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Measuring Judicial Activism: Is the Court of Justice of the European Union an activist court?

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Abstract

From the 1960s to the 1990s, the politics of law literature considered the Court of Justice of the European Union (CJEU) to be the most activist international court. While these studies have allowed the emergence of a very dynamic research field, the answers to the question of how to measure the Court's activism are still based on very heterogeneous methodological approaches, situated between large-scale quantitative (mostly political science) research, and legal case-by-case textual analysis. Reflecting this heterogeneity, the current answers to this question are equally diverse, reaching from activism to self-restraint.

The aim of our paper is to present a methodological approach that allows for combining a legal and a political science perspective. In applying both a legal doctrinal analysis and an actor-centred approach we attempt to discuss the possibility of overcoming a series of shortcomings the paper will identify in both the legal and political science literature.

1. Introduction

For three decades – from the 1960s to the 1990s, the politics of law literature considered the Court of Justice of the European Union (CJEU or the Court) to be the most activist international court. It's rulings influenced European integration to the extent that the European Union became to be considered as one of the most judicialized supranational political systems in the world (Alter 2001, 2009, Stone Sweet and Caporaso 1998).

To study the Court, scholars initially based their research on small-n case study approaches, and argued that the Court has emerged as a political power by delivering audacious interpretations of the European treaties in several landmark rulings (Pescatore 1978, Weiler 1981, Burley and Mattly 1993, Alter 1996). From the 1990s onwards, a series of analyses, first based on a purely theoretical rational choice perspective (Garrett & Weingast 1993) and later on large scale quantitative data (Garrett, Kelemen and Schulz 1998, Carruba, Stone-Sweet and Brunell 1998 & 2012) added political criteria to this explanation. These authors analysed under which political conditions the Court acted as an activist Court. They tried to see whether the CJEU is under the control of the member states (and the biggest ones in particular) or, on the contrary, is protected from the member states and capable of acting autonomously. They finally agreed that CJEU rulings were not controlled by the big member states, yet arguing that in powerful states the risk of non-compliance with the Court's rulings was higher. More recently, scholars concentrating on the influence of the Court on domestic courts and legislation (Wind 2010; Martinsen 2011, Naurin et al 2013; Larsson et al 2016; Mayoral et al 2016) have added a link between domestic level politics and EU law and politics to these studies. These approaches have brought a more nuanced perspective on the Court's influence in European integration.

Not everyone would use the notion of 'judicial activism' to describe the case law of the CJEU; yet, most scholars agree that the Court, indeed, has strongly influenced the European integration process (Kelemen and Schmidt 2012; Blauburger and Schmidt 2017). The question whether this influence (activism) is still high or on the contrary has evolved over time is still a matter of discussion. Some scholars introduced the argument that, since the mid 1990s, the Court's actions are increasingly restrained (Dehousse

1998:148, Keeling 1998). Self-restraint would more and more replace activism in the Court's jurisprudence.

While these studies on the CJEU and the politics of law have allowed the emergence of a very dynamic research field (Saurugger and Terpan 2017), the answers to the question of how to measure the Court's activism are still based on a very heterogeneous methodological approaches, situated between large-scale quantitative (mostly political science) research, and legal case-by-case textual analysis. Reflecting this heterogeneity, the answers to this question are equally heterogeneous, reaching from activism to self-restraint.

The aim of our paper is to present first elements about a possible methodological approach that allows for combining a legal and a political science perspective. In applying both a textual analysis (legal doctrinal perspective) and an approach based on the position of the Court in the EU system (political science perspective), we attempt to overcome a series of shortcomings the paper will identify in the existing literature. Based on our mixed-methods approach, the paper presents the first (legal) research results based on using a representative sample of CJEU rulings selected at random between 1980 and 2011. These results must yet be combined with a thorough study of the Court's position towards other actors in the EU system: member states and European institutions more particularly.

In the second section of this article, we define activism and summarize the literature dealing with the Court's activism, by focusing on: first, the relationship between the CJEU and the member states, and second: activism in the wider context of the EU political system. Section three presents our approach of activism as well as the methodology and the first results of our study.

2. Views on judicial activism

The notion of judicial activism is plurisemantic and part of the debate on 'integration through law'. In the vast literature on the CJEU, we can distinguish three groups of studies. The first and central one sees activism through the lenses of the relationship between the Court and the member states (Court / member states level). The second

group enlarges the perspective to the larger political system of the European Union (EU level), while the third one narrows the scope of study to the Court, the judges and lawyers' networks (Court level).

Activism and the member states (Court/ member states level)

The Court as the principal's agent

Principal-agent approaches seek to understand why national governments consent to abandon or at least share their sovereignty at supranational level by creating supranational institutions such as the CJEU. The central assumption is that state actors rationally pursue their own interests while transferring competencies to institutions. States understand perfectly well that the *ex-post* control of these institutions can be problematic. They nevertheless transfer competencies to the European level. Why? Because institutions help to decrease the uncertainty linked to the imperfect division of power between competing European actors. Furthermore, delegating powers to supranational institutions such as the Court helps to reduce transaction costs involved in the decision-making process. States agree to act according to international agreements they have signed and benefit to this end from the expertise of supranational actors. In exchange for delegating competencies, these supranational bodies provide the states with control instruments to implement policies decided at European level. However, if the rules of implementation are not respected, the European Commission refers cases to the European Court. Thus, *principals*, meaning the states, accept to be controlled by *agents* – the Commission and the European Court of Justice – to ensure that implementation is equally applied to all member states (Pollack 2003; Kassim & Menon 2003; Maher, Billiet & Hodson 2009). Research focuses on the *ex-ante* definition of the agent's preferences by the principal and on the control measures developed by the latter. It starts from the assumption that European institutions behave broadly as agents of member states. Sometimes, however, they are strongly independent. This is due to the fact that the mechanisms put in place by the states in order to control institutions are costly, which discourages their extensive use by national governments.

In studying the reasons for and conditions of delegation by governments to supranational bodies, this research analyses why the CJEU succeeded in broadening its powers, thereby facilitating European integration and the creation of a European market (Garrett 1992, 1995 ; Garrett, Kelemen & Schulz 1998, Garrett & Tsebelis 2001; Kelemen 2012).

Pollack (2003), in adopting a case-study based research methodology, offers a number of comparative case studies on the Commission and the European Court in which he develops an overarching conceptualisation of the principal-agent theory in EU studies. A first set of examples concerns cases regarding liberalisation and the creation of the European market. By examining three cases involving the role of the European Commission in foreign trade (Blair House Agreement), competition (De Havilland Affair) and case law of the Court of justice on the free circulation of goods and services in the European Union (*Cassis de Dijon* ruling), his research shows that supranational institutions influenced European integration and promoted the introduction of a single market when the control mechanisms set up by the governments were relatively weak. A second set of examples concerns the case of the European internal market. Here, the analysis concentrates on CJEU case law on equal pay for men and women (the *Defrenne* and *Barber* rulings). Results were similar in both sets of case studies: the supranational organisations fulfil their regulation and rule-making role in the European market, but their power and room for manoeuvre is closely controlled by national governments, which differs from the first set of rulings. The reason is that when the CJEU acquired discretionary power considered to be excessive by the major member states, the latter reacted by creating new control mechanisms or by limiting certain effects of their decisions in new treaties. According to Pollack, the sole example for a Court override can be found in the limits set by the Maastricht Treaty with regard of the retroactive effect of the Barber ruling of 1990. Indeed, the so-called 'Barber protocol' was inserted into the Maastricht Treaty with the intent of limiting the impact of the CJEU's *Barber vs. the Guardian* (C-262/88) ruling on the equalization of pension policies for men and women, forcing the CJEU to base its decisions on existing case law, i.e. the legislation established before the Barber ruling. However, some argue that the member states control the Court given that the revision of the Maastricht treaty provision dealing with the Barber ruling was merely an exception.

