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THE EUROPEAN COURT OF JUSTICE & THE POLICY PROCESS

SUSANNE K. **SCHMIDT**

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The Shadow of Case Law

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2018

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2017946417

ISBN 978–0–19–871777–5

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

For Torsten, Jasper, and Arthur

Acknowledgements

This book consolidates work I have conducted over many years, dating back to my time at the Max Planck Institute for the Study of Societies in Cologne, where I worked until 2005. The results of several projects feed into this text: 'The Domestic Impact of European Law', funded from 2004 to 2007 by the European Commission's Sixth Framework Programme in the NEWGOV consortium, coordinated by the European University Institute in Florence; project A6 of the Collaborative Research Centre 597, which was funded by the German Research Foundation (DFG) from 2008 to 2014; and the project TransJudFare, funded by NORFACE from 2015 to 2018. I am very grateful for the financial support I have received from the German Research Foundation and the European Commission, and I would like to thank all the interview partners who shared their time and insights. Michael Blauberger, Wendelmoet van den Nouland, Julia Spreen, Björn Schreinermacher, Rike Krämer, Tilman Krüger, Daniel Seikel, Angelika Schenk, and Benjamin Werner have collaborated or are currently collaborating with me on these projects, which has been a great pleasure. For this book, I was able to draw on the interviews that Björn Schreinermacher conducted for his Ph.D. dissertation in the context of project A6. My close collaboration with Michael across all these projects has been a particular joy. Different student assistants have provided support over the years; among them, I would like to mention Daniel Kosak, Sascha Göbel, Torben Schmengler, Martin Losch, Mario Dentice, Lukas Antoine, Pauline Anton, and Lea Feldhaus. Britta Plote provided language support and is a great secretary in all respects. I was very fortunate to be able to draw on the support of Ben Robbins for the copy-editing of the final text.

Working on a topic for such a long time means that numerous colleagues have provided me with feedback over the years. Drawing on work which has been published over a number of years implies that parts have been presented on many occasions. I am sorry that I cannot acknowledge all the helpful comments that I have received. Where I rely on previously published work, these texts have been substantially revised and updated. Without a doubt, my greatest intellectual debt is to Fritz Scharpf. I am extremely grateful for all his encouraging comments, his support of my work since the 1990s, and our many conversations throughout my career. All scholars who have met him can appreciate how fortunate I have been. Numerous others have helped me over the years to sharpen my thinking about the way the European Court of Justice impacts policymaking at the European and member-state levels. Among them are: Dorte Martinsen, Gareth Davies, Martin Höpner, Adrienne Héritier, Dan

Kelemen, Christian Joerges, Damian Chalmers, Miriam Hartlapp, Cliff Carrubba, Marie-Pierre Granger, Sabine Saurugger, Gerda Falkner, and Michelle Egan. Philipp Genschel has been a close colleague and friend with whom I have had inspiring conversations both in Cologne and Bremen. I would also like to thank my colleagues in Bremen, particularly Peter Mayer, Philip Manow, and Kerstin Martens, for making university life as good as it gets. The InIIS, Bremen's Institut für Interkulturelle und Internationale Studien, provides me with a very agreeable working environment. Special thanks go to Stephan Leibfried for his support of this book project.

Finally, I have been very lucky that several colleagues kindly gave me detailed feedback on the manuscript: Adrienne Héritier, Michael Blauberger, Dan Kelemen, Martin Höpner, Daniel Naurin, Benjamin Werner, Angelika Schenk, Fritz Scharpf, and Hans Micklitz. Their comments and enthusiasm were a great help in enabling me to manage the final months of the project.

I would also like to thank Dominic Byatt and Olivia Wells from Oxford University Press, Lakshmanan Sethuraman and Joshua Hey for their very careful and professional support in the production process, as well as the three anonymous reviewers, who gave me very helpful comments on the book proposal and the final manuscript.

Combining work on a long manuscript with university and family life is not always easy. I am grateful for the support of my family, my parents, Wilma and Horst Schmidt, and my parents-in-law, Elisabeth and Joachim Siol. My friends Annette, Karen, Annette, and Carolin have helped me to balance the exercise of writing a book with running and walking in the park. Most of all, I am indebted to my husband Torsten, and my sons Jasper and Arthur, to whom I dedicate this book. I wouldn't be where I am today without them!

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Introduction

The European Court of Justice (ECJ)[1] established itself very early on as an important actor in the European integration process. Institutionally, the ECJ created the direct effect and supremacy of European law in its rulings in Case 26/62 *Van Gend en Loos* in 1963 and in Case 6/64 *Costa v ENEL* in 1964[2] which de facto constitutionalized European law (Shapiro 1992: 126; Stein 1981; Weiler 1991: 2415). Yet the consequences of these steps are still largely unrecognized.

Implicitly, the Treaty Establishing the European Economic Community (EEC Treaty/TEEC) received constitutional status as European law overrules national law. Because of this move, the European Union (EU) and its member states operate under a constitution that is very different from those we know for nation states. The constitutions we know describe state organization and fundamental individual rights. Also, the EU constitution focuses on 'state' organization, describing the rights of the European Commission, the Council of Ministers, and the like. Yet, instead of individual, liberal rights, which formally only entered the EU with the Charter of Fundamental Rights in 2009, the EEC Treaty contains ample policy goals, most notably the famous four freedoms and European competition law. This is unusual, as national constitutions normally abstain from policy prescriptions. International treaties, in contrast, are agreements on common policy objectives, and the different revisions of the EEC Treaty have constantly expanded and refined these goals, but they have not deleted competences from the Treaty. The EEC Treaty was renamed Treaty Establishing the European Community (TEC) at Maastricht (1992). Given many changes, the numbering of the TEC was revised at Amsterdam (1997). In 2009, the Treaty was renamed the Treaty on the Functioning of the European Union (TFEU) at Lisbon, again renumbering articles. Despite this complexity, I will often simply speak of the 'Treaty' in this book,

[1] Increasingly, it is common to refer to the Court of Justice of the European Union (CJEU). However, this new term describes the whole court system of the EU, including the Court of Justice and the General Court. As this book only analyses the Court of Justice, I stick to the familiar ECJ.

[2] With the Treaty of Lisbon, Declaration 17 now codifies the case law on the supremacy of the Treaty (Beck 2012: 168).

given that the legal matter that interests me most, the four freedoms, has been part of all these treaties since the founding of the European Economic Community (EEC).[3] In combination with decades of the ECJ's jurisdiction, this constitutionalized international treaty implies that policymaking in the EU is highly constrained by case law. When constitutional courts rule how to interpret the constitution, their rulings add to the constitution.

Along with the Treaty, the Court's interpretations of it have constitutional status. Therefore, member states have to be careful not only to implement EU secondary law, but also to abide by the ECJ's interpretations of the Treaty. And yet, scholarship on the EU largely turns a blind eye to the momentous impact of the ECJ's constitutionalized policymaking, wherein, increasingly, policy options are withdrawn from majoritarian decision-making at the European and national levels.

> Different from national constitutions, the treaties are not confined to those provisions that reflect the functions of a constitution. They are full of provisions that would be ordinary law in the member states. . . . the constitutionalization of the treaties, immunizes the Commission and particularly the ECJ against any attempt by the democratically responsible institutions of the EU to react to the Court's jurisprudence by changing the law. (Grimm 2015: 470–1)

Grimm is one of the very few scholars to discuss critically this 'over-constitutionalization' (Grimm 2015: 469). The surprising neglect of this topic in the scholarship is not due to a lack of debate about the ECJ. The power of the Court is broadly discussed and largely recognized. However, in line with EU integration research in general, which appears to be still interested in the intergovernmentalism/supranationalism debate, the analysis of the Court often centres on the question of whether the Court is activist and how far the Court takes into account member states' preferences. This juxtaposition of member states and the EU ignores the consequences of the multilevel polity. Member states are not enclosed entities with governments that have a gatekeeping role in relation to the EU. In contrast, private actors can address domestic courts, claiming European legal positions when these appear more advantageous than domestic law. Domestic courts, in fact, partly favour such European law positions themselves. The European legal order's supremacy and direct effect are part of the domestic political struggle, and those finding support in EU law are in a privileged position by being able to realize their interests. Possible opposition of governments is mediated by the fact that important domestic constituencies support the policies of European law. Policy change through case law is a slow process, and as it progresses actors' preferences change as well. Constitutionalized case law

[3] In view of the renumbering, I cannot avoid referring to the different versions of the Treaty, as citations I draw on will rely on different versions.

itself, however, is relatively immune to change, unless the ECJ alters its interpretation of EU law.

European Union research on the ECJ concerns itself mainly with the political importance of this actor for the process of European integration. In exploring this issue, however, the ongoing focus on the importance of member states' interests has captured analytical interest in a debate that risks deciding whether the glass is half full or half empty. There are good arguments for detecting both 'supranational' judicial activism and the 'intergovernmental' act of listening to member states' preferences in the operation of the Court. A principal-agent approach can persuade us that the Court as an agent (or a trustee) has a great deal of leeway as the twenty-eight principals of the members states all now have to agree when they wish to rein the Court in. At the same time, the Court is what one could call a 'reactive' actor (Conant 2012). It has to wait until being called upon, as it can only decide upon single cases that are brought before it. Moreover, its rulings are pointless if they are not implemented. Repeated non-responsiveness to its adjudication undermines a court's role, making it meaningless for anyone to seek judicial redress there in the first place. All courts are therefore sensitive to general support for their adjudication. That does not mean that all rulings conform to the dominant actors' preferences. But to enjoy continued support, courts cannot become too controversial.

The debate on the ECJ has focused a lot on actors' preferences and little on the policy implications of the constitutionalized EU legal order. An early exception to this rule is Conant (2002), who discovered the restricted impact of case law on policymaking at the European and member-state levels. More recently, most work has focused on showing that the ECJ responds to member states' preferences (Martinsen 2015; Larsson and Naurin 2016; Carrubba and Gabel 2014), countering claims that the Court has a high degree of power (Alter 2009), and the impact of judicialization (Stone Sweet 2010). However, tracing how the Court's rulings pay tribute to the preferences of member states seems to overlook the most obvious point: to have a supranational constitutionalization of material policy is a highly supranational outcome. Because the Court's case law that interprets the Treaty adds to the EU's constitution, every time the Court rules expansively, this ruling carries a long way. This is not counteracted by many more rulings where the Court may be attentive to member states' preferences. Governments come and go, and democratic majorities advancing different policy preferences change. Yet a supranational constitution is likely to stay. Since 1957, we have seen many Treaty renegotiations, notably with a European Parliament that has changed its shape and increased its competences. However, the fundamental material content of the Treaty that is mainly embodied in the four economic freedoms (of goods, services, persons, and capital) and in competition law has mostly been altered by the Court. By overlooking over-constitutionalization, the debate on the Court has focused on the wrong questions in determining the degree of the Court's power.

What lies behind such a lack of attention being paid to over-constitutionalization may be the predominantly Europhile attitude of most scholars of European integration. This has been criticized in relation to political science (Majone 2014) as well as EU law (Conway 2012: 84). As the constitutionalization of EU policy locks integration in, transferring competences from the member states to the EU level, this is an outcome welcomed by many. But, concomitantly, policymaking is withdrawn from democratic decision-making and transferred to courts, which requires critical discussion. The significant amounts of attention paid to the ways in which the democratic legitimation of the EU can be furthered (Føllesdal and Hix 2006; Hix et al. 2007; Moravcsik 2002; Olsen 2013) surprisingly turns a blind eye to the extent of policy constitutionalization that leaves ever fewer policy choices to majoritarian decision-making.

I will leave the normative discussion of my positive analysis to the concluding chapter, but let me note from the outset that I perceive the normative predicament of over-constitutionalization in the withdrawal of policy options from majoritarian decision-making. With its origins as an intergovernmental Treaty, the EU's constitution contains detailed policy provisions, in particular for market-making, while being weak on the basic rights protecting minorities, a traditional function of constitutions. Closely related here is another normative concern. Fundamentally, as an economic treaty, its constitutionalization distorts the balance between state and market. Negative integration is favoured over positive integration, as Scharpf put it convincingly in the mid-1990s (Scharpf 1996). This has important political economy implications for member states. While my empirical analysis focuses on forms of market-making that are furthered by case law, thereby interpreting the four freedoms (and EU citizenship), I will leave the important question of these political economy implications to other scholars. My interest concerns what one may term judicialization,[4] which has resulted in an over-reliance on courts in deciding policies. Possibly, the normative contentions surrounding negative integration have diverted the attention of scholars away from the mechanism underlying negative integration, namely over-constitutionalization.

THE BOOK'S ARGUMENT

This book analyses the Court's power. It argues that the key to understanding this power lies in the policy implications of having a supranational

[4] I follow the definition of Stone Sweet: 'The "judicialization of politics," concerns how judicial lawmaking—defined as the law produced by a judge through normative interpretation, reason-giving, and the application of legal norms to facts in the course of resolving disputes—influences the strategic behavior of non-judicial agents of governance' (Stone Sweet 2010: 7).

constitution that, according to its drafters' intentions, is an international treaty. An international treaty contains different policy goals that are subject to further efforts of cooperation. But with the constitutionalization of the Treaty, these policy goals receive constitutional status. Every polity legitimizes itself also through its policy output (Scharpf 1970). If this output is highly constrained by constitutional rigidities, it means that policy options that would be in the 'win-set' of participating actors' preferences may no longer be an option for majoritarian decision-making. This constraint of constitutionalizing policymaking limits democratic decision-making at a time when globalization and government debt have already decreased policy options (Streeck and Mertens 2011).

Given the long record of research on the ECJ, it may seem unconvincing that one can advance an argument that illuminates a significant blind spot of existing research. An example may be helpful here. In 2015 and 2016, much of the discussion about Brexit focused on the question of EU citizens' access to social benefits in the UK. One might ask why the UK, as one of the masters of the Treaty, is politicizing a policy to which it must have consented in the Council? However, much of the European policy relating to EU citizens' access to benefits is shaped by the case law of the Court, as I will discuss in the following chapters. The constitutional status of this case law, drawing directly on the Treaty's provisions on free movement and EU citizenship, heavily constrains the EU legislature's decisions on the EU's mobility regime. The UK, with its tradition of parliamentary sovereignty, may be regarded as being particularly sensitive to increasing transfers of sovereignty. With its common-law tradition, it is also particularly well-suited to attentiveness to the way that court rulings determine policy. In this sense, it is surprising that the Brexit debate did not put more emphasis on the general problem of constitutionalized EU policymaking. Instead, again, the question was framed in terms of subsidiarity, namely national parliaments' means of showing 'yellow' or 'red' cards to the Commission's policy proposals. And yet, as we will see, the EU's secondary law is heavily influenced by ECJ case law. Controlling the Commission is of little help. While research on the ECJ has time and again shown the Court's significant impact on policy (Alter and Vargas 2000; Cichowski 2007; Stone Sweet 2004), the insights of this literature have not been taken up in the analysis of policymaking in the EU. The latter barely pays attention to constitutional constraints on policy options but assumes that everything depends on participating actors' preferences.

Historically, it was quite early in the process of European integration that the ECJ established itself as an important force, and therefore as a political actor in its own right. I argue that the impact of the direct effect and supremacy of European law is still not well understood. With these principles, which were later followed by further rulings that extended their reach to different kinds of secondary law and established state liability for breaches

of EU law (C-6/90 *Francovich*), the Court constitutionalized the rights of the Treaty, thereby transforming the political system of the EU. Stone Sweet (2007) even argues that this amounts to a 'juridical coup d'état'. It is this transformation, and its impact on policymaking on the European and national levels, that is the focus of this book.

A Skewed Balance of Powers

Compared to the situation at the national level, the balance of powers at the supranational level is skewed. When studying the EU as a political system from the perspective of comparative politics, as was advocated in an influential contribution by Hix (1994), this has to be taken into account. With a stronger court, the legislative is weaker. Weiler was early to point out the interdependence between legislature and judiciary at the European level (Weiler 1981, 1991). In the booming field of EU legislative studies, researchers tend to ignore the implications of case law, the constitutional nature of which they are rarely aware of. An example of this can be found in an important book by Thomson (2011) on the Council of Ministers. Despite being the result of one of the largest empirical exercises in EU studies, which analyses the preferences of member states in EU legislative decision-making, the index does not even contain an entry for the Court.

The constitutionalized Treaty of the EU makes case law, alongside legislation, vital to EU policies. But case-law development presupposes case load. Only if a sufficient number of cases reach a court can it incrementally develop case law. Two legal procedures are of particular relevance for the case load of the ECJ: infringement procedures that are handed by the Commission to the Court when member states fail to meet their obligations from European law (Article 258 of the TFEU) and preliminary-ruling procedures (Article 267 of the TFEU), where national courts ask the ECJ for advice in the interpretation of European law. Through the preliminary-ruling procedure, the Court establishes rules for interpreting EU law in the context of a specific case. As such, the decision on the legal case is taken by the referring court, taking into account the ECJ's interpretive guidelines. This procedure gives private actors indirect access to the Court. Member states thus cannot control the case load of the ECJ. They can, however, address observations to the Court and thereby make their views known to the judges. On this basis, scholars have analysed how member states' preferences influence the Court. Since 1994, preliminary rulings have been more important than direct actions (which are mostly infringement procedures initiated by the Commission alongside annulment procedures) in most years. In recent years, preliminary rulings have by far outnumbered all other procedures; there were 436 in 2015 and 428 in 2014 in

comparison to 48 and 74 direct actions in 2015 and 2014 respectively (Court of Justice of the European Union 2016: 94).

But how can court rulings have a significant impact if the ECJ is as responsive to governmental positions as some authors are able to show empirically (Carrubba and Gabel 2014; Larsson and Naurin 2016)? A combination of factors makes this plausible. First, authors fail to take into account that all rulings interpreting the Treaty have as much constitutional status as the Treaty itself. Small constitutional changes go a long way. The Court's high case load allows it to develop case law incrementally. Although many rulings are deferential to member states' preferences, this cannot offset the impact of even a few cases if these have constitutional status. Secondly, case-law development and its impact on policymaking is a long drawn-out process. We, therefore, have to be attentive to the time element. This matters for governmental preferences, which are in part fluid. Governments do not necessarily know what their preferences will be in a few years' time, they cannot foresee how the many different Court cases will possibly affect them, and they partly use the EU level as a means to ensure 'blame avoidance' (Weaver 1986) for unpopular measures. Only on a very general level can we assume the existence of an antagonistic relationship, where governments want to safeguard their sovereignty while the Court aims to foster integration. We are analysing a multilevel system, not an international regime where member states are the sole gatekeepers to the supranational level. The largely private actors who turn to European law through preliminary preferences are, at the same time, an important constituency for national governments. Thus, there may be silent support for the ECJ and, whether this support exists or not, its rulings matter, as politically contentious measures could not be realized without the blame being shifted in this way.

Understanding Case-Law Development

If the Court's power lies in the influence of its case law on policymaking, it is necessary to understand how this case law develops and how actors integrate it within their strategies. Case-law development needs to proceed incrementally in a case-specific way and emphasizing precedent, as courts are not legitimated to set general rules in the way a legislature is. Precedent and case law play a particular role in common-law systems as one source of law alongside the legislative text. Also civil-law systems, which emphasize guidance by legislative statutes, have to honour precedent (Beck 2012: 274; Jacob 2012; De Somer 2016). It is only by adjudicating similar cases in the same way that justice can be established.

When called upon in preliminary procedures, the ECJ establishes guidelines as to the interpretation of EU law that direct the application of the law in

general beyond the specific case. While these guidelines steer the interpretation of law, such as the term 'worker' under the Treaty, they rarely give clear-cut rules, for which the Court would not be legitimated. Thus, for the term 'worker', the Court does not prescribe a number of hours or an income necessary for an individual to qualify as a worker but argues that work has to be 'genuine and effective' but not 'purely marginal and ancillary' (53/81 *Levin*), the assessment of which is then left to the national court.

I argue that for understanding the implications of EU case law for policy-making, it is necessary to take into account the legal uncertainty that such case law generates. I use the term 'legal uncertainty' to point to the absence of the possibility to predict law, which is a central element of legal certainty. Thus, I do not focus on other elements that equally contribute to legal certainty, such as procedural safeguards. Compromises and rule contestations characterize social life in general and are not unique to the EU. Why should one draw specific attention to it in the context of the EU, if law never offers complete legal certainty? How a court reaches a decision is always uncertain, otherwise there would be no need to address the court in the first place. Yet I argue that legal uncertainty is exacerbated when dealing with European law. If we see legal certainty and legal uncertainty on a continuum, there are several reasons why supranational legal questions are subject to more legal uncertainty than national ones. These reasons relate to the European Union as an emerging multilevel polity. We can distinguish causes of legal uncertainty at the national and at the EU levels, which are connected to the institutional structure and to actors' interests. Table 1.1 summarizes these sources of legal uncertainty in the EU.

By constitutionalizing the Treaty, its supremacy brings some member-state laws into conflict. Institutionally, the ever-wider Union has resulted in great institutional heterogeneity at the member-state level. Consequently, it is increasingly difficult to judge how a Court case—establishing or interpreting a legal principle in the light of the situation in one member state—translates to

Table 1.1. Legal uncertainty in an emerging multilevel polity

	Institutions	Actors
EU level	Direct effect and supremacy of EU law; constitutionalizing the EU Treaties	Self-interests of ECJ and COM to use EU law as a motor for integration; intergovernmental decision-making leading to joint-decision traps and empty compromises subject to competing interpretations
MS level	Heterogeneity of MS's institutional conditions; uncertainty as to what case law concerning one MS means for another MS	Interests of litigants and MS courts in an alternative legal order; incentives to escape national legal restrictions

similar, but also different, conditions in other member states. This adds legal uncertainty and may provide incentives for further litigation to challenge national rules. European case law has a fundamentally different status to the case law of many other international courts. Its relevance is not restricted to the parties of the case (*inter partes*), but it takes general effect (*erga omnes*). The interpretation provided by the Court adds to the rule's meaning.

On the EU level, the Court as well as the Commission have their own interests in furthering integration, with the help of the constitutionalized Treaty. As the Treaty sets the goal of an 'ever closer union', the Court often interprets rules in a teleological fashion, in pursuit of this aim. Given their heterogeneous interests (and demanding decision rules) member states cannot rein in the Court. Because of the joint-decision trap (Scharpf 1988), a minority of governments, or even a single one when case law is based on the Treaty, can block a change. Moreover, EU law often has multiple meanings given its nature as a compromise. It is on the basis of a highly differentiated background and without a shared culture-based understanding (Streeck and Thelen 2005: 14) that member states agree to political compromises that are likely to incorporate more diversity than those struck at the domestic level. This leaves a great deal of leeway for the Court, as well as the Commission, in interpreting these rules.

For private actors, legal uncertainty grants opportunities for litigation that advances the impact of EU law further. At the level of the member states, we find that this constitutionalized supranational order provides frequent opportunities for private litigants to turn to an alternative legal setting, overcoming the constraints of national law, under the precondition that they have standing at a court to make their claims. Ever since the ECJ established the direct effect and supremacy of European law, this predominantly economic constitution grants subjective rights to individuals (Vauchez 2008). Additionally, public actors, most of all national courts, may well take an active interest in applying European rules rather than national ones. For member states, there are, therefore, incentives for codifying EU case law into secondary European law (in the form of directives or regulations), in order to strengthen legal certainty and possibly to stop case-law development in an attempt to signal their preferences to the Court. Codification means that the regulatory principles that the Court has developed in its case law are written into secondary law. It is not unusual for directives to directly cite principles that the Court has developed. If an area is only regulated by case law, it is much more difficult for actors to know their rights and duties. And as member states' administrations respond to case law to different degrees, codification promises member states more of a level playing field amongst each other. European Union legislation may, thus, be embedded in case-law development. This implies that the impact of case law cannot be reduced to the question of compliance with single rulings but reaches into legislative responses.

Legal uncertainty is intimately linked to institutional and policy change (Streeck and Thelen 2005: 26–7). Actors have to adapt to new rules and interpret them according to their needs. Given that the extent of institutional change is connected to the pace of European integration, legal uncertainty accompanies integration. The importance of legal uncertainty in the EU is interesting in view of the way that the ECJ is taken as a model for the new kind of international courts. Alter's recent work shows that the ECJ has lost its former *sui generis* status. It has become the premier example of a new kind of international court that opens up 'the new terrain of international law'—which is the title of her book (Alter 2014). As international legalization is increasingly analysed in terms of obligation, precision, and delegation (Abbott et al. 2000), the EU demonstrates that there are inherent limits to precision, as supranational law thrives on its expansive interpretation.

As I will show when I analyse the development of case law, legal uncertainty is embedded in a path-dependent method of interpreting the Treaty's principles. Interpretations that originate in one area of the Treaty are being transferred to other areas, as actors advance parallel arguments in order to further their interests. The path dependency of the Treaty's interpretation provides necessary stability, despite its expansive nature.

Case-Law Constraints on Policymaking

Case law impacts actors' strategies in the legislative process. Legislative policymaking in the EU takes place on the basis of a changing default condition that is defined by case-law development. The Commission bases its legislative proposals on this interpretation. When negotiating over European secondary law, member states do not necessarily choose between integrating a policy or leaving it under national legislative prerogative. Often the choice is between Europeanizing a policy politically through decision-making in the Council and the European Parliament or leaving it to the ECJ and its interpretation of the Treaty in case law. If judicial policymaking matters, much depends on whether member states assume that the ECJ will further their preferred policy or whether they rely on compromise in the Council to realize their preferences. If the Court defines the default condition of decision-making in the Council through judicial policymaking, member states find themselves in a very different bargaining position than if this were not the case.

ECJ case law not only impacts legislative policymaking at the EU level, it is also directly binding on member states. Member states' immediate reactions to EU case law are not only important as a neglected side to Europeanization research and compliance, the impact of case law on member states will also influence their position on the codification of case law in European secondary law. How far member states still enjoy the autonomy of regulating their society

and economy ultimately depends on the extent to which the Court rules that the Treaty applies to the national situation. European and national laws overlap. Domestic economic activity is not solely regulated by national law, which includes the transposition of existing secondary European rules. Activities for which no specific European rules seem to exist can still be influenced by European law, as certain demands may be inferred from the Treaty due to supremacy and direct effect. Well-established domestic rules may thus suddenly infringe European law. As this continually developing order takes supremacy over different national ones, there is recurrent uncertainty as to its effects.

Moreover, the specifics of case-law development leave their mark on the kind of policy at the European and national levels. Courts decide upon single cases that are mostly characterized by quite idiosyncratic aspects. In preliminary procedures, the ECJ establishes interpretative guidelines in view of a specific case. Giving constitutional status to these decisions raises serious problems of generalization, as this book will show. The rulings are relevant *erga omnes* and add onto the Treaty. Member states cannot overturn them, short of a Treaty revision (Syrpis 2012: 13). Neither can secondary law, in the form of directives or regulations, modify primary law. However, single rulings and paying attention to the multiple aspects of a dispute are both difficult to generalize into secondary law when there is codification, and it is difficult to transform them into general administrative procedures when implementing case law at the national level. Going back to the example of the term 'worker', the Court's interpretative guidelines for work as that which is 'genuine and effective' but not 'purely marginal and ancillary' neither allow the EU legislature to set down simply in secondary law that the term worker is reserved for those who are employed for at least, say, twenty hours a week nor can the national administration easily revert to such rules, as will be discussed in Chapter 7. Conant's (2002) contrasting finding of a lack of impact partly rests on her classification of case law as *inter partes* (63). While she traces a 'dramatic legal development' (186), she nevertheless expects that 'automatic policy changes' (45) should follow, interpreting instances of resistance that follow as 'contained compliance' (32) and not as member states' legitimate struggle to get closer to the original agreement.

Figure 1.1 summarizes the argument of the book. This book aims to increase the attention paid in studies of the EU to the relevance of ECJ case law in policymaking at the EU and domestic levels. Moreover, it warns against too much enthusiasm among scholars about the increasing power of international courts in a world where the difference between rich and poor countries depends on the rule of law and functioning political institutions (Acemoglu and Robinson 2012). Much of the scholarship focuses on whether international courts can constrain the executive or whether governments are supreme and do not allow international courts to have significant impact (Alter 2014; Posner and Yoo 2005). But, for the EU, the assumed dichotomy

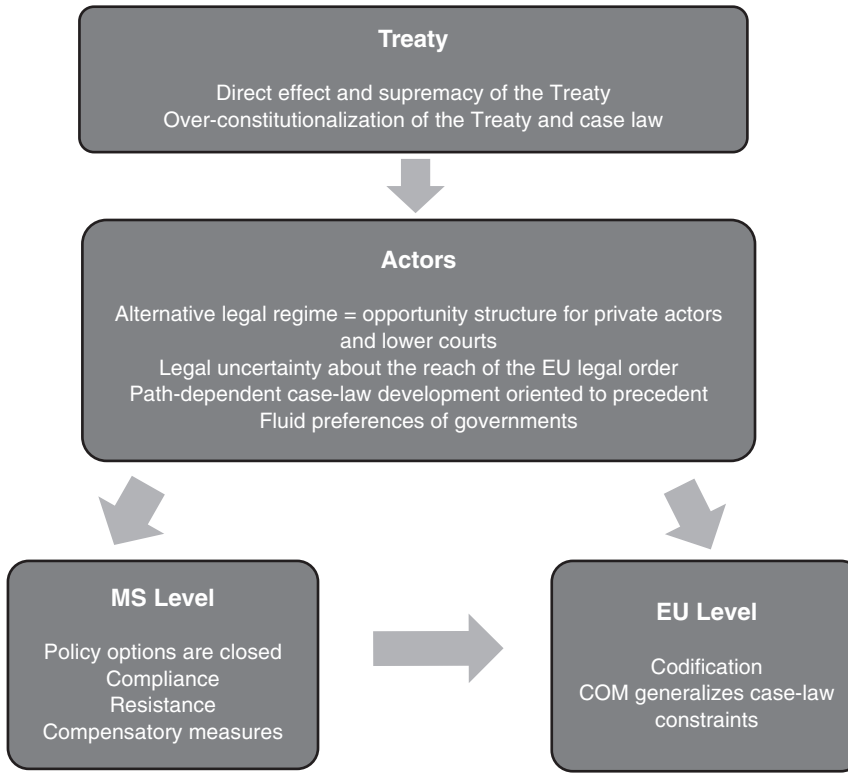

Figure 1.1. The book's argument

between both approaches obfuscates the independent role of the ECJ. Courts are 'reactive' (Conant 2012) actors that cannot drive along political and societal change alone, as Posner et al. are right to emphasize (Posner and Sykes 2011; Posner and Yoo 2005). Also, newer empirical research on the ECJ reveals its dependence on member states' preferences (Carrubba and Gabel 2014; Larsson and Naurin 2016). However, this does not mean that it has no significant judicial impact. In a world of increasing transborder activities, and particularly in the multilevel system of the EU, the interests of governments are not that fixed. The rulings of international courts, as we can study in the case of the ECJ, impose constraints. They do that by giving constitutional status to the rights they protect. That is why they are welcomed. But these are not only constraints on deficient rule of law systems that fail to honour human rights. In the case of the EU, there are often significant constraints on democratic legislatures at the national and the European levels. Under the supranational rule of law, the question is: what is the law? As the Supreme Court Judge Charles Evans Hughes famously said: 'We are under a Constitution, but the Constitution is what the judges say

it is.'[5] The underlying treaties, regulations, and directives are bound to be complex compromises to which different parties attach different meanings. This exacerbates the problem of legal uncertainty and court discretion, making it paramount to analyse the resulting bias in the balance of powers. It is not clear that there is really room for the enthusiasm ascribed to the independent role of international courts, as constitutionalized case law removes policy options from legislatures (Bellamy 2007).

CASE SELECTION AND METHODOLOGY

For quite a while, many overviews of the evolution of EU legislation have been published (Maurer 2003; König 2007). It would be nice to be able to point out which portion of legislation is heavily influenced by case law, but such data do not exist. As I previously mentioned, there has been widespread neglect of the study of EU legislation in terms of how the constitutionalized Treaty constrains policy options. Strategically, as we will see, the Commission is able to heighten the chances of its proposals being accepted by applying pressure through case law. Full transparency might undermine this strategy. In the field of social policy, Martinsen (2015: 77) has analysed the number of Commission proposals that refer to case law from 1958 to 2014. Of 123 proposals in total, forty referred to case law and, in twenty-two of these, the Commission aimed to justify legislative activity with case law. As we do not know whether these forty proposals are important or marginal legislative proposals, it is difficult to judge these numbers. This is generally the case with quantitative overviews of legislative activities, as encompassing legislative acts are included alongside wholly marginal ones. Given that member states have largely defended their welfare systems from integration, agreeing only to the coordination and not to the harmonization of social policy, we know, however, that social policy is not the most likely area for EU legal influence.

Focusing on the role of the Commission, Hofmann (2013) has tried to combine case studies on the importance of the Commission's judicial recourse on legislation with quantitative data concerning overall legislation and the use of infringement procedures. He struggles to show the importance of case law for legislation in quantitative terms, although in his case studies based on process tracing the impact can be shown. One explanation he gives is that his focus on infringement procedures represents only a partial picture. The Commission joins all preliminary procedures with observations and often uses case-law development in this area as a basis for future legislation. One may

[5] <http://c250.columbia.edu/c250_celebrates/remarkable_columbians/charles_hughes.html> [accessed 17 October 2017].

also question whether it is relevant to look for quantitative logic. Often, there need not be that many rulings—it suffices for just one to push for codification (Weiss and Blauberger 2015).

Thus, we do not know which parts of legislation are heavily influenced by case law. Yet, it is also important to keep in mind that if we were to know the percentage of EU law that is influenced by the Court, its actual importance would be hidden behind the difference in importance of laws. It is, therefore, useful to approach the issue from the angle of case-law development and to ask: in which policy fields has the Court been particularly active? This is foremost the case in the area of the single market, which has been at the centre of European integration for decades and the core of the European integration project, as Beck expresses: 'The internal market remains the core area of substantive EU law' (Beck 2012: 171). It is where it started and whence further integratory steps, such as the monetary union, were taken. Case law is particularly important in this area of EU law (Derlén and Lindholm 2013: 673; Stone Sweet and Mathews 2008: 142).

