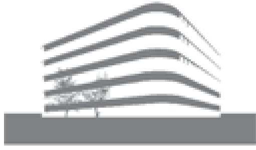


Instituto Juan March
Centro de Estudios Avanzados en Ciencias Sociales (CEACS)
Juan March Institute
Center for Advanced Study in the Social Sciences (CEACS)

Título The Politics of Judging EU Law: A new approach to National Courts in the Legal Integration of Europe

Author(s): **MAYORAL DIAZ-ASENSIO, JUAN ANTONIO**
Year: 2013
Type Thesis (doctoral)
University: European University Institute (Florencia)
City: Madrid: Instituto Juan March de Estudios e Investigaciones, European University Institute, 2015.
Number of pages: xviii, 390 p.
Abstract: *Esta tesis doctoral presenta un análisis de los procesos políticos e institucionales que afectan a la aplicación judicial del derecho europeo a nivel nacional. Como principal novedad, la investigación va más allá de los modelos de comportamiento judicial que se centran principalmente en la investigación de las cuestiones prejudiciales al Tribunal de Justicia de la UE (TJUE), recientemente considerados insuficientes para evaluar el proceso de integración legal de Europa. En consecuencia el estudio considera el impacto de las instituciones y actitudes políticas en las decisiones ordinarias de los jueces relacionadas con la aplicación de la legislación europea. Todo ello se hace a través de la presentación de nuevas cuestiones relacionadas con la relevancia de las preferencias y actitudes de los jueces hacia el ordenamiento legal e instituciones europeas, complementando el enfoque tradicionalmente neo-institucionalista centrado en el impacto de los incentivos y constreñimientos políticos y legalistas en el comportamiento de los jueces. En primer lugar, el análisis confirma la influencia de la evaluación que hacen los jueces de las instituciones de la UE (TJUE y Parlamento Europeo) y de sus homólogos nacionales (Tribunales Constitucionales y Parlamentos nacionales) sobre su autopercepción como jueces de la UE y, posteriormente, en la aplicación del derecho de la UE. En segundo lugar, el estudio también muestra cómo las instituciones nacionales, como los gobiernos y los altos tribunales nacionales, desempeñan un papel destacado en la conformación de los incentivos para la aplicación de la legislación de la UE de los tribunales nacionales, bajo la amenaza de usar su poder institucional para eludir las decisiones de los jueces contrarias a sus preferencias. Por último, la tesis revisa el uso estratégico de la jurisprudencia del TJUE y sus doctrinas (e.g. Supremacía del derecho europeo) por parte de los jueces nacionales para forzar el cumplimiento de otras instituciones con la legislación europea. En conclusión, el estudio pretende ampliar el poder explicativo de las teorías de rango medio sobre el papel que los tribunales nacionales han jugado en el proceso de integración legal de la UE mediante la incorporación de elementos legalistas e intergubernamentalistas en las teorías neo-funcionalistas del empoderamiento judicial.*

Your use of the CEACS Repository indicates your acceptance of individual author and/or other copyright owners. Users may download and/or print one copy of any document(s) only for academic research and teaching purposes.

Instituto Juan March de Estudios e Investigaciones

JUAN ANTONIO MAYORAL DÍAZ-ASENSIO

THE POLITICS OF JUDGING EU LAW: A NEW APPROACH TO NATIONAL COURTS IN THE LEGAL INTEGRATION OF EUROPE

MADRID
2015

Centro de Estudios Avanzados en Ciencias Sociales

Para mis padres, Eugenio y Antonia, y mi hermano, Alejandro.
Por todo lo que me han apoyado a lo largo de este camino.
Si soy lo que soy es gracias a ellos.

Padre, siempre estarás en mi corazón.

Esta obra se presentó como tesis doctoral en el Departamento de Ciencias Políticas y Sociales de la Instituto Universitario Europeo, el 5 de diciembre de 2013. El Tribunal estuvo compuesto por los profesores Adrienne Héritier, Bruno de Witte, Marlene Wind y Alec Stone Sweet.

Juan Antonio Mayoral Díaz-Asensio (Palma de Mallorca, 1981) es licenciado en Derecho y Filosofía por la Universidad de las Islas Baleares, licenciado en Ciencias Políticas y de la Administración por la Universidad de Complutense de Madrid. Asimismo, obtuvo el Diploma de especialización en Ciencia Política y Derecho Constitucional del Centro de Estudios Políticos y Constitucionales, y, el Máster en Democracia y Gobierno en la Universidad Autónoma de Madrid. Formó parte de la vigésima promoción de estudiantes del Centro de Estudios Avanzados en Ciencias Sociales del Instituto Juan March de Estudios e Investigaciones, donde obtuvo el título de Master en 2008. Elaboró su tesis doctoral en el Instituto Universitario Europeo, bajo la supervisión de Adrienne Héritier, y, en el propio Centro, la supervisión adicional de Ignacio Sánchez Cuenca.

TABLE OF CONTENTS

List of Tables vi
List of Figures x
List of Legal Documents xiii
List of Abbreviations xix
Abstract xx
Acknowledgements xxi

CHAPTER 1. INTRODUCTION: A NEW APPROACH TO THE STUDY OF THE POLITICAL ROLE OF NATIONAL COURTS IN THE LEGAL INTEGRATION OF EUROPE 1

1.1. The relevance of the research question at hand 2
 1.1.1. How do national judges perceive EU and domestic institutions? (Chapters 4 & 9) 3
 1.1.2. How do national courts interact with political and judicial institutions? (Chapters 5, 6, 7, 8 & 9) 4
 1.1.3. How do legal factors interact with political accounts? (Chapters 4 to 9) 5
1.2. A new analytical perspective in the field of EU Judicial Politics 6
 1.2.1. From courts to judges 7
 1.2.2. Combining attitudinal and institutional analysis 10
 1.2.3. Reconsidering neo-functionalism 10
1.3. Research design and methodological limitations 12
1.4. Plan of the study 15

CHAPTER 2. RETHINKING THE ROLE OF NATIONAL COURTS IN THE EU LEGAL INTEGRATION PROCESS: NATIONAL COURTS AS DECENTRALIZED EU COURTS 19

2.1. The role of national courts in the process of European integration 19
2.2. Filling the gap studying EU law judicial enforcement: Legal integration and constitutionalization beyond the preliminary

references system, CJEU rulings and the acceptance of EU law supremacy 22
2.3. The missing link: The relationship between EU law application and the preliminary references system 30
2.4. Legal integration and the EU policy implementation process 35
2.4.1. The role of national courts as EU courts: mere enforcers or authentic policy-makers? 36
2.4.2. The impact of EU constitutionalisation in national judiciaries' power 45
2.5. Conclusion 70

CHAPTER 3. PUZZLING POLITICS INTO THE EU JUDICIAL POLICY-MAKING PROCESS: A RECONSIDERATION OF JUDICIAL EMPOWERMENT APPROACHES TO THE ROLE OF NATIONAL COURTS 73

3.1. Judicial empowerment theory revisited: The role of political institutions in the judicial decision making process 74
3.2. Disentangling the EU judicial policy process: How do national courts enforce EU law? 81
3.3. What are the driving forces behind the judicial enforcement of EU law? 98
3.4. Explaining legal integration through a reconsidered political theory: Bridging inter-governmentalism and judicial empowerment approaches 109
3.5. Conclusions 119

CHAPTER 4. THE POLITICAL MICRO-FOUNDATIONS OF EU JUDGES: THE RELEVANCE OF MULTILEVEL POLITICS 121
4.1. Introduction 121
4.2. Building European judges: A new challenge for European institutions 123
4.3. National judges as EU judges? An exploration of national judges' attitudes and behaviour towards EU law 124
4.4. The relevance of multilevel institutional trust in national judges' feelings and decisions as EU judges: A theory of institutional compensation 134

4.5. Which factors convert national judges into EU judges? The effect of institutional trust for the incorporation of national judges into the European institutional system 142
4.5.1. Research design, data and variables 142
4.5.2. Empirical analysis and findings 147
4.6. Conclusions 160

CHAPTER 5. SUPRANATIONAL ADJUDICATION AS A POLITICAL STRATEGY: A NEW APPROACH AS MULTIPLE-ALTERNATIVE STRATEGIC DECISION 163

5.1. Introduction 163
5.2. Theorizing the adjudication process as a multiple-alternative decision process: legalist vs. political models 165
5.3. Methodology and data 177
5.4. Empirical analysis: Under which conditions are courts eager to cooperate with the CJEU and how? A multivariate analysis 183
5.5. Conclusions 198

CHAPTER 6. A POLICY-TEST OF SUPRANATIONAL ADJUDICATION AGAINST GOVERNMENTS: THE CASE OF EU SOCIAL SECURITY RIGHTS 201

6.1. Introduction 201
6.2. The Europeanization of social security systems and its context 203
6.3. National courts and the logic of supranational adjudication to the CJEU 207
6.4. Welfare states, implementation of EU social security policies by governments and the reaction of national courts: A comparative analysis 214
6.5. Statistical analysis of the variation of preliminary references among welfare systems 218
6.6. Conclusions 226

CHAPTER 7. GAMBLING FOR EU LEGAL INTEGRATION? ANALYSING NATIONAL COURTS' DECISIONS UNDER POLITICAL AND INSTITUTIONAL CONSTRAINTS 229

7.1. Introduction 229
7.2. The enforcement of EU law by European High courts (2000-2010) 230
7.3. Explaining the enforcement of EU law by national courts: The accommodation of political domestic threat on judges' legal reasoning 234
7.4. Methodology and data 240
7.5. Empirical findings 247
7.6. An additional basic test of judges' incentives: Do judges care about governments? 256
7.7. Conclusions 259

CHAPTER 8. NO TAXATION WITHOUT LITIGATION: THE IMPACT OF JUDICIAL COOPERATION FOR POLICY CHANGE 261

8.1. Introduction 261
8.2. The CJEU and non-discriminatory tax policies: Regulating through multilevel litigation 263
8.3. The Excise Duty Act and the national litigation 265
8.4. The Brzezinski jurisprudence and its implications for policy change 268
8.5. What if the Polish Constitutional Tribunal would have limited the application of EU law? A counterfactual analysis 275
8.6. Conclusion 278

CHAPTER 9. ON EU LAW SUPREMACY 281

9.1. Introduction: The politics of EU legal doctrine 281
9.2. The judicial enforcement of EU legal doctrines by national judges: An old branch new research field? 283
9.3. Mapping national judges' preferences towards EU law supremacy: A new methodological approach 284

9.4. Two models on the judicial enforcement of EU law supremacy 290
9.5. An analysis of attitudes towards the use of supremacy 291
9.5.1. Hypothesis, variables and method 291
9.5.2. Empirical analysis 296
9.6. An analysis of decisions on EU law supremacy 301
9.6.1. Hypothesis, variables and method 301
9.6.2. Empirical analysis 310
9.7. Conclusions 315

CHAPTER 10.CONCLUSIONS 317

10.1. Building loyalties: The relevance of institutional trust 318
10.2. The institutional strategic interactions of courts in the application of EU law 321
10.3. Combining legal and political motivations 323
10.4. Judicial empowerment theories revisited 325
10.5. The Europeanization of national courts: National judges as EU judges? 326
10.6. Further research: Limits and new challenges 328

APPENDIX A. SURVEYS AND DATA FROM NATIONAL JUDGES ON EU LAW 331

APPENDIX B. BUILDING A DATASET OF EUROPEAN COURTS' DECISIONS ON EU LAW 347

APPENDIX C. ADDITIONAL TABLES AND FIGURES 363

APPENDIX D. LIST OF INTERVIEWS AND MEETING GROUPS 367

REFERENCES 369

List of tables

Chapter 2

Table 2.1. Patters of acceptance of central areas of EU la in UK (1971-1998) 29

Chapter 3

Table 3.1. Modes of judicial enforcement of EU law by national courts 92
Table 3.2. Enforcement of preliminary rulings by national courts 96
Table 3.3. The Spanish Courts' treatment of CJEU rulings (precedent + preliminary rulings) 97
Table 3.4. National court' treatment of CJEU rulings 97
Table 3.5. Political determinants of the judicial enforcement of EU law 99
Table 3.6. Approaches on the behaviour of national courts 114

Chapter 4

Table 4.1. Descriptive statistics 146
Table 4.2. Ordered logit regression of the intensity of their feelings as European judges part of the European legal order 148
Table 4.3. Predicted probabilities of the main explanatory variables for feeling strongly identified as EU judge 149
Table 4.4. Ordered logit regression of the intensity of institutional trust in National and European parliaments 150
Table 4.5. Average trust in national parliaments and level of judicial independence 151
Table 4.6. Ordered logit regression of the enforcement of CJEU rulings in case of doctrinal conflict 153

Table 4.7. Predicted probabilities of the main explanatory variables at the maximum level or values 154
Table 4.8. Multinomial logit regression of the doctrinal conflict decision 156
Table 4.9. Ordered logit regression of the intensity of institutional trust in NHC and the CJEU 157

Chapter 5

Table 5.1. Models of judicial cooperation 169
Table 5.2. Average level of judicial independence by country 178
Table 5.3. Descriptive statistics 183
Table 5.4. Type of adjudication within legal areas (%) depending on the position of national governments 184
Table 5.5. Multinomial logit analysis of adjudication by High Courts - Relative Risk Ration results 188
Table 5.6. Descriptive statistics (model for strong judicial hierarchies) 192
Table 5.7. Probit analysis of adjudication in Germany and Poland for all type of courts. 193
Table 5.8. Predicted probabilities of the 'position of the governments' and 'complexity' in strong judicial hierarchies 194
Table 5.9. Predicted probabilities of the 'type of courts' in strong judicial hierarchies 194

Chapter 6

Table 6.1. Hypotheses explaining the differences on the level of preliminary references among EU-15 countries 219
Table 6.2. Descriptive statistics 221
Table 6.3. Time series cross-sectional analysis of preliminary references 223

Chapter 7

Table 7.1. Descriptive statistics 246

Table 7.2. Application of EU law across legal areas (%) 247
Table 7.3. Probit analysis of the application of EU law by High Courts 248
Table 7.4. Predicted probabilities of the main explanatory variables 250
Table 7.5. Courts' treatment of the CJEU rulings 252
Table 7.6. Descriptive statistics (model strong judicial hierarchies) 253
Table 7.7. Probit analysis of EU law application in Germany and Poland for all type of courts. 254
Table 7.8. Predicted probabilities of the 'position of the governments' and 'judicial dependence' in strong judicial hierarchies 255
Table 7.9. Predicted probabilities of the 'type of courts' in strong judicial hierarchies 256
Table 7.10. Probit probabilities of the 'use of citations' in strong judicial hierarchies 256
Table 7.11. Logit of the judges' adaptation to the government's preferences 258
Table 7.12. Predicted probabilities of judges' motivations 259

Chapter 8

Table 8.1. CJEU rulings on taxation (1958-2007) 264
Table 8.2. Polish litigation (sentences) on the compatibility of the Act of 23rd January 2004 on excise duty (Art. 80 and 81) with arts. 25, 28 and 90 European Community Treaty (now art. 28, 30 and 110 TFEU) 270
Table 8.3. Description of Polish litigation (sample=170 polish sentences) 271
Table 8.4. Factors leading the implementation of CJEU rulings against national authorities 273
Table 8.5. Predicted probabilities of Trust in Polish governments, parliament and CJEU 274
Table 8.6. Aggregate responses of the polish judges in the two scenarios 276
Table 8.7. Transfer of judges' responses 277

Chapter 9

Table 9.1. Models of EU law supremacy enforcement 290
Table 9.2. Ordered logit analysis of the determinants of the usefulness of the doctrine of EU law supremacy 296
Table 9.3.1. Predicted probabilities of the main explanatory variables for agreeing with EU law supremacy as essential 298
Table 9.3.2. Predicted probabilities by the type of court for agree with supremacy as essential 298
Table 9.3.3. Predicted probabilities of the main explanatory variables at their maximum levels 300
Table 9.4. Descriptive statistics 310
Table 9.5. Probit analysis on EU law supremacy enforcement by Spanish courts 311
Table 9.6. Predicted probabilities of the main explanatory variables 313
Table 9.7. Distribution of decisions enforcing EU law supremacy 314

Appendix B

Table B.1. List of national high courts (EU-25) 348
Table B.2. List of national courts (Germany & Poland) 350

Appendix C

Table C.1. Multilevel analysis of the application of EU law by high courts 363
Table C.2. Marginal effects and standard errors 364
Table C.3. Ordered logit analysis of the determinants of the attitudes towards EU law supremacy 365
Table C.4. Marginal effects and standard errors 366

Appendix D

Table D.1. List of interviews and meeting groups 367

List of Figures

Chapter 2

Figure 2.1. EU law judgments and referrals to the CJEU by national courts in EU-15 (1961-2011) ... 27

Chapter 3

Figure 3.1. Number of national judicial decisions concerning EU law ... 87
Figure 3.2. Amount of judicial decisions concerning EU law by countries (1961-2010) ... 88
Figure 3.3. EU law judicial enforcement process ... 90
Figure 3.4. Judicial process ... 91
Figure 3.5. Phase of adjudicatory reasoning ... 94
Figure 3.6. Interaction model between institutional and individual factors for the enforcement of EU law ... 108

Chapter 4

Figure 4.1. Support for the European Union: "In general terms, your country's membership to the European Union is..." (%) ... 125
Figure 4.2. Attitudes towards EU law - % of national judges who "agree" or "strongly agree" ... 127
Figure 4.3. "As European judge, I feel part of the European legal order" (%) ... 129
Figure 4.4. "As European judges, I feel part of the European legal order" - average score ... 130
Figure 4.5. "You have to decide over a case to which both the CJEU and the Constitutional/ Supreme Court have different and incompatible opinions in their rulings. As a result you decide to..." ... 131
Figure 4.6. Distribution of responses by country for the question (%): "You have to decide over case to

which both the CJEU and the Constitutional / Supreme Court have different and incompatible opinions in their rulings. As a result you decide to..." 132
Figure 4.7. Effect of the institutional interplay in the role of national courts as EU judges 138
Figure 4.8. Trust in National and European institutions by country - average score 141

Chapter 5

Figure 5.1. Initial adjudication process 166
Figure 5.2. Citation practices of European High Courts (2000-2010) 167
Figure 5.3. Citation practices of European High Courts by country (2000-2010) 168
Figure 5.4. Reasons behind the use of CJEU precedent 195
Figure 5.5. Reasons behind the use of CJEU preliminary references 196

Chapter 6

Figure 6.1. Number of preliminary references (art. 267 TFUE) on Social Security 207
Figure 6.2. Process of domestic judicial enforcement of EU social legislation 208
Figure 6.3. The logic of judicial EU law enforcement 209
Figure 6.4. The impact of the ideology of the government on the number of preliminary references conditioned on the % of EU migrants 226

Chapter 7

Figure 7.1. Percentage of decisions concerning EU law application (2000-2010) 233
Figure 7.2. Citation practices of European High Courts (2000-2010) 237

Figure 7.3. Spatial model on the application of EU law and citations....238

Chapter 9

Figure 9.1. Percentage of judges who agree: "EU law stands above their national legal order"....286
Figure 9.2. Percentage of judges who agree: "Supremacy principle is essential for the EU legal order"....288
Figure 9.3. Opinion of judges towards the supremacy of EU law and its use as a legal doctrine (%)....289
Figure 9.4. Marginal effect of country dummy variables on "supremacy principle is essential" as the incompatibility between EU and national legal principles increases....301
Figure 9.5. Percentage of EU law supremacy enforcement by Spanish courts (1987-2000)....305

Appendix C

Figure C.1. Coefficients for statistically significant effects on EU law supremacy....366

List of Legal Documents

Judicial decisions:

- *Court of Justice of the European Union:*
  - C-8/55 *Fédération Charbonnière de Belgique Fédéchar v. High Authority* [1956] ECR 245.
  - C-13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 45.
  - C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
  - C-6/64 *Flaminio Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] ECR 585.
  - C-57/65 *Alfons Lütticke GmbH v. Hauptzollamt Sarrelouis* [1966] ECR 205.
  - C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
  - C-43/71 *Politi s.a.s. v. Ministry for Finance of the Italian Republic* [1972] ECR 1039.
  - C-93/71 *Leonesio v. Italian Ministry of Agriculture* [1972] ECR 293.
  - C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491.
  - C-127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior* [1974] ECR 51.
  - C-146/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 139.
  - C-166/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR-33.
  - C-8/74 *Procureur du Roi v. Benoît and Gustave Dassonville* [1974] ECR 837.
  - C-36/74 B.N.O. *Walrave and L.J.N. Koch v. Association Union cyclist international, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405.
  - C-41/74 *Yvonne Van Duyn v. Home Office* [1974] ECR 1337.

- C-43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.
- C-35/76 *Simmenthal v. Amministrazione delle Finanze dello Stato* [1976] ECR 1871.
- C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.
- C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* or "Cassis de Dijon case" [1979] ECR 649.
- C-148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629.
- C-104/79 *Pasquale Foglia v. Mariella Novello* [1980] ECR 745.
- C-244/80 *Foglia v. Novello II* [1981] ECR 3045.
- C-283/81 *CILFIT v. Ministero della Sanità* [1982] ECR I-3415.
- C-14/83 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.
- C-294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339.
- C-152/84 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.
- C-287/85 *Germany v Commission* [1987] ECR 3203.
- C- 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.
- C-242/87 *Council v Commission* [1989] ECR 1425.
- C-5/88 *Hubert Wachauf v. Federal Republic of Germany* [1989] ECR 2609.
- C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] 1 ECR 4135
- C-188/89 *A. Foster and others v. British Gas plc.* [1990] ECR I-3313.
- C-234/89 *Stergios Delimitis v. Henninger Brau* [1992] CMLR 210.
- C-260/89 *Elliniki Radiofonia Tileorasi Anonymi Etairia v. Dimotiki Etairia Pliroforisis and Kouvelas* [1991] ECR I-2925.
- Joined cases C-6/90 and C-9/90 *Andrea Francovich and Daniela Bonifaci and others v. Italian State* [1993] ECR I-5357.
- Joined cases C-320/90 to C-322/90 *Telemarsicabruzzo and other v. Circostel and other* [1993] ECR I-393.
- C- 343/90 *Lourenço Dias v. Director da Alfândega do Porto* [1992] ECR I-4673.
- C-334/92 *Wagner Miret v. Fondo de Garantía Salarial* [1993] ECR I-6911.

- Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur v. Federal Republic of Germany and The Queen v. Secretary of State for Transport ex parte Factortame Ltd.* [1996] ECR I-1029.
- C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman and others* [1995] ECR 4291.
- C-268/94 *The Portuguese Republic v. The Council of the European Union* [1996] ECR I-6177.
- C-15/96 *Kalliope Schöning-Kougebetopoulou v. Freie und. Hansestadt Hamburg* [1998] ECR I-47.
- C-85/96 *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.
- C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.
- C-129/00 *Commission v. Italy* [2003] ECR I-4637.
- C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.
- C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.
- C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.
- C-173/03 *Traghetti del Mediterraneo SpA v. Repubblica italiana* [2006].
- C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981.
- C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini* [2007] ECR I-6199.
- C-313/05 *Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie,* [2007] ECR I-513.
- Joined cases C-290/05 and C-333/05 *Ákos Nádasdi v. Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága and Ilona Németh v. Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága* [2006].
- C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.
- C-426/07 *Dariusz Krawczyński v Dyrektor Izby Celnej w Białymstoku* [2008].
- C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle Entrate v. Fallimento Olimpiclub Srl* [2009] ECR I-7501.

- C-173/09 *Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa*, Opinion of the Advocate General [2010].

- *Belgium – Cour d'Arbitrage*
  - No. 12/94, Ecoles Européenes (01.02.194).

- *Czech Republic - Constitutional Court*
  - Pl. ÚS 50/04 (08.03.2006): Decision on Post-Accession Decision.
  - Pl. ÚS 29/09 (03.11.2009): Decision on the ratification of the Lisbon Treaty of the Czech Constitutional Courts.

- *Cyprus – Supreme Court*
  - Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest Warrant Law.

- *Denmark – Supreme Court:*
  - *Carlsen v. Rasmussen* Case No 1-361/1997 (06.04.1998): Danish Supreme Court of the Maastricht Treaty in case.

- *France - Conseil Constitutionnel*
  - Décision n° 92-312 (02.09.1992): *Maastricht* Judgment.
  - Décision n° 97-394 (31.12.1997): *Amsterdam* Judgment.
  - Décision n° 2004-505 (19.11.2004): *Constitutional Treaty* Judgment.
  - Décision n° 2013-314P (04.04.2013): First Preliminary reference to the Court of Justice of the European Union.

- *Germany - Constitutional Court*
  - BVerfGE 37, 271, (29.05.1974): Solange I Judgment.
  - BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986): Solange II Judgment.
  - BVerfGE 89 (12.10.1993): *Brunner v. European Union Treaty* or "Maastricht" Judgment.
  - BVerfG, 1 BvR 1036/99 (9.01.2001).
  - BVerfGE, 2 BvE 2/08 (30.6.2009): Lisbon Treaty Judgment.

- *Greece – Council of State:*
  - *Bagias v. DI KATSA* Decision No. 2808/1997).

- *Hungary – Constitutional Court:*
  - Decision 17/2004 (V. 25) AB.

- *Ireland – Supreme Court:*
  - Crotty v. An Taoiseach [1987].

- *Italy - Constitutional Court:*
  - Judgment n. 14/1964.
  - Judgement n. 183/1973, Sentenza *Frontini.*
  - Judgment n. 232/1975.
  - Judgment n. 206/1976.
  - Judgment n. 163/1977.
  - Judgment n. 170/1984, Sentenza *Granital.*
  - Judgment n. 168/1989, Sentenza *Fragd* (21.04.1989).
  - Order n. 103/2008.

- *Poland:*
  - Case K 18/4 (11.05.2005): Judgment of the Constitutional Court on the Polish Accession Treaty.
  - Case P 1/05 (27.04.2005): Judgment of the Constitutional Court on the European Arrest Warrant.
  - Case III SA/Lu 690/04 (25.05.2005), Regional Administrative Court in Lublin.
  - Case I SA/Ld 980/05 (09.11.2005), Regional Administrative Court in Łódź.
  - Case I SA/Ol 374/05 (16.11.2005), on the submission of a legal question to the Constitutional Tribunal, Regional Administrative Court in Olsztyn.
  - P 37/05 (19.12.2006): Procedural decision of the Constitutional Court.
  - Case III SA/Wa 254/07 (06.03.2007), Regional Administrative Court in Warsaw.
  - Case I SA/Gd 570/08 (16.11.2008), Regional Administrative court in Gdańsk.
  - Case I SA/Gd 330/08 (05.08.2008), Regional Administrative court in Gdańsk.

- *Spain:*
  - Judgment STS 1990/2747 of the Spanish Supreme Court (24.04.1990).
  - Decision no. 1236 (01.07.1992): Judgment of the Spanish Constitutional Court in Maastricht.
  - Judgment no. 180/93 (31.05.1993) of the Spanish Constitutional Court.
  - Declaration no. 1/2004 of the Spanish Constitutional Court.
  - Order no. 86/2011 (9.6.2011) of the Spanish Constitutional Court: First Preliminary reference to the Court of Justice of the European Union.

- *UK – House of Lords:*
  - 1st judgment Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others (18.05.1989).
  - 2nd judgment Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others (11.10.1990).

EU legislation and decisions:

- *European Parliament:*
  - European Parliament. *Report on the role of the National Judge in the European Judicial System*, A6-0224/2008.
  - Coughlan, John; Opravil, Jaroslav and Heusel, Wolfgang (ERA - Academy of European Law). *Judicial Training in the European Union Member States.* Document requested by the European Parliament's Committee on Legal Affairs [14.10.2011].

- *European Commission:*
  - Commission Notice on *Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty* [Official Journal C39 of 13.02.1993].
  - Commission Notice on the *Cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (Text with EEA relevance) [Official Journal C 101 of 27.04.2004].
  - European Commission. *Building Trust in the EU-wide justice. A new Dimension to European Judicial Training.* COM/2011/0551 final. [13.09.2011].

List of Abbreviations

BvG: Bundesverfassungsgericht – German Constitutional Court
BVerfGE: Bundesverfassungsgericht – German Constitutional Court
CJEU: Court of Justice of the European Union
CC: Constitutional Court
CJEU: Court of Justice of the European Union
EC: European Community
EC law: European Community Law
EEC: European Economic Community
EEC Treaty: Treaty establishing the European Economic Community
EP: European Parliament
ERA: Europäische Rechtsakademie – Academy of European Law
ES: Spain
EU: European Union
EU law: European Union Law
GR: Germany
ICC: Italian Constitutional Court
ICT: Information and Communications Technology
NC(s): National Court(s)
NHC(s): National higher court(s)
NGO: Non-governmental organization
NL: The Netherlands
NP: National Parliament
PCT: Polish Constitutional Tribunal
PL: Poland
SCC: Spanish Constitutional Court
TFEU: Treaty on the Functioning of the European Union
UK: United Kingdom

ABSTRACT

This research aims to present a comprehensive analysis of the political and institutional processes that are at work in the judicial application of EU law on a national level. As a main novelty, the research intends to go beyond judicial behaviour models that focus predominantly on explaining the use of preliminary references. One could namely suggest that the way national courts participate in the preliminary reference procedure is not sufficient to assess the available modes for the judicial integration of Europe. Accordingly, the study considers the impact of political institutional and attitudinal factors affecting the judicial enforcement of EU law.

This is done by posing new questions, for instance, the relevance of national judges' preferences towards EU legal order and institutions, as well as by evaluating and reviewing the impact of political and legal institutions on their behaviour and its consequences for policy areas. First of all, the analysis confirms the influence of judges' evaluation of EU institutions and their national counterparts on their self-perception as EU judges and, subsequently, in the application of EU law. Secondly, the study shows how national institutions, like governments and national high courts, play a prominent role in shaping national courts' incentives for the application of EU law, as they may use their institutional power to circumvent judges' decisions. Finally, it reviews the strategic use of European instruments such as the CJEU precedent and its doctrines (e.g. supremacy) to overcome domestic threats when applying EU law.

To conclude, the study tries to expand the explanatory power of the middle range accounts of the role national courts played, by integrating the analytical strength of the legalist/ intergovernmentalist theories into neo-functionalism.

ACKNOWLEDGEMENTS

A PhD can become not only intellectual but also an intense personal experience. During these years I had the opportunity to grow as a researcher and as a person thanks to being in EUI and interacting with professors and students of different nationalities. Altogether it made me understand that in research, good scholars and peers supporting, criticizing, inspiring and helping you are as much necessary as a good theory and reliable data.

First and foremost, I will be eternally grateful to my supervisor, Adrienne Héritier, for her never-ending academic, institutional and personal support and attention. She helped me to overcome all the difficulties that appeared during this long way and to keep going forward, especially in my first and last months in Florence. I would like to thank her for all the discussions in Convento about the thesis, in which she always looked for the most accurate approach to politics. Her comments and reflections enormously helped me to think of ways to improve my thesis. I am especially indebted to her for encouraging me with the idea of doing surveys.

I would like to thank the members of the examining board: Bruno de Witte, Marlene Wind, Alec Stone Sweet for their valuable and challenging comments and suggestions that helped me to improve this manuscript.

Collecting the empirical material for this thesis would not have been possible without the institutional support and funding for travel and collection of data from several institutions and scholars. For that reason, I would like to thank Josep Borrell, Ana Rosa del Castillo, Françoise Thauvin, Maureen Lechleitner, Gabriella Unger, Veerle Deckmyn and Machteld Nijsten. Your infinite patience with my long list of questions and requests was invaluable. In addition, I am indebted to Marlene Wind, Tobias Nowak and the members of the project "National judges as

European Union judges" for sharing the questionnaires and data for Denmark, Germany and the Netherlands, which served as an inspiration to my work. I would like to thank Marian Stasiak and the European Centre of Natolin for awarding me with the Paderewski grant and mainly for their inestimable support and help in running the survey among Polish judges. Secondly, I will be eternally grateful for the institutional support and assistance from the members of the Judicial Spanish Network on European Law (RED-UE) at the Spanish Judicial Council and the Spanish Judicial Training School, for supporting and assisting the Spanish survey. I would like to specially acknowledge the invaluable help of José Miguel García Moreno, Carmen Rodriguez Medel Nieto, Aida Torres Pérez, Rosa Mª Freire Pérez, Rafael Bustos Gisbert, Montserrat Comas d'Argemir, José Manuel Gómez Benitez, Carlos Uribe Ubago, Francisco Javier del Burgo Pradillo, Isabel Álvarez Álvarez, Javier Díez Hochleitner, Fernando Pastor López, Julio Baquero Cruz, and Itziar Gómez Fernández. I'm grateful to the European Union Studies Association for awarding me with the "Ernst Haas" Fellowship for gathering and coding the data on national law cases. I would like to thank all the team of friends involved in the data collection and coding phases, including Miguel Hernández, Luis Martínez, Katarzyna Granat, and Jorge Rodríguez. I also should thank Francisco Ramos Romeu and Stacy Nyikos, whom I do not know personally yet, but who kindly contributed with their data. Your research has also been an inspiration to me.

Neither can I forget now, when I am at the end of my doctoral training, those professors, colleagues and institutions that supported me and helped me to understand what political science was about at the start of my postgraduate studies. Firstly, the Centro de Estudios Políticos y Constitucionales where I initially started my postgraduate education and met outstanding academics and peers like Antonio Barroso, Rodrigo de Enrique, Ana Haro, Raúl Letelier, Flavia Carbonell, Erika Rodriguez and Eliane Ettmüller. Secondly, the Juan March Institute which offered me the possibility to work in a very demanding and

stimulating academic environment. I am grateful to professor José María Maravall, Ignacio Sánchez-Cuenca, José Ramón Montero, Walter Mattli, Stephen Holmes, Marta Fraile and Fabrizio Bernardi who contributed to improving my quantitative and analytical approach to politics during my stay there as a master student. Moreover, I'm grateful to the staff without which this thesis would not be as good as it is. I refer to Paz Fernandez, Magdalena Nebreda, Gema Sánchez and Luis Martínez. And I cannot forget my discussions in seminars and experiences shared with my colleagues and friends: Irene (Menéndez), Cesc, Nassos, Pablo, Nacho (Jurado), Nacho (Urquizu), Sandra, Sebas, Alfonso, Kerman, Santi, Irene (Martín), Jan, Marta (Seiz), Alberto, Albert, Dídac, Mariajo, Julia, Marga, Lluís, Alex, Ferran, Inma, Elna and Álvaro.

And, finally, I would like to thank my professors and colleagues from the Social and Political Science and Law departments of the European University Institute, with whom, thanks to the Salvador the Madariaga scholarship, I had the pleasure to share the process of becoming a PhD: Elias, Juana, Pablo, Raúl, Oriana, Michael (Blauberger), Pelle, Frederique, Roxana, Mónica, Martiño, Alejandro, Andrés, Zoe, Edurne, Abián, Marta, José Luis, Jeni, Carolien, Laurie, Hervé, Henio, Maria, Sergi, German, David (Báez), Kivanç, Ilke, Emre, Alexi, Fernando, Gabrielle, Elisa (Piras), Nacho, Kevin, Jana, Donagh, Mattia, Oliver, TJ, Emre, Johan, Michael, Yvette, Po-Kuan, Marat, Mads, David (Willumsen), Emmanuelle, Rebecca and Markus, and especially Pedro Riera who I have met during my years in the Juan March. I always wonder why living in the same island we never met before. Thank you for always being there when I needed help and entertainment. Thanks to you, Pedro, again and to Juana, German, Fred, Pelle, Jeni, Inés, Jorge, Fernando and Miguelito, who always had a place ready for me to sleep in Florence. And, finally, to Daria Popova for her invaluable help during the last stages of working on this thesis and, most importantly, for making me smile again.

And, last but not least, I would like to thank all the scholars who contributed with their comments and helped me in one way or another with the completion and revision of this thesis: Yves Mény, Renaud Dehousse, Miguel Maduro, Philippe C. Schmitter, Antoine Vauchez, Daniel Sarmiento Ramírez-Escudero, Costanza Hermanin, Modesto Escobar, Hans-Wolfgang Micklitz, Arthur Dyevre, Pablo José Castillo Ortiz, Daniela Vintila, and Dimitry Kochenov. Especially, I would like to thank Antonio Barroso, Giuseppe Martinico and Carlos Closa Montero, discussions with whom not only influenced this project but also reinforced our friendship. Moreover, I have some special words for my three polish friends, Urszula Jaremba, Katarzyna Granat, and Aleksandra Sojka. Thank you for sharing your excellence, kindness and sweetness with me in meetings, conferences and coffee conversations.

I cannot forget all my dear friends in Mallorca who patiently waited for this manuscript: Gustavo and Esther (wish you a happy life together), Pau, Marcos, Fer, Diego, David (Xavi), Pedro David, Rubén, Juanlu, Luislo, Miguel, Tito Luis, Nacho, Rosa Pedrera, Victor, Sandra and Leyre. Looking forward to celebrating the end of this trip together. Also I want to thank friends in Madrid and Salamanca: Jonas, Maruxa, Berni, Maribel, Cristina, López, Javi, Bego, Natalia, Jesús, Sofía and Sagar. And Jorge, Delia, Mikel, Migue, Marién, Ana, Rafa, Vane, Manolo, Edu, Esther and their daughter Julieta, Roci, Fran, Filippo, Ema, Samuel, Mathilde and Jean for their close friendship all these years. I will never forget you. Moreover, I would like to welcome Alex, who was born at the same time when these acknowledgments were written. This thesis would not have been the same without your parents, Dalia and Miguel. I would like to express my sincere gratitude to the Rodriguez-Ortiz family who had treated me as another family member, and especially to Teresa and Esteban for their friendship and life lessons given. And, finally, this thesis is a tribute to those whom I will never forget: Salvi, Borja and Sergio. Thanks for becoming a part of my life. To all of them and to all my friends I have mentioned before I dedicate this piece:

"Don't be dismayed at good-byes. A farewell is necessary before you can meet again. And meeting again, after moments or lifetimes, is certain for those who are friends."
Richard Bach, Illusions: The Adventures of a Reluctant Messiah.

Finally, this thesis could not have been possible without my parents, Eugenio and Antonia. Their unconditional support and love have always helped me to keep going in spite of the difficulties. I never managed to find the proper way to thank them for all the sacrifices and efforts they made to provide my brother and I with the best education to reach our dreams. This thesis is dedicated to them as an expression of my eternal gratitude to them.

Florence, 15th November 2013

ACKNOWLEDGEMENTS BY CHAPTERS:

I would like to express my eternal gratitude to Adrienne Héritier for supervising all these chapters and to Dalia Puertas for correcting them. I am also very grateful to a number of people listed below:

Chapter 1 and 2: Thanks to Giuseppe Martinico for comments on these two chapters. Thanks to Francisco Ramos Romeu and Stacy Nyikos for sharing the data used in chapter 2.

Chapter 3: I would like to thank Tobias Nowak and the members of the project "National judges as European Union judges" for sharing the data on German and Dutch judges, and Ignacio Sánchez-Cuenca, Antonio Barroso, Renaud Dehousse and Giuseppe Martinico for their comments on previous versions of this chapter. Also, I would like to thank the organizers and participants of the Theseus Doctoral seminar 2012 at the Centre of European Studies and of the "Rule of Law and Conflict" panel at the 19th International Conference of Europeanists for their suggestions.

Chapter 4 and 6: Thanks to the European Union Studies Association for awarding me with the "Ernst Haas" Fellowship and the European Centre of Natolin for the "Paderewski" grant. These funding has been used for gathering and coding the data presented in chapters 4 and 5. Furthermore, I would like to thank all the friends and researchers involved in the data collection and coding phases, including Miguel Hernández, Luis Martínez, Katarzyna Granat, and Jorge Rodríguez.

Chapter 5: I would like to thank Antonio Barroso, Michael Blauberguer, Pedro Riera, Giuseppe Martinico, and the members of the "Courts and Judges" EUI Working Group for their comments.

Chapter 8: Thank you to Tobias Nowak and the members of the project "National judges as European Union judges" for the data on national judges on Germany and the Netherlands and to Francisco Ramos Romeu for sharing his data set on Spanish EC law cases with me. This chapter could not be possible without his

effort and interest in coding all this material. I also want to thank Bruno de Witte, Marlene Wind, Urszula Jaremba, and the participants of the EUDO/CJC workshop on "National courts vis-à-vis EU law" for their fruitful comments on previous versions of this chapter.

CHAPTER 1. INTRODUCTION: A NEW APPROACH TO THE STUDY OF THE POLITICAL ROLE OF NATIONAL COURTS IN THE LEGAL INTEGRATION OF EUROPE

The European Union has built a system of judicial protection at a European level whereby the national courts are primarily responsible for the enforcement of citizens' European rights when they are not successfully acknowledged under their Member States. In this sense, national courts, as decentralized EU courts, are obliged to ensure effective application of EU law and, as a result, to promote the process of legal integration of the European Union.

For a long time, scholars of different disciplines have provided various theories regarding the problem of the political and institutional determinants that influence the way national judges enforce these rights and behave in the EU legal integration process. Scholars focused on the cooperation between the Court of Justice of the European Union (CJEU) and national courts, the role national litigants play in the preliminary reference procedure or the reasons for accepting the principles of supremacy and the direct effect of EU law by national judges.

Following this tradition, this study develops a new research agenda and reviews some old aspects on the political and institutional factors affecting the involvement of national courts in the EU legal integration and policy-making processes. This will be carried out by raising new questions and discussing different

empirical and partially neglected aspects concerning, for instance, the relevance of national judges' profiles (e.g. attitudes, knowledge and experiences with EU law). As well as by evaluating the impact of political and legal institutions and its consequences for policy areas, while employing a new methodological and institutional theoretical approach to the problem from a political science perspective.

The object of study, national courts and judges, is approached through an interdisciplinary perspective that combines insights from sociology and law to political science, with an integrative comparative approach and the use of mixed methods and techniques. In that sense, by providing novel data on law cases and judges' opinions gathered from surveys and interviews, I will provide answers to questions concerning the role of politics on the judicial application of EU law.

1.1. The relevance of the research question at hand

The central aim of this study is to identify *under which conditions political institutions may shape national courts and judges' decisions on EU law*. I would like to highlight that this analysis intends not only to study the performance of courts through the analysis of their institutional interactions with other branches of power (e.g. executive, legislative or higher courts), but also to understand the judicial decision-making process surrounding the application of EU law by considering the following: a) The relevance of judges' views towards EU and domestic institutions for the application of EU law; b) The way in which supranational and national institutions incentivize and constrain this application.

In order to carry out the research on judges' political attitudes and motivations, this thesis applies research methods (such as statistical analysis, surveys and interviews) that are innovative for the field of EU judicial politics. From the empirical analysis, two main factors are identified: a) institutional trust in EU and

domestic institutions b) the position of the CJEU, government and high courts as to the application of EU law. Moreover, the thesis underlines the relevance of legal factors that, in combination with the political ones, create incentives for the application of EU law and its instruments (preliminary references and CJEU doctrines).

These elements are framed under a strategic model of the behaviour of national courts as regards to other European and domestic institutions (Epstein and Knight 2000). This model is defined by three assumptions: a) judicial actors make choices with the intention of achieving certain goals b) these actors act strategically in the sense that their choices depend on how they expect other actors are going to behave c) the choices are structured within an institutional framework to which all actors belong. Therefore, courts will be analysed as goal-oriented actors that are influenced, incentivized and constrained in their power and choices by institutions (Farrell and Héritier 2005; Héritier 2007).

Accordingly, it will be assumed that judges, adopting the role of policy-makers (Dahl 1957), have political/legal preferences that they try to implement, specifically, a certain policy or legal interpretation or vision about the integration process. However, judges cannot act as unconstrained agents and have to take into account the preferences of diverse actors within the European and national institutional framework. In that sense, politicians and institutions interested in maximizing their own influence on policy outcomes will constrain courts to gain some benefit from their decisions. Keeping in mind these assumptions, this thesis aims to contribute to the main research question on whether and how specifically politics influence the judicial enforcement of EU law, by answering three sub-questions regarding the influence of political institutions on the daily judging EU law process:

1.1.1. How do national judges perceive EU and domestic institutions? (Chapters 4 & 9)

First, the study aims to explore the influence of judges' evaluation of EU institutions and their national counterparts on their self-perception as EU judges and, subsequently, in the application of EU law: How does the trust in institutions influence EU law? Do national judges regard the institutional performance of EU institutions during the application of EU law? Which aspects are observed to assess this performance? Moreover, which are the consequences of this evaluation for the application of CJEU rulings and doctrines? With these questions, I address more generally, the consideration of national courts as decentralized courts placed in a multilevel political-institutional game.

1.1.2. How do national courts interact with political and judicial institutions? (Chapters 5, 6, 7, 8 & 9)

The second main topic of this dissertation concerns the strategic interactions of national courts with European and domestic institutions. Under the assumptions presented above, this work deals with the following questions: Do national courts care about the reactions of other national institutions such as governments, higher courts, etc.? And why? To what extent the cooperation with the CJEU may help national judges to overcome these threats and opt for their most preferred interpretation of European Union Law? This question will be applied not only for the analysis of the decisions concerning the adoption of EU law norms and interpretations (Chapters 7 & 8), but also for the consideration of other EU legal instruments such as the references to the CJEU (Chapters 5 & 6) and the enforcement of CJEU doctrines like supremacy (Chapter 9).

1.1.3. How do legal factors interact with political accounts? (Chapters 4 to 9)

This research is not geared towards determining the unique validity of political models, but focuses instead on its combination with legal models. On this regard, I question to what extent political and legal explanations used for accounting judges' behaviour can be integrated. By analysing the application of EU law, the study tests political and legal institutional explanations that account for the behaviour of national courts. In law and economics literature, there has been a long research aimed at exploring the referral practices of lower courts to higher courts (mainly devoted to the US Supreme Court). This dissertation dialogues with the mentioned literature to extend its application to the European model, following the example of Francisco Ramos's (2003, 2006) research as to European adjudication.

In the light of these questions, the research facilitates the understanding of the political and institutional processes that are at work in the judicial application of EU law at a national level. The findings in this dissertation may also help to shed light over the process of Europeanization of national institutions and to contribute to the broad debate on the Europeanization of domestic institutions and policies, or institutional change in a broader sense. As the main scope of this research is to inquire about the institutional and political conditions under which the EU caused institutional change in the Member States courts, this study may become a good reference for scholars devoted to Europeanization studies.

It is worth noting that, so far, very little is known about the effect of EU politics upon the judiciary (Jupille and Caporaso 2009; Ladrech 2010; Nyikos 2008). Furthermore, it is not clear how different institutional and political factors may bear on those processes. Only few scholarly efforts have so far been made (Börzel 2006; Claes 2006; Davies 2012; Jupille and Caporaso 2009; Kelemen 2011; Martinsen 2011; Mattli and Slaughter 1998; Panke 2007; Schmidt 2008; Slepcevic 2009; Stone Sweet and

Stranza 2012; Wind et al. 2010) which very much supports the desirability of an in depth research devoted to this problem. These contributions have emphasized the relevance and pressure that the CJEU can exert through the dynamic of its judgments and its use by national courts for the integration of European Union law. By and large, this dissertation contributes to the analysis of EU judicial politics, and specifically to the Europeanization of national courts, by analysing which institutional dynamics influence the judicial enforcement process of EU law.

As the principle novelty, the research will aim at going beyond judicial Europeanization models that focus predominantly on preliminary references as main indicators of this process (Alter 2001; Conant 2002; Cichowski 2007, Golub 1996; Stone Sweet and Brunell 1998). The way the national courts participate in the process of cooperation with the CJEU is not sufficient to assess the varieties of the national and EU-induced dynamics affecting judges' attitudes and positions towards the legal system of the Union. It also does not seem to reflect the extension of instruments and modes available to national judges for the integration of EU law within their national legal systems. Accordingly, the study will consider the impact of other institutional and attitudinal factors by analysing how they effectively affect the *constitutional* balance of powers amongst national institutions.

1.2. A new analytical perspective in the field of EU Judicial Politics

The study offers three main novelties—two methodological (1.2.1. & 1.2.2.) and one theoretical (1.2.3.)—to the approach of national courts as a study target in the field of EU judicial politics. It consists of three innovations that try to improve our understanding of the role of national courts and its theorization within the legal integration of Europe.

1.2.1. From courts to judges

As mentioned previously, the dissertation, for the first time in the literature, explores the political implications of individual judges' attitudes and profiles on their behaviour. This study supplements the traditional approach to the study of courts through the analysis of their judgments, by introducing the perspective of national judges' profiles and attitudes. This study offers a new set of legal-political questions and items related to their agreement with the main EU law principles and values, as well as with EU institutions, among other questions.

In particular, looking into the minds of judges using surveys is an incipient task that commenced with an interest on how national courts applied EU law in practice and the national judges' perception of the European legal order. The Legal Affairs Committee of the European Parliament conducted the first survey on "the role of the national judges in the European Judicial system" in 2007[1], concluding that the main barriers for the application of EU laws were the language skills of the judges and the difficulty in understanding EU laws. A second attempt originated by the European Parliament is the recently released ERA report on "Judicial Training in the European Union Member States" requested by the European Parliament's Committee on Legal Affairs and published in 2011.[2] The study describes the state of judicial training in the European Union in EU law using the results of surveys among judges, prosecutors and court staff collected by the ERA with the collaboration of the European Judicial Training Network. The report mainly contains recommendations on how to improve the judicial training programme and cooperation. Concerning our matters, the study posed interesting questions to individual judges from the EU-27 about their knowledge and experience in dealing with EU law,

[1] European Parliament Report (2008) on the role of the National Judge in the European Judicial System, A6-0224/2008.

[2] www.era.int

their contacts with foreign judicial authorities, their evaluation of judicial training provision, and other key factors in the creation of a common European judicial culture. The main conclusion stated that, even though national judges acknowledge the relevance of EU law for their work, they still do not know how and when to apply EU law or refer a question to the CJEU.[3]

Nevertheless, recent academic studies changed this practical orientation testing whether the individual judges' preferences and attitudes towards EU law matched the EU institutions' expectations and requirements regarding the configuration of the EU legal order. The main aim of those studies was to identify how national judges apply EU law by questioning them on their knowledge, experience and views with regard to the application of EU law or the use of preliminary references (Nowak 2011). The empirical literature on judges' opinions on EU law matters is scarce but incipient: Wind et al. (2009), Wind (2010), Nowak et al. (2011) and Jaremba (2012). This study follows the same path and makes use of these innovations to know if national judges may be considered EU judges and why, by looking into their political attitudes (e.g. identity, values and trust), in combination with other meso- (type of court, jurisdiction, etc.) and macro-institutional

---

[3] It is worth mentioning that the author of this dissertation, with the support of the Presidency of the European University Institute, requested the individual data on judges' opinions collected by these institutions. Unfortunately, both of them denied this possibility by arguing the protection of the privacy of the respondents. We offered these institutions several alternatives to preserve this privacy, all of them widely used by social scientists for the treatment of individual data. Regardless, our claims received naïve and unfounded arguments as a response, or suggestions that their reports exhausted the analysis of the data. It is surprising how the European institutions may invest huge amounts of money for data collection that can be useful for social researchers, but we are not able to make use of it under the unfounded suspicion of misuse. I would like to take this opportunity and use this footnote to "not thank" these institutions and researchers in charge of those reports for their non-cooperation with this study.

factors (judicial independence, openness of the national legal system, public opinion, among others).

This study took as a reference the surveys applied by Tobias Nowak and his colleagues, and by Marlene Wind to create a questionnaire for its application in Poland and Spain. Both questionnaires were combined and complemented with new questions the author found of interest. As a result, the survey inquires about several areas: the judges' experience with and knowledge of EU law, the relationship between their national and the EU legal system, their opinions towards EU and domestic institutions, and their use of preliminary reference and application of CJEU rulings. The questions are closed, offering a limited number of alternatives to the respondents. Moreover, following the previous questionnaire from Nowak et al. (2011), I have included vignettes that describe fictitious EU law cases, in which the judges are asked to choose one of the offered courses of action.

After the data collection process in cooperation with national judicial institutions and associations, I managed to collect massive data from judges in Spain and Poland.[4] The inclusion of these two new countries not only increased the amount of individual observations and variations to be analysed, but also contributed to improve the institutional variation across countries exploited in the analysis. Consequently, the database covers countries with significant differences, not only in the years of EU membership, but also in their legal system (the degree of potential legal conflict), the structure of the judiciary (existence of Constitutional courts, number of Supreme courts, judicial review powers), and the relationship of national courts with the political power (degree of judicial independence).

---

[4] Judges from France, Portugal, Latvia, Lithuania and Bulgaria also responded questionnaires. Due to their scarce number, they have been only used in some descriptive analysis.

1.2.2. Combining attitudinal and institutional analysis

My starting point is that strategic institutional settings, together with preferences, determine choices (Morrow 1999). This study combines attitudinal and strategic institutional perspectives (Maveety 2003) by studying the joint impact of their political-legal attitudes towards judicial institutions, along with institutional incentives derived from their position within the judicial hierarchy and legal context. Mainly, I state that the institutional framework whereby judges find themselves, in interaction with their individual attitudes, determines their assessment of EU law.

Traditionally, studies on the application of EU law and use of preliminary references have focused on the influence of institutional settings on the behaviour of courts. By setting up judges' preferences and motivations from theories, scholars on EU judicial politics mainly explored how institutions influenced their preferences and forced courts to act strategically. This study tries to enrich the account given in those analyses by also testing the impact of micro-level factors, like attitudes towards politics, institutions and legal systems and its interaction with the macro- and meso-levels of analysis.

1.2.3. Reconsidering neo-functionalism

Though the dissertation gives pre-eminence to neo-functionalist' judicial empowerment factors in judicial decision-making, it also aims to acknowledge the relevance of national dynamics driving the legal integration process through litigation. For this reason, I adopt an analytical and empirical approach challenging, according to Sandholtz and Stone Sweet (2012: 19), neo-functionalist accounts arguing for a full migration of rule-making authority from national governments to the European Union by emphasizing, not only on the supranational processes compelling courts to apply EU law, but also on the importance of domestic institutions for EU legal integration.

The revised neo-functionalist approaches of this study, especially in case of empowerment theories, should not be considered as 'half way' between the two approaches, given it stands closer to the neo-functionalist assumptions. This approach may offer a better explanation of the role national courts play in the European legal integration process, not because it tries to find the perfect fusion between two opposing theories, but because it explains how the EU legal integration can work despite the existence of domestic processes that could hinder or contain that process. Therefore, this approach tries to overcome neo-functionalist limitations on the role and impact of national institutions in the EU policy process by combining the analytical strengths of both approaches, using different aspects of these theories that better suit the different kinds of aspects of the EU judicial enforcement (Sandholtz 1996). The identification of these processes will allow to assess the real impact of the judicial integration of the EU, and, ultimately, to expand the explanatory power of these micro- and meso-accounts of the EU policy-processes to the macro-level of theories of European Integration.

Secondly, the novelty of approaching judges massively allowed an improvement in functionalism by overcoming an analytical caveat not yet addressed. I refer here to the gap determining the preferences of judicial actors. The fact is especially important because although preferences have been part of the theories explaining the legal integration, until know, scholars devoted to EU law and politics inferred motivations from their decisions (induction) or derived on the basis of pre-existing theories of judicial integration (deduction). Nevertheless, we cannot be sure that the behaviour observed might perfectly represent judges' preferences, because it might be influenced during the process of judicial decision-making by other institutions or strategic settings (Frieden 1999). However, and thanks to the survey methodology, we are able to put some empirical flesh on the structure of preferences and incentives built by the theories of integration. Subsequently, this study attempts to map national judges' preferences towards EU law, EU institutions

and other political factors by asking judges to reveal them. Then these attitudes will be used to analyse the enforcement of EU law and its interaction with other institutions. In addition, those preferences will corroborate empirically some of the assumptions and deductions developed by integration theories about the motivations of judges.

1.3. Research design and methodological limitations

As a starting point, this research applies the logic of 'most similar' and 'most different' designs (Przeworski and Teune 1970), by focusing on inter-systemic similarities and inter-systemic differences of a set of cases. Firstly, for the case of most different system design, the similar systemic characteristics are defined by the common membership of all the universe of cases (EU-27), which set up common structures and dynamics for the adoption of EU law at the national and supranational levels. Meanwhile, inter-systemic differences (here adopted as explanatory variables) are identified in the variation of some domestic factors (e.g. government ideology, judicial structure, type of legal system, etc.). In other situations, most similar systems design is applied by using inter-systemic characteristics as independent variable to emphasize, regardless of the differences across Members States, the impact of supranational and domestic common institutions and dynamics in the application of EU law, such as the opposition of national governments to EU law enforcement, position of judges in the national judicial hierarchy, or the effect of trust in national courts and judges.

These research designs will be applied to measure the influence of political institutions on the day-by-day decision making of judges on EU law matters, by exploiting variation in political institutions at three levels: micro, meso and macro. In case of chapters 6 to 9 this variation is defined in the following way: law-case (micro), judicial hierarchy (meso), and national (macro); chapters 4 and 5 pay attention to the following source of

variation: judges' opinions (micro), type of court (meso), and national (macro). In that sense the thesis exploits all these sources of variation in political institutions, to the extent that they explain how national courts interact with other branches of power involved in implementation.

In order to answer the questions that are central to this study, various research strategies are here combined. The empirical evidence will be analysed through several comparative research techniques (e.g. surveys, interviews, case studies, large-N statistical data analysis). The technique of combining quantitative and qualitative data will provide a better understanding of the concerned research problems. This multidisciplinary and mixed-methods approach to the question of the politics of the judiciary and its consequences for the implementation of European legislation and policies will make the results of this research appealing to scholars from various academic disciplines, especially from politics and law, who are interested in studying the processes of European integration from different perspectives.

In addition to the advantages of each method, the combination of techniques will allow for testing and reassessing the findings through different techniques (Lieberman 2005). The mixed method approach will involve both triangulation and complementarity (Greene et al. 1989; Tarrow 1995). While *triangulation* will allow corroborating the findings using diverse research strategies, *complementarity* will facilitate the use of these techniques and data in order to analyse the different characteristics of a single phenomenon. For example, surveys and semi-structured interviews are used to triangulate the findings of the statistical analysis of case-law datasets, while for the study of the political use of citations, data from case-law and preliminary references reports are combined.

Nevertheless, the present dissertation has come across several theoretical, methodological and technical challenges and difficulties. Most of these problems emerged during the course of data collection and, afterwards, during the assessment of the empirical evidence. I find it relevant to identify these issues in

order to understand the discussions presented in the chapters, to learn from the mistakes and to improve similar potential future research. Firstly, despite the predominant political approach of this dissertation, this research has blended different perspectives, explanations and factors from law (e.g. Law & Economics) and sociology for the debate. Similarly, different research methods and techniques have been employed under the premise that no single perspective or approach would definitively give a satisfactory picture of the object under study. In order to reduce the validity threats in this research from other disciplines, I was intensively involved and interacted with the object of study during the surveys and interviews. I also visited and collaborated with different judicial and training institutions across countries, participated in EU law trainings, as well as consulting and learning from legal scholars who enriched with their suggestions the validity of the findings.

The major technical and methodological problem addressed by this dissertation related to the collection and construction of original empirical evidence for the study of attitudes and behaviour of judges. As to the surveys, considering that the judiciary is a closed community, the access to the judges has been very problematic. The access to national judges for the completion of these surveys has been an exhausting process, dependent upon the consent of the national judicial authorities and, afterwards, on the judges' willingness to take part in it. This fact made it impossible to follow the criteria of probability samplings to comply the representativeness and unbiasedness of the surveyed judges with full certainty. This, in turn, limits the inferential causations of the data (see appendix A for more information about the surveys). Despite the problems and difficulties, this research tries to enrich the scarce existence of empirical evidence on these matters, offering an improved picture of national courts as political actors within the EU policy-process, providing new insights into the existing theories.

1.4. Plan of the study

To study whether and how political-institutional factors have a relevant impact on the day-by-day application/interpretation of EU law, the dissertation will be organised as a set of separate papers. To answer these questions, each empirical paper/chapter (from 4 to 9) studies the impact of political institutions on judges' opinions and behaviour when they decide to enforce the most common EU legal instruments, that is, EU law (7 and 8), CJEU rulings (4, 5 and 6) or EU legal doctrines (9). In this sense, the political institutional that are the focus of this study are those concerned with how the implementation of EU policies affect their interest, power or policies (that is, the executive, parliaments and other courts).

Hereafter the study will be divided in two main sections: one theoretical and another one empirical, both further divided into subsections or separate papers. The theoretical part comprises the literature review (chapter/paper 2) and theoretical framework (chapter/paper 3). Chapter 2 introduces the topic of national courts as EU courts, and analyses how this topic has been addressed by the literature until today. It also emphasizes the way this study will contribute to the understanding of the political institutions-related determinants behind the judicial enforcement of EU law. In addition, it provides an overview of the supranational and national institutional dynamics reinforcing the function of national judges as EU law judges. Chapter 3 describes the theoretical framework, main hypotheses and additional methodological aspects that will drive the following analysis of application of EU law and legal instruments (CJEU rulings and doctrines) by national courts, in the context of European policy-making.

In the empirical part, I will follow an analytical strategy composed of different levels. Each level corresponds to the analysis of the relevance of political-institutions factors on one specific instrument of EU law enforcement: a) the role of national judges as EU judges, b) the use of preliminary references, c) the application of EU law and the enforcement of CJEU doctrines.

Firstly, in chapter/paper 4, I examine the acceptance by national judges of their role as EU judges and its determinants, by focusing on the relevance of institutional trust for the configuration of a European judiciary. Secondly, in chapter/paper 5, I address the question of European adjudication, through both preliminary references and precedent quotation, and its political and legal determinants, by analysing litigation on EU law at the national courts. The analysis will be followed in chapter/paper 6 by a case study analysis illustrating the main findings on the use of preliminary references as a political safeguard in conflictive policy issues like social security rights. The policy case analysis will be a useful mean to examine closely the hypothesized role of the causal mechanisms explaining supranational adjudication. For that purpose, following a nested strategy, the case selection is based on the previous statistical results in chapter 5 (George and Bennett 2005).

Chapter 7 discusses the effect of supranational and domestic institutional factors in the application of EU law. The chapter mainly explores the national constraints coming from national authorities to the application of EU law, stressing the relevance of judicial cooperation for judges to overcome these limitations. As for the case of references, the application of EU law will be analysed using data on litigation, and, subsequently, supported by a case study in chapter 8 exemplifying the relevance of judicial cooperation to force the correct application of European taxation law in Poland. The empirical analysis will be closed with the study of CJEU doctrines and its policy implications in chapter 9. This chapter tests the use of supremacy doctrines as an instrument for policy change and resolution of legal conflicts, by examining how the use of this doctrine is most commonly applied in order to legitimize the enforcement of policies/legal interpretations susceptible to contradict national principles and institutions. In the final chapter, I elaborate a revision of the theories of judicial integration, summarising the major findings of the different papers as regards the influence of political institutions in the day-by-day

enforcement of the most common EU law instruments, that is, EU legislation, CJEU doctrines and rulings.

CHAPTER 2. RETHINKING THE ROLE OF NATIONAL COURTS IN THE EU LEGAL INTEGRATION PROCESS: NATIONAL COURTS AS DECENTRALIZED EU COURTS

2.1. The role of national courts in the process of European integration

Since the beginning of the European integration in the nineteen-sixties, courts have played an important role. On the one hand, the Court of Justice of the European Union (CJEU) has established through rulings the main principles that regulate the relationship between European and national legal orders. The CJEU empowered the position of European Law thanks to the gradual dissemination of the doctrines of supremacy and direct effect on the national legal systems (Stone Sweet 2004: 14). National courts opened the door to these doctrines fostering the integration of EU regulations into national legal systems (Slaughter, Stone Sweet and Weiler 1998). On the other hand, national courts using the preliminary references system have helped the CJEU constitutionalise and redefine the allocation of power on three levels: from the governments of the Member States to the institutions of the European Union; from the executive and the legislative branches of government to the judiciary; and from the national courts of last instance and high courts to lower national courts (Alter 2001; Tridimas 2003). Referring questions

to the CJEU under article 267 of the Treaty on the Functioning of the European Union (TFEU), granted direct effect and provided full and effective power to national courts to question the implementation of EU law by other national institutions on various legal grounds and policy areas.

The constitutionalisation and integration of the European legal system, however, has not been a peaceful process of judicial compliance with CJEU rulings and EU legislation. As Stone Sweet points out, the constitutionalisation process has been full of friction between CJEU and national courts, as they have struggled for the systemic coherence and effectiveness of EU law in national systems (Stone Sweet 2010). This antagonism is particularly marked in the interaction between the CJEU and the national high courts. The CJEU subtly asserted its position as a 'supranational constitutional court' ruling the relationship between EU and national law. As a reaction, Constitutional and Supreme courts in Member States have developed several strategies to accept EU law supremacy and direct effect, while ensuring the legal coherence of the multilevel system, imposing some conditions in order to limit the empowerment of the CJEU.[5]

---

[5] The evolution of European law jurisprudence and, especially, the acceptance of EU law supremacy are understood as a doctrine that is still open to reinterpretation. I consider that high courts, once they accepted the supremacy of EU law, are not involved in a point of no return. We can observe how high courts have gradually changed their positions towards EU law supremacy. For example, in the case of Spain we saw how high courts went back a step in their consideration of EU law supremacy. Previously, in Spain, the Supreme Court acknowledged the supremacy of EU law in 1991 and the Constitutional Court in 1993 (Sánchez Patrón 2002). However, during the approval of the European Constitution by the Spanish parliament, the Constitutional Court in its declaration No. 1/2004 changed its opinion and placed limits to the supremacy of EU law by establishing the doctrine of primacy. Supremacy has been attributed to the national constitution as the supreme law of the land within a hierarchy of norms, whereas primacy simply describes the fact that European law takes precedence over national law, without the necessary implication of a hierarchy between European and

The analysis of this conflicting process of integration and the enforcement of EU law has been circumscribed to the study of seminal cases regarding EU law application by high courts (Conant 2007). The implications of this fact becomes clear if we consider that legal integration is, not only an effect of the consideration of EU law by high courts in seminal cases, but also the effect of the day-to-day application of EU law by other lower ranked courts. These judges, dealing every day with EU law cases in which they may opt to apply EU law or not, play a relevant role as the main EU law enforcers in the EU policy-making process and in the reception of EU law in the national systems.

Traditionally, the role of the national judiciaries as EU judicial institutions has been understudied by empirical legal and political studies, with some exceptions (see Damian Chalmers 2000 and Slepcevic 2009). Currently, legal and political science scholars highlight the need to explain the role of the national judiciary in the enforcement of EU law, given its important implications in the implementation of EU regulation and policies. For a long time the literature on Europeanisation and policy implementation has been remarking that the process of judicial implementation of EU policies should no longer be considered an automatic process, since it is driven by the preferences of political, social and judicial actors and their interactions (Börzel 2003; Conant 2002; Falkner et al. 2005; Slepcevic 2009). Hence, for a better understanding of the implementation of EU policies and regulation in a multi-level system, scholars started to study the factors that determine the enforcement of EU law by national judiciaries and how they affect the development of EU regulation, promoting the reception and legal integration of EU law in the national legal orders.

---

national law.

2.2. Filling the gap studying EU law judicial enforcement: Legal integration and constitutionalisation beyond the preliminary references system, CJEU rulings, and the acceptance of EU law supremacy

Scholars of European Judicial Politics have put a great deal of effort into explaining how the mechanism of preliminary references (art. 267 TFEU) boosted the cooperation among national courts and CJEU, contributing to the legal integration and constitutionalisation of the EU legal system. In the last couple of decades, the literature has developed diverse explanations (most of the time from the perspective of neo-functionalist assumptions) to account for how national judges' preferences and the incentive structures encouraged the legal integration of Europe by means of the art. 267 TFEU (Alter 1996, 1998, 2001; Burley and Mattli 1993; Carrubba and Murrah 2005; Conant 2002; Gabel et al. 2012; Garrett 1992; Garrett 1995; Garrett, Kelemen, and Schulz 1998; Garrett and Weingast 1993; Mattli and Slaughter 1998a; Mattli and Slaughter 1998b; Stone Sweet 2004; Stone Sweet and Brunell 1998a; Weiler 1991, 1994; Wind, Martinsen and Rotger 2009). By considering for the first time the strategic behaviour of national courts in the development of the EU constitutional framework, academic scholars tried to assess whether legal and political institutional factors can explain why the CJEU receives more preliminary rulings from some Member States than from others, and its consequences for legal integration (such as acceptance of EU law supremacy, direct effect, etc.). These studies have found that national courts have several political and institutional motivations for using (or not) preliminary references.

Joseph H. H. Weiler offered a pioneer answer to the question: why should national courts refer to the CJEU? He pointed out that the judiciary wants to empower its national position vis-à-vis the other branches of power (Weiler 1991, 1994). The preliminary references system provided them with a new mechanism for reviewing the acts of the executive and the legislative. Hence, by asking questions to the CJEU and enforcing its ruling, national

courts have become involved in a supranational system that allows them to exercise an additional judicial review on national legislation. At the same time, this cooperation between national courts and the CJEU gradually promoted the acceptance of the constitutionalisation of the European legal order by adopting the doctrine of supremacy, direct effect, and implied powers. This empowerment account has been followed and further developed by other scholars (Mattli and Slaugher, 1998a, 1998b; Obermaier 2008, 2009, among others) who pointed out the importance of the competition between national institutions.[6]

Karen Alter developed an intra-courts competition explanation that assumes diverse institutional incentives for each type of court: while lower and intermediate courts use EU law to increase their prestige and power in relation to high courts, which defend the prevalence of the national legal system to safeguard their power (Alter 1996, 2001). Through the preliminary references procedure, ordinary courts push for the establishment of EU law to empower their positions following the CJEU doctrine on the supremacy of European law. Therefore, national courts are able to play the higher courts and the CJEU off against each other to influence

---

[6] Within these developments, we can distinguish different accounts depending on the preferences of national courts regarding EU and national legislation. While some studies focused on the reluctance of the national judiciary to use preliminary references, shielding national legislation from the CJEU by withholding preliminary references (Golub, Jonathan. 1996. 'The politics of judicial discretion: Rethinking the interaction between national courts and the European court of justice.' *West European Politics* 19:360 - 385.); other studies try to explain why national courts rely more on CJEU rulings than others, serving as a mechanism to foster legal integration and change national policies against reluctant governments (Obermaier, Andreas J. 2009. *The End of Territoriality?: the Impact of CJEU Rulings on British, German and French Social Policy*. Farham, UK: Ashgate Publishing Limited, Ramos Romeu, Francisco. 2006. 'Law and Politics in the Application of EC law: Spanish Courts and the CJEU 1986-2000.' *Common Market Law Review* 43:395-421, Stone Sweet, A. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press).

legal development in the direction they prefer (Alter 1998). As a result, high courts have gradually accepted supremacy, pressured by the cooperation of national courts together with the CJEU, by enforcing its rulings.

In opposition to Alter's point of view, inter-governmentalist/neo-realist explanations have defended the acceptance of the supremacy and direct effect doctrine by national courts considering national authorities' preferences towards the EU (Garrett 1992; Garrett 1995; Garrett, Kelemen and Schulz 1998; Garrett and Weingast 1993; Kelemen 2001). In the same vein, Mary L. Volcansek (1986) affirmed that national interpretations and acceptance of EU law supremacy mirrored national authorities' preferences towards EU political and legal integration. By correlating the timing of changes in high courts' jurisprudence with changes in the national governments' enthusiasm for legal integration, she asserts that national courts accepted EU law supremacy as a consequence of the national governments' positive attitudes towards EU law.

In the last decade, there has been an increase of scholarly interest in the implementation of CJEU rulings by national authorities and judicial institutions. The main aim has been to assess to what extent the CJEU rulings have an impact on domestic policies. Lisa Conant's book *Justice Contained* (2002) is remarkable in this field. In her book, she demonstrates how the impact of the CJEU rulings enforced by national courts has been limited in some cases through actions of 'restricted compliance and legislative overruling' by the respective governments, parliaments and administrations of Member States. This finding evidenced how politicians and the administration may use their discretion to comply fully with their European commitments, to adapt the European rights to their preferences or institutional context, or to ignore their European demands completely.[7]

---

[7] In the same vein, Diana Panke (2007. 'The European Court of Justice as an agent of Europeanization? Restoring compliance with EU law.' *Journal of European Public Policy* 14:847 - 866, —. 2009. 'Social

Stacy Nyikos (2003) highlights the importance of the agreement between national courts and CJEU opinions for the enforcement of CJEU rulings. Despite the *overwhelming* compliance of national courts with CJEU rulings, national courts sometimes opt to change the impact of its decisions. This happens when the CJEU makes decisions that do not meet the expectations of the national courts. In such cases, national courts opt to re-refer the question, re-interpret the ruling or non-comply with it.

Lastly, in a recent work, Andreas J. Obermaier (2008, 2009) adopts a more positive view on the judicial enforcement of CJEU rulings. He finds out how policy change takes place more quickly and smoothly in countries where national courts accept and apply the CJEU jurisprudence, than in countries where they do not. Recently, attempts have been made to clarify how the involvement and strategies of interest groups in litigation affects EU law enforcement by national courts. These studies emphasize the importance of the organizational power of interest groups and the access to courts for the enforcement of EU law (Alter 2008; Börzel 2006; Cichowski 2007; Golub 1996; Martinsen 2005a; Panke 2007; Slepcevic 2009).

All these studies share the idea that legal integration has been fostered by the cooperation between national courts and the CJEU. In these studies, scholars have focused on how the legal, social and political context determined the success of the preliminary references system and of the implementation of CJEU rulings by national courts. But, with the exception of some studies carried out by Damien Chalmers (2001), Francisco Pereira Coutinho (2009),

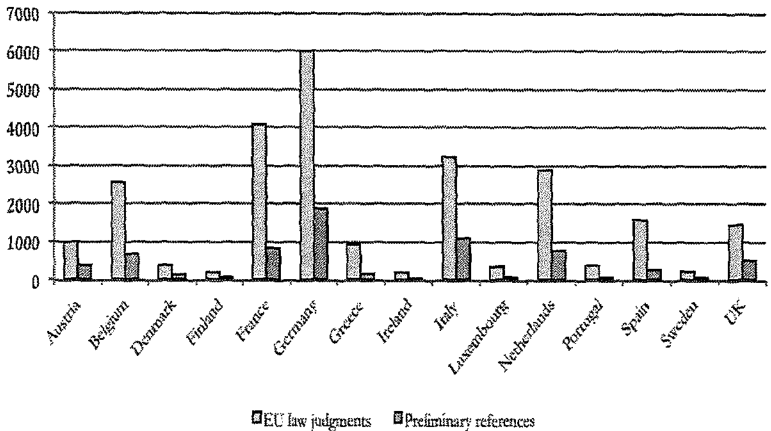
---

and Taxation Policies — *Domaine Réservé* Fields? Member States Non-compliance with Sensitive European Secondary Law.' *Journal of European Integration* 31:489 - 509) argues how the enforcement of CJEU rulings depends on the domestic interest constellations (e.g. governments, societal groups, etc.). The CJEU use to empower domestic groups that are pushing governments into compliance of EU regulation. Nevertheless, high compliance costs for governmental constituencies foster norm violations in relevant national policy areas such as taxation and social rights.

Reinhard Slepcevic (2009), Costanza Hermanin (2012) or Tatjana Evas (2012), they have disregarded how the day-by-day application of EU law (Peterson 1995) by the national judiciary has impacted the legal integration of EU legislation into national legal orders and the factors leading this integration process. As Karen and Vargas (2000) said, scholars have identified many factors that assess the variation between reference rates to the CJEU, such as the competition between courts, legal culture, access to courts, etc. Therefore, the study of CJEU preliminary references as an indicator of the judicial openness to EU law is a mistake, because so many EU law cases are decided without a reference to CJEU, and many cases referred to the CJEU do not involve challenges to national policy. In addition, day-by-day, national courts enforce EU regulation with their rulings. Citizens, firms and groups turn to courts as a last resort for the enforcement of EU law when implementation problems occur in their countries. Hence, when litigants file cases daily in the courts to request the acknowledgment of EU rights and benefits, national courts have the capability to decide whether to accept the reception and integration of EU law in their national legal systems. Consequently, and with the exceptions mentioned above, EU scholars have ignored the potential influence and consequences for the European integration of national court's rulings on EU law.

Figure 2.1 displays a quantitative example of this fact, showing how the total number of EU case law by national courts doubles the use of preliminary references in EU-15. The blue columns include judgments, not only enforcing CJEU rulings, but also those that have been solved without referring to the CJEU. The figure assesses the extent to which a relevant part of the story on legal integration remains unexplained.

Figure 2.1. EU law judgments and referrals to the CJEU by national courts in EU-15 (1961-2011)



Source: DEC.NAT[8] – National Decisions database of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union & CJEU 2011 Annual report. Accessed January 2013.

Therefore, given that the majority of EU law judgments take place outside the channels of the preliminary reference system, it becomes crucial to assess the impact of national court rulings on EU law in legal integration and the factors that determine the national judicial enforcement (Conant 2002: 81). This dissertation

[8] This database contains around 26.600 references of national courts' decisions concerning the application of Community law from 1959 up to the present day. At present, the record of decisions applying EU law is far from being complete. First, there is a misrepresentation of the decisions made by low and middle courts. For example, in the case of Ireland they only include decisions made by high courts. Hence, high court decisions are overrepresented because they are also more widely reported. Moreover, cases coming from the last 2004 and 2007 enlargement are underrepresented or not included. Despite these problems, we can observe how the application of EU-15 law still duplicates or triplicates the number of preliminary questions asked by national courts.

tries to give, firstly, an answer to the political and institutional factors that determine the enforcement of EU law by national courts. Secondly, it will assess the consequences of these factors for the reception of EU legislation in the national legal system.

The main purpose of this research project concerning judicial enforcement is to go beyond legal explanations that uniquely justify the application of EU law, and to discover the legal rules that regulate its enforcement. These explanations assume that decisions made by national judges are determined by their obligation to apply EU law, and presume that national courts apply substantive EU law loyally and correctly, with little verification as to whether this is actually the case in practice. In fact, empirical evidence reveals a significant diversity in the way national courts in Member States interpret EU legislation (Alter 2001; Chalmers 2000; Golub 1996; Slepcevic 2009). Due to these differences, we can consider national courts as judicial and political institutions whose decisions do not derive only from an abstract and constant legal faith (Shapiro 1999). The study tries to evidence and develop explanations that confirm scholars' suspicions about the role of extra-legal factors on national courts' decision-making. The logic of law and legal culture is only one constraint within the judicial decision-making process. There are other institutional factors, such as interest groups pressuring national courts to apply EU law, governments' reactions, etc., which can affect how courts apply EU law. It is unlikely that I will be able to explain the differences in the application of EU law if we do not acknowledge that political institutions and preferences also drive judges' actions.