More recently, research by Carrubba, Gabel and Hankla (2008, 2012) set out to explain variation in all CJEU decisions (i.e. preliminary rulings, direct action and actions for annulment) between 1987 and 1997 by variation in the contents of the opinions submitted to the ECJ by member states and the European Commission. Based on a large-scale dataset, they coded the CJEU's response to member state observations (so-called amicus briefs) on 3176 different legal issues raised within cases, rather than focusing exclusively on the overall outcome of proceedings. Analysing whether or not the CJEU decided in favour of the plaintiff, they found that the Court was significantly influenced by the threat of member states' legislative 'override' or not complying with decisions that lacked sufficient political support among the other member states.

Huebner (2014) convincingly argues, however, that European law requires that national courts apply European legal rights and obligations in litigation involving private parties, even if they do not seek special guidance on a particular case from the CJEU through the preliminary reference procedure. Hence concentrating solely on preliminary rulings is problematic. The number of cases decided by national courts involving a legal obligation to apply European law in contemporary Europe is estimated to be significantly larger than the number of cases where national courts refer questions directly to the CJEU. Case studies show both that national courts sometimes make ambitious decisions based on European law provisions even without the use of preliminary reference procedure (Obermaier 2008), and also, conversely, that national courts can be reluctant to vindicate European law where it might conflict with national laws and practices (Conant 2002).

CJEU as trustee

Another way to measure the Court's activism from a politics of law perspective is to look at the degree to which the CJEU is the member states' trustee. This approach starts from the idea that principals in the EU are not a unified entity but are represented by multiple governments who will typically exhibit divergent interests on any important policy issue on which the Court takes a position (Stone Sweet and Caporaso 1998; Majone 2001; Alter 2008; Stone Sweet 2010). Alter (2001, ch. 5) underlines in this context that political officials tend to have shorter 'time horizons' than do judges, being far more responsive to electoral pressures and public opinion. Further, governments have no

means of blocking enforcement actions or preliminary references, or the Court's ruling. Instead, the Member States have locked themselves into a system of judicial review whose dynamics they cannot easily control, given the decision-rule governing treaty revision (unanimity).

EU institutions possess authority to monitor Member State compliance with EU law and to punish them for non-compliance. Majone (2001) argued that a model of 'Trusteeship' replaced that of 'agency' for situations in which the member states have transferred, for all practical purposes, the relevant 'political property rights' to the EU's institutions. Under this view, the Commission is a Trustee, for example, since the Treaty confers upon it full discretion to bring non-compliance claims against the member states (which cannot block them from going to the Court). Stone Sweet (2010, 12) applies this concept to the CJEU. He argues that the 'concept of trusteeship is appropriate in so far as three criteria are met: (a) the Court possesses the authority to review the legality of, and to annul, acts taken by the EU's organs of governance and by the Member States in domains governed by EU law; (b) the Court's jurisdiction, with regard to the Member States, is compulsory; and (c) it is difficult, or impossible as a practical matter, for the Member States-as-Principals to "punish" the Court, by restricting its jurisdiction, or reversing its rulings. In this account, the Member States, as High Contracting Parties, made the CJEU a Trustee of the values and principles that inhere in the treaties.'

Stone Sweet and Brunell (1998) apply this approach in particular to the interaction between domestic courts and the CJEU. Based on the statistical analysis of preliminary references they suggest that increases in intra-European trade were associated with increasing use of the preliminary reference procedure by national courts. Their assumption was that judges who handled relatively more litigation with an EU law dimension (such as transnational disputes), would more readily refer cases to the CJEU, assuming that this encourages a 'system of mutual influence', in which transnational activity, EU law, and dispute resolution predispose political elites to adopt more pro-integrationist rules to avert judicial censure.

Another usage of this approach is made by Stone Sweet and Stranz (Stone Sweet and Stranz 2012) who concentrate on rights-based 'constitutional pluralism' in German law, which traces the engagement with the principle of 'non-discrimination' in EU law through interactions between the ECJ, the German Federal Constitutional Court (BVerfG) and German labour courts in the broader context of the ECJ's Mangold ruling. Their

study supports the claim that lower national courts are ‘agents’ of the EU judiciary, as the preliminary reference procedure allows them to circumvent the domestic judicial hierarchy (Huebner 2014).

Activism and the European political system (EU level)

Self-restraint in response to the political context

Since the late 1990s, scholars have pointed to the fact the Court does not continuously qualify as central actor of integration through law. The Court is also constrained by political, administrative and constitutional counteractions (Rasmussen 2013b; Larsson and Naurin 2015; Carrubba and Gabel 2015; Nowak 2010; Martinsen 2015). A series of factors have been identified in this respect.

First, the increase of euroscepticism led to the end of the permissive consensus that prevailed until the 1980s. EU institutions, and supranational ones like the CJEU in particular, need to take into account resistances at national level, coming from both political authorities and public opinion. Second, with the emergence of a new intergovernmentalist understanding of the EU (Bickerton et al 2015), by which deliberation and consensus have become the guiding norm of day-to-day decision-making at all levels, the CJEU’s judges are now subject to greater stress (Granger 2015). Third, since the Maastricht Treaty, new areas of competence have emerged which escape the Court’s jurisdiction. This is the case for both the Common Foreign and Security Policy (CFSP) (with a few limited exceptions) and those policy areas covered by the so-called ‘new modes of governance’, including parts of social policy, economic coordination, and education policy, etc. And fourth, the introduction of mechanisms aimed at making EU governance simpler, more flexible and less formal, has been accompanied with the development of soft law in the EU (Abbott & Snidal 2000; Shaffer & Pollack 2009, 2010; Pauwelyn et al 2012; Terpan 2015). The aim was to reduce national resistances through so called ‘new modes of governance’ that would use, instead of coercive tools and hard law, coordination mechanisms and soft law. While hard law regularly triggers non-compliance attitudes, soft law is thought to push actors to reach the goal through a learning process leading to the transformation of actors’

preferences (Jacobsson 2004, Sabel & Zeitlin 2006). Soft law would allow governments in international arenas to choose their own policy instruments to reach commonly defined goals, thus make the system more efficient. In a context where the introduction of soft law is supposed to decrease compliance problems, the European Court and judicial control more generally would no longer be the cornerstone of compliance attitudes and hence the Court and the legal system would lose its position as central actors in the process of integration through law.

In other words, political and legal developments in the EU since the 1990s have challenged the Court's role, a trend that is in contradiction with the development of other international tribunals, such as those of the WTO or the International Criminal Court, whose rulings became more salient. Confronted with these challenges, the Court has responded through greater self-restraint, as if the growing opposition to supranationalism had led the Court to cautiousness and a greater awareness of its political environment.

