CHAPTER 7 Reflections on the *Francovich* Remedy

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1 Introduction

In his monograph European Public Law, the Achievement and the Brexit Challenge, Patrick Birkinshaw concludes that in the field of public liability, an 'area of traditional concern, we have seen the most striking of dialogues and developments between our domestic system and European systems influencing the way in which our law progresses. As pointed out, the development is not all one way. The result should not be exaggerated; but the influence should not be denied.'[1] Unfortunately the 'wind of change'[2] is now going in a different direction.

Paragraph 4 of Schedule 1 of the European Union (Withdrawal) Act 2018 provides: 'There is no right in domestic law on or after IP completion day to damages in accordance with the rule in Francovich.'

This contribution aims to reflect on the famous remedy of Member State liability in the United Kingdom (UK) legal system.

2 Of Rights and Remedies

'Francovich' type claims have been a well-known route for redress for UK-based applicants who pursued compensation for breaches of Community law. The Francovich rule was later revisited and extended by the Court of Justice of the European Union (CJEU). They have provided a route for compensation where businesses or individuals have suffered damage due to non-compliance with European Union (EU) law or incorrect transposition of EU law.

When Mr Francovich filed his claim he did not realise that one of the most discussed cases in EU law would carry his name and would be the object of much academic and political debate to come.[3]

The remedy of Member State liability for breaches of Community law, and a right to monetary compensation, was established in the cases of Francovich[4] and Brasserie du Pêcheur and Factortame.[5] In European Member States it is now accepted and forms part of a national

[1] P. Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge*, Wolters Kluwer3rd ed., 2020, p. 630.
[2] *Ibid*., §10.02, p. 575.
[3] F. Nicola & B. Davis, *EU Law Stories*, 2017, 339.
[4] Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, 428.
[5] (C-46/93) EU:C:1996:79 (5 March 1996).

framework of liability provisions. However, as is well known, the new remedy received some early criticism. Harlow called the decision by the European Court of Justice 'reckless' and said it represented an 'act of defiance by the ECJ … .'[6] Others went as far and accused the Court of 'judicial law-making and the undermining of the rule of law.'[7] This argument was used by the German government which had argued in the case of Brasserie du Pêcheur and Factortame that legislation was required when creating a right to damages. The Court's view on this is well known. It referred to Article 215 [now 288 Treaty on the Functioning of the European Union] which refers to the general principles of state liability known in the Member States. The reference to the legal systems of the Member States could be understood as an opportunity for research into comparative legal analysis of existing frameworks of state liability in the various Member States. However, disappointingly in reality it appears as if this is not the case and Article 215 contains a legitimisation for the Court of Justice to develop judge made law whilst considering the opinions of the Advocate Generals and the judges' own research into academic literature.[8]

With similar scepticism Horsley states more recently that '[t]he Court's reasoning in Francovich directly challenged the nature of the EU legal order as a system of limited attributed competences and, in particular, the position of Member States within that system as constituent authorities.'[9] He further states that the additional remedy was a 'truly remarkable move' for a Court as it only ever had the role of discharging an 'agency function within a system of limited attributed competences.'[10] The Court of Justice had made it clear in its Francovich decision that 'A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 [now 10] of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law.'[11] Unlike many of the critics of the decision, Arnull argued that 'at the very least we may therefore conclude that there is an adequate legal basis in the Treaty and the legal systems of the Member States to justify the introduction of the principle

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[6] C. Harlow, Francovich and the Problem of the Disobedient State, *European Law Journal* 2, 1996, 199, 222.
[7] S. Douglas-Scott, *Constitutional Law of the European Union*, Pearson, 2002, p. 322.
[8] F. Ossenbühl, *Staatshaftungsrecht*, 5th ed., C.H.Beck, 1998, 579, 580.
[9] T. Horsley, The Court of Justice of the European Union as an Institutional Actor: Judicial Law-*M*aking and Its Limits, Cambridge University Press, 2018, 140-141.
[10] *Ibid*., 22.
[11] Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, 428.

of State liability. The case law on the subject does not, it is submitted, represent an example of contra legem behaviour on the part of the Court.'[12]

