

Court of Justice of the European Union and Crisis in the EU

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Abstract

The Court of Justice of the European Union (CJEU) has played a role in all of the major crises afflicting the European Union (EU) over the past decade. The European Commission, national courts, and private parties have brought disputes to the CJEU concerning crises affecting the Eurozone, democratic backsliding, migration, Russian aggression in Ukraine, and British exit (Brexit). Litigation in these areas has not (yet) generated a fundamental crisis for the Court itself, but the withdrawal of the United Kingdom (UK) from the EU constitutes the first imminent disintegrative “breakdown” for the EU and its Court of Justice. During the UK’s membership referendum campaign, “Leave” proponents assailed “meddling European courts” as encroachments on sovereignty and democracy. In the aftermath of the Leave victory, the jurisdiction of the ECJ over any future relationship between the UK and EU has been contested in Brexit negotiations. Under the terms of the negotiated Withdrawal agreement and political declaration on future relations, the UK accepts full ECJ jurisdiction during the transitional/implementation period immediately after withdrawal and proposes British compliance with EU law related to trade in goods and competition policy, but remains firm in its rejection of the free movement of persons and future ECJ authority over this and other sectors. The acrimony over the ECJ and free movement of persons is not isolated to the UK, but reflects common resentments about judicially expanded “social” rights for EU citizens that are prevalent across member states that are the primary “receiving” sites of intra-EU migration. Voices clamoring to “curb the Court” have grown significantly since the early 1990s. If the UK exits the EU, ending the free movement of people and ECJ jurisdiction over most areas of law, Brexit will constitute the first crisis producing a break-down in the EU institutional order, or “spillback” in the language of integration theory.

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Introduction

The Court of Justice of the European Union (CJEU) exercises authority over European Union (EU) institutions, member states, and private actors within the EU. Comprised of the Court of Justice (ECJ) and General Court, the CJEU interprets EU law to promote uniform enforcement. Consisting of two judges from each EU country as of 2019, the General Court sits in variety of panel formations and primarily resolves disputes concerning competition law, State aid, trade, agriculture, and trademarks for individuals and companies that are directly addressed by (or concerned with) an EU act. These rulings may be appealed on points of law to the ECJ, which also (1) issues preliminary rulings that interpret EU law in response to references from national courts, (2) decides whether member states have violated EU law in infringement proceedings initiated by the European Commission, and (3) hears claims from EU institutions and member states that EU institutions failed to take required action or violated EU treaties or fundamental rights. With one judge from each member state, the ECJ hears cases on three-to-five-judge panels, a Grand Chamber of fifteen judges, or the full Court, and it receives opinions in important cases from one of eleven advocates general. Fines for ongoing infringements and financial liability for failures to apply EU law give the CJEU more bite than most international courts. ECJ preliminary rulings “constitutionalized” the EU treaties, establishing the supremacy and direct effect of EU law, where EU law is given primacy over competing national laws and can be applied by national courts in the absence of domestic implementing measures. Substantively, preliminary rulings expanded free movement, equal treatment, fundamental rights, and EU citizenship. The ECJ’s activism in developing these rights contributed to the most serious threat to EU judicial authority in the form of British exit (Brexit).

EU crises and the Court of Justice: Why Brexit eclipses other challenges

All five EU crises – Eurozone, democratic backsliding, migration, Ukraine, and Brexit – inspired CJEU litigation, and Brexit rejects ECJ jurisdiction. During the Eurozone crisis, the ECJ dodged a showdown when it fielded the German Federal Constitutional Court’s first-ever reference, which questioned the EU legality and German constitutionality of the European Central Bank’s (ECB) Outright Monetary Transactions (OMT) program that restored confidence in the Euro (Hinarejos 2015). The German court’s acceptance of the preliminary ruling upholding the OMT (ECJ 16 June 2015) deferred to the ECJ, allowing the ECB to deploy a tool that relied on Germany (Payandeh 2017).

With respect to democratic backsliding, Hungary and Poland have come under fire for actions that defy fundamental values concerning the rule of law and democracy under Article 2 of the Treaty on European Union (TEU) (Kelemen and Orenstein 2016, Blauburger and Kelemen 2017). Commission discretion, however, has blunted infringement proceedings against Hungary. Deploying narrow legal bases rather than fundamental civil and political rights, the Commission also settled cases in the wake of symbolic compliance (Batory 2016). As a result, efforts to challenge Viktor Orban’s authoritarianism have proceeded through a censure vote in the European Parliament under Article 7 TEU (Staudenmaier 2018)¹ and at the European Court of Human Rights (ECtHR), which is institutionally separate from the EU and controls its own docket rather relying on any Commission or national judges to refer disputes. The rise in (1) applications alleging human rights violations and (2) pending ECtHR cases against Hungary between 2010 and 2016 (Bozóki and Hegedus 2018) suggests that national courts in Hungary are gatekeepers insulating the regime from ECJ scrutiny. By contrast, the Commission invoked

¹ Hungary’s vulnerability to any sanctions now rests with the Council of the EU, where four-fifths of national governments must agree to penalties for violations of the EU’s fundamental values (BBC 12 September 2018).