Moreover, studies focusing on the enforcement of EU law by national courts have disregarded the question of why some countries apply EU law in some policy areas rather than in others. This fact raises the following question: Why, given similar EU legislation, do we nonetheless observe variations in judicial enforcement of EU law? As we can see in table 2.1, David Chalmers has highlighted the disparity of fields in the EU law cases that national courts apply or refer to in the UK. These disparities may have different causes depending on institutional

factors (e.g. policy misfit, national authorities' behaviour, judicial cooperation, etc.) that determine the application of EU law, not only across policy areas as Chalmers showed, but also among countries.

Table 2.1. Patterns of acceptance of central areas of EU Law in the UK (1971-1998)

	Successfully invoked	Unsuccessfully invoked	Success rate (%)	Restrictive judgments	Number of references	References refused	Reported cases referred (%)
Tax	185	70	72	17	34	21	12
Sex Discrimination	74	65	53	19	49	7	29
TUPE	36	27	57	4	1	0	1
Free Movement of Goods	13	48	21	7	31	10	36
Free Movement of Persons	16	37	30	15	19	10	32
Environment	8	28	22	6	6	5	15
Intellectual Property	23	34	40	3	9	10	11
Social Security	34	39	46	1	33	3	43
Competition	14	50	21	5	5	2	5
Agriculture	33	24	57	2	40	6	58
Fisheries	11	12	47	1	16	2	64
Transport	26	6	81	3	8	4	24
External Relations	15	6	71	2	8	2	22
Pharmaceuticals	9	3	75	0	7	1	53
Freedom of Establishment	7	5	58	0	6	0	50
Freedom to Provide Services	3	5	37	1	1	2	10
Public Procurement	4	6	40	0	3	1	27
Immigration	2	12	14	0	4	0	23

Note: TUPE=Safeguarding of Employee Rights in the Event of Transfer of Undertakings

Source: Table borrowed from Damian Chalmers (2001)

At this point, one should not underestimate the determinants that the institutional context, political actors and other sociological factors place upon the national courts' decisions. Being aware of

these causes is, in fact, crucial to shed more light on why and when national courts enforce EU law at a national level. In the light of these differences across countries and policy areas in the judicial enforcement of EU law, the dissertation will establish the reason and the factors that determine the enforcement of EU law by national courts. In other words, how can we account for the variability in EU law judicial enforcement in the EU by looking at the diverse institutional configurations and preferences of political/judicial actors of the Member States?

2.3. The missing link: The relationship between EU law application and the preliminary references system

The literature on EU judicial politics has continuously remarked the importance of CJEU rulings for the enforcement of EU law (see studies cited above). National judges have gradually started to familiarise themselves with European citation practices, incorporating the opinion of other courts when they consider EU law application. In the EU literature, two types of practices have been studied: the use of preliminary references and the citation of EU law cases previously decided by the CJEU (precedent).

Concerning the use of preliminary references (art. 267 TFUE), national courts request CJEU rulings in order to provide an interpretation of an EU law provision or to declare the validity of an EU act. While preliminary rulings imply the formal request by a national court of a CJEU decision for clarification of a certain case at a national level, the rule of *stare decisis,* or precedent, requires that an earlier decision provides a reason for deciding a subsequent similar case in the same way (Kornhauser 1992b). The role of the precedent can be defined in several ways, depending on the position of the court that decided the previous case and the one that intervenes in the current case: vertical vs. horizontal, rule-

bound vs. rationale-bound adjudication, strength of the obligation, etc. (Ramos Romeu 2003)[9].

To these dimensions I added the distinction between supranational (in this case European) and national precedential practices. While the former refers to the consideration of the CJEU's previous decisions as a source of guidance (hierarchically superior or not) in the interpretation of the Treaties, the latter refers to those decisions concerning EU law taken by other national courts. As in the case of preliminary references, national judges turn to the CJEU for guidance because it is a specialized court for EU law issues (Ramos Romeu 2006). Hence, the more CJEU precedents there are, the more likely for the national court to find an answer to the issues it faces supporting the application of EU law. The argument is also applicable for previous rulings made by other national courts (ordinary, supreme or constitutional) regarding EU law.

Scholars have developed diverse justifications in law and political science to assess the use of citation practices (preliminary references and precedents). On one hand, several legal studies argue that courts primarily "desire to reach a resolution of disputes,

---

[9] Vertical/horizontal *stare decisis* refer to the position of the referring court and the court that is being referred. If both courts are in the same hierarchical position, then the reference practice is defined as horizontal, if not hierarchically. The second distinction, result-bound/rule-bound/rationale bound, describes whether the referral court is constrained by the result, the rule enunciated in the previous case or the reasons given, respectively. A third aspect that defines adjudicatory references is the breadth and strength of the precedent. The breadth comprises the cases to which the precedent can be applied, while the strength is the amount of contrary signals that a judge must receive not to apply a precedent to the case at hand. Finally, the obligation of applying precedent: There can be a strong obligation to apply precedents to similar cases, or only to consider them, leaving the final decision to the judge. For a detailed description of these referral practices I recommend Ramos Romeu's summary (Ramos Romeu, Francisco. 2003. "Adjudicatory Practices in the European Courts: A Theoretical and Empirical Analysis." School of Law, New York University, New York City.).

which is the driving force behind the preliminary references" (Micklitz 2004: 433). This model assumes that judges' behaviour is determined by the substantive and procedural rules that govern the application of EU law. Francisco Ramos developed a more sophisticated explanation of the legal model, the *team model*, to understand the adjudicatory practices of national courts. "It draws from the institutional position of judges to posit that they share the common goal of maximizing the number of correct decisions given their resource constraints. The model says that courts in different levels of the hierarchy have different functions and most of the problems of courts consist of designing adequate adjudicatory strategies given the cases they hear" (Ramos Romeu 2002: 10). These views underestimate the impact of political preferences on the adjudicatory practices, while they attenuate the importance of any kind of competition between lower and high court, as well as defending the cooperation and division of labour between hierarchies, excluding attitudes beyond the legal efficiency of law.[10] This idea as regards the use of preliminary references to solve complex or conflictive issues was previously discussed by Stone Sweet and Brunell (1998b), who argued that judges refer to the CJEU to solve the disputes in areas with an increasing transnational economic exchange.

In contrast, a group of political scientists and law scholars have concluded that judges have other incentives for referring to the CJEU and/or quote the CJEU. These aforementioned reasons are related to several political institutional and contextual factors that shape the incentives and preferences of the judiciary to refer.

[10] Even though they think that political factors do not play an important role on the use of preliminary references, some scholars recognize that high courts could disapprove of the lower courts referring to the CJEU. High courts can interpret the use of preliminary references by ordinary courts as a decline of their jurisdiction and judicial review powers, while empowering the position of the CJEU in the national legal order. Micklitz, Hans-W. 2004. *The politics of judicial co-operation in the EU: Sunday trading, equal treatment, and good faith*. New York: Cambridge University Press.

For example, judges may refer to or quote the CJEU to empower its position vis-à-vis executives and legislatures (Ramos Romeu 2003, 2006; Weiler 1991, 1994) or other courts (Alter 2001). Other incentives may be the configuration of the national legal order and judicial review powers (Carrubba and Murrah 2005; Vink et al. 2009), or the democratic or political culture of judges (Wind 2009, 2010; Wind, Martinsen and Rotger 2009), the public opinion, support for European integration and political awareness (Carrubba and Murrah 2005) and the familiarity with EU law or years of democracy (Hornuf and Voigt 2012). On the contrary, Jonathan Golub argued that national courts are more reluctant to refer when they want to protect their national jurisdiction or national interest against CJEU rulings (Golub 1996).

All these studies have underlined the importance of CJEU rulings, either as preliminary references or as precedent, for the interpretation and later enforcement of EU law. Some of them stressed the idea of CJEU ruling as a guideline for the mere solution of legal conflict. Others pointed out the relevance of extra-legal purposes or political motivations that go beyond the mere idea of interpretation of EU law. The latter accounts are usually based on neo-functionalist or empowerment explanations that defend the cooperation of national courts with the CJEU as a strategy to: 1) enforce their legal and policy interpretations; 2) obtain other benefits such as the legitimization of their decisions, reduction of the likelihood of being overridden by parliaments, or non-compliance by executives. Therefore, national courts will use CJEU citations both as a 'shield', i.e. to defend themselves from actions by the national authorities that infringe European law rights, and as a 'sword', i.e. to challenge national measures on grounds of incompatibility with European laws, extend their judicial review powers, etc. (Obermaier 2008; Tridimas and Tridimas 2004).

However, none of these studies has looked at how the use of citations is linked with the enforcement of EU law. In general, they focus on the use of the preliminary references or CJEU citations without any further analysis of the impact or link

between these citation practices and the national court's decision-making. To understand the motivations behind the adjudication mechanism we need to look at the role of CJEU rulings during the application of EU law by national courts. In this sense, we could pose the following question: *How do national courts assess the use of CJEU rulings and what are the consequences for the effective enforcement of EU law?* Some answers to this question have recently been provided by Andreas J. Obermaier (2008, 2009). By tracing the application of EU law in the area of patient mobility by national courts in UK, France and Germany, he explains how national courts cited and developed the doctrine of the European Court of Justice to overcome explicitly the resistance of national authorities to enforce EU legislation. Previously, Francisco Ramos (2003, 2006), in his study on the practices of judicial precedent by national courts found how Spanish national courts cite the CJEU ruling when they rule against the government. Moreover, following a *team model* approach, he observes how national judges, when they find another national court that contradicts or conflicts with CJEU jurisprudence on the same point of EU law, give precedence to national case law. He states that "probably national courts working within a national hierarchical system are reluctant to alter adjudicatory practices" (Ramos Romeu 2006: 412).[11]

This dissertation follows the path of these previous studies on the advantages, disadvantages and motivations for national judges to enforce their rulings with precedents and referrals. Nonetheless, unlike other contemporary studies that seek to explain the use of citations by national courts, this dissertation will also test how and to what extent national judges evaluate CJEU precedents and

[11] Nevertheless, the author does not consider to what extent this finding also fits with neo-realist or inter-governmental accounts. National courts are reluctant to introduce new interpretations that contradict previous opinions of national courts. They keep the coherence of the legal order, and protect their national legal order against the intervention of supranational institutions in the same way that neo-realist models argue.

preliminary rulings when enforcing EU law. It will also link the motivations given by the literature to explain the use of citation practices with the effective enforcement of EU law by national courts.

The main interest of the study is to consider citation practices as one of the main explanatory factors involved during judicial decision-making, in addition to disentangling the micro-mechanisms behind the political use of these citation practices against national institutions. Secondly, this study tries to extend Obermaier's conclusions on the use of CJEU jurisprudence by performing a systematic analysis in several policy areas, courts and countries. Finally yet importantly, I will try to shed light on other factors that have not been tested in the use of references yet, concerning judges' knowledge and attitudes towards CJEU jurisprudence, among others, which can mediate the use of CJEU rulings.

Having all this in mind, the project will describe the factors that determine the judicial enforcement of EU law, with special reference to the political and institutional factors that can foster and hinder the reception of EU law in the national legal order and affect its judicial implementation by national judges. In addition to this, it is important to consider to what extent national courts play a role on the policy implementation process of EU regulation, and, for instance, how this role has been empowered by the process of European legal integration.

2.4. Legal integration and the EU policy implementation process

How do national courts become involved in EU policy making? How has the constitutionalisation process contributed to national courts involvement as EU courts? This section addresses these questions to describe the effect of EU integration on the judicial enforcement of EU law and its consequences for the institutional relations among the different branches of powers.

2.4.1. The role of national courts as EU courts: mere enforcers or authentic policy-makers?

The notion that national courts are mere interpreters of law is being challenged now for a long time. Judges have the power to review and shape laws made by any national or supranational legislative institution. This fact becomes even clearer if we consider the aspects already developed by Alec Stone Sweet for the CJEU (2004: chapter 1). In this case, I reformulated them to emphasize the point that national courts are much more than simple law enforcers, by analysing these two aspects: 1) The indeterminacy of EU law application, and 2) The impact of EU law in national policies/legislation.

1) <u>Indeterminacy of EU law application:</u> One of a judge's main functions is to reduce the ambiguity or vagueness of norms during the interpretation and enforcement of laws.[12] In their day-by-day application of norms passed by the legislators, judges determine their meaning. This daily practice can create patterns of application that, gradually, will clarify the application of law to similar cases. Professor Stone Sweet (2004) established a simple model determining the discretion of judges for legal/policy interpretation. Four mutual influential factors are considered relevant to determine the scope of influence of the judicial discretion power:

a) **The nature and scope of the powers delegated to courts**: In his seminal book, *The Judicial Construction of Europe*,

---

[12] Ambiguity and vagueness is a by-product of the legislation process: legislators enact general norms for a broad public that must be applied in specific situations to protect a right. Judges are the ones in charge of its interpretation and enforcement to specific situations by means of judgments.

Alec Stone Sweet refers to the discretion of the CJEU to interpret the provisions concerning its jurisdiction and competences already contained in the Treaties. In the case of national courts, this delegation is shaped by two important texts. First, the EU treaties and legislation, plus the CJEU doctrinal developments concerning the constitutional principles of the European legal framework (e.g. supremacy, direct effect, state liability, etc.). Second, the national legal order composed by the national constitution, national courts' jurisprudence as regards EU law, and the domestic legislation. National courts are placed in the middle of a pluralist constitutional system where the configuration and reception of the EU legal principles are guided not only by the interpretation of the treaties by the CJEU, but also by the relationship between EU and national legal orders established by high courts in the framework of their own constitutional norms. [13] Therefore, the judicial discretion of national judges regarding EU law is constrained by the national legal norms and jurisprudence that shapes the reception and application of EU law. In terms of delegation, national courts as decentralized EU courts, are monitored by high courts and primary national legislation (e.g. constitutions), which establish the limits on the competence and jurisdiction for the enforcement of EU law principles and

[13] The CJEU is also constrained by this constitutional pluralism and the responses of the higher courts to the creeping power of the CJEU using pro-legal integration doctrines. The CJEU in mutual dialogue with higher courts and national constitutional systems search for common constitutional traditions that can help the reception of EU law in the national legal orders. See Kumm, Mattias. 2006. "Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution properly so called." *The American Journal of Comparative Law* 54:505-530; Maduro, Miguel Poiares. 2003. "Contrapunctual Law: Europe's Constitutional Pluralism in Action." in *Sovereignty in Transition*, edited by N. Walker. Oxford: Hart Publising.

rules. That is, assuming that the EU treaties and legislation are an incomplete contract enforced by national courts, its enforcement is constrained by some 'national safeguard clauses' that limit its application.

b) **The institutional controls** (formal or informal) that Member States can use to influence or limit the discretionary power of national courts. Domestic institutions have discretion to react to national rulings enforcing EU law, when national courts do not fulfil the expectations of the governing institutions, or if they think that national courts have extra-limited their functions. For example, national higher courts, either supreme or constitutional, having the last word on constitutional issues, may preserve the national legal order reversing extensive or expansive applications of EU law coming from ordinary courts that could stretch the jurisdiction and competences of EU institutions. (See Declaration No. 1/2004 of the Spanish Constitutional Court, Judgments Solange I [BVerfGE 37, 271 (29.05.1974)], Solange II [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)], Maastricht [BVerfGE 89 (12.10.1993)], Lisbon Treaty [BVerfGE, 2 BvE 2/08 (30.6.2009)] from the German Constitutional Court, Decision on the ratification of the Lisbon Treaty by the Czech Constitutional Courts [Pl. ÚS 29/09 (03.11.2009)], among others). This control mechanism was created for reviewing CJEU rulings and constraining its creeping powers, but it is also extendable to national courts.

We can distinguish between two types of institutional controls: *ex-ante* and *ex-post* mechanisms. On one hand, the ex-ante institutional control is the set of rules that protects the judiciary from other branches of power: 1) selection of judges; 2) promotion rules; 3) budgets (Alter 2001; Cameron 2002; Carrubba, Gabel, and Hankla 2008; Helmke 2005; Ramsayer and

Rasmusen 2003; Ramseyer 1994; Ríos Figueroa 2006; Stone Sweet 2010). Depending on the configuration, these rules can be used to influence or constrain judges' decisions. On the other hand, we can find three kinds of *ex-post* threats to the judiciary's power: 1) override of national courts' decisions by the legislature passing new legislation; 2) non-compliance by governments and administration with the ruling by not applying, obstructing or misapplying EU law; 3) reversal of lower courts' decisions by appellate or higher courts. National courts anticipating these *ex-ante & ex-post* threats will attenuate their decisions securing at least the compliance by national authorities when considering EU law enforcement (Bednar, Jr., and Ferejohn 2001; Carrubba 2009; Closa 2013; Ferejohn and Shipan 1990; Ferejohn and Weingast 1992; Rogers 2001; Staton and Vanberg 2008).[14]

There are also informal institutions that may shape or constrain the opinions and discretion of national judges when they consider EU law enforcement. The mechanisms used can be networks, peer pressures or informal methods of discipline (Edwards 2003; Geyh 1993). These informal links stress the importance of exchanging and sharing ideas not only among judges, but also between judges and other legal professionals, politicians, administration, etc. However, these same mechanisms can be considered as modes of coercing and

---

[14] For an assessment of how political constraints can influence CJEU cases, see the discussion between Clifford Carrubba and Alec Stone Sweet, among others: Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." American Political Science Review 102 (4): 435-52; &, Stone Sweet, Alec and Thomas L. Brunell. 2012. "The European Court of Justice, State Noncompliance, and the Politics of Override." *American Political Science Review* 106: 204-213.

constraining the will of judges. An example of these informal pressures has been presented first by Andrea Szukala (2003) for the case of France: "Since the mid-nineties, the French government has had a quite proactive policy on preliminary rulings that culminated in 1997 in a monitoring arrangement which more or less binds the French courts to governmental processes. The Minister for Justice's European department (SAEI) in co-operation with the Secrétariat Général du Comité Interministériel (SGCI), organises control of the 'appropriateness' when courts bring Article 234 ECT matters before the CJEU. The SGCI also intervenes, organising inter-ministerial meetings to define a common strategy concerning the question raised, and—if necessary—to "reformulate the preliminary ruling suggested by the party from which the demand for a ruling emanates". The independence of French courts to request the CJEU to give a ruling thereon seems to be of minor importance, e.g. when French budgetary interests are at stake." (Szukala 2003: 238). A similar conclusion was reached by Marlene Wind, Dorte Martinsen and Gabriel Pons (2009) for the case of Denmark in their article titled: "*The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*". In this study, they extricate the reasons that encourage or discourage the use of preliminary references by Danish judges, focusing on specific institutional mechanisms. These can be the involvement of the state adviser, judicial committees, and high courts in the use of preliminary references. They discovered that the main reason for "not making any (or very few) preliminary referrals was the discouragement from the state adviser. Moreover, 41.1 % of the judges in the lower courts stated that it is up to the High Court alone to decide whether or not a case ought to be referred to the CJEU" (Wind et al. 2009: 76).

c) **The previous doctrine developed by courts:** National courts are constrained or encouraged by the evolving jurisprudence that they have been developing in a certain policy area. This same argument can be applied to the impact of CJEU and high courts jurisprudence on the level of discretion of ordinary courts. This idea will be introduced more in-depth as regards to the policy impact of national courts rulings in following chapters.

d) **Judges' profiles:** that is, individual attitudes, skills and experience that can affect the decisions made by the judges. By this, I am referring to EU law knowledge, experience and attitudes towards EU law that can affect the correct enforcement of EU law in the way that the CJEU requires. The exercise of their judicial discretion requires judges to assimilate the necessary EU law knowledge, experience and EU *thelos* to deal with the ambiguity and vagueness of EU norms. The application of EU law requires judges to be able to compare EU law application with their national colleagues, their counterparts in other Member States and with the CJEU. Judges also need to have enough knowledge of EU law to raise points of their own motion, and actively seek and apply the relevant EU law. Moreover, in interpreting and applying European law in the national legal order, judges should consider European objectives and the purpose that the relevant piece of EU legislation seeks to attain. However, there is a difference between the normative requirements of the law mentioned above and the day-to-day reality of its application (Bobek 2008a). National judges have assimilated differently their role as European Union judges not only among countries but also within countries. These differences on EU law experience and attitudes towards EU law (understanding of EU and national legal

order relationship, support to EU institutions, etc.) may affect the consideration of EU law by national judges.[15]

As an example, we see how some EU law application requests may be unsuccessful due to an incorrect consideration of EU law demands. The German Constitutional Court in its decision BVerfG, 1 BvR 1036/99 of 9 January 2001 quashed the final decision of the Federal Administrative Court (Bundesverwaltungsgericht), holding that the approach taken by the administrative court was incorrect for two reasons. The first being that it had not dealt with the recognized conflict between the national law and the relevant Community Directives and did not identify or apply any case law of the Court of Justice. The second reason was that the administrative court had not taken into account a fundamental principle of Community law, namely the prohibition of discrimination on the basis of sex (Bobek 2008a: 17-18). The German Constitutional Court reminded that court of its duties, highlighting that it should be aware of the principles ruling the system of European law.

The existence of this judicial discretion power is a pre-condition for the effective interpretation and enforcement of EU law. Nonetheless, we observe how this power is far from

---

[15] This concern has encouraged a new wave of researches focused on determining whether judges are aware of their new responsibilities, and whether they conform to their new roles and unconditionally apply EU law or have a reserved attitude towards it. This study investigates and understands the gap between the 'law-in-the-books' and 'law-in-action', since it will highlight the anticipated difference between the ideal situation involving the judges adjusting fully to their new roles and the real situation in practice. Jaremba, Urszula. 2010. "With, Before or Against the Law? Polish Judiciary versus the European Union Legal Order." in *Fifth Pan-European Conference on EU Politics, 23-26 June 2010*. Porto, Portugal.

unconditional, and that it depends on the specific settings of these four points. The different combinations of those aspects can give us an idea of the capacity that national judges have to impose their own legal/policy interpretation concerning EU law. These factors are directly related with the enforcement of EU law and will be studied in-depth in the following chapters.

2) Impact of EU law in national policies/legislation: Closely linked with the previous idea of judicial discretion, the application of EU law by national judges may create new legal venues with an obvious policy impact on national legislation and policies. Firstly, judges are playing the role of policy-makers by balancing rights, obligations, social interests, public goods, etc. When balancing the interests and rights[16] of litigants and public interest, judges reach decisions with an obvious impact on the application of a specific legislation or policy issue. Hence, in balancing rights "courts necessarily become legislators and administrators" (Stone Sweet 2004: 11).[17] The second venue is a consequence of judgments made by judges, namely precedent. It serves as a source or assessment for the legal interpretation of laws in a specific policy

---

[16] Different criteria are use for balancing rights such as the criterion of proportionality. Proportionality is most frequently used principle for balancing rights and control the discretion exercised by national authorities when they limit or interfere citizens' rights. One common example is the case of EU Environment law: The CJEU has consistently followed proportionality, balancing the requirements of free movement of goods and services and competition with environmental protection. Wenneras, Pal. 2007. *The Enforcement of EC Environmental Law.* Oxford: Oxford University Press.

[17] Alec Stone Sweet offers a complementary argument to this affirmation. Lawmakers and administrators due to this strictly scrutinized process of argumentation defending their actions become imbued into judicial mode, "reasoning as the judge will, that is, to consider the proportionality of their own activities" Stone Sweet, A. 2000. *Governing with Judges: Constitutional Politics in Europe.* Oxford: Oxford University Press, —. 2004. *The Judicial Construction of Europe.* Oxford: Oxford University Press.

area. Specifically, through precedents, courts can create new modes, arguments, or instruments, challenging the policies made by governments or national legislation (especially in the case of high courts with judicial review powers), which can be followed by other national courts. This consideration is determined by the nature of its structure and function, as allocators of gains and losses differs at the trial and appellate levels (Haynie, Songer, Tate and Sheehan 2005). While in ordinary courts the resolution of the dispute affects only the parties directly at dispute, when it comes to appellate courts, like the Supreme Court, the judgments serve as statements that shape the relationship of the EU law with the rest of the legal domestic system. Somehow, these decisions serve as policies that are broadly applicable to other similar situations in which citizens, businesses, NGOs or the government are involved. Therefore, supreme and constitutional courts act as a political body that may determine the future development or orientation of governmental policies, shaping the allocation of rights and benefits of EU regulation, especially, when the government is not acting according to its EU obligations.

Regarding this last point, national courts can refer to the jurisprudence available (from high courts or CJEU) in a legal or policy area to solve legal/policy conflicts, reinforcing the impact of this interpretation on the whole policy area, even in favour or against governments. Consequently, the development of the jurisprudence in a specific direction, not only reduces the indeterminacy of law, but also creates new pathways for solving legal and policy conflicts that might be difficult to challenge by national authorities. However, this reinforcement of the jurisprudence in a specific policy issue will only be effective if we assume that all courts follow the same path created by previous decisions.[18]

---

[18] I refer to path dependence as "dynamic processes involving positive feedback, which generate multiple possible outcomes depending on the particular sequence in which events unfold" Pierson, Paul. 2004. *Politics in Time: History, Institutions, and Social Analysis*. Princeton:

As EU judicial politics scholars pointed out, the reiterated use of CJEU and EU law doctrines can develop strong instruments for the judicial enforcement of EU law. First, because it creates new ways of solving EU interpretation conflicts by means of CJEU jurisprudence and precedents. Second, and most significantly within the main interest of this dissertation, for the empowerment of the national judiciary in comparison with other domestic institutions. In the case of EU law, the development of the CJEU jurisprudence and its quotation by national courts has been extremely important. The CJEU has developed doctrines in several legal and policy issues in the direction of legal integration.[19] The CJEU with its rulings has not only empowered its position in relation with other national and supranational institutions, but has also created some positive externalities to the national judiciary. As we will see in the following section, national courts have assumed their role as EU courts, as well as their new powers and responsibilities bestowed by the CJEU and the EU Treaties.

2.4.2. The impact of EU constitutionalisation in national judiciaries' power

I. Supranational legal dynamics empowering national courts positions:

How has the constitutionalisation process contributed to the judicial empowerment of national courts within national policy-

---

Princeton University Press.

[19] Here I refer to the political and economic costs of reversing European integration by Member States. For instance, Member States have the means to reverse integration and recover their sovereignty by reforming the Treaties. However, there is a sort of institutional path-dependence, like the legal obligations, the reconfiguration of the inter-state relations from a supranational system to an intergovernmental system, etc., which makes it difficult for Member States to reverse the integration process.

making? National courts have been empowered through EU mandates from EU Treaties and through CJEU jurisprudence asking national courts to enforce and review the implementation of EU law. Since the creation of the European Community, European institutions have requested national courts to behave as foot soldiers in the enforcement of EU law (Maher 1994). In this sense, they are considered members of the European legal order and of the European Union judiciary, holding the responsibility to enforce EU law, even against national legislation, despite the executive's and legislative's preferences.

Over the years, the CJEU jurisprudence has empowered the judicial review powers of the national judiciary on the acts of the government, the administration and parliaments. This empowerment would not have been possible without the cooperation of national courts to increase the reception of the European legal order and its principles (e.g. supremacy, direct effect, state liability, etc.), as an exchange of that empowerment. However, it does not mean that national governments are not playing a role on the EU constitutionalisation of the EU legal system and the empowerment of national judiciary. Every treaty reformed by Member States is considered a voluntary and consented step further made by national governments and legislatures towards legal integration and constitutionalisation of the legal system, inserting the national judiciaries in the EU hierarchy. Nevertheless, the cooperation of national courts and the CJEU was crucial to mutually empower themselves in order to constrain national governments' reactions.

National courts, through the treaties, the preliminary references proceeding and the development of the doctrines of direct supremacy, state liability, etc., have become European Union judges bestowed of new and gradually stronger judicial review powers for the enforcement of EU law. The incorporation of the national courts on the EU judiciary and its empowerment is legally based on the several mechanisms recognized in the EU Treaties:

1) Article 267 TFUE that configures the system of preliminary references: The preliminary reference procedure is used when a national court refers a question of EU law to the European Court of Justice for a preliminary ruling so as to enable the national court to decide the case before it and ensure uniform interpretation and validity of EU law across all the Member States. This mechanism offered national courts the possibility to challenge national laws and interpretations with which it disagrees, creating opportunities for the CJEU to expand the reach of EU law into the national domain as well (Alter 2001).

2) Fulfilment of Member States obligations and art. 258 TFUE that establish the infringement proceedings: All European Treaties have underlined that Member States shall take all appropriate measures and coordinate their policies with EU objectives to ensure the fulfilment of their obligations under the Treaties and other EU legislation. The CJEU has conferred national courts with the obligation of monitoring the implementation of EU law and controlling that national implementing authorities fulfil their EU obligations. As we will see later, the CJEU reinforced this idea with the doctrine of 'indirect effect'. In addition, The CJEU can declare, under the initiative of the Commission, whether Member States are in breach of their Community obligations. This means that national courts, as institutions or organs of the States, could also be in breach of EU law and be subject to infringement proceedings (Maher 1994: 230). This threat reasserts the role of national courts as European Union judges, since they are responsive for the judicial review on EU regulation and its correct enforcement under the accountability of the CJEU and the Commission.

3) Art. 105 TFUE on the cooperation between national courts and the Commission: Following the CJEU recommendation, the Treaties have recognized in its former 85 TCE and now 105 TFUE, the need for cooperation between the Commission and the Member States. This article acknowledges that EU institutions have an expertise in some policy areas that can benefit national institutions, especially the Commission, offering guidelines on

enforcement of competition law to the national courts. These provisions have been included in the EU Treaties and extended to institutions of all Member States after a CJEU ruling[20] and reinforced by several Commission's notices[21] that underlined the usefulness of Commission expertise on competition law when national courts have to decide on these legal issues (Wainwright 2004). This possibility of including the European Commission as *amicus curiae* in the judicial process has empowered national courts, given that the process of consultancy is readdressed to supranational institutions, instead of to national authorities in charge of competition issues. National courts arguing and legitimizing their decisions with Commission expertise weaken the position of national authorities in certain policy issues, transferring the rule-making authority from national governments to the European Union.

Moreover, the CJEU, following the EU provisions mentioned above and its own preference for legal integration (Shapiro 1999; Weiler 1999), developed a jurisprudence that engaged national courts to help monitor and enforce EU law in the national realm, while creating a political and economic cost for government's violation of EU law. The CJEU has settled the basis for national courts to challenge national regulations, declaring some new doctrines that empower their institutional position. The transformation towards constitutionalisation was fostered under the preliminary references system that enhanced the cooperation between the CJEU and the national courts. National courts have sent provocative questions regarding supremacy, direct effect, etc., that the CJEU has solved with revolutionary and pro-integrative

---

[20] See Case C-234/89 *Stergios Delimitis v Henninger Brau* [1992] CMLR 210

[21] Commission Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty OJ [1993] C39/6. Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (Text with EEA relevance) [Official Journal C 101 of 27.04.2004].

judgments (Alter 2001: 17). These doctrines have created criteria and doctrines that help national courts assess whether EU law is enforceable, give them primacy over national legislation and help them avoid non-compliance, override and reversal by national authorities. Hence, national judges have at their hand several jurisprudential mechanisms created by the CJEU to challenge national policies and protect them from threats made by governments or other institutions.

Among the most well known CJEU jurisprudence, we can identify the decisions that affirmed the doctrine of direct effect and supremacy of EU law[22]. However, there are other decisions that also empowered the position of national courts, as we will see:

1) **Direct effect:** The CJEU established this doctrine in *Van Gend en Loos* (1963).[23] The CJEU affirmed that European law could create or recognize rights for individuals without requiring the implementation of legislation at the national level (Alter 2001: 17; Maher 1994).[24] This effect will only be enforced under certain conditions, rules and guidelines that the CJEU has developed regarding the provisions and directives that have this effect.[25] This

---

[22] For a detailed explanation of the development of these two doctrines and their acceptance by national courts, consult Alter, K. J. 2001. Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe. Oxford; New York: Oxford University Press. Stone Sweet, A. 2004. The Judicial Construction of Europe. Oxford: Oxford University Press.

[23] C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] 1

[24] There are two types of direct effect: Vertical and Horizontal. The one described above refers to vertical direct effect that allows private individuals to rely directly on Treaty provisions and EU directives in claims against the State before national courts. Horizontal direct effect confers individual right in order to make claims against other private individuals before national courts. The latter was established after case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976].

[25] The CJEU has constantly continued to define its doctrine concerning direct effect in its decisions apart from the *Van Gend en Loos*

doctrine closed the possibility for Member States to escape their obligations through non-legislating in a policy area.

2) **Supremacy:** This doctrine, that followed direct effect, states that EU law is supreme over national law; persuading States from passing any law or policy that contradict European legislation. This doctrine was accepted after several judgments, although a conflict arose with *Costa v ENEL*[26]. In this case, the CJEU asserted the supremacy of EU law, but found that the national law at stake—in this case Italian law—was not invalid or contradictory. Hence, no correction in national legislation was required and the impact of this doctrine remained unclear.[27] However, the Italian Constitutional Court (ICC) continued to assert its principle of *lex posterior derogat priori* for European law as it has been doing with the rest of international laws [ICC 1964/14; 1975/232; ICC 1976/206; 1977/163] (Stone Sweet 2004: 83-84). Meanwhile, the CJEU continued affirming this doctrine repeatedly in order to persuade national courts to apply it. One of the most famous and explicit defences of supremacy was

---

and *Defrenne* decisions. C-57/65 *Lütticke* [1966] and C-36/74 *Walrave* [1974] have complemented the direct effect of Treaty provisions established in *Van Gend en Loos*; C- 43/71 *Politi* [1971] ECR 1039, C-93/71 *Leonesio* [1972] and C-144/04 *Werner Manglod v. Rüdiger Helm* [2005] that establish the direct effect of regulations. While C-11/70 *SACE* [1970], C-41/74 *Van Duyn v. Home Office* [1974], C- 148/78 *Ratti* [1979], C-152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] and C-188/89 *A. Foster and others v. British Gas plc.* have complemented those that establish direct effect of directives.

[26] C-6/64 *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* [1964].

[27] In the meanwhile, the CJEU made one of the most challenging rulings on the issue in *Internationale Handelsgesellschaft.* The CJEU stated clearly that not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of a directly applicable Community rule. C- 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970].

contained in *Simmenthal's* decisions from 1976[28] and 1978. The latter established the definitive CJEU interpretation of supremacy contradicting the ICC's position:

> "In accordance with the principle of the precedence of Community law, the relationship between provisions of the EEC Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures [...] by their entry into force render automatically inapplicable any conflicting provision of [...] national law."[29]

After the *Simmethal* case, the ICC did not recognize the supremacy of EU law until ICC's *Granital* case established some limits to EU law application. Some national (higher) courts were reluctant and tried to contain this doctrine, which they still do. However, national courts on their own have, within their reach, the opportunity to influence national policy and legal integration in a process of cooperation and recognition of the primacy of EU law over national law.

Lastly, the Constitutional Treaty included the supremacy clause in the Treaties for the first time in its article I-6. The article declared: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." However, the Constitution was never ratified, and the Intergovernmental Conference of the Lisbon Treaty considered the inclusion of the primacy principle in declaration 17 of the treaty, stating:

> "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy

---

[28] C- 35/76 *Simmenthal* [1976]

[29] C- 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629 at paragraph 17.

over the law of Member States, under the conditions laid down by the said case law."

3) **Indirect effect:** The doctrine of indirect effect derives from direct effect of European legislation and requires national courts, as organs of the Member State responsible for fulfilment of EU obligations, to interpret domestic law in accordance to relevant EU law, especially directives. In case national authorities fail to implement EU legislation, the CJEU has empowered national courts to fill this gap, interpreting actual national legislation according to EU directives at the national level. In the *Von Colson* decision[30], the CJEU requested national courts to interpret domestic law consistently with the relevant directive.[31]

4) **State liability:** This EU principle arises when a Member State of the European Union breaches EU law and an EU citizen suffers a loss as a result of EU incorrect application. The effect of state liability implies that damages may be recoverable in respect of the suffered loss. In this respect, the CJEU in the *Francovich* ruling[32] increased the powers of the national courts vis-à-vis governments, allowing them to award litigants against national governments, where an individual has suffered losses due to the non-implementation of EU regulation or non-compliance.[33] This threat mechanism has also been extended by the *Köbler*[34] case to

[30] C-14/83 *Von Colson v. Land Nordrhein-Westfalen* [1984].

[31] The indirect effect doctrine has been developed by the following rulings: C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] 1 ECR 4135, C-334/92 *Wagner Miret v. Fondo de Garantia Salarial* [1993], C-105/03 *Criminal proceedings against Maria Pupino* [2005].

[32] Case C-6 & 9/90 *Francovich and Bonifaci v. Italian State* [1993].

[33] Further requirements have been introduced by subsequent CJEU rulings: Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v. Federal Republic of Germany* and *R v. Secretary of State for Transport ex parte Factortame Ltd.* [1996].

[34] C-224/01 *Gerhard Köbler v. Republik Österreich* [2003]. The *Köbler* dispute was about a special length-of-service increment to the

judicial acts. Hence, the European Union is also allowed to monitor the correct function of national courts as delegated EU courts. Although the CJEU has not recognized that the infringement has been harmful enough to carry state liability, the *Köbler* judgment has established the rules for its consideration.[35]

---

basic salary after 15 years of employment as a professor at Austrian Universities. The Austrian authorities denied this right to Mr. Köbler because the period he spent working in Austria was less than 15 years. On appeal to the Supreme Administrative Court (*Verwaltungsgerischtshof*), the court asked the CJEU whether requiring the period of service to be exclusively spent at an Austrian university amounted to prohibited discrimination based on nationality. As a response, the CJEU referred to its *Schöning-Kougebetopoulou* judgment [C-15/96 1998] and the national court withdrew the question. The *Verwaltungsgerischtshof* held that the length-of-service constituted a loyalty bound which would be in conformity with the rules of the free movement of persons. Still unsatisfied, Mr. Köbler brought an action for damages before the *Landesgericht* Wien against the Republic of Austria for reparation of the loss that he had suffered as a result of the non-payment of the length-of-service increment. He argued that the *Verwaltungsgerichtshof* infringed a directly applicable provision of community law, as interpreted by the CJEU. The *Landesgericht* Wien referred questions to the CJEU on this infringement for wrong interpretation. The CJEU ruled against the *Verwaltungsgerichtschof* for two reasons: wrong interpretation of the judgment in *Schöning-Kougebetopouolu*, and secondly, on its failure to uphold its reference. The CJEU remarked that the court should have afforded the CJEU the possibility to pronounce on the permissibility of loyalty bonuses in Community law. The CJEU, after pointing out these two breaches, did not find neither manifest nor sufficient infringement of Community law by the Supreme Administrative Court under *Brasserie* and *Factortame* requirements for establishing liability (Hofstötter, Bernhard. 2005. *Non-Compliance of National Courts: Remedies in European Community Law and Beyond.* The Hague: T.M.C. Asser Press.)

[35] The CJEU in *Traghetti del Mediterraneo* decided on similar lines about state liability, by enumerating the conditions under which EU law precludes the limits to state liability: '(1) rules that exclude liability for damages due to an infringement of Community law that arises out of an

The Court's ruling in *Köbler* needs to be examined in connection with two other recent judgments, namely *Commission v. Italy*[36] and *Kühne & Heitz*[37]. *Commission v. Italy* was the first occasion in which the CJEU dealt with the question of judicial wrongs under article 226 TUE (now 258 TFUE). The Court indicated that a Member State is also responsible for an infringement committed by its judiciary. In *Kühne & Heitz,* the CJEU revisited the principles of legal certainty and *res judicata*[38], crucial to the working of the judiciary. The Court opened the backdoor to reopening the procedure decided by a last instance court, which proves to be non-compliant under some conditions (e.g. not adversely affect the interests of third parties). These judgments[39] denounced the wrong interpretation that national authorities make of CJEU cases, and how appeal courts, especially Supreme Courts, legitimize this kind of misinterpretations rejecting to refer cases to the CJEU. Hence, these cases can be interpreted as an attempt of the CJEU to reframe its relationships with national Supreme courts and appropriate the position of the ultimate authority in the European legal order.

---

interpretation of legal provisions or an assessment of facts or evidence carried out by a court adjudicating at last instance; or (2) those limiting liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State in other cases where a manifest infringement of the applicable law was committed' (Zingales 2010: 419). C-173/03 *Traghetti del Mediterraneo SpA v. Repubblica italiana* [2006].

[36] C-129/00 *Commission v. Italy* [2003].

[37] C-453/00 *Kühne & Heitz* [2004].

[38] This concept refers to final judgments that prevent any re-examination or re-trial of the same dispute between the same parties.

[39] For further developments on the issue of state liability see also: C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974]; C-173/09, *Georgi Ivanov Elchinov* (especially, the opinion of the Advocate General); C-119/05 *Lucchini* [2007]; C-2/08 *Fallimento Olimpiclub Srl* [2009].

5) **Use of preliminary references:** The CJEU has gradually increased the discretion to exercise legal remedies at European level by litigants and national courts in order to challenge national legislation when European provisions appear more favourable than national legislation. That is the named legal militancy that comprises the tendency of private actors to launch legal battles at a European level to counter regulatory obstacles and national policies (Masson and Micheau 2007). The CJEU established some criteria under which national courts should ask for a preliminary ruling in the *CILFIT*[40] case. The judgment allows national courts to not send preliminary rulings if they consider that the correct application of the provision is so obvious that they leave no scope for reasonable doubt in light of specific characteristics.[41] It is also required that the question is relevant to EU law[42] and that the provision has not already been subject to the interpretation of the CJEU.[43] It is especially required for the parties to provide the factual and legislative context in light of the dispute.[44] The *Mangold*[45] case supposed a change of CJEU doctrine concerning the use of preliminary references. Before the *Mangold* case, the CJEU neglected the reference of disputes on questions created artificially by parties with the objective to challenge any national

---

[40] C-283/81 *CILFIT v. Ministero della Sanità* [1982].

[41] Lower courts enjoy a higher discretion than last instance courts because the latter are under the obligation to refer. However, last instance courts can evade this responsibility since there are some exceptions to this mandate. These exclusions are detailed in the CILFIT case, finding some exceptions that leave a broad margin to decide whether to refer or not.

[42] C- 343/90 *Lourenço Dias v. Director da Alfândega do Porto* [1992].

[43] C-26/62 *Vand Gend en Loos v. Admnistratie der Belastingen* [1963].

[44] C-320/90 *Telemarsicabruzzo and other v. Circostel and other* [1993].

[45] C-144/04 *Werner Mangold v. Rüdiger Helm* [2005].

regulation or policy, as in the *Folio v. Novello* cases.[46] However, the CJEU changed its mind in the *Mangold* case, admitting that the parties may fictitiously have created the matter to challenge Community law.[47] At the same time, this ruling encouraged national courts to refer to national law as opposed to European Law. Therefore, the CJEU has decided to lay down stricter criteria to send preliminary references enabling an 'open-door policy' vis-à-vis domestic judges (Dehousse 1998: 138). As I will explain in detail later, several courts tried to contain this discretion because they were struggling with the CJEU for the last wording on the application or interpretation of EU law in their national legal orders (Martinico 2010).

The Foto-Frost[48] case offers another interesting element on the decentralization and empowerment of national courts when enforcing EU law. In this case, the extension of judicial review powers to EU institutions acts, such as the European Commission. According to the Foto-Frost judgment, national courts may consider the validity of a European Union act. However, national courts themselves have no jurisdiction to declare that a European act is invalid. Only the CJEU, responsible for ensuring that Community law is applied uniformly in all Member States, has the jurisdiction either to declare void or invalid an act of a Community institution to preserve the cohesion of the EU law order (Claes 1995). Hence, whenever a national judge is confronted with a possible illegality of a secondary EU legislation, the court is under

[46] C-104/79 *Foglia v. Novello* [1980] & C-244/80 *Foglia v. Novello II* [1981].

[47] "The Federal Republic of Germany argued that the dispute between W. Mangold and his employer R. Helm would be fictitious because in the past the plaintiff would have publicly argued a case in favour of the opposite thesis. Therefore, the case would have been artificially created in order to raise a decision at a European level. By admitting to give a ruling without consideration of the intentions of the parties, the Court implicitly acknowledges the legal militancy of the litigants and the court." (Masson and Micheau 2007: 591).

[48] Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987].

a duty to refer for a preliminary ruling of the CJEU. In conclusion, national courts are simply embodied with a 'fire-alarm oversight' (McCubbins and Schwartz 1984) for EU acts review, referring the judgment to the CJEU as final authority on EU law application.[49]

6) **Compatibility between European and national legal values and principles:** Finally, and linked with the inclusion of the constitutionalisation of the Treaties and the introduction of human rights, the CJEU has tried to legitimize its authority and the EU legal order by embodying it with a system of values similar to those of national constitutional orders (Maduro and Azoulai 2010). The CJEU has made an effort to link the European legal order to the main constitutional principles that allow national judges the reception of EU law. This linkage is based on general principles that are common in all the contemporary European democracies such as the protection of human rights[50] and the respect of the rule

---

[49] Following McCubbins and Schwartz's argument on how the US Congress oversees the executive branch performance, we can construct a similar argument for CJEU's control of the acts of the European Commission. The CJEU would prefer to allow national institutions such as litigants, governments and national courts to oversee the executive performance of the Commission by means of the decentralized system of control of EU law (fire alarms), rather than examining on its own or by means of other EU agencies or institutions (police patrol) EU legal acts. This control system of EU acts can be a by-product of the own decentralized EU legal system, and of the weak capacity of EU institutions to review EU legal acts during the legislative process. With this fire-alarm mechanism of control over EU acts, the CJEU is delegating and decentralizing to national courts and litigants a time spending and cost resourcing activity of judicial review of EU acts. Conversely, by not having a EU special court or institution on it, it is missing potential violations unnoticed by national actors and institutions.

[50] C- 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970]; C-4/73 *Nold v. Commission* [1974]; C-5/88 *Wachauf v Federal Republic of Germany* [1989] and C-260/89 *Elliniki Radiofonia Tileorasi Anonymi Etairia v Dimotiki Etairia Pliroforisis and Kouvelas* [1991]. In these cases, the CJEU declared that "fundamental rights form an integral part of the

of law.[51] The introduction of these principles shared by all the European countries has given new instruments to the national courts to legitimize the application of EU law.[52]

To sum up: While state liability and supremacy try to enforce the adoption of EU law by national authorities and overcome non-compliance, direct and indirect effect doctrine empower national courts, not only to review national legislation, but also to enforce its own legal interpretation of EU legislation according EU law principles. Hence, we have a set of mechanisms that encourage the active involvement of national courts in EU law and in the policy-making process. We can observe how the CJEU has created new doctrines to achieve its goals empowering national judges to enforce EU law in the same way the CJEU does. Therefore, national courts, when acting as EU courts in the context of a coherent and integrated European legal order (Maduro 2009: 375),

---

general principles of Community law."

[51] C-294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986]. The CJEU interpreted that the European Community is 'a community based on the rule of law' and the Treaty its constitutional charter. Neither Member State nor EU institution can avoid a review on whether the acts adopted by them are in conformity with the constitutional principles contained in the Treaty. Consequently, the CJEU ruled in the case at hand that the action for annulment might lie against measures adopted by the European Parliament intended to have legal effects vis-à-vis third parties.

[52] Maduro and Azoulai also remarked the importance of how the legitimacy of the EU legal order is based on some *sui generis* EU values such as the creation of the internal market established in C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] and C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* or "Cassis de Dijon case" [1979], and the introduction of social justice into the market in C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976], C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman* [1995], C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] and C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002].

can legitimize EU law decisions through these principles and doctrines that increase the judicial review powers of national courts and reassert the compliance with its rulings. However, constitutionalisation theories assume that national courts have the same pro-integration attitudes and political goals as the CJEU. The dissertation questions this assumption about the correct or pro-European use of these doctrines by national judges when they consider the application of EU law. First, courts can have different attitudes towards EU law enforcement compared to the CJEU. Second, there are national dynamics limiting this EU empowerment of national courts.

II. National Legal Dynamics containing national courts' power:

The constitutionalisation of EU law has created some tensions regarding EU and national legal orders. National high courts have reacted to the CJEU's creeping powers drawing the limits of CJEU jurisprudence and EU mechanisms of cooperation, through judgments that countervail the pre-eminence of EU law. These legal mechanisms established to contain CJEU jurisprudence may also persuade ordinary courts to cooperate with the CJEU to enforce EU law. So, which are the national legal configurations that check and constraint judicial review powers entailed by the EU treaties and CJEU jurisprudence?

A) Openness of the national legal system to EU law: Rules and provisions

The uniformity of EU law suffers under such a diversity or plurality of legal systems. As W. Mattli and A-M. Slaughter (1998a) pointed out, courts are constrained by the shape and specific form of national law and legal doctrines. Despite the consequences that the diversity of national procedural and enforcement rules implies for the uniform application of EU law,

national judges are more likely to consider EU law as a matter of course, if EU law is applied under the national procedures, remedies and legal framework rather than under extraordinary procedures.

However, there is still a risk of constitutional or legal collision between national constitutions and EU Treaties. The provisions and principles of the diverse legal principles and norms of Member States may come into conflict with the EU constitutional framework developed by the Treaties and CJEU jurisprudence. Member States are legally ruled by national constitutional principles that also claim authority over other international and supranational legal orders. This conflict was partly solved when the primacy of EU law (with or without reserves) was acknowledged by the national legal orders or constitutions.

In addition, the structure or openness of the legal system also facilitated the acceptance of EU law. Theoretically, dualist orders treat national and international law (even European) as two separate sources of law, while monist systems integrate international legal orders into the national normative system with binding force (Hoffmeister 2002; Ott 2008). As a result, while *monist legal orders* integrate international and European legal systems as part of the national norms, implying the unconditional acknowledgment of EU law primacy; states with a *dualist system* emphasize the difference between national and international law and do not automatically accept European legal supremacy. Under this context, national judges might be more likely to engage in legal disputes on the applicability of EU law over national law and, consequently, less willing to apply EU law when they suspect that EU law may contradict the principles of their national legal systems.[53]

---

[53] Nevertheless, this dichotomy is becoming less significant in EU law because of the principle of direct effect. Despite its impact in terms of constitutional openness of the domestic legal order, many Constitutional courts have indeed abandoned progressively the dualism, speaking of an "integrated approach", like the Italian Constitutional Court, for instance.

Moreover, national courts can also use this indeterminacy on the interpretation of EU law to foster their most preferred interpretations. This ambiguity in the relationship between legal orders and the harmonization of EU law with the national legal order may produce some distortions on the correct application of EU norms that judges can exploit. National courts can use strong constitutional national principles to oppose or contradict EU law enforcement. For example, courts, balancing national social rights over free market policies designed by the EU may argue the constitutional protection of the social well-being and rights over free market purpose, to make prevail the national interest over supranational legislation and avoid the application of EU law.

Subsequent reforms of the treaty architecture pave the way for a legal and political deepening of the integration process. Treaty provisions which confer powers and competences to EU institutions, and define the application of EU law, are broadly defined and do not specify the relationship with national powers and with the national legal order. In addition, some of the EU law provisions (primary and secondary law) enlarge or exceed the concession made by national authorities. Therefore, their application can have important consequences in rights and policies neither regulated nor explicitly transferred by the Treaties.[54] These

---

[54] The CJEU hold in its C-8/55 Fédéchar v High Authority [1956] & 287/85 Germany v Commission [1987] judgments that the EU has competence, not only where expressly granted in the treaty, but also that it has the implied competence to carry out tasks expressly allocated to it. This doctrine was used to influence some social issues, such as combat poverty and environmental matters, to support the equal treatment directive, or to construct the idea of European citizenship with the Erasmus case (C-242/87 *Council v Commission* [1989]). However, the use of implied competences was limited on its use when the CJEU held that the provision and doctrine on it could not be used as a basis to access the European Convention of Human Rights (C-268/94 *The Portuguese Republic v. The Council of the European Union* [1996]). Douglas-Scott, Sionaidh. 2002. *Constitutional Law of the European Union*. Harlow, England ; New York: Longman.

conflicts are even more evident when EU law clashes with the fundamental national provisions, principles, values and fundamental rights that Member States devoutly protect, making the conflict resolution more difficult for all the political and judicial actors involved in the dispute. Therefore, these constitutional conflicts are far from being stopped, as high courts challenge the main principles that rule EU enforcement, such as EU law supremacy, determining the degree of reception and application of EU law by national courts.

B) Higher Courts' jurisprudence:

Despite the legal adaptations of the national legal systems to the EU provisions, there are still other legal and political issues where clash between EU and national constitutional norms is unavoidable and where higher courts have the last say:

> "1) conflicting sources of validity and legitimacy for the application of Community law in national legal orders; 2) conflicts of competences arising from the 'illegitimate' extension of Community competences (coupled with the Kompetenz/ Kompetenz conflict); 3) conflicts of fundamental rights arising from different and opposed substantive rights, policies and principles" (Maduro 1999: 162; Phelan 1997).

National high courts have continuously contested the reception of EU law principles and CJEU doctrine trying to protect the nature of their national constitutions and their authority over their national legal order. "The highest tribunals of the Member States also belong within normative orders in which they claim ultimate authority to adjudicate, and are accustomed to approval, or at least acquiescence, in their doing so" (MacCormick 1998: 521). The reluctance of high courts to EU law is a consequence of the empowerment of the CJEU as a supreme EU law authority, and is also due to the explained empowerment of ordinary courts as a European Union courts vis-à-vis high courts (Claes 2006).

> "Ordinary courts are there to settle disputes, and their problem under Community law arises due to occasional clashes of their domestic constitutional and European constitutional function, while high courts with constitutional jurisdiction are there to defend domestic constitutions. The consequence of this is that the ordinary courts are, therefore, often empowered when a Community mandate replaces their powers under domestic constitutions whereas the Constitutional courts are not attributed any additional powers, rather they loose part of the powers they did enjoy prior to the existence of European law" (Ćapeta 2007: 703-704).

National higher courts, aware of this disadvantage, have developed national doctrines to contain and restrict the reception and acceptance of EU law and EU Treaties, especially, to limit CJEU doctrines that could undermine their authority in the national constitutional order. Their national jurisprudence can serve as a deterrent for national ordinary courts' behaviour considering the application of EU law over national law. High courts may constrain national courts' judicial review powers of national legislation by two means: 1) Establishing limits and conditions to the transference of national sovereignty to EU law institutions, to the application of EU law supremacy, and to the exercise of judicial review; 2) Constraining the cooperation between the CJEU and ordinary courts. These limits, in which high courts claim their ultimate authority, are exercised either during the (treaty) ratification of the new powers and competences of their competing supranational authorities[55] or in law cases that can affect the entire relationship between EU and the national legal order or the institutional relationship of the EU and national institutions (Maduro 2003).

1) *Jurisprudential limits to the transfer of power, acceptance of EU law, EU legal principles and exercise of judicial review of treaties and secondary legislation:*

---

[55] See Closa (2013), Closa and Castillo (2012) and Dyevre (2011).

These points are raised predominantly during the ratification of EU Treaties; they concern the substance and proceedings needed to transfer powers effectively from the Member State to the EU, and to configure the relationship between the EU and the national legal order. As regards to the formal requirements for the ratification of the Treaties, higher courts have exceptionally required the use of referendums. A clear example of this is the *Crotty v. An Taoiseach [1987]*[56] case of the Irish Supreme Court during the Single European Act. The Court established the requirement of a referendum for the ratification of each treaty involving either a further transfer of sovereignty or the creation of

[56] During the ratification process of the Single European Act, Raymond Crotty took a legal action against the Irish Government. Crotty's demand was made on several of grounds; however, the only grounds on which the Supreme Court allowed the appeal were those relating to cooperation in the field of foreign policy. The judgments considered the constitutionality of the European Communities Act of 1986 and the constitutionality of ratifying the foreign policy provisions of the Single European Act (SEA) assessing the need for a referendum in order to transfer the new competences. The majority of the chamber ruled that the state could not ratify the SEA without consulting the people. They argued that the state's power to determine its foreign relations was held in trust by the people and could not be alienated by the government. The main reason was that the Act entailed a decrease in the power held by the Government to conduct the nation's foreign policy, a power the constitution explicitly granted to the Government. The Supreme Court resolved in favour of a Referendum for the Single European Act (SEA). The long-term implications have also been significant. In practice, this means that the ratification of every treaty change involving a further transfer of sovereignty or the creation of new competences for the Union has required a referendum. The Tenth Amendment was adopted in response to the ruling of the Supreme Court. The establishment of new formal requirements created by high courts are not analysed in this dissertation due to their use in shaping the strategies of the political actors involved in the ratification process such as governments, parliaments, political parties, etc.

new competences for the Union.[57] However, there have been several failed attempts initiated by national litigants to encourage higher courts to establish referendums, for example in Germany and Slovakia, during the approval of the Constitutional Treaty, and in Slovenia during the Lisbon Treaty.

Furthermore, higher courts have established limits to the European substantive conditions, constitutional values, rules and CJEU jurisprudence. First, high courts contained the recognition of direct effect and EU law supremacy asserted by the CJEU. A clear example of contained acknowledgment of the supremacy of EU law is the Italian case (see pages 49-50 above). Whilst the principle of supremacy of European law has generally been acknowledged by the Member States, national Constitutional courts have established uncertainties to this doctrine, in order to preserve the autonomy of their national constitutional and legal order.[58] The Constitutional courts have retained for themselves the

---

[57] During the Constitutional Treaty, there was another successful case for a referendum approved by the Constitutional Court in Hungary. The ruling of the Constitutional Court was thus positive with regard to the *civic movement's* call for a referendum on the Constitutional Treaty. Unfortunately, no time remained to exercise the democratic right, since the Parliament had in the meantime ratified the treaty. The government was wary of jeopardizing the smooth ratification of the EU Constitution by holding a referendum that could have yielded unpredictable results due to various political circumstances: The government lost its popularity, as the main ruling party did not support the idea of amending the Constitution to grant Hungarian nationality to all Hungarians. Furthermore, problems with the central budget deficit vis-à-vis the Maastricht convergence criteria also started to emerge at that time.

[58] These cases are **Italy**: Judgments of the Italian Constitutional Court in *Frontini* [Decision No. 183 (1973)], *Granital* [Decision No. 170 (1984)], and Fragd [Decision No. 168 (21.04.1989)]. **Germany**: Judgments of the German Constitutional Court (BVerfGE) *Solange I* [BVerfGE 37, 271 (29.05.1974)], *Solange II* [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)] *Brunner case* in Maastricht [BVerfGE 89 (12.10.1993)], & Lisbon Treaty [BVerfGE, 2 BvE 2/08 (30.6.2009)]. **Belgium**: Cour d'arbitrage's judgment No. 12/94, Ecoles Europeenes

right to review whether European Union institutions act within the competences conferred upon them and respect the fundamental constitutional norms and rights. Despite its explicit or implicit recognition that they will not review the validity of specific EU legal acts in light of national constitutional law (Maduro 2003: 534), some high courts have used this review, not only to reassert their threat of reviewing EU acts, but also to reverse some national

---

(01.02.1994). **France**: Conseil Constitutionnel in *Maastricht* (02.09.1992), in *Amsterdam* (31.12.1997) and in the Constitutional Treaty [Décision No. 2004-505 DC (19.11.2004). **UK**: House of Lords *Factortame* judgments: 1st judgment [Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others (18.05.1989)] and 2nd judgment (11.10.1990). **Denmark**: Danish Supreme Court of the Maastricht Treaty in *Carlsen v. Rasmussen* case (06.04.1998). **Greece**: Greek Council of State decision in *Bagias v. DI KATSA* [Decision No. 2808/1997)]. **Spain**: Judgment of the Spanish Constitutional Court in Maastricht [Decision nº 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004]. **Poland**: Polish Constitutional Tribunal judgments on the Polish Accession Treaty [Case K 18/4 (11.05.2005)], and, on the European Arrest Warrant [Case P 1/05 (27.04.2005)]. **Czech Republic**: Czech Constitutional Court's decision on Post-Accession Decision [Pl. ÚS 50/04 (08.03.2006)], Decision on the ratification of the Lisbon Treaty by the Czech Constitutional Courts [Pl. ÚS 29/09 (03.11.2009)]. **Cyprus:** Cyprus Supreme Court (Ανώτατο Δικαστήριο Κύπρου), Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest Warrant Law. For further information see Albi (2007). "Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of 'Co-operative Constitutionalism'". *European Constitutional Law Review* 3:25-67; Hartley (2004) *European Union Law in a Global Context: Text, Cases and Materials*. Cambridge: Cambridge University Press; Maganaris (1998) "The Principle of Supremacy of Community Law - the Greek Challenge." *European Law Review* 23; Stone Sweet (2004) *The Judicial Construction of Europe*. Oxford: Oxford University Press; and Martinico, Giuseppe (2012a) "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts". *The European Journal of International Law*. 23 (2): 401-424.

transpositions of EU legislation. For example, "the Hungarian Constitutional Court[59] found that a national law implementing EU regulations on surplus sugar stocks was against the Hungarian Constitution; indeed, the issue of sugar stocks has led to difficult cases regarding protection of constitutional rights in the other new Member States as well. The Polish Constitutional Tribunal [60] annulled national provisions implementing the European Arrest Warrant framework decision due to their non-conformity with Article 55 of the Constitution, which prohibits the extradition of Polish nationals."(Albi 2007: 28).

2) *Jurisprudential limits to the cooperation between national courts and CJEU - preliminary references:*

High courts as appellate courts can revoke orders for preliminary references when the request comes from a court that is not of last instance at the national hierarchy. If the appellate court annulled the reference making order, the referring court would be obliged to withdraw the reference to the CJEU. [61] As Michal Bobek (2010) points out, this practice varies among Member States, finding four possible situations that vary from a clear threat to the national courts' decision to cooperate with CJEU in the application and interpretation of EU law, to a total freedom of choice for courts:

[59] Hungarian Constitutional Court's decision 17/2004 (V. 25) AB.

[60] Polish Constitutional Tribunal Judgment of 27 April 2005 in Case P 1/05.

[61] The question of appeal against orders asking for a preliminary reference was questioned by the CJEU and Advocate Generals from the very beginning in several cases: C-13/61 *De Geus v Bosch* [1962], and followed in C-127/73 *BRT v SABAM* [1974] and C-146/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974]. In the C-210/06 *Cartesio* case, the Court questioned the limits to cooperation, vindicating the right to have a direct relationship with the referring judge.

a) *Appeals possible:* UK, Netherlands, France and Hungary recognized the possibility of appeal under some criteria of admissibility that varies among countries.
b) *Appeals disputed:* Germany, Austria, Czech Republic and Slovakia only admit a limited appeal, but it is unclear under which situations, and there is no consensus by the doctrine, though the majority of the experts are against it.
c) *No appeals:* Ireland, Greece and Italy neglect the possibility to appeal a decision to refer to the CJEU.
d) *Indeterminate position:* In the rest of European Member States, there is no clear situation on the appeal of reference orders because the debate has not yet begun.

In contrast, there are Constitutional courts that are more inclined to cooperate with the CJEU to solve interpretation problems (Martinico 2010). While some high courts denied the possibility of cooperation with the CJEU raising preliminary questions such as the German Constitutional Court, others courts like the Italian[62], the Spanish Constitutional Court[63], and most recently the French Constitutional Council[64], changed their mind on this topic or accepted it a long time ago, like the Belgian and Austrian Courts.

C) Legal and political culture:

Finally, legal and political culture difference across EU Member States may indeed affect the application of EU law and CJEU jurisprudence. In this regard two cultural mechanisms have been specified by the literature. Firstly, European countries with a common law tradition are attached to the general rule of binding

[62] Corte Constituzionale, ordinanza 103/2008.
[63] Spanish Constitutional Court, order 86/2011 (Arroyo 2011).
[64] Conseil constitutionnel, Décision n° 2013-314P QPC du 04 avril 2013.

precedent more than countries with other legal traditions (e.g. civil law, Scandinavian law, etc.). Judges socialized in this culture are more familiar with and are used to the application of CJEU precedents, and hence will be less likely to use preliminary references. Similarly, Hornuf and Voigt (2012) state that judges in common law countries play a more active role in the developing of law. That behaviour is extended to the application of EU law, where judges are more prone to solve EU legal conflicts and doubts without the intervention of the CJEU. The second cultural difference is related to the difference between constitutional and Nordic majoritarian democracies. It has been noted before that national courts, through the preliminary references proceeding have given stronger judicial review powers for the enforcement of EU law. Nevertheless, in countries with majoritarian democracies the lack of familiarity with the judicial review power explains why the national courts in these Member States are less likely to use of the preliminary ruling system in the EU compared to constitutional democracies (Wind 2010).

As we can observe, national courts have been empowered supranationally compared with other national authorities through the EU treaties and CJEU jurisprudence allowing the correct application and interpretation of EU law. Nevertheless, some national settings may still influence and constrain the assessment of national courts in EU law. Firstly, despite the discretion of national courts on EU law application conferred by the CJEU, they have to harmonize their EU law interpretations with their national constitutional principles. The application of EU law can become problematic when they have to harmonize both legal orders. For a national judge, the solution might be distorted when national courts are balancing sensitive competing EU principles or objectives with national principles in national contexts, where the supremacy of EU law is contested or where the EU national rulings can be reviewed by appellate or high courts. Secondly, high courts tried disempowering national courts (especially low courts) placing boundaries to the cooperation between CJEU and national courts, when they wanted to protect the constitutional

jurisdiction or the national legal order or policies. And thirdly, divergences in legal (common vs. civil law) and political cultures (majoritarian vs. constitutional systems) can have an impact on how judges participate in the EU legal system.

It is unquestionable that the CJEU has increased the discretion in areas of possible conflict of EU law with national law and institutions, allowing national courts an easier adaption of EU law to the national constitutional claims (Maduro 2003). However, their role as European Union judges is still constrained by national legal dynamics, such as national doctrines and provisions, which discourage national courts from using their EU judicial review powers based on their obligation of loyalty to the national legal order and constitutional hierarchy. National judges play a sort of schizophrenic role, taking into account both European and national legal orders to assess the reception and application of EU law in the national order. The CJEU has established the legal basis for this and the national high courts have reacted to delimit that role.

2.5. Conclusion

Since the European Union integration process began, the constitutionalisation of the Treaties has bestowed national courts with extra judicial review powers for the enforcement of EU law. The CJEU has supported this empowerment, which has created new ways to solve EU interpretation conflicts through its jurisprudence and precedents. At the same time, the national judiciary have increased their position in comparison with other domestic institutions, through judicial cooperation and the adoption of the EU judge role. The doubt is whether, having the power to apply discretionally EU law, national courts follow EU legislation and CJEU guidelines. As regards their preferences and institutional constraints, we observe how courts can use their discretion to avoid CJEU guidelines or interpret EU law narrowly. First, judges do not apply EU law, send preliminary references or follow CJEU instructions often because they are not sympathetic

to EU law or because they do not know how the EU legal system works. Second, the CJEU rulings, Treaties and secondary EU legislation are abstract enough to leave much room for interpretation. These ambiguities allow the possibility for national traditions and institutions to influence and distort the correct enforcement of EU law, partly possible because of the directives structure, for instance. Third, despite the empowerment of national courts by the CJEU, there is still need for an effective accountability system that will allow the CJEU to force national courts into following their ruling and guidelines on EU law, as well as neutralizing national contention dynamics.

There is such legal discretion left for national courts at the domestic level for assessing the impact of EU law on the national policy process. Even though it is true that the Treaties and the CJEU have given national courts the weapons to enforce and to fight against non-compliance by national authorities, this fact cannot explain by itself why and how the enforcement of EU law occurs. There is much margin of discretion where judges' preferences towards EU law and domestic institutions can also play a systematic role during the judicial enforcement process, which could be interesting for empirical research. At present time, legal and political science scholars are finding that there is a need to explain the leading domestic factors that affect the day-by-day application of EU law by national courts, since this process may be driven by the preferences of political, social and judicial actors and their interactions.

CHAPTER 3. PUZZLING POLITICS INTO THE EU JUDICIAL POLICY-MAKING PROCESS: A RECONSIDERATION OF JUDICIAL EMPOWERMENT APPROACHES TO THE NATIONAL COURTS

In order to assess the impact of political institutions of the behaviour of national courts, this chapter first will present the main theory behind the analysis of courts and judges as regards EU law. Next it will trace the policy-making process in which national courts and the political institutions relevant for the theory interact, giving brief explanations of the diverse stages in the judicial enforcement process and its implications for the EU policy implementation process. Secondly, I will derive some basic hypotheses regarding the impact of the existing institutional arrangements in the Member States on the decision-making of national judges when assessing EU law cases, considering in addition other factors that are more relevant than political institutions (including legal institutions, policy misfit, etc.). Finally, I will frame the behaviour of national courts in the process of legal integration according to the expectations of the theory. It will be done by comparing the predictions of diverse explanations accounting for the legal integration of Europe. The main aim of this chapter is to provide the theoretical framework in which the behaviour of judges is understood, with the intention of developing the arguments and assumptions that will be used later

on for the modelling and empirical analyses. Accordingly, this chapter will address the following questions:

- Which factors influence the judicial-decision making process?
- What are the motivations of judges for this enforcement?

Also, given the answer to those questions:
- How does the EU law judicial enforcement process work?
- What are the consequences of these micro-accounts for the theories of legal integration?

3.1. A Judicial empowerment theory revisited: The role of political institutions in the judicial decision-making process.

I now introduce a theory that tries to disentangle the institutional-political mechanisms that may explain the decisions of the judges when applying EU law. This theory is mainly concerned with the interactions of judges with the other branches of power at the national level (executives, parliaments and other courts) and supranational level (e.g. European Parliament, Court of Justice of the European Union, Commission, Council of Ministers), involved in the process of implementation and enforcement of national rulings. Basically, the theory takes as a baseline the main assumptions of judicial empowerment theories dealing with the increasing role of judicial institutional in the national and international political arena (see Woods and Hilbink. 2009), in particular, the assumptions of those political theories developed to explain the legal integration (Burley and Mattli 1993; Weiler 1991). This theory will be combined with other accounts, such as the inter-court competition theory (Alter 1998, 2001), to address some of their caveats. Moreover, the theory will focus on explaining the empowerment of courts in respect to other branches of powers or political institutions considered relevant for the implementation of EU legislation, or interested in how the process of judicial application of EU law is developed (that is, national

governments, parliaments and courts and their counterparts at the international level). That will exclude the consideration of some other actors or institutions of other actors important for the mobilization of courts, like interest groups, political parties, public opinion, etc. (see Carruba and Murrah 2005; Cichowski 2001; Conant 2001, among others). All these considerations are aimed at offering later a better understanding of how judicial empowerment theory accounts for the legal integration, as we will see at the end of this chapter. In these sense, this revised version of the judicial empowerment theory will try to be more specific as regards to when, how and why the legal integration process happens, by integrating insights from other theories and approaches (e.g. inter-competition theory, inter-governmentalism) useful to explain how judicial empowerment mechanism works and may foster legal integration.

The following account can be considered as a revision of the judicial empowerment theories. Firstly, the theoretical improvements come from fully integrating inter-competition theories into the judicial empowerment explanations offered by Burley and Mattli (1993) and Weiler (1991), and followed by other scholars like Ramos (2006) or Obermaier (2008; 2009). Following Stacy Nyikos's (2008) classification, empowerment is also the increase of judges' power vis-à-vis other courts. Following Karen Alter, the divergences in preferences and power within the judicial hierarchies may shape the behaviour and attitudes of courts towards EU law. In this sense, the EU legal system, as it was shown in the previous chapter, may offer incentives to enforce EU law, CJEU doctrines or ruling and then to encourage the participation of national courts in the legal integration process. Hence, the judicial empowerment theory presented here unifies the idea of competition by considering that judicial actors, when shaping policy outcomes, compete not only with other branches of power, but also with their judicial peers.

Secondly, this reconsidered version of the judicial empowerment theories, attempts to specify under which conditions and how national courts empower themselves

successfully by underlining national political dynamics. Following inter-governmentalist approaches, the judicial empowerment theory proposed here tries to 1) identify the mechanisms that national political institutions have at their reach to circumvent the discretion of judges and, subsequently, to hamper the process of legal integration, and 2) to define under which circumstances national courts will use EU law instruments to overcome limitations imposed by these institutions during the judicial-making process. In that sense, the specification of national dynamics, preferences and interactions as regards to the application of EU law will try to provide broad insights regarding when or how judicial empowerment happens.

The initial assumption is that judges decide cases in light of their policy preferences. Accordingly, national judges will support EU law against domestic law when the enforcement of EU law matches their preferences or when it helps them to influence the domestic policy or doctrines according to their preferences. As rational actors, judges want to maximize their influence over the political and legal system, hence, they will care about EU law when its application is more beneficial to the judges than the application of domestic law. However, contrary to purely attitudinal models (Segal and Spaeth 2000), this approach assumes that judges are constrained by their institutional political environments when pursuing their policy/legal interpretations (Gillman and Clayton 1999). More precisely, national political institutions competing with national courts have *ex-ante* and *ex-post institutional mechanisms of controls* that they can use to influence or limit the discretionary power of national courts. On the one hand, the ex-ante institutional control is a set of rules that protect the judiciary from other branches of power: 1) selection of judges; 2) promotion rules; 3) budgets (Alter 2001; Cameron 2002; Carrubba, Gabel, and Hankla 2008; Helmke 2005; Ramsayer and Rasmusen 2003; Ramseyer 1994; Ríos Figueroa 2006; Stone Sweet 2010). Depending on the configuration, these rules can be used to influence or constrain judges' decisions.

On the other hand, there are three kinds of *ex-post* threats to the judiciary's power: 1) override of national courts' decisions by the legislature by means of passing new legislation; 2) non-compliance by governments and administration with the ruling by not applying, obstructing or misapplying EU law; 3) reversal of lower courts' decisions by appellate or higher courts. This ex-post mechanism refers to the ' implementation problem' (Closa 2013), that points to the fact that court rulings needs to be applied by the administration, transferred by parliaments and governments into national policies and/or respected by other courts. Therefore, implementation requires the active participation or agreement with decisions of national judges' from other actors, apart from the judges themselves, to make their policy choices work without any political costs.

Considering that judges aim at achieving the highest policy influence of their decisions on EU law at the minimum costs, national judges will anticipate or react on the behaviour of other political actors. During the decision-making process judges will try to accommodate their behaviour to the reactions of other institutions, seeking to implement their policy goals and at the same time trying to reduce the negative consequences of their rulings, that is the risks and costs that non-compliance by national authorities who do not agree with the ruling would entail to national judges. Hence, judges will opt for a specific mode of implementation of EU law depending on the constraints they are face with. Courts, by modifying or adapting their rulings in anticipation of a possible non-compliance by the competent authorities, for example, may secure better outcomes than those that are achieved when they act myopically, enforcing their most preferred EU legal or policy interpretation.

However, the national court might enforce a judgment closer to its policy outcome or its own legal interpretation thanks to the protection that a judgment based on a CJEU ruling and doctrines (such as direct effect and supremacy) gives against national authorities (Alter 2001; Tridimas and Tridimas; Weiler, 1991). Judges motivated in this way will cooperate with CJEU rulings

and doctrines to legitimize their policy/legal interpretation when they face the opposition from other political powers. For that purpose, judges will enforce the compliance of EU law through preliminary references to reduce the risk of a reversal of their domestic rulings (Conant, 2002) and to force change on reluctant governments (Obermaier, 2008). In other words, judges are strategic in respect to the executive and invoke the CJEU to legitimize their exercise of power in the domestic context and to divert criticism (Ramos, 2006: 400). Nevertheless, as we will see below in this chapter, empowerment through the application of judicial mechanisms is also achieved by considering the cost of application of EU law and cooperation with European institutions, mainly the CJEU. The CJEU ruling may not meet the policy preferences of the courts (Nyikos, 2003: 400-401) or they can undermine their judicial power (Golub 1996).

National governments will think twice before overruling or misapplying a national court's decision supported by the CJEU due to the high costs that this behaviour induces (Pollack, 2003: 176). In that sense, the intervention of the CJEU offers some extra-mechanisms that can increase the likelihood of compliance by Member States. In the first place, the EU legal system is designed to deal with non-compliance of Member States, especially when national courts enforce EU law complying with CJEU rulings. As Stone Sweet and Brunell (2012: 205) show, Member State's non-compliance with any important CJEU ruling will generate new litigation by national courts and the CJEU, and new findings of non-compliance will emerge. Secondly, governments may face reputational costs when the Commission engages in a strategy of 'naming and shaming' them for poor compliance with EU policies, decreasing their political legitimacy regarding other Member States, the EU institutions and their own public. Empirically, this strategy is effective because the intervention of the Commission under the infringement procedure has helped to solve the vast majority of cases in the early stages of the proceeding (Panke 2007: 850).

Furthermore, this strategy is supplemented with art. 260 TFUE, which provides to the Commission and the CJEU the power to propose and impose mandatory fines for not complying with the Court's decisions. Moreover, according to the principle of state liability settled in CJEU's *Francovich* decision, governments are responsible for their wrong application of EU law and may face financial liability for the costs associated with their failure to transpose and apply EU legislation. Finally, and as regards to the institutional configuration of the CJEU, it is rather difficult to overturn CJEU decisions, and it requires the coordinated action by all the member governments to overrule the effect of the decisions of the Court (Stone Sweet and Brunell, 2012: 207-209). Therefore, CJEU rulings may force the governments to consider implementing the rulings, under the threat of receiving multiple lawsuits by national courts, infringement procedures (art. 259 TFUE) or penalties by European institutions against the non-compliance with CJEU rulings (art. 260 TFEU).

Moreover, considering the CJEU rulings as a means of EU judicial policy creation, the intervention of the CJEU may constrain the national scope of policy options or discretion retained by governments (Martinsen, 2011), by setting thresholds to comply with EU regulations. Hence, the CJEU's interpretations may create new limits to the actions of the national executive, narrowing the national policy options at their disposal, regarding social rights. As a consequence, national governments may comply with these ruling in order to prevent more interventions of the CJEU requested by national courts and put an end to the judicial limits imposed on their political discretion.

In addition, when direct and immediate compliance is not fulfilled through these mechanisms, due to the fact that the cost of non-compliance by the Member States is sufferable, judges can rely on the indirect effects of CJEU rulings, which in the mid-/long-term can increase the likelihood of compliance. In that sense, political and societal actors should exist and be willing to push for compliance by using reframing or shaming in order to succeed. On the one hand, the *shaming strategy* requires the intervention of

empowered social or political proponents, publicly highlighting the inappropriateness of non-compliance with CJEU rulings and imposing reputational or electoral costs on non-compliant governments. In order to circumvent increasing non-compliance costs from these groups, governments strategically adapt their policies. On the other hand, in the *reframing strategy*, political or social proponents persuade the government to alter the normative beliefs on how a certain issue should be framed and handled, by diffusing the new ideas contained in CJEU rulings into the domestic realm (Panke, 2007, 2009).

