In a franchise arrangement, when one of the parties refuses to proceed with any of their obligations to do, such as failure to grant the necessary training, or to provide for advertising exposure, on the part of the franchisor, the franchisee has no legal action to seek specific performance but rather rescission and/or an action for damages. On the other hand, if the franchisee should refuse to proceed with the running the business in accordance with the franchisor's systems, or to even continue with the business, there is no doubt that the franchisor would not be in a position to file an action to compel the franchisee to comply, but the proper remedy would be to rescind and/or recover damages.

X. CONCLUSIONS

The author agrees with the observation of Justice Vitug in his dissenting opinion in *Equatorial Realty* that "[i]t would be perilous a journey . . . to try to seek out a common path for such juridical relations as [sales] contracts, options, and rights for first refusal since they differ, substantially enough in their concepts, consequences and legal implications."

Several contractual and juridical relationships are being evolved in the modern business world not even dreamt of at the time when the provisions of the Civil Code were drafted covering both nominate and innominate contracts. Although Art. 1307 of the Civil Code enjoins that innominate contracts be regulated and construed by the rules governing the most analogous nominate contracts, the intention has never been for innominate contract situations to dilute the logical and well-established doctrinal basis of analogous nominate contracts.

There is a need to recognize that many new contracts being fashioned today are truly innovative, and the should be adjudged by analyzing their inherent structure to be able to evolve a jurisprudential pool of integrated and logical doctrines that would be the basis upon which parties can determine their rights and obligations.

REINFORCING THE ENFORCEMENT PROCEDURE: THE INTERPLAY OF THE LITIGATION ASPECT OF COMMUNITY ENFORCEMENT WITH DIRECT EFFECT AND STATE LIABILITY FOR DAMAGES FOR BREACHES OF COMMUNITY OBLIGATIONS

LORENZO U. PADILLA*

ABSTRACT

From a spectator's perspective and in the context of procedures for ensuring the effectiveness of Community law, this paper seeks to review the interplay, as an ensemble, under the remedial system of Community law, between private enforcement (mainly through the medium of direct effect pleas[1] and damage claims against Member States in breach of Community obligations[2]) and public enforcement procedures made available under the EC Treaty[3] for failure of Member States to fulfill obligations under Community law.

It endeavours to present such private enforcement procedures as primarily reinforcing, whilst separately pursuing distinct "objects, aims and effects," the public enforcement procedures made available under the EC Treaty against defaulting Member States.

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[1] By rulings under the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 177. [hereinafter referred to either as "EC Treaty" or simply "Treaty;" also, unless otherwise indicated, all Article references are hereafter understood to refer to those of the Treaty].

[2] Under Cases C-6/90 and C-9/90 Francovich and Bonifaci v. Italy, 1991 E.C.R. I-5357; Joined Cases C-46 & 48/93 Brasserie du Pûcheur v. Germany, 1996 E.C.R. I-1029; Joined Cases C-178 179, 188, 189 & 190/94 Dillenkofer v. Germany, 1996 E.C.R. I-4845; and Case C-5/94 The Queen v. Ministry of Agriculture, Fisheries and Food, *ex parte:* Hedley Lomas (Ireland) Ltd., 1996 I-2553. *See also*, Case C-91/94 Faccini .Dori v. Recreb SRL., E.C.R. 1994 I-3325; C-106/89 Marleasing SA v. Comercial Internacional de Alimentacion SA., 1990 E.C.R. I-4135; and Case C-334/92 Wagner Miret v. Fondo de Garantia Salarial, 1993 E.C.R. I-6911.

[3] Mainly under Article 169, EC Treaty.

I. INTRODUCTION

Prescinding from the pre-litigation and pre-contentious stages of the procedure under Article 169 of the EC Treaty, the litigation aspect of the "public, centralized Community enforcement mechanism"[4] provided in that Article, described as "simply one mechanism for ensuring the application" of Community law and "not by any means the best or the most effective method,"[5] is the primary focus of this paper. The significance of that instrument for enforcement, made available to the Commission, is easily overshadowed by the opportunity which the pre-litigation and pre-contentious procedures give the Commission to maintain a dialogue with the national authorities about the nature and extent of their obligations under Community law.[6] The litigation aspect of the procedure is not the preferred mode of proceeding against Member States who have failed to fulfill Community obligations.[7]

Private complainants, although allowed to bring instances of default on the part of Member States to the attention of the Commission, have no control over the commencement of proceedings under Article 169, much less in bringing such

[4] PAUL CRAIG & GRAINE DE BURCA, EC LAW: TEXT, CASES AND MATERIALS, 396-397 (1997).

[5] *Id.* at 364. For two reasons: (1) lack of time and resources on the part of the Commission to detect and follow through every instance of national infringement of Community law; and (2) for pragmatic and political reasons, the Commission might not want to pursue to judgment every alleged breach by a Member State, even if it possessed the capacity to monitor all such infringements.

[6] *Id.* at 47. It is the Commission that brings actions against recalcitrant Member States "when they act in breach of Community law." Recourse to the legal action will be a "last resort" and will be "preceded by Commission efforts to resolve the matter through negotiation." Nonetheless, it is noted that actions under Article 169 has formed "a steady part of the Court's diet and they have been used by it to propound important points of principle, as well as bringing a particular Member State to book." However, the procedure prescribed envisages that an apparent breach of Community law by a Member State should, if possible, be resolved or remedied after consultation between the Commission and the Member State concerned, without the need for immediate recourse to litigation before the Court, because "*repeated rulings by the Court that Member States have failed or refused to give effect to European Community law do not present a picture of an integrated, harmonious, or thriving Community.*" *Id.* at 363-63. The Article 169 procedure thus aims "to resolve potential Community-State confrontations in the first instance by political means," requiring the Commission, if it considers a Member State to be in breach of Treaty requirements, to give that State an opportunity to make its position on the alleged breach known to the Commission, *Id.* at 377. The Commission thus "uses Article 169, where possible, as a tool to secure compliance with Community law, rather than as a means of bringing the States before the Court."

[7] *See supra* note 6; while the Commission, in its 8th Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law 1990, 1991 O.J. C338/6-7, has stressed "its attempt to develop and support measures other than solely Article 169 proceedings, to improve the application of Community law," [it] "evidently values the opportunity which the pre-contentious stage gives it to spur Member States into compliance without having to have recourse to the more formal methods of enforcement." CRAIG & DE BURCA, *supra* note 4, at 364-365.

proceedings to litigation stage when prior procedures fail.[8] While nationals of Member States equally have stakes in seeing Member States fulfill Community obligations, the Article 169 procedure remains exclusively within the domain of the Commission.[9]

A dichotomy thus exists, in the enforcement of Community law, between public and private procedures. There is, after all, a private enforcement mechanism made available under Article 177 of the Treaty, which can be easily distinguished from public enforcement under Article 169, in terms of its "object,

[8] CRAIG & DE BURCA, *supra* note 4, at 362-63. "The Commission has stated that complaints from citizens constitute the main source for the detection of infringements of Community law, and has expressed the view that the Article 169 procedure can, in this way, contribute towards creating a more participatory Community in which citizens can play a role in the enforcement of law." Craig notes that despite this optimistic assessment of the value of Article 169 for individuals, "an individual in fact plays no role in the proceedings themselves and, indeed, has no say in determining whether or not the Commission initiates proceedings against a Member State." The procedure is regarded "as something of an opportunity for political dialogue between the Commission and the States, with litigation as a last resort, and the participation of individuals or even corporate complainants is not envisaged. Thus it may be a cheap and informal method of complaint, but the Commission ultimately has complete discretion as to whether or how it chooses to deal with the complaint."

