

# State Liability for Violation of EC Law in Italy: The Reaction of the Corte di Cassazione to *Francoovich* and Future Prospects in Light of its Decision of July 22, 1999, No. 500

Luigi Malferrari\*

## I. Introduction

Some eight years have passed since the *Francoovich* decision of the Court of Justice of the European Community (hereinafter "ECJ").<sup>1</sup> Much has been written about it.<sup>2</sup> However, less attention has been paid to the national decisions that followed *Francoovich*. Since *Francoovich* was an Italian case, it is worthy to analyze the reaction of the Italian Corte di Cassazione to the decision of the ECJ.<sup>3</sup>

This article is structured as follows.<sup>4</sup> First, it sums up the facts that gave rise to the *Francoovich* decision and the legislation Italy enacted to address its consequences. Second, it analyzes the Corte di Cassazione's case law on the question of who should pay for the damages caused by the breach of EC law (hereinafter "*Francoovich* damages"). Third, it evaluates the Corte di Cassazione's case law on the question of how the loss ensuing from late payment should be calculated in regard to *Francoovich* damages. Fourth, it discusses the (still open) question of what should be the legal basis for *Francoovich* liability in Italy in the future. This last question will be analyzed in particular in light of the decision of the Corte di Cassazione of July 22, 1999, No. 500 which has radically changed the Italian regime of State liability.

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\* Candidate for a doctor's degree (Heidelberg University); LL.M., Harvard Law School; Dottore in giurisprudenza, Università di Bologna. Parts of this paper were presented at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg on March 22, 1999 and August 2, 1999. The author would like to thank the members of the Max Planck Institute for their comments. He would also like to thank Prof. Joseph Weiler and Prof. Paolo Mengozzi for the opportunity to present earlier versions of this work in their courses, and Betsy Røben for input on the substance and language of the article.

<sup>1</sup> C-6/90 and 9/90 *Francoovich* [1991] ECR I-5357.

<sup>2</sup> See for example the list of publications mentioned in Paolo Mengozzi, *Il diritto comunitario e dell'Unione europea* 160-161 (1997).

<sup>3</sup> The Corte di Cassazione is the court of last appeal in civil and criminal matters in Italy, i.e. the highest judicial organ responsible for the interpretation of the statutes concerning civil and penal law.

<sup>4</sup> Parts 2. and 3. of this article build upon Luigi Malferrari, *The "Rebellion" of the Italian Corte di Cassazione against the Francoovich Decision of the ECJ*, in: *Introduction to the Law and Institutions of the European Union. Teaching Materials for 1998/99, Unit 4*, 42-44 (J. Weiler & L. Malferrari eds., 1998).

## II. The *Francovich* Case: Its Origins and Aftermath in Italy

The facts that gave rise to the *Francovich* case are generally well-known. They will be recalled here for reason of clarity.

In 1980 the Council of the European Community issued a directive regarding the protection of employees in the event of the insolvency of their employer (Directive 80/987, hereinafter "the Directive").<sup>5</sup> The deadline for the implementation elapsed on October 23, 1983.<sup>6</sup> By that time, Italy had not transposed the Directive into national law. Subsequently, the European Commission brought an action against Italy under Art. 225 (ex 169) TEC.<sup>7</sup> In 1989 the ECJ ruled that Italy had failed to fulfill its Treaty obligations by not implementing the Directive.<sup>8</sup> This judgment, however, did not yield any practical results because the Italian legislator remained inactive.<sup>9</sup>

The problem consisted not only of assuring the compliance of Member States with EC law but also of protecting the rights the Community legal order bestows upon individuals. Since in this case the individuals' rights at issue concerned the guarantee of employees' wages in the event of the insolvency of their employer, their protection was an urgent and vital problem for a number of Italian workers. Some of them brought proceedings before two *Pretori* (judges of 1<sup>st</sup> instance in labor law and other matters) claiming to be entitled to obtain from the Italian State the guarantee provided for in the Directive or, in the alternative, compensation.<sup>10</sup> The said *Pretori* referred the question to the ECJ according to Art. 234 (ex 177) TEC.<sup>11</sup> In its *Francovich* judgment of November 19, 1991 the ECJ denied the direct applicability of the Directive on the grounds that it did not identify the person liable to provide the guarantee.<sup>12</sup> At the same time, the ECJ held that, under certain conditions, a Member State has to pay for the damages caused to individuals by its breach of Community law (in this case, Italy's failure to transpose the Directive into national legislation).<sup>13</sup>

Shortly after the *Francovich* judgment, Italy enacted a statute (Legislative Decree No. 80 of 1992, hereinafter "the Statute") to implement the Directive.<sup>14</sup> To this end, Art. 2 paras. 1, 2 and 4 of the Statute determined the extent of the protection employees must have in the future in the event of the insolvency of their

<sup>5</sup> Council Directive 80/987 of October 20, 1980, 1980 OJ (L 283) 23.

<sup>6</sup> *Id.* Art. 11.

<sup>7</sup> C 22/87 *Commission v Italy* [1989] ECR 143.

<sup>8</sup> *Id.*

<sup>9</sup> See C-6/90 and 9/90 *Francovich* [1991] ECR I-5357, rec. 7.

<sup>10</sup> *Id.* rec. 5.

<sup>11</sup> *Id.* rec. 5-6.

<sup>12</sup> *Id.* rec. 10 et seq.

<sup>13</sup> *Id.* rec. 31 et seq. The conditions for *Francovich* liability are as follows: 1) the result prescribed by the Directive entails the grant of rights to individuals; 2) it is possible to identify the content of those rights on the basis of the provisions of the directive; 3) a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties (rec. 40).

<sup>14</sup> Decreto Legislativo No. 80 of January 27, 1992, *Gazzetta Ufficiale* No. 36 of February 13, 1992, 26.

employer. For our purposes, the key provision of the Statute is Art. 2 para. 7 which laid down the details for the payment of damages caused by the non-implementation of the Directive. This provision is worded as follows:

“For the purposes of determining any compensation to be paid to employees under the procedures referred to in Article 1(1) (namely, insolvency, composition with creditors, compulsory administrative liquidation and the extraordinary administration of large undertakings in periods of crisis) by way of reparation of the loss or damage resulting from the failure to transpose Directive 80/987/EEC within the prescribed period, the relevant time-limits, measures and procedures shall be those referred to in Article 2(1), (2) and (4). The action for reparation must be brought within a period of one year to run from the date of entry into force of this Decree.”<sup>15</sup>

From the wording of the Statute, however, it was not clear how to answer two important questions: 1) who should pay; and 2) how interest charged for late payment should be calculated on the amount set by Art. 2 para. 7 of the Statute. These two questions have since been resolved by the Corte di Cassazione. The legislator also left open a third question which is still unresolved: what national rules judges should apply in the future to determine the details for payment of *Francovich* damages if there is no specific remedy such as that provided for in Art. 2 para. 7 of the Statute.

### III. The First Question: Who Should Pay?

#### 1. Civil liability of public authorities in Italy

Before plunging into the content of the decisions of the Corte di Cassazione, it is necessary, as a preliminary point, to consider the basic rules governing civil liability of public authorities in Italy. The central provision is Art. 2043 Civ. Code which is phrased in very general terms. It is worded as follows:

“Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.”<sup>16</sup>

In the last forty years the Corte di Cassazione has continually expanded the sphere of application of Art. 2043 Civ. Code to protect a vast variety of interests injured by private parties.<sup>17</sup> By contrast, until very recently it had interpreted the conditions for applying Art. 2043 Civ. Code to the conduct of public authorities much more narrowly.<sup>18</sup> Despite the wording of Art. 2043 Civ. Code and its broad

<sup>15</sup> This translation is from joined cases C-94/95 and C-95/95 *Bonifaci* [1997] ECR I-3969, rec. 10.

<sup>16</sup> This translation is from Mario Beltramo/Giovanni E. Longo/John H. Merryman, *The Italian Civil Code* (1996). The original text of Art. 2043 Civ. Code reads as follows: “Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.”

<sup>17</sup> See Corte di Cassazione, decision of July 22, 1999, No. 500, rec. 4 (July 25, 1999) <[http://www.ilsole24ore.it/\\_norme/cittadini/](http://www.ilsole24ore.it/_norme/cittadini/)>. See also Francesco Galgano, *Diritto Privato* 339 et seq. (1994).

<sup>18</sup> Corte di Cassazione, decision of April 15, 1958, No. 1217, *Rivista Amministrativa della Repubblica Italiana*, 479 [1958]. More recently, see Corte di Cassazione, decision of March 3, 1993,

interpretation in regard to harmful conduct by private persons, from the 1950s until the decision of July 22, 1999, No. 500 the Corte di Cassazione had consistently held that Art. 2043 Civ. Code can be applied to public authorities only when they violate *diritti soggettivi* (= individual rights) but not when they violate *interessi legittimi* (= legitimate interests) or *interessi semplici* (= simple interests).<sup>19</sup> Through such restrictive interpretation of Art. 2043 Civ. Code the Corte di Cassazione had carved out for public authorities an area of immunity from civil liability.

*Interessi semplici* are interests the legal system does not protect in any way whatsoever.<sup>20</sup> The key distinction here is that drawn between *diritti soggettivi* and *interessi legittimi*. *Diritti soggettivi* can exist in regard to situations where private individuals deal with other private individuals or public authorities. *Interessi legittimi*, by contrast, exist in principle only in regard to some – but not all – relationships between private individuals and public authorities.<sup>21</sup> An example of *diritto soggettivo* is the right to physical integrity an individual enjoys toward public authorities.<sup>22</sup> An example of *interesse legittimo* is the landowner's expectation to the issue of a building permit by the public authorities.<sup>23</sup>

It is difficult to draw a line between *diritti soggettivi* and *interessi legittimi*. According to the Corte di Cassazione, the distinction between *diritti soggettivi* and *interessi legittimi* lies in the fact that the former are protected in a different way and to a larger extent than the latter.<sup>24</sup> For example, a special category of courts (the administrative courts) is in principle competent for claims regarding *interessi legittimi*, whereas ordinary courts are in principle competent for claims regarding *diritti soggettivi*.<sup>25</sup> An example of the greater protection awarded to *diritti soggettivi* lies in the fact that, as illustrated above, under the traditional case law Art. 2043 Civ. Code protected *diritti soggettivi* but not *interessi legittimi* violated by public authorities.<sup>26</sup> Although the Corte di Cassazione's distinction accurately describes the current legal situation, it is not particularly useful. In fact, it appears tautological. The fact that an individual's material interest enjoys the

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No. 2667, I Il Foro Italiano 3062 [1993]; decision of July 22, 1999, No. 500, rec. 5 et seq. (note 17). On this subject see also Pier Giuseppe Monateri, La Responsabilità Civile, in: Trattato di Diritto Civile 806 (R. Sacco ed., 1998).

<sup>19</sup> Cf. Corte di Cassazione, decision of April 15, 1958, No. 1217, Rivista Amministrativa della Repubblica Italiana 479 [1958]. See Monateri (note 18), at 812 et seq.

