
IMT Institute for Advanced Studies, Lucca
Lucca, Italy

**Is the Court of Justice of the
European Union a mere
Instrument in the Hands of
Member States?**

PhD Program in Political Science and Institutional
Change - XXIV Cycle

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2013

I

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IMT Institute for Advanced Studies, Lucca

2013

To my parents

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Acknowledgements

I am more than pleased to use this page to express my most sincere gratitude to the wonderful community of IMT, the proud city of Lucca and the Italian state without the assistance of all of which I would not take part in what is a very promising and qualitative PhD academic program.

With the same pleasure I want to state my thankfulness to Antonio Masala for being a tutor that any PhD candidate dreams for, as he has always been there when I needed him for all kinds of administrative requests and procedures. To my supervisor, Antoine Vauchez (Universite Paris-Sorbonne), for his exceptional academic advice that helped me to find the most adequate theoretical framework for this dissertation. To Giovanni Orsina, who in his capacity as the coordinator of the PhD program, practically provided the most appropriate supervisor for me in a moment when I was left without one. To Leonardo Baccini and Gabriel Katz for their irreplaceable help for the statistical analysis. To Robert Thomson (TCD) and Trinity College Dublin as a whole for all assistance during my research period in Ireland.

Last but not least, I am grateful to my fiancé and my parents for their great support – I love you all.

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PUBLICATIONS AND PRESENTATIONS

Testing Supranational and Intergovernmentalist Theories: Is the European Court of Justice a Mere Instrument in the Hands of Member States?
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An Important Note to the Attention of the Reviewers

This dissertation was initially intended as an almost entirely quantitative analysis on the judicial decision making processes taking place within the Court of Justice of the European Union. For this reason the author collected an original and novel dataset to include all publicly available information for each of the annulment action cases that were brought before the Court since 1954. This dataset is an inseparable part of the thesis and it certainly constitutes the major part of the dissertation's added value as it will enable other scholars to test in practice their hypotheses and models on institutionalism or EU integration.

The dataset contains all 1102 annulment action cases that were registered in the Court by the year of 2005 (this year was selected as not all of the cases afterwards had their rulings at the time the dataset was prepared) and it has 153 variables which needed a period of some 5 months of uninterrupted efforts to be collected. For its huge size the dataset observations are listed in a special separate file that will also be presented to the reviewers. Hopefully the STATA .dta file (containing the dataset in a format ready for statistical analysis) will also be made publicly accessible at IMT's website.

All further details concerning the dataset can be found in Chapter IV of the present dissertation.

Abstract

The thesis is an attempt to present the Court of Justice of the European Union as a rational actor performing in a strategic manner in accordance to its institutional preferences. The Court has been found to follow a self-perpetuating pattern of decision making that allows it to define a political agenda that the institution is aiming to achieve. This model is in line with the New Institutionalism theoretical assumptions and expectations and most especially to its rational choice and historical sub-branches.

The findings in the dissertation are mostly in the quantitative analysis of an extensive dataset collected by the author for the research purposes of the project. The qualitative methodology is also used through the case study instrument of examining the doctrinal rulings from the Court's case-law and their relation to the 'National versus communitarian' legal and political conflict and its often opposing interests. The key argument in the thesis is the finding that the Judges in their rulings at the Court of Justice seem to discriminate between the bigger countries and the rest of the less powerful EU member states. This enables the Court to balance between its institutional interests and those of the EU national governments which are a potential threat to the Court's pursuit of extended powers and competences, which is in agreement with all neoinstitutional arguments.

INTRODUCTION

The Court of Justice of the European Union (CJEU) has kept attracting the attention of academic scholars as an institution that is an active agent in the ongoing clash between the national interests of the Member states and those of the community. Even though a lot of theories have been put forward to explain the driving forces behind this conflict, and more specifically the role of the Court in this context, one can argue that most of the empirical evidence from CJEU case-law is based on the principle of case studies that were selected to present a certain argument or hypothesis in a more illustrative manner. In the last two decades the European Court of Justice has been more and more analyzed by purely quantitative methods in a manner similar to the one that legal scholarship has traditionally applied on its American counterpart – the US Supreme Court. However, one of the gaps that was left by most of the projects examining the Court of Justice is that the accent has rarely been put enough on the institution itself. Indeed, the Court has been so far presented mostly as a ground of competing national and supranational interests. Thus, the common aim was to rather find evidence in support of arguments originating from the main assumptions of the theories of integration or international relations but have little to do with the

mission for which the Court has been established, or the one that it managed to define in the pursuit of its own institutional agenda and long-term interests. One of the aims of this thesis is to reduce this gap.

Introduction to the problem

The problem is that the leading paradigms of the 1990s that attempted explaining theoretically the processes of European integration – neofunctionalism and intergovernmentalism – failed to defeat each other. As a result of this we need to search for a solid theory that can alone provide a model to explain the features of CJEU’s judicial review in the broad picture of community and member states competition. Therefore we need further investigation into the field of legal integration in order to understand how does the Court of Justice fit into this constant struggle between national and supranational interests. CJEU has been often found to serve as an ideal laboratory to prove a point in this context. In fact we have enough evidence that the Court of Justice is rather an institution that supports and deepens integration as most of its decisions were pro-European. At the same time we often witnessed how the Court made some steps back after some of its rulings were objected and met with massive disapproval by some or most of the EU member states. In this thesis I will mostly test to what extent the Court of Justice takes into account the political preferences of certain member

states (or of member states in general) to trump some purely legal circumstances involved in the cases. Of course, a profound institutional analysis of the European Court of Justice is nevertheless inevitable as all internal institutional procedures in the CJEU, as well as its legal basis in the Treaty and the legitimacy that the judges hold being elected by their own national governments can all be observed as expressions of the same problem. In brief, the problem is that in most of the research so far the focus has rarely been put on the Court and this thesis will be an attempt to compensate for this.

Aims and objectives

The main aim of the dissertation is to provide a thorough insight to the Court's pattern of judicial decision making through analysis of the most palpable form in which it is publicly available – its rulings. My intention is to do so using one and the same theoretical framework in which to combine large-N data analysis together with qualitative assumptions on a case by case basis. I believe it is the neoinstitutional theoretical background that could serve best to fulfill this purpose. Therefore, the main sub-aim of the dissertation is to defend the argument that it is exactly new institutionalism that is the most adequate theory that should be used to explain the mechanics of CJEU's decision making patterns. In brief, my goal is to put the

focus on the Court itself and I believe this to be the most natural approach considering the fact that the judiciary is one of the *independent* branches in the separation of political powers since Montesquieu.

My objective is to test whether and to what extent the Court takes into account the preferences of the EU member states (or a sub-group of these member states) in certain policies or whether it is impartial to the national interests and its decision making is not predetermined by extra legal aspects. Thus my dependent variable is the legal outcome of the Court's rulings (applicant won or lost its case) in these cases in which there is a clear potential conflict between national and European law or interests. My independent variables account for many of the legal and non-legal factors that the literature suggests have proven to be statistically significant in other Courts' decision making.

Summary of argument, hypothesis

My intuition is that there are cases in which the Court can decide to go either way for having to deal with issues that suppose alternative interpretations. In these cases the Court of Justice allows itself to exercise a certain dose of behavior that is a function of extra legal influences. My argument is that it is neither the national nor the supranational considerations that matter in this context even though as a result these might be directly or indirectly affected. But it is the institutional interests

of the Court itself that would turn the balance to one side or the other. In a separate chapter I will examine from neoinstitutional point of view the seminal works in the literature on this perspective of the CJEU. I argue that it is the long term desideration of the institution to legitimize itself as the Constitutional Court of Europe and to increase the scope of its competences that predetermine a certain pattern which is incorporated into the institutional memory of CJEU. In order to put forward a credible request for playing such a role the judges are bound to seek for compliance of its rulings as it needs the recognition of the EU member states to establish firmly its legitimacy. Thus, inevitably the Court will take into consideration the extent to which its rulings would potentially harm the political agenda of the EU member states and especially the bigger ones as they pose a more serious treat in this sense. And this is exactly the line that rational choice neoinstitutionalists are expecting the Court to follow.

Development of theories/current status

There is a set of several different theories that can be used complementarily for the analysis of the role that the Court of Justice might play as a strategic actor exploiting its power and competences. The hypothesis of regional integration theories such as neofunctionalism and intergovernmentalism in general explain broader processes and the Court cannot be

simply observed only as an instrument in these lines. It is the theories of judicial decision making, as well as institutionalism that can shed light on the nuances that this dissertation intends to point out. Judicial decision making theories present a wide range of extra-legal variables that were found to impact the rulings of different courts. Some of its hypotheses and findings will be tested empirically on a novel dataset of CJEU case-law. In fact I intend to present this usage of extra-legal factors as an illustration of the assumptions of rational choice institutionalism and the judges as individuals who understand the powers and the expectations vested in them to make decisions driven by their human nature and rational choice.

The other sub-branch of new institutionalism, namely the historical institutionalism, is going to be used in this thesis rather descriptively to depict the Court of Justice as a classic institution pursuing its own preferences. CJEU's consistency in its rulings is a classical example of path dependency in neoinstitutional terms. Whereas the precedents that established the main EU legal doctrines, such as EU law supremacy and direct effect, serve the role of critical junctures in exactly the same theoretical framework. This project intends to fit in with the literature review of historical institutionalism by looking behind the rationale of the main doctrines that the Court, as an example of a judicial institution, established throughout its case-law in the context of its

striving for legitimacy and pursuit of increased competences. It will contribute to the principal-agent theory by conceptualizing the potential reasons behind the existence of unintended consequences that occur when an international institution (agent) is created by a group of states (principals) to perform certain functions.

Research methods

The methodology that will be used to test for the extent to which the Court is alert to extra legal factors is predominantly quantitative. I expanded the Stone Sweet – Brunell dataset of the Court’s case-law to include new variables that enable testing for various hypotheses. As actions of annulment provide final decisions they can be analyzed statistically to control for potential significance of preferential treatment towards some of the principles (member states that in fact established the Court of Justice and have to power to amend the treaties) to whom the CJEU is allegedly an agent. I have planned having a separate chapter for this statistical analysis which is to serve as a proof of the Court’s sensitivity to member states’ influence. This chapter will be based on multivariate ordered logistic regression analysis run over a large number of observations of the Court’s case-law collected manually in a novel dataset. A special attention will be given to the type of applicants which decided to bring the cases in front of the Court as it is intuitively rational to expect that groups of lawyers,

NGOs, transnational companies and member states have different interests and if the Court is acting as a strategic agent one may assume that its role as a mediator will vary accordingly. The main assumption here is that the Court will handle more cautiously these cases in which the litigants are powerful enough to act in a way that may threaten its long-term survival or at least reduce the CJEU's competences, i.e. member state governments that may initiate a process of changing the treaties.

On the other hand, preliminary rulings do not generate actual rulings but as most main doctrines were established by CJEU through this procedure it can serve best to illustrate the political agenda of the institution. Thus, another chapter will be envisaged to look for a potential pattern that the Court followed in its preliminary rulings based on a case by case approach in a rather descriptive manner. Again, an emphasis will be put on the source from which the cases originate (type of member state court sending the referral, legal field at stake, etc.).

Future work

My intentions are to construct a plausible model of CJEU decision making that is based on the mentioned observations, theoretical expectations and results. My intention is therefore to also compare the CJEU to other similar international courts in which national and

supranational dimensions are simultaneously present. In the future this model could be tested on other international courts such as the European Court for Human Rights, the International Court of Justice or the Court of Justice of the Andean Community to test for the statistical significance of the key variables found to be correlated with the dependant variable in the original project.

CHAPTER I

THE COURT OF JUSTICE

OF THE EUROPEAN

UNION:

AN INSTITUTIONAL

OVERVIEW

History and functions of the Court of Justice of the European Union

The European Court of Justice (ECJ) was founded with the Treaty of Paris (1951) to put into operation the legal structure of the European Coal and Steel Community that the Treaty established. Later, in 1957, when some three treaty organizations emerged by the Treaty of Rome, the latter got the ECJ as its joint court. In 1967 as a consequence of the merger treaty that consolidated these organizations into a European Community (now European Union) the European Court of Justice was practically put as the highest court in matters of EU law. Each consequent treaty extended the legal framework of the Community and thus, the ECJ's powers to rule over it. These expanded competencies were most recently defined by the Maastricht Treaty in 1992 and the Treaty of Lisbon in 2009 after which the previously designed three pillar structure of the European Union was abandoned for being communitarized and the Court was renamed to its current title – The Court of Justice of the European Union. The number of cases that the Court of Justice has to rule on has grown enormously since the establishment of the institution. The workload of the Court has increased from 79 cases in 1970 to more than 2000 cases in the year of 2010. That is why in 1989 the Court of First Instance was founded to share the burden of the

increased number of cases.¹ Both courts are located in Luxembourg.

One of the main functions of the CJEU is to interpret EU law and to provide that it will be uniformly applied in all EU member states. The Court is to resolve interinstitutional and intergovernmental legal arguments. It is not only member states and institutions that can bring cases before the Court of Justice but also companies and individuals provided that their rights were violated in respect to the European law. According to one of the leading scholars studying the Court, Karen Alter, the Court of Justice was founded in order to perform three roles for the member states: to ensure that the Commission and the Council of Ministers are not exceeding their competences, to fill in the unclear aspects of EC law by interpreting it in its case-law, and to decide on charges of non-compliance that were raised by the EU member states or the Commission.²

Composition of the Court of Justice

The Court of Justice has one judge per each EU member state: 27 judges at present. The Court is assisted by eight advocates-general whose task is to provide their opinions

¹ The Court of First Instance was renamed the 'General Court' in the Lisbon Treaty.

² Alter, Karen. "Who are the 'Masters of the Treaty'?": European Governments and the European Court of Justice." *International Organization* 52.1 (1998): 121-147.

on the cases that are brought before the CJEU. They must do so publicly and impartially. Each judge and advocate-general is appointed for a renewable mandate of six years. Generally it is the EU governments that agree on whom they will appoint and assignment of the judges has to be done 'by common accord of the Governments of the Member States'.³ In practice, each government put his candidate forward and he or she is normally accepted by the others. According to the treaties the judges must be 'persons whose independence is beyond doubt and who possess the qualification required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence'.⁴ For the latter option often it has been the case that academic professors of EU or international law were appointed even if they are not permitted to perform in judges in their respective homelands. There is no retirement age for the judges but during their stay in office they are not allowed to hold any political or administrative position outside the Court.

The judges elect by secret vote the President of the Court for a term of three years that can be renewed. The President's responsibility is to be in charge of the administrative business of the institution as well as to preside the sessions for these cases that are brought before a full Court. The Court of Justice is divided into chambers of three and five judges. These chambers have one of the

³ Article 223 of the TEU (ex. Art. 167 EC Treaty)

⁴ Ibid

member judges as a president who is elected by his colleagues as well. Each judge, at the very beginning of his mandate, swears to be impartial in his duties and to keep the secrecy of the deliberations that are to take place in the cases he will rule on during his career.

In general the judges are independent from their national governments even though they are appointed by the latter. One of the most important reasons for this is the lack of dissenting judgments and the fact that the Court's rulings are issued publicly in a way that no one can understand how did each of the separate judges vote. In addition to that the President of the Court is unlikely to forward a case that is potentially sensitive for some national government to a chamber that has a judge of the same nationality.

The eight Advocates General usually include one of each of the four big EU states (Germany, France, Italy and UK). Even though they never take part of the Court's deliberations they are considered as equals to the judges in terms of hierarchy and ranking in the Court. The Rules of Procedure envisage a secret vote for electing the First Advocate General. His term is for one year. Whenever a new case is brought before the Court of Justice the First Advocate General should choose an Advocate General to whom the case is to be assigned. The chosen Advocate General is to perform the necessary legal research and to present his opinion to the Court. Even though the Court is not obliged to follow it the judges usually do so in some

80% of the cases. The Advocate General opinions are issued together with the Court's ruling in the official reports. This is actually a first opinion given on the case and the judges have admitted more often than never that they use it as a starting point for the internal discussion and deliberations on the cases.

Types of cases

The CJEU has the competency of giving judgments on the following five types of cases that are most often brought before it:

1. Requests for a preliminary ruling – these are cases in which a national court decided to ask the Court of Justice to give its opinion of a vague issue of EU law. The national courts of the member states are in charge of the proper application of European Law. In order to provide uniform interpretation the national courts often use the preliminary ruling instrument for getting the Court's advice. In some cases the national courts are even obliged to do so. In its preliminary ruling the Court of Justice only explains its views on the Community law questions that it was asked to interpret. Thus, the Court does not decide the case and the ruling is left for the national court that referred the question.

Nevertheless, in practice national courts by default follow strictly the advice of the CJEU.

2. Actions for failure to fulfill an obligation – cases in which one or several of the EU member state governments got brought before the Court for not complying with European law. Such a proceeding is usually initiated by the Commission even though in theory it can be done by another member state as well. If the Court finds that the respective state is not fulfilling its obligations its government needs to undertake the necessary actions in accordance with the treaties. The Court can also issue a fine if the member state does not follow the provisions of its ruling.
3. Actions for annulment – cases in which EU secondary legislation (directives, regulations, decisions or some other legal acts adopted by EU institutions) was found to contradict the EU treaties. Such a proceeding can be started by the Council, the Commission, the Parliament, and by any EU member state or a group of member states. Any combination of these is also possible to appear before the Court as a joint plaintiff. Individuals or companies can also ask for annulment of certain Community acts but they need to prove that the latter impacted them individually as otherwise their action for annulment will be ruled away by the Court as inadmissible.

4. Actions for failure to act – cases against EU institutions for failure of the latter to undertake an action of their competences in accordance to European legislation. EU institutions are required to act or take decisions in some cases according to the treaty. In case they did not perform their duties member states or other EU institution can bring them in Court so that this failure to act can be established.
5. Direct actions – cases brought by non-government organizations or individuals against decisions or acts of the Community. Any company or person who has experienced losses as a consequence of a certain community act or inaction is eligible to seek for compensation by bringing his case before the Court of Justice.

The Rules of Procedure

The procedural order in the Court was initially designed in a way to resemble the one that is featured by the International Court of Justice. The procedure can be divided into four different stages: the written proceedings, the preparatory inquiry, the oral hearing, and the judgment.⁵ These stages differ in cases where the Court has been asked for a preliminary ruling as in these cases there

⁵ Hartley, Trevor. *The Foundations of European Union Law*. 7th edition. Oxford University Press, 2010.

are practically no parties and the role of the Court is simply to assist this national court that has sent the request through its interpretation of EU law.

1. The written proceedings

The procedure begins with what is called an application in which the plaintiff has to explain the reasons for his claim. This application is to be sent to the Court's Registrar. The Registrar will provide it with a case number and will then send it to the defendant. The defendant then has a month to present his defense. The plaintiff may then decide to write a reply to which the defendant can again answer. It is at this point that the defendant may object the admissibility of the case. This matter involves most usually the question whether the case is within the scope of the Court's competences. It is the Advocate General who gives an opinion on the issue on a special session at which the Court is to decide whether to sustain the admissibility objection or to deny it.

2. Preparatory Inquiry

At this phase the Court is to decide what evidence will be needed to verify the questions of fact. At the moment that the application has been registered the President of the Court assigns the case to a Chamber of his own choice and selects one of the judges of this chamber as the Judge Rapporteur for the case. At the same time the First Advocate General will assign the case to one of the

Advocate Generals in the Court. The Judge Rapporteur has to summarize the factual matters in his report which he will present to the attention of the Court. Normally the Court finds it enough to determine questions of fact based on the examination of documents. In rare occasions the judges may decide to hear witnesses to whom both sides, the judges, as well as the Advocate General may ask questions.

3. Oral Procedure

The day of the hearing is preceded by the Judge Rapporteur's report which is to be commented in the speeches of both parties. In contrast to other Courts where the oral hearing is usually of great significance this stage is less decisive for the CJEU judges as in the cases brought before it the factual matters have been determined earlier. Once the parties have concluded discussions the Court adjourns and this is the time in which the Advocate General has to prepare his opinion. As soon as he is ready both parties are invited to hear it which is the end of the oral stage.

