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The domestic costs of the *Sheep Meat* decision led the French government to defy the ECJ (consistent with H2). Given the high cost of an adverse decision to French farmers and given the French government's open unwillingness to comply with an adverse decision the Court might have chosen not to rule against France. This was a case, however, where H1 and H3 dominated H2. On the one hand, the ECJ knew that if it violated its own clear and recent precedents under pressure from the French, it would lose legitimacy as an impartial arbiter in the eyes of other member governments. On the other hand, the Court had little reason to believe that the member governments would act collectively to oppose its decision. Overturning the decision would require unanimous member government support for a treaty revision, whereas at least one member government, the United Kingdom, was known to oppose the French position (as it was eager to export sheep meat to France). In this case, the cost of caving in to member government pressure apparently was higher to the Court than the cost of isolated French defiance.

The sheep meat dispute was ultimately resolved in the manner suggested by the French government – a common market organization for sheep meat was established at the Dublin meeting of the Council in May 1980. At the same meeting, in a clear reference to the *Sheep Meat* ruling, President Valéry Giscard d'Estaing of France suggested that the member states should jointly constrain the ability of the ECJ to make "illegal decisions." * Giscard suggested an institutional reform that would have given the "big four" member governments an additional judge on the Court (similar to Roosevelt's efforts to pack the Supreme Court with New Dealers in 1936). * Ultimately, however, no such changes were made.

In sum, this line of cases provides some support for each of our three hypotheses. The ECJ took advantage of the conflict between a free-trade provision (Article 33) and agricultural policy provisions (Articles 38–46) to establish a controversial precedent [(H1).] *** The conflict came to a head in the *Sheep Meat* case, and when push came to shove the French government was not prepared to back down given the high domestic costs of so doing (H2). The Court was willing to maintain its adversarial stance because it did not think that a restraining collective response from the member governments was likely (H3).

Equal Treatment of the Sexes

Article 119 of the Treaty of Rome states that men and women should receive equal pay for equal work. Pay is defined broadly (in ironically

sexist language) as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer." This loose definition has prompted numerous ECJ cases concerning the benefits that fall under the rubric of Article 119 ***, particularly age pensions.

The first significant case was *Defrenne No. 1*.[15] The ECJ held that pensions paid under statutory (that is, publicly mandated) social security schemes did not constitute pay as defined in Article 119. *** In *Defrenne No. 2*, the ECJ declared that Article 119 had direct effect; individuals could rely on Article 119 in cases before national courts.[16] The Court applied a retrospective limitation to its judgment so that states would not have to answer to complaints regarding violations of Article 119 prior to the date of the *Defrenne No. 2* decision. This was expedient since it was clear that acting otherwise might have ran some national pension schemes into bankruptcy. * This decision left unanswered the question of whether Article 119 applied to occupational pensions.

Finally, in *Bilka* the Court declared that occupational pensions constituted pay under Article 119.[17] *** The ramifications of this decision were potentially enormous and extremely costly to employers. This seems inconsistent with H3 because the Court could have expected a collective restraining response from the EU member governments.

Indeed, the Council made a quick, if somewhat messy, effort at damage control. Two months after *Bilka* the Council passed a new directive on occupational pensions.[18] The directive gave occupational pension schemes until 1993 to comply with the equal treatment principle but exempted the use of sex-based actuarial assumptions and survivors' pensions from the equal treatment doctrine altogether. The directive also delayed the requirement to equalize pensionable ages. *

The ECJ moved next. In the *Barber* case the Court ruled that sex-based differences in pensionable ages violated Article 119 and had to be eliminated.[19] This decision was at odds with the Council's directive regarding pensionable ages and in effect overruled it. However, the Court

[15] Case 80/70, *Defrenne v. Belgium* [1971] ECR 445 at para. 6.
[16] Case 43/75, *Defrenne v. SABENA* [1976] ECR 455.
[17] Case 170/84, *Bilka Kaufhaus GmbH v. von Hartz* [1986] ECR 1607.
[18] Directive 86/378 OJ 1986 L225/40.
[19] Case 262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889.

reduced the potential tensions by limiting the retrospective application of the principles. * The Court's language was vague:

> The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

This could be interpreted in many ways. At the conservative extreme the Court's ruling might imply that only workers who joined occupational pension schemes after the date of the judgment are eligible for equal benefits. The liberal interpretation would be that the equal treatment principle applies to future pension payments for all workers regardless of when they joined. *