My focus in this book is on the four freedoms: the free movement of goods, services, persons (comprising worker mobility and the establishment of companies), and capital, which allows the analysis of a central area of case-law development in the EU. I also include an analysis of citizenship rights, introduced in the Maastricht Treaty, as its legal interpretation parallels that of workers. There is an important normative dimension to this area of case-law development in the loosening of the nexus between member states and their nationals (Bellamy 2008b: 599).

My first empirical task in this book is to explain the dynamic development of case law. Case-law development is the initial dependent variable that this book is interested in. I have to show that the Court indeed interprets the Treaty in a way that places constraints on member states. Thus, Chapter 3 traces the interpretation of the four freedoms as an incomplete contract by the Court, arguing that this development is characterized by legal uncertainty, which provides an opportunity structure to private actors, lower courts, and the Commission. In the attempt to broaden the reach of the freedoms through litigation, reasoning by analogy plays an important role, which transfers arguments from one freedom to another. This orientation of courts and litigants towards precedent leads to a path-dependent legal interpretation, which gives necessary stability.

After having developed an explanation for the development of case law, the remainder of the book concerns itself with its impact, as an important independent variable, on policymaking at the European and member-state levels. At the EU level, focusing on the four freedoms allows me to select case studies from EU legislation where case-law development has led to legislation, as well as where it failed to do so (Geddes 1990). Note that my overall argument relates to the neglect within research on European integration to

study the implications of constitutionalizing the Treaty. I do not include cases where Court interpretations of secondary law require secondary law reform. These follow a different logic, given the absent constitutional nature of case law. While legislation in the single-market area abounds, there are some major legislative initiatives that correspond to the market freedoms. Thus, there are three examples of legislative acts that codify large areas of case-law development: the Services Directive relating to the freedom to provide services and the freedom of establishment; the regulation for the mutual recognition of goods; and the Citizenship Directive. While quantitative studies can use representative sampling, they cannot account for the political and economic salience of the legislation. The Services Directive rates highly on both accounts, as it led to unprecedented political mobilization while covering a high percentage of member states' Gross Domestic Product (GDP). For the free movement of services, I will also analyse the recent Patient Mobility Directive. It was originally included in the Services Directive, but then separated from it. It is important because new member states took a prominent role in its negotiation, and member states were highly divided about codification. Moreover, member states have reserved prerogatives for health in Article 152(5) of the TEC, so that the Patient Mobility Directive demonstrates the difficulty of protecting policies from single-market freedoms. In order to discuss the limits of the proposed mechanisms of case law in impacting legislation, I also analyse two cases where legislation at the EU level failed. First, I briefly discuss the Monti II regulation, which was meant as a reply to the contentious Case C-438/05 *Viking* and Case C-341/05 *Laval* cases of the ECJ that subjected the right to collective action to the need to respect single-market freedoms in 2007. Secondly, I discuss in greater detail the failed legislative response in direct company taxation, following up on the extensive case law of the free movement of capital and of establishment. While case law in this area seriously constrains member states' tax policies, agreement on secondary law was never achieved.

By focusing on the impact of the four fundamental freedoms, I leave out important areas of the Treaty that have also had a big impact on policymaking at the European and national levels. In particular, competition law and anti-discrimination rules come to mind. Competition law gives the Commission broad administrative powers and has supported many liberalization processes, particularly in relation to utilities or transport. Because of the *de minimis* rule, there is a threshold at which competition law becomes relevant (Conway 2012: 39), which protects member states somewhat. Next to economic rights, anti-discrimination rights have a strong foundation in the Treaty and have led to significant advances, particularly in relation to equal treatment between women and men since the 1970s (Cichowski 2007), and resulted in different anti-discrimination directives. In their study on position formation in the European Commission, Hartlapp et al. (2014: 75–6) mention that Cases

C-7/93, C-147/95, C-206/00, and C-351/00 had a direct influence on the internal negotiation of secondary law proposals on anti-discrimination. With the foundation and judicial development of EU citizenship rights since Maastricht, rights have been broadened beyond the previous dominance of economic aspects, partly allowing EU citizens to take equal advantage of member states' welfare systems (Schmidt 2012). As citizenship rights are not only linked to non-discrimination but also to persons' rights of free movement, an analysis of them takes up part of this book.

After having analysed the impact of case law on EU policymaking, the book turns to the member-state level and to their reactions to European case law. Just as in the study of the integration process, research on Europeanization has largely neglected the implications of case law. In an increasingly heterogeneous Union, a systematic study of these effects is far beyond the reach of any monograph. To give an example, there are indications that the new member states are more reluctant to recognize the *erga omnes* effect of case law. This is apparent, for instance, in the negotiations on the Patient Mobility Directive discussed in Chapter 5. This makes increasingly heterogeneous effects across member states and policy fields likely. In my analysis of member-state responses to case law, I only aim to synthesize what we know from existing research on case law's Europeanization effects. On the one hand, the goal is to provide more systematic avenues for future research on Europeanization. On the other hand, the impact of case law at the member-state level is important, as it influences member-state positions on the codification of case law at the European level, as will be discussed in Chapters 4 and 5.

Case studies face two fundamental problems: the problem of generalizability and the problem of conclusive argumentation. There are thousands of EU legislative acts. If I can show for a few of them that case law matters, is this a relevant finding? It is not possible to indicate how generalizable my findings are, as we lack sufficiently detailed information on the broader set of cases. It is, however, possible to show that my findings are relevant in terms of economic significance and in terms of the diversity of policy areas that are affected. Given the common ignorance in political science of the constitutional nature of case law, and the detailed, material policy prescriptions of the ECJ, one could argue that legislative analyses of EU policymaking would need to show that case law does not matter.

Additionally, if a judicial shadow over EU legislation is not in fact the rule, which we cannot know, I describe important mechanisms for understanding the European integration project. For instance, pressure from the ECJ is an important exit from the joint-decision trap (Falkner 2011). Qualitatively, legislation such as the Services Directive or the Citizenship Directive has a much greater economic impact than most legislative projects. Moreover, and on a more fundamental point, the following case studies can raise understanding on how legal precedent may matter.

In summary, the analysis of the impact of case law on policymaking at the European and the member-state levels allows a more differentiated assessment of the ways in which the ECJ makes a difference. As the analysis will show, again and again constitutionalized case law withdraws policy options from legislative decision-making.

Turning from the problem of generalization to the question of conclusive argumentation, the analysis is based on case studies (Gerring 2007), employing what one might call a 'standard' set of methods, in other words process tracing of decision-making with respect to the relevant actors (George and Bennett 2005), their preferences, strategies, and institutions, as well as making comparisons across cases (Collier 1993; Hall 2003; Lijphart 1979; Sartori 1991). Alongside comparisons, the analysis of case studies draws on inductive reasoning. Counterfactual arguments can provide a check here (Fearon 1991; Levy 2010). My analysis is grounded in actor-centred institutionalism (Scharpf 1997; Scharpf 2000a), with an interest in establishing mechanisms that explain institutional change (Mayntz 2004). The quantitative turn of political science (King et al. 2004) has led to an underappreciation of what we can learn from single cases (Rueschemeyer 2003) and from mere description (Gerring 2012). Increasingly, methodological refinement in political science focuses on case studies, possibly underestimating what we can learn through competing analyses of the same political phenomena using different data, methods, and, importantly, theories. Along with my argument that research on European integration fails to pay sufficient attention to the policy implications of the constitutionalization of the Treaty, I discuss different studies critically in terms of this deficiency.

Newspapers, press reports, and documents from the EU, national governments, and private actors were analysed, partly with the help of MAXQDA. Given this book's research interest in the implications of ECJ case law, the review of case notes and legal analyses has been a major part of the work. I was able to draw on different interviews conducted within the context of different research projects. In addition, quantitative data on case-law development have been gathered, for instance concerning the path-dependent nature of EU law, by tracing how case law increasingly refers to several of the fundamental freedoms. At the national level, data have been assembled on the citation of ECJ landmark cases by domestic courts as a way to trace how case law impacts the legal orders of member states when there is no codification in EU secondary law. Specific references to the kind of data analysis are made in the appropriate places throughout the book.

THE BOOK'S STRUCTURE

My argument is that the supranational judiciary has far-reaching implications for policies at the EU and national levels, which research on European

integration has largely ignored. An intergovernmental treaty forged in order to pursue specific integration aims has a very different thrust than a national constitution designed to allow political order and to safeguard individual rights. In order to show these implications, three steps are necessary. First, we have to understand case-law development. How does the Court interpret the Treaty? Only if case law adds specification and if it matters on its own is it necessary for the analysis of legislation to pay attention to it. Secondly and thirdly, the question becomes how case law makes a difference to policy-making at the European and member-state levels. This book analyses this impact with a special emphasis on the European level.

In order to advance my argument, Chapter 2 discusses research on the ECJ as a political actor. The discussion of the Court has long been characterized by two contrasting positions. What Alter (2014: 337) terms the 'executive control thesis' in line with the intergovernmentalist paradigm has been challenged by claims of 'judicial activism'. I summarize how scholars have explained the power of the Court and its limitations, discussing the institutional rules that govern the Court and questioning what we know of judges' preferences. Important to the Court's development of case law has been the support of the EU's legal community. Alongside this community, the Commission is also an important source of support, as are the interests of private actors who litigate and member-state courts that address the Court through the preliminary procedure. Chapter 2 discusses how these actors can push case-law development further. Member states, as masters of the Treaty, closely observe the cases that come before the Court, and the latter is aware of its dependence on member states' implementation of its rulings. Yet, by interpreting the constitution, incremental case-law advances also go a long way. The chapter closes with a summary of the shortcomings of the literature that the book addresses.

Chapter 3 turns to an analysis of case-law development. The overlapping of EU and domestic legal orders, coupled with the great material detail of the EU Treaty, leads to a state of legal uncertainty, I argue, as to the extent to which EU law impacts member states' policies. These policies become subject to potential challenge. Some private actors can draw on this supranational, alternative legal setting, which promises them benefits. As I show in respect of the interpretation of the four freedoms and citizenship, legal uncertainty in terms of the Treaty's scope, which is almost always broadening, is embedded in a path-dependent method of interpreting rights. Principles that are established in one area are transferred to other areas, as some private actors perceive benefits in such a transfer and legitimize their claims through established principles. The interpretation of the four freedoms as a prohibition of restrictions, I will show, was first applied to the free movement of goods. This was an accidental establishment of a path, hinging on the fact that the trade of goods was first taken up. From here, the argument that the four freedoms not

only require that member states grant non-discrimination rights but that member states have to justify all restrictions on these freedoms was transferred to services, establishments, the free movement of workers, capital, and also citizens.

It is not easy for political scientists to examine the course of legal argumentation in case-law development. This is particularly true as case law relates in great detail to the specific conditions of the decision at hand to an extent that cannot be of interest to political scientists. By drawing on examples from the four freedoms of goods, services, persons (free movement of labour, establishment, citizenship), and capital in order to show parallels in juridical argumentation, I hope that the discussion will be of wider general interest. At the same time, the detailed analysis of ECJ case law will serve to open this *terra incognita* more widely to political science. As I show in Chapter 3, the Court's interpretation of the freedoms gives detail and substance to their meaning. In light of the constitutionalization of European law, policymaking at the EU and member-state levels has to be attentive to this meaning.

As case law complements the Treaty, it is one basis on which the Commission proposes its secondary law. In this way, case law takes generalized effect. Chapters 4 and 5 move on to this analysis. Chapter 4 starts by focusing on the different ways that the Court's case-law development interacts with legislative policymaking. It then turns to an analysis of the Services Directive and the lesser known regulation on the mutual recognition of goods, showing how principles of case law that are motivated by the specific circumstances of individual cases constrain the design of general rules, given the constitutional status of case law. Secondary law cannot modify constitutional principles. At the most, the legislature can hope to signal to the Court its political preferences. While the Court as a reactive actor, and so dependent on implementation, cannot ignore these, the Services Directive in particular shows how political contention does not necessarily intimidate the Court. Generalizing the prohibition of restrictions approach from the free movement of goods to services raised concerns about the redistributive implications of the kind of regulatory approach that was chosen. Such political contention can be interpreted as an 'inefficient' outcome in the context of a path-dependent explanation of case-law development. Despite being confronted with a political reaction to its legal principles, the Court went on to broaden the reach of its jurisdiction with the contentious *Viking* and *Laval* rulings on the limits on collective action.

The Services Directive is at the core of the single market and, despite the political contention surrounding it, one may argue that the legitimation requirements for market regulation are not so high. Thus, case-law constraints may not matter so much after all. Chapter 5 addresses policies that are more sovereign sensitive. The Citizenship Directive and the Patient Mobility Directive were both highly influenced by case-law development, although member states

have largely reserved their right to define citizenship and their welfare systems. These exceptions in the Treaty have not restrained the Court, which consistently holds that member states have to respect the four freedoms also in the areas where they have defined exemptions in the Treaty (Azoulai 2011). Citizenship and patient mobility are very interesting because member states defined common policies for coordinating their welfare systems at an early stage. Although member states had agreed in secondary law how they wanted to translate the policy goals of the Treaty, this did not inhibit the Court from partly designing an alternative policy, drawing on its understanding of the Treaty's requirements. This case law has constitutional status and cannot be overruled. In particular, the Patient Mobility Directive shows how EU policies are becoming contradictory and dysfunctional as a result.

Case law cannot establish general rules as courts are only legitimated to rule in an individual case. Member states often have an interest in agreeing on secondary law once a certain amount of case law has developed, as this improves legal certainty compared to a situation where regulation of a field is predominantly case law driven. Regulation through case law has a tendency to create inequalities. For private actors, the 'law of the land' is more difficult to understand if it is based on case law and not on secondary law, favouring those who are able to afford legal advice. Across member states, there is no resulting level playing field if administrations and local courts have to base their decisions partly on case law, as member states understand and react to case law unevenly. If member states agree to codify case law in the Council, this cannot be taken to mean that it conforms to their preferences, as legal scholars assume (Syrpis 2012: 7). Rather, case law may set in motion a process of policy change that results in the necessary majority preferring codification that would not have been there without the case law.

However, existing case law does not guarantee the necessary majorities for a common policy. Corporate tax policy is an example where agreement on secondary law does not emerge despite ample case law. I discuss this failure of codification in Chapter 5. The tax competition that the Court has fostered has increasingly been recognized as a problem for public revenues. But member states' interests remain diverse. Interestingly, recent moves by the G20 and the Organization for Economic Cooperation and Development (OECD) to draw up international rules against tax competition and base erosion have also come into conflict with the constraints of EU case law that limits the win-set of agreement.

In light of these growing constraints, it is surprising that political science is not paying more attention to this special status of EU law. However, the constraints could be a mere paper tiger, and political science would be right to pay little attention to them. Chapters 6 and 7, therefore, consider the member-state level to investigate compliance with case law. The literature on Europeanization that deals with the consequences of EU membership for

member states has rarely analysed the domestic impact of case law. The dominant argument is that member states are 'contained compliers' (Conant 2002) attending to case-law constraints only when there is pressure from interested constituencies. In Chapter 6, I discuss two case studies that deal with taxes and with the residence of third-country nationals. Both should be least likely cases for the compliance of member states, and yet we find far-reaching responses to the residence rights of third-country nationals and resistance in the case of taxes. Member-state administrations do respond to ECJ case law in a rule of law fashion, changing their administrative guidelines as they would in response to national constitutional law. But they do not always do it. They may also resist, as they wait for further case law and hopefully narrow down the scope of EU law requirements.

On the basis of these inconclusive findings, Chapter 7 seeks to summarize what we can derive from different case studies about member-state responses. There can be no expectation that case law has a one-dimensional impact, I argue. Member-state actors differ in their preferences for policy reform as backed by case law and their interests in keeping to the status quo. Actors, moreover, differ in their cognizance of the constitutional nature of case law and the interpretation of case-law constraints. The domestic impact of case law, therefore, is bound to be diverse and will be one consideration of many in shaping domestic policy processes. In order to give examples of domestic responses, I differentiate between executive, legislative, and judicial reactions. Lastly, societal actors are important in the way they further the domestic impact of EU law, and their cooperation is partly required in responding to case law. As case law does not prescribe general rules in the way secondary law does, there are direct and indirect responses. In part, domestic policies are required to be changed as a direct effect of new case-law development. In part, domestic policy changes respond to indirect effects, for instance if case law fosters regime competition. Another indirect response arises when domestic actors aim to compensate for policy instruments that are taken away by case-law constraints. To sum up, it is a diverse and somewhat messy picture that emerges when analysing the domestic impact of EU case law. As constitutionalized case law takes away policy options, narrowing the realm of democratic politics, it is, however, important to take note of these constraints. Moreover, it is not only at the EU level that the need to heed case law hampers the designing of general policy rules. The British response to EU citizens' access to social benefits that I discuss shows how single rulings with a constitutional status do not translate well into universally applicable rules for administrations (Blauberger and Schmidt 2017).

Chapter 8 concludes by providing a summary of the book's argument. First, it discusses the book's findings with regard to the assertion that the ECJ is activist. Contrary to this claim, I argue that the impact of the ECJ does not depend on its activism. Rather, its impact is due to the constitutional nature

of its case law. Secondly, in a temporal dimension, I contend that the different durations of political and judicial processes imply that the impact of case law is generally overlooked because of its incremental nature. Thirdly, I discuss the normative dimension of the ECJ's impact on policy. On this basis, I ask what we can learn that can be applied to the study of international courts. I close with a few remarks on where research on European integration may go from here.

2

The European Court of Justice as a Political Actor

In this book, I explain how the constitutional status of the European Court of Justice's (ECJ) case law impacts policymaking at the European and member-state levels. This chapter will summarize how political science considers courts in general, and the ECJ in particular. This allows me to map out the added value of my own approach within this research field. Specifically, I argue that the literature in this area has thus far ignored 'over-constitutionalization' (Grimm 2015: 469). This term implies the ways in which detailed policy prescriptions in the Treaty offer ample opportunities for judicial interpretation: case law not only reveals constitutional constraints on public authority, but it gives an interpretation of policy that is subsequently embedded in secondary law. Codification in secondary law generalizes case law. Even if the Court is often attentive to governments' preferences, small steps taken in constitutionalized case law go a long way.

Analyses of courts as political actors can be roughly distinguished into two categories: those which downplay or emphasize their impact. Scholars who deny that courts can have any significant impact typically stress the idea that courts are essentially 'reactive' (Conant 2012: 11) actors that are dependent on both litigants bringing cases before them and on governments and legislatures complying with their rulings (Hönnige and Gschwend 2010). Scholars who regard courts as active or dynamic political actors typically point out that law is an incomplete contract in need of interpretation. This gives leeway for judges to pursue policy preferences. Courts' principals would have to reach agreement in order to 'punish' courts for going astray. They are also constrained by the ethos of the rule of law not to interfere with independent courts. We can find both approaches in relation to the ECJ in the form of the 'executive control thesis' (Alter 2014: 337) and the 'judicial activism' claim (Stone Sweet 2004). With convincing empirical support for both judicial impact and constraints upon it, research is increasingly focusing on 'the political boundaries of judicial discretion' (Larsson and Naurin 2016: 1).

In the following section, I summarize to what extent the literature in this area regards courts as political actors. Are courts more than the neutral umpire implied within the concept of balance of power? How is it possible that they can have an independent influence on policymaking? I begin with the question of whether courts are conceptualized as political actors in both political science and international relations and then turn to the abundant literature on the ECJ. As we will see, the two perspectives on courts as being either activist or largely reactive, dependent actors permeate the discussion. This chapter's review of the scholarship concludes by discussing the shortcomings of the literature and leads on to describe the contribution of this book.

COURTS AS POLITICAL ACTORS

Are courts political actors? The common assessment of the political role of courts draws on the standard assumption that as part of the separation of powers courts adjudicate disputes on the basis of laws that are legitimated by the legislative. The role of the adjudicator, who is guided by texts that are decided elsewhere, at first sight does not carry much political significance. It is only when one takes into account the notion that laws are generally incomplete contracts, which do not regulate everyday situations in complete detail but require interpretation, that the independent impact of courts becomes apparent. In fact, the US Supreme Court demonstrated very early in its history that courts may well function as political actors. In its decision in *Marbury v Madison* (1803), the Court gave itself the right to judicial review and to declare laws unconstitutional. If courts can interfere in this way and overrule the legislature, they are clearly political actors.

But are courts really in a position to do so? Courts receive their institutional rules from the legislative, which detail the way they operate (Voeten 2013: 423–4). These include how judges are to be appointed. As part of the ruling elite, they are not likely to stray off course, particularly as they may be fearful of changes to their operational rules if they do so. Moreover, following the school of political realism, courts are essentially reactive actors, which rely on the support of multiple other actors. They have to be called upon by litigants. More importantly, they cannot themselves enforce the full implementation of their decisions by the executive and the legislature. The recent disempowerment of the Polish and the Hungarian Constitutional Courts and the similar earlier fate of the Russian Constitutional Court (von Steinsdorff 2010; Blauberger and Kelemen 2016; Kelemen and Orenstein 2016) serve as examples of the very limited power courts have to interfere in politics. If there is some scope for their independent political impact, this is clearly circumscribed by the political context in which the court operates (Conant 2006: 84).

But the necessary political support is not restricted to the political system. Courts also require sufficient societal support for their interpretations (Voeten 2013: 427). In the US, the relative weakness of courts was widely discussed after Rosenberg (1993) claimed that it is a 'hollow hope' to expect social change from court rulings, which he demonstrated using the examples of civil and women's rights. In his study of Germany, Vanberg (2005) additionally finds that the public can give crucial support in overcoming the compliance problem that courts face when adjudicating against the preferences of governments. If contentious court rulings find public support, and executive inactivity is visible to the public, there are potential electoral costs for governments in relation to non-compliance.

In international relations, the debate concerning courts is similarly structured. In this area, independent courts hold the promise of transforming a dominant state of anarchy into a system under the rule of law. Accordingly, processes of legalization are broadly discussed (Abbott et al. 2000; Zangl 2005). Again, some authors reject the notion of any independent impact at this level. Goldsmith and Posner (2006), Posner and Yoo (2005), and Posner and Sykes (2011) are prominent advocates of the position that international courts' authority is bound by the preferences of governments. Rational governments decide whether to bind themselves to international law and courts. The latter are, therefore, fundamentally dependent on the preferences of powerful governments as they will only comply when it suits their interests (Alter 2014: 45–6). Alter (2014: 337), however, rejects what she calls the 'executive control thesis' for several reasons. In contrast to the American context, where political parties can influence the composition of the federal and state judiciary, this kind of streamlining is absent at the international level. More fundamentally, she rejects the preoccupation with executive control and the strong rational-choice assumptions that governments cannot bind themselves to this extent. After all, to achieve empirical support, the argument faces the problem of revealed preferences: 'falsifying this executive control thesis would require a shocking correlation in which judges systematically and generally ignore government opinion. This would be surprising indeed' (Alter 2014: 338). Rather than being preoccupied with the means of executive control, she argues that it is more important to show with which causal mechanisms international courts can influence politics. A concept that resonates with this argument is that of judicial power, elaborated by Staton and Moore (2011), which is defined as the process through which 'courts endowed with formal powers to review the actions of states come to constitute binding constraints on governments' (Staton and Moore 2011: 555).

The lack of a legitimized monopoly of force at the international level may appear to distinguish the analysis of international courts. However, as Carrubba and Gabel (2014: 214) emphasize, it is just as questionable why governments at the national level should obey court rulings that violate their preferences.

Similarly, Staton and Moore (2011) argue that the analysis of judicial power gains from a unified approach for national and international courts.

To study the ECJ, one can thus draw on results for both domestic and international courts. One approach that does so is Stone Sweet's influential theory of judicialization. It describes the increasing importance of the judiciary in comparison to the legislature for the determination of collectively binding decisions (Stone Sweet 1999). For judicialization to proceed, Stone Sweet points to certain preconditions: a sufficient case load needs to reach a court so that it is able to develop case law. Furthermore, precedent needs to be honoured. Finally, courts have to give reasons in their rulings, as this allows litigants to draw on case law to further their interests. As Stone Sweet shows, the importance of precedent in orienting the future behaviour of courts and litigants leads to the path-dependent development of case law (Stone Sweet 2004: ch. 1). I will expand on this idea in the next chapter. We will now proceed to a more detailed discussion of the institutionalist foundations of the ECJ's power (for an extensive discussion, see Stone Sweet 2010), paying due attention to instances in which member states continue successfully to exercise control.

THE ECJ AS A MOTOR OF INTEGRATION

The literature on the ECJ mirrors the general arguments that are made about courts. The question of its power was intensely discussed in a debate in the 1990s between Garrett on one side and Burley (later Slaughter) and Mattli on the other. The idea of the ECJ's intergovernmentalist position, in which it merely follows the preferences of the member states and particularly the larger ones, was introduced by Garrett (1995). He opposed the neofunctionalist analysis advanced by Burley and Mattli (1993), who had argued that the Court could use the 'mask' of law to further European integration so it did not appear as a political actor. They interpreted the support of private litigants and lower courts as processes of functional and political spillover. Garrett's argument that governments will only accept ECJ rulings if they conform to their interests was heavily criticized by Mattli and Slaughter (1995, 1998). Later, Garrett refined his argument in a joint article with Kelemen and Schulz, arguing that the ECJ would also rule against the preferences of powerful member states whenever the legal line of argumentation was well established (Garrett et al. 1998). They found that the Court backs down in the face of political opposition when its legal interpretation does not meet with support. However, in cases where there is sufficient precedent, the Court will uphold contentious decisions against the member states. Garrett et al. (1998) thus assume that the Court is responsive to

the political context from which it receives its ultimate political legitimacy. Yet, law and precedent have a significant influence, as a court cannot contradict its own rulings too many times.

By acknowledging the independent impact of (case) law, this position comes close to the observations of Alter, who supports the dynamic view of the Court. Alter explains the political power of courts by taking into account the time dimension. She finds that new interpretations are normally tested in relatively insignificant cases (Alter 1998: 131). It is only later that the consequences materialize, but by this time there would be significant political costs in interfering with an independent judgment, which carry much more weight than the policy losses of a single case (cf. Kelemen 2001).

Based on the work of Alter, Mattli, and Slaughter, as well as Stone Sweet, Kelemen, and others, the dominant perspective within the literature on European integration is that the ECJ is an important political actor in its own right, as it has been highly influential in advancing European integration. Phelan even argues that the field is unusual within social science as there is no prominent alternative explanation (Phelan 2011: 769). Nevertheless, the argument that member states' preferences are paramount for the Court's rulings is often voiced.

> It is more than plausible that the ECJ's decisions actually reflect the opinion of a majority of judges and, by imperfect proxy, a majority of member state governments that appointed them. Thus, an alternative claim is that the Court is acting within its discretion and has not been curtailed because the preferences of the judges are not at odds with those of the member states. (Malecki 2012: 62)

Carrubba and Gabel (2014) show in their book that the ECJ's rulings do in fact reflect the observations that member states submit in court cases. Larsson and Naurin (2016) make a similar argument. Based on a separation-of-powers model, they show that the Court is influenced by the potential for a legislative override. With a focus on the executive and its means of non-compliance, Conant (2002) argued that the justice administered by the ECJ is 'contained', as member states only comply to the extent that there is a supporting coalition furthering these rights. Consequently, the Court can only count on member states' compliance when rulings keep close to their preferences.

Thus, as is true for courts in general, the ECJ's role is subject to continued debate concerning the scope of its discretion. In order to understand how the ECJ can be a politically influential actor, it is important to analyse its foundational institutional rules, as well as the support it enjoys from different actors. In line with the separation-of-powers approach, much of the research focuses on the potential for member states to override court rulings (Carrubba and Gabel 2014; Larsson and Naurin 2016). In the following section, I will summarize what we know from the literature, beginning with the Court itself and its professional environment. I then go on to discuss what can be seen as the

Court's supporting coalition, with the Commission on the one hand and the ECJ's cooperation with the member states' courts and the interests of private litigants on the other. These are the main parameters of the institutional setting that permit an activist court, and I will summarize the debate on judicial activism on this basis. Member states still remain important actors. I will, therefore, close by discussing the influence that the masters of the Treaty have on its interpretation. Given decades of research on the ECJ's operation, what follows cannot aspire to a complete literature review but seeks to draw out the main lines of research in order to elucidate the absence in the literature that my contribution seeks to fill.

The Court, its Judges, and its Professional Environment

To answer the question of whether the Court can be a political actor, it is good to begin by looking at the court itself. How are its judges chosen and under what constraints do they operate? What do we know about judges' preferences, and to what extent is the Court supported within the legal profession?

One ECJ judge is appointed for each member state by common agreement of the member states for a renewable term of six years (Article 253 of the Treaty on the Functioning of the European Union (TFEU)). With the Treaty of Lisbon (Article 255), a general hearing procedure was introduced in order to screen candidates for their suitability. In general, renewable terms make judges susceptible to political pressure and are therefore regarded as a sign of reduced judicial independence. In terms of the ECJ, it is recorded that some judges may be reminded that salary levels in their home country are much lower and that reappointment is not automatic.[1] But the fact that no dissenting opinions are published and decisions are taken in secret shields the judges at the ECJ. Moreover, as Carrubba and Gabel (2014: 120) argue, judges are hardly able to predict which government will be in office upon their reappointment, which limits strategic behaviour.

For the question of whether judges are put under pressure from their member states, it is interesting to take a look at the Advocate Generals (AGs) (Solanke 2011). Appointed on the same conditions as the judges for a six-year renewable term, they are asked by the Court to give a statement on pending cases that raise new legal issues. Their opinion lays out the evidence of the case, pays attention to the applicable precedent and the relevant literature, and makes an argument for how the case should be decided in the general interest. Since they expose themselves with these opinions, and in light of the impression that the Court often follows their arguments, the AGs presumably face

[1] Reinhard Müller, 'Noch ein "Ja, aber"?', *FAZ* 10 June 2015.

similar pressures to judges. However, it does not appear that the five AGs of the large member states (Poland, as the sixth largest member state, has only participated since 2013, and the other AG positions rotate among the smaller member states) aim to avoid controversy with their opinions. Advocate Generals are frequently reappointed, despite opinions that extend the reach of EU law and encroach on member states' sovereignty. Thus, a number of AGs who took up their positions in 2006 are now in their third term: France is sending Yves Bot, Italy Paolo Mengozzi, and the United Kingdom Eleanor Sharpston. The British AG Francis Jacobs held office from 1988 to 2006. The German AG Juliane Kokott is also in her third term and has been in the post since 2003. In the legal literature, AG opinions are time and again cited as marking important departure points for the future development of EU law. One example is AG Sharpston, who has repeatedly argued for EU law to prohibit reverse discrimination against national citizens. Such discrimination may result from the freedoms not applying to purely national situations. If the Court judges that national regulations, for instance regarding services provision, restrict the four freedoms, it results in EU citizens being regulated less stringently than national citizens. Should EU law prohibit this reverse discrimination against national citizens, the sovereignty member states possess to regulate their markets would be reduced, which is certainly not in line with the UK government's preferences. Nevertheless, AG Sharpston was reappointed and is now serving her third term, which testifies to weak member-state control.

The ECJ decides by simple majority. Like courts in other political systems, the ECJ is a very efficient decision-maker. This is the source of its power in the relatively slow decision-making system of the EU, which has many veto points (Maduro 2007). It sits in chambers of three or five judges, depending on the issue. Important decisions are reserved for the Grand Chamber of thirteen judges. Case C-62/14 *Gauweiler*, the first preliminary reference for the German Constitutional Court, which deals with the Outright Monetary Transactions (OMT) of the European Central Bank, is such a case. The plenum of all twenty-eight judges very rarely decides a case; a recent example that required all judges to reach a decision was Case C-370/12 *Pringle* on the ESM (European Stability Mechanism) (Court of Justice of the European Union 2012: 112). In 2015, chambers of five judges decided 58 per cent of all cases (2014: 55 per cent), chambers of three judges 34 per cent (2014: 36 per cent), and the Grand Chamber 8 per cent (2014: 8.7 per cent) (Court of Justice of the European Union 2016: 10).

Given that decisions are taken in secret, and because there are no dissenting opinions, we lack an empirical basis from which to assess the significance of judges' preferences. In the research on courts in the US, the attitudinal model is important, analysing the impact judges' policy preferences have on judgments (Segal 2008; Rehder 2006). Malecki (2012) has analysed the Court's judgments quantitatively with regard to the composition of the responsible chamber in

order to shed some light on internal decision-making. Differentiating whether the judgment supports or negates the Commission position, Malecki shows that judges do in fact pursue different preferences; in other words, it makes a difference which judges sit in a chamber. Beyond more general statements such as these it is, however, scarcely possible to learn more through quantitative analyses. Based on a qualitative analysis of a set of particularly contentious and seminal judgments, Höpner finds that neither party affiliation nor the background of judges within their home countries in different kinds of capitalist systems contributes much to explaining the judgments they reach (Höpner 2010).

As difficult as it is to gain insight into judges' preferences, we can also look at the institutional rules under which the Court operates and ask how likely it is that judges can bring their preferences to bear upon rulings. I would argue that there are good reasons to assume that the policy preferences of judges are less rather than more significant at the EU level, given the rules that govern the allocation of cases to rapporteurs and chambers. This allocation is the responsibility of the president, who seems to be guided by ad-hoc considerations (Malecki 2012).[2] There is no specialization among chambers or judges in terms of specific cases.[3] This makes it less likely that a judge can develop a specific line of argumentation across a series of cases. We can assume that the rapporteur for a case is the most influential for its resolution. Judges are never allocated cases that concern their home country. In general, one would expect judges to pursue their policy preferences if they had a connection to the polity concerned. While judgments influence other cases through precedent (Knight and Epstein 1996), it is likely that policy preferences play a lesser role at the EU than at the national level because the effect of case law is more indirect.