4. Judgment

The judges have their deliberations in which only they are allowed to be present. The Judge Rapporteur has the responsibility to present a written draft of the judgment and this is the document that serves as a starting point for the discussion of the judges. The procedure

envisages a vote to be taken if necessary to reach a decision. In such cases the judges vote in turn of seniority having the most junior of them voting first. Decisions are taken with simple majority but voting is secret and in the end the issued judgment is single and has the signatures of all the judges on it. Thus, it is never known whether the judges in the chamber have reached a consensus or had a minority opposing the final judgment. The judgment is finally read in open court after which it is also published officially together with the opinion of the Advocate General. The judgments of the Court of Justice are no subject of appeals even though there are some special provisions which allow for a ruling to be reviewed, i.e. if there was a case of breached procedural rules. Actually appeal cases can be brought before the Court of Justice – these appear in cases coming from litigants contesting a decision from the Court of First Instance.

Languages in the Court

The Court of Justice of the European Union is a multilingual Court as all the official languages of the Union are working languages for its institutions. All documents are always translated into the official languages of all current member states. Since the very beginning however French has a principal role in the Court. That is probably a result of the fact that the

United Kingdom joined the Community in 1973 – well after it was founded. In addition to that the very first treaty (the one of the European Coal and Steel Community) that was signed in 1951 was drafted only in French which is also an official language in 3 of the 6 states that established the ECSC.⁶ The very structure of French administrative law has also enjoyed a dominant position among the legal systems of the majority of the founding member states.⁷

The language of each case is usually determined depending on the nationality of the applicant or the defendants. The litigants are however aware of the fact that judges cannot understand most of the official Union languages, so a French- or an English-speaking lawyer is more likely to present before the Court.⁸ Judges sit alone during their deliberations and interpreters are not allowed in their room. The Court has adopted French as its working language. As a result the drafts and the final version of the judgment are given in French and only then translated into the language of the case.

⁶ Fennelly, Niall. *Legal Interpretation at the European Court of Justice*. Fordham International Law Journal, vol. 20, issue 3. 1996.

⁷ Everling, Ulrich. *Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities*. Festschrift til ole due 55-74. 1996.

⁸ Hartley, Trevor. *The Foundations of European Union Law*. 7th edition. Oxford University Press, 2010.

Judicial Activism

Judicial activism as a concept in law terminology concerns the occasions in which a Court creates law. This role of any court is inevitably in conflict with the legislature as it has a political aspect. The Court of Justice has more often than never based its rulings not only on the texts of the treaties or the secondary European legislation but has adopted for itself the mission of promoting further European integration. In order to achieve this mission the Court has formed its own institutional agenda by pursuing the policy of strengthening the Union by increasing the scope of Community law and expanding the powers and competences of the EU institutions including itself. The most important aspect of this process has been the establishment of some legal principles and doctrines that changed effectively the relations between the member states and the Union. For a political scientist it is of a great interest to research the instances in which a court has performed such a judicial activism because these are really the moments where the institution reveals how it understands the general reasons for its existence and the way it defines the mission it is there to achieve. Therefore it is worth mentioning some of the most illustrative cases in which the Court managed to read what was not actually written in the treaties and would probably never appear there if the process of

legal integration was to be lead only by the national governments.

One of the most famous cases is the *Les Verts vs. European Parliament*.⁹ *Les Verts* is the French green party which brought the European Parliament before the Court for its decision to allocate money from the community budget in a way that the party found discriminatory against parties which were not represented in the current European Parliament. The treaty was clear enough that the Court of Justice can review the legality of the acts of the Council and the Commission. In other words there was a problem with the admissibility of the case as the legality of acts of the European Parliament was not mentioned as a subject of the Court's jurisdiction. Nevertheless the judges decided that the annulment action is admissible. The Court based its ruling on the general spirit of the treaty which according to the judges provides for establishing the rule of law uniformly throughout the union and thus the acts of the member states and all community institutions should be subject of review even if these were not expressly listed. With a stroke of the pen the judges formally expanded their jurisdiction to cover the legality of the European Parliament's acts by claiming that the Court is thus simply filling in a gap that was left in the treaties. Indeed the Court has followed a similar logic in an earlier case where it was decided that

⁹ Case 294/83

the GATT¹⁰ was also a subject of its judicial review as an agreement which is binding on the Community. Otherwise, as it is argued in the judgment, the agreement could not only 'receive uniform application throughout the Community' but 'the unity of the common commercial policy would also be jeopardized'.¹¹

In another case from its 1980s case-law the Court had to rule on whether the European Parliament can be the source of an action for annulment of Council's acts. At the time of the case the treaties did not mention the Parliament as a potential initiator of an annulment action. Nevertheless the Court decided that:

'The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities. Consequently, an action of annulment brought by the parliament against an act of the Council or the Commission is admissible.'¹²

It is these cases that reveal the political mission of a Court which has proven that it can base the rulings on its

¹⁰ The General Agreement on Tariffs and Trade which was replaced by the WTO (World Trade Organization) in 1995

¹¹ Joined cases 267-269/81

¹² Case 70/88 European Parliament vs Council

views on what the law should be even if it does not match the exact wording of the treaties. It has to be pointed out that of all EU institutions, the Court of Justice has probably gone farthest in limiting national sovereignty by the establishment of the EU law supremacy principle and by imposing the obligation of member states to implement it.¹³ The principles of supremacy and direct effect however, will be examined in more detail in another chapter of this thesis.

Compliance

The instances of judicial activism are often sensitive and usually met with criticism and negative reactions by the member states. Even though the judiciary is theoretically independent the Court of Justice, similarly to all other international courts, needs to take into account the way its rulings are likely to be accepted by the European governments. This is partly for the lack of such institutions in the Union (i.e. communitarized police) which may enforce sanctions in case certain national officials or institutions decide to not comply with the decisions of the Court. Consequently a provision of imposing fines on the non-complying governments was introduced in the 1990s. Fines however have rarely been effective as a measure of preventing member states non-compliance as usually the Court sets a small amount of

¹³ Keohane, Robert and Hoffmann, Stanley. *The New European Community: Decisionmaking and Institutional Change*. Oxford: Westview Press. 1991

money as a monetary penalty.¹⁴ In addition there is evidence that when a state is found to infringe EU rules it can escape punishment for an average period of ten years.¹⁵ The Court should always be careful in the pursuit of its political agenda as the only way it can be perceived as a legitimate and a neutral actor is if its judgments are actually complied with. To date there is probably a single case in which a member state has openly refused to obey to the Court's decision. This happened in the so called Sheepmeat case in which the judges decided that France had to allow lamb and mutton imports in accordance with Community law.¹⁶ The French government has blatantly announced that it will not comply with the ruling before the Union adopts a mechanism to protect French farmers and threatened to ignore the Court by keeping the abovementioned trade barriers. The French pressure was strong enough for the Court to make a step back from its stand in the consequent action that the Commission brought against France for its non-compliance. Thus the case was never actually resolved and in the end the issue was settled with an intergovernmental deal that appeased all involved sides (with the UK being the state mostly opposing the French government's decision).

¹⁴ Nicolaidis, Phedon and Suren, Anne-Marie. *The Rule of Law in the EU. What the Numbers Say?* EIPASCOPE 2007/1

¹⁵ Ibid

¹⁶ Case 232/78

CHAPTER II

NEW

INSTITUTIONALISM

INSTITUTIONS

This chapter is about institutions. Why institutions exist, how do they survive through the course of time and how they predetermine the boundaries of political behavior. These are the basic questions that the theory of new institutionalism and its different strands are trying to examine from the perspective of political analysis. Douglas North's classical presentation of the institutions as 'the rules of the game in a society or, more formally, the humanly devised constraints that shape human interaction'¹⁷ is probably the most widespread definition. Using such a definition however one should strictly distinguish the difference between an institution and an organization. Indeed if we understand institutions as the set of rules for making decisions then the organizations that political scientists examine can be observed simply as players¹⁸.

The literature often does not take into account this confusion and the term institution is practically associated with the organizations that are there to follow the established institutional rules.¹⁹ Even though the

¹⁷ North, Douglas. *Institutions, Institutional Change and Economic Performance*. Cambridge University Press, Cambridge 1990.

¹⁸ *Ibid*

¹⁹ Hodgson, G.M. What are Institutions? *Journal of Economic Issues*, XL(1), 1-25; 2006 Hodgson points out that this is often the case as usually

institutions are, in the most general sense, only rules we can not use North's definition for the purpose of this thesis as the focus here is rather on the organization – the Court of Justice of the European Union – which was founded with a mission to perform within the boundaries of these rules. It is these rules that lay at the basis of political performance as politics cannot be organized in a lack of institutions. Politics is structured by institutions as they define the political actors that are allowed to perform and influence the preferences of these actors.²⁰ On the other hand institutionalism is the theory of studying political institutions and the way they affect political decision-making outcomes. In political science the term was first used by March and Olsen in the 1980s when they claimed that organization of politics can predetermine political outcomes.²¹

Institutionalism developed to a stage in which practically all social sciences currently have a new institutionalism of their own. With the progress that institutionalists borrowed from so different fields such as these of psychology, economics, statistics and international relations, manage to expand our knowledge on institutions and institutional change. In recent years, with the development of political

organizations are characterized by a very clear structure and are thus hard to differentiate from institutions.

²⁰ Steinmo, Sven. The New Institutionalism. In *The Encyclopedia of Democratic Thought*, London: Routledge, 2001.

²¹ March, J.G and Olsen, J.P. *Rediscovering Institutions: The Organizational Basis of Politics*. New York: The Free Press. 1989

science scholarship on the European Union and its institutions, new institutionalism is more often used in explaining the Union's decision-making processes. This is totally in line with March and Olsen beliefs that political democracy depends not only on economic and social conditions but also on the design of political institutions.²² There is a common understanding shared by the institutionalists that the functioning of institutions depends on the circumstances in which they appear and endure. However within the school of new institutionalism there are various assumptions about the laws that govern politics and thus several sub-categories of institutionalism emerged. The main three branches of new institutionalism are rational choice institutionalism, historical institutionalism and sociological institutionalism.

These three strands differ in their very definition of what an institution is. According to historical institutionalists institutions are rules and assets taken over from the past which are embedded in concrete temporal processes.²³ Institutions are thus perceived as constantly developing structures which change over time as a result of different social or political outcomes. The procedures and routines which institutions constitute are considered a dynamic function of enduring legacies of past political struggles.²⁴

²² Ibid

²³ Thelen, Kathleen. Historical Institutionalism in Comparative Politics. *Annual Review of Political Science* 1999.2; 369-404. 1999

²⁴ Ibid

On the other hand rational choice institutionalists imply on the reasons of institutions' existence and the rationality of the actors that created them. They focus on the practical purposes of inventing institutions and on the preferences of the sides involved in a certain institutional behavior. In this chapter the theories of rational choice and the historical institutionalism will be observed in further detail. In addition to this there are two separate chapters containing evidence to examine the validity of these theories assumptions when the decision making processes in the Court of Justice of the European Union are concerned. Such an analysis would of course be more complete and precise if it could be properly performed through the lenses of sociological institutionalism as well. However, most of the potential proofs to confirm the sociological dimension of judicial decision making within the CJEU are practically not available. We know too little about the social interactions between the judges in Luxembourg. The individual input that each of them undoubtedly has as a human being put under the conditions of interpersonal interactions is almost impossible to measure. The final rulings of the Court of Justice may be public but neither the deliberations of the judges, nor their personal votes were ever revealed in accordance with the principles of secrecy that each judge vows to maintain even after the end of his mandate.

It is exactly for this reason that I decided not to include an in-depth analysis of the sociological institutionalist

perspective.²⁵ Still, for the sake of completion it is worth mentioning the views of the sociological institutionalism which implies that institutions are socially constructed and embody formally the different societal norms and cultural perceptions of how the world functions.²⁶ For this type of institutionalism the human nature and the acceptable interpersonal behavior are variables that predetermines the preferences of the actors in an institution and thus these actors' interactions are also a function of the relevant individual identities.²⁷ An illustration of a sociological institutional approach to the judicial activism of the Court of Justice of the European Union would be the assumption that the famous doctrines EU law supremacy and direct effect would not happen in the 1960s if it was not for the two new judges that entered the Court in 1962 – the French Robert Lecourt and the Italian judge Alberto Trabucchi. Both of these are known to have been in favor of establishment of the direct effect doctrine while other sources suggest that judge Hammes and judge Donner as well as the Advocate General Roemer were opposing the principle. As Ditlev Tamm has put it:

²⁵ Even though it is worth to mention that examining the CVs and academic background of judges was successfully used in the literature to test for correlations between their personal preferences and judicial outcomes.

²⁶ Thelen (1999)

²⁷ Hall, Peter and Taylor, Rosemary. *Political Science and the Three New Institutionalisms*. *Political Studies*, vol. 43. 936-957. 1996

“A qualified guess of oral testimony is that Lecourt and Trabucchi were followed by the Italian Rossi and the Belgian Delvaux thus making a narrow majority”²⁸

Personal leadership, national legal traditions or individual background are certainly an interesting subject of research. If rational choice institutionalism is at one of the ends of the historical institutionalism approach to institutions than sociological institutionalism is on the other. However, in the case of the Court of Justice, the subtle notions with which these factors might have influenced the judicial decision making is practically impossible to be observed profoundly. The only quantifiable exceptions that I found in this context are the nationality and the seniority (the number of years in office) of the CJEU judges.²⁹

RATIONAL CHOICE INSTITUTIONALISM

The rational choice is a paradigm that was originally introduced to economics. Its main assumption is that actors are rational and their actions can therefore be extracted as logical choices determined by their own preferences and motives, as well as those of the rest of the actors. In practice actors are expected to be selfish individuals whose overall goal is to optimize their so called Utility function trying to

²⁸ Tamm, Ditlev. *The History of the Court of Justice of the European Union Since its Origin*. TMC Asser Press, The Hague. 2013.

²⁹ The impact of these is tested as they are controlled for as independent variables in the regression analysis in Chapter IV

exploit the information they know. A classical definition of a rational agent is the one of Shepsle:

“One who comes to a social situation with preferences over possible social states, beliefs about the world and a capacity to employ these data intelligently. Agent behaviour takes the form of choices based on either intelligent calculation or internalised rules that reflect optimal adaptation to experience.”³⁰

The general mechanics of how politics works according to rational choice institutionalists is best captured by Hall and Taylor who claim that the rational actors have fixed preferences and act in a highly strategic manner in the pursuit of the maximization of these preferences.³¹ Politics is therefore a series of collective action dilemmas and it is the mentioned strategic interaction that settles the outcomes. In this process institutions come to serve as the instrument that structures the interaction among the different actors and to direct them towards certain desired outcomes “by affecting the range and sequence of alternatives on the choice-agenda or by providing information and enforcement mechanisms that reduce uncertainty about the corresponding behavior of others and allow gains from exchange.”³²

³⁰ Shepsle, Kenneth. Studying Institutions: Some Lessons from the Rational Choice Approach. *Journal of Theoretical Politics*, 1: 131-147. 1989

³¹ Hall and Taylor (1996)

³² Ibid

Of course actors act within certain institutional context which is defined and bounded by the rules, norms and practices of the respective organizational setting. The critics of rational institutionalism point out that the latter follow a rather mechanic understanding of actor preferences which leads to the design of simplistic models based on too narrow assumptions. Therefore, rational institutionalism fails to capture some complex interactions that are an essential part of the way institutions function.³³ Even though a common critique of rational choice institutionalism is that it overemphasises institutions and structures and down plays choice and agency³⁴ political scientists examining the European Union have recently started looking for explanations of policy outcomes in institutions as a collective entities and not so much in the preferences of individuals that perform within the boundaries of these institutions. In other words institutions are instruments that individuals need to achieve their goals.

The views of rational choice institutionalists justify the existence of institutions by their intended functions. It is the effects that were envisaged to occur out of the institution existence that predetermined its establishment. In this understanding rational institutionalism seems to agree with

³³ Ibid

³⁴ Bell, Stephen. Institutionalism: Old and New. In Woodward, D. Government, *Politics, Power and Policy in Australia*. Melbourne: Longman, 2002.

the principal-agent models³⁵ in Political Science. These models are featured by having legitimate decision-makers (principals) which choose to delegate some of their competencies by creating a certain institution (an agent) that will facilitate the process for the principal by reducing its transaction costs.³⁶ Delegation occurs if the expected gains exceed the costs for the principal. The costs of delegation are obviously highest in instances where the agent either can not perform as it was instructed to, or when the agent has the opportunity to form and follow its own preferences which do not coincide with those of the principal.

HISTORICAL INSTITUTIONALISM

Historical institutionalists are more focused on the evolutionary nature of institutions. Thus, in contrast to rational choice institutionalists, they put the accent on the institution as a concept which rather forms individual behavior instead of being a function out of it. Indeed human interaction is so complex that it is extremely unlikely to have it balanced around a point of equilibrium which depends on a clear set of rational actor's preferences. Koeble argues that "Individuals are embedded in so many social, economic and political relationships beyond their

³⁵ The notions of principal-agent delegation are explained in a more detailed way in Chapter III of this dissertation

³⁶ Pollack, Mark. *The Engines of European Integration: Delegation, Agency and Agenda-setting in the EU*. Oxford: Oxford University Press. 2003.

cognition and control that it is almost absurd to speak of utility-maximizing and rational behavior in a strictly economic sense"³⁷.

The methodology of historical institutionalism is opposite in its direction compared to one of the rational institutionalists. There is not necessarily a disagreement that individuals are acting in a strategic manner, but it is the historical observations of this behavior that will tell us more about its elements and about the priorities of the actors. Therefore, according to historical institutionalists, the more adequate approach is the empirical analysis of the instances illustrating the functioning of an institution. As March and Olsen put it there is a certain "logic of appropriateness" in institutional matters.³⁸ It is the personal perception of the agents' own responsibilities and delegated duties that to a great extent shape the reactions of the individuals. This concept is often referred to as normative neoinstitutionalism but the general idea is that institutional life cannot be understood only in abstract terms of some assumed rationality but also through the beliefs of individual actors that their decisions come to serve the mission for which their institution exists.

Analyses of historical institutionalism are centered around institutional development over the course of time, as well

³⁷ Koeble, Thomas. *The New Institutionalism in Political Science and Sociology. Comparative Politics*, 27; 221-244, 1995.

³⁸ March and Olsen (1989)

as the particular context in which they developed.³⁹ For this purpose the concepts of path dependency and critical junctures are very useful and are considered fundamental for historical institutionalism. Path dependence is characterized by the way in which past decisions have framed the boundaries of further institutional development. It was not after the 1960s that social scholars realized that historical outcomes have often had a very long-term impact. In some cases the costs of diversion from the path are often so high that institutions are left with one or just several possible options. As Pierson argues “once a certain path is established self-enforcing mechanisms make reversals very difficult.”⁴⁰ The timing of events is also of essential significance according to historical institutionalists. In other words some minor episodes that happened in the early stages of institutional development might have been more influential compared to more recent events which might otherwise look like being more significant for their actual wider-spread impact.

It is because of this distinction that the concept of critical junctures appeared. In a period of a critical juncture a situation or a decision has set a particular path that somehow predetermined the consequent path of events. The periods in between are known as periods of continuity.⁴¹ Historical institutionalism is practically a

³⁹ Thelen (1999)

⁴⁰ Pierson, Paul. *Politics in Time: History, Institutions, and Social Analysis*. Woodstock, UK: Princeton University Press. 2004

⁴¹ Hall and Taylor (1996)

comparative approach and is therefore relying mostly on case studies. Historical institutionalist scholars are looking into these occasions in which a certain option was chosen among others that would have potentially resulted in another path of dependency. Thus continuity periods are examined as an immediate outcome of the critical junctures. They are periods in which the recurrence of the chosen pattern is simply reinforced. The reasons behind the critical junctures are not so important for the historical institutionalists. Indeed, one of the main weakness of the concept is the fact critical junctures are usually recognized once their long term effect has appeared as one needs to have the retrospect sight to identify the juncture. Therefore, once identified, critical junctures are interesting also for the rational institutionalist it is assumed in their theory that actors exploited the opportunity to choose a certain path in line with their own interests. This is another indicator that rational and historical institutionalisms can well be used complementary as they are anyway laid on assumptions that do not necessarily contradict to each other.

CONCLUSIONS

Each of the main streams of New Institutionalism has its weaknesses and limitations explaining the processes of institutional change. Actors are practically operating within a system of incomplete and biased information. It means that they have to take decisions in a state of a bounded

rationality. This creates problems in analyses of institutions. In any case institutions emerge and endure for a reason. Political institutions are usually established to decrease uncertainty, to structure certain processes and to lower the transaction costs involved. However, with time institutions tend to shape their own preferences and they are trying to follow a so called logic of appropriateness which is perceived as their mission. In this process institutions are struggling to survive and this survival is easier if they happen to affirm their legitimacy and manage to expand their institutional competences. In the following chapters I will try to present the case of the Court of Justice of the European Union within these lines of argument.

