of the criteria for establishing liability, as set down in *Francovich* itself, were relatively explicit about asking whether the claimant could establish the existence of an EU law right in principle, then proceeding to query the more precise personal and material content of that

[36] E.g. as in *Bonifaci*, *supra* n. 14; *Maso*, *supra* n. 14; *Carbonari*, *supra* n. 13.

[37] Indeed, the 'intention to confer rights' criterion has attracted considerably less scholarly analysis than either the 'sufficiently serious breach' or the 'direct causal link' requirement – though there are some notable exceptions, e.g. J. Jans et al., *Europeanisation of Public Law* (Europa Law Publishing 2007) Ch. 8; P. Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Hart Publishing 2011). Note that the same relative neglect of the 'intention to confer rights' criterion appears true also as regards the corresponding EEA case law on state liability following the ruling of the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTRA Court Reports 95: *see further*, e.g. S. Magnússon and O. Hannesson, 'State Liability in EEA Law: Towards Parallelism or Homogeneity?', 38 *ELRev* (2013) p. 167. The picture is rather more complex in respect of the non-contractual liability of the EU institutions under Arts. 268 and 340(2) TFEU: *see further*, e.g. P. Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Hart Publishing 2011); K. Gutman, 'The Evolution of the Action for Damages against the European Union and Its Place in the System of Judicial Protection', 48 *CMLR* (2011) p. 695.

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EU law right in practice. By contrast, the alternative formulation which emerged in *Brasserie* and became generalised after *Dillenkofer*, is much less explicit or demanding – at least on its face – than the original *Francovich* approach: the Court seems to ask quite simply, does EU law intend to confer rights upon the claimant? Issues such as how to define the precise personal and material scope of protection under EU law are not explicitly articulated or indeed separately identified. In such circumstances, there is a risk that the 'intention to confer rights' becomes excessively abstract – a requirement to be ticked off on a checklist, rather than the crucial gateway that will define the parameters of Member State liability.

If that risk materialises, it opens up the route to two main subsequent possibilities. The first is that the Court's neglect to explore the 'intention to confer rights' in fuller detail will lead to some important protective scope issues simply falling from view right at the outset and not being recaptured during the later stages of the *Francovich* analysis. If so, that could have some significant consequences. To begin with, it makes it more likely that subsequent steps in the *Francovich* analysis might proceed on an unclear basis. For example, it surely becomes more difficult to identify the direct causal link between the claimant's loss and the Member State's breach, if we have not clarified from the outset the exact nature of the losses the claimant is even entitled to be protected against; or rather, it may well become much *easier* to establish the required causal link, if the claimant's intended rights have been articulated so generally that the Member State's breach can almost automatically be associated with the claimant's losses.

Furthermore, paying lip service to the 'intention to confer rights' and otherwise neglecting the protective scope issues relevant to *Francovich* implies a subtle but important shift in the emphasis and indeed purpose of the right to reparation under EU law. The more the Court effectively glosses over the 'intention to confer rights' criterion, the less effort it takes to articulate the legally-protected expectations of the individual; and instead, the more the Court's attention will naturally focus upon the 'sufficiently serious breach' requirement, and thus upon the degree of culpability that should be attributed to the defaulting Member State. The central attention of *Francovich* liability moves away from ensuring the effective judicial protection of individuals in respect of damage done to their legally-defined personal interests; towards acting rather as a vehicle primarily for admonishing the Member State for having breached its obligations under the Treaties.

Such a prospect appears problematic for several reasons. To treat *Francovich* less as an action for reparation in respect of individual losses unjustly suffered, and more as a vehicle for imposing punitive and deterrent fines in respect of wrongs done, obviously runs contrary to the Court's basic statement of principle in *A.G.M.-COS.MET*. But more fundamentally, to gloss over any discussion of the appropriate protective scope of EU law is also to avoid engaging with potentially

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contested legal and moral questions about the nature and extent of the rights and interests which might warrant protection through the EU's system of non-contractual liability. In extreme cases, to treat *Francovich* primarily as a means of securing retribution against the defaulting Member State, divorced from any clear and compelling understanding of the basis upon which any given claimant should be entitled to challenge the relevant infringement of EU law, might even facilitate the unjust enrichment of particular individuals. Such concerns are surely magnified in those situations where (as we have seen) the obligations which the Member State is alleged to have breached are even legally distinct from the intended rights which are supposed to provide the basis for the individual's call for reparation: the claimant might well be compensated, less on the basis of some superficial assessment of his/her own entitlement to legal protection, and more on account of the Member State's behaviour in respect of an entirely separate duty imposed under the Treaties. Such an approach perhaps also sits uneasily with the scheme for punishment and deterrence envisaged by the Treaties themselves: after all, the imposition of financial penalties upon Member States for infringing their EU law obligations is meant to be governed by the particular legal and institutional provisions set out in Article 260 TFEU.

The second main possibility is that, far from being entirely neglected, certain protective scope issues will instead be picked up and addressed in contexts other than the 'intention to confer rights' criterion – be it the direct causal link, or some consequential dimension to the right to reparation – so that the subsequent legal elements of the *Francovich* action are not merely reflecting the findings about protective scope made at the 'intention to confer rights' stage, but actively seeking to perform some of the basic protective scope functions which were not conducted by the Court at the outset. Such an outcome is not inherently problematic (even if it sounds intuitively capable of aggravating concerns about maintaining coherence and consistency across the *Francovich* analysis). After all, this might well be seen as a choice made by the Court (to a greater or lesser extent deliberate) about where best to locate and address certain of the key protective scope issues posed by the Member State's non-contractual liability under EU law within the particular legal structures of the *Francovich* action.

Nevertheless, that choice does have certain consequences – not least since, in most cases, it will imply that the relevant protective scope questions will be negotiated through a very different legal framework than that provided by the 'intention to confer rights' criterion. Instead of being treated as an integral part of defining the EU law right that forms the very basis of the claimant's action, such protective scope issues would be understood rather as matters of subsidiary concern and thus suitable for regulation by domestic law in the first instance (subject primarily to the principles of equivalence and effectiveness). As such, the Court's role is not to lay down common standards for the protective scope of

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Francovich liability in the exercise of its own hermeneutic monopoly; but rather to scrutinise *ex post* the Member States' various choices about the nature and extent of the legal protection that might have been intended under EU law itself. Even if one accepts that national procedural autonomy is the natural point of departure for addressing supplementary issues such as the applicable limitation periods or the exhaustion of alternative remedies, it is perhaps less obvious that the Court should surrender its own responsibility to define directly the content and limits of the individual rights envisaged under the Treaties. That could risk compromising, at least to some degree, the unity and integrity of EU law itself.

Exploring further the potential implications of the Court's tickbox approach to the 'intention to confer rights'

How far might such risks and possibilities go beyond the purely linguistic and theoretical, so as actually to impact upon the nature and quality of the *Francovich* action in practice? We might usefully begin by considering how the Court responds to one of the most common and apparently most straightforward type of *Francovich* claims: those based upon an alleged breach of the Treaty free movement provisions. True enough, there is evidence here of some important protective scope questions being overlooked during the Court's relatively superficial assessment of the 'intention to confer rights', instead to be picked up (if at all) only further down the line within other structurally distinct elements of the *Francovich* analysis.

After all, the Court's usual response to whether the Treaty free movement provisions are intended to confer rights upon individuals rarely goes beyond the equivalent of a simple 'yes, of course they are'.[38] There is seldom any further investigation, at this stage, as to the precise nature or content of the rights conferred upon individuals by the Treaty free movement provisions. For example, consider entitlement to reparation in respect of pure economic loss. On one view, this question constitutes an integral part of defining the protective scope of the relevant EU law right, since it is directly concerned with identifying the latter's basic material content, i.e. the extent of the legal interests in respect of which the claimant is entitled to legal protection through the medium of compensation. As such, one might expect this issue to be located squarely within the Court's analysis of the 'intention to confer rights' criterion. But instead, the question of pure economic loss is generally overlooked by the Court, throughout its analysis of the substantive conditions that vest the right to reparation in principle, until we reach

[38] Beginning with *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3, especially at para. 54. Also, e.g. *Hedley Lomas*, *supra* n. 20; *Köbler*, *supra* n. 15; *Test Claimants in the FII Group Litigation*, *supra* n. 20; ECJ 11 June 2015, ECLI:EU:C:2015:386 *Berlington Hungary*. Consider also, e.g. *Danske Slagterier*, *supra* n. 26.

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subsequent consideration of the recoverable extent and heads of damage – by which stage, the protective scope of the Treaty free movement provisions for the purposes of *Francovich* liability is to be reasoned instead through the presumption of national procedural autonomy, subject to the principles of equivalence and effectiveness.[39]

Indeed, one might argue that the Court's tickbox approach to the 'intention to confer rights' requirement can mask some complex protective scope issues, or at least push such issues back to a later stage in the *Francovich* analysis. Consider the essentially conditional and indeed partial nature of the Treaty free movement provisions: the precise scope and extent of the abstract right to free movement must be evaluated in any given case, since it will meet its limit where EU law in fact permits the Member State to regulate the domestic market, notwithstanding any negative consequences that may have for cross-border trade. That evaluation will require the reconciliation of competing public interests, whose outcome will often hinge upon a detailed proportionality assessment – such that national measures may only marginally overstep the Member State's legitimate power to regulate its domestic market.[40] The primary Treaty provisions are nevertheless unforgiving of even such minor infractions: all national measures infringing directly effective free movement rights should be disapplied in those situations covered by EU law.[41] That state of affairs creates the concern that many claimants are delivered a great deal more free movement than they might have been entitled to expect, given the only limited degree to which the Member State overstepped the boundaries of legitimate market regulation.[42]

When it comes to the potential for non-contractual liability in such disputes – that is, of compensating individuals for the losses they have suffered, over and

[39] *See*, e.g. *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3; *Metallgesellschaft*, *supra* n. 23. Consider, in particular, the discussion of national discretion over the recovery of economic losses in *A.G.M.-COS.MET*, *supra* n. 2.

