



Supranational influence in EU enforcement: the ECJ and the principle of state liability

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ABSTRACT Existing research on supranational autonomy in the European Union (EU) is predominantly concerned with political and judicial agenda-setting, whereas the supranational institutions' capacity to exert independent influence in post-decisional enforcement has received more limited attention. Employing principal-agent analysis, this article explores an important component of the supranational institutions' efforts to boost EU enforcement during the last decade – the European Court of Justice's (ECJ's) establishment of the principle of state liability in conflict with the explicit wishes of national governments. This case suggests that the supranational institutions may exercise independent influence not only through agenda-setting, but also by moving the enforcement of state compliance beyond governments' original intentions when delegating supervisory competences. Tracing the attempts of member states to undo or limit the effects of the ECJ's actions, the article confirms the limits of treaty revision as a sanction, but suggests that state inaction at the national level constitutes a form of sanction which should not be neglected.

KEY WORDS Compliance; enforcement; European Court of Justice; principal-agent; state liability.

INTRODUCTION

In the last decade, the European Court of Justice (ECJ) has expanded European Union (EU) enforcement in ways which deviate from the declared interests of national governments. Through the principle of state liability, the ECJ has created a form of decentralized sanctions against non-complying member states, despite the explicit rejection of such a system at the 1991 intergovernmental conference (IGC). In this article, I explain this development employing a principal-supervisor-agent (P-S-A) model specifically designed to capture strategic relations in EU enforcement, thus joining the growing number of scholars who use principal-agent (P-A) theory to account for patterns in member state control and supranational influence in European integration (see, especially, Pollack 1996, 1997).

The increasing use of P-A theory stems not least from its capacity to bridge the competing conceptions of intergovernmentalism and neo-functionalism. By

acknowledging the initial primacy of the member states and then investigating their degree of control over the supranational institutions, P-A theory offers a neutral theoretical language which does not a priori discriminate against the claims of either of the two approaches. Intergovernmentalists have employed P-A analysis to further the argument that the independent influence of the Commission, the Court, and the Parliament is limited and that national governments effectively remain in control (Garrett 1992; Garrett and Weingast 1993; Moravcsik 1993, 1995). Scholars inspired by neo-functionalism, on the contrary, have used P-A theory to demonstrate that the supranational institutions enjoy considerable autonomy and thus can push the process of integration further and in other directions than desired by member state governments (Cram 1997; Alter 1998; Stone Sweet and Caporaso 1998).

This article attempts to address a weakness in the growing literature on supranational influence. Existing research is predominantly concerned with the supranational institutions' capacity to drive European integration forward by engaging in political or judicial policy-making. As Mark Pollack notes: 'Much of the literature on the EC's supranational organizations focuses on the purported "agenda setting" functions of these organizations' (1996: 10). By contrast, the supranational institutions' capacity to exert independent influence in EU enforcement has so far received more limited attention. Whereas, slightly simplified, the literature on supranational autonomy largely has refrained from extending this analysis to the enforcement phase, the legal and political scholarship on enforcement does not explicitly address the question of independent supranational influence (cf. Snyder 1993; Steiner 1995; Mendrinou 1996; Jönsson and Tallberg 1998).

The few studies that combine these orientations, and examine member states' capacity to prevent the institutions from strengthening EU enforcement beyond governments' wishes, have explored the Court's transformation in the 1960s of the Article 177 procedure into a decentralized system of enforcement (cf. Weiler 1994; Alter 1998). Supranational attempts to reinforce EU supervision did not end with the creation of this important avenue of enforcement, however. Most notably, the last decade has witnessed a concerted push by the Commission and the Court to strengthen centralized as well as decentralized enforcement (Tallberg 1999). The ECJ's establishment of the principle of state liability, sometimes referred to as a third stage or pillar in achieving effective decentralized enforcement (Steiner 1995: ch. 2; Dehousse 1998: 46), is probably the most important component of these efforts.

The argument here is developed in three stages. First, I explain why the focus on post-decisional enforcement rather than pre-decisional agenda-setting requires an extended P-A-S model. Second, I show how the ECJ, by exploiting its judicial independence and member governments' lack of intrusive monitoring mechanisms, succeeded in introducing a form of decentralized sanctions that national governments on repeated occasions had decided against. Third, I account for member states' two-fold attempts to sanction the Court and state liability: the failed attack at the 1996–7 IGC, and the temporarily more successful option of inaction at the national level.

A PRINCIPAL-SUPERVISOR-AGENT MODEL OF EU ENFORCEMENT

The analytical core of P-A theory is the principal-agent relation, which in its simplest version arises whenever one party (principal) delegates certain functions to another party (agent). This act of delegation immediately gives rise to a problem, however, as the agent might decide to pursue its own interests rather than those of the principal – to ‘shirk’ in the P-A vocabulary. The principal may reduce the likelihood of such shirking by engaging in monitoring of the agent’s actions and by threatening to impose sanctions if undesired behaviour is detected.

