

Editorial

Damages for Breach of Community Law by Member States

A major incentive to compliance with Community law is undoubtedly the prospect of financial sanctions. These can be informal, such as blocking all decisions on applications for assistance from one or more of the structural funds, or formal, such as requiring the repayment of financing granted from the structural funds when Member States have awarded contracts for works supported by such financing in breach of the public procurement directives or Articles 30 or 59 EEC. But it is one thing for the Commission to apply sanctions, it has not always proved easy for individuals to obtain damages for loss suffered through breach of Community law by national administrations. Readers will no doubt remember the judgment in *Bourgoin v. MAFF* (1986) 2 CMLR 267 in the United Kingdom which followed the judgment in Case 40/82 *Commission v. United Kingdom* (1982) ECR 2793. In that case a settlement was reached out of court so the appeal to the House of Lords was never heard. Particularly when it is blatantly evident that the breach is nothing more than a cynical manipulation for national self-interest it has become essential that the Court of Justice now pronounce on the question of liability in damages.

In its judgment in Cases C-6 and 9/90 *Francovich et al. v Italy* (judgment of 9 November 1991) the Court addressed the question of state liability for failure to implement a directive. The Court found that Directive 90/987 (O.J. 1980 L 283/23 on employee protection in the event of insolvency of the employer) did not specify the institution responsible for the guarantee of the payment of unpaid salaries and that the state could not be regarded as that institution solely because it had failed to implement the directive by the due date. Accordingly, the Court concluded that even the precise and unconditional identification of the beneficiaries and content of the guarantee would not, on their own, allow the directive to have direct effect. It went on, though, to discuss State liability for the loss which individuals had suffered through the failure to implement the directive, noting that national courts had to ensure the full effect of Community rules and the rights which they conferred on individuals. Further, in view of the importance of State action in ensuring that such rights could be upheld, the Court found that State liability for damage caused to individuals was inherent in the scheme of the Treaty. The Court further upheld a long-standing view of the Commission that Article 5 EEC obliged the Member States to compensate individuals for such damage. Of course, the nature of the infringement would affect the conditions in which liability would arise. In the case of failure to implement

a directive it would have to be shown: first, that the result of the directive were to confer rights on individuals; secondly, the content of those rights were identifiable on the basis of the provisions of the directive, and, thirdly, that there was a causal link between the failure to implement the directive and the loss suffered by the individual concerned.

If these conditions were fulfilled the Member State would be liable within the context of national law on liability, although, as the Court has stated on myriad occasions in relation to repayment of tax or duties unlawfully levied, the substantive and formal conditions would have to be no less favourable than those applicable to similar claims under national law and could not be organised so as to make compensation practically impossible or excessively difficult to obtain. *In casu* the national court had to ensure that within the framework of the relevant national laws the applicants had a right to compensation for the damage they had suffered through non-implementation of the directive.

If this reasoning is applied to directly effective articles of the EEC Treaty, such as Article 30, we may yet see the Member States ceasing to defend the indefensible. Ministers might no longer lay claim to all the Christian virtues except resignation. And pigs might fly?

Laurence Gormley