CHAPTER III

New Institutionalism and the Court of Justice

“The European Court of Justice is a political court with a political agenda. Its rulings, time and again, are based on principles that the Court simply creates and which have no legal basis in the Treaties themselves. As one of its former judges has admitted, the European Court of Justice, is a court with a “mission”. That mission is to create a federal Europe.” Sir James Goldsmith, 1996⁴²

Modeling Judicial Decision Making

What factors predetermine judicial decision making? A court, as an institution, would ideally be expected to act as a simple tool to apply the law automatically. Thus, judges should serve as individuals formally solving rather practical questions based on the generally accepted legal norms. In fact that was what scholars in the field initially considered as the main reasoning behind judicial behavior. This model has been for long qualified as somehow naïve and incomplete. C. Herman Pritchett was one of the first scholars to question it in a scientific manner providing empirical evidence.⁴³ In the 1940s Pritchett claimed that judges’ personal policy preferences influence significantly their rulings and thus he set the foundations of the attitudinal model which other scholars upgraded later. In a series of publications in the 50s and the 60s some American

⁴² Citation from a speech given by Sir James Goldsmith at the 1996 Referendum Party Conference in Brighton.

⁴³ See generally C. Herman Pritchett, *The Roosevelt Court: A Study of Judicial Politics and Values, 1937-1947*. Quadrangle Books, 1948

political scientists, principally Glendon Schubert and Harold Spaeth, argued that the use of quantitative methods would improve our understanding of judicial behavior and examined extensive databases of judicial decisions to provide evidence in favor of the attitudinal model. It did not last long before other scholars added the dimensions of personal or institutional policy agenda to further develop the analysis of the allegedly strategic judicial decision making.

These models are not in contradiction to each other but are rather complementary and in different circumstances it is different factors that are found to matter. It is worth emphasizing that up to date the majority of the scholars that approached the subject are American. Hence, it is not surprising that their analyses referred almost exclusively to the US Supreme Court. However, the institutional and procedural constraints that courts inevitably have to face differ essentially from case to case. Therefore, one should be exceptionally careful when he or she extrapolates the findings and even the approach that seemed to explain judicial reasoning in other legal systems. The numerous studies of the Supreme Court's judicial decision making provided evidence for some extra-legal aspects such as the judges backgrounds and attitudes, public opinion or institutional constraints which happened to influence the rulings at the expense of the law. In this thesis I intend to test some of these factors as variables that might have determined the decisions of the Court of Justice from the

perspective of new institutionalism. As clarified in the previous chapter, once ideas get institutionalized, they tend to often be exploited in a strategic rational manner so that the institution that is applying them provides better grounds for its legitimacy, and thus, its own survival.

The Court of Justice of the European Union is such a peculiar legal institution that it can hardly be compared to any other court on the globe. Nevertheless, it enjoys a great deal of academic attention as its role is crucial in another theoretical debate. The leading theories of European integration, neofunctionalism and intergovernmentalism, disagree in their beliefs about the origin of the driving forces behind CJEU rulings and both camps present evidence in an attempt to refute the opponent views. This vigorous debate led to the unjustified assumption that one of the sides is generally wrong and thus it is preferable to approach the Court in the alternative way. Moreover, it seems that scholars examining the Court of Justice so far did not succeed in isolating the effect of purely legal and technical factors from the extra-legal ones. That vital gap produced certain problems of selection bias and heterogeneity among observations in the relevant quantitative studies which are anyway still quite scanty.

It may even be taken for granted that the processes of European integration have influenced the way the Court of Justice functions. The reverse, of course, seems just as right. However, a judicial institution as a Court is foremost

characterized by its independence and therefore it is at least inappropriate to observe it within the same hierarchical dimensions as the rest of the EU institutions. Exactly for this reason one of my main arguments in this dissertation is that if the Court is acting within a frame that predetermines the boundaries of its powers then these restrictions are rather posed by the EU legislation and only thus, indirectly, by the member states' influence and agenda. This framework can therefore hardly be explained by general theories of integration and I argue that it is the micro level of technical, institutional and legal analysis through which we can understand better the judicial decision making of the CJEU and the extent to which the Court takes into account external factors.

Hence, I believe it is more adequate to observe the Court from the perspectives of neoinstitutionalism and its subcategories. Indeed, this does not mean that the Court of Justice will be examined as an entirely separate institution which has nothing to do with the mainstream of European politics. The Court's decision-making in the context of its interdependence with the political agenda of EU member states can be better explained (Chapter IV) by rational neoinstitutionalism instead of using the intergovernmentalist approach presenting the institution as a simple agent of the principals (EU member states). If the Court was a mere instrument in the hands of the member states one can hardly explain the regularly announced discontent of the latter with the rulings of the judges in

Luxembourg which have often been in contradiction with the officially expressed position of even the strongest European governments. On the other hand, the arguments of neofunctionalism that the Court has followed a certain pattern of pro-European behaviour in its judgments for the spill-over effect of European integration also does not hold true in a vast number of cases in which the Court restricted the scope or even annulled certain directives and regulations that would deepen and widen the integration within the Union. The tracks of the Court's pro-European pattern of decision making could probably be better found through the means of historical institutionalism (Chapter V) and its concepts of path dependency and critical junctures.

For the reasons of my argument I need a brief overview of the key findings in the literature concerning the Court's decision making. I will address these in neoinstitutional terms trying to explain that the extent of independence that the judiciary encompass has proven to be strong enough to make the CJEU an agent that cannot be viewed through merely neofunctional or intergovernmental lenses.

Theoretical Concepts in European Integration and Judicial Decision Making

Intergovernmentalism vs Neofunctionalism

Probably the first systematic attempt to test empirically the interdependence between CJEU and the concrete political

situation in which the Court had to consider the preferences of the European Commission and the EU member states was an article of Eric Stein that was published in 1981.⁴⁴ Stein took 11 crucial cases in which the Court of Justice delivered decisions maintaining further legal integration in the EU. In almost all of these the Commission supported the pro-European ruling, while there were at least some of the member states that opposed in all of the cases. Stein also considered the opinion of the Advocate-General which seems to be well correlated with the actual legal outcome. These findings came to convince academic circles that the Court fits better the neofunctionalists explanation of European integration. Neofunctionalism, a theory proposed by Ernst Haas in 1960s, assumes the decline of the power of the nation-state and, as opposed to intergovernmentalism, predicts the shift towards supranational institutions in matters that involve widening and deepening the regional integration.⁴⁵ The argument of the neofunctionalists is that often supranational institutions have undertaken and enforced actions that would never take place if these decisions were up to the member states to decide upon. In this context the role of the Court of Justice has been vital and Stein's paper helped the revival of neofunctionalism which was announced dead by its inventor – Haas – shortly after the

⁴⁴ Stein, Eric, *Lawyers, Judges and the Making of a Transnational Constitution*. *American Journal of International Law*, Vol. 75, No.1, 1981.

⁴⁵ Haas, Ernst. *The Uniting of Europe*. Stanford, 1958.

Luxembourg “empty chair” crises in the late 1960s. In his own words “the Court fashioned a constitutional framework for a federal-type structure in Europe”. An institution is similar to a human being – it is trying to provide its survival and then, if possible, to become more powerful. In the case of the CJEU that would mean extending the scope of its competencies. The number of cases in Stein’s paper is far from being big enough to allow any conclusive evidence about the nature of the Court’s decision making. In any case though, in some of the cited rulings the Court managed to increase its powers exploiting an opportunity to indoctrinate the principles that it established totally in line with the theory of historical and rational institutionalism.

The allegedly revived neofunctionalism in the 1980s triggered a quick response by the camp of the intergovernmentalists after Stein’s paper. The principal-agent (PA) analysis is probably the dominant approach to the study of delegation in international politics and it somehow fits the intergovernmental ideas on European integration. By definition, principals are those actors who create agents, through a formal act in which the former confers upon the latter some authority to govern, that is, to take authoritative, legally-binding, decisions. Thus, if the EU member states can be viewed as the principals then organizations like the European Commission and the European Court of Justice are their agents. Garrett used the PA analysis in a very restrictive way to depict the CJEU as

an institution that almost lacks autonomy.⁴⁶ A relatively extensive description of the role that the Court of Justice enjoys in EU legal integration in terms of the 'principal-agent' theory is provided by Jonas Tallberg who produced some reasonable research on the European Court of Justice's decision making constraints. One of the primary merits of P-A analysis, as Tallberg argues, is its open-ended character, thus allowing for nuanced, empirical assessments of the scope for supranational influence.⁴⁷ The Principal-Agent paradigm does not seem to address efficiently the fact that the agents are not mere instruments but have independent preferences and might have their own political agenda. Intergovernmental arguments are thus not necessarily in contradiction with rational institutionalism which acknowledges the reality of having the CJEU considering extra-legal factors and political power especially in cases where the institutions interests might be involved in the long run. In the end it is the member states that can change the Treaty and thus the form and the functions that the Court exercises. In other words the Court is in a relationship of interdependence with the principals that have established it. And the

⁴⁶Garrett, Geoffrey. *International Cooperation and Institutional Choice: The European Community's Internal Market*. International Organization, Vol. 46, No. 2, 1992.

⁴⁷ Tallberg, Jonas. *Supranational Influence in EU Enforcement: The ECJ and the Principle of State Liability*. *Journal of European Public Policy*, 7:1, 2001.

approach of the intergovernmentalists does not capture the fact that the Court is a rational actor in this game which realizes that the principals are also dependent on its existence as the member states cannot do without the power of judiciary in the alliance that they formed.

Burley and Mattli produced a seminal paper in 1993 in which they find the neofunctional approach a plausible one. Claiming that legal integration has been actually engineered by the Court they agree that the “judges working in Luxembourg managed to transform the Treaty of Rome into a constitution.”⁴⁸ In addition Burley (now Slaughter) and Mattli’s theory pointed out several ways in which the Court might be used to respond to the interests of different private actors rather than those of some member state. These groups include traders, large producers or transnational companies. Thus, as neofunctionalists would argue, the spill-over effect of more litigation would lead to more references to the Court which in turn will expand the domain of EU law, closing this vicious circle by leading to even more litigation. Mattli and Slaughter confirm these views in their reply to Garret in 1995.⁴⁹ It is rather naïve to believe that the Court could not

⁴⁸ Burley, Anne-Marie and Mattli, Walter. *Europe before the Court: A Political Theory of Legal Integration*. International Organization, Vol. 47, No.1, 1993.

⁴⁹ See Burley, Anne-Marie and Mattli, Walter. *Law and Politics in the European Union: A Reply to Garrett*. International Organization, Vol. 49, No. 1, 1995.

be hindered in the process of constitutionalizing the treaties or increasing the scope of its competences. In the end it was the supreme courts of the member states that adopted the legal doctrines of direct effect and supremacy to help this legal integration penetrate within their national law systems. Neofunctionalists would probably find no evidence for their arguments from the CJEU judgments if *Cassis de Dijon* and *Van Gend En Loos* were not to happen so early in the Court's case-law. It is the theoretical background of historical institutionalism and its concepts of path dependency and critical junctures that explain better the always ongoing conflict between national and EU law. The mechanics of this process will be observed in further detail in Chapter V, where it will be revealed that the legal integration has its limits and the Court of Justice is not a simple push button of neofunctional determinism but is rather a rational agent which needs to assess the extent to which it may act in accordance to the member state's approval of extra integration. It is the *Kompetenz-Kompetenz* controversial issue that is the word of fashion in the Court's struggle to turn the treaties into a constitution and it seems that we are still to witness another famous judgment in this context that historical neoinstitutionalists will label as a critical juncture that will define EU legal integration in the long run.

In his later works Geoffrey Garrett retreats from his originally extreme positions as he argues that indeed the

member states, especially the economically strongest ones, frequently choose not to argue against the Court's decisions for the cost of doing this is often higher than the inevitable benefits that these decisions bring as well.⁵⁰⁵¹ Thus, as the Court is aware of this reasoning of the national governments, it acts as a strategic rational actor which understands its limits. Its primary objective as an institution is to expand the domain of European law and therefore its authority to interpret it. However, the Court realizes that its power is not simply given by the wording of the treaties, but rather came as a function of member states' interests through the legislation they adopted and it is exactly these governments that can change the status quo. Carrubba, Gabel, and Hankla as well argue that the capacity of the CJEU to influence member state behavior is highly constrained⁵² but their initial results are somehow dubious and triggered controversial reactions. An year later, in 2010, Carrubba and Gabel published a revised

⁵⁰ Garrett, Geoffrey. *The Politics of Legal Integration in the European Union*. International Organization, Vol. 49, No. 1, 1995.

⁵¹ Garrett, Geoffrey, Daniel Kelemen and Heiner Schulz. *The European Court of Justice, National Governments, and Legal Integration in the European Union*. International Organization, Vol. 52, No. 1, 1998.

⁵² Carrubba, Clifford, Matthew Gabel and Charles Hankla. *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*. *American Political Science Review*, 2008.

version of their test of the neofunctionalist arguments.⁵³ Garrett's turn from the conservative views of intergovernmentalism is exactly a retreat to the rational institutionalist ideas that an institution needs to take into account the factors that might alter its functioning and is acting accordingly whenever necessary. This gives a face of the Court of Justice and in the next chapter I am going to prove that the Court has been more tolerant and sensitive to the actions of the states that have the real power to modify the treaties and the overall institutional framework in the European Union.

The existing literature has dealt surprisingly little with the internal structure, organization and procedures in the Court as a factor in its judicial decision making. In fact I am aware of a single paper that is focused on this matter.⁵⁴ There are a number of issues in this context that may well further the policy preferences of certain involved actors to an extent in which potentially these could influence the Court's rulings. Such extra-legal circumstances include the CJEU judges and Advocate Generals appointments by their

⁵³ Carrubba, Clifford and Gabel, Matthew. Of Courts and Commerce: Reconsidering Evidence from the European Court of Justice. Paper presented at PEIO, Washington DC, 2010.

⁵⁴ Gabel, Matthew. The Politics of Decision-making in the European Court of Justice: The System of Chambers and Distribution of Cases for Decision. ECPR conference, Marburg, 2003

respective national governments, the internal distribution of cases to the Advocate Generals and the Judge Rapporteurs, as well as the consequent composition of the Court that will actually provide the final judgment. In this thesis it is my intention to investigate whether similar institutional constraints concerning the CJEU have been exploited strategically by justices and/or member states to achieve certain policy goals and the extent to which such extra-legal variables are a significant part of the equation of the Court's decision making will be assessed in Chapter IV of this thesis.

The procedures within the CJEU as well as the special positions of the Advocate Generals, Judge Rapporteurs and judges in general imply a potential tool that member states may exploit through their appointments. In a 1998 paper Kenney finds no pattern of appointment politics or an indication that CJEU judges are assigned in the context of some political factors.⁵⁵ In this paper I will run another test to confirm these findings. Apart from the nationalities of the justices I included information on the seniority of the Advocate Generals and the Judge Rapporteurs, as well as the number of judges deciding each particular case, which may serve to control for the theoretical expectations of collegiality as a factor of judicial decision making. As Edwards puts it: 'The more collegial the court, the more

⁵⁵ Kenney, Sally. *The Members of the Court of Justice of the European Communities*. *Columbia Journal of European Law*, 5:1, 1998.

likely it is that the cases that come before it will be determined on their legal merits⁵⁶. In his seminal paper Edwards poses his views that the levels of collegiality are higher in smaller courts as smaller groups have the potential to interact more efficiently. The Court of Justice of the European Union is certainly a Court in which you would expect high intensity of personal relationships that would trigger more easily the occurrence of differing views which lie at the heart of what appellate justice is about.⁵⁷

On the other hand one should also consider all other non-procedural but still relevant legal issues that could alter the outcome of the Court's ruling. Such factors predetermine the overall case complexity which will be defined later in this dissertation in terms of the number of legal matters involved in each particular case as well as the certain legal provision that is at stake. An empirical study on the impact of case complexity in the US Supreme Court suggests that this factor significantly increases the likelihood of opinion writing. In other words the judges refrained more often from writing dissents in cases with fewer legal provisions and issues.⁵⁸ The decision making process in the CJEU, however, does not provide for the option of issuing

⁵⁶ Edwards, Harry. *The Effects of Collegiality on Judicial Decision Making*. University of Pennsylvania Law Review, Vol. 151, 2003.

⁵⁷ *Ibid.*

⁵⁸ Johnson, Scott. *The Influence of Case Complexity on the Opinion Writing in the Rehnquist Court*. Ohio Northern University Law Review, Vol. 25, 1999.

concurrent opinions and we have no access to information on the secret vote of the judges. In any case the focus on the institution as a separate entity that is not acting under the guidance and the expectations of the member states is again present to support the approach of institutionalism to the Court's decision making.

It has to be pointed out that solely extra-legal issues were rarely found to explain the variation of any Court rulings. As George & Epstein conclude: '...the most complete explanation of judicial outcomes should incorporate legal and extra-legal factors. Seen in this light, the views of neither the classical legal thinkers nor the behavioralists are incorrect; but they are incomplete. Both law and politics play significant roles in the Supreme Court's decision-making process.'⁵⁹ Therefore, a complete understanding of judicial behavior must include both legal and extra-legal factors. The main objective of this paper however is not to create a model that will predict the rulings of the CJEU but simply to contribute to our understanding of the institution by testing its reaction towards a set of factors that should not predetermine any part of the outcome in ideal circumstances.

After all the Court can only rule on cases that were brought in front of it. Therefore the decision to refer a case to the

⁵⁹ George, Tracey and Epstein, Lee. *The American Political Science Review*, Vol. 86, No. 2, 1992.

CJEU is inevitably an essential factor in European legal integration. For this reason anticipating the judicial outcome is crucial for the costs that the Court's decisions might cause. As in any national legal system, citizens have opinions over how decisions should be made. These opinions matter to courts because the more the weight of public opinion is against a particular decision, the greater the cost to the court's legitimacy if it chooses to make that decision⁶⁰. This hypothesis has been tested not only for the Court of Justice rulings⁶¹ but also for the national courts' decisions to refer a case to the CJEU⁶². The evidence and the findings of the authors is consistent with the idea that judges take into account public opinion as they function under a considerable legitimacy constraint. In 1995 Caldeira and Gibson also published a quantitative analysis on the effect of public opinion towards the CJEU in which they find that in general this opinion is shaped mostly by how one feels about the EU in general⁶³. These findings come to support a rational neo-institutionalist argument that the Court of Justice, as a traditional political institution, is an actor taking into account the rules of a

⁶⁰ Caldeira, Gregory A. Courts and Public Opinion. In *American Courts: A Critical Assessment*. Edited by John B. Gates, Charles A. Johnson. Washington, D.C.1990

⁶¹ Mattli, Walter and Anne-Marie Slaughter. Revisiting the European Court of Justice. *International Organization*, Vol. 52, No. 1 (Winter 1998), 177-209.

⁶² Carrubba, Clifford J. and Murrah, Lacey. Legal Integration and Use of the Preliminary Ruling Process in the European Union. *International Organization*, Vol. 59 (Spring 2005), 399-418.

⁶³ Caldeira, Gregory A. and Gibson, James L. The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support. *The American Political Science Review*, Vol.89, No. 2 (Jun 1995), 356-376

strategic game, featured by exogenous preferences, that can be modeled around the constant strive of the Court, as an agent, to pursue its own institutional agenda within the constraints set by the member states (the principals) that characterize its ultimate function – namely to apply the law that the principals adopted.