For want of ways to empirically assess judges' preferences further, I therefore assume that the ECJ largely pursues its own interest to stabilize and extend its position as a corporate actor (Schneider and Werle 1990). Self-interest is represented by the expansion of their own competence and resources to the monopolization of competence and the enlargement of their autonomous decision-making (Schimank 1992: 264). To the extent that judges pursue individual policy preferences, the institutional set-up means that they are unlikely to have a coherent impact, reducing their preferences to the level of empirical 'noise'. While the pay-off for pursuing individual policy preferences is quite low, the pay-off for building the EU's legal doctrine is larger.

[2] Rules of Procedure, Article 15 § 1: 'As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur in the case.'

[3] In contrast, at the German constitutional court, judges have specific portfolios. This allows single judges with a specific assignment to shape case law significantly. An example is Udo di Fabio, who was responsible for European integration between 1999 and 2011 and as rapporteur notably shaped the ruling on the Lisbon Treaty, as well as the case about financial aid to Greece.

It is not a new phenomenon for the community of EU lawyers to provide arguments for an expansive interpretation of EU law. As recent historical studies show, from early on the community of EU lawyers has been actively looking for cases in order to develop case law (Alter 2009: ch. 4; Vauchez 2010; Vauchez 2015; Pollack 2013). Thus, a group of lawyers working at the Commission's legal service at the Court or who were members of the European Law Association FIDE discussed possibilities for strengthening the ambit of EU law before *van Gend* established direct effect. They then publicized the decision broadly, emphasizing its transformative character and the new role that the Court should assume for integration. The decision on supremacy in the *Costa* case was, thus, clearly anticipated. Schepel and Wesseling show how lawyers working for European institutions have been unusually active in publishing in the major European law journals, using these venues to influence the debate on European law (Schepel and Wesseling 1997: 172–3). Vauchez (2012) analyses how a transnational 'esprit de corps' developed through conferences, Festschriften, and eulogies that have instilled consistency into the Court's operation. This helped to overcome the problem of the Court itself having no influence on the appointment of its judges, meaning they had to socialize judges from highly heterogeneous environments.

Martin Höpner (2011) has shown in great detail how EU lawyers have cultivated an ethos in which the transfer of competence to the European level is regarded as a good thing per se. European legal scholars are not highly concerned by the fact that the Court cannot on the whole be overruled. They adhere to a view of the transformationist role of European law. This telos provides legitimation for extensive case law. Conway (2012: p. xv) even speaks of a 'language of love' between EU lawyers and the ECJ; he argues that 'A reluctance to criticise the ECJ is marked in academic literature' (Conway 2012: 84). In view of the overall supportive stance of the legal profession in broadening the reach of European law, allegations of legal activism have generally been largely denied and downplayed by the legal community. This consensus resembles research on European integration in general, where most researchers have long welcomed further integration. Majone has been a vocal critic of this in recent years, arguing that European scholars have turned a blind eye to the pitfalls of European integration. He argues that more integration is still regarded as the only insurance against war, ignoring how the dysfunctional aspects of European integration have led to new conflicts among member states, the failed euro policy being the best example (Majone 2014).

Within the legal profession, Rasmussen was the first to condemn the Court's legal activism (Rasmussen 1986). But his criticism did not meet with agreement among the mainstream of European lawyers (Conway 2012: 64–9). In part, defenders of the Court revert to semantic differentiations and argue that the Court is more entrepreneurial than activist (Solanke 2011). Eeckhout

(1998: 17) argues that critics would have to show the usurpation of 'the role of the legislature'. For this, the Court would need to divert from European law in its interpretations, which Eeckhout cannot detect and therefore denies. Crucially, he states 'the interpretation which [the Court] prescribes is not contrary to the intentions of the legislature. Those intentions are in any event most difficult to determine in Community law.' Another argument points to the fact that the EU's developed legislative system indirectly legitimates the Court, as the legislature could step in (Dobler 2008: 530). However, such legitimation overlooks the reality that the constitutionalized case law largely does not permit overrule, given the multiple veto points that can lead to a joint-decision trap (Scharpf 2006).

At times, criticism has become more vocal, diffusing beyond the expert circles of lawyers and EU integration specialists to the general public (Basedow 2012). Interestingly, the debate was particularly pronounced in Germany, despite the country's tradition of having a powerful constitutional court. Here, the former president of the country, and also of the constitutional court, Roman Herzog, publicly pledged in 2008 to 'stop the ECJ' (Pop 2008). Contentious rulings like those in the *Laval* and *Viking* cases, which constrained union activity by arguing that strikes hampered the economic freedoms of the Treaty, were received very critically, particularly in Northern European countries (Seikel 2014b; Blauberger 2012). Other cases, such as Case C-372/04 *Watts*, which allowed a British patient to circumvent the waiting times of the British National Health Service, demonstrated the far-reaching domestic policy implications of supranational case law. In fact Kelemen (2016: 139) perceives that there is a 'proliferation of critical voices' and asks, 'Might the European legal field, which has so long supported the authority of the ECJ, come to act as an external constraint of the Court?'

Whichever way the relationship develops in the future, its position of being embedded in the EU's legal community has for a long time allowed the ECJ to expand the reach of EU law. Yet, even in the context of a legal community pursuing common aims, filling in legal gaps can be contentious. Why was one interpretation chosen over another? Often the underlying laws give little indication, as Keeling has argued in relation to the free movement of goods in Articles 30 and 36 of the Treaty Establishing the European Economic Community (EEC Treaty/TEEC). It may, therefore, be difficult to avoid criticisms of activism.

> The bulk of the task was, however, left to the Court. It was the Court that had to determine the scope of the prohibition decreed by Article 30. It was the Court that had to decide in what circumstances a measure caught by Article 30 was justified on the grounds set out in Article 36. . . . The expression 'creative jurisprudence', which is often used in mock disparagement of courts that give non-obvious answers to questions for which there is no obvious answer, is especially absurd in this context; for whatever the Court did with such scant material, its jurisprudence was bound to be creative. (Keeling 1998: 512)

Contentious case law undermines the legitimation of the ECJ. One can, therefore, assume that the Court has its own interest in preventing conflictual rulings (Shapiro and Stone Sweet 2002: 128). But the institutional conditions of its functioning as a supranational court make this difficult. In view of the great institutional heterogeneity amongst the twenty-eight member states, it is impossible for the Court to assess all the repercussions of its rulings when called upon in preliminary proceedings. Larsson and Naurin agree that the Court faces significant uncertainty as to the political reactions to its judgments (Larsson and Naurin 2016: 2). Even if member states submit observations, this is unlikely to provide a full picture of all concerns. Generally, courts have to decide those cases that are brought before them. As the European Union has not made all competences supranational, at times the ECJ could principally point to its limited competence and deny adjudication (Roth 2008). In particular, as the Court acts as a constitutional court, it should be careful which cases to decide upon, taking into account that its rulings are added to the EU's constitution (cf. Scharpf 1966: 528). However, the Court takes the view that it has to solve all disputes that are brought before it (Keeling 1998: 512). Reaching decisions by simple majority, it is also better placed to do so in comparison to the Council or Parliament (cf. Bellamy 2008a). And often conflicts are delegated to the Court that cannot be solved politically due to their contentious nature (Maduro 2007: 824).

Therefore, it is difficult for the ECJ to avoid conflict. The dilemma is manageable because of the way that the Court's case law develops. Since most of its cases are preliminary rulings, the Court does not decide upon legal disputes by itself but gives indications to member-state courts on how to interpret the Treaty. It is up to those courts to use these guidelines in adjudication. Moreover, case law is typically developed incrementally. Given the weak legitimation of courts to create rules, this allows the Court to await reactions from the legal community and the member states in order to assess whether there is sufficient support for the chosen interpretation (von Bogdandy 1995: 25). The incremental development of case law provides precedent, upon which later rulings can build (De Somer 2016). Stone Sweet argues that case law is heavily path dependent (Stone Sweet 2004: 35–6), an idea I will develop further in the next chapter. Precedent shields the Court from the reproach of political judgments and makes it easier for the Court to maintain contentious judgments reached against the member states (Garrett et al. 1998). By objecting to these judgments, member states would simultaneously endanger the principle of legal independence and the general importance of the rule of law. Incrementally, the ECJ may establish doctrines which member states would have objected to had they known the consequences of these rulings for their domestic polities from the beginning (Alter 1998: 131).

In summary, while member states appoint the judges, the ECJ enjoys great institutional independence. Its operation is shielded from oversight. It can

draw on a broad network of EU lawyers, sympathetic to the expansive reach of EU law, who are also willing to bring cases actively to the ECJ that allow the establishment of new principles. Case-law development takes place incrementally. Precedent and the value of the rule of law shield the Court from interventions.

The Commission

Alongside the legal profession, the Commission is a particularly important party in Court cases. As the two main supranational actors with their own corporate interests in furthering integration, the Commission and the Court are close partners. As the guardian of the Treaty, the Commission has privileged access to and knowledge about the Court (Hofmann 2013). The Commission can hand infringement procedures to the Court when member states fail to meet their obligations under European law (Article 258 of the TFEU). In the context of this book, these are of interest only when they are connected to the Treaty. Their relevance in the monitoring of member states' compliance with secondary law is discussed in implementation studies (Börzel et al. 2012). The Commission's Legal Service has been a particularly powerful actor in the development of European law since the early days of the European Economic Community (EEC) (Rasmussen 2012; Alter 2009: ch. 4; Hofmann 2008). Additionally, if the Commission is not part of the legal proceedings, it normally intervenes and puts its opinion to the Court. Quantitative studies have shown that the Court sides with the opinion of the Commission in 75 per cent of cases (Carrubba and Gabel 2014: 134), making the Commission's position the single most important predictor of the Court's ruling (Malecki 2012: 61, 65). Carrubba and Gabel (2014: 136) argue, however, that this is only because the Commission reflects member states' positions towards a case, implying that it does not have an independent impact on the ruling. Both authors also find that the Commission refrains from infringement action if it expects non-compliance: 'The Commission disproportionately pursues enforcement actions when it expects compliance with a favourable ruling' (Carrubba and Gabel 2014: 135).

With its right to initiate infringement procedures, the Commission can instigate case-law development in new areas. When pushing for the expansion of European law by initiating cases, the Commission normally enjoys the support of private actors. An example of this is the Commission's repeated legal action against the shareholder privileges of the state of Lower Saxony in the Volkswagen company, which led to two cases (C-112/05, C-95/12). Significantly for the Commission, the German company Porsche wanted to strengthen its influence on Volkswagen but could not achieve this in the German political context. Porsche, therefore, addressed the Commission to gain its backing (Werner 2013). European law offers private litigants a very favourable

environment for pursuing their interests. On this basis, they may further integration or push through domestic reforms (Schmidt 2000).[4]

The literature on adversarial legalism, in particular, has shown how the Commission, the Parliament, and also the ECJ are keen to support the enforcement of European law through private actors (Kelemen 2006, 2011). In its reliance on the administration of member states for compliance, the Commission needs the support of those actors who profit from European law in order to enforce it. As such, the control of implementation of European law relies more on the 'whistle blowing' of private actors than on the systematic 'police control' of national implementation by the Commission (Pollack 1996). Next to instrumentalizing private actors in this way, there is another point of consideration. Given the unsolved problem of legitimating the European order, the active use of European rights by private actors is seen to be legitimacy enhancing by the European institutions. After all, it is mainly due to the Commission, Court, and Parliament that these European rights exist and are being expanded through case law. By using these rights, private actors indirectly legitimate the actions of those building them (Kelemen 2006: 123; Cichowski 2006: 51; Slepcevic 2009).

A characteristic of most analyses of the Commission in relation to the Court is the focus on its initiation of infringement procedures or its interventions in preliminary references. There is much less attention paid to how the Commission combines case law with its right of initiation (Schmidt 2000). Behind this neglect, I would argue, lies the lack of attention given to the policy implications of over-constitutionalization. The ECJ is incorrectly regarded as a 'normal' constitutional court that does not make detailed policy prescriptions. But secondary law—directives or regulations that are proposed by the Commission—cannot overrule primary law, namely the Treaty and its interpretations. To the extent to which the Court adds to the Treaty's meaning through its case law, the Commission is likely to take it up in its secondary law proposals. This codification generalizes the impact of case law.

Hartlapp et al. (2014) give numerous examples of how references to case law are important for reaching decisions on internal organizational conflicts concerning policy within the Commission. In general, however, analyses of policymaking in the EU pay scant attention to case law. This is the argument of this book, and I will present my analysis of the importance of the interaction between the Commission and the Court in Chapter 4. There I will also discuss the European Parliament, which is not a relevant actor in Court procedures and is therefore neglected in this chapter.

[4] Sometimes (quasi-)public actors also have recourse to changing the legal regime by reverting to EU law. An example is the attempt of the regional pharmacy board in Saarland to challenge pharmacy regulation in Germany (C-171–172/07) (Schreinermacher 2013: 27).

The ECJ's Supporting Coalition: Member-State Courts and Private Litigants

Private actors enjoy direct access to European courts only when appealing to European decisions that affect them directly, for instance in competition law. However, individuals or companies may argue before national courts that European law needs to be applied to their case. This presupposes, of course, that potential litigants find legal standing, which is often a demanding precondition. When the implications of EU law are sufficiently clear and beyond doubt, member-state courts can apply this law directly (*acte clair* doctrine), as a uniform implementation across the EU can be expected. If there are doubts about the legal issue, national courts have to address the ECJ through the preliminary procedure. This gives private parties indirect access to the Court. Litigants may be concerned with trade or general policy interests, or they may be motivated to address the ECJ for reasons that are more loosely associated with the case at hand. Thus, NGOs or private law firms may litigate as an advertisement for their general activities or pursue a case for ideational reasons. An example here is Elaine Vogel-Polsky, the lawyer who pushed the *Defrenne* rulings combating discrimination against women (Hoskyns 1996: 68–73). Little research has been conducted on litigants in the EU (Vanhala 2006, 2009). Anecdotal evidence points to the relevance of Galanter's (1974) distinction between 'one-shotters' and 'repeat players' in the legal system of the EU too. While the literature rightly emphasizes the partly prohibitive preconditions for legal standing (Kelemen 2011), this should not distract from the significant prize of successful litigation that is analysed in this book: constitutional change throughout the Union. And the development of ECJ case law shows that, as restrictive as the situation may appear to the individual litigant, for the Union as a whole, case load is sufficient to bring about far-reaching changes.

A fundamental aspect of this possibility of challenging the national legal order emerged in the 1960s as part of the constitutionalization of individual rights through the ECJ with the doctrines of direct effect and supremacy (Vauchez 2008). In fact, the preliminary reference procedure was initially introduced to provide lower courts with the means to seek help in the interpretation of EU law. But direct effect and supremacy transformed the procedure into one allowing private actors to challenge national law in terms of the degree to which it conformed with EU law (Mancini 1989: 606; Alter 1998: 133–5). This developed into a mechanism for decentralized control of member states' compliance with European law. The institutional provision of preliminary rulings, as Weiler argues, leads to a unitary system of judicial decision-making in the EU (Weiler 1981: 300). As the rulings of the ECJ are directly translated into the rulings of member states' judicial systems, governments struggle to oppose European law without questioning the judicial independence of their courts.

But why do member-state courts address the ECJ and help to overturn the domestic legal system with European law? In fact, it took a few years until the courts began to take up this opportunity, with the first case reaching the ECJ in 1961 (Mancini 1989: 605). For lower courts, the preliminary procedure is quite attractive, as it strengthens their independence from the domestic court hierarchy to which they belong. Basing their decision on supreme European law shields them from the risk of being overturned by the next higher court (Weiler 1994: 518–20). And lower courts are said to be less concerned with the coherence of the national legal system (Alter 2001: 49).

Domestic courts often frame the questions raised in the preliminary procedure in a way that gives clear indications of the sort of answer they would like to receive (Nyikos 2006). The ECJ has every incentive to follow this lead, which gives assurance that its verdict will be taken up rather than ignored by the lower court. Were lower courts not to follow its rulings, this would undermine the authority of the ECJ. The cooperation with lower national courts is particularly important for the ECJ, as they provide it with a case load and integrate European law into the judicial systems of the member states (Dyevre 2010: 323). Acknowledging the important role of lower courts in actively asking for certain rulings, Gareth Davies has argued that the ECJ should not be blamed for its activism (G. Davies 2012). The contentious Case C-144/04 *Mangold* ruling on age discrimination shows how litigators may strategically address courts so as to derail domestic policies with the help of European law, thereby relying on the explicit framing of the issue by the lower court judge. In this case, the litigator had first attempted to influence the policy in the German Parliament. After this had failed, he reverted to fabricating a case and litigating (Stone Sweet and Stranz 2012). In a quantitative analysis, Chalmers and Chaves show how preliminary rulings only partly monitor compliance with EU law and partly push for what they call 'thickly evaluative norms' in the areas of economic liberalism, equal opportunities, and labour rights (Chalmers and Chaves 2012).

Discussing Brexit, Davies (2016b) has recently called upon domestic courts to engage in more critical debate with the ECJ, thereby requesting a challenge to what Conant (2002: 50, 67), for example, criticizes as an often contained compliance with case law. Davies argues that 'unquestioning obedience' is not loyalty but subversion, as only a judicial dialogue can lead to an acceptable development of case law.

Still, there are significant differences in the use of the reference system in the member states (Mayoral 2016). Analysing the British case, Golub pointed to disincentives to refer cases, which allows policy outcomes to be controlled while slowing down the integration process (Golub 1996: 381). Marlene Wind argues that the small number of references from Danish and Swedish courts have to be explained through the absence of a tradition of judicial review in majoritarian democracies. There is the assumption that only the highest courts

should request preliminary rulings. In general, she finds that domestic courts interpret EU law themselves, arguing with the *acte clair* doctrine that the meaning of EU law is sufficiently clear (Wind 2010: 1046, 1048, 1053, 1055).

Despite such support for the ECJ, the relationship with national courts is not necessarily an easy one, particularly if supreme or constitutional courts are involved. The ECJ depends on their cooperation, but member-state courts may not always be interested in furthering the applicability of European law when they address the ECJ. Beach (2001) gives the example of the Irish abortion case (C-159/90) in which the issue was whether freedom of services could undermine the Irish prohibition of abortion. Irish student associations had published information about abortion clinics in the UK, which were illegal under Irish law. In their defence, they referred to the freedom of services as allowing them to disseminate information about services in other member states (Beach 2001: 20; see also Nyikos 2006: 528–9). When the Irish High Court addressed the ECJ, it was clear that it would not have followed a ruling that undermined the Irish prohibition of abortion. In fact, the Irish Supreme Court openly threatened non-compliance should the ECJ take such a decision (Beach 2001: 21). The ECJ, therefore, in a Solomonic judgment, established, in principle, the relevance of freedom of services for abortion but denied its relevance in the case at hand. This gave Ireland the opportunity to include a protocol on abortion to the ongoing negotiation of the Maastricht Treaty.

Supreme and constitutional courts lose power to the ECJ at the apex of the judicial hierarchy. This has led to many conflicts between the ECJ and the highest national courts, both historical and ongoing. For the highest national courts, it cannot be taken for granted that the supremacy of European law will be accepted. Thus, the Czech Constitutional Court declared a ruling of the ECJ to be *ultra vires* in 2012 (Anagnostaras 2013). A notable—and widely cited—critic of the ECJ is the German Constitutional Court (GCC). Only very recently has the GCC posed its first preliminary reference (Case C-62/14 *Gauweiler*), questioning the competence of the European Central Bank (ECB) to enact the Outright Monetary Transactions (OMT). Although the GCC has made clear in its reference that it regards the decision of the ECB to be *ultra vires*, in its judgment it largely followed the ECJ. Again, the ECJ faced a difficult situation. On the one hand, it had already affirmed the euro rescue plan in the Irish *Pringle* case. On the other hand, it risked provoking another instance of open opposition from the GCC, as it had done in the early 1970s when the ECJ did not deem the protection of basic rights in the Community to be sufficient (B. Davies 2012: ch. 5). In its ruling on 16 June 2015, the ECJ backed the ECB plan, but it at least followed the GCC in the assessment that the ECB should be subject to judicial oversight.

In terms of the ECJ's case-law development, conflict with the highest member-state courts has been important. Notably, its establishment of its own human rights' jurisdiction can be seen as an answer to the objections of

the Italian and German constitutional courts in the 1960s and 1970s. They had threatened to subject European law and court rulings to judicial review for as long as there was insufficient fundamental rights protection at this level (Weiler 1986: 1119; B. Davies 2012).

For my analysis of the policy implications of case law, the interests of private actors and lower courts in turning to an alternative legal setting is of central importance. It is facilitated by the great detail contained in constitutionalized case law based on a Treaty that provides much more differentiated rules than national constitutions do.

The Court and the Masters of the Treaty

To what extent are member states able to guide the Court to follow their wishes more closely? Member-state governments are the masters of the Treaty. In discussions within political science, the discretion of the Court in its relationship to the member states receives the most attention. Member states shape the institutional rules under which the Court operates. Moreover, there is quantitative data on the way the Court responds to member states' observations in Court proceedings.[5] As Kelemen (2016: 128) argues,

> For the most part, the literature on interactions between member governments and the ECJ has long since arrived at a general consensus that member governments set the outer bounds of how far the ECJ can push both its authority and the scope of European law but that within these bounds the ECJ has substantial room for maneuvering that it can use to promote deeper integration.

In relation to these outer bounds, I will first discuss how member states shape the Court's institutional foundations, before turning to the more difficult question of how they influence its rulings.

Institutional foundations

In terms of their institutional foundations, there are convincing arguments for why it would be difficult to show supranational courts what their politically acceptable limits are. Principal-agent theory explains that agents' discretion rises with the number of principals that have heterogeneous preferences (Hammond 1996; Tsebelis and Garrett 2001). And principal-agent theory also tells us that the ECJ has a very broad sphere of action, as it has to please,

[5] Formally, there is the distinction between interventions in direct actions, i.e. infringement procedures, and those in observations to preliminary references. In the former, intervening governments join the case. In the latter, this is not possible as the national court poses the question (Carrubba and Gabel 2014: 63).

in extreme cases, only a single member state in order to be immune to sanctions (Kassim and Menon 2003; Tsebelis and Garrett 2001). The more the EU grows, and the more heterogeneous it becomes, the greater the discretion of the ECJ becomes. The EU polity's decision rules are demanding, requiring a qualified majority of member states' votes for secondary law, and unanimity to change the Treaty. High-order decision rules imply that a minority of member states can lock court-induced changes in. Twenty-eight member states are unlikely to agree on how to rein the ECJ in. The joint-decision trap kicks in, which protects the Court (Scharpf 1988, 2006). In fact, Larsson and Naurin (2016: 25–6) find that the Court is less responsive to member states' observations when an override requires unanimity.

However, member states not only have preferences concerning policy but also in relation to the institutional balance of the European Union. Governments may turn against judgments that further their policy interests, as they know that a court that is too strong may violate their own preferences in the future (Moravcsik 1995). It is hard to predict whether member states will follow more homogeneous institutional or more heterogeneous policy interests. From this perspective, the independence of the Court, stemming from the heterogeneous policy preferences of member states, is limited by member states' homogeneous institutional preferences.

Expanding on the literature on principal-agent theory, Alter and Stone Sweet have argued in favour of taking a 'trustee' perspective on courts (Alter 2008a; Stone Sweet and Brunell 2013). While they differ in their precise argumentation, the general idea is that member states have to 'trust' their courts and delegate independent power to them in order to safeguard the rule of law and the independent third-party arbitration of courts. Accepting the discretion of courts is part of this delegation: 'A trustee is a particular kind of agent, possessing the power to govern the rulers themselves. In the most common situation, the trustee court exercises fiduciary responsibilities with respect to the constitution, in the name of a fictitious entity: the sovereign People' (Stone Sweet and Mathews 2008: 86). After all, it is fundamental to the balance of powers and the rule of law for courts to rule against executives (Caranta 2008: 195). Otherwise, independent courts would have no use. From this perspective, the ECJ pretty much does what it is intended to do.

At several times during treaty negotiations, the Court has become an issue in debates, which shows that the trustee relationship is not without contention for member states. But again, these instances can be taken as either the exception that proves the rule that member states are generally content with the case law of the Court or as the tip of the iceberg at points when governments finally had an opportunity to intervene.

The member states, thus, tried to constrain the implications of the ECJ's ruling in Case 262/88 *Barber* through a protocol to the Maastricht Treaty that limited the retroactive effect of the ruling. In this ruling, the ECJ argued that

Article 119 of the EEC Treaty (now Article 157 of the TFEU) also applied to the equal treatment of women under private pension schemes. There were enormous financial implications, as women working part-time were often excluded from such schemes. Because the Court interprets the EU law as it stands, its rulings generally elucidate how things should have been all along, implying that its findings should take full retroactive effect. The reaction to the *Barber* ruling can be taken as a clear sign to the ECJ that member states were not willing to accept an activist court. Following the ruling, the Court was perceived to be practising judicial self-restraint (Garrett et al. 1998: 166, 168; Dehousse 1998: 148–56). The UK had also brought far-reaching reform proposals into the negotiations on the Maastricht Treaty, attempting to curtail the activism of the Court. However, this received some support from Germany and France but not the necessary backing from all member states (Tallberg 2000: 114–15).

In the context of the Lisbon Treaty, Austria successfully bargained for a five-year moratorium in the conflict about German medical students studying in Austria. Austria had tried to curb the influx of incoming German students who had not found a place in German medical schools which had more restrictions on the intake of students. However, the ECJ ruled that the principles of non-discrimination and free movement prohibited Austria from treating German students any differently from Austrian ones (C-147/03). Austria would thus be forced to pay for part of German medical training (Scharpf 2008: 91–2). Following this bargain, it was ensured that a quota of 75 per cent of medical student places had to be reserved for Austrians in Austria for five years, which was later prolonged until 2016. Following another ECJ ruling concerning French students in Belgium, the Court accepted restrictions in cases where member states are able to prove a lack of professionals due to students returning to their home country (Damjanovic 2012). A survey in 2014 showed that only 21 per cent of Germans who completed medical studies in Austria stayed in the country to work.[6]

In terms of the strength of the Court, it is crucial to keep in mind that it operates within a multilevel political system and that the ECJ receives direct support from litigants and courts in member states. As I have argued, litigants' support for alternative policies at the EU level is also significant for the electoral considerations of member-state governments. And because of the preliminary ruling procedure, member states are scarcely able to ignore European law. By openly opposing it, they would not only question the independence of the EU judiciary, which is so central to the rule of law, but also their domestic court system.

Based on experiences in the US, Dan Kelemen has analysed why member states have such difficulty using court-curbing mechanisms against the ECJ

[6] 'Ausländische Medizinstudenten gehen fort', ORF, Tirol, 1 Dec. 2014. <http://tirol.orf.at/news/stories/2683711> [accessed 10 May 2017].

(Kelemen 2012). As we have just seen, the joint-decision trap prevents member states from stripping the court of its competences, changing its mandate, or reducing its resources. Given that jurisdiction stripping is not really possible, member states have signalled their criticism of the Court by keeping policy areas outside of its jurisdiction, such as immigration and asylum in the Maastricht Treaty (Kelemen 2012: 46). Interestingly, at Lisbon, immigration and asylum was added to the Court's jurisdiction. Member states had seen that they need the Court to enforce agreements. This instance shows that, while member states are critical of the Court, their overall assessment is still positive. Drawing on an argument made for the national context that courts depend on public support (Vanberg 2005), Kelemen argues that the extent of public support ('trust') the Court enjoys, as measured by Eurobarometer data, shields it from court-curbing measures. Even when comparisons are made to the national judicial system, he finds high levels of support. Surprisingly, countries that were struck by highly controversial rulings, such as the cases of *Viking* and *Laval* that curtailed union rights, did not show a lowering of public support for the ECJ (Kelemen 2012: 50). Kelemen also discusses whether member states can attempt to influence the Court by appointing eurosceptic judges. Only eurosceptic countries are likely to do so, and Kelemen asks whether such judges could make a difference. They would have to be the median judge in decision-making, given the simple majority rule in the Court. Looking at the composition of the different chambers at the ECJ, Kelemen concludes that it is very unlikely that eurosceptic member states could make their influence felt by appointing the median judge (Kelemen 2012: 53–4). Changing the underlying institutional rules is always something of a nuclear option. Such an extreme reaction is not necessary if the 'masters' of the Treaty are deferred to in the Court's everyday operation. We will now turn to this question.

The influence of the member states

Carrubba and Gabel (2014) recently argued in their quantitative study that the Court largely follows the member states' position. Courts 'cannot successfully push interpretations of international law that are inconsistent with underlying government preferences' (Carrubba and Gabel 2014: 49), they argue. Carrubba and Gabel show that the Court responds to member states' threats of non-compliance, as becomes apparent in the balance of third-party government briefs that are submitted. They analyse legal issues rather than court cases, as cases often address several legal questions. By taking the opinions of the AG to reflect the legal merit of the case (Carrubba and Gabel 2014: 97), they show that the Court does in fact respond to the threat of non-compliance by member states and does not decide in a certain way purely based on legal arguments. Thus, Carrubba and Gabel (2014: 213) conclude that 'Everything happens conditionally on implicit government acquiescence.'

Using similar but more recent data in an argument that refers to override rather than non-compliance in a separation-of-powers model, Larsson and Naurin (2016) arrive at similar conclusions that the Court is responsive to member states' signals. This does not mean determination, however, as the results of their empirical analysis show that there is considerable room for Court discretion. Although Carrubba and Gabel appear to emphasize the role of member states more strongly, they also hold that 'within limits, it is perfectly possible for international courts to innovate and change the functioning of an international organization' (Carrubba and Gabel 2014: 49). Thus, the difference between the various authors appears to be one of degree, as few would say that governments' preferences do not matter at all to international courts. Alter emphasizes that it would be surprising to find that international courts consistently violated governmental preferences (Alter 2014: 338). Interestingly, Carrubba and Gabel find—counter to expectations that preliminary rulings have a greater impact in the integrated European court system—no difference in the significance of government briefs for ECJ rulings in infringement versus preliminary rulings (Carrubba and Gabel 2014: 164). Thus, they see no evidence that the Court relies heavily on the support of lower national courts to bring its verdict into the judicial systems of member states. What could one add, from a qualitative viewpoint, to these quantitative analyses of how governments' interventions influence the Court?

Relating to actors, Carrubba and Gabel assume that governments rationally intervene in all those cases that matter to them. Larsson and Naurin (2016), however, emphasize that the Court has to operate with significant uncertainty as to whether member states are seeking to override processes. Additionally, case studies show that member states do not necessarily always intervene when their interests are at stake. One example is Case C-292/04 *Meilicke* on taxes, which I discuss in Chapter 6. In this example, the legal issue of dividend taxation had already been discussed in Case C-319/02 *Manninen*, but the German government had not intervened in *Manninen*, although it claimed large tax losses of €5 billion in *Meilicke*. Thus, governments do not necessarily intervene in rulings that affect them. It is possible that they are not aware of the implications. Alternatively, they may hope that their infraction of EU law will not come to light too soon if they keep quiet. Interventions in cases, thus, do not adequately reflect political salience.

Moreover, the preferences of governments are somewhat fluid. Not only is it difficult for governments to assess the consequences of all possible turns that a ruling can take, but it is also difficult to foresee how a ruling could favour or hamper future policy choices. In the European multilevel system, the European legal system offers societal actors the option to turn to an alternative legal framework. For governments, this means that they can observe which of the policy options are preferred by domestic actors, which may be important constituents for them. Moreover, within coalition governments, there are

frequently differences in policy preferences. As the EU often serves the purpose of avoiding blame, not all rulings which imply shifts in domestic policy are necessarily unwelcome. It is important to note that even if governments concur with court-driven changes, this does not imply that these changes would have been realized without the influence of the Court. In relation to government briefs then, we cannot assume that all required policy changes are brought to the attention of the Court (cf. Larsson and Naurin 2016). Figure 2.1 summarizes the arguments for the weakness of courts.

Although qualitative studies often find that many rulings contradict the observations and policies of a high number of member states, which indicates that the Court has a large amount of leeway and the member states have little control (Cichowski 2004: 496), building on Conant (2002), Martinsen (2015) questions the Court's power, emphasizing the political constraints under which it operates. Whereas Carrubba and Gabel, in addition to Larsson and Naurin, do not observe compliance or override as such, but rather analyse how the Court's rulings respond to member-state governments' interventions, in a qualitative study this interaction between rulings and legislation can be traced. In a very systematic way, Martinsen compares the impact of case law on the legislative process in three social-policy case studies: the Working Time Directive, the Patient Mobility Directive, and the failed Monti II Regulation. She differentiates between four different legislative reactions: codification, modification, non-adoption, and override. Only codification is taken to indicate significant judicial impact. Martinsen's research interests are similar to my own, given her focus on judicial and legislative policymaking. By focusing on EU legislation, Martinsen's work addresses an important gap in the literature that neglects this interaction. Martinsen's starting point is, however, that the ECJ is much weaker than is assumed in the literature, whereas I would argue that its actual impact has been neglected.