<sup>20</sup> Vincenzo Cerulli Irelli, Corso di Diritto Amministrativo 366 et seq. (1997).

<sup>21</sup> Corte di Cassazione, decision of July 22, 1999, No. 500, rec. 5 (note 17).

<sup>22</sup> See Corte di Cassazione, decision of February 18, 1997, No. 1501, Giust. Civ. Mass. 268 [1997] (stating the full protection of the right to physical integrity vis-à-vis public authorities).

<sup>23</sup> Corte di Cassazione, Sezioni Unite, decision of June 30, 1969, No. 2371, Giust. Civ. 1832 [1969] (stating that the permit to build on a lot can be issued only if the zoning rules allow so).

<sup>24</sup> Cf. Corte di Cassazione, decision of July 22, 1999, No. 500, rec. 5 (note 17). See also Cerulli Irelli (note 20), at 369.

<sup>25</sup> See id. rec. 3 and 6.3. See also Sebastiano Cassarino, Manuale di Diritto Processuale Amministrativo 25 (1990). However, it should be noted that the scope of this principle has been extensively curtailed by the Legislative Decree No. 80 of 1999 (see *infra* text accompanying note 165).

<sup>26</sup> See *infra* text accompanying note 19.

legal protection typical of *interessi legittimi* is a consequence of its qualification as *interesse legittimo* and therefore cannot be a defining element. Nevertheless, the Corte di Cassazione's distinction between *interessi legittimi* and *diritti soggettivi* is interesting because it may indicate what at least in some cases the judicial process for drawing that line is: when having to adjudicate on an individual's interest curtailed by public authorities, judges probably decide first what kind and intensity of legal protection that interest should enjoy and accordingly qualify it as either *interesse legittimo* or *diritto soggettivo*.

According to another criterion for distinguishing *diritti soggettivi* from *interessi legittimi*, the former correspond to values that are per se worthy of protection whereas the latter correspond to values that are protected only to the extent they are not in conflict with the public good.<sup>27</sup> This criterion has the advantage of trying to individuate the essence of *interessi legittimi* and *diritti soggettivi*. However, it is so general that its usefulness may be doubted. Moreover, it seems that *diritti soggettivi* are protected to the extent they are not in conflict with the public good just as *interessi legittimi* are. The unsuitability of this criterion is confirmed by the fact that, as pointed out by the Corte di Cassazione, there is no intrinsic difference between the factual individual's interest underlying a *diritto soggettivo* and that underlying an *interesse legittimo*.<sup>28</sup>

According to a third criterion, *diritti soggettivi* correspond to values the individual can fulfill autonomously (e.g. physical integrity) whereas *interessi legittimi* correspond to values he or she can fulfill only through the active intervention of the government (e.g. the issue of a building permit).<sup>29</sup> This criterion too is unsuitable. There are values that an individual can fulfill autonomously and nonetheless are protected as *interessi legittimi*. Such *interessi legittimi*, called *interessi oppositivi*, exist in some of the cases where public authorities intrude into the private sphere of the concerned individuals.<sup>30</sup> An example of *interessi oppositivi* occurs when public authorities expropriate a private lot.<sup>31</sup> In such a situation, the landowners' interest is qualified as *interesse legittimo*, even though they are perfectly capable of fulfilling autonomously their interest in disposing of their lot without needing the intervention of the public authorities. This demonstrates that the line between *diritti soggettivi* and *interessi legittimi* cannot be drawn according to whether the underlying value can be fulfilled autonomously or not.

None of the illustrated criteria allows a sharp distinction between *diritti soggettivi* and *interessi legittimi*. The main reason for this is probably that the line

<sup>27</sup> See Cerulli Irelli (note 20), at 376; Francesco Cocozza/Guido Corso, Le situazioni soggettive. Le libertà dei singoli e delle formazioni sociali. Il principio di eguaglianza, in: *Manuale di Diritto Pubblico*, 201, 202–203 (G. Amato & A. Barbera eds., 1994); Giovanna Visintini, *I Fatti Illeciti* 369 et seq. (1987). Cf. also Sabino Cassese, *Le Basi del Diritto Amministrativo* 463 et seq. (1996).

<sup>28</sup> Cf. Corte di Cassazione, decision of July 22, 1999, No. 500, rec. 5 (note 17).

<sup>29</sup> See Cerulli Irelli (note 20), at 374. Cf. also Cassese (note 27), at 463 et seq.

<sup>30</sup> Corte di Cassazione, decision of July 22, 1999, No. 500, rec. 8 (note 17).

<sup>31</sup> See Visintini (note 27), at 373 et seq.

between *diritti soggettivi* and *interessi legittimi* is often arbitrarily drawn. Nevertheless, the distinction between *interessi legittimi* and *diritti soggettivi* is central in the Italian legal system. In particular, it is relevant for State liability because, until the Corte di Cassazione's decision of July 22, 1999, No. 500, Art. 2043 Civ. Code applied only to violations of *diritti soggettivi* by public authorities.<sup>32</sup>

## 2. Content of the relevant decisions

Art. 2 para. 7 of the Statute, as mentioned above, laid down the details for the payment of damages caused by Italy's non-implementation of the Directive.<sup>33</sup> However, Art. 2 para. 7 did not explicitly state who has to shoulder such payment. By contrast, Art. 2 para. 6 of the Statute made *expressis verbis* the INPS (Istituto Nazionale della Previdenza Sociale = National Agency for Social Welfare Benefits) responsible for the payment of future unpaid wage claims.<sup>34</sup> As a result, it was unclear whether the State or the INPS had to pay for the damages in question. This doubt gave rise to judicial disputes between workers, the Government and the INPS. Some of the *Pretori* seized of the disputes ruled that the State was responsible under Art. 2043 Civ. Code for paying the sums due under Art. 2 para. 7 of the Statute.<sup>35</sup> The Government appealed these decisions and, eventually, the judicial disputes reached the Corte di Cassazione.

In several decisions, the Corte di Cassazione held that not the State but the INPS is liable for the payment under Art. 2 para. 7 of the Statute. Whereas some of those decisions relied mostly on textual arguments<sup>36</sup>, others went on to make general remarks on State liability for the failure to legislate and the relationship between EC law and national law.<sup>37</sup> These latter decisions are of particular interest and therefore the present analysis will focus on them only.

The decisions that are the object of the present analysis are virtually identical to each other.<sup>38</sup> The reasoning of the Corte di Cassazione consists of five arguments. They will be analyzed in turn.

<sup>32</sup> I will return to this subject later. See *infra* text accompanying note 156 et seq.

<sup>33</sup> See *supra* text accompanying note 14.

<sup>34</sup> The INPS is the public organization responsible for the payment of pensions and other social welfare benefits. See Cerulli Irelli (note 20), at 240–241.

<sup>35</sup> See decision of March 27, 1996, No. 2750, *Notiziario di Giurisprudenza del Lavoro* 31 [1996]; decision of January 19, 1996, No. 401, *I Il Foro Italiano* 503 [1996]; decision of October 11, 1995, No. 10617, *I Il Foro Italiano* 503 [1996]; decision of January 15, 1996, No. 283, *Giurisprudenza Italiana* 518 [1996].

<sup>36</sup> Decision of January 15, 1996, No. 283, *Giurisprudenza Italiana* 518 [1996]; decision of January 19, 1996, No. 401, *I Il Foro Italiano* 503 [1996].

<sup>37</sup> Decision of July 19, 1995, No. 7832, *2 Il Fallimento* 137 [1996]; decision of September 9, 1995, No. 9547, *I Giustizia Civile* 1383 [1996]; decision of October 11, 1995, No. 10617, *I Il Foro Italiano* 503 [1996].

<sup>38</sup> *Id.*

a) *The arguments relying on the wording of the Statute*

The first and second arguments rely on the wording of Art. 2 of the Statute. In its first argument, the Corte di Cassazione states that from the fact that the heading of Art. 2 is "Coverage by the Guarantee Fund" it can be inferred that the coverage by such fund applies to all the cases mentioned in Art. 2 of the Statute.<sup>39</sup> It should be noted that the Guarantee Fund is the fund through which the INPS operates.<sup>40</sup>

In its second argument, the Corte di Cassazione states that according to Art. 4 of the Statute the INPS must bear all the payments laid down in Arts. 1, 2 and 3 of the Statute.<sup>41</sup> Art. 4 of the Statute is worded as follows: "The costs ensuing from the application of Arts. 1, 2 and 3 (...), which are shouldered by the Guarantee Fund of the Law No. 297 of 1982, are covered according to Art. 2 para. 8 of the latter law. (...)"<sup>42</sup>

b) *The conciliation argument*

The third argument is a systemic argument and is central in the reasoning of the decision. It can be termed as the "conciliation argument." The Corte di Cassazione begins by recalling the holding of the ECJ in *Franovich* to which it formally pays tribute.<sup>43</sup> The aspect of the *Franovich* decision that the Corte di Cassazione emphasizes is that the handling of details regarding the payment of damages for breach of Community law is a matter left to national law.<sup>44</sup> From this the Corte di Cassazione draws the conclusion that the protection awarded to individuals in national courts must be carried out according to Italian law and the legal qualification to be given to relevant situations must be determined according to national law only.<sup>45</sup>

Additionally, the Corte di Cassazione illustrates some aspects of the Italian legal order. In a first step, it recalls that the distinction between *interessi semplici*, *interessi legittimi* and *diritti soggettivi* does not exist in the Community legal order.<sup>46</sup> In a second step, it remarks that in the Italian constitutional system legislation is a manifestation of the political function of government, i.e. free in setting

<sup>39</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 138.

<sup>40</sup> See the Law of May 29, 1982, No. 297 (Disciplina del trattamento di fine rapporto e norme in materia pensionistica = Rules on terminal funding and pension schemes). Cf. Corte di Cassazione, decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 137.

<sup>41</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 138.

<sup>42</sup> The original version reads as follows: "Agli oneri derivanti dall'applicazione degli articoli 1, 2 e 3 (...), posti a carico del Fondo di garanzia di cui alla legge n. 297 del 1982, si provvede ai sensi dell'art. 2, ottavo comma della medesima legge. (...)."

<sup>43</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 138.

<sup>44</sup> *Id.* The passage the Corte di Cassazione refers to is C-6/90 and 9/90 *Franovich* [1991] ECR I-5357, rec. 42.

<sup>45</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 138.