In this ‘CJEU vs. member states’ permanent contest the national governments compliance with the Court’s decisions is of obvious significance. Therefore, the area of legislation that has been concerned by the CJEU rulings is to be considered in its respective national circumstances as well. In a study that measured the factors behind the implementation of the Court’s decisions Nyikos found statistical significance in her independent variables to conclude that ‘The higher the certainty about judicial decision-making, the more likely litigants are voluntarily to implement CJEU decisions, thereby cutting the costs they incur by awaiting a domestic ruling. In other words, the less perceived room there is for novel or evasive interpretation on the part of the national court, the more likely litigants are to desist’⁶⁴. These findings suggest that national court’s legitimacy is also at stake and all judicial decision-makers are likely to take into account their mutual institutional constraints whenever they have the opportunity to rationalize their strategies. In 2003 Carrubba

⁶⁴ Nyikos, Stacy. The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment. *European Union Politics*, Vol. 4(4), 397-419. 2003

applied his model of judicial institutions to demonstrate that 'public perceptions of institutional legitimacy are critical to the EU legal system being able to act as an effective democratic check'⁶⁵. If public opinion about the CJEU is such an essential factor then it goes without saying that member states compliance with the Court's decisions is a crucial interest of the Court as it is the most visible and convincing course through which it can establish its legitimacy in the eyes of the general public. Nyikos and Carrubba conclusions fit within the rational institutionalism paradigm of the principal-agent theory in which the Court of Justice of the European Union is expected to attempt maximizing its own utilities within the system of rules into which it has been set. This is of course the main assumption of new institutionalism as well, as its theoretical expectation is that the Court is first and foremost interested in its own survival and the origin of its legitimacy in the eyes of the sovereigns is an inseparable part of this pursuit.

Non-compliance with the Court's rulings for infringement (ex art.226 ECT) is explained in a different manner by two competing theories. The supporters of the management theory argue that not complying is involuntarily and is caused simply by the lack of capacity of the member states to implement properly and timely the European rules. The alternative theory, the so-called enforcement approach,

⁶⁵ Carrubba, Clifford J. The European Court of Justice, Democracy, and Enlargement. *European Union Politics*, Vol. 4(1), 75-100. 2003

claims that there is a voluntary decision of the member state that is a function of its power vis-à-vis the supranational European institutions. Boerzel, Hofmann and Panke actually find that these theories are rather complementary and not exclusive⁶⁶. In any case it will be naïve to believe that the Court ignores totally the costs that some (or all) member states would have to pay as a consequence of its rulings. Practically all of the findings cited in the papers that deal with compliance of EU law imply that the CJEU is destined to function as a strategic political actor if it wants to move on with its own institutional agenda which is another expectation of the rational choice institutionalism.

On the other hand, a good descriptive analysis on the mechanisms and the strategies that national governments might take into account in their approach towards the Court of Justice can be found in Granger's paper of 2006⁶⁷. In fact national courts have been often found to act strategically by submission of preemptive opinions during the initial stage of referral to the CJEU as an attempt to influence how the final interpretation will sound⁶⁸. As Panke argues: 'Owing to the high organizational degree of

⁶⁶ Panke, Diana; Hoffman, Tobias and Boerzel, Tanja. Who's Afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance. ECPR Annual Conference, Granada, 2005.

⁶⁷ See p.2 above

⁶⁸ Nyikos, Stacy. Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions. European Journal of Political Research, 45: 527-550. 2006

societal norm opponents in the field of social policy, governments consider domestic costs as more important than costs induced from above⁶⁹. Therefore, by the very decision to send a case to Luxembourg, national institutions by default cause a selection bias at least within the preliminary ruling procedure (it allows member state courts to choose whether to apply European rules or to ask the Court of Justice for their interpretation). The causal relationships between the litigants, the national courts and the CJEU makes the perspective of the public choice methodology fit the European legal integration conveniently as it takes into account the motives of all actors to advance their own political preferences. Thus, intergovernmentalism and supranationalism are two opposite extremes which would be valid only under restrictive circumstances⁷⁰. Another important finding was provided in 2005 by Carrubba and Gable who tested how the observations submitted by member states to express and defend their preferences influence the outcomes of the Court's cases. Their results indicate strongly that the Court is constrained by this political influence and even distinguish between legal and extra-legal methods of constraints to which the Court of Justice is found to

⁶⁹ Panke, Diana. The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law. *Journal of European Public Policy*, 14:6, 847-866.2007

⁷⁰ Tridimas, George and Tridimas, Takis. National Courts and the European Court of Justice: a Public Choice Analysis of the Preliminary Reference Procedure. *International Review of Law and Economics*, 24 (2004), 125-145.

respond⁷¹. In any case the problem of selection bias which is inevitable whenever a large-N of preliminary reference cases are analyzed statistically makes it inappropriate to apply quantitative methodology. Therefore, for the purposes of this thesis, the CJEU case-law involving preliminary rulings will be restricted to those very few of them that settled the core principles of EU law. As I will try to reveal later, these fit well the expectations of historical institutionalism serving as ‘critical junctures’ that predetermine a consequent ‘path dependency’ also through their self-reinforcing feature as legal precedents.

Probably the most notable name in the camp of the neo-functionalists is that of Alec Stone Sweet who in a series of papers with his collaborators (Stone Sweet and Brunell 1998a and 1998b, Stone Sweet and Caporaso 1998, Stone Sweet 1999, Stone Sweet and Fligstein 2002, Stone Sweet and Sandholtz 2010, Stone Sweet 2010) consistently argues that the Court of Justice of the European Union has promoted supranational norms at the expense of national laws. Most importantly Stone and Brunell argue that legal integration occurred because it was driven by the increased transnational business interests within the Union. By using econometric methods Stone Sweet and Brunell manipulate a dataset of observations to find that a rise in transnational activity leads to the rise in preliminary referrals, and that

⁷¹ Carruba, Clifford J. and Gabel, Matthew. Do Governments Sway European Court of Justice Decision-making?: Evidence from Government Court Briefs. IFIR Working Paper Series. 2005.

transnational activity is simultaneously activated by the consequent consolidation of legislation⁷². Stone Sweet and Sandholtz's 1997 paper is in fact the introduction of the currently leading paradigm in European integration which relies on three causal factors – exchange, organization and rules⁷³. Stone Sweet and Brunell practically reaffirm the same views by presenting the integration process as a constitution of three causal factors: transnational exchange, dispute resolution and legislation. Their theory suggests that in case the causal links among these three factors are hindered, the legal system intervenes according to a self-sustaining and expansionary dynamic⁷⁴. Stone Sweet restated this formulation later as well: 'European integration is driven by a self-reinforcing causal system involving trading, litigation, legislation and lobbying'⁷⁵. Thus, the expectations of Stone Sweet of a self-perpetuating cycle seem to be in agreement to those of the historical institutionalists who would argue that the process of European legal integration is a classic example of path

⁷² Stone Sweet, Alec and Brunell, Thomas. The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-1995. *Journal of European Public Policy*. 5: 1, 66-97. 1998.

⁷³ Stone Sweet, and Sandholtz, Wayne. *European Integration and Supranational Government*. *Journal of European Public Policy*, 1997.

⁷⁴ Stone Sweet, Alec and Brunell, Thomas. Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. *The American Political Science Review*, Vol. 92, No. 1, (March 1998), 63-81.

⁷⁵ Stone Sweet, Alec and Fligstein, Neil. Constructing Politics and Markets: An Institutional Account of European Integration. *The American Journal of Sociology*, Vol. 107, No. 5, (March 2002), 1206-1243.

dependency that the Court of Justice managed to establish in the first decades of its functioning.

It has not been longer than 10 years that scholars started testing empirically their theories of European legal integration with the help of serious quantitative and statistical analysis. In 1999 Stone Sweet and Brunell codified the case-law of the Court of Justice in a database. This otherwise exhaustive database however does not provide in-depth information on the actual outcome of the Court's rulings. Neither does it distinguish between the content or the significance of the cases apart from the legal procedure that was followed and the actual area of legislation that each case concerns (free movement of persons, approximation of laws, etc.).

Soon after Stone Sweet and Brunell published their hypothesis a certain number of scholars started testing it empirically by providing evidence from the case-law of the Court of Justice of the European Union. Up until recently, however, practically all relevant research either referred to a concrete area of legislation or, if it involved purely quantitative methods, allowed for significant selection bias, preventing occurrence of the appropriate variation to be examined. In the next chapter of this thesis I will try to deal with this problem by limiting the analysis to the annulment action cases only, however the cases of preliminary rulings which constitute the most crucial decisions and the main legal doctrines of the Court can hardly be analyzed

statistically in an adequate manner for the purpose of this study and I have therefore decided to address some of them on a case by case basis in the fifth chapter of the thesis as they have set the principles that the CJEU abides by in a way that historical institutionalists will define as path dependent.

The Institutionalists

In her 1998 paper Karen Alter, one of the most prominent scholar studying the Court of Justice, examined the institutional constraints of CJEU-member states relations. Her conclusion implies that domestic politics influences European integration and governments do not oppose the Court's rulings unless these bear some short-term costs. The Court of Justice, being fully aware of this status quo, is thus found to be a rational actor that designs its strategy accordingly⁷⁶. Later Alter kept observing the degree to which member states got involved in the legal integration or rather constitutionalization of Europe. She found that some of the variables that predetermine member states' actions in relation to the Court are national legal education, the litigiousness of individual societies, the strategic behavior of national judges and inter-court competition.^{77 78}

⁷⁶ Alter, Karen. Who are the "Masters of the Treaty"? European Governments and the European Court of Justice. *International Organization* 52, 1, Winter 1988. 121-147.

⁷⁷ Alter, Karen. The European Union's Legal System and Domestic Policy: Spillover or Backlash? *International Organization* 54, 3, Summer 2000. 489-518.

These findings again match the rational choice institutionalists assumption that the central actors in the political process are utility-maximizing actors, driven by their self-interest and preferences, and institutions not only emerge and survive as a result of these actors interdependence but also become a subjective agent in the political processes once they start functioning.⁷⁹

In a 1998 paper that examines all CJEU rulings regarding environmental legal issues Cichowski provides evidence that supports the neo-functional theories. The Court of Justice is found to act to fuel the European integration process having decided often against the interests of the most powerful member states. As Cichowski argues: “The relationship between the national courts and the Court of Justice lead to the creation of new European laws. This construction of supranational policy undermines national control over particular policy decisions”⁸⁰. Observing the essence of the content of all environmental cases that the CJEU dealt with, Cichowski found out that one of the main conflict is that of national environmental regulations that hinder European free trade priorities. Examining the

⁷⁸ Alter, Karen and Vargas, Jeannette. Explaining Variation in the Use of European Litigation Strategies: European Community Law and Gender Equality Policy. *Comparative Political Studies*, 33. May 2000.

⁷⁹ Tallberg, Jonas and Jonsson, Christer. *Institutional Theory in International Relations*. In Jon Pierre, Guy Peters, and Gerry Stoker (eds.). *Debating Institutionalism*. Manchester University Press. 2008.

⁸⁰ Cichowski, Rachel. Integrating the Environment: the European Court and the Construction of Supranational Policy. *Journal of European Public Policy*, 5: 3, 387-405. 1998.

Court's response in these cases the author reached the following conclusion: "Judicial rulings either actively dismantled national environmental regulations which presented a clear obstruction to free trade; or the rulings led to the construction of a supranational legal framework to balance environmental protection and economic interests"⁸¹. Evidently in both ways the Court has actually expanded supranational authority which is the evident expectation of rational institutionalism and its own institutional interests of survival and power. Cichowski reached similar conclusions in a paper that used the role of the CJEU in regards to women rights as another example which affirms the neoinstitutionalist paradigm. As the author argues: 'Supranational constitutionalism has led to both the expansion of EU law and the opportunity for social groups to bring claims against their own governments and dismantle discriminatory national practices'⁸².

Margaret McCown is probably the only scholar that examined the significance of precedents in European law. McCown argues that precedents get institutionalized and even set the context of future European legislation as treaty revisions have been often found to be influenced by the

⁸¹ Ibid.

⁸² Cichowski, Rachel. Women's Rights, the European Court, and Supranational Constitutionalism. *Law and Society Review*, Vol. 38, No. 3, (Sep 2004), 489-512.

CJEU case-law⁸³. McCown denies the findings of Garret et al (1998) and proves that legal argumentation is crucial for judicial integration. She provides quantitative evidence that precedents in European law matter and they progressively structure outcomes. Moreover, McCown believes that making precedent-based decisions gives advantage to the Court because it enables other parties to argue in terms of precedents and the use of Court's interpretation to justify their positions⁸⁴. The opportunity of demonstrating consistency throughout the decision making processes is delivered comfortably for any judicial institution by referring to precedents in its case-law. The idea of having precedents that a Court follows in its subsequent rulings can well serve to fit the notion of 'path dependency' which, as the historical institutionalists would argue, predetermines certain patterns of an institution's further behavior and decision making.

Pitarakis and Tridimas also tested quantitatively the neofunctional arguments that trade and references to the CJEU are in a mutual dependency and progressively cause each other. In the analysis they published in 2003 they confirmed 'a causal link that runs from references per

⁸³ McCown, Margaret. The Use of Judge-Made Law in European Judicial Integration: Precedent Based Arguments in EU Inter-institutional Disputes. Paper presented at ECSA conference, 2001.

⁸⁴ McCown, Margaret. The European Parliament before the Bench: ECJ Precedent and EP Litigation Strategies. *Journal of European Public Policy*, 10: 6, 974-995. 2003.

capita to the ratio of intra-EU trade to GDP'⁸⁵. However, their findings did not support the same causal link in the opposite direction. In fact Carrubba and Gabel reach the same conclusion after they run a quite rigorous test on the impact that pro-liberalizing CJEU rulings have on trade⁸⁶. Their regression reveals a significant positive correlation which supports the argument of Stone Sweet and Brunell. However, they also do not find the expected reverse effect of trade on Court's decisions. This progressive interdependence between a member state's trade within the Union and its national courts' references to the court in Luxembourg is a sign that, since the CJEU established itself as an effective institution and an essential decision-maker, the national courts started considering European law as another instrument to pursue their own institutional interests. The inertia of this self-enforcing system is a clear example of the path dependency expectation on which historical institutionalists stress when explaining the constraints that institutional factors impose in the political processes.

In a series of publications (2006, 2008, 2010) Daniel Kelemen introduces the concept of adversarial legalism to explain the long term evolution of the CJEU case-law and

⁸⁵ Pitarakis, Jean-Yves and Tridimas. George. Joint Dynamics of Legal and Economic Integration in the European Union. *European Journal of Law and Economics*, 16: 357-368. 2003.

⁸⁶ Carrubba, Clifford and Gabel, Matthew. *Of Courts and Commerce: Reconsidering Evidence from the European Court of Justice*. Presented at PEIO, Washington DC, 2010.

the overall European governance. According to Kelemen ‘adversarial legalism’, traditionally viewed as a uniquely American legal style, is “an approach of regulation through strict legalistic enforcement of detailed legal norms, relying on active judicial intervention and frequent private litigation” that is spreading in the European Union caused by the economic and political pressures that European integration unleashed⁸⁷. Recently Alec Stone Sweet recognized Kelemen’s theory as one with the greatest potential and predicted that the introduction of the Charter of Human Rights within the competences of the European Union institutions will strengthen the dynamics of this adversarial legalism. In Stone Sweet’s opinion, if Kelemen is right this will result in further judicialization of the EU governance⁸⁸. The evolution of the above mentioned legal norms and the timing of this active judicial intervention in the case of the CJEU can neatly be traced in the context of historical institutionalism concepts of path dependency and critical junctures. The moment when the Court decided to put forward a novel legal principle or to set an essential precedent. Historical institutionalism defines critical juncture as a moment in which contingent choices are made to set a certain pattern of institutional development and consolidation that is hard to reverse. In the following section I will observe the notions of EU law supremacy and

⁸⁷ Kelemen, Daniel. American-style Adversarian Legalism and the European Union. EUI Working Paper, RSCAS 2008/37

⁸⁸ Stone Sweet, Alec. The European Court of Justice and the Judicialization of EU Governance. *Living Reviews in European Governance*, Vol. 5, No. 2. 2010.

direct effect in this sense, as well as the development of the Court's case-law that defined the freedoms of movement within the European Economic Area in legal terms.

Recent studies concerning the legislative politics in European integration tend to avoid the intergovernmentalism vs. supranationalism axis of debate. Leuffen and Hertz for example found strong statistical evidence that anticipation is a huge factor in policy-making for proving that member states fear the costs of enlargement. Their empirical analysis shows that legislative output increases before the accession of new member states⁸⁹. This research did not concern the CJEU directly but the fact the legal integration seems to be influenced significantly by political factors, such as enlargement, is illustrative enough. If EU legislative institutions even respond to exogenous factors then the Court of Justice is likely to act accordingly as a rational agent in this system. To what extent the Court is a rational and political actor still remains to be answered. Grimmel introduced the concept of context rationality which for a researcher on the CJEU means that he should take into account the purely legal issues that the Court actually decides on. This concept is in line with the neoinstitutionalism and especially its rational choice subdivision. Rationality is of course limited and whether it is for the lack of complete information, the

⁸⁹ Leuffen, Dirk and Hertz, Robin. *If Things Can Only Get Worse: Anticipation of Enlargement in European Union Legislative Politics*. *European Journal of Political Research*, 49: 53-74. 2010.

amount of time that actors have to make a decision or some other constraints that disallow performing the most desired action one has to take into account the neoinstitutional concept of bounded rationality as in practice all institutions perform within certain limits. In fact the Court's first and foremost purpose is to make sure that the law is obeyed. Thus, in Grimmel's opinion we should explore the law itself before we try to understand integration through law as in most cases maybe the Court is just solving issues in a practical manner. By outlining this point Grimmel claims that judicial law making is not based solely on trivial and political rationality and can be understood appropriately only by paying attention to the context of European law⁹⁰.

Indeed the process of European integration is already far more than simply liberalizing trade and integrating markets. A big deal of issues sensitive to the member states have been Europeanized in the last decade or so. These include elements of social, health and monetary policies, rights of labor and even voting rights⁹¹. Therefore if in this sense the neofunctionalist paradigm is valid we have to expect that legal integration will impact the everyday life of the EU citizens more essentially in the nearest future. Thus, constructing a model of these processes with the central

⁹⁰ Grimmel, Andreas. *Judicial Interpretation or Judicial Activism?: The Legacy of Rationalism in the Studies of the European Court of Justice*. Center for European Studies Working Paper Series #176.. 2010.

⁹¹ Wind, Marlene. *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*. *European Union Politics*, Vol. 10 , No. 1, 63-88. 2009.

role of the Court of Justice in it should help us understand and probably even anticipate the outcomes of European policy- and decision-making. Moreover, such a working model will be a useful tool in the hands of all actors involved in legislation at the EU level, as the struggle between the Commission and the member states on the way towards federalization of Europe is inevitable. In any case, as has been shown in this section, it seems that practically the findings in all essential studies devoted to the judicial activism of the CJEU can be viewed through the lenses of the traditional concepts of neoinstitutionalism. A further part of this thesis (Chapter V) is intended to demonstrate this from the perspective of historical institutionalism by conducting a deeper analysis of some of the most illustrative legal doctrines and rulings of the Court. There, in contrast to the quantitative analysis of annulment cases in the next chapter, I will follow a rather descriptive approach based on the judgments and legal principles that emerged in the CJEU case-law through the preliminary rulings procedure.

CHAPTER IV

The Court of Justice and Rational Institutionalism: Evidence from a Novel Dataset

In this chapter I will try to test the argument that the Court of Justice of the European Union is acting as a rational agent taking into account extra-legal circumstances that lay beyond its original institutional purposes. Such a finding should support the views that new institutionalism is the most appropriate theoretical background that one should use to approach the CJEU and understand its decision making in the context of the internal institutional interests and agenda of the Court. The ultimate test that should illustrate that political conditions are taken into account in the judicial decision making of international law judges would be having the same Court treating certain countries or litigants more favorably than others in cases of similar character. This would be consequently explained in purely neoinstitutionalist arguments representing the judges as rational decision makers realizing their own and their institution's interdependency and applying this non-legal dimension in their judgments.

Methodology

For the purpose of conducting an adequate test to check whether some extra-legal features were statistically significant as factors that influenced the judgments of the Court of Justice I rely on the methods of quantitative analysis. In short I will run several multivariate ordered logistic regressions having the decision of the Court as a dependent variable and different subsets of independent

variables that comprise of the above-mentioned factors. In order to perform such a task one should be extremely cautious to avoid the problems of selection bias or heterogeneity among observations. Otherwise the extent of correlation between the variables will be misleadingly biased.

In general the objective of this chapter is twofold. First, it is an attempt to contribute to our understanding of judicial decision making by providing a quantitative analysis of a large dataset consisting of a certain relative part of the rulings from the case-law of the Court of Justice. This analysis would capture variables of both legal and extra-legal character. And, on the other hand, the findings of this research should shed light on the extent to which rational institutionalist arguments hold against neofunctionalism being a prominent theory of European integration that has so far served mostly to explain the Court's judicial decision making. I can conveniently achieve both of the objectives simultaneously by running the same test as a big deal of the extra-legal variables actually imply exactly the claims that member state preferences are taken into account in the Court's decisions.