Why did the Court leave its retrospective limitation so ambiguous? One plausible interpretation is that the ECJ may have made a vague ruling in order to gauge the reaction of member governments. Their reaction was swift and decisive. The EU governments were extremely worried by the enormous financial implications of the *Barber* decision, and they reacted in the strongest possible way – through treaty revision. The governments added a protocol to the Maastricht Treaty that limited the application of the equal treatment principle to periods of work after the *Barber* judgment.[20]

The ECJ responded to the "Barber protocol" in the 1993 case *Ten Oever.*[21] In this case the Court was asked to clarify the retrospective limitation it had imposed in *Barber.* *** The Court *** affirmed the governments' preference as expressed in the protocol. In effect the Court's ruling said: "this is what we meant all along. The member governments did not overrule us; they simply helped us clarify a point."

In two subsequent cases, however, the ECJ behaved in ways that arguably challenged the Barber protocol. The *Vroege*[22] and *Fisscher*[23] cases concerned whether the retrospective limitation with regard to pensionable ages established in *Barber,* and affirmed in the protocol, also applied to the right to join occupational pension schemes. * The Court

[20] Treaty on European Union, Protocol No. 2 on Article 119.

[21] Case 109/91, *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakebedrijf* [1993] ECR I-4879.

[22] Case 57/93, *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

[23] Case 128/93, *Fisscher v. Voorhuis Hengelo BV and Stiching Bedrijfspensioenfonds voor de Detail- handel* [1994] ECR I-4583.

decided that the retrospective limitation in *Barber* applied only to equalization of pensionable ages and did not apply to the right to join pension schemes. Therefore, Vroege and Fisscher could date the right to join their pension schemes back to 8 April 1976, the date when Article 119 had been given direct effect in *Defrenne No. 2*. *

Ostensibly, these bold decisions circumscribed the applicability of the Barber protocol to the specific issue involved in the *Barber* case (differences in pensionable ages) when it was likely that the governments had intended the protocol to limit the retrospective application of Article 119 in general. But the ECJ provided member states with methods for limiting the financial consequences of these decisions. The Court held that women would have to pay their back-contributions in order to join the schemes retroactively – making it extremely unlikely that many would choose this option. More importantly, the ECJ allowed member states to maintain existing legislation limiting retrospective claims or to pass new laws to this effect. * Women are now entitled to receive equal treatment under pension schemes, but the full impact of this change will not be felt for years, when this generation of workers retires.

We can learn three important lessons from this line of cases about the interaction between the ECJ and the member governments. First, in instances where the potential domestic ramifications of adverse ECJ decisions are great member governments are unlikely to passively abide by Court decisions. This is completely consistent with H2.

Second, as H3 suggests, Court decisions with costly domestic ramifications for all member governments are likely to provoke collective responses to rein in the Court. *** In this line of cases the ECJ was willing to circumvent secondary legislation passed by the Council. Once the governments clearly signaled their resolve through a treaty revision, however, the Court retreated.

Finally, this line of cases illustrates that the ECJ–member state game is not one of complete information. If it were, the Court would not have pushed so hard for an expansive interpretation of "equal pay" – because it would have known that this was universally unacceptable among EU member governments. In reality the Court did not anticipate the strength of government opposition. Thus it floated a series of trial balloons – in the form of open-ended decisions – designed to test the resolve of governments. Because the precedents established in these decisions were vague, they did not constrain the Court. Consistent with H1, the Court thus had room to modify its interpretation in subsequent judgments to accommodate member government preferences. ***

State Liability for the Violation of EU Law

One of the central ways in which EU policy is made is through directives. These are pieces of secondary legislation that member governments are required to transpose into national law. This process, however, is plagued by a fundamental problem. Governments that do not approve of an EU directive (typically when passed by a qualified majority in the Council) may not transpose it into national law on time, may transpose it incorrectly, or may not transpose it at all. Moreover, until Maastricht, the EU treaties made no provision for sanctioning member states that failed to implement directives. Under Articles 169 and 170 of the Rome treaty, the Commission or other governments may take a member state to the ECJ for failing "to fulfill an obligation under this Treaty." If the Court finds the state to be in violation of a directive and that the relevant government failed to remedy the problem, the plaintiff can take the government back to the ECJ (Article 171). But governments that ignored ECJ rulings faced no penalties until the ratification of the Maastricht Treaty. *