<sup>46</sup> *Id.*

its aims and thus immune from control by the judiciary.<sup>47</sup> In this passage the Corte di Cassazione cites only Art. 31 of the Royal Decree No. 1054 of 1924.<sup>48</sup> The Corte di Cassazione further observes that an individual's interests ("posizioni soggettive") cannot be protected from political acts of government.<sup>49</sup>

Subsequently, the Corte di Cassazione applies these considerations to the case at issue. It holds:

"Therefore, it must be excluded that in the Italian legal system individuals acquire from Community law, as interpreted by the Court of Justice, the right (*diritto soggettivo*) to the enactment of legislative acts; in any case, it must also be excluded that because of Community law such a character of the State's legal system [i.e. the inconceivability of any individual's right to legislation] may be qualified as an unlawful act in the sense of Art. 2043 of the Civil Code for which the State would be liable. (...) In other words, the legal system currently in force is in conflict with general rules of the Community legal order (...) in that it does not foresee that individuals have the right to an adequate compensation for the damages caused by the non-implementation of a directive."<sup>50</sup>

From the foregoing the Corte di Cassazione draws the conclusion that Art. 2 para. 7 of the Statute, if interpreted to assign the financial responsibility at issue to the INPS instead of the State, eliminates the aforementioned conflict between Community law and the Italian legal system.<sup>51</sup>

*c) The argument of the coherence of the legal system*

The fourth argument is also a systemic argument. It can be termed as the "argument of the coherence of the legal system." The Corte di Cassazione holds that interpreting Art. 2 para. 7 of the Statute to the effect that the INPS is liable is not in conflict with the need for coherence of the legal system.<sup>52</sup> In the Corte di Cassazione's view, the reason for this is that the application of Art. 2043 Civ. Code to the case at issue would lead to a difference between the person liable (i.e. the INPS) and the one who caused the damages (i.e. the State).<sup>53</sup> By contrast, Art. 2043 Civ. Code requires that unlawful damages are made good by the person who caused them.<sup>54</sup>

<sup>47</sup> *Id.* at 139.

<sup>48</sup> This provision is worded as follows:

"The appeal to the Consiglio di Stato [= the highest administrative court in Italy] is not admissible against acts the Government issues by carrying out its political function (Il ricorso al Consiglio di Stato in sede giurisdizionale non é ammesso se trattasi di atti o provvedimenti emanati dal Governo nell'esercizio del potere politico)." (Gazzetta Ufficiale No. 158 of July 7, 1924).

<sup>49</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 139.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*



d) *The Constitutional Court argument*

The fifth and final argument can be termed as the “Constitutional Court argument.” The Corte di Cassazione recalls that the decision of Dec. 31, 1993, No. 512 of the Constitutional Court interpreted Art. 2 para. 7 of the Statute to the effect that it shoulders the responsibility to pay to the INPS.<sup>55</sup> In that decision the Constitutional Court had to decide on the question of whether Art. 2 paras. 6 and 7 of the Statute run afoul of Arts. 3, 24, 25 and 81 of the Constitution which guarantee respectively formal and substantial equality, recourse to courts, *juge légal* and the need for public expenses to be covered in the budget.

3. Commentary

On the whole, the decisions illustrated above should be criticized because of their *a priori* hostility against the principle of State liability, their misinterpretation of EC law and the weakness of some of their arguments. Each argument of the Corte di Cassazione will be scrutinized in turn.

a) *The arguments relying on the wording of the Statute*

The Corte di Cassazione relies on the wording of the heading of Art. 2 of the Statute and the text of Art. 4 of the Statute. Such arguments are legitimate.

The heading of Art. 2 of the Statute is unequivocally worded “Intervention of the Guarantee Fund under the Law of May 29, 1982, No. 297.” The Law of May 29, 1982, No. 297 regulates the intervention of the INPS regarding rules on terminal funding and pension schemes. The heading of Art. 2 of the Statute does not foresee any other kind of intervention besides that of the Guarantee Fund.<sup>56</sup> Therefore, the heading of Art. 2 of the Statute militates in favor of the liability of the INPS for the *Franco* damages.

Art. 4 of the Statute regards the costs ensuing from the application of its Arts. 1, 2 and 3 and mentions that they are shouldered by the Guarantee Fund of the above-mentioned Law No. 297, i.e. by the INPS. It is true that Art. 4 of the Statute is phrased in a rather convoluted way and does not *expressis verbis* state that the responsibility of the INPS extends to all the payments laid down in Art. 2 of the Statute.<sup>57</sup> However, the text of the Statute is sufficiently clear to indicate that the INPS is liable for the payment under Art. 2 para. 7 of the Statute and does not contain any element that points toward a different interpretation.<sup>58</sup>

<sup>55</sup> *Id.* The decision of December 31, 1993, No. 512 of the Constitutional Court is published in I Il Foro Italiano 316 [1994].

<sup>56</sup> See *supra* text accompanying note 40.

<sup>57</sup> Cf. Enrico Sconditti, Profili di responsabilità civile per mancata attuazione di direttiva comunitaria: il caso *Franco* in Cassazione, I Il Foro Italiano 503, 508 (1996).

<sup>58</sup> But see Massimiliano Franco, Individuazione del soggetto tenuto al risarcimento del danno per tardiva attuazione della direttiva Cee n. 80/987 in materia di garanzia dei crediti di lavoro, I Giustizia Civile 1386 (1996) who relies on Art. 2 para. 6 of the Statute. It is true that this latter provision

*b) The conciliation argument*

The third argument (the “conciliation argument”) is not only the central one, but also the most interesting and controversial. Accordingly, it will be analyzed in detail.

The first point to be made regards the way the Corte di Cassazione interprets the procedural autonomy of the Member States. In the Corte di Cassazione’s view, from the *Francovich* judgment it follows that the protection awarded to individuals in national courts must be carried out according to national law and the legal qualification to be given to relevant situations must be determined according to national law only.<sup>59</sup> It is true that according to the *Francovich* decision the handling of details regarding the payment of damages for breach of Community law is a matter left to national law.<sup>60</sup> However, the Corte di Cassazione brings this specific statement of the ECJ to extremes which are not in conformity with EC law. The Corte di Cassazione forgets that the procedural autonomy of the national legal order is not without restraints and limits.<sup>61</sup> As indicated in the *Francovich* judgment, the application of national substantive and procedural rules encounter two general limits which can be described as the principle of non-discrimination and that of effective protection: “The substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.”<sup>62</sup> As a result, national procedural rules must be set aside when they frustrate the effectiveness of EC law.<sup>63</sup> Moreover, as can be inferred from *Francovich*, when specific Community rules regarding the procedures are applicable, conflicting national rules must be set aside.<sup>64</sup>

The second point regards the Corte di Cassazione’s emphasis on the distinction between *interessi semplici*, *interessi legittimi* and *diritti soggettivi*. This is one of the crucial passages of the decision and deserves some attention. The Corte di Cassazione almost complains about the fact that such distinction does not exist in the Community legal order. Thereafter, it states that in the Italian constitutional system

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states that the INPS is responsible only for the claims filed after the entry into force of the Statute. However, according to Art. 2 para. 6 of the Statute such limitation applies only to the cases envisaged by the preceding paragraphs. Therefore, the limitation of Art. 2 para. 6 does not apply to Art. 2 para. 7 of the Statute.

<sup>59</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 138.

<sup>60</sup> See *supra* text accompanying note 44.

<sup>61</sup> See Gil Carlos Rodríguez Iglesias, *Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts*, Europäische Grundrechte-Zeitschrift 289 (1997).

<sup>62</sup> C-6/90 and 9/90 *Francovich* [1991] ECR I-5357, rec. 43. See Takis Tridimas, *Epilogue: Recent Developments in the Law relating to State Liability in Damages*, in: *New Directions in European Public Law* 183, 184 (Jack Beatson & Takis Tridimas eds., 1998).

<sup>63</sup> This line of thought can also be found in the Constitutional Court’s decision of April 23, 1985, No. 113 (*Beca*), II Riv. Dir. Agr. 330 [1987], rec. 2–4.

<sup>64</sup> Cf. C-6/90 and 9/90 *Francovich* [1991] ECR I-5357, rec. 42.

legislation is a manifestation of the political function of government, i.e. free in setting its aims and thus immune from control by the judiciary.<sup>65</sup> Significantly, in this last passage about Constitutional law the Corte di Cassazione cites not a single provision of the Constitution but only a Statute of 1924.<sup>66</sup> This highlights the weakness of the argument of the Corte di Cassazione.<sup>67</sup> It is plain that a statute of 1924 may not bear much significance for the interpretation of the higher-ranking and more recent constitutional norms.<sup>68</sup> The fact that in this passage the Corte di Cassazione refers only to a statute can be explained by saying that there are no constitutional norms that directly support its statement. But this also reveals what the Corte di Cassazione really has in mind and what it is worried about: not some Constitutional principle, but the interpretation of Art. 2043 Civ. Code whereby public authorities are not liable for their violation of *interessi legittimi*.<sup>69</sup> Under this reading, the passage about the absence of the distinction between *interessi semplici*, *interessi legittimi* and *diritti soggettivi* in EC law acquires a new and central dimension, whereas at first sight it did not seem very relevant for the Corte di Cassazione's reasoning, which formally revolved around Constitutional law.

The third point relates to the conclusion of the conciliation argument. The Corte di Cassazione concludes that Art. 2 para. 7 of the Statute, if interpreted to the effect that the INPS is liable, has resolved the conflict between the *Francovich* liability under EC law and the Italian law principle whereby individuals do not have the right to the enactment of legislative measures.<sup>70</sup> If one regards this principle of Italian law as possessing constitutional nature, one should say that the argument of the Corte di Cassazione, albeit superficially appealing, at its core lacks coherence. A conflict between constitutional law and EC law can be resolved only if either the former or the latter is modified. Since the Italian constitution is rigid, i.e. it can be modified only through a law adopted according to a complex procedure (Art. 138 Cost.), a statute may not modify it. As a result, by definition a statute cannot solve a conflict between Italian Constitutional law and EC law. From this perspective, the argument of the Corte di Cassazione would be inappropriate and not convincing. Yet, if one regards not constitutional law but the Corte di Cassazione's interpretation of a statutory provision (namely Art. 2043 Civ. Code) as the object of the Corte di Cassazione's argument, then the reasoning appears

<sup>65</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 139.

<sup>66</sup> In one of the decisions on the Second Question the Corte di Cassazione even more laconically refers to "fundamental principles evident in the Constitution" (decision of January 9, 1997, No. 133, I Il Foro Italiano 1469 [1998], 1480, rec. 9.)

<sup>67</sup> Cf. generally Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3:1 European Law Journal 3, 28 (1997) who explains: "When interpreting private law in a way not completely manifested by its black letters and coloured with social implications, judges invoke pertinent constitutional rules or principles in order to provide their decisions with due formal authority."

<sup>68</sup> The Italian Constitution entered into force in 1948 (see Art. XVIII of the Disposizioni Transitorie e Finali appended to the Constitution).

<sup>69</sup> See *supra* text accompanying note 16 et seq.

<sup>70</sup> See *supra* text accompanying note 47 et seq.

logical. It could be restated as follows: 1) Art. 2043 Civ. Code as interpreted by the Corte di Cassazione is in conflict with EC law to the extent that it does not foresee State liability for failure to enact legislation; 2) this conflict evaporates and the Corte di Cassazione's case law remains untouched if the liability of the State is passed on to the INPS.