Case Selection

There are several legal procedures through which an action can be brought in front of the Court of Justice. In fact almost all cases that the Court hears fall under the

following three procedures: actions for annulment, references for a preliminary ruling and actions for failure to fulfill obligations (infringement procedure). In a project that finished in 2008 Stone Sweet and Brunell collected an exhaustive database of all CJEU cases under these three procedures. Their dataset lists the cases chronologically and includes information on the litigants and the subject matter of each particular case. This is the first paper in which this dataset has been extended to add and codify all publicly available data about the corresponding ruling of the Court, Advocate General and his opinion, Judge Rapporteur, composition of the Court, number of referrals in consequent case-law, and the contested legal act.

The treaties that the member states sign and all the EU secondary legislation evolving out of them are allegedly the paramount tool of European integration. Those are a subject of arduous negotiations often resulting in approving the version of wording that no one originally proposed but neither has someone opposed in the end of the day. Then, that lowest common denominator text is up to the Court of Justice to use in its rulings. Thus, as European law is frequently vague but at the same time concerns specific provisions, it is understandable why half of the cases brought in front of the Court are actually references for a preliminary ruling.

Even though obviously all cases from the Court's case-law bear certain information that may be processed to reveal

some of the potential patterns which the justices followed, for the purpose of the research, I decided to limit the dataset only to the applications for annulment cases. There are several reasons that justify this decision. The most obvious is the concern of avoiding potential selection bias. First, preliminary rulings are actually not even decisions per se but rather interpretation of the European legislation and as such can hardly be codified and consequently be a subject of quantitative analysis. Moreover, the source of these references are by default the national courts and there are good reasons to believe that national judicial authorities prefer to interpret the law within their internal national constraints as they usually have the option to do so. In fact it is known that several member states such as Sweden, Denmark and the United Kingdom often prefer not to make a reference even in cases where they should.⁹² What is even more the average duration for the preliminary ruling procedure is roughly 2 years and many courts are reluctant to wait for that long and would rather go with their own interpretation.⁹³

There is no doubt that the crucial CJEU judgments of highest political and legal significance were delivered through the preliminary rulings procedure. That is why it is not surprising that these are also the most well-known

⁹² Address given by advocate general Carl Otto Lenz in London, 1995. See ‘The Preliminary Ruling Procedure and the United Kingdom’, *Fordham International Law Journal*, Vol. 19, No.3, 1995.

⁹³ See Brunell and Stone Sweet dataset at <http://www.eu-newgov.org> and annual press release issues of the Court of Justice.

and cited cases as the Court introduced some essential principles which often widened the scope of its competences and thus deepened European integration. However, a thorough and simultaneously meaningful quantitative analysis of a large number of observations of the preliminary rulings is an extremely difficult task even if the problem of selection bias could be avoided. In order to examine the potential extra-legal dimension of the Court's approach towards these cases one should also be able to assess the specificities of the national law of each respective member state from which the reference for a preliminary ruling came. On the other hand, even if this could be done it would still be quite tricky to determine whether the Court's interpretation actually served better the preferences of the member states or the long-term interests of the Community. In fact it is a regular practice of the Court to deliver interpretations that favor the national legislation in a particular case in parallel with such an argumentation that can be analogically invoked in the future in order to justify a much wider pro-European interpretation of the law at the dislike of the member states:

'A common tactic is to introduce a new doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the facts of the case before it. The principle, however, is now established. If there are not too many protests, it will be reaffirmed in later cases; the

qualifications can then be whittled away and the full text of the doctrine revealed.⁹⁴

Infringement cases are another potential source of selection bias as the Commission is known to negotiate terms with the member states that have failed to fulfill their obligations. This means that the set of cases that will enter the Court under this procedure could be predetermined in advance by certain criteria that are a result of these negotiations. Moreover, it could be assumed that the Commission anyway does not initiate an infringement procedure at every potential occasion, not only for the lack of sufficient capacity to monitor entirely the compliance of all obligations that member states have agreed to fulfill, but also as it is aware of its chances to do it successfully in the Court. If this is the case this would of course alter significantly the results of any intended test. In the end the treaty is also quite restrictive as to who may bring whom in the context of this procedure and, even though it implies incidents of a direct clash between national and supranational interests, it is limited to conflicts between the member states and the Commission.

Thus, I am left with the actions for annulment which I believe are anyway the most appropriate cases providing the ideal laboratory environment for the envisaged test. The annulment cases represent the Court's solutions to

⁹⁴ Hartley, Trevor. *The Foundations of European Union Law*. Oxford University Press, 2010.

specific problems in which the rulings can be easily read in terms of national vs. supranational actors success. It is not surprising that these are the cases which are least studied in the literature as they bear a lower long-term legal significance. However, they are the ideal starting point for any quantitative analysis of the CJEU as an institution and one of the objectives of this paper is to fill this gap as well. In fact to the best of my knowledge there is a single paper in which annulments were examined to uncover certain patterns that these cases generally followed.⁹⁵ As Bauer & Hartlapp claim in it:

‘Notwithstanding the role annulments have played in selected case studies, there is no interpretative overview, let alone systematic attempt to analyze annulment actions at the aggregate level as a particular set of cases in their own right.’

Bauer and Hartlapp managed to depict some of the tendencies regarding the evolution of the number of annulment cases by year, by state or by area but their research did not go further to elaborate on the actual rulings as it was not focused on the Court as an institution at all. In fact the authors are looking into ‘the driving forces

⁹⁵ Bauer, Michael and Hartlapp, Miriam. Much Ado about Money and How to Spend it. Analyzing 40 Years of Annulment Cases against the European Union Commission. *European Journal of Political Research*, Vol. 49, 2010.

of policy-related conflict between national and supranational actors' and thus, on the reasons that trigger a certain actor to initiate an annulment action. Whereas the evident objective of this paper is to look into the judgments in these cases as a catalyst in which some potential features intrinsic to the European Court of Justice decision-making may have revealed.

Dataset

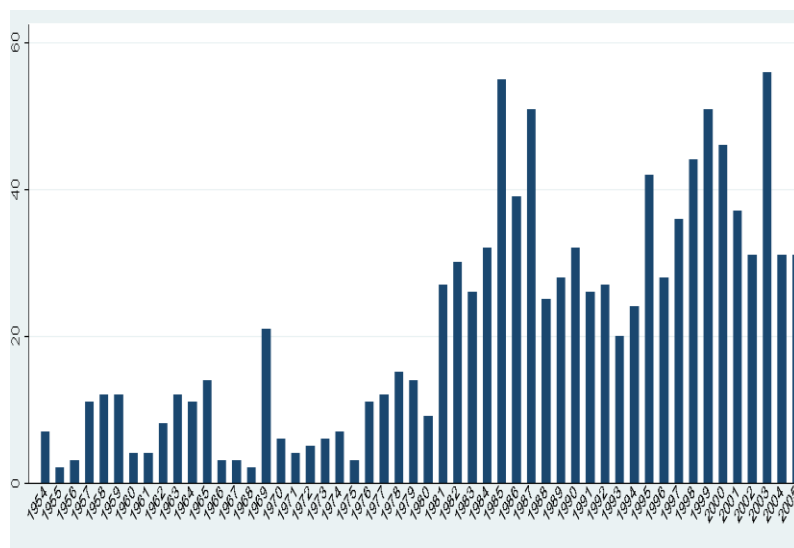
This chapter is based on a dataset including all the 1102 actions of annulment cases that were brought in front of Court of Justice between 1954 and 2005 and ruled on by a judgment of the Court. In this original dataset the Court's decision is coded as 0 if the applicant was not successful, 1 if it got a partial success in the case, and 2 if it the Court ruled in its favor. This is also the dependent variable used in the statistical analysis. All data was gathered manually using the EUR-Lex site maintained by the Publications Office of the European Union.⁹⁶

All publicly accessible information has been used to create variables of factors for which there are theoretical grounds to suppose they could explain the variation of the Court's judgments. These control variables are divided into three groups depending on their temporal occurrence regarding the procedural phase of the case. The pre-procedural factors include those variables that are present at the

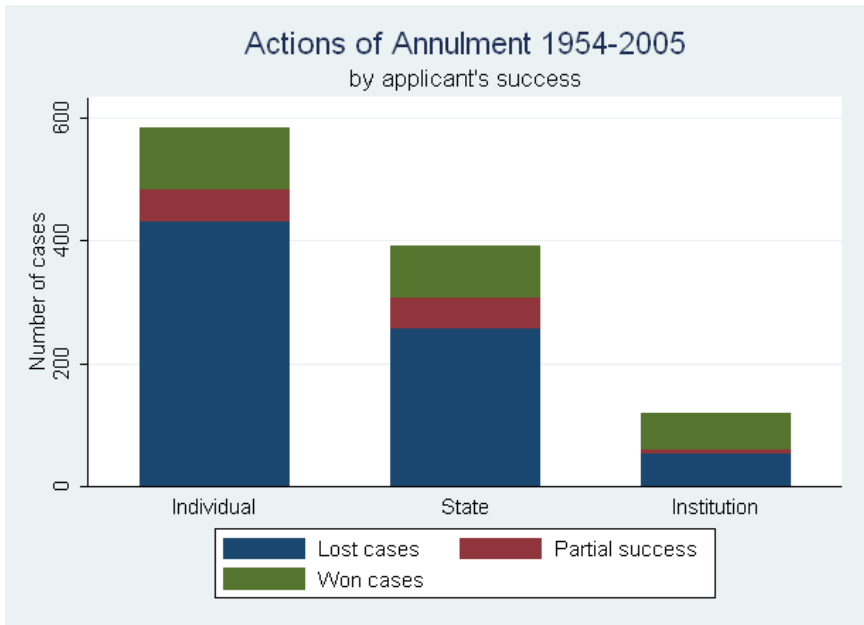
⁹⁶ <http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en>

moment of registering the case. These include information about the litigants, the year in which the case was brought in, the number of legal matters involved, the legal area at stake, as well as the measure contested for annulment. The second group concerns the procedural stage in which the actual justices deal with the annulment action. The coded data into these variables comprises the seniority of the assigned to each case Advocate Generals and the Judge Rapporteurs, as well as their nationality and the composition of the Court. The post-procedural variables consist of information about the duration of the cases and their significance measured in terms of further referrals in the subsequent case-law, and the number of citations in all community legal documents issued by the end of 2010.

Descriptive Data and Analysis



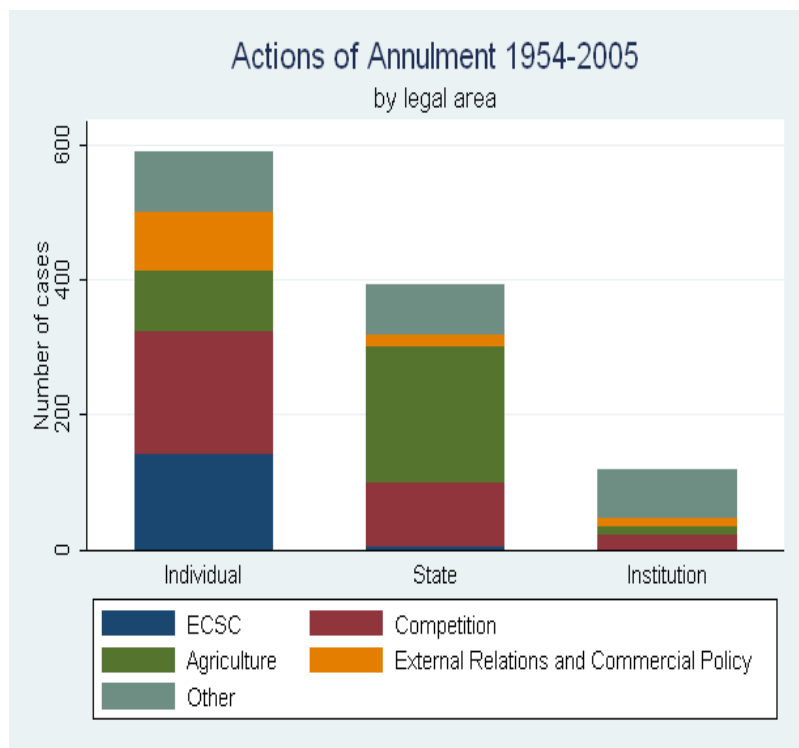
The number of annulment actions has gradually increased over time together with the widening of the competences of the community but also because of the Union's waves of enlargement. The number of successful applications however has been pretty much constant throughout the decades at a rate of about 25% of success in cases where the applicants were national actors (individuals or member state governments) and the European institutions, most often the Commission, had to defend the validity of the contested legal measure. For the purpose of completeness I have included all annulment actions in the dataset. Still, later in the statistical analysis I drop the inter-institutional cases as these do not represent an actual conflict between the national interests and those of the Community. The following table is illustrative for the distribution of the cases based on the types of applicants and their success.



The third column consists of the inter-institutional cases which are not included in the regression analysis for the significance of all tested variables. Not surprisingly the overall picture reveals that the national claims are rarely victorious as the Court dismisses the annulment actions against the Community institutions in more than 70% of the cases.

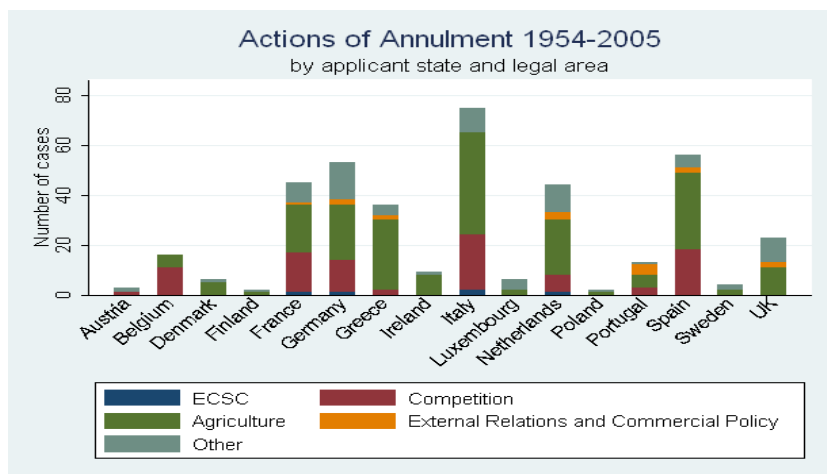
Interestingly the majority of cases concern a short list of legal domains with more than half of the annulment actions regarding the areas of agriculture and competition. Bauer and Hartlapp claim that putting money into the centre of attention is expected for having economic interest as a good indicator of conflict emergence. They present the thesis that

agriculture and competition are most often involved as it is money distribution that lies at the heart of these policies. In any event, it has to be taken into account that the results of the analysis of annulment cases concern a limited set of policies and, even though the effect of each different legal area will be controlled for, all results should be viewed within this context.



There are certain rules that govern the conditions under which an individual is allowed to bring an annulment case

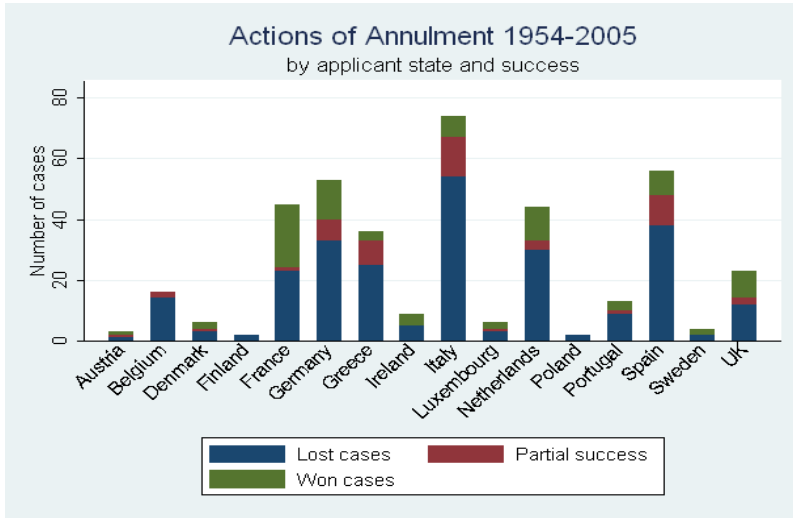
in front of the Court of Justice⁹⁷ and that is why a considerable deal of the applications coming from individuals are not successful simply for being inadmissible. This can partly explain why in general having a member state as an applicant is a significant factor predetermining the chances of having a winning annulment case. Thus, a deeper analysis within the category of member states applicants is needed in order to test for the potential political impact that certain states might have over CJEU judgments. A look at the policies that member states most usually refer to as applicants when they try to void a certain piece of legislation reveals that agriculture is a common area of interest, whereas competition is practically never an issue of conflict for the Nordic and the non-continental (UK and Ireland) states.



⁹⁷ See Article 263 (ex 230) of the Lisbon Treaty

There is a very important assumption that has to be made before going into the analysis of applicants' success within the group of member states. And that is that each of the member states has enough capacity to provide for the optimal legal presentation of its side in the case. Even though this seems to be an evident fact it still has to be pointed out as otherwise one may argue that it is for the lack of resources that some member states are less successful in Court.

Even though in general the Court of Justice rules in favor of a member state in less than a third of the annulment actions, the arguments of intergovernmentalists, and thus of rational institutionalism, that member states interests are a factor in the Court's decision-making may still hold if justices are found to favor certain states significantly more often than others. To test for such a potential impact I generated a dummy variable to account for the three most powerful EU member states (Germany, France and UK) which are also the states that are traditionally the biggest net contributors towards the overall EU budget. The following table also implies that the usual net contributors are more likely to win an annulment case in the Court.



Test Results

Pre-procedural stage:

Before the investigation of the impact that all available different legal and extra-legal variables had over the final decisions of the Court in the database of all 1102 annulment actions in the 1954-2005 period it is worth mentioning that applicants are fully or partially successful just in some 29.78% of the cases (the number of interinstitutional cases is not included here). It is indeed true that the states had better success (34.7%) compared to private organizations or individuals (26.5%). The best predictor of the decision is of course the opinion of the Advocate General for the

respective case as the Court has been recorded to follow it in some 80% of all cases which is true not only for the present dataset of annulment actions but for the other type of cases as well.

The opinion of the Advocate General in its essence looks very much alike the wording of the final ruling that the Court will issue. However, it is characterized by two features which have to be taken into account for the purposes of this project. First, it is not anonymous - it is prepared by a certain Advocate General whose name is publicly available for each of the cases at stake. Thus, the amount of personal responsibility differs when compared to the rulings of the Court for which we never know whether some of the judges were reluctant to agree to or not. Second, the Advocate General is well aware that his opinion is a subject of revision and eventual change. In other words, in cases which assume alternative approaches that may alter the final decision in either way, the Advocate Generals have the option to either be a bit balder knowing that in the end it is the judges that will have the final say, or to partially alleviate the pressure that would be otherwise transferred fully to the judges by suggesting a decision that is more favorable to the applicants in the more sensitive cases in which the interests of the bigger member states are usually involved.

The following table reveals that the Advocate Generals are not likely to discriminate between member state and non-

member state applicants. However, within the group of cases in which the applicant has been a member state, the opinions of the Advocate Generals are found to be positively and statistically significantly correlated with the power of the member state involved:

Dependent variable: Opinion in favor of applicant		
State	0.226 (1.56)	
Big State		0.498** (2.14)
Overall R-squared	0.0021	0.0098
Number of observations	947	367

This is totally in line with the expectations of rational choice institutionalism which would present the Court as a rational actor considering the powers of these internal actors (the bigger member states in this case) that are capable of changing the scope of the institution's competences. The Advocate Generals are by default anyway usually nationals of the bigger member states and they would also be aware that the Court will be a subject of more severe criticism if it does not follow the opinion of the Advocate General especially if the case at stake is more sensitive for one or some of the bigger member states.

Of course the above mentioned observation has to be controlled for against the final decisions of the Court of Justice as well. The following table comes to convince us that it is not only the opinions but also the final rulings that seem to follow the same pattern. The first regression is a simple quantification of the well known fact that the decisions of the judges and the opinions of the Advocate Generals are positively correlated with a very large degree of statistical significance. What is more interesting however, is the fact the Court's rulings are in a direct positive and statistically significant correlation with the dummy variable 'state' (1 if the applicant is a member state and 0 if otherwise) no matter whether we have controlled for the opinion of the Advocate General (regression II) or not (regression IV). This is not the case if we focus on the group within which all the cases actually have member states as applicants. The comparison between regression III and regression V reveals that the statistical significance in cases involving the big member states is lost once we control for the opinion of the Advocate Generals in these cases. But from the previous table we know that this opinion is positively correlated with the presence of a big member state as an applicant. In other words the judges are found to have followed the Advocate Generals when their opinions were in favor of big member state applicants.