[40] One thinks in particular of complex 'balancing of rights' disputes such as ECJ 12 June 2003, ECLI:EU:C:2003:333, *Schmidberger*. But also of disputes in which the Member State might infringe the Treaties for essentially procedural (rather than substantive) reasons, e.g. ECJ 14 December 2004, ECLI:EU:C:2004:799, *Radberger Getränkegesellschaft*; ECJ 15 November 2005, ECLI:EU:C:2005:684, *Commission* v *Austria*. And of disputes which hinge essentially upon an evaluation of the evidence base for national policy choices, e.g. ECJ 13 April 2010, ECLI:EU:C:2010:181, *Bressol*; ECJ 23 December 2015, ECLI:EU:C:2015:845, *Scotch Whisky Association*. *See further*, e.g. N. Nic Shuibhne and M. Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Caselaw', 50 *CMLR* (2013) p. 965.

[41] Notwithstanding the discussion in ECJ 8 September 2010, ECLI:EU:C:2010:503, *Winner Wetten* about whether national courts might enjoy the power temporarily to uphold the application of an admittedly unlawful obstacle to movement.

[42] At least until the Member State corrects the situation by adopting properly compliant regulatory provisions.

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above the mere disapplication of conflicting national legislation – the legal structures of *Francovich* might appear to be almost as unforgiving as the directly effective free movement provisions themselves. For a start, we would expect for the Court to wave through as obvious that the Treaty free movement provisions are intended to confer rights on individuals. Instead, judicial attention would surely focus on whether the Member State's breach of EU law should be considered sufficiently culpable, given the circumstances, as to justify imposing liability to make reparation. For those purposes, the substantive question of just how far the Member State might have gone in excessively regulating the marketplace is only one factor relevant to determining the existence of a 'sufficiently serious breach'; even a marginal infringement of the free movement provisions might suffice to establish *Francovich* liability if the constellation of other relevant considerations so suggests. A tickbox approach to the 'intention to confer rights' therefore offers little recognition for the inherently conditional and partial nature of the Treaty free movement provisions: far from possessing an EU law right that corresponds only to the limit of legitimate national regulation, the claimant is treated as enjoying a simple and apparently boundless entitlement to trade on a cross-border basis, so that establishing liability is essentially a matter of interrogating the nature of the Member State's own culpability.

That discrepancy between surface expectation and actual entitlement may be acknowledged (if at all) only at the stage of verifying the direct causal link and/or the recoverable extent and heads of loss: for example, were it possible under national causation rules to argue that the claimant's losses were only partially attributable to the sufficiently serious breach, since the Member State would still have been entitled under EU law to enact similar if marginally less restrictive regulatory standards. At the very least, EU law is thus leaving an important question about its own protective scope to the application of diverse national rules. But at worst, the neglect fully to articulate and delimit the degree of legal protection the claimant was really entitled to expect under the Treaty free movement provisions, might lead such nuances to be lost entirely from consideration, thereby shifting the emphasis under *Francovich* away from effective judicial protection of the individual and towards effective punishment of the defaulting Member State.

To some degree, it may simply be that such issues have not yet been posed directly to the Court for suitable guidance. But there are plenty of similar problems that also await further clarification. Consider the relationship between first order EU law rights (such as the Treaty free movement provisions) that automatically govern situations falling within their own personal and material scope; and second order EU law rights (the general principles of EU law and the Charter of Fundamental Rights) that apply only within the scope of EU law, i.e. when their potential application has already been directly triggered by some first

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order provision.[43] It is certainly possible to bring a claim for reparation based upon the Member State's breach of the general principles and/or the Charter.[44] But should those first and second order EU norms count as separate 'intended rights', each providing the basis for its own *Francovich* action? Or should they instead be treated as a single albeit composite right for the purposes of seeking reparation? That choice may decisively affect the rest of the Court's analysis, by either broadening or narrowing the range of factors relevant to identifying, *inter alia*, a sufficiently serious breach, the direct causal link and the recoverable heads of damage.

By way of illustration, take a dispute inspired by the ruling in *Carpenter*.[45] The third country national spouse of a British national is deported by the UK authorities (even though the marriage is accepted to be genuine). The British national succeeds in arguing that his situation falls within the scope of EU law: as an occasional provider of services to clients in other Member States, he is entitled to rely on Article 56 TFEU; since deportation of his wife is likely to interfere with his ability smoothly to provide those services, the UK must justify its deportation decision – and for those purposes, the UK must respect the fundamental right to private and family life as protected under the Charter as well as the general principles of EU law.[46] If the claimant were to bring a *Francovich* action against the UK, should liability be founded on his first order right to provide services under Article 56 TFEU, so that he is arguing for compensation in respect of his lost contracts in other Member States? Or should liability be based upon the secondary right to respect for family life, so that the claimant is seeking compensation for the personal damage caused by his wife's deportation? Or would the *Francovich* claim be underpinned by an undifferentiated combination of both rights to free movement and to family life? Obviously, each choice implies a rather different approach to assessing not only the recoverable losses, but also the requirements of breach and causation (which might seem more straightforward to prove in relation to the right to family life than as regards the right to provide services).

Such questions can arise not just across different (first and second order) provisions of EU law, but even within one and the same substantive EU norm. There has so far been little judicial engagement with the question of whether, specifically for the purposes of *Francovich* liability, any given EU law right can or

[43] *See further*, e.g. M. Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"', 52 *CMLR* (2015) p. 1201.

[44] *See*, in particular, ECJ 12 September 2006, ECLI:EU:C:2006:545, *Eman and Sevinger*. *Cf.* disputes based on EU liability in respect of the general principles/Charter, e.g. ECJ 14 October 2014, ECLI:EU:C:2014:2282, *Giordano* v *Commission*.

[45] ECJ 11 July 2002, ECLI:EU:C:2002:434, *Carpenter*.

[46] *See* Art. 7 of the Charter.

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should be divided into the pursuit of primary and secondary objectives – such that only the interests legally protected by the primary objectives of the relevant provision are apt to provide the basis for a right to reparation; while those interests legally protected only on a purely secondary basis would fall outside the legitimate protective scope of the EU system of non-contractual state liability. In fact, a first-order-norm/second-order-norm dispute like *Carpenter* could equally well be framed in such terms: the claimant's freedom to provide economic services constituted the primary objective of his EU law rights; the protection of his private and family life was merely a secondary objective and as such might be treated as not amenable to vindication through the Member State's non-contractual liability. But such an analysis is even more pointed in disputes which do not engage two distinct legally binding norms, only the interpretation of a single EU law right.

By way of illustration, take a dispute inspired by the ruling in *Ruiz Zambrano*.[47] The third country national parent of an infant Belgian citizen is treated as unlawfully resident by the Belgian authorities and thus ordered with deportation as well as prevented from undertaking paid employment. However, Article 20 TFEU requires that the parent should enjoy a right to reside in Belgium, as the primary carer of a minor EU citizen, where the parent's deportation would in fact endanger the child's own continuing residence within the EU territory as a whole. Article 20 TFEU also requires that the parent should be issued with a work permit entitling them to engage in gainful employment during their period of lawful residency under EU law. For the purposes of *Francovich* liability, should we treat the parent's bundle of derived entitlements to residency and employment as falling entirely within the protective scope of Article 20 TFEU – whether the consequences of that choice are worked out explicitly at the initial stage of the 'intention to confer rights' assessment, or only later (for example) when double-checking the heads of damage considered recoverable under national law? Or might the Court in such a dispute instead be persuaded to distinguish between the primary and secondary objectives of Article 20 TFEU, such that the Member State can be held responsible only for damage wrongly inflicted upon the family's security of residence, but not for any losses incurred through the parent's unlawful exclusion from the employment market?[48]

In short, how the Court chooses to define the 'intention to confer rights' can play a crucial role in the subsequent character of the entire *Francovich* assessment. Yet in practice, the Court rarely offers any detailed guidance. Instead, the

[47] ECJ 8 March 2011, ECLI:EU:C:2011:124, *Ruiz Zambrano*.

[48] Note that, in ECJ 10 July 2014, ECLI:EU:C:2014:2068, *Ogieriakhi*, it appears to have been taken for granted that a *Francovich* action, based on the Member State's unlawful refusal of permanent residency for a third country national family member of a migrant EU citizen, could include claims in respect of lost employment/income.