It should be underlined that a different reading of the decision would lead to harsher critique of the Corte di Cassazione. If the principle whereby individuals cannot have the right to adequate compensation for the damages caused by failure to legislate really possessed constitutional character, the Corte di Cassazione would have dangerously allowed a statutory provision like Art. 2 para. 7 of the Statute to indirectly amend the Constitution. This, however, does not seem plausible and should be ruled out.

The fourth point regards the Corte di Cassazione's statement whereby an individual's interests ("posizioni soggettivi") cannot be protected from political acts of government.<sup>71</sup> First of all, it is important to put this broad statement in the proper perspective: it cannot refer to the control of constitutionality by the Constitutional Court, which of course applies to all kinds of acts. Second, it should be noted that in this passage the Corte di Cassazione cites its decision of January 8, 1993, No. 124.<sup>72</sup> That latter decision concerned an agreement between the Government and the teachers' unions. According to such agreement, the Government had to reform the school system by means of legislative and regulatory acts. However, the reforms agreed upon did not come into being. Therefore, the teachers' unions sued the Government for payment of the damages its breach had allegedly caused to their reputation among their members and in the public opinion. The Corte di Cassazione rejected the claim of the teachers' unions by holding that the agreement at issue is not a private law contract.<sup>73</sup> It also held that the enactment of legislation cannot be the object of a binding agreement and is not subject to any judicial control.<sup>74</sup> It is doubtful that the citation of the teachers' agreement case is on point in the decisions on Art. 2 para. 7 of the Statute. It goes without saying that the EC Treaty cannot in any possible way be compared with an agreement between the Government and professional unions. It is equally evident that the State's obligations ensuing from the EC Treaty and the soft law obligations ensuing from an agreement between the Italian Government and professional unions are incomparable.<sup>75</sup>

The fifth point regards the question of whether the Corte di Cassazione had to make a reference to the ECJ under Art. 234 (ex 177) para. 3 TEC.<sup>76</sup> It is submitted that this question should be answered in the positive. When the decisions on

<sup>71</sup> Decision of July 19, 1995, No. 7832, 2 Il Fallimento 137 [1996], 139.

<sup>72</sup> The decision of January 8, 1993, No. 124 is published in: I Il Foro Italiano 1487 [1993].

<sup>73</sup> *Id.* at 1489.

<sup>74</sup> *Id.* at 1489-1490.

<sup>75</sup> See also Sconditti (note 57), at 506, 510-511.

<sup>76</sup> Art. 234 (ex 177) TEC is worded as follows:

"(1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

the First Question were taken, it was not plain that Art. 2 para. 7 of the Statute, if interpreted to the effect to make the INPS liable for the *Francovich* damages, was in conformity with EC law. The *Francovich* decision of the ECJ had ruled that the State must make good the damages it causes to individuals by breaching EC law.<sup>77</sup> Making the INPS liable is tantamount to passing on the liability of the negligent Member State to the employers, given the fact that the INPS is financed through contributions of the employers.<sup>78</sup> Therefore, interpreting Art. 2 para. 7 of the Statute to the effect of making not the State but the INPS liable for the *Francovich* damages inevitably raised the question of whether EC law, as interpreted by the ECJ in *Francovich*, prohibited such a shifting of the *Francovich* liability from the State to another entity.<sup>79</sup> The fact that the legal dispute before the national court required the resolution of such a question is confirmed by the references two Italian courts of first instance made to the ECJ under Art. 234 (ex 177) para. 2 TEC.<sup>80</sup> The Corte di Cassazione, instead, does not even indirectly mention this question.

In this context it is noteworthy that the ECJ, answering the referred question about the conformity with EC law of Art. 2 para. 7 of the Statute, *de facto* upheld the interpretation of Art. 2 para. 7 of the Statute whereby the INPS has to pay for the *Francovich* damages.<sup>81</sup> It ruled that retroactive and proper application in full of the measures implementing the Directive suffice in principle for reparation for the *Francovich* damages.<sup>82</sup>

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- (a) the interpretation of this Treaty;
  - (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
  - (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

(2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

(3) Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

<sup>77</sup> C-6/90 and 9/90 *Francovich* [1991] ECR I-5357, rec. 31 et seq.

<sup>78</sup> See Constitutional Court, decision of December 31, 1993, No. 512, I Il Foro Italiano 316 [1994], 318.

<sup>79</sup> Cf. Adelina Adinolfi, *The Judicial Application of Community Law in Italy*, 35 *Common Market Law Review* 1313, 1336 (1998), who deems the solution adopted by the Corte di Cassazione as questionable “mainly because the ‘Guarantee Fund’ is financed partly by compulsory contributions on the part of the employers.”

<sup>80</sup> Joined cases C-94/95 and 95/95 *Bonifaci* [1997] ECR I-3969, rec. 45 et seq.; C-373/95 *Maso* [1997] ECR I-4051, rec. 23.

<sup>81</sup> Joined cases C-94/95 and 95/95 *Bonifaci* [1997] ECR I-3969, rec. 54; C-373/95 *Maso* [1997] ECR I-4051, rec. 41.

<sup>82</sup> *Id.* See also Austin B. Clayton, *The Place of Francovich and Its Progeny in EC Law* 34 (1998) (unpublished JD thesis, Boston University Law School) (on file with author). It is noteworthy that in its decision of June 16, 1993, No. 285 the Constitutional Court, without referring the question to the ECJ under Art. 234 (ex 177) TEC, ruled that Art. 2 para. 7 of the Statute, interpreted to the effect of making the INPS liable for the *Francovich* damages, is in conformity with EC law (I Il Foro Italiano 2393 [1993] rec. 3.2).

The sixth and final point regards the question of whether the conciliation argument was necessary. It is submitted that this question should be answered in the negative. Other decisions of the Corte di Cassazione that regarded the INPS as liable relied only on other arguments.<sup>83</sup> The Corte di Cassazione's decisions of January 15, 1996, No. 283<sup>84</sup> and of January 19, 1996, No. 401<sup>85</sup> drew on the following two considerations: 1) the Constitutional Court's decisions of 1993 No. 285 and No. 512 interpreted Art. 2 para. 7 of the Statute to the effect of making the INPS liable<sup>86</sup>; 2) according to Art. 4 of the Statute the INPS must bear all the payments laid down in Arts. 1, 2 and 3 of the Statute.<sup>87</sup>

*c) The argument of the coherence of the legal system*

The argument that focuses on the need for coherence within the legal system is *per se* right but not decisive. It is true that under Art. 2043 Civ. Code the person causing the damages and the person liable for them are the same.<sup>88</sup> Therefore, as the Corte di Cassazione argues, if Art. 2 para. 7 of the Statute makes the INPS liable, such liability cannot fall under Art. 2043 Civ. Code because it was the State that caused the *Francovich* damages. However, the coherence of the legal system would be equally assured if the State were held liable under Art. 2 para. 7 of the Statute and this latter provision were considered a subcase of Art. 2043 Civ. Code. Also under this construction the person who caused the *Francovich* damages (i.e. the State) and the person who must pay for them under Art. 2043 Civ. Code (i.e. the State) would be the same.

*d) The Constitutional Court argument*

The final argument of the Corte di Cassazione draws on the Constitutional Court's decision whereby Art. 2 para. 7 of the Statute places the liability at issue on the INPS.<sup>89</sup> Reliance on decisions of the Constitutional Court is certainly legitimate and, under certain circumstances, compulsory. Yet it should be noted that this holding of the Constitutional Court rested solely on the interpretation of Arts. 3, 24, 25 and 81 of the Constitution which protect respectively formal and substantial equality, recourse to courts, *juge légal* and the need for public expenses to be covered in the budget. These constitutional norms certainly have very little – if anything – to do with State liability or the impossibility for individuals to force the legislature to enact a statute.

<sup>83</sup> See *supra* text accompanying note 36.

<sup>84</sup> The decision of January 15, 1996, No. 283 is published in: *Giurisprudenza Italiana* 518 [1996].

<sup>85</sup> The decision of January 19, 1996, No. 401 is published in: *I Il Foro Italiano* 503 [1996].

<sup>86</sup> See *supra* text accompanying note 55.

<sup>87</sup> See *supra* text accompanying note 41.

<sup>88</sup> See *supra* text accompanying note 16.

<sup>89</sup> See *supra* text accompanying note 55.

#### IV. The Second Question: How Should Interest Charged for Late Payment Be Calculated?

##### 1. The Italian rules regarding loss from late payment

The Second Question the Statute left open was how the loss ensuing from late payment had to be calculated on the sum laid down in Art. 2 para. 7 of the Statute. Before analyzing the relevant decisions of the Corte di Cassazione, the main Italian rules regarding loss from late payment should be illustrated at the outset.

The generally applicable rule is Art. 1224 Civ. Code.<sup>90</sup> According to Art. 1224 para. 1 Civ. Code, the debtor who pays with delay has to pay legal interest on the sum due, regardless of whether the creditor proves that he or she has suffered damages from the delay in the payment or not. Legal interest is a fixed interest rate established by law.<sup>91</sup> The idea underlying the automatic award of legal interest in case of delayed payment is that money is per se a productive good. Art. 1224 para. 1 Civ. Code thus serves a compensatory function: it automatically obliges the debtor who pays with delay to pay legal interest and thus prevents him or her from obtaining an unjustified advantage.<sup>92</sup>

The sum calculated on the basis of legal interest is, of course, an approximation of the damages that in actuality the impossibility of using the sum due causes to the creditor.<sup>93</sup> Therefore, Art. 1224 para. 2 Civ. Code allows the creditor who sustains greater damages than those consisting of the legal interest to obtain reparation in full. To this end, however, the creditor must demonstrate having sustained such greater damages.<sup>94</sup> The proof can also rest on presumptions and common knowledge elements ("fatti notori").<sup>95</sup>

The condition for the award of legal interest and greater damages under Art. 1224 Civ. Code is twofold: 1) the delay has occurred because of the debtor's fault; 2) the creditor places the debtor in default ("mette in mora il debitore").<sup>96</sup> The request for the award of legal interest is considered implicit in the request for pay-

<sup>90</sup> Art. 1224 Civ. Code is worded as follows:

"In obligations having as their object a sum of money, legal interest is due from the day of the default even if it was not due previously and even if the creditor does not prove that he has suffered any damage. If interest was due at higher than the legal rate before default, interest after default shall be due at the same rate. The creditor who proves to have suffered greater damages is entitled to additional compensation. This is not due if the rate of interest to be paid after default was agreed." (Beltramio/Longo/Merryman, *supra* note 16).

<sup>91</sup> See Art. 1284 Civ. Code.

<sup>92</sup> Cf. Corte di Cassazione, decision of October 19, 1994, No. 8533, 6 Gius 522 [1995]; decision of March 29, 1994, No. 3078, 13 Gius 124 [1994]. See Vincenzo Carbone, Art. 1224, in: Nuova Rassegna di Giurisprudenza sul Codice Civile 94, 95 (Cesare Ruperto & Vittorio SgROI eds., 1998).