Continued Judicialization

However, there is no consensus on the idea that the CJEU has become less audacious in a changing European context. Two types of argument plead in favour of a remaining judicial activism.

First, the challenges mentioned above may not be so important as expected. Some policy fields have already evolved from soft law to hard law, enlarging the scope of the Court's control. This is the case with immigration, asylum and other fields related to the area of liberty, security and justice, since the Amsterdam treaty. And since the Lisbon treaty, this is also the case with the European Charter of Fundamental Rights, which has become a binding commitment. And traditional law in forms of directives, regulations and decisions, still plays a crucial role and so does the CJEU. This may be due to the fact that the EU responds with further regulatory integration to conflict and crisis situations (Saurugger & Terpan 2016a). As Genschel and Jachtenfuchs (2013, 3) underline, conflict and crisis situations 'in turn increase national differences and thus perpetuates the vicious circle of regulatory integration and increasing salient national identities.' Regulatory authorities, and in particular the CJEU, thus has the power to overcome political blockades by judicial politics. Ironically, the potential of integration

through judge-made law is particularly high if the potential for agreement in the Council is low because this prevents the Council from changing the CJEU's rulings by legislation or Treaty revision (Alter 2009; Garrett and Tsebelis 2001).

A second line of argumentation insists on the response of the Court. Even if the challenges are real, it is doubtful whether the Court has responded through greater self-restraint. On the contrary, the Court may have found in these challenges new reasons to be activist. For example, soft law, though non-binding, is often taken into account by the Court in its jurisprudence, the Court blurring the distinction between hard and soft rules. It has also been argued that the Court has developed an audacious reasoning in order to get a grip on intergovernmental policy-areas such as CFSP. For example, in the Case of Mauritius (C-658/11), the Court decided that, even though it has no jurisdiction to rule on the legality of a CFSP act according to Article 275 TFEU, this limitation does not extend to Article 218 TFEU on the adoption of external agreements. This enabled the Court to annul a Council CFSP Decision on the grounds that the European Parliament had not been properly informed, which constitutes a violation of an essential procedural requirement. Other decisions, such as Opinion 2/13 on the EU accession to the European Convention on Human Rights, could testify of the Court's continued activism, especially in situations where its own powers are at stake. Instead of responding to a challenging context through self-restraint and cautiousness, the Court could try to overcome these constraints through a renewed, although selective, activism.

Hence, a number of publications since the 2010s insist on the continued judicialization of the EU (Kelemen 2011; Maduro and Azulaï 2010, Schmidt 2012; for an overview see Blauburger & Schmidt 2017). Kelemen, for example, argues that 'across policy areas ranging from employment discrimination to consumer protection to securities regulation to the free movement rights of workers, students, and even medical patients, we can observe more coercive legal enforcement, more rights claims, and a growing judicial role in shaping policy' (Kelemen 2011, 5). Two mechanisms are at play in this context: First, the process of deregulation and judicial reregulation in the context of which derives from the creation of the European Single Market. This has led to a situation in which the arrival of new policy players, such as interest groups, companies, NGOs and newly created regulatory authorities, has upset the traditional cooperative and informal arrangements that had long characterised the policy-making process. The

second mechanism is the EU's fragmented institutional structure. A weak administrative apparatus led to the establishment of a powerful judicial system. The fragmentation between the European and the national level, as well as among EU institutions, generated principal-agent problems that encouraged the establishment of strict, judicially enforceable goals, based on transparent and accountable procedures. Hence, that the higher the distrust between regulators and regulated actors in liberalized markets, the more formal, transparent and legalistic the laws and regulatory processes become, and thus, the more important the judicial apparatus. In fragmented systems, policy-makers have an increasingly difficult job to create majorities to pass their new legislation (Garrett, Kelemen & Schulz 1998, Skowronek 1982, Pollack 2003). In other words, the fragmentation of power insulates the judiciary against being overruled easily, as well as other forms of political backlash.

Activism within the Court (Court level)

Legal scholars have always justified the idea of a powerful CJEU by the thorough study of landmark rulings. They do not care a lot about the political conditions in which the Court gives its rulings but rather focus on the Court's reasoning and its methods of interpretation. The Court's jurisprudence is, then, analysed from three different perspectives. First, rulings are considered as part of the EU legal order: there is no need to talk about activism, given that the Court just fulfils its role as EU law interpreter. Secondly, the Court is viewed as activist by legal scholars who are critical towards the Court and express concerns about the legal methods used by the judges. The CJEU is criticized for defending a pro-integration agenda and going beyond its role of legal interpreter. The third perspective, situated in between the previous ones, acknowledges the Court's tendency to issue bold and 'activist' rulings, yet refuses to either defend or criticize these rulings.

Whatever perspective is chosen, these legal studies limit themselves to case studies and a selection of rulings that are considered 'important', due to what they bring to the existing EU legal order. There is no attempt at studying systematically the Court's jurisprudence in order to determine the proportion of activist rulings in comparison with the proportion of non-activist ones. Instead, examples are used to conclude either in favour of self-restraint (C-2/90 Commission vs. Belgium, C-268/91 Keck and

Mithouard, Opinion 1/94), or in favour of continued activism (C-6/90 & 9/90 Francovitch, Opinion 2/13, Mangold C-144/04).

In history and political science, too, some scholars concentrate on the study of a limited number of landmark rulings. Some authors in both disciplines argue that the judges and advocates general have adopted a pro-integration stance since the landmark rulings of the early 1960s (Rasmussen 2008, Davies 2012, Vauchez 2008, 2012). The argument is based on both the jurisprudence of the CJEU and the sociological profile of the judges. Empirically, however, they limit their study to a few cases, and most of all to the 1963-64 rulings *Van Gend en Loos* and *Costa v. Enel*. They usually assume that the CJEU has systematically favoured integration through its main rulings, but do not base their argumentation on a longitudinal analysis of the Court's activities.

This approach is helpful in so far as it opens the 'black box' of the CJEU and suggests four possible explanations for its activism. First, most of the members of the courts have been specialized in national rather than international law (Cohen 2010). This would explain the tendency to transform EU law into something that somehow resembles national law, with values and principles of a constitutional nature, principles such as direct effect and supremacy, etc. Second, a more institutionalist argument is that the judges and advocates general defend pro-integration positions because they have been socialized in a pro-European environment. Even if they had not necessarily a pro-EU bias at the moment of their selection as a judge, they quite soon learned the legal reasoning of the European Court and get accustomed to a European legal way of thinking. The third argument, also based on an institutionalist ground, states that the European judges, being agents of the Court, have fought for reinforcing the Court's position in order to strengthen their own position. The fourth idea is close to the second and third ones, at least at first sight, but it is shaped in a more sociological way. According to this assumption, the legalization of European integration might not only be explained by the pro-integration bias of the judges; it also results from the activist behaviour of lawyers, both in EU institutions and the member states, who succeed in advancing the cause of EU law (Vauchez 2012). The added value of this approach is that it recognises links between different institutions (the CJEU and the Commission in particular) and different professional arenas (like the judiciary and academia), all of them being driven by the same rationale. However, two main flaws remain. First, this

approach, while focusing on the Court and its judges, is oblivious of the political system in which they are embedded. The members of the Courts do not take judicial decisions in a legal and political vacuum. Their sociological profile is one element among others explaining the choices made by the Court of Justice over the years. Among these elements are the objectives of the treaties, in particular the promise of an 'ever closer Union' enshrined in the preamble of the Rome Treaty (Schepel & Blankenburg 2001), and the organisation and functioning of the Court (see below) as well as its interactions with other actors (Pollack 2013). Secondly, it takes the activism of the Court for granted, and does not position itself in the debate on activism / self-restraint. Since the early 60s, the judges may have refrained from activism, especially but not exclusively in the period following the Maastricht treaty.