The Court sought in a series of decisions to increase the effectiveness of EU directives, primarily by granting individuals legal recourse to them in national courts even if their government had failed to transpose them into national law (that is, the "direct effect" of directives). But direct effect did not apply to all directives, and member governments continued to evade their obligation to abide by them. Then in the landmark 1991 *Francovich* decision the ECJ ruled that governments must compensate individuals for the loss caused to them resulting from the nonimplementation of directives, even those without direct effect.[24] The implications of *Francovich* are still not clear; the Court has yet to establish a system of state liability for the violation of EU law. Here we speculate on the likely course of interaction between the ECJ and member governments that will determine the shape of such a system. ***

History of Direct Effect

We begin by sketching briefly the thirty-year history of the Court's efforts to empower individuals with respect to EU law. In 1963 the Court decided that some EU provisions could have direct effect, conferring rights on individuals rather than simply imposing duties on governments.[25] The

[24] Joined cases C-6/90 and 9/90, *Francovich and Others v. Italy* [1991] ECR I-5357.
[25] Case 26/62, *Van Gend en Loos* [1963] ECR 1.

ECJ then decided in *Van Duyn* that direct effect applied, in principle, to directives.[26] This decision was subsequently clarified, stating that directives are only subject to direct effect when the deadline for national implementation has passed.[27]

In 1986 the Court ruled that private parties could sue only the state, not other private parties, for violating directives that have not been transposed into national law.[28] The Court's next decision then sidestepped the whole notion of direct effect. In *Marleasing* the Court ruled that where a directive had not been incorporated into national law, domestic courts had to interpret existing national law in light of that directive.[29] ***

But the ECJ was not yet finished with the issue of conferring individual rights under EU directives. With the passage of the Single European Act and the spate of directives issued pursuant to it in order to complete the internal market, the Commission stepped up its proceedings against member governments with respect to the nonimplementation or "incorrect" implementation of directives. * The effectiveness of using Articles 169–171, however, was limited by the lack of enforcement provisions. As a result, disobedient governments simply refused to implement judgments. The best way to ensure real member government compliance with directives was for individuals to bring cases against their governments in national courts for violations of their rights under EU law. In *Francovich* the Court had the opportunity to make this possible.

The Francovich Ruling

Francovich concerned Italy's failure to implement a directive intended to ensure that employees received full payment of salary arrears if their employers became insolvent.[30] Even though the Commission brought a successful proceeding against Italy under Article 169, Italy still took no action to implement the directive.[31] Francovich and others, who were owed arrears of salary, then sued the Italian government. The case was ultimately referred to the ECJ.

[26] Case 41/74, *Van Duyn* v. *Home Office* [1974] ECR 1337.
[27] Case 148/78, *Ratti* [1979] ECR 1629.
[28] Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.
[29] Case C-106/89, *Marleasing* [1990] ECR I-4135.
[30] Directive 80/987 OJ L283/23, 1980 ("Insolvency Directive").
[31] Case 22/87, *Commission v. Italy* [1989] ECR 143.

The Court held that the insolvency directive was not directly effective. * It also ruled, however, that member governments are liable to compensate individuals for losses resulting from the nonimplementation of a directive – even if the national legal systems do not permit such liability – provided that three conditions are met. First, the directive must confer rights on individuals. Second, these rights must be identifiable from the provisions of the directive. Finally, a causal link must exist between the breach of EU obligations by the national government and the loss suffered by the individual.

Francovich thus represented a quantum leap in the Court's intervention inside member states because it asserted that individuals' claims to damages from the violation of EU law did not depend on the doctrine of direct effect. * The decision sent shock waves through European capitals. Although *Francovich* concerned only a small number of limited claims, the potential range of claimants and size of damages under the state liability principle were virtually without limit.

The ECJ, however, did not address in *Francovich* the scope of the state liability principle. A number of outstanding issues remained to be resolved. Did the principle extend to cases where the Court ruled that national implementing measures were inadequate? What about much broader, and more vague, obligations under EU treaties? How far should state liability go? What conditions should be established before states are liable to pay damages?

How the ECJ answers these questions will ultimately determine the impact of *Francovich*. An extensive interpretation by the Court would be the capstone on more than thirty years of effort by the ECJ to expand and entrench its authority. It is equally clear, however, that member governments will not passively accept such an interpretation. We now explore the responses of member governments to *Francovich*.