The finding that the Court seems to discriminate between member state and non-member state applicants regardless

of the opinion of the Advocate General is an indicator that the judges are most likely to ignore this opinion in the cases where it was not in favor of the member state applicants. This observation needs further attention as it is interesting enough to look for the potential reasons for this pattern. A possible explanation would be that the Court is sensitive to the member states reactions once the Advocate General has issued his opinion against their applications. If these reactions constitute the possible emergence of consequent behavior that would threaten the institutional preferences of the Court (for example in case the bigger member states involve into debates on the role of the judiciary) than the judges might be more likely to ignore the opinions and rule in favor to the member state instead. Such an explanation is of course speculative if not tested for the impact of political reaction to Advocate Generals opinions. Unfortunately, to the best of my knowledge such a database has not been yet gathered or announced.

Dependent variable: Decision in favor of applicant	I	II	III	IV	V
Opinion of Advocate General	1.809*** (14.65)			1.813*** (14.66)	1.869*** (8.78)
State		0.388*** (2.74)		0.465** (2.52)	
Big State			0.540** (2.41)		0.290 (0.95)

Overall R-squared	0.3165	0.0063	0.0114	0.3219	0.3293
Number of observations	944	977	392	944	366

Legal matters

Only 8.55% of the 983 cases in the database which represent a conflict between national and community interests over an action for annulment concern a single legal matter. The literature suggests that the issue of complexity is a potential factor in judicial decision making. The rationale behind this hypothesis is that issues which are legally harder to decide are less likely to lead to a ruling that will change the status quo. In this context the annulment action cases are again a very suitable basis for analysis. Of course the complexity of cases is an abstract concept which is not easy to quantify. For the purpose of this dissertation I have decided that the number of legal matters involved in each of the cases in the database can serve as a relatively good proxy.

It is self evident that an issue concerning for example competition, free movement and external policy at the same time should be one of a higher legal complexity compared to another issue in which only competition is involved. In any case we have no other publicly available indicator at hand that can enable the intended quantitative analysis. The results however imply that complexity (expressed in the number of legal matters involved in a

case) does not seem to impact significantly the rulings in the case of the Court of Justice.

Dependent variable: Decision in favor of applicant		
Opinion	1.809*** (14.65)	
Legal Matters	0.016 (0.20)	-0.024 (-0.39)
Overall R-squared	0.3165	0.0001
Number of observations	944	977

Case year

Another observation that the dataset allows to be performed is a test of the applicants' success in annulment actions over the course of time. I have used the consecutive case year as an independent variable in an attempt to track a potential pattern in the balance of the Court's decisions for and against the applicants. Of course it has to be said that the number of cases has steadily grown with each new decade. Not surprisingly, however, there is practically no correlation which implies that the Court has been stable in its approach during the years. This of course is a rather weak statement as it lies on two assumptions that have to be provided. Firstly, that the cases for annulment actions

have also followed a pattern of steady and predictable applications which were relatively similar in their chances to be successful in the Court. And secondly, that the judges would of course be a subject of any extra-legal impact in their judicial decision making. The latter assumption is in line with the theoretical background of new institutionalism and at the same time has been tested and confirmed at several occasions in this dissertation. On the other hand we cannot say the same for the former assumption, and this is an interesting field for further research. Indeed, the Court is able to deal only with the applications that are brought in front of it and there is no mechanism that guarantees that all occasions of controversial community actions, decisions or legislation will be attacked in Court.

Dependent variable: Decision in favor of applicant		
Opinion	1.809*** (14.66)	
Case Year	0.003 (0.35)	-0.001 (-0.17)
Overall R-squared	0.3166	0.0000
Number of observations	944	977

Annulment measure

The majority of annulment cases (644 out of the 1102 in the dataset) have been applications for making void a certain decision taken at the Community level such as an imposed fee or some legislative act different from a directive or a regulation which I have as separate categories of the 'annulment' variable in the quantitative analysis. Interestingly enough directives are rarely contested (27 cases). Just as actions objecting the admissibility of a given case which account for some 14 of all annulment action cases. On the other hand appeals (222 cases) and regulations (195) represent an essential share of the legislative measures that were brought before the Court of Justice. The appeals are a more recent practice as the Court of First Instance (the judgments of which are the actual acts that the applicants appeal against) was established in 1989.

The ordered multivariate logistic regression shows that in general the impact of the respective category of contested legislative measure is not so significant. Moreover this effect, if any, seems to be present in the initial phase of the case as it is the Advocate Generals opinions that take the statistical significance when included in the equation. Still, it is worth mentioning that appeals and regulations have some indications of being harder to annul as they are negatively correlated with the Court's rulings even though this effect is significant only at the 10% level of confidence in testing the null hypothesis.

It is hardly surprising that the Court of First Instance judgments are less likely to be ignored by the Court of Justice. As about regulations – these are such norms of legislation that are immediately binding and enforceable in all member states. Thus, they differ from directives which have to be transposed into national law, whereas regulations are self-executable and do not require additional implementing measures. In other words directives are less strict by default for their feature of letting the member states deliberate on the methods through which they will be implemented in their respective national legal systems. So this observation can hardly support essentially the rational choice neoinstitutional expectations. It will therefore be more interesting to track down the legal areas that are at stake for the cases in the dataset, as these are linked directly with the member states' interests.

Dependent variable: Decision in favor of applicant		
Opinion	1.999*** (14.80)	
Annulment Measure (Appeal)	-1.162 (-1.02)	-1.247* (-1.71)
Annulment Measure (Decision)	-0.794 (-0.71)	-0.776 (-1.09)
Annulment Measure (Directive)	-0.379 (-0.30)	-0.414 (-0.48)
Annulment Measure (Regulation)	-1.427 (-1.26)	-1.441* (-1.95)
Overall R-squared	0.2951	0.0111
Number of observations	944	977

Legal Area

It is interesting to distinguish between cases in terms of the area that the annulment actions concern. Agriculture and competition account for more than half of the cases (57.88%). The European Steel and Coal Community (14.75%) and the External Relations and Commercial Policy (10.58%) represent the other two legal areas that trigger the majority of applications for annulments. All other areas of

community legislation were at stake in just some 16.79% of the cases.

The following table reveals that the judges are unlikely to distinguish between most of the different legal areas. This is true for all of the above mentioned areas but External Relations and Commercial Policy. This area is more sensitive for member states compared to the rest and one would expect that all European legislation concerning the policies of external relations would be taken seriously enough by the member states not to allow for potential gaps or unclear and obscure legal norms that will not endure external revision. In any case it is evident that applications in the External Relations area are much less likely to bear success for the applicants. The External Relations are an extremely sensitive area for the member states and this negative correlation is totally in line with the rational choice neoinstitutional expectations. The judges are expected to act much more carefully when they have a case concerning the legal areas which fall within the realms of hardcore member state interests.

Dependent variable: Decision in favor of applicant		
Opinion	2.034*** (15.02)	
Legal Area (Agriculture)	0.104 (0.43)	-0.155 (-0.72)
Legal Area (Competition)	-0.077 (-0.31)	-0.132 (-0.61)
Legal Area (ECSC)	-0.131 (-0.43)	-0.331 (-1.32)
Legal Area (External Relations and Commercial Policy)	-0.738** (-2.05)	-0.303 (-1.01)
Overall R-squared	0.2934	0.0014
Number of observations	944	977

Procedural Stage:

Number of judges

Another interesting logistic regression is the one in which we have the variation of the Court's decision controlled for the number of judges in each of the dataset cases. Once a newly initiated case application is registered, the President of the Court decides on the composition of the judges that

will sit, deliberate and prepare the ruling. It is a common practice to have cases of minor potential significance heard by a small chamber (3 to 5 judges) in the Court. Whereas those cases that concern more sensitive applications are usually held in front of more of the judges and often even in full chamber.

The regression table shows that there is a very strong and positive correlation between the number of judges in the cases and their decision in favor of the application. This is of course self-evident if member states are in general more successful than non-member states in cases of annulment actions. As cases of member states are by default listened to in larger chambers of judges this correlation is not really surprising. What is interesting however is the fact that, once we add the Advocate General opinion as another independent variable in the regression, the statistically significant effect of the number of judges disappears. This is an illustration of the fact that in cases for which the President of the Court has decided that a higher number of judges will be necessary, the judges are less likely to deviate from the opinion of the Advocate General which is already anyway correlated positively with a decision in favor of the applicant.

Dependent variable: Decision in favor of applicant		
Opinion	1.799*** (14.48)	
Number of Judges	0.034 (1.03)	0.079*** (3.18)
Overall R-squared	0.3172 0.0086	
Number of observations	943 976	

Therefore it will be interesting to see whether this pattern is applied within the group of cases in which we have only member states as applicants. The regression here is quite different as I have the number of judges as the dependent variable and the variables 'state' and 'big state' (1 if the applicant is France, Germany or the United Kingdom and 0 otherwise) as independent ones. Interestingly enough the cases in which the applicant is a big state are heard by chambers comprised of a higher number of judges. The statistical significance at the 1% level of confidence is an indicator that this relationship is not accidental.

In brief the presidents of the Court of Justice have most probably discriminated between bigger and smaller member state applicants. One can hardly find an explanation for this different from the rational choice

neoinstitutional belief that the Court of Justice should be reacting rationally and strategically in situations that involve sensitive matters of national interests that may potentially trigger a conflict and threaten the institution's preferences and agenda. In the analysis of the various legal areas and contested measures of legislation one cannot find substantial differences when the different member states are compared. Therefore the sensitivity of the applications is indeed likely to originate from the political power of the member state that brought them. At the same time the judges can hardly stay indifferent to a situation in which they recognize that whenever a bigger state files an application they are convened in larger chambers.

Dependent variable: Number of judges		
State	1.057*** (5.76)	
Big State		1.616*** (4.93)
Overall R-squared	0.0343	0.0656
Number of observations	982	393

Advocate General seniority

Another interesting aspect of extra legal factors that may potentially influence the decision making is the seniority of the main officials that act as agenda setters for the whole process before the very judgment is issued. These are the Advocate General and the Judge Rapporteur. The opinion of the Advocate General is by far the best predictor of the final ruling and it is worth considering the number of months in office that the respective Advocate General has spent at the moment he announced his opinion. It is a logical expectation to have the senior Advocate Generals feeling more comfortable in their decisions to the rather sensitive cases in comparison to the initial months of their mandates.

At the same time, one might also assume that in the longer run seniority might display the potentially more conservative or more liberal stand that the Advocate General could have in his ideological approach to the national versus communitarian law conflict. If this is the case we are likely to witness statistically significant correlation between seniority and our dummy dependent variable of having a judgment in favor of the applicants that are trying to make a certain piece of EU legislation void. The regression however does not provide support for such an argument as there is no statistical significantly correlation based on the dataset between the seniority of the Advocate Generals and the dependent variable.

Dependent variable: Decision in favor of applicant		
Opinion	1.807*** (14.65)	
Advocate General Seniority	-0.024 (-1.16)	-0.027 (-1.64)
Overall R-squared	0.3176	0.0024
Number of observations	944	947

Judge Rapporteur seniority

As already mentioned, it makes sense to apply an identical logic to the Judge Rapporteurs as well. The judge who has been given the task to act in the case as a Rapporteur has the substantial power to prepare the first draft of the ruling. The judges are initially to deliberate and discuss on this very draft and it is therefore a very responsible task. Collegiality, which the literature on extra-legal factors of judicial decision making recognizes as a potentially important variable, would make it less likely to have the judges ignore the stand of their colleague – especially if he has been in office long enough to have deserved generally agreed authority and respect.

The quantitative analysis however provides no arguments to strengthen the expectation that the Judge Rapporteurs in the Court of Justice of the European Union are likely to take extra-legal factors into account to the extent to which the ultimate wording of the judgments is a function of their draft. If rational choice institutionalists were to expect some correlation here it would be logical to have the Rapporteurs exploiting (or maybe even abusing) their senior position within the institution. This does not seem to be happening in practice though.

Dependent variable: Decision in favor of applicant		
Opinion	1.809*** (14.66)	
Judge Rapporteur Seniority	0.000 (0.02)	0.010 (0.51)
Overall R-squared	0.3165	0.0002
Number of observations	944	947

The following is an interesting observation regarding the weighted difference in the Advocate General’s seniority and that of the Judge Rapporteur for each particular case. The names of both officials are determined in advance so the Advocate General is aware of which judge is going to

be the Rapporteur for the case at stake. In the second regression, in which the seniority of the Advocate General is tested for correlation against the positivity of his opinion for the annulment action application, there is no statistically significant correlation. On the other hand, once we take the difference in the duration of the period in office for both officials, it seems that Advocate Generals are more likely to prepare opinions against the application when they are more senior than their Rapporteur counterparts. The statistical significance in this observation is not so strongly expressed but it is an interesting illustration of a potential situation in which an Advocate General decides to take over most of the responsibility for an eventual decision against the application for having a Rapporteur that was appointed in the Court relatively recently.

Dependent variable: Opinion in favor of applicant	I	II
Months AG more senior than Judge Rapporteur	-0.021* (-1.70)	
Advocate General Seniority		-0.019 (-1.14)
Overall R-squared	0.0024	0.0011
Number of observations	947	947

Judge Rapporteur nationality –

What is much more interesting in terms of correlation between the Rapporteurs and the final judgments is their nationality. In the end, the cases of annulment actions have been deliberately chosen as most adequate for the purposes of our analysis exactly because they present the clearest form of contradiction between national and communitarian interests and legislation. As it has already been mentioned in Chapter I the national governments appoint the judges and Advocate Generals of their own choice. If they are to find these “representatives” accountable for their performance it can be done efficiently only through the opinions of the Advocate Generals and the decisions in which the respective judge is known to have acted as the Rapporteur.

The results presented in the following table show positive and statistically significant correlations between the nationality of Belgian, German, French, British, Greek, Irish and Luxembourgish and the decision in favor of the applicant in the cases in which they had to judge. The significance in this correlation however disappears when we add the opinion of the Advocate General as an additional variable in the regression. It is only the Greek nationality that remains significantly correlated and the Advocate General has been Greek in only 24 of all cases so nationality of the Rapporteurs does not seem to influence judicial decision making in the Court of Justice.

Dependent variable: Decision in favor of applicant		
Opinion	2.027*** (14.91)	
B	0.935 (1.32)	1.009* (1.87)
D	0.851 (1.19)	1.082** (2.01)
DK	0.520 (0.67)	0.789 (1.32)
E	-0.118 (-0.11)	0.921 (1.41)
F	0.908 (1.21)	1.428*** (2.61)
GB	0.818 (1.07)	1.276** (2.26)
GR	1.551** (2.04)	1.646*** (2.68)
I	-0.094 (-0.13)	0.333 (0.60)
IRL	0.636 (0.89)	0.994* (1.76)
L	1.065 (1.47)	1.294** (2.39)
NEW	-0.088 (-0.09)	-0.468 (-0.60)
NL	0.596 (0.84)	0.827 (1.51)
P	0.621 (0.82)	0.619 (1.03)
S	0.889 (1.12)	0.195 (0.29)
SF	-0.293	0.619

	(-0.29)	(0.90)
Overall R-squared	0.3042	0.0238
Number of observations	944	977

Advocate General nationality –

The nationality of Advocate Generals is another factor that the dataset enables to be tested for correlation with the opinions that they provide. The logic here is identical in terms of the assumptions of rational choice neoinstitutional theory. Namely, if national governments are acting strategically as rational actors then member states should be expected to appoint such Advocate Generals that are prone to decide in favor of national interests rather than communitarian ones. Of course this can be true only for the complicated cases that allow for alternative and controversial interpretations as in the end Advocate Generals have the very responsible task to consider the law. But one of the main assumptions in this paper is that at least some of the cases that member states bring before the Court of Justice are anyway such that allow for adversative ultimate judgments and these are exactly the cases in which a biased Advocate General might cease the opportunity to make the difference. And even if these occasions are not that often they will be captured by the statistical analysis. Performing a complete regression analysis in this occasion is a bit more complicated as usually the Advocate Generals have the nationality of the bigger member states. So I have

decided to create a separate group of Advocate Generals which are not nationals of one of the 4 big member states (Germany, France, Italy or the UK) as otherwise the nationals of states like Denmark, Ireland, Luxembourg or Portugal have provided opinions of a small number of cases which might potentially alter the results significantly.

The analysis implies that nationality of the Advocate General impacts his opinion only in the cases when he is French (against the annulment action application) or British (in favor of the applicant). This effect might not be based on a very strong statistical significance but can still be a subject of interesting further research as the member states of France and the United Kingdom are known to fit well into the roles that these results hint when national versus supranational interests are involved.

Dependent variable: Opinion in favor of applicant	
Germany	0.000 (0.00)
France	-0.374* (-1.70)
Italy	0.344 (1.52)
United Kingdom	0.462** (2.08)
Overall R-squared	0.0119
Number of observations	947

Post procedural variables:

Duration

The duration of the period between each case was registered and its judgment was provided is another variable that I managed to gather information for and it is interesting to see whether the Court has been recorded to take longer to reach a decision against the applicants. A rational choice neoinstitutionalist might argue that the Court should be interested in and therefore wait for member state reactions before it publishes its ruling.

The statistical analysis does not seem to provide any evidence supporting such expectations as the duration of a case is not correlated with the final decision no matter whether we control for the opinion of the Advocate General or not.

Dependent variable: Decision in favor of applicant		
Opinion	1.810*** (14.66)	
Duration	0.005 (0.83)	0.003 (0.62)
Overall R-squared	0.3169	0.0003
Number of observations	944	977

Referrals in EU documents

The following two regressions might not match the profile of factors that matter in the national/supranational axis of debates. They do not even seem to fit the rational choice neoinstitutional theoretical background. However, for matters of completeness, I believe these variables should be included in this dissertation's analysis. As they are a very interesting indicator for the significance of each particular case other scholars could use them to extract landmark

cases out of the whole pool of annulment actions in the period of 1954-2005.

What is even more surprising is the fact that one of the variables - the one regarding the number of times a case was referred to in all various EU documents – happens to be correlated positively and significantly with my dependent variable. The effect of the year in which the case took place has to be isolated as obviously older cases could have been cited in the Community documents or the Court's case-law referrals for a longer period of time and that is why I have the 'case_year' variable present in the analysis as well. It is for the goals of some other research fields to explain why the successful annulment action applications were more often referred to in the consequent EU documents. The answer here is most certainly in the institutions that prepared these documents and this has not been the Court. On the other hand, the number of cases in which the Court itself referred to a case from the archive of its case-law does not seem to be correlated with the decision's dimension of having a successful annulment application or not.

Dependent variable: Decision in favor of applicant		
Opinion	1.803*** (14.62)	
Referrals in EU documents	0.004* (1.81)	0.005*** (2.64)
Case Year	0.003 (0.44)	0.001 (0.18)
Overall R-squared	0.3192	0.0063
Number of observations	943	961

Dependent variable: Decision in favor of applicant		
Opinion	1.813*** (14.68)	
Referrals in Court of Justice case-law	0.016 (1.60)	0.010 (1.11)
Case Year	0.001 (0.19)	0.000 (-0.07)
Overall R-squared	0.3183	0.0011
Number of observations	943	961

I am using several multivariate ordered logistic regression analysis tests in order to control for the combined effect of the abovementioned three groups (pre-procedural, procedural and post-procedural) of variables. These variables represent all publicly available legal and extra-legal factors that have been coded in the dataset and are theoretically expected to potentially influence the court's decision-making. The dependent variable again is the decision of the Court which is accompanied by a dummy for the Advocate General opinion as an independent variable in all of the tests. The 'opinion' variable is the best predictor for the Court of Justice decision as in more than 80% of the cases the judges followed the opinion of the Advocate Generals which is thus also an appropriate proxy in which most of the purely legal considerations of each particular case should be embodied. The second independent variable that is present in each of the regressions is either a dummy ('state') which determines whether the applicant is a state or an individual; or another dummy ('big state') to distinguish between the three most powerful states and biggest net contributors in the EU budget – Germany, France and UK – when only the cases in which the applicant is a member state are left in the dataset.