Transferring the principal-agent imagery to the EU context, students of European integration have conceptualized national governments as principals which through the Treaties have delegated certain functions to the supranational institutions as agents. In line with the logic of P-A theory, it has then been posited that the Commission’s capacity to act as policy entrepreneur and independent agenda-setter, and the ECJ’s capacity to engage in judicial policy-making, are conditioned by the control mechanisms exercised by member state principals. Whereas this actor configuration aptly captures the relationship between national governments and supranational institutions in the pre-decisional phase of political and judicial agenda-setting, the analytical fit is less immediate when we address the Commission’s and the Court’s enforcement functions. The roles that national governments and supranational institutions play depend on what aspect of the EU policy process is under scrutiny.

For a proper understanding of the strategic relationship between member states and supranational institutions in EU enforcement, we need to extend the original two-actor model into a three-actor P-S-A model. The addition of a ‘supervisor’ to the cast of actors is familiar from economic P-A theory as developed within the new institutional economics, where it is recognized that the principal, for the purpose of enhancing control over the agent’s actions, may engage a supervisor whose role it is to gather more information about the agent’s activity than would otherwise be available to the principal (cf. Alchian and Demsetz 1972; Tirole 1986).

In the simple P-S-A model presented here, the member governments of the EU (multiple principals) assign to the Commission and the Court (supervisors) the task of enforcing the implementation of and compliance with EC law, as delegated to the individual member states (multiple agents). Member states are thus conceived of as both principals and agents, who at t_0 collectively reach decisions in inter-governmental bodies, and at t_1 are expected to individually carry out the adjustments necessary to realize these decisions. The supranational institutions, for their part, function as supervisors engaged by national governments for the purpose of monitoring actual member state behaviour and enforcing compliance with Community rules. This configuration reflects the roles of member states and institutions as laid down in the Treaties and as exercised in practice.

The preferences that member states and supranational institutions hold in this strategic relationship are distinct and conflicting. The pro-integrationist preferences of the Commission and the ECJ hold true also in the post-decisional phase, where ‘more Europe’ takes the shape of adequate compliance with European Community

(EC) rules. As the Commission and the Court stress in basically all reports and judgments pertaining to the question of compliance, policy-making initiatives at the European level are of little value and the concept of a 'Community based on the rule of law' amounts to little, if member states routinely flout legislation and fail to comply with Court judgments.

Member states' interests are more complex and involve three parallel and partly contradictory preferences. These reflect member states' various roles as expressed in the P-S-A role configuration. First, as principals, they want to see the policy proposals agreed to in the Council properly implemented and complied with, and to this end they need to equip the Commission and the Court with the necessary enforcement powers. Second, and also as principals, member states are anxious to protect state sovereignty, and this obviously puts a limit on the desire to delegate fiercer enforcement weapons to the supranational supervisors. Third, as agents, member states prefer to soften the adjustment demands of new EU policies on national political, economic, and administrative structures. All EU member states hold all three kinds of preference. It is essential to note, however, that the relative intensity of the different preferences is likely to vary across the member states. As I will show, this variation has important implications for government principals' capacity to sanction supranational shirking.

The delegation of supervisory powers to the Commission and the Court constitutes an act of collective self-commitment which transforms the original principal-agent relation into a P-S-A relationship. But, whereas this delegation ameliorates the problem of member state non-compliance, it also creates a new dilemma. National governments engage the Commission and the Court to perform certain well-defined enforcement functions – no more, no less. As the interests of the supranational institutions partly differ from those of national governments, however, there is a palpable risk that the institutions may attempt to conduct their enforcement operations in other ways than governments desire. Engaging the Commission and the Court as supervisors therefore does not solve the problem of shirking *per se*. Rather, it replaces governments' concern with one form of shirking – state non-compliance – with another – supranational influence. Instead of one, we now have two principal-agent-like relationships subject to the problem of shirking, namely, that between principal and supervisor and that between supervisor and agent.

Conceptualizing the Commission and the Court as supervisors in a P-S-A relationship yields a number of important implications. It suggests that these institutions will perform their enforcement functions with an eye to their own interests, that is, promoting 'more Europe' through adequate compliance. To the extent that existing enforcement means are insufficient to secure satisfactory compliance with EC rules, the supranational institutions will work to reinforce these instruments, if necessary by independent action in conflict with member state preferences. The mechanisms by which the institutions can induce higher compliance, and the means they must enhance if they are to exert independent influence in EU enforcement, are monitoring and sanctions. Most importantly, however, conceptualizing the Commission and the Court as supervisors suggests that their capacity to move EU enforcement beyond member states' wishes is constrained by governments' ability

to control the institutions through monitoring and sanctions. In the remainder of the article, this model provides the analytical framework for analysing the ECJ's establishment of the principle of state liability and member states' subsequent attempts to undo or limit the effects of the Court's actions.