[9] The Court has described Article 169 proceedings as "entirely 'objective'" (*Id.* at 371-372; discussing, at 372, Case 416/C85 Commission v. United Kingdom, 1988 E.C.R. 3127), which ruled that the Court will confine its role to deciding "whether or not the Member State in question has failed to fulfill its obligations as alleged." Repeating this in Case C-200/88 Commission v. Greece, 1990 E.C.R. I-4299, it held that it was not for it to decide whether the Commission's discretion under Article 169 had been "wisely exercised" (paragraph 9). Attempts to put restrictions on the time at which proceedings should be brought under Article 169 have also been rejected on the ground that "the considerations which determine [the Commission's] choice of time cannot affect the admissibility of the action [under Article 169], which follows only objective rules." Commencement of its action after only a lengthy period of time cannot have the effect of "regularizing a continuing contravention." CRAIG & DE BURCA, *supra* note 4, at 372-373. However, the Court has more recently indicated "that the Commission's discretion when to bring proceedings is not entirely unfettered, and that the Treaty may place certain substantive limits upon its exercise." In Case C-96/89 Commission v. Netherlands, 1991 E.C.R. 2461, it acknowledged that "in certain cases the excessive duration of the pre-litigation procedure laid down in Article 169 is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of the defence," although it found in that case that the State concerned "has not proved that the unusual length of the procedure had any effect on the way in which it conducted its defence." Restrictions are imposed on the Commission's discretion "when to refer a matter to the Court after issuing a reasoned opinion, rather than on its discretion in commencing the litigation procedure in the first place." Excessive haste in requiring a response to a reasoned opinion is just as likely or even more likely to affect the ability of a Member State to exercise its right of defense than is delay in commencing. *See also* CRAIG & DE BURCA, *supra* note 4, at 375. In an action against Ireland, the Court referred to the Commission's "regretable behavior" and reprimanded it for the short length of time it allowed the State for compliance with the reasoned opinion (five days given to amend a legislation which has been in force for 40 years, while it was clear that "there was no particular urgency"), although the Court held the application as admissible because the Commission had in fact awaited Ireland's reply before referring the matter to Court (Case 74/82 Commission v. Ireland, 1984 E.C.R. 317, paragraph 12). In proceedings

aims and effects."[10] Also, in terms of function and effect, a "direct effect" plea under Article 177 differs from an enforcement ruling under Article 169, as has been repeatedly underscored by the Court of Justice.[11]

A. *Research Problem, Hypotheses, and Objectives*

While acknowledging the distinction between the public, centralized Community level enforcement reserved to the Commission by Article 169, on the one hand, and the private, decentralized, and national level enforcement made available to nationals of Member States through the medium of Article 177 direct

against Belgium, the Court actually declared the Commission's action inadmissible "on account of the shortness of the time allowed for responding to the letter of formal notice and the reasoned opinion," ruling that "a reasonable period must be allowed, although very short periods could be justified in circumstances of urgency or where the Member State was fully aware of the Commission's views long before the procedure started," neither of which situation obtained in that case. Case 293/85, Commission v. Belgium, 1988 E.C.R. 305; also discussed in CRAIG & DE BURCA, *supra* note 4, at 375.

[10] Whereas under Article 177, the Court will rule on the "interpretation of Community law, leaving it for the national court to spell out the practical implications of that ruling in the particular case," in enforcement proceedings under Article 169 (or 170), the Court will "actually pronounce directly on the compatibility of a Member State's conduct with Community law." *See* Opinion of Advocate General Roemer in Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 3.

[11] *See* CRAIG & DE BURCA, *supra* note 4, at 370. "The direct effectiveness of a Community provision, and thus the ability of individuals to enforce the provision before national courts, would not be accepted as a defence or an answer to a Commission action under Article 169 for failure to implement that provision." Also, distinguishing Article 177 (preliminary ruling) from Article 169 (as a form of enforcement procedure), the Court has held that the provisions of the former gives the Court no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of the provision of a domestic law in relation to the Treaty, as would be possible for it to do under Article 169 (Case 6/64 Costa v. ENEL, 1964 E.C.R. 583; CRAIG & DE BURCA, *supra* note 4, at 428-429). Furthermore, in Case 28/67 Molkerei-Zentrale Westfalen v. Hauptzollamt Paderborn, 1968 E.C.R. 143, 153 the Court ruled that proceedings by an individual "were intended to protect individual rights in a specific case," whereas Commission proceedings were intended "to ensure the uniform and general observance of Community law;" *see* CRAIG & DE BURCA, *supra* note 4, 368. Also, Opinion of Advocate General Lagrange in Costa, E.C.R. 583, at 601-602, underscoring that "the procedure for finding default by a Member State as laid down in Articles 169 to 170, . . . is not open to individuals." On the other hand, as Advocate General Tesauro opined in Case No. C-213/89 The Queen v. Secretary of State for Transport, Ex Parte Factortame Ltd. and Others (Factortame I), 1990 E.C.R. I-2433: "32. Nor does there seem to me to be any justified basis for arguing *a contrario* (as in the observations of Ireland and the United Kingdom) that individuals are already afforded sufficient protection by virtue of the possibility open to the Commission, in the context of infringement proceedings brought under Article 169, to apply to the Court of Justice for interim measures, a situation which in fact also occurred in this instance in regard to the nationality requirements of the United Kingdom legislation now before the Court, as I have already indicated. In this respect may it suffice to recall the judgment in Van Gend & Loos, in which the Court affirmed that *a restriction of the guarantees against an infringement by Member States of a Community provision having direct effect to the procedures under Articles 169 and 170 'would remove all direct legal protection of the individual rights of their nationals'* (22)."

effect rulings, on the other,[12] a unified view of their complementary roles in the system may provide a wholistic perspective of their interplay as an ensemble in the total Community enforcement process. Such a unified approach may likewise provide a context for understanding the relationship, if any, between breaches by Member States of Community obligations and the private remedy of reparation for damages arising from failure of Member States to fulfill such obligations.

Those are at once the problems, the hypotheses and the objectives that this paper seeks to briefly address.

B. *Scope, Delimitations, and Methodology*

Apart from Article 169, the Commission is also given power under Article 90(3) to ensure the application of Article 90 provisions on public undertakings, through directives or decisions addressed to Member States. That area is excluded from the scope of this paper.

The enforcement procedure under Article 170 which is initiated by Member States against other Member States, through the Commission, is likewise beyond the ambit of this study, as well as the enforcement procedure under Article 100a(4)[13] providing an exception to the procedure laid down in Article 169 (and Article 170), whereby the Commission (or any Member State) may bring matters "directly before the Court of Justice" if "it considers" that "another Member State is making improper use of the powers provided for" in Article 100a.

Also, as indicated at the outset, the pre-litigation and pre-contentious aspects of the Article 169 procedure are not addressed by this paper.

This paper takes the methodological approach of first examining Article 169, in isolation, as an enforcement mechanism to see whether, standing alone, it can ensure cooperation among Member States, as well as the effectiveness and uniform application of Community law. It will proceed to make a cursory survey and analysis of relevant case law by which, with the same aim of ensuring cooperation among Member States, as well as effectiveness and the uniform application of Community law, the Court of Justice had, first, recognized and, then, strengthened private enforcement procedures: initially, by extending protection to directly effective rights and, lately, acknowledging private claims

[12] As well as the observation that a parallel may not be drawn between them (Molkerei-Zentrale, E.C.R. 143, 153; CRAIG & DE BURCA, *supra* note 4, at 368).

[13] Not to mention similar enforcement procedures under Article 180 (made available under the EC Treaty to the Board of European Investment Bank and the Council of European Central Bank), of the EUROPEAN COAL AND STEEL COMMUNITY TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, art. 88 and TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, arts. 141-142 (made available formerly to the High Authority and, now, to the Commission), which are mirror images of Articles 169-171 of the EC Treaty.

under Community law to reparation for damages causally linkable to a Member State's failure to fulfill Community obligations. It will conclude by evaluating those three elements of this analysis in operation as an ensemble.

II. ARTICLE 169, VIEWED IN ISOLATION

The enforcement procedure envisioned in Article 169 culminates in bringing the matter of a Member State's failure to fulfill an obligation under the Treaty "before the Court of Justice." In turn, under Article 171, if the Court of Justice finds that a Member State has failed to fulfill a Treaty obligation, "the State shall be required to take the necessary measures to comply with the Judgment of the Court of Justice." Then, there is a "process iteration" whereby the Commission monitors compliance with the judgment by the Member State concerned and, again, issues a reasoned opinion in case of non-compliance with the judgment, specifying the necessary measures to be taken to comply with the Court's judgment within a given time-limit, in default of which, another iteration of the litigation loop occurs, the only incremental difference being that the second action for declaration of the Member State's failure to comply with the judgment "shall specify the amount of the lump sum or penalty payment to be paid by the Member State which it considers appropriate in the circumstances."

If non-compliance with the judgment is confirmed, the Court of Justice renders another judgment of failure to fulfill an obligation, the incremental variation this time being the imposition of "a lump sum or penalty payment." The Article, then, becomes silent about the not-entirely-impossible prospect of the obligation under the second judgment not being fulfillled, save for a final reference to an Article 170 sub-routine, whereby Member States themselves may initiate a procedure similar to that provided under Article 169, also through the Commission (except that in case of failure by the Commission to issue a reasoned opinion "within three months from the date on which the matter was brought before it," the Member State which initiated the Article 170 proceedings may take control of the procedure, bringing the matter by itself before the Court of Justice).