Article 7 TEU against Polish reforms forcing the retirement of all Supreme Court judges over age 65, which enabled the Law and Justice party to appoint new judges and threaten judicial independence. In these infringement proceedings, the ECJ issued an interim order to suspend the Polish law, on grounds it infringed Article 19 TEU prohibiting age discrimination and Article 47 of the EU Charter of Fundamental Rights guaranteeing a fair and public hearing by an independent and impartial tribunal (ECJ 19 October 2018). Once the Polish government complied and reinstated all judges forced into retirement (BBC 17 December 2018), the ECJ escaped another challenge to its authority.

Meanwhile, disputes concerning the migration crisis raise provocative choices. Responding to a Belgian reference, the ECJ ruled that EU law did not require an embassy abroad to grant visas to Syrians hoping to apply for asylum, deferring to the national immigration office and thereby skirting obligations to those displaced in Lebanon, Jordan, and Turkey (ECJ 7 March 2017). The opposite decision risked increasing refugee arrivals when the EU was acting to limit them.² Yet infringement proceedings against Poland, Hungary, and the Czech Republic for their refusal to admit refugees in an EU relocation scheme (ECJ pending) have no easy solution. These states led opposition to EU redistribution of refugees, and are expected to resist enforcement. Relieving countries of responsibility to help front-line states receiving the most refugees, however, will infuriate Italy's nationalist government. The Commission may spare the ECJ of this lose-lose proposition by stalling its prosecution while the EU tries to secure its external borders (Deutsche Welle 29 June 2018).

² The Syrians lodged applications for humanitarian visas over six months after the EU negotiated its March 2016 deal with Turkey to reduce irregular migration.

In the crisis of Russian aggression against Ukraine, several Russian entities lost challenges against EU sanctions before the General Court. Interpreting the EU-Russia Partnership Agreement, the General Court upheld sanctions as proportionate to penalize Russian violations of Ukraine's territorial integrity, sovereignty, and independence (General Court 13 September 2018). Although EU sanctions failed to moderate Russian interference in Ukraine, and the losing parties may appeal to the ECJ on points of law, these challenges from foreign enterprises are unlikely to threaten the CJEU.

By contrast, Brexit poses a fundamental crisis for the ECJ. The British government's current White Paper on the UK's future relationship with the EU proposes to end the Court's jurisdiction (Department for Exiting the European Union 2018). This situation fits John Ikenberry's definition of crisis as "an extraordinary moment when the existence and viability of the political order are called into question" (2008, 3). The ECJ sits atop the institutional structure that has resolved EU-related disputes concerning the UK for nearly half a century. If the UK negotiates entirely new dispute resolution mechanisms with the EU, or if it "crashes out" of the EU without any withdrawal agreement, the institutional order between the EU and UK "breaks down." Even if the UK softens Brexit by opting for a variant of the "Norway model" within the European Economic Area (EEA), institutional transformation ensues. The European Free Trade Area (EFTA) Court exercises jurisdiction over only three non-EU EEA members (Iceland, Liechtenstein, Norway) and interprets EU law on the single market, but it does not cover common policies in the fields of agriculture, fisheries, taxation, foreign policy, and currency. Moreover, although the EFTA Court usually follows ECJ case law to promote uniform application of single market provisions across the entire EEA (including the EU-28), it has also "gone its own way" on "essential questions of European single market law" (Baudenbacher

2017). Institutionally, the EFTA Court is independent of and different from the ECJ: the EFTA Court has not recognized ECJ doctrines of direct effect and supremacy, national courts of last instance have no formal obligation to make references to it, and its “advisory opinions” in response to references are not formally binding on referring courts (EFTA Court 2018, Baudenbacher 2017). These institutional differences make becoming a party to EEA institutions without full EEA membership – “docking into” the EFTA Court – potentially appealing to the UK (Wright 2018).