It was emphasised that the remedy of Member State liability cannot be viewed in isolation from the Member States' obligations under Community law more broadly. As Arnull points out: 'The Treaties are silent on the matter, although it might be thought that such liability is a corollary of primacy and direct effect, in that the payment of damages may in some circumstances be the only way of upholding an individual's rights under Community law.'[13] The main actors are national judges in giving life to the remedy of Member State liability when interpreting European and national law provisions. Following from this the authority of the Court's judgments on Member State liability and national judgments providing the remedy within the national judicial system is to be viewed emphatically in connection with the principle of supremacy of Community law.[14]

Craig's view is that 'the ECJ has been at its most creative in this area.' In his view 'the need for effective remedies to safeguard EU rights is reflective of the principle ubi ius, ibi remedium, which is found in many national legal systems. The duty incumbent on Member States to take all appropriate measures to ensure fulfilment of their Union obligations is especially salient in a polity such as the EU, but resonates with analogous obligations in federal or confederal systems.'[15] Conceptual differences between English and continental legal systems could therefore act as one of the reasons why abandoning the Francovich remedy can be disaggregated from the existence of any rights under EU law. Many continental legal systems are centred on rights (Rechtsansprüche) and causes of action. Comparatists have noted that the English legal system has never provided a clear distinction between substantive and procedural administrative law.[16] English law is concerned with remedies rather than rights: 'Ubi remedium, ibi ius'. Austin conceived of law in a typically English way by focusing on the

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[12] A. Arnull, European Union Law and the Contra Legem Principle, *European Law Review* 47(3), 2022, 291, 306.
[13] A. Arnull, *The European Union and its Court of Justice*, Oxford EC Law Library, 1999, 149.
[14] P.-C. Müller-Graf, 'Die Verantwortung mitgliedstaatlicher Gerichte für die Autorität des Unionsrechts'. In G. Barrett, J.-P. Rageade, D. Wallis & H. Weil (eds), *The Future of Legal Europe: Will We Trust in It? Liber Amicorum in Honour of Wolfgang Heusel*, Springer, 2021, 584.
[15] P. Craig, The EU, the Member States and Damages Liability (July 5, 2021). In M. Heidemann (ed.), *The Transformation of Private Law – Principles of Contract and Tort as European and International Law*, Springer, available at SSRN: https://ssrn.com/abstract=3880596, p. 32.
[16] J. Schwarze, *European Administrative Law,* Sweet & Maxwell, 1992, 148.

remedy rather than a body of law as, for instance, that developed in France in the 19th century. In Germany, the individual right against a public authority to an act or omission of that authority is always accompanied by a procedural means to effectuate this act or omission directly: 'Ubi ius ibi remedium'. Further, in German Law some topics dealt with by the English Courts under the heading of 'remedies' would not be considered as procedural topics. The liability of public officials, for instance is covered in 'substantive' rather than 'procedural' provisions in the German Civil Code.[17] It has been argued, however that the continental view on rights and remedies has also echoed in early common law case law.[18] Beal refers to the case of *Ashby v. White*[19] which contains the premise that the existence of a right requires a remedy. Lord Holt CJ said that 'if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal'.[20] However, other comment suggests that the *Ashby v. White* principle is a myth and largely misunderstood because the final decision in the House of Lords never adopted Lord Holt's reasoning in his dissenting speech delivered in the Queen's Bench division.[21] To conclude it is at least clear that the application of the ubi ius principle did not find the same application it finds in continental legal systems and is subject to some debate in the common law. The loss of the Francovich remedy does not necessarily mean that there is no remedy for breaches of Community law in English law. There may well be statutory claims for compensation should retained EU law rights be infringed. However, Francovich as a judge made remedy has been abandoned.

3 Removal of *Francovich*

Paragraph 4 of Schedule 1 of the European Union (Withdrawal) Act 2018 stipulates in quite an authoritarian style that there is generally 'no right in domestic law on or after [the end of the transition period] to damages in accordance with the rule in Francovich. This means that this

[17] *See* Article 34 Basic Law in connection with Article 839 Civil Code.
[18] K. Beal QC, *Ubi Ius, Ibi Remedium*: Do the Union Courts have the 'Latin for Judging', *Judicial Review*, 20(3), 2015, 115.
[19] (1703) 92 ER 126.
[20] *Ibid.*
[21] T. Sampsell-Jones, The Myth of *Ashby v. White*, 8 *University of St. Thomas Law Journal* 40, 2010, 49.

'key remedy' has now been 'turned off' as Barnard[22] expressed it where a breach occurred on or after Exit Day.