<sup>93</sup> Cf. Corte di Cassazione, decision of May 16, 1997, 4359, 16 Gius 1932 [1997]; decision of February 3, 1995, No. 1307, 14 Gius 1973 [1995].

<sup>94</sup> Corte di Cassazione, decision of June 20, 1997, No. 5517, 19 Gius 2331 [1997].

<sup>95</sup> *Id.* See Carbone (note 92), at 108.

<sup>96</sup> Corte di Cassazione, decision of November 18, 1996 No. 10069, 4 Gius 469 [1997]. However, if the debt was caused by an unlawful act, the debtor is regarded as placed in default from the day of the unlawful act (Corte di Cassazione, decision of January 27, 1996, No. 637, Danno e resp. 345

ment, whereas the same does not apply to the request for greater damages which must be done explicitly.<sup>97</sup>

The Italian legal system provides an especially creditor-favorable treatment for debts due because of employment. In case of late payment, such debts are governed not by the generally applicable rule (Art 1224 Civ. Code) but by a more creditor-friendly rule (Art. 429 para. 3 Code Civ. Proc.). Art. 429 para. 3 Code Civ. Proc. prescribes the award of legal interest as well as greater damages to the employee who receives payment related to his or her employment with delay. The judge must award such legal interest and greater damages *ex officio*, i.e. neither a request nor the proof by the worker is necessary.<sup>98</sup> Additionally, the creditor (i.e. the worker) is not required to place the debtor (i.e. the employer) in default.<sup>99</sup>

## 2. Content of the relevant decisions

The Statute does not say anything about the question of how the loss ensuing from late payment has to be calculated on the sum laid down in Art. 2 para. 7 of the Statute. This question was raised in four proceedings: the *Repubblica Italiana* case, the *Lorella* case, the *Campanelli* case and the *Pacifico* case.<sup>100</sup> These proceedings involved workers who claimed to be entitled to payment under Art. 2 para. 7 of the Statute and the INPS.<sup>101</sup> The decisions in the second instance ruled that legal interest and damages from devaluation had to be calculated from the declaration of insolvency of the employer or from fifteen days thereafter.<sup>102</sup> They did so by subsuming the payment of Art. 2 para. 7 of the Statute under Art. 2043 Civ. Code.<sup>103</sup> The INPS appealed these decisions to the Corte di Cassazione.<sup>104</sup>

The Corte di Cassazione upheld the result of all four decisions in the second instance.<sup>105</sup> However, it ruled that such result must rely on Art. 429 Code Civ. Proc. and confirmed its previous case law whereby the payment of Art. 2 para. 7 of the Statute does not fall under Art. 2043 Civ. Code.<sup>106</sup> The main arguments of the Corte di Cassazione can be summarized as follows.

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[1996], 346). See also Carbone (note 92), at 95, 100; Giorgio Cian/Alberto Trabucchi, Commentario breve al codice civile 1119–1120 (1997).

<sup>97</sup> See Cian/Trabucchi (note 96), at 1123–1124.

<sup>98</sup> See Federico Carpi/M. Taruffo, Commentario breve al codice di procedura civile 892 et seq. (1996); Carbone (note 92), at 117–120.

<sup>99</sup> Corte di Cassazione, decision of April 23, 1991, No. 4386, Notiziario Giur. Lav. 659 [1991]. See Carpi/Taruffo (note 98), at 895.

<sup>100</sup> See *Il Fallimento* 69 [1996]; *Il Fallimento* 186 [1997]; *I Il Foro Italiano* 1469 [1998], 1471; *I Il Foro Italiano* 1469 [1998], 1478.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *I Il Foro Italiano* 1471 [1998]; *I Il Foro Italiano* 1478 [1998]; *Il Fallimento* 186 [1997].

<sup>104</sup> *Id.*

<sup>105</sup> Decision of August 23, 1996, No. 7770, *Il Fallimento* 69 [1996]; decision of September 27, 1996, No. 8552, *Il Fallimento* 185 [1997]; decision of January 9, 1997, No. 133, *2 Il Foro Italiano* 1469 [1998]; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998].

<sup>106</sup> *Id.*



First, the Corte di Cassazione draws on a systemic argument relating to national law. All four decisions share this argument. The Corte di Cassazione, by referring to its previous case law, holds that for the purpose of determining the competent court (*Tribunale* or *Pretore*), the payment under Art. 2 para. 7 of the Statute falls under Art. 409 No. 1 Code Civ. Proc. (debts due because of employment).<sup>107</sup> The Corte di Cassazione concludes that, given the exact parallelism between the substantive provision of Art. 429 para. 3 and the procedural provision of Art. 409 No. 1 Code Civ. Proc., the former must be applied to all sums due under Art. 2 para. 7 of the Statute.<sup>108</sup>

Second, the Corte di Cassazione uses a teleological argument relating to national law. The *Repubblica Italiana*, *Lorella* and *Pacifico* decisions share this argument. The Corte di Cassazione holds that the payment under Art. 2 para. 7 of the Statute fulfills a compensatory function.<sup>109</sup> From this it follows that the creditor should also be awarded the loss ensuing from delay in the payment.<sup>110</sup>

Third, the Corte di Cassazione draws on a systemic argument relating to EC law. The *Lorella* and *Pacifico* decisions share this argument. The Corte di Cassazione recalls the EC law principle whereby the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favorable than those relating to similar domestic claims.<sup>111</sup>

Fourth, the Corte di Cassazione employs a teleological argument relating to EC law. The *Campanelli* and *Pacifico* decisions share this argument. The Corte di Cassazione holds that, in order to be in conformity with EC law, national law must ensure an adequate reparation of the damages caused to individuals by breach of EC law.<sup>112</sup> It further recalls the principle laid down by the ECJ in *Brasserie du Pêcheur* whereby complementary loss cannot be excluded from the reparation to be paid for *Francoovich* damages.<sup>113</sup> Therefore, the Corte di Cassazione concludes that the damaged individuals must be given an adequate compensation and that loss of profit cannot be excluded from the reparation.<sup>114</sup>

<sup>107</sup> Decision of September 27, 1996, No. 8552, *Il Fallimento* 185 [1997], 186; decision of January 9, 1997, No. 13, *I Il Foro Italiano* 1469 [1998], 1481, rec. 15; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1477.

<sup>108</sup> Decision of August 23, 1996, No. 7770, *Il Fallimento* 69 [1996] 73; decision of September 27, 1996, No. 8552, *Il Fallimento* 185 [1997], 186; decision of January 9, 1997, No. 133, *I Il Foro Italiano* 1469 [1998], 1481, rec. 17; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1477. See *supra* text accompanying note 98 et seq.

<sup>109</sup> Decision of August 23, 1996, No. 7770, *Il Fallimento* 69 [1996] 73; decision of September 27, 1996, No. 8552, *Il Fallimento* 185 [1997], 186–187; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1477.

<sup>110</sup> *Id.*

<sup>111</sup> Decision of September 27, 1996, No. 8552, *Il Fallimento* 185 [1997], 187; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1477.

<sup>112</sup> Decision of January 9, 1997, No. 133, *I Il Foro Italiano* 1469 [1998], 1480, rec. 11; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1477.

<sup>113</sup> Decision of January 9, 1997, No. 133, *I Il Foro Italiano* 1469 [1998], 1480–1481, rec. 12; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1476 and 1477.

<sup>114</sup> Decision of January 9, 1997, No. 133, *I Il Foro Italiano* 1469 [1998], 1481, rec. 13 and 1482 rec. 18; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1477.

## 3. Commentary

Similar to the decisions analyzed in regard to the First Question, the decisions on the Second Question are interesting especially for their reasoning. These latter decisions, with the partial exception of the *Repubblica Italiana* and *Lorella* decisions, not only deal with the resolution of a concrete legal question (how to calculate interest charged for belated payment) but also concern the relationship between EC law and Italian law and the principles governing State liability under Italian law.

The focus of the analysis will be on the following three aspects of the decisions at issue: 1) the choice to apply Art. 429 para. 3 Code Civ. Proc. to the payment under Art. 2 para. 7 of the Statute; 2) the autonomy of national law from EC law as developed by the Corte di Cassazione; 3) the shift of tone from the decisions on the First Question to those on the Second Question.

*a) The application of Art. 429 para. 3 Code Civ. Proc.*

The subsumption of the payment of Art. 2 para. 7 of the Statute under Art. 429 para. 3 Code Civ. Proc. should not come as a surprise. It is settled case law that the concept of debts due because of employment is to be interpreted broadly.<sup>115</sup> The concept comprises not only the payment arising directly from employment but also every payment for which employment is the logical *sine qua non*.<sup>116</sup>

Having said this, there is still one question to ask: was the application of Art. 429 para. 3 Code Civ. Proc. necessary in order to assure compliance with EC law? It is submitted that this question must be answered in the positive. It should be recalled that in 1994, in order to determine the competent court (*Tribunale* or *Pre-tore*), the Corte di Cassazione had subsumed the payment of Art. 2 para. 7 of the Statute under Art. 409 No. 1 Code Civ. Proc. (debts due because of employment) which falls under the competence of the *Pre-tore*.<sup>117</sup> Once the Corte di Cassazione had done so, the EC law principle of non-discrimination between domestic and EC law situations required it to draw from the application of Art. 409 No. 1 Code Civ. Proc. all the consequences that it would normally draw in regard to similar legal positions ensuing from domestic law. One of these consequences was to apply Art. 429 para. 3 Code Civ. Proc. to the payment under Art. 2 para. 7 of the Statute, given that the former provision applies to debts due because of employment just as Art. 409 No. 1 Code Civ. Proc. does. In the *Lorella* and *Pacifico* decisions the Corte di Cassazione correctly relies on this argument.<sup>118</sup>

<sup>115</sup> See Corte di Cassazione, decision of June 16, 1993, No. 285, I Il Foro Italiano 2393 [1993], 2396.

<sup>116</sup> See Corte di Cassazione, decision of November 9, 1994, No. 9339, Notiziario di Giurisprudenza del Lavoro 322 [1995]; decision of November 11, 1994, No. 9475, I Il Foro Italiano 831 [1995].

<sup>117</sup> Decision of July 9, 1994 No. 6482, Il Fallimento 159 [1995]; decision of November 9, 1994, No. 9339, I Il Foro Italiano 831 [1995].

<sup>118</sup> See *supra* text accompanying note 111.