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'intention to confer rights' is often treated in a tickbox fashion; and often also as a requirement to be fulfilled on an all-or-nothing basis. In consequence, the relationship between the autonomous *Francovich* criteria risks becoming excessively abstract: there is *a* right, there is *a* breach, and provided there is a causal relationship between the latter and the harm sustained, there will be liability. In many disputes, it may well be that the nature of the intended right and its relationship to the issues of breach and causation, as well as all other consequential liability questions, is too obvious to warrant being explored in greater detail. But that risks becoming a bad habit when extended into cases where the nature of the intended right and its influence upon the remainder of the *Francovich* assessment is more complex or contestable, i.e. where there is indeed *a* right, and there may well be *a* breach, but the final prospect of liability needs to emerge through a process of greater definition within and mutual interaction between these otherwise autonomous legal concepts. For those purposes, we are not suggesting that all relevant protective scope issues must be fully dealt with under the initial 'intention to confer rights' requirement. It is perfectly possible for such issues to be addressed elsewhere within the subsequent legal structures of the *Francovich* action. But as things stand, one may worry about the potential for some important protective scope issues, especially those concerning the precise nature and extent of the claimant's 'intended right', to get altogether lost from consideration; or to be addressed only in a relatively superficial and disjointed manner; and in any case, to be mediated through concepts premised upon the (qualified) autonomy of the various domestic legal systems.

When deep-rooted conceptual problems seep into the Francovich action: issues of standing and process within the 'intention to confer rights'

The Court's checklist/tickbox assessment of the 'intention to confer rights' criterion can risk rendering the *Francovich* action insensate to other important protective scope questions. In particular, we shall now explain that EU law struggles with certain more deep-rooted conceptual themes about just how to handle the very idea of 'rights', particularly those involving essentially collective or public interests. When those already difficult themes come to be processed through the *Francovich* action, a superficial assessment of the 'intention to confer rights' criterion hardly provides any more rigorous analysis. By those means, we might risk proceeding without any confident judgment as to whether and how far the claimant's 'right' under EU law even deserves to be protected through a system of non-contractual state liability at all.

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Some preliminary observations concerning how EU law deals with a diverse range of 'rights'

We can begin with some preliminary (doctrinal, not jurisprudential) observations about how EU law handles the very idea of 'rights'.[49] Defining the capacity directly to enforce EU law – that is, identifying the range of persons who are entitled to rely upon any given EU provision as a direct source of legal rights/ obligations before the domestic courts – is primarily the responsibility of EU law itself.[50] The Member State's procedural autonomy has but a subsidiary role to play: usually in regulating the various executive issues that arise once EU law has done the job of defining its own protective scope,[51] though sometimes also in making default choices about the full range of persons entitled to enforce EU rights / obligations before the national courts, where EU law has explicitly or implicitly delegated such authority to the Member State.[52]

In any event, the capacity directly to enforce EU law can cover a wide range of possibilities: it goes without saying that not every right to invoke EU provisions before the domestic courts will be of the same kind or quality. Consider the entirely familiar distinction between (on the one hand) substantive rights/ obligations, which envisage a particular level of protection within any given dispute or relationship; and (on the other hand) purely procedural rights/ obligations, which foresee only a degree of participation in some decision-making process but without predetermining its final outcome. Or consider the equally important distinction between (on the one hand) subjective individual rights, which are personal to their beneficiary, the breach of which should give rise to an equally personal remedy such as compensation; and (on the other hand) mere rights to standing, usually in vindication of some collective interest, where

[49] *See further*, e.g. A. Downes and C. Hilson, 'Making Sense of Rights: Community Rights in EC Law', 24 *ELRev* (1999) p. 121; W. van Gerven, 'Of Rights, Remedies and Procedures', 37 *CMLR* (2000) p. 501; T. Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link', 41 *CMLR* (2004) p. 1199; S. Beljin, 'Rights in EU Law', in S. Prechal and B. van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008).

[50] *See further*, e.g. M. Dougan, 'Who Exactly Benefits from the Treaties? The Murky Interaction Between Union and National Competence Over the Capacity to Enforce EU Law', 12 *Cambridge Yearbook of European Legal Studies* (2009-10) p. 73.

[51] E.g. contrast ECJ 7 May 1998, ECLI:EU:C:1998:205, *Clean Car Autoservice* or ECJ 19 March 2015, ECLI:EU:C:2015:189, *E.ON Földgáz Trade* with ECJ 13 March 2007, ECLI:EU: C:2007:163, *Unibet* or ECJ 15 October 2009, ECLI:EU:C:2009:631, *Djurgården-Lilla Värtans Miljöskyddsförening*.

[52] Consider, e.g. ECJ 20 October 2005, ECLI:EU:C:2005:625, *Ten Kate Holding*; ECJ 4 October 2007, ECLI:EU:C:2007:583, *Consorzio Elisoccorso San Raffaele*; ECJ 16 July 2009, ECLI: EU:C:2009:466, *Mono Car Styling*.

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infringement should not lead the legal system to enrich the claimant personally. In particular, while many public law obligations can be assumed to create subjective rights for the benefit of particular individuals, the potential enforcement of which should thus be reserved to and for the direct benefit of those right-holders, other public law obligations are evidently intended to benefit society as a whole rather than any specific person/s, and imply the need for broad standing rules, as well as appropriate though not necessarily personal remedies, if they are to be effectively enforced: that will often appear to be the case, for example, with general environmental legislation. Indeed, the same may be true also for private law. Most such obligations will create personal rights for an identifiable group of individuals, the latter being responsible for the vindication of their own legal entitlements. But certain private law obligations may also require broader potential enforcement mechanisms if they are to be properly effective: for example, where individual right holders (such as consumers or employees) are in practice ill-equipped to defend their own interests, so that representative organisations should also be recognised as competent to initiate some form of collective legal action.[53]

Even playing just with those two variables, EU law can thus create a wide spectrum of possible scenarios, when it comes to the decentralised enforcement of Treaty norms before the national courts. At one extreme, the claimant might rely upon a subjective individual right to some particular substantive benefit or level of protection. At another extreme, the claimant might be entitled to no more than a mere right to standing before the domestic courts to promote the enforcement of certain general interest procedural obligations incumbent upon the competent public authorities.

However, whatever the abstract theory, it can undoubtedly prove more difficult in practice to express the potentially varied nature of one's capacity to enforce EU law in terms which also capture the appropriate corresponding character of the claimant's entitlement to judicial protection (in general) and when it comes to determining the availability of reparation pursuant to the *Francovich* case law (in particular).[54] When will the claimant's capacity directly to enforce any given provision of EU law also qualify as an 'intention to confer rights' specifically for the purposes of establishing the non-contractual liability of the Member State? And conversely, when should we assume that the lack of an appropriate 'intention to confer rights' for the purposes of the *Francovich* action should also disqualify the

[53] Consider, e.g. ECJ 10 July 2008, ECLI:EU:C:2008:397, *Firma Feryn*; ECJ 25 April 2013, ECLI:EU:C:2013:275, *ACCEPT*. Equally where private interests are many and dispersed, so that collective actions can provide a more efficient means of redress, and one which does not impose excessive demands upon the judicial system.

[54] *See further*, e.g. P. Oliver, 'State Liability in Damages Following *Factortame III*: A Remedy Seen in Context', in Beatson and Tridimas *supra* n. 18; Dougan, *supra* n. 50.

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claimant from being recognised to enjoy any other capacity directly to enforce the relevant provisions of EU law before the domestic courts?

To help illustrate those issues, consider the ruling in *Muñoz*.[55] The Court held that one private party must be able to bring a civil action to enforce certain EU agricultural regulations against another private undertaking (notwithstanding that, under domestic law, enforcement powers were reserved exclusively to a designated public authority). The claimant in *Muñoz* clearly fell within the protective scope of EU law: it was recognised as enjoying capacity directly to enforce the relevant regulations. But the Court did not clarify any further the precise nature of the claimant's right under the Treaties. In particular, it remains unclear whether the claimant in *Muñoz* had an EU law right not only to seek an injunction to prevent its commercial rival from breaching the applicable EU quality control standards; but also to seek compensation in respect of any losses sustained as a result of the impact of that unlawful activity upon its own market position (by analogy with the ruling in *Courage* v *Crehan*).[56] In other words, did its direct commercial concern confer a right of standing upon the claimant in *Muñoz*, but only so as to protect the public interest in a system of fair competition? Or was the claimant also endowed with the capacity to enforce its own subjective right to fair competition against the predations of its market rivals?[57] Conversely, consider the ruling *Peter Paul*.[58] As we know, the Court held that the various EU directives on deposit guarantee schemes and banking supervision are not intended to confer rights on depositors and cannot provide the basis for a *Francovich* claim against the Member State based on alleged shortcomings in discharging its regulatory duties; nor was there any obligation upon the Member State otherwise to establish a system for compensating depositors in respect of their losses, over and above the minimum requirements laid down by the relevant EU legislation. But even if the claimants in *Peter Paul* were not entitled to *Francovich* damages in respect of their non-existent subjective rights, would they at least have enjoyed standing (say) to seek judicial review before the national courts, in respect of a

[55] ECJ 17 September 2002, ECLI:EU:C:2002:497, *Muñoz*. *See further*, e.g. A. Biondi, Annotation of *Muñoz*, 40 *CMLR* (2003) p. 1241.