What, precisely, is the value of an enforcement mechanism which merely declares a fact (that of a Member State having failed to fulfill an obligation under the Treaty) but cannot compel performance of that obligation? Viewed in isolation, one may find it absurd to even associate such a mechanism with the concept of enforcement when all it does is declare the existence of a situation but cannot determine and forcibly cause remedial measures to be executed.

It is enforcement with a theoretical content and grounding quite easily distinguished by its apparent weakness from the concept of enforcement of judgments at national court level, where in the ordinary order of things execution follows *ad invitum* in the event of non-compliance with a judgment.

The same pragmatic considerations as would inhibit the Commission from availing of the declaratory action provided under Article 169 at every instance

of perceived Member State violations of Treaty obligations, so as not to invite an outcome of that sort,[14] should make the Court of Justice hesitate to resort to declaratory judgments of that nature in every instance where such a relief is sought before it, for fear of making ceremonious pronouncements destined to fall on deaf ears and be consigned to case reports for the knowledge of the studious.[15] Neither would a mere pronouncement that a Member State has acted in breach of Community law or has failed to fulfill Community obligations provide the national courts of Member States the occasion to rule against such States by nullifying or disregarding national measures contravening Community law.

So circumstanced, it should be expected that the Commission would adopt a policy of preferring pre-contentious procedures to remedy breaches of Treaty obligations while the Court of Justice would adhere to the expedient of indulging most patiently in every presumption inclined towards finding best endeavours to comply with Treaty obligations on the part of Member States alleged to be in default.

One would say, if careless in judgment, that the resulting system should be timid in operation, broad in extension but without substance and sanction, and clearly without a will to determine or even influence the action of Member States. One would hardly find the effectiveness of Community law in those circumstances alone. It might not always inspire cooperation either and the uniformity of application of Community law would be quite illusive.

But, the wisdom of Article 169 may lie precisely in its weakness.

The lessons of ages of strife that has torn the European landscape, culminating in two great wars, but intensely motivating its peoples to aspire "for an ever greater union" and a Community increasingly sans internal frontiers, caution against imbuing the Article 169 procedure with too much power, too soon. One need not look for authorities to support the obvious proposition that external compulsion cannot serve as an instrument of policy among equally sovereign States, and that any measure of sovereign rights given up can only come by way of auto-limitation.

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[14] *See* Weiler, J., *The Community System: The Dual Character of Supranationalism*, (1981) 1 YBEL 267, 268 (also quoted in CRAIG & DE BURCA, *supra* note 4, at 376), who notes that action by the Commission under Article 169 "will often be influenced by [such] political considerations" as "not wish[ing] to prejudice delicate negotiations with a Member State" and that "effective supervision" by the Commission to monitor Community law is "an impossible task," given the "vast range of Community measures," and even if alleged violations were brought to the attention of the Commission, "it is unrealistic to expect them to take up all but the most flagrant violations."

[15] *See also* observation in CRAIG & DE BURCA, *supra* note 6, regarding, the possible impact on the Community's image of "repeated rulings" of Member State defaults.

III. ARTICLE 169, AS INSTRUMENT TO ACTUATE SOVEREIGN STATES

Thus, albeit weak in appearance, to regard the system of enforcement of Community law under Article 169 as timid is to lose sight of the *sui generis* nature of a supranational entity, so delicately constructed in the Treaties of the European Communities, operating on a level different from those within the national context, as yet without what may be the conceptually preferable neatness, simplicity and rigidity of a federal system but with a peculiar symmetry still evolving from the increasing integration of separate elements out of distinct national systems.

The Community has created its own legal system,[16] quite distinct from those of its Member States, and Community institutions, like the Commission and the Court of Justice, operate on that level. In this sphere, the elements are vastly different, their modalities of cooperation and interaction quite uniquely their own, and the motives, values and objectives are multifarious, constantly in tension and clashing on occasion, and ever changing with time and circumstances, albeit spanning the same landscape called the Community.

It is a system whose scope and extension derive wholly and quite delicately from the common unity of its elements and from the commonality of its principles, directions and visions; its apparent strength radiates from the intensity of the spirit to integrate those elements into a single entity, as yet fragile and imperfect as any new-born.

The columns with which that system has, and is being, engineered are cooperation, effectiveness and uniformity. It is the procedure prescribed in Article 169, the Treaty's main enforcement mechanism, which is meant principally to cement it.

[16] Van Gend, 1963 E.C.R. 3, where the Court stated that the "Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community." Literature abounds on the subject and related issues; *see, inter alia*, Wyatt, D., *New Legal Order* or *Old* 7 EL REV. 147, (1982) and Weiler, J., *supra* note 14.

IV. ARTICLE 169, AS ENFORCING THE COMMUNITY FRAMEWORK

Thus, in enforcing the first column, breaches by Member States of the obligation of cooperation[17] constitute one category of proceedings under Article 169; in enforcing the second, inadequate implementation[18] and the failure to give proper effect to Community law[19] constitute two other categories; and in enforcing the third, although remaining a mere latent possibility while the cogency and precedential value of rulings of the Court of Justice continue to command respect, actions against the courts of Member States if deliberately ignoring or disregarding Community law[20] constitute another category.

When describing Member States' violation for purposes of enforcement proceedings, Article 169 is very general: the Commission need only find that the Member State concerned "has failed to fulfill an obligation under [the] Treaty." This may extend to "any rule or standard which is a binding or effective part of Community law," although certain kinds of breaches already identified above have far more often been the subject of Article 169 proceedings than others, to repeat: (1) breach of the obligation of cooperation under Article 5;[21] (2) inadequate implementation of Community law;[22] (3) failure to give proper effect to

[17] *See* CRAIG & DE BURCA, *supra* note 4, at 384.

[18] *Id.* at 386.

[19] *Id.* at 388.

[20] *Id.* at 389.

[21] Case 96/81 Commission v. Netherlands, 1982 E.C.R. 1971, involving the obligation to facilitate the achievement of the Commission's task, including that of monitoring compliance with the Treaty by providing "information on compliance;" Case 240/86 Greece v. Commission, 1988 E.C.R. 1835, involving the obligation to respond at pre-litigation stage of an investigation by the Commission for purposes of Article 169 proceedings as a form of cooperation in the achievement of Community goals; Case 272/86 Commission v. Greece, 1988 E.C.R. 4875, involving the obligation to cooperate with the Commission in obtaining information about an administrative practice and in determining whether it gave rise to barriers to trade in olive oil, persisting even before the Court, thereby constituting a "serious impediment to the administration of justice."

[22] Case 167/73 Commission v. France, 1974 E.C.R. 359, by tolerating provisions in internal legislations contrary to Community law, thereby giving rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law; Case 96/81 Commission v. Netherlands, 1982 E.C.R. 1791 and Case 160/82 Commission v. Netherlands, 1982 E.C.R. 4637, by reliance on "whimsical" administrative practices that, quite apart from their uncertainty and alterability, lack appropriate publicity; but *see contra* Case 29/84 Commission v. Germany, 1985 E.C.R. 1661, where the Court acknowledged the possibility that a Member State may not be found in default even where it has failed to adopt specific measures to implement a directive where "the existence of general principles of constitutional or administrative law renders" implementation by specific legislation superfluous, provided (1) those principles guarantee full application of the directive, (2) that persons concerned are made fully aware of their rights and, (3) where appropriate afforded the possibility of relying on them before the national courts.

Community law;[23] and (4) failure of a Member State's judiciary to comply with Community law.[24]

It is thus clear that the resulting legal structure can only be as strong as the cement that keeps those columns together.

But, as already indicated, viewed in isolation, in the light alone of its purported aims and functions, the strength of the Article 169 enforcement mechanism leaves much to be desired. Indeed, by itself, it appears to undertake so much beyond its full potential. Hence, the need to regard how other provisions of the Treaty, or mechanisms inherent in the system of Community law, reinforce it.

V. COMPLEMENTING THE FUNCTION OF ARTICLE 169

Appropriately complementing the public enforcement procedure is a private one. There is, however, no provision in the Treaty, as express and specific as Article 169, that formally institutes a private enforcement procedure against Member States in violation or default of Community obligations.[25]

If this were to be indicative that no private enforcement procedure exists at all in the general scheme of the Treaty, then one is led back to the conclusion that the Community legal system is just as weak as the powerless public enforcement mechanism it possesses under Article 169.