Similar bottom-up strategies have been presented by Lisa Conant (2002: 11) who states that "while the CJEU cannot unilaterally impose major policy changes, there is a number of reasons why judicial interventions in policy-making are nonetheless significant. First, the CJEU may provoke political responses by surprising other actors and recasting debates with decision that no one anticipated." Governments may try to contain the implications of judicial solutions by restricting or avoiding this interpretation. Even though, the CJEU rulings' content may survive and be used by other social actors or political opponents or institutions to push for policy change in their future interactions with governments. For example, CJEU rulings "with innovative legal interpretations may embolden the Commission in negotiations over legislation or infringement proceedings with Member States because it feels confident that the CJUE will support it in any disputes. Similarly, sympathetic national officials may use CJEU case law to bolster arguments for changes in national law and policy. Firms, groups and individuals may also invoke CJUE interpretation in attempts to gain leverage relative to other private or public actors." (Conant, 2002: 11).

Despite these mechanisms offered by the literature, the influence or compliance with CJEU rulings cannot be taken for granted if we consider the research done by Carrubba et al. (2008, 2012), Conant (2002) and Garret et al. (1998), among others, showing how governments may avoid or contain CJEU rulings. Nonetheless, the theory suggested here allows for non-compliance

as a likely outcome that national judges may consider. What is relevant for the argument developed in this thesis is that judges see CJEU rulings and doctrines (e.g. supremacy) as an additional instrument that may increase the probability of their influencing public policies and, at the same time, cover their back against governments' reactions or threats by shifting blame for the decision to the CJEU. Therefore, although we cannot be sure that every judgment will induce fully successful compliance in the first stage, the combination of top-down and bottom-up strategies may improve substantially the influence of CJEU rulings in the mid-/long-term (Panke, 2009). To sum up, even if the governments contain the implementation of CJEU rulings and are not effective as soon as they are made, we still might expect later a gradual shift in the policies and acceptance of CJEU rulings, if they are "accompanied by complaints about violation of innovative legal principles, streams of copycat cases before national courts and the CJUE, interest groups and firm lobbying, and debates among elected officials" (Conant, 2002: 45).

Next this theoretical framework will be adopted in order to explain the EU judicial-making process at the domestic level, by placing national courts and judges within the political system, and later to derive some hypothesis about the role of this courts during the enforcement of EU law.

3.2. Disentangling the EU judicial policy process: How do national courts enforce EU law?

Members States frame the judicial enforcement process in a broader implementation process of EU legislation. In particular, judicial enforcement is described as the course of action of application of a certain legal rule to solve a legal question raised in a case law. As regards to this process, what is relevant for this dissertation is how and under which political and institutional conditions national courts enforce or protect a right, review national legislation, etc., under EU law provisions. For concept

clarification, first, the idea of judicial enforcement has to be distinguished from the implementation process. As Kal Raustiala and Anne-Marie Slaughter said, "implementation is the process of putting international commitments intro practice: the passage of legislation, creation of institutions (both domestic and international) and enforcement of rules" (2002: 539). While the implementation is related to the previous actions and efforts made by the political powers and administration to comply with their EU law obligations, the judicial enforcement process is considered the last stage in the implementation process to force the compliance with EU legislation, specifically, a reaction to the lack or wrong implementation by the national authorities in charge. Therefore, we could define judicial enforcement as a later stage in which national courts are involved as a reaction to the implementation problems.

Second, despite the clear relationship between the implementation and the judicial enforcement process, the latter is not limited only to the application of EU law for implementing EU demands, such as enforcing EU against national law. This is only one side of the story in the judicial application of EU law. In this dissertation, judicial enforcement is also extended to EU law decisions where national courts enforce and give pre-eminence to any EU law interpretation over other possible interpretations, even when national law seems to comply with European law. This second definition refers to those EU law cases where both litigants have their own conception or idea of how EU law should be applied; relying on national courts for the enforcement of EU law interpretations that are more beneficial to their interests. For this reason—as in the case of EU law vs. national law cases—when national courts choose a specific mode of EU law interpretation or treatment, they are also opting for a particular policy or legal pathway which has important consequences for the development of that given legal or policy area. We must not overlook those consequences when studying the enforcement of EU law by national courts. Even though the impact on the national legislation will not be the same as when national courts enforce EU law

invalidating national provisions, by opting for an EU law interpretation (enforcement) national courts are also intervening in the policy-making process shaping the development of national policies and legislation.

Keeping this in mind, we can identify judicial enforcement of EU law when national judges[65]:

1) Enforce EU law against national legislation or against private agreements made under national regulation (e.g. private contracts).
2) Enforce any EU law interpretation over others, giving pre-eminence to some EU law interpretation.

The judicial enforcement process is represented in figure 3.3 (see below). As we can observe, the process for the judicial application of European law comprises a set of stages involving several actors and institutions. These actors will consider different factors depending on the stage in which they are taking part. In the current study, I focus on how national courts balance these factors during the judicial decision-making and understand under which conditions national courts will enforce EU law. In a first stage, the initiation of the judicial enforcement process depends on the

---

[65] Distinguishing between both ways of judicial enforcement, I am not excluding the judge's capability of legal interpretation when evaluating the compatibility of EU law with national provisions. To some extent, the first point also refers to a conflict between competing interpretations as in the second point. While in the second case, the national judge interprets EU provisions balancing the suggestions offered by the litigants on which interpretation should prevail, in the first case national courts interpret EU law provisions to figure out to what extent national law is compatible with EU law. In this case, the litigants will try to defend their position offering an interpretation of national law provisions compatible with EU law. Hence, in both cases we can consider that national courts are assessing which interpretation should prevail over others. While in one situation national courts are considering opposing EU law definitions, in the other cases they are evaluating the compatibility of national law with EU law.

effective transposition of EU regulation into the national legal order, and how this is done. That is, whether national legislation complies with the EU legal standards required in the EU treaties, directives, regulations, etc. As a result, the effective transposition and compliance with EU law will reduce the number of EU law cases asking for the correction and proper implementation of EU law by the national authorities. In contrast, national actors could find further encouragement to suit EU law cases when they find out that a new national law transposing EU law can be applied to economic contracts (economic law) or social interactions (e.g. family law).

In a second stage, because of implementation problems or unsatisfactory social, political or economic interactions, EU legal disputes may emerge to contest the relevant national legislation or the current EU law interpretation by national actors (e.g. individuals, firms, governments, etc.). All these actors will file EU law cases in courts depending on their expectations as regards to EU law judicial enforcement, their resources and the institutions determining the access to justice. To begin with, litigation experience and the expectations of litigants affect their chances of success and, hence, their participation in litigation, as we can see from the party capability theory (Galanter 1974; Songer, Sheehan and Haire 1999). Those actors used to performing as repeat players in the courts, will increase their experience in dealing with these issues, thus achieving success. Secondly, the organizational capacity refers to the available resources at the disposal of litigants such as information (regarding both the relevant national and European provisions), the situation on the ground, and the necessary funding to pay litigation in courts. Thirdly, the access to courts refers to the legal mechanisms that ease or constrain access to civil justice, such as the refunding of the procedural costs (Slepcevic 2009). These three factors together will determine the probability of litigants suiting an EU case law in national courts, and to what extent the judge will consider that the litigants can legitimately pursue their EU rights through litigation. Once in court "each private actor has a powerful tool to enforce its rights

rooted in the European provisions, and each national court becomes potentially a directly involved actor in the process of the enforcement of European law" (Slepcevic 2009: 378).

The role of enforcing EU rights, places national courts as main trustees of the European legal integration process in their own national system. This has contributed to overcome the political weakness of the European institutions and to force the compliance by Member States with their obligations. European institutions, anticipating the difficulty in exercising political and administrative control of EU regulation, rely on judicial institutions (such as CJEU and national courts) and litigants for the full compliance of national authorities with EU law provisions. As we have seen in chapter 1, for that purpose EU institutions have empowered the role of courts to monitor the implementation task of Member States (Kelemen 2008). First of all, EU institutions have enhanced the power of the CJEU, impelling it to make expansive interpretation of EU rights and to enforce EU rights and obligations against reluctant Member States with little fear of political backlash (Alter 1998; Garrett, Kelemen and Schulz 1998). At the same time, national courts have been empowered by the CJEU to support and cooperate on the judicial enforcement of EU law. Consequently, social and political actors have at their reach judicial institutions capable of enforcing their EU rights on behalf of EU institutions.

This enforcement system of EU policies has evolved into a decentralized system (Tridimas 2001, 2003) where most of the relevant rights and EU policies are recognized through EU litigation or adversarial legalism (Kelemen 2008, 2011, 2012). To be precise, the enforcement of EU rights and policies in (national) courts is the result of a two-part process. The first part of the process entails the increase in EU rights and obligations over the years. The second has to do with the establishment of procedures and institutions empowering and legitimizing national courts and litigants to enforce EU rights (Kelemen 2008), which has obviously increased the legal activity of actors directly involved in the national judicial processes. Daniel Kelemen shows how the

extension of the level of litigation and judicial involvement is applicable to the CJEU, through enforcement actions, direct actions and preliminary references. Nevertheless, he does not find any evidence that this adversarial legalism has been extended to the national courts, showing how civil litigation rates in several European countries were constant over time, or even reduced like in the UK. Hence, he concludes that there is no evidence in his data on whether the growth of litigation at the EU level is also reflected in similar increases in litigation at the national level (Kelemen 2008: 17).[66] However, this conclusion can be challenged by observing other types of data related with the level of EU litigation at the national level. Figure 3.1 shows the evolution of litigation in EU law and its development over the years, taking as indicators the number of EU law decisions made by national courts.[67] We observe that, contrary to Kelemen's argument, there is evidence of how the level of litigation at the EU has been increasing since the beginning of the integration process.[68]

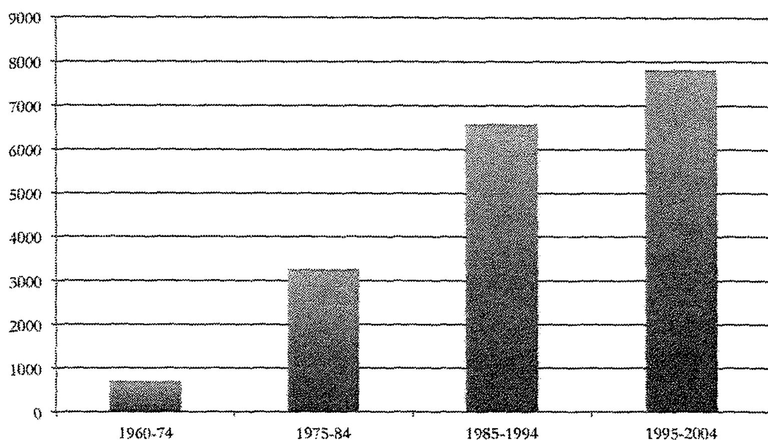
---

[66] Kelemen, in his paper, is conscious of the limits in the interpretation of his data and makes some objections on the conclusions extracted from the figures.

[67] See chapter 1 for a description of the data and its limitations.

[68] Nevertheless, some factors could have affected the increase of EU law decisions at the national level like the incorporation of new countries to the European Union.

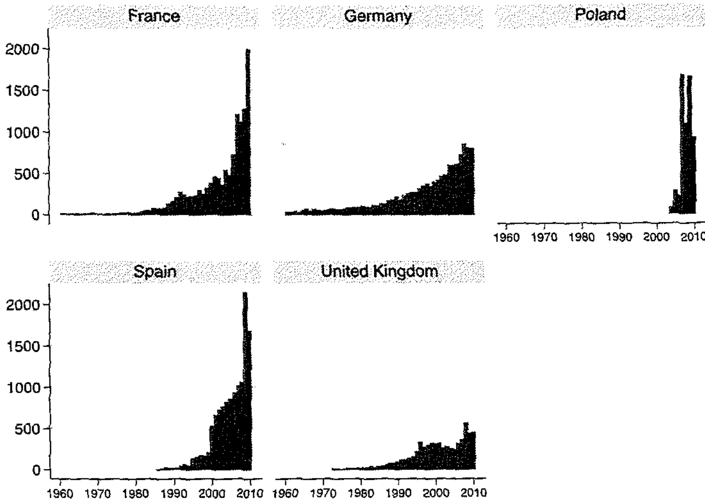
Figure 3.1. Number of national judicial decisions concerning EU law



Source: DEC.NAT – National Decisions database of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. Accessed June 2010.

This increase in the level of litigation is clearer when we analyse this phenomenon within countries. Figure 3.2 shows the amount of EU law cases in several Member States. As we can see in the graphic, the number of EU law cases has been generally increasing over the years and sometimes in a very drastic way. Therefore, we can assert that the process of adversarial legalism explained by Kelemen's can be extended to the case of national courts.

'igure 3.2. Amount of judicial decisions concerning EU law by countries 1961-2010)[69]



Source: Lex-Polonica (Poland), Lexis-Nexis (UK), Lexis-Nexis Juris Classeur (France), Juris (Germany) & Westlaw-Spain (Spain).

[69] The data was gathered using National databases that report decisions from several national courts. The universe of cases was determined by searching those decisions in which the national judges cited the keyword "European/ Communitarian law". The search tries to minimize the problems of finding EU law cases using a much-extended term among judges for referring to EU law before Lisbon Treaty. Nevertheless, broader searches can be performed introducing other terms regarding EU law provisions such as directives, regulations, EU treaties or CJEU, to cover all these cases where judges apply EU law not making explicit reference to the "European or Communitarian law". The inclusion of all these new terms will increase the number of EU law cases for every year, reinforcing our extension of Kelemen's argument on the adversarial legalization of the EU law system.

The CJEU is not the only main instrument that the EU institutions use for promoting the compliance with EU law. National courts, after their empowerment for reviewing EU rights and the improvement of access to justice of litigants, have also become the main trustees for exercising political control over governments and administrations of Member States on behalf of EU institutions. As a result, we see to what extent the role played by national courts in the implementation and enforcement of EU law has been—and still is—central for the proper application and reception of EU law into the national legal systems.

There is no doubt about the importance of national actors as (EU) institutions enforcing EU law. However, we still know very little on how and why national courts enforce EU law. The configuration of the judicial enforcement as domestic decentralized processes, in which diverse national institutions are involved, makes plausible the idea that national courts could react differently with regards to EU law enforcement demands. In principle, national courts—as national actors implementing EU regulation and obligations—may not implement EU law and CJEU interpretations uniformly, despite the need for a homogeneous application of EU provisions in the European integration. In this regard, the decentralized European policy-making process is determined at the national level by its own domestic politics and dynamics, thus increasing the complexity of the process (see figure 3.3).

Thus, the outcome of the judicial enforcement process, like EU policy-making in general, should be much more diverse than one would expect (Héritier and Knill 2001). During the judicial decision-making (see figure 3.4 above), national courts consider diverse factors that could determine their rulings. As we will see later, these legal, social or political determinants vary in certain degrees, to the extent that the responses and behaviour of national courts towards EU law may diverge, depending on the institutional context or policy area in which the EU case is framed. This dissertation will show whether it is indeed the case for national courts, by emphasizing the role of political-related factors.

Figure 3.3. EU law judicial enforcement process

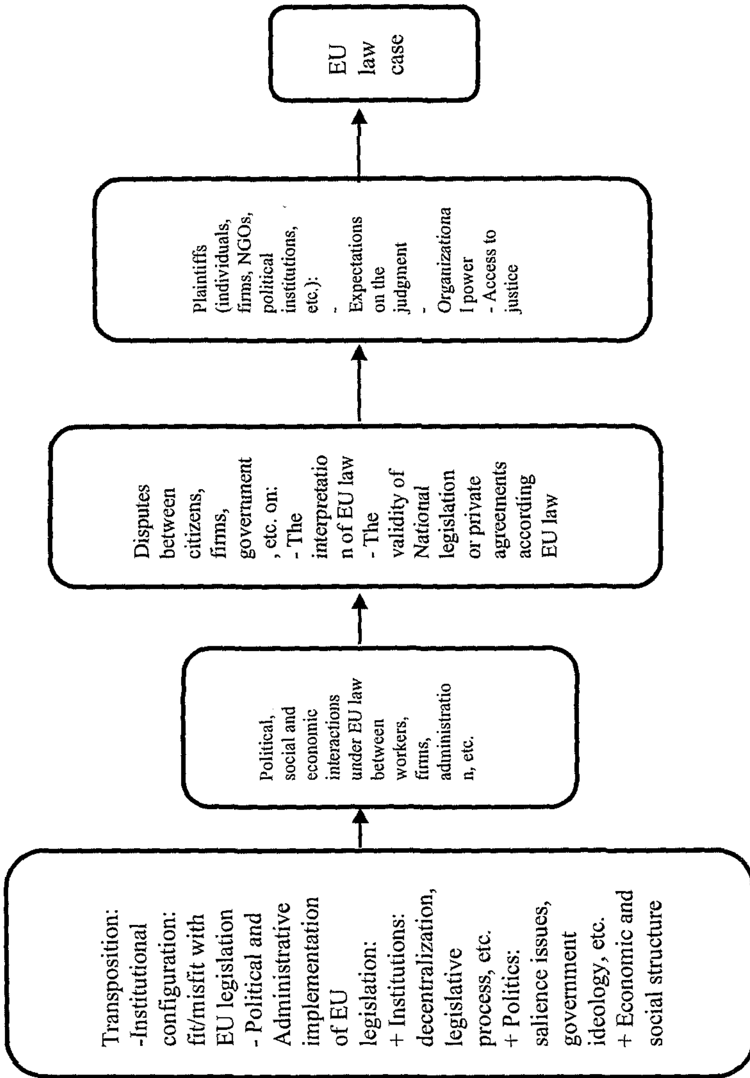
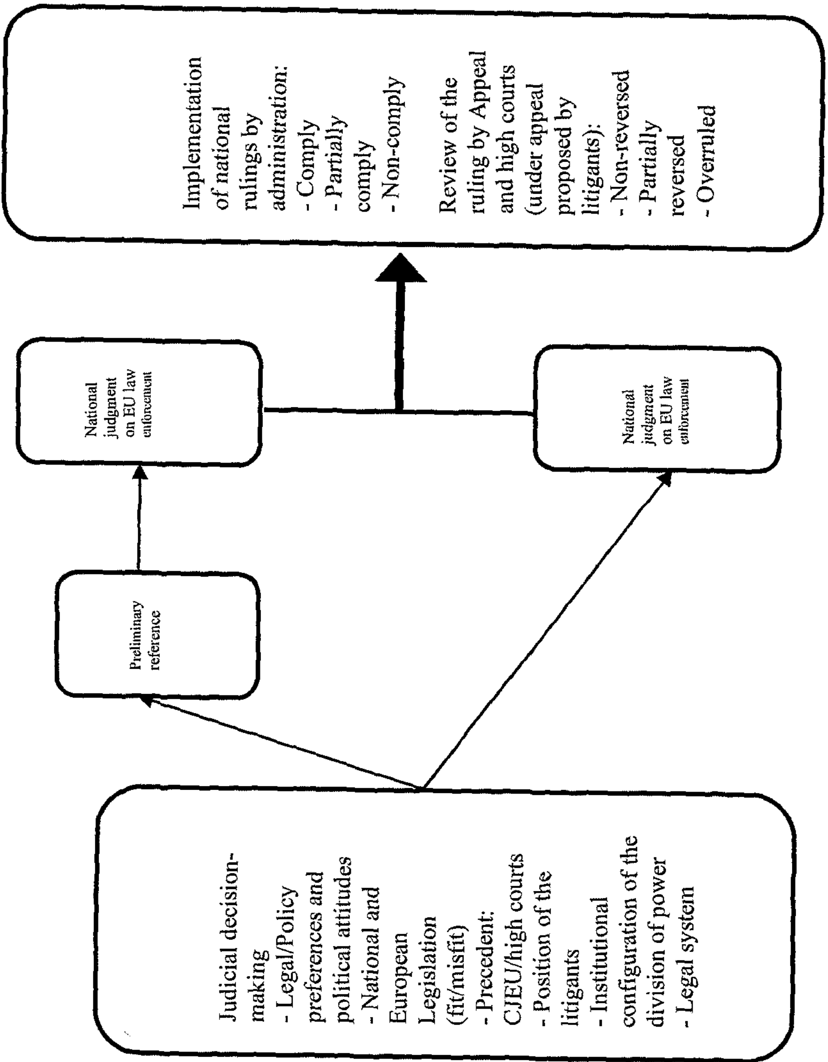


Figure 3.4. Judicial process



However, I will consider whether national courts may also play common strategies in the enforcement of EU law (e.g. cooperation with the CJEU), to promote uniformity and convergence of EU law regulations across national legal systems. In order to capture the variation in the judicial enforcement and to classify the different kind of decisions that national courts can make to apply EU law, I compiled diverse alternatives in the treatment of EU law by national courts following Francisco Ramos's classification on this issue (Ramos Romeu 2003: 243-44). These alternatives, showed in table number 3.1, classify the treatment given to EU law by the court in order to solve the case and the mode of solving it:

Table 3.1. Modes of Judicial Enforcement of EU law by national courts

Modes of EU law enforcement	Types	Explanation
The court enforces EU law	1.1. In conjunction with national law because EU law refers to it 1.2. In conjunction with international law indistinguishably 1.3. In conjunction with national law indistinguishably 1.4. In spite of national law 1.5. In spite of international law 1.6. Only applies EU law (vs. contracts, *dominant positions*, etc.)	National court applies EU regulations and dictates to solve the case. That is, EU law provision is part of the main rationales of the ruling. It is the main and more evident kind of enforcement. While categories 1 to 3 consider EU law enforcement together with other provisions, 4 and 5 are the most challenging mode of enforcement in which EU law prevails over other legislation.
The court cites EU law	2.1 In support of national law 2.2. Obiter dictum[70]	National court applies EU law in support of the main reasoning of the case (e.g. when the judge enforcing a national act that transposed any EU directive, also cites the transposed directive).
The court does not enforce EU law	3.1. It is not temporally applicable 3.2. It is not substantially applicable	National court does not enforce EU law. The categories range

[70] It refers to all EU law statements or observations made by the judges that are not strictly necessary for deciding the case, but the judge has included it because he wanted to make a better and more detailed argument. These kinds of arguments are not binding.

	3.3. It is not subjectively applicable 3.4. It does not have direct effect 3.5. National law is in compliance with EU law 3.6. It applies international law 3.7. It is not superior to national law 3.8. There is no EU law applicable	from a wrong identification of the facts or legal issue by the litigants, to more substantive *rejections concerning* the relationship between EU and national law (see 4, 5, 6 & 7).
The Court is silent on EU law	4. The court is silent	If one of the parties raised a point of EU law that the court did not address.

When deciding EU law application, national courts do not have all these options in mind. The nature or type of EU law issue usually suggests or limits the use of these alternatives or modes of governance. There are obvious differences between a case where the main issue is the compatibility of national law with EU law, and a case where each litigant defends its own EU law interpretation on how it should be enforced. Hence, while in the first case national courts should decide whether to enforce EU law in spite or against EU law (1.4), or whether national law is compatible with European law (3.5), in the second case the court may decide to enforce EU law together with national/international law and how (1.1, 1.2 or 1.3). Most of the time, the claims of the litigants delimit the decisions or the responses made by the judges. For example, the plaintiff suits a case in an ordinary court with the intention of annulling a contract that, from his legal point of view, is illegal under EU and national law. In this situation, the decision of the court is limited to 1.1, 1.3, 1.6, 2.1 & 2.2 in case the judge decides to enforce EU law because the denounced facts were illegal. Otherwise, the judge should say why these laws were not enforceable, arguing, for example, that the dominant position alleged by the plaintiff does not fit with the definition or requirements posed by EU law for its enforcement (cases 3.2 /3.3). Nevertheless, national courts may go beyond the pretensions of the litigants and enforce EU law in modes not indicated by the plaintiff or appellant, or suggest the application or citation of EU law *sua sponte*, that is, when the application of EU law is suggested by the courts instead of the litigants. This situation happens when national judges are really acquainted with EU law and CJEU doctrines to the extent that they can suggest its

application or amend the claims of the litigants when they think it is necessary.

Figure 3.5. Phase of adjudicatory reasoning

Litigation process

Preliminary reference

No citations

CJEU precedent

- Compliance
- Non-compliance

- Compliance
- Non-compliance

National court ruling

During the litigation, the national court may support its opinion or interpretation on previous CJEU precedents or on a preliminary question sent to the CJEU. National judges have in their hands a powerful tool for the interpretation of EU law in cases where the application of EU law is not clear. Hence, as well as the alternatives on the enforcement of EU law, judges can also decide about the mode in which they deal with EU law cases as regards the use of citation practices (see figure 3.5 above). Recently in the EU literature (Obermaier 2008; Ramos Romeu 2002; Ramos Romeu 2003; Ramos Romeu 2006), two types of references have been studied: the use of preliminary references and the citation of EU law cases previously decided by the CJEU (or *precedent*). From a strict legal account, the main objective of this citation practices is to give modes or examples of how to handle and decide the cases assigned to them.

It is worth pointing out that national courts can deal with the enforcement of EU law involving the opinions of other judges (either supranational or national). This dissertation will deal with this adjudicatory phase in which national courts consider whether to enforce EU law following the mandates of CJEU regarding EU law application. It will also measure the impacts of these practices in the final enforcement of EU law. For this reason, I will not limit the analysis to the use of citations, but will include how and why they deal with these practices when they consider enforcing or not EU law.

The contemplation of how national courts deal with CJEU rulings when they are asked to enforce EU law is not trivial. Since the early two thousands, scholars such as Stacy Nyikos (2003) have pointed out the fact that national courts do not always follow CJEU rulings (see table 3.2 below). One could interpret from this evidence that the CJEU makes decisions that do not meet the expectations of national courts. In such cases, judges should decide to, on the one hand, accept or comply with the CJEU decision, or, on the other, overturn the CJEU ruling by means of non-implementing, re-referring or reformulating the CJEU if they find the ruling unacceptable. As we can see in table 3.2, national

courts evaded or did not comply with CJEU preliminary rulings in 6.5 % of the cases finally decided by the courts (11 out 168 rulings).

Table 3.2. Enforcement of preliminary rulings by national courts

National court's treatment of CJEU preliminary rulings	*UK*	*France*	*Belgium*	*Netherlands*	*Germany*	*Total*	*%*
				Evasion or non-compliance			
Re-referral	0	1	0	0	2	3	1 %
Re-interpretation	2	3	0	0	1	6	2 %
Non-compliance	0	1	0	1	0	2	0.6 %
				Compliance			
Compliance	14	32	10	33	68	157	53.3 %
				Others			
Litigant withdrawal	4	6	1	7	110	128	42.6 %
Law is revoked	0	1	1	0	2	4	1.3 %
Total	20	44	12	41	183	300	100 %

Source: Data set on National Court Compliance with the CJEU Decisions in EU Preliminary References, 1958-1995 by Stacy A. Nyikos.

We could conclude that national courts noticeably follow or fully comply with CJEU preliminary references, given that the number of evasion or non-enforcement of CJEU preliminary rulings is minimal. Nevertheless, if we also pay attention to the cases with all kinds of citation practices (that is, preliminary rulings and precedent) we observe that the compliance with CJEU rulings is lower. For example, in the case of Spain (see table 3.3 below) in almost 81 % of the cases national courts comply with CJEU rulings, while in 19 % of the cases the courts opt for any of the different modes of non-compliance (Ramos Romeu 2003, 2006).

Table 3.3. The Spanish courts' treatment of the CJEU rulings (precedent + preliminary rulings)[71]

National courts' treatment of CJEU rulings	N	%
	Compliance	
Comply	132	80.98
	Non-compliance	
Limit	6	3.68
Distinguish	23	14.11
Dissent	2	1.23
Total	163	100

Source: Data set of Spanish EC Law cases, 1986-2000 by Francisco Ramos.

The evidence and findings presented by Ramos show the importance of national courts in regards to how the courts deal with CJEU rulings, and to what extent they follow CJEU mandates to support their rulings. For the study of the treatment of CJEU rulings (see chapter 7), I have considered the same categorization used by Ramos and other US scholars (Johnson 1979; Spriggs and Hansford 2000; Westerland et al. 2010) in order to define the modes of citation practices by national courts. Therefore, as regards to the enforcement of rulings, national courts may (see table 3.4):

Table 3.4. National courts' treatment of CJEU rulings

Modes of CJEU ruling enforcement	Types	Explanation
Comply	1.1. Follow 1.2. Explained 1.3. Harmonized	The national court cites and 'follows' (1.1) or supports the CJEU case, or is attempting to justify its decision based on the decision made by the CJEU. This category also identifies when the judge made a subtler or not so straightforward CJEU compliance. This is the case of the 'harmonized' and 'explained' mode of

[71] "Comply" is when national courts follow CJEU rulings. The observations of non-compliance are those where the national court "limits" the impact of the CJEU case law, "distinguishes" the CJEU ruling after discussing it, and, directly "dissents", disagrees or criticizes the CJEU ruling.

		compliance. The national courts harmonize (1.2) when the case at hand and the CJEU ruling differ in some way, but the court has found a way to reconcile and bring into harmony the apparent inconsistency. The national courts 'explain' (1.3) when the citing opinion clarifies, interprets, construes, or otherwise, annotates the decision in the cited case.
Limit or Restrict	2. Limit	The court cites a CJEU case but somehow limits its impact on the instant case ("refusal to extend decision of cited beyond precise issues involved").
Distinguish	3. Distinguish	The court cites a CJEU decision but distinguishes the case at hand ("case at bar different either in law or fact from case cited for reasons given").
Dissent	4. Dissent	Whenever the national court cites but explicitly dissents or disagrees from the CJEU case.

In this dissertation, the relevance of CJEU rulings will be underlined for the enforcement of EU law, to the extent of being considered one of the main explanatory variables of this study. Concretely, the main intention is to figure out under what conditions national courts will enforce EU law through preliminary references or precedents, instead of applying the law on their own. In following chapters, I will discuss in detail the implications of reference practices for national courts. Although in this study, I extend this practice to other kinds of precedential practices, such as the decisions made by other national courts on EU law. However, as we have seen in figure 3.5, references are still one of the other factors that courts may consider for EU law application. Nevertheless, other political and institutional settings or factors should be considered to determine the decisions of national courts on EU law.

3.3. What are the driving forces behind the judicial enforcement of EU law?

This section introduces the factors that could affect the enforcement of EU law by national courts. All of them are possible alternative (but not exclusive) explanations related to politics for the application of EU law by courts. The following table presents these factors in groups:

Table 3.5. Political determinants of the judicial enforcement of EU law

Explanations for the judicial enforcement of EU law	**Mechanisms**	**Indicators**
A) Policy/Legal misfit between national law and European Regulation	Implementation and compliance problems by domestic implementing authorities	- Percentage of implemented / transposed directives - Political, welfare and economic systems at the national and EU level
B) Domestic Politics: - Position and political preferences of Governments and Higher courts - Judicial independence - Judicial and legal institutions	1) Political and legal threats to national courts' rulings coming from national authorities willing to protect their national power, policies or jurisdictions from the influence of EU institutions. 2) Lower courts enforce EU law to increase their judicial review power vis-à-vis high courts, while high courts contain EU law reception to protect their jurisdictional power	- Government: a) Ideology and preferences towards EU and policies; b) Position of the government in EU law cases; c) Judicial independence indexes - Type of court/position within the judicial hierarchy - Limits to EU law enforcement: Dualism vs. monist systems & Counter-limit doctrine
C) Influence of CJEU jurisprudence	National courts adjudicate cases according CJEU jurisprudence to protect them from political threats	- Number of CJEU rulings - Request and Citation of CJEU precedent and preliminary rulings
D) Attitudinal factors: Political and legal preferences of national judges & knowledge	1) National judges enforce EU law when they perceive their new responsibilities and are capable of exercising their EU law tasks 2) National judges apply EU law when they trust the EU and national institutions	- EU law knowledge - Understanding of the relationship between the EU and national legal systems (e.g. feelings as EU judge, compatibility between EU and national legal principles, etc.) - Opinions towards EU integration and institutions (e.g. trust in EU and national institutions)

The main reasoning is that EU law judicial enforcement is influenced, incentivized or constrained, mainly by political institutions or actors involved in the judicial process. The institutional conditions affecting the decisions made by judges refer mainly to two kinds of institutions: political and legal.

A) Policy misfit between national and EU legislation

One of the most important factors with regard to the reception of EU legislation discussed in the literature is the compatibility between the national system and the new European regulations. In view of the fact that the configurations and diversities of legal and policy traditions can determine different levels of EU law reception. Since the nineties, these explanations asserting the stickiness of institutions have been the dominant accounts for explaining the implementation and compliance with EU law by national institutions. Previous institutional configuration and the structure of the institutional implementing structures have been the main arguments presented by the literature. Those explanations focusing on the policy dimension of implementation stress the importance of the mismatch between EU rules and domestic policy standards, institutional arrangements and traditions (Börzel 2000; Knill and Lenschow 2000). As I will analyse in chapter 5, in the area of social security rights, for example, if we consider that the European social security model has been based on the social protection principles of the founding members, these countries should be more compatible with the new European legislation and, therefore, exposed to less judicial pressure in order to adapt. To sum up, the misfit between institutional legacy and European social regulations should increase the pressure on national courts to enforce supranational law on the domestic institutions.

Nonetheless, as Dorte Martinsen (2005a) demonstrates in her analysis concerning the application of EU legislation to social security, the institutional fit/misfit justification does not fully explain the impact of Europeanization in Member States. She discovers other factors that have determined the implementation of EU law. These factors include the role of political and administrative institutions, and their capacity and policy preferences to implement EU law (Héritier 2001; Risse, Green Cowles and Caporaso 2001). During the implementation of their European obligations, politicians and the administration make use of their discretion to fully comply with their commitments, to

adapt the European rights to their preferences or institutional context, or to ignore their European demands completely (Falkner et al. 2004).

Clearly, when national governments and administrations, whether deliberately or not, fail to fulfil their supranational obligations, national courts play a crucial role in the integration through law. National courts control the final process of implementation insofar as they are the final guards of European law in the domestic legal system, through the application of EU law and use of adjudication for clarification. Therefore, national courts will undergo more pressure for the application of EU law in contexts where the pre-institutional configuration misfits with EU legislation and, in addition, where national authorities have not implemented EU policies, hypothesizing that:

***$h_{1.1}$*: Goodness-of-fit:** *National courts are more likely to enforce EU law and its instruments*[72] *in contexts where national authorities have not implemented EU policies fully or correctly.*

Nevertheless, national judges may be compelled to apply EU law when they have the certainty that EU law is applicable at the national level. The correct transposition of EU law into national law increased the likelihood of national judges to ascertain the applicability of EU law to the case. Despite the obligation of national courts to interpret national provisions according to EU law even when EU legislation was not transposed, national judges may have some difficulties to apply EU law when it is not yet transposed—be it correctly or incorrectly. First, the lack of legal uncertainty created for not transposing the directive may prevent national judges from construing national rules in conformity with EU law. The legal ambiguity created by this situation may prevent them from interpreting national provisions

[72] "Instruments" refer to the enforcement of CJEU rulings or EU legal doctrines.

to avoid the risk of making decisions that are against the law (Kaczorowska 2008: 320).

***$h_{1.2}$*: Legal safe-ground or certainty:** *National courts are more likely to enforce EU law and its instruments in contexts where national authorities have implemented EU policies fully or correctly.*

B) Domestic Politics:

The hypothesis on *policy misfit* posits that national courts will be involved in the EU law enforcement regardless of the preferences of other actors. However, national institutions, such as governments and higher courts, may try to contain EU law enforcement when EU law application challenges their most preferred policies or interests. This is the case of governments that try to deliberately contain the application of EU law and CJEU rulings if these oppose their policy or administration's interest (Conant 2002). Hence, when these political institutions reiterate the contention of EU legislation, national courts will avoid criticism by not enforcing EU law against them[73]. For example, the application of EU law is less likely to support the extension of social rights to immigrants during right-wing governments. According to these expectations, I hypothesize that:

[73] I assume that national courts care about other actors, especially when those actors have the capacity to challenge and misapply national courts' decisions. Hence, judges will look for ways to enforce EU law that could avoid governments' criticism. While national authorities such as the government and the administration will try to maximize their own policy preferences as well, attending to political or economic costs produced by the implementation of EU legislation. These assumptions will be developed in following chapters as part of the strategic behaviour of judges.

***h_2*: Political Deference:** *National courts are less likely to enforce EU law and its instruments when the preferences of political institutions oppose EU law policies.*

Even though the government has other tools and strategies in order to control, influence or constrain the behaviour of national courts and preclude EU law enforcement contrary to its interests. Little attention has been paid to the study of the institutional rules that govern the relation between courts and judges with the other governmental branches (Ríos Figueroa 2006). Independent judges from the executive will face fewer constraints in the application of EU law, especially when this enforcement challenges the policies preferred by the government. National courts will be free from the pressure of political or economic interests that will try to influence the decision of the judge on the application of EU law. In the literature of EU judicial politics, some scholars have recently studied these institutional relations with remarkable results. Wind et al. (2009) demonstrate how the Ministries participate in the selection and drafting of questions on article 267TFUE to the CJEU when a national court considers whether to refer or not. Hence, national governments may try to get advantage of some formal or informal mechanisms to influence the opinion of the courts or to threaten the compliance with national court rulings. The influence that these threats of non-compliance will have in the behaviour of national courts will depend on the institutional configuration that mediates the relationship between the executive and parliamentarian power, and the judiciary. In the light of such developments, I hypothesize the following:

***h_3*: Judicial independence:** *When the application of EU law and its instruments is against the interest of the government, the administration or any public institutions, independent judges are more likely to enforce such law than non-independent judges.*

Finally, as a domestic institution, national higher courts may impose limits to the application of EU law, especially to the lower

courts. Most of the conflicts between low and high courts are related to the supremacy of EU law at the domestic level. While higher courts defend the pre-eminence of the national legal system to safeguard their power, lower courts argue for the establishment of EU law following the CJEU doctrine. National courts have accepted the supremacy of EU law in different ways and periods (Mattli and Slaughter 1998a, 1998b). Belgium and the Netherlands, for example, accepted the direct effect and supremacy of EU law immediately after the CJEU established these doctrines. While in the cases of Germany, France, Italy, UK and Sweden, their national authorities and high courts contested its acceptance. In the light of such developments, national courts may take into consideration the receptiveness of their own legal systems towards the EU law regulations for the application of EU law. When higher courts accept this doctrine, it is easier for other courts that consider it applicable to enforce EU law. The supremacy of EU law presupposes the reduction of the risk of reversal from national authorities, especially when high courts are jealous of their control over the validity of laws or judicial review.

However, some national high courts challenged this supremacy. This conferred EU law a kind of contested or negotiated normative authority due to the conditions posed by the higher courts, which were expressed in the doctrines of 'counter-limits' (*controlimiti*). These doctrines raised national fundamental principles against the penetration of EU law. Several countries, following the examples of Italy and Germany have established these doctrines to protect their national legal system from the reception of EU law (Maduro 2007), like the case of the Spanish Constitutional Court. In countries where higher courts have sentenced the doctrine of counter-limit, national courts will be more reluctant to the enforcement of EU law. Under these contexts, national courts will try to avoid the threat of appeal to their decisions when they apply EU law beyond its national limits, or when they enforce EU law in an extensive or integrationist mode. Accordingly, I hypothesize:

***h_4*: Counter-limit:** *National courts are less likely to enforce EU law and its instruments after higher courts have established limits to the reception of EU law.*

For long time, the literature has been underlining the importance of considering different incentives and preferences, even within the judicial hierarchy. National courts may have their own preferences towards EU law or towards the enforcement of certain legal/policy interpretations under EU law. Consequently, some judges might be more prone to enforce EU law due to their positive attitudes towards the EU or policy issues. A first attempt to unveil these institutional preferences comes from the intra-judiciary competition theory that considers diverse institutional incentives for each type of court: lower and intermediate courts use EU law to increase their prestige and power vis-à-vis high courts. The intra-judiciary competition theory assumes diverse institutional incentives for each type of court: while lower and intermediate courts use EU law to increase their prestige and power vis-à-vis high courts, higher courts try to contain the reception of EU law to protect their authority, jurisdiction and judicial review powers from the influence of the CJEU (Alter 1996). Since the integration process began, national courts—through the preliminary references procedure—have been able to play the higher courts and the CJEU off against each other, to influence legal development in the direction they preferred (Alter 1998). These same incentives can be extended to the enforcement of EU law to understand whether those dynamics work in the case of the application of EU law. Following Weiler's arguments (1991, 1994), beyond legal rules and jurisprudence that drive the behaviour of national judges, the lower courts want to empower their national position vis-à-vis the other branches of power and high courts. Whereas higher courts, aware of this menace, will try to contain those EU law decisions, considering them a serious threat to their interests. For that purpose, I assume national ordinary (low) courts will apply EU law to increase their judicial review power in respect of high courts; while high courts will

control and review EU law reception to protect their jurisdictional powers. This fact leads me to hypothesize that:

***h_5: Courts competition**: Ordinary courts are more likely to enforce EU law and its instruments than high courts.*

C) Influence of CJEU jurisprudence:

While national courts are the primary EU law courts, they look at the CJEU for guidance as a specialized court in EU law issues (Ramos Romeu 2006). As I mentioned previously, national judges can decide in which way they deal with EU law cases, either through preliminary rulings or through precedent. National courts may use CJEU rulings in order to provide an interpretation of an EU law provision or to declare the validity of an EU act. While preliminary references imply that a national court has made a request to the CJEU for a decision to clarify a certain case at the national level, the rule of *stare decisis* (precedent) requires that an earlier decision provides a reason for deciding a subsequent similar case in the same way (Kornhauser 1992a). In cases where the CJEU rules in favour of EU law application, national courts will be more likely to enforce EU law than to disregard the opinion of the CJEU (Nyikos 2003; Nyikos 2006; Tridimas and Tridimas 2004). However, their reaction to the obligation of accepting the CJEU ruling or its implementation will depend on an individual cost-benefit analysis for the courts. This analysis will be developed in more detail in chapter number 7 and 8. Hence, I hypothesize that:

***h_6: CJEU rulings**: National courts are more likely to enforce EU law and its instruments after finding/receiving a CJEU ruling supporting the application of EU law.*

Nevertheless, national courts may also adjudicate cases in accordance with CJEU jurisprudence to force the legislator or the administration to comply with their decisions. Judges will use this

strategy when they are aware that national institutions, such as governments and higher courts, may try to contain EU law enforcement when its application goes against their political interests. Scholars have already studied this fact discovering that in several contexts, national courts have questioned the compliance of EU law through CJEU rulings to avoid the risk of a reversal of their domestic rulings (Conant 2002; Obermaier 2008). Hence, to avoid criticism in the application of EU law, national courts will refer to the CJEU under governments that are unfavourable to European integration, or when certain sensitive policy areas run counter to government preferences. From this, we can expect that national courts may use CJEU rulings strategically, which leads me to hypothesize that:

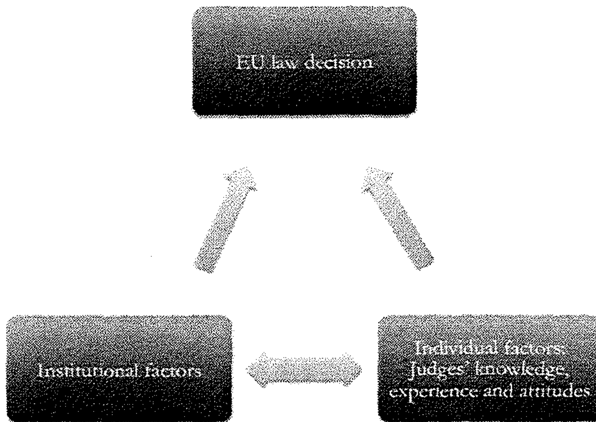
***h_7: CJEU rulings as a political strategy**: National courts will enforce EU law and its instruments against the government more, when having a CJEU ruling that supports this application.*

D) Attitudinal factors:

Reiterated concerns about the understanding that national courts have of their role as main EU law enforces has encouraged a new research focused on determining whether judges are aware of their new responsibilities, and whether they conform to their new roles and unconditionally apply EU law, or have a reserved attitude towards it (Bobek 2008a; Jaremba 2010). These studies highlighted the importance of the experience, knowledge and understanding that national judges have of EU law, and how it affects EU law enforcement. They attempt to see how national judiciaries perceive the new role imposed on them, how they experience it in their daily practice, whether they want to exercise the new role, and foremost, whether they are capable of exercising those new tasks. Their main conclusion is that we should not take for granted the obligations that EU law impose on national courts and their unconditional acceptance of it.

This dissertation will include these types of factors to determine how EU law judicial enforcement may vary according to individual knowledge and attitudes towards EU law. Mainly, I intend to model judicial choice on EU law cases as a trade-off between the institutional and contextual environments of courts and the specific characteristics of the case at hand, but conditioned by the judges personal predispositions towards EU law (Brace and Hall 1997). For that purpose I examine the effects of personal attributes, contextual and institutional influences, and their interactions in the salient characteristics of the EU law case at hand (see figure 3.6), and its consequences for the judicial choice of enforcing EU law.

Figure 3.6. Interaction model between institutional and individual factors for the enforcement of EU law



Below are some of the working explanatory hypotheses related with the influence of judges' attitudes and knowledge that I will take into account:

***h_8*: Knowledge of EU law:** *National courts are more likely to enforce EU law and its instruments when they are acquainted with*

the rules and principles of its application (e.g. EU law supremacy, direct and indirect effect of EU law provisions, etc.) and its binding effects.

h_9: Support for EU legal principles: *National courts are more likely to enforce EU law and its instruments when they strongly support EU legal values.*

h_{10}: Trust in EU and European Institutions: *National courts are more likely to enforce EU law and its instruments when they strongly support EU institutions and the integration process.*

This section has briefly introduced the most prominent and promising factors and hypotheses for the study of the judicial enforcement of EU law. The dissertation will deal with these explanations in diverse ways to the extent that the importance given to each factor will depend on the main objective of each empirical chapter.

3.4. Explaining legal integration through a reconsidered political theory: Bridging intergovernmentalism and judicial empowerment approaches

Considering the previous factors, how can we understand the role—attitudes and behaviour—of national courts in the European integration process? There are several explanations in the literature for the application of EU law, based on different theories of judicial behaviour: legal, neo-realist/intergovernmentalist and empowerment/supranationalist/neo-functionalist theories. The importance and impact that these accounts attribute to the factors mentioned above can determine the main differences between them. One of the goals of this dissertation is to frame the behaviour of national courts and to test empirically the theoretical explanations that one can find in the literature of European Judicial Politics for the enforcement of EU law. I reframed the

categorization of these theories in order to capture some nuances of different approaches based on the preferences of judges and to explain how these motivations interact with the institutional context promoting the legal integration of Europe. As a result, six theoretical approaches are presented (see table 3.6 below) showing the main characteristics that define every framework and the expected behaviour of national courts under each situation.

While in the case of the first explanations (referred to as legal) the main purpose of judges is to optimize the efficiency of their decisions and work-time, the rest of the models assume that judges also have policy preferences and they want to maximize their influence (governmentalist, judicial empowerment and inter-competition explanations). Hence, according to these differences in this research I will distinguish between legal and political models. As far as the latter models are concerned, several types of political accounts are introduced depending on how national courts interact with their institutional framework. However, the theory defended in the beginning of the chapter advocates for what is called here a reconsidered judicial empowerment, in which governmentalist and inter-court-competition approaches are integrated.

Firstly, **legal explanations** posit that national courts want to maximize the correct application of EU law in their decisions, using the variations in national legal cultures and doctrines as an explanation (see Carrubba and Murrah 2005; Chalmers 2001; Stone Sweet 2004; Stone Sweet and Brunell 1998a; Vink et al. 2009). This model assumes that the legal norms, institutions and traditions that regulate the application of EU law, determine the behaviour of judges despite the motivations and influence that other actors can bring to the judiciary. This approach explains judicial behaviour in terms of legal integration based on logic and legal reasoning. Moreover, it stresses the relevance of the experience with EU law, rules and principles for its application (e.g. EU law *supremacy*, *direct and indirect effect* of EU law provisions, etc.) and the knowledge of EU regulation and its binding effects. A more sophisticated explanation of the legal

model will also be considered in this dissertation, the **team model**, which was developed by Ramos Romeu (2002: 10) to understand adjudicatory practices: "It draws from the institutional position of judges to posit that they share the common goal of maximizing the number of correct decisions given their resource constraints. The model says that courts in different levels of the hierarchy have different functions and most of the problems of courts consist of designing adequate adjudicatory strategies given the cases they hear".

In the same vein, from the point of view of a neo-functionalist legal account, Stone Sweet and Brunell (1998a, 2004) defend the relevance of preliminary references to solve legal conflicts on compatibility of EU law with national law emerged from transnational economic exchanges and EU legislation. The more often are judges exposed to the resolution of conflicts between national vs. EU law, the more likely it is that they will refer to the CJEU. Judges in this situation refer to the Court asking for a resolution that will help them to do their task more efficiently (Stone Sweet 2004: 22). In that sense, what matters then is the type of dispute before the judge, the type of judge being asked to resolve the dispute, and the nature and scope of the EU law that is relevant to the dispute. The resolution of these disputes, in turn, encourages further transnational exchange, and, as a result, further cases. Furthermore, litigants request more referrals and so on.

The second group of explanations to consider is the ***realist or (inter)-governmentalist*** model. These theories assume that judges, as national institutions, care about the national interest. The most simplistic theory, the **unified neo-realism**, presumes that judges share preferences with the rest of the national authorities (e.g. government, administration, etc.) in the application of EU law. Moreover, national judges will contain the extension of EU law to protect their national legal order from reception of EU law legal principles and from the jurisdiction of the CJEU. Therefore, national judges are strategic with regard to judges at the supranational level, whereas the CJEU is also strategic with regard to the enforcement of EU law supremacy.

Jonathan Golub gave an example of this point of view. He affirmed how British courts, exercising their discretion under Article 177 and *acte clair*, have withheld references from the Court which might have become ammunition for additional adverse rulings. In a sense, UK courts decided to interpret EU law themselves instead of facing the prospect of frequent frustration at the hands of the CJEU. Instead of relying on the CJEU for their empowerment against other European institutions and national governments, British judges empower themselves by strategically withholding references from the supranational Court (Golub 1996). British judges restrain themselves from referring, in order to maintain their ability to promote specific political interests at the national level, instead of risking these interests in a preliminary reference. In the same vein, according to this account, we must expect that national courts will be reluctant to enforce EU law supremacy with the purpose of promoting or protecting their political or legal interest at the national level, containing the reception of EU law into the national legal system. This behaviour is reinforced when national governments argue the negative effects of EU regulations for important national policies, legislation or values.

A more sophisticated realist model, here called ***pluralist neo-realism*** (Garrett 1995; Garrett, Kelemen, and Schulz 1998; Kelemen 2001), assumes divergence of preferences among national institutions. As we will observe for the neo-functionalist model, these theories stress the importance of institutional constraints to limit the enforcement of EU law by national courts. In contrast with the previous realist models, judges do not necessarily share their preferences with the other national authorities. National courts are interested in promoting the goal of European integration when they seek to secure their own interests, competences and policy preferences within their own national legal and political context. Meanwhile, national authorities such as the government and the administration will try to maximize their own policy preferences neglecting the application of EU law when

it is invoked against their most preferred regulations and policies, using various instruments at hand.

Assuming these divergences in the preferences between institutions, governments may try to contain deliberately the enforcement of EU law by national courts, if they run counter to their policy interest or power (Conant 2002). When the competent authorities, supporting national provisions through *ex-ante* and *ex-post* controls to national courts' rulings, oppose the European provisions that the courts have to implement, we can expect a lower European law enforcement by said courts. Scholars have debated how these threats can influence or constrain judicial decision-making. Courts aware of these political reactions will modify or adapt their rulings in anticipation of a possible punishment (removal and non-compliance) by the competent authorities, securing better outcomes than if they act myopically enforcing their most preferred EU legal or policy interpretation (Carrubba 2009; Carrubba, Gabel, and Hankla 2008; Ferejohn, Rosenbluth, and Shipan 2007; Ferejohn and Shipan 1990; Murphy 1962; Pritchett 1961; Staton and Vanberg 2008). Either way, as long as courts care about the political consequences of their judgments, they have an incentive to anticipate the reactions of public institutions when making their rulings concerning EU law. According to these arguments, when national authorities are against the application of EU law, its enforcement by national courts will be lower.

The second neo-functionalist approach, the ***judicial empowerment*** theories stress the importance of the cooperation between national courts and supranational judicial institutions during the process of judicial enforcement (Conant 2002; Obermaier 2008; Ramos 2006). Here I distinguish two types of neo-functionalist theories. The first type of neo-functionalism affirms the importance of neo-functionalist dynamics, without disregarding the importance of domestic politics on the behaviour of courts. This is the **reconsidered judicial empowerment** theory already introduced as the main theory of this dissertation. According to this theory – as in the pluralist neo-realist model –

judges do not share preferences with the other national authorities. National courts are interested in promoting the goal of European integration when they seek to secure their interests, competences and policy preferences within their own national legal and political context. Meanwhile, national authorities such as the government and the administration will try to maximize their own policy preferences neglecting the application of EU law when it is invoked against their most preferred regulations and policies. As in the neo-realist accounts, national courts care about implementing their rulings. Nevertheless, in this case, national courts decide to appeal for institutional support for their rulings and thus reduce political threats.

National courts, as strategic actors with regard to national institutions eager to protect their control over national policies, will empower themselves against those institutions to secure their interests, competences and policy preferences within their own national legal and political context. According to empowerment explanations, national courts may enforce the compliance of EU law through CJEU rulings to avoid the risk of a reversal of their domestic rulings (Conant 2002). In words of Ramos (2006: 400), "judges are strategic towards other political actors and invoke precedent to legitimize their exercise of power in the domestic context and divert criticism". According to these arguments, national courts will enforce EU law when they can support their decisions by means of CJEU rulings, despite the opposition of national authorities.

Table 3.6. Approaches on the attitudes and behaviour of national courts

Approach	General characteristics	Role of National courts
Legalism **- Team model – Kornhauser & Ramos** **- Neo-functionalist – Stone Sweet and Brunell**	- The main aim of judges is to keep the internal logic of the EU legal/national systems - Judges do not pursue their political or policy preferences - EU law enforcement is an objective; political power and threats are irrelevant - CJEU Jurisprudence is only used for interpretative purposes	- National courts enforce EU law according to the rules and legal traditions - National courts are affected by the institutional structure of the judiciary but not by politics

Unified (Inter)governmentalism Neo-realism	- National courts want to *protect their national legal system or national interests* - National courts and other national institutions such as government share the same objective: to protect the national interest - CJEU jurisprudence, especially preliminary references, is considered as a menace to the national legal system	- National courts do not enforce EU law when it contradicts *directly* relevant national provisions - National courts avoid CJEU jurisprudence to protect their national interest
Pluralist (Inter)governmentalism Neo-realism	- National courts want to *maximize* their policy power (EU judicial review powers) and policy influence - National authorities (e.g. governments, high courts) want to maintain their control on the policy process and protect their national policies and jurisdiction - CJEU Jurisprudence is only used for interpretative purposes	- National courts are constrained by political threats - National courts *only* quote CJEU Jurisprudence for interpretative purposes
Reconsidered Judicial Empowerment - Neo-functionalism	- National courts want to maximize their policy power (EU judicial review powers) and policy influence - National governments, administration, parliaments, and higher courts are a serious threat to the courts' behaviour - CJEU jurisprudence is considered an instrument to challenge national policies or avoid political threats	- National courts are constrained by political threats - National courts strategically make use of CJEU rulings to enforce EU law and challenge national legislation and legal doctrines
Unconstrained Judicial Empowerment - Neo-functionalism	- National courts want to maximize their *influence* in the policy and national process - EU law is a mask for the policy implications of the EU judicial review powers - National governments and higher courts are not a serious threat to the courts' powers - CJEU jurisprudence challenges national policies and pushes for integration	- National courts, under the *protection of a* constitutionalised EU law system, are less affected by domestic political constraints - National courts use CJEU rulings to attack national policies and to change or influence the policy-making process
Inter-judicial competition – integrated into the reconsidered judicial empowerment theory (Assumptions also applicable to the rest of approaches except the legalist and the unified	- *Ordinary and high courts* have different points of views towards EU law reception - Ordinary (lower) courts interpret EU law enforcement as an opportunity to increase their judicial review powers at	- *Lower courts enforce EU law* more than higher courts - Lower courts cite CJEU jurisprudence in support of their EU rulings to protect themselves from high courts' reactions

governmentalism)	the national level - High courts want to protect their judicial review powers and the influence of CJEU authority

On the other hand, we have those perspectives of political neo-*functionalism*, here named **unconstrained judicial empowerment**, where national courts have been empowered by the constitutionalisation of the EU legal system and by the EU mandates to review national transposition and implementation of EU law to the extent that they are not threatened by political reactions. Under the mandate of the EU treaties and CJEU jurisprudence, national courts are asked to apply EU law against conflicting national legislation, by using their extended judicial review powers of the national judiciary vis-à-vis other branches of power to carry out this purpose (Weiler 1991, 1994). CJEU doctrines and EU Treaties have offered the chance for national courts to challenge national legislation and policies relying on the EU principles and doctrines of EU supremacy, direct effect, state liability, etc.

National judges, therefore, will make use of these new judicial review powers protected by EU institutions to enforce EU law supremacy against national legislation according to their most preferred legal and policy interpretation. These judicial review powers, based legally on EU law principles already accepted by the national system, create expectations of compliance by national governments that encourage national courts to enforce EU law supremacy without taking into account the position of the other institutions. Thus, the main difference between the two functionalist perspectives derives on how national courts consider or evaluate domestic political and institutional threats. While in the former neo-functionalist view national courts care about the reaction of governments and higher courts, this second perspective assumes that in general terms national courts are confident on the effectiveness of their rulings despite challenging the main policy and interests of the implementing authorities.

Last of all, I present the models that have been developed to account for the role of national courts in the integration process and consider the political competition within judicial hierarchy. Even though it can be used as an alternative account for the role of national courts in the judicial enforcement of EU law, I opted to incorporate the assumption and premises of this account to complement the empowerment approach already presented. This theory stresses the importance of the competition between lower and higher courts. As Karen Alter points out in her **inter-judicial competition explanation**, lower and higher courts have different institutional incentives when it comes to EU law. Lower courts use EU law to increase their prestige and power: through the preliminary references procedure, they are able to play the higher courts and the CJEU off against each other so as to influence legal developments in the direction of their preference (Alter 1996, 1998). In the same way that high courts disapprove of ordinary courts referring to the CJEU because that may endanger their constitutional authority, they may also interpret the enforcement of EU law supremacy as an increase of CJEU jurisdiction at the expenses of their constitutional jurisdiction and judicial review powers within the national legal order. Hence, higher courts will not enforce EU law supremacy in order to prevent the decline of their judicial review powers.

In that sense, contrary to legal functionalism approaches, what matters in all the versions of the judicial empowerment explanations (including inter-court competition ones) for the legal integration, is the policy position of domestic and supranational actors in EU law disputes, the institutional features that these institutions have to constrain or incentives of judges to apply or not to apply EU law, and the EU law instruments that national courts have at their reach to overcome these limitations. The resolution of these disputes in favour of the integration of the EU law into the national legal system or policies through the application of EU law instruments (e.g. CJEU precedent, preliminary references or EU legal doctrines), in turn, encourages

further application, and, as a result, further EU law cases. Furthermore, litigants suit more EU law cases, and so on.

After presenting all these approaches, the main aim of the dissertation is to open the black boxes of actual judicial decision-making, particularly at the level of the EU's day-to-day policy process (Peterson 1995). This will be done in order to identify under which conditions national courts enforce EU law and to determine which of these approaches better explains the role that national courts are playing in the European integration process. Although the dissertation gives pre-eminence to the judicial empowerment factors in judicial decision-making, I recognize the importance of national and legal dynamics that still drives or shapes the evolution of the integration process. For that reason, I will adopt what I would call a 'reconsidered judicial empowerment' approach. This new approach challenges the most optimistic neo-functionalist accounts (here called unconstrained) that argue for a full migration of the rule-making authority from national governments to the European Union. This dissertation is sceptical on this point and emphasizes the importance of domestic institutions for EU legal integration; even if in the end, neo-functionalist dynamics are considered as the leading processes and as beneficial for the empowerment of EU institutions and EU legal reception.

This reconsidered judicial empowerment approach (hereafter only "empowerment approach" will be considered) should not be considered a 'half way' between the two approaches, because it falls easier into the neo-functionalist assumptions. This approach offers a better explanation of the role of national courts in the European integration legal process, not because it tries to find the perfect fusion between two opposing theories, but because it explains "exactly how, empirically, the EU can despite many intergovernmental characteristics end up with policy innovation against the will of governments" (Falkner 2011: 5, footnote 4). Hence, following Gerda Falkner's argument, the approach tries for the first time to link (inter)governmentalist and neo-functionalist expectations in empirical terms; although in theoretical terms, the

main argument is closer to the latter. In fact, this is why I consider the main argument of the reconsidered judicial empowerment approach as a refinement of neo-functionalism, studying EU law enforcement and its dynamics as specific mechanisms of spillover brought about the cooperation between national and supranational institutions. This approach tries to overcome neo-functionalist limitations, especially the ones related to judicial empowerment, on the role and impact of national institutions in the EU policy process, by combining the analytical strengths of both approaches, using the different aspects of these theories that better suit the different kinds of aspects of EU judicial enforcement (Sandholtz 1996).

This new approach will unravel the specific individual processes in the EU legal policy process and will allow the identification of specific micro-mechanisms that lead national courts to enforce EU law. Once these micro-mechanisms have been defined and clarified, and their aggregate effect determined, we will be in a position to:

1) Frame the impact of the national judicial enforcement in the range of day-to-day policy-making (mid-range theories);

2) Expand the explanatory power of these micro- and meso-accounts of the EU policy processes to the macro level of theories of European Integration.

3.5. Conclusion

This chapter shows how the judicial enforcement of EU law works and how its importance has increased over the years for the legal integration process of the European Union. Although there is an agreement on the important role that national courts play in overcoming the implementation and interpretation problems of EU regulations and its rights, a proper justification of the specific mechanisms that lead national courts to enforce EU rights is still lacking. Political and legal scholars have conceived the role of the national courts in diverse ways, offering justifications for national

courts' behaviour and its effect on the EU policy-making process. Nevertheless, the problem with these theories is that they do not consider national courts as a central actor when developing their argumentation. When they do, they only focus on the cooperation between national courts and the CJEU through the preliminary references system.

We still need a theory that can describe the role of national courts beyond the exceptional cases of CJEU references, paying attention to other situations where EU law courts may enforce the reception of EU law and push towards EU legal integration. Secondly, political scientists have framed the behaviour of national courts from a governmentalist/neo-functionalism dichotomy, giving pre-eminence to the neo-functionalist dynamics as the foremost factors. This fact leads to a misunderstanding of the individual process due to the underestimation of domestic dynamics for the conformation and shape of integrationist dynamics. This dissertation tries to offer a solution to this mistake, offering a new neo-functionalist approach that considers the importance of national dynamics. This new account tries to solve some of the empirical and theoretical caveats of neo-functionalism as regards the judicial enforcement process with the objective of improving European integration theories.

CHAPTER 4. THE POLITICAL MICRO-FOUNDATIONS OF EU JUDGES: THE RELEVANCE OF MULTILEVEL POLITICS

4.1. Introduction

The adoption of the Lisbon Treaty has underscored the necessity of the creation of a European judicial culture that fully respects the EU legal order and that is crucial for the efficient functioning of the Union. This requirement has become even clearer after the expansion of EU competences across a wide range of areas introduced by the Treaty. At the same time, the Treaty stresses the idea that the European Union should be built on the rule of law combining European law and national legal orders, both applied by national judges who work within different legal systems and traditions. This fact delegates to national courts great part of the responsibility of the integration of the new Lisbon rules and EU law into their national legal systems.

However, these demands and obligations are assumed without testing first whether judges conform to their new roles as EU decentralized judges and unconditionally accept EU law principles and CJEU rulings. Aware of this situation, the Commission has recently affirmed that European law must be coupled with effective implementation, which guarantees legal security and uniform interpretation. It has also underlined the importance of prioritizing the training of judges, as they are responsible for the enforcement and respect of Union law.

Recent literature on the field of EU judicial politics and sociology has also emphasized the relevance of the experience, knowledge and attitudes of judges towards EU law, and how they affect the acknowledgment of the EU legal order and the implementation of EU law. This new research trend aims at showing how national judiciaries perceive the new role imposed by the Treaties, how they experience it in their daily practice and whether they are capable of exercising those new tasks (Bobek 2008; Jaremba 2010; Nowak et al. 2011). Their main conclusion is that the unconditional application of EU law by national courts and the obligations it imposes on them should not be taken for granted. Following this new trend, this chapter, as a main contribution, shows a first picture of the role of national judges as European Union judges, considering their attachment to the EU legal order and commitment to CJEU rulings as EU judges. In a second stage, the chapter will try to fathom the socio-legal and political factors that influence their role as EU judges by analysing the interplay between supranational and national institutional and judicial politics.

The first conclusion of this chapter relates to how political institutional trust influences their national judges' feelings as part of the EU legal order. We observe that national judges displeased with the functioning on national political institutions -like the National parliament- and satisfied with the democratic performance of the European Parliament rely on the EU to empower its national position against distrusted national parliaments. The second conclusion underlines the relevance of judicial institutional trust for the application of CJEU rulings and the acknowledgment of the Court of Justice of the European Union (CJEU) as the supreme authority on the EU legal order. The chapter shows that national judges tend to trust the CJEU since it operates based on the same principles as the national court. They are more confident when they think that the legal norms the CJEU represent and apply are compatible with domestic notions of law. These findings stress the importance of effective and well-functioning European institutions, especially after the Lisbon

Treaty, for the achievement of a common culture shared by European Union judges.

The chapter is organized as follows: in the next section, I briefly describe the new Lisbon claims towards a common European culture made of EU judges. The third section offers empirical evidence showing to what extent national judges already feel and behave as European Union judges. The fourth section shows the theoretical importance of institutional trust for the identification of national judges as European judges and the application of CJEU rulings. In the last section, I use quantitative methods to study the impact of institutional factors on the self-perception of national judges as European judges and the adjudication to the CJEU, closing the chapter with the conclusions.

4.2. Building European judges: A new challenge for European institutions

Since the ratification of the Lisbon Treaty, several European institutions such as the CJEU and European Commission have stressed the importance of a common judicial culture that fully respects and applies the main EU legal order principles as it is crucial for the efficient functioning of the European Union (European Commission 2011). The importance of this common European legal 'spirit' is even more necessary when we understand the European legal order as a combination of the European Union law and the diverse national legal systems of their Member States. However, the overlap between law of the Union and the different legal systems and traditions raise legal conflicts as regards the interpretation of EU law and primacy of EU law over national legislation. National judges, as decentralized EU courts, are responsible for solving the tensions and conflicts created by the integration of the Union law into their national legal order.

To solve these tensions and couple the development of the European Union with the effective and uniform implementation of

EU law, the EU under the Lisbon Treaty remarked the importance of its new competence to support the training of the judiciary (art. 81.2h and 82.1c TFEU) for building a coherent legal context at the European level (European Commission, 2011). This statement advocates for the development of a genuine European judicial culture that consists on the assimilation by national judges of their role as European judges and of the main EU law principles, which governs the EU legal order. According to the Commission, the assimilation of this EU legal culture will be essential to build a fully integrated European legal and judicial area and to foster the proper enforcement of EU law across Member States.

These claims point at the relevance of how national judges' attitudes and commitment to the European legal order may influence EU law enforcement. In the light of these concerns, the next section will show how national judges effectively look upon EU law. Moreover, what it is more important for our research, *if national judges really feel and decide as EU judges and, if so, under which conditions.*

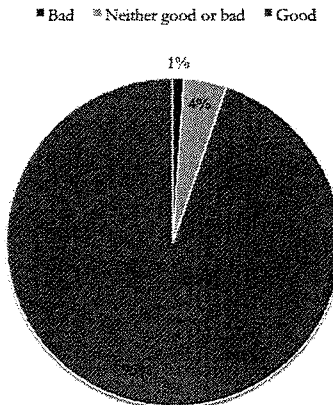
4.3. National judges as EU judges? An exploration of national judges' attitudes and behaviour towards EU law

To address the question concerning national judges' identification as EU judges we make use of new data on the attitudes towards EU law and European integration collected in Germany, the Netherlands, Spain and Poland. This data makes it possible for the first time to map the preferences of judicial actors towards the EU legal order, taking into account factors such as trust in EU institutions, knowledge on EU law, experience, and use of preliminary references (see Appendix A for detailed information).

Judges' support for the EU has been traditionally identified as one of the levers enabling the effective implementation of EU law (European Commission 2011). This approach connects the enforcement of EU law by national judges to their effective

support for the European integration process. Figure 4.1 offers an example of this support by judges, showing how a 95 % of them believe EU membership is good for their country. However, the level of general support for European integration does not give a good deal of variability or randomness for proper causality analysis[74]. We should look for more specific indicators on judges' attitudes towards EU that really influence the effective EU law application.

Figure 4.1: Support for European Union: "In general terms, your country's membership to the European Union is…" (%)



N= 537 (Netherlands: 136; Germany: 156; Spain: 130; Poland: 115)

[74] The literature shows to what extent pro-European attitudes (e.g. support for integration or trust in EU institutions) among European citizens are a consequence of an ever-closer fusion between national and European institutions (Wessels 1997), their socialization (Norris 1997; Meehan 2000; Olsen 2002; Risse et al. 2001; Börzel y Risse 2003) or permissive-consensus (Bruter 2003; Shore 2000; Delanty y Rumford 2005; Scharpf 1999; McGowan 2007). The arguments offered in this work are closer to the first two approaches, excluding any impact of the explanations coming from permissive-consensus accounts.

Accordingly, the lack of variation in the traditional attitudinal questions used in European political and sociological studies show they are not adequate for studying the attitudes of national judges towards the EU legal order. To overcome this limitation, we need to supplement them with a new set of legal-political questions or items related to their agreement with the main EU law principles and values, as well as with EU judicial institutions. These questions have been traditionally addressed by the literature by taking individual preferences as given (Dyevre 2010), expressed in the seminal national courts' decisions as regards EU law[75] (Alter 2001; Closa 2013), or reflected in public opinion (see Mattli and Slaughter 1998b; Carrubba and Murrah 2005).

As previous chapters of this study have indicated, recent academic studies have tried to change this basic orientation testing whether the individual judges' preferences and attitudes towards EU law fit with EU institutions' expectations and requirements regarding to the configuration of the EU legal order. The main aim of these studies is to identify how national judges apply EU law by questioning national judges on the knowledge, experience and views with regard to the application of EU law or use of preliminary references (Jaremba 2012; Nowak et al. 2011; Wind 2010; Wind et al. 2009). This study follows the same path and makes use of these innovations to ascertain whether national judges should be considered *de facto* EU judges by looking at their feelings/values and their effective behaviour as European judges.

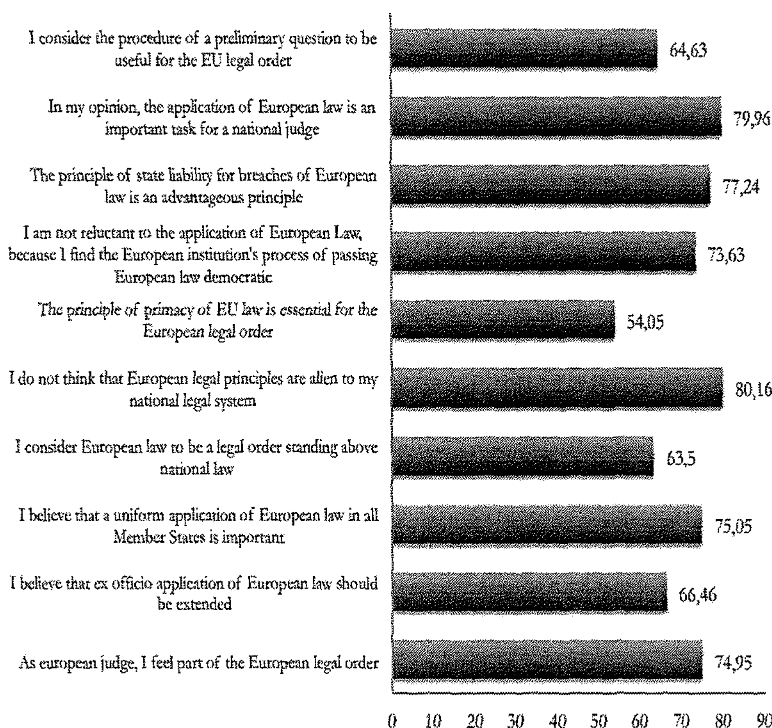
With this in mind, how do judges conceive EU law? Do they agree with EU law principles? Figure number 4.2 shows the positions towards EU law of the judges surveyed. We can observe

---

[75] There are, however, good reasons to believe that public decisions of a court might not match the sincere preferences of the justices of that court. When, for example, justices seek to keep their position or to please their appointing authorities, this may lead them to make strategic decisions far from their individual preferences (Epstein and Mershon 1996).

to what extent national judges 'strongly agree' or 'agree' with some of the main EU law principles and legal instruments that governs the EU legal system and statements related to the relationship between the EU and their national legal order.[76]

Figure 4.2. Attitudes towards EU law - % of national judges who 'agree' or 'strongly agree'



N= [492-504] judges. These variables measure whether judges agree or disagree with the statement, using a five-point scale variable: 0: strongly

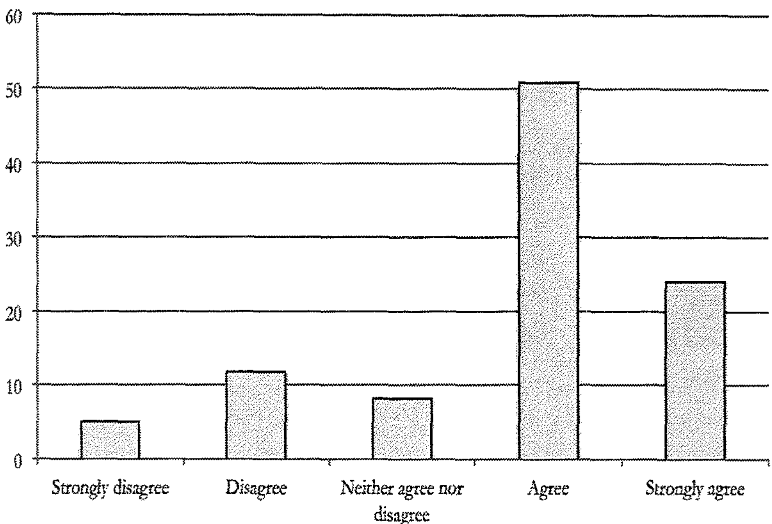
[76] The statements and items asked are biased towards pro-European opinions and attitudes as regards the EU legal order as demanded by EU institutions for the efficient functioning of an EU legal order.

disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

In most of the items, a large majority of the judges 'agree' or 'strongly agree' with the EU law principles or mechanisms that the survey asked about. However, this percentage is lower in three items: two of them related to the supremacy of EU law over the national legal orders. The lower percentages, compared to the rest of items, indicate to what extent either the acknowledgment or the assimilation of the principle of supremacy cannot be taken for granted among national judges. As regards the rest of EU law principles and mechanisms showed below, there are still between a 19 %-46 % of the judges (depending on the item) who do not agree or have a neutral opinion. These disagreements and no opinions may have, as the EU states, consequences for the effective or uniform application of EU law by national judges.

Much more relevant for this study is questioning if national judges' feelings of membership to the EU legal order actually, considered as a clear indicator of the (un-) willingness and engagement of national judges in the EU institutional/constitutional framework as EU judges. Figure 4.3 disaggregates the results obtained for the item: "As European judges, I feel part of the European legal order". Despite the high rate of responses that agree with the statement – strongly or not - (74 %), we observe an interesting variation in the intensity of this feeling/identification.

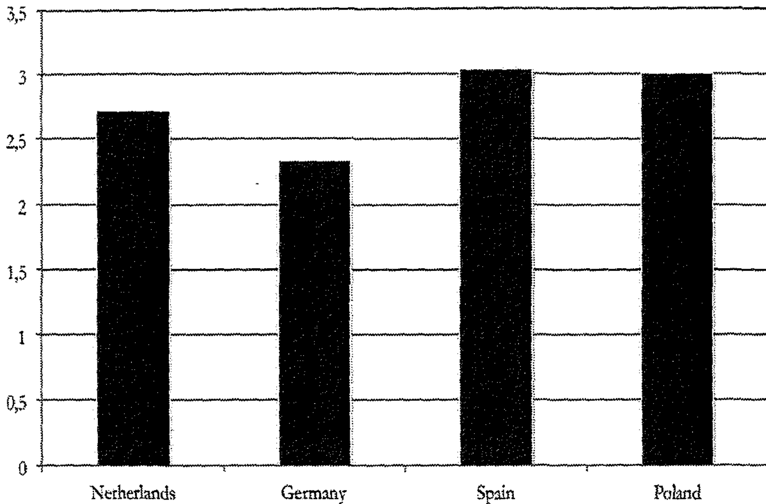
Figure 4.3. "As European judge, I feel part of the European legal order" (%)



N= 499 (Netherlands: 129; Germany: 131; Spain: 125; Poland: 114)

Among countries (see figure 4.4 below), we observe some variation in national judges' feelings as member of the EU legal order. While higher average scores are for Poland and Spain, in Germany and in the Netherlands judges feel less part of the EU legal as an average. These divergences lead us to question whether these disparities may be attributed to the difference in the years since membership between these groups of countries.