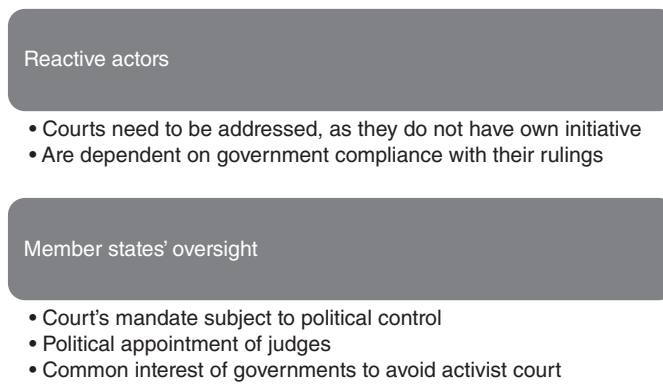

Figure 2.1. Weak courts

How can these different interpretations be explained? I would like to point to two reasons here: Martinsen's neglect of the importance of over-constitutionalization and her expectation that Court rulings are able to determine policies. First, by considering pure secondary case law (the Working Time Directive) to have the same level of importance as her other two case studies, Martinsen does not examine whether member states can revise the underlying directive or regulation or whether they would need to alter the Treaty. The Working Time Directive, which is known for its opt-out provision, is, additionally, a case that cannot tell us much about constraints from the Court. Member states can simply opt out of the directive. Secondly, there is attention needed to the specifics of case law, which only gives directions to solve very distinct disputes. In analysing judicial influence, Martinsen expects the full endorsement of Court rulings in legislation, arguing otherwise that legislators did not 'abide' (2015: 87, 122) by the Court's rulings. For Martinsen, as soon as the influence of the Court is mediated, this is taken as a sign that politics has the upper hand. However, as case law is so sketchy, it normally has to be complemented by codification. Martinsen wrongly assumes that Court rulings can devise whole policies that consist of general rules. Not taking the partial nature of case law into account leads to an overemphasizing 'modification', and with it political influence, thereby downplaying the importance of the Court.

There are two further qualitative findings that are interesting within the context of the influence of member states on the Court's rulings. Maduro (1998) analyses the case law on the free movement of goods and argues that the Court pursues a majoritarian activist position on the basis of information on the regulatory status quo in member states. He believes that the Court is only prepared to strike down member states' regulations if these are not in line with the regulations of the majority of member states. A kind of judicial harmonization process results from majoritarian activism. There has been no parallel study of the other freedoms to test this argument to my knowledge. In fact, we will see when we discuss the Court's tax case law in Chapter 5 that authors explicitly argue against Maduro's view (Graetz and Warren Jr 2006: 1193). This could also mean that the Court has become less cautious since the 1990s. An indicator for this is that some authors deny that the Court still pursues a majoritarian approach in other areas of case law (Barnard 2009: 598–9). This may mean that additional considerations have become stronger for the Court, such as its wish to improve the legitimation of the EU through a strengthening of individual rights (cf. Cichowski 2013).

Obermaier has argued, on the basis of the case law on patient mobility, that the Court 'fine-tunes' its rulings over a succession of cases. This allows the Court to take into account member states' reactions, thereby adapting its case law to their institutional conditions. Consequently, he argues that the implications of case law remain marginal (Obermaier 2008b: 746, 751). As we turn

to tracing case-law development in Chapter 3, we will see how important it is for the Court to develop case law over a series of rulings. There may be seminal judgments that stand out, but as single judgments cannot provide general rules, they are typically embedded in a group of similar cases that collectively delineate the scope of European law. Within such a series of cases, fine-tuning implies that the Court takes into account member states' considerations, aligning its rulings further with their concerns. We could distinguish it from an extreme reaction that we might call 'reversion', where the Court implicitly or explicitly overturns its earlier rulings. We could thus see a continuum of case law between activism, where new principles are established that encroach upon member states' competences, fine-tuning, where the limits of the reach of such activist case law are elucidated, and reversion, where the Court, in light of opposition from member states, reverts to a previous judicial position, re-establishing member states' competences.

Placing fine-tuning in such a continuum emphasizes a general feature of these processes and leads me to an interpretation that differs from Obermaier. For the implications of case law to be marginal, there would need to be reversion, since, otherwise, the seminal, activist case lives on. Fine-tuning only clarifies the scope of the conditions for case law's relevance. The general point to keep in mind is that, because of its *erga omnes* effect, activist case law does not only affect a single legal dispute. Its implications continue to be significant, in particular if case law interprets the Treaty. These implications may concern the immediate duties of implementation. But the constitutional nature of case law also means that certain policy options at the domestic and European levels are foreclosed. When debating the Services Directive, for instance, national treatment was no longer an option given past case law. The ECJ has a significant influence on non-decisions (Bachrach and Baratz 1962) in the way it closes off policy options that were previously available. And the Commission often enshrines such case law in proposals for secondary law, as will be analysed in Chapters 4 and 5.

The fact that case law is not only relevant for the individual case but lives on also leads us to reconsider quantitative analyses of case law. In general, quantitative analyses do not allow authors to differentiate between the importance of issues. Thus, if a ruling involves three legal issues, many member states intervene, and the Court consequently backs down on two of the three issues, it may be the case that these two issues are comparatively insignificant. Significant changes may result from rulings on a few issues in which the Court decides against the member states. Moreover, we could even question the findings on purely quantitative grounds. We could say that, whether the Court issues one activist judgment in ten cases, or only one in a hundred, as long as there is no reversion, a step taken towards more integration is still made. In this respect, the high case load that results from the indirect access of private actors is significant, and member states cannot

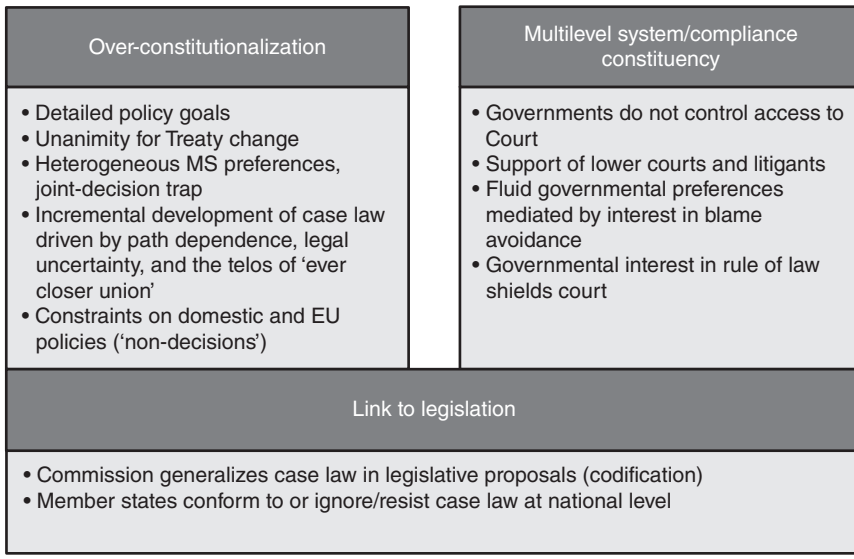

Figure 2.2. The strength of the Court

control this access. Figure 2.2 summarizes the arguments for the strength of the Court.

Where does this leave us? The Court can be shown to be responsive to member states' interventions. But we cannot judge to what extent it is lenient towards insignificant issues while it pushes through more significant ones. Member states may also fail to interfere reliably in relation to their preferences. There may be overriding interests in the EU's legal system, conflicting preferences within government, or insecurity about future voter preferences. A high case load allows the Court to incrementally develop case law. In Carrubba and Gabel's (2014) view, this evolves in line with governmental preferences. Larsson and Naurin (2016) show that override matters, but accord the Court significant discretion in furthering integration. According to Alter (2014), international courts have much greater leeway. Disagreement among these positions is, however, a matter of degrees. All fall short, however, of emphasizing the constitutionalization of case law, where even infrequent activist rulings go a long way.

CONCLUSION: SHORTCOMINGS IN THE LITERATURE

As we have seen, there is a significant amount of research on multiple aspects of how the ECJ functions. It is broadly recognized that the Court is an important

motor of integration, while it remains a matter of debate to what degree the Court can have an impact that contradicts the preferences and intentions of member states. As my starting point, the discussion so far has largely focused on the relationship of the judiciary to member-state governments. If the implications of the ECJ's case law for policymaking are analysed, this is done with the view that governments have the means to mediate its impact. The expectation here is one of 'automatic policy changes' (Conant 2002: 45), which thereby interprets any alterations as 'modification' (Martinsen 2015) and, therefore, as a counterbalance to the Court. The impact of case law is not sufficiently captured by analysing whether and how member states respond to single rulings. Case law becomes part of the Treaty and thereby influences future secondary law, as well as member states' remaining policy options. This is the topic of this book. Even if we find that the Court is essentially a reactive actor that takes heed of and aligns itself with governments' opinions, this does not mean that its impact is largely marginal.

In this respect, the over-constitutionalization of the Treaty plays a decisive role. As an international treaty that fosters economic integration, primary law in the EU is at once very detailed and only partially elaborated in comparison with national constitutions. Though periodical Treaty revisions have broadened rights, this has not fundamentally altered the thrust of economic integration in the Treaty. The Treaty favours economic rights over others and supports liberal rather than republican ideas about legitimation (Scharpf 2009). More importantly, despite the wide recognition that the European Treaties have fundamentally changed their character over a long period through the doctrines of direct effect and supremacy, there has been no discussion about reducing and simplifying the content of the Treaties in order to regain flexibility at the level of EU secondary lawmaking, as well as at the level of the member states, which are bound by the supremacy of EU law.

If the meaning of the constitution is altered in one ruling, this change may go a long way, even if the Court submits to member states' preferences in several rulings that follow. Courts need to respond to political pressures and uphold the independent rule of law. Case-law development unfolds in a path-dependent way. Its incremental, case-specific development makes its implications uncertain. Member states' positions may not be the single best indicator as to the impact of ECJ case law. Not only are governments not really able to foresee the implications of single rulings, they also have somewhat fluid preferences, as actors that are important constituents litigate for policy change at the European level.

Thus, focusing on member states' preferences can only partly explain the Court's behaviour. Its relationship to its supporting coalition of lower courts, litigants, and the legal profession is also relevant here. In particular, we also have to account for the importance of legal arguments, as it is implausible that case law is only determined by the preferences of judges and member states.

Should this idea hold, there would be no explanation for why rational actors would aim to influence the policy process in the first place, as the meaning of the resulting laws would be irrelevant in subsequent court proceedings.

This chapter has shown that research on the ECJ is preoccupied with juxtaposing governmental control of the Court and judicial activism, analysing these two options according to degree and therefore largely failing to capture the real relevance of the Court in terms of its influence on material policy. In order to understand this influence, it is necessary to analyse the development of case law by the Court in the next chapter.

3

Case-Law Development between Path Dependence and Legal Uncertainty

This book argues that research on the European Union (EU) has neglected the policy implications of European Court of Justice (ECJ) case law. Although the importance of the ECJ in developing EU legal doctrine is recognized, the literature largely overlooks how this directly impacts policymaking at the EU and member-state levels. Implicitly, the constraints that the ECJ places are compared to the constraints that national constitutional courts pose. However, one finding of this book is that the rule of law and independent courts have a different quality at the supranational as opposed to the national level. The extent of detail within the material rules of the constitutionalized European Treaties is underestimated (Grimm 2015).

In comparison to national constitutions, the EU Treaties do not predominantly focus on rules of state organization, setting out the structure of the polity, and sets of individual rights. Rather, we find quite detailed rules in relation to different economic freedoms and competitive markets. The case law pertaining to these rules complements the Treaties and results in a dense web of material rules that mainly focus on market regulation, but increasingly also on social rights. It is true that modern constitutions are characterized by a growing set of individual social rights, which aim to protect not only individual liberty and political participation but also a decent quality of life, in terms of rights to shelter and labour. But the extensive individual social rights of modern constitutions do not prescribe which policies to pursue as the Court does in its case law.

This chapter presents an explanatory framework for understanding the case-law development of the Court. My starting point is that the EU needs to be conceptualized as a multilevel system of governance (Jachtenfuchs 1995; Marks et al. 1996). One consequence of this system is that governments are no longer gatekeepers to the EU polity. They remain important players, but different actors may seek to further their interests at the EU level, rather than within a domestic context. Governments acting in such an environment only partly have a set of fixed preferences. They profit from the multilevel

system in different ways, including through blame avoidance (Weaver 1986). They can observe different policy solutions across the EU. Additionally, they get to know which domestic policies their prospective voters will attempt to abolish through litigation. We can, therefore, expect governments not to intervene reliably in the ECJ when they fear a significant impact from ECJ rulings. They do not always know which policies they will support in two years' time when the ECJ gives its judgment.

The ECJ itself is committed to an 'ever closer union'. In this chapter, I argue that the detailed constitutionalized Treaty rules, the multilevel character of the EU, and the incremental progression of case-law development combine in a way that characterizes this development as one that is simultaneously marked by legal uncertainty and path dependence. It is important to emphasize from the start that these terms are in a tension and appear contradictory. I argue that these concepts are helpful for understanding case-law development in the EU, which manages to bridge this exact contradiction. The Court takes a difficult task upon itself. On the one hand, it has to foster an integrated court system where lower national courts apply unfamiliar European law alongside national statutes. This requires stability and predictability in European law. On the other hand, the Court has to provide impetuses for further integration. It needs to be responsive to a community of EU lawyers that has long continued to present legal concepts for advancing integration. Litigants pick up these ideas and provide further impetus. Reconciling these demands for stability and change is possible, I argue, by pursuing, on the one hand, a path-dependent interpretation of the Treaty oriented towards precedent. The necessary dynamism, I argue, is provided, on the other hand, by legal uncertainty concerning the actual reach of EU law.

The extent to which the Treaty grants legal positions is evolving and uncertain. Legal uncertainty arises from the unclear implications of the constitutionalized Treaty overlapping with domestic legal orders and the balancing approach that the ECJ employs to mediate between the different legal orders. In reconciling the demands of integration and the legitimate policy interests of the member states, the Court employs a proportionality test, implying that the specific outcome of such balancing is uncertain. Legal uncertainty also results from case law's focus on the situation of the affected member state, with uncertain implications for similar but slightly different rules in other member states. Additionally, when the Court gives guidelines on interpretations in preliminary rulings, these do not amount to clear policy prescriptions, for which the Court is not legitimated. Moreover, reading unequivocal requirements out of the Treaty would conflict with the Court's interest in providing continuing impetuses for integration.

The path-dependent development of case law complements its uncertain implications for the EU and the domestic legal orders. Path dependence reflects an emphasis on precedent and a unified approach to interpreting the

four freedoms of goods, services, persons, and capital, as I will show. Legal innovations in one area, creating a new path, may spread to other areas as litigants adopt new arguments that are beneficial to them. Litigants provide positive feedback, but how the Court rules cannot be predicted. Though seemingly contradictory, both path dependence and legal uncertainty thus characterize case-law development.

In the following section, I will start by discussing the distinctive approach to integration in the EU, underlying the extensive reach of EU law. I will then discuss legal uncertainty. Laws are incomplete contracts that are open to interpretation and development of their meaning. To understand how case law can impact legislation, it is necessary to show how in its development it can acquire autonomy from the control of political actors. In this chapter, I aim to explain why the jurisdiction of the ECJ could evolve in such a way, proving that political efforts to counteract the development are insufficient. In light of over-constitutionalization and the detailed policy aims of the Treaty, case-law development is an important determinant of policymaking, alongside the political preferences of legislative, executive, and societal actors. Whether the Court follows these arguments, and which consequences result from policies at the EU and member-state levels, remains to some extent uncertain. In developing this argument, I will summarize case-law development for the four freedoms in the hope of further familiarizing readers within political science with this important and overlooked determinant of EU policymaking.

My explanation is the basis for discussing the impact of case law on policymaking at the EU and member-state levels in the following chapters.

THE DISTINCTIVE APPROACH TOWARDS INTEGRATION IN THE EU

The EU is not only about concerns with trade among member states. To understand the impact of ECJ case law on policymaking, it may be best to begin with what may be a common misunderstanding. In many quantitative analyses of case-law development, case load at the Court is related to trade. For instance, in a major contribution to the field, Stone Sweet and Brunell take the growing case load at the ECJ as an indication for a growth in transborder conflicts that are related to trade (Stone Sweet and Brunell 1998; Stone Sweet and Caporaso 1996; cf. Schepel 1998). This supports their neofunctionalist explanation of European integration as based on private actors acting in unison with supranational ones. In addition, Carrubba and Gabel consider how trade flows change and show that rulings have a long-term effect on trade (Carrubba and Gabel 2014: 178). This assumes that trade is the main reason

that litigants address the Court. However, Court cases only partly deal with transborder disputes (Alter 2000: 500).[1]

The focus on trade could reflect a misunderstanding rooted in experiences in the US, which follows a different philosophy. The EU legal order substitutes the national order, rather than simply complementing it, as is the case in the US, where interstate commerce adheres to different rules (Barnard 2009). European harmonization seeks to regulate state and transborder activities alike. Though the US interstate commerce clause directs federal laws to questions of interstate rather than state commerce, it has been interpreted along different lines across the decades. We can see, for instance, that the freedom to provide services is much less developed in the US than it is in the EU. This concerns highly regulated sectors, such as the insurance sector, as well as basic services, such as hairdressing (Schelkle 2017: 250; Egan 2015; Goebel 2002; Pfennigstorf 1987). In the EU, even though it would often have been easier to agree on rules that were directed exclusively towards transborder activities, the Commission has generally favoured an integrated approach (Troberg 1997b: 1414, no. 32). The advantage is that companies that wish to take up transborder activities in the single market do not have to comply first with additional regulatory requirements. This would burden the single market and, therefore, is something the Commission seeks to avoid (Miersch 1996: 137–8). Thus, the comprehensive coordination approach, which goes beyond merely facilitating interstate commerce, actually results in a high degree of privileging of single-market activities. In order to facilitate an at times very low percentage of market activity, all regulation is changed and all market activities have to adapt. A vivid example is regulation 924/2009, which requires the use of the international bank account number (IBAN) for all transactions in euros, although only a fraction of these are transborder. The EU legal order does not complement but substitutes the legal orders of member states.

This comprehensive order, first of all, is concerned with the harmonization of laws in EU legislation. There is a certain tension between the latter and the four freedoms, which formally exclude situations that are 'wholly internal' (Shuibhne 2002) to a member state. The four freedoms require a cross-border element to become relevant. However, the broad interpretation of the freedoms through the ECJ, following the *Dassonville* formula (see further on) and targeting all domestic rules that 'are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade', has little regard for the autonomy of member states. Barnard argues that this contrasts with the non-discriminatory approach of the US Supreme Court that only intervenes in

[1] Conant also criticizes this point, not in relation to the comprehensive approach, which is discussed here, but rather the fact that non-trade-related references (such as those concerning social policy) are included in the data set of Stone Sweet and Brunell (Conant 2001: 114).

favour of interstate commerce if state rules discriminate against interstate trade (Barnard 2009: 586–90).

There are, thus, differences between the US and the EU, and within the EU between harmonization and the direct judicial application of the four freedoms. The broad interpretation of the four freedoms implies, however, that a potential effect on trade is sufficient. As the ECJ is called upon to interpret primary and secondary EU law, it follows that case law is not only rooted in economic interdependence. Often private actors turn to EU law in purely domestic cases, seeking to benefit from a more favourable legal order.

Empirically, this may be demonstrated through an analysis of all cases at the ECJ between 1984 and 2011 that dealt with insurance services and can be researched in the EUR-Lex database using. Insurance services are subject to the freedom to provide services and, additionally, there are different EU insurance directives regulating the sector. The ECJ cases are distinguished according to whether they are infringement procedures (thirty-four) or preliminary rulings (twenty-nine). We then checked whether the dispute involved a cross-border aspect, including foreign-owned insurance companies. As the Commission often initiates cases on behalf of complainants, infringement procedures were taken to imply a cross-border conflict, with the exception of those cases that unambiguously deal with purely domestic issues. The analysis, therefore, overstates transborder conflicts, as all procedures that deal with implementation deficits are included as well. Nevertheless, we found thirty-four cases that dealt with transborder conflicts against twenty-nine cases that dealt with purely domestic issues. This shows how often European law is used to target domestic regulatory changes.

The focus of the literature in this area on interstate trade effects tends to overlook the far-reaching policy consequences of the EU legal order. The fact that the background to much important scholarship is the United States may explain the relative neglect of the policy implications of case law within the literature. I will now turn to a demonstration of how legal uncertainty within a context of path dependence provides a framework for the dynamic development of case law.

LEGAL UNCERTAINTY

As was noted in the introduction, I take legal uncertainty to imply that the precise meaning of law cannot be predicted. To provide legal certainty is one of the core functions of the rule of law. At the same time, legal certainty can never be absolute. Legal scholars often speak of the indeterminacy of law (Stone Sweet 2004: 32, 34, 38), also at the national level. Treaty articles cover general topics with comparatively few sentences, implying that their

precise implications are—to an extent—open. Rather than speaking of legal indeterminacy, which would connect my argument to a related but essentially different discussion about the theory of law by legal scholars (Everson and Eisner 2007: 53), I prefer the term legal uncertainty. The justification for this is, first of all, disciplinary. The aim of this book is to pay attention to the importance of the judicial system for analysing policy processes. For this, the term legal indeterminacy comes with a lot of legal theoretical baggage, while the term uncertainty is well established in political science, for instance when analysing decision-making under conditions of uncertainty (Streeck and Thelen 2005). Uncertainty also seems to be the preferred term in light of the widespread use of rational choice theory, and the problems of bounded rationality and incomplete information. Moreover, Beck (2012) has put the term at the centre of his critical analysis of the Court's legal reasoning.

If a degree of legal uncertainty characterizes any legal order, why should legal uncertainty be a promising focus of analysis at the supranational level? Sources of legal uncertainty can be detected, first of all, in the legal texts themselves, particularly as we are dealing with supranational law, which is full of compromises. Secondly, the way the Court adjudicates adds to legal uncertainty. Thirdly, the context of the multilevel system heightens the ambiguity of the implications of EU law. These sources of uncertainty will be discussed in succession.

Legal Texts as a Source of Legal Uncertainty

Case law develops within the context of laws that are necessarily incomplete contracts, since they cannot cater for all eventualities: 'The idea of the incomplete contract is basic to a wide range of approaches to delegation and to courts. Generally, contracts are said to be "incomplete" to the extent that there exists meaningful uncertainty as to the precise nature of the commitments made' (Stone Sweet 2004: 24).

Legal uncertainty, Beck (2012: 5) argues, 'is a necessary feature of all legal systems', but its extent varies. As was argued in the introduction to this book, there is a continuum between legal certainty and legal uncertainty. Within the EU, legal uncertainty is pronounced. For one thing, arguments that have been made for the international context apply here. Member states are forced to draw up incomplete contracts that are flexible enough to deal with future contingencies, so legal uncertainty becomes a necessary condition for integration (Abbott and Snidal 2000: 433, 456). Goldstein and Martin argue that governments may not be able to enter international obligations without a 'veil of ignorance' over the precise future consequences of international regimes, in order to prevent the mobilization of domestic lobbying groups (Goldstein and Martin 2000: 606). Similar arguments of incomplete contracting have been

made for national constitutions (Stone Sweet 2000: 44). Uncertain rules, thus, facilitate international cooperation.

The logic of political decision-making in the EU further demonstrates that legal uncertainty appears to be a much more significant problem at the supranational level. Decision-making in the European Union is hampered by the heterogeneity of the member states' interests as well as demanding decision rules. Decisions require a qualified majority or unanimity, in addition to the involvement of the European Parliament. Due to common compromises and incomplete legislative specifications, there is great need for legal clarification by the Court (Everling 2000: 221). The extent of national heterogeneity is distinctive at the European level. Member states' heterogeneous readings of legal compromises are backed by the value pluralism that they represent (Beck 2012: 175–6).

Adjudication as a Source of Legal Uncertainty

The ECJ and the Commission have to absorb the legal uncertainty that stems from the partly empty or inconclusive compromises and the incomplete contracts from the Council of Ministers and the European Parliament (EP). Given the indeterminacy of legal texts, the Court enjoys a certain degree of freedom when interpreting European law. Stone Sweet calls this the zone of discretion (Stone Sweet 2004: 26). The Court's 'discretion increases broadly in proportion to the extent of legal uncertainty in the norms relevant to the specific legal problems it is asked to resolve' (Beck 2012: 8). Legal uncertainty resulting from intergovernmental problems of agreement offers a chance for supranational actors to strengthen their own position by opting for interpretations that enhance their own competences. Consequently, supranational actors can be assumed to have their own interest in legal uncertainty, which serves them as an opportunity structure.

Self-interest can explain why legal uncertainty is not only absorbed but indeed also generated by supranational actors. In this context, it is relevant to note how rapidly the case law of the Court has been developing, as integration in the EU has matured quickly (Beck 2012: 237). Were the ECJ to define the limits of national and European competences in its judgments once and for all, it would hamper its ability to adjust future rulings towards the course of further integration. It is easier to maintain this capacity if some ambiguity remains in the ECJ's judgments, allowing the provision of positive impetuses later. Otherwise, progress towards further integration would hinge exclusively on the decisions of the Council and the Parliament regarding secondary law. In fact, Kranenpohl reports a similar finding from his interviews with German constitutional judges, who state that judgments have to remain ambiguous in order to allow for appropriate judgments in the future (Kranenpohl 2009).

If even national constitutional judges see themselves as being faced with contradictory demands to provide stability while remaining flexible enough for future imponderables, this must be all the more relevant within a dynamically developing and expanding union.

However, it is not only self-interest that leads supranational actors to generate legal uncertainty. Legal uncertainty also derives from the nature of case law. Courts make decisions on contentious issues. In order to do so, they must interpret rules. If these rules do not determine the issue at hand, judges use a method of interpretation to adapt the existing rules to their current problem. There are different methods of interpretation, but the ECJ gives particular weight to the teleological method that is oriented towards the goal of further integration (Pescatore 1983). As courts are only legitimated to adjudicate and not to legislate, case law develops incrementally by slowly closing existing gaps in the law (Shapiro and Stone Sweet 2002: 91–2) and always focusing on the specific problem of interpretation arising from the case. The legitimation of judge-made law is significantly bound by its incremental character. Typically, case law is originally developed in a series of cases, which incorporate new legal principles in a rather unclear way. It is also common to establish a new interpretation but to deny its relevance in the case at hand (Alter 1998: 131). This mode of development makes it possible for the Court to get to know the reactions of national courts, legal commentators, and important political actors, allowing it to modify its rulings in the face of strong dissent (Bleckmann 1983: 81). By proceeding in such an incremental fashion, sudden changes to the course of legal interpretation can be avoided, thereby defending the consistency of the legal system (von Bogdandy 1995: 25).

The openness of legal texts, which provides a zone of discretion for courts, is, thus, incrementally closed. Precedent serves to orient and to legitimate jurisprudence: 'precedent performs its most significant function as a modality of argumentation. In performing this function, it helps to limit the range of possible decisions and permissible arguments' (Gerhardt 2005: 909). By acknowledging precedent, judges avoid appearing to rule arbitrarily or politically (Jacob 2012). Precedent fosters path dependence and provides stability, as I will explain later. It also supports the Court's autonomy (De Somer 2016). However, most case law includes some ambiguity. 'Precedents thus create their own legal uncertainty' (Beck 2012: 92). Moreover, the Court does not really signal when it changes its interpretation (Conway 2012; Beck 2012: 255). Derlén et al. (2012: 518) argue that, in contrast to common-law countries, the ECJ has no known method of establishing its case law and 'nor does it state when and why it deviates from existing case law'. This makes it impossible to know which direction the Court is likely to take in a case. There is a tradition of relatively short judgments with few explicatory justifications, in which earlier case law is only cited when it backs the ruling (Derlén et al. 2012: 519).

In relation to the specific reasoning of the ECJ, the importance it gives to the proportionality principle also has to be mentioned. Typically, proportionality analysis, involving four steps, is used to assess whether a government intervention into a right is lawful. The Court asks whether the intervention is legitimate (1), in other words, whether the government was authorized to do it. The suitability test (2) questions whether the policy objective and intervention are related. The necessity test (3) considers whether it is the least restrictive measure. Finally, the proportionality test (4), in the narrow sense, assesses the overall costs and benefits of the intervention (Stone Sweet and Mathews 2008: 76). As a principle, proportionality has German origins and has been developed since the late eighteenth century (Stone Sweet and Mathews 2008: 98–112). With the establishment of a strong constitutional court in the Federal Republic after the Second World War, proportionality analysis was further elaborated and diffused to other countries, as well as being adopted by international courts (Stone Sweet and Mathews 2008; Knill and Becker 2003). Its increasing relevance is tied to the constitutional courts' growth in importance and to constitutionalization processes more generally. Proportionality analysis allows for the managing of conflicting goals. Assigning this analysis to courts places them in the role of ultimate arbiter. Importantly, there are few right or wrong decisions in proportionality analysis, but only the question of which court is competent to do the balancing (Wahl 2006: 491). There is 'near complete freedom enjoyed by the judiciary in balancing' (Beck 2012: 87). In this context, it is important to remember that the constitutionalized Treaty is special in terms of the extent of detailed rules that it prescribes. This means there is a greater need to balance between different rules. Beck (2012: 77) also emphasizes that the absence of a hierarchy of norms aggravates legal uncertainty in the EU. 'As a mode of judicial governance, PA [proportionality analysis] casts a deep shadow on the lawmaking of non-judicial actors, while providing judges with a flexible means of managing sensitive legal questions in potentially explosive political environments' (Stone Sweet and Mathews 2008: 162). This adds uncertainty, and fuels litigation and case-law development. Stone Sweet and Mathews (2008: 142) call proportionality analysis the most important institutional innovation of the ECJ after supremacy and direct effect. At the same time, proportionality analysis is 'the most intrusive form of review' (Stone Sweet and Mathews 2008: 80), leaving less autonomy to other governmental branches than the strict scrutiny test, for example, which the US Supreme Court employs. As Martinsen (2011) shows, control of the ECJ by proportionality has increasingly led to EU law even interfering in member states' welfare and asylum policies, although governments have always been keen to keep these policies outside the reach of the EU as much as possible. The proportionality test, moreover, is another example of a rule that the ECJ introduced through case law that later became codified. Article 52(1) of the

EU Charter of Fundamental Rights refers to it (Stone Sweet and Mathews 2008: 141).

The Multilevel System as a Source of Legal Uncertainty

A final cause of legal uncertainty is the multilevel character of the European political system. European law is superimposed on the different national legal orders of member states. Accordingly, case law has different national implications in the member states, and it is often hard to predict what a preliminary ruling will mean for other member states (Hatzopoulos 2002: 728). National rules may be similar, but they differ in some—possibly decisive—ways.

Another important consequence of superimposing a set of rules on a variety of circumstances in different member states is that the resulting diversity gives private actors ample ideas for possible litigation strategies, under the precondition that they have legal standing. They can try to transfer legal arguments across member states, as well as across different policies and fundamental freedoms. Finally, part of the multilevel system is its multilingual nature. Legal texts exist in the different languages of the Community, with multilingualism adding to legal uncertainty as different meanings are conveyed (Beck 2012: 174). Figure 3.1 summarizes the different sources of legal uncertainty.

The rule of law has to provide legal certainty, taking into account that this cannot be absolute. As I have given several reasons why legal uncertainty is heightened in the EU, I now aim to show that path dependence provides the necessary stability, drawing on the seminal work of Stone Sweet (2002).

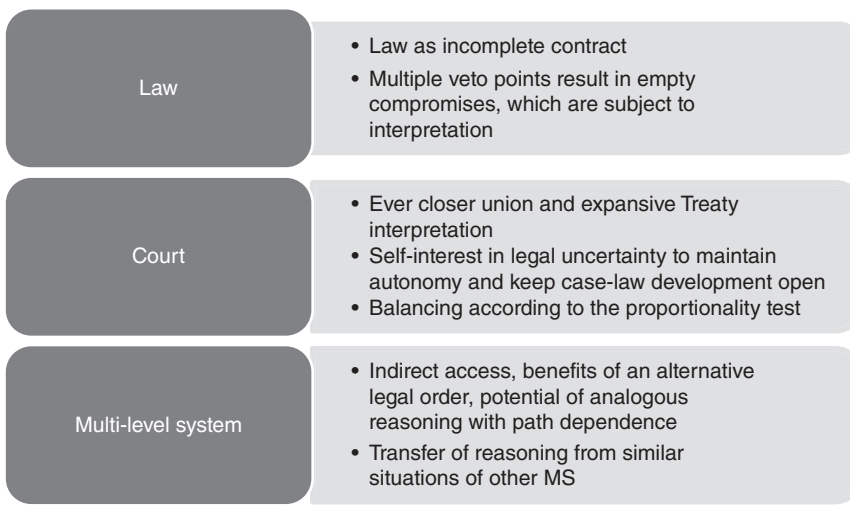

Figure 3.1. Different sources of legal uncertainty

In the following section, I begin by showing how the concept of path dependence can be applied to case-law development by focusing on the four freedoms, as explained in Chapter 1. I then go on to show how the path established for interpretation of the freedom of goods was incrementally transferred to the other fundamental freedoms of services, persons (workers, establishment), and capital. The resulting extensive interpretation of the freedoms significantly constrains policymaking at the EU and national levels, as I will show in later chapters.

APPLYING THE CONCEPT OF PATH DEPENDENCY TO CASE LAW

There are four attributes of path-dependent processes (Beyer 2005). First, the beginning of a new path is contingent. It has often been noted that historical accidents provide critical junctures whence a new path develops (Capoccia and Kelemen 2007). Secondly, the sequence of actions is important. Thirdly, positive feedback stabilizes the path, making a path reversal increasingly unlikely (Mahoney 2000; Pierson 2000). Fourthly, and last, a 'lock in' is the result, even though the institutional solution that characterizes the path may be inefficient. Developments that are particularly long term are often analysed, such as Pierson's explanation of the welfare state as path-dependent (Pierson 2000). A particularly famous example is that of the QWERTY keyboard for typewriters. Even though it is considered to be less suited to typing quickly than alternative keyboard settings, it has remained the most prevalent setup, and once it was established, it could not be replaced by a more efficient keyboard layout (David 1985).[2]

For the concept of path dependence to be meaningful, it cannot only signify that 'history matters' (Beyer 2005; Werle 2007). The notion of positive feedback is the mechanism that stabilizes a path. Three sources of such positive feedback can be distinguished and illustrated by the QWERTY example: positive economies of scale due to sinking costs of production; technical complementarity between hard- and software, referring in this example to the keyboards and the secretaries trained to type on them; and, thirdly, the non-reversibility of investment (David 1985: 334–5). The emphasis on the sequence of events and the contingent beginning of a path are less distinctive than positive feedback, as they are general neo-institutionalist explanations.