The only way to avoid the “Brexit break down” would be for the UK to remain in the EU. The ECJ enabled the UK’s unilateral revocation of Article 50 and maintenance of all existing membership terms in a preliminary ruling responding to a Scottish court’s reference (ECJ 10 December 2018). While the government rejects this option as violating the referendum outcome, a pending appeal could give the ECJ a legal avenue to reject a no-deal Brexit on grounds that UK expats who resided in other EU member states for 15 years or longer faced discrimination on the basis of their residence, excluding them from the right to participate in an election that eliminates their EU citizenship rights. British EU citizens challenged the Council’s decision to begin withdrawal negotiations in the General Court, which dismissed the action as inadmissible because negotiations take away no EU rights and an agreement could preserve these rights (26 November 2018). Approval of the Withdrawal deal would render the appeal moot, but the ECJ could intervene if the UK “crashes out” of the EU. Yet such an intervention to “invalidate” the Brexit referendum would be incendiary, eclipsing controversial judgments that inflamed Euroscepticism for decades. The fact that ECJ jurisdiction became a “red line” in the UK’s Brexit negotiations should give rise to some institutional soul searching. Even if no other “exits” from the EU seem plausible, this does not mean that the ECJ’s role in the Brexit crisis has no

broader implications. Resentments that fueled the vote to “Leave” exist across the EU, and British grievances about the role of the ECJ and its rulings are shared by governments and citizens in several other member states. As a result, this chapter focuses on the relationship of the Brexit crisis to the ECJ.

Brexit and the ECJ: Theorizing British aversion to EU judicial jurisdiction

Neofunctionalist and liberal intergovernmentalist theories cannot explain why ending ECJ jurisdiction is among the “red lines” of the UK government. Predicting ongoing spillovers to the ever-closer union, neofunctionalism and related approaches such as transactionalism and historical institutionalism, with their one-way ratchets toward further integration and sticky path-dependency, preclude any end to ECJ jurisdiction. Neofunctionalist accounts describe a lost past, where the ECJ insulates itself from politics through the “mask and shield” of legal reasoning and the relationships it cultivates with legal professionals serving the beneficiaries of integration (Burley and Mattli 1993). Liberal intergovernmentalism (Moravcsik 1998) and related rationalist institutionalist accounts do no better at predicting why the British are so frustrated that they insist on ending ECJ jurisdiction. Conceptualizing the ECJ as an agent that enforces grand bargains member states agreed, interstitially specifies legislation, and remains vulnerable to legislative overrule or non-compliance, the principals should not need to terminate their agent.

By contrast, the actor-centered institutionalism of Fritz Scharpf theorizes grounds for backlash against the ECJ. Because the intergovernmental consensus necessary for agreements impedes the correction of unwelcome decisions imposed by supranational institutions, the democratic legitimacy of EU institutions suffers (Scharpf 2006). The ECJ’s enforcement of liberal treaties that privilege negative integration and strain national social systems exacerbates this problem (Scharpf 2010). Observing the left’s critique of market bias, Liesbet Hooghe and

Gary Marks develop a postfunctionalist theory to explain how the post-1990 extension of European integration into areas associated with state sovereignty and national identity – including EU citizenship – mobilized opposition from the right and resulted in mass politicization of integration (2008). Surveys demonstrate that popular trust in the ECJ plummeted from 1993 to 1999, and remained low through March 2018 in all of the largest states except Germany (Figure 1). The clash between nationalism and neoliberalism in the British Conservative party since the Maastricht era, and the popularity of the United Kingdom Independence Party (UKIP) (Hooghe and Marks 2008) coincide with popular trust falling most steeply among the British over the 1990s and remaining lower than other large member states until the Eurozone austerity era, when Italians, and ultimately the French, became similarly distrusting (Figure 1).

The protracted conflict over Brexit among elected politicians includes no champions of the ECJ, even while the government tolerates its temporary jurisdiction over the UK as a necessary evil of the transitional period and a potentially more longstanding role in regulating trade in goods. The next section draws on ECJ scholarship to explain why the UK wants out from under that Court, but has nonetheless agreed to a limited degree of future ECJ influence.

Breach of contract? Why the ECJ generates resistance

After decades of scholarship lauding the ECJ as the engine of European integration, critical voices multiplied. That the ECJ offers an escape from the dysfunctional EU legislative process (Falkner 2011) is no cause for celebration to its critics. In these accounts, (over)constitutionalized case law removes choices from elected representatives, threatening democracy legitimacy (Bellamy 2007, Grimm 2015, Scharpf 2016, Schmidt 2018). The ECJ created mandates to which national governments never agreed in EU primary (treaties) or

secondary law (regulations and directives) when it pioneered solutions to promote the free movement of goods. Resentments emerged when the ECJ applied these principles to workers, but it took further extensions to “persons” and EU citizenship rights to fuel radical resistance to the EU (Schmidt 2018) and the ECJ (Kelemen 2016). Far from engaging in interstitial interpretation to “complete the contract” of general legislation, the ECJ breached the contracts member states made in EU law.