Figure 4.4. "As European judge, I feel part of the European legal order" – average scores

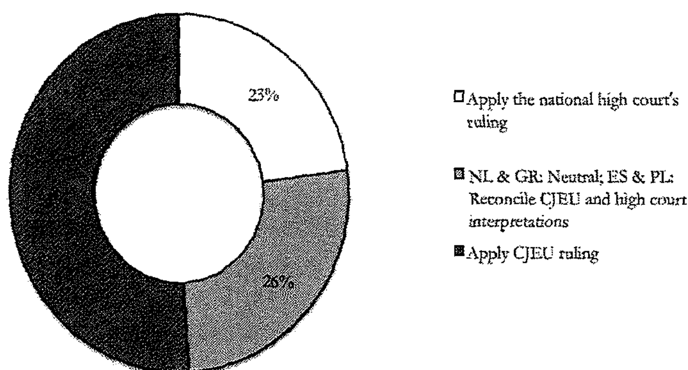


N= 499 (Netherlands: 129; Germany: 131; Spain: 125; Poland: 114)

As regards the decisions of national judges as EU judges, I analyse, as a behavioural pattern, whether national judges will follow the CJEU as a supreme legal authority in case of doctrinal conflict or not. According to the principle of judicial subsidiarity, the CJEU should be followed in difficult and controversial cases, where careful consideration of the European law is necessary. To study this pattern I make use of one vignette[77] generated to study the determinants in national courts' decisions when CJEU doctrine is incompatible with the high courts' doctrine on an EU law matter. The main aim is to test whether national judges will behave as EU judge following the CJEU ruling when it contradicts the national highest court's opinion concerning the application of EU law (see figure 4.5):

[77] Vignettes describe hypothetical situations in which judges choose to apply EU law or to follow any other course of action with regards EU law application (Finch 1987; Nowak et al. 2011).

Figure 4.5. "You have to decide over a case to which both the CJEU and the Constitutional / Supreme Court have different and incompatible opinions in their rulings. As a result you decide to..."[78] *(%)*



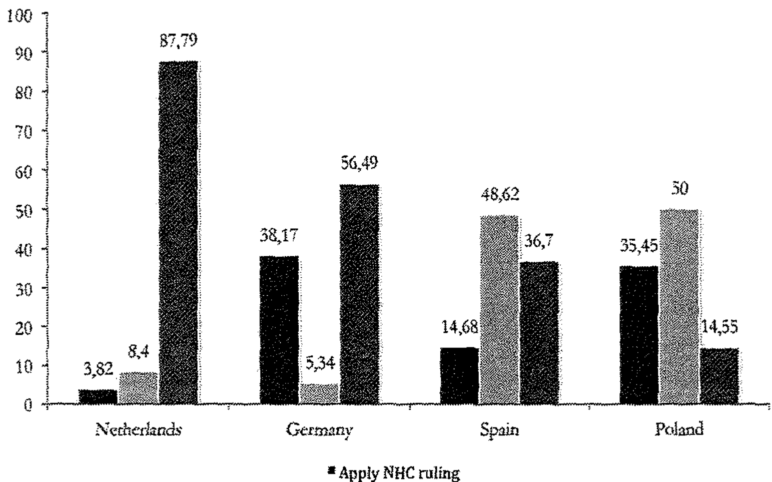
N= 481 (Netherlands: 131; Germany: 131; Spain: 109; Poland: 110)

Figure 4.5 shows a major support of national judges to the CJEU in case of doctrinal clash with the highest national court

[78] While in the Polish and Spanish case the question was formulated as in the vignette, for the case of the Netherlands and Germany the wording was different. The question was posed in the following way: "I believe that, when judgements of the CJEU and the Supreme /Constitutional Courtare in conflict, a national judge should follow the judgement of the Supreme/Constitutional Court". To answer this question, judges were given five options: "strongly agree", "agree", "neutral", "disagree", and "strongly disagree". To standardize both responses, I decided to merge "strongly agree" and "agree" from the Dutch and German responses with "apply the national court's ruling" Polish response, "neutral" with "to reconcile both interpretation", and "disagree" and "strongly disagree" with "apply CJEU ruling". However, we should be cautious when comparing the "neutral" and "to reconcile CJEU and NHC interpretations" categories due to both responses can suggest different things to the respondents.

(NHC), Constitutional or Supreme. Nevertheless, it is remarkable the existing variation in relation to the other two alternatives. For example, in 23 % of the cases national judges, contrary to the EU recommendation/mandate of considering the CJEU the supreme authority in EU law controversial cases, will opt to enforce the decision of their national high courts. While in 26 % of the cases, judges decided to take a neutral position /to reconcile the both opinions.

Figure 4.6. Distribution of responses by country for the question: "You have to decide over a case to which both the CJEU and the Constitutional / Supreme Court have different and incompatible opinions in their rulings. As a result you decide to..." (%)



N= 481 (Netherlands: 131; Germany: 131; Spain: 109; Poland: 110)

Looking more in detail to country results (figure 4.6 see above), we see how most of the Dutch (87.79 %) and German (56.49 %) judges will follow the decision of the CJEU or, at least, a considerable amount of them like in Spain (36.7 %), while in Poland only a minority of judges (14.55 %) will follow that course of action. In this same country, we observe that national judges will opt to reconcile both doctrinal positions more than endorsing

solely the position of the CJEU or the national higher court. As explained above, we should be cautious extracting conclusions concerning that middle option in Germany and the Netherlands. These differences seems to be influenced by the wording of the response, in which the option 'neutral' is an obscure response that can refer to any other alternatives apart of reconciling contradictory opinions. Despite this objection, we observe how the CJEU is less followed in new Member States. These results support the idea that national judges belonging to recently acceded Member States are less supportive of the CJEU. This fact can be attributed to several reasons related to the education, training, experience and knowledge of EU law.

In addition, we observe how differences in legal doctrines dealing with such conflicts in the constitutional law of these four countries correlate with the support of CJEU rulings. Where a Constitutional or Supreme Court established limits to the reception of EU law, as in Germany, Poland and Spain, judges are less keen to enforce CJEU rulings, compared to the Netherlands.

Throughout this section, we have seen evidence of the national judges' attitudes and behaviours as European Union judges. The main conclusions that can be extracted from these figures are the following: 1) The majority of national judges may be considered as EU judges: 74 % of the judges feel part of the EU legal order at the same time that 51 % of them will follow CJEU rulings in case of legal conflict. 2) These attitudes and behaviour are constant neither among countries nor among individuals. There is some clear variation in the attitudinal and behavioural patterns of national judges that can be ascribed to legal and political institutional or individual factors. In the next sections, I will try to disentangle the individual and institutional dynamics that determine their feelings and decisions as EU judges, paying special attention to institutional trust as one of the main key factors.

4.4. The relevance of multilevel institutional trust in national judges' feelings and decisions as EU judges: A theory of institutional judicial compensation

In this section, I explain how and why institutional trust may shape national judges' role as EU judges. For this purpose, I attempt to integrate institutional political theories into legal behaviour concerning EU law and courts. The theoretical argumentation presented here tries to give credence to the idea that the much-discussed question of the European Union judges is endogenous to the national and European institutions. This account will not discard the effect of other individual and contextual factors equally relevant for the involvement of EU judges into the EU legal order.

There is already a vast body of research explaining the attitudes and behaviour of EU citizens and public opinion towards the European Union and their political and sociological processes, regarding dimensions such as support for European integration (Kitzinger 2003; Sánchez-Cuenca 2000), trust in European institutions (Muñoz et al. 2011), participation and voting on European Parliament Elections (Franklin et al. 1995; Garry et al. 2005), among others. A recent wave of Europeanization studies have also tried to measure the impact of the EU on the structure, culture, and staff of national governments, civil servants and public administration (see Mastenbroek and Princen 2010). Building on this approach, we will try for the first time to integrate European and national institutional dynamics to show whether these encourage judges to feel and decide as EU judges.

The European constitutional framework bestows national judges with new benefits and advantages like the competence of review and declaring national legislation and acts from other branches of power void. This supranational empowerment is not achieved without costs. Some important policy and legal processes are transferred to the European level and cannot be longer be made at the national level. When national judges transfer their loyalty to EU institutions, they should assume that the legislation on certain

legal and policy matters can only be passed by the European Parliament (EP) and not by the national parliament (NP) anymore, and that in case of legal conflict the supreme interpreter of EU law conflicts is the CJEU and not the HNC. This implies that political decision-making could be less transparent, accountable and democratic for judges, and that their decisions could not only potentially threaten the judicial authority of the highest court, but also undermine some of the core principles of their domestic legal system.

In addition, a positive evaluation of the EU institution may be also reinforced or conditioned by a negative assessment of national institutions. Therefore, the worse the opinion of the national political system, the lower the opportunity cost of transferring sovereignty to the European Union. In that case, "countries suffering from severe problems such as corruption, poor performance of the national parliament, low responsiveness of political parties, high structural unemployment, etc. may find the solution in the EU. On the other hand, countries with low corruption, an efficient democracy, a highly developed welfare state, etc., might be more reticent with respect to the integration project" (Sánchez-Cuenca 2000: 151).

Accordingly, the better the perceived performance of the European institutions, and the worse that of the national institutions due to the corruption or manipulation of the national judiciary by the other branches of power, the lower the opportunity cost of adopting their new role as European judges. Thus, national judges will have to assess whether the functioning of politics and constitutional framework at the supranational level will compensate their loyalty transfer from the national level to Europe.

Following these general statements, I will explore to what extent the integration of national judges into the EU legal order may be a consequence of the interplay between supranational and national politics, as Sánchez-Cuenca (2000) and Kitzinger (2003) showed in the case of citizen support for European integration. The working hypothesis is the following:

***h_1**: the more positive the national judges' opinion of the functioning of supranational institutions and the more negative their assessment of national institutions, the greater their role as EU judges.*

This general idea can be applied both to the feelings (attitudes) and to decisions (behaviour) of national judges as European judges. However, we may expect an influence of distinct national and supranational institutions depending on whether we are asking them about their feelings as part of the EU legal order or about their decisions concerning the CJEU rulings. Here, I affirm that national judges are engaged in two levels/stages of reasoning depending on whether they are assessing their membership or position into the EU political and institutional framework or they are rendering a decision concerning EU law. In the first case, they are evaluating their political and constitutional ties or loyalty to the institutional system. Due to the political implications of this assessment, judges will rely on political institutions -specifically parliaments- as a maximum expression of democratic legitimacy, and as cue for the evaluation of the political performance of both systems. On the other hand, judges engaged in a decision strictly related to judicial matters - finding and interpreting the relevant EU law interpretation, for instance – tend to use a different reasoning or evaluation of their judicial loyalty or ties to the supreme judicial authorities, the CJEU and the national higher court.

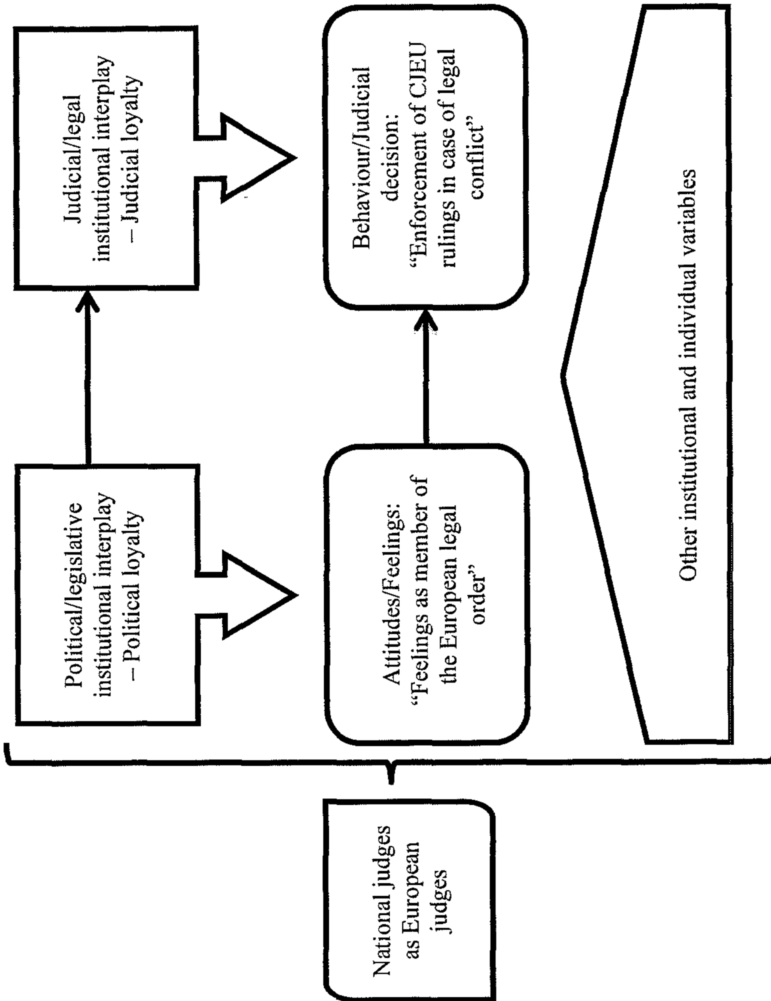
To assess these two different questions, judges acquire information and evaluate institutions from different perspectives, discriminating among them depending on the political or judicial implications of their assessment. From this perspective, feelings as EU judges and their decisions as such are conditioned by different institutional evaluations. The explanations for these differences in the influence of institutions can be explained by how the judges psychologically frame these questions: On the one hand, views on their European role do not vary independently from views on the

functioning of the EU political system reflected on the democratic chambers of Member States. On the other hand, their specific judicial evaluations (that is, judicial decisions on EU law) are linked more to a pure legal reasoning and, for that reason, to the evaluation of the functioning of judicial supreme authorities such as the CJEU and the national higher court.

Consequently, judges rely on national and political institutions -like the NP and EP- when they are assessing their involvement into the institutional political-legal system as European judges. On the contrary, national judges facing any specific legal problem will consider the performance on judicial authorities to take a decision. Judges are aware of the existence of two institutional frameworks, a political one and a more specific legal one, with different sources of legitimacy, the parliaments and the courts, respectively (see figure 4.7).

These differences are linked to the political nature of their feelings as EU judges compared to the act of judging the application of EU law. Their identity and feelings as EU judges are framed in political terms, like other attitudes (e.g. European identity and political citizenship). National judges' membership as part of the EU legal order is based on their political evaluation of the functioning of the EU as a political entity, and, specifically, the European-level legislative chamber as a source of political and democratic legitimacy. Under these circumstances, the EP serves as venue for reinforcing their membership as an EU actor. As regards their judicial behaviour as EU judges, that is, when they have to make specific judicial decisions of the application of EU law, national judges reduce their institutional framework of reference to the judicial institutions; the ones indeed legitimized clarifying legal conflicts.

Figure 4.7: Effect of the institutional interplay in the role of national courts as EU judges



In the light of such arguments, national judges suffering problems with the bad performance of the national parliament will find a solution at the EU, increasing the feelings as EU judges. National judges will perceive lower costs on transferring sovereignty from the national to the European parliament when they believe that their domestic institutions are not performing well due to corruption or because they are threatening their independence. Hence, under these circumstances, national judges will support the transfer of sovereignty from national parliament to the European one. This strategic relationship will be strengthened when national judges have a good opinion of the institutional performance of the European Parliament. Especially, the judiciary will rely more on EU institutions, first, when the European Parliament, as a democratic chamber, is passing (or co-legislating) EU legislation that extent the scope of their judicial review powers, and, second, when the EP is able to communicate is effective policy capability.[79]

In line with this argument, national judges may find the legislation (co) passed by the EU democratic chamber useful to empower its national position vis-à-vis the other branches of power (Golub 1996; Weiler 1991, 1994). New legislation will give them new opportunities and mechanisms to review the acts and to challenge the power or poor performance of their national parliament under the political legitimacy of EU institutions and the supranational chamber. Hence, the EU has to be seen in relation to judges' support for EU integration. In general, such motives

---

[79] The relevance of the EP as a legislator has been strengthened especially after the Treaty of European Union, where the co-decision procedure was introduced and revised by the Treaty of Amsterdam (Craig 2010). Since these reforms were introduced, the role of the EP becomes more important as a democratic chamber in the European legislation. The gradual reforms enhanced the legitimacy of EU legislation and its democratic credentials by enabling the EP to participate into the law-making process, with positive consequences for the evaluation of its performance and functioning among European citizens, even judges.

include the potential benefits to judge; for example, an increase in power and their national status under the legitimacy of their political institutions, like the EU parliament. As I said before, EU institutions are perceived as the actors that ensure institutional benefits that those national political institutions can no longer provide or warrant (Kritzinger 2003; Sánchez-Cuenca 2000), such as their judicial independence and powers. As a result -and because of their mistrust of their national institutions- judges agree to a transfer of sovereignty with the hope that the EU institutions will solve these problems or dysfunctions by empowering themselves under the sponsorship of a supranational political and constitutional framework. Accordingly, I hypothesize:

***h_2**: the more positive the national judges' opinion of the functioning of European parliament and the more negative their assessment of the national parliament, the greater their feelings of membership to the EU legal order.*

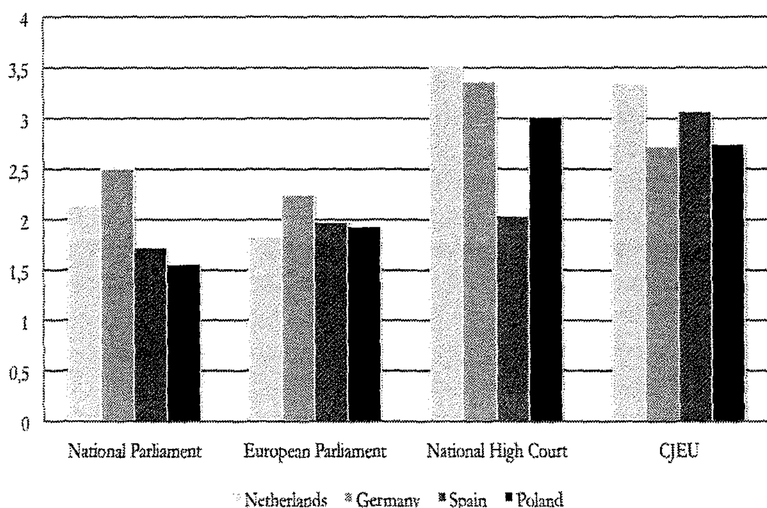
As regards their decisions as EU judges to follow CJEU rulings, national judges who mistrust their national highest court will find a solution at the CJEU as well. As in the case of the NP and EP, national judges will apply CJEU rulings when they think that, for instance, their supreme national judicial authority is not performing well due to their lack of judicial independence. This strategic relationship will be strengthened when national judges have a good opinion of the institutional performance of the CJEU. National courts will support the application of CJEU when they believe that the CJEU "argumentation include a certain reflexivity that takes into account the differing legal cultures and traditions that underlie the pluralistic EU legal order" (Paunio 2010: 14-15). The CJEU continuously takes decisions within the EU legal framework, considered as a forum where different normative views and legal traditions meet and compete. National judges will trust the CJEU and their interpretation when they appreciate that CJEU decisions are based or founded on a supranational legal framework compatible with the principles and values of their

national legal orders. Especially, the judiciary will rely more on EU supranational judicial institutions when they think that CJEU rulings will not undermine the most basic national legal foundations of their national legal system. Accordingly, I hypothesize:

***h_3**: the more positive the national judges' opinion of the functioning of CJEU and the more negative their assessment of the national highest court, the greater their support for CJEU rulings.*

Figure 4.8 offers an idea of the cross-country variation on institutional confidence within the sample. Nevertheless, our aim is to know if the individual variation of this institutional trust has an impact on their feelings and decisions. Within these results, it is remarkable the higher trust in judicial institutions compared to the trust in the political parliamentary ones.

Figure 4.8. Trust in National and European institutions by country – average score



N= 481 (Netherlands: 133; Germany: 137; Spain: 125; Poland: 114). The variables measure the intensity of trust in institutions using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

4.5. Which factors convert national judges into EU judges? The effect of institutional trust for the incorporation of national judges into the European institutional system

In this section, I will explore the influence of institutional trust, among other factors, in national judges' feelings and decisions as EU judges. For the analysis, I will use econometric techniques taking into consideration the influence of several individual and contextual political and legal factors. Throughout the analysis, I will focus on the influence of the interplay between EU and national institutions, in order to ascertain to what extent the integration of national judges into the EU legal order may be a consequence of the interaction between supranational and national politics, as Sánchez-Cuenca (2000) and Kitzinger (2003) have highlighted.

4.5.1. Research design, data and variables

To assess the role of national judges as EU judges, the study relies on a dataset on national judges' opinions on EU law and institutions (more details in the appendix A). In the following pages, I present a description of all the variables that will be used in the empirical analysis:

1) *Dependent variables: Feelings and decisions as EU judges*

a) Feeling part of the European legal order: The variable measures whether judges agree or disagree with the idea of feeling part of the EU legal order and its intensity, using a five-point scale

variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

b) Following CJEU rulings in case of doctrinal conflict: I have created a dependent variable using the responses to the vignette: "You have to decide over a case to which both the CJEU and the Constitutional/Supreme Court have different and incompatible opinions in their rulings. As a result you decide to…" (See figures 4.5 and 4.6 above). The variable adopts value 0 when the national judge would follow the national higher court ruling, 1 when the national judge would adopt a neutral position or reconcile the CJEU decision with the opinion of the national higher court, and 2 when the national judges would apply the CJEU ruling.

2) Main explanatory Variables:

- Trust in the Court of Justice of the European Union (CJEU): The variable measures the intensity of trust in the CJEU, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

- Trust in the highest national court: The variable measures the intensity of trust in the German, Spanish and Polish Constitutional Tribunal and the Supreme Court in the Netherlands, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

- Trust in the National Parliament: The variable measures the intensity of trust in the National parliament, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

- Trust in the European Parliament: The variable measures the intensity of trust in the European parliament, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

3) *Control Variables:*

- *Type of Court:* The variable adopts the value of 0 when the judge belongs to a district court or similar, 1 if he/she belongs to a regional or appeal court, and 2 if the judges works on a Supreme Court (only for Poland and Spain). The literature has underscored the importance of considering different incentives and preferences within the judicial hierarchy. National courts may have their own preferences towards EU law depending on their position within the national judiciary. The inter-judiciary competition theory assumes diverse institutional incentives for each type of court: While lower and intermediate courts use EU law and CJEU rulings to increase their prestige and power vis-à-vis high courts, higher courts try to contain the reception of EU law to protect their authority, jurisdiction and judicial review powers from the influence of the CJEU (Alter 1996). Accordingly, I assume that national lower courts will enforce CJEU decisions to increase their judicial review power vis-à-vis high courts by playing the higher courts and the CJEU off against each other in order to influence legal development in the direction they prefer (Alter 1998).

- *Knowledge of EU law:* These variables codes whether the judges think their knowledge of EU law is sufficient to judge the possible EU law content of the cases. This is measured by a 5-point scale that assesses their subjective evaluation of their knowledge of European law. The variable ranges from 'Poor' to 'Very good' knowledge of European law. National judges will be more likely to feel part of the EU legal order and/or to enforce CJEU law when they are acquainted with rules and principles for its application (e.g. EU law supremacy, direct and indirect effect of EU law provisions, etc.) and its binding effects.

- *Knowledge of national law*: A 5-point scale measuring their subjective evaluation of their knowledge of national law. The variable ranges from 'Poor' to 'Very good' knowledge of national law.

- *Judicial independence (Linzer & Staton):* This measure of judicial independence is taken from Linzer and Staton (2011) who

created an index based on hetereoskedastic-graded response IRT model using eight of the common measures of judicial independence. The values range from 0 (minimal independence) to 1 (maximal independence).

- *Judicial independence (subjective):* Ten-point scale that measures judges' assessment of their independence from political power. The index ranges from 0 (minimal independence) to 1 (maximal independence). The data is only available for Spain and Poland.

- *Evaluation of the European Unions as democratic:* Five-point scale that measures to what extent agree or disagree with the following statement: "I am reluctant to the application of European law, because I find the European institution's process of passing European law is undemocratic". 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree. The values have been reversed to measure positive attitudes to the democratic character of the EU.

- *CJEU rulings are clear:* Five-point scale that measures to what extent agrees or disagrees with the following statement: "In general, I believe that the rulings made by the CJEU are clear". 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

- *EU legal principles compatibility with domestic legal orders:* Five-point scale that measures whether judges agree or disagree with the following statement: "I think that European legal principles are alien to my national legal system". 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree. The values have been reversed to measure positive attitudes towards the compatibility between EU and national principles. This variable will be used to study if national judges trust the CJEU more when they think that the decisions of the Court of Justice are based on a supranational legal order that will not undermine the most basic national legal foundations of their domestic order.

- *Country:* This variable identifies national judges' country: 0: The Netherlands, 1: Germany; 2: Poland; and 3: Spain. Generally,

the Netherlands will be treated as the category of reference to compare all these countries.

Method: For the analysis of the dependent variable, I will estimate ordered logit models, which tend to work best with ordinal variables. The analysis will take into consideration the influence, as independent variables, of several factors such as legal knowledge, trust in EU and national institutions, type of court, among others. In the analysis, multicollinearity among variables has been prevented. As a main novelty with previous analysis on European Judicial Politics, these regressions estimate for the first time a model combining individual variables (judges' attitudes, institutional evaluations, and knowledge) with contextual variables to control for the mainly institutional factors studied by the literature (judicial independence, constitutional system, among others). The variables used in the analysis are summarized in the following table n° 4.1:

Table 4.1. Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
To feel part of the EU legal order	482	2.788	1.092	0	4
To follow CJEU ruling	482	1.278	0.811	0	2
Trust in the National Parliament	468	2.044	1.03	0	4
Trust in the European Parliament	468	2.032	0.93	0	4
Trust in the Constitutional/Supreme Court	471	3.074	1.006	0	4
Trust in the CJEU	469	3.005	0.867	0	4
Knowledge of National law	480	2.881	0.662	0	4
Knowledge of European law	479	1.442	0.872	0	4
Type of Court	482	0.385	0.52	0	2
EP is a democratic institution	477	2.882	0.929	0	4
EU principles compatible with national legal order	478	2.937	0.956	0	4
CJEU rulings are clear	392	2.081	1.035	0	4
Judicial Independence (subjective)	218	7.373	2.166	0	10
Judicial Independence (Linzer & Staton)	477	0.871	0.083	0.73	0.94
Country: The Netherlands	482	0.267	0.443	0	1
Country: Germany	482	0.271	0.445	0	1
Country: Spain	482	0.224	0.417	0	1
Country: Poland	482	0.226	0.418	0	1

The findings of the model on EU judges' decisions are also tested using a multinomial logit specification assuming that the relationship between the three alternatives ('to apply national

higher court ruling' / 'to reconcile both interpretations' / 'to apply CJEU ruling') are not linear or ordinal. Moreover, that the odds of preferring one path of action to another do not depend on the presence of the other alternatives. It will allow testing whether the factors associated with 'reconcile/neutral' are statistically different from the factors associated with 'enforcing CJEU ruling' behaviour or not.

4.5.2. Empirical analysis and findings

The next section is devoted to the empirical testing of the hypotheses previously presented using econometric techniques. The analysis will be divided in two parts: the identification of national judges as part of the EU legal order and the enforcement of CJEU rulings.

- ***Analysis of national judges' feelings as member of the EU legal order:***

The first model showed below (see table 4.2 see below) tests the combined effect of legal and political individual variables, such as trust in the National Parliament, the European Parliament, the Constitutional/Supreme Court and the CJEU, knowledge of EU and national law; and institutional and contextual, like type of court and country; on national judges self-perception as EU judges.

According to the hypothesis presented above, the results demonstrate how judges, at the 0.01 level of significance, feel part of the EU legal order when 1) they mistrust their national parliament, and 2) trust the European Parliament. The effects of the institutional parliamentary trust in national judges' membership to the EU legal order is reported generating predicted probabilities for the highest value/outcome of the dependent variable (strongly agree=4) in table 4.3. There are indeed substantial differences in the likelihood of 'strongly feeling part of the EU legal order' between the trust categories. We can observe that the predicted probability to strongly self-identify as EU judge

increases when 'trust in the EP' is higher. Conversely, higher levels of support for the national parliament seem to be associated with lower levels of identification as an EU-judge.

Table 4.2. Ordered logit regression of the intensity of their feelings as European judges part of the European legal order[80]

Dependent variable:	National judge as European judge
Trust in the National Parliament	-0.372*** [0.109]
Trust in the European Parliament	0.326*** [0.110]
Trust in the Supreme / Constitutional Court	0.183 [0.119]
Trust in the CJEU	0.130 [0.116]
Knowledge of national law	0.024 [0.155]
Knowledge of European law	0.706*** [0.115]
Type of Court	0.633*** [0.200]
Country: The Netherlands (category of reference)	
Country: Germany	-0.327 [0.268]
Country: Spain	0.865*** [0.300]
Country: Poland	0.158 [0.290]
τ_1	-0.976
τ_2	0.44
τ_3	0.994
τ_4	3.656
Observations	478
Pseudo-R^2	0.08

Standard errors in brackets * significant at 10 %; ** significant at 5 %; *** significant at 1 %

[80] The same model has been estimated considering "Trust in the Council of Ministers", "trust in the European Commission" and "trust in the European Union" with non-significant results. These results discard the possibility that national judges value equally the performance of EU political institutions.

Table 4.3: Predicted probabilities of the main explanatory variables for feeling strongly identified as EU judge

Strong feelings as EU judge (=4)	Trust in NP	Trust in EP
Do not trust	0.38	0.11
Hardly trust	0.29	0.16
Neither trust nor distrust	0.21	0.21
Trust	0.15	0.27
Trust very much	0.10	0.35

A closer look to the factors that determine the level of trust in the European Parliament may clarify the importance of the relationship between the feeling of belonging to the EU legal order and the trust in the EP and NP. For that purpose, I estimate the regression of table number 4.4 (see below) testing the determinants of trust in National and European parliaments, including two new variables: 'EU is democratic' and 'Judicial Independence (subjective)'[81].

In the results, we observe first how judges in Spain and in Poland trust less heir National Parliaments than in Germany and in the Netherlands (See Models 1, 2 and 3). According to our theoretical argument, there should be a correlation between trust in NP and its performance as regards the judiciary, for instance by guaranteeing the level of judicial independence. To test this link I report and compare the levels of support to the NP and of judicial independence *de facto* in table 4.5 (see also below), observing how those countries with higher levels of judicial independence trust more the NP. This finding is confirmed at the individual level by analysing the impact of the subjective evaluation of judicial independence on the trust in national parliaments for Spain and Poland. Indeed, model 3 above shows how those judges who

[81] The questions about judicial independence was only included in the questionnaire for Spanish and Polish Judges. To prevent the reduction of observations, the variable measuring the dependence of courts from politics will be included in one model (nº 3) to test whether judges trust less in national parliaments when they are influenced by them.

declared higher independence levels tend to trust more in their national parliaments.

Table 4.4. Ordered logit regression of the intensity of institutional trust in National and European parliaments

	Trust in EP	Trust in NP	Trust in NP	Trust in NP
		Model 1	Model 2	Model 3
Trust in the National Parliament	1.179*** [0.115]			
Trust in the European Parliament		1.174*** [0.118]	1.203*** [0.116]	1.009*** [0.160]
Trust in the Supreme / Constitutional Court	-0.041 [0.120]	0.832*** [0.122]		0.819*** [0.158]
Trust in the CJEU	0.573*** [0.128]	-0.066 [0.126]	0.239** [0.115]	-0.356* [0.194]
Knowledge of national law	-0.317** [0.158]	0.119 [0.160]	0.220 [0.151]	0.021 [0.229]
Knowledge of European law	0.158 [0.107]	0.135 [0.107]	0.076 [0.105]	0.155 [0.165]
Type of court	0.062 [0.200]	-0.341* [0.197]	-0.205 [0.194]	-0.253 [0.266]
EU is democratic	0.212** [0.107]	-0.230** [0.106]	-0.310*** [0.104]	-0.269* [0.163]
Country: The Netherlands (category of reference)			**Poland (CoR)**	
Country: Germany	0.734*** [0.271]	0.643** [0.276]	0.712*** [0.272]	
Country: Spain	0.893*** [0.304]	0.370 [0.300]	-0.610** [0.260]	1.034*** [0.358]
Country: Poland	1.094*** [0.315]	-0.613* [0.314]	-0.698** [0.305]	
Judicial Independence (subjective)				0.198*** [0.070]
τ_1	1.405	1.219	-0.316	2.159
τ_2	3.259	3.545	1.809	4.522
τ_3	5.476	5.21	3.402	5.253
τ_4	9.294	9.039	7.061	8.959
Observations	476	476	477	211
Pseudo-R^2	0.15	0.19	0.15	0.19
Standard errors in brackets	*** significant at 10 %; ** significant at 5 %; *** significant at 1 %**			

Table 4.5. Average trust in national parliaments and level of judicial independence

	National Parliament	Judicial Independence (Linzer & Staton)
Netherlands	2.15	0.9452
Germany	2.51	0.9342
Spain	1.73	0.8454
Poland	1.56	0.7343

These results confirm the idea that national judges trust more the NP and, hence, bear more loyalty transfer costs to the EU when domestic institutions are performing well, especially as regards their independence. When national parliaments respect the functioning of the judiciary, national judges will remain loyal to their national political and legal system. On the contrary, under contexts of low judicial independence, national judges will opt to transfer their loyalty to the EP as a source of political legitimacy. The new EU political loyalty gives incentives to national judges to make use of their EU judicial review power against national legislation and acts. As Marlene Wind has also argued (Wind 2010), once the loyalty has been transferred from the national to the European Parliament as a democratic source of the European legislation, the higher political legitimacy or supremacy of EU institutions over national ones forces national judges to put European law before the acts of their own national institutions. Under these circumstances, national judges may easily adopt the point of view of the European legislators, such as EP, when they have to control or review the effective implementation by national authorities of the European legislation.

As regards other variables of the analysis, we see a positive effect of the knowledge of EU law and national law in their socialization as EU judge. In addition, judges from intermediate and Supreme courts[82] identify themselves more as members of the EU legal order, than those from lower courts. It is worth to

---

[82] The judges included from Supreme courts belong to legal orders where there is a supreme constitutional authority above them.

mentioning how judges rely on institutional proxies or cues to be able to overcome their information shortfalls in two ways. Since citizens generally, and judges more specifically, pay more attention to the national political arena than European politics, they tend to employ domestic cues (like the national parliament) to form their opinion about the European Parliament (Hobolt 2012). Similarly, national judges employ as a heuristic their opinion or evaluation about institutions performing at the same level of government, either supranational or domestic: the CJEU for the EP and the national higher courts for national parliaments. In these sense, judges with less knowledge about the EU law use national institutions as a proxy to interpret and evaluate the performance of EU institutions. This fact has been confirmed observing judges' participation on seminars devoted to the use of preliminary references.[83] In that case, judges where asked to allocate roles and functions to European institutions. While judges with more knowledge and interest in EU law and politics where able to discern the differences and nuances of the EU policy/law making process, judges which were less knowledgeable endorsed similar roles to European institutions (EC, EP and CJEU) to those of their national institutions (executives, national parliaments and courts).

- ***Analysis of the decisions of national judges as EU judges: The enforcement of CJEU rulings***

Next, I analyse the factors that influence the decisions of national judges to follow CJEU rulings in case of doctrinal conflict. Going one step further from legal and political current analyses on this issue, I will study to what extent institutional factors, especially whether institutional confidence on national and supranational judicial institutions, have any influence on the decisions of national judges.

---

[83] XVIII Workshop on the judicial application of European Community law, 1st-4th October 2012. Spanish Judiciary School.

The model in table 4.6 (see below) shows the impact of the same variables tested in the model used for explaining judges' membership to the EU legal order. One of the most remarkable outcomes is precisely related to the feeling of belonging to the EU legal order. In that case, we observe in model 1, at the 0.1 level of significance, how the likelihood that national judges enforce CJEU rulings is increased as grows the identification as European judges. These results show how effectively, and according to the Commission (2011)'s claims, national judges with a more intense feeling of belonging to the EU legal order tend to solve legal tensions by following CJEU doctrines as a solution. Thus, the adoption of their European role by national judges erodes the significance of national highest courts as institutional actors playing a role in constitutional conflicts (Kumm 2005).

Table 4.6. Ordered logit regression of the enforcement of CJEU rulings in case of doctrinal conflict

Dependent variable:	Follow CJEU ruling	Follow CJEU ruling
	Model 1	Model 2
National judges feels part of the European legal order	0.179* [0.097]	0.150 [0.102]
Trust in the National Parliament		-0.021 [0.118]
Trust in the European Parliament		0.149 [0.122]
Trust in the Supreme / Constitutional Court		-0.359*** [0.128]
Trust in the CJEU		0.612*** [0.132]
Knowledge of national law	-0.277* [0.159]	-0.202 [0.169]
Knowledge of European law	0.255** [0.118]	0.192 [0.124]
Type of court	0.181 [0.214]	0.235 [0.227]
Country: The Netherlands (category of reference)		
Country: Germany	-2.149*** [0.339]	-2.002*** [0.369]
Country: Spain	-2.397*** [0.333]	-3.051*** [0.398]
Country: Poland	-3.494*** [0.369]	-3.488*** [0.403]
τ_1	-3.442	-2.555
τ_2	-1.982	-1.023
Observations	475	460

Pseudo-R^2	0.14	0.18
Standard errors in bracket * significant at 10 % ** significant at 5 % *** significant at 1 %		

Nevertheless, this argument holds true until the introduction of political institutions (see model 2 in table 4.6). The inclusion of institutional variables into the model erases the significance of the self-perception as EU judges, showing a strong effect of judicial institutions and contextual variables in the behaviour of judges. As we see in table 4.7, the predicted probability of applying CJEU rulings is 0.6 when national judges feel more as EU judges. In addition, this probability is reinforced with the effect of trust in the CJEU and its performance, observing how the rate is increased to 0.68 when the national judge trusts the CJEU. While in the case of the NCH, the trust of national judges on their respective highest courts lower to 0.46 the likelihood to enforce CJEU rulings.

Table 4.7. Predicted probabilities of the main explanatory variables at their maximum levels or values"[84]

Dependent variable:	Follow HC ruling	Reconcile / Neutral	Follow CJEU ruling
I feel European judge (model 1)	0.13	0.26	0.6
Trust in NHC (model 2)	0.19	0.33	0.46
Trust in the CJEU (model 2)	0.08	0.22	0.68

The findings of this model are also tested using a multinomial logit specification to model the choice amongst these three outcomes. This specification allows us to test whether the factors associated with 'reconcile/neutral' are statistically different from the factors associated with 'enforcing CJEU ruling'. If the factors affecting these two behaviours are similar, then a simple logit specification may be appropriate. If the factors are different, then the use of a multinomial regression will provide a more accurate

[84] The Pearson correlation coefficient between "I feel European judges" and "Trust in the CJEU" is 0.13, showing a very weak correlation.

picture of the decision of national judges when they find a conflict between the CJEU and the national higher court. The table presents the relative risk ratios that indicate how the risk of the outcome falling in the comparison group – both *Follow CJEU ruling* or *Neutral* - compared to the risk of the outcome falling in the referent group - *Follow NHC ruling* - changes with the variable in question. For example, if the explanatory variables increases the chance of applying CJEU rulings compared to national higher courts' rulings, the odds ratio will be higher than 1. If it reduces it, the odds ratio will be less than 1.

Looking at the results in table 4.8, we can observe how the likelihood of choosing 'to reconcile' as compared to 'to follow NHC ruling' is positively affected by their feelings as EU judges, trust in the CJEU, and the country of origin. Meanwhile, 'following CJEU ruling' as compared to 'NHC rulings' is negatively affected by their trust in the national higher court and the context, and positively influenced by their trust in European institutions. This is especially the case of the CJEU, whose impact is higher compared with the rest of institutional trust variables. These differences in the variables affecting both reconciling and applying CJEU ruling show the relevance of national and European judicial institutions for choosing 'to follow CJEU' compare 'to reconciling' option in which the interplay among institutions seems irrelevant. In addition, the group of countries affecting negatively the enforcement of CJEU rulings are those characterized for being less opened or restricted to the reception of the EU law (when compared to the Netherlands).

Table 4.8. Multinomial logit regression of the doctrinal conflict decision

Dependent variables:	Reconcile interpretation vs. Follow NHC ruling	Follow CJEU ruling vs. Follow NHC ruling
National judges feels part of the European legal order	1.322* [0.167]	1.184 [0.123]
Trust in the National Parliament	1.139 [0.168]	0.899 [0.179]
Trust in the European Parliament	0.874 [0.172]	1.462** [0.192]
Trust in the Supreme / Constitutional Court	0.769 [0.202]	0.549*** [0.204]
Trust in the CJEU	1.422* [0.189]	2.691*** [0.199]
Knowledge of national law	0.713 [0.252]	0.778 [0.246]
Knowledge of European law	1.088 [0.190]	1.277 [0.172]
Type of court	1.421 [0.341]	1.673 [0.357]
Country: The Netherlands (category of reference)		
Country: Germany	0.125*** [0.721]	0.096*** [0.530]
Country: Spain	0.668 [0.702]	0.009*** [0.643]
Country: Poland	1.393 [0.676]	0.035*** [0.653]
Observations		460
Pseudo-R^2		0.28
Standard errors in brackets		*** p<0.01, ** p<0.05, * p<0.1

Finally, I test the factors that determine the trust in judicial institutions to disentangle the mechanisms that leads national judges to follow CJEU rulings. For that purpose, I estimate the regression of table number 4.9 (see below), adding two new variables: 'EU principles compatible with national legal order' and 'CJEU rulings are clear'. In these results, we observe how effectively judges use as a proxy their trust in domestic judicial institutions to assess the national higher court, as we have seen in the case of national parliaments and the EP. This finding can be linked to the idea that, in the domestic context, national judges trust more their national highest judicial authority when they think that it is not disturbed or influenced by other distrusted political domestic institutions like the national parliament. In that situation, national judges will keep their loyalty to their national hierarchy. Otherwise, national judges will opt to transfer their loyalty to the

CJEU as a source of judicial legitimacy to challenge the position of their national highest court and political institutions.

Table 4.9. Ordered logit regression of the intensity of institutional trust in NHC and the CJEU

	Trust NHC	Trust CJEU	Trust CJEU
		Model 1	Model 2
Trust in the CJEU	0.566***		
	[0.071]		
Trust in the Supreme / Constitutional Court		0.517***	0.436***
		[0.068]	[0.071]
Trust in the National Parliament	0.439***	-0.120*	-0.129*
	[0.066]	[0.066]	[0.070]
Trust in the European Parliament	-0.094	0.293***	0.321***
	[0.068]	[0.065]	[0.071]
Knowledge of national law	0.216**	-0.098	-0.081
	[0.092]	[0.091]	[0.097]
Knowledge of European law	-0.093	0.136**	0.160**
	[0.065]	[0.064]	[0.070]
Type of court	0.121	0.093	0.132
	[0.121]	[0.120]	[0.129]
EU principles compatible with national legal order	0.034	0.243***	0.223***
	[0.061]	[0.058]	[0.063]
Country: The Netherlands (category of reference)			
Country: Germany	-0.137	-1.008***	-0.936***
	[0.167]	[0.154]	[0.188]
Country: Spain	-1.735***	0.167	0.143
	[0.173]	[0.184]	[0.214]
Country: Poland	-0.236	-0.851***	-0.782***
	[0.182]	[0.176]	[0.209]
CJEU rulings are clear			0.107*
			[0.059]
τ_1	-0.062	-0.587	-0.432
τ_2	0.577	0.393	0.52
τ_3	1.257	1.086	1.192
τ_4	3.055	2.901	3.029
Observations	477	477	394
Pseudo-R^2	0.23	0.15	0.14

Standard errors in brackets * **significant at 10 %; ** significant at 5 %; *** significant at 1 %**

What about national judges' trust in the CJEU? In the theoretical section, I asserted that national judges will support the application of CJEU doctrines when they consider that its decisions take into account the differing legal cultures and traditions that underlie the pluralistic EU legal order. To confirm this statement I added 'EU principles compatible with national

legal order' variable for testing if national judges trust more the CJEU when they appreciate that their decisions are founded on a supranational legal order that respect their national legal traditions.

In table 4.9 results, we see how at the 0.01 level of significance judges that believe that the EU principles are not alien to the national legal order are more prone to trust the CJEU. They trust more the CJEU because they think that the compatibility between the EU and national legal principles will prevent the CJEU from undermining the most basic national legal foundations of their national legal system with its decisions. To sum up, national judges will trust the CJEU because it operates based on the same principles as the national court. They are just afraid that the legal norms the CJEU represents are not compatible with domestic notions of law or that the supranational court does not yet operate according to the same principles as its national court system (Paunio 2010). To moderate national judges' fears and increase "the legitimacy of the EU legal order requires the CJEU to pay due respect to the common national legal traditions" (Maduro 2007: 6). Moreover, the variable 'CJEU rulings are clear' demonstrate how national judges feel more confident in following the CJEU when the dialogue through its rulings is clear and understandable for the national judge.

Accordingly, among the judges interviewed, judge 2 underscored how relevant is for the CJEU to take into consideration the principles ruling the national political system and its constitution. Otherwise, the opinion of their highest national authority would take absolute primacy over the European treaties and CJEU rulings when the national constitutional principles are at stake:

> *"The Court of Justice will deliver better and more solid opinions if they take into account and consider the different types of legislations. For an international court and the great variety of national legislation that it makes, of course, it is very important that they know, not only what the case is about, but also the consequences and the practices in the Member States. This is part of the dialogue between the different judicial systems. (...) If one day, the Conseil*

> *Constitutionnel were to be in a position to say that the EU law violates the constitutional identity of France. We would of course not apply the European law. EU law is not my constitutional rule. We are French judges, we cannot violate our constitution."* (Judge 2)

This finding highlights the idea developed by *Constitutional Pluralist theories* that the EU legal order, as codified in the new art. 4.2 TEU, must respect the identity of the national legal orders (Komárek 2007; MacCormick 1993, 1999; Maduro 2003, 2007; Walker 2002; among others). National judges require systemic compatibility between EU and diverse national systems, judging the recognition and adjustment of the EU legal order to the plurality of equally legitimated claims of authority made by the other legal order (Maduro 2003). This assessment is contingent on national judges sharing the same hermeneutic framework. However, national judges may have a different institutional and legal understanding of them when acting as EU judges role. For that reason, it is important that national judges know and *agree* with EU legal principles for an effective enforcement of EU law.

In addition, the model testing institutional trust (still table 4.9) provides some evidence of a legitimacy transfer 1) from the national to the supranational level and 2) from legislatives institutions to judicial ones. In the first case, like in the case of parliamentary trust (see table 4.4 above), it may be a cognitive shortcut that enables the supranational court to tap into a national source of legitimacy (Grosskopf 2005). Given that they have very little information about the EU and its institutions, some judges use information about national politics as a proxy to European politics (Muñoz et al. 2011). The same argument can be extended to the second kind of transfer.

Returning to models in tables 4.6 and 4.8, and regarding the effects of other variables in the model about the application of CJEU rulings, we can see a strong effect of constitutional contexts compared to majoritarian ones, such as in the Netherlands. I should indicate that the constitutional contexts considered in this analysis are also those where national Constitutional courts have

established counter-limits (Martinico 2010) or reservations to European doctrines to preserve the autonomy of their national constitutional and legal order.[85] In this situation, the Constitutional courts have retained for themselves the right to review whether European Union institutions act within the competences conferred upon them and respect the fundamental constitutional norms and human rights. Under these restricted legal framework, national judges will try to avoid any kind of judicial backlash from the national higher court following its doctrine instead of following the CJEU rulings. As a final remark, and contrary to what we can expect from Karen Alter's arguments about the diverse incentives of national courts to cooperate (2001), this chapter shows the irrelevance of the hierarchical position of the judge within the national judiciary for this decision.

4.5. Conclusions

This chapter tries to address one of the most recent concerns for the EU after Lisbon: The need of a common culture shared by European Union judges. For that purpose, EU institutions will try to encourage their feelings of belonging to the EU legal order by promoting their learning of EU law principles, doctrines and legislation. In the light of such claims, this study offers a preliminary picture of the present situation on the acceptance of EU principles and values by national judges and, most importantly, of their feelings as part of the EU legal order and decisions. The

---

[85] Within our dataset these cases are: **Germany**: Judgments of the German Constitutional Court (BVerfGE) *Solange I* [BVerfGE 37, 271 (29.05.1974)], *Solange II* [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)] *Brunner case* in Maastricht [BVerfGE 89 (12.10.1993)], & Lisbon Treaty [BVerfGE, 2 BvE 2/08 (30.6.2009)]; **Spain**: Judgment of the Spanish Constitutional Court in Maastricht [Decision n° 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004], and, **Poland**: Polish Constitutional Tribunal judgment on the Polish Accession Treaty [Case K 18/4 (11.05.2005).

empirical evidence showed throughout this section the broad acknowledgement of some of the main principles and institutional mechanisms that govern the application of EU law.

Furthermore, a large percentage of the sample of national judges asked (74 %) identify themselves as 'EU judges', and most of them (55 %) will also follow CJEU rulings in case of legal conflict. The chapter has explored how institutional factors, specifically -the interplay between supranational and national politics- influence the integration of national judges into the EU legal order as decentralized EU courts. The analyses have demonstrated why and to what extent trust in political institutions influences their national judges' feelings as part of the EU legal order. National judges displeased with the functioning on national political institutions, like the National parliament, and satisfied with the democratic performance of the European Parliament rely on the EU to empower its national position against distrusted national parliaments.

Secondly, I have highlighted the relevance of the trust in the judicial institutions for the acknowledgment of the Court of Justice of the European Union as the supreme authority on the EU legal order and, subsequently, the application of CJEU rulings. We have observed how national judges tend to trust the CJEU since it operates based on the same principles as national courts. They are more confident when they think that the legal norms the CJEU represent and apply are compatible with domestic notions of law. These findings indicate the importance of effective and well-functioning European institutions, especially after the Lisbon Treaty, for the achievement of a common culture shared by European Union judges. The legitimacy of the EU law is founded on the support of a broad constituency of national judges acting as EU judges that is a product of the broader assimilation of the EU law principles and its assessment of the performance of European political and judicial institutions.

CHAPTER 5. SUPRANATIONAL ADJUDICATION AS A POLITICAL STRATEGY: A NEW APPROACH AS MULTIPLE-ALTERNATIVE STRATEGIC DECISION

5.1. Introduction

It is relevant to point out that national courts can deal with the enforcement of EU law involving the opinions of other judges. National courts may support EU law application using the adjudication to the CJEU, by involving it directly or indirectly in the decision-making of the process. The literature on the use of preliminary references has already dealt with this topic recognizing the relevance of citation practices used by judges; in order to clarify EU law application, support their interpretation, challenge high courts' threats, etc. Nevertheless, by analysing mostly the use of preliminary references sent by national courts, all these studies commence on a wrong starting point for several reasons. First, academics focusing only on the use of preliminary references are giving a wrong impression of the adjudication reasoning in which judges are involved. National judges considering the use of citations face a multiple-alternatives choice instead of a simple binary decision on whether or not to send a preliminary reference to the CJEU. As Francisco Ramos (2002) pointed out, the judicial adjudication process offers several means

of action that makes this decision more complex: for example, judges can decide, for several reasons, to make use of previous CJEU decisions on the topic instead of sending a preliminary question to the CJEU or decide on their own. Secondly, these processes are not independent from each other. Until now, scholars have studied both mechanisms as completely independent tools available to judges, giving the idea that national judges did not relate both mechanisms to each other. However, in this chapter I affirm that the process of preliminary reference is not independent from other methods of deciding EU law cases using precedential practices or deciding without quoting.

Recently in the EU literature, some authors relied on the importance of two types of practices: a) the use of preliminary references b) the analysis of EU law cases previously decided by the CJEU or precedent. Until now, no systematic studies have been considering the relevance of CJEU precedent to answer the question on why national courts adjudicate to the CJEU; with the exception of Francisco Ramos (2002; 2006) in Spain and EU-15 higher courts. This author collected and analysed for the first time systematic data on national EU law cases to unravel the factors that lead national judges to cooperate with the CJEU. Nevertheless, he failed to explain under which conditions national courts would opt for one method of deciding EU law cases over the others, and the impact of individual and institutional factors on these alternatives.

This chapter will deal with the adjudicatory phase in which national courts consider whether to refer to the CJEU, from a multiple-alternative choice perspective. I will not only limit the analysis to the use of references, but also to how and why judges deal with these practices influenced by political and institutional factors. The chapter will be divided in two more sections, one theoretical and one empirical. The theoretical section presents the adjudication decision process as an alternative-choice strategic decision in which judges are asked to select the best possible answer from a list of possible paths of action. In addition, I will develop two models, a legal and a political model, that try to

account for reference practices among the European judiciaries. The remaining sections will test empirically, from this new perspective of analysis, the arguments offered by the two models using original empirical evidence from the EU-25 Member States. To sum up, the principle purpose of this chapter is to extricate one of the main political rationales behind the use of the citation mechanism when they are assessing EU law cases. This will help us understand better the relevance of supranational adjudication to the CJEU, before studying the judicial enforcement of EU law in the following chapters.

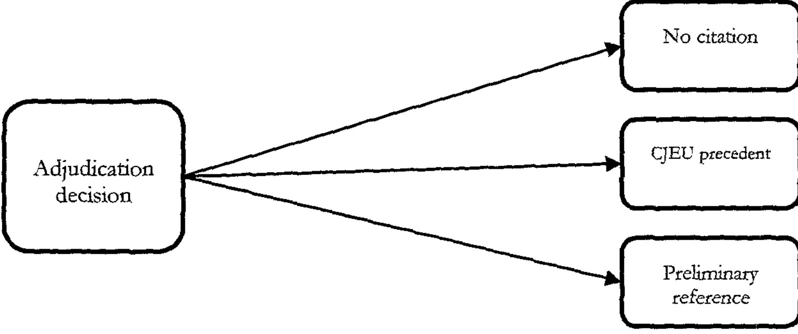
5.2. Theorizing adjudication as a multiple-alternative decision process: Legalist vs. Political models

Scholars studying adjudication to the CJEU have been making their inferences considering it a two-alternative process: the judge decides whether to refer or not when making a decision on EU law. Mostly during analysis, both theoretical and empirical accounts have relied on the assumption that the decision of using CJEU precedents and referring a question to the CJEU are independent processes in which all these options or stages are not linked to one another during the judicial decision-making process. For example, consider the decision made by a national judge in a binary choice decision process where they could send a preliminary reference to the CJEU or not send it. If we have to imagine the decision tree, the judge has only two possible outcomes: To refer the question to the CJEU (parameter x), and the likelihood of not referring (1-x). The scenario described would change if we introduce a third alternative, modifying the probabilities of the two previous scenarios. This third alternative would be to use previous CJEU decisions or precedent for solving EU law cases.

Judges can decide in which way they deal with EU law cases, such as applying EU law on their own or taking into account the opinion of other courts, that is, citation practice (Tridimas and Tridimas 2004). As we indicated in the theoretical chapter,

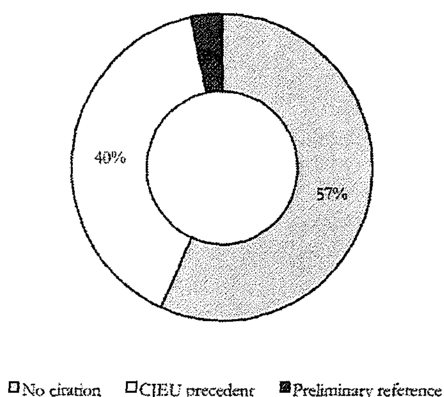
European courts rely on two types of citation practices: the use of preliminary references and the citation of cases previously decided by the CJEU (see figure 5.1 below). Concerning the use of preliminary references, national courts request CJEU rulings in order to provide an interpretation of an EU law provision or to declare the validity of an EU act. While preliminary references imply that a national court has requested a CJEU decision for clarification on a certain case at the national level, the rule of *stare decisis* requires that an earlier decision provides a reason for deciding a subsequent similar case in the same way (Kornhauser 1992). Along with the cases already decided by the CJEU, national courts will also be able to find an answer to the issues it faces supporting the enforcement of EU law.

Figure 5.1. Initial adjudication process



In the sample used for this study, we observe (see figure 5.2) how the European high courts made recurrent use of citation practices to support their opinions:

Figure 5.2. Citation practices of European High Courts (2000-2010)



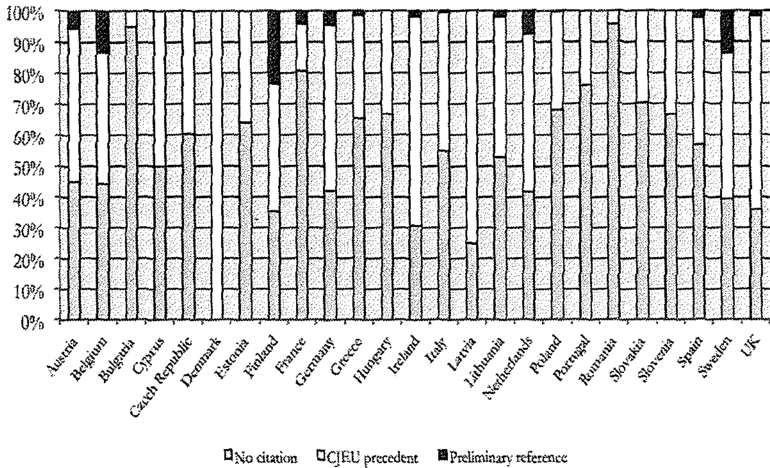
Source: Data set of High Court and EU Law cases 2000-2010 (N=4167 decisions & 110 courts).

The percentages indicate a regular use of citations by the national courts, showing their willingness to play their role in the partnership with the CJEU. As we expected, national courts rely more on CJEU precedent (40 %) than on preliminary references (3 %).[86] However, as we observe in figure 5.3, this distribution may change from one country to another. These differences in the use of citations and its variants may be associated to the characteristics of the specific EU law case, the institutional or legal context, or the attitudes or legal and policy preferences of the judges.

---

[86] While the use of CJEU precedent prevents the use of preliminary references, the use of the latter does not exclude the use of CJEU precedent. Most of the time, preliminary rulings are reinforced with CJEU precedents supporting the legal reasoning developed by the Court of Justice in its ruling.

Figure 5.3. Citation practices of European High Courts (2000-2010)



Source: Data set of High Court and EU Law cases 2000-2010 (N=4167 decisions & 110 courts).

In this section I will focus on the political and institutional determinants under which national courts decide to cooperate with the CJEU and how. To answer these questions next, I will present, develop and discuss the different accounts or models given to explain the cooperation of national courts with the CJEU. For each model, I reviewed the preferences of national actors and how the modes of citations —preliminary references and precedent—are explained to finally suggest some hypotheses. I identified two models of cooperation, one legal and one political, that can easily be associated to the previous approaches presented in chapter 3, accounting for the behaviour of national courts/judges (see table 5.1 below):

Table 5.1. Models of Judicial Cooperation

Models of Judicial Cooperation	**Characteristics**	**Theoretical approaches endorsing this account**
Legal Model	- The main aim of judges is to keep the internal logic of the EU legal/national systems and correctness of their decisions - National courts enforce EU law according to their rules and legal traditions - National courts are not affected by political factors or institutions - CJEU Jurisprudence is only used for interpretative purposes	- Legalism (Team Model and Neo-functionalist legal explanations) - Unified governmentalism - Pluralist governmentalism
Political Model	- National governments, parliaments and higher courts are a serious threat to courts' behaviour (*non-applicable to unconstrained judicial empowerment approaches*) - National courts want to maximize their power (EU judicial review powers) and policy influence - National courts strategically make use of CJEU rulings to enforce EU law and challenge national legislation	- Reconsidered judicial empowerment - Unconstrained judicial empowerment - Intra-judicial competition

The differences between these two models have to do with the kind of the assumptions made to explain judicial citations during the adjudication process. The main purpose is to test their assumptions by looking at the decisions made by national courts as an observable phenomenon.

A) <u>The Legal Model</u>: This account explains how judges follow the legal rules that govern their behaviour under EU legal procedures. Hence, we must expect that national courts will

adjudicate to the CJEU when they have an obligation to do it. For example, national judges will be obliged to refer to the CJEU a preliminary question when, following the Treaties and CJEU jurisprudence, there is no appeal to or when the judges have doubts about the validity of EU law. Similarly, national courts are under the obligation of adhering to CJEU decisions. Nevertheless, this obligation does not entail that national judges will follow these rules in every situation. For that reason, we need judges to be aware of the applicability of EU law and have enough knowledge and competence to follow these references rules (Nowak et al. 2011).

Francisco Ramos (2002) has developed a more sophisticated and interesting version of these models, by adding some new assumptions related to the institutional position of judges. In the so-called 'Team Model', judges share the common goal of maximizing the number of correct decisions given their resource constraints, and not conflicting interests. Because of this goal, courts in different levels of the hierarchy have different functions that design the adequate adjudicatory strategies to follow in each case. Under this scheme, national judges consider the CJEU as a specialized court who yields better signals as to how EU law should be applied. For that reason, national judges will rely on CJEU precedent to determine the application of EU law, saving the resources and time that they would have had to invest for its resolution.

Concerning preliminary references, national judges consider their use necessary for the production of knowledge to resolve EU law cases that they cannot find in CJEU precedent. National judges outsource when they find that the national judiciary faces infrequent difficult problems or new issues related to the validity of EU law, or conflict between EU law and national legislation concerning new legislation. Under this situation, national judges delegate to the CJEU the creation of the necessary knowledge for the resolution of the case, thus saving resources to resolve the case. Therefore, we should observe precedential practices and preliminary references driven by the need to solve complicated

legal issues, independently of their position within the judicial hierarchy.

***h*₁**: *National courts are more likely to refer to the CJEU when they face complex and difficult cases as regards to the application of EU law.*

Finally, legalist model accounts would expect higher levels of judicial cooperation the higher we climb the judicial hierarchy, given that they hear more important and difficult cases than other courts. Following this argument, we would expect to find plenty of difficult cases in the docket of highest national courts, when compared to the rest of courts. For that reason, due to the own complex nature and implications of difficult EU law cases, we expect highest national courts to make important references or use CJEU precedents in difficult issues.

h_2: *Highest courts are more likely to refer to the CJEU than other courts to solve complex EU law issues.*

B) The Political Model: The team model assumes that judges share a common goal and for this reason, it fails to incorporate political conflict into the model, which certainly existed in the history of the European Union. Here I state that, according to the judicial empowerment theory, political motivations may coexist with the legal ones in the use of citations. First, I should indicate that this model does not exclude the application of some legalist assumptions. This model offers some political explanations that may be complementary to the use of citations for legal interpretative purposes. Generally, this model considers that judges are interested in promoting their judicial power (Weiler 1993) and autonomy from other branches of powers or courts (Alter 2001) to influence the policy process with their decisions. Accordingly, national judges will adjudicate to the CJEU strategically in order to legitimize their policy, influencing

decisions that have no space in national legal rules and avoiding criticism from political and judicial actors.

Moreover, this model also assumes that political and legal preferences may diverge from court to court. As mentioned in chapter 4, different judges have different interests and motivations vis-à-vis EU law, depending on their policy preferences, pro-European legal attitudes or judicial position (e.g. lower vs. higher court). As Karen Alter (1996) pointed out, the logic of adjudication may depend on the type of court. Concerning the preliminary references, lower courts "can use it to circumvent the restrictive, jurisprudence of higher courts, and to re-open legal debates which had been closed, and thus to try for legal outcomes of their preference for policy or legal reasons" (Alter 1996: 8). Moreover, both lower and higher courts will refer to the CJEU to deflect criticism when they make decisions against the government. As regards the precedential practices, the arguments about motivations are similar. Following these arguments, we hypothesize that:

h_2: *Higher courts are more reluctant to adjudicate to the CJEU than lower courts.*

Nevertheless, we should have some reservations concerning this assumption. When Karen Alter refers to higher courts, most of the time she is referring to Constitutional courts or Supreme courts on the top of the judicial authority. These courts are considered the guardians of national legal values and principles within the judicial hierarchy. However, in some countries these highest judicial authorities coexist together with other judicial higher courts that, supposedly, are under the authority of the constitutional interpreter. For example, in France, the *Conseil Constitutionelle* cohabits with the *Conseil d'État* and the *Cour du Cassation*; in Spain, the *Tribunal Constitucional* coexists with the *Tribunal Supremo*, and so on. In some sense, these courts compete with each other to have the final say on some policy or legal issues even if it contradicts the opinion of the Constitutional Court.

Under this competition context, Supreme Courts coexisting with a highest constitutional authority may use citations to avoid criticism or overruling coming from their highest national courts.

h*₃*: Supreme courts under the authority of highest courts (e.g. Constitutional courts) are more willing to refer to the CJEU.

In addition, national courts may try to use citations, not only against courts but also against governments or other political institutions involved in the implementation of EU legislation and enforcement of national rulings later. As it has been remarked in previous chapters, Member States have discretion to react to national rulings enforcing EU law, when national courts do not fulfil their expectations. Two types of institutional mechanisms have been distinguished: *ex-ante* and *ex-post* mechanisms. On one hand, the ex-ante institutional control is the set of rules that protects the judiciary from other branches of power: 1) selection of judges; 2) promotion rules; 3) budgets. Depending on the configuration, these rules can be used to influence or constrain judges' decisions. On the other hand, we can find three kinds of *ex-post* threats to the judiciary's power: 1) overriding of national courts' decisions by the legislature by means of passing new legislation; 2) non-compliance by governments and administration with the ruling by means of not applying, obstructing or misapplying EU law; 3) reversal of lower courts' decisions by appellate or higher courts.

Assuming that, courts aware of these political reactions will modify or adapt their rulings when the governments oppose to the application of EU law in anticipation of a possible punishment (removal and non-compliance) by the competent authorities, securing better outcomes by enforcing CJEU rulings. National political institutions and governments will think twice before overruling or misapplying a national court's decision supported by the CJEU. The EU legal system is organized to deal with non-compliance of Member States, especially when national courts enforce EU law complying with CJEU rulings. According to Stone

Sweet and Brunell (2012), Member State's non-compliance with any important CJEU ruling will generate new litigation by national courts and the CJEU, and new findings of non-compliance will appear. Therefore, CJEU rulings may force the administration and governments to consider implementing the rulings under the threat of receiving multiple lawsuits from national courts, infringement procedures (art. 259 TFUE) or penalties by European institutions against their non-compliance with CJEU rulings (art. 260 TFEU).

Considering the CJEU rulings as a mean of EU judicial policy creation, the direct intervention of the CJEU may reduce or constrain the national scope of policy options or discretion retained by governments (Martinsen 2011). The CJEU hereby powerfully intervenes in the selective means of EU policies and the various thresholds set to comply with EU regulation. Hence, the CJEU interpretations regarding policy issues may create new limits to the actions of the national executive, narrowing the national policy options at their reach. And, consequently, national governments, parliaments and administrations will comply with these rulings to prevent more interventions from the CJEU requested by national courts, putting an end to the judicial limits of their political discretion.

Hence, the political advantages of preliminary references make them more likely to be used than precedent, in a case where the government is involved in the litigation against the application of EU law. This extra-persuading power of preliminary references may motivate national courts to make use of this kind of adjudication when they face the opposition of the political national authorities. Therefore, I hypothesize that:

> ***h_3**: National courts are more likely to refer to the CJEU when political institutions or the government is against the application of EU law.*

Nevertheless, political may try to use institutional mechanisms also to contain the use of judicial citations. Independent judges from other branches of power will face fewer constraints in the use

of judicial citations. National governments may try to get advantage of some formal or informal mechanisms to influence the opinion of the courts or discourage the use of preliminary references and CJEU citations by national judges when the application of CJEU jurisprudence and rulings can affect their most preferred policies (Wind, Martinsen and Rotger 2009).

h_5: National courts are less likely to refer to the CJEU when they have low levels of independence from political powers.

Finally, we have to make a distinction between the different benefits and costs that national courts bear when they rely on a certain adjudication mechanism or another. The use of a CJEU previous ruling has its own political advantages and disadvantages. First, precedential practices are intrinsically submitted under a set of equivalence criteria that determine when two cases are alike. Having a limited set of judgments made by the CJEU related with certain issues, national courts would find that those CJEU citations only fulfilled partially their policy expectations, or that they have a limited application to the case at hand. As a solution, they should refer to the CJEU, to wait for a ruling that enforces their most preferred policy or legal interpretation.

More relevant is the persuading power of preliminary references compared to CJEU precedent. The empowerment of the precedent is lower because the CJEU is not directly involved in the judicial process. Once a national court has received a CJEU ruling, the CJEU asks for a report expecting that the national judges have implemented its decisions at the national level. Therefore, the threat of the reaction of the CJEU against non-compliance with its decisions has the power to legitimize national rulings made by the national court against governments. Nevertheless, this supranational judicial control is missing in the case of CJEU citations, reducing the persuasiveness of the precedent against EU law opponents.

***h_5**: National courts are more likely to use preliminary references than CJEU precedent when political institutions or the government is against the application of EU law.*

In contrast, a CJEU preliminary ruling has its own disadvantages as well. First, there is the risk that the CJEU does not give a response to the case at hand because it considers that the issue had already been discussed in a previous filed case. This situation limits the possibility of searching for new CJEU rulings that could satisfy the national courts' preferences. Secondly, the CJEU makes decisions that sometimes do not meet the expectations of the national courts (Nyikos 2003, 2006). Apart from the delay in the proceedings and resources invested to send the question to the CJEU (Jaremba 2011a; Nowak et al. 2011), the CJEU's discretion of interpretation could sometimes generate rulings against the interest of the national courts. When this happens, judges should take into account the several costs this will entail, depending on their reaction to the decision of the CJEU. One of these costs is the effort invested in non-enforcing, re-referring or reformulating the CJEU ruling, if they find the ruling objectionable. Moreover, rulings disregarding CJEU ruling could carry new costs in terms of the reputation of national judges if litigants appeal the application in another court. Additionally, courts resigned to accept non-preferred rulings also incur a loss in that it diminishes the utility extracted from this CJEU's decision.

Hence, having these advantages and disadvantages, national courts may be determined in their choice between CJEU precedents or preliminary references depending on several factors: resources and time, expertise, political costs of their decisions, among others. However, in this chapter I will focus on the impact of political and legal accounts and, mainly, on the effect of unfavourable political institutions and governments in their likelihood to cite the CJEU, testing whether courts use them to avoid criticism in the application of EU law against political powers.

5.3. Methodology and Data

The analysed data contains information on high courts' EU law cases from 2000 until 2010 for EU-25, with the exception of Malta and Luxembourg that were not available (see appendix A for more information). The data, imperfect because it is based on reported national decisions and not the whole population, allows to study, for the first time, the impact of institutional and political factors across a wide variety of EU countries. This study tries to overcome the limitations found in previous studies by coding information concerning particular aspects of EU law cases and allowing for a further analysis of the individual characteristics. Compared to Ramos's studies on EU-15 and Spain on CJEU citations, the dependent variable is reliable for the study of the modes of adjudication, as the treatment of the CJEU citation is coded distinguishing between CJEU precedent and preliminary reference. More information of the database, e.g. countries, type of courts, jurisdiction, etc., is showed in appendix B.

a) Dependent variable: the variable codes the treatment of EU law cases depending on whether the court 0: did not refer to the CJEU (neither precedent nor preliminary reference) and decided on EU law cases on its own; 1: used CJEU precedents; 2: sent a preliminary reference to the CJEU. These categories are considered mutually interdependent when the judge has to make a decision.

b) Independent variables:
Main explanatory variables:
- *Political institutions against EU law*: The variable takes the value 1 if the national, regional or local government, administration or public body is defending the non-enforcement of EU law, either because they argue that EU law is not applicable to the case at hand or because their act or national law was already

implemented according EU law. Otherwise, the variable has value 0.

- *National Government or institutions against EU law:* The variable adopts the value 1 only if the government, institution or administration at the national or federal level is against the enforcement of EU law; either because they argue that EU law is not applicable to the case at hand or because their act or national law was already implemented according to EU law. Otherwise, the variable has value 0.

- *Judicial dependence:* Independent judges from other branches of power will face fewer constraints in the use of citations. As a proxy of judicial dependence, I use the judicial independence measure from the Latent Judicial Independence around the Globe project (1960-2010) but reversed in its values. Website:
http://userwww.service.emory.edu/~jkstato/page3/index.html

Table 5.2. Average level of 'judicial dependence' by country

Country	Judicial dependence	Country	Judicial dependence
Austria	0.01	Italy	0.11
Belgium	0.17	Latvia	0.17
Bulgaria	0.55	Lithuania	0.33
Cyprus	0.17	Netherlands	0.04
Czech Republic	0.17	Poland	0.26
Denmark	0.04	Portugal	0.17
Estonia	0.33	Romania	0.33
Finland	0.02	Slovakia	0.33
France	0.18	Slovenia	0.25
Germany	0.17	Spain	0.20
Greece	0.28	Sweden	0.04
Hungary	0.33	UK	0.06
Ireland	0.02		

Source: Linzer and Staton (2011)

- *Type of Court:* This categorical variable adopts value 0 when appeal and last instance intermediate courts decide the EU law case. Value 1 is given when the EU law case is decided by higher courts such as Supreme Courts or similar (e.g. Cour du Cassation) cohabiting with a judicial highest authority. Value 2 is given when

the case is decided by the highest judicial authority (e.g. Constitutional courts, Supreme Courts or similar). According to the political models, high courts will be much less likely to cite the CJEU than other courts. However, higher courts competing with the hierarchical judicial superior will refer to increase their power and judicial authority by playing the CJEU against its national highest judicial authority. See appendix B for more information about the courts included.

Case-related variables:

- *Type of Plaintiff (EU law invoker):* This variable adopts the value of 0 if an individual is requesting EU law enforcement; 1 if it is a firm; 2 if it is a NGO, environmental association or trade union; 3 in the case of the government, administration or public body; and 4 for other actors (e.g. Ombudsmen or EU institutions). From the party capability theory (Galanter 1974; Songer, Sheehan and Haire 1999) the resources and litigation experience of litigants affects their chances of success even in requesting the use of citations. Governments, administrations, businesses and interest groups are accustomed to acting as repeat players in the courts, increasing their experience of how to deal with these issues, thus achieving success. Moreover, administrations, as well as big firms, have more resources (money and time) to expend on these cases if we compare them with mere individuals (e.g. workers). Therefore, I expect a lower use of citations when it is supported by individuals than for the rest of actors, due to their lesser organizational power and legal experience (Slepcevic 2009).

- *EU secondary legislation:* The variable codes 1 if the case involves the application or interpretation of EU directives or regulations; 0 when it only involves the application of EU Treaties or similar. These provisions use a language or mandates that are more specific and clear than the ones used in the Treaties, reducing the probability of referring. Likewise, the ambiguity of general rules in Treaties may increase the use of citations because national judges may have more doubts regarding its application.

- *National court precedent*: The variable codes 1 if the high court relies on a previous national ruling to make a decision on EU law, e.g. coming from the Supreme, Constitutional or regional courts; and 0 otherwise. In this case, there is not a straightforward hypothesis. However, I expect higher courts to use national precedents to support and legitimize the legal reasoning expressed in the CJEU precedents or rulings.

- *Complexity*: The complexity of the case presented to the national court is measured as the sum of the different EU law subject/matters that the case rests upon. As the legal model predicts: the higher the complexity of the case, the more it relies on citations.

- *Legal area:* The variable distinguishes diverse EU legal areas such as: Competition; Employment and Social affairs; Enterprise and Industry; Environment, health and consumer protection; Internal market; Justice and Home affairs; Research, information, education and statistics; Taxation and Customs Unions; Agriculture, Energy and Transport.

Country-related variables:

- *Legal experience:* The experience of national judges is measured by the number of years of EU membership. The legal model predicts that experience affects positively the use of citation practices. On the contrary, we could expect that this experience may affect the likelihood that the court will know more about EU law to deal with the legal issue on its own, disregarding the use of references.

- *Stock of CJEU precedent:* The variable describes the total number of CJEU rulings per year in a policy field showed before its transformed to its logarithmic version. The legal model predicts that precedent is going to found more likely in fields where there are more previous rulings or precedents. The accumulation of precedent will affect the probability of the judge finding an answer to EU law issues at CJEU jurisprudence. Concerning preliminary references, if EU precedent is available, it will be less necessary to

produce it, and thus, preliminary references should be less likely. Source: EUR-Lex.

- *Implemented EU legislation*: Percentage of notified national measures implementing all adopted EU directives in the policy areas showed above. Source: European Commission – Application of EU law. http://ec.europa.eu/eu_law/directives/archmme_en.htm

- *Common Law:* Cases decided by courts from legal systems with common law elements are coded as 1, and 0 the rest. European countries such as UK, Ireland and Cyprus come from common law traditions where there is a general rule of *stare decisis* or use of precedent. Judges socialized in this culture will be more aware and accustomed to the usage of decisions from other courts, and hence make more use of precedent than preliminary references or applying the EU law on their own.

- *Dualism*: A dummy variable codes 1 if the Member State has a dualist legal system and 0 otherwise. Poland, Czech Republic, Slovak Republic, Romania, Bulgaria, Slovenia, Estonia, Lithuania, Latvia, Cyprus, Belgium, France, Luxembourg, the Netherlands, Spain, Portugal, Greece and Austria were coded as monists, while Hungary, Italy, Germany, UK, Ireland, Malta, Sweden, Finland and Denmark were coded as dualists. The information on legal systems was gathered from Hoffmeister (2002) and Ott (2008).

- *Counter-limits:* The variable identifies those Member States where the highest judicial authority (Constitutional or Supreme Court) has established counter-limits or reservations to European doctrines, in order to preserve the autonomy of their national constitutional and legal order. In this situation, the highest courts have retained for themselves the right to review whether European Union institutions, as well as national courts acting as EU judges, act within the competences conferred upon them and respect the fundamental constitutional norms and human rights. Under these contexts, national judges will refer less to the CJEU to avoid any kind of criticism or appeal from the national highest court for extending the application of EU law.

- *Limits to judicial cooperation:* The variable codes from 0 to 3 and goes from a total freedom of choice for courts to cooperate

with CJEU in the application and interpretation of EU law to a clear threat to national courts decision: a) No appeals (0); b) Indeterminate debate (1); c) Appeal disputed (2); d) Appeals possible (3). High courts as appellate courts can revoke orders for preliminary references when the request comes from a court that is not of last instance under the national hierarchy. Considering this threat, national courts will be less prone to cooperate with the CJEU, especially using preliminary references. *Source:* Bobek (2010).