SUPRANATIONAL SHIRKING IN EU ENFORCEMENT: THE PRINCIPLE OF STATE LIABILITY

Wanted: sanctions against non-complying member states

To provide the Commission and the Court with the means to fulfil the supervisory responsibilities laid down in Articles 155 and 164, government principals have equipped the supranational institutions with certain concrete enforcement powers. Primary among these powers is the Commission's right to initiate infringement proceedings against non-complying states under Article 169, and the Court's duty in such cases to determine whether or not member states are in compliance. Besides this delegated enforcement power at the centralized EU level, an additional instrument has been created at the national level through the ECJ's transformation of the preliminary ruling procedure under Article 177 into a means of enforcement. In their respective profiles, these forms of centralized and decentralized enforcement conform to what Mathew McCubbins and Thomas Schwartz denote 'police-patrol' and 'fire-alarm' oversight in their classic application of P-A theory to congressional-bureaucratic relations in the US (McCubbins and Schwartz 1984). Whereas supervision through the Article 169 procedure is centralized, active, and direct, granting the supranational institutions an immediate role in the enforcement of member state compliance (police-patrols), supervision through national courts is decentralized, reactive, and indirect, where the role of the institutions consists in creating and perfecting a system permitting citizens and companies to independently secure their rights under EC law (fire-alarms).

In P-A theory, enforcement is generally taken to mean the existence of both monitoring and sanctions. Prior to 1991, however, neither police-patrol enforcement through Article 169 proceedings nor fire-alarm enforcement through national courts could be backed up with a general threat of financial sanctions if member states refused to comply. This absence of sanctions seriously handicapped EU enforcement and undermined the supranational institutions' capacity to effectively fulfil the role as supervisors securing member state compliance. Not surprisingly, therefore, the institutions had on repeated occasions called on government principals also to delegate sanctioning powers. The proposals included both the suggestion that Article 169 proceedings be equipped with financial penalties, and the suggestion that some kind of state liability principle be developed to the effect that individuals could claim compensation from non-complying states in national courts.

Already in 1975 the Court presented a document in which it argued that the lack of sanctions in the European Economic Community (EEC) Treaty constituted an omission which ought to be corrected through amendment (European Court of

Justice 1975). The suggestions bore apparent similarity to the sanctioning powers that the Community institutions held in the European Coal and Steel Community (ECSC) Treaty, but which they were stripped of in the EEC Treaty. In the same document, the Court also stated that the protection of individuals' rights required the creation of a remedy through which individuals could claim damages from a state failing to comply with Article 177. Similarly, the European Parliament had already in 1983 sided with the Court when calling 'upon the Member States to adopt an amendment to the EEC Treaty, as suggested by the European Court of Justice, to provide effective sanctions against a Member State in default of a judgment' (European Parliament 1983: 6). Also the Parliament recognized that a complementary way of strengthening enforcement would be to improve the possibility for individuals to claim compensation from non-complying member states.

Fuelled by mounting compliance problems and the imminent arrival of '1992', these calls for sanctions were repeated at the 1991 IGC. In a contribution to the IGC, the Commission outlined three possible types of sanction (European Commission 1991). First, it envisaged financial sanctions against member states that fail to comply with the Court's judgments, either by withholding payments to offending states or by imposing financial penalties. Second, the Commission discussed the possibility of boosting Article 5 of the Treaty, by specifying in detail what rules – including state liability – must be laid down in national legal systems to deal with failures to comply with Community law. Third, it suggested the possibility of extending the jurisdiction of the ECJ by giving it the right to strike down 'unconstitutional' national legislation, to specify what measures non-complying states must take to right their wrongs, and to award compensation to victims of member state infringement.

In light of the threat to national sovereignty posed by these suggestions, it is hardly surprising that member governments remained largely reluctant to confer new enforcement powers on the Commission and the Court. At the same time, however, member states had come to view compliance problems as a general nuisance, as evidenced by a declaration attached to the Maastricht Treaty. In the end, therefore, national governments, on initiative from the UK, settled for the less consequential and more sovereignty-friendly alternative of revising the existing Article 171. In cases where member states have not taken the measures to comply with the Court's judgments in Article 169 proceedings within the assigned time period, the Commission may now, after a second identical proceeding, propose a penalty to be approved or dismissed by the Court.

Parallel to this intergovernmental process, however, the ECJ independently pursued the second main track suggested by the supranational institutions. By introducing the principle of state liability in November 1991, the Court created a new form of decentralized sanctions against non-complying states. The fact that national governments had explicitly decided against fiercer sanctions than Article 171, as well as discarded the alternative of a state liability principle, did not discourage the Court.