It is true that Art. 1224 Civ. Code allows full compensation of damages.<sup>119</sup> To that extent, despite what the *Campanelli* and *Pacifico* decisions held, Art. 1224 Civ. Code would have met the requirements laid down by the ECJ in *Brasserie* and *Maso*.<sup>120</sup> *Brasserie* held that the total exclusion of loss of profit cannot be accepted.<sup>121</sup> *Maso* ruled that *Francoovich* damages must also comprise the complementary loss the beneficiaries demonstrate to have sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the Directive.<sup>122</sup>

However, as illustrated above, Art. 429 para. 3 Code Civ. Proc. is more favorable than Art. 1224 Civ. Code.<sup>123</sup> Art. 429 para. 3 Code Civ. Proc. applies to debts due because of employment based on domestic law. The payment under Art. 2 para. 7 of the Statute had been qualified as a debt due because of employment. Not to apply Art. 429 para. 3 Code Civ. Proc. to the payment under Art. 2 para. 7 of the Statute would mean discriminating against the *Francoovich* payment vis-à-vis other payments due because of employment on the basis of the fact that the former ensue from EC law. This is precisely what the above-mentioned non-discrimination principle prohibits: the substantive and procedural conditions for reparation of loss and damage laid down by national law for violations of EC law must not be less favorable than those relating to similar domestic claims.<sup>124</sup>

In addition to the fact that EC law required the application of Art. 429 para. 3 Code Civ. Proc., another element seems to have influenced decisively the choice of that provision. It emerges clearly from the *Campanelli* and *Pacifico* decisions that the Corte di Cassazione wanted to assure coherence within its own case law. In previous decisions the Corte di Cassazione had subsumed the payment of Art. 2 para. 7 under Art. 409 No. 1 Code Civ. Proc. in order to determine the competent court.<sup>125</sup> The corollary to choosing Art. 409 Code Civ. Proc. was to apply Art. 429 para. 3 Code Civ. Proc., given the exact parallelism between both provisions.

#### b) EC law and national law as separate systems

In the *Campanelli* and *Pacifico* decisions, the Corte di Cassazione mentions the separation and autonomy of national law from EC law.<sup>126</sup> From this autonomy the Corte di Cassazione draws the conclusion that the fact that a State action is

<sup>119</sup> See *supra* text accompanying note 90 et seq.

<sup>120</sup> The *Campanelli* and *Pacifico* decisions expressly relied on the ECJ's decision in *Brasserie* to justify the application of Art. 429 Code Civ. Proc. See *supra* text accompanying note 113.

<sup>121</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, rec. 87.

<sup>122</sup> C-373/95 *Maso* [1997] ECR I-4051, rec. 41. See also joined cases C-94/95 and 95/95 *Bonifaci* [1997] ECR I-3969, rec. 53; C-261/95 *Palmisani* [1997] ECR I-4025, rec. 35.

<sup>123</sup> See *supra* text accompanying note 90.

<sup>124</sup> See *supra* text accompanying note 62.

<sup>125</sup> See Corte di Cassazione, decision of November 9, 1994, No. 9339, *Notiziario di Giurisprudenza del Lavoro* 322 [1995]; decision of November 11, 1994, No. 9475, *I Il Foro Italiano* 831 [1995].

<sup>126</sup> Decision of January 9, 1997, No. 133, *I Il Foro Italiano* 1469 [1998], 1480, rec. 9; decision of February 10, 1998, No. 1366, *I Il Foro Italiano* 1469 [1998], 1476.

illegal under EC law does not entail its illegality under national law.<sup>127</sup> In this context the Corte di Cassazione also states that according to its case law the damage ensuing from the non-implementation of a directive does not fall under Art. 2043 Civ. Code.<sup>128</sup> The Corte di Cassazione adds that the national rules in conflict with EC law are not repealed or invalidated, but must only be set aside.<sup>129</sup>

The statement about the separation and autonomy between EC law and national law is neither totally unproblematic nor fully convincing. The first objection is that it does not faithfully correspond to the relationship between Italian law and European law as developed by the Constitutional Court. It is true that the Constitutional Court has repeatedly held that Community law and Italian law are regarded as independent and separate legal systems.<sup>130</sup> Nevertheless, such construction has been developed to justify and rationalize the operation of the principles of supremacy and direct effect of Community law in Italy. Moreover, in the *Granital* decision of 1984 the Constitutional Court conceded that "Community law and Italian law, while separate and independent, must necessarily be coordinated, as the Treaty of Rome requires"<sup>131</sup> and that "(...) municipal law does guarantee compliance with [the Community's] rules in Italy."<sup>132</sup> Additionally, a later decision of the Constitutional Court hints at the possibility of the Italian legal system consisting of both EC law and national law.<sup>133</sup> In this latter decision the Constitutional Court held that the constitutionally required limitation of administrative discretion can be achieved through not only national legislation but also EC law.<sup>134</sup>

The second objection is conceptual. If EC law has direct effect in Italy and national judges are called upon to enforce it, the whole legal system must consist of both EC law and national law. Because of its direct effect and supremacy, EC law cannot but interrelate with national law and ultimately influence it. It is this complex and intertwined legal system made of EC law and national law that must be given coherence. This critique appears forceful especially with regard to State liability because in this field the substantive and procedural details are laid down by national law.

The reliance on the principle whereby national rules in conflict with EC law must be set aside also deserves criticism. To be sure, this principle belongs to EC law as well as to the case law of the Constitutional Court.<sup>135</sup> However, it cannot

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Decision of January 9, 1997, No. 133, I Il Foro Italiano 1469 [1998], 1480, rec. 10; decision of February 10, 1998, No. 1366, I Il Foro Italiano 1469 [1998], 1476.

<sup>130</sup> See decision of June 8, 1984 No. 170 (*Granital*), 21 C.M.L. Rev. 756 [1984], rec. 4.

<sup>131</sup> *Id.*

<sup>132</sup> Decision of June 8, 1984 No. 170 (*Granital*), 21 C.M.L. Rev. 756 [1984], rec. 5.

<sup>133</sup> Decision of November 27, 1998, No. 383, rec. 4.2 and 4.3 (July 31, 1999) <<http://www.giur-cost.org/decisioni/index.html>>.

<sup>134</sup> *Id.*

<sup>135</sup> See for ex. C 106/77 *Simmenthal* [1978] ECR 629, rec. 21. It should be noted that this principle does not preclude that Italian law in conflict with EC law can be declared unconstitutional by the Constitutional Court (see decision of April 23, 1985, No. 113 (*Beca*), rec. 7, II Riv. Dir. Agr. 330 [1987]; decision of Nov. 10, 1994, No. 384, I Il Foro Italiano 3289 [1994]).

be inferred – as the Corte di Cassazione seems to do – that Art. 2043 Civ. Code, which at the time of the decisions analyzed above did not apply to the violation of *interessi legittimi* by public authorities, must be set aside in cases of *Francovich* liability. It must be emphasized that in order to ensure compliance with EC law, national judges must not only set aside rules that are in conflict with EC law or frustrate its purpose; when necessary, they must also apply national procedural rules like Art. 2043 Civ. Code in such a way as to give full effect to Community law and not to discriminate between domestic and EC law situations.<sup>136</sup> This is necessary because it is usually national law that governs the procedures and remedies.<sup>137</sup> The Corte di Cassazione misses – or wants to ignore – this fundamental point.<sup>138</sup>

### c) Shift of tone

A comparison should be drawn between the decisions analyzed in regard to the First Question on the one hand and the *Campanelli* and *Pacifico* decisions on the Second Question on the other hand. It is interesting to compare those two sets of decisions because they all concerned the principles governing State liability and the relationship between EC law and national law. Moreover, both the *Campanelli* decision and the decisions analyzed in regard to the First Question were written by the same judge.

The tone in the *Campanelli* and *Pacifico* decisions is certainly more Euro-friendly than in those dealing with the First Question. The *Campanelli* decision emphasizes that the national legal order must ensure an adequate reparation of the damages individuals sustain from violation of EC law<sup>139</sup> and judges must recognize and protect the right to such reparation even without specific legislation.<sup>140</sup> The *Pacifico* decision draws on two Euro-friendly considerations: 1) that although the handling of details regarding the payment of damages for State liability is left to national law, the fact that according to Community law the situation gives rise to compensation cannot but influence the choice of the national rules to be applied;<sup>141</sup> 2) that such rules must not be less favorable than those relating to similar domestic claims.<sup>142</sup>

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<sup>136</sup> See *supra* text accompanying note 61. In the Italian system, Art. 2043 Civ. Code applies to the violation of the individual's interests that other provisions protect. Art. 2043 *per se* provides only a remedy (cf. Corte di Cassazione, decision of July 22, 1999, No. 500, rec. 8 [note 17]).

<sup>137</sup> Cf. Rodríguez Iglesias (note 61), at 289.

<sup>138</sup> It should be noted that according to the *Campanelli* decision EC law prescribes results whereas national law provides the means for attaining them (decision of January 9, 1997, No. 133, I Il Foro Italiano 1469 [1998], 1480, rec. 11).

<sup>139</sup> Decision of January 9, 1997, No. 133, I Il Foro Italiano 1469 [1998], 1480, rec. 11.

<sup>140</sup> *Id.* rec. 13.

<sup>141</sup> *Id.* at 1477.

<sup>142</sup> *Id.* at 1477.

The tone in the decisions dealing with the First Question was rather Euro-unfriendly. What is the reason for such a shift of attitude? In order to understand what might have happened we need to recall the core of the problem in the decisions on the First Question. There is enough evidence that in those decisions the Corte di Cassazione reacted to a specific danger: *Francovich* could call into question the State's immunity from civil liability in case of violation of *interessi legittimi*.<sup>143</sup> If this analysis is correct, there are three elements in the *Campanelli* and *Pacifico* decisions that can explain the shift of attitude of the Corte di Cassazione.

The first element is the Corte di Cassazione's statement about the separation and autonomy of Italian law from EC law.<sup>144</sup> This theoretical construction, absent as such in the decisions on the First Question, is emphasized in both the *Campanelli* and the *Pacifico* decisions.<sup>145</sup> Through such separation between the national and the Community legal system the Corte di Cassazione explains why qualifying a State action as illegal under EC law does not entail its illegality under national law.<sup>146</sup> In that connection the Corte di Cassazione emphasizes that according to its case law the damage ensuing from the non-implementation of a directive does not fall under Art. 2043 Civ. Code.<sup>147</sup> The Corte di Cassazione seems to imply that if the two legal orders are separate, two different sets of rules regarding State liability can coexist next to each other without interfering with one another: on the one hand the Italian rules on State liability, in particular Art. 2043 Civ. Code, and on the other hand the Community rules on Member State liability for breach of EC law. The Corte di Cassazione might use this separation theory as an expedient to immunize the Italian rules governing State liability from the influence of the *Francovich* case law.

The second element that can help understand the more Euro-friendly tone in the *Campanelli* and *Pacifico* decisions is that in the decisions on the Second Question EC law required the Corte di Cassazione to do something it was ready to do in any event. The Corte di Cassazione itself recalls that in 1994 it had repeatedly held that the payment under Art. 2 para. 7 of the Statute falls under Art. 409 No. 1 Code Civ. Proc. (debts due because of employment).<sup>148</sup> As already illustrated, the necessary corollary of that choice was to apply Art. 429 para. 3 Code Civ. Proc. to the payment of Art. 2 para. 7 of the Statute, given the direct link between Art. 409 No. 1 Code Civ. Proc. and Art. 429 para. 3 Code Civ. Proc.<sup>149</sup> By contrast, in the decisions on the First Question the Corte di Cassazione was firmly

<sup>143</sup> See *supra* text accompanying note 65 et seq.