- *EU support:* The variable codes the results of the Eurobarometer on the question of whether citizens think that EU membership is a 'good thing'. Burley and Mattli claim that judges cannot deviate from the political preferences of the public opinion regarding European Union (Burley and Mattli 1993; Carrubba and Murrah 2005). Courts are worried about the judgment of public opinion on Europe. The more public opinion is against EU, the greater the cost to the national court's legitimacy if it chooses to apply EU law instruments like CJEU jurisprudence. Hence, national courts are less likely to refer on EU law when the national political environment is unfavourable to European integration. Source: Eurobarometer.

c) Methods:

I use multinomial logit, which models a single decision between more than two unordered and non-independent alternatives. Since the multinomial logit model estimates the likelihood that a judge will make a particular decision concerning the reference to the CJEU (to rely on CJEU precedent or send a preliminary reference) relative to a base decision (not to cite), it yields three estimates. Thus, the results of the model will indicate the effects of the independent variables on the probability change from: (1) making a decision on EU law application without citations; (2) basing their decision on CJEU precedent; and (3) sending a preliminary question to the CJEU. In addition, since the choices within the same courts may not be independent, I control for robust standard errors clustered by court. Moreover,

multicollinearity among these variables was prevented. Table 5.3 shows a description of the variables detailed above and used in the analysis:

Table 5.3. Descriptive Statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
Modes of adjudication: No citations	4167	0.56	0.49	0	1
Modes of adjudication: CJEU Precedent	4167	0.39	0.48	0	1
Modes of adjudication: Preliminary reference	4167	0.03	0.17	0	1
Type of Plaintiff: Individuals	4167	0.56	0.49	0	1
Type of Plaintiff: Firms	4167	0.63	0.48	0	1
Type of Plaintiff: NGOs & Trade Unions	4167	0.03	0.18	0	1
Type of Plaintiff: Public institutions	4167	0.12	0.33	0	1
National Government and institutions against EU law	4167	0.46	0.49	0	1
Political institutions against EU law	4167	0.46	0.49	0	1
Judicial dependence	4167	0.16	0.12	0	0.4
Type of Court: Appeal or last instance	4167	0.17	0.38	0	1
Type of Court: Supreme Court or similar	4167	0.68	0.46	0	1
Type of Court: Highest national court	4167	0.13	0.34	0	1
Counter Limits	4167	0.74	0.43	0	1
Support for European Union	4167	53.7	12.4	26	81
Limits to judicial cooperation: No appeals	4167	0.20	0.40	0	1
Limits to judicial cooperation: Indeterminate debate	4167	0.27	0.44	0	1
Limits to judicial cooperation: Appeals disputed	4167	0.19	0.39	0	1
Limits to judicial cooperation: Appeals possible	4167	0.32	0.46	0	1
Complexity	4167	1.19	0.53	1	6
Legal experience	4167	33.1	17.8	1	53
EU secondary legislation	4167	0.80	0.39	0	1
EU legislation implemented	4167	96.7	5.42	66.7	100
National precedent	4167	0.22	0.41	0	1
Dualism	4167	0.40	0.49	0	1
Common law	4167	0.13	0.33	0	1
Stock of CJEU precedent	4167	6.96	1.44	0.69	8.3
Legal area: Competition	4167	0.14	0.35	0	1
Legal area: Employment and Social affairs	4167	0.16	0.37	0	1
Legal area: Enterprise and Industry	4167	0.18	0.38	0	1
Legal area: Environment, health and consumer protection	4167	0.16	0.36	0	1
Legal area: Internal Market	4167	0.16	0.37	0	1
Legal area: Justice and Home affairs	4167	0.08	0.27	0	1
Legal area: Research, information, education and statistics	4167	0.05	0.22	0	1
Legal area: Taxation and Customs Unions	4167	0.03	0.18	0	1
Legal area: Agriculture, Energy and Transport	4167	0.01	0.05	0	1

5.4. Empirical analysis: Under which conditions are courts eager to cooperate with the CJEU and how? A multivariate analysis

Before proceeding to the analysis of the adjudication across policies it would be interesting to see in more details how these effects of the main independent variable, that is, 'national

governments against the enforcement of EU law', vary across legal domains (see table 5.4 below).[87] What we can generally observe is that, with the exception of 'competition', 'employment and social affairs' and 'research, information and education area', the percentage of preliminary references and CJEU precedent and preliminary references increases. Moreover, it is remarkable that in the areas of 'Taxation and custom unions', 'Justice and home affairs', 'Enterprise and Industry' and 'Energy and transports' the amount of references to CJEU rulings surpasses the decisions taken without any kind of doctrinal support. In addition, there is not a clear pattern in non-citing when the government is against EU law or not. Considering these trends, next I will try to find out whether the patterns of judicial empowerment can be applied or generalised across policy areas, and not only in a given domain. In that sense, this analysis will defend the idea that strategies of judicial empowerment are constant across legal areas, regardless of the fact that these strategies can be more majoritarian in some policies compared to others.

Table 5.4. Type of adjudication within legal areas (%) depending on the position of national governments

Legal area		No citation	CJEU precedent	Preliminary reference	n
Competition	Total	66.42	31.96	1.61	453
	Against EU law	70.82	28	1.18	425
	No opposition	59.14	38.52	2.33	257
Employment and Social affairs	Total	52.53	44.88	2.60	364
	Against EU law	56.10	40.98	2.93	205
	No opposition	51.02	46.52	2.46	488
Enterprise and Industry	Total	49.31	47.16	3.53	391
	Against EU law	48.23	48.23	3.54	226
	No opposition	49.74	46.74	3.53	567

[87] It must be considered that the broad categorization used for controlling for policy areas limits the conclusions that can be extracted about the use of CJEU rulings. Moreover, the data is not representative in terms of policy areas, which limits the use of generalizations as regards to the effects across policies. For that purpose, chapters 6 and 8 has been included with the idea of giving more detailed explanations of the role institutional interactions, especially the role of governments, for the implementation of EU policies.

Environment, health and consumer protection	Total	64.64	31.80	3.57	435
	Against EU law	61.01	35.32	3.67	218
	No opposition	66.37	30.11	3.52	455
Internal Market	Total	58.21	38.33	3.46	404
	Against EU law	50.60	42.63	6.77	251
	No opposition	62.53	35.89	1.58	443
Justice and home affairs	Total	56.04	40.38	3.57	204
	Against EU law	43.24	48.65	8.11	37
	No opposition	57.49	39.45	3.06	327
Research, Information, education	Total	81.36	15.68	2.97	192
	Against EU law	85.37	12.20	2.44	123
	No opposition	76.99	19.47	3.54	113
Taxation and custom unions	Total	23.45	67.59	8.97	34
	Against EU law	18.18	69.32	12.50	88
	No opposition	31.58	64.91	3.51	57
Energy and transport	Total	40	53.33	6.67	6
	Against EU law	36.36	54.55	9.09	11
	No opposition	50	50	0	4

Source: Data set of High Court and EU Law cases 2000-2010 (N=4167 decisions & 110 courts).

In table 5.5 below, we see the statistical model for the discussion of the two theories/modes of judicial cooperation already discussed. To test the validity of these explanations, I use two similar models that differ in the variation of one of the main explanatory variables. While the first model estimates the effect of general political institutions (e.g. national, regional, or local) opposing the enforcement of EU law, the second model estimates the effect when national institutions such as government, parliament, and similar oppose the enforcement of EU law. However, our model of reference for the interpretation will be the first one, unless I specifically indicate the opposite. For each model, the first column contains the estimates of the effects of the variables on *CJEU Precedent,* and the second the estimates of *Preliminary Reference.* The baseline category for comparison is the category in which the national court decides to judge the case on its own, which is *No citations*.

The two models show a reasonable goodness-of-fit to the data in its pseudo-R^2: 0.16 both. To facilitate the interpretation of the results I present, instead of the coefficients, the relative risk ratios that indicate how the risk of the outcome falling in the comparison group—*CJEU precedent or preliminary reference*—compared to the risk of the outcome falling in the referent group—*No citations* —changes with the variable in question. For example, a positive

value will indicate that the risk of using precedent compared to the risk of not citing increases as the variable increases, that means that the use of precedent is more likely, showing how strongly any outcome of the dependent variable may be associated to changes in a unit increase of a given explanatory variable. If the variable increases the chance of citations, the odds ratio will be higher than 1. If it reduces the chance, the odds ratio will be lower than 1.

Next, I discuss separately to what extent the empirical results confirm the expectations of each adjudication model and its feasibility.

o Legal Model: Having as a reference the model 1, we can see in the results showed below that most of the predictions of the legal model are fulfilled, but their significance and the coefficients signs are sometimes lacking as regards the use of citations. For example, while the *degree of implementation of EU legislation* has no effect on the use of preliminary references, we find a slight positive effect of this variable in the use of precedent compared to no citations. This result shows how national courts are more likely to use precedent than deciding on their own, as national authorities transpose the percentage of European legislation. This effect may be explained by the increasing need for guidance that national judges have when new European legislation is transposed into their national legal order. Similarly, the amount of *existing CJEU precedents* had only a significant effect in the use of precedents, as I expected. Concerning *legal experience*, described by the years of EU membership, we see a significant and small positive effect on the use of preliminary references.

The most significant and relevant variables of this model seem to be related with the own legal specificities of the EU law cases, such as *complexity* and the *European legislation discussed*. Firstly, we can see how the use of precedent and preliminary references increases 1.5 and 1.66 respectively compared to not referring. The differences in the risk relative ratio show how national judges are more likely to use preliminary references in complex cases. As regards the consideration of *secondary legislation* in the case (compared to the mere application of EU treaties provisions), we

can appreciate how it has a negative effect in the use of any mode of citation, 0.49 for preliminary references and 0.4 for precedent. It is due to the clear and specific legal mandates and rules contained in the secondary legislation as regards its application, compared with the EU treaties, reducing the need of citing for the solution of the case. Among other remarkable legal aspects, we observe how national judges are more willing to use CJEU precedent when they can support its use or legal reasoning on previous *national precedent* as well.

o Political Model: The results from the political model meet the expectations on the strategic behaviour of courts in two aspects: 1) the effect of legal and political institutional constraints on the judicial cooperation; and 2) the use of citations against the government, the administration and the highest courts to divert criticism for their decisions. Concerning the effect of *limits to judicial cooperation*, first, we see how, contrary to the hypothesis formulated, the use of precedent is decreased when the risk of appeal is indeterminate or permitted. Meanwhile, the use of preliminary references increases when the risk of appeal against preliminary references orders is indeterminate or disputed. This second finding is interesting to the extent that it shows how national courts cooperate more with the CJEU when the use of these mechanisms is under debate, more than when its request is allowed or completely banned. In addition, we may see how in countries with higher levels of *judicial dependence* of the judiciary towards other branches of power, judges make less use of citations. Under these contexts, political institutions discourage national judges from using preliminary references and CJEU citations, especially when the application of CJEU jurisprudence and rulings can affect their most preferred policies (Wind, Martinsen and Rotger 2009).

More interesting is the case of *counter limits* to EU reception. In these cases, national courts, under the threat of reversal or appeal for extending the application of EU law, are more likely to refer cases to the European Court of Justice. In this context, national judges will adjudicate to the CJEU in order to avoid any

kind of criticism or appeal from the national highest court for extending the application of EU law. Moreover, in the situation of *higher courts that cohabit with highest courts limiting the reception of EU law* (see interaction between 'type of courts: Supreme Court or similar' and 'counter limits'), higher courts competing with the hierarchical judicial superior will quote the CJEU more, in order to undermine the authority of its national hierarchical superior on EU law issues. While at the same time increasing their judicial review powers conferred by the EU, by playing the CJEU against its national highest judicial authority. Namely, high court' judges under this context are 8.47 more likely to refer to the CJEU. That means that national judges understand preliminary references as the most effective mode of cooperation to undermine the power of their national judicial authority.

Table 5.5. Multinomial logit analysis of adjudication by high courts – Relative Risk Ratio results

	Model 1		Model 2	
INDEPENDENT VARIABLES	CJEU Precedent vs. No citations	Preliminary reference vs. No citations	CJEU Precedent vs. No citations	Preliminary reference vs. No citations
Political institutions against EU law	1.437*** [0.160]	2.093*** [0.557]		
National Government and institutions against EU law			1.382*** [0.175]	1.819** [0.456]
	Category of reference: Type of court: National highest court			
Type of Court: Appeal or last instance	0.575* [0.183]	0.324* [0.22]	0.588* [0.189]	0.337* [0.222]
Type of Court: Supreme Court or similar	0.561 [0.212]	0.1** [0.089]	0.540 [0.207]	0.091*** [0.8]
Counter Limits	1.271 [0.512]	0.229** [0.170]	1.241 [0.517]	0.219** [0.159]
Counter Limits X Type of Court: Appeal or last instance	1.007 [0.475]	1.158 [1.027]	0.99 [0.474]	1.135 [0.987]
Counter Limits X Type of Court: Supreme Court or similar	1.223 [0.615]	8.47** [8.592]	1.269 [0.654]	9.268** [9.282]
Judicial dependence	0.001*** [0.001]	0.012* [0.028]	0.001*** [0.001]	0.011** [0.25]
	Category of reference: Type of plaintiff: Individuals			
Type of Plaintiff: Firms	0.986 [0.119]	1.06 [0.264]	0.968 [0.115]	1.013 [0.254]
Type of Plaintiff: NGOs & Trade Unions	1.09 [0.226]	2.736* [1.61]	1.095 [0.229]	2.807* [1.704]
Type of Plaintiff: Public	0.708**	0.961	1.438**	0.822

institutions	[0.152]	[0.38]	[0.26]	[0.31]
	Category of reference: Limits to Judicial cooperation: No appeals			
Limits to judicial cooperation:	0.572*	4.461**	0.577*	4.269**
Indeterminate debate	[0.166]	[2.72]	[0.169]	[2.554]
Limits to judicial cooperation:	0.844	4.104***	0.828	3.791**
Appeals disputed	[0.259]	[2.182]	[0.251]	[2.009]
Limits to judicial cooperation:	0.709	1.893	0.662*	1.547
Appeals permitted	[0.152]	[1.246]	[0.145]	[1.051]
Stock of CJEU precedent	1.442**	0.985	1.438**	0.986
	[0.209]	[0.376]	[0.206]	[0.382]
Complexity	1.5***	1.66***	1.504***	1.669***
	[0.117]	[0.242]	[0.118]	[0.248]
Legal experience	0.992	1.039***	0.993	1.04***
	[0.007]	[0.014]	[0.007]	[0.015]
EU secondary legislation	0.491***	0.403***	0.489***	0.396***
	[0.077]	[0.141]	[0.076]	[0.139]
EU legislation implemented	1.019**	1.032	1.019**	1.031
	[0.009]	[0.024]	[0.009]	[0.025]
National precedent	1.566***	0.68	1.555***	0.673
	[0.127]	[0.186]	[0.188]	[0.184]
Common law	1.536	1.014	1.605	1.137
	[0.449]	[0.186]	[0.48]	[1.021]
Dualism	1.12	0.752	1.081	0.66
	[0.254]	[0.399]	[0.257]	[0.381]
Support for EU integration	1.004	0.973**	1.081	0.971**
	[0.006]	[0.012]	[0.2567]	[0.013]
	Category of reference: Legal area: Competition			
Legal area: Employment and	2.132**	3.002**	2.145**	2.988**
Social affairs	[0.679]	[1.668]	[0.688]	[1.614]
Legal area: Enterprise and	4.172***	5.392	4.078***	5.078
Industry	[1.32]	[5.568]	[1.297]	[5.366]
Legal area: Environment, health and consumer protection	1.172	1.723	1.234	1.897
	[0.329]	[1.233]	[0.34]	[1.349]
Legal area: Internal Market	1.413	3.617***	1.496	3.883***
	[0.429]	[1.701]	[0.454]	[1.788]
Legal area: Justice and Home	11.029***	4.044	10.546***	3.659
affairs	[8.001]	[8.346]	[7.621]	[7.598]
Legal area: Research, information, education and statistics	1.287	1.894	1.293	1.942
	[0.66]	[2.712]	[0.661]	[2.798]
Legal area: Taxation and	6.949***	18.828***	7.052***	19.6***
Customs Unions	[3.67]	[17.197]	[3.729]	[17.994]
Legal area: Agriculture,	4.253***	7.607**	4.172**	7.435*
Energy and Transport	[2.348]	[7.783]	[2.316]	[7.678]
Observations		4167		4167
Clustered courts		107		107
$\mathbf{R^2}$		0.16		0.16
Robust standard errors in brackets			*** p<0.01, ** p<0.05, * p<0.1	

In the same line as the situation of intra-higher courts competition, we see how national judges adjudicate to the CJEU when they foresee the negative consequences or threat of political institutions against the application of EU law. Judges will try to

use citations as a safeguard *against public or political institutions contrary to the application of EU law*. Moreover, national judges become selective in choosing the adjudication process. As we can observe, the use of preliminary references is almost 0.7 higher than the use of precedent, meaning that national judges are more likely to use preliminary references than CJEU precedents when they want to challenge national policies and prevent the consequences of a potential unfavourable government or other political institution. According to the political model, the persuasiveness or protection of the CJEU precedent is lower, because the CJEU is not involved directly in the judicial process and in the intervention of national policies. Therefore, the threat of a reaction from the CJEU against non-compliance with its decisions has the power to legitimize national rulings made by the national court against governments. Nevertheless, this supranational judicial control is missing in the case of CJEU citations, reducing the persuasiveness of the precedent against EU law opponents. Hence, due to the political advantages of preliminary references, national judges will be more selective when using them, if they have a strong preference to strike down the position of political institutions.

If we pay attention to the type of higher national courts considered in the database (see Appendix A), we only find few cases coming from Constitutional courts, which are the more reluctant courts to the reception of EU law. Most of the highest national courts in the database are Supreme Courts who do not see the CJEU as a threat for their national legal system or authority. Hence, to study better the conditions under which the inter-court competition works in countries with constitutional courts, I make use of another dataset that contains information on national courts' EU law cases from countries with a strong judicial hierarchy dominated by constitutional courts, like Germany and Poland. These two countries where chosen to test the inter-competition theory (see appendix B for more information) in the context of a strong judicial competition among the judicial levels, but diverse in terms of some contextual variables, like judicial independence

or years of membership. In addition, this dataset includes a rich sample from lower courts, allowing us to test the behaviour of low ranked courts. In this case, the data collection was improved by selecting a representative sample from the whole population and stratified from year and type of courts, allowing for a more accurate test of the impact of institutional and political factors. Compared to the previous dataset, due to the reduced number of preliminary references (8 cases), the dependent variable does not distinguish between CJEU precedent and preliminary reference.

The model estimated in this case is simpler and includes similar variables to the previous one measuring the position of political institutions, national courts' citations, legal experience, judicial dependence, and counter limits. However, it is important to remark the following differences in the variables of the model:

a) Dependent variable - Adjudication to the CJEU: the variable codes the treatment of EU law cases depending on whether the court 0: did not refer to the CJEU (neither precedent nor preliminary reference) and decided on EU law cases on its own; 1: adjudicated by using CJEU precedents or sending a preliminary reference to the CJEU. In 67.2 % of the cases, courts adjudicated to the CJEU.

- *Type of Court:* This categorical variable adopts value 0 when lower courts decide the EU law case. Value 1 is given when the EU law case is decided by higher courts such as Supreme Courts (e.g. Polish Supreme Administrative Court or the German Federal Fiscal Court). Value 2 is given when the Polish or German Constitutional courts decide the case. According to the political models, high courts will be much less likely to cite the CJEU than other courts.

- *Complexity*: The complexity of the case presented to the national court is measured as the sum of legislation involved in the case. As the legal model predicts: the higher the complexity of the case, the more it relies on citations.

- *Jurisdiction:* The variable distinguishes diverse legal jurisdictions such as: Administrative, Civil, Criminal,

Social/labour, Constitutional and Fiscal. Due to the low number of criminal cases (n=5) they where dropped from the analysis.

For this dataset, I estimate a probit model that is adequate for dummy variables with standard errors clustered by court. Table 4.6 below shows a description of the variables detailed above and used in the analysis. The results of the model in countries with strong judicial hierarchies are presented in table 5.7 below. First, we can see how, according to the previous findings as regards the legalist model, at 0.1 % of significance national judges are more likely to use citations in complex cases. Among other remarkable legal aspects, we observe how national judges are more willing to use CJEU precedent when they can support its use or legal reasoning on previous *national precedent* as well.

Table 5.6. Descriptive statistics (model strong judicial hierarchies)

Variable	Obs.	Mean	Std. Dev.	Min	Max
Adjudication to the CJEU	874	0.671	0.469	0	1
Political institutions against EU law	874	0.593	0.491	0	1
National Government and institutions against EU law	874	0.573	0.494	0	1
National precedent	874	0.348	0.481	0	2
Complexity	874	7.924	5.674	0	60
Type of court: Lower court	874	0.652	0.476	0	1
Type of court: Supreme court	874	0.319	0.466	0	1
Type of court: Constitutional court	874	0.028	0.166	0	1
Jurisdiction: administrative	874	0.686	0.464	0	1
Jurisdiction: civil	874	0.076	0.266	0	1
Jurisdiction: Social/Labour	874	0.074	0.262	0	1
Jurisdiction: constitutional	874	0.030	0.173	0	1
Jurisdiction: fiscal	874	0.131	0.338	0	1
Legal experience	874	48.963	5.497	0	53
Counter Limits	874	0.946	0.225	0	1
Judicial dependence	874	0.134	0.089	0	0.221

Paying attention to the type of court, we see that neither of the legalist expectations are fulfilled. As we can observe in model 1 and 2, Constitutional Courts are less willing to refer than the rest of courts. More interesting is the case of counter limits to EU reception. In this context of strong judicial hierarchy, national judges adjudicate more to the CJEU in order to undermine the authority of their Constitutional court. In addition, the interaction

between the type of court and a context limiting the reception of EU law, shows us some nuances. In model 3, we observe that, before the establishment of these limitations, higher courts (either Supreme or Constitutional) are more prone to cite the European Court than lower courts. Nevertheless, once this doctrine is established, their level of referral decreases drastically, being lower courts those who refer more under these limitations to surpass the Constitutional courts, when deciding EU law, as Karen Alter (2001) argued. Furthermore, we can also confirm in the three models presented that national judges adjudicate to the CJEU more when they foresee the negative consequences or threat of political institutions contrary to the application of EU law.

Table 5.7. Probit analysis of adjudication to the CJEU in Germany and Poland for all type of courts

	Model 1	**Model 2**	**Model 3**
Independent variables	Dep. Var.: Adjudication to the CJEU		
Political institutions against EU law	0.551*** [0.112]		
National Government and institutions against EU law		0.573*** [0.110]	0.595*** [0.111]
National Precedent	0.448*** [0.102]	0.446*** [0.102]	0.474*** [0.103]
Complexity	0.023* [0.012]	0.022* [0.012]	0.020* [0.012]
	Category of reference: Lower courts		
Type of court: Supreme court	-0.022 [0.113]	-0.035 [0.113]	4.366*** [0.279]
Type of court: Constitutional court	-0.647* [0.383]	-0.679* [0.388]	5.419*** [0.704]
Counter Limits	1.039*** [0.229]	1.041*** [0.232]	5.553*** [0.138]
Type of court: Supreme court X counter limits			-4.398*** [0.292]
Type of court: Constitutional court X counter limits			-6.396*** [0.679]
	Category of reference: Jurisdiction: Administrative		
Jurisdiction: Civil	0.026 [0.208]	-0.024 [0.205]	-0.030 [0.206]
Jurisdiction: Social/Labour	0.184 [0.219]	0.137 [0.217]	0.123 [0.218]
Jurisdiction: Constitutional	0.389	0.425	0.192

	[0.369]	[0.373]	[0.375]
Jurisdiction: Fiscal	0.653***	0.585***	0.585***
	[0.204]	[0.200]	[0.200]
Legal experience	0.004	0.004	0.002
	[0.011]	[0.011]	[0.011]
Judicial dependence	-0.071	-0.415	-0.255
	[0.967]	[0.959]	[0.967]
Constant	-1.446***	-1.384***	-5.804***
	[0.505]	[0.499]	[0.502]
Observations	874	874	874
Clustered courts	262	262	262
Pseudo-R^2	0.08	0.09	0.10
Robust standard errors in brackets	***$p<0.01$, ** $p<0.05$, * $p<0.1$		

The strength of effects of the opposition of political institutions, type of courts and counter limits on the use of citations in table 5.7 are reported generating predicted probabilities for different scenarios. As we can see in table 5.8 and 5.9, there are substantial differences in the probability of using citations.

Table 5.8. Predicted probabilities of the 'position of the governments' and 'complexity' in strong judicial hierarchies

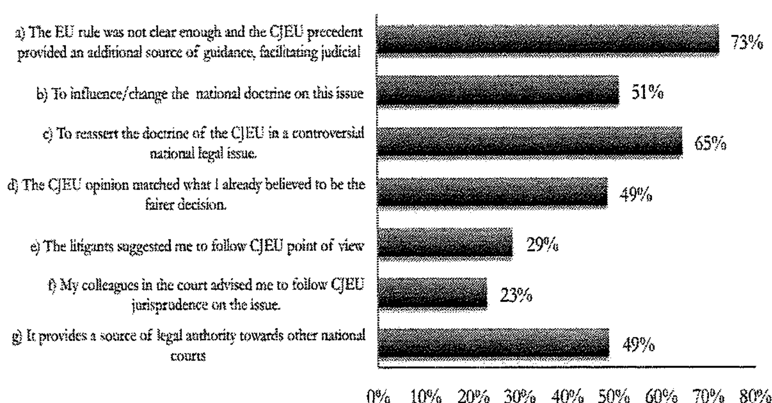
Effect of independent variables on the use of citations	Minimum values for continuous / 0 for dummies	Maximum values for continuous / 1 for dummies
Against national government or public institution (dummy)	0.56	0.76
Complexity (continuous)	0.64	0.86

Table 5.9. Predicted probabilities of the 'type of courts' in strong judicial hierarchies

Effect of independent variables on the use of citations	No counter limits	Under counter limits
Lower	0.45	0.84
Supreme	0.92	0.24
Constitutional	0.99	0.01

The results analysed have shown to what extent national judges consider legal and political motivations when they assess cooperating with the CJEU during the adjudication process. From this analysis, we can conclude that: a) political motivations and strategies are considered relevant for the use of citations; b) the effect of political factors does not preclude the mutual consideration of legal factors for the use of citations. Legal and political motivations may coexist and motivate jointly the references by national judges. These conclusions are reinforced by individual data gathered mainly from judges concerning their motivations for the use of precedent and preliminary references:

Figure 5.4: Reasons behind the use of CJEU precedent



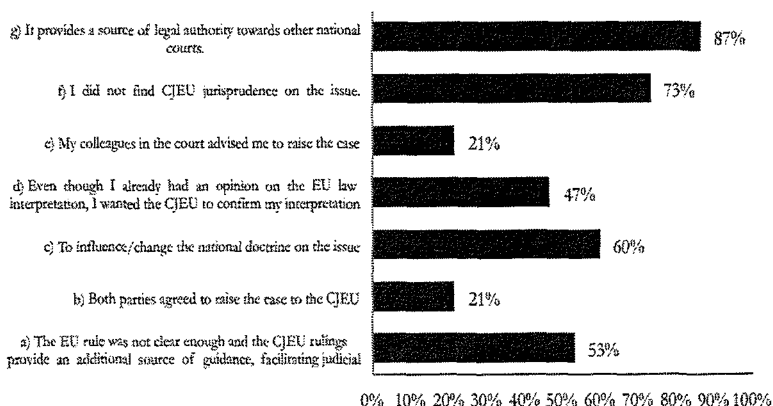
N= 148-160 (In the sample judges from Poland, Germany, Spain, Portugal, Bulgaria, Latvia, and France)

Figure 5.4 shows how national judges use CJEU precedent for both political and legal reasons. For example, in 73 % of the cases, judges use the precedent as guidance for the application of EU law in complex cases. These motivations fit into the main rationale attributed to judges by the legalist model, that is, the maximization of correct decisions. However, we also observe how a

considerable part of the judges attends to political purposes, that is, the influence of the policy-making process by changing the jurisprudence (51 % of judges). Some increase their prestige as regards to other judges (49 %) or reassert the CJEU doctrine in conflictive legal cases (65 %). Judges motivated by these purposes use CJEU precedent to divert criticism and/or legitimize their policy or legal interpretation when they face the opposition from other political and judicial powers.

Similar conclusions can be extracted from figure 5.5 for preliminary references, but limited due to the reduced number of surveyed judges who requested a preliminary ruling (n=15).

Figure 5.5. Reasons behind the use of CJEU preliminary references



N= 14-15 (Spanish, German and Polish judges)

These judges agree that their motivation to use preliminary references was a combination of the following factors:

1. The influence of national doctrine or policies
2. The lack of jurisprudence or guidance to solve the issue
3. The provision of legal authority towards other courts

Therefore, while the political motivations for the use of preliminary references are similar to those for the use of precedential practices, the legal motivation is related to the need to create new jurisprudence as guidance for solving the problem. In addition, when analysing their decisions, it is remarkable how judges tend to interpret the use of preliminary references as a more efficient source of legitimacy against other national institutions. This was also confirmed during the interviews when they were asked about their motivations for citing, showing how judges cooperate with the CJEU to challenge the positions of governments and high courts:

> *"The main motivation is quite simply, uncertainty. And that's it. We had difficulties ourselves to interpret the combination between EU law and internal law. (...) We also use the precedent of the Court to legitimate the position against the government, even in costly cases".* (Judge 2)

> *"The CJEU is a great ally for lower courts. We use it to bypass the judicial hierarchy,"* (Judge 1)

Moreover, according to Maduro's (2003: 513) argument on the constitutionalisation of the EU legal system, it seems that national courts are not (or they do not feel) *responsible* for the effective incorporation of EU law and CJEU jurisprudence into their national legal orders. The data gives some evidence to think that national judges can be more *selective* and *self-interested* than responsible in their enforcement of EU law and cooperation with the CJEU. Regarding the surveyed judges, 49 % of them selected previous CJEU rulings that agreed with their own policy or legal views to support their opinions. By doing this, the judges gain support for their preferred legal outcome while avoiding the possibility of the CJEU ruling against their legal or policy interpretations. Thus, national judges, aware of the limitations and the advantages of supranational adjudication for judicial enforcement, may decide between being conservative in their dialogue with the CJEU and applying only precedent, or being

more ambitious, opening a political discussion with the CJEU and the national authorities for the configuration and impact of EU regulation on the national policies. In a similar vein, 47 % of the judges had already made up their mind before sending a question to the European court. This motivation seems more plausible if we think that judges will send preliminary references waiting for a ruling that may legitimize their legal/policy interpretations.

This review on judges' attitudes and behaviour on the use of citations brings the attention to a striking fact. Even though the expectations of the legalist model are fulfilled, the evidence suggests that recourse to supranational adjudication was sought not only when there were doubts in the act of interpreting. National judges are also political EU courts motivated by the possibility of influencing national law or increasing their prestige or legitimacy thanks to the cooperation with the CJEU. The predictions of the political model seem to manifest very strongly when analysing it along with the legal models throughout the higher courts. There is clear evidence of political and institutional dynamics that influence the attitudes and behaviour towards citations, very akin to the empowerment and inter-court competition approaches.

5.5. Conclusions

This chapter has given systematic evidence to test to what extent judicial politics theories on judicial cooperation represented by Karen Alter, Alec Stone Sweet, Anne-Marie Slaughter, among others, may explain the use of CJEU citations by national courts and judges. This evidence brings many relevant and interests insights on how, and foremost why, judges participate in the process of legal and judicial integration with the EU, using the preliminary references and precedent procedure.

First, unlike previous judicial politics studies, I emphasized the role of CJEU precedent as an alternative mode for national judges to protect their policy and legal decisions from the

reactions of other political and judicial institutions. For that purpose, I considered adjudication as an interdependent multiple-alternatives decision in which judges could choose from: a) deciding on their own, b) using CJEU precedent, or c) sending a preliminary reference; instead of a simple binary decision on whether or not they should send a preliminary reference to the CJEU. Under this approach, I found substantial differences on the impact of political and legal variables in citations. As we observed, similar political motivations and strategic behaviour—such as innovating in policies or rights, or their reputation towards other courts—drive the adjudication modes, references and precedent, with some slight differences. The most relevant concerns the higher effect of political variables in the use of preliminary references compared to CJEU precedent. The former turned out to be more highly valued by national courts when they faced a serious political or institutional threat against their rulings.

Secondly, I pointed out the relevance of legal explanation in the reasons for citations as well. Hence, far from discarding the validity of legal arguments in favour of political accounts, they should be considered as complementary. For example, national courts will refer when they have doubts regarding the conflict of national and European legislation. At the same time, judges foreseeing the negative consequences of confirming the incompatibility between national and European legislation, may make these references to prevent the reactions for modifying the policies and norms passed by political institutions.

To conclude, in the course of the analysis I have confirmed that political traits of judges might as well play a role in the way they act. In that sense, legal motivations, but also the willingness to promote and protect their ability to influence the policy and judicial process, will determine, with some likelihood, the way in which they will function as an EU judge.

CHAPTER 6. A POLICY-TEST OF SUPRANATIONAL ADJUDICATION: THE CASE OF EU SOCIAL SECURITY RIGHTS

6.1. Introduction

In the last couple of decades, the judicial politics literature has developed diverse institutional justifications for explaining the variation among EU Member States in the rate of preliminary references requested to the Court of Justice of the European Union (Alter 1996, 1998, 2008; Burley and Mattli 1993; Carrubba and Murrah 2005; Mattli and Slaughter 1998a, 1998b; Stone Sweet and Brunell 1998; Stone Sweet 2004; Weiler 1994; Wind et al. 2009). By considering the strategic behaviour of national courts, scholars have pointed at the latter's different motivations for cooperating with the CJEU: the increase of their judicial review powers; domestic legal culture and tradition; and public support for integration, among others. However, by analysing the preliminary references as a whole, all these studies have failed to trace how domestic political factors affect the cooperation between the CJEU and national courts (Kilpatrick 1998).

These works analyse the use of preliminary references assuming that other political incentives and constraints, such as the preferences of the executive towards EU policies, are constant across countries and policies. Especially, these studies overlook the logic of national courts' adjudication on contentious political issues, that is, when the application of EU law contradicts or

challenges the national legislation protected by national governments. Hence, to fully understand what it is going on when judges refer to the CJEU, the process of adjudication should not be considered as an automatic enforcement process disconnected from the domestic politics, but also driven by the preferences, incentives and constraints of political and judicial actors that may vary across countries for a single policy area (Börzel 2003; Conant 2002; Falkner et al. 2005). This fact raises new questions related to the judicial behaviour of national courts among EU policy areas, such as: To what extent can we see country differences on the use of preliminary references in a policy area? May these differences be explained by looking at the strategic interaction of national courts with their national governments?

This chapter follows the previous discussion on the use of supranational adjudication testing the validity of its political use as a safeguard in a certain contentious policy area.[88] The main aim of this work is to understand why we find diverse rates of judicial activism by looking at the impact of EU legislation on national policies and the reactions of Member States' governments and administration to that impact. This chapter explores the judicial responses of national courts in the area of social security, for which implementation at the national level still continues to rely on logics of reasoning strongly tied to the nation-state (Martinsen and Falkner 2011). The analysis tries to discern the extent to which its behaviour is determined by the government protection of national policies and level of litigation, among other factors. The study shows how national courts opt to refer more to the CJEU in those cases where the EU law challenges the main principles and prerogatives protected by national governments.

By asserting that judges refer more cases to the CJEU to effectively avoid criticism and legitimize their legal interpretations in sensitive national policy areas, I contradict Jonathan Golub's

---

[88] The case study was selected among the policy issues from the previous analysis (see table 5.3 in chapter 5) in which I observed a recurrent use of preliminary references.

claim that courts avoid to refer in relevant national policy areas (1996). The main conclusions reinforce the results arrived by Lisa Conant (2002) and Dorte Martinsen (2005a) about the relevant role of national courts and their cooperation with the CJEU for the Europeanization of social rights. This chapter seeks to complement these contributions by offering a strategic explanation of the involvement of national courts, exposing to what extent the cooperation between national courts and the CJEU is driven by political domestic factors.

The chapter is organized as follows: in the next section, I briefly describe the historical pattern of European Social Security integration and the role that national courts played in its development. The second section develops a simple model that examines why national courts can be compelled to adjudicate sensitive decisions to the CJEU under certain institutional constraints. Thirdly, and according to the previous model, I develop a brief comparative analysis of the relevant political factors that affected the national judicial adjudication to the CJEU in this specific policy area. These comparative findings are supported using statistical analysis in the fourth section, which is followed by the chapter's conclusions.

6.2. The Europeanization of social security systems and its context

The EU has enacted several regulations to safeguard the social rights of European workers during the period of European integration considered in this study[89]. Council Regulation 3/58 establishes the system of social protection; Council Regulation

[89] The period of study is determined by the availability of preliminary references on social security matters in Alec Stone Sweet and Thomas Brunell's Data Set on Preliminary References in EC Law (Art. 234), 1961-2006. http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26

1612/68 guarantees that migrant workers enjoy all social and tax advantages granted to national workers; Council Regulation 1408/71 states that migrants are entitled to export social security benefits; and, finally 883/2004 Regulation of the European Parliament of the Council coordinates the social security system and expands these rights to all citizens, independently of their labour status, in equality with nationals of a Member State. These regulations formed the legal basis of European Social Security, which individuals followed to pursue their social protection rights at the CJEU. The court, based on this legislation, has gradually interpreted these regulations to determine the scope and content of European welfare benefits for European citizens, and the integration of these principles and prerogatives in the Member States. In this context, national courts have also played a crucial role in the implementation of this legislation within their national legal systems, referring cases to the CJEU denouncing national restrictions (Martinsen 2005a).

Until recently, the literature of Europeanization of social rights had recognized to what extent the reception, enforcement, and effectiveness of the European Social Security legislation has been determined both by the pressure and coerciveness of the supranational institutions (such as the CJEU) and by other domestic factors. Namely: a) the institutional legacy (previous national social security rules), b) the correct implementation of EU legislation by political and administrative institutions, and, c) the pressure of EU migrant population and interests groups through legal instruments (Martinsen 2005a; Cichowski 2007).

One of the most discussed factors in the literature regarding the reception of EU legislation, especially in the case of social security rights, is the compatibility between welfare national systems and the new European legislation. These justifications show how the configurations and diversities of welfare traditions have determined the different levels of reception or adaptation to EU demands. For example, while Denmark, Finland and Sweden are determined by a universalistic and residence-based welfare state, Germany, Belgium, Netherlands, Luxemburg and France are

classified as insurance-based systems[90] (Esping-Andersen 1990; Menz 2005). Considering that the European social security model has been based on an *insurance-based system*--mainly the social protection model of the founding members--countries with a *residence-based model* are less compatible with the new European legislation and, therefore, exposed to higher institutional pressures by national actors and supranational institutions for their adaptation to EU social prerogatives (Martinsen 2005a).

Nonetheless, as Martinsen (2005a, 2005b) demonstrates in her analysis concerning the application of EU social security legislation for Denmark and Germany, the institutional fit/misfit justification does not fully explain the impact of Europeanization of national welfare states. She reveals how other mediate factors have determined the integration of EU law in these two countries. These factors are the capacity and political preferences of political and administrative institutions for the implementation of EU legislation (Falkner et al. 2004; From and Stava 1993; Héritier 2001), or what is identified as "national political, administrative and legal acceptance or contestation of European demands" (Martinsen 2005a). During the implementation of their European obligations, national politicians and administration--depending on their policy preferences-- have made use of their discretion to comply with their commitments (e.g. Denmark), or to ignore their European demands completely, as in the case of Germany. The services provided by the social security rights, such as social

---

[90] In *residence-based* systems, most social security services are based on permanent residence, i.e. only those who live in the country can claim the benefits, while *insurance-systems* provide effective social protection against the major risks in life and their consequences (i.e. illness, unemployment, old age, industrial accidents, etc.). This fact makes a *residence-based* system more reluctant to provide social services abroad or to temporary residents. Therefore, these systems are more prone to be pressured by employees and entrepreneurs in EU to request welfare coverage under the social security system of the country they are or were working in, regardless of how long they worked there or which country they are living in.

assistance or social minimum benefits, constitutes one of the most direct redistributive and transnational policies among Member States that affects national welfare policies. For that reason, national politicians claimed these welfare policies as a domestic prerogative that should keep under national control, hence preventing its full Europeanization (Falkner 2010; Scharpf 1999).

Under these contentious political contexts, the Court of Justice of the European Union and national courts played a crucial role in social rights integration through law by referring conflictive policy cases to the CJEU. This process produced a series of CJEU-driven political decisions that stretched the social rights acknowledged on EU regulations under a 'court-decision' trap (Martinsen and Falkner 2011), which consisted on CJEU rulings warranting accessibility and exportability of social rights that surpassed the lowest common denominator of Member State's preferences that governments do not manage to roll back (Pierson and Leibfried 1995).

Despite scholars showing the relevant role of national courts for the integration of EU social security law, there have been no political explanations justifying their involvement in the judicial implementation process using preliminary references. With this background in mind, this research will try to fill this gap by analysing how the strategic decision-making of national courts as regards other political actors affects the cross-country variation in the use of preliminary references (see figure number 6.1)[91]

---

[91] Stone Sweet and Brunell (1998) proposed a simpler explanation for the variation in preliminary references: "judges who handle relatively more litigation in which EC law is material will be more active consumers of EC law, and more active producers of preliminary rulings, than judges who are asked to resolve such disputes less frequently" (Stone Sweet 2010). Despite the unavailability of indicators for measuring EU litigation rates, we control for this factor using as a proxy *the percentage of EU foreigners* of the country, assuming that the level of EU litigation in this field will be higher in countries with elevated amount of EU transnational migration.

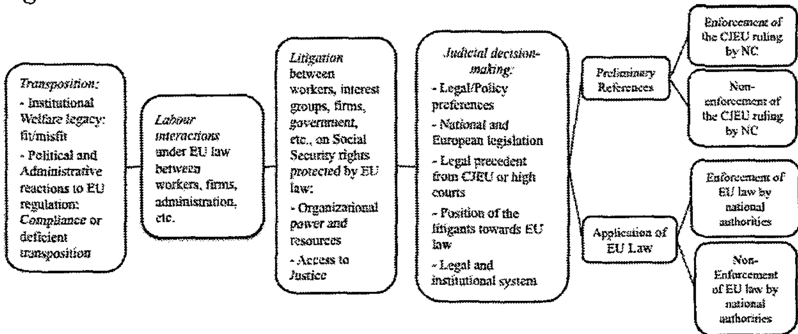
Figure 6.1. Number of preliminary references (art. 267 TFUE) on Social Security

Source: Stone Sweet, A., & Brunell, T. – The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234), 1961-2006. EUI 2007 NEWGOV Project.

6.3. National courts and the logic of supranational adjudication to the Court of Justice of the European Union

The process of judicial enforcement of European law consists of a set of stages in which several actors and institutions are involved (see figure 6.2 below). These actors will consider different factors depending on the stage in which they are taking part. This study focuses on how national courts balance these aspects during the judicial decision-making process to understand under which conditions national courts will enforce EU law by means of preliminary references instead of applying the law themselves.

Figure 6.2. Process of domestic judicial enforcement of EU Social legislation



Source: Own elaboration

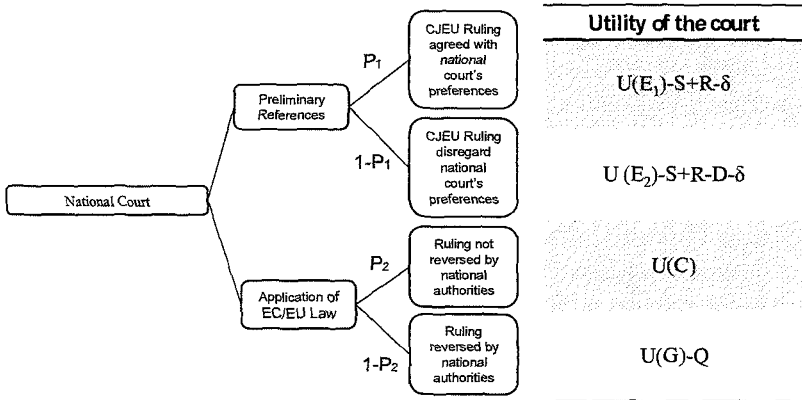
For the clarification of this calculus, I replicate G. Tridimas & T. Tridimas's formal model (2004) to explain the use of preliminary references by national courts. The model presented below (see figure 6.3 below) complements the explanation given by these authors. The model adds new insights based on recent empirical findings that, from our point of view, should be taken into account to understand the logic of delegation by national courts. One of these new factors, for instance, is the risks and costs of reversion that preliminary references would entail to national judges who do not agree with the requested CJEU ruling. The omission of these costs leads the authors to assume that national courts refer to the CJEU already knowing that they will take a ruling according their preferences and without any costs, overestimating the benefits of references as a result.

However, this assumption does not seem to fit the facts. In some cases, the CJEU takes decisions that do not meet the expectations of national courts (Nyikos 2003). This is the reason why some courts use mechanisms like pre-emptive opinions to try influencing the CJEU's decisions in order to get a favourable ruling (Nyikos 2006). The European Court's discretion of interpretation would sometimes generate rulings against the interest of the national courts. If that is the case, judges may

assume several costs depending on how they react to the decision of the CJEU. One of these costs is the effort that would have to be invested to non-implement, re-refer or reformulate the CJEU guidelines in case they find the ruling objectionable. Moreover, rulings disregarding a CJEU ruling could carry costs of reputation to national judges if litigants appeal the application in another court. In addition, courts resigned to accept non-preferred rulings also carry a loss that diminishes the utility that they can extract from the CJEU's decision.[92]

Figure 6.3 represents the model that analyzes the decision-making of national courts when dealing with EU case law[93]:

Figure 6.3. The logic of judicial EU law enforcement



[92]The model assumes that national governments and administration may override CJEU rulings to fit their legal or policy preferences (Carrubba et al. 2008). That was the case in Social security field when Member States passed on the Council of Ministries the Council Regulation (EEC) no. 1247/92 of 30 of April 1992 to overrule the Court's expansive interpretations on these issues (Martinsen and Falkner 2011). This possibility has not been included to keep the straightforwardness of the model.

[93] The model does not consider as a third alternative the defection of the case law or the referral to high courts.

Source: Own elaboration.

First, it is important to note that national courts have enough discretion to decide whether to refer a case law to the CJEU.[94] Second, national courts have their own legal/policy preferences based on the idea of European integration, fairness, the protection of disfavoured complainants, or, as in our case, the integration of EU Social Security Law into the national legal system.[95] These preferences can sometimes disagree with the policy preferences of other national institutions such as the government, the bureaucracy or appeal/high courts. If we assume that national courts, as policy-makers, seek to maximize their own legal/policy interpretation and its latter enforcement by *national authorities*, they will opt for one or the other mode of implementation depending on the constraints they face. Courts, by modifying or adapting their rulings in anticipation of a possible non-compliance by the competent authorities, may secure better outcomes than if they act myopically enforcing their most preferred EU legal or policy interpretation (Carrubba, Gabel and Hankla 2008; Ferejohn, Rosenbluth and Shipan 2007; Ferejohn and Shipan 1990). Moreover, the reversal of their decisions can also undermine a court's public legitimacy or reputation, and thereby reduce its future influence on policy and, to some extent, affect their career prospects (Carrubba 2009; Carrubba, Gabel and Hankla 2008; Staton and Vanberg 2008; Tridimas and Tridimas 2004).

---

[94] Lower courts enjoy a higher discretion than last instance courts because the latter are under the obligation to refer. However, last instance courts can evade this responsibility since there are exceptions that leave a broad margin to decide whether to refer or not. These exclusions are detailed in the CJEU Case 283/81 CILFIT v Ministry of Health.

[95] National courts, especially intermediate and high courts, shape with their rulings the allocation of rights and benefits of EU legislation at the national level. Their decisions serve as policy-guidelines that are broadly applicable to other similar situations in which citizens, business, NGOs or the government are involved (Stone Sweet 2004).

In any case, as long as courts care about implementing their policy preferences through their judgments, they have an incentive to anticipate public institutions' reactions when applying EU law and to avoid that any institutions in charge of the implementation of their decisions may pursue an otherwise less preferred policy. National courts calculate its expected losses and the likelihood to suffer them, paying attention to the preferences of the government during the judicial proceedings or previous implementation processes. For example, if the government overrules EU new legislation or denies its effective application despite pressures from the European Commission and other individual litigants, judges will expect a high reluctance of politicians to accept pro-integration rulings.

Among the benefits stemming from a referral to the CJEU, I consider the possibility that, according to *neo-functionalist judicial empowerment* explanations, the court might obtain a judgment closer to its policy outcome or its own legal interpretation thanks to the protection that a judgment based on a CJEU ruling gives against national authorities (Tridimas and Tridimas 2004; Weiler 1991). National courts will reduce deniability if we understand that national courts are responsible to comply with the CJEU rulings, or if they blame the CJEU for its decision. National courts, eager to protect their power over national policies, will empower themselves against other national institutions to secure their interests, competences and policy preferences. For that purpose, national courts will enforce the compliance of EU law through preliminary references to avoid the risk of a reversal of their domestic rulings (Conant 2002) and to force change on reluctant governments (Obermaier 2008). In other words, judges are strategic as regards the executive and invoke the CJEU to legitimize their exercise of power in the domestic context and divert criticism (Ramos Romeu 2006).

In addition, national governments will think it twice before overruling or misapplying a national court's decision supported by the CJEU. The EU legal system is organized to deal with non-compliance of Member States, especially when national courts

enforce EU law complying with CJEU rulings. As Stone Sweet and Brunell (2012) show, Member State's non-compliance with any important CJEU ruling will generate new litigation by national courts and the CJEU, and new findings of non-compliance will emerge. Therefore, CJEU rulings may force the bureaucracy and governments to consider implementing the rulings under the threat of receiving multiple lawsuits by national courts, infringement procedures (259 TFUE) or penalties by European institutions against their non-compliance with CJEU rulings (art. 260 TFEU).

Moreover, considering the CJEU rulings as a mean of EU judicial policy creation, the intervention of the CJEU may reduce or constrain the national scope of policy options or discretion remained by governments (Martinsen 2011). The CJEU hereby powerfully intervenes in the selective means of EU policies and the various thresholds set to comply with EU regulations. Hence, the CJEU's interpretations may create new limits to the actions of the national executive narrowing the national policy options at their disposal regarding social rights. As a consequence, national governments, parliaments and bureaucracies will comply with these ruling in order to prevent more interventions of the CJEU requested by national courts and put an end to the judicial limits imposed to their political discretion.

The structure of benefits and costs on national courts to refer or not is shown in figure 6.3. Following the original notation of Tridimas & Tridimas (2004), C, G and E denote the most preferred policies or legal interpretation by national courts, government, and the CJEU, respectively. I have modified the model assuming that the CJEU may provide diverse judgments (E_1 and E_2), depending on the closeness of CJEU rulings to the national court's preferences.[96] While E_1 is closer to the preferences of the latter, E_2 is opposed to them. P_1 represents the probability that the CJEU ruling agrees with the national court preferences,

---

[96] The CJEU is indifferent between E1 and E2. CJEU extracts the same utility in both cases. The difference between both policy positions is only relevant for the calculus of pay-offs of the domestic court.

and P_2 defines the probability that national institutions will not overturn the judgment of the national court (or the likelihood that the government agrees with the national court's ruling). P_1 depends on the institutional and legal mechanisms of collaboration between CJEU and national courts, such as pre-emptive opinions, the intervention of General Advocate, previous rulings in similar cases or precedent, and governments' opinions (see Carruba et al. 2008), among others. P_2 is determined by domestic institutional factors related with the independence of the judiciary and the administration and the power of the parliament (Wind et al. 2009), previous national judgments on the topic (Ramos 2006), etc.

Therefore, if we look at figure 6.3, we determine that the expected utility from not referring is defined as:

$$P_2 \times U(C) + (1 - P_2) \times (U(G) - Q)$$

Where Q is the legitimacy/reputation loss that national courts suffer when national authorities (e.g. government, administration or other courts) overturn the judgment. In contrast, the expected utility in the case that courts refer the case law to the CJEU is defined as:

$$P_1 \times (U(E_1)\text{-S+R-}\delta) + (1 - P_1) \times (U(E_2) - \text{S+R-D-}\delta)$$

Where S is the extra-cost on resources, time and materials that the national court has to bear when referring (especially if they have to write a pre-emptive opinion). R is the benefit that the court gains from the protection that a judgment based on a CJEU ruling gives against national authorities' reactions. D are those costs that the national courts will suffer in the case that the CJEU rules against their policy preferences (whatever the reaction of the national courts to CJEU rulings). δ is the discount factor loss in the value of the CJEU decision due to the passing of time.[97] In

[97] The discount factor varies between 0 and 1. If it equals 0 it means that the actor only values the present moment and does not give any

reference to the last point, national judges are afraid of sending references to the CJEU due to the length of the procedure. For that reason, they will prefer to solve EU law cases as soon as they can to avoid the daily overwork and overload (Nowak et al. 2011). Concisely, national courts will opt for referring to the CJEU when the expected net utility gains (benefits minus costs) from doing so exceeds the utility gains from not referring. Consequently, national courts will refer to the CJEU when the expected utility of the first function is greater than the expected utility from rulings on EU law without referring:

$$P_1 \times (U(E_1)\text{-S+R-}\delta) + (1 - P_1) \times (U(E_2) - \text{S+R-D-}\delta) > P_2 \times U(C) + (1 - P_2) \times (U(G) - Q)$$

The following sections will test the feasibility of this model studying the behaviour of national courts during the policy implementation process of the European social security law.

6.4. Welfare states, implementation of EU social security policies by governments and the reaction of national courts: A comparative analysis

Observing the variation in the use of preliminary references (see figure 6.1 above) we notice that countries whose national welfare systems strongly misfit the principles of the European social security legislation, such as Denmark, Finland or Sweden, sent less preliminary references than the rest of Member States. In contrast, preliminary references have been used more often in those countries where EU immigrants have been attracted by a more open labour market such as Germany, Belgium or Netherlands, most of which also have corporatist welfare systems.

To understand fully the behaviour of national courts and their involvement in CJEU preliminary proceedings in those countries,

---

consideration to the future. If it equals 1 the actor values present and future.

we need to pay attention to how national authorities in charge of the correct transposition and application of EU regulation have reacted to transnational labour exchanges. The political responses to the implementation of social security rights has varied depending on the preferences of national governments and their bureaucracies as regards the extension of these welfare rights in a context of high immigration inflows. In the case of Social-Democratic welfare countries such as Denmark, Finland and Sweden, national authorities have implemented politically and administratively the European demands to de-territorialize their social security system to fit Community legislation (Martinsen 2005b). The high degree of receptiveness to European legislation has largely avoided the use of judicial enforcement.

Conversely, most of the corporatist welfare countries have suffered a more conflictive mode of implementation. Corporatist countries, as targets of greater volumes of immigration, foresee the economic costs that the expansion of social rights would carry. The persistent reticence of governments and administration to implement EU legislation properly boosted the request of preliminary references by EU citizens/litigants in these countries, suffering a greater level of judicial intervention to enforce social security rights. In the words of Martinsen for the German case, "*de facto* EU-related immigration (...) explained partially the higher reference rate to the CJEU. With more European migrants inhabiting German territory, the reach and content of their EU-ensured rights are likely to be tested and invoked in the national legal setting to a greater extent" (Martinsen 2005a).

This model of contentious implementation also applies to the case of the UK, in which the claims for social rights was defined by the lower coverage of the welfare system in comparison with corporatist systems. Between 1979 and 1997, successive UK governments showed a strong commitment towards reducing the role of the state, a process that included a reduction in state welfare provision and social security. While in most European countries, the debate about welfare has been conducted in consensual terms between government and opposition, in Britain

the majority system has excluded opposition parties from having any significant influence on policy, leaving the ideological determination of welfare system to the Conservative Party (Baldock 1993; Mares 2006). The low coverage provided by the welfare system together with the lack of commitment of right-wing parties in the UK with the extension of social rights has meant that an increasing EU population of migrant workers and their families has opted to go to the courts for the request of the social security rights granted by EU regulation.

The situation of contested compliance has persisted in France, Belgium, Germany, Netherlands and the UK since 1970, as well as the concomitant CJEU's efforts to expand the social rights of EU migrants. Thus, the CJEU rulings have been limited in some cases by actions of restricted compliance, and legislative overruling by the respective governments and administrations (Conant 2002). This contention was more patent when the Council of Ministers overruled the Court's expansive interpretations on those issues by passing the Council Regulation (EEC) no. 1247/92 of 30 of April 1992. The main purpose of this regulation was to circumvent the power of the CJEU specifying the social benefits that were non-exportable among Member States (Martinsen and Falkner 2011). However, the CJEU has managed to increase the accessibility, coverage and to some extent exportability of these social rights despite Member States continuously claiming that EU institutions overstepped the competences of the Community, granting benefits and coverage that fall outside the Treaties. One of the main examples is the territorial extension of the health coverage that the CJEU managed to enlarge by making pro-integrative decisions in favour of a cross-border health care system in seminal judgments such as *Decker* (C-120/95, 28 April 1998) and *Kohll* (C-158/96, 28 April 1998), among others. This was the case even when the territorial extension of this right was in principle entitled to Member States and only extensible by means of prior authorization policies by the EU social security coordination scheme established by Regulation 883/2004. So far, these explanations only refer to the capacity of EU migration to initiate

EU litigation and the capacity of CJEU to challenge national legislation on that issue. Nevertheless, we still do not have a complete explanation of the reasoning behind the involvement of national in the process of Europeanization of social rights.

How does our judicial behaviour's model fit this narrative? Some national courts are more highly constrained by the probability of reversal/override of their rulings in certain contexts than in others. In those countries that the literature identifies as non-compliers, such as Germany, UK, Netherlands, Belgium, etc., national courts have decided to refer more frequently to the CJEU to avoid the contained compliance by the government, the bureaucracy or other courts. As a solution, courts decide to use preliminary references to support and legitimize their judgments, giving the opportunity to the CJEU to expand their interpretation over social security rights. That is, they opt for supranational adjudication as an alternative way to reinforce their legal/policy interpretations on EU legal matters at the same time that they reduce deniability. In addition, national judges, as soon as they accept the CJEU doctrines on social security rights, make governments more difficult to avoid an accomplishment of these decisions. Such CJEU rulings, stretching EU social rights in contradiction with national provisions, created a policy constraint for Member States as regards their discretionary power on these matters. Under this possibility, the domestic politician is forced, therefore, to implement EU regulations and CJEU rulings in order to avoid the consequences of further policy intervention by CJEU (Obermaier 2008).

Hence, if governments and bureaucracies hinder implementation, and national political considerations are irreconcilable with the CJEU jurisprudence, national courts resolve non-compliance by threatening with a multiplication of CJEU rulings that may contradict and limit the power of the national implementing authorities (Obermaier 2009). The CJEU will allow national courts to introduce new doctrines gradually without generating political concerns. In the first law case referred to the CJEU, the court will establish the doctrine as a general

principle, subsequently, in following decisions requested by national courts, the CJEU will invoke the same principle but this time subjected to various qualifications or specifications that reduce the discretion of national governments and administrations on the application of EU law. This means that Member States have already established or acknowledged the new principle or rule (Alter 2009). Therefore, courts aware of the judicial activism of the CJEU on the empowerment of social rights (Joppke 2001) will refer, considering that they will be successful in promoting social security rights with the CJEU support, circumventing the power of national governments and bureaucracies with their guidelines on how social security rights should be applied.

6.5. Statistical analysis of the variation of preliminary references among welfare systems

In this section I will support statistically the arguments presented in the previous sections as regards the determinants of the use of preliminary references of national courts in the field of Social Security (Luxembourg excluded) taken from Alec Stone Sweet and Thomas Brunell's dataset: *The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234), 1961-2006. EUI 2007 NEWGOV Project*, accessed on June 2011. For that purpose, I collected panel data to test whether Member States with welfare regimes that misfit European social regulations suffer more pressure from national courts, or on the contrary, as an alternative hypothesis, whether:

h: *National courts are more likely to refer in Member States where we find a contested implementation of the European social model than those with a higher misfit between EU and national legislation.*

Contested implementation is found in countries where governments 1) tried to avoid the political and economic costs that

the expansion of social rights would carry for its state (e.g. Germany, the Netherlands, France, Belgium), or 2) had a strong ideological commitment towards reducing the role of their welfare system (such as UK). In both cases, and according to the formal model presented above, I expect national courts to make use of the preliminary references system to challenge government's contention to the promotion of EU social rights legislation (see table 6.1 below).

Table 6.1. Hypotheses explaining the differences on the level of preliminary references among EU-15 countries

Welfare system	Countries	Policy misfit	Restricted compliance with SSR legislation
Social-Democrat	Sweden, Denmark & Finland	Residence-based: High misfit	Low
Liberal	Ireland & UK	***Null hypothesis***	High
Corporatist	Germany, Netherlands, Austria, France & Belgium	Insurance-based: Low misfit	***Alternative hypothesis***
Southern European	Italy, Spain, Portugal & Greece		Medium

Source: Own elaboration.

To identify restricted-compliant Member States I use two main variables:

- ***Type of welfare state:*** According to the previous section, I expect a more active use of references to force governments to implement EU legislation on ***corporatist*** countries than in others. To measure that, I built dummy variables to distinguish among *types of welfare systems* across Member States: (1) Social-Democrat [Sweden, Denmark and Finland], (2) Corporatist or Continental [Germany, Netherlands, Austria, France and Belgium], (3) Liberal or Market-based [Ireland & UK]; and (4) Southern

European or Mediterranean [Italy, Spain, Portugal and Greece][98].

- ***Ideology of the government:*** In this case, I expect an active use of preliminary references to challenge the position of ***conservative governments***, which by definition are against the extension of social security rights, like UK from 1979 to 1997. The variable was codified 0 for left-wing governments, 1 for centred, and 2 for right-wing governments. Data on the ideology from 1975 onwards of the government was taken from the database of Political Institutions (Beck et al. 2001), accessed on June 2011.

For the analysis, I estimate several linear panel models of the number of referrals on Social Security matters, modelling by contemporaneous correlation and correcting for panel heteroscedasticity. In addition to a linear panel regression with random effects,[99] and in order to check the consistency of the results among estimations, I estimate three alternatives available to obtain robust standard errors estimates: Feasible generalized least squares (FGLS), Driscoll and Kraay standard errors (D&KSE) and

[98] The classification also relies on the criteria of insurance & residence welfare systems. While Finland, Sweden, Denmark, UK and Ireland are considered as residence-based systems, the corporatist systems are characterized as insurance-based. Mediterranean countries are considered as a sub-category of corporatist model (Rhodes 1996). However, I opt to follow the traditional classification of welfare states (Esping-Andersen 1990; Corrado et al. 2003) to cover other general characteristics of the welfare systems, such as universalism of some services, that could be lost if I include countries in a simple insurance/based category. For this variable, the use of random effects will account for this unobservable country heterogeneity on the qualitative differences of welfare systems. Moreover, this variable will help us to test if courts try to overcome misfit between different types of welfare systems.

[99] The significant p-values of the hausman tests confirms systematic differences between the coefficients estimated under random effects and fixed effects.

pooled OLS regressions with panel corrected standard errors (PCSE) (Hoechle 2007). Finally, the control variables used in the analysis are the following:

a) *Years of EU membership*: The higher the number of membership years the higher the use of preliminary references.
b) *Years since last EU legislation regulating social security rights*: The likelihood of sending preliminary references will be higher during the first years of the implementation.
c) *Percentage of EU migrants* (as a percentage of the total population), and *population size.* [100] The rate of preliminary references will be higher in countries with a high level of EU workers or population claiming for the correct application of EU security rights. For this study, I will focus on the effect of EU migrants as litigants, relating it with the two main explanatory variables: type of welfare state and ideology of the government. The data about EU migration from 1983 until 2003 was extracted from several migrations, labour workforce and population reports from the European Centre for the Development of Vocational Training and Eurostat.

Table 6.2. Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
Preliminary references on Social Security rights (SSR)	318	1.443	2.12	0	10
Welfare system: Social Democratic	318	0.148	0.355	0	1
Welfare system: Corporatist	318	0.387	0.488	0	1
Welfare system: Liberal	318	0.189	0.392	0	1
Welfare system: Southern European	318	0.277	0.448	0	1
Ideology of the government	318	1.088	0.932	0	2
Percentage of EU migrants	244	1.559	1.406	0.11	5.95
Years since new European regulation on SSR	318	19.66	8.279	2	32

[100] Following previous studies on the use of preliminary references, I took into consideration the introduction of intra-EU trade in the model. However, it was highly correlated with the population size and I decided to keep population instead of intra-EU trade due to its relevance for controlling litigation rates.

Years since membership	318	20.49	12.753	0	45
Population (logged)	318	2.864	1.055	1.08	4.40

Table 6.3 shows the different specifications tested[101] (see below). Within the empirical results, one of the most remarkable outcomes is related to the main explanatory variable, that is, the type of welfare regime. Taking as a reference model 6 we observe how *corporatist* countries are significant at 1 %, concluding that this group of countries refers 1.5 points to the CJEU more than social-democratic systems. This finding rejects the argument that Member States whose welfare regimes have a high degree of misfit with European social regulations suffer more pressure from national courts for the integration of supranational law on their domestic institutions. As we observe in the results, corporatist countries, characterized by insurance-based regime - which fits better with the European social model - refer more than residence-based welfare states.

[101] The same models have also been estimated adding the variable *majoritarian vs. constitutional system* (Wind et al., 2009: 71-74) and the interaction between the types of welfare system with the percentage of EU migrant population. No significant effects have been found, despite the results of the other variables keep constant.

Table 6.3. Time series cross-sectional analysis of preliminary references[102]

Independent variables	*Model 1 1973-2003*	*Model 2 1983-2003*	*Model 3 1983-2003*	*Model 4 1983-2003*	*Model 5 1983-2003*	*Model 6 1983-2003*
	Random effects	Random effects	Random effects	FGLS	D&SSE	PCSE
Welfare systems (category of reference: Social Democratic)						
Corporatist	1.904*** [0.554]	1.536*** [0.330]	1.395*** [0.324]	1.598*** [0.426]	1.598*** [0.375]	1.598*** [0.368]
Liberal	-0.137 [0.307]	-0.384 [0.333]	-0.351 [0.333]	-0.242 [0.397]	-0.242 [0.271]	-0.242 [0.210]
Southern European	-0.393 [0.436]	-0.195 [0.369]	-0.497* [0.267]	-0.401 [0.364]	-0.401* [0.201]	-0.401** [0.175]
Ideology of the government (left-right)	0.290*** [0.103]	0.276** [0.129]	-0.132 [0.172]	-0.116 [0.199]	-0.116 [0.085]	-0.116 [0.179]
Percentage of EU migrants		0.325*** [0.106]	-0.263 [0.208]	-0.411 [0.263]	-0.411 [0.258]	-0.411 [0.274]
Ideology of the government (left-right)*Percentage of EU migrants			0.364*** [0.097]	0.428*** [0.130]	0.428*** [0.135]	0.428*** [0.138]
Years since new European regulation on social security rights	-0.004 [0.022]	-0.009 [0.022]	0.001 [0.023]	0.005 [0.021]	0.005 [0.025]	0.005 [0.025]
Years since membership	0.001 [0.015]	-0.006 [0.009]	-0.010 [0.008]	-0.009 [0.012]	-0.009 [0.007]	-0.009 [0.009]
Population (log)	0.418 [0.322]	0.489* [0.292]	0.613** [0.290]	0.505*** [0.128]	0.505*** [0.132]	0.505*** [0.131]
Constant	-0.618 [0.968]	-0.895 [1.082]	-0.645 [1.185]	-0.474 [0.652]	-0.474 [0.496]	-0.474 [0.737]
Observations	318	244	244	244	244	244
Number of countries	14	14	14	14	14	14
R-squared					0.45	0.45
R2 within	0.028	0.023	0.04			
R2 between	0.731	0.823	0.86			
R2 overall	0.395	0.425	0.45			
Wald test	0.000***	0.000***	0.000***	0.000***	0.000***	0.000***
Hausman test	0.001	0.016	0.021			
Robust standard errors in brackets	*** significant at 10 %; ** significant at 5 %; *** significant at 1 %**					

Moreover, looking at the list of countries that belongs to this group, I conclude that they consist of those Member States that

[102] The time scope of the regression analysis is limited by the availability of the data. Data on the percentage of EU migration from 1983 until 2003 was extracted from several migrations, labour workforce and population reports from the European Centre for the Development of Vocational Training and Eurostat. Data on the ideology from 1975 onwards of the government was taken from the database of Political Institutions (Beck et al. 2001), accessed on June 2011.

have continuously opposed the proper implementation of EU law (Netherlands, Germany, France and Belgium), as labelled by Lisa by Conant (2002) and D. Martinsen (2005a). This category of countries includes mostly non-compliant states, suggesting that courts do not only ask for CJEU rulings with the intention to solve doubts about the application of EU law. In addition, judges use references more in those systems where the government and the bureaucracy tried to evade or contain the transposition and enforcement of their EU obligations to legitimize the application of EU law.

This analysis fits well with our model, where national judges, observing the high level of non-compliance, contention and overruling of national institutions, have strategically decided to refer to the CJEU. Taking this decision, national courts evade the losses and costs for application of EU law, at the same time that their legal or policy decisions are empowered or legitimized by the CJEU. Secondly, a learning process of national courts reinforces this use of preliminary references in the social security issue across time. The pro-active involvement of the CJEU has sent to national courts a clear signal that the probability of a ruling in favour of the extension of EU social rights would be greater than before, encouraging the participation of national judges already in favour of this EU policy over time (Conant 2002; Joppke 2001; Martinsen 2005a).

A second interesting finding is related to the ideology of the cabinet. The variable 'ideology of the government' tests whether national courts under right-wing cabinets send more rulings than under centre-left cabinets. Looking at the results in model 2, we observe how national courts refer a 27 % more as the ideology of the governments turns more conservative. This effect is explained by the desire of judges to avoid criticism from governments reluctant to increase the coverage of social security rights. More interesting is the interaction of this variable with the percentage of EU migrants, which shows an increase of 0.428 in the previous effect (see models 3, 4, 5 and 6). This last finding shows how EU migrants constituted a relevant actor for the reception of EU

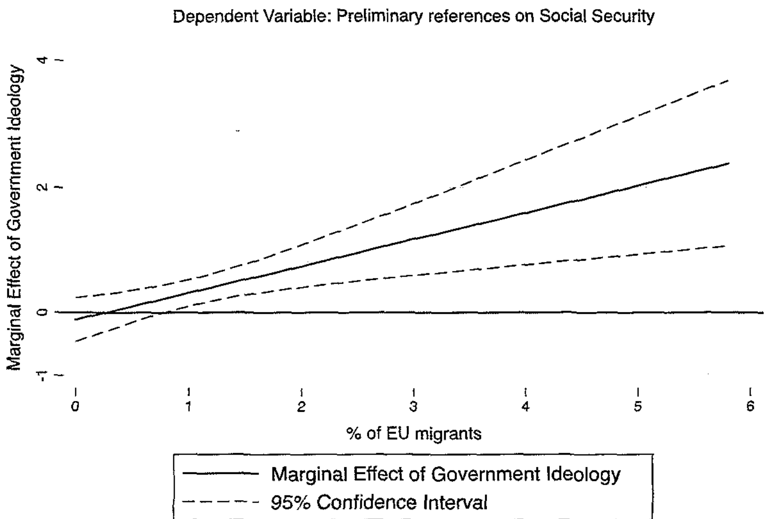
legislation by opposing restricted welfare policies through litigation of conservative governments (Martinsen 2005a).[103]

It is not possible to know if X has a meaningful conditional effect on Y from simply looking at the magnitude and significance of the coefficient on the interaction term presented in table 6.3 (Brambor et al. 2006). For that purpose, I report the marginal effect and standard errors of ideology of the government (X) on the number of preliminary references (Y) across different values of the % of EU migrants (Z) in order to know how the effect of X on Y changes along some range of Z values. Figure 6.4 illustrates the marginal effect of ideology of the government and the corresponding standard errors across the full range of the modifying variable (% of EU migrants). The graph shows how the marginal effect of ideology of the government on the number of preliminary references changes with the percentage of EU migrants. The solid sloping line indicates how the marginal effect of ideology of the government changes with the increase of the population. The upper and lower bounds of the confidence interval above the zero line help us to confirm how effectively the ideology of the government has a statistically significant effect on the number of preliminary references.

---

[103] Additional models have been tested the interaction between the percentage of EU migrant population with the type of welfare state to test for its joint effect. However, no significant interaction effect was found. Because the effects of the other variables were identical with and without this additional interaction, I decided to exclude it from the table to keep the straightforwardness of the specifications.

Figure 6.4. The Impact of the ideology of the government on the number of preliminary references conditioned on the % of EU migrants



6.6. Conclusions

The literature on EU judicial politics has systematically overlooked the logic of national courts' adjudication on contentious political issues, ignoring how the strategic cooperation between national courts and the CJEU may be a reaction to the position of governments and bureaucracies towards EU policies or legislation. For this purpose, I offer a new model to explain the logic behind the use of preliminary references by national judges. The model concludes that the use of references is a strategic response to the non-implementation or insufficient transposition of EU regulations in countries where the extension of social rights to migrant workers entailed for politicians: a) a political and financial effort for the welfare system; or b) a challenge to their political

ideological commitments. Under these contexts of continuous contestation in the implementation of EU social security, national courts triggered a strategy of interested cooperation with the CJEU to empower their EU legal interpretations in this legal matter.

This study mainly asserts that national judges, as a usual strategy, refer more to the CJEU in those cases where the executive challenges the application of EU legislation, that is, government and bureaucracy. Hence, contrary to Jonathan Golub's affirmation (1996) that courts avoid to refer in relevant national policy areas, this chapter gives comparative quantitative empirical evidence on how judges refer EU cases to the CJEU on salient policy issues protected by national governments as a way of bypassing the negative consequences of the domestic judicial application of EU law.

These findings question the idea that national courts only request CJEU rulings to provide an interpretation of the application of the European law. What I find is that national courts intervene more in those countries where domestic institutions contest the EU legislation more. In conclusion, as a political strategy, courts in social security issues refer to the CJEU to rule against the contested application of EU law in their own countries. However, this explanation and the model developed are still limited to policy areas where national legislation seems to be central for national authorities and governments, such as social security, taxation, etc. Future research could also study the behaviour of national courts in other policy/legal areas in order to test whether political motivations also lie behind the national judges' decision to make use of preliminary references.

CHAPTER 7. GAMBLING FOR EUROPE? ANALYSING NATIONAL COURTS' DECISIONS UNDER POLITICAL AND INSTITUTIONAL CONSTRAINTS

7.1. Introduction

The question of why and how courts apply European Law may be one of the most important questions that scholars on the European Union seek to answer. Citizens and other social and economic actors turn to courts as a last resort of enforcement when EU law implementation problems occur in their countries. Citizens and interest groups hold in their hands a powerful weapon to enforce European regulation when courts become involved in the process of EU law implementation (Slepcevic 2009; Stone Sweet 2004). Therefore, this important role of national courts is crucial to understand the conditions under which national courts enforce EU law, and to unveil the dynamics of the judicial implementation of EU legislation.

Studies on national courts' enforcement of EU law have usually focused on the most important cases that have resulted in high courts deciding the application of EU law. Moreover, scholars who have sought to explain systematically the compliance of national courts with EU law have mostly looked at the use of preliminary references (Carrubba and Murrah 2005) and the compliance with the CJEU (Ramos Romeu 2006), without

determining the common factors (especially political ones) that induce national courts to enforce EU law. The central purpose of this chapter is to understand and give empirical evidence of the main mechanisms behind the enforcement of EU law by national courts. The chapter will consider the diverse macro and micro institutional characteristics and political elements that play a part in the judicial decision-making. The analysis explores the judicial responses of several national high courts to diverse political and legal incentives and constraints present during EU law cases. As well as how these factors determine the courts enforcement of EU law during their decision-making.

In the chapter, I will study the application of EU law in EU-25 Member States, with especial consideration of high courts due to their relevant role as allocators of policies. First, among other findings, I discover to what extent national courts are concerned about the reaction of the competent authorities. Second, there is evidence *that national courts opt to cite or support their decisions* with CJEU rulings in those cases where the EU law challenges the main principles and prerogatives of the national authorities of each Member State. These main results empirically corroborate the conclusions of Georges and Takis Tridimas' (2004), Ramos' (2003; 2006), Obermaier' (2008) and the previous chapters of this thesis on the use of CJEU rulings as a political safeguard against governments' non-compliance. This chapter seeks to complement these contributions by offering a strategic explanation of the EU law decisions of national high courts, taking into account the position of each litigant in relation to EU law, that is, whether the appellant/respondent is in favour or against EU law enforcement.

7.2. The Enforcement of EU Law by European High Courts (2000-2010): High Courts as Allocators of EU Rights, Benefits and Policies

This section focuses on explaining the relevance of higher courts' decisions for the policy process and its impact. This

consideration is determined by the structure and function of appellate bodies, like Supreme Courts, as allocators of gains and losses (Haynie, Songer, Tate and Sheehan 2005). While in ordinary courts the resolution of the dispute affects only the parties directly at dispute, for appellate and high courts the judgments serve as statements that shape the relationship of the EU law with the rest of the legal domestic system. This determines the impact of EU legislation with evident consequences for the development of national policies. Somehow, these decisions create policy precedents that are broadly applicable to other similar situations in which citizens, business, NGOs or the government are involved. Therefore, high courts act as a political body that may determine the future development and implementation of governmental policies when shaping the allocation and enforcement of rights and benefits under EU legislation. The consequences of these judicial choices for EU policy development bring the need to understand the factors that determine this judicial policy implementation.

Their definition as high courts does not free them from the pressures of political or interest groups. On the contrary, despite being one of the higher institutions in the hierarchy of the national judicial system, higher courts' decisions are sometimes under the review of another judicial authority to prevent them from enforcing EU law against the national constitution. These are the cases of Belgium, Hungary, Spain, Latvia, Slovakia, Slovenia, Portugal, among others, where the Constitutional Courts may monitor the decisions of their Supreme Courts. Second, political institutions such as governments and administrations retain faculty to react to a higher court's decision. This means that administrations and governments have the capacity to avoid judicial decisions misapplying, obstructing or non-applying EU law courts' judgments. Lastly, governments and parliament, by passing new legislation, can override national courts' rulings by the legislature (Bednar, Jr., and Ferejohn 2001; Carrubba 2009; Ferejohn and Shipan 1990; Ferejohn and Weingast 1992; Rogers 2001; Staton and Vanberg 2008).