[2] The relevance of path dependence was rejected early on by Liebowitz and Margolis (1990), who argued that QWERTY would have been abandoned had there been efficiency gains. They argue that rational economic actors would then have invested in new typing machines and the necessary retraining of secretaries.

Increasingly, path dependence is used to analyse jurisprudence, focusing mainly on the effect of precedent on subsequent judgments (Hartmann 2016; Fon et al. 2005; Hathaway 2003). Jurisprudence has, as Shapiro and Stone Sweet argue, an inherent tendency to produce path dependence: 'Legal institutions are path dependent to the extent that how litigation and judicial rule-making proceeds, in any given area of the law at any given point in time, is fundamentally conditioned by how earlier legal disputes in that area of the law have been sequenced and resolved' (Shapiro and Stone Sweet 2002: 113). Beck (2012: 239) notes that the ECJ makes clear reference to precedent, quoting its own case law more frequently than it refers to the wording of rules or to purposive arguments. Reasoning by analogy and precedent legitimizes the Court; the teleological approach orients its rulings.

For the rule of law, the unity of the legal order is an important juridical goal in order to ensure that law develops without contradictions. This supports precedent and path dependence. In the judicial hierarchy of the EU, the ECJ depends on the cooperating member-state courts in order to be effective. However, lower courts will only be able to apply European law independently if the case law is consistent. This is also one incentive for the US Supreme Court to honour *stare decisis* (Bartels 2009: 475). It has to be noted that the cases that reach the ECJ or other constitutional or supreme courts are those where precedent does not give a clear indication of the outcome. Otherwise the cases would not need to be handled at this level. Moreover, courts, in particular courts of last instance, are not bound by precedent at all times (Gerhardt 2005). They also have the responsibility to arrive at 'just' decisions.

While precedent and path dependence orient litigants and lower courts, the ECJ itself is free to enact changes in its development of case law, possibly resulting in a critical juncture from which a new path can develop (Capoccia and Kelemen 2007: 367). For such a break in the path to occur, it is likely that particular incentives or mounting opposition from relevant actors will be of significance. In contrast to historical critical junctures, which rarely occur, occasions for new judicial interpretations abound.[3] To what extent are there incentives for legal innovation in the court system to bring about such a critical juncture and start a new path? Occasional landmark judgments initiate new interpretations and show that judges are free to bring in new considerations. Successful new interpretations in the legal literature, in judgments, or in the opinions of the general advocates that initiate a new development in case law are disproportionately cited afterwards. This can be an internal legal

[3] Note that Capoccia and Kelemen (2007: 367) argue that even the rulings that establish direct effect and supremacy do not have the status of critical juncture, as they could equally have come at another time. I disagree. The consequences of these two rulings are enormous and still little understood. It therefore seems more useful to argue that critical junctures for case law are more easily brought about—the question is whether positive feedback is provided.

incentive to deviate from precedent, alongside external pressures that push towards a critical juncture. If there is subsequent positive feedback, a new path can be solidified. For case law, path deviations or reversals appear to be less of a problem than they are for other path-dependent processes.

In Chapter 2 we saw, when legal activism and the difficulty of court curbing was discussed, that member states cannot directly steer the course of jurisprudence. They can only hope to influence it through handing their opinions and observations to the Court. But from within the legal profession, path deviations can be fostered. The development of EU law is the best example as the doctrines of the direct effect and supremacy of European law were purposefully promoted and established by Commission officials of the legal service, professors, and judges (Vauchez 2008; Alter 2009).

As we will see later, in terms of the freedom of goods, the *Dassonville* Case 8/74 (11 July 1974) and *Cassis de Dijon* Case 120/78 (20 February 1979) cases established a new path in the late 1970s. Instead of being interpreted narrowly as a non-discrimination rule, freedom of goods was interpreted broadly as a prohibition of restrictions. An orientation towards precedent does not prevent about-turns. 'It is difficult to defend the assertion that precedents impose binding rules on judges, compelling them to decide individual cases in certain ways' (McCown 2003: 979). Subsequently, processes of positive feedback have transferred this broad interpretation to the other freedoms, as we will see. Private litigants give crucial positive feedback. A broad interpretation of the basic freedoms gives them freedoms of choice that they have not enjoyed before, if they can construct a cross-border characteristic of their economic activity (Oliver and Enchelmaier 2007), which is the prerequisite for EU law to apply—once they have access to courts, which can prove to be a serious constraint, of course. It is important to note, however, that restrictions on legal standing hardly lessen the impact of my argument. As complicated as it may be for the individual litigant to draw on possible EU Treaty rights, once a claim can be established, the resulting ruling of the Court has a treaty-like status and is applicable across the Union. As we will see in the discussion of case law for the four freedoms, constraints on the legal standing of individual litigants have not hindered the necessary case load for far-reaching case-law development. In this process, the interpretation of the freedom of goods serves as a 'focal point', in Schelling's definition (1960: 57).

The more private actors assert their interests through European law, the more general knowledge about these European rights is strengthened. Success and failure in court cases give positive or negative signals to actors in a similar situation, thereby reinforcing either litigation or non-litigation (Fon et al. 2005: 44, 47, 51). Litigants orient their legal argumentation towards precedent because presenting 'arguments rooted in the Court's past interpretations is extremely effective' (McCown 2003: 981).

Yet, litigants do not provide positive feedback by themselves. They find a support structure in the cooperation between lower courts and the ECJ, in the

community of EU lawyers that push for the broader impact of EU law, and in the Commission, which frequently instigates new case law with infringement proceedings. Often, complaints by private actors who choose not to litigate themselves stand behind initiatives of the Commission. But litigation and the actions of the Commission could not be so successful were there not a community of EU lawyers who often favour the broadening of EU law. Moreover, private litigants would have to rely on the Commission exclusively should domestic courts be less willing to hand preliminary references to the ECJ or to apply EU law directly.

The interest of private actors in a more favourable legal order, the interest of European institutions in improved implementation and legitimation of European rights, as well as the orientation of jurisprudence towards cases of precedent and internal coherence, consequently, all contribute to the positive feedback received by a parallel interpretation of the basic freedoms. Referring back to the QWERTY example, one could draw a parallel between the positive returns to scale and the positive feedback on successful litigation. If private actors can enhance their position through litigation, this sends a positive signal to other litigants. The path of case law and the interest of supranational actors in strengthening their own legitimacy might be compared with the hardware and the litigation strategies of private actors with the complementary software. Finally, the relevance of precedent parallels the non-reversibility of technical investments. The more established a line of legal reasoning, the less likely it is to be altered. However, the precise scope of an interpretative path remains uncertain. Given the differences between the fundamental freedoms, there are ample possibilities to find a rationale for a differentiated treatment. Therefore, there are not only good reasons for a transfer of the argumentation for the freedom of goods to the other freedoms but also against it.

Furthermore, central to the concept of path dependence is the notion that once a path has been 'locked in', it cannot be changed despite existing dysfunctionality. If the freedoms can be interpreted broadly as prohibiting restriction, economic actors can pick the member state with the lowest regulatory requirements for the freedoms' establishment, raising fears of a regulatory race to the bottom (Sun and Pelkmans 1995). These distributive consequences of case law can be taken as a dysfunctional lock-in, as those actors that are negatively affected by case law cannot alter the path's course.

PATH-DEPENDENT JURISPRUDENCE ON THE FUNDAMENTAL FREEDOMS

As I have shown, the concept of path dependence suits the analysis of jurisprudence. It is particularly meaningful within the context of EU law, for

which we wish to explain the significant expansion of case-law development and its impact on policies. For dynamic case-law development to unfold, it was important that the ECJ initiated a new path for the freedom of goods, as I will now discuss. Originally, the fundamental freedoms were interpreted as forming a prohibition against discrimination. Under this non-discrimination rule, goods had to comply with the rules of the importing (or host) state, which is also called national treatment. Non-discrimination puts EU nationals on an equal footing with nationals and protects the regulatory capacity of the state where goods are traded. Nicolaïdis and Shaffer have referred to the saying 'When in Rome do as the Romans do' as characterizing this approach (Nicolaïdis and Shaffer 2005: 268).

By interpreting the fundamental freedoms as prohibiting discrimination, one defers to the autonomy of the member states. Each member state remained relatively free to determine the quality of goods and services traded in its territory. If trade was not to be hampered by these different national requirements, it was necessary to harmonize regulations at the European level. Private actors had few incentives to turn to EU law if they did not have to counter discrimination.

This changed radically in the 1970s when the ECJ broadened its interpretation of the freedom of goods first in its *Dassonville* ruling and later in the *Cassis* judgment. The issue was Article 28 of the Treaty Establishing the European Community (TEC), which reads: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.' In *Dassonville* (No. 5), the Court ruled that these equivalent effects were characterized as follows: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'

The emphasis for the freedom of goods changed from the prohibition of discrimination to the prohibition of restrictions to trade more generally. By including indirect and potential effects, the new scope of the freedom of goods was enormous, 'maximizing the right for individuals to participate on the market on whatever terms they choose, and providing them with a vehicle to challenge any national rule which—even potentially and indirectly—stands in their way' (Barnard 2013: 74–5).

Cassis de Dijon dealt with German import restrictions on French liqueur, given that these imports did not meet German regulations on the alcohol content of liqueur. The case illustrates differences in interpretation. Under the former interpretation of narrow non-discrimination, Germany could bar French liqueur for violating German rules. But in *Cassis*, the Court ruled that member states had to recognize products 'lawfully produced and marketed in one of the Member States' (No. 14). This implied that member states were obliged to take into account the regulatory requirements of products in

their origin country. Germany had to recognize the French regulation of liqueur as being equivalent. Additional regulatory burdens may only be imposed when they are proportionate and justified by overriding public interests, as they pose 'a double burden' for market participants who are already regulated in their home country. Consequently, the member state is no longer able to regulate EU foreigners according to its own discretion but has to recognize mutually the functionally equivalent regulations of other member states. In moving the interpretation of the law towards a prohibition of restrictions, a general assumption of such equivalence (the home-country rule) was introduced. This loosens the link between territory and legal order (Schmidt 2007), and private actors need no longer be tied to their national regulatory framework. European law allows the extraterritorial validity of the most preferential national legal order (Steindorff 1999).

It is useful at this point to discuss another concept that will be relevant throughout the book: the potential for reverse discrimination against nationals. This happens if nationals are regulated more stringently than economic actors from other member states who are active in the national market based on their equivalent home-country regulation. The four freedoms aim to facilitate trade; it is not possible for nationals to claim a violation of an internal market freedom with respect to their own government if there is no transborder aspect. In terms of its own nationals, the government is free to pursue stricter rules; however, it may be that there are national constitutional principles that prohibit such discrimination. As we will discuss at the end of this chapter, as long as reverse discrimination against nationals remains possible, the reach of the four freedoms does not include purely national markets. Should reverse discrimination against nationals be prohibited, as has sometimes been discussed in the legal profession, the four freedoms impose a barrier on all market regulations, and also those that are purely domestic.

Along with the expanded interpretation of the non-restrictions approach, member states could seek broader exceptions to the reach of the fundamental freedoms. Next to the exemption in Article 30 of the TEC, which refers to public security, *Cassis* introduced an open list of exemptions in the form of 'mandatory requirements' (summary 2) for the general public interest, allowing member states to impose their host-country regulatory requirements. However, the ECJ interprets this possibility very narrowly (Oliver and Enchelmaier 2007), and the measures need to be proportionate. The interpretation of the freedoms as a prohibition of restrictions makes the regulations of host states subject to external scrutiny as to their proportionality (Schneider 1996: 515). Democratic rules are checked for their market consequences. The differences between the non-discrimination and the non-restriction approach are depicted in Figure 3.2.

The Court's balancing approach of proportionality can be neatly summarized through the example of Case C-55/94 *Gebhard*. National regulatory measures

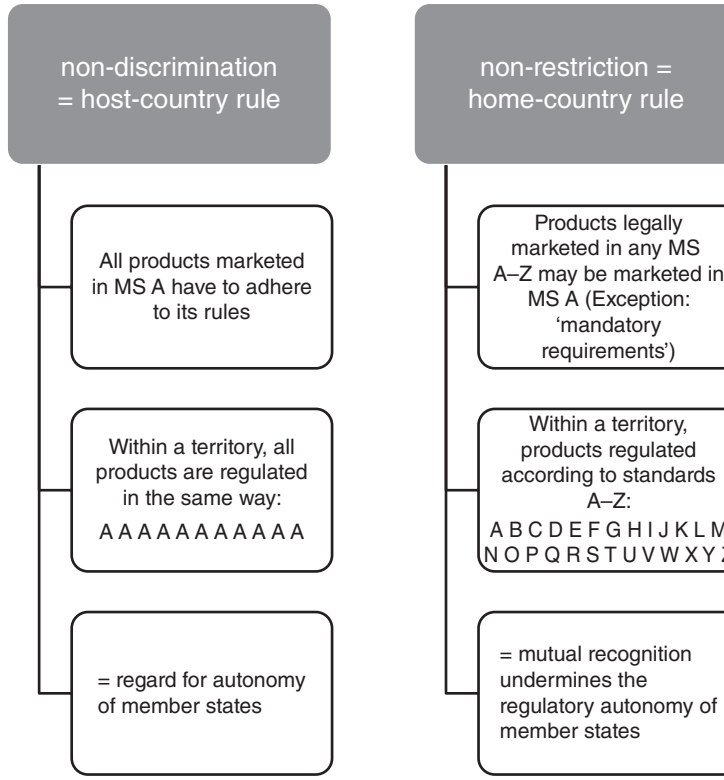

Figure 3.2. The non-discrimination and non-restriction approaches

must meet 'four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it' (No. 37 of C-55/94). The introduction of proportionality, Stone Sweet and Mathews (2008) emphasize, broadens the scope for judicial review, limiting parliamentary sovereignty in general. Since the autonomy member states still have to regulate is checked by the Court's proportionality test, legal uncertainty becomes an inherent part of this extensive interpretation (Randelzhofer and Forsthoff 2001: No. 54; Hatzopoulos 2000: 43–4).

Why is the non-restriction interpretation an important new path? In principle, this interpretation subjects all national regulatory measures to scrutiny that will possibly hinder market freedoms. At the same time, *Cassis* accorded a minimum of regulatory autonomy to member states by introducing mandatory requirements as a rule of reason. Implicitly, member states traded enhanced market access for a loss of their regulatory autonomy (McCall Smith 2000). This began, however, in a Community of nine member

states with similar levels of economic development, where member states could assume an equivalent level of market regulation. Although ongoing rounds of enlargement have eroded this precondition, the judicial path of interpreting the fundamental freedoms was subsequently broadened to include all freedoms and deepened to allow fewer exceptions to the national regulatory prerogative. It is only most recently, in light of the EU's crisis, that the Court has again accorded more leeway to member states, most noticeably in the greater amount of freedom they have been given to protect their welfare systems, as I will discuss later.

Alter and Meunier demonstrated early on that the Commission took up the *Cassis* judgment to provide itself with legal support on which it could build its single-market initiative (Alter and Meunier-Aitsahalia 1994). Though the Court had not spoken of 'mutual recognition', the Commission established this term. Building the single market would be much easier if deadlock-prone harmonization could be restricted to those areas where there were narrow exceptions to the freedom. Under the broad interpretation of non-restriction, mutual recognition would be the rule.

In the following section, I argue that the interpretation of the freedom of goods served, subsequently, as a 'focal point'. Different actors pushed for similar leeway for the other freedoms (cf. Garrett and Weingast 1993). In theoretical terms, the initial interpretation of the freedom of goods represents a critical juncture. Interpreting the fundamental freedoms as prohibiting restriction is a very different path to the obligation of non-discrimination. With the much greater leeway to pursue economic activities that this interpretation offers, there are significant incentives for litigants to argue analogously for the other freedoms. Such positive feedback is the core of path dependence. We can also consider it to be a contingent event that goods markets internationalized first. As we will see later, the transfer of the non-restriction interpretation to the other freedoms has significant redistributive repercussions. The political costs of redistribution render the lock-in of non-restrictions dysfunctional. It is, therefore, highly unlikely that this interpretative path would have been chosen had the process begun with the interpretation of another freedom.

Before we analyse how the reasoning for a prohibition of restrictions transferred to the other freedoms, it is important to note that the freedom of goods also offers an example of a critical juncture that did not result in a path that structured the interpretation of the other freedoms.

The *Keck* ruling (Cases C-267 and C-268/91, 24 November 1993) broke with precedent in the interpretation of the freedom of goods (Reich 1994). It is one of the rare examples where the Court explicitly decided for a juncture in its case law (Beck 2012: 252). Previously, litigants in the UK had made ever further inroads into national regulatory autonomy in relation to shop opening hours (Rawlings 1993). The broad interpretation of the freedom of goods as a

prohibition of restrictions had confronted the ECJ with all sorts of questions. By establishing in *Keck* that selling arrangements do not fall under the freedom of goods, the ECJ limited the reach of the freedom of goods as a prohibition of restrictions.

> *Keck* can only be understood against the background of the considerable confusion which had been created over the previous few years as a result of the Court treating all types of import restriction as falling under Article 28, whether or not they discriminated in any way against imports. The risk of abuse became increasingly obvious and the Court was driven to ever more far-fetched solutions. By its ruling in *Keck*, which partially reversed the pre-existing case law, the Court sought to set proper bounds to the scope of Article 28. (Oliver 1999: 793)

The Court drew a distinction between rules that relate to the production and distribution of goods and those that relate to certain selling arrangements (like shop opening hours, pricing, or ruinous competition). As long as the latter concern all economic actors in a state, and both national and EU foreign goods, they are not covered by the freedom of goods and member states retain the autonomy to regulate the organization of their markets (Troberg 1997a: 1471 No. 33). How does *Keck* relate to the idea of fine-tuning, which was introduced in the last chapter? *Keck* restricted the reach of the freedom. In doing so, it fine-tuned the application of the non-restrictions approach, as its expansion into selling arrangements was halted. It was a partial reversion, as few earlier steps in this direction had been taken. Potentially, *Keck* could have served as a critical juncture had this argument about the bounds of non-restriction been applied to the other freedoms. But this path was not established. There was no positive feedback on the *Keck* ruling. As was argued earlier, the Court and the legal profession are well placed to provide new legal interpretations that can establish new paths, but private actors and the Commission will only provide positive feedback on those interpretations that are in their interest.

How could one refute the presence of a path-dependent process? Case law is often ambiguous, as this book argues. As such, different scholars classify cases in different ways—where one scholar sees a non-discrimination approach (Davies 2003), another sees a prohibition of restriction (Barnard 2010), while yet another argues for an evolving market-access test (Tryfonidou 2010). Yet, beyond such differences, there is widespread agreement among legal scholars on a convergent interpretation of the fundamental freedoms through the ECJ (Davies 2003; Tryfonidou 2010; Oliver and Roth 2004; Barnard 2013). A path-dependent argument could be refuted if one could prove that there are distinct elaborations of reasoning on the different fundamental freedoms rather than identical types of arguments in different areas. Figure 3.3 summarizes how legal uncertainty and path dependence relate to each other.

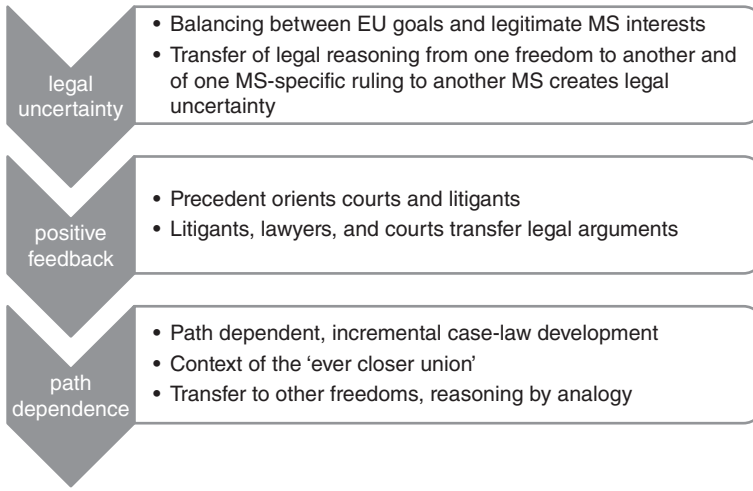

Figure 3.3. Legal uncertainty and path dependence

THE TRANSFER OF LOGIC TO OTHER FREEDOMS

In the following section, I will show how the 'logic of goods' was transferred to the other fundamental freedoms, building on the litigation strategies of private actors. Initially, the ECJ ruled cautiously outside of the area of freedom of goods and treated the different freedoms distinctly.

> In the 1970s and 1980s the prevailing view was that the scope of the four freedoms should be drawn along different lines: Article 28 EC on the free movement of goods was to be considered as a far-reaching prohibition of any measures potentially hindering or restricting the import of goods, whether indistinctly applicable or not. . . . In contrast, the provisions on the free movement of persons—workers, establishment and services—were generally regarded as an expression of the general principle of non-discrimination on grounds of nationality, as set forth in Article 12 EC. (Oliver and Roth 2004: 411)

An analysis of the types of cases that come before the ECJ over time, presented in Figure 3.4,[4] shows which freedom was interpreted at which point in time. Initially, the freedom of goods and the free movement of workers were responsible for a high number of cases. Because of the need to coordinate social-security systems, secondary law structured the free movement of workers from the very beginning so that it was less subject to case-law development, as based on the Treaty, than the freedom of goods. Then, towards the end of the 1990s,

[4] This is the result of a EUR-Lex search of preliminary and infringement procedures for the relevant freedom in the case summary.

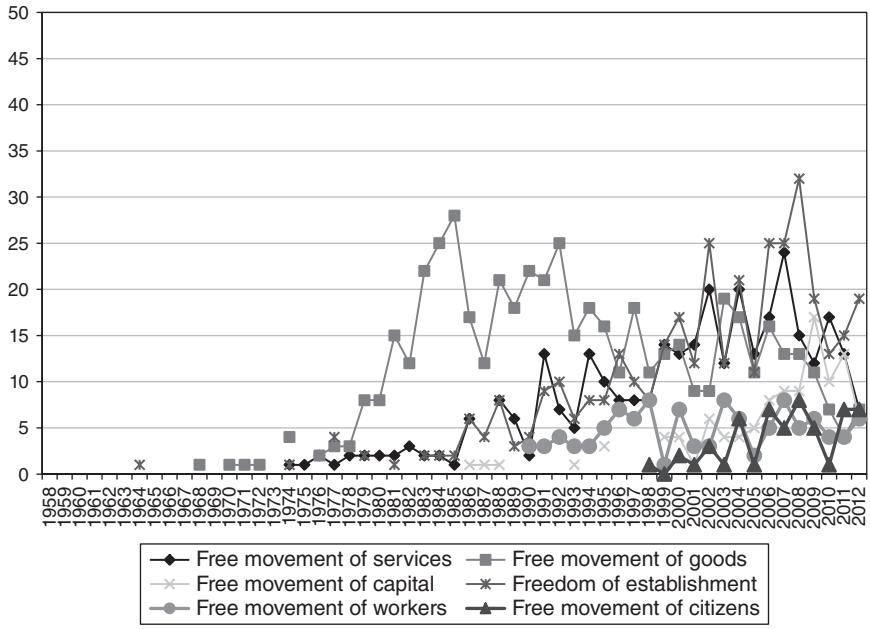

Figure 3.4. Completed legal cases according to freedom, 1958–2012

Source: Adapted from Susanne K. Schmidt, Gefangen im 'lock in'? Zur Pfadabhängigkeit der Rechtsprechung des Europäischen Gerichtshofs. *Der moderne Staat: Zeitschrift für Public Policy, Recht und Management*, 3 (2) (2010), 477.

the freedom of services led to more cases, with the freedom of establishment following a few years later. The free movement of capital came last, as this was only declared to be directly effective after the Maastricht Treaty.

Services

For a long time, the ECJ interpreted the freedom of services restrictively (Hatzopoulos 2000: 63–4; Roth 2002: 20; Davies 2007b: 14). Article 57 of the TFEU notes that 'the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.' By limiting the freedom of services to temporary activities, with explicit reference to the 'same conditions' of its 'own nationals', the freedom did not seem to have much scope, so freedom of establishment appeared necessary. Although the ECJ had already argued in Case 33/74 *van Binsbergen* for a limited mutual recognition of rules, so that the requirements for temporary activities were not prohibitive, this restrictive line on services was still dominant. One example is the well-known Case C-113/89 *Rush Portuguesa*,

which allowed France to apply its minimum wage to workers posted from Portugal. Instead of the home-country rule and Portuguese wage levels, the host-country principle was deemed relevant, and trade in services could be restricted in favour of domestic regulatory interests.

It is only since the 1990s and, particularly, the 2000s, that the Court has emphasized the duty of member states to abolish hindrances to trade in services more forcefully. Accompanying the more liberal approach, interest in litigation rose. The first ruling to apply the argumentation in the *Cassis* case to services was that arising from Case C-76/90 *Säger* in 1991. It is a typical example of a private actor seeking to overcome the restraints of national law. A British company was offering patent renewal services in Germany, where only registered patent attorneys were allowed to provide this service. An incumbent competitor sought legal assistance, and the German court addressed the ECJ (Barnard 2013: 386–7). The ECJ argued in parallel to the freedom of goods:

> Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services. (Summary 1)

Dynamic case-law development shows the increasing motivation of private actors to seek the assistance of courts in proceedings against national regulatory restrictions. By shifting the interpretation from a non-discrimination to a non-restrictions approach, existing regulations of other member states have to be mutually recognized. As private actors found an alternative legal order, the number of cases rose. Hatzopoulos (2012: 179) tracks the growth in case law based on the freedom to provide services (Article 56 of the TFEU): while the ECJ decided on only forty cases between 1995 and 1999 (an average of eight cases per year), there were 140 cases between 2000 and 2005 (an average of twenty-three cases per year), and between 2006 and 2010 (with the accession of many more member states) there were 137 cases (an average of twenty-seven cases per year). A high number of cases enables courts to develop case law incrementally. 'Only disputes that are actually litigated are capable of generating legal precedent' (Fon et al. 2005: 45).

The scope that the freedom of services offers is also due to its application to service recipients alongside service providers (Menéndez 2009: 8). As early as 1975, the Commission argued that German delegates of Amnesty International

who sought to have lunch in France could not be denied entrance to the country as they were recipients of a service (Hofmann 2013: 214–15). Recently, this same argument was taken up to extend the rights of third-country nationals. One preliminary reference concerned a Turkish citizen, who, after having been denied a visa, argued that she had intended to receive services (a haircut) in Berlin, and therefore should not need a visa under the Turkish Association Agreement. For service providers (a lorry driver), this argument had been successful (Case C-228/06 *Soysal*) (Wiesbrock 2013a), but the Court denied its relevance for the passive freedom of services (Case C-221/11 *Demirkan*).

With view to the Services Directive (2006/123/EC), which will be analysed in Chapter 4, Hatzopoulos (2012: p. x) holds that the case law on the freedom of services is unique as 'the Court has set the principles . . . the legislature has intervened *ex post* in order to consolidate, codify, rationalize, and, often, restrict the scope of principles and rules introduced by the Court' (Hatzopoulos 2012: p. xi).

Establishment

The development of case law for the freedom of establishment is comparable to that for the freedom of services. Originally, it appeared that member states were able to maintain their national company-law restrictions, following the ruling in Case 81/87 *Daily Mail* in 1988 (Freitag 1999: 269). In 1999, a fundamental change to the case law came about with the ruling in Case C-212/97 *Centros*. A Danish couple took up the non-restrictions reasoning on the fundamental freedoms and established a limited company in the UK, in order to exploit the much lower British capital requirements, in comparison to Denmark (only approximately DKR 1,000 instead of DKR 200,000), to establish a company. Again, this shows how litigants provide positive feedback, transferring legal arguments from one fundamental freedom to another. The couple had no intention of becoming economically active in the UK. They only wanted to circumvent the stricter Danish rules. The Danish authorities declined to register the Danish branch office and a preliminary proceeding ensued. The ECJ diverted from its earlier jurisprudence in the case of the *Daily Mail* (Hoor 1999; Freitag 1999: 270) and extended the non-restrictions approach to the freedom of establishment (Article 49 and Article 54 of the TFEU). Companies, thus, had a 'right to have the most preferable legal order' (Steindorff 1999).

Not surprisingly, companies took up this new regulatory flexibility and several rulings followed, allowing the ECJ to concretize its new case law. The cases of C-208/00 *Überseering* and C-167/01 *Inspire Art* again extended the freedom of establishment. Parallel to the freedom of goods, the ECJ detailed

member states' obligations to mutually recognize the regulations of other member states.

Interestingly, the important case of *Überseering* is an example of how case law can come about quite accidentally. *Überseering* basically abolished the German seat theory in company law, dealing a serious blow to German corporate governance. In this case, a Dutch company was active in Germany but had only transferred its administrative centre and not its legal seat to Germany. It had been denied legal standing in a court case. According to German seat theory, which governs company law, the company would have needed to be re-established under German law once it had lost its Dutch links in order to have its legal seat in Germany. The German court asked whether this would not effectively prohibit the freedom of establishment, a view which the ECJ shared. Interestingly, this is not a case in which active domestic courts aimed to instrumentalize European law. The chamber of the supreme court (BGH) that put forward the reference was responsible for buildings and not for company law. The company law chamber had criticized the posing of the preliminary reference as it deemed the legal questions to have been settled through its own case law.[5] Therefore, the case came about coincidentally. After *Überseering*, this chamber also had to change its line of interpretation.

The ECJ took its turn in its ruling on Case C-210/06 *Cartesio* in late 2008, in which it employed caution by not extending its liberal jurisprudence on company mobility further. After a string of cases that expanded the case law, the ECJ reverted to fine-tuning. In this case, a Hungarian company wanted to move its administration to Italy while keeping its seat of incorporation in Hungary. Surprisingly to most observers, the ECJ ruled that the freedom of establishment does not require member states to allow companies to change their administrative seat while maintaining, at the same time, their status according to the law of the member state of incorporation. The very liberal jurisprudence was applied only to companies moving into member states and not to cases of companies moving out of a member state (Barnard 2013: 329). Interestingly, the English, German, and French translation of the Hungarian reference to the ECJ included contradictions about whether the transfer of the registered office or the 'real seat' was the issue. This led the Irish government to demand a reopening of the oral procedure (Gerner-Beuerle and Schilling 2010: 307–8), which the Court declined (C-210/06, No. 41–53). Thus, the case exemplifies the legal uncertainty that flows from the multilingual nature of the legal order.

A broad interpretation of the freedom allows actors to pick the most efficient regime for establishing companies. Often, the freedom of establishment is used

[5] Thank you to Rike Krämer for pointing this out to me. Ulrich Forsthoff, 'Mehr Wahlmöglichkeiten für Unternehmen, Europarichter: Deutschland muß ausländische Rechtsformen anerkennen', *FAZ* 13 Nov. 2002, p. 18.

in tandem with the freedom of services. The Services Directive reflects this in its application to both freedoms. In addition to allowing lenient establishment rules for companies, the freedom of establishment, together with the free movement of capital, has become relevant for tax competition, which will be discussed in Chapter 5. Concerning the codification of the case law on establishment at the EU level, I only discuss the Services Directive in Chapter 4. There are also several company directives that have been agreed in the EU since the 1960s.[6] Explicitly in relation to the *Cartesio* judgment, the European Parliament has called on the Commission to pursue its plans for a fourteenth Company Law Directive on the cross-border transfer of company seats in 2012 in order to give 'the necessary clarification', emphasizing that 'it is for the legislators and not for the Court of Justice to establish on the basis of the Treaty the relevant measures to accomplish the freedom of a company to transfer its seat' (2011/2046 (INI)). However, the institutional diversity of member states' regimes has not allowed progress in this area.

The Free Movement of Workers

For several reasons the case law on the free movement of workers is much more complicated than that for the other freedoms. I will present this in greater detail in Chapter 5, in addition to a historical account of European citizenship and its subsequent codification in the Citizenship Directive, but here I only focus on the switch to a non-restrictions approach. In contrast to the other freedoms, this freedom was shaped by secondary law from the very beginning. In order to ease the free movement of workers, the participation of workers and their families in social assistance and insurance schemes needed to be regulated. Case law, therefore, often deals with secondary law alongside interpretation of the Treaty.

The freedom of movement of persons is special because it is explicitly linked to non-discrimination (Article 45 II of the TFEU): 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.' An approach of non-discrimination is linked to the host state treating nationals and EU nationals alike. There is no equivalent in this article to the prohibition of quantitative restrictions, which allowed the switch to the non-restrictions approach for the freedom of goods (Barnard 2001: 38). A different development of case law can also be expected here since the argument concerning a 'double burden' of regulatory requirements, subject to the regulations of the home and host state,

[6] <http://ec.europa.eu/internal_market/company/official/index_en.htm> [accessed 10 May 2017].

is only significant for goods and services but not for natural or legal persons, who are only integrated into the state of economic activity and so its rules apply (Barnard 2013: 244).

Building on regulations 3 and 4 of 1958, the freedom of movement for workers and their families was further spelled out in legislation in 1968 (EEC No. 1612/68, now 492/2011; 68/360/EEC, now 2004/38/EC) by granting rights to non-discrimination and national treatment. The right of residence in a member state after the termination of employment followed in 1970. In 1990, three directives further regulated the residence of workers, students, the retired, and self-employed workers (90/364/EEC; 90/365/EEC; 90/366/EEC). The affiliation to different national social insurance schemes was coordinated in regulation 1408/71/EEC (now 883/2004).

