Summary

This economic discussion of the non-contractual liability of Member States of the European Union started with some thoughts on the importance of the enforcement of law. In fact, over the course of the whole argument, different aspects of law-enforcement played a major role.

However surprising the use of liability - a classical law and economics instrument for the minimisation of accident costs - might be to reach such an unusual aim as law-enforcement, throughout this study, it was attempted to illustrate the sound theoretical basis for such goal.

The problem dealt with here was found to have various experimental features.

Firstly, only very rarely, the topic of supranational law enforcement in the European Union has been treated in an economic fashion. Scholars in legal and political science have written extensively in the field, but in lack of an adequate method, economists have long ignored the topic. In this work, the framework and findings of the relatively new law and economics literature was applied to the topic of law enforcement through state liability.

Secondly, however helpful, the standard answers emerging from this law and economics scheme could not satisfy. Indeed, it was at first rather unclear how the facts under analysis were to fit in this scheme. Member states’ breaching and the following reaction show elements of both contract law, tort law and -of course- law enforcement. Legal rules are similar to those products analysed by contract law, the instruments applied are those of tort law, but the aim -as was found out- is similar to the one of law enforcement.

Additionally, in the fields of contract law and especially tort law, the well-established findings and methods of the law and economics literature were to be applied to an actor which has typically been left out of law and economic textbooks: the state. In the field of law enforcement, the complication was found in the applying actor: instead of public enforcement by the state, the role of the individual as enforcer was shed light upon.

The special nature of the European context was acknowledged by an introductory chapter presenting the basic European institutions and the essentials of the
Community’s legal framework. After that, we started with a thorough analysis of breaches of European Community law: to which extent do they occur; how do we explain them, given that member states agreed with the rules concerning breaches and what is the legal answer to those breaches?

On the first question, we introduced and discussed in detail the data on breaches from the Commission’s annual reports. Unfortunately, the quality and the one-sightedness of this data did not allow us to form ourselves a clear impression of the dimension of the breaching problem. In fact, more questions than answers arose. We concluded that the optimist data offered by the Commission does not necessarily reflect a high implementation of European law. The data could not provide us with any information on the role of private enforcement and -fiercely opposed to mainstream scholarship’s opinion- implies that the European Union does not suffer from a severe non-compliance problem.

Following, we attempted to better understand breaching states by means of empirical analysis. Understanding why member states act as they do is indeed a necessary condition to being able to influence this very acting. The identification of independent variables was followed by extensive data gathering. The limits of the available data - only public enforcement data is available- was used to gain insights over the effect of the Commission’s enforcement efforts.

The results of this empirical analysis made it possible to explain member states’ breaches by means of different explanatory variables. Most interestingly, a high number of variables was found to be of no statistical significance in explaining for breaches. Whether a state is governed centrally or in a federal way, its level of corporatism as well as the instability of its political system (frequency of governmental changes or the number of parties in government) proved to be of no statistical relevance.

On the other hand, the size of a member state’s economy as well as its (correlating) voting power in the Council relate positively with the number of infringement proceedings initiated against a member state. A considerable part of this relation can be explained only with the willingness of member states to breach and the lack of fear to search the conflict with the Commission. This confirms the critique that the
Commission’s article 226 action is really rather a political negotiation process than a law enforcement one.
Confirming political research in the field of international public law, corruption and the correlating effectiveness of states’ bureaucracy is found to be the most important factor explaining infringements of Community law. We interpret this as an illustration of the importance of “lower executive powers” in applying community law.

Older member states have more serious conflicts on infringements with the Commission than younger member states do. Historical reasons might explain for this. It cannot be excluded however, that older member states fear the conflict with the Commission less than younger ones do.

As a final finding, the number of no-votes in the Council negatively explains the number of breaches detected. We read this as a demonstration of the existence of logrolling in the Council which leads to problems with the ex-post enforcement of deals made. It is indeed rather shocking and surprising to observe that the incentives to breach Community law are bigger after voting in favour as part of vote-trading than after voting against.

On a general level, we were able to conclude that intentional decisions play a considerable role in explaining for breaches. In the following, we then looked into the possibilities to influence exactly these intentional decisions.

These possibilities were extensively dealt with by setting out the current legal possibilities to deal with breaches as well as the historical path that led to these rules. Some of the ongoing changes and expected evolutions were highlighted.

This descriptive legal chapter brought up the question what all this really aims at. In this critical chapter, we sought the connection with the law and economics literature. The methods and ideas of the three main branches of law and economics were analysed and it was then tested whether they could be applied to the non-contractual liability of member states.

After a detailed discussion, we were able to profoundly imbed the topic of member states’ non-contractual liability in the law and economics field. We concluded that contract law is of no help in dealing with problems arising in the post-negotiation period. There is no such thing as an efficient breach of law. Most importantly, tort law
proved to be a major guidance. Borrowing from the deterrence concept, we introduced the idea of ex-ante compliance with the law instead of mere ex-post enforcement. The relevance and -under some conditions- necessity of public enforcement were illustrated through the comparison with the economics of crime and punishment.

Resulting from this analysis, a number of policy recommendations were made to better deal with three different cases of breaches against Community legislation.

In a first scenario, the non-transposition or late transposition of directives granting individual rights, locus standi is initially to be given to all individuals, and punitive damages should not be excluded. After a first judgement, only affected individuals are to be awarded simple damage compensation. In the case of directives not granting individual rights, qualified entities are to be awarded punitive damages.

In the second scenario, the non-proper incorporation of directives in domestic law, group action should be introduced and/or facilitated where individual rights were granted by the directive in question. In case of severe breaches, punitive damages should be awarded. In case the directive did not concern individual rights qualified entities are to be heard before Court. Punitive damages are appropriate here since the number of victims will be smaller and a market-based damage will only occur in very few cases.

Were this private enforcement mechanism found not to function appropriately, upon a sufficiently serious breach, fines should be made available to the Commission already in the first Court hearing.

Finally, in the scenario of violations of treaty provisions, regulations and decisions; high legal uncertainty offers another reason for public enforcement by the Commission. The Court should be involved earlier than is the case now, in order to enable further private enforcement. Also, upon continuing breaches, fines should be awarded starting from the first day from first judgement.

Under low legal uncertainty, private enforcement should be facilitated by group action and initial punitive damages when individual rights are breached against in a
severe way. In the alternative case, qualified entities should be awarded punitive damages.
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