Constitutionalizing rulings declaring the direct effect and supremacy of EU law are ECJ inventions long contested by national supreme courts, whose challenges resurface (Komárek 2013; Dyevre 2016, 107-108; Madsen, Olsen, and Sadl 2017) and inspire justification from constitutional pluralists (Krisch 2010, Avbelj and Komáreck 2012, Berman 2012). National judges in Nordic and Central/East European states refer disproportionately few cases to the ECJ for preliminary rulings that interpret EU law, shielding their governments from de-centralized enforcement of EU rights (Bobek 2008, Wind 2010). British judges remain reluctant to engage the ECJ, making only 63 percent as many references for preliminary rulings as French judges and only 27 percent as many as German judges (Rabkin 2016, 95). Marlene Wind attributes such reticence to majoritarian political culture in countries such as Denmark, Sweden, and the UK, where constitutional review to overturn legislation does not exist (2010). It was so alien to the British that Parliamentary debates about the UK’s adoption of the European Communities Act 1972 – years after the ECJ declared the direct effect and supremacy of EU law – show no realization that parliamentary sovereignty was at stake (Nicol 2001).³

³ Nicol shows that the government understood the implications of ECJ doctrines but did not enlighten MPs. The French Conseil d’État’s rejection of supremacy until 1989 and other national courts’ resistance to direct effect may have led the 1972 UK government to expect that constitutionalization was unenforceable.

The functional logic for the direct effect and supremacy of EU law is compelling since member states could otherwise free themselves from rules through new national legislation. However, deploying these doctrines to expand rights and obligations beyond the letter of the law in substantive areas is not necessary. Scholars disagree about the extent to which the ECJ responds to member state preferences, but several argue it is a strategic actor that avoids unacceptable rulings that would provoke (1) override through treaty revision or legislative correction or (2) pervasive non-compliance (e.g. Carruba, Gabel, and Hankla 2008 and 2012). Historical accounts of the early period demonstrate that the ECJ was aware of strong preferences and tried to make rulings tolerable (Pollack 2013). A case study of social policy jurisprudence on health care found that the Court narrows unwelcome legal principles to limit negative impacts of controversial decisions, simplifying implementation and increasing compliance (Obermaier 2008).

Yet Olof Larsson and Daniel Naurin reveal that the ECJ is more responsive to national governments who confirm the judicial bias of advancing integration, finding that observations supporting “more Europe” before the ECJ were four times more influential than those hoping to maintain “more domestic control” (2016, 398). While this proclivity was uncontroversial for trade in goods (Larsson and Naurin 2016, 396), it helped precipitate the Brexit backlash because rulings were much less likely to respect state views concerning free movement of workers. The Court was also more attuned to national preferences in areas with qualified majority voting (QMV), acting in its strategic interest to avoid override since QMV makes it easier to overturn judgments with new EU legislation (Larsson and Naurin 2016, 401). Paradoxically, this renders the ECJ obtuse in the most sensitive areas: those where member states maintained vetoes. Taxation and social security/social protection are among the five policy domains requiring

unanimity after the Lisbon Treaty (EU 2018). Disputes about free movement of workers/persons often concern benefits drawing on general taxation in states most annoyed by the ECJ's citizenship jurisprudence, including the UK. Compounding these frustrations, Larsson and Naurin found that the UK intervened more often than any other state (2016, 392). Although the British often argue for "more Europe" regarding competition policy and free movement of goods, services, and capital, they joined several states demanding "more autonomy" for free movement of persons.

Widespread acknowledgement of judicial retrenchment over the past several years exposes the neofunctionalist mask as a myth. Growing ranks of legal scholars see the Court shifting toward a more restrictive interpretation of EU citizen rights (Shuibhne 2015, Thym 2015, Verschueren 2015, O'Brien 2016, Sadl and Madsen 2016), which a team of political scientists attributes to its responsiveness to mass politicization (Blauberger et al 2018). A blatant instance includes the ECJ upholding nationality discrimination in an infringement proceeding only days before the Brexit referendum (ECJ 14 June 2016). Assailing the judgment as part of the trend to dismantle EU citizenship rights, Charlotte O'Brien argues that the "ECJ has played politics and lost," thereby sacrificing "the last vestige of EU citizenship on the altar of the UK's nativist tendencies" (2017, 209). Quantitative analysis reveals that this propensity to "play politics" peaks in years coinciding with treaty revisions and shortly prior to signature, theorized to be a strategic effort to avoid irritating governments when they are best positioned to rollback the Court's jurisdiction or rulings (Castro-Montero et al 2017).