Originally, rights of residence and movement in the EU were strictly tied to the status of a worker. In the 1980s, a series of cases (C-53/81; C-139/85; C-196/87) broadened the application of these rights, making it sufficient to be economically active to any extent, even if one was not necessarily earning enough to make a living (Davies 2003: 195). The Court tested for indirect and covert discriminatory measures (Oliver and Roth 2004: 416), including the presence of a mere potential effect following the *Dassonville* formula (Barnard 2001: 38–9).

The shift to the non-restriction path took place with the ruling in Case C-415/93 *Bosman*, which involved a football player. The transfer fees required when players changed clubs was held to be 'an obstacle to the freedom of movement' (No. 103), though the system did not discriminate along national lines. Thus, the Court established an interpretation of the prohibition of restrictions that also applied to the free movement of workers. The restrictions path has by now become the dominant interpretation for the movement of workers and the other freedoms.[7]

> Whatever nomenclature used in that jurisprudence, be it manifested in impeding access/hindrance to trade or the terminology of 'liable to hamper or to render less attractive', it is crucial to appreciate that the common objective in all such jurisprudence is the removal of the restriction to exercise the free movement right. . . . The removal at the national level of such restrictions is clearly at the focus of recent free movement jurisprudence. (Connor 2010: 177)

As was the case for the other freedoms, the change to the non-restriction path for free movement led to numerous cases where actors sought to improve their situation, sometimes including rather far-fetched arguments. Case C-190/98 *Graf* concerned a German who had resigned from his employment contract

[7] Barnard (2009: 592) mentions the following in relation to workers in Case C-464/02, no. 45: 'It is settled case-law that Article 39 EC prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement (*Graf*, No. 18, and *Weigel*, No. 50 and 51).'

after four years in Austria and litigated for compensation, due to the fact that Austrian workers receive this when they are laid off after more than three years. The ECJ did not follow this logic and argued that the possibility of hindrance was 'too uncertain and indirect' (No. 24). At the time, it was hoped that this could undermine the positive feedback of further litigation and help to 'stem the flow of cases that seek to challenge key pillars of national welfare and social provision internal to the Member States which were never intended to interfere with free movement' (Barnard 2001: 50). Another example is the *Weigel* case in which a German couple, after having moved to Austria, filed a lawsuit because the Austrian annual tax on automobiles was higher than it was in Germany, arguing that this was a restriction of their freedom of movement. So too here, the Court rejected the claims, thereby fine-tuning what it understands to be non-restriction:

> However, the Treaty offers no guarantee to a worker that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation. Given the disparities in the legislation of the Member States in this area, such a transfer may be to the worker's advantage in terms of indirect taxation or not, according to circumstance. (C-387/01, No. 55)

These instances of fine-tuning can be regarded as points when negative feedback is given to litigants, as the Court offers no incentive for further litigation. It leaves one wondering what motivated litigants and lower courts to pursue these cases before the ECJ. But within such extreme cases, the Court takes a broad approach to restrictions, which does not require the introduction of hindrance, making it somewhat likely that national rules will appear to restrict a certain freedom (Barnard 2010: 258).

Beginning with Case C-224/98 *d'Hoop*, the Court has argued that any measure that makes the take-up of rights to free movement less attractive is a restriction. *D'Hoop* involved a Belgian who had obtained secondary-school education in another member state and, therefore, did not qualify for the Belgian 'tide over' allowance available to school-leavers. Case C-212/05 *Hartmann* is also part of this series of cases. In this case, a family lost the German child-raising allowance after their move to Austria due to the residence principle, though the father was a German civil servant. Such financial losses clearly made it less attractive to take up residence abroad. The Court recognized movement unconnected to employment, thereby broadening the right to free movement, which the AG had dismissed (No. 88). At the same time, the Court agreed that member states can demand that a 'link' to their territory must be proven where social benefits are concerned. But residence was not the only possible way to prove this, as 'a substantial contribution to the national labour market also constituted a valid factor of integration into the society of that Member State' (No. 36).

A further step was taken with Case C-287/05 *Hendrix* (Verschueren 2012: 193). Mr Hendrix, a recipient of the Dutch incapacity benefit for young

people, had moved to Belgium while continuing to work in the Netherlands. The action of cutting his benefits was in line with the existing social-security regulation (1408/71, now 883/2004), establishing the territoriality principle for this kind of social benefit. But the Court challenged this hindrance to free movement, thereby overruling the legislative decision of the member states: 'the development in Hendrix can be seen as a way of facilitating free movement by encouraging the home state to bear some of the costs of the emigration of its citizens, and not just the host state' (Barnard 2013: 292).

As is the case for previous paths of development, we can see the necessitation of many far-reaching changes at the member-state level if disincentives to moving abroad are counted as restrictions to the free movement of workers and, additionally, if member states are even called upon to facilitate the movement of their citizens. The case law on the free movement of workers is particularly interesting, as this area was shaped by the secondary law of the Council. This demonstrates the low levels of deference with which the Court, at times, addresses the preferences of member states (Martinsen and Falkner 2011; Schmidt 2012).

Capital

Finally, the free movement of capital diverges to some extent from the other freedoms, as it has been regarded 'for many years the poor relation to the other three' (Barnard 2013: 579). The freedom, laid down in Article 67 of the Treaty Establishing the European Economic Community (EEC Treaty/TEEC), was shaped legislatively by two early directives in the 1960s. In an early judgment (*Casati*, C-203/80), the ECJ established that this freedom did not enjoy direct effect. In the context of the single market, the Council liberalized capital movements from 1990 onwards with directive 88/361/EEC. Shortly afterwards, the governments agreed in the Maastricht Treaty to prohibit all restrictions on capital and payments in Article 73b(1) (now Article 63(1) of the TFEU), rephrasing the freedom and opening it up for direct effect. The Court affirmed the direct effect of the freedom in *Sanz de Lera* (joined cases C-163/91, C-165/94, and C-250/94).

Following the Treaty change, since 1994, the number of cases reaching the ECJ has risen significantly, enabling the ECJ to bring its interpretation into line with the restrictions approach employed within the other freedoms (Murphy 2012: 290). In the first case on golden shares in relation to Portugal, it ruled—largely in parallel to the aforementioned quotation from the *Säger* ruling—that non-discriminatory rules violated European law as they were 'liable to impede' the acquisition of shares and therefore likely 'to dissuade investors' from putting money into other member states (C-367/98, No. 45) (Barnard 2013: 592).

Barnard (2013: 594–6) asserts that the case law of the Court deals with five different kinds of national regulation: (1) property purchase and investment; (2) cross-border transactions; (3) loans; (4) investments in companies and shares; and (5) golden shares giving privileges to certain shareholders. By largely adopting the language of 'restriction', the Court follows the approach established in the *Cassis* and *Dassonville* jurisprudence. Member states have to justify their regulations objectively, even if they apply without discrimination 'either under the judicially developed public-interest requirements or, more commonly, under the broad express derogations' (Barnard 2013: 593).

Alongside the agreement on direct effect, the Maastricht Treaty introduced a new exception that was to allow member states to discriminate for tax purposes between place of residence and investment (Article 65(1)(a) of the TFEU), which could be seen as less liberal than the earlier directive (Barnard 2013: 607–8).[8] However, the Court also interpreted this exception narrowly: 'Gone was the cautious and uncharacteristically deferential Court which sought to leave matters of capital liberalisation to the Member States in Council' (Murphy 2012: 291). Thus, in 2009 the ECJ stated that member states may not restrict tax deductions for charitable donations to domestic bodies, which render donations to foreign charities less attractive (*Persche*, C-318/07). The governments of Germany, France, the UK, Ireland, Spain, and Greece had submitted opinions arguing that tax deductions needed a link to the pursuit of public interest in the same territory. Article 65(1)(b) of the TFEU includes another derogation for 'all requisite measures to prevent infringements . . . in the field of taxation and the prudential supervision', which also referred to public policy and public security (Barnard 2013: 610). While member states could at times successfully justify regulations, I will discuss in Chapter 5 how their tax policies have come under pressure from the expanded interpretation of the free movement of capital combined with the freedom of establishment, which has given private corporate actors many incentives to litigate against domestic tax rules. As the Court interprets restrictions narrowly and does not generally honour fiscal arguments, this is a particularly difficult development for member states. In light of the complexity of the case law on taxes, which concerns both freedoms, I will discuss it in detail in Chapter 5, where I will also discuss the failure to codify this case law.

Citizenship

Citizenship rights were a last-minute addition to the Maastricht Treaty and were added without significant political discussions (Aziz 2009: 291). EU

[8] Barnard (2013: 608) argues that this article codifies the Court's decisions in Case C-279/93 *Schumacker* and Case C-203/90 *Bachmann*.

citizenship has a mere supplementary status for those that possess it, for which all citizens of all the member states automatically qualify. As an essential part of this citizenship, all EU citizens may move and reside freely within the EU; this right is explicitly subject to secondary law provisions. In terms of basic political rights, EU citizens may stand and vote in elections for municipalities and the European Parliament in all member states. In third countries, member states provide consular protection for each other (Wind 2009: 254). These rights, mentioned in Article 18 of the TEC inter alia, are just examples (Barnard 2010: 420). Article 12 of the TEC, which establishes the principle of non-discrimination, is also relevant for citizenship rights. Given their partial overlap, the free movement of workers is *lex specialis*, and Article 18 only functions as a safety net. Based on this addition to citizenship, case law has incrementally extended rights from workers to economically inactive citizens. In due course, the language of restrictions was transferred to citizenship law. Over the years, the interpretation of Article 18 has resulted in comprehensive citizen rights, despite their intended supplementary nature. Gareth Davies goes so far as to argue that citizenship rights have now subsumed the other freedoms (see also Somek 2007: 794). This convergent development merits a discussion of citizenship alongside the four freedoms.

> [S]ince [Articles 18 and 12 of the TEC] are as broadly worded as the economic rights, the economic Treaty articles do become entirely superfluous. One may rely on them as a matter of *lex specialis* legal form, but the limits of their scope become entirely unimportant, since where they stop citizenship will pick up.
>
> (Davies 2003: 189)

The first case to show that citizenship rights can be decisive was Case C-85/96 *Martinez Sala*. It established the principle of non-discrimination in the granting of child-raising allowance to an economically inactive EU citizen lawfully residing in Germany (Tryfonidou 2010: 39). In Case C-184/99 *Grzelcyk*, decided upon in 2001, the Court established that the right of residence also applied to economically inactive EU citizens—in this case a student—that require assistance. This case was very influential in the negotiation of the Citizenship Directive (see Chapter 5). If member states want to withdraw the right of EU nationals to be treated in the same way, they have to show evidence of an 'unreasonable burden' on their welfare state that results from it (Tryfonidou 2010: 39). Hereby, the Court contradicted existing secondary law and broke with previous case law (Case C-197/86 *Brown*), which had ruled out benefits for EU students (Wind 2009: 258). In Case C-413/99 *Baumbast*, the Court declared Article 18 I of the TEC to be directly applicable, thereby giving EU citizens the right of residence and movement (Wind 2009: 256, 259).

Without going too much into the details of this case-law development, suffice it to say that the addition of citizenship rights gave the Court, the EU's legal community, and civil-society actors a basis on which to question

difficult European political compromises on how to differentiate between economically and non-economically active EU citizens in the allocation of social benefits. Case C-138/02 *Collins* is important here, as AG Colomer tackled the need to define limits to the rights of EU citizenship for the first time. According to AG Colomer, the requirement that member states treat all EU citizens in the same way undermines the national orientation of welfare systems, although the EU Treaty considers welfare to be chiefly the responsibility of the member states:

> In the present case, however, I take the view that a condition as to residence, which is intended to ascertain the degree of connection with the State and the links which the claimant has with the domestic employment market, may be justified in order to avoid what has come to be known as 'benefit tourism', where persons move from State to State with the purpose of taking advantage of non-contributory benefits, and in order to prevent abuses. I do not believe that that condition goes beyond what is necessary to attain the objective pursued since it is applied after examination of claimants' personal circumstances in each case.
>
> (No. 75)

The Court, however, was not ready to follow the recommendation of the AG (see No. 63), emphasizing instead that the general principle of non-discrimination (Articles 6 and 8 of the TEC) implied the right to access 'benefits of financial nature' (No. 50). In the case at hand, which concerned access to jobseeker's allowance for a newly established Irish American in the UK, however, the Court perceived there to be a lack of 'a reasonable period of residence'. Thus, this serves as an example for the finding that new legal principles ('a reasonable period of residence') are often introduced in a case, where their actual relevance is denied, making it easier to establish precedent.

In another case from the time, AG Jacobs was the first to argue for a broader non-restriction approach to citizenship:

> But discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article 18 to apply. In particular, it is not necessary to establish that, for example, a measure adversely affects nationals of other Member States more than those of the Member State imposing the measure.
>
> (*Pusa* (C-224/02, No. 18))

The Court had followed this line in *Pusa*, as well as in other cases. In Case C-406/04 *De Cuyper*, the Court argued that it was a restriction and clearly fell under Article 18 (No. 39), since a national incurred a disadvantage by simply exercising their freedom to move. In this case, the residence clause for Belgian unemployment benefits was considered to be justified by the public interest (No. 48). The restriction served to assure the availability to the labour market. The case is, thus, another example in which the broad scope of a freedom is stated by the Court, while affirming an exception.

> The language of De Cuyper is similar to that of Cassis de Dijon. It is the restrictiveness of the measure which is considered to be egregious, but it will be considered lawful if it is in the public interest and proportionate. Such language exposes a variety of national measures to challenge on grounds of their restrictiveness—anti-terrorism detention orders requiring individuals to remain within an address, bail restrictions, jury service, anti-social behaviour orders containing restrictions on movement, or even restrictions on residence which are imposed to prevent tax evasion. (Chalmers and Monti 2008: 127)

Alongside the incremental establishment of rights that pertain to EU citizens, the Court has expanded eligibility for these rights. For instance, it has allowed parents to partake in the citizenship rights of their children, which will be discussed further in Chapter 6, and has restricted member states' power to expel EU citizens for reasons of public security (C-482/01). Thus, the ECJ has instituted high barriers for member states in instances where they use the public policy provision as a means to impede the rules of free movement.

To summarize this development, citizenship rights have had an astonishing journey from their status as a rather meaningless addition to the Treaty to the point where they have become a central tenet of EU law. For some time, the ECJ has pursued an approach that upholds equal rights through its non-restriction approach, making the nationality of citizens seem increasingly unimportant. The Court aimed to align its case law to the rights of workers and non-workers (Wind 2009: 243). By applying the principle of non-discrimination on the basis of nationality, alongside the prohibition of restriction, the case law on citizenship made inroads into national welfare systems. An increasingly contentious issue was whether member states could still privilege their own nationals according to EU law. Increasing economic heterogeneity, after rounds of Eastern enlargement and the Eurozone crisis, politicized potential 'welfare migration' (Blauberger and Schmidt 2014). Within this context, and that of the UK's Brexit discussions, the Court has become more reluctant to emphasize the equal rights EU citizens have to access benefits. Under mounting political debate and increasing opposition from rich Western member states, the Court has begun to halt the expansion of rights, fine-tuning the definition of member states' obligations to non-economically active EU citizens.

In Case C-333/13 *Dano*, which was decided upon in November 2014, the ECJ held that a Romanian who had neither worked nor intended to do so could be denied social assistance in Germany. In Case C-67/14 *Alimanovic*, Germany was allowed to deny unemployment benefit for over six months to those who have worked for less than a year. Case C-299/14 *Garcia Nieto*, another preliminary reference from Germany, permitted further restrictions. In Case C-308/14 *Commission v UK*, AG Villalon held the contentious British 'right to reside' test to be compatible with EU law, and the Court followed this assessment shortly before the Brexit referendum. In view of mounting political

opposition, the expansion of EU rights was halted (Kramer 2016). Before *Dano*, members of the German social-benefit administration expected the ECJ to abolish all distinctions between nationals and EU citizens (interview Senatorin für Soziales, Bremen, 27 April 2016). Halting the expansion of case law does not imply reversion; it remains to be seen whether the political pressure on the Court will become so high that this step is taken. At present, the Court has put its interpretations of the four freedoms and citizenship on a common path. If it refrains from further extending EU rights in this area, legal uncertainty will decline and so too will the incentives litigants have to use EU law to pursue an extension of rights.

A Unified Restrictions Approach

Thus far, I have laid out how the early interpretation of the freedom of goods, which established a prohibition of restrictions approach, began a path that provided incentives for many private actors to argue analogously for the other fundamental freedoms. Such positive feedback broadened the path, helping to establish it for all the freedoms—goods, services, establishment, free movement of workers, capital, and, finally, citizens. This path-dependent process of convergent interpretation is mainly driven by litigants, with the support of the Commission and the EU law community. Because of direct effect and supremacy, the fundamental freedoms can be used by litigants to bypass national regulations. As is the case for the other freedoms, the prohibition of restriction is coupled with the question of whether there are public interests to justify it ('mandatory requirements') and, should this be the case, whether the measure is proportionate. The results of this proportionality assessment cannot easily be predicted, making the actual scope of the fundamental freedoms legally uncertain. Derlén et al. (2012: 534–5) also consider this path of convergent interpretation, which is developing in the case law, to justify restrictions, based on a network analysis of how all Court rulings cite each other: 'Using resampling, we conclude that *Member States Justifying Restrictions of Basic Freedoms* constitutes an independent area of law separate from the case law dealing with other issues regarding those basic freedoms which, at this juncture, remain independent from each other' (Derlén et al. 2012: 531, original emphasis). '[T]he Court appears to take a more unified approach as regards justifications' (Derlén et al. 2012: 535). My analysis of the Court's interpretation as a path-dependent process can be seen to present the microfoundations that underlie this clustering of citations.

Next to the positive feedback from litigants who work towards convergence, there are internal legal reasons that explain the transfer of the interpretative logic applied to the free movement of goods to the other freedoms. In reading the Court's rulings, it is striking how often several of the freedoms are relevant

to a decision. An analysis of all court cases pertaining to the fundamental freedoms reveals how often a freedom is taken up by the Court in combination with other freedoms. It appears that the freedom of goods is the only freedom frequently applied on its own. Therefore, it is easier to pursue a slightly different legal path in this area. Once the *Dassonville* logic spreads through positive feedback to one of the other freedoms, however, there is indeed pressure to interpret all freedoms in the same way.

If several basic freedoms are relevant to a case and they are interpreted analogously, this strengthens the coherence of case law (Lenaerts and Corthaut 2008). Figure 3.5 shows how common it is for the different freedoms to be simultaneously relevant in a single ruling.[9]

Once two or more basic freedoms are relevant to a case, legal coherence can only be maintained if the legal reasoning does not differ. The opinion of AG Colomer in the first Volkswagen case emphasized that the parallel interpretation of the freedoms makes it ultimately irrelevant whether the free movement of capital or the freedom of establishment applies to the case (Blauberger et al. 2012: 54).

> In any event, I see no point in delving any deeper into an incorrect legal classification of the alleged infringement, which is of no great consequence, since the Court of Justice subjects both Community freedoms to similar scrutiny, and I propose to apply that methodology below in order to establish whether the infringements complained of have taken place (...). (C-112/05, No. 60)

In a similar line of reasoning in his opinion to Cases C-158/04 and C-159/04 *Alfa Vita*, AG Maduro criticized the restriction of the *Keck* argumentation to the freedom of goods as undermining the consistency of the law:

> Thirdly, it has been apparent that the rule in *Keck and Mithouard* is not easily transposed into the fields of the other freedoms of movement. The Court has never in fact adopted the 'selling arrangement' classification in its case-law relating to the other freedoms.... This difference in approach raises a problem of consistency in the case-law. This problem appears to be even greater as many national measures examined by the Court from the perspective of the free movement of goods can also be treated as restrictions on the other freedoms of movement. (No. 33)

The litigation behaviour of private actors, and the attempts to ensure the consistency and coherence of the legal order, act as positive feedback to a path-dependent development, I have argued. The judges themselves are relatively free to rule either in favour of similarity or difference. The example of the *Keck* jurisprudence may help to show the different weight of both factors. From the

[9] This is the result of a EUR-Lex search of preliminary and infringement procedures for the relevant freedom in the case summary. The analysis discusses whether other freedoms are relevant to the rulings. An earlier version with less information appeared in Schmidt (2010).

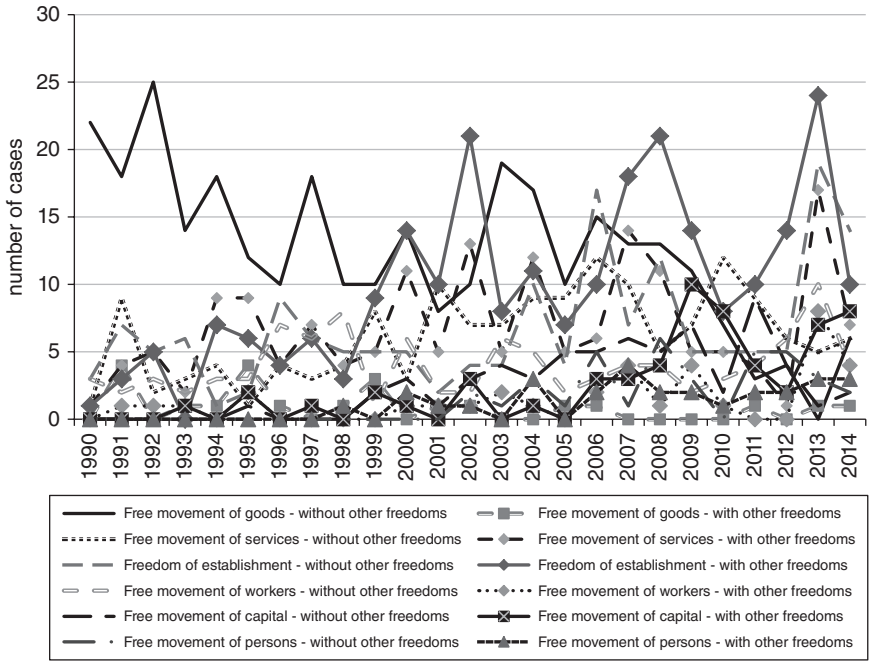

Figure 3.5. Several freedoms in a ruling, 1990–2014

Source: Adapted from Susanne K. Schmidt, Who Cares about Nationality? The Path-Dependent Case Law of the ECJ from Goods to Citizens. *Journal of European Public Policy*, 19(1) (2012), 13.

perspective of legal dogma, a transfer of the *Keck* argumentation would strengthen the coherence of the legal order. However, there is little positive feedback for such an extension of *Keck* to the other freedoms, as actors who prefer a restrictive reading of the basic freedoms will not turn actively to the ECJ (Scharpf 2010: 221). They may only make a *Keck*-like argument when they have to defend national regulations before the ECJ. This role is restricted to governments that are either involved in the cases directly or as intervening parties. The transfer of the more restrictive *Keck* argumentation to the other freedoms depends, therefore, solely on the Court's assessment of whether it needs such a restriction, which is only likely in the face of significant political contention.

What does this dynamic, which moves towards convergence and a legally coherent interpretation, imply? I have shown earlier that the Court, supported by the legal profession, is well placed to bring legal innovations into case law. Yet not all innovations are critical junctures leading to a new path of case-law development. Private litigants only provide positive feedback to those interpretations that extend their rights. Therefore, it is important to take a look at those areas where the interpretation of the fundamental freedoms is still fluid.

Before turning to this question, I would like to emphasize how easily national policy decisions can be seen to interfere with the four freedoms according to the restrictions path. I will give a few more examples here. Opponents of the UK's 2004 Hunting Act—this prohibits the hunting of large mammals, such as foxes, with dogs—argued for a reference to the ECJ by claiming that the import of dogs and horses from Ireland was suffering (Ryland and Nurse 2013: 105). Cases that did reach the ECJ were the following: C-110/05 *Italian trailers* and C-142/05 *Mickelsson*. The first case concerned an infringement procedure, where the Commission took Italy to court over prohibiting motorcycles that tow a trailer, as this effectively bans imports from other member states. The Court agreed that such a prohibition violated Article 34 of the TFEU; however, it could be justified in the interest of road safety. Barnard (2009: 576) argues that this case may mean that the Court is in the process of reconsidering the *Keck* restrictions on the free movement of goods, replacing it with a restrictions analysis. *Mickelsson* was a preliminary procedure that questioned the almost complete Swedish ban on jet-skis in navigable waterways. Again, the Court regarded the ban as a 'measure having an equivalent effect to quantitative restrictions'. This being a preliminary procedure, it was up to the domestic court to balance the justification of environmental protection and the restriction on the freedom. Both cases were notable as the AGs had discussed in their opinions whether the *Keck* rule could be transferred to justify restrictions on use (Barnard 2013: 141–2).

THE EVOLVING INTERPRETATION OF CASE LAW

Depending on the breadth of the interpretation of the rights of free movement, the sphere of the market is strengthened at the expense of member-state governments' ability to regulate their markets. Given the need to strike a balance in the assessment of the proportionality of measures, there is persistent legal uncertainty regarding the reach of the freedoms vis-à-vis the scope of the exemptions. But it is not only the act of balancing that contributes towards legal uncertainty. In addition, the interpretation of the freedoms is not fixed. While the prohibition of restrictions is well recognized, additional incipient developments can be mentioned here, which can lead to a significant broadening of the application of the fundamental freedoms. These are: the horizontal effect of the freedoms; a prohibition of reverse discrimination against nationals; and, closely related to these, the application of the freedoms to purely internal situations.

First, it is a matter of contention to what extent the fundamental freedoms have a horizontal direct effect and are binding, not only for public but also for private actors. This would be another critical juncture. In its rulings in Case

C-341/05 *Laval* and C-438/05 *Viking*, the ECJ supported such an understanding and assessed the actions of the unions with regard to their effects on the freedoms of establishment and services (Joerges and Rödl 2008; Höpner and Schäfer 2010; Höpner and Schäfer 2012). These much-discussed cases were decided upon in December 2007. In *Laval*, a Swedish union had boycotted a building site where a company had posted Latvian workers, refusing to sign a collective agreement with the Swedish unions. In *Viking*, a ferry route from Finland to Estonia had reflagged the ships from Finland to Estonia, leading to a union boycott. In both cases, the ECJ ruled that the right of unions to take industrial action—while being a fundamental right—needs to be proportionate; in other words, it must be suitable for the achievement of the given objectives, as strikes restrict private employers' fundamental freedoms. AG Maduro even argued that the freedom of establishment should have a horizontal direct effect, but the Court did not completely share his opinion in the *Viking* case. As a result, it is not clear whether and to what extent Article 21(1) of the TFEU on citizenship, Article 49 of the TFEU on establishment, and Article 56 of the TFEU on the freedom to provide services have a horizontal direct effect (Barnard 2013: 242).

For the free movement of goods, the question appeared more settled. Thus, Barnard (2013: 77) denied the existence of such a horizontal effect, referring only to the indirect responsibility of member states to guarantee the free movement of goods. The Court took the position in Case C-265/95 *Spanish strawberries* that Article 34 of the TFEU prohibits state action and state inaction vis-à-vis private restrictions. In this case, the Commission had brought France before the Court for its lack of action in the face of French farmers' recurrent obstruction of agricultural products from other member states, notably Spain. However, Case C-171/11 *Fra.bo*, which was decided upon in September 2012, has now established the horizontal effect of the free movement of goods. The case concerned an Italian manufacturer of copper fittings for water and gas pipes.[10] It had brought a legal action against a German standardization body, the German Technical and Scientific Association for Gas and Water (DVGW), which resulted in the preliminary proceeding. The DVGW, a private, not-for-profit body, issues standards for water pipes that are relevant for marketing products in Germany. Fra.bo had received a preliminary certificate for five years in 2000, which the DVGW did not renew because a test result for a more demanding technical specification was missing. The DVGW argued that as a private body it was not bound by the provisions of the free movement of goods. Moreover, it did not pursue economic activities. The Court, however, reiterated its interpretation of rules 'capable of hindering, directly or indirectly . . . intra-Community trade'. Article 28 of the TEC also

[10] There is a documentation of the case carried out by the company. See: <http://www.frabo.com/deu/frabo/der-fall-frabo> [accessed 10 May 2017].

applied to the standardization and certification activities of a private law body, if national legislation referred to it (Heller 2012; Kubicki and Obajtek 2012). The case demonstrates quite well the predicament in which the Court finds itself. If states delegate regulatory competence to private actors, this cannot circumvent their responsibility towards the single market. However, binding private actors by the four freedoms significantly extends the reach of EU law.

The free movement of workers has a horizontal direct effect, at least when it comes to questions of non-discrimination. This was first established in Case 36/74 *Walrave* in 1974 for reasons of nationality (Schepel 2012: 177–8; Chalmers et al. 2010: 797) and was confirmed for all matters of non-discrimination in Case C-281/98 *Agonese*, which was decided upon in 2000 (Barnard 2013: 77, 241). What should also be noted here is the ruling in Case C-415/93 *Bosman* on football transfers. The free movement of capital (Article 63 of the TFEU), as a latecomer, is generally less developed than the other freedoms. Here the Court could have referred to a horizontal direct effect in the Volkswagen case (C-112/05) in relation to the private agreement between workers and trade unions of 1959, but it refrained from doing so (Barnard 2013: 586). Schepel (2012) argues that extending the doctrine of a horizontal direct effect to the free movement of capital would undermine the different varieties of capitalism currently present in the EU.

Secondly, the scope of application of EU law would increase greatly were EU law interpreted as prohibiting reverse discrimination against nationals. As mentioned earlier, when explaining the difference between the non-discrimination and non-restriction approaches, reverse discrimination against nationals occurs when EU foreigners profit from a more beneficial regulatory regime than nationals. In upholding stricter market regulation, governments then discriminate against their own nationals. A well-known example is the German beer-purity regulation that constrains German brewers, but not other breweries who sell beer in Germany. It is not uncommon for EU lawyers to argue that the different treatment resulting from reverse discrimination against nationals is prohibited by EU law (Tryfonidou 2009). After all, it may seem absurd that a legal order establishing non-discrimination on the basis of nationality among EU citizens leads to discrimination within member states (AG Sharpston C-34/09, *Zambrano*, No. 144). So far, however, the ECJ has not established this principle, which member states very much oppose, judging from the opinions they present to the ECJ. Thus, EU citizens living in a member state may be subject to more beneficial rules concerning, for instance, family unification with third-party nationals than those citizens who are subject to national law. If EU law rendered discrimination against nationals impossible, this would imply that all national regulations needed to be abolished as soon as laxer regulations from other member states were mutually recognized. Such an interpretation would severely curtail the potential to pursue policy goals through regulation at the national level.

In the absence of prohibition of reverse discrimination at the EU level, however, national fundamental rights may be violated. For instance, if more weakly regulated goods or services do not pose a risk to the general interest, it is not really possible to justify restrictions to the right of professional freedom (Riese and Noll 2007). As we shall see in Chapter 7, Italy is an example of a member state where reverse discrimination is prohibited by the constitution (Conant 2002: 14). Consequently, EU law has a far-reaching domestic impact. If an extension of EU law towards the prohibition of reverse discrimination against nationals were to take place, there would no longer be regulatory competition, but national regulations would be struck down immediately, alongside which the least restrictive European regulation would be allowed. Again, this would mean a critical juncture resulting most probably in extensive positive feedback for a new path of legal interpretation.

Thirdly, and closely related to the prohibition of reverse discrimination, an extension occurs if the ECJ applies the freedoms to cases that are purely internal to a member state. Traditionally, the application of the basic freedoms requires a cross-border element, and nationals cannot draw on European law for purely domestic cases. Otherwise, reverse discrimination against nationals could not occur, as they would have the same rights as EU citizens. In its jurisprudence on the freedom of goods and services, however, the ECJ has, at times, violated this principle (Hatzopoulos 2000: 58–62). Thus, the ECJ delivered the following ruling in *Pistre* concerning the question of the free movement of goods within France (C-321-324/94, No. 44): 'Accordingly, whilst the application of a national measure having no actual link to the importation of goods does not fall within the ambit of Article 30 of the Treaty . . . Article 30 cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State.'

It is easy to see that the potential to turn to European law, even in purely domestic, internal cases, motivates private actors to improve their situation further by turning to the ECJ. For the freedom of services, the rule has been eroding (Barnard 2013: 368). An example is Case C-60/00 *Carpenter*, which was decided upon in 2002. In this case, the Filipino wife of a British citizen had been denied residence in the UK. The ECJ argued, however, that since Mr Carpenter was offering services in other member states, Mrs Carpenter's right of residence could be derived from EU law, according to which her husband's provision of services should not be inhibited.

Two examples from the area of freedom of movement demonstrate the incentives that such a broadening of EU rights can offer.[11] Case C-535/08 *Pignataro* (26 March 2009) dealt with the preconditions for eligibility in

[11] I am grateful to Ulrike Liebert and Tatjana Evas for telling me about these cases.

regional elections. Ms Pignataro could not stand for elections in Sicily, as she did not have her domicile in that region at the time. She then tried to argue that she had suffered inadmissible discrimination under European law, as nationals from other member states, who could also stand in the elections, were not required to take up a domicile in Sicily. The ECJ, however, denied the relevance of this application of EU law to this purely internal situation. In another case, that of *Mariano* (C-27/08, 17 March 2009), an Italian woman litigated, as she received a very small pension after her (unmarried) partner's fatal accident, arguing that an EU foreigner living in Italy would have been treated more favourably under the same circumstances. Again, the ECJ denied this application, invoking the argument that it was a purely internal situation.