4. Strategic constructivism: the Court, the member states and the EU's political system

The studies presented above do not allow a clear conclusion with regard to the question whether the CJEU is an activist court or not, nor how activism should be defined. This difficulty is due to the absence of a definition of activism, the methods used and the lack of inter-disciplinary analyses. In this section, we propose a theoretical framework that aims at linking the three levels of analysis: Court level, Court/member states level, EU level. Strategic constructivism helps us to develop a coherent framework, while reconciling political science and law.

Strategic constructivism: Linking the Court with the member states and the European system

Does integration through law in the EU take another form, or in other words does integration through law no longer exist through the CJEU's audacious rulings, as it did during the 1960s, 1970s and 1980s, but only through a multiplicity of interconnected activities from the Court, European institutions, citizens' groups and companies (Conant 2002, Cichowski 2007, Kelemen 2011)? Or is the Court still 'a strategic actor, whose agenda is influenced by legal values, whether these be enshrined in the treaty or

informed by judge's vision of their own role, but whose rulings are also informed by the knowledge that it must come to terms with reality in order to ensure compliance' (Dehousse 1998: 179)? One could argue that already in the 1960s the Court did not evolve in a political vacuum and had to be called upon by other actors (Commission, member states, private parties). But, since then, the development of the EU as a complex and sophisticated system of governance may have increased the importance of the environment on the Court's behaviour.

From what we have seen above, the contradictory accounts of the Court in the EU political system: activist – non activist, independent – not-independent from member states, widely accepted – still questioned by constitutional courts, shows that understanding the Court is a complex endeavour. This is even more the case as the Court, being a legal institution embedded in a political system, needs a legal understanding as much as a political science point of view.

A way to come closer to grasping the Court's role in today's EU governance is to combine the insights presented above into a strategic – or actor-centred constructivist framework, that allows us to link a **legal interpretation** of EU law to the **strategic position** of the Court vis a vis domestic actors.

While constructivism draws on the idea that identity is socially constructed, the strategic counterpart adopts a specifically actor-centred perspective, insisting that although actors are embedded in cognitive frames they are equally able to develop a strategy that will help them to achieve their goals (McNamara 1998, Parsons 2002, Blyth 2002, Hay & Rosamond 2002, Jabko 2006). From this perspective, norms do not solely constitute the environment in which actors are embedded (a constitutive logic), but are also tools, consciously used by these same actors to attain their goals (a causal logic) (Gofas & Hay 2010). In other words, while the legal framework in which the Court acts remains a crucial element for explaining the Courts rulings, its embeddedness in its environment and the interaction with other actors – member states, European institutions, interest groups and non-state actors more generally, add to an holistic understanding of why the Court acts as it does.

Looking for activism through the systematic study of the Court's reasoning

For the purpose of this research, we define the Court's activism by two dimensions: legal activism and political activism. Legal activism refers to rulings that are considered by legal scholars as either functional, teleological, consequentialist and systemic interpretations, and which we will define in more detail below. The Court's political activism, on the other hand, is measured by the distance between the Court's position and that of the member states concerned by the case (defendants or plaintiffs).

If legal activism is coupled with political activism, the Court's activism is at its highest level. In other words the higher the degree of legal activism *and* the distance of the Court with regard to the position of member states concerned by the case, the more activist is the Court.

Legal activist and non-activist interpretations

With regard to the normative or legal frame, the treaties have endowed the Court of justice with the task of ensuring that in the interpretation and application of the treaties the law is applied. The vagueness of treaty provisions and the difficulty to apply very general rules to specific practical situations (idea of an incomplete contract) has increased the need for judicial interpretations. For the sake of the unity of European law, this interpretative task has been delegated to the European Court. Thus, studying the way the Court interprets European law is crucial to understand the legal embeddedness of the Court's rulings and EU legal integration more generally.

In order to identify activism in the Court's case law, we apply a methodology based on the legal interpretation the Court gives of European treaties and secondary law. Legal scholars working on the CJEU have identified the different types of interpretation that are at the judges' disposal (Bengoetxea 1993, McCormick 1994 & 2005, Bengoetxea, McCormick & Moral Soriano 2001, Pollicino 2004, Izcovitch 2009, Conway 2012). Drawing on this literature, we use a typology distinguishing between six different possible interpretation criteria (Table 1). Four different methods give birth to activist interpretations of the CJEU – the so-called functional, teleological, consequentialist and systemic interpretations – while two other methods are non-activist – the literal and historical interpretations.

Table 1: Types of interpretation

Interpretation Criteria	Activism / Self Restraint
teleological	Activism
functional	
consequentialist	
systemic	
historical	Self Restraint
literal	

The literal (or textual) criterion must stick to the text and should not allow for any ‘external’ criteria to interfere. The historical argument, typical of the French exegetic school and the tradition of the so-called legislative legal positivism, prescribes that legal provisions be interpreted in a way that corresponds to the will of the legislator. When choosing these interpretations, the Court exerts self-restraint instead of activism, as the Court does not make use of a room of manoeuvre for interpreting EU law.

The other methods are activists, although not to the same extent. Functional, teleological and consequentialist interpretations do not stick to the ‘historical’ will of the treaty drafters or lawmakers, nor do they limit themselves to the strict application of written rules. They usually add something to legal texts. A functional interpretation assumes that a legal provision must be interpreted in a way that ensures its ‘effectiveness’ or ‘useful effect’. Teleological (or purposive) interpretation (Pollicino 2004) implies that interpretation is consistent with the goals and purposes explicitly or implicitly established by the treaties. This type of interpretation is demonstrated by the use of sentences such as: "according to the spirit, the goals and purposes of the Treaty...", "the objective of the EEC Treaty...", or by references to the preamble of the Treaty. The consequentialist interpretation (McCormick 1994, 2005; Conway 2012) takes into consideration the foreseeable consequences of the interpretive decision.

The CJEU has widely used the three methods. For example, ‘useful effect’ was invoked in the jurisprudence dealing with the direct effect of directives (C-41/74, Van Duyn). And in Van Gend en Loos (C-26/62, Van Gend en Loos 1963), the Court has used both the teleological criterion (in using sentences such as: ‘The objective of the EEC

Treaty...’, ‘according to the spirit, the goals and purposes of the Treaty...’, making a reference to the preamble of the Treaty: ‘an ever closer union’) and the consequentialist one (the frequent use of the modal verbs ‘could’ or ‘would’ shows that the Court anticipates the consequences of its decisions).