Government Responses to Francovich

Earlier we sketched three possible responses by governments to adverse ECJ decisions. The first – noncompliance by the litigant government – is not at issue with respect to *Francovich* because the Italian government has already accepted the decision. The other two collective responses – statutory legislation and treaty revision – have been widely discussed by member governments. Not surprisingly, the U.K. Conservative, government took the lead in trying to restrict the scope of *Francovich*. It claimed that the question of state liability should be a matter of national law ***.

This would limit state liability to cases in which governments have shown "grave and manifest disregard" of their EU obligations – a very strict condition that is rarely fulfilled.[32] The British government also advocated a statute of limitations restricting damage payments to recent violations of EU norms.[33] Furthermore, it demanded that existing national laws be allowed to stand that limit the time span over which damages must be paid.[34]

The broader issue of constitutional (that is, treaty) limitations on the ECJ was widely discussed in the context of the 1996–97 Intergovernmental Conference. The U.K. government proposed that a qualified majority in the Council should be able to overturn ECJ decisions. *** A somewhat less controversial British proposal sought to restrict to the highest court in each member country the right to refer cases to the ECJ for "preliminary judgments" (Article 177 EC).[35] ***

As in so many other issues, however, British Conservatives were outliers in Europe. * Some members of the EU – most notably, France and Germany (along with their economic allies among the Benelux countries and Austria) – attach a greater positive weight to the presence of an effective legal system in Europe. These countries strongly support the EU legal system for at least two reasons. First, [they] are deeply committed to expanding European integration as a means of stabilizing geopolitics on the continent. Second, the economies of the northern core of the EU are those that benefit most from the removal of nontariff barriers to trade in the EU, and the ECJ has been a powerful actor in furthering this agenda. Thus these governments have strong incentives not to emasculate the ECJ, even in the face of an incendiary decision such as *Francovich*.

We are not saying that those member governments that generally support the rule of EU law should be expected to sit idly by and allow the ECJ to entrench the state liability principle. They were, however, reticent to follow the British lead of institutionalizing political

[32] Submission of the British government to the ECJ regarding *Factortame No. 3* (see later). ***

[33] See *Daily Mail,* 24 October 1995, 22; and *The Times,* 23 October 1995.

[34] For example, when the British government was recently ordered by the Court to change its prescription charge laws – a ruling that threatened to cost up to £500 million due to reimbursing all men between the ages of sixty and sixty-four for charges dating back five years – it cited a 1993 regulation applying a three-month time limit, reducing the overall costs of compliance with the ruling to £40 million; *Daily Mai,* 24 October 1995, 22.

[35] See *Financial Times,* 2 February 1995, 10; 3 April 1995, 17; 22 August 1995, 10; and *The Times,* 23 October 1995.

intervention in European law. The political consensus in the EU seems to support two objectives limiting the *Francovich* ruling. The first is to adopt restrictive criteria for establishing the liability of member states. The second is to circumscribe the retrospective application of all ECJ rulings, not only *Francovich,* and to allow existing national laws to stand that constrain the time span over which damages must be paid.[36]

Toward a System of State Liability for the Violation of EU Law

How should we expect the ECJ to react to this political environment? Given that the costs of *Francovich* to all member states are potentially enormous (H2, H3), and given that the exact nature of the precedent set in the case is unclear (H1), we anticipate that in the future the Court will voluntarily restrict the application of the state liability doctrine in ways desired by the bulk of member governments.

Four recent cases provide a preliminary test for our predictions. First, in *Brasserie du Pêcheur* a French brewing company sought damages from the German government for losses incurred when forced to stop exporting beer to Germany because its product did not comply with the German beer purity law (declared in violation of EU law by the ECJ in 1987).[37] Second, in *Factortame No. 3* a group of Spanish fishermen claimed damages from the British government for losses incurred as a result of the 1988 Merchant Shipping Act, ruled illegal by the ECJ in 1991.[38] Third, in *British Telecommunications* the plaintiff sought damages from the U.K. government for losses following the failure to implement appropriately a directive on procurement procedures for utilities.[39] Finally, in *Dillenkofer* a number of German tourists claimed damages from the German government for its failure to implement a 1990 EU directive on package tours.[40]

On 5 March 1996 the ECJ delivered its rulings in the *Brasserie du Pêcheur* and *Factortame* cases.[41] The ECJ reaffirmed the principle established in *Francovich*. It ruled that states have to pay damages if three conditions are met: (1) the violated EU law must confer rights on

[36] *The Times,* 23 October 1995.
[37] Case C-46/93.
[38] Case 48/93.
[39] Case C-392/93.
[40] Joined cases C-178/94, C-179/94, 188/90, 189/94, and 190/94.
[41] Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur* and *Factortame* [1996] ECR I-0000.

individuals, (2) the violation must be sufficiently serious, and (3) the damage must have been directly caused by the violation. The ECJ stated that a violation of EU law is "sufficiently serious" if it has persisted despite a court ruling or if it is clear in light of settled case law. The decisive test is whether the government has "manifestly and gravely" disregarded the limits of its discretion.