[56] ECJ 20 September 2001, ECLI:EU:C:2001:465, *Courage* v *Crehan*. *See further*, e.g. W. van Gerven, 'Harmonisation of Private Law: Do We Need It?', 41 *CMLR* (2004) p. 505; S. Drake, 'Scope of *Courage* and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice', 31 *ELRev* (2006) p. 841; N. Reich, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights', 44 *CMLR* (2007) p. 705; D. Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime', 12 *Cambridge Yearbook of European Legal Studies* (2009-10) p. 257.

[57] In which regard, consider: *Firma Feryn*, *supra* n. 53; *ACCEPT*, *supra* n. 53.

[58] *Peter Paul*, *supra* n. 30.

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possible failure by the domestic regulatory authorities adequately to enforce the applicable EU directives?[59]

The task of translating one's capacity directly to enforce EU law into an appropriate form of judicial protection is not limited to the distinction between subjective personal rights and mere rights of standing. Even assuming that EU law has indeed envisaged the creation of an individualised right, issues can also arise when it comes to the distinction between substantive and procedural levels of protection. After all, the treatment of substantive provisions within a system of non-contractual state liability obviously calls for a very different assessment than that appropriate to purely process-based provisions. For example, breach of a right merely to participate in any given decision-making process will present specific challenges when it comes to establishing a causal link between the Member State's infringement and the claimant's damage (especially where the national authorities argue that the outcome would have been the same in any case). Similarly, such a breach raises problems in deciding the extent and heads of recoverable loss (including whether they should be limited to the nominal value of the process rights itself, unrelated to any actual loss resulting from the contested final decision).

Indeed, nor need the challenges end there. Just as we have seen that it is possible to distinguish between the primary and secondary objectives of a given EU measure for the purposes of ascertaining the material scope of the claimant's protected interests under EU law, so too it may be possible to distinguish between the primary and secondary beneficiaries of a given EU measure when it comes to defining the latter's intended personal protective scope. Consider situations where the protective scope of EU law is not defined directly by the European Court of Justice, but rather by devolving responsibility onto the Member States through the principle of national procedural autonomy (subject to the requirements of equivalence and effectiveness). That was the case, for example, in *Verholen*: the claimant fell outside the personal scope of Directive 79/7 on equal treatment between men and women in the field of social security;[60] nevertheless, as the husband of a woman who had suffered unlawful discrimination, Mr Verholen claimed that he actually suffered its adverse consequences in practice.[61] The Court held that, in principle, national law should determine an individual's standing and legal interest in bringing proceedings; but here, a man who actually bore the adverse effects of sex discrimination against his wife should be entitled to bring legal proceedings before the national courts. That begs the question: what sort of judicial protection should such a claimant, who enjoys only a derived capacity to

[59] In which regard, consider: ECJ 25 July 2008, ECLI:EU:C:2008:447, *Janecek*.
[60] Directive 79/7 [1979] OJ L6/24.
[61] ECJ 11 July 1991, ECLI:EU:C:1991:314, *Verholen*.

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enforce EU provisions, be entitled to expect under the Treaties? In particular, would a claimant like *Verholen* be entitled to rely on their status as a secondary beneficiary of Directive 79/7, in order to seek reparations from the Member State under *Francovich*? In any event, it seems unlikely that the Court would sanction the availability of *Francovich* protection in situations where the Member State has recognised an individual's capacity directly to enforce EU measures entirely as a matter of national discretion and free from any compunction under EU law itself.[62] After all, it seems difficult to argue that there is an 'intention to confer rights', when EU law itself appears so agnostic or even nonchalant about its own protective scope.

In other words, although they are legally distinct tasks, there is nevertheless a close inter-relationship between defining the capacity directly to enforce EU law (on the one hand) and identifying an 'intention to confer rights' for the purposes of the *Francovich* action (on the other hand). Deciding whether there is an 'intention to confer rights' for the purposes of *Francovich* will often involve, and indeed hinge upon, verifying the existence and nature of the claimant's prior capacity directly to enforce EU law in the first place. As such, we should not be too surprised if uncertainty or confusion when it comes to EU law's general approach to 'rights' also extends into the process of determining the scope of the Member State's non-contractual liability under *Francovich*.

And vice versa. Indeed, based upon our analysis so far, one might predict that the Court's tendency towards a tickbox assessment of the 'intention to confer rights' requirement, risks precisely to overlook any explicit discussion of just how far the claimant's particular capacity to enforce EU law should translate into an entitlement also to claim reparation through the medium of the *Francovich* action. After all, if the standard formulation of the 'intention to confer rights' requirement which emerged from *Brasserie* and *Dillenkofer* neglects to focus attention on basic protective scope issues about the personal and material scope of the claimant's EU law rights, one might expect the same to be true also when it comes to verifying the underlying nature of the claimant's EU law rights and, in particular, their aptness for protection through compensation as a matter of EU public law. If that risk indeed materialises, the consequences would be similar to before: questions about the true nature of the claimant's capacity to enforce EU law for the purposes of awarding compensatory damages would be pushed back (if at all) to subsequent stages in the *Francovich* analysis and thus likely be handled through a very different legal framework; in any event, the whole emphasis of the *Francovich* system would shift away from protecting the rights of deserving claimants, to focus more upon penalising the Member State for its wrongdoing.

[62] Consider the situations at issue in, e.g. *Ten Kate Holding*, *supra* n. 52; *Mono Car Styling*, *supra* n. 52.

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Exploring the case law concerning when mere standing to enforce EU law might also provide the basis for a Francovich claim

How far may such theoretical problems have extended into judicial practice? Indeed as predicted, various rulings suggest that the Court does not always confidently separate out a mere right to invoke EU law before the national courts, from the creation of subjective personal rights apt for protection specifically through the *Francovich* case law. Moreover, it is noteworthy that these rulings typically involve a claim to enforce certain procedural obligations, rather than to benefit from a particular substantive level of protection under EU law. For example, *Diahatsu Deutschland* concerned a trade union action claiming standing to seek the imposition of penalties for the non-publication by a company of its accounts, as required by an unimplemented EU directive.[63] Although there could be no (horizontal) direct effect of the relevant EU rules as against the company itself, the Court nevertheless referred explicitly to the possibility of the trade union seeking *Francovich* damages against the Member State for its failure to implement the directive correctly – without offering any clarification of whether the Court considered that the trade union's mere right of standing to enforce a third party's obligation was nevertheless sufficient to bring the claimant within the protective scope of *Francovich* liability (let alone how the national court should seek to value that right in compensatory terms).

Certain EU measures have generated entire bodies of case law of their own grappling precisely with these issues. Consider those rulings dealing with the Member State's procedural obligation to notify to the Commission, then hold in abeyance, draft technical regulations, pursuant to what is now Directive 98/34.[64] Notwithstanding the usual rule that directives cannot of themselves be enforced against individuals,[65] the Court established in *CIA Security* and *Unilever Italia* that the duty to notify can indeed be enforced in litigation between two private parties,[66] through disapplication of the relevant national rules, on the rather curious grounds that Directive 98/34 was intended to create neither rights nor obligations for individuals.[67] Yet the Court in *Sapod Audic* then explicitly

[63] ECJ 4 December 1997, ECLI:EU:C:1997:581, *Daihatsu Deutschland*.

[64] Directive 98/34, OJ 1998 L 204/37 (previously Directive 83/189, OJ 1983 L 109/8).

[65] E.g. ECJ 26 February 1986, ECLI:EU:C:1986:84, *Marshall*; ECJ 14 July 1994, ECLI:EU:C:1994:292, *Faccini Dori*.

[66] ECJ 30 April 1996, ECLI:EU:C:1996:172, *CIA Security*; ECJ 26 September 2000, ECLI:EU:C:2000:496, *Unilever Italia*. Contrast with the ruling in ECJ 13 July 1989, ECLI:EU:C:1989:318, *Enichem Base*.

[67] *See further*, e.g. S. Weatherill, 'Breach of Directives and Breach of Contract', 26 *ELRev* (2001) p. 177; M. Dougan, Annotation of *Unilever Italia*, 38 *CMLR* (2001) p. 1503.

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suggested that an individual who suffers loss as a result of the disapplication of national technical regulations pursuant to Directive 98/34 may yet seek compensation from the Member State pursuant to the *Francovich* case law.[68]

On the one hand, *Sapod Audic* could be interpreted as the Court's attempt to resolve the inherent self-contradiction which would otherwise underlie the rulings in *CIA Security* and *Unilever Italia*, whereby a purely procedural directive that apparently creates neither rights nor obligations nevertheless appears uniquely capable of reshaping the legal relationships between individuals, but without offering any legal redress to those who undeniably suffer loss as a consequence of the Member State's default. On the other hand, *Sapod Audic* sits uneasily with the 'intention to confer rights' requirement imposed by the *Francovich* action itself: why should a measure which is not designed to create any rights in favour of individuals be capable of furnishing the platform for a compensatory action against the defaulting Member State?