The ECJ introduces and expands the principle of state liability¹

Before the principle of state liability was introduced, national courts could only under very limited circumstances award damages to individuals who had suffered from member state non-compliance. The principle of direct effect only offered remedies in the individual case, and the principle of indirect effect did not provide any right to damages at all. By introducing a new, general principle of state liability, the Court circumvented the weaknesses of existing remedies, improved individuals' possibilities to obtain compensation when their rights have been infringed upon, and provided a powerful incentive for member states to comply with EC law.

The principle of state liability was first established in the *Francovich* case in 1991, and then subsequently developed in *Brasserie du Pêcheur*, *Factortame III*, *British Telecommunications*, *Hedley Lomas*, and *Dillenkofer* in 1996 (European Court of Justice 1991, 1996a, b, c, d, e). In *Francovich*, the Court determined that an individual can claim compensation from a state which has failed to implement EU directives, given that three conditions are satisfied: (1) the directive confers rights on individuals, (2) the contents of those rights are apparent from the directive, and (3) there is a causal link between the state's failure to implement the directive and the loss suffered. Relying on purposive and teleological reasoning, the Court argued that the full effectiveness of Community law would be called into question, and the protection of individuals' rights weakened, if compensation could not be obtained where member states had breached Community law. The Court concluded by stating that 'it follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty' (European Court of Justice 1991: 33).

But, 'combining terseness of expression with expansiveness of principle' (Ross 1993: 58), *Francovich* raised as many questions as it answered. For example, did the principle of state liability apply to all kinds of Community act, treaty articles as well as other kinds of provision; to all kinds of breach, no as well as late and incorrect implementation; to breaches by all branches of government, administrative as well as legislative and judicial? In 1996, these questions were answered in a long line of cases which elucidated and specified the principle of state liability. In the linked cases *Brasserie du Pêcheur* and *Factortame III*, the Court expanded the principle when establishing that it applies to *all* breaches of *all* Community law, regardless of whether they result from the legislative, executive, or judicial branches of government, and regardless of whether or not the Community provisions have direct effect. The ECJ also rephrased the three criteria so as to fit this broader formulation, and substituted the second criterion (rights must be sufficiently clear) with the more restrictive condition that the breach must be 'sufficiently serious'.

In the remaining three formative cases that followed, *British Telecommunications*, *Hedley Lomas*, and *Dillenkofer*, the Court addressed what had become the key remaining question, the definition of a sufficiently serious breach of Community law. In *British Telecommunications*, the Court held that a breach was not sufficiently serious if a directive was imprecisely worded and capable of bearing the meaning given by a government acting in good faith. In *Hedley Lomas*, the

Court strengthened the principle of state liability by stating that the mere infringement of Community law could be enough to establish the existence of a sufficiently serious breach, given that the member state at the time when it committed the infringement had little or no discretion. Finally, in *Dillenkofer*, the Court clearly stated that all instances where member states have not implemented a directive in time constitute *per se* serious breaches of Community law.

Many national governments reacted very strongly when the principle of state liability was first established and later developed by the Court. National protests carried three overriding themes, all related to the question of national sovereignty: (1) that the Court was wrong in its claim of state liability being inherent in the Treaty, (2) that such a principle would entail an encroachment on the institutional autonomy of national courts as well as on national constitutional affairs, and (3) that member states explicitly had decided against developing a general principle of state liability when discussing measures against non-compliance at the 1991 IGC. Apart from the Italian, three other governments – the British, the Dutch, and the German – submitted observations in the *Francovich* case; all rejected the argument that anything like a principle of state liability was inherent in the Treaty, and all emphasized the need to preserve the institutional and procedural autonomy of national legal systems (European Court of Justice: 1991: paras 15–17). When the question of state liability returned in 1996 with *Brasserie du Pêcheur* and *Factortame III*, there were still governments which defended the same position and had not yielded (European Court of Justice 1996a, b: paras 30–46). These governments – the German, the Irish, and the Dutch – also emphasized that member states at the 1991 IGC had decided not to lay down any general rules governing state liability and instead had chosen to revise Article 171. The German government even went so far as to openly accuse the ECJ of judicial activism, when stating that ‘an extension of Community law by judge-made law going beyond the bounds of the legitimate closure of lacunae would be incompatible with the division of competence between the Community institutions and the Member States laid down by the Treaty’ (European Court of Justice 1996a, b: para. 32).