Paragraph 4 of Schedule 1 is then subject to the transitional provisions stipulated under paragraph 39 of Schedule 8. 39 (3): Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the UK before exit day. In particular, sub-paragraph (7) delays the prohibition in the Act on seeking Francovich damages in domestic law for two years after exit day. This ensures that the Act does not prevent individuals from continuing to claim such damages in domestic law where a breach of EU law occurred before exit day. In other words, it provides for a two-year window for accrued claims to be brought by the end of 2022.[23]

When reflecting on the arguments for excluding the Francovich remedy in English law the lack of connection with the EU legal order stands out as the main reason. The UK government's view was that 'The UK government responded to the EU law framework by rolling back existing judicial remedies. The Francovich remedy is linked to EU membership' and 'will no longer be relevant after we leave'.[24] In the same vein Lord Keen of Elie stated: 'The UK will no longer be under an obligation to implement directives after exit, so the ability to claim Francovich damages would not be possible as a post-exit cause of action.'[25] The UK government's rationale for the removal of the remedy might therefore be seen in the link between supremacy of EU law and the obligation under EU law but somewhat limited to the implementation of directives. The UK government can find partial support in some commentators who see in the Francovich principle 'an extension of supremacy of EU law, ensuring its full effectiveness.'[26]

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[22] C. Barnard, Retained EU Law in the UK Legal Orders: Continuity Between the Old and the New. In A. Lazowski & A. Cygan (eds), *Research Handbook on Legal Aspects of Brexit*, Legal Studies Research Paper Series, Edward Elgar, 2022. University of Cambridge Faculty of Law Research Paper No. 27/2021 p. 10, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947215.

[23] https://www.legislation.gov.uk/ukpga/2018/16/schedule/1; last accessed 13 October 2022.

[24] A. Lang, V. Miller & J.S. Caird, Commons Library Briefing, Number 8140, EU (Withdrawal) Bill: The Charter, General Principles of EU Law, and 'Francovich' Damages, 17 November 2017, 31.

[25] European Union (Withdrawal) Bill, Volume 791: debated on Tuesday 8 May 2018, 117: Schedule 8, p. 64.

[26] S. Douglas-Scott, The Constitutional Implications of the EU (Withdrawal) Act 2018: A Critical Appraisal, Queen Mary University of London, School of Law, Legal Studies Research Paper, No. 299/2019, 7.

Others refer to the 'federalist aspirations' of the damages action under EU law: 'In EU Law, a liability action (especially if successful) is tangible evidence of a loss of sovereignty as the individual, by appealing directly to the supranational authority, "reduced" the Member State to just another tortfeasor.'[27] The nature of retained EU law, however, which has been given superior status to earlier domestic law is however, somewhat nebulous in this context. If the Francovich principle was 'an extension of supremacy of EU law', then surely supreme retained EU law should be treated similarly to maintain consistency. Section 5(2) of the European (Withdrawal) Act 2018 provides that 'Accordingly, the principle of supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day.' This section has not been without controversy as is evidenced here: 'We consider that the notion of maintaining the "supremacy principle" following exit amounts to a fundamental flaw at the heart of the Bill. We do not consider that clause 5 clearly operates to bestow "supremacy" on retained EU law once exit day arrives. The "supremacy" on retained EU law once exit day arrives.' Against the recommendations of the Select Committee, the drafters of the EU (Withdrawal) Act 2018 maintained the terminology but not the theoretical consequences. In other words, the term 'supremacy' in the EU (Withdrawal) Act 2018 has therefore adopted a different meaning; it is no longer to be understood as an EU term but a culturally specific UK term in the Withdrawal legislation. Whilst 'supremacy' of retained EU law was to continue, the remedy for breaches was to be removed. At the time of writing the UK government has introduced a new Bill which is seeking to repeal the principle of retained EU law supremacy by the end of 2023.[28]In reversal of the order under the EU (Withdrawal) Act 2018 the Bill then also seeks to allow for the principle of supremacy to be re-instated by way of the introduction of secondary legislation in individual areas of retained EU law.[29]

Before the coming into force of the EU (Withdrawal) Act 2018 there was support for the continued application and even the extension of the Francovich principle in the House of Lords:

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[27] A. Biondi & M. Farley, Damages and Liability Actions in EU Law. In R. Schütze & T. Tridimas (eds), *Oxford Principles of European Law* (Vol. 1). Oxford University Press, 2018, 1040-1063, 1045.