So, a system of private enforcement had to be invented, in the sense of being discovered or found, by searching the spirit, general scheme and the wording of the Treaty.[26]

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[23] Case 68/88 Commission v. Greece, 1989 E.C.R. 2979, involving the failure to penalize those who infringe Community law in the same way as the Member State concerned penalizes those who infringe national law.

[24] Although this "has never formed the basis of Article 169 proceedings," same is legally possible on the ground that a Member State is "responsible even for actions and inactions on the part of constitutionally independent organs of State" and considering that "their failure to comply with Community obligations," given the "central role played by national courts in the implementation and enforcement of Community law domestically" could have "very serious consequences for Community law." CRAIG & DE BURCA, *supra* note 4, *citing* the Opinion of Advocate General Werner in Case 30/77 R. v. Bouchereu, 1977 E.C.R. 1999.

[25] As distinguished from those made available against measures of Community institutions, quite restrictively under Article 173 (with its almost forbidding rule on *locus standi*) and, exceptionally, under Article 184.

[26] *See* Van Gend, E.C.R. 3. Speaking of the development of the doctrine of direct effect and the function of Article 177 in such development, CRAIG & DE BURCA, *supra* note 4, at 155, note that apart from the Court's invocation of the "spirit" of the Treaties in Van Gend, when it drew upon the text of the Treaty, in support of the specific concept of direct effect, it not only cited the preamble of the Treaty, which makes reference to citizens as well as States, but also to the preliminary ruling procedure under Article 177, "which envisages that parties before national courts would be pleading and relying on points of EC law." In Van Gend, E.C.R. 3, the Court overruled objections to direct effect, premised on Articles 169 and 170, as follows: "The fact that [Articles 169 and 170] of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations." For instance, "[a] restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty." It considered that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States."

As a matter of course, being complementary to public enforcement and supportive of the latter, the private enforcement mechanism thus found addresses the same intended effects of strengthening the columns of cooperation,[27] effectiveness[28] and uniformity.[29]

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[27] Opinion of Advocate General Tesauro in *Factortame I*, E.C.R. I-2433 above, describing Article 5 of the Treaty, regarding the duty of cooperation, as "the real key to the interpretation of the whole system."

[28] Advocate General Tesauro, arguing in *Factortame I*, E.C.R. I-2433 from the standpoint of "*effectiveness* of Community law," in favor of giving national courts having the "jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which *might prevent Community rules from having full force and effect*," describing the principle of *effectiveness as of "the very essence* of Community law" and concluding that, by virtue of such principle, "the national court is to apply Community law either through the means provided for under the national legal system or, failing that, of its own motion" (quoting the judgment in Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal, 1978 E.C.R. 629, paragraph 24). In relation to giving direct effect to decisions imposing an obligation in a Member State or all the Member States to act in a certain way, the need to maintain the "effectiveness (*l'effet utile*) of such a measure" was the premise for recognizing that the nationals of that State should be allowed to "invoke it in the courts" and for the national courts to "take it into consideration as part of Community law (Case 9/70 Grad v. Finanzamt Traunstein, 1970 E.C.R. 825). In relation to directives, Advocate General Lenz, in Faccini Dori, I-3325, at paragraph 15, arguing on the basis of "the effective application of Community law in the Member States" pointed out that "where all the other conditions are satisfied in order for a provision of a directive to be directly applicable, a national court may apply the provision in question *even where the beneficiary has not expressly relied upon it.*"

Speaking of judicial contribution to market integration, CRAIG & DE BURCA, *supra* note 4, at 1112. Note that the Court, through Article 169 actions and direct effect, interpreted the relevant Treaty articles "in the manner best designed to *give effect to the objectives* of the Treaty".

[29] Case 48/71 Commission v. Italian Republic (Art Treasures II) 1972 E.C.R. 529. "8 The attainment of the objectives of the Community requires that the rules of Community law established by the Treaty itself or arising from procedures which it has instituted are *fully applicable at the same time and with identical effects over the whole territory of the Community* without the Member States being able to place any obstacles in the way."

VI. ARTICLE 177 AND DIRECT EFFECT RULINGS

To accord private participation in the enforcement of the Community provisions would, however, require recognizing rights in favor of private persons[30] directly flowing from those provisions which, moreover, must be immediately applicable to the national context: rights which may be invoked before national courts and which the latter would be obligated to enforce: rights having direct effects in favor of nationals of Member States.[31]

By thus giving immediate effects to Community rights at the national level, the doctrine of direct effect has established a link between Community or public enforcement with national or private enforcement,[32] the latter thereby reinforcing the former by enabling Community enforcement procedures to draw upon the strength of national enforcement procedures.[33]

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[30] Relating the principle of direct effect and Article 169 action, CRAIG & DE BURCA, *supra* note 4, at 1004 recalls the "interplay between private enforcement through the medium of direct effect and public enforcement through actions brought by the Commission," and indicates that one motivation for direct effect was to alleviate the burden that would otherwise be placed on the Commission "if it were to be the sole enforcer of Community norms." If action under Article 169 were to be the only method of ensuring compliance with Community law, this would place "an impossible burden on this institution." Direct effect, therefore, provides an alternative avenue through which compliance with Community law can be attained, especially in the area of competition.

[31] Van Gend, E.C.R. 3. Leading direct effect rulings involving Treaty provisions include Case 6-64, Costa v. ENEL, 1964 E.C.R. 0585 (Articles 52 and 53); *Factortame I*, (Articles 7, 52, 58 and 221, particularly the principle of non-discrimination on grounds of nationality); Case No. 77/72 Capolongo v. Azienda Agricola Maya, 1973, E.C.R. 0611 (article 92(1) "where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2), and Article 13 (2)); Joined Cases 2 and 3/69 Sociaal Fonds voor de Diamantarbeiders v. SA Ch. Brachfeld and Sons and Chougol Diamond Co. [1969] E.C.R. 0211 (Articles 9, 12, 17, 95); Case 167 Commission v French Republic, 1974, E.C.R. 0359-0374 (Article 48); Joined Cases C-430/93 and C-431/93 Van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten, 1995, I-4705 (Articles 3(f), 85, 86 and 90).

[32] Speaking of the Court's express jurisdiction "in relation to acts of the Member States under the Treaties" and of its more limited nature than its jurisdiction "in relation to acts of Community institutions," CRAIG & DE BURCA, *supra* note 4, at 309, observe that the Court can interpret Community law in the context of Article 177 "in such a way that it becomes obvious that a particular national law is in breach of the Treaty" [and it can declare in enforcement proceedings brought by the Commission or a Member State that a Member State is failing to fulfill its obligations under the Treaty].

[33] In Equal Opportunity's Commission v. Secretary of State for Employment, 1994, 1 WLR 409, the question was asked whether judicial review under Article 177 is available for the purpose of securing a declaration that certain United Kingdom legislation is incompatible with Community law (regarding, as well, the specific need for a declaration that the United Kingdom has breached its obligations under the Treaty). Although citing the *Factortame I* case as supporting such recourse, Lord Keith opined that "there is no need for any [such] declaration [by the national court that the United Kingdom or the Secretary of State was in breach of obligations under Community law]," because a declaration "that the threshold provisions of [the national law] in question are incompatible with Community law would suffice for the purpose sought to be achieved" and "is capable of being granted consistently with the precedent afforded by *Factortame*" (also discussed in CRAIG & DE BURCA, *supra* note 4, at 280).