This formulation corresponds to the Court's interpretation of Article 215 EC, which governs the noncontractual liability of EU institutions. The ECJ left it to national courts to decide whether a violation of EU law is sufficiently serious. National courts must also decide on the level of damages. However, the ECJ ruled that damages must be no less than the compensation for similar claims under domestic law. The Court held that national liability laws apply as long as they do not make it "excessively difficult or impossible" to obtain effective compensation.

The ECJ ruled on the *British Telecommunications* case three weeks later.[42] The Court held that the conditions for establishing state liability set out in its 5 March decision also applied to cases where a government had incorrectly transposed a directive into national law. *** On 8 October 1996 the ECJ delivered its ruling in the *Dillenkofer* case.[43] The Court reaffirmed the conditions set out in *Brasserie du Pêcheur* and *Factortame* and ruled that the failure to take any measure to transpose a directive on time constituted a sufficiently serious violation of EU law.

The Court's reasoning in these cases follows in three important ways the prior proposals of national governments regarding limitations of the *Francovich* principle. First, the "manifest and grave" violations proviso is a very strict condition. *** Second, the Court held that only violations of clear and unambiguous provisions would give an automatic right to compensation ***. Third, the ECJ left it to national courts to adjudicate state liability cases according to national liability laws. The Court thus followed government demands that state liability should be a matter of national law, subject to a minimum EU standard based on the principles governing the liability of EU institutions.

These cases suggest that the ECJ is willing to tailor its state liability rulings in ways that the core member governments, especially France and Germany, wish. Nonetheless, a number of issues remain to be resolved. The fact that liability claims are to be adjudicated according to national

[42] Case 392/93, *British Telecommunications* [1996] ECR I-0000.

[43] Joined cases C-178/94, C-179/94, 188/90, 189/94, and 190/94, *Dillenkofer* [1996] ECR I-0000.

liability laws raises the question of the extent to which the Court will allow national statutes of limitation to stand. In most member states the state incurs liability only under very restrictive substantive and procedural conditions. * Thus national liability laws may provide member states with an effective shield from liability in most cases and with an effective cap on retrospective payments of damages. ***

CONCLUSION

The existing literature on legal integration in the EU poses a stark dichotomy between two views of ECJ–government interactions: the legal autonomy and political power perspectives. This article has developed a theoretical framework that is subtler and more balanced than either of these perspectives. Moreover, we have subjected our view to empirical tests that are much less vulnerable to the "sampling on the dependent variable" critique. Our theoretical framework generated three independent hypotheses about the strategic interactions between the Court and member governments. These hypotheses were then tested against a carefully selected set of cases in which we sought to hold constant as many factors – other than those of direct bearing on our hypotheses – as possible.

The starting point of our theoretical analysis is that the ECJ is a strategic actor that must balance conflicting constraints in its effort to further the ambit of judicial review in the EU. On the one hand, the Court's legal legitimacy is contingent on its being seen as enforcing the law impartially by following the rules of precedent. On the other hand, the Court cannot afford to make decisions that litigant governments refuse to comply with or, worse, that provoke collective responses from the EU governments to circumscribe the Court's authority. Understanding how these conflicting constraints function requires careful delineation of the legal and political conditions in particular cases.

The empirical analysis generated strong support for our three hypotheses. First, the greater the clarity of EU treaties, case precedent, and legal norms in support of an adverse judgment, the greater the likelihood that the ECJ will rule against litigant governments. Second, the greater the costs of an ECJ ruling to important domestic constituencies or to the government itself, the greater the likelihood that the litigant government will not abide by the decision. Third, the greater the costs of a ruling and the greater the number of EU member governments affected by it, the greater the likelihood that they will respond collectively to rein in EU activism – with new secondary legislation revisions of the EU treaty base.