Judicial independence and ECJ shirking

P-A theory posits that the first prerequisite for an agent or supervisor to shirk is that it successfully manages to exploit the asymmetric distribution of information, while the principal’s chances of preventing such shirking rests with its capacity to furnish proper monitoring mechanisms. To fully understand the extraordinary ease with which the ECJ, compared to almost all political agents/supervisors, can act contrary to the preferences of its principals, it is helpful to introduce a distinction between *participation-* and *observation-*based monitoring. While participation-based monitoring refers to the ability to observe and actively intervene in the taking of a decision or the execution of an action, observation-based monitoring refers to the ability to observe a decision or action without the possibility to intervene in and force a change of outcomes in this process. Whereas, for example, the Commission is subject to participation-based monitoring by national governments through the

comitology system, there is no such direct and intrusive monitoring in the Court's decision-making process. Even if member states may submit observations and argue their cases before the Court, they are not involved in the actual decision-making of the Court and cannot prevent it from handing down a particular judgment. As reflected in the observations filed in *Francovich*, governments were fully aware of the likely implications of a general state liability principle, yet they were unable to prevent the ECJ from charging ahead. Continuing the comparison with the Commission, it should also be noted that the Court is relieved from all kinds of *ex-post* monitoring in the form of institutional checks and judicial review.

Needless to say, this autonomy from intrusive monitoring is an expression of the Court's judicial independence, which indeed constitutes a prerequisite for the ECJ to function as a court in the first place. It might seem like a truism to explain Court shirking by referring to the absence of direct interference in its internal decision-making. Nevertheless, it is exactly this independence and governments' forced recourse to observation-based monitoring that make it uniquely easy for the Court to introduce measures, such as state liability, that go beyond many member states' preferences. Whereas national governments often can limit, stop, or even correct shirking by the Commission through monitoring, the only means they have at their disposal with respect to the Court are sanctions.

In view of member governments' concern with national sovereignty, it is hardly surprising that the establishment of the principle of state liability sent shock-waves through the capitals of Europe. The Court was viewed as having gone too far in its eagerness to fulfil its supervisory role, especially since government principals had explicitly decided against introducing a state liability system of sanctions. It is reasonable to assume that member states, as agents which have to comply with Community law, also were concerned with how this decentralized sanction would further reduce their room for manoeuvre by rendering inadequate implementation and compliance exceedingly costly. The very fact that the principle of state liability aroused political concerns even before it was introduced, and immediately was followed by widespread protests, is particularly interesting in light of existing analyses of Court autonomy. The argument that the ECJ, because of the different time horizons of courts and politicians, can shirk and create legal precedent without causing political reactions (Alter 1998: 130–3) does not apply in the case of state liability, as national governments were acutely aware of the potential implications. Neither did the apolitical language of the Court's reasoning mask the political contents of its decisions and shield judges from political criticism (Burley and Mattli 1993: 72–3). Moreover, while some member states largely came to accept the principle as laid down in *Francovich*, the opinions submitted in *Brasserie du Pêcheur* and *Factortame III* five years later suggest that other governments continued to contest the decision and hardly considered it to be inherently legitimate just because it was handed down by the ECJ (e.g. Weiler 1991: 2428).

Finally, it should be recognized that the ECJ's establishment of the principle of state liability, as opposed to what Geoffrey Garrett *et al.* (1998) contend, challenges rather than supports the argument that the Court tailors its rulings to the preferences of the core member states, especially Germany and France. First, the

judgments handed down in 1996 constituted a broadening, not a restriction, of the state liability doctrine (e.g. Dehousse 1998: 55). In *Brasserie du Pêcheur* and *Factortame III*, the addition of the sufficiently serious condition was combined with the far greater *extension* of state liability to *all* breaches of *all* Community law, and in *Hedley Lomas* and *Dillenkofer*, the Court further strengthened the principle by chipping away at the sufficiently serious condition. Second, even a cursory reading of the German observation submitted in *Brasserie du Pêcheur* and *Factortame III* suffices to rule out the conclusion that the ECJ should have tailored its ruling to the preferences of the German government. Third, if indeed we were to accept Garrett *et al.*'s argument, we would expect the Court to accommodate member states in some other way than by introducing a condition that required such detailed instructions to national courts as to seriously challenge their autonomy in applying EC law. Finally, it is logically flawed to assume that the Court suddenly became sensitive to government preferences *after* the principle had been established in *Francovich*. The observations filed by governments and the positions taken at the 1991 IGC had fully revealed their sharp opposition to any general principle of state liability; an ECJ rationally adapting its judgments to government preferences would therefore never have proceeded with the introduction of state liability in the first place.

SANCTIONING SUPRANATIONAL SHIRKING: MEMBER STATES' ATTEMPTS TO LIMIT THE IMPLICATIONS OF STATE LIABILITY

Through the principle of state liability, the ECJ independently developed a form of decentralized fire-alarm sanction which rendered enforcement in national courts more threatening to national sovereignty and potentially more effective in forcing member states to comply – consequences at odds with the preferences of member state principals and agents. But this is not the end of the story. The P-A literature suggests that principals will respond to shirking by sanctioning the agent/supervisor, improving control mechanisms, or attempting to undo the effects of the agent's/supervisor's actions. Supranational shirking therefore does not translate into supranational influence unless the institutions, and the measures they have introduced, survive possible *ex-post* sanctions by national governments.