Moreover, the Court in *Sapod Audic* gave no hint as to its understanding of the material interests which might be protected by Directive 98/34 for the purposes of a *Francovich* action. Surely there was no subjective individual right to any identifiable substantive benefit or level of protection; yet nor was there any subjective individual right to any identifiable procedural benefit (such as a right to be heard). The only possible 'right' enjoyed by individuals pursuant to Directive 98/34 would be the mere right to invoke the Member State's breach of its notification/standstill duties in proceedings before the national courts. But what financial value might we place upon such a right – especially given that the simple availability of litigation in itself fulfils the claimant's expectations under EU law? Such logical and practical dilemmas were presented to the Court for resolution in *Berlington Hungary*.[69] Referring directly to *Unilever Italia* and without any mention of *Sapod Audic*, the Court held that, since Directive 98/34 creates neither rights nor obligations for individuals, it is also and in consequence to be treated as incapable of providing the foundation for a *Francovich* action under EU law. A more rigorous application of the 'intention to confer rights' prevailed, albeit at the cost of judicial protection for those undoubtedly harmed by the Member State's breach of EU law.

A particularly striking illustration is provided by the case law delivered pursuant to Directive 85/337 on the system of environmental impact assessments.[70] The Court had regularly indicated that the range of persons entitled to bring legal action, for the purposes of enforcing Directive 85/337 directly before the national courts, should be conceived in broad terms: rulings such as *Kraaijeveld* referred to

[68] ECJ 6 June 2002, ECLI:EU:C:2002:343, *Sapod Audic*.
[69] *Berlington Hungary*, *supra* n. 38.
[70] Directive 85/337, OJ 1985 L 175/40.

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a right of access to the domestic courts simply in favour of 'those concerned'.[71] That broad judicial approach has since been articulated and refined through more detailed provisions adopted by the EU legislature in order to specify the conditions under which members of the public and non-governmental organisations should be able to bring judicial review proceedings.[72] Either way, how are we to translate such a generous conception of environmental *locus standi* into an appropriate standard of judicial protection and, in particular, a suitable remedy for the claimant?

Signs that the Court might prove unsure about how to define the capacity to enforce EU environmental obligations, in terms of individual rights and their judicial protection, first arose in a series of enforcement proceedings brought by the Commission against Germany: the Court noted that various EU directives designed to increase levels of environmental protection actually created rights for individuals, though of an undefined nature; such rights should be capable of being enforced before the national courts, though it was left unclear by which precise means.[73] The first real opportunity to clarify further the intended nature of such rights, and their corresponding entitlement to judicial protection, arose in the dispute in *Wells*.[74] Here, the Court expressly envisaged that an individual seeking to enforce Directive 85/337 against a public authority which had granted permission to another private entity for the carrying out of certain mining works, without conducting the necessary environmental impact assessment, should also

[71] ECJ 24 October 1996, ECLI:EU:C:1996:404, *Kraaijeveld*. Also, e.g. ECJ 16 September 1999, ECLI:EU:C:1999:418, *World Wildlife Fund*; ECJ 19 September 2000, ECLI:EU:C:2000:468, *Linster*. The Court has followed a similar approach in other (related) legislative contexts, e.g. ECJ 7 September 2004, ECLI:EU:C:2004:482, *Landelijke Vereniging tot Behoud van de Waddenzee*; *Janecek, supra* n. 59; ECJ 26 May 2011, ECLI:EU:C:2011:348, *Stichting Natuur en Milieu*; ECJ 19 November 2014, ECLI:EU:C:2014:2382, *ClientEarth*. On the general issues surrounding private standing in environmental disputes, *see further*, e.g. A. Ward, 'Judicial Review of Environmental Misconduct in the European Community: Problems, Prospects and Strategies', 1 *Yearbook of European Environmental Law* (2000) p. 137; H. Somsen, 'The Private Enforcement of Member State Compliance with EC Environmental Law: An Unfulfilled Promise?', 1 *Yearbook of European Environmental Law* (2000) p. 311; R. Macrory and S. Turner, 'Participatory Rights, Transboundary Environmental Governance and EC Law', 39 *CMLR* (2002) p. 489.

[72] In particular: Directive 2003/35 [2003] OJ L156/17; but *see now* the codified provisions of Directive 2011/92 [2012] OJ L26/1. Consider, e.g. *Djurgården-Lilla Värtans Miljöskyddsförening*, *supra* n. 51; ECJ 8 March 2011, ECLI:EU:C:2011:125, *Lesoochranárske zoskupenie*; ECJ 12 May 2011, ECLI:EU:C:2011:289, *Bund für Umwelt und Naturschutz Deutschland*; ECJ 16 April 2015, ECLI:EU:C:2015:231, *Gruber*.

[73] E.g. ECJ 28 February 1991, Case C-131/88 *Commission* v *Germany* [1991] ECR I-825; ECJ 30 May 1991, Case C-361/88 *Commission v Germany* [1991] ECR I-2567; ECJ 30 May 1991, Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607; Case C-58/89 *Commission* v *Germany* [1991] ECR I-4983; Case C-298/95 *Commission* v *Germany* [1996] ECR I-6747.

[74] ECJ 7 January 2004, ECLI:EU:C:2004:12, *Delena Wells*.

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be able to seek damages against that public authority for having breached its EU law obligations. The ruling stopped short of suggesting explicitly that Directive 85/337 was intended to confer rights on individual members of the public for the purposes of the *Francovich* case law. Instead, the Court appeared to assume that the Member State should provide a mechanism for making good any harm caused to the claimant by its own failure to carry out an environmental impact assessment, in accordance with the principles of equivalence and effectiveness, and that that mechanism should include the possibility of obtaining financial compensation as a matter of national law.

Even to that extent, the ruling in *Wells* could already be seen as problematic. After all, one might fairly have assumed that, when it comes to carrying out environmental impact assessments in accordance with Directive 85/337, individuals merely have an EU right to standing in the public interest, not a subjective personal right that should be valued and compensated in monetary terms.[75]

Nevertheless, the Court went further in its subsequent decision in *Leth*.[76] It turns out that the reference in *Wells* to the possibility of the defaulting Member State incurring liability under national law, was not intended to exclude the possibility also of the disgruntled citizen seeking *Francovich* reparation directly under EU law itself. For those purposes, the Court observed that the objective of Directive 85/337 is to protect the environment and quality of life; exposure to noise resulting from a qualifying project can have significant effects on the quality of life and potentially also the health of individuals. The Court concluded from those considerations that Directive 85/337 is intended to confer an individual right to have the environmental effects of qualifying projects assessed by the competent authorities *and also* to protect against pecuniary damage which is the direct economic consequence of such effects. For those purposes, the ruling also engaged in greater detail with the precise scope of the material interests considered to fall within the protective scope of Directive 85/337 and thus of the *Francovich* action: qualifying pecuniary damage would cover (for example) a decrease in property value; but not (say) certain competitive disadvantages.

There are good reasons why one might feel uncomfortable with those findings in *Leth*. After all, not only has the Court gone beyond a right of standing to bring judicial review proceedings in the public interest, so as to extract from the regulatory regime established under Directive 85/337 certain subjective

[75] *See further*, for critical discussion, e.g. S. Prechal and L. Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law?', 2 *Yearbook of European Environmental Law* (2001) p. 89; P. Wenneras, 'State Liability for Decisions of Courts of Last Instance in Environmental Cases', 16 *Journal of Environmental Law* (2004) p. 329.

[76] *Leth*, *supra* n. 4.

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individual rights. In addition, those individual rights are defined not merely in procedural terms, concerning the need to conduct and the possibility to participate in an environmental impact assessment; but also in substantive terms, conferring protection against the direct economic consequences of the environmental effects of a qualifying project. Furthermore, when it comes to articulating the full protective scope of Directive 85/337, the Court's conception of the material scope of the individual interests safeguarded under EU law is essentially monetarised: the Directive protects against (certain) pecuniary damage to property values, rather than the non-material interests of the individual, let alone the general interests of the natural environment.

But however expansive and controversial the Court's findings in *Leth* may appear when it comes to drawing the borderline between subjective personal rights and mere rights to standing, or that between substantive rights and purely procedural rights, we should recall that the Court's full reasoning through of such protective scope issues, for the purposes of establishing *Francovich* liability on the part of the Member State, was not confined to the 'intention to confer rights' requirement. Rather, it was at the subsequent stage of verifying the existence of a direct causal link that the Court reined in the full potential impact of its previous findings. The essentially procedural nature of the Member State's obligations under Directive 85/337, which did not in any way predetermine the substantive decision on whether the proposed project should be authorised to proceed, implied that failure to conduct an assessment could not in principle by itself be held responsible for any decrease in the value of the claimant's property, even if it arose directly from the relevant environmental effects. In other words, the problem in *Leth* was less about the Court treating the initial 'intention to confer rights' criterion in an entirely superficial manner, then having to address the essential protective scope issues only at subsequent stages in its *Francovich* analysis. Rather, the judgment illustrates how the Court might adopt a very expansive approach to the protective scope of EU law for the purposes of the 'intention to confer rights'; but then employ a range of alternative legal tools – principally, the denial of a direct causal link between the Member State's breach of its essentially procedural obligations and the claimant's pecuniary losses in relation to their admittedly personal and substantive rights – in order finally to settle the protective scope of the *Francovich* action. As we have seen, that expansive approach to 'rights' under EU law is contestable. As we also know, the choice to tackle protective scope issues through legal instruments predicated upon the presumption of national autonomy is equally open to debate.