Finally, the systemic criterion is more respectful of written rules, but takes into consideration the normative context in which the legal provision is placed and makes interpretive links between different provisions belonging to the same legal order. It is activist, but to a more limited extent, as it remains grounded in written rules. Yet, it gives the Court a larger room of manoeuvre. This way of interpreting rules has also been used by the European Court in a very broad manner including most of the interpretative technique familiar to national legal cultures: *a contrario* interpretation, recourse to analogy, *a fortiori* reasoning, *ad absurdum* argument. In Van Gend en Loos, for instance, the Court mentioned the ‘general scheme’ of the treaties, invoking quite clearly the systemic criterion.

Measuring activism through legal interpretations

It is often argued that the European Court has chosen to interpret the treaties in a rather bold manner, refusing to limit its legal reasoning to literal and historical arguments, and using a combination of the four activist legal criteria of interpretation. For instance, the teleological interpretation has often been combined with the systemic one, treaty objectives being part of the system constructed by the legal doctrine. Similarly, the consequentialist interpretation can overlap with the systemic interpretation when the consequences taken into consideration are not the practical effects ‘out there’ in the world, but the internal legal effects within the European legal system (Itzcovitch 2009). This type of legal reasoning is consistent with the idea of an activist court as it gives a large room for manoeuvre to the judges, contrary to textual and historical arguments.

However, what is lacking in the existing literature is a way to measure, empirically, to what extent the Court has privileged teleological, functional or systemic interpretations over textual and historical ones. In this paper, we suggest a method that would help to fill this gap. To determine whether the Court has been – and still is – activist or on the contrary is restraining itself from activism, we use the typology of interpretations presented above and apply it to the Court’s case law. The basic idea is to

look at the distance between the interpretation on the one hand, and the textual basis and original intentions of the drafters of the treaties on the other. The higher the distance, the greater the activism.

The content of the rulings needs to be analysed in order to check whether –at least- one of the activist interpretations has been used by the Court (Table 2). A ruling is made of answers to different pleas, therefore giving way to different possible interpretations made by the Court. Each time one of the four activist methods has been found in a specific ruling, the latter is meant to be activist (even if non activist interpretations are also found in the same ruling). A difference is made between rulings where most of the interpretations are activist and rulings where we find less activist interpretations than non-activist ones. The former is presented as very activist while the latter is said to be activist (but to a lesser extent). When only historical and literal interpretations are found, rulings are characterized as self-restraint.

One of the main problems we face in analysing these rulings is that some of them may express activism but not ‘new’ activism, as the Court often applies legal solutions that have been found in earlier jurisprudence. This is why a distinction is made between routine and new activism. When an activist interpretation is found in a Court’s rulings, especially the most recent ones, we carefully check whether this is new activism or simply routine. An activist interpretation that is pure routine is added to the number of non activist interpretations.

In Table 2, we take the example of a ruling comprising five different interpretations. The degree of activism is measured by the number of (new) activist interpretations out of the total. As there is only one activist interpretation out of five, the ruling would be classified as being ‘activist’. Should the (new) activist interpretations have outnumbered the routine and non activist interpretations, then the ruling would have been classified as ‘very activist’. If no (new) activist interpretation had been found, the ruling would be an example of self restraint.

Table 2: Legal analysis of a Court ruling: Example

Legal Interpretations	New activism (functional, teleological, consequentialist or systemic interpretation)	Routine activism	Non activist interpretations (textual or historical interpretations)
Legal interpretation n°1		1	
Legal interpretation n°2	1		
Legal interpretation n°3			1
Legal interpretation n°4			1
Legal interpretation n°5			1
Total	1	1	3

We are perfectly aware that classifying court's decisions along an activist / self-restraint divide is a simplification of a very complex legal argumentation. However, although the classification of one or the other ruling might be discussed, we claim that establishing the presence of activism in judicial decisions is possible, and that it is a good solution to study a large number of rulings. If studying all the Court's rulings is too heavy a task, limiting the analysis to landmark rulings such as Van Gend en Loos (1963), Costa vs Enel (1964) and others, is not satisfying. Making general assertions based on the arbitrary selection of a few cases is not scientific enough. We think that our method can help to: 1) evaluate the proportion of legal activism in a policy area; 2) compare the proportion of legal activism in different policy-areas or in different periods of time (Table 3).

Table 3: Proportion of legal activism in different policy areas / different periods of time.

	Very activist	Activist	Self Restraint
Period 1 or Policy area 1			
Period 2 or Policy area 2			
.../ ...			

To answer the question whether the CJEU has become less activism since the 1990s, we could compare four periods of time: 1980-81 (period 1); 1990-91 (period 2); 2000-01 (period 3); 2010-11 (period 4) (Table 4). Each of the four periods corresponds to a specific context. In 1980-81, the CJEU has just ruled on the famous *Cassis de Dijon* case and is depicted as an activist Court. In 1990-1991, the permissive consensus begins to fade, and integration through law seems to be challenged by euroscepticism. In 2000-01, the permissive consensus has been replaced by permissive dissensus, while in 2010-2011 the European Union is recovering from the crisis over the Constitutional treaty, and relaunched by the entry into force of the Lisbon treaty. We know that a group of scholars argue that the Court is less activist since the early 1990s, in a context of increasing euroscepticism. If this is true, we should find a huge difference between periods 1 and 2 on the one hand, and periods 3 and 4 on the other. In 1980-81, activism should be high, as well as in 1990-91 because the permissive consensus has just started to decrease at that time. The last periods being influenced by the constraining dissensus, activism should be lower.

At that stage of the research project, we have studied a limited number of rulings for each period: 25 in period 1 -1980-81 (out of 259); 36 in period 2 (out of 350); 128 in period 3 – 2001-02 (out of 518); and 107 in period 4 (out of 629). This does not allow us to provide significant results. In Table 4, we present provisional results that could indicate a decrease in activism in period 4 (2010-11): around 10% of activist rulings while this proportion amounted to 20% (at least) in the other periods. In order to confirm this trend, we need to analyse a higher number of rulings. So far, we are only able to confirm that legal activism is present in the four periods and has not disappeared since the end of the permissive consensus.

Table 4: Number / proportion of activist rulings in four different periods

Year	Number of rulings studied	Legal activism or self restraint	
		Very activist / activist	Self restraint (or routine)
Period 1 (1980-81)	25/259	5 (20%)	20 (80%)
Period 2 (1990-91)	36/350	10 (27%)	26 (73%)
Period 3 (2000-01)	128/518	21 (19,6%)	107 (71,4%)
Period 4 (2010-11)	107/629	10 (10,3%)	97 (89,7%)

Political activism and non-activism of the Court

As we have underlined above, the CJEU does not evolve in a political vacuum and must be placed in the wider context of the European political system, that is CJEU-member states relationship, and the EU system more generally. Hence, the study of the Court's legal interpretations must be complemented with the analysis of the political conditions in which rulings are issued, both at national and EU level. The strategic constructivist approach in studying the Court and the politics of law in the EU, combining the doctrinal embeddedness with the strategic positioning vis a vis the member states thus allows us to study the constraints and opposition faced by the Court, while acknowledging the fact that power is unequally distributed amongst actors.

We argue that the link between legal activism – or activism through audacious legal interpretations – and political activism leads to a particularly high level of activism.