Existing literature applying P-A analysis to European integration isolates five forms of sanctions against the supranational institutions (Pollack 1997; Alter 1998; Stone Sweet and Caporaso 1998). The two rather blunt instruments of cutting the budget of the institutions or refusing to appoint their personnel are seldom effective in the EU context and would not have been so in this case either, as neither would have corrected the effects of the ECJ's enforcement-enhancing actions. The third sanction of rewriting the Court's judgments through new legislation was not available, as only decisions based on secondary legislation can be rewritten by statute, and not judgments based on the Treaty such as *Francovich*. The two sanctions that remained open to national governments were treaty revision and non-compliance, and they pursued varieties of both.

The sanction of treaty revision

The early 1990s witnessed growing signs that national governments had become increasingly uncomfortable with the way the Court expanded Community law into domains previously thought off limits, and the establishment of the principle of state liability was one essential reason behind these sentiments. In 1992, Chancellor Kohl openly accused the ECJ of judicial activism when stating that 'it does not only exert its competencies in legal matters, but goes far further. We have an example of something that was not wanted in the beginning. This should be discussed so that the necessary measures may be taken later' (quoted in Weiler 1993: 444). That same year, at the Edinburgh Summit, Germany attempted to table a proposal that suggested curtailing the power of national courts to refer cases to the Court under the preliminary ruling procedure – the basis of the ECJ's doctrinal developments (Weiler 1993: 444; interview, Commission official, 19 February 1998). Another member state that showed signs of desiring a re-evaluation of the supranational institutions' competences – the Court's in particular – was the UK. British Eurosceptics reacted strongly against a number of ECJ judgments delivered in the early 1990s, among them *Francovich*, that further strengthened decentralized enforcement (cf. Neill 1995).

The IGC scheduled for 1996 provided the perfect opportunity to voice this discontent and turn these threats into action. In September 1995, the UK representative of the 'Reflection Group' charged with preparing the IGC circulated a paper which expressed concerns about how certain ECJ judgments, *Francovich* in particular, 'have led to significant unforeseen consequences, have been disproportionate in their effect, and have created severe practical problems' (Davis 1995: 1). To correct this situation, the UK proposed that the IGC should limit member state liability for breaches of EC law, limit the retrospective effect of judgments, and extend governments' capacity to apply national time limits to cases based on EC law. Moreover, it was proposed that the IGC should create an ECJ appeals procedure, facilitate the rapid amendment of Community legislation in cases where the Council believes that the Court has interpreted a provision in a way not originally intended, and introduce an accelerated procedure for time-sensitive cases. While some of these suggestions thus sought to limit the effects of particular judgments, and others constituted direct sanctions against the Court itself, all questioned the existing judicial system of the Community. In one deal, member state principals could revise the delegated powers of the Court, improve control mechanisms, and reduce the effects of supranational shirking.

A majority of the members in the Reflection Group were not prepared to back the UK proposals, though the French and German representatives indicated a certain level of approval. Other members of the group sympathized with the one or the other of the suggestions, but no single proposal ever gathered the support of a majority, never mind the unanimity required for treaty revision. The small states, Belgium in particular, remained faithful to the Court (interview, Commission official, 7 January 1998).

Notwithstanding this setback in the Reflection Group, the UK persisted in its campaign against the Court, and when the IGC opened, the British government

presented its suggestions anew (IGC 1996a). Again, the main emphasis was on the 'risk of excessively large and unpredictable financial liabilities' (IGC 1996a: 4), but this time the proposals were also rejected by most member states. As a Commission official monitoring the negotiations on the Court put it: 'The UK was marginalized, but not alone' (interview, 7 January 1998).

While most of the time hiding behind the more extreme British position, the German and French governments came out in the open as it became increasingly clear that the UK proposals would not gather the required support. In October 1996, Germany presented a suggestion that collided head-on with the declared position of the ECJ, when arguing for the splitting of the Court's competence with respect to preliminary references from national courts, and the transfer of certain domains to the Court of First Instance (IGC 1996b). In March 1997, the French government tabled a proposal with modified versions of the British proposals concerning the limitation of the retrospective effect of judgments, the power of the Council to amend Community law when the Court has interpreted a provision 'incorrectly', and the possibility of relying on national time limits (IGC 1997). While milder, the French suggestions nevertheless retained the essence of the British proposals. One Commission official monitoring the negotiations goes so far as to declare all these proposals 'blatant attempts by certain member states to weaken the Court' (interview, 7 January 1998). In the end, however, none of the proposals suggesting revisions of the Court's existing competences gathered anything close to the support of all member states, and none found its way into the Amsterdam Treaty.