In short, EU law has yet to develop a coherent framework for addressing the interaction between individual rights and collective interests. Given that the Court can encounter difficulties in seeking to define the appropriate capacity directly to enforce any given provision of EU law, it is perhaps unsurprising that a degree of

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uncertainty then also seeps into the 'intention to confer rights' criterion under the *Francovich* action, i.e. when it comes to the distinct if closely-related task of defining the appropriate protective scope of EU law specifically for the purposes of establishing non-contractual state liability. But an already difficult challenge is hardly helped by the fact that nothing in the 'intention to confer rights' assessment as currently formulated and undertaken by the Court poses such questions with any degree of clarity. That said, the case law does at least suggest that the Court is increasingly willing to provide more explicit guidance to the national courts when faced with EU provisions designed to create individual rights of a purely procedural (rather than more substantive) nature, for example, for the purposes of identifying the direct causal link.[77]

Protective scope issues with no natural home: separating liability under public law from the judicial protection of private law rights

Our final main issue for discussion illustrates a different sort of problem in seeking to locate protective scope issues comfortably within the existing legal structures of the *Francovich* action. It would appear that certain such issues are not actually suitable for being dealt with under the 'intention to confer rights' criterion at all. Yet it is difficult to identify any other forum in which the Court is explicitly required or encouraged to undertake the necessary assessment. The point is well illustrated by considering the distinction between public law and private law rights for the purposes of *Francovich* liability.[78]

The public-private distinction under the EU system of judicial protection

Judicial protection under EU law is characterised, as much as within the national legal systems, by a division between public law and private law situations. In public law situations, the availability of certain remedies will indeed be as of right and follow directly from the mere breach of EU law: that is the case, for example, with the right to recovery of charges unlawfully levied by the public authorities.[79]

[77] In the future, possibly also, e.g. when it comes to delimiting the recoverable extent and heads of loss.

[78] *See further* on the general conceptual and legal framework/background, M. Dougan, 'What is the Point of *Francovich*?', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the 21st Century: Rethinking the New Legal Order (Volume 1)* (Hart Publishing 2004).

[79] E.g. ECJ 8 February 1996, ECLI:EU:C:1996:40, *FMC*, and ECJ 2 December 1997, ECLI:EU:C:1997:580, *Fantask* (subject only to the defence of passing on/unjust enrichment as recognised under EU law).

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But the availability of other public law remedies will be conditional upon meeting certain criteria over and above proof of an infringement per se. That is certainly the case with non-contractual liability to make reparation for wrongdoing under the *Francovich* action: the *Francovich* criteria are specifically designed to limit the potential for Member State liability to arise in respect of the performance of public functions in the general interest.[80] That is precisely why the Court requires not merely a breach, but a sufficiently serious breach, of the Treaties before a Member State can be required to make reparation for its wrongdoing. The relevant criteria to be taken into consideration for those purposes are focused around the degree of discretion conferred upon the Member State under EU law, but also taking into account factors such as the reasonableness of the Member State's interpretation, whether it has acted in good faith and whether its approach was encouraged or condoned by the EU institutions themselves. Such criteria all reinforce the character of *Francovich* as a public law remedy which seeks to strike a fair balance between compensating the individual victim who has suffered loss at the hands of the Member State (on the one hand) and safeguarding the public interest in efficient and effective regulation and administration (on the other hand).[81]

By contrast, the standard of judicial protection in respect of private law rights and obligations is not governed by the same considerations. In many cases, breach of a binding private law obligation will justify the provision of an effective remedy per se and without any further (fault-based) limitation on the defendant's liability to make reparation.[82] For example, the availability of private law damages for infringements of EU competition law, in accordance with the *Courage* v *Crehan* jurisprudence, is based upon the principle that the defendant's mere infringement of the Treaties provides sufficient culpability to justify its liability to make reparation in respect of losses that can be directly attributed to its unlawful

[80] *See*, in particular, *Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3, especially at paras. 28-29 and paras. 43-47. Also, e.g. *R v HM Treasury, ex p British Telecommunications*, *supra* n. 14; *Haim*, *supra* n. 26. *See further*, e.g. P. Craig, '*Francovich*, Remedies and the Scope of Damages Liability', 109 *LQR* (1993) p. 595; N. Gravells, 'State Liability in Damages for Breach of European Community Law', *Public Law* (1996) p. 567; Craig, *supra* n. 3; D. Waelbroeck, 'Treaty Violations and Liability of Member States: The Effect of the *Francovich* Caselaw', in Heukels and McDonnell, *supra* n. 18. For a different view, *see* e.g. D. Edward and W. Robinson, 'Is There a Place for Private Law Principles in Community Law?', in Heukels and McDonnell, *supra* n. 18.

[81] On the post-*Brasserie* evolution of the sufficiently serious breach criteria, consider in particular: *Haim*, *supra* n. 26; *Larsy*, *supra* n. 26; *Köbler*, *supra* n. 15; ECJ 25 January 2007, ECLI:EU:C:2007:56, *Robins*; ECJ 16 October 2008, ECLI:EU:C:2008:565, *Synthon*. *See further*, e.g. C. Hilson, 'The Role of Discretion in EC Law on Non-Contractual Liability', 42 *CMLR* (2005) p. 677.

[82] *See further*, on the right to effective judicial protection in private law relationships, e.g. ECJ 10 April 1984, ECLI:EU:C:1984:153, *Von Colson* and ECJ 15 May 1986, ECLI:EU:C:1986:206, *Johnston*.

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behaviour.[83] Of course, that is not to deny that certain public interest considerations also play a role in shaping the nature and limits of private law remedies: the state still has legitimate concerns about striking a fair balance between disputing parties or different social groups, or containing the risks associated with certain behaviours and activities, which can justify limiting or even excluding the possibility of certain private law liabilities.[84] But those concerns are qualitatively different from those at play in public law situations, which are governed by fundamental constitutional considerations about relations between citizen and state in a democratic political system governed by the rule of law.[85] Thus, when the Member State is acting in a purely private law capacity, the standard of judicial protection for individuals required under EU law should be governed by exactly the same framework as that applicable to any other private law actor. For example, under Directive 2006/54, although the Member States exercise a degree of discretion in prescribing an effective remedy for victims of sex discrimination in the sphere of employment, they cannot limit the availability of an effective remedy by introducing additional (fault-based) requirements going beyond the wrongdoing already outlawed by EU law – and all that is true regardless of whether the relevant employer is a public or private entity.[86]

[83] *Courage* v *Crehan*, *supra* n. 56; ECJ 13 July 2006, ECLI:EU:C:2006:461, *Manfredi*; ECJ 5 June 2014, ECLI:EU:C:2014:1317, *Kone*. On the development of private liability in damages under EU law, *see further*, e.g. van Gerven, *supra* n. 20; A. Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages', 39 *CMLR* (2002) p. 447; N. Reich, 'The *Courage* Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?', 42 *CMLR* (2005) p. 35. *See now* Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L329/1. On the development of the legislative regime, *see further*, e.g. T. Eilmansberger, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action', 44 *CMLR* (2007) p. 431; N. Dunne, '*Courage* and Compromise: The Directive on Antitrust Damages', 40 *ELRev* (2015) p. 581.

[84] Consider, e.g. the limitation on damages liability in respect of EU competition law infringements in cases where this would lead to the claimant's unjust enrichment: e.g. *Courage* v *Crehan*, *supra* n. 56; *Manfredi*, *supra* n. 83. Consider also EU legislation establishing the conditions for/limits of private liability in particular contexts, e.g. the Product Liability Directive 85/374 [1985] OJ L210/29; Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1.

[85] It is interesting to note that, for many private lawyers, the prospect of extending EU principles of judicial protection from their original public law home into the distinct private law sphere equally raises concerns over legal coherence and individual autonomy: *see*, e.g. D. Leczykiewicz, 'The Constitutional Dimension of Private Law Liability Rules in the EU', in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013).

[86] Directive 2006/54 [2006] OJ L204/23 (previously Directive 76/207 [1976] OJ L39/40). *See*, e.g. ECJ 8 November 1990, ECLI:EU:C:1990:383, *Dekker*; ECJ 22 April 1997, ECLI:EU:C:1997:208, *Draehmpaehl*.

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In practice, of course, such public-private distinctions are not nearly so easy to draw as they are in theory. After all, EU law itself generally lacks any clear and systematic distinction – indeed, any clear and systematic criteria for distinguishing – between what should count as a public law or a private law situation for the purposes of the Treaties.[87] Consider, for example, the rule embodied in Article 45 TFEU concerning non-discrimination against migrant workers. That rule might be breached by purely private conduct (as in the case of an individual employer whose terms and conditions discriminate against migrant employees);[88] or in what could be seen as a private law context by a public authority (if the latter discriminates in its own terms and conditions of employment);[89] or instead by what would undoubtedly be classified as the administrative conduct of a public authority (for example, in setting the criteria for access to employment training programmes);[90] or by the regional/national assembly in exercising its legislative prerogatives (to set out the statutory framework of applicable employment law);[91] or indeed by means of improper judicial conduct (based on the *Köbler* case) which consists in refusing to vindicate the migrant worker's EU law rights.[92] One and the same provision of EU law might thus be capable of manifesting itself in a variety of public and private law contexts. Moreover, the Court has long held (in rulings such as *Bozzetti*) that Member States are competent to designate the national courts having jurisdiction over any given category of EU action.[93] The Member State may therefore classify a particular dispute either as one of private law to be adjudicated through its civil courts, or as one of public law to be pursued through its administrative courts.[94] To the extent that EU law thus relies upon national law to categorise the public or private nature of certain legal actions, differing domestic approaches towards the liability of public authorities might end up applying to one and the same 'right' under the Treaties.