Others have contested these arguments on grounds that treaty revision is too difficult to pose credible threats (Pollack 1997, Alter 1998, Höpner and Schäfer 2012, Davies 2016). This difficulty renders override through legislative correction futile, given that

(over)constitutionalization enables the ECJ to reassert its preferences by declaring “politically corrective” secondary legislation incompatible with the treaty (Davies 2014, Schmidt 2018).

Exhibiting faith in the law, Gareth Davies claims that the restrictive turn in EU citizenship rights results from less deserving litigants (2018).⁴

Meanwhile, evidence of overrides and non-compliance reflect a more nuanced picture of judicial politics than this debate asserts. Scholarship identifies that the ECJ has been defied in ways that deprive its rulings of impact. Treaty change deserves attention in three respects. First, treaty revisions that contest past ECJ rulings are rare, but they exist. The Barber and Grogan Protocols to the Maastricht Treaty did not overturn judgments, but they circumscribed their impact, communicating the limits of toleration (Curtin 1992; Garrett, Kelemen, and Schultz 1998). In the Amsterdam Treaty, Article 141 (4) overrode the ECJ’s 1995 *Kalanke* ruling that rejected a German affirmative action measure (Conant 2002, 235). The rarity of these events could result from either a politically strategic court or the difficulty of attaining unanimous consent. Denying their significance, however, is folly, as they addressed pensions, abortion, and gender discrimination, all of which are salient, and the first had dire fiscal consequences.

Second, while member states never removed a competence that the ECJ possessed, they repeatedly excluded or limited ECJ jurisdiction for new areas from the Maastricht to Lisbon treaties. The exclusion of Justice and Home Affairs from ECJ jurisdiction in Maastricht has only been partially eroded, as states negotiated partial opt-ins and continuing opt-outs in subsequent treaties. The typical mechanism of decentralized EU law enforcement through national courts is

⁴ Portraying Trojani or Brey as more deserving than Alimanovic, and casting Sala as more deserving than Dano requires a thick lens of white, male, and/or Christian privilege. The only unambiguously more deserving litigant is Baumbast, who was economically active abroad and possessed sufficient resources to support a family (2018). The ECJ’s demographic composition makes these biases unsurprising (Gill and Jensen 2018).

truncated since only courts of last instance refer disputes to the ECJ for preliminary rulings concerning asylum and immigration, and states decide to allow or forbid references from lower courts in areas related to policing and judicial cooperation (Due 1998, Conant 2002). Reserving references for courts of last instance constrains access to justice since it forces parties to appeal through the national judicial hierarchy and then requires cooperation from the judges who are least likely to make references in most states, regardless of formal obligations. Despite net gains overtime, the ECJ had its authority over Article 7 TEU⁵ limited to reviewing procedural requirements, and it remains largely excluded from the Common Foreign and Security Policy (Barents 2010).

Third, discussions about curbing the Court reflect the politicized context prevailing since the 1990s. The informal British proposal to overturn ECJ rulings through QMV in the Council of Ministers (Garrett, Kelemen, and Schulz 1998) foreshadowed Scharpf's arguments that states be able to subject rulings to support from a majority of governments in the European Council (2009 and 2010). European Parliament debates repeatedly addressed eliminating the right of lower courts to make references to the ECJ in the early 1990s (European Union 14 September 1993). In official proposals to the 1996 Intergovernmental Conference, the UK called for an appeals procedure within the ECJ, an expedited procedure for important references, and Council competence to initiate proceedings to correct judicial interpretations of legislation (UK 1996, 2-16). These proposals sought more voice for national governments, and Schmidt now emphasizes how the exclusive right of the European Commission to propose all new EU legislation ratchets up integration because it privileges the Court's expansive interpretations of the treaties over

⁵ The provision under which the Council may suspend a member state's voting rights for violations of democratic values and fundamental rights.

explicit wording in secondary legislation (2018). Parallel ideas for legislative overrides from a Conservative British government in the mid-1990s and progressive German academics today suggest that Luxembourg has a problem. The ECJ has unified not only the mainstream right and left in ire, but also those from majoritarian and constitutional democracies.

Meanwhile, legislative overrides in EU secondary law happen. Explicit regulatory reversals of rulings are rare, but as with treaty revision, they concern disputes over salient social policies affecting individual rights. The Council adopted an amending regulation in 1980 in order to overrule an ECJ judgment and reassert national control over access to cross-border health care, a restrictive approach later affirmed by both the Council and European Parliament in the patient rights directive (Martinsen 2015, 227). In response to a series of judgments expanding access to non-contributory social benefits, member states acted unanimously in the Council to overturn the Court's more generous approach with another amending regulation in 1992 (Conant 2002, 193; Martinsen 2015, 227).