The sanction of inaction

Besides the attempts to sanction the Court and limit the effects of its shirking through treaty revision, inaction at the national level has functioned as a second form of sanction. In general terms, inaction or non-compliance functions as a sanction whenever official member state actors refrain from accepting or adjusting to the results of supranational shirking, for example, Commission decisions or ECJ case-law advances, thereby reducing their impact at the national level. In the case of state liability, recalcitrant reception and implementation by the judicial and political branches of government have reduced, at least temporarily, the impact of the Court's shirking.

In their capacity as Community courts, national courts are charged with the duty to apply EC law, and national governments must enable and allow domestic courts to fulfil this function. When the ECJ introduced the principle of state liability, it was the obligation of member states to ensure that individuals actually could rely on this remedy. If the substantive and procedural conditions for state liability laid down in national law were sufficient to satisfy the ECJ's standards, these were to be relied on. If not, national legal systems would have to be adjusted; either through governments legislating to the effect that appropriate remedies were created, or through courts recognizing a new cause of action or adjusting existing remedies.

Most national legal systems did not, however, provide a corresponding remedy against the state in matters of national law, and where they did, this seldom permitted actions against the legislative and judicial branches of government. *Francovich* and the ensuing string of cases therefore introduced something which was partially or completely new, and which required that appropriate remedies be created through judicial or legislative action. Yet, by 1997, no member state had taken legislative action to accommodate the development in Community law (SOU 1997: 104). A Swedish legal investigator, who has mapped the reception of the new principle in co-operation with the Ministries of Justice in the other member states, describes the prevailing approach in most governments as being the ostrich strategy of burying the head in the sand (interview, 18 February 1999). Rather than duly initiating the legislative measures required to give full effect to the EC rules on state liability, national governments have confidently refrained from any action and accepted the often less-than-optimal fit resulting from the existing order or the modifications that national courts may undertake.

The other way in which national legal systems could have been adjusted to allow for claims brought on the principle of state liability would have been for national courts to modify existing procedures to meet the specified needs and requirements. These adjustments could have resulted either from the recognition in national case law of how individuals can make use of the state liability remedy, or from a *de facto* practice of accepting such claims even though procedures are not explicitly designated. It is difficult to assess the extent to which national procedures have been sufficiently adjusted, *de facto* or *de jure*. But while certain legal systems, such as the French and the Dutch, have had few difficulties accommodating the new European rules on state liability, others, such as the Italian, are known to have deterred litigants through procedural incertitude, that is, by not clearly specifying what legal procedures to use (cf. Caranta 1993).

Patterns in the cases handled by national courts are an indirect indication of the extent to which individuals have been able to rely on the principle of state liability. Data collected by the International Federation for European Law (FIDE) and the Commission indicate that the concrete implications of the principle so far have been more restricted than often predicted (FIDE 1998; European Commission 1997: 475–7, 1998: 313–15). As regards cases brought before courts based on incorrect or no transposition of directives, an exceedingly common occurrence, many member states – Belgium, France, Germany, Ireland, Italy, the Netherlands, Sweden, and the UK – had seen only a few cases, generally less than five, by early 1998. Even more strikingly, an entire group of states – Austria, Denmark, Finland, Greece, Portugal, and Spain – had not witnessed a single state liability case raised on these grounds.

Of the cases that indeed have been decided by national courts, the dominant, but by no means exclusive, picture is one of hesitancy or even reluctance. In relatively few cases have the claimants actually been awarded compensation; more often, their claims have been dismissed on procedural or substantive grounds (FIDE 1998). It is slightly ironic, if not typical, that among the examples we find the cases that established and expanded the principle of state liability: *Francovich* and *Brasserie du Pêcheur*. Mr *Francovich*'s first action failed because he had employed the procedure

for industrial relations rather than civil claims, though the Italian legal system had not clearly designated what procedure to use (cf. Caranta 1993:291). Whereas most legal observers regarded liability as effectively established after the ECJ's judgment in *Brasserie du Pêcheur* and *Factortame III*, and criticized the ECJ for meddling in the business of national courts on this basis, the German Federal High Court very surprisingly ruled against the claimant in *Brasserie du Pêcheur* (cf. Deards 1997).

A special case of national court recalcitrance are the instances where higher courts have dismissed liability claims by refuting the supremacy of EC law over national law. The Commission recounts an Italian case where two lower courts had taken the view that the Italian state was obliged to pay compensation because of legislative breach, but where the Supreme Court of Appeal – disregarding the legal duty under EC law to create an effective remedy if one does not exist – found that the Italian state could not be held liable since there were no such provisions in Italian law (European Commission 1997:476).

In sum, existing data suggest that many national courts and governments have emasculated the principle of state liability through various forms of inaction, and thereby, at least temporarily, limited its enforcement-enhancing effect. As a councillor with the Commission's Legal Service concluded: 'When it comes to the real possibilities, it remains very difficult to sue a member state in its own courts' (interview, 18 February 1998).