VII. ARTICLE 177 AS MEANS FOR MARSHALLING NATIONAL COURTS IN RELATION TO RIGHTS WITH DIRECT EFFECTS

The Court of Justice has, by declaring rights with direct effects under Article 177, marshalled national courts to participate in the domestic sphere in the Community enforcement mechanism, by recognizing such directly effective rights in cases of clear, precise, unconditional Community provisions and measures, in order to ensure cooperation, effectiveness and uniformity of Community law. It held that the obligation of Member States to apply Community provisions extends to national courts called upon to apply them where they have direct effects.[34]

In particular, the obligation of cooperation under Article 5 of the Treaty would require national courts to read national legislations, as far as possible,[35] in conformity with Community provisions, as well as to enforce such provisions against all organs[36] or emanations of the State.[37]

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[34] Not without initial, widespread and continuing resistance; *see* Roth, W., *'The Application of Community Law in West Germany: 1980-1990'* (1991) 28 C.M.L. REV. 137-182; Schermers, H., *'The Scales in Balance: National Constitutional Court v. Court of Justice'* (1990) 27 C.M.L. REV. 97-105; Craig, P., *'Sovereignty of the United Kingdom Parliament after Factortame'* (1991) 11 Y.B.E.L. 221; Gaja, G., *'New Developments in a Continuing Story: The Relationship Between EEC Law and Italian Law'* (1990) 27 C.M.L. REV. 83-95; Petriccione, R., *'Italy: Supremacy of Community Law over National Law'* (1986) 11 E L. REV. 320; and Pollard, D., *'The Conseil d'Etat is European – Official'* (1990) 15 E.L. REV. 267. Snyder speaks of the function of Article 177, in the Community context, and of the broader implications for institutional development of the structure of the judicial liability system: "By breathing new life into the form of judicial cooperation envisaged by Article 177 it strengthens the vertical relations of collaboration within the judicial branch of the two levels of government. However, it does not directly involve any other national institutions such as parliaments. In addition, it does not necessarily strengthen existing relations between Community institutions, nor does it create new horizontal links between them, as might have been the case if, for example, the judicial liability system had been enacted by the Council, following a Commission proposal and in cooperation with Parliament . . .." *See* Snyder, F., The Effectiveness of European Community Law, (1993) 56 MLR 19, also quoted in CRAIG & DE BURCA, *supra* note 4, at 237-238.

[35] As far as concerns Treaty provisions, "a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means" (Simmenthal, 1978, E.C.R. 629). In proceedings concerning civil rights and obligations freely entered into by the parties, "it is for the national court or tribunal to apply binding Community provisions such as Articles 3(f), 85, 86 and 90 of the Treaty even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court or tribunal" Van Schijndel, 1995 I-4705.

As far as concerns regulations, a legislative provision of national law reproducing the content of a directly applicable rule of Community law can in no way affect direct applicability, or the court's jurisdiction under the Treaty (Case 34/73 Variola v. Amministrazione delle Finanze, 1973 E.C.R. 981).

To ensure effectiveness, the rules for enforcement of directly effective rights at national level must be adequate,[38] not less favourable than those made available nationally to similar claims, and should not in practice render the exercise of such rights impossible or excessively difficult.[39]

As far as concerns decisions, "it would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities have by means of a decision imposed an obligation in a Member State or all the Member States to act in a certain way, the effectiveness ("*l'effet utile*") of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law. Grad, 1970 E.C.R. 825.

And, as far as concerns directives, "when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty." Faccini Dori, I-3325. *See also* Case C-192/94 El Corte Ingles SA v. Cristina Blazquez Rivero, 1996 E.C.R. I-1281; Marleasing SA, E.C.R. I-4135, paragraps 8 and 9; Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891, paragraph 26; Case 222/84 Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, etc..

[36] Von Colson, 1954 E.C.R. 1891 paragraph 26 (against prison officials); Johnston, 1986 E.C.R. 1651. (State authority charged with the maintenance of public order and safety acting in its capacity of employer), etc..

[37] Case C-271/91 Marshall v. Southampton and South West Hampshire Area Health Authority, 1993 E.C.R. I-4367 (State acting in its capacity as an employer, also described in paragraph 9 thereof as "an authority which is an emanation of the Member State"); Case C-188/89 Foster and others v. British Gas plc., 1990 E.C.R. I-3313 (organizations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable in relations between individuals; "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals") etc..

[38] Case C-271/91 Marshall v. Southampton and South West Hampshire Area Health Authority (Marshall II), 1993 E.C.R. I-4367 (ruling that national rules on reparation which set a limit on the amount recoverable for injury to Community rights should be set aside, as it contravenes the standard of "adequacy"); *also* Von Colson, E.C.R. 1891, where the Court, regarding the prohibition on discrimination, ruled that: "if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then *in order to ensure that it is effective* and that it has a deterrent effect, that compensation *must in any event be adequate* in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application."

[39] Case C-208/90 Emmott v. Minister for Social Welfare and Attorney General, 1991 E.C.R. I-4269, reiterating that: "16 As the Court has consistently held (*see, in particular*, the judgments in Case 33/76 Rewe-Zentralfinanz AG and Rewe-Zentral AG v. Landwirtschaftskammer fuer das Saarland, 1976 E.C.R. 1989 and Case 199/82 Amministrazione delle Finanze dello Stato v. San Giorgio SpA, 1983 E.C.R. 3595), in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, *provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law.*" In this case, it particularly held "that Community law precludes the competent

To ensure uniformity of application of Community provisions, the informative[40] and precedential value[41] of direct effect rulings under Article 177 have been emphasized.

The field of Community measures capable of producing directly effective rights has broadened with the recognition that directives, when sufficiently clear, precise and unconditional, like regulations, can produce direct effects in favor of individuals as against the State, as well as its organs[42] or emanations,[43] upon failure by the State to timely or correctly transpose such directives.[44]

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authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by [directives], on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system." Advocate General Mischo, in the opinion he delivered in this case, argued that "[i]n the absence of [such] measures of harmonization, the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules," and "[t]he position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect," but "*[t]his is not the case where reasonable periods of limitation of such actions are fixed." Summing up his views, he states elsewhere in the opinion: "22. Thirdly, the conditions and time-limits provided for by national law must not make it impossible in practice to exercise the rights which the national courts are obliged to protect.* If that were the case, the competent Irish authorities would not be entitled to rely upon them and, above all, the national court would not be entitled to apply them. *The Court does not therefore accept the straightforward application, without restriction, of national law but insists that it should apply only in so far as it does not make the protection of the rights which individuals derive from the direct effect of Community law impossible in practice. That condition is fundamental, for it shows that it is the* ***principle of the effet utile of Community law which is the foundation of the relevant case-law and from which the answer to the question raised must be drawn.*** The importance of that principle in relation to the application of directives has indeed been established by the Court since its judgment in the *Grad* case. (4)."

[40] Joined Cases 28-30/62 Da Costa v. Nederlandse Belastingadministratie, 1963 E.C.R. 31 (even if they have already formed the subject of a preliminary ruling in a similar case); Case 14/86 Pretore di Salo' v. X 1987 E.C.R. 2545 (as long as it is considered necessary in order to give judgment in the main proceedings, as when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier); provided, it is not asked within the framework of proceedings between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce that court to give a ruling on the point (Case 104/79 Foglia v Novello (Foglia I), 1980 E.C.T. 745), or in the nature of a request for the Court to deliver advisory opinions on general or hypothetical questions instead of assisting in the administration of justice in the Member States (Case 244/80 Foglia v. Novello (Foglia II), 1981 E.C.R. 3045-3068). Case 66/80 Spa International Chemical Corporation v. Amministrazione delle Finanze dello Stato, 1981 E.C.R. 1191-1224 (there may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier).

[41] Case 283/81 SRL CILFIT v. Ministry of Health, 1982 E.C.R. 3415-3432 (when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions of the court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical). Parenthetically, this case also establishes formidable guidelines as to when national courts may find it unnecessary to avail of Article 177 rulings: in case of absence of relevance, "that is to say, if the answer to that question, regardless

VIII. Reforming National Procedures According to Direct Effect Rulings Under Article 177

Notwithstanding all the foregoing, however, when one looks back at the Article 169 enforcement mechanism and realizes the apparent weakness of the system that private enforcement proceedings address by way of pleas regarding directly effective Community rights, one perceives an enormous gap remaining between the power required to maintain the columns of cooperation, effectiveness and uniformity, on the one hand, and the reinforcement supplied by direct effect rulings under Article 177, on the other hand.

After all, the key to private enforcement still lies in the hands of national courts[45] and, while an Article 169 procedure hangs over the heads of such courts as might be inclined to disregard or ignore Community law, in particular direct effect rulings under Article 177, it is really nothing like a sword of Damocles in any sense of that allusion: the whole exercise could just end up where it started: at the weakness of the enforcement mechanism.

IX. Marshalling National Courts in Relation to Non-Directly Effective Rights: Compensation for Private Damages Arising from Default of Member States

The logical complement of directly effective rights are, of course, non-directly effective rights, so that after inventing, in the sense of discovering or finding from the system of the Treaty, the mechanism for private enforcement of directly effective rights, the missing direction can only be to invent, in the same sense aforesaid, a private enforcement procedure for non-directly effective rights.[46]

of what it may be, can in no way affect the outcome of the case," or when "it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt," a possibility the existence of which "must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community," which is to say that interpretation of Community law is the virtual monopoly of the Court.