<sup>144</sup> See *supra* text accompanying note 127 et seq.

<sup>145</sup> Decision of January 9, 1997, No. 133, I Il Foro Italiano 1469 [1998], 1480, rec. 9; decision of February 10, 1998, No. 1366, I Il Foro Italiano 1469 [1998], 1476.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Decision of July 9, 1994 No. 6482, Il Fallimento 159 [1995]; decision of November 9, 1994, No. 9339, I Il Foro Italiano 831 [1995]. These latter decisions are cited in the *Pacifico* decision (I Il Foro Italiano 1469 [1998], 1477) as well as in the *Campanelli* decision (I Il Foro Italiano 1469 [1998], 1481, rec. 15).

<sup>149</sup> See *supra* text accompanying note 115 et seq.

opposed to introducing the institute of State liability for the failure to enact legislation into the Italian torts system.

The third element that can help understand the Euro-friendly tone in the *Campanelli* and *Pacifico* decisions is the ECJ's decision in *Brasserie*. That latter decision clarified that in areas where Member States have wide discretion to make legislative choices, *Francovich* liability arises only if the Member State's breach of EC law is sufficiently serious, i.e. manifest and grave.<sup>150</sup> *Brasserie* held that the conditions laid down by Art. 288 (ex 215) TEC for the Community's liability also apply to the Member State's liability for breach of EC law.<sup>151</sup> It must be pointed out that the standards Art. 288 (ex 215) TEC lays down for responsibility for legislative wrong are very high when the legislature enjoys wide discretion.<sup>152</sup> This restriction introduced by *Brasserie* may have reduced the Corte di Cassazione's worries about a comprehensive rule of State liability for legislative wrong and the ensuing danger of open floodgates for State liability.

In this context it should be pointed out that the *Campanelli* decision is in conflict with the decisions on the First Question as regards the question of whether a specific legislative basis is necessary to award *Francovich* damages for failure to legislate. On the one hand, according to the central argument of the decisions on the First Question, Art. 2 para. 7 of the Statute resolved the conflict between the *Francovich* decision and the impossibility of State liability for failure to enact legislation under Italian law.<sup>153</sup> From this statement it follows that without a specific intervention of the legislator the individuals concerned cannot have a right to reparation for damages ensuing from legislative breach of EC law. On the other hand, in the *Campanelli* decision the Corte di Cassazione states that even without a specific intervention of the legislator the individuals concerned would have a right to reparation for damages ensuing from the violation of EC law.<sup>154</sup> This contradiction in the Corte di Cassazione's case law highlights the conceptual difficulties stemming from the effort to reconcile two conflicting needs: the need to preserve the State's immunity from civil liability in case of violation of *interessi legittimi* on the one hand and the need to respect the *Francovich* case law on the other hand.

<sup>150</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, rec. 37. On this decision see *supra* note 2, at 283 et seq.

<sup>151</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, rec. 42.

<sup>152</sup> *Id.* rec. 43 et seq. See also Clayton (note 82), at 24, 27; Carol Harlow, *Francovich and the Problem of the Disobedient State*, 2:3 *European Law Journal* 199, 220 (1996).

<sup>153</sup> See *supra* text accompanying note 46 et seq.

<sup>154</sup> Decision of January 9, 1997, No. 133, I Il Foro Italiano 1469 [1998], 1482, rec. 13 and 18.

V. *The Third Question: What Should Be the Legal Basis for Francovich Liability in Italy in the Future?*

1. The new rules on State liability under Art. 2043 Civ. Code after the decision of July 22, 1999, No. 500

The cases analyzed above left open the question of what the basis for *Franco-vich* claims should be in the future. To answer this question, it is necessary to illustrate the new interpretation of Art. 2043 Civ. Code introduced by the Corte di Cassazione's landmark decision of July 22, 1999, No. 500.<sup>155</sup>

This decision brings about radical changes in the Italian regime of State liability.<sup>156</sup> The most important and revolutionary of these changes is the interpretation whereby Art. 2043 Civ. Code can protect not only *diritti soggettivi* but also *interessi legittimi* violated by public authorities.<sup>157</sup>

The facts of the case can be summarized as follows. The City of Fiesole did not zone a particular lot as area upon which building is allowed.<sup>158</sup> It took this decision on the basis of a zoning rule that was later invalidated by the Consiglio di Stato, the highest administrative court in Italy.<sup>159</sup> Consequently, the owner of the lot, Mr. Vitali, sued the City of Fiesole for damages.<sup>160</sup> The defendant objected that the landowner wishing to build on his or her lot has only an *interesse legittimo* with respect to the public authorities and that, according to the case law of the Corte di Cassazione, the violation of *interessi legittimi* does not give rise to liability under Art. 2043 Civ. Code.<sup>161</sup>

The Corte di Cassazione took this case as an opportunity to overrule its previous case law whereby only the violation of a *diritto soggettivo* gives rise to liability of public authorities under Art. 2043 Civ. Code.<sup>162</sup> It relies on three main arguments. First, the text of Art. 2043 Civ. Code does not limit its sphere of application to *diritti soggettivi* so that, to be unjustified in the sense of Art. 2043 Civ. Code, a damage does not require the violation of a *diritto soggettivo*.<sup>163</sup> Second, the sphere of application of Art. 2043 Civ. Code has continually been expanded: an ever increasing number of individual interests has been subsumed under Art. 2043 Civ. Code when injured by private parties; at the same time, some of the individual interests that were usually regarded as *interessi legittimi* have been qualified as *diritti soggettivi* to award them protection under Art. 2043 Civ. Code.<sup>164</sup>

<sup>155</sup> Decision of July 22, 1999, No. 500 (note 17).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* rec. 8 et seq. The terms *interesse legittimo* and *diritto soggettivo* are discussed *supra* in the text accompanying note 20 et seq.

<sup>158</sup> Decision of July 22, 1999, No. 500, Svolgimento del processo (note 17).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* rec. 1.

<sup>162</sup> *Id.* rec. 2 et seq.

<sup>163</sup> *Id.* rec. 8 and 9.

<sup>164</sup> *Id.* rec. 2, 4 and 5.



Third, according to Arts. 33–35 of the Legislative Decree No. 80 of 1998, administrative courts are competent to rule on *interessi legittimi* as well as *diritti soggettivi* in the fields of public services, urban development and construction (“servizi pubblici, urbanistica ed edilizia”), being empowered to take in these fields all judicial remedies including compensation for damages: this implies the legislator’s intention to grant the same legal protection to both *interessi legittimi* and *diritti soggettivi* which Arts. 24 and 113 of the Constitution regard as equally valuable.<sup>165</sup>

The Corte di Cassazione mentions four further considerations that support a new reading of Art. 2043 Civ. Code. First, the immunity that the restrictive interpretation of Art. 2043 Civ. Code has awarded to public authorities is in conflict with fundamental needs for justice.<sup>166</sup> Second, legal scholars have criticized almost unanimously the traditional restrictive interpretation of State liability under Art. 2043 Civ. Code.<sup>167</sup> Third, the Constitutional Court doubted that the absence of State liability for the violation of *interessi legittimi* has been an appropriate solution.<sup>168</sup> Fourth, according to the legislation transposing the EC directive 89/665, in the field of public procurement individuals have a right to compensation for the damages they suffer from administrative acts taken in violation of Community law.<sup>169</sup>

The Corte di Cassazione holds that Art. 2043 Civ. Code is applicable to the “individual interests significant for the legal order” (“interessi rilevanti per l’ordinamento”).<sup>170</sup> It specifies that individual interests significant for the legal order can be not only *diritti soggettivi* but also *interessi legittimi* and other individual interests.<sup>171</sup> The Corte di Cassazione further explains that, to identify what “individual interests significant for the legal order” are *in concreto*, it is necessary to compare the conflicting interests: on the one hand the individual’s factual interest curtailed by the public authorities and on the other hand the objective the public authorities pursue.<sup>172</sup> According to the Corte di Cassazione, the individual’s factual interest is significant for the legal order only if its sacrifice is not justified by the pursue of an overriding objective by the public authorities.<sup>173</sup> Besides, the

<sup>165</sup> *Id.* rec. 2 and 6.3.

Art. 24 para. 1 of the Constitution reads as follows:

“All are entitled to institute legal proceedings for the protection of their *diritti* and *interessi legittimi*. (Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi.)”

Art. 113 para. 1 of the Constitution reads as follows:

“Judicial protection of *diritti* and *interessi legittimi* against acts of public authorities is always allowed before the ordinary or administrative courts. (Contro gli atti della pubblica amministrazione è sempre ammessa la tutela giurisdizionale dei diritti e degli interessi legittimi dinanzi agli organi di giurisdizione ordinaria o amministrativa.)”

<sup>166</sup> Decision of July 22, 1999, No. 500, rec. 3.3 (note 17).

<sup>167</sup> *Id.* rec. 1.

<sup>168</sup> *Id.* rec. 2 and 7.

<sup>169</sup> *Id.* rec. 6.1.

<sup>170</sup> *Id.* rec. 8.

<sup>171</sup> *Id.* rec. 11.

<sup>172</sup> *Id.* rec. 8.

<sup>173</sup> *Id.* rec. 8.

Corte di Cassazione explicitly rules out that the violation of any *interesse legittimo* whatsoever gives rise to State liability under Art. 2043 Civ. Code.<sup>174</sup> It holds that an *interesse legittimo* is protected under Art. 2043 Civ. Code only when the underlying factual interest is violated and is significant for the legal order.<sup>175</sup>

The Corte di Cassazione also introduces an important change regarding the subjective element of unlawful acts by public authorities. It recalls that under its traditional case law violations of *diritti soggettivi* by public authorities were *per se* fraudulent, malicious or negligent under Art. 2043 Civ. Code.<sup>176</sup> The Corte di Cassazione holds that in a new interpretation of this provision State liability now requires fraudulence, malice or negligence of public authorities to be established.<sup>177</sup> According to the Corte di Cassazione, public authorities act fraudulently, maliciously or negligently if they breach the rules of impartiality, correct procedure and sound administration.<sup>178</sup>

The decision of July 22, 1999, No. 500 must be welcome. It brings about coherence to the rules of civil liability and increases the vitality of the rule of law. At the same time, it must be emphasized that this decision does not necessarily entail an expansion of State liability. The actual scope of State liability under Art. 2043 Civ. Code in the future will depend on how the parameters laid down by the decision will be applied in each single case. The extent to which the objective pursued by public authorities will be given preference over the individual interest curtailed by the public authorities remains to be seen, as does the difficulty of proving fraudulence, malice or negligence of public authorities under Art. 2043 Civ. Code.