When inaction is more effective than action

The attempt by some member states to sanction the Court at the 1996–7 IGC illustrates well the difficulties involved in revising the agent's/supervisor's mandate in the context of the EU (Scharpf 1988; Pollack 1997; Alter 1998). As opposed to negotiating a new treaty, revising an existing one implies that the status quo is the default outcome. Consequently, as long as this is preferred by just a single member state, the existing order will stand, the supranational institutions will remain un-sanctioned, and the result of their shirking will survive unscathed. Expressed in more formal terms, the option of revising the mandate is conditioned by the distribution of member states preferences and the decision rules governing the sanctioning of agents. In the negotiations on the ECJ at the 1996–7 IGC, both these variables pointed in favour of the Court, as divergent member state preferences and the requirement of unanimity made treaty revision impossible.

In comparison with the act of revising the Treaty, the sanction of inaction has greater chances of succeeding. This sanction is not subject to barriers at the supranational level such as decision-making rules and the distribution of preferences among national governments. Moreover, as it consists of political and judicial inaction rather than action, it does not have to pass the hurdles of the domestic decision-making process to be effected. Rather, this sanction is automatically executed whenever an official member state actor, whose active co-operation is required for supranational decisions to gain practical importance, prefers instead to maintain the status quo. The sanction of inaction forces us to question what actually constitutes successful supranational influence. A focus on legal output and formal

sanctions alone would have called for the conclusion that the strengthening of decentralized enforcement was home free once state liability had been established by the Court and saved from countermeasures at the IGC. As member states' recourse to evasion and inaction has shown, however, such a conclusion would have overestimated the immediate influence of these supranational actions on European governance. This qualified understanding of supranational influence is at the heart of the emerging literature on the conditions determining when ECJ jurisprudence translates into concrete policy effects (cf. Conant 1998; Slaughter *et al.* 1998; Alter 1999).

The effectiveness and success of inaction as a sanction should not, however, be overstated. The major weakness, compared to a revision of the Treaty, is that it cannot remove the basic cause of concern, but instead merely limits its effects, and perhaps only temporarily. Just because some national governments and courts have emasculated the principle of state liability and its implications, it does not mean that it is not there and will not come back to haunt them from time to time. Moreover, if the approach to state liability follows the same pattern of development as the attitude toward direct effect and EC law supremacy, we are likely to see subsiding resistance and growing acceptance over time. Finally, in the perspective of doctrinal development, the state liability principle might provide a future stepping stone for the Court in the continued construction of a European judicial order.

CONCLUSION

This article has four primary implications for the debate on supranational influence in EU studies. First, the case of state liability indicates that the supranational institutions may exert independent influence not only through agenda-setting and policy execution, but also by moving the enforcement of state compliance beyond governments' original intentions when delegating supervisory competences. This case passes the counterfactual test that intergovernmentalist scholars recommend whenever an independent supranational effect on European integration is claimed (Moravcsik 1995: 616). By any measure, it is highly unlikely that EU governments, in the absence of supranational action, would have stepped in to institutionalize state liability somewhere between their 1991 rejection of this system of sanctions and the attempts in 1996–7 to punish the ECJ for introducing this very principle. The limiting effect of inaction at the national level is not sufficient to undo this independent influence on EU supervision.

Second, the case contributes to the growing body of knowledge on the specific means of control employed by member states. Whereas the analysis confirms the conclusions of existing research that high institutional hurdles render the sanction of treaty revision exceedingly difficult to use, it also suggests that inaction at the national level constitutes an additional sanction which should not be neglected. Inaction, non-compliance, and evasion at the implementation stage imply that we should not restrict our conception of sanctions to formal means, but be open to other forms of *de facto* sanctions.

Third, the case of state liability lends preliminary support to the P-S-A model

presented in the article. This extended model, where member states both delegate supervisory powers to the supranational institutions and are the subjects of supervision, better captures EU enforcement as a strategic context, by which I mean the configuration of actors, their preferences, constraints, and opportunities.

Fourth and finally, the case of state liability supports the assertion that one of the primary merits of P-A analysis is its open-ended character, thus allowing for nuanced, empirical assessments of the scope for supranational influence. When confronted with an empirical process such as the introduction of state liability, the competing positions of intergovernmentalism and neo-functionalism often prove too blunt to capture the more complex realities of the institutions' capacity to exert independent influence. In the case of state liability, member state control was neither complete, as the ECJ did succeed in introducing a form of sanction that governments had explicitly decided against, nor lost, since the concrete effects of this supranational shirking so far have been partially circumscribed by inaction at the national level.

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NOTE

- 1 The principle of state liability has been the object of extensive legal attention and research. For prominent contributions, see, e.g., Caranta 1993; Craig 1993, 1997; Ross 1993; Steiner 1993; Emiliou 1996.

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