[42] *See* note 36 *supra*.

[43] *See* note 36 *supra*.

[44] Case 148/78 Pubblico Ministero v. Ratti, 1979 E.C.R. 1629 (*so long* as the period prescribed for the Member States to incorporate the provisions of a directive into their internal legal orders has not yet expired, the directive cannot have direct effect; such effect only arises at the end of the period prescribed and in the event of default by the Member State concerned [*Italian Solange*]).

[45] *See* notes 8, 34, 35, 38, 39 *supra* and notes 48, 50, 51, 55 *infra*.

[46] Which, although operating after-the-fact of damage having been sustained, will nonetheless effectively deter disregard of such rights and prospectively encourage respect for them.

This is still consistent with the starting point, which is Article 169, the purpose of which is to enforce Member State obligations because, after all, at the flip-side thereof, are rights: that is, obligations of Member States may give rise to individual rights which, although not directly effective as to be by themselves entitled to enforcement by national courts in the absence of legislative transposition, are nonetheless rights which could provide a legal foundation for reparation of private damages causally linkable with the failure to fulfill those obligations.

Thus, recognizing damage claims by private individuals against Member States arising from breaches of Community obligations also reinforces by private means, on the national level, the Community enforcement procedure. This invention, which was first applied in the context of enforcement of non-directly effective Community rights,[47] also applies as a matter of course and with greater reason, to the enforcement of directly effective Community rights.[48]

Just how strong an element has thus been added by this form of reinforcement to the Community enforcement mechanism under Article 169 remains to be seen.[49]

[47] Francovich, E.C.R. I-3357; also Wagner Miret, E.C.R. I-6911 and Marleasing, E.C.R. I-4135.

[48] Advocate General Mischo, who also argued for the doctrines in the Brasserie du Pêcheur, E.C.R. I-1029 Dillenkoffer, E.C.R. I-4845 (*see* Opinion of Advocate General Tesauro in these two cases, which he both delivered on the same day), and Lomas, I-2553 (*see* Opinion of Advocate General Lager) cases, as early as in the opinion he delivered in Francovich, E.C.R. I-5357 made this quite clear thus: "1. Although, as Community law now stands, it is in principle for the legal system of each Member State to determine the legal procedure which will enable Community law to be fully effective, that State power is nevertheless limited by the very obligation of the Member States, under Community law, *to ensure such effectiveness*; 2. *That is true in respect not only of provisions of Community law which have direct effect but of all provisions whose purpose is to grant rights to individuals.* The lack of direct effect does not mean that the result sought by Community law is not to grant rights to individuals, but merely that these are not sufficiently precise and unconditional to be relied upon and applied as they stand; 3. In the event of failure to implement a directive or its incorrect implementation, a Member State *deprives Community law of the desired effect.* It also commits a breach of Article 5 and the third paragraph of Article 189 of the Treaty, which affirm the binding nature of the directive and require the Member State to take all the measures necessary for its implementation. . . ."

[49] The simplicity of the doctrine in the area of damages arising from failure to implement a directive within the prescribed period (requiring only an identification of rights and the content of those rights from Community provisions, the existence of damage and a causal link between that failure and the resulting damage) is matched by a different set of criteria (derived from doctrines applicable to non-contractual damage claims against Community institutions) made applicable especially where the Member State's obligation is characterized by latitudes of discretion, becoming somewhat illusive as those latitudes of discretion broaden.

Besides, this method of private enforcement draws upon national remedial rules,[50] as the Court of Justice has endeavored to emphasize that it does not – so much as it cannot – create new remedies (especially private ones operating on national level), "finding" that the right to damages arising from breach of Community obligations by Member States is "inherent in the system" of the Treaty, not a rule of its own creation.[51]

With this private mechanism being thus dependent for enforcement upon national courts, the Community stares right back at Article 169 procedure as the medium for enforcement if national courts nonetheless ignore or disregard Community rights which are the subject of such private actions before them.

[50] Advocate General Mischo had also addressed this concern in Francovich: "42. It follows from the foregoing that the possible compensation of an individual for loss or damage suffered as a result of the breach of a provision of Community law with direct effect has its foundation in the Community legal order itself. Of course, if *other remedies capable of ensuring the full force and effect of Community law* are available in the national legal system, they may be used, but as the Court pointed out in its judgment in Case 179/84 Bozzetti, 1985 E.C.R. 2301, paragraph 17, although it is 'for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law... the Member States are responsible for ensuring that those rights are effectively protected in each case'. Accordingly, if the payment of compensation is the sole means in the particular circumstances of ensuring effective protection, the Member State is under an obligation by virtue of Community law to make available to individuals an appropriate remedy enabling them to claim compensation."

[51] In Case 158/80 Rewe v. Hauptzollamt Kiel, 1981 E.C.R. 1805, the questions was: "3. Does a breach of a Community regulation give directly applicable rights to a person whose rights have been adversely affected by provisions laid down by the law or administrative action of a Member State or the implementation thereof which are inconsistent with the provisions of that regulation *so that he may bring an action before a national court for the application of measures contravening Community law to be discontinued or for the provisions of Community law to be complied with?*" The Court, in reply, explained that "although the Treaty has not made it possible in a number of instances for private persons to bring a direct action, before the Court of Justice, it was not intended to create new remedies before the national courts to ensure the observance of Community law other than those already laid down by national law." On the other hand, "the system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of actions provided by national law to be available for the purpose of ensuring observance of Community provisions having direct effect," on the same conditions concerning the admissibility and procedure as would apply "were it a question of ensuring observance of national law" (CRAIG & DE BURCA, *supra* note 4, at 202-203). Advocate General Mischo did not think this should alter the conclusion in Francovich E.C.R. I-5357, at paragraph 47; "a Member State cannot object to the bringing of an action for damages against the State in respect of the infringement of a right granted to individuals directly by Community law on the ground that its national legal system recognizes the principle of immunity of the public authorities, in particular the legislature; once the action for damages exists as a form of action, a Member State can no longer rely on the status of the person alleged to be liable in order to deprive individuals of the possibility of bringing such an action and thus impair the effectiveness of Community law with direct effect."

X. OTHER DIRECTIONS FOR FURTHER STRENGTHENING PRIVATE ENFORCEMENT

At least two further directions have aspired towards the same objective of ensuring cooperation from Member States by reinforcing the public enforcement mechanism under Article 169: (1) by Treaty amendment relating to Article 169; and (2) by more creative interpretative rulings under Article 177.

As regards the first, the provisions of Article 171, as amended by the Treaty on the European Union, which was noted at the outset, now prescribes a penalty payment system for Member States declared under Article 169 to have failed to fulfill Community obligations; however, the absence of a "collection system" (a situation which could render the payment of the fine imposed as another obligation which the Member State concerned may fail to fulfill, causing the process to loop back to Article 169 procedure recursively at every instance of such failure), and the imperfect mechanism for making the fine commensurate with the gravity and magnitude of breaches by Member States, appear to have largely emasculated those provisions.[52]

As regards the second, horizontal direct effects had been advocated for all directives which Member States have failed to timely or correctly transpose, not only to induce immediate cooperation from Member States but also to ensure effectiveness and uniformity of application of Community measures in the form of directives. Also, the possibility of actions directly filed by private individuals before their national courts to compel Member States of which they are nationals to perform obligations (as distinguished from recognizing rights) under the Treaty had been attempted.

[52] CRAIG & DE BURCA, *supra* note 4, at 365, describe this development as "sharpening Article 169 (thus implicitly suggesting its bluntness, without describing it as weak) as an enforcement procedure." The efficiency and effectiveness of this new power has been questioned, however "given that there is no real mechanism" for "collection" should a Member State refuse to comply, and given the "absence of injunctive powers" on the part of the Court. Craig points out, in footnote 16, at 365, that "[a]lthough the Court has power to order injunctive measures in interim proceedings under Article 186, it does not have these powers under Article 171 when giving judgment in Article 169 proceedings." However, the Commission, despite its acknowledgement of serious delay in complying with adverse judgments, "seems concerned to emphasize more the conciliatory methods of ensuring compliance with Community law, and to look at the 'penalty payment' as a supplementary tool rather than its most important enforcement method." It states that while this new instrument does "strengthen its hand (thus implicitly suggesting an improvement from previous weakness, also without stating that it had been weak)," it stressed that "its enhanced power would not lead it to neglect more co-operative forms of negotiation with Member States over the enforcement of Community law" *Id.* at 366. The Commission thus "uses Article 169, where possible, as a tool to secure compliance with Community law, rather than as a means of bringing the States before the Court" *Id.* at 377. *See* also Curtin's *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, (1993) 30 17, where he envisages problems in the application of the "penalty payment" provision now incorporated into Article 171 (quoted in CRAIG & DE BURCA, *supra* note 4, 365-366).