More commonly, both EU and national legislative resistance to unwelcome ECJ rulings takes the form of "restrictive application as policy," "preemption" (Conant 2002, 32-33), "modification" (Martinsen 2015, 36), or "compensatory measures" (Schmidt 2018, 209-211) all of which entail legislation to limit jurisprudence. Examples encompass policy areas including the balance between mutual recognition and regulatory harmonization, liberalization of electricity and transportation, posting workers, collective bargaining, EU citizenship, and cross-border health care. Usually successful at the EU level, this strategy enjoys variable success when deployed unilaterally by national governments in domestic law (Conant 2002, 194-195; Blauburger 2012, Schmidt 2018, 209-210). Despite resistance, the ECJ failed to take the hint for a long time, chipping away at restrictions in EU legislation until opposition became loud and

widespread (Blauberger et al 2018). Expansive interpretations of rights associated with the free movement of workers and their extension to “persons” in the advent of EU citizenship have been particularly controversial (Schmidt 2014, Blauberger and Schmidt 2017).

Given the difficulty in passing EU legislation, innovative case law often meets with legislative gridlock and legal uncertainty about how principles developed for specific disputes apply more generally (Martinsen 2015, Schmidt 2018). Obedience to this creative case law is possible (Blauberger 2014; Schmidt 2018, 211), but confusion about implementation and “pushback” prevails. Schmidt observes that “the sheer complexity of the regulatory framework, which is driven by case law, is actually resulting in ‘dis-unity’, as national administrations and EU citizens ... make sense of ... the complicated legal regime in very different ways” (2018, 243). Lack of uniformity offers opportunities for national governments to avoid unacceptable policies, which reduces the risk of backlash against the ECJ (Conant 2002, Martinsen 2015, Werner 2016), but also results in unequal treatment (Schmidt 2018). Commission prosecution of questionable choices by national administrations can result in infringement proceedings. Yet in adjudicated disputes, compliance with ECJ judgements is delayed in half of all cases and resisted in another ten percent (Hofmann 2018, 12). Even more cases are closed after symbolic compliance or payment of fines despite ongoing defiance, to protect important constituencies or avoid costly implementation (Kilbey 2010, Batory 2016, Falkner 2015).

Decentralized enforcement through national courts directly applying EU law is unlikely to yield different outcomes. References constitute a minute fraction of EU law cases before national courts (Mayoral 2013, Hübner 2017, Pollack 2017). National judges in France, Germany, and the UK (Conant 2002, 190) and Denmark, Norway, and Sweden (Wind 2018, 336) prefer their own interpretations: they all cite treaties, conventions, and EU legislation more

frequently than ECJ rulings that interpret these texts. Existing studies of national judicial interpretation indicate that outcomes vary across courts and often diverge from existing ECJ case law. Early studies found that British judges refused to overturn national provisions that were incompatible with EU law (Chalmers 2000), German and French judges independently interpreted EU law in ways that contradicted ECJ rulings (Conant 2002, 173 and 209-210, and Spanish judges gave precedence to national case law when it conflicted with ECJ jurisprudence (Ramos Romeu 2006). Such resistance continues, with more recent studies finding that national courts enjoy discretion in their application of EU law (Davies 2012, Schmidt 2018, 219-224); national high courts across twenty-five EU member states failed to enforce EU law in a majority of cases (Mayoral 2015); and French, German, and Italian courts did not enforce the EU Race Equality Directive a decade after its adoption (Hermanin 2012).

To the extent that ambiguities persist and national administrations do not anticipate enforcement, governments may evade obligations. National administrators routinely “contain compliance” with unwelcome ECJ obligations by obeying the judgment with respect to the parties to the case and ignoring the broader policy ramifications for similar situations unless legal or political mobilization generates pressures for general application (Conant 2002). A growing literature confirms that such narrow compliance (Helfer 2013) and other evasions characterize many areas of attempted ECJ intervention, with several studies reinforcing the finding that domestic responses to ECJ principles determine practical impact. Judicial efforts to subjugate national labor relations to the free movement of services in the single market from the mid-2000s achieved their intended effects in Sweden and the UK but fell flat in Denmark, Germany, and Italy, owing to different constellations of interests and structures (literature reviewed in Hofmann 2018) or intransigent national courts (Perinnetto 2012). Member states contested ECJ expansions

of eligibility for social benefits and residence rights to migrating EU and third-country nationals long before these issues attracted mass attention, and national administrations consistently demonstrated their ability to limit access in practice (Conant 2002).