It is apparent that these and other cases take up the opportunities provided by the ECJ's decisions in cases like *Pistre* or *Carpenter*, where the freedom of goods and services was applied to purely internal situations. At the same time, if the ECJ denies a broadening of the applicability of case law in the area of freedom of movement and citizenship, it becomes less likely that additional litigants will attempt to invoke this argumentation. This shows the possibilities not only for positive but also for negative feedback in litigation proceedings. The examples given show how private litigants orient themselves towards precedent. This transfers legal arguments from one freedom to another. The ECJ, however, is neither a slave to its own case law nor to a desirable coherence in the interpretation of the different freedoms. Moreover, striking a balance according to the proportionality principle allows it to argue in favour of either European or national interests. It may present arguments for differences or parallels between the different freedoms. Whenever it does not further the scope of the freedoms, as in cases such as *Cartesio*, *Pignataro*, and *Mariano*, or even when it presents a new legal argument that limits the reach of the fundamental freedoms, as was the case in *Keck*, litigants are not rewarded. In cases such as these, which lack positive feedback, the Court sets out different priorities concerning its legitimation: while member states may hold the Court in higher esteem when it protects their autonomy, the community of EU legal scholars, private litigants, and the Commission reward the Court for advancing the applicability of EU law.

CONCLUSION

Under no rule of law is legal certainty absolute. However, I have argued that there are good reasons to assume that European law is characterized, to an unusual extent, by legal uncertainty. The compromising character of European legal acts, as they are decided upon by a heterogeneous set of actors, puts a heavy interpretative load on the ECJ. The ECJ, as it is committed to the telos of

European integration, is bound to interpret these norms in a way that strengthens the European level. In order to have the scope to make suitable future decisions, it is likely to let its case law remain legally uncertain, thereby allowing for future integrative steps, rather than deciding finally on an issue.

Private actors find a set of individual rights in the European legal order based on the supremacy and direct effect of European law that offer an alternative to their domestic legal obligations. They draw on precedent, help to consolidate it, and transfer it to other legal areas. The interpretation of a prohibition of restrictions that was first established for the freedom of goods serves, I have argued, as a 'focal point' for different actors, initiating a path-dependent process. Positive feedback results from mobile private actors who seek out a more preferential legal order and present arguments in favour of analogous developments for the other freedoms as has occurred for the freedom of goods. Even if private actors face restrictions in legal standing, successful litigation grants the significant prize of a change to EU law that has constitutional status. For the Commission and the Court, this use of European rights fosters the supranational institutions' legitimacy. And a parallel interpretation of the different fundamental freedoms furthers the coherence of the legal order, which facilitates the cooperation of the national courts, who apply EU law autonomously, whenever precedent is sufficiently clear and unambiguous (Alter 2008b: 218).Too many changes in its case law and a differentiated approach to the different freedoms would complicate and hamper the diffusion of EU law as the 'law of the land'. The combination of legal uncertainty and path-dependent case-law development allows the Court to respond to the contradictory demands of providing both impetus for integration through expansive rulings and judicial stability.

It is also possible to detect both a 'coincidental' beginning of a path and the resultant inefficiencies that occur at a later stage. For the freedom of goods, the *Cassis* logic does not imply that there will be significant redistributive consequences. This is different for the other freedoms. It is, therefore, highly unlikely that a similarly far-reaching interpretation could have been established if it had not been for the 'coincidence' of goods markets internationalizing first. Given the distributional issues that are raised by this path, it can be regarded as inefficient and dysfunctional in a political sense. In terms of the freedom of establishment, for instance, the transfer of a far-reaching prohibition of restrictions undermines market regulations that are regarded to be of central importance for the national form of capitalism in some member states (Höpner and Schäfer 2010). A broad interpretation of the freedom of establishment enables regulatory arbitrage of company law and taxes. Similarly, the extensive interpretation of the freedom of movement and of union citizenship would lead to universal access to different kinds of national social benefits (Haltern 2005: 97). The transfer of the non-restrictions approach from goods to other areas, thus, poses a dilemma. While free trade requires non-discrimination between

national and foreign products, this kind of equal treatment between foreigners and nationals strips national citizenship rights of much of their content. Ultimately, without any form of exclusion, it would be questionable whether a state could impel its citizens to fulfil the duties (taxes, defence) necessary for the state's survival (Scharpf 2009). This became particularly apparent in the jurisprudence on the free movement of persons and union citizenship (cf. Hilpold 2008) in which the Court recently responded with fine-tuning rather than extending the equal treatment of EU citizens further in light of waning public support for European integration.

It is important to recognize yet another aspect of these redistributive consequences of path-dependent case-law development: some actors are favoured over others. Mobile private actors, partly supported by national political actors who favour similar (normally liberalizing) reforms, can find legal positions in European law that offer them more beneficial regulation in comparison with the status quo, which is oriented towards the national situation. Actors who profit from the regulatory status quo, in contrast, cannot defend their interests with EU law; nevertheless, they are privileged by national law. At the national level, the actors who support ECJ-driven liberalization are those who cannot achieve such changes domestically, due to the veto power of other actors. These vetoes are overruled with the help of European law.

As for the Court, it is not imprisoned in its legal doctrine. The judges may deviate from precedent and its attendant path. There are, however, strong positive incentives to honour precedent, as there are to follow a convergent approach in the interpretation of all fundamental freedoms, for instance, by facilitating the application of EU law through the lower courts. Path deviations are initiated mainly from within the legal system and are hardly ever the result of political steering. These occasional shifts are not predictable. At what point exactly the ECJ draws a line between the need to honour European obligations and national regulatory concerns is, then, somewhat unclear to the participating actors. This points to the relevance of the concept of legal uncertainty. By not following certain arguments, the Court, after a while, demotivates actors from pursuing a certain line of reasoning in litigation since there is negative feedback.

The advantage of a path-dependent argument is that it takes 'the law seriously' (Joerges 1996) and allows for the independent political influence of legal doctrine (Smith 2008). If the content of legal texts scarcely contributes to the Court's decision-making, as some scholars of rational choice appear to assume in the way they simply relate rulings to governmental power or judges' political preferences, it becomes difficult to understand why rational actors try to influence the legislative process in the first place, or why it should make a difference to courts that they can be overruled legislatively (Dyevre 2010: 311).

Having discussed legal uncertainty and path dependence, we can look at the question of legal activism or judicial power once more. Due to

over-constitutionalization, highly dynamic case-law development can also be produced by a court that is not very activist. Operating between legal uncertainty and the path-dependent development of case law, the Court does not require a pronounced activist orientation to push the process of case-law development along. In having to honour precedent, legal consistency, and a cooperative spirit with lower courts, the Court answers individual litigants with the aim of improving their regulatory position. The Court's interest in the consistency of the law leads to converging interpretations of the four freedoms and citizenship rights, and, given the complexity of the European polity, the Court must be largely ignorant of the implications of its decisions in the heterogeneous polities of the current twenty-eight member states.

On the basis of these considerations, I will turn now to the implications of constitutionalized case-law development for EU policymaking.

4

The Interaction of Judicial and Legislative Policymaking

The last chapter explained the dynamic expansion of case law, which progresses in a path-dependent fashion and is driven by interested actors and legal uncertainty concerning the boundaries of European law. We will now turn to the legislative process and analyse the shadow that case law casts over it. By analysing how case law impacts legislation in the European Union (EU), we can explain why the European Court of Justice's (ECJ) importance is not solely reliant on the direct implementation of its rulings. The over-constitutionalization of the Treaty implies that there are far-reaching constraints on EU policymaking.

As we have seen, the broadening of the jurisprudence on the fundamental freedoms develops incrementally through case law—it is not explicitly decided upon by the member states in the Council or by the European Parliament (EP). Unlike other international regimes, the EU has a relatively effective legislative process that makes it possible to tie case law to the political process through consensual decision-making. This possibility indirectly legitimizes the far-reaching case law of the ECJ (Dobler 2008: 530). As Scharpf (2009) argues, the possibility to rein in the Court through legislative acts constitutes the ultimate input legitimacy to the output legitimacy of court judgments. But within the EU, the legislative process cannot overrule the Court if it has based its rulings on the Treaty. The constitutional nature of case law does not allow it. By embedding case law subsequently in secondary law proposals, the Commission ensures that case-law obligations are enforced. This is one important solution to the puzzle of why member states do not simply respond with non-compliance to the considerable redistributive consequences of case law.

Case law can be equivalent to legislation. Rules are then determined by courts and not by legislatures. However, regulation through case law leaves a lot of legal uncertainty, since judge-made law is oriented towards single cases. Though Weiler demonstrated long ago that in the EU judicial policymaking is an alternative to legislation (Weiler 1981, 1991), the interaction between legislative and judicial policymaking is analysed as more of an exception

than a rule in European integration studies. Over-constitutionalization is ignored, with its many direct implications for the content of European policies. There is the implicit assumption that the status quo in EU legislation is set by the member states, as liberal intergovernmentalism argues (Moravcsik 1993), or by an existing piece of European legislation. Often, however, the ECJ's judicial policymaking defines the default condition of non-agreement, and lawmaking takes place in the shadow of the Court.

This chapter systematizes the different ways that judicial policymaking can impact upon European legislation. Depending on how the interpretation of European law develops, driven by private litigants and the Commission, the legislative process can be pressured to respond. The European Commission is crucial in this respect. It enjoys a formal monopoly on initiative. It drafts the proposals and introduces its interpretation of the Court's judgments under the purview of its powerful legal service. The Commission here has the role of a gatekeeper, as it is the only actor that can systematically broaden the case-specific consequences of rulings into general implications. Moreover, the Commission may actively foster judicial pressure, combining its legislative role with its role as a guardian of the Treaty, emphasizing that codification is needed for greater legal certainty. The term codification denotes that regulatory principles that have been developed in case law are written into secondary law. This provides general rules, while the implications of case law are difficult to judge by those it concerns. Acknowledging codification adds to EU research in two important ways. First, it shows how EU legislation is embedded in case-law development. Secondly, this codification reveals that the impact of case law cannot be reduced to the question of compliance with single rulings.

I argue that the relative neglect of judicial policymaking in research is rooted in the difference that we find between the rule of law at the national and the supranational levels. The 'comparative turn' in EU studies (Hix 1994) has resulted in treating the EU like any national political system. However, since it has an intergovernmental Treaty as a constitution, this provides a very different basis. When referring to the Treaty, case law has constitutional status and EU secondary law has to abide by it—a constraint that is generally overlooked by political scientists. Courts are much more efficient decision-makers than legislators, particularly at the supranational level. Given the multilevel European system, case law is developed in response to cases that are situated in very different national contexts, making it difficult to foresee its implications. EU legislation is embedded within this context of case-law constraints.

Secondary law (legislation) cannot overrule primary law (the Treaty). However, as marked by legal uncertainty as the latter's implications are, and as much the Court is an actor dependent on the support of not only lower courts and litigants but also governments, in making the will of the legislature explicit, there is the hope of influencing the interpretation of the Court.

This chapter proceeds as follows: I begin by discussing how judicial policymaking can be brought into the legislative process of the EU, differentiating between several types of judicial 'shadow' on the legislative process, analysing their features through small case studies. After first focusing on the way that the Commission may combine its legislative and judicial roles, I then move on to discuss member states' preferences when they are confronted with case law in the legislative process, focusing on the Services Directive and the regulation on the mutual recognition of goods. This chapter presents examples of policies that liberalize markets. The next chapter will analyse cases that deal with issues that are more sensitive to sovereignty, such as individual social rights, healthcare, and taxes.

Before delving into the impact of case law on legislative policymaking, I will discuss expectations relating to how legislative actors position themselves vis-à-vis case law. This principally concerns the member states' governments, but also the Commission and the EP.

NEGOTIATING LEGISLATION IN THE SHADOW OF THE COURT

Decision-making in any arena is highly dependent on the question of whether some or all actors have alternative means to realize their interests. This puts the focus on the question of the default condition: what happens in instances of non-agreement (Ostrom 1986)? Many legislative studies of the EU implicitly or explicitly assume that the default condition of legislation in the EU is continued national prerogative. This implies that member states' bargaining positions depend on the extent to which they favour cooperation as opposed to national, independent decision-making. However, European legislation is frequently not concerned with new areas of cooperation but about reforming existing ones. One example is the case mentioned in the original joint-decision trap article, the Common Agricultural Policy (CAP) (Scharpf 1988). Once there is a policy in place in the EU, those actors who favour its continuation are in a particularly strong bargaining position, given that a minority can block a reform that is favoured by the majority; in cases of unanimity rule, this can be even a single member state. Most importantly for our context, the default condition can be defined by the ECJ's case law due to over-constitutionalization and the abundant policy content of the Treaty. Davies (2014: 1593) even speaks of 'the legislative competence of the Court', which he argues to be 'broader than the legislative competence of the legislature'.

Table 4.1 shows the consequences of the decision rule of qualified majority voting or unanimity at the supranational level: those who favour the status

Table 4.1. Types of default condition and bargaining power in European legislation

Type	Default condition		Bargaining power lies with:
A)	National legislation	→	Those favouring non-cooperation.
B)	Existing EU legislation	→	Those favouring legislative status quo
C)	Existing case law	→	Those favouring existing or likely case law, which is either extensive or restrictive (= type A).

quo are always in the stronger bargaining position, reflecting that it is easier to maintain the status quo than to change it. If there is case law (Type C), and the Court does not simply back national competence (Type A), member states that favour existing or likely case-law development have a stronger bargaining position.

How can we expect case law that details policy requirements to influence decision-making in the EU? Assuming that there is case-law development and the Court does not give a large amount of leeway to member states' regulatory objectives, legislation is constrained by it. First of all, it becomes an issue of how the Commission integrates case law into policy proposals in order to codify it into secondary law. Secondly, the bargaining power of member states will differ according to the interpretation of the Court. Thirdly, member-state governments can be expected to have diverse preferences regarding codification, depending on their preferences on policy content, their normative understandings of the role of legislatures, the uneven use of Court-made rights by private actors, the unequal implementation of case law among member states, and the importance of legal uncertainty.

First of all, the impact of case law on legislation depends on how the Commission picks it up in its agenda setting. With its formal monopoly on initiation, it has a gatekeeping role. Moreover, of all legislative actors, it is the only one that also systematically takes part in the judicial process, as the guardian of the Treaty. Thus, it may simultaneously be a player in the legislative and judicial realms. The Court structures decision-making by foreclosing or opening up certain options at the proposal stage for all legislative actors, including the Commission. For example, Hartlapp et al. (2014: 88–91) show that the Directorate-General (DG) for the Environment could successfully refer to several cases (C-31/87; C-324/93) and the then pending Case C-513/99 to convince the DG for the Internal Market to include green award criteria in public procurement. In these rulings, the Court allowed member states exceptions (see Type A). Because the single market would have remained fragmented without a common agreement on policy, regulatory interests were strengthened over liberalization. As much as the Court supports integration through its development of case law, we can expect the Commission to take up these incentives for legislation, partly codifying case law into general rules.

Secondly, for the Commission and all actors involved in the legislation, everything depends fundamentally on whether the Court interprets the rights of the Treaty broadly or not. Member states were made aware of this at an early stage when the *Cassis de Dijon* judgment overhauled the building of the single market (Alter and Meunier-Aitsahalia 1994). While before *Cassis* member states could rely on their host-country rules as long as there was no European harmonization—so that in the Council negotiations the choice was between the national status quo and a European rule—after *Cassis* there is the presumption that the single market already exists and member states mutually recognize each other's rules (Schmidt 2007).

Where the Court interprets the Treaty freedoms broadly, and the Commission takes this case law up in its proposal, the more liberal states in the Council are favoured (Gormley 2012: 52–3). They may threaten simply to await further case law in line with their preferences, rather than agreeing on secondary law. In contrast, where the Court interprets the Treaty freedoms more narrowly,[1] those member states that favour a high level of regulation have a better bargaining position in the Council. Retaining regulatory competence allows them to realize their preferences unilaterally. This threatens other member states with market fragmentation. Consequently, these may agree to a higher level of regulation than they would have actually favoured. However, if market fragmentation is not that significant, and if the option of exemptions for those member states that have a higher degree of regulation (Article 95, 4–10 of the Treaty Establishing the European Community (TEC)) applies, European agreement at a lower regulatory level becomes possible.

Hubschmid and Moser give the example of car emissions standards for such a logic of reregulation in the Council. The ECJ allowed member states to pursue stricter environmental standards in its Case 302/86 *Danish Bottles*. This changed the default condition, labelled 'reversion policy' by Hubschmid and Moser. Those member states that favour stricter environmental standards, like the Netherlands, Denmark, and Germany, could pursue them after *Danish Bottles* on a unilateral basis and started to do so (Hubschmid and Moser 1997: 238; De Witte 2012: 31). Because they wanted to avoid market fragmentation, member states like France and Italy, who had blocked the decision before, agreed to stricter environmental standards. Similarly, Kilpatrick (2012: 211) sees the restrictive *Rush Portuguesa* ruling of 1990 as having favoured stricter regulation in the original Posted Workers Directive. A wide or narrow interpretation thus strengthens actors who favour liberalization or regulation in the negotiations. But this is not the only impact the Court has.

[1] It allows exceptions for member states due to health, environmental, or other reasons that follow the mandatory requirements. It also allows member states to draw on the right of exception, which Article 95 (paragraphs 4–10) of the TEC stipulates.

Much depends, thirdly, on member states' preferences regarding the codification of case law. There are benefits and disadvantages for the legislature in responding to case-law development. Depending on how case law develops, member states may be interested in using codification to signal their policy preferences to the Court. If case-law development is rapid and the number of potential litigants is high, member states may hope that their agreement on secondary law will play a role in the considerations of the Court ('signalling effect') (Garrett et al. 1998). From these considerations we can surmise that those member states whose preferences conflict with case-law development are interested in codification. In particular, when case law shapes policy issues of greater political salience, we may expect the legislature to be interested in participating in the shaping of policy through codification. The Council and the EP have a much more legitimate authority than the Court to shape European policies. In areas of important case-law development, this may also lead to the normative conviction that policymaking cannot be left to the Court.

Codification generalizes rights that are established by case law. As case law is difficult to understand, private actors will take up these rights unevenly (Conant 2002), raising concerns about equality before the law. Differences in implementation among member states give an incentive to support codification. If case law is implemented more unevenly than secondary law, those member states that implement case law will likely push towards a level playing field. In contrast, those member states that reject the policy implications of case law may resist codification, as a low take-up of rights implies that it has restricted impact. Reflecting on these considerations, we can surmise that those member states that implement case law according to the logic of the rule of law are likely to favour codification. This promises greater equality before the law, as well as a level playing field vis-à-vis other member states. Member states that aim to constrain the impact of case law will, conversely, resist codification.

Legal uncertainty, finally, may be another important consideration here. Patchy case-law development may make it unclear what exactly European law is demanding from the regulation of a policy field. A breach of EU law is not always without cost. It can lead to liability claims, for instance in public procurement. Those who have to make long-term investment decisions may need to know how stable certain regulatory privileges are (Schmidt 2000). Therefore, there may be an interest in codifying case law and setting up general rules, allowing the re-establishment of legal certainty. It may be, however, that only private actors pay the price for legal uncertainty, making codification less of a priority, particularly if member states prefer rights not to be diffused and used. We can deduce from these points that member states have an incentive to codify if they perceive there to be costs related to legal uncertainty. If legal uncertainty that arises from case law only impacts

relatively marginal actors, the incentive may be smaller. If there are benefits to be derived from legal uncertainty, as the rights established by case law are barely used, this may make non-codification attractive.[2]

To sum up, member states' positions in relation to codification depend on several factors. What are the normative costs of regulation carried out by the Court? What are the gains and losses of an uneven implementation of case-law regulations? How rapid is case-law development, and what is the worst-case scenario that is associated with it? The policy interests of member states have to be weighed against these factors. When legal uncertainty is highly disadvantageous, one can expect member states to be willing to forego their policy preferences to a certain extent in order to achieve legal certainty.

In addition to the member states and the Commission, the European Parliament is equally affected by the interplay of case law and legislation. Along with the Commission and the Court, the EP is generally believed to be an actor that is pro-integration. In line with the general neglect of over-constitutionalization by legislative analyses of the EU, not much is known about how the EP positions itself in relation to ECJ case law. In fact, members of the EP seem to be little aware of it. The Services Directive, analysed in this chapter, shows this clearly.

If the Commission takes it up, case law can be generalized into secondary law. Table 4.2 (adapted from Schmidt 2008) shows continuity in the relationship between judicial and legislative policymaking. In extreme cases, there is judicial dominance, in which case law replaces legislative action, and legislative dominance, in which case law has no influence. The latter is the standard assumption in EU legislative studies. I will not discuss these two extreme positions in this book. Between these two poles, the Commission takes case

Table 4.2. The interrelationship between judicial and legislative policymaking

Judicial dominance	← Interaction →		Legislative dominance
Case law replaces legislative action	*Active* pressure: Lesser evil, divide and conquer	*Passive* linkage of case law with legislation: Services Dir., Goods Reg., Citizenship Dir., Patient Mobility Dir.	Case law has no influence = standard assumption of EU legislative studies

Source: Adapted from Susanne K. Schmidt, Europäische Integration zwischen judikativer und legislativer Politik. In Martin Höpner and Armin Schäfer (eds), *Die Politische Ökonomie der europäischen Integration* (Frankfurt a.M.: Campus 2008), 111.

[2] Blauberger (2014) makes a similar argument for the member-state level, whether they react to case law with anticipatory obedience (out of fear of liability claims and/or further litigation) or contained compliance, if such pressure is absent.

law not only generally to give support to its preferred policy position, but as a specific instrument to force through changes. I summarize this active role first, before I then turn to a more extensive analysis of how legislation is shaped under the shadow of case law.

PRESSURIZING THE LEGISLATIVE PROCESS: STRATEGIES OF THE COMMISSION

On several occasions, I have described the way that the Commission can use its privileged position in relation to the Court to push its legislative proposals through (Schmidt 2000, 2004, 2011a). I will therefore only provide a summary here. By utilizing its role as a guardian of the Treaty, in possible combination with its executive competences in competition law,[3] the Commission can actively foster case law in those policy fields where it wishes to pass legislation. Two main strategies can be distinguished here (Schmidt 2000): 'lesser evil' and 'divide and conquer'. Reaching an agreement on legislation in the Council becomes a 'lesser evil' for member states when the Commission initiates cases at the Court that threaten case law and legal uncertainty. But the Commission may also advance proposals incrementally through a strategy of 'divide and conquer'. It may use infringement procedures to initiate domestic changes in some member states, thereby breaking down opposition in the Council and winning allies.

Making an Offer that Can't Be Refused: The Lesser-Evil Strategy

In the case of lesser evil, governments can avoid a lingering worst-case scenario by reaching an agreement in the Council. I became aware of this strategy when analysing electricity liberalization in the 1990s (directive 96/92/EC) (Schmidt 2000). Although, as a single-market measure, the Council only required a qualified majority, given the important role France had as the main electricity exporter, the case was one of de facto unanimity. France firmly opposed liberalization, but could not be marginalized on this issue. As there seemed little chance of reaching an agreement in the direction of liberalization, the Commission initiated infringement proceedings in 1994, putting pressure

[3] Note that while in the rest of this book I focus on the four freedoms, competition law also becomes relevant in terms of the strategies that are employed. The Commission can, to some extent, choose whether to use competition-law powers against a dominant position or to strengthen the fundamental freedoms.

on member states. It argued that the import and export monopolies of five member states, including France, infringed upon the market freedoms (Slot 1994: 525). For member states, this posed the threat that their electricity monopolies might incrementally fall under European competition law and the market freedoms. Given the legal uncertainty resulting from case law and the long-term investment needs of the sector, this was highly undesirable.

This credible threat of litigation changed the default condition for the member states. While they preferred their national policy to a common European one, they preferred the latter over a stepwise dismantling of monopolies through the Court. France therefore cooperated, allowing the Council to reach an agreement in 1996, just before the Court ruling set out the member states' Treaty obligations. But what happened next shows the inherent unpredictability of case law due to the proportionality test, namely the legal uncertainty that arises from the Court's balancing of the Treaty's free-market principles and legitimate exemptions for member states. In its ruling from October 1997 (C-157-160/94), the Court largely sided with the member states and not with the Commission. Had member states known this would happen, it is unlikely that they would have agreed to liberalization.

Another example here is the liberalization of road haulage (Schmidt 2004). Despite the dedicated chapter for transport in the Treaty, the European Economic Community remained largely inactive in the 1960s and 1970s (Héritier et al. 2001). It proved difficult to overcome the traditional system of bilateral quotas for road haulage, and harmonization was unsuccessful. Change came in 1985 when the Court ruled, after instigation by the EP, that the Council had failed to implement the transport chapter of the Treaty. Member states took this ruling as a threat that 'the Court would directly apply the Treaty . . . which could have meant the instantaneous liberalization of the road haulage market' (Young 1994: 6).

Actors such as the Netherlands and the Commission, who supported liberalization, were strengthened in their bargaining position and repeatedly threatened to refer the matter back to the Court if the Council failed to lift the restrictions quickly. In light of this, the Council reached an agreement to liberalize all transit transport from the beginning of 1993 (Regulation 1841/88). Comparing the votes of two coalitions in the Council shows how important the Court's threat was. The original opposition from France, Germany, Italy, Spain, Portugal, and Greece mustered forty-eight votes, while the supporters of liberalization—the UK, Belgium, the Netherlands, Denmark, Ireland, and Luxembourg—could only gather twenty-eight votes in this community of twelve member states (Young 1994: 15). With the threat of litigation for liberalization, reaching agreement in the Council became a lesser evil for the supporters of the status quo. Figure 4.1 depicts the lesser-evil strategy.

Liberalization of air transport is another case where the Commission's powers were used at an early stage to bring about phases of liberalization, for which

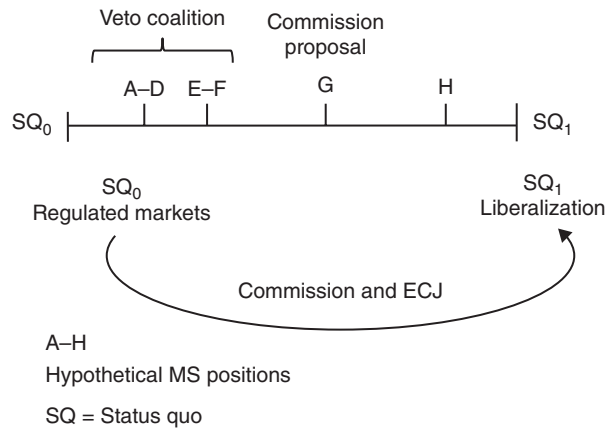

Figure 4.1. Lesser evil

Source: Adapted from Susanne K. Schmidt, Only an Agenda Setter? The European Commission's Power over the Council of Ministers. *European Union Politics* 1(1) (2000), 52, and Susanne K. Schmidt, The European Commission's Powers in Shaping European Policies. In Dionyssis G. Dimitrakopoulos (ed.), *The Changing European Commission* (Manchester: Manchester University Press, 2004), 111.

the necessary majorities in the Council were lacking (Argyris 1989). Dobson has recounted how the Commission, with the support of a few member states and the Court, managed to liberalize the market between 1987 and 1997 in several stages (Dobson 2010: 1135). Case C-209-213/84 *Nouvelles Frontières* was crucial here, in which the Court affirmed that competition rules applied to air transport. The Commission then drafted letters to ten airlines, containing the threat of high fines, which coerced the Council into agreeing on liberalization (Kassim and Stevens 2010). In the early 2000s, the Commission was again helped by the Court when it was struggling against the bilateral open-skies agreements that had been made by different member states with the US (Dobson 2010: 1144–5). Similarly, Héritier and Karagiannis have analysed this case, without differentiating, however, between lesser-evil and divide-and-conquer strategies (Héritier and Karagiannis 2011: 160).

Rauh and Schneider give general support for the relevance of case law to regulation. They have analysed investors' responses to regulatory decisions on the basis of stock-market information. They find that investors are sensitive to court cases that indicate imminent regulatory changes (Rauh and Schneider 2013: 1138).

Another important example of the lesser-evil strategy is given by Blauberger and Weiss (2013). They analysed the Council's decision on the Defence Procurement Directive in 2009, after it had refused to make this step a few years earlier in 2005. In this field, which is sensitive to sovereignty, member states supported their national policy prerogative by referring to Article 346 of the Treaty on the Functioning of the European Union (TFEU) that allows

an exemption from common-market rules where essential security interests are concerned. But a ruling of the ECJ (C-414/97) eroded this argument by interpreting the exception in a narrow way. The Commission picked up this interpretation after some time and made a proposal for a directive, which member states accepted in light of the danger of further court cases. A preliminary procedure (C-615/10) that followed shortly afterwards emphasized that this was not merely a theoretical danger but a very acute one (Blauberger and Weiss 2013). Despite the agreement on legislation, the Commission initiated a second round of threats using the Court, thereby attaining further concessions from the member states that went beyond the directive (Weiss and Blauberger 2015).

Other examples may be given here. The way that Bulmer (1994) describes the adoption of the merger-control regulation also shows how the Commission successfully threatened member states with a worst-case scenario. Public procurement is a more recent example where case law has had significant 'influence in the law-making process' (Bovis 2006: 462) of the public sector directive (2004/18).

Breaking the Resistance in the Council: Divide and Conquer

In cases of lesser evil, the default condition of negotiations in the Council is different. Member states no longer decide whether they prefer a common European policy to their national prerogative, but only whether they prefer it to regulation through case law. This is not, however, the only way that the Court, as a political actor, can interfere with legislation in the EU. In a process that unfolds in stages, the Commission can aim to overcome a blocking minority in the Council by targeting some of the member states with infringement procedures or a competition law action. If these member states then alter their domestic policies in response to this divide-and-conquer strategy, they are likely to switch sides in the Council and support the Commission's proposal for a general policy change.

I originally discovered this strategy when analysing the liberalization of ground handling at airports. Here, the Commission overcame opposition by targeting airport monopolies in several member states with its competition law powers (Schmidt 1998: 286–92). Subsequent legislation was successful.

The various European liberalization policies of previously highly regulated sectors give further examples of this strategy. These show that the Commission has used its power to approve state aid as a lever to foster the liberalization of telecommunications in Italy, and it has made the granting of its approval for international mergers of electricity providers and air-transport companies subject to liberalization consent (Thatcher 2007: 193, 216, 231). The third

liberalization package for electricity (and gas) also profited from this combination of the Commission's competences. Member states opposed the Commission's plans for 'ownership unbundling', which requires operators to sell their networks, in order to assure non-discriminatory access for competitors. In particular, Germany attempted to build a veto coalition within the Council, but the Commission secured a deal with E.ON, the largest German electricity provider. The Commission had been pursuing cartel charges due to an abuse of dominant positions in the industry that had occurred through cross-subsidization and exorbitant retail prices, and had raided the offices of the four large German electricity companies E.ON, RWE, Vattenfall, and EnBW in December 2006. E.ON agreed to sell its high-voltage transmission network in exchange for the dropping of these charges.[4] This helped the Commission to deliver a significant blow to the German opposition and break resistance among the other electricity companies that were opposed to change.

Though these are examples of the Commission using its executive powers under competition law, they can be subsumed, nevertheless, under judicial policymaking. After all, the significant independence and breadth of the Commission's powers depend on their broad interpretation through the ECJ. If the ECJ practises judicial self-restraint, the Commission is much weaker. In such cases, its far-reaching interpretations of its powers under European competition law are no longer credible to private and public actors and do not change their behaviour.

The gambling sector provides an example of such a weakening of the Commission in its use of the divide-and-conquer strategy. After its first attempt, the Commission had to exclude gambling from the Services Directive. Based on the freedom of services, there had already been several Court cases on gambling monopolies at the time (Case C-243/01 *Gambelli*, 6 November 2003; Cases C-338/04, C-359/04, and C-360/04 *Placanica*, 6 March 2007) (Adam 2015). On this basis, the Commission began infringement procedures against restrictions on sports betting in 2006. Originally targeting nine member states (Denmark, Finland, Germany, Hungary, Italy, the Netherlands, Austria, France, and Sweden) (IP/06/436 and IP/06/1362), the Commission continued the cases against Germany, Sweden, Greece, and the Netherlands in 2008. With the initiation of additional preliminary proceedings by interested competitors, liberalization appeared imminent (SWD (2012) 345 final, p. 22).

However, the Court then seemed to back down. In a Portuguese reference from September 2009 (C-42/07), it questioned whether member states were required to recognize service providers licensed in other member states mutually if there was no prior harmonization, since member states may not be sufficiently assured that consumers are protected against fraud (Hatzopoulos 2013: 494).

[4] *FT* 28 Feb. 2008, *FAZ* 29 Feb. 2008, *FAZ* 1 Mar. 2008.

This surprising interpretation was followed in later cases, concerning Dutch (C-258/08), Austrian (C-347/09), and Italian (C-660/11 and C-8/12) references. For the first time, the Court excluded a sector from the need of mutual recognition, while emphasizing, however, that member states cannot prevent all cross-border activity (Hatzopoulos 2013: 495–6). The Commission received much less support in jurisprudence than it had originally thought it would.

Nevertheless, the Commission pursued its policy goals. In May 2010, it closed the infringement file against Italy after it had liberalized online gambling (IP/10/504). In October 2010, the case against France was dropped, which had also liberalized (IP/10/1597). In autumn 2012, the Commission published a policy document on games of chance, which laid out its reading of the legal situation (COM (2012) 596 final; IP/12/1135). Although the Court is cautious in its demands, the Commission requires member states at least to justify their restrictions using a proportionality test. In November 2013, the Commission announced that it had closed the proceedings against Finland but requested information from Belgium, Cyprus, the Czech Republic, Lithuania, Poland, and Romania. It also notified Sweden that it perceived there to be violations of the freedom to provide services, announcing that it would soon turn to the Court if Sweden refused to alter its policy (IP/13/1101).

In its attempt to follow a divide-and-conquer strategy for gambling services, the Commission has not only faced an unusually restrictive Court. The committees in the European Parliament too have repeatedly been sceptical about liberalizing online gambling (2012/2322 (INI)). Consequently, liberalization is slow to proceed.