Without diminishing the importance or difficulty of such challenges, we can nevertheless argue that they should not cloud our judgment at least when it comes to the *Francovich* right to reparation: as an autonomous EU law action, designed

[87] *See further*, e.g. M. Chiti, 'The EC Notion of Public Administration: The Case of the Bodies Governed by Public Law', 8 *European Public Law* (2002) p. 473.

[88] E.g. ECJ 6 June 2000, ECLI:EU:C:2000:296, *Angonese*.

[89] E.g. ECJ 28 November 1989, ECLI:EU:C:1989:599, *Groener*.

[90] *Cf.* Art. 7(3) Regulation 492/2011 [2011] OJ L141/1 (previously Regulation 1612/68 [1968] OJ L257/2).

[91] E.g. ECJ 4 April 1974, ECLI:EU:C:1974:35, *Commission* v *France*.

[92] *Köbler*, *supra* n. 15.

[93] ECJ 9 July 1985, ECLI:EU:C:1985:306, *Bozzetti*. Similarly, e.g. ECJ 18 January 1996, ECLI:EU:C:1996:10, *SEIM*; ECJ 22 October 1998, ECLI:EU:C:1998:498, *IN.CO.GE.'90*.

[94] Consider, e.g. Case C-300/06, ECLI:EU:C:2007:757, *Ursula Voß* (Germany); ECJ 15 April 2008, ECLI:EU:C:2008:223, *Impact* (Ireland). Consider also, e.g. ECJ 16 July 2009, ECLI:EU:C:2009:468, *Visciano*.

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specifically to incorporate safeguards for the Member State's performance of its general interest functions, the Court should have little choice but to lay down a coherent and uniform approach to identifying those public law powers which are deserving of specially crafted protection from the imposition of excessive non-contractual liability – thereby separating them from the Member State's ordinary private law powers, which should justly be governed by different principles of judicial protection.[95]

Exploring the case law concerning Francovich as a public (not private) law remedy

What does the available case law tell us about how well the Court has discharged that responsibility? The striking point to note is that nothing within the existing legal structures of the *Francovich* action expressly requires the Court to ensure that the protective scope of the system of Member State liability is limited to situations involving the exercise of public law powers under the Treaties.

In particular, we know that there is a distinction between (on the one hand) the EU law rights relied upon by the claimant to establish their entitlement to protection under *Francovich* and (on the other hand) the EU law obligations whose breach is the subject of scrutiny in order to determine the culpability of the Member State. But the 'intention to confer rights' criterion emerges as an inappropriate forum for checking that the claimant's action is properly grounded in public law. In many cases, the claimant will be invoking an intention by EU law to confer what are undoubtedly private law rights – for example, relating to employment or consumer relationships (as was true in disputes such as *Francovich* and *Dillenkofer* respectively).[96] Evidently, it is not the public or private law classification of the claimant's intended rights which is to be considered decisive; this is not the relevant stage at which to delimit the protective scope of *Francovich* conceived as an essentially public law remedy.

Rather, it is the public or private law character of the Member State's obligations that needs to be checked and verified. But at no subsequent stage in the existing legal structures of the *Francovich* action is the Court explicitly prompted or required to make such an assessment. One might assume the most natural point

[95] *See further*, e.g. E. Deards, 'Curiouser and Curiouser? The Development of Member State Liability in the Court of Justice', 3 *European Public Law* (1997) p. 117. Note that the Court appears keen to treat *Francovich* as the relevant framework through which to assess the Member State's non-contractual liability in respect of public law defaults, including in situations where the possibility of damages is explicitly referred to by the relevant EU legislation: consider, e.g. ECJ 9 December 2010, ECLI:EU:C:2010:751, *van Spijker*.

[96] More recently, e.g. ECJ 24 January 2012, ECLI:EU:C:2012:33, *Dominguez*; ECJ 15 January 2014, ECLI:EU:C:2014:2, *AMS*; ECJ 11 September 2014, ECLI:EU:C:2014:2209, *Papasavvas*; ECJ 26 March 2015, ECLI:EU:C:2015:200, *Fenoll*.

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would come when evaluating the existence of a 'sufficiently serious breach', i.e. by asking whether that breach relates specifically to the Member State's public law obligations under the Treaties. But if the Court is indeed undertaking that enquiry, whether here or elsewhere in its overall *Francovich* analysis, it must be doing so only implicitly. And to be fair, by and large, not unsuccessfully. After all, the vast majority of *Francovich* cases handled by the Court do indeed involve a breach of Member State obligations which are recognisably of a public law nature: non- or faulty transposition of directives into national law;[97] legislative or administrative action which infringes a binding Treaty obligation;[98] and shortcomings in judicial protection either as regards the applicable remedies and procedural rules or when it comes to the proper handling of final disputes (regardless of whether the specific disputes themselves relate to public or private law).[99]

But perhaps it is inevitable that, in a system where a crucial element in defining the proper protective scope of the Member State's non-contractual liability relies upon an implicit rather than express process of assessment and verification, the Court will sometimes seem to sanction the public law remedy of *Francovich* reparations in a situation where both the claimant's intended rights and the Member State's relevant obligations appear to be of a purely private law character. Consider the ruling in *Fuß*,[100] which concerned an action brought by an employee against his public employer for having been required to work excessive hours in contravention of the Working Time Directive.[101] When asked whether the claimant was entitled to reparation in respect of the damage he had suffered as a result of an infringement of his basic employment rights, the Court simply observed that the Working Time Directive does not contain any specific provisions on sanctions or remedies, then proceeded to direct the national

[97] E.g. ECJ 17 September 1997, ECLI:EU:C:1997:413, *Dorsch Consult*; ECJ 24 September 1998, ECLI:EU:C:1998:434, *EvoBus Austria*; ECJ 19 April 2007, ECLI:EU:C:2007:229, *Farrell*; ECJ 21 June 2007, ECLI:EU:C:2007:373, *Jonkman*; ECJ 3 September 2014, ECLI:EU:C:2014:2133, *Proceedings Brought by X*.

[98] E.g. *Hedley Lomas*, *supra* n. 20; ECJ 20 November 1997, ECLI:EU:C:1997:553, *Petrie*; *Brinkmann*, *supra* n. 20; ECJ 7 September 2006, ECLI:EU:C:2006:525, *N*; *A.G.M.-COS.MET*, *supra* n. 2.

[99] Consider, e.g. ECJ 14 January 1997, ECLI:EU:C:1997:12, *Comateb*; ECJ 22 April 1997, ECLI:EU:C:1997:207, *R* v *Secretary of State for Social Security, ex p Sutton*; ECJ 17 July 1997, ECLI:EU:C:1997:376, *GT-Link*; *Evans*, *supra* n. 14; *Köbler*, *supra* n. 15; *Traghetti del Mediterraneo*, *supra* n. 4; ECJ 19 June 2014, ECLI:EU:C:2014:2005, *Specht*. *See further*, e.g. M. Dougan, 'The *Francovich* Right to Reparation: Reshaping the Contours of Community Remedial Competence', (2000) 6 *European Public Law* 103.

[100] *Fuß*, *supra* n. 24.

[101] Directive 2003/88 concerning certain aspects of the organisation of working time, OJ 2003 L299/9.

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court to consider the claimant's action for reparation in accordance with the *Francovich* case law – observing that the latter's system of Member State liability 'holds good for any case in which a Member State breaches EU law, whichever public authority is responsible for the breach'.[102]

Fuβ is a remarkable judgment.[103] It is perfectly true that the Working Time Directive does not contain any explicit provisions on sanctions or remedies for its infringement. The same is true for the great majority of EU measures (including many that create private rights in fields such as employment or consumer law). The real question is what should fill that silence: a system of judicial protection suited to the exercise of public law powers in the general interest; or one which is more appropriate to the ordinary private law relationships regulated under EU law? The latter provides the most natural and compelling answer: whether employed in the public or private sector, Mr Fuβ was intended to benefit from certain employment rights whose infringement should generate the right under EU law to an effective remedy per se; or at least, if the availability of a remedy was to be made conditional upon some requirement of fault, that requirement should apply regardless of the public or private character of the employer.[104] Instead, the Court decided that the *Francovich* action furnished the appropriate vehicle for analysing Fuβ's claim to effective judicial protection – meaning that the claimant was not entitled to a remedy in respect of the infringement of his employment rights per se, or at least on the same basis as would any purely private sector counterpart, but was instead expected to demonstrate that his public employer had committed a 'sufficiently serious breach' of its obligations under EU law.[105]

To that extent, the ruling in *Fuβ* illustrates exactly the sort of confusion we identified and warned against before: without a clear and explicit understanding that the protective scope of the *Francovich* action is limited to the public law defaults of national authorities, a standard of judicial protection specifically designed to limit the provision of reparation to individuals so as to protect the general interest in effective and efficient public administration, is extended into an essentially private law relationship where no such countervailing considerations apply. Moreover, the

[102] *Fuβ*, *supra* n. 24, para. 46.