Pre-procedural stage

The first four tests involve those variables that concern mostly the preliminary legal aspects of the cases which should serve to check the theoretical expectations of having

the case complexity, the legal area or the legal measure that is contested as factors influencing decision making process. All major groups of legal areas and measures are turned into separate dummy variables to check for the potential effect of each of them. The impact of legal measures in the second test is limited only to the categories of decisions and regulations as there are almost no observations involving actions for the annulment of a directive or appeals that were brought in front of the Court of Justice by a member state. Regulations are found to be much harder to annul, while the rest of the variables are of a rather insignificant effect.

Procedural stage

Another four regressions were run in order to account for the potential impact of member state driven appointments of Advocate Generals and Judge Rapporteurs. The functions of the Judge Rapporteur are of such a special interest as they are assigned by the President of the Court in order to monitor the progress of the respective case. Eventually all judges would deliberate on the basis of a draft judgment prepared by the Judge Rapporteur himself. Moreover, the Rapporteur is responsible for an assessment of the complexity and the significance of the case and proposes the chamber or the number of judges that should

deal with the case in his opinion⁹⁸. Even though the procedure offers so wide-ranging agenda setting functions to the Rapporteurs the nationality of these judges proves to be of little significance. In fact the Greek was the only nationality to have a statistically significant impact on the decision but at the same time Greeks had the least number of cases assigned to them. However, there is a positive and statistically significant correlation between the French Rapporteurs and the dependent variable when the test is limited only to those cases where the applicant is a EU member state. On the other hand the nationality of the Advocate General has no significant effect on the Court's judgments. Thus, it can be argued that Kenney's findings that governments generally do not exert political influence through the members of the Court assigned by them are confirmed.

Post procedural variables

On average an annulment action case is cited in more than 26 community documents out of which almost 6 are later judgments⁹⁹ of the Court itself. Nevertheless, the notion of legal significance or precedent is not correlated with the rulings, as the number of later citations of each respective case in the consecutive case-law of the Court of Justice as

⁹⁸ Edward, David. Interview with Judge David Edward. Edinburgh, Scotland, 2005.

⁹⁹ Orders of the Court are also counted towards this variable

well as in all European documents are of no statistical importance. The same result is true for the case duration.

In brief, the results of the three types of variables grouped together – to test for their combined effect in each of the case development phases – did not change much compared to their impact when regressed against the Court's decision separately. Interestingly, the dummies for a member state and a 'big state' applicant keep their positive statistical significance levels in 9 out of the 10 tests. To put it simply the judges of the Court of Justice seem to discriminate between states and non-governmental applicants. What is even more the three biggest and most powerful EU members enjoy a preferential attitude as these are more likely to initiate a successful annulment action.

Dependent variable: Decision in favor of applicant	Pre-Procedural Stage				Procedural Stage				Post-Procedural variables	
Opinion of Advocate General State	2.004*** (14.74)	2.186*** (9.11)	2.028*** (14.96)	2.125*** (9.57)	2.02*** (14.88)	2.128*** (9.26)	1.989*** (14.54)	2.059*** (9.02)	1.997*** (14.71)	2.096*** (9.42)
Big State	0.459** (2.02)	0.529* (1.80)	0.380* (1.83)	0.544** (1.99)	0.375** (2.06)	0.440 (1.44)	0.335* (1.87)	0.651** (2.06)	0.466*** (2.71)	0.539* (1.94)
Legal Matters	-0.055 (-0.78)	0.038 (0.35)	-0.041 (-0.54)	-0.017 (-0.16)						
Case Year	-0.004 (-0.47)	-0.021 (-1.24)	-0.006 (-0.70)	-0.015 (-0.99)						
Annulment Measure (Appeal)	-1.071 (-1.02)									
Annulment Measure (Decision)	-0.944 (-0.90)	-0.508 (-0.73)								

Annulment Measure (Directive)	-0.712 (-0.58)									
Annulment Measure (Regulation)	-1.572 (-1.48)	-1.319* (-1.70)								
Legal Area (Agriculture)			0.033 (0.12)	0.372 (0.90)						
Legal Area (Competition)			-0.023 (-0.09)	0.303 (0.69)						
Legal Area (ECSC)			-0.064 (-0.19)	0.885 (0.76)						
Legal Area (External Relations and Commercial Policy)			-0.599 (-1.61)	-0.608 (-0.56)						
Number of Judges					0.047 (1.46)	0.038 (0.65)	0.042 (1.31)	-0.000 (-0.01)		
Advocate General Seniority Judge Rapporteur Seniority Advocate General Nationality Judge Rapporteur Nationality					-0.016 (-0.80)	-0.038 (-1.23)	-0.026 (-1.20)	-0.039 (-0.92)		
					-0.005 (-0.21)	-0.028 (-0.62)	0.008 (0.34)	0.003 (0.07)		
							None	None		
					1.517* (1.85) - GR	1.835* (1.84) - FRA				
Referrals in EU documents									0.002 (0.47)	-0.003 (-0.36)
Referrals in ECJ case-law									0.000 (0.00)	0.006 (0.16)
Case Duration									-0.006 (-0.98)	-0.006 (-0.55)
Overall R-squared	0.2985	0.3411	0.2959	0.3189	0.3097	0.3408	0.3045	0.3384	0.2935	0.3120
Number of observations	944	348	944	366	943	366	943	366	943	365

Note: Absolute z-statistics in parentheses (*Statistically significant at $p < .1$; ** Statistically significant at $p < .05$; *** Statistically significant at $p < .01$)

CHAPTER V

The Critical Junctures in the Court's Path Dependency

The New Legal Order in the European Community: The Court of Justice and Historical Institutionalism

The European legal system that was originally envisaged in the 1950s was rather weak and the way in which it was designed left little powers to the Court of Justice to affect member state policies or to enforce governments compliance. Today this initial legal system is significantly transformed and it was mostly the Court of Justice that made this transformation happen. The major instrument that CJEU used to generate this metamorphosis is undoubtedly the reference for a preliminary ruling. This procedure enabled national courts to ask the CJEU for its interpretation of a certain piece of legislation. In the 1960s the Court of Justice did not miss the opportunity to allow individuals to bring in their national courts issues of conflict between EU and national law that affected them. Within a year the Court also widened its institutional powers by adopting the principle of supremacy of European to national law. The Court of Justice based these rulings on its contentious arguments that the Treaty of Rome created a “new legal order of international law” and that its spirit determined the irreversible transfer of national sovereignty to a supranational European level.

Of course these innovations had to go through the approval of the member states as well as their national judiciaries. The national courts had good reasons to object as the new order implied that within this EU legal system they would

suddenly become a subordinate agent of the Court of Justice. Transferring these competences to the CJEU meant that the highest national courts would lose their monopoly even over the interpretation of certain constitutional provisions. Moreover, the national courts would thus eventually channel decisions that will potentially import a conflict between EU and national law at the dislike of their governments. At the same time the governments could present even more sound arguments against this new legal order.

There is absolutely no doubt that the Court went well beyond what the member states believed they agreed to when signing the treaties. The Court of Justice based its rulings on the “special and original nature” of the Treaty of Rome but nevertheless one can hardly find a politician or a scholar in the 1960s who can be cited for perceiving the Treaty of Rome really as one of an extraordinary character. In any case the Court has used the opportunities presented by national court’s referrals to make a plenty of significant legal expansions of the EU authority. As some even say it changed the Treaty of Rome in order to build a common market and make European law more enforceable¹⁰⁰. And, thus, the governments needed to have a very good reason in order to delegate their national sovereignty to an institution that would interpret actively the EU legislation.

¹⁰⁰ Alter, Karen. *The Making of a Supranational Rule of Law*. In *Europe Today: National Politics, European Integration, and European Security*, edited by Ronald Tiersky. 2004

Even though high courts, as courts of last instance, must refer question of EU law to the CJEU, the constitutional courts in Italy, Belgium, Germany and France have never made a referral¹⁰¹. On the other hand lower courts, which were used to having a court hierarchically above them that could overrule their decisions, grabbed the chance to reopen legal debates that seemed to have already been settled. Having the Court's ruling and interpretation behind the decision of a lower court judges would amplify the effect of the latter and make it harder to reverse by their upper counterparts. Of course, just as higher courts would restrain from making a referral that would allow a broader and more importantly expansionist interpretation of the EU law, the lower courts would also avoid asking the Court of Justice such questions that could undermine their authority and competences.

In their actions the politicians follow a more pragmatic approach and are driven mostly by results in terms of their policy agenda. Thus, it is not surprising at all that the CJEU established the legal principles it needed with an extreme caution. In fact usually when the Court introduced a new principle it did not apply it to the case at stake. However, it is still worth to point out the evident argument that politicians would prefer to avoid public confrontations with their national courts officials concerning the separation of powers or the constitutionality of a certain

¹⁰¹ Ibid.

bill. Thus, politicians often found different ways to circumvent compliance as it was easier to tackle the unwanted consequences of the Court' rulings than to enter an open debate on the essence of a given legal principle. In the end it is a must to take into consideration that, even though being the "masters of the Treaty", the politicians had just one option of sanctioning judicial activism and it was amending the Treaty in its parts that they found the CJEU interpreted inadequately. And changing the Treaty is not an easy task to do as it requires unanimity and involves a great loads of institutional reforms. The institutional conflict between the principal and the agent is therefore a contest determined by bounded rationality, as governments that are willing to prevent the unwanted activism of the judges in Luxembourg can not make a sure bet on having all EU members supporting their stand or a Treaty amendment.

The Court of Justice of the European Union generally has jurisdiction for three forms of proceedings. These are direct actions, references for preliminary rulings, and appeals. Direct actions arise most often in cases where the European Commission initiates an infringement procedure in accordance to Article 226 EC against a member state which the Commission believes failed to fulfill its obligations. Another essential part of the direct action cases are the annulment actions in which a member state, community institution or, under certain circumstances, even an individual can challenge the validity of a legislative

measure that was adopted at the European level. Appeals are always brought as cases against a ruling of the Court of First Instance which was created in the last decade to reduce the workload of the judges in the main court in Luxembourg. Almost all of these cases are rather technical, the Court of Justice practically has little room of maneuver but to follow the letter of the law and it is unlikely that the Court can act creatively in its judgment to form some kind of a legal principle that would emerge out of them. In these instances the Court of Justice acts as a traditional national court. On the contrary, in the preliminary ruling cases the CJEU is enabled and actually referred to by the national courts to provide its interpretation of the law. In this procedure the Court of Justice in its actions resembles rather a constitutional court. That is why the famous principles that the judges in Luxembourg managed to establish and develop were introduced in their preliminary rulings. Any book of European law posing the argument that the Court has allegedly constitutionalized the European legal system would be based on extensive analysis of the path that the CJEU has set by its most famous legal doctrines such as the supremacy of European law or the principle of direct effect.

Typically half of the cases that are brought in front of the Court, at least in the more recent years, are references for preliminary rulings. There are also the cases in which the relationship between European and national law, respectively the institutional linkage of the CJEU vis-à-vis

national courts, is really at stake. Under the procedure of references for preliminary rulings national courts may, and sometimes actually must, refer a question to the Court of Justice to ask for the Court's clarification of given points of EU law. The Court of Justice is most often asked to verify whether there is a conflict between national and European law or if the latter complies with the community legislation. As it is the preliminary rulings where scholars found the Court of Justice to act as a performer of expansive judicial activism in the most palpable manner, it is inevitable that I try to take a deeper insight in the most famous cases. My main argument is that it has been exactly these cases that predetermined further decision-making and this observation fits perfectly the concept of path dependency that is the main instrument of analysis from a historical institutionalist point of view.

A common belief is that the CJEU is most active in its interpretations when the process of political integration is slowed down. Effective international courts are able to convince domestic political institutions to comply, either through direct persuasion or via pressure from supra and sub-state actors¹⁰². However, one should also consider the linkage in the opposite direction. As Karen Alter puts it today there is no doubt 'that Euro-law associations made possible the Court of Justice's constitutionalizing doctrines by creating test cases, by acting as the ECJ's and

¹⁰² Helfer, Laurence and Slaughter, Anne-Marie. *Toward a Theory of Effective Supranational Adjudication*. Yale Law Journal, 1997.

Commission's kitchen cabinet, by spurring individuals to bold action, and by creating an impression of a momentum favoring the Court's doctrinal creations'¹⁰³. Indeed the neofunctionalists' theory provided for the influence of different 'nationally constituted groups with specific interests and aims' that they found to be driving the process of integration¹⁰⁴. These groups would embody the interests of the business, politics or science¹⁰⁵ or can in general comprise of any self-interested actors who could potentially exploit the opportunities that litigation in international courts offer¹⁰⁶. Even though legal integration as a consequence of the CJEU's judicial activism was clearly a function of the essential efforts of such interest groups one should not attribute the constitutionalization of Europe solely to the actions of these agents. If it was the case, as Alter argues, we could not explain the failure of the ECSC to construct a strong framework for a liberated coal and steel community, as well as the lack of activism that Court of Justice featured in the first decade of its existence. Neither can one clarify why judicial institutions in other projects of regional integration similar to the CJEU (for

¹⁰³ Alter, Karen. *The European Court's Political Power*. Oxford University Press. 2009

¹⁰⁴ Burley, Anne-Marie and Mattli, Walter. *Europe before the Court: A Political Theory of Legal Integration*. *International Organization* 47, 1. Winter 1993.

¹⁰⁵ Mattli, Walter. 'Ernst Haas' Evolving Thinking on Comparative Regional Integration: of Virtues and Infelicities. *Journal of European Public Policy*, Vol. 12, No. 2, 327-348. 2005.

¹⁰⁶ Stone Sweet, Alec. *Judicialization and the Construction of Governance*. *Comparative Political Studies*, 26(4). 1999.

example the Andean Tribunal of Justice) did not manage to replicate its success albeit the presence of identical circumstances for these self-interested actors to emerge. Therefore there is no automaticity in the international legal process, but it is a range of additional conditions that should be present for having these interested groups agendas accomplished.

Integrating the Court of Justice Doctrine in the Member States

The impact of Euro-law advocacy movements as Alter calls them has been significant since the very first two key rulings that initiated the process of European legal integration. It is not surprising at all that the 15 of the first 18 preliminary references came from Dutch Courts as the 1953 Dutch constitution allowed for the supremacy of international law¹⁰⁷. The famous Van Gend en Loos cases was brought in front of the Court of Justice by a young Dutch lawyer who was a member of the Dutch euro-law association. It is known that two years earlier this association generated a task force to determine which are the provisions of the Treaty of Rome that can be seen as directly applicable under Dutch law as national authorities should find them supreme to the incompatible Dutch legislation.

¹⁰⁷ Vauchez, Antoine. *Integration through Law: Socio-History of EU Political Common Sense*. EUI, Working Paper, 2008.

The Van Gend en Loos case meant that European law is practically supreme to the national one in the Netherlands as for the Dutch legal system direct effect stemming from European legislation was just identical to EU law supremacy. Thus, the contribution of the Dutch legal order to the emergence of the CJEU's doctrinal principles was important and, compared to the other EU members at the time, the Netherlands indeed featured the optimal constitutional setting in this context¹⁰⁸. In most of the other countries, however, the legal systems prescribed that primacy had to go to the last adopted law. In short, this meant that national legislators could simply overrule the direct effect that the Van Gend en Loos case established by passing a law against it.

The Costa vs. Enel decision followed quickly to establish the supremacy of European law. Legal activism played its role quite extensively as well. The 62-year-old lawyer Flaminio Costa and his colleague compatriot Giangaleazzo Stendardi contested a negligible electricity bill to put forward a test-case against the Italian nationalization law. As Vauchez puts it, 'test-case was a familiar strategy to Stendardi' who can be cited for writing in 1958 that 'it will be necessary to plead judicially such an issue, in order to provoke a decision for example of the European Court of

¹⁰⁸ Slaughter, Anne-Marrie' Stone Sweet, Alec and Weiler, Joseph. The European Court and National Courts – Doctrine and Jurisprudence. Oxford, 1998.

Justice'¹⁰⁹ in order to compensate for the lack of clarification in the treaties about the EU law supremacy.

Even though the Court of Justice announced its doctrine with the Van Gend en Loos and Costa cases the principles of direct effect and Community law supremacy in order to get really established these had to pass the final test of approval by the member states national judicial authorities. It is interesting to observe this process for each of the EC members in the 1960s as well as for the United Kingdom which had its stance even though it joined the EU a decade later.

Belgium and the Netherlands

The Belgian constitution in the 1960s provided for no effect of the treaties as long as they have not obtained parliamentary approval. Nevertheless the Belgian courts never contested the CJEU and the direct effect principle for instant applicability of secondary EC legislation. This tendency of Belgian judges probably originates in their traditional international outlook¹¹⁰. The question with European law supremacy to conflicting national rules however took quite some time to penetrate the Belgian legal order. Belgium is one of the states that had the *lex*

¹⁰⁹ Vauchez, Antoine. Integration through Law: Socio-History of EU Political Common Sense. EUI, Working Paper, 2008

¹¹⁰ Bribosia, Herve. Report on Belgium. In The European Court and National Courts – Doctrine and Jurisprudence. Edited by Slaughter, Anne-Marrie' Stone Sweet, Alec and Weiler, Joseph. Oxford, 1998.

posterior derogat legi priori principle, according to which in case of a conflict between international treaties and subsequently adopted laws the latter should prevail. Still treaties have always been the source of Belgian administrative law, so such cases were rare in Belgium¹¹¹. It was the notorious 1971 Le Ski decision that made it all official. In fact the Belgian *Cour de cassation* reasoned its ruling with the argument 'that the treaties which have created Community law have instituted a new legal system in whose favor the member states have restricted the exercise of their sovereign powers in the areas determined by those treaties'. In other words the national court used the exact language of the Court of Justice in its *Costa vs. ENEL* judgment. This decision was met with expected approval but there is an up-to-date debate on whether the source from which the supremacy derives is the Belgian constitution or the supranational EC legal order and the international treaties.

The Netherlands is probably the member state in which the doctrine of the Court of Justice of the European Union was met with the least resistance if any. The Dutch legal tradition is characterized by its monist perceptions on the relationship between national and international law. Since 1953, when the constitution of the Netherlands entered into force the supremacy of European law, as per se international law, has practically almost never been

¹¹¹ Waelbroeck, M. *Le Juge Belge devant le Droit Communautaire*. RBDI, 2/1965. p.348

contested. It can even be argued that it was the Dutch legal system that influenced the European one. The Netherlands brought the very first reference for a preliminary ruling before the CJEU in 1961 and since then has kept being among the most active member states to have their courts asking for the interpretation of the Court of Justice.¹¹² This can of course be explained by the lack of a Constitutional Court in the Netherlands. The early activism of the Dutch judicial authorities¹¹³ led to their reference for the famous Van Gend en Loos case in which the CJEU established its direct effect principle. The president of the Court of Justice of the European at that time was another Dutch, Judge Donner, who was known for sharing the traditional monist beliefs of legal thought in the Netherlands concerning the relationship between national and international law. In fact the issue of Kompetenz-Kompetenz was never the subject of ongoing legal debates in the country and this can be attributed to the absence of any provisions in the Constitution that somehow define the notion of sovereignty loss or the relevant limits in this context.¹¹⁴

¹¹² Up until 2010 the Dutch courts have sent 767 references to the court in Luxembourg and it is only the courts of Germany, Italy and France that initiated a higher number of preliminary rulings.

¹¹³ 17 out of the first 26 preliminary ruling references came from the Dutch courts.

¹¹⁴ Claes, Monica and De Witte, Bruno. Report on the Netherlands. In *The European Court and National Courts – Doctrine and Jurisprudence*. Edited by Slaughter, Anne-Marrie, Stone Sweet, Alec and Weiler, Joseph. Oxford, 1998.