Measuring the political activism of the Court is a real challenge, which is generally measured, as we have seen above, through the analysis of situations where the CJEU has to face resistance from different actors at both national (national governments, administrations, national courts...) and EU level (national governments in the Council and the European Council, Commission, Parliament...) and rules against these oppositions. A central issue of political activism in the majority of social science studies is the relationship between the Court and the member states (Carruba et al. 2008, 2012; Larsson and Naurin 2016). The higher the distance between the Court's position and the concerned member states position, the higher the degree of the Court's activism.

Although the question of the Court's autonomy vis a vis its member states has received contradictory answers¹, we operationalize political activism as the distance between the Court's position and that of the member states. The fact that the Court

¹ While Carruba et al's analysis shows a strong correlation between member states preferences and the Court's rulings, Cichowski's data suggests that vague laws have given the Court the opportunity to make expansive rulings, regardless of member state opposition. In concentrating on environmental and social cases brought before the national courts by NGOs and trade unions, Cichowski finds that although the Court is informed about the preferences of the most powerful member states, it does not hesitate to act in opposition to those interests. She shows, furthermore, that rulings invoking treaty-based principles and areas governed by unanimity voting present a greater challenge to EU policy makers interested in reversing adverse decisions through corrective legislation or treaty amendments, and hence combines a norm-based explanation with strategic positioning of member states.

holds a position that is either contrary to -or very distant from- that of the concerned member states (defendants or plaintiffs) can be considered as a sign of activism. At this stage, we can distinguish between two different types of relations between the Court and the member states.

A first possibility is to focus on the degree of power of the member state(s) involved in the procedure (in particular in infringement procedures). Active participation in judicial proceedings by the more powerful states is likely to constrain the Court's interpretations. Indeed, the Court may fear that the member state(s) concerned do not comply with an activist ruling, and therefore restrain itself (Carruba 2008; Garrett & Weingast 1993 ; Garrett 1998 ; Garrett, Kelemen & Schultz 1998 ; Adam, Bauer & Hartlapp 2014). Hence the following hypothesis: the more powerful the member states, the more the activism.

A second possibility is to look at the degree of consensus among the member states at EU level. For the Court, the threat of legislative override increases when several member states reveal their preferences to the court. In contrast, when the member states appear to be divided over a legal question, the threat of legislative override in the EU context decreases (Adam, Bauer & Hartlapp 2014). The more the interpretation of the Court faces opposite observations from the member states, the more the activism. In the case of preliminary rulings, a way to measure the opposition of the member states would be to look at the observations the member states send to the Court (the so-called 'amicus briefs'). However, these observations are not available for cases after 1993 (Naurin et al. 2013)

In both cases we are facing, at least, two main pitfalls: how can we identify the position of the member states? Are we sure that all the member states share the same views? Different solutions are possible. First, we can establish a database -or use an existing one- of the member states' positions in cases related to a specific policy area. Second, we can limit the analysis to a very specific area, in order to study a small number of cases. The analysis would then be systematic (all rulings in a specific field being studied) but achievable. This is what we have done in two recent research efforts on European defence procurement and member states' essential security interests (Saurugger and Terpan 2016), and the CJEU and the external powers of the European Parliament (Terpan 2017a). In the former study we concentrated on two main rulings of

the CJEU, while the latter focus on eleven cases where the parliament used a litigation strategy against the Council in order to strengthen its powers in external relation. This leads to a third possibility, which is to consider the position of the Council as a proxy for the position of the member states. This may work at least in actions for annulment and failure to act.

In addition to CJEU-member states relationship, it could also be useful to study the interactions between the Court, on the one hand, and supranational institutions (Commission, Parliament, European Central Bank) and interest groups on the other. Delivering audacious interpretations and opposing the member states is enough to consider a Court's ruling as being activist. Yet, political activism is even higher when the Court stands alone and opposes not only the member states but also the other actors of the EU system. For example, Opinion 2/13 on the EU's accession to the European Convention of Human Rights is a case of very strong activism as the Court opposed not only the position of the member states but that of the Commission and the Parliament. Taking into account the position of supranational and non governmental actors adds another layer of complexity to the challenge of measuring judicial activism, and might not be possible in large-scale analyses. However, if we assume that, in the European integration process, political activism is mainly defined by a strategic position of the Court against the member states, then the interactions with other actors might not be a central issue: they are not a condition for activism, but rather the indication of a higher degree of activism.

Conclusion

Is the CJEU an activist Court? Does the Court compensate for the lack of legislation at EU level through audacious and innovative interpretations of existing rules? Has the Court's activism decreased over time, and especially since the 1990s and the end of the permissive consensus? Answering these questions implies to measure the Court's activities and its propensity to act as a policy-maker instead of being the mere mouth of the law.

In this paper, we have suggested a method to analyse judicial activism at the CJEU based on a law and politics perspective. We have argued that activism is both a matter of legal interpretation, and related to the type of interaction between the Court and other actors in the EU system – the strategic position of the Court towards these actors. The paper is based on the conviction that the strategic position of the Court cannot alone testify of judicial activism; it needs to match an activist interpretation. Large-scale studies may successfully establish correlations between member states' preferences and the Court's rulings. But when looking at a single case, or at a series of cases within the same policy-area, the fact that the Court ruled against the member states is not enough to conclude in favour of judicial activism. A thorough analysis of the legal reasoning of the Court must be added to the picture.

Studying the CJEU's jurisprudence systematically is a vast endeavour, due to the amount of decisions that must be dissected. The content analysis of the rulings makes it difficult to study a very large number of rulings, despite a number of attempts that are currently undertaken in the extraordinarily interesting context of the Danish iCourts project². However, the method can easily be applied to the study of a small number of cases, and is also well suited to the study of a set of rulings at policy-area level.

References

- Abbott, K. W. & Snidal, D. (2000) Hard and Soft Law in International Governance, (2000) *International Organization*, 54, 3, 421-456
- Adam, C., Bauer M. W., Hartlapp M. (2014). It is not always about winning-Domestic Politics and Legal Success in EU Annulment Litigation Beyond Judicial Constraint", *Journal of Common Market Studies*, September.
- Alter, K. (1996). The European Court's Political Power, *West European Politics*, 19, 3, 458–87.
- Alter, K. (2001). *Establishing the supremacy of European Law*. Oxford, Oxford University Press
- Alter, K. (2003). *Establishing the supremacy of European Law* . Oxford, Oxford University Press