[103] Though for a different perspective, *see* J. Tomkin, Casenote on *Fuβ*, 49 *CMLR* (2012) p. 1423.

[104] *Cf.* ECJ 22 December 2010, ECLI:EU:C:2010:819, *Gavieiro Gavieiro*: a claim for unlawfully withheld wages can be brought against a public sector employer based on the direct effect of the relevant EU employment directive, without having to consider the availability of damages pursuant to the *Francovich* case law. And contrast with *Specht*, *supra* n. 99, where it is not possible directly to restore equal treatment in working conditions, in an action brought against a public sector employer based on EU employment law, the claimant may have no choice but to seek reparations from the Member State pursuant to *Francovich* (affirmed in ECJ 9 September 2015, ECLI:EU:C:2015:561, *Unland*).

[105] Note in particular the discussion in *Fuβ*, *supra* n. 24, paras. 65-70.

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Court's approach poses the clear risk of introducing an unjustifiable discrepancy between the judicial protection of employees depending on (the irrelevant factor of) the identify of their employer: whereas public employees are now expected to fulfil the *Francovich* criteria in order to secure reparation for breach of their basic employment rights, we can assume that private employees in an entirely comparable position will continue to benefit from the general right to an effective remedy under EU law. The outcome is *Fuβ* is perhaps all the more frustrating because there was indeed an opportunity for the Court consciously to consider these issues, when it explicitly discussed the potential scope of the system of *Francovich* liability and its aptness to apply in this particular dispute. But instead of identifying and respecting the division between situations in which a national authority acts in a public or instead a purely private capacity for the diverse purposes of EU law, the Court simply cited as authority for its reasoning the *Brasserie* principle that Member States are to be held ultimately responsible under *Francovich* for the unlawful acts of all their public bodies – which is very true, but entirely beside the point, since such responsibility should only become engaged through *Francovich* where the dispute relates to the exercise of public law powers.[106]

In short, the question of the public law character of the dispute, which should be crucial to defining the protective scope of the *Francovich* action, is not really appropriate for discussion in the context of the initial 'intention to confer rights' criterion and it is not explicitly being asked under the subsequent 'sufficiently serious breach' requirement. Once the analysis has passed those points and an autonomous right to reparation under *Francovich* is already on the cusp of being fully vested – or just as likely, dismissed for want of sufficient Member State culpability – it is difficult to see how the situation can be salvaged through either the direct causal link test or the remaining consequential analyses that complete a *Francovich* analysis. As a result, judgments like *Fuβ* illustrate the very real risk that *Francovich* liability will extend beyond the public law situations it was specifically designed to cater for, into purely private law disputes which should be governed by a very different framework of judicial protection. As a result, the failure of EU law to find an appropriate home for this basic protective scope question within the existing legal structures of the *Francovich* action might well offer Member States undue protection from liability and thus undermine the effective protection of individual rights.

Conclusions

Finding appropriate answers to basic questions of protective scope – concerning the very creation of a legal right, as well as the latter's amenability to protection through a system of individual reparations, together with the personal and material

[106] *See Brasserie du Pêcheur* and *Factortame III*, *supra* n. 3, para. 32. Also, e.g. *Köbler*, *supra* n. 15.

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scope of the interests that right is actually designed to protect – is crucial to the good functioning of any system of liability. In the case of Member State liability under EU law pursuant to the *Francovich* principles, such protective scope issues are not explicitly or systematically addressed as such; they need to be translated into and matched up across the various distinct elements which define the specific legal architecture of the *Francovich* action itself. In particular, that legal architecture is marked by two important characteristics, each of which influences the manner in which, and/or the consequences that flow from how, protective scope issues are eventually located within the *Francovich* principles: first, the potential distinction between whatever right is claimed by the individual as the basis for their entitlement to reparation *versus* whatever obligation the Member State is alleged to have infringed as the trigger for its own culpability; and secondly, the difference between those elements of *Francovich* which are defined autonomously under EU law *versus* those (i.e. the direct causal link and all consequential matters) which are governed by the principles of national autonomy, equivalence and effectiveness.

The *Francovich* system perhaps works at its best when key protective scope issues are addressed explicitly within the context of the initial 'intention to confer rights' requirement and their implications are then followed through consistently into the remaining legal structures of the *Francovich* analysis. However, this paper has argued that that idealised approach is actually relatively uncommon in the decided case law and identified several situations in which the system does not appear always to work quite so well.

The basic problem lies in the idea that the Court often seems to treat the 'intention to confer rights' criterion in a relatively superficial manner, akin to a simple checklist or tickbox requirement, and without further elaboration or exploration. Viewed in the light of the twin characteristics identified above, such judicial practice could have some important consequences. In the first place, the less attention the Court pays to defining the 'intention to confer rights', the more the natural emphasis of any *Francovich* analysis shifts towards the 'sufficiently serious breach' requirement. The relationship between right and breach moves from being merely autonomous, to becoming excessively abstract – with questions about the precise nature and extent of the claimant's own entitlement to seek reparation playing second fiddle to the search for culpability on the part of the national authorities. In the second place, there is the risk that important protective scope issues – which undoubtedly need some sort of answer, if *Francovich* is to be effectively operationalised in any given case – must be picked up (if at all) only later down the line: for example, when addressing the often closely interlinked questions about the existence of a direct causal link or the recoverable extent and heads of damage. That creates the inherent danger that certain issues concerning the precise nature and extent of the claimant's entitlement to seek reparation will

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be addressed only partially and/or incoherently. In the third place, though the point is closely connected, to thus neglect the 'intention to confer rights' criterion and rely instead upon other elements of the *Francovich* action, so as to find answers to certain protective scope questions, inevitably changes the basic legal framework though which the right to reparation is realised. In particular, through the presumption of national autonomy which applies to all *Francovich* matters lying outside the autonomous core of the right-plus-breach, the diverse domestic conceptions of each Member State may replace a common EU understanding of relevant protective scope issues, subject only to the ex post surveillance provided by the principles of equivalence and effectiveness.

As we have seen, that basic problem of limited judicial engagement with protective scope issues at the stage of the initial 'intention to confer rights' criterion, is capable of manifesting itself also in certain more complex ways.

To begin with, the Court's superficial approach to the 'intention to confer rights' requirement might well combine with more deep-rooted conceptual doubts about how EU law handles the very notion of 'rights' – such that some key distinctions (for example) between subjective personal rights and mere rights of standing in the public interest, risk becoming confused or altogether lost – with consequences that can again reverberate through the remaining legal structures of the *Francovich* analysis. In particular, it is in precisely such contexts that one might most acutely perceive the *Francovich* centre of gravity shifting from questions about the individual's entitlement to reparation, to focus instead on the issue of the Member State's culpability under EU law – so that the Court risks tipping the balance away from the avowed purpose of *Francovich* in protecting deserving individuals, and towards the rather different objective of penalising the defaulting Member State as an end in itself.

Moreover, our analysis suggests that certain basic protective scope issues – such as the distinction between judicial protection in respect of the public as opposed to the purely private law activities of the Member State – are not apt to be dealt with by the 'intention to confer rights' criterion at all, yet nor do they find any obvious alternative forum within the current legal structures of the *Francovich* action, making it perhaps unsurprising (though no less unfortunate) that the Court occasionally neglects to observe them. In such situations, the emergence of interstitial gaps between the claimant's intended right and the Member State's alleged breach can risk tipping the balance under *Francovich* in precisely the other direction, i.e. so as to shield Member States from liability to make amends for their wrongdoing under EU law, despite the absence of any compelling public interest to justify such a differential standard of judicial protection.

Such problems might suggest that the current legal structures of the *Francovich* action are simply not well suited to identifying, articulating and dealing with certain important protective scope issues in a coherent and systematic manner.

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Of course, it is possible that, to some extent, our problems may ultimately prove more theoretical than real: insofar as the legal framework of *Francovich* allows national courts both to apply its autonomous criteria to the facts of any given dispute in practice, and especially to adapt existing domestic rules and practices to the needs of *Francovich* in accordance with the presumption of national autonomy, it may well be that the national courts are reaching their own principled and/or pragmatic solutions to legitimate protective scope problems 'under the radar' of EU law itself.[107] But even if that were true, there is a good case for arguing that the unity, rigour and coherence of the EU's own system of Member State liability calls for basic protective scope issues to be addressed more explicitly and more systematically, both within and across the existing *Francovich* legal framework.

[107] *See*, for detailed studies of various national experiences in translating *Francovich* into the domestic legal context, e.g. C. Kremer, 'Liability for Breach of European Community Law: An Analysis of the New Remedy in the Light of English and German Law', 22 *YEL* (2003) p. 203; M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) Ch. 11; M.-P. Granger, 'National Applications of *Francovich* and the Construction of a European Administrative *Ius Commune*', 32 *ELRev* (2007) p. 157; M. Künnecke, 'Divergence and the *Francovich* Remedy in German and English Courts', in Prechal and van Roermund, *supra* n. 49; P. Giliker, 'English Tort Law and the Challenge of *Francovich* Liability: 20 Years On', 128 *LQR* (2012) p. 541; T. Lock, 'Is Private Enforcement of EU Law Through State Liability A Myth? An Assessment 20 Years After *Francovich*', 49 *CMLR* (2012) p. 1675.

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