Regarding their structure, factors related to the political attachment or compliance of judges with politics, apart from their acknowledged experience in legal fields, can determine the selection of the justices of the higher courts. For example, in most cases, a system of quotas and bargaining linked to the different political factions in the Government, Parliament or Judiciary, determines the nomination of the new magistrates. Moreover, Judicial Councils or the Ministry of Justice, as well as links to political interests in their nomination and operation, have a control over judges' careers (Garoupa and Vanberg 2009). This illustrates the importance of political interest in the selection of judges and their careers in higher courts, some of whom may become more responsive for their decisions against political interest, and, especially the government. These considerations underline the fact that, as a judicial and political body, it is subject to not only legal factors but also several political ones, which may constrain, to some extent, the application of EU law in some important policy issues. National courts, anticipating these *ex-antes* (selection and monitoring) and *ex-post* (non-compliance) threats, may attenuate their decisions securing at least the compliance by national competent institutions. They can do this, for example, enforcing national law compliance according to governments' policy preferences.

Analysing the distribution of EU law cases within the sample of countries studied[104], we can identify a more relevant detail: the importance of these appellative bodies for the compliance with EU law by governmental and public bodies. More than a half of the cases (2009 out of 4225 – 46.78 % of EU law cases) are judged on legal issues involving any political institutions as litigants concerning decisions and acts. This means that most of the decisions made in these courtrooms as regards to EU law may have a significant impact on the behaviour of political institutions and policies, especially, after a judgment allowing an appeal

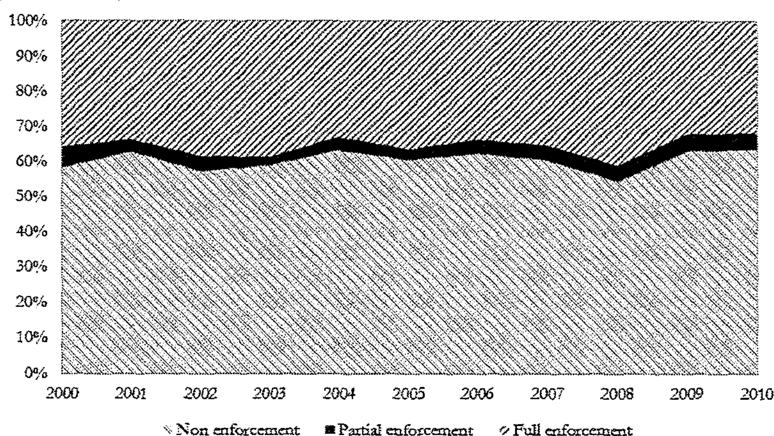
---

[104] These countries are all EU-27 Member States, with the exception of Luxembourg and Malta.

against acts or regulations passed by the government or administration.

Concerning the enforcement of EU law, figure 6.1 shows the diversity in the response of European high courts to litigants' EU legal claims:

Figure 7.1. Percentage of decisions concerning EU law application (2000-2010)



Source: Data set of High Court and EU Law cases 2000-2010 (N=4167 decisions & 110 courts).

The reasons given for the differences in the enforcement are usually limited to the consideration of the legal rules that guide the application of law.[105] However, the logic of law is only one more

[105] The nature of decisions received by higher courts may partially produce the high percentage of non-enforcing decisions. Higher courts, as appeal courts, review decisions of trial courts for errors of law. Assuming that lower court judges, among other things, try to maximize the number of correct decisions, we should expect that in absolute terms most of the appealing cases should not be allowed. The argument is that this multi-layered review process supposes that administration and legal experts, like the state lawyers, have examined the case before it gets to court, and it is likely that a large proportion of the incorrect denials have

constraint within the judicial-decision making process; other *institutional factors may affect the judicial enforcement* of EU law. From my point of view, for a full explanation of this variance, scholars must also take into account the institutional and political context, preferences and strategies of national judges with regard to other actors in the domestic system that can influence or place constraints upon national courts' decisions. For that reason, I will base my analysis on the strategic decision-making of national courts, disentangling the political incentives and constraints that national judges may have when enforcing EU law.

7.3. Explaining the Enforcement of EU Law by national courts: The accommodation of political domestic threat on judges' legal reasoning

As I briefly introduced in the theoretical chapter 2, there are several accounts in the literature that explain the application of EU law based on different theories of judicial behaviour: legal, (inter)governmentalist and empowerment theories. One of the goals of this chapter is to test empirically the three explanations that one can find in the literature of European Judicial Politics for the enforcement of EU law. Firstly, *legal* explanations posit that national courts want to maximize the correct application of EU law in their decisions, using the variations in national legal cultures and doctrines as an explanation (Chalmers 2001; Stone Sweet and Brunell 1998a, 2004). This model assumes that the behaviour of judges, seeking to maximize the number of correct decisions, is determined by the rules and legal traditions that regulate the application of EU law, despite the constraints that other actors can bring to courts. This approach explains judicial behaviour in terms of legal integration, based on logic and legal

---

been filtered out. By the time the case gets to court, the State lawyer, and the judge as well, have good reason to presume that there is a strong basis to the denial (Kritzer 2003).

reasoning, which relies on factors such as EU knowledge or experience on EU law application.

The second theory to consider is the *realist or (inter)-governmentalist* (Garrett 1995; Garrett, Kelemen and Schulz 1998; Kelemen 2001). National courts still interested on maximizing the correct interpretation of EU law, also care about national authorities implementing the compliance of their rulings. Meanwhile, national authorities such as the government and the administration will try to maximize their own policy preferences, neglecting or containing the application of EU law when it is invoked against their most preferred regulations and policies.

Assuming the different preferences of the institutions, governments may try to contain deliberately the enforcement of EU law by national courts, if they run counter to their policy interest or power (Conant 2002). Therefore, we can expect that European law enforcement by courts will be lower if the European provisions to be implemented are opposed by the competent authorities supporting national provisions by means of the *ex-ante* and *ex-post* controls, and political threats and constrains that Member States can place to the judicial decision-making. Courts, by modifying or adapting their rulings in anticipation of a possible non-compliance by the competent authorities, may secure better outcomes than if they act myopically enforcing their most preferred EU legal or policy interpretation (Carrubba, Gabel, and Hankla 2008; Ferejohn, Rosenbluth, and Shipan 2007; Ferejohn and Shipan 1990). Moreover, non-compliance can also undermine a court's public legitimacy, and thereby reduce its future influence on policy and, to some extent, cause the removal of judges from the court (Carrubba 2009; Carrubba, Gabel, and Hankla 2008; Staton and Vanberg 2008). Either way, as long as courts care about implementing their judgments, they have an incentive to anticipate public institutions' reactions when making their rulings concerning EU law.

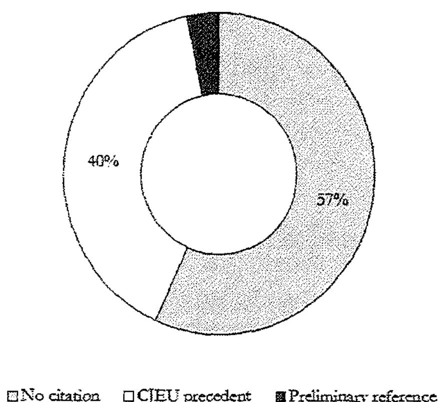
According to these factors, I hypothesize that:

h_1: ***Political Deference:*** *High courts are less likely to enforce EU law when government or political institutions' preferences are opposed to EU law enforcement.*

The third theory, the *empowerment* model, stresses the importance of cooperation between supranational judicial institutions in the process of judicial enforcement. National courts, as strategic actors concerning national institutions eager to protect their influence in national policies, will empower themselves against the intervention of judicial institutions to secure their interests, competences and policy preferences. According to empowerment explanations, to avoid the risk of a reversal of their rulings, national courts may enforce the compliance of the EU law through preliminary references and CJEU rulings to force change on reluctant governments (Conant 2002; Obermaier 2008; Ramos 2006).

As I tested in chapter 5, national courts can make use of these adjudicatory practices for avoiding criticism and legitimating their decisions against the menace of non-compliance of the government or other courts. Hence, citing the CJEU may increase the likelihood that the government and other political and judicial institutions comply with the national court's ruling in fields that are problematic because they run counter to the government's interest. In the sample used for this study, we observe how the European high courts made recurrent use of citation practices to support their opinions (see figure 7.2 – also exposed in chapter 5):

Figure 7.2. Citation practices of European high courts (2000-2010)



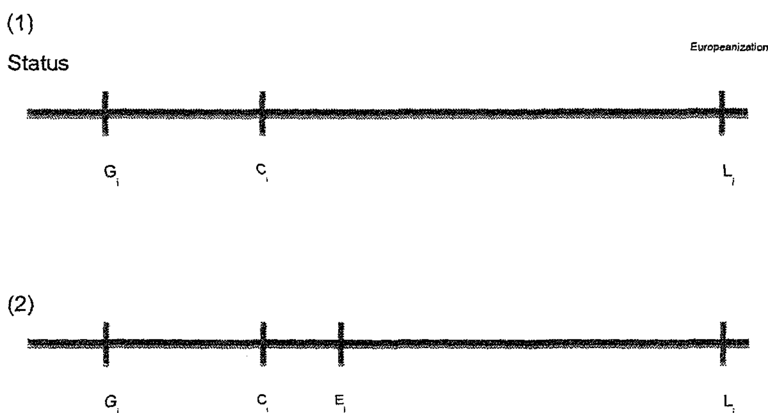
Source: Data set of High Court and EU Law cases 2000-2010 (N=4167 decisions & 110 courts).

In the light of these practices, I will test to what extent the strategic use of CJEU rulings to support its judgments increases the application of EU law to avoid criticism in the application of EU law against public institutions. To explain this kind of neo-functionalist behaviour by national courts I use a spatial model. The straight line depicts the range of alternatives in a policy issue ranked from 'Status quo' to the 'Europeanization' of the national policy as one moves from left to right. The range expresses the possibility of national judges making decisions that protect national policies or legislation from the influence of EU legislation or that fully integrates EU law into the national legal order. I assume that all actors: governments (G), courts (C), Court of Justice of the European Union (E) and the litigants (L), have their own most preferred legal or political ideal point, that are differentiated by Euclidean distance about their most preferred policy outcome.

If we imagine that the court has the option to choose a policy, we can consider the following situation. If the court were independent and not affected by political and legal threats or

overridden, it would simply choose to implement its most preferred policy issue C_i. When the government has the opportunity to influence a judge's opinion or to react to the court's action by non-implementing or applying its ruling wrongly to keep closer to G_i (see situation 1 in figure 7.3), then the court's best option is to take a distant policy point from its ideal point and move the policy closer to G_i. This way it considers Government's preferences in order to avoid triggering an override, misapplication or any other kind of political penalty.

Figure 7.3. Spatial model on the application of EU law and citations



Notes:
G_i: Status quo policy, position of the government
L_i: Ideal point of the litigant
E_i: Ideal point of the CJEU
C_i: Ideal point of the national court

Nevertheless, under a context of European constitutionalism, where national courts are attached to other supranational authorities, judges can use mechanisms that protect them from political influences such as references. Adjudication to the CJEU can give courts space to take decisions that are more

independent. Political institutions are not able to undertake the same political threats as regards the CJEU to the extent that they are persuaded to comply with their decisions if they want to avoid more intervention by EU institutions in their policies. This idea points to citations as a crucial factor for predicting judicial independent behaviour. According to that argument, the possibility of citing the CJEU to support rulings allows courts more room to implement their policy or legal interpretations. In situation 2, I include the position of the CJEU, denoted by E_i. Compared to the previous situation, with the CJEU placed to the right of the most preferred issue by the court, now it can pursue its most preferred policy freely, that is, to implement C_i. Likely, the court will enforce the position of the CJEU since it is much closer than the policy preferred by the government. The court is able to do so because the support of the CJEU would prevent the government from overturning the national court's decision.

Hence, I hypothesize that:

h_2: Political Challenge: *High courts are more likely to enforce EU law against public institutions when they can support their opinion citing a CJEU ruling.*

In last instance, empowerment explanations are not restricted to the competition between national courts and the political and administrative institutions. As Alter points out, ordinary, supreme and Constitutional courts may have different institutional incentives as regards EU law. On one hand, ordinary courts and Supreme courts under the constraint of Constitutional courts (or similar) may use EU law to increase their prestige and power: through the preliminary references procedure, they are able to play the higher courts and the CJEU off against each other so as to influence legal developments in the direction they prefer (Alter 1996, 2001). On the other hand, in the same way that Constitutional courts disapprove of ordinary courts referring to the CJEU because it may endanger their constitutional authority, they may also interpret the enforcement of EU law as an increase of

CJEU jurisdiction at the expenses of their constitutional prerogative and judicial review powers within the national legal order. Hence, Constitutional courts will enforce EU law less, in order to prevent the decline of their judicial review powers or authority.[106] Therefore, I hypothesize that:

***h_3*: Highest courts' power protection:** *Highest national courts (e.g. Constitutional or similar) are less likely to enforce EU law than other courts.*

In addition and conversely, lower or Supreme courts competing with highest courts "can use it to circumvent the restrictive, jurisprudence of higher courts, and to re-open legal debates which had been closed, and thus to try for legal outcomes of their preference for policy or legal reasons" (Alter 1996: 8). This happens especially when higher courts compete with national highest courts to have the final say in some policy or legal issues. Therefore, Supreme Courts coexisting with a highest constitutional authority will apply EU law to circumvent or challenge the judicial review powers.

***h_4*:** *Supreme courts under the pressure of highest judicial courts are more willing to apply EU law to circumvent the powers of their highest judicial authority.*

7.4. Methodology and Data

To assess the enforcement of EU law by European high courts, the study comprises a dataset on EU law cases that contains information on particular aspects of the judgments that allows an analysis of the fourth hypotheses presented above. The database

[106] The main difference between nationalist and inter-competition accounts is that the latter assumes diverse motivations and incentives among courts as regards EU law enforcement.

contains diverse types of higher courts: Constitutional, Supreme and appeal courts (see appendix A).

a) Dependent variable: EU law enforcement

For this study, I took from the dataset all the cases decided by the above mentioned high courts (n=4163). At this point, I coded the treatment that the court gave to EU legal demands alleged by litigants. To do this, I used the following criteria taken from Ramos (2003) to classify the enforcement of EU law claims:

0. *The Court does not enforce EU law because:*
    - 0.1. It is not temporally applicable to the case at hand
    - 0.2. It is not substantially or subjectively applicable to the case
    - 0.3. It does not have direct effect
    - 0.4. National law is in compliance with the EU law
    - 0.5. It applies international law
    - 0.6. It is not superior to national law
    - 0.7. There is no EU law applicable to the case at hand

1. *The Court partially enforces EU law:*
    - 1.1. In conjunction with national law
    - 1.2. In conjunction with international law
    - 1.3. In spite of national law
    - 1.4. In spite of international law
    - 1.5. In support of national law

2. *The Court enforces EU law:*
    - 2.1. In conjunction with national law
    - 2.2. In conjunction with international law
    - 2.3. In spite of national law
    - 2.4. In spite of international law
    - 2.5. In support of national law

The dependent variable adopts the value 2 whenever the high courts allow the enforcement of EU law ('fully'), 1 when

'partially' and 0 when it is not allowed. Within the dataset there are 1468 out of 4163 cases that fully enforce EU law (35.26 %) and 173 (4.16 % of the cases) that enforce it partially.

b) Independent Variables:

Main explanatory variables:

–*Government and political institutions against EU law:* The variable adopts the value 1 when the national, regional or local government, administration or public body is against the enforcement of EU law, because they argue that EU law is not applicable to the case at hand or because their act or national law was already implemented according to EU law. Otherwise, it adopts value 0. According to the main argument of the chapter, I expect high courts to apply EU law less when the government or administrative body is against its enforcement.

- *National government and institutions against EU law:* The variable adopts the value 1 only if the government or administration at the national or federal level is against the enforcement of EU law, because they argue that EU law is not applicable to the case at hand or because their act or national law was already implemented according to EU law, and 0 otherwise.

- *CJEU citation:* This variable codes 1 when higher courts cited the CJEU ruling either from precedent or reference, and 0 otherwise. For this variable, I expect a positive effect on the use of CJEU citations when national courts want to apply EU law with the intention of reinforcing their opinion against public institutions. To test this argument I will interact this variable with the '*Government and political institutions against EU law*' variable.

- *Judicial dependence:* Independent judges from other branches of power will face fewer constraints in enforcing EU law against political institutions. National governments may try to get advantage of some formal or informal mechanisms to discourage judges from applying EU law when it goes against domestic interests. As a proxy of judicial dependence, I used the judicial independence measure from the Latent Judicial Independence around the Globe project (1960-2010) but reversed in its values.

Website:
http://userwww.service.emory.edu/~jkstato/page3/index.html. For more information about the average level of independence across countries refer to page 149 in chapter 5).

- *Type of higher court:* This categorical variable adopts value 0 when appeal and last instance courts decide the EU law case. Value 1 when the EU law case is decided by higher courts such as Supreme Courts or similar (e.g. Cour du Cassation) cohabiting with a judicial highest authority at the national level. Value 2 when the case is decided by the highest judicial authority (e.g. Constitutional courts, Supreme Courts or similar). According to the political models, high courts will be much less likely to apply EU law than other courts. In contrast, higher courts constrained by their national highest authority will apply EU law to increase their power and judicial authority vis-à-vis its national highest judicial authority. More information about the courts included can be found in the appendix B.

Case-related variables:

–*Type of Plaintiff (EU law invoker):* This variable adopts the value of 0 if an individual is invoking EU law enforcement against the defendant; 1 if it is a firm; 2 if it is a NGO, environmental association or trade union; 3 if it is the government, administration or public body; and 4 for other actors (e.g. Ombudsmen or EU institutions). From the party capability theory (Galanter 1974; Songer, Sheehan, and Haire 1999) the resources and litigation experience of litigants affects their chances of success even in requesting adjudication. Governments, administrations, businesses and interest groups are accustomed to acting as repeat players in the courts, increasing their experience of how to deal with these issues, thus achieving success. Moreover, administrations, as well as big firms, have more resources (money and time) to expend on these cases if we compare them with mere individuals (e.g. workers). Therefore, I expect a lower enforcement of EU law when it is supported by individuals than for the rest of actors, due

to their lesser organizational power and legal experience (Slepcevic 2009).

–EU secondary legislation: The variable codes 1 if the case involves the application or interpretation of EU directives or regulations; 0 when it only involves the application of EU Treaties or similar. These provisions use a language that is more specific and clear than in the Treaties, increasing the application of EU law due to national judges having fewer doubts on its application.

–National court citation: The variable has value 1 if the high court has cited a previous national ruling, e.g. coming from the Supreme, Constitutional or regional courts; and 0 otherwise. In this case, there is not a straightforward hypothesis. On one hand, high courts may use national precedents to support EU law application against the government for the same reason that they use CJEU citations. On the other hand, the court can interpret and quote national court precedent as a contradictory signal against the application of EU law.

–Complexity: The complexity of the case presented to the national court is measured as the sum of the different EU law subject/matters that the case rests upon. The higher the complexity of the case, the less they will apply EU law.

–Legal area: The variable distinguishes diverse EU legal areas such as: Competition; Employment and Social affairs; Enterprise and Industry; Environment, health and consumer protection; Internal market; Justice and Home affairs; Research, information, education and statistics; Taxation and Customs Unions; Agriculture, Energy and Transport.

Country-related variables:

–Legal experience: The experience of national judges is measured by the number of years of EU membership. I could expect that experience may affect the likelihood that the court will apply EU law, as they know more about EU law to deal with the legal issue.

–Implemented EU legislation: Percentage of notified national measures implementing all adopted EU directives in the policy

areas showed above. Source: European Commission – Application of EU law. http://ec.europa.eu/eu_law/directives/archmme_en.htm

–EU counter-limits: Whilst Member States have generally acknowledged the principle of supremacy of European law; national Constitutional and Supreme Courts have established reservations to this doctrine, in order to preserve the autonomy of their national constitutional and legal order. The Constitutional Courts have retained for themselves the right to review whether European Union institutions act within the competences conferred upon them and respect the fundamental constitutional norms and human rights. Hence, in countries where highest courts have sentenced the doctrine of counter-limit, national courts may be more reluctant to the enforcement of EU law. Under these contexts, national courts will try to avoid the threat of appeal of their decisions when they apply EU law beyond its national limits.

–Dualism: A dummy variable codes 1 if the Member State has a dualist legal system and 0 otherwise. Poland, Czech Republic, Slovak Republic, Romania, Bulgaria, Slovenia, Estonia, Lithuania, Latvia, Cyprus, Belgium, France, Luxembourg, the Netherlands, Spain, Portugal, Greece and Austria were coded as monists, while Hungary, Italy, Germany, UK, Ireland, Malta, Sweden, Finland, and Denmark were coded as dualists. The information on legal systems was gathered from Hoffmeister (2002) and Ott (2008).

–EU support: The variable codes the results of the Eurobarometer on the question of whether citizens think that EU membership is a 'good thing'. Burley and Mattli claim that judges cannot deviate from the political preferences of the public opinion regarding European Union (Burley and Mattli 1993; Carrubba and Murrah 2005). Courts are worried about the judgment of public opinion on Europe. The more public opinion is against EU, the greater the cost to the national court's legitimacy if it chooses to apply EU law by itself. Hence, national courts are more likely to enforce EU law when the national political environment is favourable to European integration.

c) Method:

For the analysis of the dependent variable, I estimate an ordered probit model that is adequate for ordinal dummy variables.[107] Moreover, there is the possibility of finding a correlation or interdependence between rulings on legal issues decided from the same court, which would artificially deflate standard errors. To control for this situation, I introduce standard errors clustered by court, making more flexible the assumption that observations are independent. Moreover, multicollinearity among these variables was prevented. Table 6.1 shows a description of the variables detailed above and used in the analysis:

Table 7.1. Descriptive Statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
EU law enforcement	4163	0.746	0.945	0	2
CJEU citation	4167	0.429	0.495	0	1
Type of Plaintiff: Individuals	4167	0.562	0.496	0	1
Type of Plaintiff: Firms	4167	0.630	0.482	0	1
Type of Plaintiff: NGOs & Trade Unions	4167	0.034	0.182	0	1
Type of Plaintiff: Public institutions	4167	0.128	0.335	0	1
National Government and institutions against EU law	4167	0.461	0.498	0	1
Government and Public institutions against EU law	4167	0.461	0.498	0	1
Judicial dependence	4167	0.163	0.128	0	0.413
Type of Court: Appeal or last instance	4167	0.178	0.382	0	1
Type of Court: Supreme Court or similar	4167	0.688	0.463	0	1
Type of Court: Highest national court	4167	0.133	0.340	0	1
Counter Limits	4167	0.748	0.434	0	1
Support for European Union	4167	53.757	12.488	26	81
Complexity	4167	1.192	0.531	1	6
Legal experience	4167	33.094	17.840	1	53
EU secondary legislation	4167	0.802	0.397	0	1
EU legislation implemented	4167	96.779	5.423	66.7	100
National precedent citation	4167	0.224	0.417	0	1
Dualism	4167	0.406	0.491	0	1
Legal area: Competition	4167	0.145	0.352	0	1
Legal area: Employment and Social affairs	4167	0.164	0.371	0	1
Legal area: Enterprise and Industry	4167	0.185	0.388	0	1
Legal area: Environment, health and consumer protection	4167	0.160	0.367	0	1
Legal area: Internal Market	4167	0.165	0.371	0	1
Legal area: Justice and Home affairs	4167	0.085	0.279	0	1
Legal area: Research, information, education and statistics	4167	0.054	0.227	0	1
Legal area: Taxation and Customs Unions	4167	0.034	0.183	0	1
Legal area: Agriculture, Energy and Transport	4167	0.003	0.059	0	1

[107] A probit model assumes that the effect of the independent variables adopts the shape of a standard cumulative normal probability distribution, which is an S-shape, instead of a linear or logarithmic shape.

7.5. Empirical Findings

In this section, I test the political factors, among others, that drive European high courts to enforce EU law. As it has been done in chapter 5, I see in more detail these impact of the main independent variable, that is, 'national governments against the enforcement of EU law', across legal domains (see table 7.2 below). Checking the table we can observe that in all the policy areas, with no exceptions, the percentage of cases where EU law is non-enforced is higher when national governments manifestly oppose it. At the macro-level, it seems that the national governments may influence the decisions of national courts regarding the application of EU law. Considering this general pattern, what the statistical analysis will try to test is if national courts use empowerment legal instruments to challenge political institutions, like governments, and if yes, under which conditions. As it has been done in chapter 5, this analysis will defend the idea that strategies of judicial empowerment are constant across legal areas, regardless of the fact that these strategies can be more majoritarian in some policy areas compared to others, due to other factors.

Table 7.2. Application of EU law across legal areas (%) depending on the position of the government towards EU law

Legal area		Non-enforcement	Partial enforcement	Full enforcement	n
Competition	No opposition	58.20	5.08	36.72	256
	Against	73.88	7.29	18.82	425
Employment and Social affairs	No opposition	59.75	3.08	37.17	487
	Against	70.24	0.98	28.78	205
Enterprise and Industry	No opposition	55.12	6.18	38.69	566
	Against	68.14	3.98	27.88	226
Environment, health and consumer protection	No opposition	55.16	4.84	40.00	455
	Against	71.10	4.13	24.77	218
Internal Market	No opposition	55.53	3.61	40.86	443
	Against	60.16	3.19	36.65	251
Justice and home affairs	No opposition	57.67	1.53	40.80	326
	Against	59.46	0.00	40.54	37
Research, Information, education	No opposition	60.18	2.65	37.17	113
	Against	70.73	2.44	26.83	123
Taxation and custom unions	No opposition	52.63	3.51	43.86	57
	Against	48.86	1.14	50.00	88
Energy and transport	No opposition	75.00	25.00	0.00	4
	Against	63.64	0.00	36.36	11

Source: Data set of High Court and EU Law cases 2000-2010 (N=4167 decisions & 110 courts).

Looking at the empirical results showed in table 7.3, one of the most remarkable outcomes is related to the presence of a government or administrative institution against EU law enforcement. Among the full models represented in models 1 and 2 shown below, we observe at the 0.01 level of significance that the likelihood of high courts enforcing EU law is lower when this application goes against policies defended by political institutions. Therefore, high courts apply EU law less when governments and administration threat with an opposition to EU law with non-compliance or another political threat. This shows how difficult it is for high courts to challenge the policies and acts of governments and public institutions.

Table 7.3. Probit analysis of the application of EU law by high courts[108]

	MODEL 1	MODEL 2
INDEPENDENT VARIABLES	EU law enforcement	EU law enforcement
CJEU citation	0.008 [0.068]	0.033 [0.064]
Against government or public institution	-0.330*** [0.073]	
CJEU citation X against government or public institution	0.217** [0.101]	
Against national government or public institution		-0.316*** [0.084]
CJEU citation X against national government or public institution		0.209* [0.108]
	Category of reference: Type of Court: National highest court	
Type of Court: Appeal or last instance	-0.371*** [0.136]	-0.382*** [0.140]
Type of Court: Supreme Court or similar	-0.385*** [0.111]	-0.382*** [0.112]
Counter Limits	-0.197 [0.151]	-0.217 [0.148]
Counter Limits X Type of Court: Appeal or last instance	0.249 [0.204]	0.269 [0.202]

[108] A multilevel analysis has also been estimated showing similar results (see table C.1 in appendix C). In addition, I estimated the same models for dummy dependent variables collapsing the categories "full enforcement" and "partial enforcement", having identical results.

***Counter Limits* X Type of Court: Supreme Court or similar**	0.245 [0.175]	0.257 [0.175]
Judicial dependence	-0.205 [0.270]	-0.163 [0.264]
	Category of reference: Type of Plaintiff: Individuals	
Type of Plaintiff: Firms	-0.092 [0.068]	-0.085 [0.070]
Type of Plaintiff: NGOs & Trade Unions	-0.166 [0.125]	-0.175 [0.127]
Type of Plaintiff: Public institutions	0.084 [0.122]	0.111 [0.129]
Dualism	0.002 [0.082]	-0.001 [0.081]
National precedent	0.030 [0.048]	0.033 [0.049]
Support for EU integration	-0.000 [0.003]	-0.000 [0.003]
Complexity	0.006 [0.034]	0.004 [0.034]
Legal experience	0.002 [0.002]	0.003 [0.002]
EU secondary legislation	0.043 [0.061]	0.042 [0.062]
EU legislation implemented	0.008** [0.004]	0.008** [0.004]
	Category of reference: Legal area: Competition	
Legal area: Employment and Social affairs	-0.026 [0.084]	-0.030 [0.082]
Legal area: Enterprise and Industry	0.078 [0.094]	0.088 [0.092]
Legal area: Environment, health and consumer protection	0.067 [0.083]	0.041 [0.085]
Legal area: Internal Market	0.180** [0.072]	0.142** [0.069]
Legal area: Justice and Home affairs	0.120 [0.083]	0.133 [0.085]
Legal area: Research, information, education and statistics	0.043 [0.081]	0.043 [0.079]
Legal area: Taxation and Customs Unions	0.313** [0.132]	0.304** [0.132]
Legal area: Agriculture, Energy and Transport	-0.089 [0.284]	-0.060 [0.291]
Cut 1	0.711	0.769
Cut 2	0.824	0.882
Observations	4163	4163
Pseudo-R^2	0.02	0.02
Robust standard errors in brackets	***** p<0.01, ** p<0.05, * p<0.1**	

According to the arguments presented above, political institutions have several mechanisms that make them more successful, compared to other litigants. Apart of from the great amount of economic and experiential resources that they can invest on EU law litigations, the threat of non-compliance may cause a court to implement a ruling according to governments'

preferences, instead of what it would choose if it were completely independent. On the other hand, the implication of political interests in the selection of high court judges and over their careers makes judges responsive to their decisions against the government. At first sight, this finding seems to reject the argument that national courts cannot be constrained by political factors.

Regarding the second hypothesis, the results demonstrate how judges are strategic in the use of CJEU citations concerning national governments: At the 0.05 level of significance, the second main explanatory variable 'CJEU citation X against government or political institution' shows how high courts use CJEU citations to shield their judgments against competent authorities. A similar result has been found for the interaction with institutions like the national government, ministries, etc., but at the 0.1 level of significance. National courts look upon the cases already decided by the CJEU to find an answer to the issues they face and support for the application of EU law. This legitimates their decisions against the menace of non-compliance and other political threats from political institutions. Hence, the possibility of citing the CJEU reduces the likelihood of political threats affecting national courts when enforcing EU law in policy fields that run counter to political institutions. On the contrary, the levels of judicial dependence do not seem to have any additional effect, suggesting how the impact of the governments' position is constant, regardless of the differences in the relationship between the executive and judicial powers. The effects of the CJEU citations as regards to the opposition of political institutions are reported generating predicted probabilities for different scenarios in table 7.4:

Table 7.4. Predicted probabilities of the main explanatory variables

Effect of independent variables on EU law full enforcement	**Minimum values for continuous / 0 for dummies**	**Maximum values for continuous / 1 for dummies**
CJEU citation (dummy)	0.34	0.35
Against government or public institution (dummy)	0.4	0.28
Against government or public institution X CJEU citation	0.33	0.41

As we can see in table 7.4, there are substantial differences in the probability of enforcement between categories. Firstly, the rate of failure on EU law enforcement is 12 % lower when the government is involved in the litigation against the application of EU law. However, we can observe how this probability increases by 8 % when high courts find a citation that can apply to the case at hand to support their rulings.[109]

Lastly, paying attention to the type of court, we can see how the variables do not work in the predicted direction. Following the legalists accounts, we see how the highest national judicial authority (compared to other higher courts) is more prone to apply EU law. If we pay attention to the type of highest national courts considered in the sample, we may be able to explain this finding. Most of the highest national courts come from countries that have not established counter limits or reservations against EU law reception. This fact is confirmed when we control the existence of national counter limits to EU law reception, observing—as I expected—how effectively higher courts are more prone to apply EU law than their judicial superior. Nevertheless, the effect is not significant. Conversely, in countries where national highest courts have no strong inclination to protect their national powers from EU law reception, highest courts are likelier to apply EU law or willing to engage in the resolution of complicated EU legal issues because they consider themselves better equipped to deal with conflictive cases. Finally, it is also worth noting the positive impact of implementation for the application of EU law with a 0.05 level of significance.

Next, using the dataset from countries with strong judicial hierarchies, I assess whether the court is constrained by the government in its application and under which conditions. The

---

[109] In appendix C, table C.2, there is a report of the calculus testing whether the effect of CJEU citations (X) on EU law enforcement (Y) when the government is against EU law enforcement (Z=1) is different from zero and, hence, significant.

variables (see table 7.6 below) used in the analysis are the same than in chapter 5, with the exception of the following variables:

- ***Dependent variable: EU law enforcement:*** I coded the treatment that the court gave to EU legal demands alleged by litigants. To do this I used the criteria used above to classify the enforcement of EU law claims. This time the variable distinguishes between enforcement (1) or non-enforcement of EU law (0), showing how in 69.34 % of the cases EU law was enforced.

- *CJEU citation:* This variable codes whether courts cited the CJEU and, if so, the reaction of national courts to CJEU rulings (see table 2.4 in chapter for more detailed information about the categories):

0. No citation: National court does not cite any CJEU ruling

1. Compliance: National courts cite and follow or are supportive of the CJEU case, justifying their judgment in terms of the CJEU's decision

2. Non-compliance: National courts limit, distinguish or dissent with CJEU rulings. a) Limit: the court cites a CJEU case but somehow limits its impact on the instant case. b) Distinguish: the court cites a CJEU decision but distinguishes the case at hand. c) Dissent: whenever the national courts cite but explicitly dissents or disagree with the CJEU case.

Table 7.5. Courts' treatment of the CJEU rulings (Germany & Poland)

National courts' treatment of CJEU rulings	N	%
No citation	240	27.46
Comply	564	64.53
Non-Comply	70	8.01
Total	874	100

Source: Data set of German and Polish EU Law cases.

Table 7.6. Descriptive statistics (model strong judicial hierarchies)

Variable	Obs.	Mean	Std. Dev.	Min	Max
EU law enforcement	874	0.693	0.461	0	1
Political institutions against EU law	874	0.594	0.491	0	1
National Government and institutions against EU law	874	0.575	0.494	0	1
National precedent	874	0.350	0.482	0	2
Complexity	874	7.917	5.678	0	60
CJEU citation: No citation	874	0.274	0.446	0	1
CJEU citation: Compliance	874	0.645	0.478	0	1
CJEU citation: Non-compliance	874	0.080	0.271	0	1
Type of court: Lower court	874	0.652	0.476	0	1
Type of court: Supreme court	874	0.319	0.466	0	1
Type of court: Constitutional court	874	0.028	0.166	0	1
Jurisdiction: administrative	874	0.686	0.464	0	1
Jurisdiction: civil	874	0.076	0.266	0	1
Jurisdiction: Social/Labour	874	0.074	0.262	0	1
Jurisdiction: constitutional	874	0.030	0.173	0	1
Jurisdiction: fiscal	874	0.131	0.338	0	1
Legal experience	874	48.979	5.460	0	53
Judicial dependence	874	0.133	0.090	0	0.221
Counter limit	874	0.946	0.225	0	1

In the empirical results showed in table 7.7, one of the most remarkable outcomes is related to the presence of a government or administrative institution against EU law enforcement. Among the models represented in models 1 and 2 showed below, we observe at the 0.05 level of significance the likelihood that high courts enforce EU law is reduced when this application goes against national policies defended by public and/or national level institutions. Therefore, and according to the previous analysis presented above for EU-25 members, national courts apply EU law less when the government threats with its opposition to EU law with non-compliance or another political threat, showing how difficult it is for national judges to challenge the policies and acts of governments and public institutions.

Table 7.7. Probit analysis of application of EU law in Germany and Poland for all type of courts

	Model 1	Model 2
INDEPENDENT VARIABLES	EU law enforcement	
	Category of reference: CJEU citation: No citation	
CJEU Citation: Compliance	0.260 [0.183]	0.258 [0.179]
CJEU Citation: Non-compliance	-0.815** [0.343]	-0.976*** [0.340]
***Political institutions against* EU law**	-0.364** [0.185]	
Political institutions against EU law X CJEU Citation: Compliance	0.768*** [0.231]	
***Political institutions against* EU law X CJEU Citation: Non-compliance**	0.303 [0.408]	
National Government and institutions against EU law		-0.400** [0.184]
National Government and institutions against EU law X CJEU *Citation*: Compliance		0.789*** [0.230]
National Government and institutions against EU law X CJEU Citation: Non-compliance		0.545 [0.404]
	Category of reference: Lower courts	
Type of court: Supreme court	-0.111 [0.685]	-0.129 [0.686]
Type of court: Constitutional court	1.203 [0.943]	1.286 [0.946]
EU counter limit	1.207* [0.640]	1.188* [0.642]
Type of court: Supreme court X EU counter limit	-0.564 [0.690]	-0.549 [0.692]
Type of court: Constitutional court X EU counter limit	-1.479 [0.907]	-1.570* [0.912]
National Precedent	-0.014 [0.114]	-0.007 [0.114]
Complexity	0.015 [0.013]	0.014 [0.013]
	Category of reference: Administrative	
Jurisdiction: Civil	-0.055 [0.235]	-0.067 [0.235]
Jurisdiction: Social/Labour	-0.208 [0.251]	-0.211 [0.252]
Jurisdiction: Constitutional	-0.364 [0.416]	-0.354 [0.415]
Jurisdiction: Fiscal	-0.357 [0.232]	-0.378* [0.229]
Legal experience	-0.017 [0.011]	-0.017 [0.011]
Judicial dependence	-3.956*** [1.121]	-3.998*** [1.111]
Constant	0.786 [0.824]	0.814 [0.824]
Observations	874	874
Clustered courts	263	263
Pseudo-R2	0.216	0.216
Robust standard errors in brackets		***** p<0.01, ** p<0.05, * p<0.1**

In addition, and also according to the hypothesis related to the use of citations, the results also demonstrate how judges are strategic in the use of CJEU citations as regards national

governments and other political institutions. At the 0.01 and 0.05 level of significance respectively, the main explanatory variable 'Compliance with CJEU ruling' interacted with the opposition of political institutions shows how national courts use CJEU citations to shield their judgments against competent authorities. Furthermore, we observe how national courts are able to disagree with CJEU's doctrine, with negative consequences on the probability to enforce EU law.

In contrast with the former analysis, the *levels of judicial dependence* seem to impact the judges' decisions. National governments get advantage of some formal or informal mechanisms to influence the opinion of the courts or to threaten the compliance with national court rulings. As to the type of court, we see how the *Constitutional courts* are less prone to apply EU law when we control the existence of national counter limits to EU law reception, observing—as I expected—how effectively higher courts are more prone to apply EU law than their judicial superior. Nevertheless, the effect is only significant in model 2 and does not show any other remarkable impact among the other types of courts.

The strength of effects of the opposition of political institutions, judicial independence, use of citations, type of courts and counter limits on the enforcement of EU law in table 7.7 can be estimated looking at predicted probabilities for different scenarios. As we can see in table 7.8, 7.9 and 7.10, there are substantial differences in the probability of enforcing EU law.

Table 7.8. Predicted probabilities of the 'position of the governments' and 'judicial dependence' in strong judicial hierarchies

Effect of independent variables on the enforcement of EU law	**Minimum values for continuous / 0 for dummies**	**Maximum values for continuous / 1 for dummies**
Against national government or public institution (dummy)	0.73	0.69
Judicial dependence (continuous)	0.89	0.54

Table 7.9. Predicted probabilities of the 'type of courts' in strong judicial hierarchies

Effect of independent variables on the enforcement of EU law	No counter limits	Under counter limits
Lower	0.65	0.81
Supreme	0.8	0.44
Constitutional	0.9	0.12

Table 7.10. Predicted probabilities of the 'use of citations' in strong judicial hierarchies

Effect of independent variables on the enforcement of EU law	No opposition to EU law	National government against EU law
No CJEU citation	0.76	0.65
CJEU citation: Compliance	0.69	0.76
CJEU citation: Non-compliance	0.62	0.85

10.6. A robustness test of judges' incentives: Do judges really care about governments?

One of the main assumptions leading this chapter emphasizes the interest that judges have in maximizing the correct interpretation of EU law, namely, the implementation of their rulings by national authorities like government or administration. By analysing the position of national political institutions on EU law matters, I have tested how judges are sensible towards the legal arguments against certain EU law interpretations or enforcement. Accordingly, some of the interviewed judges pointed out the complexity in EU law cases where the government opposed the application of EU law. In that sense, the position of the government becomes a substantial burden on the shoulders of the judge, thus jeopardizing the normal enforcement of EU law:

> *"If you discover during the instruction of the case that a type of interpretation creates enormous difficulty, you try to look if there is another one, correct one, which solves this difficulty. (...) We try to look at all the aspects, if the legal solution or reasoning conducts to a*

more acceptable result (...) If there is another way, legally correct, which gives better results in terms of general interest, you have to look at it. But sometimes it's not. You have to do what you have to do." (Judge 2)

"The legislator or the administration confuses intentionally the application of the regulation, and the judge has to use the European legislation to clarify the problem. As litigants, they try to mislead you, like a squid." (Judge 1)

These statements can give us a glimpse of how judges consider the adaptation of their rulings in anticipation of a possible non-compliance by the competent authorities, in order to secure better outcomes than if they just acted myopically enforcing their most preferred EU legal or policy interpretation. As I mentioned above, this behaviour is based on the possibility that governments and other institutions may try to contain national courts from enforcing EU law, if it runs counter to their policy interest or power. If that is true, we must expect this behaviour to be more likely among judges who care about the consequences of their decisions for policies or the implementation of their decisions. As long as courts care about implementing their judgments, they have an incentive to anticipate public institutions' reactions when making their rulings concerning EU law. To test the impact of the intensity of these preferences, I make use of a dependent variable built by using the responses from the survey presented in chapter 4 to the following vignette:

"In a case where national provisions or policies stand central, the government pointed out the negative consequences of EU law application for the main social and economic institutions and policies of the country. In order to reduce the policy-impact of your decision, you decide to make an EU law interpretation that will allow an easier implementation of your ruling by the administration." The judges are asked whether they would act this way or not.

The variable adopts value 1 when the national judge would follow this path; and 0, otherwise. As independent variables, I will

use some of the variables tested in previous analyses on judges' attitudes, such as knowledge on EU law and national law, type of court, and country dummy variables (see description in chapter 3). In addition, the model includes variables measuring the relevance of certain policy factors considered by judges when they have to make a decision: 1) implementation by national authorities; 2) political consequences of their rulings; 3) policy objectives.[110] In addition, we added a variable showing judges' trust in their governments.[111]

Table 7.11. Logit of the judges' adaptation to the government's preferences[112]

	Model 1	Model 2	Model 3
Judge values implementation of rulings by national authorities	0.466*** [0.141]		
Judge values political, social or economic consequences of their rulings		0.378*** [0.127]	
Judge values policy objectives			0.681*** [0.249]
Type of court	0.089 [0.303]	0.211 [0.303]	0.162 [0.301]
Knowledge of EU law	-0.444** [0.203]	-0.525** [0.205]	-0.448** [0.199]
Knowledge of national law	0.050 [0.257]	0.030 [0.256]	0.036 [0.253]
Trust in national government	-0.106 [0.146]	-0.052 [0.139]	-0.012 [0.137]
Spain	0.463 [0.356]	0.374 [0.354]	0.018 [0.365]
Observations	190	190	192

[110] *Relevance of policy factors:* These three variables measure whether judges consider any of these factors during the judicial decision making process, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree. The correlation between these factors ranges between 0.25 and 0.48. For more information, see question 13 of the questionnaire in Appendix A.

[111] *Trust in national government:* The variable measures the intensity of trust in Spanish and Polish governments, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

[112] The analysis is restricted to those countries where these questions were added in the questionnaire, that is, Poland and Spain.

Pseudo-R^2	0.07	0.06	0.06
Standard errors in brackets	* significant at 10 %; ** significant at 5 %; *** significant at 1 %		

Observing the results reported in table 7.11, we notice how the three indicators are significant at 1 %, showing that judges feel more constrained by the position of the governments when they are worried about the implementation of their decisions and its political consequences. According to that, judges who are afraid of political retaliations but still interested in enforcing their legal interpretations correctly, will make use of the EU instruments, like CJEU rulings, to overcome these threats.

The impact of judges' motivations in the adaptation of judges to government's' desires tested in table 7.11 are reported generating predicted probabilities for different scenarios in table 7.12.

Table 7.12. Predicted probabilities of judges' motivations

Effect of independent variables on adaptation of judges to the governments' preferences	Minimum values	Maximum values
Judge values implementation of rulings by national authorities (continuous variables)	0.39	0.81
Judge values political, social or economic consequences of their rulings (continuous variables)	0.41	0.76
Judge values policy objectives (continuous variables)	0.51	0.89

10.7. Conclusions

In this chapter, I have tried to give a response to one of the recurrent questions asked by political and law scholars, to be precise: Do political factors explain the enforcement of EU law by national courts? This study gives some preliminary answers to this question, supported by empirical evidence. Following the arguments that the literature offers on the topic, I have tested how public institutions can constrain European higher courts in their

decisions. Among other arguments, the government has within reach some economic, experiential and, most importantly, institutional resources that can constrain the decisions made by higher courts concerning EU law.

Significantly, high courts—aware of these political threats—try to avoid them by empowering themselves through CJEU citations, in order to legitimize their decisions vis-à-vis competent authorities. This behaviour shows the importance of CJEU citations, as a sort of cooperation between CJEU and national courts, for the implementation of EU law. According to previous studies about the reason for national courts to use CJEU jurisprudence, national judges usually cite CJEU as a normal strategy in those cases where it is possible that national institutions challenge the enforcement of EU legislation.

To sum up, these findings confirm the general statements of the empowerment/neo-functionalist theories, although complemented by the realist accounts. There is evidence to reassert Lisa Conant's (2002) argument from her book *Justice Contained*, that governments of the Member States find many ways around the structure of the EU and national systems to evade the full force of the law. Nevertheless, the constitutionalisation of EU law and the integration of the national judicial system in the EU system by means of cooperation instruments, such as CJEU rulings and precedents, have developed powerful mechanisms to force governments to comply with EU law demands and obligations.

CHAPTER 8. NO TAXATION WITHOUT LITIGATION: THE IMPACT OF JUDICIAL COOPERATION FOR TAX POLICY CHANGE IN POLAND

8.1. Introduction

This chapter follows the previous discussion on the enforcement of EU law and its application against national authorities—like governments, administration and higher courts—testing how national courts react to EU provisions that might contradict national legislation in contentious policy areas.[113] The main aim of this work is to discuss the validity of the arguments presented in the previous chapter, regarding the relevance of the cooperation between national courts and the CJEU for the correct implementation of EU law by national governments and higher courts. For that purpose, this chapter explores the judicial responses of national courts in the area of taxation, concretely excise duties, as a sensitive area in which States often have political and economic concerns opposed to the implementation of the European legislation (Panke 2009). The analysis tries to discern the extent to which national courts deliberately enforce

[113] The case study was selected among the policy issues from the previous analysis (see table 7.2 in chapter 7) in which I observed a significant effect of national courts intervention in the enforcement of EU law.

CJEU rulings to strike down the resistance of national governments to comply with European legislation.

The analysis of taxation in the area of EU judicial politics is remarkable for two reasons. First, despite the significance of economic rights (see Chalmers 2000; McCown 2004), most of the recent analysis on judicial enforcement focuses on the protection of social or environmental rights (see Conant 2001; Cichowski 2001; Kilpatrick 1998; Obermaier 2008; Slepcevic 2009; Stranz and Stone Sweet 2012). Current studies on the institutional interactions of national courts pay attention to the enforcement of social provisions and rights, emphasizing how labour, administrative, and social courts guaranteed and upgraded the social protection of European citizens. The case of study presented from this point forward tries to underline the relevance of the CJEU and national courts' interactions for the expansion of the freedom of movement, by ensuring that national tax rules do not discourage individuals from benefiting from the internal market, concretely by abolishing discriminatory taxes (art. 90 EC Treaty).

Secondly, taxation is an area that has always been constrained by Member States and where EU institutions have limited powers for its regulation and enforcement. Nevertheless, the CJEU through its ruling, in collaboration with other European institutions, managed to intervene on taxation policies and, in addition, to force Member States to comply with it (Genschel and Jachtenfuchs 2011). The analysed case of study will demonstrate how national courts also played a crucial role in the regulation and control of taxation policies carried out by the CJEU, by fighting, together with individual litigants, the reluctance of domestic governments to comply with the European policies. Hence, the study will provide empirical evidence of the relevance of national courts' cooperation for the regulation and harmonization of taxation.

The study shows how national courts, encouraged by litigants, rely on CJEU rulings when national governments try to contain the enforcement of EU legal provisions. The main conclusions reinforce the arguments stated by several scholars (Panke 2009;

Genschel and Jachtenfuchs 2011; Genschel et al. 2011) about the role of the CJEU for the European regulation and harmonization of taxation policies. In addition, this chapter seeks to complement these contributions by exposing how national courts integrated the CJEU rulings into their national legal systems, challenging national authorities' position against EU law. This aspect refers directly to the strategic interactions between the CJEU and the national courts (Alter 2001; Obermaier 2008, 2009; Panke 2007; Stone Sweet and Stranz 2012), and its relevance for the reception and compliance of Member States with the European demands and obligations. In last instance, the chapter seeks to test how the position of national courts towards the enforcement of CJEU rulings would have varied depending on the position of the higher courts, in this case the Polish Constitutional Tribunal.

The chapter is organized as follows: in the next section, I briefly describe the evolution of CJEU rulings on taxation policies and its relevance for the harmonization of the internal market. The second section develops the case of study describing the Polish legal dispute on excise duties on second-hand cars before the intervention of the CJEU through the Brzeziński case. The subsequent section describes how national courts, empowered by the CJEU ruling, forced the government to implement national legislation according to the EU treaties. Finally, using novel empirical evidence, I test whether the policy scenario would have changed if the Polish Constitutional Tribunal had decided to intervene in the legal dispute. The chapter will be closed with the conclusions of the analysis.

8.2. The CJEU and non-discriminatory tax policies: Regulating through multilevel litigation

Since the creation of the European Economic Community, the CJEU has shaped the regulation of taxation by constraining the taxation policies of the Member States (Genschel and Jachtenfuchs 2011). Despite the competency limitations of the

European institutions to legislate on taxes, the EU managed, through the intervention of the Court, to constrain the Member States' policy decisions on tax. Through the competences over single market regulation that declares the European market an area without internal frontiers in which the free movement should be ensured, the EU institutions, like the Commission, the Council and the CJEU, have intervened national policies that limited these freedoms by means of national discriminatory taxation.

In the case of the Court of Justice of the European Union, the legitimization of this intervention comes from the capacity of the court to review the validity of national tax regulation with the European legislation on the subject. Thanks to the doctrine created from the particular increasing number of cases on taxation (see table 8.1), the court managed to harmonize and establish some common principles on direct and indirect taxation applicable to the EU Member States. From the 1980s, the number of CJEU rulings (see table 8.1) regulating on general harmonisation directives for individual Member States increased, affecting widely the major excises, among other indirect taxes. In a way, the successful intervention of the court was based on an increasing European legislation that provided the CJEU with very useful legal instruments and arguments against the reluctance of States to the harmonisation of these taxes (Genschel and Jachtenfuchs 2011).

Table 8.1. CJEU rulings on taxation (1958-2007)[114]

	1958-1967	1968-1977	1978-1987	1988-1997	1998-2007
Excise and other indirect tax	2	19	49.5	68	102
Total tax jurisprudence	4	39	88	209	417

Source: Genschel and Jachtenfuchs (2011)

[114] These numbers refer to cases filed either as a preliminary reference or as infringement procedures.

Nevertheless, these analyses omitted how national courts had contributed to overcome the weakness of the European institutions and had forced Member States to comply with their obligations (Kelemen 2011). National courts, empowered by CJEU rulings, also played an important role for the harmonization of tax regulation by compelling national governments to comply with EU law. To illustrate this situation, I will analyse the implementation of the Council article 3.3 of the Directive 92/12/EEC [115] and articles 25, 28 and 90 of the European Community Treaty (now art. 28, 30 and 110 TFEU, respectively), affecting the Polish excises duty on second-hand vehicles, concretely articles 80 and 81 of the Polish Act of 23rd January 2004.

8.3. The Excise Duty Act and the national litigation

Since the early accession of Poland to the EU, there has been a controversy concerning the compatibility of the Excise Duty Act of 2004[116] with the European principles. The Polish act imposed a duty on the first registration of a car. While the taxation of cars by excise duty falls within non-harmonised areas, the calculation method leading to discrimination of imported cars caused doubts on the conformity of this tax, under the prohibition of tax discrimination in article 90 CE.

This legal conflict made second-hand car owners file cases at the Polish administrative courts to settle the dispute. However, there were varied judgements regarding the compatibility of the Polish excise with the EU law (Jaremba 2011b; Lazowski 2008). While some courts allowed the claims for the reimbursement of

[115] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.

[116] Ustawa z dnia 23 stycznia 2004 r. o podatku akcyzowym.

unduly levied tax[117] by applying the *Simmenthal* doctrine, other judges dismissed the demands as unjustified, like in the case of the Regional Administrative Court in Lublin.[118] The legal scenario turned more complex when national courts decided to involve the CJEU and the Polish highest courts in the equation, to determine the compatibility of the Polish provisions with the European regulation.

In June 2004, Mr. Brzeziński (hereinafter Mr. B.) purchased and imported a second-hand car from Germany. Mr. B. paid the excise duty accordingly, and few days later claimed its reimbursement, arguing that the administration charged him with a duty that was contrary to articles 23, 25 and 90 of the EC Treaty. The Custom Office in Warsaw rejected his reiterated claim and complaints. As a result, Mr. B. initiated proceedings at the Regional Administrative Court in Warsaw, in the same legal terms, against the decision of the Custom Office dismissing the reimbursement. This same court interrupted the procedure to refer a question to the CJEU about the compatibility between the European and national provisions.

Meanwhile, on a similar case, the judges from the Regional Administrative Court in Olsztyn decided to refer a question to the Polish Constitutional Tribunal regarding the contested provision, questioning its constitutionality in conjunction with article 90 EC of the provisions.[119] In the proceedings, the Ministry of Finance and the government remarked the financial consequences of the case. The Polish Constitutional Tribunal considered the case as

---

[117] For example, judgment of Regional Administrative Court in Łódź, Case I SA/Ld 980/05, *Anna X v. Dyrektor Izby Celnej w Łódź* [9th November 2005].

[118] Judgment of Regional Administrative Court in Lublin, Case III SA/Lu 690/04, *X v. Dyrektor Izby Celnej w Bialej Podlaskiej*. [25th May 2005].

[119] The Decision of the Regional Administrative Court in Olsztyn, Case I SA/Ol 374/05) on the submission of a legal question to the Constitutional Tribunal [16th November 2005]

inadmissible in its decision of December 2006[120], before the resolution of the preliminary reference. It stated that the doubts about the compatibility conflicts between the Polish and EU law should be referred by Polish courts to the European Court (Bobek 2008b), but reserving its jurisdiction to handle-EU law when there was a conflict with constitutional matters (Lazowski 2008).

Once the Polish Constitutional Tribunal decided not to protect the position of the government, the Minister of Transport and Building altered the regulations by introducing uniform lower rates in 28th March 2006. The government, forecasting a possible intervention by the EU institutions, modified the taxes by lowering the excise duty, eluding the situation of discrimination for the new taxpayers. This situation might have been encouraged by the threat of a likely unfavourable CJEU ruling granting the reimbursement of the similar previously closed cases, producing considerable legal pressure and economic costs to the government. By solving the situation of the current taxpayers through legislation reforming, the government might have thought that the CJEU would feel satisfied and would at least limit the temporary effects of the reimbursement. This strategy was reiterated in the position expressed during the Joined Cases *Nádasdi and Németh* at the CJEU[121]. In order to avoid or to minimise the financial consequences of the CJEU ruling, the Polish government was involved in the case against the Hungarian excise duty act by submitting a written observation. In the observation they asked for the limitation of the temporary effects of the judgment, presumably because it believed that if the court proceeded to such a limitation it would have an effect on the pending Polish case (Somssich 2011).

---

[120] P 37/05 Procedural decision of 19th December 2006 of Polish Constitutional Tribunal.

[121] Joined cases C-290/05 and C-333/05 *Ákos Nádasdi v. Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága* and *Ilona Németh v. Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága* [2006].

The government's reform, however, only solved the situation of the new cases; still leaving opened the cases of those customers who paid the higher rate before this regulation. The new tax was much lower (75 PLN) than the previous one applied (500 PLN), opening the debate on whether the old customers who paid a higher rate could apply for a reimbursement of the difference between the old and the new tax (Czech and Barcik 2007). Neither the Constitutional Tribunal nor the government answered this question, or they tried to avoid it strategically. Nevertheless, this plan to contain the extensive effects of a retroactive reimbursement was quashed when, first, the General Advocate in 21st September 2006, and the CJEU after, in 18th January 2007, decided.

8.4. The Brzeziński jurisprudence and its implications for policy change

At Luxembourg, the dispute on the compatibility of the Polish excise duty act was settled by the CJEU[122] providing, not only a clear guideline on how to proceed, but also a forceful instrument for the enforcement and compliance of EU law by the government. On 18th January 2007, the Court offered a judgment that declared the national provisions to be in breach of the EU law, ending with the incongruence of the multiple interpretations given by administrative courts and administrative bodies, and compelling the administration to reimburse the money with no temporal limitation, just like the government had feared. The Court assessed the compatibility of the excide duty in the light of the article 90 EC that seeks to ensure the neutrality of internal taxation, as regards competition between imported and domestic manufactured products. The CJEU found that national courts should preclude the excise duty, insofar as the amount of the duty imposed on second-

[122] C-313/05 *Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie* [2007].

hand vehicles acquired in a Member State other than Poland exceeds the amount due for the same duty in the purchase of similar vehicles already registered in the country. Therefore, the Court concluded that article 90 EC was infringed where the tax charged on the imported product and that charged on the similar domestic product were calculated differently based on diverse criteria that led to higher taxation being imposed on the imported product.

In line with the CJEU ruling, the Regional Administrative Court in Warsaw quashed the decisions of the Customs Office that refused to uphold the Mr. B. application seeking reimbursement of excise duty paid in respect of the intra-Community acquisition of a second-hand car. The Administrative Court ruled that the Customs Office's decision, and similar ones, were unlawful insofar as the customs authorities had failed to take into account the prohibition of discrimination enshrined in Article 90 EC. Accordingly, the Polish court granted Mr. B. the right to reimbursement of the excise duty paid, by asserting the authoritative position of the CJEU in this subject to change the national jurisprudence on this topic.[123] Still, the decision was very controversial. For instance, the Gdańsk court[124] raised some concerns on how the ruling should be interpreted and enforced (Jaremba 2011b: 953). Two years later, the Regional Administrative Court in Białymstoku had set out the same question in case C426/07 *Krawczyński*[125].

Nevertheless, the Warsaw court stated that it was the competence of the administrative authorities to determine the precise amount and proceeding for reimbursement. Despite the initial reticence, and because of the multiple sentences enforcing the Brzeziński ruling, the Polish government modified the relevant articles of the law. In July 2008, one year and a half later, they

---

[123] III SA/Wa 254/07 [6th March 2007], Regional Administrative Court in Warsaw.

[124] I SA/Gd 570/08 [16th October 2008], and I SA/Gd 330/08 [5th August 2008], Regional Administrative Court in Gdańsk.

[125] C-426/07 *Dariusz Krawczyński v Dyrektor Izby Celnej w Białymstoku* [2008].

passed a new act on the return of overpaid excise duties on intra-community acquisitions or imports of passenger cars, providing for a special proceeding for the reimbursement of the taxes levied in violation of EU law. In the meantime, national court cases started to shake up the administrative and governmental inactivity by basing the calculation methods of the reimbursement amount on existing provisions of the Polish Fiscal Code passed in 2006. Moreover, the European Commission through its infringement proceedings, after its letter of formal notice sent in 2005, exerted a combined pressure that reinforced the judgments of the CJEU.

In 2007, after the CJEU ruling, a great number of Regional Administrative Courts laid down decisions affecting similar provisions (see table 8.2). The multiplication of unfavourable rulings put a lot of pressure on the government to come up with an instrument to end the judicial uncertainty and ambiguity about the rules concerning the proceedings and calculus of the reimbursement. As a result of the litigation and administrative claims, reinforced by the combined pressured of the Commission, the Polish government, by the end of 2008, reimbursed the amount of PLN 104 million (approx. EUR 24,791,000) in excise duties (Somssich 2011).

Table 8.2. Polish litigation (sentences) on the compatibility of the Act of 23rd January 2004 on excise duty (art. 80 and 81) with articles 25, 28 and 90 European Community Treaty (now art. 28, 30 and 110 TFEU)

Courts		2004	2005	2006	2007	2008	2009	2010	Total
Supreme Court	Cases	0	0	0	1	0	1	0	**2**
	Cases citing Brzeziński	0	0	0	1	0	0	0	**1**
Supreme Administrative Court	Cases	0	1	1	54	17	17	16	**106**
	Cases citing Brzeziński	0	0	0	26	8	8	6	**48**
Regional Administrative Courts	Cases	0	*5*	*16*	*991*	*93*	*76*	*22*	***1203***
	Cases citing Brzeziński	0	0	0	347	64	23	5	**439**
Constitutional Court	Cases	*0*	*0*	*1*	*0*	*0*	2	1	***4***
	Cases citing Brzeziński	0	0	1	0	0	0	1	**2**
All courts	Total Cases	**0**	**6**	**18**	**1046**	**110**	**96**	**39**	**1363**
	Total cases citing Brzeziński	**0**	**0**	**1**	**374**	**72**	**31**	**12**	**515**

Source: LexPolonica

As we can see, courts at all levels, including the Supreme Administrative Court, accepted and applied the CJEU doctrine, later supported by the Krawczyński case ruled in 2008. It seems that the Warsaw Regional Administrative Court set a relevant precedent for the Polish national authorities. Further judicial cases followed this in order to legitimize the void of the national legislation, and to discipline those courts reluctant to misapply an excise duty that clearly contradicted the European Treaties, resulting in a uniform application of EU law.

Examining a sample of cases extracted from the Polish databases used in chapters 5 and 7 (see table 8.3), we can see that after the CJEU delivered its ruling for Brzeziński in early 2007, in most of the cases (155 out of 170) the reimbursement of the excise duty on the basis of the EU law was successfully invoked. As a common strategy, during the first months after the CJEU ruling, Polish courts reinforced their decisions with the Brzeziński precedent to quash the decisions of the Customs Office and the legislation of the government.

Table 8.3. Description of Polish litigation (sample=170 Polish sentences)

Year	Successfully invoked	Unsuccessfully invoked	CJEU Brzeziński	National jurisprudence	Regional Adm. Court	Supreme Adm. Court
2006	1	0	1	1	1	0
2007	133	5	129	43	127	11
2008	10	3	12	5	12	1
2009	5	4	8	4	9	0
2010	6	3	3	5	8	1
Total	155	15	153	58	157	13

Source: LexPolonica

In the light of such developments, how can the government's policy change be explained? The Brzeziński decision by the Warsaw Administrative Court thwarted the diversified Polish jurisprudence as regards the application of the excise duty on imported second-hand cars, which allowed the government to justify the non-reimbursement. As we noticed in table 8.2 and 8.3, the precedent path played an important role on the implementation

process as it served to persuade the national authorities to change the legislation.

After observing the behaviour of the Polish courts, we might wonder which factors mobilized Polish judges to enforce CJEU rulings against the non-compliers. To test this fact, I make use of one of the vignettes designed to study the behaviour of Polish courts when national law contradicts EU law. In this specific case, the vignette tries to offer a description of a situation where the national court has the opportunity to enforce a CJEU ruling that declares the incompatibility of national legislation:

> *In a range of judgements, the CJEU has ruled that a certain national provision is in conflict with European law. You have to judge over a case whereby this national regulation stands central. However, the national legislator has not taken any action so far to change this national regulation. Although you do not agree with the interpretation of the CJEU, you follow this interpretation, because you believe that European law takes priority over national law.*

Polish judges were asked whether, under these conditions, they would or would not enforce the supremacy of EU law supported by CJEU against the interest of the national authorities. From a sample of 116 responses, we observed how 62.07 % of the judges would enforce the CJEU ruling, while a 37.93 % would not consider the opinion of the Court, keeping the national regulation in force. Therefore, what factors lead judges to apply CJEU rulings to make national legislators comply with the EU demands? For that purpose, I estimated a logit regression using most of the variables of the previous analysis in chapter 4. Moreover, I added the 'trust in Polish government' and 'trust in European Commission' as explanatory variables. These variables measure the intensity of trust in the Polish government and in the European Commission, using a five-point scale variable (0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much).

Table 8.4 shows the results of the statistical analysis. While model 1 represents the outcome when using trust in government as

independent variables, model 2 shows the analysis for trust in the national parliament. The results are clear, regarding the relevance of the judge's evaluation of national institutions for the resolution of this political puzzle. First, we might appreciate, according to the findings in chapter 3, to what extent it is relevant that judges trust in the CJEU for the enforcement of its rulings when national law contradicts EU law. Second and more significantly, is the impact of the evaluation of the national authorities responsible for the correct implementation of EU law. In this case, we see how the more they trust in the Polish executive and parliament, the lower is the likelihood for a judge to enforce a CJEU ruling annulling the national legislation, and vice versa: the less they trust, the more they enforce CJEU rulings. In such cases, judges will use the CJEU ruling to overcome the reluctance of national governments that, from their point of view, are not trustworthy for several reasons (e.g. threat of political reprisal, governmental inefficiency, corruption level, manipulation of the judge's independence, etc.).

Table 8.4. Factors leading the implementation of CJEU rulings against national authorities

	Model 1 Executive	Model 2 Legislative
Trust in Polish government	-0.727*** [0.268]	
Trust in European Commission	0.444* [0.265]	
Trust in Polish Parliament		-0.449** [0.212]
Trust in European Parliament		0.266 [0.217]
Trust in Polish Constitutional Tribunal	0.135 [0.306]	0.069 [0.307]
Trust in the CJEU	0.688*** [0.266]	0.628** [0.252]
Type of court	0.004 [0.485]	0.014 [0.461]
Knowledge of EU law	0.514 [0.381]	0.448 [0.367]
Knowledge of national law	-0.120 [0.373]	0.024 [0.368]
Constant	-1.679 [1.358]	- 1.897 [1.348]
Observations	113	112
Pseudo-R^2	0.15	0.12

Standard errors in brackets *** significant at 10 %; ** significant at 5 %; *** significant at 1 %**

The strength of effects of trust in institutions for the implementation of CJEU rulings against national authorities in table 8.4 are reported generating predicted probabilities for different scenarios. As we can see in table 8.5, there are substantial differences in the probability of enforcing CJEU rulings against national institutions such as the polish government and parliament.

Table 8.5. Predicted probabilities of Trust in Polish government, parliament and CJEU

Effect of independent variables on the implementation of CJEU rulings against national authorities	Minimum values	Maximum values
Trust in Polish government (continuous variable)	0.87	0.28
Trust in Polish parliament (continuous variable)	0.78	0.37
Trust in CJEU (continuous variable)	0.23	0.79

Therefore, I can assert how the process of adversarial legalism defined by Kelemen at the European level can be extended for the case of national courts. The CJEU is not the only main instrument that EU institutions have for promoting the compliance with EU law; national courts, after their empowerment for reviewing EU rights and the improvement of access to justice for litigants, have also become the main trustees for exercising political control on behalf of EU institutions, on bad-performing or non-trustable national governments and administrations. As a result, we see to what extent and why national courts have been—and still are—central in the reception and enforcement of EU law into the national legal systems.

8.5. What if the Polish Constitutional Tribunal would have limited the application of EU law? A counterfactual analysis

To conclude the analysis I present an alternative interpretation of the Polish case concerning the potential role that Constitutional courts can play in this kind of conflicts between the European and the national legal orders. As mentioned previously, the judges from the Regional Administrative Court in Olsztyn sent out a question to the Polish Constitutional Tribunal (PCT) [126] questioning the constitutionality, in conjunction with the article 90 EC, of the national provisions. However, the Polish Constitutional Tribunal declared the case inadmissible, by asserting that Polish judges should address the CJEU their doubts about the compatibility conflicts between the Polish and EU law (Bobek 2008b).

Considering that, I wonder whether Polish judges would react differently to the Brzeziński case if the Polish Constitutional Tribunal had restricted the application of EU law to the case. For that purpose, I presented a similar case to the surveyed Polish judges to test whether their position or decisions would have changed with the position of the Polish highest court. That is, whether national judges are sensitive to the doctrinal constraints imposed by the Polish Constitutional Tribunal. The test examines the responses given by judges when asked to answer both of the questions below. They had to choose from three similar paths of behaviour, allowing us to see whether there was an alteration in their behaviour once the Polish Constitutional Tribunal changed the rules of the game, and in which direction. The scenarios are:

Scenario without the intervention of the PCT: *"You are uncertain whether or not a national provision is in conflict with an EU provision. In this case, national provision stands central. However, one of the litigants invokes a CJEU ruling stating that the national*

---

[126] The Decision of the Regional Administrative Court in Olsztyn, Case I SA/Ol 374/05) on the submission of a legal question to the Constitutional Tribunal [16th November 2005].

regulation is contrary to EU law and not applicable. Consequently..."

Scenario with the intervention of the PCT: *"You are uncertain whether or not a national provision is in conflict with an EU provision. In this case, national provision stands central. However, one of the litigants invokes a CJEU ruling stating that the national regulation is contrary to EU law and not applicable. By contrast, the Constitutional Tribunal has ruled that this EU provision should be applied restrictively because it is affecting fundamental national rules or legal values. Consequently..."*

For each question, judges had to choose from three alternatives on how they would react: A, B and C, representing gradually their commitment with the application of CJEU rulings (see the wording in table 8.6). Obviously, the wording of option A was modified depending on whether the PCT had precluded the application of EU law or not.

Table 8.6: Aggregate responses of the Polish judges in the two scenarios

	Without PCT intervention	**With PCT intervention**
A) I would preserve national provisions from CJEU interpretation / I would follow the Constitutional Court interpretation	11.50 %	58.26 %
B) I would interpret national law in accordance with European law	63.72 %	20.87 %
C) I would follow the CJEU interpretation and apply the EU law instead of the national law	24.78 %	20.87 %
Number of Polish judges	113	115

n= 113-115 polish judges

The table speaks for itself, showing how the position of the judges certainly changed with the position of the PCT. Once the Constitutional Tribunal expresses a strong claim against the application of EU law, the percentage of judges supporting the application of the CJEU interpretation decreases around 4 %. More relevant is the reaction of those who decided to make use of their judicial review powers of the national legislation without

involving the European court. Under a constitutional constrained context, 43 % of these judges changed their position. At the same time, the number of judges who supported the application of the PCT ruling raised dramatically by 46 %.

Observing table 8.7 below, we are able to see where these transfers took place. Each row shows how the responses of the judges in the scenario 'without the PCT' are allocated within the responses given for the second scenario 'with the PCT intervention'. That would help us see whether judges are consistent with their behavioural path, or on the contrary, they would change their opinion depending on an institutional shock, that is, the position of the PCT with reference to EU law enforcement. The grey zones underline those areas whereby a transfer of opinions took place. Looking at the percentages reported, we see how the doctrinal clash between the PCT and the CJEU has polarized the legal responses of the judges, giving pre-eminence to the ruling of the Constitutional Polish Tribunal. Looking at the row corresponding to response B for the scenario without the intervention of the PCT, we can see how 43 % of the judges changed their position and supported the opinion of the Constitutional Tribunal, while the transfer of those judges in favour to the CJEU is almost marginal (8 %). Also relevant is the congruence of those judges who chose A before the intervention of the PCT, maintaining their opinion. Finally, we can observe that some judges who supported the CJEU previously, changed their position radically to the one supported by the PCT (35 %).

Table 8.7. Transfer of judges' responses

	With PCT intervention		
Without PCT intervention	**A: PCT**	**B: Interpret**	**C: CJEU**
A: Apply national law	13 100 %	0 0 %	0 0 %
B: Interpret	43 59.72 %	23 31.94 %	6 8.33 %
C: CJEU	10 35.71 %	1 3.57 %	17 60.71 %

n= 113 polish judges

In previous chapters, there are explanations of the micro-mechanisms that lead to these behaviours. *Mainly, it is the judges'* attitudes towards judicial institutions and towards the relationship between the national and European legal system (e.g. compatibility between legal systems, supremacy of EU law, among others) that may provoke the changes to their positions. These findings clarify the situation of judges under context of Constitutional pluralism, "where two or more high courts [...] can claim authority to resolve legal disputes about the scope, content and applicability of a right, and no single high court can directly impose its authority on the other" (Stone Sweet and Stranz 2012: 97). In Poland, the pluralism in the constitutional system was settled after the decisions made by the Polish Constitutional Tribunal on the Polish Accession Treaty [Case K 18/4 (11.05.2005)] and on the European Arrest Warrant [Case P 1/05 (27.04.2005)]. Through these, the Polish court bestowed itself with the competence of reviewing and examining the application of EU law under the Polish fundamental legal principles.

The findings have proved to what extent Polish judges are loyal and attached to the PCT. Nevertheless, it is worth mentioning that Polish judges still use the CJEU to empower their own legal authority, and subvert the rulings of the PCT (Alter 2001; Stone Sweet and Stranz 2012). Moreover, the counterfactual analysis shows us how the application of the Brzeziński case could have been contested more if the PCT had decided to circumvent the power of the CJEU.

8.6. Conclusion

The case study showed that national courts influenced national *authorities in the correct implementation* and compliance of EU legislation. By applying the Brzeziński doctrine in multiple cases, national courts forced the government, administration and parliament to end judicial uncertainty concerning the technical

details of the reimbursement. In accordance with the empowerment and Eurolegalism theories, I find out how policy change takes place more efficiently in countries where national courts accept and apply the CJEU jurisprudence. Consequently, the cooperation of national courts with the CJEU served as a strategy to: 1) enforce legal and policy interpretations; and 2) extract other benefits such as the legitimization of their decisions, reducing the likelihood of parliament override or executive non-compliance (as stated in chapter 7). That is, national courts used CJEU citations to challenge national measures on grounds of incompatibility with European laws and to extend their judicial review powers (Obermaier 2008; Tridimas and Tridimas 2004).

Moreover, further analysis on the behaviour of Polish courts provided some nuances to these findings. First, we observed how the use of CJEU rulings is conditioned both by their attitudes towards the performance of the Court and of the non-compliers, like national governments and parliaments. Second, we observed the relevance of the position of the PCT for the implementation of CJEU rulings by national courts. The low profile of the Polish Constitutional Tribunal in this contentious political topic, allowed national courts to easily adopt the guidelines received from Luxembourg. However, we should be cautious with the political interpretation of the position of the PCT concerning the law cases discussed here. It seems that the case was clear on how the conflict between EU and national law should be solved, and, for that reason, the PCT decided to delegate on the CJEU the resolution of the conflict, preventing a doctrinal conflict that may have harmed its reputation as highest constitutional interpret.

CHAPTER 9. ON EU LAW SUPREMACY

9.1. Introduction: The Politics of EU legal doctrine

Over the years, the CJEU has developed several doctrines (e.g. supremacy, direct effect, proportionality, state liability, etc.) that empowered the judicial review powers of the national judiciary on the acts of the government, administration and parliaments. National courts, particularly through the EU law supremacy doctrine, have been gradually bestowed with stronger judicial review powers that legitimize the revision of national legislation according to EU policies; especially when national authorities did not fulfil their European obligations or when national laws/policies contradict the main principles of EU legislation.

In this sense, national courts, when acting as EU courts in the context of a coherent and integrated European legal order (Maduro 2009: 375), might legitimize their EU law decisions through these principles/doctrines to force compliance. Therefore, we can appreciate how the CJEU has created useful doctrines for judges to attain the correct enforcement of European legislation, protecting national judges when enforcing EU law. However, there is still uncertainty about *under which circumstances* national courts evaluate EU law supremacy as a relevant doctrine to intervene in policy/legal areas.

The main aim of this work is to understand the principal mechanisms behind national courts enforcing the EU law supremacy doctrine, and for this purpose, I study the diverse institutional and attitudinal elements that play a role during the

judicial decision-making. The chapter will try to answer specifically how judges come to have their specific preferences as regards to EU law supremacy; by analysing to what extent the institutional context and their evaluation towards institutions affect their assessment and application of the EU law supremacy. For this purpose, I will review some aspects addressed by Karen Alter (2001) and other scholars, about the extent to which judges agree with EU law supremacy differently. However, I will also try to *innovate* on this topic by considering the impact of attitudes towards supranational institutions, their position within the national judicial hierarchy, and their interaction with national governments.

The chapter particularly studies to what extent political and judicial incentives and constrains affect the enforcement of EU law supremacy, analysing diverse explanations to national courts' behaviour. As main conclusions, the chapter covers: 1) to what extent institutional trust influences national judges' opinions towards the EU law supremacy doctrine. I observe how national judges, displeased with the functioning of national judicial institutions like Constitutional Courts and satisfied with the CJEU, value this doctrine more for the correct functioning of the EU legal order. 2) The relevance, according to EU legal studies, of this doctrine as a rule for judges to solve conflicts between EU and national legislation, especially among those in higher courts, which are mostly engaged in the resolution of legal conflicts. 3) The citation of the supremacy doctrine to support EU law enforcement against the national policies protected by the government

This chapter is organized as follows: in the next section, I briefly describe the principal innovations of this study in the context of EU studies. The second section discusses and frames empirically the relevance of judges' preferences towards EU law supremacy. The third section explores the different theories and institutional explanations put forward to explain why national courts enforce EU law supremacy. The subsequent sections are divided into the two empirical strategies: 9.5 and 9.6; used for

testing the hypotheses presented. Each empirical plan contains a description of the data, variables and methods followed during the quantitative analysis. The chapter is closed with the conclusions.

9.2. The judicial enforcement of EU legal doctrines by national judges: An old brand new research field?

The study of this kind of enforcement[127] is relevant for several reasons. From a political point of view, these are the most challenging decisions against national authorities, policies and legislation with two clear consequences:

1) By definition, the assertion of the EU law supremacy doctrine affects the validity of the challenged national provisions. Hence, the enforcement of EU law against national law precludes the application of the latter. This replacement of national law with EU law may determine the future development or orientation of governmental policies shaping the allocation of rights and benefits under EU legal grounds.
2) The implications of the judicial enforcement of EU law for national policy development make national courts vulnerable to political and institutional pressures to influence their judgments. Despite the increasing independence of the judiciary in modern democracies, political institutions, such as governments and higher courts, still retain faculties to react and to contain EU law application against national law (see chapter 3 and 7). National courts, anticipating these *ex-post* threats, will look for

[127] National judges can choose different types of EU law enforcement. Another example of EU law enforcement is the application of EU law in conjunction with national or international law. This last possibility tries to harmonize national law with EU law instead of precluding the application of national law.

institutional solutions like the CJEU doctrines to force compliance with their rulings.