The Court of Justice has, however, so far refused to pursue the first. In *Faccini Dori*,[53] the Court declined to follow the recommendation of the Advocate General that "in future cases," horizontal direct effect should be accorded to directives.[54] A qualified answer appears to have met the second, in a case involving directly effective rights: that depends on whether such a remedy is available under national rules.[55]

[53] *See supra* note 2.

[54] Advocate General Lenz stated in Faccini Dori, I-3325: "Following the judgments in *Foster* (32) and *Marleasing*, (33) calls have increasingly been heard in academic circles for directives to be given horizontal effect. Among the members of the Court, to date Advocate General Van Gerven (34) and, recently, Advocate General Jacobs (35) have spoken out in favour of the horizontal applicability of directives . . . albeit not in response to questions having a bearing on the determination of the cases then before the Court. (36) . . . 61. In my view, the nature of directives does not preclude their having horizontal effect. Neither would that eliminate the demarcation between regulations and directives, since directives cannot have direct effect until the period for transposition has elapsed and only in the case of clear and unconditional provisions. . . . 73. In the final analysis, I consider that for reasons of legal certainty it is not possible to envisage directives having horizontal effect as regards the past. As far as the future is concerned, however, horizontal effect seems to me to be necessary, subject to the limits mentioned, in the interests of the *uniform, effective application* of Community law."

[55] In Rewe, E.C.R. 1805, the government of the United Kingdom submitted that while the Court has frequently recognized that directives, if they are sufficiently precise, may be directly effective to enable a citizen to invoke their provisions against a defaulting Member State endeavouring to enforce against him personally inconsistent national measures (judgment of 5 April 1979 in Case 148/78 Pubblico Ministero v. Ratti, (1979) E.C.R. 1629, judgment of 23 November 1977 in Case 38/77 Enka BV. v. Inspecteur der Invoerrechten en Accijnzen, 1977 E.C.R. 2203), *that is, however, a very different matter from endeavouring by private action to compel a Member State to remedy its default generally. According to the United Kingdom such a general remedy is available only to the Commission under Article 169 of the Treaty.* The Commission, in turn, argued that the legal system laid down by the Treaty prescribes that only the Court of Justice has jurisdiction in connection with an infringement of the Treaty by a Member State and then only on the application of the Commission or of another Member State, and that consideration prompts the Commission to refuse to recognize a personal right of the kind referred to in the question. In tersely reasoning its ruling (*see supra* note 51), the Court replied that "that does not mean, however, that in such cases individuals do not have any rights. The order for reference shows that the national law fully authorizes a claim that rights have been infringed by unlawful conduct of the authorities in breach of Community law or by invalid national laws. In order to make such a claim individuals do not require a personal right based on Community law. As the Court has already stated, Community law does not require in all cases that complete protection should be available before the national courts (judgment of 6 May 1980 in Case 152/79 Lee v. Minister for Agriculture, 1980 E.C.R. 1495). *The principal point is that the effectiveness of Community law must not be fundamentally jeopardized* (judgment of 21 January 1976 in Case 60/75 Russo v. Aima, 1976 E.C.R. 45)." Also emphasizing that the two remedies are not mutually exclusive where a national remedy is available for private enforcement, Advocate General Tesauro opined in Case 332/88 Alimenta v. SA Doux, 1990 E.C.R. I-2077: "It should then be borne in mind that, in the event of a Member State making use of the right to prohibit imports conferred on it by Article 9 of the directive in an abusive or discriminatory manner, creating unjustified obstacles to trade, the usual remedies provided for in the Treaty and in the national legal systems themselves would be available. More particularly, the Commission could initiate the Treaty-infringement proceedings provided for in Article 169 of the EEC Treaty and *the aggrieved trader could have recourse to the national judicial authorities, possibly relying on the direct applicability of Article 30 of the Treaty.*"

One proposition is for nationals of Member States, as private individuals, instead of waiting to suffer damages from the failure of Member States to transpose directives on time (and thereby be entitled to claim compensation for damages under *Francovich*) and in anticipation of the possibility of suffering such damage or of enjoying non-directly effective rights flowing from such directives, to file an action before the courts of such Member States to compel transposition.[56] At least one case appears to forbid this course.[57]

As though "to throw the baby with the bath water," both problems can be completely avoided by the proposition of making directives directly applicable without need of transposition, as in case of regulations. That, however, loses sight of the necessary difference that exists, and must exist, between directives and regulations under Article 189[58] which contemplates certain measures that the Community is bereft of competence to legislate upon without according Member States latitudes of discretion in terms of forms and methods.[59]

[56] But transposition of directives obviously involves the exercise of legislative prerogatives, and the writer of this paper knows of no legal system in which the exercise of legislative prerogatives, one way or another, can be mandated by court injunction. Article 189 evidently recognizes ranges of legislative prerogatives and apparently accords respect, or compromises, by conceding to national legislatures latitudes of discretion as to form and methods for bringing about the results sought by measures that require transposition. That situation is different from the imposition of State liability for the injurious exercise or non-exercise of such legislative prerogatives, as Advocate General Tesauro has underscored in his opinion in Brasseri du Pûcheur, E.C.R. I-1029: "Indeed, the context we are dealing with here is completely different from that in which the theory of the immunity of the State in its capacity as a legislator was developed in certain Member States. The Commission correctly pointed out at the hearing that *in national law there can hardly be a situation where not only is the legislature under the obligation to enact a law, not only is it possible to determine with a sufficient degree of precision what it must do, but in addition the legislature must act within a certain period.* In my view it is not excessive to say that *in relation to the transposition of directives the legislature is in a situation close to that of the administration responsible for the implementation of the law.*"

[57] Advocate General Lenz in Case 228/87 Criminal Proceedings against Persons Unknown, 1988 E.C.R. 5099, stated: "It falls to the Commission to monitor the conformity with Community law of the conduct of the Member States and, in the event of a breach, it is that institution which, by issuing a reasoned opinion, initiates the procedure under Article 169 for a declaration of a failure to fulfil obligations. Nor may the right to bring before the Court the question of the compatibility of the conduct of a Member State with Community law be brought within the jurisdiction of national courts indirectly by means of the preliminary reference procedure. On the contrary, it is for the national courts to examine, on their own responsibility, whether the action of the Member State is compatible with the Community legal order and draw the appropriate inferences from their findings. In this task, the Court provides its assistance only by the interpretation of Community law." On the other hand, according to Joined Cases T-479/93 and T-559/93 Bernardi v. Commission, 1994 E.C.R. II-1115: "35 The Court finds that the Treaty makes no provision for any legal remedy enabling natural or legal persons to bring proceedings before the Community judicature on any issue regarding the compatibility of the conduct of the authorities of a Member State with Community law." Consequently, applications by private persons for a declaration that a Member State has infringed Community law are manifestly inadmissible. But *see supra* note 33. In *Costa*, E.C.R. 583 the Court, speaking of Article 12 of the Treaty, also stated: "For its part, the

XI. REINFORCING ARTICLE 169 ITSELF

There have been rulings by the Court of Justice which appear to have strengthened the Article 169 litigation aspect itself, causing it to gain substantially in terms of importance. Even after the State breach of Community obligation has been remedied, it has been held that an enforcement action under Article 169 would still be admissible. The issue for the Court is "whether the Member State was in breach at the time the Commission found it necessary to initiate proceedings before the Court." In other words, "whether the failure indeed occured."[60]

Thus, in certain circumstances discussed above, when a State fails to implement a directive which was intended to benefit individuals, Community law will render the State liable in damages to those individuals who have suffered loss as a result. In that connection, an infringement finding under Article 169 may constitute an important means, "albeit not a necessary one," of showing the illegality of the State action. Hence, the fact that the infringement or illegality has

Commission is bound to ensure respect for the provisions of this Article, but this obligation does not give individuals the right to allege, within the framework of Community law and by means of Article 177 either failure by the State concerned to fulfill any of its obligations or breach of duty on the part of the Commission." Finally, in Case 98/86 Ministere Public v. Mathot, 1987 E.C.R. 809, in the context of directly effective rights injured by reverse discrimination: "11 It is correct that Directive 79/112 created obligations concerning the labelling and presentation of foodstuffs marketed in the entire Community without permitting any distinction to be drawn according to the origin of those foodstuffs, subject only to the condition contained in Article 3 (2). *National rules which impose those obligations only on domestic products to the exclusion of products imported from other Member States therefore discriminate against certain traders contrary to Community law* by virtue of the fact that the requirements of the directive are not yet applied to imported products. However, *such a situation does not give those traders the right to seek exemption from the obligations laid down in the directive. It is for the Commission to ensure that the national authorities put an end to that situation by extending the scope of the national rules to all the products covered by the directive.*"

[58] But note the views of Advocate General Lenz in Faccini Dori, I-3325 (1994) (at paragraph 61).