## 2. *Francovich* liability in the future

### a) Application of Art. 2043 Civ. Code

Until the decision of July 22, 1999, No. 500 Art. 2043 Civ. Code could not apply to *Francovich* claims involving *interessi legittimi*. Accordingly, the question of what legal basis *Francovich* claims could have in the future was very difficult, at least in the case of violation of *interessi legittimi*. Due to the significant changes in the State liability regime resulting from the decision of July 22, 1999, No. 500, it is possible to find a coherent and satisfactory solution to that question on the basis of Art. 2043 Civ. Code.

The main reason for the inapplicability of Art. 2043 Civ. Code to *Francovich* claims regarding *interessi legittimi* was the restrictive interpretation of State liability whereby Art. 2043 Civ. Code applied only to the violation of *diritti soggettivi*

<sup>174</sup> *Id.* rec. 9.

<sup>175</sup> *Id.* rec. 9.

<sup>176</sup> *Id.* rec. 11.

<sup>177</sup> *Id.* rec. 11.

<sup>178</sup> *Id.* rec. 11.

by public authorities.<sup>179</sup> This case law has been overruled by the decision of July 22, 1999, No. 500, with the result that the main obstacle to the applicability of Art. 2043 Civ. Code to *Francovich* damages involving *interessi legittimi* has evaporated. According to that decision, Art. 2043 Civ. Code can apply to all the individual interests significant for the legal order, including *interessi legittimi*.<sup>180</sup> As a result, Art. 2043 Civ. Code now constitutes a potential legal basis for any *Francovich* claim, regardless of whether it involves *diritti soggettivi* or *interessi legittimi*.

This, however, does not necessarily mean that Art. 2043 Civ. Code will be used as the legal basis for *Francovich* damages. To reach this result the following question must be answered in the positive: are “individual interests significant for the legal order” under Art. 2043 Civ. Code also those significant for Community law? In other words: does the expression “legal order” in the decision of July 22, 1999, No. 500 comprehend EC law as well? A positive answer is by no means obvious because, as illustrated above, in the *Campanelli* and *Pacifico* decisions the Corte di Cassazione held that national law is separate and autonomous from EC law.<sup>181</sup> Should the Corte di Cassazione want to deny the applicability of Art. 2043 Civ. Code to *Francovich* claims, it could follow this approach to extreme consequences. It could hold that the individual interests falling under Art. 2043 Civ. Code are only those relevant for the Italian legal order. This approach, however, would be unsuitable. The critique of this approach as used in the *Campanelli* and *Pacifico* decisions, expressed above, can be repeated in this context: a strict separation of national law from EC law does not correspond to the Constitutional Court’s case law and is conceptually not convincing.<sup>182</sup> A further criticism relates to the hypothesis that a *Francovich* claim is similar to a claim concerning an individual interest that is significant for the Italian legal order. If in such a case the Corte di Cassazione declined to apply Art. 2043 Civ. Code, it would breach the non-discrimination principle laid down by the ECJ.<sup>183</sup> According to this principle as applied to damages for breach of Community law, the substantive and procedural conditions for reparation of loss and damage laid down by national law for the violations of EC law must not be less favorable than those relating to similar domestic claims.<sup>184</sup>

In this context it must be emphasized that it is not totally clear how the “individual interests significant for the legal order” under Art. 2043 Civ. Code shall be determined *in concreto*.<sup>185</sup> According to the comparative test laid down in the decision of July 22, 1999, No. 500 and discussed above, it is necessary to compare the individual’s factual interest on the one hand and the objective the public au-

<sup>179</sup> See *supra* text accompanying note 16 et seq.

<sup>180</sup> See *supra* text accompanying note 170 et seq.

<sup>181</sup> See *supra* text accompanying note 126 et seq.

<sup>182</sup> *Id.*

<sup>183</sup> See *supra* text accompanying note 61 et seq.

<sup>184</sup> *Id.*

<sup>185</sup> See *supra* text accompanying note 172 et seq.

thorities pursue by curtailing that individual interest on the other hand.<sup>186</sup> The individual's factual interest is qualified as an interest significant for the legal order only if its sacrifice is not justified by the pursue of an overriding objective by the public authorities.<sup>187</sup>

It is not clear what the objective pursued by the public authorities is in the case of *Francovich* liability for failure to legislate. It could be the need to preserve the legislator's discretion and ultimately its freedom from external influence. This explanation, however, would not be particularly convincing for the case when EC law does not leave any discretion to the national legislator. It must also be pointed out that this comparative test does not necessarily play a role for the establishment of *Francovich* liability. As held by the ECJ, "where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."<sup>188</sup>

Finally, it is noteworthy that the decision of July 22, 1999, No. 500 does not mention the *Francovich* case law of the ECJ, which some regarded as an argument in favor of abandoning the restrictive interpretation whereby Art. 2043 Civ. Code applied only to the violation of *diritti soggettivi* by public authorities.<sup>189</sup> The Corte di Cassazione could have drawn on *Francovich* as an additional argument to reverse its traditional case law on Art. 2043 Civ. Code. This would have been a legitimate argument because *Francovich* brought to light and exacerbated the inadequacy of the restrictive interpretation of Art. 2043 Civ. Code with regard to State liability. Contradictions and discrepancies arose precisely from the Corte di Cassazione's effort to reconcile the need to preserve the State's immunity from liability for violation of *interessi legittimi* with the need to comply with the *Francovich* case law. Such contradictions and discrepancies are highlighted by the *Campanelli* decision. This latter decision on the one hand rules out the applicability of Art. 2043 Civ. Code to *Francovich* liability and on the other hand holds that, even without specific legislation like Art. 2 para. 7 of the Statute, the individuals concerned must have a right to reparation for *Francovich* damages.<sup>190</sup> These two needs contradict each other because it is virtually impossible to find for *Francovich* damages an adequate legal basis other than Art. 2043 Civ. Code. As a result, the need to comply with the *Francovich* case law of the ECJ, if taken seriously, ultimately required the revision of the restrictive traditional case law whereby

<sup>186</sup> Decision of July 22, 1999, No. 500, rec. 8 (note 17). See *supra* text accompanying note 172 et seq.

<sup>187</sup> Decision of July 22, 1999, No. 500, rec. 8 (note 17). As noted by the Corte di Cassazione, this comparative test is not substantially different from the rule of traditional case law whereby Art. 2043 Civ. Code applies only to the *diritti soggettivi* violations that are not justified by the law.

<sup>188</sup> C-127/95 *Norbrook* [1998] ECR I-1531, rec. 109.

<sup>189</sup> See Roberto Caranta, *Governmental Liability After Francovich*, 52 (2) *Cambridge Law Journal* 272, 289 (1993). Cf. also Monateri (note 18), at 825, 858.

<sup>190</sup> Decision of January 9, 1997, No. 133, I *Il Foro Italiano* 1469 [1998], 1482, rec. 13 and 18.

Art. 2043 Civ. Code applied only to the violation of *diritti soggettivi*. Therefore, it is surprising that the decision of July 22, 1999, No. 500 does not mention the *Francoovich* case law of the ECJ.

On the other hand, the Corte di Cassazione did not need to rely on *Francoovich* and might have omitted it on purpose, in order to avoid making too many radical changes at a time. From this silence on *Francoovich* must not necessarily be inferred any aversion of the Corte di Cassazione to State liability for violation of Community law.

#### *b) Creation of a Euro-damages rule*

Should Art. 2043 Civ. Code not be applicable to *Francoovich* claims, the question about which remedies to apply would be very problematic. A first possible solution would be to apply a judge-made rule especially tailored for State liability for breach of Community law. This would probably serve the purpose of avoiding any influence of the *Francoovich* case law on the interpretation of Art. 2043 Civ. Code in regard to State liability. However, it would be an audacious and maybe dangerous action. Although from time to time the absence of a textual basis has not restrained Italian judges from creating new rules when they wanted to, Italy is still a civil law system and not a common law one. This gives rise to some technical and conceptual difficulties to the praetorial creation of legal rules.

#### *c) Application by analogy of Art. 288 (ex 215) TEC*

Another alternative to Art. 2043 Civ. Code would be to apply by analogy the rules for liability of the European Communities (Art. 288, ex 215 TEC).<sup>191</sup> Applying by analogy Art. 288 (ex 215) TEC to *Francoovich* liability was the approach indicated by the ECJ in *Brasserie*.<sup>192</sup> This might be a suitable solution in some regards. There are, though, two problems. First, the criteria used for EC liability are currently not detailed enough and therefore should be further developed before they can constitute an autonomous liability regime. Second, although this solution might aim at respecting the autonomy of national law on State liability, it could lead to a creeping harmonization of this area of national law. It is doubtful whether this is legitimate or appropriate.

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<sup>191</sup> See Josephine Steiner, *The Limits of State Liability for Breach of European Community Law*, 4 (1) *European Public Law* 69, 95 et seq. (1998).

<sup>192</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, rec. 29 et seq.

## VI. Conclusion

The cases discussed in Parts 3. and 4. clearly show that the *Francovich* decision created no little resistance among the Italian judiciary.<sup>193</sup> It is submitted that such resistance was due not only to the revolutionary content of *Francovich per se* but also to the fact that *Francovich* highlighted and exacerbated tensions that already existed within the Italian case law on State liability.<sup>194</sup> Such tensions regarded the case law whereby Art. 2043 Civ. Code is interpreted broadly in regard to violations of individual's interests by private persons but restrictively in regard to their violation by public authorities.<sup>195</sup> This reading seems to be confirmed by the reversal of that case law carried out by the decision of July 22, 1999, No. 500.<sup>196</sup>

At the same time, there has been a moderate Euro-friendly development from the decisions on the First Question to those on the Second Question. Regardless of the motives that might be behind it, this development must be welcome. In the decisions on the Second Question the Corte di Cassazione seems more keen on accepting *Francovich* liability, at least as a matter of principle. Is this the beginning of a slow development that would ultimately lead the Corte di Cassazione to fully accept State liability for breach of EC law? It is too early to answer this question. An important litmus test will be future cases on the question of what legal basis *Francovich* liability should have in the absence of specific legislation like Art. 2 para. 7 of the Statute. Following the decision of July 22, 1999, No. 500, Art. 2043 Civ. Code may provide an adequate legal basis for any *Francovich* claim, as it now applies to the violation not only of *diritti soggettivi* but also of *interessi legittimi*.

<sup>193</sup> See Caranta (note 189), at 287. Cf. also Clayton (note 82), at 7; Steiner (note 191), at 95. For similar instances of rebellion of national courts against the influence of EC law on torts and contracts law see Caruso (note 67), at 17–26.

<sup>194</sup> Cf. generally Caruso (note 67), at 29 who explains: “Harmonisation (...) has progressively driven home to the Member States how much of their sovereignty is at stake in the surrendering of national control over private law. Integrationist pressure from Brussels is increasingly shaking the presumption of the neutrality of private law. It is forcing the national legislators to engage in debates and make choices on subjects that were once the prerogative of civil courts with their piecemeal adjudication.”

<sup>195</sup> See Monateri (note 18), at 806 et seq.

<sup>196</sup> See *supra* text accompanying note 156 et seq.