Equal treatment, migration, and the absence of European solidarity

Resistance is striking considering that few workers exploited free movement rights historically, with the exception of mass Italian migration in the early period of integration (Straubhaar 1988). Eastern enlargement transformed migration after 2004 as Ireland, Sweden, and the UK immediately accepted workers from newer member states, and opportunities for firms to post workers led to elevated migration in countries imposing the seven-year delay in free movement (Schmidt 2018, 210, 216). Mass migration promptly ensued (Drew and Sriskandarajah 2007), and the social rights of EU citizenship suddenly captured the popular imagination (Blauberger and Schmidt 2017). Often portrayed as a reaction against eastern “others,” frustration develops even when obligations extend equal treatment to wealthier westerners: Austria and Belgium oppose the free movement of German and French students in medicine and veterinary sciences (de Witte 2012).

Yet despite all the acrimony over “welfare migration,” Austria and Germany succeed in denying EU citizens minimum subsistence benefits (Heindlmaier and Blauberger 2017), the UK deploys mass administrative procedures (rather than individual assessments) to exclude claimants from eligibility (Blauberger and Schmidt 2017), and Denmark and the Netherlands creatively “quarantine” mobile EU citizens from benefits coverage (Kramer, Sampson, and Van Hooren 2018). In cross-border health care, Danish courts insulated the national system from ECJ principles until prolonged pressure from the Ombudsman resulted in legislative reform while the Spanish legislature ignored its national courts’ efforts to apply EU law (Martinsen and Mayoral

2017). Poland adopted EU requirements on cross-border care in legislation, but administrative practices remain restrictive and national courts look the other way (Vasev, Vrangbaek, and Krepelka (2017), displaying a pattern of legal change with no implementation that is common in post-communist democracies (Falkner and Treib 2008, Conant 2014). A case study of Danish welfare utilization reveals that local administrators follow the more restrictive provisions of EU legislation rather than the more expansive eligibility declared by the ECJ, enabling Denmark to limit residence rights to EU citizens who provide for themselves and grant full benefits only after a substantial work history (Martinsen, Pons Rotger, and Thierry 2018).

The evasion and controversy concerning EU citizenship indicate that the ECJ exceeded the boundaries of EU solidarity. All “political corrections” of judgments relate to social policy (three treaty revisions and two legislative overrides), and reference rights to the ECJ remain restricted to courts of last instance in areas concerning asylum and immigration. Despite this history, judges displayed a slow learning curve when they overrode restrictions in the Citizenship Directive of 2004/38 for a decade before reversing course with the *Dano* judgment of 2014 (Blauberger et al 2018).

Brexit and the ECJ: British exceptionalism or warning bell?

Blauberger et al (2018) attribute the timing of ECJ retrenchment to judicial accommodation of the public mood rather than government preferences. If true, this was a blunder. Elected governments are more attuned to public sentiments than judges, and heeding government warnings would have been wiser than waiting until entitlements inflamed hostile attitudes about immigration. Often dismissed as exceptional, British Euroscepticism can be a harbinger of trouble. As leaders of two political corrections (Barber and exportability of non-contributory benefits), the British secured unanimous agreement. David Cameron’s demands to

reduce incoming EU citizens' access to benefits during negotiations for a better membership deal (Glencross 2016, 26-33) reflected common frustrations. British calls to curb the Court⁶ and anti-immigrant Brexit grievances are wake-up calls. Even while campaigning to "Remain" as Home Secretary, Theresa May advocated working "to limit the role of the Court of Justice" (2016). She and her then shadow counterpart, Yvette Cooper, responded to animosity toward unlimited EU migration by claiming that talks about migrant quotas could follow a Remain victory (Glencross 2016, 33). Since becoming Prime Minister, May held fast to ending free movement of persons, and the "Withdrawal Agreement" that she negotiated with the EU has UK courts merely taking "due regard" of CJEU decisions after the end of the transitional period (Council 2019, 4). Due regard requires fair consideration of all the facts, but it is not direct effect, which requires enforcement. May's preferred future relationship with the EU accepts transfers of sovereignty to facilitate trade in goods but restores domestic authority over immigration, consistent with the fact that ECJ jurisprudence on trade has been more acceptable than rulings on migrant rights (Larsson and Naurin 2016, 396). Even if migration serves economic interests, national competence can limit rights to the economically active and/or self-sufficient. Granting equality to migrants who contribute for qualifying periods is all that governments agreed to in EU law; it is not a uniquely British preference.