[28] Subsection A1 in The Retained EU Law (Revocation and Reform) Bill 2022; https://bills.parliament.uk/bills/3340 last accessed 13 October 2022.

[29] Subsection A3 in The Retained EU Law (Revocation and Reform) Bill 2022; https://bills.parliament.uk/bills/3340 last accessed 13/10/2022. *Explanatory notes Retained EU Law (Revocation and Reform) Bill Explanatory Notes*, p. 13; https://publications.parliament.uk/pa/bills/cbill/58-03/0156/en/220156en.pdf; last accessed 13 October 2022.

Lord Davis of Stamford, for instance commented: 'I dare say it will be said by the Government on this subject that Francovich will not be appropriate after we have left the Union because we will not be part of it any more and the whole purpose of Francovich is to provide a remedy to those who are disadvantaged by the non-observance of Union law in the EU. My view is that we should make sure that those people who currently enjoy those rights and remedies – which is all our citizens – should continue to enjoy them in respect of the same laws as they do at present, in other words in respect of retained law. There could be a very reasonable and attractive agenda that would say that we should extend the Francovich principle from a Union law or a retained law to the generality of law in this country – British law, English law, Scots law et cetera.'[30] Lord Davis refers to the remedial relief individuals can seek in the courts around the country and pays respect for the rule of law. His speech also conveys the appreciation of the unifying effects of a ius commune.

The Francovich remedy is as discussed earlier very much about the rule of law and the creation of an effective remedy for the infringement of rights. There is little mention in the Explanatory notes on the Withdrawal of the need for protecting citizens' rights other than the view that there would be other remedies available for the protection of individuals. This raises some interesting questions with regard to the scope of protection of the Francovich remedy. The Court of Justice made it clear that 'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'[31] Dougan emphasises that the scope of the Francovich remedy is primarily concerned with providing individuals with a remedy for breaches of Community law. In his view less importance is attached to the idea of punishing national governments for failing to comply with their obligations under EU Law.[32] Fears of floodgates of Francovich-type state liability cases were never confirmed. Empirical research showed that the remedy remained 'residual and exceptional' in Member States.[33] Lock's research in 2012 concludes that Member State liability is not an effective private enforcement

[30] European Union Withdrawal Bill, Volume 789 debated on 5 March 2018, Lord Davis of Stamford, 43: Schedule 1, p. 16, line 27.
[31] Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357 para. 33.
[32] M. Dougan, Addressing Issues of Protective Scope within the Francovich Right to Reparation, *European Constitutional Law Review* 13(1), March 2017, 124.
[33] Marie-Pierre F. Granger, Francovich Liability Before National Courts: 25 Years On – Has Anything Changed?. In Paula Gilliker (ed.), *Research Handbook on EU Tort Law*, Elgar, 2017, 95; T. Lock, Is Private Enforcement Through State Liability a Myth? – An Assessment 20 Years after Francovich, *Common Market Law Review* 49(5), 2012, 1675-1702.

mechanism. Only 22% of the then 37 cases in Germany succeeded and 28% of the 25 cases in the UK were successful at the time of his research.[34] More recently it has been noted that more research into the monetary success of the damages claims is needed to be able to analyse the claims made in Member States under this head of tort.[35] It is also worth noting that the Francovich remedy was enforced by national courts and is largely reliant on the application of domestic law due to its hybrid nature. Empirical evidence shows little reason to suggest that the Francovich remedy caused extensive budgetary concerns. Further, as the remedy was largely implemented through national law provisions and often failed due to the high threshold of the 'sufficiently serious' test. Whilst it protected the rights of individuals and the rule of law, in political debates Francovich became symbolic ofr the perceived loss of sovereignty during EU membership. As discussed the preservation of the term 'supremacy' in the European Union (Withdrawal) Act 2018 EUWA is not entirely coherent with this sentiment and illustrates the conceptual difficulties the drafters of the EUWA faced. To conclude it appears that the end of Francovich is simply designed to prevent legal challenges to Government action. With the disappearance of the Francovich remedy from the toolkit of UK lawyers, it is therefore worth examining whether other remedies for breaches of Community law might be available in English law.