² <http://jura.ku.dk/icourts/>

- Alter, K. (2008). Agents or trustees? International courts in their political context. *European Journal of International Relations*, 14(1), 33-63.
- Alter, K. (2009) *The European Court's political power: selected essays*: Oxford University Press.
- Alter, K. (2012). The global spread of European style international courts. *West European Politics*, 35(1), 135-154.
- Alter, K. & Helfer, L. R. (2010), Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice, *International Organization* 64, Fall, 563–92.
- Bauer M.W. & Hartlapp M. (2010). Much Ado about Money and How to Spend It! Analysing 40 Years of Annulment Cases against the European Commission. *European Journal of Political Research*, Vol. 49, n° 2, pp. 202-222.
- Bengoetxea J., McCormick N., Moral Soriano L. (2001). Integration and Integrity in the Legal Reasoning of the European Court of Justice, in De Burca G., Weiler J.H.H. (Eds.), *The European Court of Justice* 43–85.
- Bengoetxea J. (1993). *The legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Clarendon Press.
- Bickerton, C. J., Hodson, D. and Puetter, U. (Ed.). (2015). *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*. Oxford University Press, USA.
- Bieber R. (Dir.), *Mélanges en l'honneur de Bernard Dutoit*, Librairie Droz, 2002, 352 p.
- Blauberger, M. & Schmidt, S. (2017) The European Court of Justice and its political impact, *West European Politics*, 40:4, 907-918
- Blyth, M. (2002). *Great transformations: Economic ideas and institutional change in the twentieth century*. Cambridge University Press.
- Börzl, T.A (2005). "Mind the gap! European integration between level and scope", *Journal of European Public Policy* vol. 12, No.2, pp. 217-236.
- Bribosia E., Scheeck L. & Ubeda De Torres A. (2010) *L'Europe des cours. Loyautés et résistances*, Bruylant.
- Bulmer, S. (1997). Shaping the rules? The constitutive politics of the European Union and German power. *Tamed Power: Germany in Europe*, 49-79.
- Burley, A & Mattli, W. (1993). Europe before the Court: a political theory of integration. *International Organization*, 47(1), 47-76.
- Caldeira G. A. & Gibson J. L., The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support, *American Political Science Review*, 89, June, 1995, pp. 356-76.
- Cappelletti, M. et al. (1986). *Integration Through Law: Methods, Tools and Institutions v.1: Europe and the American Federal Experience*, Walter de Gruyter & Co.
- Cappelletti, M. et al., (1987). *Integration Through Law: Europe and the American Federal Experience: Consumer Law, Common Markets and Federalism in Europe and the United States*, Walter de Gruyter & Co.

- Carrubba C.J., Gabel M. & Hankla C., Judicial Behavior under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review*, Vol. 102, No. 4, 2008, pp. 435-452.
- Carrubba C.J., Gabel M. & Hankla C., Understanding the Role of the European Court of Justice in European Integration, *American Political Science Review*, Vol. 106, No. 1, 2012, pp. 214-224.
- Carrubba and Gabel 2015, *International courts and the performance of international agreements: A general theory with evidence from the European Union*, Cambridge, Cambridge University Press
- Cichowski, R. (2007). *The European Court and civil society: litigation, mobilization and governance*. Cambridge, University Press
- Cohen, A. (2010) 'Dix personnages majestueux en longue robe amarante', *Revue française de science politique*, 60(2), 227-246
- Conant, L. J. (2002). *Justice contained: law and politics in the European Union*. Cornell University Press.
- Conway, G. (2014) *The Limits of Legal Reasoning and the European court of justice*, Cambridge University Press.
- Davies, B. (2012). *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979*. Cambridge, Cambridge University Press
- De Búrca, G. (2010). New governance and experimentalism: An introduction. *Wis. L. Rev.*, 227.
- De Witte B., Muir E. & Dawson M. (2014). *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, 304 p.
- Dehousse, R. (1998). *The European Court of Justice: The Politics of Judicial Integration*, Palgrave Macmillan.
- Garrett G., "Global markets and national politics: Collision course or virtuous cycle?", *International Organization*, No. 52, 1998.
- Garrett G., Kelemen D.R. & Schulz H. (1998). The European Court of Justice, National Governments, and Legal Integration in the European Union, *International Organization*, Vol. 52, No. 1, pp. 149-176.
- Garrett, G. & Tsebelis, G. (2001). The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union, *International Organization*, 55, 2, 357-90.
- Garrett G. & Weingast B. (1993). Ideas, Interests and Institutions: Constructing the EC's Internal Market" in Goldstein, J. and Keohane, R.(eds). *Ideas and Foreign Policy*, Ithaca, Cornell University Press pp. 173- 206
- Genschel, P. (2011) 'One trap, many exits, but no free lunch: How the Joint-Decision Trap shapes EU tax policy', in G. Falkner (ed.), *The EU's Decision Traps. Comparing Policies*. Oxford: Oxford University Press, pp. 54-73.
- Ginsburg, T. (2005). Bounded Discretion in International Judicial Lawmaking, *Virginia Journal of International Law*, 43, 3, pp.631-73.
- Gofas, A., & Hay, C. (Eds.). (2010). *The role of ideas in political analysis: a portrait of*

- contemporary debates*. Routledge.
- Granger, M.-P. (2015), 'The Court of Justice's Dilemma – Between More Europe and 'Constitutional Mediation'', in Bickerton, C.J. et al. (eds), p. 208-226
- Grimmel A., "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 No. 176, 2010.
- Hay, C., & Rosamond, B. (2002). Globalization, European integration and the discursive construction of economic imperatives. *Journal of European public policy*, 9(2), 147-167.
- Helfer, L. R. & Slaughter, A.-M. (1997). Toward a Theory of Effective Supranational Adjudication, *Yale Law Journal*, 107, 2, pp.273–391.
- Huebner, C. (2014). 'Introducing a Database on National Courts' Interaction with European Law', Paper presented at the 2014 ECPR General Conference, Glasgow
- Itzkovich G. (2009) "The Interpretation of Community Law by the European Court of Justice", *German Law Journal*, Vol. 10, No. 5.
- Jabko, N. (2006). *Playing the market: a political strategy for uniting Europe, 1985–2005*. Cornell University Press.
- Jacobsson, K. (2004). Soft regulation and the subtle transformation of states: the case of EU employment policy. *Journal of European Social Policy*, 14(4), 355-370.
- Joerges, C., & Neyer, J. (1997). From intergovernmental bargaining to deliberative political processes: the constitutionalisation of comitology. *European law journal*, 3(3), 273-299.
- Kelleng D. (1998) In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?, in Scritti In Onore Di G. F. Mancini, Curti Gialdino ed., Milano.
- Kelemen, D. R. (2011). *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Cambridge, MA: Harvard University Press.
- Kelemen, D. R. & Schmidt, S.K. (2012). Introduction – the European Court of Justice and legal integration: perpetual momentum? *Journal of European Public Policy*, 19(1), p.1–7.
- Keohane, R. O., Moravcsik A. & Slaughter, A.-M. (2000), *Legalized Dispute Resolution: Interstate and Transnational*, *International Organization*, 54, 3, pp.457–88.
- König T. (2007) "Divergence or convergence? From ever-growing to ever-slowing European legislative decision making", *European Journal of Political Research*, vol. 46, No. 3, pp. 417–444.
- Kutscher H., (1976) *Methods of interpretation as seen by a judge of the Court of Justice* 2, sect 6(a).2, Luxembourg.
- Larsson, O. & Naurin, D. (2015) *Legislative Override of Constitutional Courts: The Case of the European Union*, in: *International Organizations*.
- McCormick, N. (1994) *Legal Reasoning and Legal Theory (1978)*, Oxford University Press.
- McCormick, N. (2005) *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford University Press, 2005.