EU institutions heeding the limits of agreement may be the only hope to "head forward" even if this does not produce "more integration." Respecting the limits of legislation may even entail "spillback" relative to ECJ rulings, but tolerating a greater degree of national differentiation may be the only means to preserve most of the benefits of integration. By

⁶ The UK also spearheaded the 2012 Brighton Declaration's agenda to reign in the ECtHR (Madsen 2016).

contrast, if the UK withdraws, ends free movement of people, and reduces ECJ jurisdiction, the disintegrative scenario of “break down” occurs. Extending rights to resident EU citizens after the transitional period and a close trade and customs regime constitute “muddling through,” where path-dependent and incremental responses build on pre-existing institutional structures.

As Brexit negotiations continue, the EU insists on “all freedoms or no freedoms” within the single market. Pragmatic compromises might serve the EU better in the long run.

Euromphiles and progressives may detest these trade-offs, but pretending that judges can impose unwelcome solutions is folly. Courts do not operate in vacuums, and judges become fickle friends in the wake of sustained pressure. Persistently defying democratically elected governments provokes backlash against judges and the beneficiaries of their generosity.

Advocates seeking a more progressive, cosmopolitan Europe need to mobilize for this goal politically in democratic venues and socially in communities where national identity remains salient, rather than deploying lawyers to the comfortable rationality of the court house.

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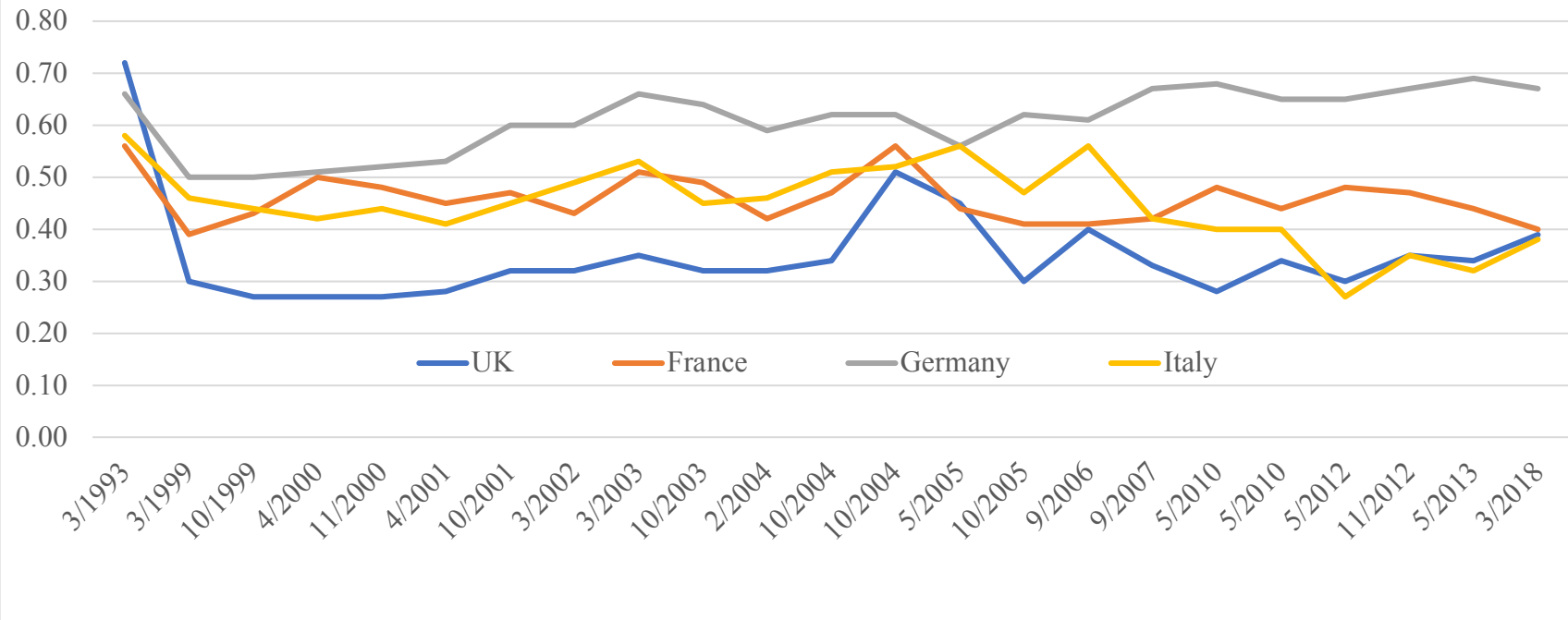
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Figure 1: Percent who tend to trust the European Court of Justice, 1993-2018



Source: Source: European Commission. (1993-2018). *Eurobarometer*. Survey question ‘Trust in European Institutions: European Court of Justice,’ available at <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/themeKy/9/groupKy/28>, accessed February 2019.