In the light of these consequences of EU law supremacy enforcement for the national policy and legal system, it is important to assess the factors that drive national judges to enforce this powerful doctrine, relevant for reviewing whether national legislation is in accordance with EU law or not.

From an academic point of view, there is no exhaustive and in-depth political empirical analysis of the application of doctrines by national courts. Recently, political scientists such as Dorte Martinsen (2011) have emphasized the debate on CJEU legal doctrines, pointing out the importance of the *CJEU proportionality doctrine,* as a tool for restraining national and administrative reaction to the judicial Europeanization of their national policies. Similarly, I state that the judiciary, by applying the principle of EU law supremacy, possesses a powerful tool to solve conflicts between EU and national legislation, as well as to increase the persuasiveness and credibility of EU law application, especially to strike the balance between supranational and national principles in legally incompatible contexts. In the light of the consequences that EU law supremacy enforcement has for the national policies and legal systems, it is important to assess the factors that drive national judges to consider this kind of doctrine as a powerful and relevant instrument for the application of EU law. The dataset built on judges' profiles in combination with Francisco Ramos's (2003; 2006) data for the study of legal EU law practices of Spanish national courts, offers, for the first time, a unique opportunity to cover this field.

9.3. Mapping national judges' preferences towards EU law supremacy: A new methodological approach

Before analysing how judges' value the CJEU doctrine on EU law supremacy, I present a depiction of *how do judges look upon the EU legal order?* That is, how do judges from the sample

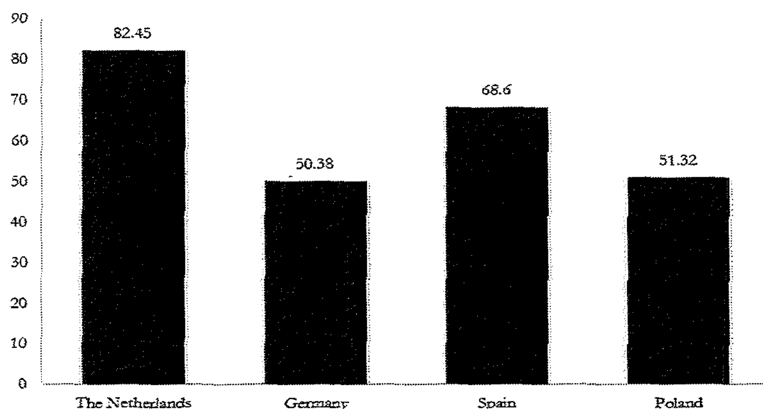
consider the relationship between the EU and national legal system, by asking whether *they think that EU legal order stands above the national one?* The analysis on the acceptance of the precedent of EU rules over national rules has been focused mainly on national Constitutional courts, which mostly contested the application of this principle, underestimating the relevance of these principles for other types of national courts and, moreover, for their interaction with political institutions.

The following figure shows the several positions towards the supremacy of the EU legal order over the national legal system of the judges surveyed. In figure 9.1, we observe to what extent national judges 'strongly agree' or 'agree' with the idea that EU law stands above national law. As we can observe, the picture is diverse, with respect to the acceptance of the supremacy of European Union law. For Dutch judges, the acknowledgement of supremacy of the EU legal order is less problematic than for the rest of nationalities. In this case, the precedence of EU law over national law is less challenging, as the Dutch Constitution solved the issue, recognizing the supremacy of international law over national law (Alter 2001; Claes and de Witte 1998). For the rest of countries, the supreme status of EU law remains uncertain, although national judges seem receptive, and, as Karen Alter remarked, European Union law supremacy came as part of the *acquis communautaire*. Nevertheless, contrary to her statement, the EU law supremacy over the national legal order is not a widely accepted principle, observing some cross-country variation (at least among the judges within the sample)[128].

---

[128] Even though it is not the main aim of this chapter, table C.3 in the appendix offers a statistical analysis explaining which factors explain these attitudes.

Figure 9.1. Percentage of judges who agree: "EU law stands above their national legal order"



n= Germany (131 judges), the Netherlands (127), Spain (109) and Poland (112). EU law *stands above national legal order*: The variable measures whether judges consider European law to be a legal order standing above national law and its intensity, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

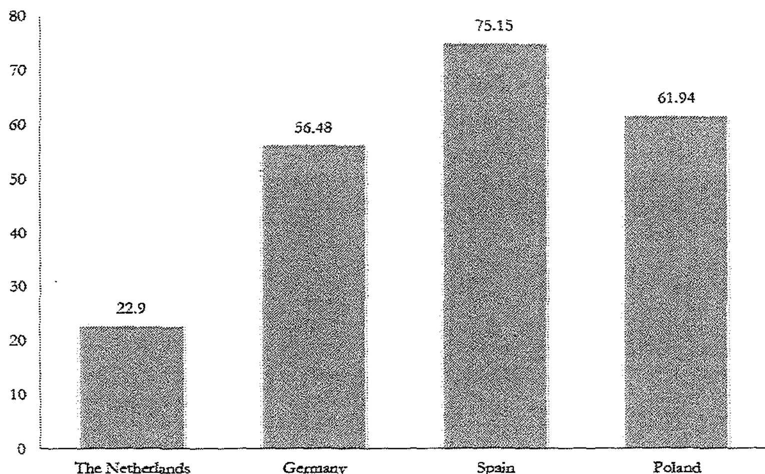
Why do judges consider the supremacy doctrine essential for the EU legal order? EU law supremacy as a rule for conflict resolution

According to the previous literature, the supremacy mandate offers a final resolution rule for legal conflicts in situations where the application of EU law against national law becomes a complex and sensitive issue (Avbelj 2011). As far as national judiciaries are concerned, the question of what to do in the event of a conflict of rules turns it into an issue of European law where the CJEU doctrine establishes the way to proceed. In that case, this doctrine warrants the uniform executive enforcement of EU law in every Member State, as well as its effectiveness.

Moreover, as I mentioned above, these are the most challenging decisions against national authorities, policies, and legislation, determining the future development or orientation of national policies and jurisprudence. In this sense, the principle of supremacy is useful as it creates a binding precedent that other judges must follow and comply with once it is stated that EU legislation takes precedence over national law. Even this mandate could also be directed to other national institutions such as government, parliaments, and administration, forcing them to comply and change their legislation according to their European obligations, by serving as an authority argument for encouraging national authorities to initiate procedures to change their policies.

Figure 9.2 offers a general picture of whether the sampled judges evaluate the principle of precedence of EU legislation over national law *as essential for the EU legal order*. Looking at the graph, we can appreciate how this principle is much valued for the functioning and legal integration of Europe among those judges exposed to potentially more conflictive contexts, compared to the Netherlands. Conflictive systems are those in which two or more legal systems co-exist and the supremacy of one over the other is not generally acknowledged. Accordingly, a legal system becomes more conflictive as the number of judges who believe that the EU legal order stands over the national order decreases. This conflict becomes more evident when higher courts establish limits to EU law (Germany, Poland and Spain). So, the consideration of this doctrine would become extremely useful for judges when they are walking on the sides of the limits established by these courts.

Figure 9.2. Percentage of judges who agree: "the supremacy principle is essential for the EU legal order"

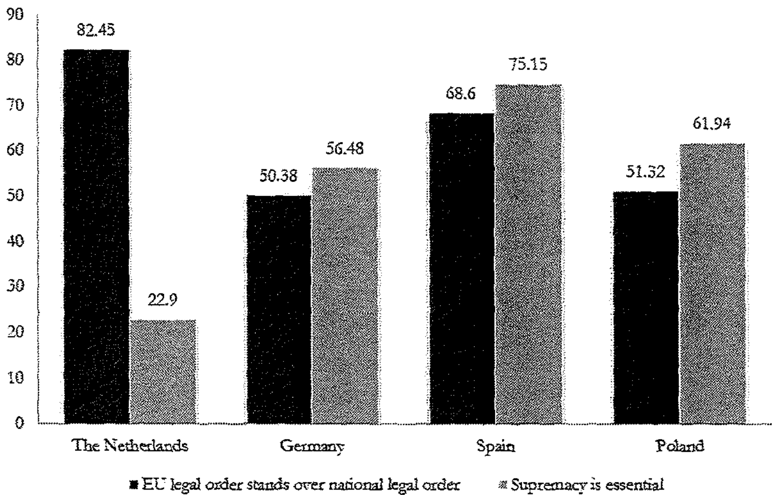


n= Germany (131 judges), the Netherlands (127), Spain (109) and Poland (112). Supremacy doctrine is essential: The variable measures whether judges think that the principle of precedence of Community law is essential for the European legal order and its intensity, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

Therefore, and as a general rule, I state that the position adopted on supremacy doctrine depends largely on the institutional self-interests of the judge, which are, at the same time, determined by the institutional framework in which the judge is placed. However, before entering the in-depth explanatory analysis let me first specify the relationship between judges' views on the supremacy of EU law over their national legal order, and their assessment on the doctrine that tries to clarify this relationship (see figure 9.3 below). Undoubtedly, we observe a positive relationship between the conflict of the national legal system and the usefulness of this doctrine for the integration of EU law. As we could expect, judges positively consider this principle

essential, when they still perceive some contradictions between the national and the European legal orders. According to this picture, judges seem to value that rule positively, as a useful instrument for solving potential legal conflicts.

Figure 9.3. Opinion of judges towards the supremacy of EU law and its use as a legal doctrine (%)



n= Germany (131 judges), the Netherlands (127), Spain (109) and Poland (112).

In the following sections I will focus on the political and institutional determinants under which national courts decide to use EU law principles and how. To answer these questions, I briefly present below the different models given to explain this new way of cooperation between national courts and the CJEU.

9.4. Two models on the judicial enforcement of EU law supremacy

As in the case of CJEU citations, the preferences of national actors towards the use of supremacy might be explained offering some hypotheses from the legal and the political accounts (see table 9.1 below):

Table 9.1. Models of EU law supremacy enforcement

Models of Judicial Cooperation	Characteristics	Theoretical approaches endorsing this account
Legal Model	- The main aim of judges is to keep the internal logic of the EU legal/national systems and correctness of their decisions - CJEU supremacy doctrine is used for interpretative purposes and to solve conflicts between EU and national legal norms - National courts do not use supremacy doctrine to discipline political institutions	- Legalism (team model & neo-functionalist) - Unified governmentalism - Pluralist governmentalism
Political Model	- National courts want to maximize their power (EU judicial review powers) and policy influence - National courts use the EU law supremacy doctrine strategically to enforce EU law and challenge *national* legislation.	- Reconsidered judicial empowerment - Unconstrained judicial empowerment - Inter-judicial competition

Legal Model: By following the 'Team' and '*neo-functionalist*' legal models (Kornhauser, Ramos, Stone Sweet 2004), judges share the common goal of maximizing the number of correct decisions given their resource constraints, and not conflicting interests. Because of this goal, courts in different levels

of the hierarchy and legal contexts have different incentives that influence the use of doctrines in each case. Under this scheme, national judges consider the CJEU doctrines a rule for solving legal conflicts.

The Political Model: Regarding the CJEU preliminary references, this model offers some political explanations that may be complementary to the use of CJEU doctrines for legal interpretative purposes. Generally, this model considers that judges are interested in promoting their judicial power and autonomy from other branches of powers or courts, to influence the policy process with their decisions (Alter 2001; Weiler 1993). Accordingly, national judges will enforce EU law supremacy strategically, to legitimize their policy influencing decisions that have no space in national legal rules, in order to avoid criticism from political and judicial actors.

The differences between these two models begin at the level of the assumptions made to explain the enforcement of the CJEU doctrines. The main purpose is to test both accounts by first looking at the attitudes towards the application of the supremacy doctrine and, later, at the decisions made by national courts applying effectively this doctrine as an observable phenomenon. The use and combination of the findings in these two datasets of attitudes and decisions, will allow for testing different hypotheses concerning the application of EU law supremacy.

9.5. An analysis of attitudes towards the use of supremacy

9.5.1. Hypotheses, variables and method

In this section, I explain how the institutional configuration affects judges' preferences towards the EU law supremacy doctrine. To answer these questions, next I will present, develop and discuss the diverse (but compatible) accounts available for its explanation.

- **Legal conflict:** I state that, as we observed in figure 8.3, this doctrine will be highly valued in contexts were the judge foresees the potential level of conflict between the national legal order and the European framework (Stone Sweet and Brunell 1998a). That situation will become more evident in legal contexts where a Constitutional court or higher court is acting as a supreme judicial authority establishing limits to the reception of EU law, like in Germany, Poland and Spain. So, the consideration of this doctrine would become extremely useful for national judges when they walk on the side of the limits established by these courts. Under this situation, the supremacy mandate offers a final resolution rule for legal conflicts, which regulates the relationship between legal orders (Avbelj 2011).

***h_1**: National judges value the EU law supremacy doctrine more in legally conflictive systems than in open ones.*

This relationship would be stronger when judges individually believe that the national legal order is incompatible with EU law. Therefore, judges that interpret that the EU principles are alien to the national legal order will value this rule highly, as a mean to overcome the potential difficulties generated by these incompatibilities at the individual level. Here, I am pointing out that national judges may have different institutional and legal understandings of these compatibilities. For that reason, it is important that national judges acknowledge the problem in the coexistence of the supranational and domestic order, for a positive assessment of EU law supremacy as an essential rule to solve legal conflicts.

***h_2**: National judges value EU law supremacy more in conflictive legal systems when they perceive a strong incompatibility between EU and national principles.*

Judge's position within the national judicial hierarchy: Alternatively to Karen Alter's argument, I hypothesize that courts

in different levels of the judicial hierarchy have different functions and most of the difficulties that courts face have to do with designing an adequate problem law-solving strategy given the kind of cases they decide (Kornhauser 1995; Ramos Romeu 2006). While judges from lower parts of the hierarchy tend to resolve the most common issues concerning the application of EU law, and to defer problems of bigger complexity to higher instances; higher courts hear more complex cases than other courts in the legal system, such as those related to the compatibility between European and national law.

Under these assumptions, lower courts, after studying the case, will resolve the problems that are most common to them, and will defer to higher courts the resolution of disputes between the European and the national legislation. For lower court judges, engaging in the resolution of this kind of conflict is costly. Given that their resources, time and knowledge is limited, and that they have to deal with many other cases, a practice of deferral is ideal for them not only to maximize their time, but also for the correctness of the decisions. For this reason, lower court judges will give answers to EU law issues in the best knowledge available to them, and will defer to higher instances if it is necessary to generate new jurisprudence on whether a national law contradicts EU legislation in successive appeals. At the same time, higher court judges, mostly engaged in working out the basic doctrinal structure, will solve complex issues regarding legal conflicts, serving as a reference for other courts from the judiciary.

Therefore, I hypothesize that the nature of the issues solved will differ across the levels of the judiciary. On the one hand, lower courts will defer to higher courts new and complex issues about the compatibility of EU law with national law, while, on the other hand, I expect the dockets of higher courts to be composed of difficult cases related to the application of EU law supremacy. In contrast with lower courts, higher courts are better equipped to deal with problematic issues; hence, one expects these courts to be more openly engaged in supremacy cases and to offer lower court levels some doctrinal solutions to these types of conflicts.

Nevertheless, this argument is not extensible to Constitutional courts, which are eager to protect their power and domestic legal order from the influence of the CJEU, as we will see later.

In a similar vein, the EU law supremacy doctrine serves higher courts, not only as a rule for conflict resolution, but also as an authoritative argument to discipline lower court judges and defect criticism under the coverage of the CJEU doctrine when they make a decision that other branches of power are not prone to like. In such a case, higher court judges would rely on EU law supremacy under the threat of review from other branches of power by forcing them to follow the superior EU law and exclude the conflicting national legislation.

h_3*: *Higher courts value EU law supremacy more than lower courts.

Trust in courts – Institutional judicial compensation theory: According to the compensation theory tested in chapter 3, national judges value the CJEU supremacy doctrine more when they think that their supreme national judicial authority is not performing well due to their lack of judicial independence or disagreements with the decisions made by the higher court, for instance. In this case, the EU law supremacy doctrine serves as an authoritative argument to challenge the decisions made by a distrusted court. This strategic relationship strengthens when national judges have a good opinion of the institutional performance of the CJEU (see chapter 4). Accordingly, I hypothesize:

h_4*: *The higher the opinion national judges have of the functioning of the CJEU, and the lower their opinion of the national highest court, the more essential they consider the EU law supremacy doctrine for the EU legal order.

Variables description: For the analysis I use a model combining individual/attitudinal variables (judges' attitudes,

institutional evaluations, and legal knowledge) with the main meso and macro institutional/contextual variables studied by the literature (type of court, country), on national judges' assessment of the supremacy doctrine:

- *Supremacy of EU legal order:* The variable measures whether judges consider European law to be a legal order standing above national law and its intensity, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

- *Supremacy doctrine is essential:* The variable measures whether judges think that the principle of precedence of European law is essential for the European legal order and its intensity, using a five-points scale variable: 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

- *Trust in the Court of Justice of the European Union (CJEU):* The variable measures the intensity of trust in the CJEU, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

- *Trust in the highest national court:* The variable measures the intensity of trust in the German, Spanish and Polish Constitutional courts and the Supreme Court in the Netherlands, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.

- *Type of Court:* The variable adopts the value of 0 when the judge belongs to a district court or similar, 1 if they belong to a regional or appeal court, and 2 if the judge works in a Supreme Court (only available for Poland and Spain).

- *Knowledge of EU law*: A 5-point scale measuring their subjective evaluation of their knowledge of European Union law. The variable ranges from 'Poor' to 'Very good' knowledge of EU law.

- *EU legal principles are alien in the national legal system:* Five-point scale that measures whether judges agree or disagree with the following statement: "I think that European legal principles are alien to my national legal system". 0: strongly

disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.

- *Country:* This variable identifies national judges' country: 0: The Netherlands, 1: Germany; 2: Poland, 3: Spain.

Method: For the analysis of the dependent variable, I estimate an ordered logit model that is adequate for ordinal variables. The analysis will take into consideration the influence, as independent variables, of several factors such as knowledge of EU law, trust in the CJEU and in the national highest court (Constitutional or Supreme), type of court, and others. In the analysis, multicollinearity among variables has been prevented.

9.5.2. Empirical analysis:

The following section is devoted to the empirical testing of the hypotheses presented above, using statistical techniques. According to these hypotheses, the results in table 9.2 (and represented in figure C.1 of Appendix C) show how judges are more confident on the principle of EU law supremacy when 1) they distrust the national highest court, and 2) they trust the CJEU.

Table 9.2. Ordered logit analysis of the determinants of the usefulness of the EU law supremacy doctrine

	Model 1	**Model 2**
EU legal order stands over national legal order	0.697***	0.673***
	[0.101]	[0.102]
Trust in national Supreme/Constitutional Court	-0.238**	-0.244**
	[0.116]	[0.117]
Trust in the Court of Justice of the European Union	0.318**	0.325***
	[0.125]	[0.126]
Knowledge of EU law	0.498***	0.479***
	[0.108]	[0.109]
Country: The Netherlands (category of reference)		
Country: Germany	1.267***	0.315
	[0.268]	[0.421]
Country: Poland	1.429***	0.322
	[0.287]	[0.492]
Country: Spain	2.321***	1.946***
	[0.308]	[0.493]

EU law principles are alien	-0.408***	-1.069***
	[0.108]	[0.265]
Type of court	0.373*	0.393**
	[0.196]	[0.197]
EU law principles are alien X Germany		0.866***
		[0.298]
EU law principles are alien X Poland		0.946***
		[0.345]
EU law principles are alien X Spain		0.249
		[0.375]
τ_1	-0.171	-1.052
τ_2	2.47	1.642
τ_3	3.251	2.426
τ_4	6.171	5.380
Observations	479	479
Pseudo-R^2	0.1695	0.1788
Standard errors in brackets	*** significant at 10 %; ** significant at 5 %; *** significant at 1 %**	

The effects of the institutional judicial trust on EU law supremacy are reported generating predicted probabilities for different scenarios in tables 9.3.1, 9.3.2 and 9.3.3. There are substantial differences in the probability of 'EU law principle is essential' between categories. We observe in table 9.3.1 that this probability increases as 'trust in the CJEU' increases. While the evaluation of the EU law supremacy doctrine is lower at high levels of support for the national highest court. Mostly, it seems that highly trusted and well-performing national institutions hinder the use of CJEU doctrines. Hence, the crucial question of who decides the limits of EU law application is not only a question for the CJEU or for the highest national court: it is also a task for the national judges who have to solve, within the system, by refereeing the performance of these courts. Therefore, supremacy will only operate successfully if the CJEU is able to establish a basic level of trust with national courts.

Table 9.3.1. Predicted probabilities of the main explanatory variables for agreeing with EU law supremacy as essential

Supremacy is essential (Agree=3)	Trust in NHC	Trust in CJEU
Do not trust	0.61	0.32
Hardly trust	0.58	0.38
Neither trust nor distrust	0.55	0.45
Trust	0.51	0.51
Trust very much	0.47	0.56

As to the position of the judge in the judicial hierarchy, (see model 2 in table 9.2 and predicted values in table 9.3.2 below) we see how judges agree more with this doctrine as we go up in the judicial hierarchy. This finding supports, in some sense, the idea presented by Alec Stone Sweet and Thomas Brunell (1998: 90) about the role played by appellate courts in the legal integration process:

> *"Because a core function of appellate judging is to resolve disputes involving legal interpretation and conflict of law, we would expect the appellate courts to be far more involved in the construction of the legal system than Alter imagines them to be."*

Thus, it is the specialization of intermediate and higher courts in solving legal conflicts concerning the supremacy of EU law over national law, compared to lower courts, that explains why those courts value this principle more.

Table 9.3.2. Predicted probabilities by the type of court for agreement with supremacy as essential

Supremacy is essential (Agree=3)	Agree	Strongly agree
Lower	0.48	0.05
Intermediate	0.55	0.08
Higher	0.60	0.12

It seems that the higher we go in the judicial hierarchy; judges agree more with these statements. The only instance in which this does not hold up is concerning the outcome category of 'strongly

agree'. Here, those belonging to higher courts are (statistically) significantly more likely to rate EU law supremacy as essential. However, the substantive effects are minimal for 'strongly agree'. This directly relates to the following overall impression: the great majority of changed probabilities suggested by the predicted effects occur in the three middle categories. On consideration, such results are not surprising: the overwhelming percentages of respondents (around 79 %) choose the three middle categories. As such, the baseline probabilities for being in between these categories are high, meaning that any changes as a function of the covariates will be correspondingly big.

Finally, I take a closer look to the institutional variation across countries and their relevance for the evaluation of EU law supremacy. For that purpose, I included one variable per country, leaving the Netherlands as a category of reference, assuming that Dutch judges will have fewer incentives for asserting the supremacy doctrine due to the higher openness of their system compared to the other countries. Indeed, the results show how judges in contexts with conflictive legal systems value EU law supremacy doctrine more, confirming the idea that national judges value this doctrinal tool as a conflict resolution rule under contexts susceptible of generating doctrinal disputes between EU and national law. In addition, we can observe how this relationship increases when national judges perceive a high degree of compatibility between EU and national constitutional principles, especially in the cases of Germany and Poland. In these situations, judges value EU law supremacy even more, as a rule to solve disputes about the conflictive application of EU law as well as a source of political legitimacy. Table 9.3.3 shows the predicted probabilities for the effect tested above:

Table 9.3.3. Predicted probabilities of the main explanatory variables at their maximum levels[129]

Supremacy is essential	**Agree (=3)**	**Strongly agree (=4)**
EU law principles are alien	0.05	0
The Netherlands	0.23	0.01
Germany	0.55	0.08
Poland	0.55	0.08
Spain	0.61	0.24
The Netherlands X EU law principles alien	0.38	0.03
Germany X EU law principles alien	0.32	0.64
Poland X EU law principles alien	0.46	0.48
Spain X EU law principles alien	0.60	0.12

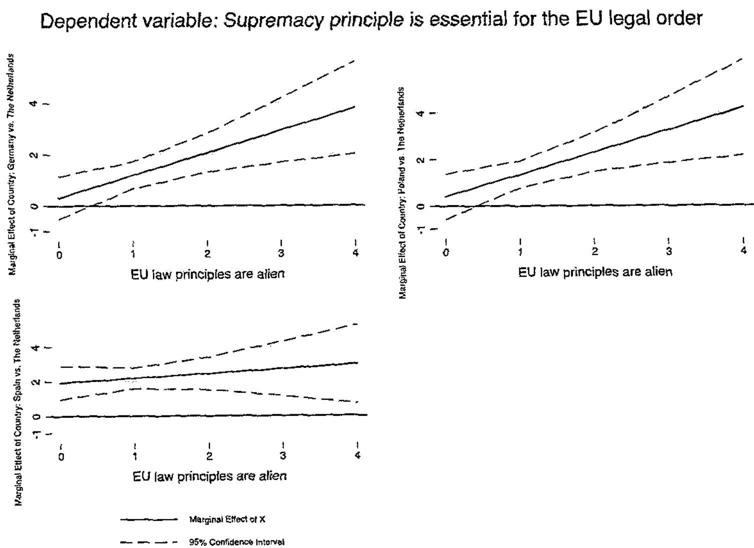
I should remind that the legal contexts considered as conflictive in this analysis are those where national Constitutional courts have established counter-limits (Martinico 2010) or reservations to European doctrines, in order to preserve the autonomy of their national constitutional and legal order.[130] To test the magnitude and significance of the coefficient on the interaction term presented in table 9.3.3 above (Brambor et al. 2006), figure 9.4 reports the marginal effect of the country variables on the consideration of 'supremacy as essential' being conditional upon the individual opinion as to 'the incompatibility between the EU and national legal order'. Thus showing the solid sloping line representing how the effect of each country variable changes with the evaluation of the compatibility. In addition, the upper and

[129] The predicted values for "the Netherlands" were calculated using "Spain" as a category of reference.

[130] Within our dataset these cases are: **Germany**: Judgments of the German Constitutional Court (BVerfGE) *Solange I* [BVerfGE 37, 271 (29.05.1974)], *Solange II* [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)] *Brunner case* in Maastricht [BVerfGE 89 (12.10.1993)], & Lisbon Treaty [BVerfGE, 2 BvE 2/08 (30.6.2009)]; **Spain**: Judgment of the Spanish Constitutional Court in Maastricht [Decision n° 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004], and, **Poland**: Polish Constitutional Tribunal judgment on the Polish Accession Treaty [Case K 18/4 (11.05.2005).

lower bounds of the confidence interval above the zero line help us confirm the statistically significant effect of the interactions.

Figure 9.4. Marginal effect of country dummy variables on "supremacy principle is essential" as the incompatibility between EU and national legal principles increases



9.6. An analysis of decisions on EU law supremacy

9.6.1. Hypotheses, variables and method

In this section, I will test how the institutional interactions with domestic institutions may affect judges' decisions enforcing EU law supremacy. I will proceed in the same way as in the previous section.

Governments' position: Following the *judicial empowerment* model, national courts have been empowered by EU mandates/doctrines to review national transposition and implementation of EU law. Over the years, CJEU jurisprudence has extended the powers of the national judiciary vis-à-vis other branches of power (Weiler 1991; Weiler 1994) to carry out this purpose, increasing (or establishing) additional judicial review powers on the acts of the government, administration and parliaments. CJEU doctrines and EU Treaties have offered the chance for national courts to challenge national legislation and policies relying on the EU principles and doctrines of EU supremacy. As a result, national courts can use these legal doctrines supported by the CJEU to persuade governments into complying with EU law, and to avoid the contention of EU law enforcement by national authorities.

National judges, therefore, will make use of these judicial review powers conferred by EU law supremacy doctrines against national legislation, to enforce their most preferred legal or policy interpretation. The judicial review powers, legally based on EU law principles already accepted by the national system, create expectations of compliance by *national governments* that encourage national courts to enforce it:

h_1: *National courts are more likely to enforce EU law supremacy when they rule against the government.*

In line with previous findings of this study about citations, national judges will support the EU law supremacy doctrine with CJEU rulings to reinforce its criticism against government's policies. In the same vein as other kinds of EU law enforcement, citing the CJEU may increase the likelihood of the government complying with the national court's ruling in fields that are problematic because they run counter to government interest. In this analysis, I will also test this argument, hypothesizing that:

h_2*: *National courts are more likely to enforce EU law supremacy against the government when they can support their opinion citing a CJEU ruling.

Protection of Constitutional courts' powers: In last instance, empowerment explanations are not restricted to the competition between national courts and the political and administrative institutions. As Alter points out, ordinary and Constitutional courts have different institutional incentives as regards to EU law. Ordinary (also Supreme) courts use EU law to increase their prestige and power: through the preliminary references procedure, they are able to play the higher courts and the CJEU off against each other in order to influence legal developments in the direction their prefer (Alter 1996, 1998). In the same way that Constitutional courts disapprove of ordinary courts referring to the CJEU as endangering their constitutional authority, they may also interpret the enforcement of EU law supremacy as an increase of CJEU jurisdiction at the expenses of their constitutional jurisdiction and judicial review powers within the national legal order. Hence, Constitutional courts will not enforce EU law supremacy in order to prevent the decline of their judicial review powers.[131]

h_3: Constitutional courts are less likely to enforce EU law supremacy than ordinary courts.

Data and variables: This section describes the variables and the econometric technique used for the analysis. To study the determinants of EU law enforcement against other legal national or international orders, I analyse a dataset on Spanish EU law decisions that contains information on EU law enforcement and other particular aspects. The dataset on Spanish EU law decisions

---

[131] The main difference between nationalist and inter-competition accounts is that the latter also assume diverse motivations and incentives between ordinary and higher courts as regards to EU law enforcement.

was gathered by Francisco Ramos for his dissertation and article on the adjudicatory practices in the European Courts (Ramos Romeu 2003, 2006). The dataset includes information on decisions from 1986 (year of Spanish accession to the European Union) to 2000, where courts cited EU law or the CJEU in some way or another. From around 4000 EU law cases, he randomly selected a sample of 475 decisions stratified by year.[132] Each national judgment in the dataset was codified to count and study the precedential practices of the Spanish courts. However, the author also gathered information concerning other interesting aspects of national judgments, such as the experience of Spanish courts in EU law application, the type of national court, whether the court enforced EU law against the dictates of national law or international law, among other aspects.

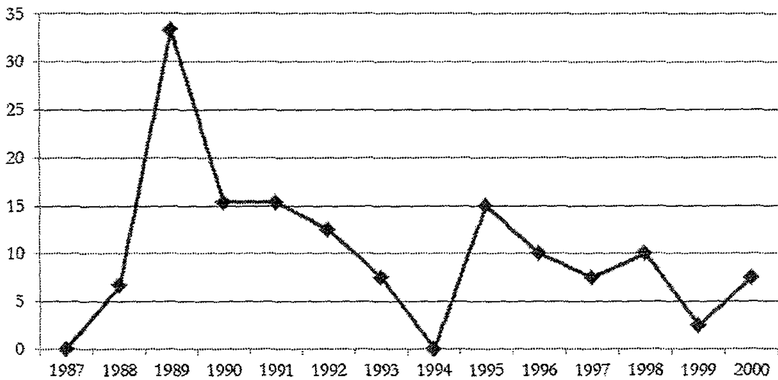
a) Dependent variable: EU law supremacy enforcement

For this study, I use one of the variables contained in this dataset to determine under which conditions Spanish courts apply the EU law supremacy doctrine against national or international law transposed into the national legal system. The variable codes "whether, in the application of EU law, the court actually finds that it has to enforce EU law against the dictates of national law or international law" (Ramos Romeu 2006: 407). In these cases, the variable codifies 1 when national courts underlined the supremacy of EU law against national and international law, and 0 otherwise. This variable provides an answer, with some limitations, to the questions of how and when national courts give primacy to EU law over national and international law. However, this dataset offers, for the first time, the possibility of measuring the application/enforcement of EU law by national courts. Within the

[132] For years with less than 40 decisions, the author included all of them and, for other years, 40 cases were selected randomly. Moreover, the author recognizes that high court decisions are overrepresented (Spanish Supreme and Constitutional Court) because their decisions are more widely reported.

dataset, 46 out of 472 cases enforce EU law against national or international law (9.75 % of the cases). Figure 9.5 plots the proportion where EU law supremacy was enforced:

Figure 9.5. Percentage of EU law supremacy enforcement by Spanish Courts (1987-2000)



Source: Ramos (2003)

b) Independent variables: Most of the independent variables are already contained in Ramos's dataset. For the analysis, I restricted to modifying the codification of some variables and introducing other variables for consideration. The dataset is exhaustive enough to control for the main hypothesis mentioned above.

Main explanatory variables:

- *National court ruled against the Government:* The variable codes 1 whenever the court ruled against the government and 0 otherwise. The judicial empowerment model predicts that national courts will empower themselves with EU law principles and CJEU doctrine to enforce their most preferred legal or policy interpretations vis-à-vis other national authorities (executive, parliament and administration). In contrast, realist or national models claim that national courts will adopt solutions according to

governments' preferences such as interpreting EU law in conjunction with national law or international law, or not applying EU law.

- *Use of CJEU citation by national courts:* This is also one of the main explanatory variables that adopts value 1 when the Spanish national court cites a CJEU decision, and 0 otherwise. As Ramos remarks, 154 out of 472 cases do this (32.63 %). Following legal models, national courts will enforce the supremacy of EU law when they find a CJEU decision supporting this supremacy of EU law over national law, or the exclusive competence of EU law institutions in this policy area. Moreover, from the neo-functionalist/empowerment model, national courts will also quote the CJEU to legitimize their EU law supremacy decisions against other national institutions. To support this last affirmation, I will introduce an interaction between the national courts 'ruling against the government' and 'the citation of CJEU rulings'. This interacted variable will allow me to test whether courts tried to shield EU law supremacy against the government quoting the CJEU.

- *Type of Court:* The variable adopts value 2 whenever the Constitutional Court made the decision, value 1 when the Supreme Court made it and 0 when other ordinary courts (High Court of Justice, Competition Court, National Audience, etc.) made the decision. The inter-court competition model (Alter 1998, 2001) claims that ordinary courts (Supreme courts or lower courts) will be more likely to enforce EU law supremacy than Constitutional courts to increase their judicial review powers over their national legal system and empower their position vis-à-vis other courts and other institutions.

Case-related variables:

- *Social policies:* This variable codes 1 if the case concerns social security, social provisions, free movement of workers, consumer protection or environment, and 0 otherwise.

- *Public body:* The variable codifies 1 if a public body is involved in the EU law case at hand, either as a plaintiff or as a

defendant, and 0 otherwise. Any type of administration (local, regional, autonomous community, national) and other public entities such as universities, hospitals, etc., have been coded as public bodies. As in the 'against government' variable, we find contradictory hypotheses for explaining the effect of the involvement of public bodies as litigants. While the realist model predicts that national courts are less likely to enforce EU law supremacy when a public body is involved, neo-functionalist empowerment models claim that courts are likelier to enforce EU law when a public body is involved to promote their most preferred legal interpretation. However, there is a major difference between those variables: 'public bodies' codes whether a public body is involved despite its position regarding EU law application.

- *Treaty enforcement:* The variable accounts for the application of a Treaty or primary law, adopting the value 1, as compared to cases relating to secondary legislation, which has value 0. The legal and empowerment model claims that national courts will be likelier to enforce EU law supremacy when national law is opposing the Treaties and main EU law principles. National courts can be more compelled to enforce EU law supremacy when they are considering primary legislation.[133] In contrast, treaties use a language that is vaguer than that of secondary legislation. This ambiguity of general rules may reduce EU law supremacy enforcement due to national judges being less sure of its application.

Country-related variables:

- *EU legislation:* The variable measures the number of legislation pieces passed by EU institutions in a given policy sector. The information was taken from Fligstein & Stone Sweet's (2001) data that distinguish between different policy areas such as free movement of goods, agriculture, transport, competition,

---

[133] The EU Treaties require EU Member States, including national courts, to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties.

taxation, and other areas. The prediction of this variable is that national courts will be more likely to apply EU law and assert its supremacy in more codified policy areas. National courts, in these cases, will have more EU legal sources at hand to oppose national or international law. New EU legislation creates new obligations and demands that national judges have to interpret and/or enforce into their national legal system. This fact will increase the probability of conflict between EU legislation and national legislation, especially when national regulations have not yet been adapted to EU demands.

- *Support for the European Union:* The variable measures the support of Spanish citizens for the European Union. The percentages have been taken from the Eurobaromenter considering the question of whether citizens think that membership of the EU is a 'good thing'. The more Spanish citizens support the EU, the more judges will enforce EU law supremacy.

- *Economic growth:* From realist models, positive attitude towards EU institutions will increase in times of economic growth. The effect of EU institutions on economic growth may also increase citizens' support for EU law and the affirmation of EU law supremacy. The Spanish GDP measures economic growth.

- *Higher Courts acceptance of EU law supremacy:* The variable describes the position of Spanish higher courts as regards to EU law supremacy. While the Spanish Supreme Court acknowledged EU law supremacy in its 24th of April 1990 judgment, the Constitutional Court acknowledged it on the 31st of May 1993. Therefore, the variable adopts for lower courts and the Supreme Court the value 0 before 1991, 0.5 between 1991 and 1993, and 1 afterwards. For the Constitutional Court, the variable is coded 0 before 1994, and 1 from the date of its own acknowledgment of EU law supremacy. [134] The inter-court

---

[134] This codification is different to the one made by F. Ramos Romeu. He has only coded the effect of higher courts' acceptance of EU law supremacy for lower courts, leaving as 0 the cases of higher courts. From my point of view, this codification is inadequate for several

competition model suggests that ordinary courts are more likely to enforce EU law supremacy against national and international law, as higher courts accept this doctrine.

- *Ideology of the government:* During this period, two political parties have been in charge of the Spanish government: the Socialist Party (left-wing) and the Popular Party (right-wing). The variable codes 1 when the Socialist Party was in office and 0 for the Popular Party. The variable will be interacted with the 'social policies' variable to measure whether national courts enforce EU law supremacy against national law preferred by the government in office.

c) Method: For the analysis of the dependent variable (1 = enforcement of EU law supremacy, 0 = non-enforcement of EU law supremacy) I estimate a probit that assumes that the effect of the independent variables adopts the shape of a standard cumulative normal probability distribution, which is an S-shape, instead of a linear or logarithmic shape. Moreover, there is the possibility of finding a correlation between cases decided by the same courts. To control for this situation, I introduce standard errors clustering regarding the type of court, making more flexible the assumption that observations are independent.

---

reasons. First, he is assuming that high courts are not bound by their own opinions and doctrines on EU law supremacy acceptance. Nevertheless, high courts should account their changes in their doctrinal position, especially when litigants have the chance to argue high courts' precedents on this issue. Second, between the Supreme Court and the Constitutional Court there is a relation of hierarchy. The Constitutional Court, as a main interpreter of the constitution, is the ultimate authority in the interpretation and determination of the primacy between national and supranational orders. Hence, we should admit that the Supreme Court, as well as the lower courts, is also bounded by the opinion of the Constitutional Court on EU law supremacy.

9.6.2. Empirical analysis

In this section, I test statistically the determinants of EU law supremacy enforcement by the Spanish courts. For the analysis, I estimated four models. Table 9.5 presents equation 1 with basic models for all courts. Equation 2 corresponds to the previous model and includes the interaction between 'CJEU citations' and 'Ruling against the government' variables. Equations 3 and 4 emulate equation 2 for both lower and Supreme courts respectively. In the following table, there is a summary of the variables used in the analysis.

Table 9.4. Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
EU law supremacy enforcement	472	.0974576	.2968946	0	1
CJEU citation	472	.3262712	.4693453	0	1
Ruling against the government	472	.2860169	.4523769	0	1
CJEU citation X Ruling against the government	472	.125	.3310698	0	1
Treaty enforcement	472	.3135593	.4644318	0	1
Economic growth	472	2.924364	1.625663	-1	5.5
Support for European Union	472	58.9197	8.392481	48.5	78
Ideology of the government	472	.6059322	.489168	0	1
Social policies	472	.3940678	.489168	0	1
Ideology of the government X Social policies	472	.2521186	.4346897	0	1
Public body	472	.75	.4334721	0	1
Type of court	472	.4661017	.6068568	0	2
EU legislation (logged)	472	4.806642	1.524765	-2.3	8.1
Acceptance of EU law supremacy	472	.7701271	.3411259	0	1

In the empirical results shown in table 9.5 (see below), one of the most remarkable outcomes in the four specifications is related to national courts ruling against the government. From the four models that appear below, we observe how at 1 % level of significance, the likelihood that national courts enforce EU law supremacy doctrine increases when the judgment goes against the government. The willingness of national judges to empower themselves vis-à-vis governments explains the application of EU law against national or international law defended by the government. Judges will legitimize their judicial review powers mentioning the EU law supremacy principle, *at the same time that*

they implement their most preferred policy or legal preferences, thus precluding national legislation.

Table 9.5. Probit analysis on EU law supremacy enforcement by the Spanish courts[135]

	Equation 1 All courts	*Equation 2 All courts*	*Equation 3 Lower courts*	*Equation 4 Supreme Court*[136]
Independent variables:	*Dependent variable: EU law supremacy enforcement*			
CJEU citation	0.840*** (0.152]	0.394* (0.235]	0.356 (0.349)	0.997 (0.662)
Ruling against the government	1.367*** (0.182)	0.953*** (0.213)	0.808*** (0.310)	1.677*** (0.593)
CJEU citation X Ruling against the government		0.770*** (0.222)	0.829** (0.347)	0.493 (0.863)
Treaty enforcement	0.365** (0.157)	0.370** (0.156)	0.227 (0.254)	0.328 (0.441)
Economic growth	0.050 (0.069)	0.062 (0.068)	0.081 (0.091)	-0.346* (0.206)
Support for European Union	0.012 (0.014)	0.013 (0.013)	0.008 (0.019)	0.031 (0.040)
Ideology of the government	0.272 (0.330)	0.373 (0.314)	-0.234 (0.503)	0.928 (0.673)
Social policies	-0.368 (0.392)	-0.385 (0.393)	-0.285 (0.430)	-0.875 (0.554)
Ideology of the government X Social policies	0.397 (0.471)	0.408 (0.477)	0.648 (0.621)	
Public body	-0.234 (0.297)	-0.190 (0.284)	0.000 (0.383)	-0.417 (0.732)
Type of court	-0.420* (0.245)	-0.403* (0.232)		
EU legislation	0.246*** (0.076)	0.242*** (0.065)	0.266** (0.120)	0.112 (0.136)
Acceptance of EU law supremacy	0.133 (0.574)	0.212 (0.555)	-0.905 (0.722)	1.713 (1.484)
Constant	-4.456*** (1.271)	-4.437*** (1.205)	-3.300* (1.841)	-5.648 (3.638)
Observations	472	472	280	164
Pseudo-R^2	0.3147	0.3268	0.3511	0.4601
Standard errors in brackets	* significant at 10 %; ** significant at 5 %; *** significant at 1 %			

135 Logit and time-series analyses have also been estimated showing similar results.

136 The inclusion of the interacted variable "Ideology of the government X Type of policy" in the last model, in which the numbers of observations have been considerably reduced, creates severe multicollinearity, and inflates the standard errors for the coefficients, making the estimated probit regression coefficients highly unreliable. To prevent this problem I excluded this variable from the last analysis for the Supreme Court.

Table 9.5 shows other important effects: According to neo-functionalist models, national judges enforce the EU legal supremacy doctrine more when the application of a Treaty or primary law is involved in the case. With reference to CJEU citations, equations 1 and 2 show how national courts enforce EU law supremacy more when they find any CJEU decision supporting EU law enforcement. In addition, this effect is more significant after interacting the 'CJEU citation' variable with 'ruling against the government'. Therefore, we see how CJEU jurisprudence in national courts has a positive impact and a higher significant effect on EU law supremacy enforcement when they are ruling against the government, and not against other kind of litigants such as firms, individuals, etc. Hence, we have an effect of CJEU citations on EU law supremacy enforcement when the government is in loss because of the court's decision.[137] This last finding confirms the hypothesis of this chapter regarding the use of CJEU citation in support of EU law supremacy enforcement against governments. National courts look at the cases already decided by the CJEU to find an answer to the issues they face and support the application of EU law supremacy, reinforcing the legitimacy of their decisions against the menace of non-compliance from the government.

---

[137] It is not always possible to know if X has a meaningful conditional effect on Y from simply looking at the magnitude and significance of the coefficient on the interaction term. It is nearly always the case that we should go beyond the traditional table of results and report the marginal effect and standard errors of X on Y across different values of Z in order to know how the effect of X on Y changes along some range of Z values (Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006). "Understanding Interaction Models: Improving Empirical Analyses." *Political Analysis* 14:63-82. These quantities of interest are reported in Table C.4 of Appendix C, showing that the effect of ECJ citations (X) on EU law supremacy enforcement (Y) when the government is against EU law enforcement (Z=1) is different from zero and, hence, significant.

The effects of the CJEU citations concerning against whom it is used, are reported generating predicted probabilities for different scenarios in table 9.6:

Table 9.6. Predicted probabilities of the main explanatory variables

Enforcing EU law supremacy	No CJEU citation	CJEU citation
Against public institution	0.1016	0.4569
Against other litigants	0.0130	0.0335

As we see in the above table, there are substantial differences in the probability of supremacy enforcement between categories. Firstly, the rate of failure on EU law supremacy enforcement is 9 % higher when the government is involved in the litigation to argue the non-enforcement. Furthermore, we observe that this probability increases by 35 % when the national court finds a citation that can apply to the case at hand.

These results shows how the realist model does not fit with the empirics, while most of the judicial empowerment hypotheses are confirmed, concluding that national courts are more prone to enforce EU law supremacy when they rule against the government. This finding discards: 1) that national courts share the same motivations and preferences as national governments or that they want to protect the national legal order from EU law reception; 2) the constraints posed by governments on national courts' behaviour are less effective under the protection of their judicial review powers bestowed by the CJEU supremacy doctrine.

Lastly, paying attention to the type of court, we observe how the variable works in the expected direction and that it has a 10 % level of significance. To make a further test of this effect, I have created a dummy variable for each kind of court: ordinary, Supreme and Constitutional Court; instead of using an ordinal single variable, estimating a probit analysis for each type of court. The estimation of the model for Constitutional courts was precluded because during the estimation of the regression, the dummy variable identifying Constitutional courts' judgments was

dropped because it perfectly predicted the 28 outcomes, given that all the decisions made by the Constitutional courts were negatively correlated with EU law supremacy enforcement. However, a mere table can show us what is happening:

Table 9.7. Distribution of decisions enforcing EU law supremacy

Ordinary Courts	67.39 %
Supreme Court	32.61 %
Constitutional Court	0 %

This finding confirms inter-competition prediction that Constitutional courts do not enforce the EU law supremacy principle because they can interpret it as a reduction to their jurisdiction and judicial review powers. Hence, it is clear that national Constitutional courts, as ultimate authorities in their legal order, will not enforce EU law supremacy in favour of CJEU powers. In contrast, lower and Supreme courts are more prone to enforce EU law supremacy against government than Constitutional courts. This effect can be explained because these courts applying EU law, not only empower their positions vis-à-vis national authorities, but also vis-à-vis Constitutional courts undertaking its monopoly on judicial review on legal norms. They try to increase their role into their national judicial system and impose their legal and policy interpretations making use of their judicial review powers bestowed by the European constitutional system.

In addition, comparing both models of lower (equation 3) and Supreme courts (equation 4), we observe that lower courts, through CJEU citations, are more likely than Supreme courts to play national authorities (governments and high courts) off against the CJEU so as to influence legal developments in the direction they prefer (Alter 1996, 1998). Lower courts try to obtain CJEU support by referring to its jurisprudence to prevent the threats of reversal by higher courts and the non-compliance of governments and administration. Meanwhile, the Supreme Court is in a better institutional position to impose its judgments over judicial and

governmental institutions, such as lower courts and the administration, without quoting the CJEU so often.

9.7. Conclusions

This chapter has explored ways of accounting for EU law supremacy enforcement, by trying to give an answer as to which institutional factors explain its enforcement. The research offers some interesting findings concerning this question; some of them clarifying my conclusions in previous chapters. Following the arguments that the literature on EU judicial politics offers, the study shows how:

1) National courts enforce the law supremacy doctrine to preclude the application of national legislation or policies by the government and empower their position against the executive.
2) How they use this doctrine as rule to solve conflicts between EU and national legislation for judges, especially Supreme courts, which are mostly engaged in the resolution of legal conflicts.
3) The relevance of trust in the CJEU for the enforcement of its doctrines. The main results corroborate empirically the conclusions made by neo-functionalist political and legal predictions for the application of EU law.

What is more important from these findings is that national courts enforce the EU law supremacy doctrine to challenge governments' position and to impose their legal or policy interpretation. Hence, having this possibility of reaction in mind, national courts will try to avoid those threats of non-compliance using EU legal doctrines, such as EU legal supremacy and proportionality, as empowerment tools at hand. In the same way, they use CJEU rulings to legitimize their decisions and force the competent authorities to comply with their ruling under the threat

of EU institutions. So therefore, national courts are confident enough that national governments will accept and comply with EU principles and CJEU doctrines that legitimize EU law enforcement. Nevertheless, despite their beliefs about government compliance, national authorities still may react to contain EU law application.

CHAPTER 10. CONCLUSIONS

In this final chapter, I will assess in what respect this study has enhanced our understanding of the political role that national courts play in the European legal integration process. The research question of this study stemmed from the literature on EU judicial politics. This literature has underlined and developed several explanations for the role of national courts in the legal integration of Europe. All these studies developed the idea that legal integration has been mainly fostered by the cooperation between national courts and the Court of Justice of the European Union. EU scholars invested a lot of effort to disentangle the political, legal, economic and social factors that mediated the success of this mechanism. Despite the huge amount of research carried out on the behaviour of national courts as EU agents, there is still need for a further explanation on how national courts potentially influenced the EU legal integration process in its day-by day gradual application.

As we have seen in this research, preliminary references are not the only mechanism used in the application of EU law. National courts, as EU courts, have at their disposal several instruments or ways to enforce EU law, which do not necessarily involve the direct intervention of the CJEU. Such instruments are the application of EU law without citations from the CJEU, the use of *CJEU* precedent or the enforcement of EU law doctrines. This conundrum has led me to contemplate in chapters 4, 7, 8 and 9 whether institutional political factors may have influenced these other methods of implementing EU law, as in the case of the use

of preliminary references. For this, I raised new questions regarding the motivations, incentives and constraints placed by supranational and domestic institutions driving the application of those instruments. In addition, in chapters 4 and 5 this work has reviewed and tested empirically the validity of some of the arguments posed by previous literature, to argue the political cooperation of national courts with the CJEU through the request of preliminary references and its enforcement.

That approach reinforced the conclusion made by political scientists that the judicial enforcement of EU law is also about politics. This idea has been fully supported by one of the first comprehensive analyses of the judicial decision-making process on EU law matters. Focusing on the question of the importance of political institutions for the judicial application of EU law, I have examined three factors, some of which were already present, in one way or another, in the existing literature on the topic of EU Judicial Politics and law studies.

10.1. Building loyalties: The relevance of institutional trust

According to European public opinion studies, the individual opinions as regards institutions and its interplay may entail important consequences for the support of European integration and institutions (Kitzinger 2003; Muñoz et al. 2011; Sánchez-Cuenca 2000). Despite the prolific research evidencing the impact of individual evaluation for several types of EU-related opinions and behaviours, this political mechanism had not yet been explicitly considered as a source for the political and institutional attachment of national judges to their role as EU judges and, subsequently, for explaining the enforcement of EU law. In part, this is still due to the scarce application of survey techniques in the field.

The findings in chapter 4 strongly suggest the influence of judges' opinions and attitudes towards institutions, both supranational and national, on their role as decentralized EU

courts. Firstly, the analyses have demonstrated to what extent and how the trust in political and judicial institutions influences national judges' attachment to the EU legal order. The main explanation refers to an individual calculus whereby national judges, displeased with the functioning of national political institutions—like the national governments and parliament—, and satisfied with the performance of European institutions—like the European Parliament—rely on the EU to empower their national position against distrusted national parliaments.

Secondly, the here named *institutional judicial compensation theory* extends its relevance to the acknowledgment of the Court of Justice of the European Union as the supreme authority on the EU legal order, in opposition to national higher courts. In that sense, national judges have more confidence in the CJEU and, subsequently, apply its rulings when they think that the legal norms that the Court represents and applies are compatible with their domestic notions of law. These findings indicate the importance of the European Court's capability to create and to promote the assimilation of a common legal framework also shared by national judges to increase the legitimacy of their functions as EU judges.

The compensation mechanisms suggest that national judges are under multiple and multilevel loyalties, which are simultaneously considered when assessing their function as EU judges (Martinico 2012b). The validity of this mechanism has been tested empirically, analysing to what extent the evaluation of European and national institutions by national judges affects their enforcement of several EU law instruments. These instruments are: the resolution of doctrinal conflicts adopting the position of the CJEU (chapter 3), the enforcement of EU law supremacy doctrines (chapter 9), or the application of EU law against the interest of other national institutions, like the executive or the parliament (chapter 8). The results observed from these analyses stressed the significance of the institutional calculus whereby national judges make their decisions with regard to EU law.

That conclusion questions, or at least establishes, some nuances to those approaches and definitions that define the application of EU law as a duty for national courts derived from the European Treaties and the rulings of the CJEU. As actors placed in a multilevel game, national judges seem to evaluate the performance of the institutions, on whose decisions they rely on for their every day judicial tasks. This fact clarifies the nature of the mandate on EU law given to domestic judges, by emphasizing the individual assessment of the role of the main political and judicial actors involved in the politics of the EU, for the exercise or accomplishment of their role as EU judges. This conclusion introduces political psychological elements that modify or affect the way national judges integrate or assimilate their duties as EU judges, by pointing whether and how European institutions are able to promote their loyalty or trust by means of the type of decisions made and their effect on the national legal systems.

If nothing else, these findings suggest that the role of *trust in institutions* should be further examined, but through a different lens. It is not simply that, in general, there is a blind obligation from the Treaties to behave as EU courts. It is, more importantly, that some judges are more likely inclined to do so depending on the role played by the institutions that define the multilevel playground in which EU law is assessed. From this point of view, the influence of institutions such as the European Parliament or the Court of Justice of the European Union is still worth examining, since it helps in predicting the process of judicial enforcement. However, a more comprehensive approach, beyond the relationship between the performance of European institutions and their evaluation by national levels, would be more accurate for capturing the impact of institutional trust, for instance by considering how the institutional design of European institutions may increase trust.

10.2. The institutional strategic interactions of courts in the application of EU law

The question of how institutions influence court behaviour has received a lot of attention from the political science perspective. However, scholars have focused more on the incentives and constraints placed by judicial or legal institutions than on those coming from political ones. In the last decade, there has been an increasing scholarly interest on the impact of national authorities on the implementation of judicial rulings, especially CJEU rulings. In this regard, Lisa Conant (2002) demonstrates how the impact of the CJEU rulings enforced by national courts has been limited in some cases by actions of 'restricted compliance and legislative overruling' by the respective governments, parliaments and administrations of Member States. Politicians and the administration may use their discretion to comply fully with their European commitments, to adapt the European rights to their preferences or institutional context, or to ignore their European demands completely. Nevertheless, the study has overlooked the idea that national judges, as strategic actors, may have the capability to anticipate the reactions of these institutions to its rulings and adapt their behaviour accordingly. This study has thus tried to fill a gap between the idea that national courts can feel constrained by institutions and the relatively narrow focus of the existing studies on how governments and administration enforce this constrain.

The findings in chapter 7 show, according to the realist/governmentalist models (Garrett 1995; Garrett, Kelemen and Schulz 1998; Kelemen 2001), that national authorities, both governmental and judicial institutions, may play a prominent role in shaping national courts' incentives for the application of EU law, as they may use their institutional power to circumvent judges' decisions. National courts still interested on maximizing the correct interpretation of EU law, also care about the implementation made by national authorities of their rulings. Therefore, and under the threat of removal, non-implementation or

an override of their rulings, national courts are less prone to enforce EU law if the competent authorities supporting national provisions are opposed to the European provisions that have to be implemented. National judges, by modifying or adapting their rulings in anticipation of a possible non-compliance by the competent authorities, expect to secure better policy/legal outcomes than if they act myopically enforcing their most preferred EU legal or policy interpretation (Carrubba, Gabel, and Hankla 2008; Ferejohn, Rosenbluth and Shipan 2007; Ferejohn and Shipan 1990). As long as courts care about implementing their judgments, they have an incentive to anticipate public institutions' reactions when making their rulings concerning EU law.

However, the findings in chapters from 5 to 9 show how the magnitude of these kind of threats is lower when national courts make a strategic use of European instruments such as CJEU precedent and its doctrines (e.g. supremacy) when applying EU law. In line with the judicial empowerment theories, I emphasized the importance of the cooperation between national courts and the CJEU. National courts, again, as strategic actors eager to protect their power control over national policies, empower themselves against those institutions to secure their interests, competences and policy/legal preferences within their own national legal and political context. In such cases, national courts use CJEU citations, preliminary references, precedent, and EU legal doctrines, against reluctant governments to enforce the compliance with its rulings and to avoid the risk of a reversal of their domestic rulings (Conant 2002). These findings are presented in relation to policy areas in chapters 6 and 8, by analysing the implementation of social security rights first, and the taxation issue after; showing how the national judiciaries indeed refer to the CJEU as a weapon to implement its decision and to force policy change on reluctant governments (*Obermaier 2008*).

In sum, I consider that these analyses helped and contributed to determine the particular mechanism related to the political use of CJEU citations and its doctrines previously pointed out in the literature, as well as its relationship with the application of EU law.

The analyses clarified the motivations and situations under which courts quoted the CJEU for the enforcement of EU law. In this sense, the study shed more light on the motivational aspects of this behaviour by providing systematic empirical evidence from judges' opinions and decisions on this regard. Additionally, it stressed the importance of the other legal instruments available to judges to force compliance. For this purpose, national judges politicize the use of, not only preliminary references, but also precedent and EU legal doctrines such as supremacy.

10.3. Combining legal and political motivations

Perhaps one of the most difficult problems to overcome for researchers on judicial politics is the consideration of institutional accounts that could directly relate to the importance of legal dynamics accounting for the application of EU law. Arguably, one could say that one of the reasons why judges apply EU law is their interest or concern in keeping the internal logic of the legal systems, be it European or national. This research was also encouraged to determine the validity of the institutional legal models and how they coexist with previous findings on the impact of politics. For this purpose—and following the literature on law and economics coming from the other side of the Atlantic—I tested how national courts rely on CJEU citations (chapter 4) and on EU law supremacy (chapter 9), in order to maximize other institutional goals such as the number of correct decisions given their institutional resources and the division of labour within the judicial hierarchy and legal system.

Under the assumptions of the team model (Kornhauser 1995; Ramos 2002), the findings show, firstly, how national judges adjudicate to the CJEU in complex EU law issues, saving the resources and time that they would have had to invest for its resolution. In this situation, national courts consider the CJEU as a specialized court who yields better signals as to how EU law should be applied. Accordingly, national judges outsource when

they find that the national judiciary faces problems that seem infrequently difficult, or new issues related to the validity of EU law or conflict of EU law with national legislation coming from new legislation. Secondly, national judges consider the EU law supremacy doctrine as a rule for solving legal conflicts (Stone Sweet and Brunell 1998b). Indeed, national judges consider this doctrine highly valuable in contexts where the judge foresees the potential level of conflict between its national legal order and the European legal framework. Thirdly, as we move higher up the judicial hierarchy, we observe an increasing probability that judges rely on adjudication to the CJEU or on the enforcement of EU law supremacy (with the exception of Constitutional courts) due to the complexity, nature and implications of the EU law cases, compared to lower courts.

There are some important implications for the study of the politics stemming from these findings. The first might seem obvious and trivial, but it is probably the most intriguing. Institutional legal motivations also seem to play an important role in the process of referencing to the CJEU and enforcement of EU law doctrines. More importantly, it seems that this is not because following one particular account will set aside the other. It rather seems to be, from the evidence of the surveys, the result of a combination of multiple incentives, such as denoting a psychological process of decision-making partially fuelled by both political and legal institutional motivations and incentives. This means that, at lest in part, the answer to the questions about why judges make use of citations is partly contained in both accounts. Thanks to the survey data and the interviews carried out, I am able to confirm in chapter 5 how judges are capable, not only to identify multiple arguments to enforce CJEU rulings, but also to see political and legal accounts as complementary.

10.4. Judicial empowerment theories revisited

This study began its introduction by posing its theoretical ambition to expand the explanatory power of the middle-range accounts of the role national courts play, by integrating the analytical strength of the intergovernmentalist theories into neo-functionalism, and in particular in judicial empowerment theories. From the neo-functionalist perspective, this study has tested the relevance of European dynamics and its side effects for the behaviour of courts, by illustrating how the EU institutional framework offers national courts enough instruments to work on integration. Nevertheless, identifying the relevance and the mechanisms behind national dynamics that may also shape or even contain the legal integration of the Union has complemented this approach.

By stressing how national political and judicial institutions impact the application of EU law, especially those that contain the reception of EU legislation, I tried to raise doubt on the neo-functionalist accounts that support a full migration of the rule-making authority from national governments to the European Union. This dissertation gives us a reason to be more sceptical regarding this point and emphasizes the importance of domestic institutions to place constraints on the dynamics promoting the legal and policy integration of Europe. It demonstrates empirically how courts can work in favour of integration, despite governments and high courts' preferences against certain EU policies. Following Gerda Falkner's (2011) advice, I tried, for the first time, to complement neo-functionalist approaches about the judicial integration of Europe by linking (inter-)governmentalist and neo-functionalist expectations in empirical terms. Although in theoretical terms, the main purpose was to explain how the dynamics of the latter are more powerful than the realist ones. The empirical identification of these mechanisms helped to understand a little bit more how judicial empowerment dynamics bypass the opposition of national institutions in the EU policy process, by

combining the theoretical, analytical and empirical strengths of both approaches.

Consequently, this dissertation tries to emphasize the role of the national dynamics, especially those containing the application of EU law instruments, as an important factor for our understanding of neo-functionalism. Although the contention of national authorities to the compliance of EU law has always been argued, it has hardly been studied or even empirically linked to the neo-functionalism. The findings in this study on the impact of political national factors provide an enriched picture of the nature of neo-functionalist empowerment dynamics. By integrating the analytical tools from other accounts, we can now theorize better and improve the explanatory power of the functionalist approaches applied to everyday judicial policy-making, and, in last instance, expand to the macro level theories of European legal integration.

10.5. The Europeanization of national courts: National judges as EU judges?

The findings presented in this thesis also have an important implication for Europeanization studies. This research has pointed out diverse mechanisms of Europeanization at work in the judicial application of EU law at the national level. In particular, this dissertation has contributed to the analysis of the Europeanization of national courts, by offering new institutional and individual factors influencing or mediating this process, and going beyond judicial Europeanization models that focus predominantly on preliminary rulings references as main indicators of the said process (Alter 2001; Conant 2002; Cichowski 2007, Golub 1996; Stone and Brunell 1998).

To begin with, the study showed to what extent individual profiles are a relevant factor for the Europeanization of national judges. In chapter 4, we have observed an interesting effect of the individual EU-related characteristics or factors in the self-identification of national judges as EU judges, such as the

evaluation of EU institutions—like the European Parliament and the Court of Justice of the European Union—or their knowledge of EU law (chapter 4). According to these results, national judges' interactions with EU institutions and legislation open the door to Europeanization.

Secondly, new evidence is given on how the domestic institutional dynamics mediate the involvement of national courts in the EU policy process. In this work, several dynamics have been identified. First, the institutional/political competition between national courts and other national institutions such as governments and higher courts, promoted the interested use of preliminary references and CJEU doctrines, enabling with its application for EU law to permeate the boundaries of national law, and, most importantly, to turn national judges into EU judges through the enforcement of these mechanisms. This finding goes in the same direction as previous studies on the use of the preliminary references. By referring questions to the CJEU and enforcing its ruling, national courts have become involved in a supranational system that allows them to exercise an additional judicial review on national regulation passed by other national institutions. At the same time, this cooperation between national courts and the CJEU gradually promoted their acceptance of their role as EU courts and the constitutionalisation of the European legal order by adopting the doctrine of supremacy, direct effect, and implied powers. Thirdly, the study has confirmed in chapters 4 and 8, how the integration of EU law also had an effect upon the structure, reasoning and judicial activity of the national judiciaries. In that case, we observed how the potential conflict between EU and national law had indeed affected the way that judges approach EU law by incentivising the use of European problem solving rules to keep the internal logic and coherence of their legal systems.

10.6. Further research: Limits and new challenges

Considering the theoretical and legal improvements contained, this dissertation would only succeed, however, if these findings help to establish a new and sustainable rebirth of the research agenda, methods and techniques in the field of EU judicial politics. From the author's point of view, this research has potentially opened new horizons in this research field, many of them deserving further investigation and improvement. First of all, focusing on individual opinions instead of decisions, we have learnt about and tested the importance of individual profiles and attitudes (e.g. institutional trust, legal and political preferences, knowledge, experience, etc.) for predicting the behaviour of national judges.

As regards this empirical finding, one of its limitations lies in the temporal and geographical scope of the individual data and subsequent analysis. Since I only managed to gather data for a few number of countries, a next step in the analysis would be to consider other Member States and replicate these analyses with a broader territorial scope. In fact, there are still many variations in the political and judicial systems and cultures of the EU-27 Member States, such as in the Nordic or common law states, that must be controlled for. Hence, it would be necessary to map the profiles of national judges from the rest of Member States by collecting similar data. Then, it would be possible to confirm robustly these findings. At the same time, it would also be necessary to improve the application of survey techniques and criteria (e.g. representativeness) by solving some of the economic and institutional constraints exposed. If we really want to make a qualitative leap in this area through the analysis of surveyed data, we must carefully consider how to deal with these limitations.

With regard to research on national court decisions, the most relevant improvement would be to find a more integrative measure or indicator of the legal factors leading to the application of EU law. In this study, I focus mainly on the design, code and investigation of the political and institutional aspect of the judicial

enforcement of EU law, but there are other aspects related with the correct enforcement of EU law that deserve closer attention. For example, the legal reasoning behind the application of EU law and whether that legal reasoning was correctly applied or not. There is also need for a proper scrutiny and assessment of the correct legal application as to their results, by considering and analysing the legal discretion of judges and the potential legal errors made when considering EU law.

Finally, it would also be interesting to extend the application of some of the analyses and methods presented here to other similar integration experiences (Alter 2008, 2012). In the same way that I have done in this dissertation, we could explore to what extent the institutional political supranational and domestic factors play a role in the national judicial enforcement of supranational law and courts' rulings. For example with the European Court of Human Rights or the Permanent Review Court of the Mercosur and their relevance for the economic or legal integration of those new regional experiences.

APPENDIX A. SURVEYS AND DATA FROM NATIONAL JUDGES ON EU LAW

The data from Germany and the Netherlands was collected from the project: "National judges as European Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands" organized by Tobias Nowak, Fabian Amtenbrink, Marc Hertogh and Mark Wissink in collaboration with the University of Groningen, the Erasmus University of Rotterdam, the Dutch Judiciary and the Hague Institute for the Internationalisation of Law. The questionnaires were distributed among civil judges working at appeal and district courts in the Netherlands, and at district and regional courts in Germany, working on civil and labour matters. The survey was run in the Netherlands from the end of April to July 2009, while in Germany the survey was opened from mid-October to mid-December 2009. For more information about the Dutch and German data, please see Nowak et al. 2011.

The data from Poland was gathered by the author in collaboration with the European Centre of Natolin and the Polish Ministry of Justice. The Ministry of Justice distributed the questionnaires among several civil, criminal and administrative courts, including higher courts, such as the Polish Supreme Court and the Polish Supreme Administrative Court. Nevertheless, we did not receive any information about the number of courts and judges who were approached by the Ministry for their participation. In this case, the online survey started in late

November 2011 and closed in March 2012. Finally, in collaboration with the Network of Experts on European Union Law at the Spanish Judicial Council, we gathered the data concerning Spanish judges. In this case, the online survey started in late April 2012 and closed in December 2012. Moreover, this collection technique was complemented with the distribution of questionnaires among judges attending judicial training courses at the Spanish Judicial School thanks to the further training service.

Moreover, only in the Polish survey the option 'neutral' / 'neither agree nor disagree', that could be found in the Dutch and German surveys, was excluded from some responses of the questionnaire for their comparison with other similar data for posterior methodological studies and developments. We considered excluding the 'middle option' of 'neither agree nor disagree' to avoid fatigued or poorly motivated respondents to complete the survey selecting the middle alternative when they could. This problem worsens especially in long and exhaustive questionnaires such as the one provided in Poland.

Secondly, there is a potential source of error that must be considered when deciding whether to offer a middle alternative. This is the possibility that respondents who do not hold an opinion on the issue at all will select the middle-alternative rather than explicitly admitting their ignorance by selecting or volunteering 'don't know' (Sturgis et al. 2010, 2011). This type of socially desirable responding, which we refer to as a 'hidden don't know' response is likely to be particularly problematic for valid inference because it will lead to both over-estimates of the degree of opinionation in the population and violation of the ordinality assumption. Sturgis and his colleagues argue that for many response scales that employ a 'neither/nor' alternative as the midpoint, it is the 'hidden don't know' that is the primary threat to validity. This phenomenon is especially strong among those who are *most* interested in the topic area. This is because the decision to select the mid-point rather than admit ignorance is reflective of a social desirability bias and, as such, is found most often amongst individuals who believe they *should* have an opinion on matters of

public interest. Concerning judges and opinions towards EU law, we assume that judges, to some extent, could be forced to answer due to the increased importance and interest on EU legal topics among the judiciaries, forcing judges to take a position on EU law issues even when they do not have an opinion on the issue.

Nevertheless, we should consider that neutrality is often an entirely reasonable position to take on many issues, so excluding a middle alternative by providing an even number of answer categories, may force genuinely neutral respondents to choose from among the directional answer categories, that is, 'forced directional' responding (O'Muircheartaigh, Krosnick and Helic 1999). This reduces item reliability and validity by forcing respondents with genuinely neutral positions to select from amongst the available directional alternatives. However, the intention of the questionnaire, apart from reducing the consequences of fatigued respondents and hidden 'don't know', is to force judges to reflect and give a response on an issue that we consider conflictive. Krosnick has coined the term 'satisficing' for this type of response, where respondents 'lean' in a particular direction on an issue but choose the midpoint to minimize cognitive costs (Berinsky 2004; Krosnick 1991). This cognitive cost is due to their reticence to answer political or conflictive issues. Moreover, as Johns Roberts (2005) demonstrates, respondents would prefer to report the opposite rather than admit to an undesirable attitude, then omitting the midpoint would be feasible. For that reason, omitting the midpoint may improve validity, because the midpoint is also used as a safe haven by a 'silent minority', taking refuge in that option rather than confessing to an unpopular viewpoint.

When there are questions on controversial topics for judges, like political or legal political matters, omitting the neutral category and offering a 'don't know' / 'not applicable' option might therefore obtain the most accurate gauge of public opinion for those who really cannot choose between agreement or disagreement (Roberts 2005). These kind of forced responses are not a problem because judges have the ability to construct valid

attitudes towards European and national law relationship. There is more to be gained than lost by requesting a greater effort from them to conform these opinions. Without the political cognitions or the ability to marshal them, respondents would not realize the valid constructions that attitude items are there to measure. For that reason, as an experiment, I decided to take the middle option off some attitudinal scales in Poland to avoid the attraction of a substantial number of respondents who might not be comfortable giving their opinion on conflictive issues. As we said before, these implications will be tested in further studies on survey design for judges.

Nevertheless, the data have their own limits. Firstly, it must be indicated that the full version of the questionnaire was applied in Poland and Spain. In the case of Germany and the Netherlands a short version was applied, which have been taken as a template for the one presented in this study. As a result, there are individual variables that are only available for study in Poland and Spain. From a methodological point of view, despite the results showed in this dissertation, it is impossible to extend the conclusions of the study to the whole judiciary of the countries, because of the lack of representativeness of the data. The criterion of random and probability sampling was impossible to fulfil under the constraints imposed by the national judiciaries for the distribution of the questionnaire. However, during the sample design and the collection of data, I worked to reduce any kind of survey errors related to non-response and self-selection. I controlled and approached judges from different legal areas, jurisdictions and court levels to avoid that judges who are more knowledgeable and familiar with EU law matters were the only ones responding the survey. By approaching judges with very different profiles to fill the questionnaires, I prevented the overrepresentation of more knowledgeable and interested judges on EU law and the underrepresentation of those who are not interested in EU law issues at all. Moreover, the triangulation of methods allowed supporting the findings through its combination with other complementary research techniques such as interviews. Finally,

the possibility of a response bias, where only judges who have experience or affinity with EU law answer the questionnaire, was discarded by a high percentage of judges with low knowledge on EU law or who indicated that EU law plays a minor role in their every day work.

Questionnaire:

Survey on the application of EU law and the use of preliminary references (art. 267 TFEU)

Presentation of the study:
This questionnaire is part of an academic research project devoted to the study of the application, knowledge and experience in European law by national judges. The project has the support and funding from the European University Institute, the Network of Experts on EU law (EU-RED) Spanish Judicial Council, the European Centre of Natolin, and the European Union Studies Association. With this study, we try to know in depth the knowledge, experience and practice of national judges in European law, and to contribute with new guidelines for the improvement of the application of EU law. For that purpose, we have prepared a comprehensive questionnaire of closed and open questions. Please note that any opinions you provide are confidential and will be treated as anonymous. No personal identification of your responses will be made. All responses will be aggregated and analysed together with the other judges of the European Union. Thank you very much for your time and cooperation, which is essential for the improvement and implementation of training programs on European law. We hope you enjoy the experience.

YOUR POSITION & EXPERIENCE WITH EU LAW

1. In which judicial body do you currently serve as a judge? *(Please mark)*

District courts or similar ☐
Regional courts or similar ☐
Supreme courts or similar ☐
Constitutional Court ☐
Other court or Judicial body *(Please specify below) – Warning: If you have previously occupied a position in any court indicate next to your current body (e.g. Judicial training school – Regional Court)* ☐

___

2. Indicate your position on the court or judicial institution

Judge - Magistrate ☐
Others (e.g. référendaire, state lawyer, etc.; please indicate below). ☐

3. **In which jurisdiction do you serve as a judge?** *(If you work in several jurisdictions, please mark your main field of activity).*

Civil ☐
Social / Labour ☐
Criminal ☐
Administrative ☐
Another jurisdiction *(Please specify below)* ☐

___

4. On average, how many cases did you try over the past 12 months? ___

5. On average, in how many of the cases you tried over the past 12 months did European law play a role? ___

6. In your experience, how often is EU law raised by the parties?

Very often [in more than 20 cases] ☐
Often [10-20] ☐
Occasionally [5-10] ☐
Rarely [1-5] ☐
Never [0] ☐
If so, which areas are most concerned? ___

7. In your experience, how often is EU law raised by you (ex officio)?

Very often [in more than 20 cases] ☐
Often [10-20] ☐
Occasionally [5-10] ☐
Rarely [1-5] ☐
Never [0] ☐

EUROPEAN UNION & INSTITUTIONS

8. In general terms, [your country]'s membership to the European Union is...

☐ Something good
☐ Neither good nor bad
☐ Bad

9. For each of the following institutions, please state to what extent you tend to trust or not trust each one *(Please mark one in each row).*

	Don't trust	Hardly Trust	Neither trust nor distrust	Trust	Trust very much
European Union	☐	☐	☐	☐	☐
National Government	☐	☐	☐	☐	☐
European Commission	☐	☐	☐	☐	☐
National Parliament	☐	☐	☐	☐	☐
European Parliament	☐	☐	☐	☐	☐
Higher Courts	☐	☐	☐	☐	☐
Higher Administrative Courts	☐	☐	☐	☐	☐
Constitutional Court	☐	☐	☐	☐	☐
European Court of Justice (CJEU)	☐	☐	☐	☐	☐
European Court of Human Rights	☐	☐	☐	☐	☐
The Council of the European Union	☐	☐	☐	☐	☐

10. To what extent do you feel attached to or identified with...? *(Please mark one in each row).*

	Not attached	Little attached	Attached	Strongly attached	Very strongly attached
Your country	☐	☐	☐	☐	☐
Europe	☐	☐	☐	☐	☐
Your region	☐	☐	☐	☐	☐

APPLICATION OF EU LAW: Access to EU law, information and training

11. How do you value your knowledge of...

	Bad	Moderate	Reasonable	Good	Very Good
National law?	☐	☐	☐	☐	☐
EU law?	☐	☐	☐	☐	☐

12. Regarding EU law application, to what extent do you agree or disagree with the following statements? *(Please mark one in each row)*

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
In practice, I find it difficult to recognise if European law is applicable to a case, when parties do not point this out.	☐	☐	☐	☐	☐
In my experience, the application of European law is generally easy to establish or unproblematic.	☐	☐	☐	☐	☐
In general, I believe that the rulings made by the CJEU are clear.	☐	☐	☐	☐	☐
In general, secondary European law is clear.	☐	☐	☐	☐	☐
In general, the European Treaties are clear.	☐	☐	☐	☐	☐
In my experience, the search for sources of EU law is a time-consuming process.	☐	☐	☐	☐	☐
In hindsight, the application of European law proved to be less time-consuming than expected.	☐	☐	☐	☐	☐

13. In general terms, and in your opinion, to what extent are these factors relevant when deciding whether to apply EU law? *(Please mark one in each row)*

	Not relevant at all	To little extent	Relevant	To a large extent	To a very large extent
National legislation (Acts, decrees, etc.)	☐	☐	☐	☐	☐
National Constitution	☐	☐	☐	☐	☐
European legislation (Directives, Regulations, etc.)	☐	☐	☐	☐	☐
European Treaties	☐	☐	☐	☐	☐
Other International Treaties	☐	☐	☐	☐	☐
The Constitutional Tribunal jurisprudence	☐	☐	☐	☐	☐
The higher courts jurisprudence	☐	☐	☐	☐	☐
The CJEU jurisprudence	☐	☐	☐	☐	☐
To make it easier for national authorities (e.g. administration) to implement the rulings	☐	☐	☐	☐	☐
The social, political or economic consequences of the sentence	☐	☐	☐	☐	☐
The ideological position of the judge	☐	☐	☐	☐	☐
The public expectations on the case	☐	☐	☐	☐	☐
Policy objectives	☐	☐	☐	☐	☐
The opinion of other members of the court	☐	☐	☐	☐	☐

14. In general terms, what are the reasons for applying EU law? *(Please mark in each row)*

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
I only apply European law if it provides a fairer solution to a dispute than national law.	☐	☐	☐	☐	☐
My knowledge of EU law was sufficient to judge the possible EU law content of the cases.	☐	☐	☐	☐	☐
It is primarily the responsibility of the parties to draw attention to any EU law aspects of the cases, and they did.	☐	☐	☐	☐	☐
The position of the CJEU on the issue was clear.	☐	☐	☐	☐	☐
EU legislation on the issue was clear enough.	☐	☐	☐	☐	☐
European law was compatible with national law, national interest or policies.	☐	☐	☐	☐	☐
I agreed with the interpretation or application of EU law by the CJEU in the issue.	☐	☐	☐	☐	☐
National jurisprudence supported the application of EU law.	☐	☐	☐	☐	☐
EU law coincided with my legal position regarding the issue.	☐	☐	☐	☐	☐
There were no doubts on how to interpret national law according to EU law.	☐	☐	☐	☐	☐

15. What three sources do you use most frequently to make a judgment on

EU law? *(Multiple choice)*

☐ EU law books
☐ EU law journals
☐ Online databases (e.g. EUR-LEX, CURIA, etc.)
☐ Executive documents (e.g. Regulatory impact assessments)
☐ Legislative documents (e.g. Explanatory notes)
☐ I never look for information on European law
☐ Other, namely____________

16. Can you mark to what extent you agree with the following statements? *(Please mark one in each row)*

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
In general, I am well informed about national law.	☐	☐	☐	☐	☐
In general, I am well informed about European law.	☐	☐	☐	☐	☐
It is unclear to me when I should apply European law ex officio.	☐	☐	☐	☐	☐
It is clear to me when I must refer a preliminary question.	☐	☐	☐	☐	☐
It is clear to me how I must refer a preliminary question.	☐	☐	☐	☐	☐
It is unclear to me what I must do with an answer to a preliminary question.	☐	☐	☐	☐	☐
I know how to interpret national law in conformity with EU directives.	☐	☐	☐	☐	☐

17. Do you consider that language constitutes a barrier for an adequate access to information on EU law?

☐ Yes
☐ No

18. Have you ever participated in any training program concerning EU law?

☐ Yes
☐ No

19. How often do you quote the following courts when applying EU law? *(Please mark in each row)*

	Never	Rarely	Occasionally	Frequently	Very Frequently
European Court of Justice (CJEU)	☐	☐	☐	☐	☐
European Court of Human Rights	☐	☐	☐	☐	☐
Foreign high courts	☐	☐	☐	☐	☐
Constitutional Court	☐	☐	☐	☐	☐
Other higher courts	☐	☐	☐	☐	☐
Other higher courts	☐	☐	☐	☐	☐

20. In the case of CJEU precedent, were any of these reasons behind your decision for quoting it? *(Please mark in each row) Warning: Do not confuse with the use of CJEU preliminary references*

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree

The EU rule was not clear enough and the CJEU precedent provided an additional source of guidance, facilitating judicial interpretation.	☐	☐	☐	☐	☐
To influence/change the national doctrine/policy on this issue.	☐	☐	☐	☐	☐
To reassert the doctrine of the CJEU in a controversial national legal issue.	☐	☐	☐	☐	☐
The CJEU opinion matched what I already believed to be the fairer decision.	☐	☐	☐	☐	☐
The litigants suggested me to follow CJEU point of view.	☐	☐	☐	☐	☐
My colleagues in the court advised me to follow CJEU jurisprudence on the issue.	☐	☐	☐	☐	☐
It provides a source of legal authority towards other national courts.	☐	☐	☐	☐	☐

21. In EU law cases, do you consult other actors the application of EU law: *(Multiple choice)*

☐ Fellow national judge(s)
☐ Foreign judge(s)
☐ ECJ judge(s) or référendaire (s)
☐ Acquaintances in legal profession (lawyers)
☐ State lawyers
☐ Prosecution service
☐ Governmental institutions or public agencies
☐ University professors
☐ International judicial networks
☐ National judicial networks
☐ NGOs or social groups
☐ Others, namely_________

PRELIMINARY REFERENCES PROCEDURE

CASES BROUGHT BEFORE THE CJEU

22. How many times during your carrier as a judge have you brought a case before the CJEU with the use of article 267?

☐ 0 times
☐ 1 time
☐ 2 times
☐ 3 times
☐ 4 times or more

(If you have brought a case to the CJEU, please continue to the next question. If not, please skip to question 27).