- Maduro, M. & Azoulai, L. (eds.) (2010). *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, Bloomsbury Publishing.
- Majone, G. (2001). Two Logics of Delegation Agency and Fiduciary Relations in EU Governance. *European Union Politics*, 2(1), 103-122.
- Malecki, M. (2012) Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments Of Chambers, *Journal of European Public Policy*, pp. 59-75.
- Martinsen, D.S. (2011) 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion'. *Journal of European Public Policy* 18(7):944-61.
- Martinsen, D. S. (2015). Judicial Influence on Policy Outputs?: The Political Constraints of Legal Integration in the European Union. *Comparative Political Studies*.
- Mayoral, J. A., Wind, M., de Witte, B., Jaremba, U., & Podstawa, K. (2016). *National Courts and EU Law: New Issues, Theories and Methods*.
- McNamara, K. R. (1998). *The currency of ideas: monetary politics in the European Union* (pp. 138-62). Ithaca, NY: Cornell University Press.
- Naurin, D., Cramér, P. L. O., Lyons, S., Moberg, A., & Östlund, A. (2013). Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008. Data report.
- Neill P. (1996). *The European Court of Justice: a Case Study in Judicial Activism*, 218, Intergovernmental Conference, Minutes of Evidence, House of Lords.
- Nowak, T. (2010). Of Garbage Cans and Rulings: Judgments of the European Court of Justice in the EU Legislative Process. *West European Politics*, 33(4), p.753-769.
- Obermaier, A. (2008). The national judiciary: swords of the European Court of Justice' Rulings: the example of the Kohll/Dekker jurisprudence. *European Law Journal* , 14(6), 735-752
- Panke D., *The effectiveness of the European Court of Justice - Why reluctant states comply*, Palgrave, 2010
- Panke D., *The European Court of Justice as an agent of Europeanization? Restoring compliance with EU law*, *Journal of European Public Policy*, January 2007
- Parsons, C. (2002). Showing ideas as causes: the origins of the European Union. *International organization*, 56(01), 47-84.
- Pauwelyn, J., & Wouters, J. (2012). *Informal international lawmaking*. Oxford University Press.
- Pescatore, P. (1978). L'exécutif communautaire: justification du quadripartisme institué par les Traités de Paris et de Rome. *Cahiers de droit européen*, 387.
- Pollack, M. A. (2003). *The engines of European integration: delegation, agency, and agenda setting in the EU*. Oxford University Press.
- Pollack, M. A. (2013). New EU Legal History: What's New, What's Missing, *The Am. U. Int'l L. Rev.*, 28, p.1257.
- Pollicino O. (2004), "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint", *German law journal*, vol. 5, n. 2.

- Radaelli, C. M. (2008). Europeanization, policy learning, and new modes of governance. *Journal of Comparative Policy Analysis*, 10(3), 239-254.
- Rasmussen, M. (2008). The origins of a legal revolution: the early history of the European Court of Justice. *Journal of European Integration History*, 14(2), 77-98.
- Rasmussen 2013b
- Rasmussen, H. (1998) *Between Self restraint and Activism: A Judicial Policy for the European Court*.
- Sabel & Zeitlin 2006
- Saltinyte, L. (2010). Jurisdiction of the European Court of Justice over Issues Relating to the Common Foreign and Security Policy under the Lisbon Treaty, *Jurisprudencija / Jurisprudence*, 1, 119, pp. 261-279.
- Saurugger, S., & Terpan, F. (2014). La Cour de justice au cœur de la gouvernance européenne. *Pouvoirs*, 149(2), 59-75.
- Saurugger, S., & Terpan, F. (2016). Judicial Activism: Defence Procurement and The European Court of Justice, Atlanta, Conference of the International Studies Association, 16-19 May.
- Saurugger, S., & Terpan, F. (2016a). Do crisis lead to the hardening of soft law? The Multiple-streams framework and the EU's economic governance instruments, *Policy Sciences*, 49(1), 2016, pp.35-53.
- Saurugger, S., & Terpan, F. (2017). *The Court of Justice of the European Union and the Politics of Law*, Palgrave Mcmillan.
- Schepel, H., Blankenburg, E., 2001. Mobilizing the European Court of Justice. In Búrca, G. de & Weiler, J.H.H. (eds.). *The European Court of Justice*, OUP Oxford., p.9-42.
- Schmidt S.K. & Kelemen R.D., *The Power of the ECJ*, Routledge, NY, 2014, 160 p.
- Pollack, M. A., & Shaffer, G. C. (2009). *When cooperation fails: the international law and politics of genetically modified foods*. Oxford University Press.
- Shaffer, G., & Pollack, M. A. (2010). Hard vs. soft law: alternatives, complements and antagonists in international governance. *Minnesota Law Review*, 94, 706-99.
- Stein, E. (1981) Lawyers, Judges, and the Making of a Transnational Constitution, *American Journal of International Law*, 75, 1, pp.1-27.
- Steinberg, R. H. (2004). Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints, *American Journal of International Law*, 98, 2, pp.247-75.
- Stephan, P. B., III (2002), Courts, Tribunals, and Legal Unification—the Agency Problem, *Chicago Journal of International Law*, 3, pp.333-52.
- Stone Sweet, A. (2004). *The Judicial Construction of Europe*, New York, Oxford University Press.
- Stone Sweet, A. (2010) 'The European Court of Justice and the judicialization of EU governance', *Living Reviews in European Governance* 5(2), available at <http://europeangovernance.livingreviews.org/Articles/lreg-2010-2/> (accessed 8 September 2011).
- Stone Sweet A. & Brunell, T.L (2012) "The European Court of Justice, State Noncompliance, and the Politics of Override", *American Political Science Review*, Vol. 106, No. 1, pp. 204-213.

- Stone Sweet A. & Brunell, T.L. (1998). Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community, *The American Political Science Review*, Vol. 92, No. 1, March, pp. 63-81.
- Stone Sweet, A. (2010). The European Court of Justice and the judicialization of EU governance. *Living Reviews in EU Governance*.
- Stone Sweet, A. & Caporaso J. A. (1998). From Free Trade to Supranational Polity: The European Court and Integration, in Sandholtz W. & Stone Sweet, A., *European Integration and Supranational Governance*, Oxford University Press, 92-133.
- Stone Sweet, A. & Stranz, K. (2012). Rights adjudication and constitutional pluralism in Germany and Europe, *Journal of European Public Policy* , 19(1), 92-108
- Terpan, F. (2015). Soft Law in the European Union—The Changing Nature of EU Law. *European Law Journal*, 21(1), 68-96.
- Terpan, F. (2017a forthcoming). The CJEU and the External Powers of the Parliament, New Activism or Self Restraint?, in Juan Santos Vara (Ed.), *The Democratisation of EU International Relations Through EU Law*, Routledge.
- Töller, A. E. (2010). Measuring and comparing the Europeanization of national legislation: A research note. *JCMS: Journal of Common Market Studies*, 48(2), 417-444.
- Van den Herik and Schrijver 2008
- Vauchez, A. (2008). The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda). *International Political Sociology*, 2(2), p.128–144.
- Vauchez, A. (2012). Keeping the dream alive: the European Court of Justice and the transnational fabric of integrationist jurisprudence. *European Political Science Review*, 4(01), 51-71.
- Weiler, J. (1991). The transformation of Europe, *Yale Law Journal*, 100(8), 2403-2483.
- Weiler, J. H. H. (1981). The Community System: The Dual Character of Supranationalism, *Yearbook of European Law*, 1, pp.257–306.
- Weiler, J. H. H. (1982). Community, Member states and European integration: is the law relevant?. *JCMS: Journal of Common Market Studies*, 21(1), 39-56.
- Wind, M. (2010). The Nordics, the EU and the reluctance towards supranational judicial review. *JCMS: Journal of Common Market Studies*, 48(4), 1039-1063.