France

The French legal system is peculiar for the existence of three supreme courts. Even though these three institutions act with practically no interaction between them they have all adopted both the “direct effect” and the “supremacy” doctrine. In contrast to some other member states France featured a monist view on the relation between international and national law and as the constitution of the Fifth French republic says ‘treaties possess a superior authority’. Probably the final step of compliance with the EU supremacy principle was the *Jacques Vibre* case that the Cour de Cassation ruled on in 1975¹¹⁵. In short the object of this case was a fiscal law that contradicted the treaty. The lower French Courts in fact acted in accordance with the treaty and ruled against the fiscal law. However, they based their judgment on the French constitution and not on the logic that the Court of Justice used in its *Costa vs. ENEL* decision. This was not enough for the camp of the pro-European legal circles and the Cour de Cassation decided to base its ruling on both, the Constitution and the treaty. Basically that is the *modus operandi* that this French Court kept using up to date¹¹⁶. The role of Adolph Touffait has to be emphasized as he was the public prosecutor at the time when the *Jacques Vibre* decision was taken and he was also known to be a enthusiastic supporter of European legal

¹¹⁵ Plotner, Jens. Report on France. In *The European Court and National Courts – Doctrine and Jurisprudence*. Edited by Slaughter, Anne-Marrie, Stone Sweet, Alec and Weiler, Joseph. Oxford, 1998.

¹¹⁶ *Ibid.*

integration in France. In fact Touffait conclusions on the case recommended that the Court should base its ruling entirely on the 'specific nature' of the Community treaties. As a matter of fact Touffait was appointed as a judge in the Court of Justice just one year after the *Jacques Vibre* ruling.

The Conseil d'Etat, one of the three highest French courts, waited until 1990 to engage with the supremacy doctrine. Even though based entirely on the French constitution its *Nicolo* decision basically confirmed the primacy of community law over subsequent national statute legislation. One should also consider the fact that Yves Galmot, the French judge in the CJEU in the 1982-1988 period, became a member of the Conseil d'Etat right after his mandate in Luxembourg has finished and the famous *Nicolo* decision followed just one year later¹¹⁷.

Germany

The Maastricht decision that the Federal Constitutional Court of Germany issued in 1993 involved the problems of sovereignty and Kompetenz-Kompetenz issues, as it examined and redefined the bounds to which German national powers can be transferred to the European supranational level. The Federal Constitutional Court is the highest court in Germany and therefore its decisions are the most relevant regarding any issues of European integration as all lower courts must observe them. In its Maastricht

¹¹⁷ Ibid.

decision the German court practically made a significant step back from its previous stand as the Court's case-law beforehand envisaged that only the acts of German authorities can directly be a subject of constitutional complaints. After the famous Maastricht ruling the case is that acts that are considered to be beyond the limit of the European Community can also be challenged and reviewed by the Federal Constitutional Court.

It has to be emphasized that the Constitutional Court of Germany expressed its protectionist position towards European law even earlier with the so-called "Solange" cases. In *Solange* the Court settled a principle according to which Community legislation is practically superior as long as it does not violate the basic rights that German citizens have under the German national law. As a matter of fact, however, the CJEU anyway could serve well enough to protect these basic rights as those are defined in the treaties as well. With the Maastricht ruling the Federal Constitutional Court simply abandoned the basic rights doctrine or rather extended it to assure that the general principle of democracy is sustained in regard to a transfer of national sovereignty. The right of direct elections for example guarantees the democratic legitimacy that the German Parliament holds concerning its influence over the development of European integration. In other words the Court decided that the control of member states is still preserved no matter that they ratified the Maastricht

Treaty, which was simply an act of transferring strictly limited powers to the Community level.(Kokott)

The view of the Federal Constitutional Court towards the European law eroded from one of an autonomous legal order to an approach of dealing with it as a mere international law. Indeed, in its original ruling in *Solange I* in 1974 with which the Court decided that preliminary requests for norm control are admissible, “as long as Community law does not contain a valid and formulated catalogue of basic rights established by a parliament which is equivalent to the catalogue of basic rights of the (German) Basic Law”. This judgment was also a subject of certain criticism which claimed that it implied having the German basic rights as a milestone standard for community rights. Thus five years later, probably as a reaction to this criticism, in 1979 the Federal Constitutional Court has ruled that “The Senate leaves open whether and possibly how far – may be in view of the political and legal developments in the European Area accomplished in the meantime – the principles of the decision of 29 May 1974 can be further upheld unrestricted” (*Vielleicht-Beschuss*).

Finally, with its *Solange II* ruling, as the highest German court noted that the needed standard of basic rights protection is already guaranteed to match the requirements of the German Basic Law, the CJEU was found to be a lawful judge that all German citizens are entitled to by the German Constitution. According to the court this provision

can hold, “as long as the European Communities, in particular the Court of Justice, generally ensures an effective protection of the basic rights against Community acts, which basically corresponds to the protection of basic rights compelled by the Basic Law”. (Solange II)

Kompetenz-Kompetenz is a term denoting the legal ability to determine someone’s competences. Thus, Kompetenz-Kompetenz is widely relevant in international law. The classic paradigm is that international organization do not have Kompetenz-Kompetenz but it is rather states that do. In other words supranational organizations, similar to the European Community, are holders of only those competences that were delegated to them by the member states. Within the EU context the notion of Kompetenz-Kompetenz implies the question of which are the competent judicial authorities to decide whether a certain Community decision is properly taken for being within the competences that the member states transferred to the supranational level. The Maastricht decision put into words the fact that the German Federal Constitutional Court has never considered the European Community as a Kompetenz-Kompetenz holder. Moreover it consists of thorough indications of potential review powers that the German highest court could exploit at its discretion if in the future some Kompetenz-Kompetenz is transferred to the supranational European level.

Even though the Federal Court explicitly mentions that in case European institutions develop the treaty of Maastricht beyond its framework all legal instruments that such an activity generates would not be binding within German territory, the highest German court still finds it appropriate to announce that it will exercise its authority “in a cooperative relationship with the CJEU”. In other words the Maastricht decision means that the German Court expects that the institutions of the Community must respect the constitutional specificities of each member state.

Italy

Considering the relationship between European and Italian law one has to take into account the fact that Italian judicial authorities have adopted an entirely dualist approach since the very signing of the Treaty of Rome. Thus, in Italy the realm of European law is simply viewed as one of international law – as a separate legal system which has no hierarchical features vis-à-vis the national one unless to the extent to which the Italian state has transferred certain competences and sovereignty by adopting the respective legal texts in the treaties. The principal actor in Italy in the context of conflict between European and national legal norms is the Constitutional Court. This Court has used the wording of Article 11 of the Italian Constitution as a legal basis to justify the limitation of sovereignty which in turn

predetermines the degree to which European law can be applicable on Italian territory.¹¹⁸

Having in mind the dualist views of the Constitutional Court it was not surprising to find it standing against the principle of European law supremacy. In 1964 with its decision in the *Costa vs. Enel* case the Constitutional Court affirmed the *lex posterior derogate priori* principle according to which in the conflict of national and European law it is the last adopted legal norm that always prevails. The Court of Justice of the European Union could not allow such an approach as this would mean that the parliament of a member state can make pointless any legal act adopted at the Community level. As the case was sent for a preliminary ruling to the Court of Justice as well it exploited it to create its famous doctrine of supremacy.

It took almost 10 years for the Constitutional Court to agree with the supremacy of European law principle. In its *Frontini* decision in the end of 1973 the Court confirmed that in a case of a contradiction between community and national ones the former prevail in case they are older than the latter. This reiteration of the *lex posterior derogate priori* principle was also extended by providing the possibility of judicial review over conflicting national legislation in the

¹¹⁸ Article 11 of the Italian constitution says that ‘Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends’.

alternative case.¹¹⁹ These cases, however, could be referred only to the Constitutional Court. After another 10 years, with its *Granital* ruling, the Constitutional Court finally approved the supremacy of European legal acts even though this concerned only the measures having direct effect. The Court also allowed judges of lower-ranked courts to apply this principle instantly in their chambers. Moreover, somehow similar to the German experience, the Constitutional Court of Italy reserved for itself the monopoly of competences in cases that involve the fundamental rights and principles established by the Italian constitution.

The Constitutional Court never really discredited or questioned the doctrine of direct effect and in some of its rulings in the 1980s¹²⁰ has chosen to follow a very open approach that allowed for practically all types of European legislation to be directly applicable. The Italian highest court also did not address the issue of *Kompetenz-Kompetenz* but its overall dualist stands and especially its conditional authorization of the supremacy principle are indicative enough to suggest that it would give the *Kompetenz-Kompetenz* power to the state and not to the community.¹²¹ In any case it is worth mentioning that the

¹¹⁹ When the more recently adopted piece of legislation is the national one.

¹²⁰ Corte Costituzionale 1985, no. 232 and Corte Costituzionale 1989, no. 389.

¹²¹ Cartabia, Marta. *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*. Edited by Slaughter, Anne-Marrie⁷ Stone Sweet, Alec and Weiler, Joseph. Oxford, 1998

Constitutional Court of Italy files its first ever reference to the Court of Justice for a preliminary ruling only in 2008.

Constitutionalizing the Treaty

It has been shown how the principles of supremacy and direct effect led to a wave of reactions within the member states judicial systems. These two principles can be observed as a critical juncture that predetermined the overall consequent development of European law. Indeed none of the brave further CJEU rulings that changed the status quo within the Union in legal terms would be possible if it was not for the principle of EU law supremacy. Its introduction has started an irreversible flow of events that inevitably led to the deepening of integration in Europe. Thus, it is obvious that the whole course of legal integration in the EU can be understood as a spill over effect of the Courts' doctrine.

The concept of path dependency, as understood by the neoinstitutionlists, can be applied appropriately to the case law of judicial institutions especially when the notion of a precedent is involved. It is natural that when courts decide actual cases basing their judgments along previous rulings they seem performing an unbiased and in general less political function. Therefore precedents constitute a type of constraint that predetermines to a certain degree the arguments that different actors from both sides of the bar would hope to use with success. That is exactly why the

main legal doctrines that the Court established in the 1960s and their implementation within the legal systems of the union's member states represents a course of events that happened to be particularly crucial for the whole process of legal integration in the EU, or what many scholars would rather address as the constitutionalizing of the treaty.

The choices that the judges in Luxembourg made to introduce a given legal principle by creating a precedent can be observed as the so called 'critical juncture' moments in which an enduring impact is created. An impact that will predetermine the limits of freedom that further judges in the institution will enjoy when none of those who have set the precedent are still in office.

It would be of course misleading to claim that CJEU case-law can be explained by the historical institutionalist patterns of path dependency and critical junctures if it was only for the cases that established the supremacy of European law or the notion of direct effect. It can well be argued that these were simply practical issues that the court had to decide inevitably as the alternative would not allow any reasonable performance of the institution's competences. Indeed the supremacy and the direct effect concepts, the latter considerably more than the former, had their political implications which went well beyond the expectations of the European governments. But one can hardly disagree that the alternative would simply undermine the overall purpose and value of all legislation

that is adopted at the supranational level. In a way this constitutionalization process was justified for the lack of other plausible options that would still enable the whole European system stand firmly on legal grounds.

Still, it can well be argued that crucial CJEU rulings such as the one in the Frankovich have come as a consequence of the Court's reasoning of the direct effect principle. In fact the case of Frankovich concerned member states' liability to pay compensation to individuals who happened to suffer a loss for their governments failure to implement a certain EU directive or regulation within their national legislation. Thus, the Court effectively deepened the impact of its direct effect doctrine some 20 years after the latter has been adopted. This would be unlikely to happen if the national courts were to avoid the incorporation of the direct effect doctrine within their legal systems. The whole process was evidently triggered by the early choice that the judges in CJEU made to close other alternative options with the Van Gend en Loos ruling. This choice has clearly generated the self-reinforcing path dependency processes in the subsequent case-law. The argument of path dependency is again valid as the judgment in Frankovich would never be possible if direct effect was not established in advance. And this is exactly the pattern of processes that historical institutionalists would expect to observe as a result of the precedents that the EU judges have baldly set in the 1960s. It has to be noted that the Court followed the doctrine established in Frankovich in a later case (Case C-213/89

commonly known as Factortame) to widen even further the range to which it can be applied by redefining the principle of effectiveness in cases where member state liability for obstructing Union law is involved.

In any case for some of the above reasons I am going to reveal the pattern of path dependency and critical juncture in the Court's case-law in other cases and subsequent rulings where the Court could have followed a different approach without having the practical necessities of altering the status quo. It seems that the interpretation of the judges in Luxembourg regarding the internal market and its famous freedoms of movement can be given as an illustrative example in this context. The critical juncture here would be the well-known *Cassis de Dijon* and *Dassonville* rulings that were issued by the Court in the 1970s.

Just like in other free trade areas the Union's definition of free movement was originally defined as the prohibition of discrimination.¹²² In other words the national authorities should not discriminate external actors to the extent that the latter do not violate domestic regulations. Through its 1974 *Dassonville* ruling the Court of Justice stated that Belgian legislation constituted a measure having equivalent effect to a quantitative restriction on imports and is thus in violation with the Treaty. Later on in its 1979 *Cassis de Dijon*

¹²² Schmidt, Susanne. Path Dependency of Case-Law and the Free movement of Persons. 2011

ruling, concerning a certain piece of German legislation having to do with the amount of alcohol in beverages, the Court softened the range of the measures of equivalent effect principle by giving a clearer definition of the cases in which the principle works. However, the most significant implication of the *Cassis de Dijon* ruling was the establishment of the principle of mutual recognition which implied that products that were legally produced in a member state should be freely introduced in the markets of other member states.

In brief the Court of Justice defined the freedom of movement of goods as a prohibition of restriction rather than being simply a commitment to no discrimination between domestic and imported goods. Litigation in some of the further cases however led to the application of the same reasoning behind the definition of the other freedoms. The *Dassonville/Cassis de Dijon* interpretation of the Court was soon applied to the cases regarding another freedom of movement – that of services. The 1990 *Sager* case was about a British firm that wanted to enter the German market in its industry. In Germany however the relevant sector featured stricter regulation and the firm had to obtain additional license. The Court reconfirmed its freedom of trade reasoning by claiming that:

“Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies

without distinction to national providers of services and to those of other Member States...”

The free movement of people within the internal market was initially restricted to labor related activities. Similarly to the pre-Dassonville interpretation the Court was applying the non-discrimination reasoning whenever it had to deal with cases concerning the free movement of workers. In 1993, however, in one of its most famous rulings in the so called *Bosman* case the judges decided that the system of transfer fees in European football is in fact “an obstacle to the freedom of movement”. Prior to *Bosman* a football team had to pay a transfer fee to a player’s club in order to attract him when the contract with his ex-team expires. However, it was often the case that the amount of this fee is set too high so that players are forced to prolong their contracts. The Court found that this system is indeed not a discriminatory one but constitutes a restriction to the free movement of workers. Thus, practically extending the scope of European law once again, the CJEU followed the already well-known pattern of changing its interpretation of the freedoms of movement to one that is opposed to restrictions instead of the mere prohibition of discrimination.

CONCLUSION:

**An Instrument or a Key
Decision-Maker**

The present dissertation examined the Court of Justice of the European Union from neoinstitutional perspectives. The achieved aim of the author to shift the focus of the Court's analysis from exogenous to internal factors seems to have proven successfully that it is exactly New Institutionalism that is the most appropriate theoretical framework to serve as a basis to approach the institution. The Court of Justice is illustrated as a rational player acting strategically to defend its institutional preferences and agenda.

The thesis presents the most extensive dataset of annulment action cases ruled by the CJEU. In a series of tests I check for the impact on the Court's decision making of all publicly accessible extra-legal variables for which there are certain theoretical expectations of effect. One of the main findings concerns the lack of empirical evidence from the CJEU to support essentially the extra-legal model of judicial decision making. These results are still in line with the argument that in smaller courts the legal factors prevail for having a high level of collegiality which triggers stronger interpersonal interactions that allow the occurrence of different legal perspectives when justices elaborate on their approach to each separate case. The nationality of the justices, as well as the policies that the annulment cases concern, do not appear to sustain the preferences of certain political agendas within the Court of Justice.

On the other hand, the test for an overall influence of national over supranational interests seem to materialize the intergovernmentalist arguments that member state governments have better chances to file successful applications of annulment actions. This statistically significant effect might be partly explained by the stricter rules for admissibility which the treaty applies to potential non-governmental applicants. However, a deeper within-member-state analysis reveals that the three most powerful EU members, which are also the biggest net contributors to the Union's budget, are doing much better than their counterparts in terms of success in the annulment actions that they initiated. This effect is significant and stays constant through the tests of all case progress stages. Even though this is the main finding provided by the regression analysis, its magnitude is constrained to the fact that national actors are only successful in less than 30% of their annulment actions. Moreover, most of these cases concern only a couple of EU legislation areas - agriculture and competition.

In any event, further research is needed to develop the legal models of CJEU judicial decision making. The presented novel dataset contributes to decrease the lack of a proper extensive quantitative approach that annulment action cases definitely deserve. The Court of Justice tends to take into account which member state is involved in its cases and it is more likely to rule in favor of the bigger states compared to those that contribute less to the EU budget.

Thus, the institution inevitably fits the definition of a rational agent in neoinstitutionalist context. The ratio (more than 70%) of the Court's decisions in favor of EU legislation contested for annulment however comes to reveal that in general the institution is not that dependent on national preferences as intergovernmentalism would suggest. This extra-legal motivation behind the Court's rulings is therefore more likely to stem from its own institutional agenda which is by default in line with the idea of deepening and widening the processes European integration. The long term rationale of the CJEU is consequently based on the idea of increasing the scope of its competences. Then it is logically to conclude that the Court considers member states' preferences only to the extent to which the latter do not threaten the endurance of the EU legal doctrines established by the Court of Justice or the survival of the institution per se.

The references that the CJEU had to deal with under the preliminary ruling procedure have naturally enabled the Court to put forward its interpretation of European law. The institution managed to take advantage and has been seen to exert a form of judicial activism that led to certain outcomes that were unexpected or/and undesired by the member states but were at the same time practically irreversible for the relatively high costs of a relevant political reaction that could potentially undo this impact.

The autonomy that judicial institutions feature by default may have facilitated the Court of Justice in this endeavor. As shown in Chapter IV, rational institutionalism seems to explain appropriately the Court's assessment of its decision-making powers which allow it to act so that it has clearly widened the scope of its competences and supranational tendencies through the means of legal integration. The annulment cases as well as the timing and the overall circumstances around the precedents that established the most challenging legal doctrines of the judges in Luxembourg attest for the fact that the Court has been aware of the competing political interests that its rulings concerned. The case-law that was generated as a result of the precedents within the preliminary ruling procedure however is rather an illustration of historical institutionalist arguments. Indeed any Court is supposed to be consistent in the long-term of its reasoning so the CJEU is not an exception for abiding by the precedents that it has itself set.

The variance between Union law application in the CJEU and in the national courts of the member states can be clearly depicted. Member state courts consider their constitution as the supreme legal norm. They interpret EU law to a degree to which it is in comfort with the constitution. At the same time the Court of Justice takes the Treaties in an identical manner. Even though one should acknowledge recent developments such as including member states constitutional traditions in the text of the

Lisbon Treaty or the decision that fundamental human rights present a principle of law that is to be recognized in the EU, it is evident that the Court considers the treaties as supreme by default. In a reality of this forced coexistence the national courts had to adopt the legal principles that the CJEU adopted. On the other hand the Court of Justice managed to balance its approach to the 'national vs Union law' divergence to the extent to which the courts of the member states would be likely to accept.¹²³ The Kompetenz-Kompetenz issue that occurred as a result of a decision by the German supreme court was addressed by the CJEU judges in exactly this manner as in their consequent case law they started referring to principles and rights evolving out of the national constitutions of the EU members. The inclusion of the Fundamental Charter of Human Rights in the Lisbon Treaty comes as a solid argument for the historical institutionalist concept of path dependent determinism in European legal integration.

In any case it has been shown that the overall pattern that the Court established and followed in its case-law whenever it had to interpret EU law can be generalized in historical institutionalist terms as a sequence of critical junctures that predetermined a self-reinforcing process of path dependency. As a rational actor and a judicial institution which foremost goal is to survive the CJEU has to stick to the legal principles it created. For this reasons it

¹²³ Hartley, Trevor. *The Foundations of European Union Law*. Oxford University Press, 2010.

seems that for the majority of the preliminary ruling cases it could be a potentially fruitful exercise to look deeper trying to figure out which were the national interests that the Court ignored or took into account in its rulings on a case-by-case basis.

In brief, the Court of Justice is an institution that can hardly fit the definition of being an agent of national interests even though it was revealed that it is sensitive to their agenda for having a clear correlation between the Court's rulings and the national preferences of the most powerful EU member states. It would be more proper to argue that depending on certain circumstances the Court of Justice arbitrarily selects to act as an instrument in the hands of member states. This reaction however seems to be a part of the Court's long-term strategy of being a decision maker with increased competences and a key actor quickening the processes of EU integration.

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