23. If so, in which court were you employed when you made use of the 267-procedure? *(Please indicate below)*

1st time	
2nd time	
3rd time	

4th time

24. What type of case was it? *(Please limit yourself to the last 4 times)*

1st time

2nd time

3rd time

4th time

25. Were any of these reasons behind your decision for bringing cases before the CJEU? *(Please mark one in each row).*

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
The EU rule was not clear enough and the CJEU rulings provide an additional source of guidance, facilitating judicial interpretation.	☐	☐	☐	☐	☐
Both parties agreed to raise the case to the CJEU.	☐	☐	☐	☐	☐
To influence/change the national doctrine/policy on the issue.	☐	☐	☐	☐	☐
Even though I already had an opinion on the EU law interpretation, I wanted the CJEU to confirm my interpretation on EU law.	☐	☐	☐	☐	☐
My colleagues in the court advised me to raise the case.	☐	☐	☐	☐	☐
I did not find CJEU jurisprudence on the issue,	☐	☐	☐	☐	☐
It provides a source of legal authority towards other national courts.	☐	☐	☐	☐	☐

ENFORCEMENT OF CJEU PRELIMINARY RULINGS

26. In general terms, when you received the ruling...

- Did the CJEU substantially reformulate your questions? ☐ YES ☐ NO
- Were the CJEU rulings easily applied to the facts? ☐ YES ☐NO
- How much did you agree with the rulings by the CJEU?

☐ Strongly agreed
☐ Fairly agreed
☐ Fairly disagreed
☐ Strongly disagreed

POTENTIAL PRELIMINARY PREFERENCES: Cases that you considered taking to the CJEU, but ended up not doing so.

27. What was the reason for not bringing the case before the CJEU? *(Please mark in each row)*

	Strongly disagree	Disagree	Neither agree nor	Agree	Strongly Agree

			disagree		
My knowledge of EU law was sufficient to judge the possible EU law content of the cases.	☐	☐	☐	☐	☐
It is primarily the responsibility of the parties to draw attention to any EU law aspects of the cases and they didn't do so.	☐	☐	☐	☐	☐
There was no doubt about the position of the CJEU on the question, and raising the case was therefore seen as unnecessary.	☐	☐	☐	☐	☐
It is hard to judge when there is 'reasonable doubt'.	☐	☐	☐	☐	☐
It is mainly the responsibility of national courts to decide whether to raise a question, and I decided not to.	☐	☐	☐	☐	☐
Presenting cases at the CJEU takes too long.	☐	☐	☐	☐	☐
National courts are capable of making their own judgements in EU law cases.	☐	☐	☐	☐	☐
The prosecution service normally does not encourage taking cases to the CJEU.	☐	☐	☐	☐	☐
The possibility of an appeal against the order referring to the CJEU.	☐	☐	☐	☐	☐
I do not agree with the dynamic interpretation style of the CJEU.	☐	☐	☐	☐	☐
It takes too long to formulate a preliminary question.	☐	☐	☐	☐	☐
I consider the posing of preliminary questions to be an exclusive task for the courts of last resort.	☐	☐	☐	☐	☐
I found a previous CJEU ruling on the issue.	☐	☐	☐	☐	☐

RELATIONSHIP BETWEEN EU & NATIONAL LAW

28. **To what extent do you agree with the following statements concerning the role of judges towards EU law?** *(Please mark one in each row)*

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree
As a European judge, I feel part of the European legal order.	☐	☐	☐	☐	☐
I believe that ex officio application of European law should be extended.	☐	☐	☐	☐	☐
I believe that a uniform application of European law in all Member States is not important.	☐	☐	☐	☐	☐
I consider European law to be a legal order standing above national law.	☐	☐	☐	☐	☐
I think that European legal principles are alien to my national legal system.	☐	☐	☐	☐	☐
The principle of primacy of EU law is essential for the European legal order.	☐	☐	☐	☐	☐
EU law should be applied restrictively when it is affecting fundamental national rules or legal values.	☐	☐	☐	☐	☐
The principle of state liability for	☐	☐	☐	☐	☐

breaches of European law by governments and administration is an advantageous principle.					
I am reluctant to the application of European law, because I find the European institution's process of passing European law is undemocratic.	☐	☐	☐	☐	☐
The principle of state liability for breaches of European law by national courts is an advantageous principle.	☐	☐	☐	☐	☐
I believe that, in case of conflict of European law with national law, judges should make a European-compatible interpretation of national law.	☐	☐	☐	☐	☐
In central national regulations, the opinion of the government or administration in charge is crucial for the interpretation of EU law.	☐	☐	☐	☐	☐
EU law application is clearer when government positions or pledges coincide with EU provisions.	☐	☐	☐	☐	☐
EU law application is clearer when both parties agree on a European-compatible interpretation of EU law.	☐	☐	☐	☐	☐
When national and EU law are in conflict, a national judge should make an effort to find a European-compatible interpretation of national law.	☐	☐	☐	☐	☐
In my opinion, the application of European law is an important task for a national judge.	☐	☐	☐	☐	☐
I consider the procedure of a preliminary question to be useful.	☐	☐	☐	☐	☐
The incorporation of European law into the national legal system makes judicial decisions more complex.	☐	☐	☐	☐	☐

In the following section, several situations are illustrated; please choose the action you would follow under the given situation.

29. In a range of judgements, the CJEU has ruled that a certain national provision is in conflict with European law. You have to judge over a case whereby this national regulation stands central. However, the national legislator has not taken any action so far to change this national regulation. Although you do not agree with the interpretation of the CJEU, you follow this interpretation, because you believe that European law takes precedence over national law.

☐ I would certainly act this way
☐ I would not act this way

30. Questionnaire A: You preside over a case in which both European and national rules can apply. In this case, national provision stands central. However, both parties to the dispute believe that the application of national rules is sufficient. For this reason…

☐ I would only apply national law
☐ I would only apply EU law

Questionnaire B: You preside over a case in which both European and national rules can apply. In this case, national provision stands central. The state lawyer in the dispute believes that the application of national rules is relevant for the national policy system. For this reason...

☐ I would only apply national law
☐ I would only apply EU law

31. **In a range of judgements, the CJEU has ruled that a certain national regulation is in conflict with European law. You preside over a case in which this national provision stands central. You are acquainted with the judgements of the CJEU, but you choose not to involve them in your decision. You are of the opinion that an national judge should exclusively apply national rules; and not the interpretation of the CJEU.**

☐ I would certainly act this way
☐ I would not act this way

32. **Questionnaire A: You are uncertain whether or not a national provision is in conflict with an EU provision. In this case national provision stands central. However, one of the litigants invokes a CJEU ruling stating that the national regulation is contrary to EU law and not applicable. *Consequently...***

☐ I would follow the CJEU interpretation and apply the EU law instead of the national law
☐ I would preserve national provisions from CJEU interpretation
☐ I would interpret national law in accordance with European law

Questionnaire B: You are uncertain whether or not a national provision is in conflict with an EU provision. In this case national provision stands central. However, one of the litigants invokes a CJEU ruling stating that the national regulation is contrary to EU law and not applicable. By contrast, the Constitutional Court has ruled that this EU provision should be applied restrictively because it is affecting fundamental national rules or legal values. Consequently...

☐ I would follow the CJEU interpretation and apply the European law
☐ I would follow the Constitutional Court interpretation
☐ I would interpret national law in accordance with European law

33. **In this case you suspect that national regulation could be in conflict with EU regulation. However, you decide to preserve national rules interpreting them in a European-compatible way instead of precluding its application.**

☐ I would certainly act this way
☐ I would not act this way

34. **In a range of judgements, the Constitutional Court has ruled that the supremacy of EU law is limited by the national constitutional principles. *Thus, you have to judge over a case whereby the application of* EU regulation implies the infringement of one of the articles of the Constitution. As a result you decide...**

☐ I would not apply EU law because of the mandate of the Constitutional Court
☐ I would refer this issue to the Constitutional Court
☐ I would refer to the European Court of Justice
☐ I would apply EU law

35. **You have to decide over a case to which both the CJEU and the Constitutional/Supreme Court has different opinions in their rulings. As a result you decide to...**

☐ apply CJEU ruling

☐ *apply the Constitutional Court/Supreme Court*
☐ reconcile CJEU and high court interpretations

36. Questionnaire A: In a case where national provisions stand central for the policy process, you decide to make an EU law interpretation that will allow an easier implementation of your ruling by the administration.

☐ I would certainly act this way
☐ I would not act this way

Questionnaire B: In a case where national provisions or policies stand central, the government pointed out the negative consequences of EU law application for the main social and economic institutions and policies of the country. In order to reduce the policy-impact of your decision, you decide to make an EU law interpretation that will allow an easier implementation of your ruling by the administration.

☐ I would certainly act this way
☐ I would not act this way

PRACTICAL INFORMATION

37. In a scale, where 0 means low judicial independence and 10 high judicial independence, how do you evaluate the degree of independence in your country?

0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐

38. When did you become a judge?

19/20 ☐

39. What year were you born?

19 ☐

40. Gender

☐ Male
☐ Female

41. In an ideological scale, where 0 means left and 10 means right, where would you place yourself?

0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐

APPENDIX B. BUILDING DATASETS OF EUROPEAN COURT'S DECISIONS ON EU LAW

For this dissertation, two datasets on EU law decisions where built on: 1) National higher courts from the EU-25 Member States; 2) national courts from countries with a strong judicial hierarchy (Germany and Poland). The data on ***European Higher Court's decisions on EU law*** was gathered from the CASELEX database that reports important national case law from national high courts and last instance courts linked to EU law from 2000 onwards. The subject areas covered are competition law, employment law, company law, intellectual property law, consumer law, competition law, environmental law, freedom of movement law, ICT and media law, private international law, public procurement law, and social security law.

For the relevant chapter I codified all the decisions made by several European higher courts until 2010. The resulting dataset is considered as a sample (n=4295) of the population of EU law cases filed in the higher courts showed in table II.1 below. This raises uncertainties about the comprehensiveness of the database and its representativeness. Undoubtedly, the lawyers in charge of the database have failed to find and report all EU law cases taken by these courts. This data makes us think that there is a source of selection bias, that is, the likelihood that a case will be included in the Caselex database by the lawyers working on this project. Caselex identifies and selects cases only when: "(i) a national

court interprets a term mentioned in an EU rule; (ii) a national court says something about the 'values' of a certain EU rule; (iii) a national court de facto applies an EU rule in a new way" (Faro and Nannucci 2008). This study takes advantage of this selection since it helps to identify cases in which European high courts decide on substantive EU issues from procedural decisions or judgments without any implication for the implementation of EU policies. Therefore, Caselex aggregates the most important case laws connected with the effective implementation of EU law by national higher courts, leaving out all the cases that are irrelevant to EU law enforcement. In conclusion, this criterion increases the accuracy of our dataset rather than blurring the results, since they already identified the sample of cases with relevant policy implications from the total population. Despite these points, this database is still the best compilation of EU law cases we have today, both in quality and in quantity.

Finally, the data only contains information on cases in which EU law was applied or not, but not for the cases in which EU law *should* have been applied but was not. Nevertheless, this unique approach is available for political and legal scholars to study and disentangle the factors that determine the enforcement of EU law.

Table B.1. List of national higher courts (EU-25)

Country	**Court**	**Hierarchy**	**Jurisdiction or *Specialization***
Austria	Oberste Gerichtshof (Supreme Court)	Higher court	Ordinary
	Verwaltungsgerichtshof (Administrative Court)	Higher court	Administrative
Belgium	Arbeidshof / Cour du travail (Labour Court)	Appellate court	Labour
	Arbitragehof - Cour d'arbitrage (Arbitration Court)	Constitutional	Constitutional
	Grondwettelijk Hof / Cour constitutionnelle (Constitutional Court)	Constitutional	Constitutional
	Hof van Beroep (Court of Appeal)	Appeal	Ordinary
	Hof van Cassatie / Cour de cassation (Court of Cassation)	Higher court	Ordinary
	Raad van State / Conseil d'Etat (Council of State)	Higher court	Administrative
Bulgaria	Административен съд (Administrative Court)	Appeal	Administrative
	Апелативен съд (Court of Appeal)	Appeal	Ordinary
	Върховен административен съд (Supreme Administrative Court)	Higher court	Administrative
	Върховен касационен съд (Supreme Court of Cassation)	Higher court	Ordinary
	Окръжен съд (Regional Court)	Appeal	Ordinary
	Софийски градски съд (City Court of Sofia)	Appeal	Ordinary
Cyprus	Ανώτατο Δικαστήριο της Κύπρου (Supreme Court)	Higher court / Constitutional	Ordinary / Constitutional
Czech	Krajský soud (Regional Court)	Appeal court	Ordinary

Republic	Nejvyšší soud (Supreme Court)	Higher court	Ordinary
	Nejvyšší správní soud (Supreme Administrative Court)	Higher court	Administrative
	Ustavní soud (Constitutional Court)	Constitutional	Constitutional
Denmark	Højesteret (Supreme Court)	Higher court	Ordinary
Estonia	Eesti Vabariigi Riigikohus (Supreme Court)	Higher court / Constitutional	Ordinary / Constitutional
Finland	Korkein oikeus (Supreme Court)	Higher court	Ordinary
France	Conseil d'Etat (Council of State)	Higher court	Administrative
	Cour de Cassation (Court of Cassation)	Higher court	Ordinary
Germany	Bundesarbeitsgericht (Federal Labour Court)	Higher	Labour
	Bundesfinanzhof (Federal Finance Court)	Higher	Fiscal
	Bundesgerichtshof (Federal Court of Justice)	Higher	Ordinary
	Bundespatentgericht (Federal Patent Court)	Higher	Ordinary
	Bundesverfassungsgericht (Federal Constitutional Court)	Constitutional	Constitutional
	Bundesverwaltungsgericht (Federal Administrative Court)	Higher court	Administrative
Greece	*Εφετείου Αθηνών (Court of Appeal)*	Appeal	Ordinary
	Ανώτατο Ειδικό Δικαστήριο (Special Supreme Court)	Constitutional	Constitutional
	Άρειος Πάγος (Supreme Court)	Higher	Ordinary
	Συμβούλιο της Επικρατείας (Council of State)	Higher	Administrative
Hungary	Fővárosi Bíróság (Municipal Court)	Appeal	Ordinary
	Fővárosi Ítélőtábla (Metropolitan Court of Appeal)	Appeal	Ordinary
	Legfelsőbb Bíróság (Supreme Court)	Supreme Court	Ordinary
Ireland	High Court of Ireland	Appeal court	Ordinary
	Supreme Court of Ireland	Higher court	Ordinary
Italy	*Consiglio di Stato (Council of State)*	Higher court	Administrative
	Corte di Appello (Court of Appeal)	Appeal court	Ordinary
	Corte Suprema di Cassazione (Supreme Court of Cassation)	Higher court	Ordinary
	Tribunale Amministrativo Regionale (Regional Administrative Court)	Appeal court	Administrative
	Tribunale (Trial Tribunal)	Appeal court	Ordinary
Latvia	Augstākā tiesa (Supreme Court)	Higher court	Ordinary
Lithuania	Aukščiausiasis Teismas (Supreme Court)	Higher court	Ordinary
	Vyriausiasis Administracinis Teismas (Supreme Administrative Court)	Higher court	Supreme
Netherlands	Centrale Raad van Beroep (Higher Social Security Court)	Higher court	Social
	College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry)	Appeal	Economic
	Gerechtshof (Court of Appeal)	Appeal	Ordinary
	Hoge Raad (Supreme Court)	Higher court	Ordinary
	Raad van State (Council of State)	Higher court	Administrative
	Rechtbank 's-Gravenhage (District Court)	Appeal	Ordinary
Poland	Krajowa Izba Odwoławcza Urzędu Zamówień Publicznych (National Appeal Chamber of the Public Procurement)	Appeal	Public law
	Naczelny Sąd Administracyjny (Supreme Administrative Court)	Higher court	Administrative
	Sąd Apelacyjny (Court of Appeal)	Appeal	Ordinary
	Sad Najwyzszy (Supreme Court)	Higher court	Ordinary
	Sąd Ochrony Konkurencji i Konsumentów (Court for Competition and Consumer Protection)	Appeal	Special
	Sąd Okręgowy (Regional Court)	Appeal	Ordinary
	Trybunał konstytucyjny (Constitutional Court)	Constitutional	Constitutional
	Wojewódzki Sąd Administracyjny (Regional Administrative Court)	Appeal	Administrative
Portugal	Supremo Tribunal Administrativo (Supreme Administrative Court)	Higher court	Administrative
	Supremo Tribunal de Justiça (Supreme Court of Justice)	Higher court	Ordinary
Romania	*Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and* Justice)	Higher court	Ordinary
Slovakia	Najvyšší súd (Supreme Court)	Higher court	Ordinary
Slovenia	Upravno Sodišče (Administrative Court)	Appeal	Administrative
	Vrhovno Sodišče (Supreme Court)	Higher court	Ordinary
Spain	Tribunal Supremo de España (Supreme Court)	Higher court	Ordinary
Sweden	Arbetsdomstolen (Labour Court)	Appeal	Labour
	Högsta domstolen (Supreme Court)	Higher court	Ordinary
	Marknadsdomstolen (Market Court)	Appeal	Economic

	Miljööverdomstolen (Regional Environmental Court)	Appeal	Environmental
	Regeringsrätten (Supreme Administrative Court)	Higher court	Administrative
United Kingdom	Court of Appeal in Northern Ireland	Appeal	Ordinary
	High Court of Justice in Northern Ireland	Appeal	Ordinary
	Competition Appeals Tribunal	Appeal	Competition
	House of Lords	Higher court	Ordinary
	The Supreme Court	Higher court	Ordinary
	Court of Session in Wales	Appeal	Ordinary
	Court of Appeal of England and Wales	Appeal	Ordinary
	High Court of England and Wales	Appeal	Ordinary

The data for the analyses of EU law application in countries with strong judicial hierarchy, such as Germany and Poland, was gathered from national databases (Juris and LexPolonica). The dataset includes information on decisions from their membership to the EU to 2010, where courts cited EU law or the CJEU in some way or another. From around 20139 EU law cases for Germany and 4863 from Poland, I randomly selected a sample of 583 and 529 decisions respectively stratified by court and year with an error level of 4% and 95% of confidence. Each national judgment in the dataset was codified to count and study the application of EU law and the use of citation practices of the German and Polish courts. However, I also gathered information concerning other interesting aspects of national judgments, such as the experience of Spanish courts in EU law application, the type of national court, and jurisdiction among other aspects (see codebook below).

Table B.2. List of national courts (Germany and Poland)

Country	Court	Hierarchy	Jurisdiction or Specialization
Germany	Amtsgericht	Lower	
	Arbeitsgericht	Lower	
	Sozialgerichte	Lower	
	Verwaltungsgericht	Lower	Administrative
	Finanzgericht	Lower	Fiscal
	Hessischer Verwaltungsgerichtshof	Lower	
	Kammergericht	Lower	
	Landesarbeitsgericht	Lower	
	Landessozialgericht	Lower	Social
	Landgericht	Lower	
	Oberlandesgerichte	Lower	
	Oberverwaltungsgericht	Lower	
	Bundesverwaltungsgericht (Federal Administrative Court)	Higher court	Administrative
	Bundesarbeitsgericht (Federal Labour Court)	Higher court	Labour
	Bundesfinanzhof (Federal Finance Court)	Higher court	Fiscal
	Bundesgerichtshof (Federal Court of Justice)	Higher court	Civil

	Bundespatentgericht (Federal Patent Court)	Higher court	Patent
	Bundessozialgericht (Federal Social Court)	Higher court	Social
	Bundesverfassungsgericht (Federal Constitutional Court)	*Constitutional*	Constitutional
Poland	Wyrok Sądu Okręgowego (Disctrict court)	Lower	Ordinary
	Wyrok Sądu Apelacyjnego (Court of Appeal)	Lower	Ordinary
	Sąd Okręgowy (Regional Court)	Lower	Ordinary
	Wojewódzki Sąd Administracyjny (Regional Administrative Court)	Lower	Administrative
	Naczelny Sąd Administracyjny (Supreme Administrative Court)	Higher court	Administrative
	Sad Najwyzszy (Supreme Court)	Higher court	Ordinary
	Trybunał konstytucyjny (Constitutional Court)	Constitutional	Constitutional

Codebook:
National Courts' decisions (Polish example)

A. Case identification variables:

I. Identification number (follow "case_id).

- id_definitive: 34

II. Jurisdiction (jurisdiction):

1. Administrative
2. Civil
3. Criminal
4. Social
5. Military
6. Others

III. Court (court):

1. District Court
2. Court of Appeal
3. Regional Administrative Court
4. Supreme Administrative Court
5. Supreme Court
6. Constitutional Court

IV. Type of decision (decision):

1. First-instance case-law
2. Appeal

3. Question of constitutionality
4. Competence Conflict
5. Others

V. Date of the decision (date).

VI. Signature (signature)

B. Case related variables:

I. Type of plaintiff/s or appellant/s (P1; if there are more than 1 code it as P2, P3...):

1. Individual person (e.g. worker, resident, pensioner, employee, etc.)
2. Business (or Business Association)
3. Professional Association (e.g. lawyers, judges, doctors, etc.)
4. Trade Unions
5. NGO or non-profit organizations
6. Local Government
7. Regional Government
8. National Government (e.g. National government, ministries, and public institutions such as treasury, national office of social security, etc.).
9. State (general category, just in case there is not any specification of the litigant)
10. State Agency (e.g. Competition or Regulatory Agency)
11. Parliament
12. Judiciary
13. Prosecutor
14. Public firms (e.g. Companies or firms that belong to the State)
15. Ombudsman
16. Public institutions (e.g. Hospital, University, etc.)
17. EU institution
18. Political and public not identified institutions.
19. Others

II. Type of defendant or respondent (D1, D2):

1. Individual person (e.g. worker, resident, pensioner, employee, etc.)
2. Business (or Business Association)
3. Professional Association (e.g. lawyers, judges, doctors, etc.)
4. Trade Unions
5. NGO or non-profit organizations
6. Local Government or administration
7. Regional Government or administration
8. National Government (e.g. National government, ministries, and public institutions such as treasury, national office of social security, etc.).
9. State (general category, just in case there is not any specification of the litigant)
10. State Agency (e.g. Competition or Regulatory Agency)
11. Parliament
12. Judiciary
13. Prosecutor
14. Public firms (e.g. Companies or firms that belong to the State)
15. Ombudsman
16. Public institutions (e.g. Hospital, University, etc.)
17. EU institution
18. Others

III. Name of the plaintiff (P1_name): example
P1: 2. Business
P1_name: Vodafone
OR
P1: 8. National government
P1_name: Treasury

IV. Name of the defendant (D1_name):

V. Type of EU law case (t_eu_case):

1. National law vs. EU law
2. International law vs. EU law
3. Application of EU law (also whether CJEU preliminary reference could be ask):

Note: Whether EU law is applicable to a certain case.

4. Correct Interpretation of EU law (or how to interpret EU law) Note: The application of EU law is already clear, however, they try to clarify in which terms, or, when, it is not clear which provisions, regulation, directive, etc.
5. EU law is cited in support of national law (when EU law is not the main issue)
6. Collective agreement vs. EU law
7. Administrative act or resolution vs. EU law

VI. Who invokes EU law? (W_eu_law)

1. Plaintiff
2. Defendant
3. Both
4. Court

VII. Position of the plaintiff(s) on EU law application or "EU law invoker" (Plain_euposition):

0. *Against EU law*: This variable adopts the value of 0 if the plaintiff is against EU law invoking national or international regulations/or another interpretation of EU law.
1. *In favor of EU law*: This variable adopts the value of 1 if:
   a) The plaintiff is invoking EU law against national and international law.
   b) The plaintiff is invoking EU law supporting a different application or interpretation than the defendant.

VIII. Position of the defendant(s) on EU law application or "non-EU law invoker" (Defen_euposition):

0. *Against EU law*: This variable adopts the value of 0 if:

a) The defendant is against EU law invoking national or international regulations.
b) The defendant is supporting that national law, decree or act is in compliance with EU law.

1. *In favor of EU law*: This variable adopts the value of 1 if the defendant is invoking EU law against national and international law/another interpretation of EU law.

IX. Legal provisions considered by the litigants or the court, especially EU law (norms):
Note: Introduce all the provisions following these examples and the following criteria: number and name of the law/directive; number of the article, and year.

- Case 1: Article 141 EC and Directive 97/80/EC on the burden of proof in cases of discrimination based on sex; Equality Act 206/1995
- Case 2: Article 10(2) of Chapter 1 of the Contracts of Employment Act 2001; Directive 2001/23/EC
- Case 3: Directive 89/104/EEC; Slovak Trade Mark Act 1997, as amended in 2001
- Case 4: Brussels I Regulation (EC) No 44/2001 or the Insolvency Regulation (EC) No 1346/2000
- Case 5: Council Directive 2000/35/EC on combating late payment in commercial transactions (the Directive), implemented in the Commercial Act
- Case 6: Directive 86/653/EEC relating to self-employed commercial agents (the Directive), which was transposed in the Commercial Code
- Case 7: Article 65 of Act No. 461/2003 Coll. on social insurance and Article 46(1) of Regulation (EEC) No 1408/71 (the Regulation).
- Case 8: Council Directive 2004/17/EC (the Directive), which was implemented by the Procurement Act
- Case 9: Act No. 586/2003 Coll. on the legal profession for the purposes of representation in trade mark proceedings. The court pointed out that Regulation (EC) No 1348/2000

on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters
- Case 10: Article 26(1)(h) of the Public Procurement Act and Article 45(2)(d) of the Directive
- Case 11: Article 43 EC

X. Legal facts denounced (facts):
- Registration act
- Collective agreements
- Salaries are discriminatory
- Abuse position
- Trademark registration
- Criminal action
- University act
- Discrimination
- National law
- Etc.

XI. Legal area (legal_area):
0. Free movement of goods.
1. Agriculture
2. Competition
3. Free movement of capitals
4. Common commercial policy
5. Environmental policy
6. Taxation
7. Freedom of establishment
8. External policy
9. Free movement of workers
10. Social provisions
11. Social security
12. Transport policy
13. Approximation of laws
14. Consumer protection

XII. Treatment of EU law case (eulaw_treatment):

Notes: This variable codes whether the court has enforced EU law and why.

0. Non-enforcement of EU law: This variable adopts the value of 0 if the court decided to not enforce EU law because:

0.1 It is not substantially or subjectively applicable to the case
0.2 It does not have direct effect.
0.3 National law (act, regulation, decree, order) is in compliance with the EU law.
0.4 It applies international law in spite of EU law.
0.5 EU law is not superior to national law.
0.6 There is no EU law applicable to the case at hand.
0.7 The court enforced a different EU law provisions, right, obligation, etc., than the one alleged by the main EU law invoker.

1. Enforcement of EU law: This variable adopts the value of 1 if the court decided to enforce or apply EU law to a certain legal facts, against any national or international law or to enforce the interpretation suggested by the plaintiff/appellant:

1.1 It is substantially or subjectively applicable to the case
1.2 It has direct effect.
1.3 National law (act, regulation, decree, order) is not compliance with the EU law.
1.4 EU law applies in spite of International law.
1.5 EU law is superior to national law.
1.6 National law implementing EU law was applied (EU law was not mentioned)

2. The court is silent on EU law

XIII. CJEU citations (cjeu_citation):

0. *Non-CJEU citation:* The variable codes 0 if the national court has not cited CJEU rulings in the case at hand (either precedent or preliminary ruling).

1. *CJEU citation:* The variable codes 1 if the national court has cited CJEU rulings in the case law at hand (either precedent or preliminary ruling).

XIV. Amount of CJEU citations (ncjeu_citations): Total amount of CJEU citations made by the court in the case-law (either precedent or preliminary ruling).

XV. Preliminary references (pr):

0. *Non-preliminary reference:* The variable codes 0 if the national court has not requested an CJEU ruling for the case at hand.
1. *Preliminary reference:* The variable codes 1 if the national court has requested an CJEU ruling for the case law at hand.

XVI. Preliminary references identification (pr_id):
Number/ Signature of the case:
Case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen
Or
C-79/83, Dorit Harz v Deutsche Tradax GmbH

XVII. Reference Denial (refden):

0. References not involved
1. The court applies a preliminary ruling that it referred
2. The court denies a reference for a preliminary ruling
   - 2.1. because there is already a decision by the CJEU
   - 2.2. because there is already a decision by a national court
   - 2.3. because EU law is not applicable
   - 2.4. because the court is not obliged to refer
   - 2.5. because the court has no doubts as to the interpretation of EU law
   - 2.6. because it is not necessary
   - 2.7. the court does not give any reason

2.8. because the request was made by the litigants in wrong grounds
2.9. because the decision is still appealable
2.10. because the case was still open in lower courts
2.11. CJEU has no jurisdiction on ECHR

3. The Court does not apply a ruling by the CJEU rendered as a result of a reference by the same court
    3.1. on the same case, same issue
    3.2. on another case, same issue

XVIII. CJEU precedent (precedent):

0. *Non-CJEU precedent:* The variable codes 0 if the national court has not cited a previous CJEU ruling for the case at hand.
1. *CJEU precedent:* The variable codes 1 if the national court has cited a previous CJEU ruling for the case law at hand.

XIX. Amount of CJEU precedent (precedent_n):

XX. CJEU precedent identification (precedent_id):
Number/ Signature of the case:
Case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen
Or
C-79/83, Dorit Harz v Deutsche Tradax GmbH

XXI. National court' citations (nccit):

0. *Non-National Courts' citation:* The variable codes 0 if the national court has not cited previous national Court rulings in the case at hand.
1. *National Courts' Citation:* The variable codes 1 if the national court has cited previous national rulings, e.g. coming from the Supreme, Constitutional or regional courts, in the case law at hand.

XXII. National court' citation identification (nccit_id):
Number/ Signature of the case:

XXIII. Amount of National precedent (nccit_n):

XXIV. Other court citations (othercit):

0. *Non Other Courts citation:* The variable codes 0 if the national court has not cited previous national Court rulings in the case at hand.
1. *Other Courts Citation:* The variable codes 1 if the national court has cited previous national rulings, e.g. coming from the Supreme, Constitutional or regional courts, in the case law at hand.

XXV. Other court citation identification (othercit_id):
Number/ Signature of the case

XXVI. Treatment of EU law by the cited national and CJEU court:
Notes: This variable codes whether the courts cited in the judgment support the enforcement EU law and why.

0. Non-enforcement of EU law: This variable adopts the value of 0 if the court decided to not enforce EU law because:

0.1 It is not substantially or subjectively applicable to the case
0.2 It does not have direct effect.
0.3 National law is in compliance with the EU law (act, regulation, decree, order).
0.4 It applies international law in spite of EU law.
0.5 EU law is not superior to national law.
0.6 There is no EU law applicable to the case at hand.
0.7 The court does not have competence

1. Enforcement of EU law: This variable adopts the value of 1 if the court decided to enforce or apply EU law to a certain legal facts, against any national or international

law or to enforce the interpretation suggested by the plaintiff/appellant:

1.1 It is substantially or subjectively applicable to the case
1.2 It has direct effect.
1.3 National law is not compliance with the EU law.
1.4 EU law applies in spite of International law.
1.5 EU law is superior to national law.

XXVII. CJEU citation and National citation Treatment:
Notes: This variable measures the reaction of the national court to the citations.

0. Over-compliance: National court cites CJEU and goes beyond CJEU wording.
1. *Compliance:* national court cites and follows or is supportive of the CJEU case or is attempting to justify his decision in terms of the CJEU's decision. Compliant treatments or reactions are coded as
   1.1 Following: "cited as controlling".
   1.2 Harmonized: "apparent inconsistency explained and shown not to exist"). Harmonized means that "the cases differ in some way, however, the court has found a way to reconcile and bring into harmony the apparent inconsistency".
   1.3 Explained: "indicates that the citing opinion clarifies, interprets, construes or otherwise annotates the decision in the cited case". *That is, to establish some criteria that it should follow for a decision, without saying explicitly that they are following it. E.g. when they check the criteria of proportionality and they mentioned it or the exception for national measures or barriers.*
2. *Limits:* the court cites an CJEU case but somehow limits its impact on the instant case ("refusal to extend decision of cited beyond precise issues involved).

3. *Distinguish:* the court cites an CJEU decision but distinguishes the case at hand ("case at bar different either in law or fact from case cited for reasons given").
4. *Dissent:* whenever the national courts cite but explicitly dissents or disagree from the CJEU case.

XXVIII. Complexity (complex): Following (Maltzman et al., 2000), is the number of legal provisions relied upon in the decision.

APPENDIX C. ADDITIONAL TABLES AND FIGURES

CHAPTER 6

Table C.1. Multilevel analysis of the application of EU law by high courts

INDEPENDENT VARIABLES	MODEL 1 EU law enforcement	MODEL 2 EU law enforcement
CJEU citation	0.014 [0.043]	0.039 [0.039]
Against government or public institution	-0.222*** [0.045]	
CJEU citation X Against government or public institution	0.147** [0.06]	
Against National Government or public institution		-0.194*** [0.046]
CJEU citation X Against national government or public institution		0.124** [0.063]
	Category of reference: Type of Court: National highest Court	
Type of Court: Appeal or last instance	-0.282** [0.125]	-0.289** [0.123]
Type of Court: Supreme Court or similar	-0.264* [0.142]	-0.275** [0.139]
Counter Limits	-0.216 [0.151]	-0.231 [0.147]
Counter Limits X Type of Court: Appeal or last instance	0.236 [0.18]	0.245 [0.177]
Counter Limits X Type of Court: Supreme Court or similar	0.206 [0.184]	0.223 [0.18]
Judicial dependence	0.666 [0.321]	0.011 [0.310]
	Category of reference: Type of Plaintiff: Individuals	
Type of Plaintiff: Firms	-0.078* [0.043]	-0.071* [0.042]
Type of Plaintiff: NGOs & Trade Unions	-0.087 [0.088]	-0.087 [0.088]

Type of Plaintiff: Public institutions	0.061 [0.059]	0.087 [0.057]
Dualism	-0.019 [0.087]	-0.022 [0.083]
National precedent	0.009 [0.037]	0.010 [0.037]
Support for EU integration	-0.003 [0.002]	-0.003 [0.002]
Complexity	0.000 [0.028]	-0.001 [0.028]
Years since membership	0.003 [0.002]	0.003 [0.002]
EU secondary legislation	0.027 [0.047]	0.027 [0.047]
EU legislation implemented	0.005* [0.003]	0.005* [0.003]
	Category of reference: Legal area: Competition	
Legal area: Employment and Social affairs	0.054 [0.069]	0.051 [0.069]
Legal area: Enterprise and Industry	0.077 [0.066]	0.083 [0.066]
Legal area: Environment, health and consumer protection	0.063 [0.067]	0.046 [0.068]
Legal area: Internal Market	0.130** [0.062]	0.112** [0.062]
Legal area: Justice and Home affairs	0.119* [0.071]	0.128* [0.071]
Legal area: Research, information, education and statistics	0.053 [0.082]	0.053 [0.082]
Legal area: Taxation and Customs Unions	0.309** [0.095]	0.302** [0.095]
Legal area: Agriculture, Energy and Transport	-0.054 [0.246]	-0.053 [0.246]
Constant	0.578* [0.336]	0.529 [0.334]
Intraclass correlation (ρ) level 1 countries		0.002
Intraclass correlation (ρ) level 2 courts		0.032
No. of decisions		4163
No. of courts		107
No. of countries		25
Robust standard errors in brackets	*** p<0.01, ** p<0.05, * p<0.1	

Table C.2. Marginal effects and standard errors

Marginal effect of CJEU citations	ME Conditional Beta	Conditional SE	Significance
when enforcing EU law against other actors	0.0081	0.0683	0.9052
when enforcing EU law against public institutions	0.2254	0.0651	0.0005***

CHAPTER 9

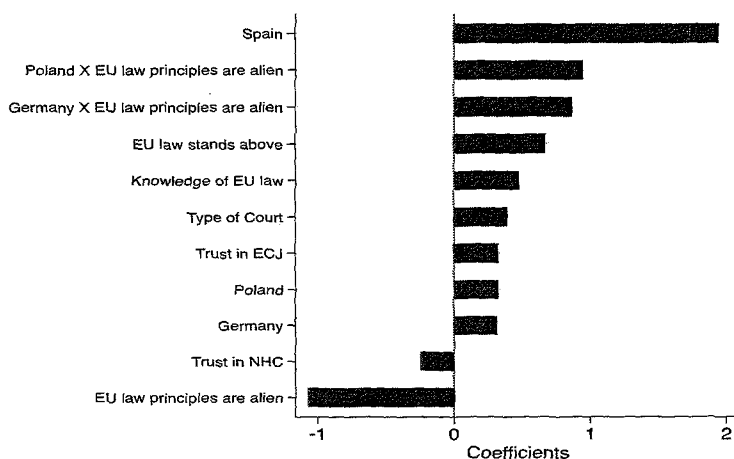
- Section 9.5:

Table C.3. ordered logit analysis of the determinants of the attitudes towards EU law supremacy

	EU law stands over national law
Trust in national Supreme/Constitutional Court	-0.342***
	[0.111]
Trust in the Court of Justice of the European Union	0.536***
	[0.119]
Knowledge of EU law	0.488***
	[0.108]
Country: The Netherlands (Category of reference)	
Country: Germany	-1.420***
	[0.263]
Country: Poland	-1.239***
	[0.280]
Country: Spain	-0.419
	[0.291]
EU law principles are alien	-0.330***
	[0.105]
Type of court	-0.066
	[0.198]
τ_1	-3.432
τ_2	-1.002
τ_3	-0484
τ_4	2.424
Observations	480
Pseudo-R^2	0.1006

Standard errors in brackets * significant at 10 %; ** significant at 5 %; *** significant at 1 %

Figure C.1. Coefficients for statistically significant effects on EU law supremacy



- Section 9.6:

Table C.4. Marginal effects and standard errors

Marginal effect of CJEU citations	ME Conditional Beta	Conditional SE	Significance
When enforcing EU law supremacy against other actors	0.3939978	0.2353708	0.0917*
When enforcing EU law supremacy against public institutions	1.16419	0.2353708	0.0001***

APPENDIX D. LIST OF INTERVIEWS AND MEETING GROUPS

Table D.1. List of interviews and meeting groups

Country	Type of Court / Encounter	Reference number
Spain	Lower court – First instance court	1
France	High court	2
Spain	XVIII Workshop on the Judicial application of European Community law, Spanish Judiciary School (recording not allowed)	3

REFERENCES

Albi, Anneli. 2007. "Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of 'Co-operative Constitutionalism'." European Constitutional Law Review 3(1): 25-67.

Alter, Karen J. 1996. "The European Court's Political Power." West European Politics 19(3): 458-87.

—. 1998. "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration." in The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context, edited by A.-M. Slaughter, A. Stone Sweet, and J. H. H. Weiler. Oxford: Hart Publishing: 227-252.

—. 2001. Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe. Oxford; New York: Oxford University Press.

—. 2008. "The European Court and Legal Integration: An Exceptional Story or Harbinger of the Future?" in The Oxford Handbook of Law and Politics, edited by K. E. Whittington, R. D. Kelemen, and G. A. Caldeira. Oxford; New York: Oxford University Press: 209-228.

—. 2009. The European Court's Political Power: Selected Essays. New York: Oxford University Press Austen-Smith.

—. 2012. "The Global Spread of European Style International Courts." West European Politics 35(1): 135-154.

Alter, Karen J. and Jeannette Vargas. 2000. "Explaining Variation in the Use of European Litigation Strategies." Comparative Political Studies 33(4): 452-482.

Arroyo, Luis. 2011. "Sobre la primera cuestión prejudicial planteada por el Tribunal Constitucional. Bases, contenido y consecuencias." Working Papers on European Law and Regional Integration, WP IDEIR nº 8.

Avbelj, Matej. 2011. "Supremacy or Primacy of EU Law – (Why) Does it Matter?" European Law Journal 17(6): 744-763.

Baldock, John. 1993. "Patterns of change in the delivery of welfare in Europe." in Markets and Managers: New Issues in the Delivery of Welfare, edited by P. Taylor-Gooby and R. Lawson. Buckingham; Philadelphia: Open University Press: 24-37.

Beck, Thorsten, George Clarke, Alberto Groff, Philip Keefer and Patrick Walsh. 2001. "New tools in comparative political economy: The Database of Political Institutions." World Bank Economic Review 15(1): 165-176.

Bednar, Jenna, Wiliam N. Eskridge Jr., and John Ferejohn. 2001. "A Political Theory of Federalism." in Constitutional Culture and Democratic Rule, edited by J. Ferejohn, J. N. Rakove, and J. Riley. New York: Cambridge University Press: 223-270.

Berinsky, Adam. 2004. Silent Voices: Public Opinion and Political Participation in America. Princeton: Princeton University Press.

Bobek, Michal. 2008a. "Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice". Common Market Law Review 45(6):1611-1643.

—. 2008b. "On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't do as I say'?" in Cambridge Yearbook of European Legal Studies 2007-2008, vol. 10, edited by C. Barnard. United Kingdom: Hart Publishing: 1-34.

—. 2010. "Cartesio - Appeals Against an Order to Refer Under Article 234 (2) EC Treaty Revisited." Civil Justice Quarterly 29:307-316.

Börzel, Tanja A. 2000. "Improving Compliance through Domestic Mobilisation? New Instruments and the Effectiveness of Implementation in Spain." in Implementing EU Environmental Policy. New Directions and Old Problems, edited by C. Knill and A. Lenschow. Manchester-New York: Manchester University Press: 222-250.

—. 2003. Environmental Leaders and Laggards in Europe: Why there is (not) a 'Southern Problem'. Aldershot: Ashgate.

—. 2006. "Participation Through Law Enforcement: The Case of the European Union." Comparative Political Studies 39:128-152.

Brace, Paul R. and Melinda Gann Hall. 1997. "The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice." The Journal of Politics. 59: 1206-1231.

Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006. "Understanding Interaction Models: Improving Empirical Analyses." Political Analysis 14: 63-82.

Burley, Anne-Marie and Walter Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." International Organization 47: 41-76.

Cameron, Charles. 2002. "Judicial Independence: How can you tell it when you see it? And, who cares." in Judicial Independence at the Crossroads: An interdisciplinary Approach, edited by S. Burbank and B. Friedman. Thousand Oaks, California: Sage: 134-148.

Ćapeta, Tamara. 2007. "The National Courts' Mandate in the European Constitution." European Public Law 13: 703-708.

Carrubba, Clifford J. 2009. "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems." The Journal of Politics 71:55-69.

Carrubba, Clifford J. and Lacey Murrah. 2005. "Legal Integration and Use of the Preliminary Ruling Process in the European Union." International Organization 59: 399-418.

Carrubba, Clifford J., Matthew Gabel and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." American Political Science Review 102: 435-452.

Chalmers, Damian. 2000. "The Positioning of EU Judicial Politics within the United Kingdom." West European Politics 23(4): 169-210

Chalmers, Damian. 2001. "The Positioning of EU Judicial Politics within the United Kingdom." in Europeanised Politics?

European Integration and National Political Systems, edited by K. H. Goetz and S. Hix. London; Portland, OR: Frank Cass Publishers: 169-210.
Cichowski, Rachel A. 2007. The European Court of Justice and Civil Society. Cambridge: Cambridge University Press.
Claes, Monica. 1995. "Judicial Review in the European Communities: The Division of Labour between the Court of Justice and National Courts." in Judicial Control: Comparative Essays on Judicial Review, edited by R. Bakker, A. W. Heringa, and F. Stroink. Antwerpen: Maklu: 109-132
—. 2006. The National Courts' Mandate in the European Constitution. Oxford: Hart Publishing.
Claes, Monica and Bruno de Witte. 1998. "Report on the Netherlands." in The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context, edited by A.-M. Slaughter, A. Stone Sweet, J. H. H. Weiler. Oxford, Hart Publishing: 171-194.
Closa, Carlos. 2013. "National Higher Courts and the Ratification of EU Treaties". West European Politics 36(1): 97-121.
Closa, Carlos and Pablo Castillo. 2012. "National Courts and the Ratification of the EU Treaties: Assessing the Impact of Political Contexts in Judicial Decisions", in Multilayered Representation in the European Union, edited by T. Evas, U. Liebert and C. Lord. Berlin, Nomos: 129-156.
Conant, Lisa. 2002. Justice Contained: Law and Politics in the European Union. Ithaca, NY: Cornell University Press.
Conant, Lisa. 2007. "Review Article: The Politics of Legal Integration". Journal of Common Market Studies 45(Annual Review): 45-66.
Corrado, Luisa, David A. Londoño, Francesco Mennini and Giovanni Trovato. 2003. "The Welfare States in a United Europe." European Political Economy Review 1:40-55.
Craig, Paul P. 2010. The Lisbon Treaty: Law, Politics, and Treaty Reform. Oxford: Oxford University Press.

Czech, Piotr and Jacek Barcik. 2007. "The Excise Duty of Imported Cars - Legal Problems." Transport problems 2(1): 45-49.

Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker." Journal of Public Law 6: 279-95.

Davies, Gareth. 2012. "Activism relocated: the self-restraint of the European Court of Justice in its national context." Journal of European Public Policy 19(1): 76–91.

Dehousse, Renaud. 1998. The European Court of Justice: The Politics of Judicial Integration. Basingstoke: MacMillan.

Doruglas-Scott, Sionaidh. 2002. Constitutional Law of the European Union. Harlow, England; New York: Longman.

Dyevre, Arthur. 2010. "Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour." European Political Science Review 2(2): 297-327.

—. 2011. "The German Federal Constitutional Court and European Judicial Politics." West European Politics. 34: 346-361.

Edwards, Harry T. 2003. "The Effects of Collegiality on Judicial Decision Making." University of Pennsylvania Law Review 151: 1639-1690.

Epstein, Lee and Jack Knight. 2000. "Toward a Strategic Revolution in Judicial Politics: A look back, a look ahead." Political Research Quarterly 53(3): 625-61.

Epstein, Lee and Carol Mershon. 1996. "Measuring political preferences." American Journal of Political Science. 40(1): 261–294.

Esping-Andersen, Gosta. 1990. The Three Worlds of Welfare Capitalism. Cambridge, UK: Polity Press.

European Commission. 2011. Building Trust in the EU-wide justice. A new Dimension to European Judicial Training.

European Parliament. 2008. Report on the role of the National Judge in the European Judicial System, A6-0224/2008.

Evas, Tatjana. 2012. Judicial Application of European Union Law in post-Communist Countries. The Cases of Estonia and Latvia. England, USA: Ashgate

Falkner, Gerda. 2010. "The European Union and the Welfare State." in Handbook on Comparative Welfare States, edited by H. Obineger, C. Pierson, F. G. Castles, S. Leibfried and J. Lewis. Oxford: Oxford University Press: 293-305.

Falkner, Gerda. 2011. "Interlinking Neofunctionalism and Intergovernmentalism: Sidelining governments and manipulating policy preferences as 'pasarelles'." Institute for European Integration Research.

Falkner, Gerda, Miriam Hartlapp, Simone Leiber and Oliver Treib. 2004. "Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?" West European Politics 27: 452-473.

Falkner, Gerda, Oliver Treib, Miriam Hartlapp and Simone Leiber. 2005. Complying with Europe: EU Harmonisation and Soft Law in the Member States. Cambridge: Cambridge University Press.

Farrell, Henry and Adrienne Héritier. 2005. "A rationalist-institutionalist explanation of endogenous regional integration." Journal of European Public Policy 12(2): 273-290.

Farrell, Henry and Adrienne Héritier. 2006. "Codecision and Institutional Change." EUI Working Papers. RSCAS No. 2006/41.

Faro, Sebastiano and Roberta Nannucci. 2008. "Trans-European Access to National Case Law: The Caselex Project." in 2nd International Conference on Theory and Practice of Electronic Governance, edited by T. Janowski and T. A. Pardo. Cairo, Egypt: ACM: 76-82.

Feld, Lars and Stefan Voigt. 2003. "Economic Growth and Judicial Independence: Cross Country Evidence. Using a New Set of Indicators". European Journal of Political Economy 19(3): 497-527.

Ferejohn, John, Frances Rosenbluth and Charles R. Shipan. 2007. "Comparative Judicial Politics." in The Oxford Handbook of

Comparative Politics, edited by C. Boix and S. Stokes. Oxford: Oxford University Press: 727-751.

Ferejohn, John and Charles R. Shipan. 1990. "Congressional Influence on Bureaucracy." Journal of Law, Economics, and Organization 6: 1-21.

Ferejohn, John and Barry Weingast. 1992. "A Positive Theory of Statutory Interpretation." International Journal of Law and Economics 12: 263-279.

Finch, Janet. 1987. "The Vignette Technique in Survey Research". Sociology 21: 105

Fligstein, Neil and Alec Stone Sweet. 2001. "Institutionalizing The Treaty Of Rome." in The Institutionalization of Europe, edited by A. Stone Sweet, W. Sandholtz, and N. Fligstein. Oxford; New York: Oxford University Press: 29-55.

Franklin, Mark N., Cees van der Eijk and Michael Marsh. 1995. "Referendum outcomes and trust in government: Public support for Europe in the wake of Maastricht." West European Politics 18:101-117.

Frieden, Jeffrey. 1999. "Actors and Preferences in International Relations." in Strategic Choice and International Relations, edited by D. A. Lake, and R. Powell. Princeton: Princeton University Press: 39-76.

From, Johan and Per Stava. 1993. "Implementation of Community Law: The Last Stronghold of National Control?" in Making Policy in Europe - The Europeification of National Policy-making, edited by S. S. Andersen and K. A. Eliassen. London: Sage: 55-67.

Gabel, Matthem, Clifford J. Carrubba, Caitlin Aninsley and Donald M. Beaudette. 2012. "Of Courts and Commerce" The Journal of Politics Vol. 74(4): 1125-1137.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." Law & Society Review 9: 95-160.

Garoupa, Nuno and Tom Ginsburg. 2009. "Guarding the Guardians: Judicial Councils and Judicial Independence." American Journal of Comparative Law 57(1): 103-134.

Garrett, Geoffrey. 1992. "The European Community's Internal Market." International Organization 46(2): 533-560.

—. 1995. "The Politics of Legal Integration in the European Union." International Organization 49(1): 171-181.

Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. "The European Court of Justice, National Governments, and Legal Integration in the European Union." International Organization 52(1): 149-176.

Garrett, Geoffrey and Barry Weingast. 1993. "Ideas, Interests and Institutions: Constructing the EC's Internal Market." in Ideas and Foreign Policy, edited by J. Goldstein and R. Keohane. Ithaca, NY: Cornell University Press: 173-206.

Garry, John, Michael Marsh and Richard Sinnott. 2005. ""Second-order" versus "Issue-voting" Effects in EU Referendums." European Union Politics 6: 201-221.

George, Alexander L. and Andrew Bennett. 2005. Case Studies and Theory Development in the Social Sciences. Cambridge, MA: MIT Press.

Genschel, Philipp and Markus Jachtenfuchs. 2011. "How the European Union Constraints the State: Multilevel Governance of Taxation". European Journal of Political Research 50: 293-314.

Genschel, Philipp, Achim Kemmerling and Eric Seils. 2011. "Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market". Journal of Common Market Studies 49(3): 585-606.

Geyh, Charles Gardner. 1993. "Informal Methods of Judicial Discipline." University of Pennsylvania Law Review 142: 243-331.

Gillman, Howard and Cornell W. Clayton. 1999. "Beyond Judicial Attitudes.'" in Supreme Court Decision-Making, edited by Cornell W. Clayton and Howard Gillman. Chicago: University of Chicago Press: 1-12.

Golub, Jonathan. 1996. "The politics of judicial discretion: Rethinking the interaction between national courts and the

European court of justice." West European Politics 19: 360-385.

Greene, Jennifer C., Valerie J. Caracelli and Wendy F. Graham. 1989. "Toward a Conceptual Framework fo Mixed-Method Evaluation Designs." Educational Evaluation and Policy Analysis 11(3): 255-274.

Grosskopf, Anke. 2005. "Learning to Trust the European Court of Justice - Lessons from the German Case." in 9th European Union Studies Association. website: http://aei.pitt.edu/3149/

Hartley, Trevor C. 2004. European Union Law in a Global Context : Text, Cases and Materials. Cambridge: Cambridge University Press.

Haynie, Stacy, Donal Songer, Neal Tate and Reginald S. Sheehan. 2005. "Winner and Lossers: Appellate Court Outcomes in a Comparative Perspective." in Annual Meeting of the American Political Science Association. Washington, DC.

Helmke, Gretchen. 2005. Courts under Constraints. Cambridge: Cambridge University Press.

Héritier, Adrienne. 2001. "Differential Europe: National Administrative Responses to Community Policy." in Transforming Europe, edited by M. Green Cowles, J. Caporaso, and T. Risse. Ithaca: Cornell University Press: 44-59.

Héritier, Adrienne. 2007. Explaining Institutional Change in Europe. Oxford, Oxford University Press.

Héritier, Adrienne and Christoph Knill. 2001. "Differential Responses to European Policies: A Comparison." in Differential Europe: The European Union Impact on National Policymaking, edited by A. Héritier, D. Kerwer, Christoph Knill, D. Lehmkuhl, M. Teustch, and A. Douillet. Lanham-Boulder, New York-Oxford: Rowman and Littlefield Publishers: 257-294.

Hermanin, Costanza. 2012. Europeanization through Judicial Enforcement?: The case of Race Equality Policy. Thesis Manuscript. Department of Political and Social Sciences. European University Institute.

Hobolt, Sarah B. 2012. "Public Opinion and Integration" in The Oxford Handbook of the European Union, edited by E. Jones, A. Menon and S. Weatherill. Oxford: Oxford University Press: 716-733.

Hoechle, Daniel. 2007. "Robust Standard Errors for Panel Regressions with Cross-Sectional Dependence." The Stata Journal 7(3): 281-312.

Hoffmeister, Framk. 2002. "International Agreements in the Legal Order of the Candidate Countries" in Handbook on European Enlargement, edited by A. Ott and K. Inglis,. T.M.C. Asser Press: The Netherlands: 209-267.

Hofstötter, Bernhard. 2005. Non-Compliance of National Courts: Remedies in European Community Law and Beyond. The Hague: T.M.C. Asser Press.

Hornuf, Lars and Stefan Voigt. 2012. "Preliminary References — Analyzing the Determinants that Made the ECJ the Powerful Court it Is." CESifo Working Paper Series, No 3769. CESifo Group Munich

Jaremba, Urszula. 2010. "With, Before or Against the Law? Polish Judiciary versus the European Union Legal Order." in Fifth Pan-European Conference on EU Politics, 23-26 June 2010. Oporto, Portugal.

—. 2011a. "Tracking the Judicial Interaction in the European Union. On to a New Explanation of National Judicial Behaviour in the Process of Legal Integration in the European Union. Case of the Polish Civil Judge." in UACES Annual Conference - Exchanging Ideas on Europe 2011. Cambridge, UK.

—. 2011b. "The Impact of EU law on National Judiciaries: Polish Administrative Courts and their Participation in the Process of Legal Integration in the EU". German Law Journal (12): 930-956.

—. 2012. Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes. Thesis Manuscript. Erasmus Law School. Erasmus University Rotterdam.

Johnson, Charles A. 1979. "Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination." American Journal of Political Science 23:792-804.

Joppke, Christian. 2001. "The Legal-domestic Sources of Immigrant Rights: The United States, Germany, and the European Union." Comparative Political Studies 34: 339-366.

Jupille, Joseph and James Caporaso. 2009. "Domesticating Discourses: European Law, English Judges and Political Institutions." European Political Science Review 1(2): 205-228.

Kaczorowska, Alina. 2008. European Union Law. New York: Routledge-Cavendish.

Kelemen, R. Daniel. 2001. "The Limits of Judicial Power". Comparative Political Studies 39(1): 622-650.

Kelemen, R. Daniel 2008. "American-Style Adversarial Legalism and the European Union." in EUI Working Papers RSCAS, vol. RSCAS 2008/37. Florence: Robert Schuman Centre for Advanced Studies, European University Institute.

Kelemen, R. Daniel. 2011. Eurolegalism: The Transformation of Law and Regulation in the European Union. Cambridge, MA: Harvard University Press.

Kelemen, R. Daniel. 2012. "Eurolegalism and Democracy." Journal of Common Market Studies 50(S1): 55–71.

Kilpatrick, Claire. 1998. "Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the CJEU." European Law Journal 4(2): 121-147.

Knill, Christoph and Andrea Lenschow. 2000. "Do New Brooms Really Sweep Cleaner? Implementation of New Instruments in EU Environmental Policy." in Implementing EU Environmental Policy. New Directions and Old Problems, edited by C. Knill and A. Lenschow. Manchester-New York: Manchester University Press: 251-86.

Komárek, Jan. 2007. "European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles." Common Market Law Review 44:9-40.

Kornhauser, Lewis A. 1992a. "Modeling Collegial Courts I: Path-dependence." International Review of Law and Economics 12: 169-185.

—. 1992b. "Modeling Collegial Courts II: Legal Doctrine." Journal of Law, Economics, & Organization 8: 441-470.

—. 1995. "Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System," Southern California Law Review 68: 1605-1629.

Kriesi, Hanspeter and Daniel Bochsler. 2012. Varieties of Democracy. NCCR Democracy.

Kritzer, Herbert M. 2003. "The Government Gorilla: Why Does Government Come out Ahead?" in In Litigation: Do the 'Haves' Still Come Out Ahead?, edited by H. M. Kritzer and S. S. Silbey. Stanford, CA: Stanford University Press: 342-370.

Kritzinger, Sylvia. 2003. "The Influence of the Nation-State on Individual Support for the European Union." European Union Politics 4(2): 219-241.

Krosnick, Jona. 1991. "Response strategies for coping with the cognitive demands of attitude measures in surveys." Applied Cognitive Psychology 5: 213–36.

Kumm, Mattias. 2005. "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty." European Law Journal 11: 262-307.

—. 2006. "Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution properly so called." The American Journal of Comparative Law 54: 505-530.

Ladrech, Robert. 2010. Europeanization and National Politics. Palgrave Macmillan.

Lazowski, Adam. 2008. "Poland: Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Court and the Court of Justice". Europan Constitutional Law Review 4(1): 187-197.

Liebermann, Evan S. 2005. "Nested Analysis as a mixed-method strategy for comparative research." American Political Science Review 99(3): 435-452.

Linzer, Drew and Jeffrey K. Staton. 2011. "A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence." Paper presented at the Annual Meeting of the American Political Science Association, Seattle, WA.

MacCormick, Neil. 1993. "Beyond the Sovereign State." Modern Law Review 1(18): 1-16.

—. 1998. "Risking Constitutional Collision in Europe?" Oxford Journal of Legal Studies 18: 517-532.

—. 1999. Questioning Sovereignty: Law, State, and Nation in the European Commonwealth. Oxford University Press, Oxford.

McCown, Margaret. 2004. "The Free Movement of Good." in The Judicial Construction of Europe, edited by A. Stone Sweet. Oxford: Oxford University Press: 109-145.

Maduro, Miguel Poiares. 1999. "The Heteronyms of European Law." European Law Journal 5: 160-168.

—. 2003. "Contrapunctual Law: Europe's Constitutional Pluralism in Action." in Sovereignty in Transition, edited by N. Walker. Oxford: Hart Publising.: 501-537.

—. 2007. "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism." European Journal of Legal Studies 1(2):1-21.

—. 2009. "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism." in Ruling the World? Constitutionalism, International Law and Global Governance, edited by J. L. Dunoff and J. P. Trachtman. Cambridge: Cambridge University Press: 356-379.

Maduro, Miguel Poiares and Loic Azoulai. 2010. "Introduction: The Past and Future of EU Law." in The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, edited by M. P. Maduro and L. Azoulai. Oxford: Hart Publishing: XIII-XX.

Maganaris, Emmanuel. 1998. "The Principle of Supremacy of Community Law - the Greek Challenge." European Law Review 23: 179-183.

Maher, Imelda. 1994. "National Courts as European Community Courts." Legal Studies 14: 226-243.

Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game.* Cambridge, UK: Cambridge University Press.

Mares, Isabela. 2006. Taxation, Wage Bargaining, and Unemployment. Cambridge: Cambridge University Press.

Martinico, Giuseppe. 2010. "Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?" in Shaping Rule of Law through Dialogue: International and Supranational Experiences, edited by F. Fontanelli, G. Martinico, and P. Carrozza. Groningen: Europa Law Publishing: 221-253.

—. 2012a. "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts". The European Journal of International Law. 23(2): 401-424.

—. 2012b. "Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order". I • CON International Journal of Constitutional Law *10(3): 871–896.*

Martinsen, Dorte Sindbjerg. 2005a. "The Europeanization of Welfare - The Domestic Impact of Intra-European Social Security." Journal of Common Market Studies 43: 1027-1054.

—. 2005b. "Social Security in the EU: the de-Territorialisation of Welfare?" in EU Law and the Welfare State. In Search of Solidarity, edited by G. de Burca. Oxford: Oxford University Press.

—. 2011. "Judicial policy-making and Europeanization: the proportionality of national control and administrative discretion." Journal of European Public Policy 18(7): 944-961.

Martinsen, Dorte Sindbjerg and Gerda Falkner. 2011. "Social Policy: Problem Solving Gaps, Partial Exists, and Court-Decision Traps" in The EU's Decision Traps. Comparing Policies., edited by G. Falkner. Oxford: Oxford University Press: 128-144.

Masson, Antoine and Claire Micheau. 2007. "The Werner Mangold Case: An Example of Legal Militancy." European Public Law 13(4): 587-593.

Mastenbroek, Ellen and Sebastiaan Princen. 2010. "Time for EUI matters: The Europeanization of Duthc Central Government." Public Administration 88: 154-169.

Mattli, Walter and Anne-Marie Slaughter. 1998a. "Revisiting the European Court of Justice." International Organization 52: 177-209.

—. 1998b. "The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints." in The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context, edited by A.-M. Slaughter, A. Stone Sweet, and J. H. H. Weiler. Oxford: Hart Publishing: 253-276.

Maveety, Nancy. 2003. The pioneers of judicial behavior. Ann Arbor: University of Michigan Press.

McCubbins, Mathew D. and Thomas Schwartz. 1984. "Congressional oversight overlooked: police patrols versus fire alarms." American Journal of Political Science 28: 165-179.

Menz, Georg. 2005. Varieties of Capitalism and Europeanization: National Responses Strategies to the Single European Market. Oxford; New York: Oxford University Press.

Micklitz, Hans-Wolfgang 2004. The politics of judicial co-operation in the EU : Sunday trading, equal treatment, and good faith. New York: Cambridge University Press.

Morrow, James D. 1999. "The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics", in Strategic Choice and International Relations, edited by D. A. Lake, and R. Powell. Princeton: Princeton University Press: 77-114.

Muñoz, Jordi, Mariano Torcal and Eduard Bonet. 2011. "Institutional Trust and Multilevel Government in the European Union. Congruence or Compensation?" European Union Politics 12(4): 551-574.

Murphy, Walter F. 1962. Congress and the Supreme Court. Chicago: University of Chicago Press.

Nowak, Tobias, Fabian Ambtenbrink, Marc Hertogh and Mark Wissink. 2011. National Judges as European Union Judges Knowledge, Experience and Attitudes of Lower Court Judges in Germany and the Netherlands. The Hague: Eleven International Publishing.

Nyikos, Stacy A. 2003. "The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment." European Union Politics 4: 397-419.

—. 2006. "Strategic interaction among courts within the preliminary reference process - Stage 1: National court preemptive opinions." European Journal of Political Research 45: 527-550.

—. 2008. "Courts" in Europeanization: New Research Agendas, edited by P. Graziano and M. Vink. Basingstoke: Palgrave Macmillan: 182-194.

Obermaier, Andreas J. 2008. "The National Judiciary—Sword of European Court of Justice Rulings: The Example of the Kohll/Decker Jurisprudence." European Law Journal 14:735-752.

—. 2009. The End of Territoriality?: the Impact of CJEU Rulings on British, German and French Social Policy. Farham, UK: Ashgate Publishing Limited.

O'Muircheartaigh, Colm, Jom Krosnick and Armin Helic. 1999. Middle alternatives, acquiescence, and the quality of questionnaire data. Paper presented at the American Association for Public Opinion Research Annual Meeting, St. Petersburg, Florida.

Ott, Andrea. 2008. "Multilevel Regulations Reviewed by Multilevel Jurisdictions: The ECJ, the National Courts and the ECtHR." in Multilevel Regulation and the EU. The Interplay between Global, European and National Normative Processes, edited by A. Follesdal, R. A. Wessel and J. Wouters. Martinus Nijhoff Publishers: Netherlands: 345-366.

Panke, Diana. 2007. "The European Court of Justice as an agent of Europeanization? Restoring compliance with EU law." Journal of European Public Policy 14: 847-866.

—. 2009. "Social and Taxation Policies — Domaine Réservé Fields? Member States Non-compliance with Sensitive European Secondary Law." Journal of European Integration 31: 489-509.

Paunio, Elina. 2010. "Conflict, power, and understanding - judicial dialogue between the CJEU and national courts." No Foundations: Journal of Extreme Legal Positivism 4: 5-24.

Pereira Coutinho, Francisco. 2009. "Os Tribunais Nacionais na Ordem Jurídica Comunitária: O Caso Português. Thesis manuscript. Faculdade de Direito da Universidade Nova de Lisboa.

Peterson, John. 1995. "Decision-making in the European Union: Towards a framework for analysis." Journal of European Public Policy 2: 69-93.

Phelan, Diarmuid Rosa. 1997. Revol or Revolution? The Constitutional Boundaries of the European Community. Dublin: Round Hall Sweet & Maxwell.

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

Pierson, Paul and Stephan Leibfried. 1995. "The Dynamics of Social Policy Integration." in European Social Policy: Between Fragmentation and Integration, edited by S. Leibfried and P. Pierson. Washington, DC: Brooking Institution: 342-265.

Pritchett, C. Herman. 1961. Congress versus the Supreme Court. Minneapolis, MN: University of Minnesota Press.

Przeworski, Adam and Henry Teune. 1970. The Logic of Comparative Social Inquiry. New York: Wiley-Interscience.

Ramos Romeu, Francisco. 2002. "Judicial Cooperation in the European Courts. Testing Three Models of Judicial Behavior." Global Jurist Frontiers 2.

—. 2003. "Adjudicatory Practices in the European Courts: A Theoretical and Empirical Analysis." School of Law, New York University, New York City.

—. 2006. "Law and Politics in the Application of EC law: Spanish Courts and the CJEU 1986-2000." Common Market Law Review 43: 395-421.
Ramsayer, Mark and Eric Rasmusen. 2003. Measuring Judicial Independence. Chicago: University of Chicago Press.
Ramsayer, Mark. 1994. "The Puzzling (in)dependence of Courts: a Comparative Approach." Journal of Legal Studies 23: 721-47.
Raustiala, Kal and Anne-Marie Slaughter. 2002. "International Law, International Relations and Compliance." in Handbook of International Relations, edited by W. Carlsnaes, T. Risse, and B. A. Simmons. London-Thousand Oaks-New Delhi: Sage Publications: 538-558.
Rhodes, Martin. 1996. "Southern European Welfare States: Identity, Problems and Prospects for Reform." South European Society and Politics 1(3): 1-22.
Ríos Figueroa, Julio. 2006. "Judicial Independence: Definition, Measurement, and its effects on Corruption. An Analysis of Latin America." Department of Politics, New York University, New York.
Risse, Thomas, Maria Green Cowles and James Caporaso. 2001. "Europeanization and Domestic Change: Introduction." in Transforming Europe. Europeanization and Domestic Change, edited by M. Green Cowles, J. Caporaso, and T. Risse. Ithaca: Cornell University Press: 1-20.
Robert, Johns. 2005. "One size doesn't fit all: Selecting response scales for attitude items". Journal of Elections, Public Opinion and Parties 15(2), 237-64.
Rogers, James R. 2001. "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction." American Journal of Political Science 45: 84-99.
Sánchez-Cuenca, Ignacio. 2000. "The Political basis of Support for European Integration". European Union Politics. 1(2): 147-171.
Sánchez Patrón, José Manuel. 2002. "El control judicial nacional del respeto de los derechos fundamentales en la aplicación del

Derecho comunitario". Cuadernos constitucionales de la Cátedra Fadrique Furió Ceriol. 38-39: 169-187.

Sandholtz, Wayne. 1996. "Membership Matters: Limits of the Functional Approach to European Institutions." Journal of Common Market Studies 34: 403-429.

Sandholtz, Wayne and Alec Stone Sweet. 2012. "Neo-functionalism and Supranational Governance." in Oxford Handbook of the European Union, edited by Erik Jones, Anand Menon, and Stephen Weatherill. Oxford: Oxford University Press: 18-33.

Scharpf, Fritz W. 1999. Governing in Europe: Effective and Democratic? Oxford: Oxford University Press.

Schmidt, Susanne K. 2008. "Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty". Journal of Comparative Policy Analysis: Research and Practice 10(3): 299-308.

Segal, Jeffrey A. and Harold J. Spaeth. 2002. The Supreme Court and the Attitudinal Model Revisited. Cambridge: Cambridge University Press.

Shapiro, Martin. 1999. "The European Court of Justice." in The Evolution of European Union Law, edited by P. Craig and G. De Búrca. Oxford: Oxford University Press: 321-349.

Slaughter, Anne-Marie, Alec Stone Sweet and Joseph H. H. Weiler. 1998. The European Court and the National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context. Oxford: Hart Press.

Slepcevic, Reinhard. 2009. "The judicial enforcement of EU law through national courts: possibilities and limits." Journal of European Public Policy 16: 378-394.

Somssich, Réka. 2011. "Preliminary reference from the new Member States - an attempt to identify problems of common interest and regional specificities." in Central and Eastern European Countries after and before the Accession, edited by R. Somssich, and T. Szabados. Volume 1. Budapest: ELTE: 105-139.

Songer, Donald R., Reginald S. Sheehan and Susan Brodie Haire. 1999. "Do the "Haves" Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988." Law & Society Review 33: 811-832.

Spriggs, James F., II and Thomas G. Hansford. 2000. "Measuring Legal Change: The Reliability and Validity of Shepard's Citations." Political Research Quarterly 53: 327-341.

Staton, Jeffrey and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." American Journal of Political Science 56: 504-519.

Stone Sweet, Alec. 2000. Governing with Judges: Constitutional Politics in Europe. Oxford: Oxford University Press.

—. 2004. The Judicial Construction of Europe. Oxford: Oxford University Press.

—. 2010. "The European Court of Justice and the Judicialization of EU Governance." Faculty Scholarship Series Paper 70.

Stone Sweet, Alec and Thomas L. Brunell. 1998a. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community." American Political Science Review 92: 63-81.

—. 1998b. "The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95." Journal of European Public Policy 5: 66-97.

—. 2012. "The European Court of Justice, State Noncompliance, and the Politics of Override." American Political Science Review 106(1): 204-213.

Stone Sweet, Alec and Kathleen Stranz. 2012. "Rights adjudication and Constitutional Pluralism in Germany and Europe." Journal of European Public Policy. 19(1): 25-42

Sturgis, Patrick, Caroline Roberts and Patten Smith. 2010. Middle alternatives revisited: how the neither/nor response acts as a 'face-saving' way of saying 'I don't know'. Southampton, GB, Southampton Statistical Sciences Research Institute, S3RI Methodology Working Papers (M10/01).

—. 2011. "Middle alternatives revisited: How the neither/nor response acts as a way of saying 'I don't know'." Sociological Methods and Research.

Szukala, Andrea. 2003. "France: the European Transformation of the French Model" in Fifteen Into One? The European Union and its Member States, edited by W. Wessels, A. Maurer, J. Mittag. Manchester: Manchester University Press: 216-247.

Tarrow, Sidney. 1995. "Bridging the quantitative-qualitative divide in Political Science." American Political Science Review 89: 1-36.

Tridimas, Takis. 2001. "Liability for Breach of Community Law: Growing Up and Mellowing Down?" Common Market Law Review 38: 301-332.

—. 2003. "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure." Common Market Law Review 40: 9-50.

Tridimas, Georges and Takis Tridimas. 2004. "National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure." International Review of Law and Economics 24: 125-145.

Vink, Maarten, Monica Claes and Christine Arnold. 2009. "Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis". Paper presented at the 11th Biennial Conference of the European Studies Association.

Volcansek, Mary L. 1986. Judicial Politics in Europe: An Impact Analysis New York: Peter Lang.

Wainwright, Richard. 2004. "The Relationship between the national judge and the European Commission in applying articles 81 and 82 of the EC treaty." ERA-Forum 5: 84-91.

Walker, Neil. 2002. "The Idea of Constitutional Pluralism." The Modern Law Review 65: 317-359.

Weiler, Joseph H. H. 1991. "The Transformation of Europe." Yale Law Journal 100: 2403-2483.

—. 1993. "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena

of Political Integration." JCMS: Journal of Common Market Studies 31: 417-446.

—. 1994. "A Quiet Revolution: The European Court of Justice and Its Interlocutors." Comparative Political Studies 26: 510-534.

—. 1999. "The Constitution of the Common Market Place: The Free Movement of Goods." in The Evolution of EU law, edited by P. Craig and G. De Búrca. Oxford: Oxford University Press: 349-377.

Wenneras, Pal. 2007. The Enforcement of EC Environmental Law. Oxford: Oxford University Press.

Wessels, Wolfgang. 1997. "An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes". Journal of Common Market Studies 35(2): 267-299.

Westerland, Chad, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Scott Comparato. 2010. "Strategic Defiance and Compliance in the U.S. Courts of Appeals." American Journal of Political Science 54: 891-905.

Wind, Marlene. 2009. "When Parliament Comes First - The Danish Concept of Democracy Meets the European Union." Nordisk Tidsskrift for Menneskerettigheter 27: 272-288.

—. 2010. "The Nordics, the EU and the Reluctance Towards Supranational Judicial Review." Journal of Common Market Studies 48: 1039-1063.

Wind, Marlene, Dorte Sindbjerg Martinsen, and Gabriel Pons Rotger. 2009. "The Uneven Legal Push for Europe: Questioning Variation when National Courts go to Europe." European Union Politics 10: 63-88.

Woods, Patricia J. and Lisa Hilbink. 2009. "Comparative Sources of Judicial Empowerment: Ideas and Interests." Political Research Quarterly 62: 745-752

Zingales, Nicolo. 2010. "Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?" German Law Journal 11: 419-438 .