4 The Reappearance of the *Francovich* Remedy

Whilst the remedy is gone after the two-year window closes by the end of the year, retained rights in EU law will remain for some time. It follows that in important areas of law such as Environmental law it will be harder to bring an action against the government for breaches of obligations under retained EU law.[36]

As discussed earlier Francovich stands for the protection of the individual against the state. Judge Giuseppe Frederico Mancini, the Italian lawyer who drove the protection of workers' rights and who was instructive in the formulation of the Francovich principle believed in the protection of the individual.[37]

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[34] T. Lock, Is Private Enforcement Through State Liability a Myth? – An Assessment 20 Years after Francovich, *Common Market Law Review* 49(5), 2012, 1675-1702, 1685.
[35] A. Biondi & M. Farley, Damages and Liability Actions in EU Law. In Robert Schütze & Takis Tridimas (eds), *Oxford Principles of European Law* (Vol. 1, pp. 1040-1063), Oxford University Press, 2018, 1063.
[36] https://www.politicshome.com/news/article/government-accused-of-chilling-bid-to-block-compensation-claims-after-brexit; last accessed 1 September 2022.
[37] F. Nicola & B. Davis, *EU Law Stories*, Cambridge, 2017, 345.

A recent and one of the last cases using the Francovich remedy illustrates the importance of this remedy. *QH (Afghanistan) v. Secretary of State for the Home Department*[38] concerned a claim for damages by a young Afghan who was born in Afghanistan and later joined his British uncle in the UK at the age of 16. His application for asylum was refused wrongfully and he was removed to Germany where he spent three years fighting the deportation and then seeking compensation. The Court of Appeal held that amongst other breaches this constituted a breach of Article 27 of the Dublin III Regulation. It was decided that this breach had been sufficiently serious and that he was entitled to Francovich damages.

The question remains as to what is going to happen if applicants will not be able to claim Francovich compensation in cases like this. The Francovich remedy was previously embedded in English private law. Liability for breach of Community law was comparable to a breach of statutory duty.[39] This had been considered in the Factortame V decision.[40] Lord Hobhouse relied on previous case law, i.e., *Garden Cottage Foods*[41] and *Bourgoin v. MAFF*[42] and held that the duty was imposed by way of the European Communities Act 1972. The decision in *Phonographic Performance Limited v. Department of Trade and Industry and Another*[43] which was concerned with the alleged incorrect transposition of the Rental Rights and Related Copyrights and Related Rights in the Information Society Directive (2001/29) confirmed this. The court made important statements as to the nature of the claim. It held that a claim in damages for breach of Community law 'gives rise to a correlative right in one who has suffered such damages' and that such a 'right is not discretionary'.[44] The Crown had argued that the cause of action is 'sui generis' resulting in a public law claim which 'ought to be pursued in a public law claim' in proceedings for judicial review. Such a procedure 'will enable the court to exercise control over the claims and the periods for which they may be pursued.' The Crown argued that in this case the court should strike out the claim as an abuse of process. It was held that this interpretation of the nature of the claim would be 'to subject the rights of an individual to a discretion and a time limit much more restrictive than those normally appropriate to a private law claim for breach of statutory duty and would itself constitute a breach of

[38] [2022] EWCA Civ 421 (01 April 2022).
[39] T. Cornford, *Towards a Public Law of Tort*, Ashgate, 2008, 2230; Jack Williams, Francovich Claims Are Dead, EU Relations Law https://eurelationslaw.com/blog/francovich-claims-are-dead-long-live-francovich-claims; last accessed 9 August 2022.
[40] [1998] 1 CMLR 1353.
[41] [1984] AC 130.
[42] [1986] QB 716.
[43] [2004] 3 CMLR. 31.
[44] *Ibid*.; para. 47.

Community Law'.[45] Despite the fact that the courts ruled that the European remedy should be considered as a breach of statutory duty it is still not clear whether the term is used in a wide non-technical sense or whether the traditional tort was referred to. It has been argued that 'the Eurotort is simply to be classified as a tort in domestic proceedings and the repeated references to breach of statutory duty are a redundancy.'[46] The creation of torts such as the Euro tort as a breach of statutory duty has even been described as 'obscure'.[47] It is, however an important point for two reasons. With a view to the discovery of pure economic loss the distinction is crucial: the traditional breach of statutory duty allows such a recovery more liberally, the tort of negligence does not.[48] A separation of domestic law and a free-standing cause of action in Community law as seen in German cases does not feature in the English decisions. Secondly, this approach might allow for a reassessment of Francovich in English courts.[49] The flexible common law approach may have been more prepared to accommodate the European remedy in its domestic system of torts and provide an effective protection of Community law rights. It is, of course now well established that the Francovich remedy is a breach of statutory duty.[50] As a private law cause of action in tort, breach of statutory duty is subject to procedural provisions provided for in other pieces of legislation.