[59] Where the Court held: "24 The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas *it has competence to do so only where it is empowered to adopt regulations.*"

[60] Lagrange in Case 7/61 Commission v. Italy, [1961, 1962]). The reasons offered to explain why enforcement actions may be admissible even after the infringement has been cured are: (1) the Commission's continued interest in bringing the action must be upheld because, otherwise the defaulting State will remain "safe to carry on its improper conduct in the absence of any judgment finding that it was in breach of its obligations"; (2) the continuing need to rule on the legality of short breaches (that is "breaches of short duration" or "limited in time"), the duration of the conduct contrary to the Treaty not being an indication of the gravity of the infringement; and (3) the practical need to establish the liability the defaulting Member State may incur, by reason of its failure to fulfill its obligations, "towards those to whom rights accrue as a result of that failure" (CRAIG & DE BURCA, *supra* note 4, at 381-383).

been remedied by the time Article 169 proceedings are heard does not preclude the importance of securing a ruling on the legality of the past conduct of the State.[61]

Also adding significant measures, in terms of internally generated strength, to the reinforcement of the Article 169 procedure is the demonstrated firmness and constancy, in the context of enforcement proceedings, of the Court of Justice which has not been very receptive to attempts to raise defenses in enforcement proceedings, "although Member States have not lacked ingenuity or resourcefulness in providing reasons for their failure to fulfill Treaty obligations."[62] Examples of such unsuccessful defenses[63] were: (1) *force majeure*;[64]

[61] Steiner, J., From Direct Effect to *Francovich'* (1993) 18 E.L. REV. 3, (1993) commenting on Francovich, 1991 E.C.R. I-5357 (1991), states that "special characteristics" and "particular difficulties" of Community law lie in its lack of precision and uncertainty of scope, such that the precise nature of a State's obligation may not be clear until elucidated by the Court. A ruling under Article 169 (or Article 177) will undoubtedly clear matters, not only for the party concerned but for all the Member States (*see also* CRAIG & DE BURCA, *supra* note 4, at 383). That the absence of such a ruling does not, however, prejudice private claims for damages is clearly indicated in Brasserie du Pûcheur, 1996 E.C.R. I-1029 above: "In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the Member State concerned would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement." Also, as early as *Van Gend*, note 10 *supra*, the Court has stated: "A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals. *There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty;*" furthermore, "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States."

[62] CRAIG & DE BURCA, *supra* note 4, at 390.

[63] *Id.* at 390-393, and discussions therein.

[64] Case 77/69 Commission v. Belgium, 1970 E.C.R. 237, invoking lapse of draft legislation owing to the dissolution of Parliament as basis for claiming *force majeure*, which the Court overrruled on the ground that liability under Article 169 "arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in case of a constitutionally independent institution"; Cases 48/71 Commission v. Italy *(Art Treasures II)*, 1972 E.C.R. 527 and 7/68 Commission v. Italy *(Art Treasures I)*, 1968 E.C.R. 423, invoking difficulties encountered in parliamentary procedures required to abolish the offending measure characterized as "outside its control," which the Court overruled on the ground that "any other conclusion

(2) lack of inertia or opposition to the application of Community law;[65] (3) illegality of the Community measure on which the infringement proceedings are based;[66] and, (4) concurrent breach by other Member States.[67]

would subject the application of Community law to the varying laws of the Member States in this regard;" similar attempts to disclaim responsibility in other cases were also rejected on the ground that "a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits laid down in Community directives," thus precluding the argument "that the breach was brought about by another organ or institution of the State which is independent of the Government" (CRAIG & DE BURCA, *supra* note 4, at 391, with reference to note 74). However, one situation which the Court agreed could constitute "force majeure" was "where a bomb attack presented 'insurmountable difficulties,' rendering compliance with the Treaty impossible" (Case 33/69 Commission v. Italy, 1970, E.C.R. 93, albeit the Court was not satisfied in that case that the bomb attack "did render compliance excessively difficult by the time the proceedings were brought").

[65] Case 301/81 Commission v. Belgium, 1983 E.C.R. 467, holding that what matters is "an objective finding of a failure to fulfill obligations" and not "proof of any inertia or opposition on the part of the Member State concerned," the breach in question not requiring "deliberate infringement or moral wrongdoing," as CRAIG & DE BURCA, *supra* note 4, at 392, point out.

[66] Case 226/87 Commission v. Greece, 1988 E.C.R. 3611, ruling that a Member State cannot plead the unlawfulness of a decision addressed to it as a defense in an action under Article 169, because other Treaty provisions permit judicial review of the lawfulness of measures adopted by Community institutions, or the failure to adopt such rules, although for different objectives and subject to different rules.

CRAIG & DE BURCA, *supra* note 4, at 392-393, however, suggest that a plea of illegality might be a defence to an action under Article 169: (1) where the earlier measure was not a decision addressed to the Member State in question, but a regulation the illegality of which might reasonably not have been apparent to the Member State until the Commission brought enforcement proceedings (*citing* the view of Advocate Ceneral Mancini in Case 204/86 Commission v. Greece, 1988 E.C.R. 5323 and Case 226/C87 Commission v. Greece, 1988 E.C.R. 3611; for an unsuccessful attempt to plead the illegality of a directive (rather than a decision addressed to it) which the State had failed to implement, Craig invites attention to C-74/91 Commission v. Germany, 1992, E.C.R. I-5437); (2) where the Community measure was so gravely flawed as to be legally "non-existent" (*see* C-137/92P Commission v. BASF and Others (PVC), 1994 E.C.R. I-2555, discussing the principle of "non-existence"); and (3) "possibly," in extreme cases where the decision infringes a principle of a constitutional nature (*citing* Cases 6 and 11/69 Commission v. France, 1969 E.C.R. 523; Case 70/72 Commission v. Germany, 1973 E.C.R. 813, and Case 156/77 Commission v. Belgium, 1981 E.C.R. 1881; *see* CRAIG & DE BURCA, *supra* note 4, at 393, note 76 therein). *See contra*, note 9 *supra*, where defences to Article 169 proceedings, albeit clearly of a category different from the foregoing, were acknowledged or sustained.

[67] Case C-146/89 Commission v. United Kingdom, 1991 E.C.R. 3533, holding that a Member State cannot justify its failure to fulfill obligations under the Treaty by pointing to the fact that other Member States have also failed, and continue to fail, to fulfill their obligations, the reason being that "the implementation of Community law by Member States cannot be made subject to a condition of reciprocity" while other Treaty provisions "provide a suitable means of redress for dealing with the failure by the Member States to fulfill their obligations under the Treaty"; however, in CRAIG and DE BURCA, *supra* note 4, at 392, at note 75 therein, it is observed that while the Court rejected the "reciprocity" theory, it considered the "exemplary conduct" of the United Kingdom in later voluntarily remedying its breach and, therefore, ordered "each part to bear its own costs, rather than ordering the UK to bear all".

CONCLUSION

The public, centralized Community level enforcement reserved to the Commission by Article 169, on the one hand, and the private, decentralized, and national level enforcement made available to nationals of Member States through the medium of Article 177 direct effect rulings, on the other hand, have distinct "objects, aims and effects," and a parallel may not indeed be drawn between them. But, they can and should be viewed as related components of the entire Community enforcement system, of which the neglect of one diminishes the other. A unified view of their complementary roles in the system truly provides a useful wholistic perspective of their interplay as an ensemble in the total Community enforcement process.

Such a unified approach likewise provides a context for better understanding the relationship shown to exist between breaches of Community obligations by Member States and the private remedy of reparation for damages arising from the failure to fulfill such obligations.