In a recent blog Williams assesses whether there might be a reappearance of Francovich claims in the courts.[51] He states that 'a claim for Francovich damages is a private law cause of action in tort (breach of statutory duty) and is subject to the six-year limitation period in section 2 of the Limitation Act 1980. This means that the EU (Withdrawal) Act 2018 reduces the limitation period for such claims.'[52] He considers whether there might be a way to challenge the provisions in the EUWA. He suggests that it might be possible to argue that the provisions in the EU (Withdrawal) Act 2018 should be 'read down' in accordance with section 3 Human

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[45] *Ibid*., para. 50.
[46] K.M. Stanton, 'New Forms of the Tort of Breach of Statutory Duty', *Law Quarterly Review*, 120, 2004, 324 [329].
[47] *Ibid*., at 340.
[48] *Ibid*., at 341.
[49] J. Williams, Francovich Claims Are Dead, EU Relations Law https://eurelationslaw.com/blog/francovich-claims-are-dead-long-live-francovich-claims; last accessed 1 September 2022.
[50] *Arriva v. Department for Transport* [2019] EWCA Civ 2259.
[51] J. Williams, Francovich Claims Are Dead, EU Relations Law https://eurelationslaw.com/blog/francovich-claims-are-dead-long-live-francovich-claims; last accessed 1 September 2022.
[52] *Ibid*.

Rights Act 1998. Article 1, Protocol No. 1, European Convention on Human Rights (ECHR A1P1) provides as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In the recent case of *R v. The Proprietor of H Schools, ex parte AA*[53] it was confirmed that the Strasbourg Court has interpreted the concept of 'possessions' broadly. The claimants had sought damages for discrimination at school under Part 6 of the Equality Act 2010 and argued that there was a breach of their rights in ECHR A1P1. As well as tangible property, the term possessions has been held to include various intangible rights and legitimate expectations to payments or assets of various kinds.[54] The concept of 'possessions' has an autonomous meaning which is independent of the formal[55] classification in domestic law and is not limited to the ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision. The High Court confirmed that a claim for damages in this case was a 'possession' within the meaning of A1P1.[56] More problematic is the requirement that the claimant can show that there was a legitimate expectation to the possession.[57] These are complex questions and the success of challenges to the shorter limitation period contained in the EU (Withdrawal) Act 2018 is uncertain. Time will tell whether the courts will be seized with this issue. There is some hope now as it appears that plans to repeal the Human Rights Act 1998 have been dropped.[58] Only time will tell whether a challenge to the EU (Withdrawal) Act 2018 might be brought in the UK or even Strasbourg and provide applicants with more time to seek justice. The Human

[53] [2022] EWHC 1613 (Admin).
[54] *Ibid*., 47.
[55] https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf; p. 7, last accessed 8 September 2022.
[56] [2022] EWHC 1613 (Admin) 55.
[57] *Ibid*., with reference to *Draon v. France* (2005) 43 EHRR 40.
[58] https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan; last accessed 8 September 2022.

Rights Act 1998 could perhaps still come to the rescue should an applicant want to argue that the shorter limitation period is in breach of Human Rights.

6 Conclusion

Much has been said about the Francovich remedy which has become synonymous with the body of case law that was established by the Court of Justice of the EU over a span of nearly 30 years. It is not only famous case names that will no longer play a role in British courts. Despite the relatively small number of successful claims in the UK, Francovich had found its prominent place within a myriad of complex domestic principles on public liability and inspired judges and academics. It provided an avenue for redress and stood for the protection of rights and the rule of law and it opened avenues for cross-fertilisation. Rights without remedies are not much use. Let us hope for the wind to change again. In Judge Frederico Giuseppe Mancini's words: 'In any event, aren't professors even if they are judges, entitled to a bit of daydreaming?'[59]

[59] G. Frederico Mancini, The Italians in Europe, *Foreign Affairs*, 79(2), March-April, 2000, 122-134, at 134.