Another example of this strategy is sports policy. Sports originally appeared outside the Treaty and the single market, until in 1995 the Court judged professional football's transfer system according to the free movement of workers in Case C-415/93 *Bosman*. Some other cases based on free movement and competition law followed (Barani 2005; Rincón 2007), as well as the issuing of a White Paper by the Commission in 2007 (COM (2007) 391 final). This case law has supported moves towards legislation in this area, with the parliamentary committee for sports and culture demanding guidelines from the Commission 'on the application of Community competition and internal market law to sport'.[5] Additionally, the Lisbon Treaty gives further competences for sports policies to the European level. In a communication (COM (2011) 12 final), the Commission detailed several measures it intends to pursue, among them the further assessment of the consequences of the Treaty's non-discrimination rules—on the grounds of nationality—for sports (p. 11).

[5] Euractiv, 'MEPs Adopt Report on Future of EU Sport Policy', 3 Apr. 2008. <http://www.euractiv.com/section/science-policymaking/news/meps-adopt-report-on-future-of-eu-sport-policy> [accessed 11 May 2017].

Regarding the free movement of capital, from 2002 onwards, the Court issued several rulings against Golden Shares (Höpner and Schäfer 2010: 355–7; Werner 2016). Werner (2013: ch. 5) traces these incremental attacks by the Commission on Golden Shares in different countries. In its most recent ruling against the German Volkswagen law in October 2013 (C-95/12), however, the Court let the special veto rights of Lower Saxony pass. Following this ruling, the Commission once again has less support in case law to liberalize corporate governance rules.

These examples, where the Commission strategically combines its judicial and legislative roles, or turns to its broad administrative powers in competition law to promote legislation, are not the only cases where case law is significant for legislation. Preliminary references make up the bulk of the ECJ's activities and therefore account for much of the development of case law. This may give incentives for the Commission and the member states to codify case law in legislation. While I treat both active pressure and passive linkage (Table 4.2) as analytically distinct, they do overlap empirically. Thus, while not the result of a grand strategy, in the example of the Services Directive, to which we now turn, the Commission also took up some judicial activities in preparation (Schreinermacher 2013: 166).

THE SERVICES DIRECTIVE

The Services Directive has been characterized as 'the most salient and contested piece of legislation passed in the EU in the last decade' (Lindberg 2008: 1185). It can be seen as a crucial case (Eckstein 1975) for analysis, which shows that the shadow case law casts is also relevant in important legislative projects. The Services Directive has attracted significant academic attention (Lubow 2017). Strikingly, most scholars overlook how case law influenced the directive but interpret this legislative process as a question of preferences and power differentials in the EP and in the Council. Of course, this could mean that I am mistaken. However, my analysis that points out the relevance of case law supports my claim that existing analyses have thus far ignored the importance of judicial policymaking. I see this neglect as being less rooted in the failure of individual scholars, and rather in the treatment of the EU as a normal political system, an interpretation that became common after Hix's seminal early article (Hix 1994). As important as it has been to open the study of the EU to comparative politics, and to move it away from an explicit international relations perspective, this glosses over a crucial difference: at the supranational level, the balance of power is skewed due to a fragmented, weak legislature and the very detailed constitutionalization of rights. Namely, there is over-constitutionalization.

As was mentioned in Chapter 3, for a long time the Court interpreted the freedom of services narrowly. It was only in the 2000s that it emphasized the necessity to facilitate transborder trade in services on the basis of a growing number of court cases (Hatzopoulos and Do 2006: 923). Against this backdrop, the Commission launched its proposal for a Services Directive in early 2004. While services had been part of the original 1992 programme, the intra-EU trade of services was not as significant as their role in domestic economies. The single-market programme only succeeded in some sector-specific directives, specifically for financial services, such as insurance. As long as the Court interpreted the freedom to provide services restrictively, there was little pressure on member states to agree on single-market rules.

Schreinermacher (2013: 166) shows that the Commission had prepared the ground for the Services Directive with some infringement procedures: between 2002 and 2006, it opened sixty-six infringement procedures against member states in the area of free movement of services, compared to only forty-seven in the period from 1997 to 2001. In addition, preliminary references increased from seventy-three to ninety-seven. In particular, France was the target of thirteen infringement procedures in 1997–2001 and nine procedures in 2002–6. The number of French preliminary references was low in comparison (four and seven in these two periods respectively). The opposite is the case in Germany: there were three and seven infringement procedures in the two periods respectively, but, in comparison, there were nine and sixteen references, putting Germany under much more pressure from European law, as utilized by private actors, than France.

The Content of the Directive

The story of the Services Directive is well known, but let me quickly recapitulate its main points. Since decision-making on sector-specific directives for services had proven cumbersome, the Commission proposed a horizontal approach for a Services Directive, which would apply to all services where specific legislative measures had not yet been taken (COM (2004) 2 final, p. 3). This unusually broad target covered about 50 per cent of all economic activity, which led to a process of unprecedented politicization. The directive aims to realize the freedom of establishment and the freedom of services. Originally, only lotteries and genuine not-for-profit public services (such as education or cultural activities) were left out of the directive, but health and social services were included. In order to achieve a harmonized horizontal approach to services regulation, the draft directive relied on the principle of home-country control. Service providers had to abide by the regulations of their home state and enjoyed the freedom to provide services on this basis. This implied that all member states had to recognize services that were regulated in other member

states as being equivalent to their domestically regulated services. At the same time, member states had to review their national regulatory requirements and abolish excessive requirements. To ensure the required level of cooperation between home- and host-country authorities, the directive introduced a duty of cooperation so that host-country authorities could obtain information from home-country authorities concerning the legality of companies and details of their regulation.

The proposal was a significant radicalization (De Witte 2007: 9–10) of the incipient changes in the Court's case law. While the ECJ had been more generous in its exceptions for the freedom of services than for the freedom of goods, when balancing the freedom with public interests, the Commission proposed the country-of-origin principle as a general rule. This would abolish opportunities to impose host-country rules, which the Court still had granted, and gave the directive a considerable deregulatory potential. Once unions and NGOs became aware of the consequences, their protests eventually led to the failure of the constitutional treaty in France and the Netherlands (Howarth 2007: 94; Grossman and Woll 2011: 99–100).

Due to its broad scope, it was not generally possible for public and private actors to assess all the implications of the directive (Davies 2007a: 241–2). In relation to the breadth of necessary regulatory change, it is important to keep in mind the EU's specific approach for integration, which was discussed earlier. Although the Treaty and the fundamental freedoms only target transborder activities and not internal matters, secondary law pursues a unified approach for domestic and transborder activities. In addition, there was an overlap with existing services law, in particular the Posted Workers Directive (96/71/EC) of 1996. The services draft loosened some restrictions on posted workers in its Article 24, such as the need to carry papers for local controls in the host country and the obligation to appoint a national representative for the posting company, making control by the host country more difficult. The high number of transposition measures, which were required in member states once the directive was agreed, testifies to its breadth and to the difficulty of assessing its effects: Hungary had to adopt 333 measures, Germany 222, France 84, Austria 52, the UK 15, Italy 10, and Greece 107 (Hatzopoulos 2013: 461). As a side note, these highly diverse numbers substantiate doubts about whether one can assess the domestic impact of European integration quantitatively by counting laws (Töller 2010).

Indeed, several analyses have shown (Miklin 2009) that many relevant political actors were slow to realize the enormous implications of the directive. The detailed preparation of legislation in the Commission is actually meant to prevent such politically contentious proposals reaching the public. In this sense, the Services Directive was an accident of internal policy coordination. In addition, member states failed to notice the political salience of the issue in their feedback on various preparatory policy documents. In this 'accident',

case law played an important role. As Hartlapp et al. show in their detailed empirical work, as the directive was being prepared, the DG for the Internal Market repeatedly pointed out that all it was doing was codifying case law: no changes to the policy status quo were intended, merely a consolidation of all the existing requirements for case law and a greater transparency of regulation (Hartlapp et al. 2014: 104–7). It was particularly the case within the Commission that the argument for a mere codification of case law kept the concerns of other DGs at bay. The contrast between this perspective on 'simple codification' and the political controversies the directive attracted shows how much the public underestimates the reach of EU law as it is interpreted by the ECJ, and, possibly, how much the ECJ overestimates the public's support for its rulings.

Negotiating the Services Directive

The political reactions to the draft emphasized the significant redistributive consequences of the regulatory status quo as shaped by case law. If we consider that the directive merely codified the case law, this elucidates the 'inefficiency' part of my path-dependency argument. The proposal was published in early 2004, a few months before the Eastern enlargement. Consequently, the labour-intensive nature of many services raised fears of wage competition, most of all in those countries that rely on collective wage agreements, such as Germany. Only minimum wages are automatically binding for service providers from other member states, following the *Rush Portuguesa* ruling; collective agreements are not.

As Davies points out, home-country rule for services provision is very challenging, as it violates expectations in relation to two relationships: the privileges of nationals vis-à-vis their own nation state, an issue we discussed in Chapter 3 in terms of reverse discrimination against nationals, and the equal treatment of citizens.

> An individual who is present in the jurisdiction but not subject to its regulation, and operating under a more beneficial regime, is a direct challenge to the content of citizenship—national or European—and its associated guarantees of equality and privilege. His domestic competitor sees his most privileged position as a national citizen undermined, while the two competitors, working side by side, operate under different legal regimes with different rights, despite a shared EU citizenship. (Davies 2007b: 7)

After all the demonstrations and protests that the 'Bolkestein directive' gave rise to, which undermined the legitimacy of the EU project, the directive was extensively modified. In this process, the EP and its rapporteur Evelyne Gebhardt took on a leadership role. The political constellation of the Services

Directive was unusual in several respects. Member states were divided. One coalition was mainly comprised of old member states, the other of the new members, though including both the UK and the Netherlands. But despite these divisions, the Council was united in supporting the idea that a Services Directive was needed for economic growth as there were more and more hindrances to trade in services.[6] Moreover, while the Commission and the EP are normally natural allies, here they were opposed to one another. This extraordinary constellation among the EU institutions gave the EP an unprecedented prominence. The divided Council could not agree unanimously on a revised proposal. If the EP could achieve the necessary unity to agree on a revision with the support of a broad majority, the Commission and the Council would be bound to go along with it and conclude this contentious but important piece of legislation.[7]

While the Commission, in its discussions with the Council, repeatedly referred to the constraints of case law,[8] the rapporteur in the EP largely denied them. It is fair to say that case-law restrictions were scarcely reflected in the EP's discussions. The socialists had invited the German Advocate General (AG) Kokott to explain the legal dimension of the directive, which Gebhardt considered to be rather loose (interview MEP PES 1 December 2010; interview German Trade Union Confederation 20 November 2009). The Parliament, as the conflict around the services directive clearly shows, ignored over-constitutionalization. In the course of negotiations, Gebhardt argued for replacing the principle of home-country control with the principle of mutual recognition. Although many did not perceive a difference (interview German Trade Union Confederation 20 November 2009), the reference to 'recognition' seemed to imply a broadening of rights for the host country and to put the burden of proof of equivalent regulation on the private party offering the product, not on the member state (interview French Financial Ministry 25 November 2009). As was widely promoted by Gebhardt, the EP wanted to see the rights of the host country strengthened, but settling for host-country control would have thwarted the building of a services market and would have been next to meaningless given the case law of the Court and its overriding constitutional status.

In the end, the central Article 16, which originally included home-county rule, simply discusses the obligation to enable freedom of services. By including a list of measures that host states are *not* allowed to impose, such as special duties on registering in the host country or *ex ante* certification, as well as prescriptions for materials and tools used, Article 16 indirectly establishes

[6] Interviews: Council General Secretariat 27 Oct. 2010; German Federal Ministry of Economics 19 Nov. 2009; German Trade Union Confederation 20 Nov. 2009.

[7] Interviews: German Federal Ministry of Economics 19 Nov. 2009; MEP PES 28 Oct. 2010.

[8] Interviews: French Financial Ministry 25 Nov. 2009; Council General Secretariat 27 Oct. 2010.

home-country regulation (Nicolaïdis and Schmidt 2007). It should be additionally noted that the list of justifications in Article 16(3)—that host countries may use to achieve 'overriding reasons relating to the public interest'—is much narrower than ECJ case law. Lawyers have considered this to be a 'deregulatory shift', which was brought about by the directive (Davies 2007b: 12, 18; De Witte 2007: 12).[9] Other legal commentators, however, considered the directive as falling behind the case law of the ECJ (Editorial Comments 2006: 309), since the Court had clearly established the country-of-origin principle. This raised the interesting question of whether the Court would take into account the preferences the legislature had signalled and adapt its interpretations in the future.

The change in language, if not in substance, allowed agreement to be reached on the directive, which was desired by many but was highly politicized. Significantly, the European Trade Union Confederation (ETUC) backed the compromise in terms of the interests of its Eastern members, easing member states' fears of further protests (interview German Trade Union Confederation 20 November 2009). The broad mobilization of unions had helped the Socialists to abolish all references to the contentious home-country principle in the directive (interview MEP PES 28 October 2010), but this was understood by many to be only a symbolic change.[10] The compromise on Directive 2006/123/EC of 12 December 2006 between the Socialists and Christian Democrats in the EP was also made possible by the more restricted scope of the directive, which exempted health services, utilities, public transport, social and security services, temporary workers, gambling and lotteries, waste, audiovisual services, electronic communication, and financial and legal services. However, again, it is crucial to consider what this exemption means when one examines not only the legislative process but also the judicial route. Those who asked for the exemptions assumed that they would keep these policies under national purview. In fact, narrowing down the directive only meant that these areas were subject to the Treaty rules, turning the exemption into an easy concession for the supporters of liberalization (interview German Trade Union Confederation 20 November 2009). Much to the displeasure of the Eastern European

[9] For instance, consumer protection is not part of the exceptions in Article 16(3), which only refer to 'public policy, public security, public health or the protection of the environment'. Consumer protection is mentioned, however, in Article 3(2) where it is considered to fall under host-country rules. In its case law, the Court hardly ever recognized it as an exception, and those actors that wanted the directive felt that the liberalization of services would not succeed if member states could refer to consumer protection as an exemption (interview MEP EPP 27 Oct. 2010). See also Recital 40.

[10] Interviews: French Financial Ministry 25 Nov. 2009; Council General Secretariat 27 Oct. 2010; Federal Ministry of Economics 19 Nov. 2009; MEP PES 28 Oct. 2010; German Trade Union Confederation 20 Nov. 2009; MEDEF 11 Dec. 2009.

member states, the facilitation of the Posted Workers Directive was deleted. As it had done for health services (see next chapter), the Commission promised a separate follow-up. The fact that the posting of workers enforcement Directive (2014/67/EU) was only adopted in May 2014 demonstrates that this issue continued to be politically contentious.

The legislative process of the Services Directive is generally hailed as a significant success for the EP (Loder 2011), and for social movements and unions in general (Leiren and Parks 2014).[11] The political discussions, as is also the case for academic analyses, have largely overlooked the shadow that case law casts.

The Court proved these assumptions to be wrong. The *Laval* and *Viking* judgments of December 2007 showed shortly afterwards that leaving the Posted Workers Directive out of the Services Directive did not alter its subjection to the freedom of services. The Court presented itself as being unimpressed by the heightened political contentiousness of the Services Directive and seriously interfered with the prerogatives of societal self-regulation (Joerges and Rödl 2009; Höpner and Schäfer 2010: 354). It clearly sided with the observations of the new member states and the UK in favour of the freedom of services and against the right to industrial action (Lindstrom 2010: 1316, 1320), thereby arguing for the horizontal effect of Article 43 of the TEC.[12]

Other provisions of the proposal survived the political debate more or less untouched. By including far-reaching provisions on administrative cooperation (Chapter VI; Articles 28–36), the Services Directive lays the foundation for administrations to operate transnationally. But the difficulty of breaking the national hierarchy of command has been little discussed. While the Minister has the ultimate political responsibility (Döhler 2001), administrations are obliged to comply with horizontal demands that originate in other member states' administrations. This is not our focus here, but it is important to recognize that these far-reaching changes are a requirement that stems from the case-law principle of non-restriction. As trade in services often relies on the presence of the service provider in the host state, its regulation in the home state necessitates far-reaching administrative exchanges.

[11] See Lindberg (2008) for a detailed analysis of inner-parliamentary decision-making that makes no reference to the constraints of case law, however.

[12] Lindstrom sees the Services Directive as an example of the Council and the EP scaling back the market, and concludes her article by arguing that the *Laval* and *Viking* cases show how much secondary law is needed (Lindstrom 2010: 1322–3). Such an argument can only be made under the assumption that secondary law could constrain the Treaty, disregarding its constitutional status.

What we can Learn from the Directive

To sum up, in the negotiations actors differed in their awareness of the constraints of case law embedded in the Commission's proposal for codification. As Stone Sweet and Mathews (2008) argue, proportionality analysis subjects parliamentary sovereignty to judicial review. Since a general framework cannot do justice to the balancing the Court performs in individual cases, the proposal radicalized the case law, giving more scope to the freedoms to provide services and of establishment, and less scope to member states' regulatory interests. The dominant political discourse that the EP established largely ignored the case law, although more liberal supporters in the Europäische Volkspartei (EVP) were clearly aware of its constraints. Nevertheless, the position of negligence advanced by Gebhardt, who argued that there are many legal interpretations but that these should not overshadow the political process, also had its merits. After all, the Commission instrumentalizes case law to a large extent strategically, emphasizing certain interpretations over others. By ignoring over-constitutionalization, inadvertently or not, the EP can be seen to be reverting to an extreme form of signalling: showing the Court that its policy preferences are uninhibited by the policy constraints of the Treaty. The extent to which political actors ignore over-constitutionalization is also apparent in political calls to exclude policies from the directive, which totally misjudges that this would mean that the Treaty applies directly. What could have been hoped for—that the Court would note the lack of political and societal support for an extensive interpretation of individual rights that followed from the fundamental freedoms—did not materialize. The Court simply continued to push through its case law; this was true for the patient mobility case law (see Chapter 5) as well as for *Laval* and *Viking*. However, the case law on services is still difficult to predict. Thus, for a ruling that concerned German regulatory restrictions on pharmacies (*Doc Morris*; C 171–172/07; 19 May 2009), most commentators would not have foreseen that the Court would have come to such a restrictive interpretation of the freedom of services.

Additionally, the Commission seemingly remained unaffected by the political sensitivities that emerged during the legislative process. This becomes evident when one considers the Commission's *Handbook on Implementation of the Services Directive* that was published in 2007 in all the Community's languages (European Commission 2007). It gives member states guidance on implementing the directive. Interestingly, the Commission interprets the central Article 16 (pp. 36–40) with extensive reference to the existing case law on the freedom of services. In these few pages alone, it cites the case law of the ECJ twenty-one times, referring to specific rulings in the footnotes sixty-eight times.

> It should be noted that the terms 'public policy', 'public security' and 'public health' are concepts of Community law which stem directly from article 46 of the

> EC Treaty [Treaty Establishing the European Community]. These concepts have been consistently interpreted by the ECJ in a narrow sense, meaning that there must be a genuine and serious threat to a fundamental interest of society and it is for the Member State invoking these public interest objectives to demonstrate the risks involved. (European Commission 2007: 37)

While secondary law cannot override primary law, it appears that the Commission is not easily troubled by the political process, as long as it has the constitutional nature of case law to support its interpretation. This is the baseline from which the legislative process cannot divert. In the course of implementation, the Commission has begun several infringement procedures to pressure member states into compliance. In the summer of 2010, it approached twelve member states, as a result of their insufficient implementation of the directive, with a reasoned opinion (Belgium, Germany, France, Greece, Ireland, Luxembourg, Austria, Poland, Romania, Slovenia, the UK, and Cyprus, later followed by Sweden; IP/10/821). The cases against Germany, Greece, and Austria were referred to the Court in October 2011 (IP/11/1283) but closed in May 2012 (IP/12/534). After all these original cases were closed, in the summer of 2013, a new case against Hungary was sent to the Court, which involved luncheon vouchers that had been introduced in 2012 (IP/13/578).

In summary, the Services Directive was unusual in the degree to which it was politicized. Interestingly, political contention left the Court and the Commission unswayed in their supranational, hierarchical mode of decision-making, despite the higher legitimacy of the joint-decision mode that involves the legislature (Scharpf 2000b, 2006: 851). It is striking that the literature in the area of political science on the Services Directive—a widely analysed piece of legislation—largely ignores the power of judicial constraints. Following the activism of the EP, most research has equally overstated the political nature and understated the judicial nature of the Services Directive. The legislature is taken to be sovereign, in parallel to the situation at the national level. The different nature of the balance of powers in the EU has not been understood. Here, the legislature does not have many options at its disposal, as the EU suffers from too many constitutional constraints.

THE REGULATION FOR GOODS

The regulation on mutual recognition of goods (764/2008)[13] is much less well known than the Services Directive, although it is similar in its thrust. It was decided after the Services Directive. The lack of controversy that characterized

[13] This part of the chapter draws on Schmidt (2011b).

the decision-making process for the regulation of goods indirectly supports my interpretation of the path dependency of case law. It shows that the *Cassis* logic of regulation meets with relative acceptance in terms of goods, but once it is transferred to services or other freedoms, it becomes controversial because of the redistributive issues it raises.

The Commission announced a new package for the internal goods market in February 2007 (COM (2007) 35 final), which consisted of four different measures, among them the regulation on mutual recognition of goods.[14] It is now called a 'new legislative framework'.[15] Similar to the Services Directive, the regulation builds directly on the case law of the ECJ and specifies the obligations of member states under mutual recognition. Like the Services Directive, it codifies the case law and introduces single contact points to facilitate the marketing of products for EU suppliers. However, given the extent of harmonization in this area, it only applies to the approximately 20 per cent share of the goods market that is non-harmonized. Additional differences concern the long-standing development of case law for goods—Commission documents typically mention some 300 cases here (2003/C 265/02, p. 18)—and the extent of standardization of goods that facilitates high amounts of trade. Services are not standardized to this extent. Although the regulation is described in interviews as an extremely complex piece of legislation that is not sufficiently understood by many,[16] with its horizontal, all-inclusive approach, the whole internal market package passed quickly, as it was proposed in February 2007 and agreed upon in June 2008. The British House of Commons, for instance, complained about the insufficient time they had to consider the proposal thoroughly.[17] Only Italy abstained from voting.[18] This time, the Commission and EP were on the same side (interview Commission 24 June 2009). One parliamentary reading sufficed in February 2008 (Council 6 611/08, 27 February 2008, pp. 1–2). It was particularly the German Presidency, in the first half of 2007 that pushed the directive through.

[14] 'A proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC.' (Decision 3052/95/EC had established a procedure for the exchange of information in cases where member states prohibited the marketing of products under mutual recognition. However, while initially member states gave notice of measures taken, after the year 2000 the Commission was hardly ever contacted.)

[15] <http://ec.europa.eu/growth/single-market/goods/new-legislative-framework/index_en.htm> [accessed 11 May 2017].

[16] Interviews: Permanent Representation Germany 22 June 2009; Commission 24 June 2009.

[17] See House of Commons, Select Committee on European Scrutiny Twenty-Second Report; under: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xxii/4106.htm> [accessed 11 May 2017].

[18] Conseil 11075/08, 23 June 2008. This was due to a question concerning precious metals, which had been discussed a few times in the Working Group (Council 16213/07, 10 Dec. 2007, p. 2; 5317/08, 18 Jan. 2008, p. 18).

The regulation codifies existing case law. Like the services directive, it even goes beyond case law in that member states sacrifice additional national regulatory autonomy. Again, the case-specific balancing the Court performs between the freedom of goods and member states' regulatory interests could not be generalized. Its outcome is uncertain. If member states want to re-establish legal certainty with codification, they cannot generalize the exceptions granted from balancing, but are forced to go beyond the rulings.

Since the *Cassis* ruling, case law has been crucial for the internal market for goods. Following this judgment, the Commission issued a 'Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ("Cassis de Dijon")' (OJ No. C 256/2, 3 October 1980), which laid down its interpretation of the ruling. This was the first time that the Commission took up case law to build policy, thereby radicalizing its implications (Alter and Meunier-Aitsahalia 1994). The Commission simply assumed that the member states had a clear one-sided duty to recognize the legal orders of each other by stating that 'Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State.' The possible exceptions from the free movement of goods included in both Article 30 of the TEC and the mandatory requirements, which the Court had introduced, were simply neglected. Already in this first instance, we find the problem that the Court can balance between a freedom and the public interest but that these exceptions are case-specific and hard to generalize. However, member states did not share the Commission's view, and their subsequent practice did not match the Commission's hopes for a far-reaching mutual recognition of goods regulations (Pelkmans 2007).

The history of the single market for goods illustrates well the difficulty of relying on case law for regulation. Case law cannot define an issue of policy in a conclusive way. Focused as it is on the case at hand, case law has unclear implications for similar, but slightly different, additional cases. This suggests that there is less legal certainty than when secondary law explicitly describes regulatory intent. As there are only EU case law and national product specifications to refer to, companies that market their products in other member states face problems when claiming their rights only based on case law. In the late 1990s, the Commission started to require that member states add mutual recognition clauses to their national product regulations (COM (2002) 419 final, p. 26). This was meant to serve as a legal reference point for companies from other member states when they demanded market access for equivalent products. The background to this was the ECJ's *Foie Gras* case (C-184/96, 22 October 1998), where the Commission insisted that foie gras that was legally marketed in other member states could be sold in France. The Court agreed in this case with the Commission's argument that member states were required to insert a mutual recognition clause into their technical regulations

(in para. 28) (Craig and De Búrca 2007: 716–17). However, a few years later in Case C-24/00, which dealt with the authorization of a food additive, and in Case C-95/01 *Greenham and Abel*, the Court did not uphold the Commission's argument that Article 28 of the TEC required the inclusion of this clause. In both cases, AG Mischo had similarly argued against this obligation (Bartels 2005: 693–6). This shows the limited guidance of case law for regulatory requirements, an experience that motivates the Commission to introduce legislation.

The Content of the Regulation

What is the content of the regulation? It is notable that companies have clear requirements (Article 4 of Regulation 764/2008) to provide 'relevant information concerning the characteristics of the product or type of product in question' as well as 'relevant and readily available information on the lawful marketing of the product in another Member State'. However, this does not need to be in the language of the country of destination (Article 4b). The central Article 6 delineates the burden of proof concerning the equivalence of regulation. Mutual recognition presupposes equivalent regulation. The question addressed under Article 6 is who bears the burden of proof whenever member states doubt the presence of equivalent regulation and therefore want to deny market access. The regulation thereby clarifies a point where the case law had left the highest legal uncertainty, according to the Commission (COM (2012) 292 p. 5). The regulation solves the matter with a reversal of the burden of proof, which now falls exclusively on member states. If member states wish to invoke an exception and to prevent the marketing of a product, they have to specify 'the technical rule on which the decision is to be based and [set] out technical or scientific evidence to the effect that . . . (a) the intended decision is justified' and 'appropriate' (Article 6).

Companies are allowed to immediately put their products on the market. If authorities intend to object to the marketing, they face clear deadlines in the regulation: the supplier has twenty working days to respond to the objections of the authority, which then has another twenty days to justify its final decision and communicate it to the economic operator and the Commission (Article 6). The EP and the Council included the alteration that authorities may bar a product only in the case of danger. Altogether, authorities are confronted with a potentially complex situation as products regulated in the other twenty-seven member states may enter each national market. Underlying harmonization is only provided by the General Product Safety Directive (2001/95/EC and 92/59/EEC) that requires producers to market only safe products (Interpretative communication, 2003/C 265/02, p. 5). In addition to the information in various languages provided by the companies, authorities can inform themselves at member states' national contact points, which are established

by the regulation. In Recital 30, the regulation encourages member states to provide information in different languages.

Whenever national authorities object to foreign products, they bear the burden of proof and have to demonstrate the proportionality of their rules (Recital 23 and Article 6b). This was closely discussed in the Council, and member states made sure to state explicitly that they do not have to justify their national regulations as such (Council 9610/07, limite, 15 May 2007, pp. 2, 7). Another issue in the working group was the question of 'technical or scientific evidence' in Article 6, as member states were concerned about the level of scientific support they would need when rejecting a product (Council 5673/08, 25 January 2008, p. 22).

The EP had included several modifications to the regulation (interview General Secretariat Council 25 June 2009). It requested that the effect on free movement should be specified more precisely than in the proposal by replacing 'affecting' free movement with 'hindering' it (amendment 33, Article 1, p. 24). Supported by the efforts of the German and Portuguese presidencies, the Parliament also included the requirement for the operator to provide information on the products (Article 4) and the possibility of temporarily suspending the marketing of a product (now Article 7) (see Council 5312/08, 1 February 2008, p. 2). But in stark contrast to the discussions around the Services Directive, the EP did not focus on dangers of insufficient regulation. The liberal Alexander Stubb, who shortly afterwards became the foreign minister of Finland, acted as rapporteur. In its report (A6-0489/2007), the EP emphasized the need to enhance legal clarity and its assumption of equivalent regulations in the different member states: 'This approach (mutual recognition) is perfectly understandable because it can be assumed that the public interest, e. g. protection of health or of the environment, is safeguarded in a similar way in the different Member States' (p. 50).

The Burden of Proof in the Case Law

The regulation, I have argued, improves legal certainty for companies and authorities by one-sidedly putting the burden of proof on member states. This burden of proof is crucial, as it manifests the underlying assumptions of the regime. If the assumption is that the member states still possess the sovereign rights to regulate their markets, companies have to show that they meet 'equivalent' regulatory requirements. If the assumption is that the European free market prevails, member states have to justify the basis of their regulatory goals. It is surprising that the member states have scarcely discussed this relevant issue of the burden of proof. Why would they consent to such a restriction of their regulatory autonomy? To answer this question, I will now

outline how the Commission, the member states, and the ECJ perceived the burden of proof.

The Commission never discussed a reversal of the burden of proof but simply a clarification on an existing legal uncertainty (e.g. SEC (2007) 112, p. 18). This is because it had already understood what the onus on member states was, as it described in its communication after the *Cassis* judgment (interview Commission 24 June 2009). Regulation 764/2008 finally codified this position. In its 1999 communication on mutual recognition, the Commission had stated that

> The protection of health cannot be used without a valid reason, for this would lead to borders being reintroduced within the Single Market. Therefore, it is for the national authorities to prove that their regulations are necessary in order to truly protect the interests cited in Article 30 (ex Article 36), and in particular that placing the product in question would pose a risk to public health.
>
> (SEC (1999) 1106, p. 10)

Moreover, it is interesting that while the Commission cites the case law of the ECJ on many occasions for other aspects, it does not do so for the burden of proof. It just mentions the general lack of legal certainty, given that the mutual recognition regime is structured around more than 300 rulings on the freedom of goods. It also mentions that the case law does not give the Commission any means to require the member states to take up specific measures (SEC (2007) 112, pp. 18, 20).

> The question of the burden of proof is hard to solve with current legal tools. . . . It should be noted in this context that the case-law of the Court of Justice does not necessarily allow the Commission to require much more from Member States than a mere reference to Articles 28 and 30 EC Treaty in their national rules: the Court has indicated that Member States enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the imports of products. (SEC (2007) 112, pp. 19–20)

The Council, in contrast, clearly stated that the regulation brings about a change to the burden of proof: 'It also transfers the "burden of proof" from the economic operator to the administration, thus making it more difficult for a member state to deny the marketing of products that are already accepted in another member state.'[19] In the same way, the German Parliament was informed about this matter (see Baddenhausen 2007: 2). Stubb, as the EP's rapporteur, also spoke of such a reversal (A6-0489/2007).

The case law includes divergent statements on the burden of proof. The beer purity case (178/84) of 1987 states that 'it is for those authorities to demonstrate

[19] Luxembourg 23 June 2008, 11062/08 (Presse 186): 'Council approves rules to improve free movement of goods in the EU', p. 2.

that the prohibition is justified on grounds relating to the protection of the health of its population' (summary, No. 4; compare also grounds No. 46). Similarly, the Court had argued before in the Case C-251/78 *Denkavit* (8 November 1979, Rec. 24) that the national authority referring to the restrictions of Article 30 of the TEC had to bear the burden of proof (Dammann 2007: 100). These rulings support the position of the new regulation. But the Court did not always burden the member states consistently. In the famous case on woodworking machines (C-188/84), the Court denied the claim that member states have to approve machines that offer less safety for users, which seemed to imply that the Commission had the burden of proof (grounds 17–22; Dammann 2007: 101).

Legal theories of burden of proof support the idea that there is not a one-sided obligation (Lenaerts et al. 2006: 24-073; Dammann 2007: 116). As AG Tesauro argued in Case C-362/95, the party that takes a certain position needs to provide the proof. Also, the Court stated in Case C-127/92 (No. 13) that 'It is normally for the person alleging facts in support of a claim to adduce proof of such facts.' On this basis, the producer using Article 28 of the TEC for marketing its products would have to bear the burden of proof concerning the equivalence of regulation.[20] In addition, the member states that draw on Article 30 of the TEC or on mandatory requirements would have to bring proof for the need to bar the product.

Explaining Member States' Consent

In internal market decisions, member states face a trade-off between retaining regulatory authority and ensuring easier market access for their companies. The benefits of regulatory authority are counterbalanced with free-trade benefits. The complicated mutual recognition regime for goods did not lead to a level playing field. Companies that are denied market access could complain to the Commission, address the Courts, or approach the SOLVIT network,[21] but they cannot refer to concrete legal positions. It was particularly small- and medium-sized enterprises (SMEs) that were disadvantaged, as they could not pay lawyers as easily as large companies or adapt their products to national specifications. Consequently, it is not surprising that Germany, which is strong in exports and SMEs, pushed for the regulation during its presidency. Moreover, the case-law-based regime led to further inequalities as member states implemented case law unevenly, often following an approach of 'contained

[20] I would like to thank Rike Krämer for pointing this out to me.

[21] SOLVIT is a network of national officials, coordinated by the Commission, which was established in 2002 with the aim of providing simple, informal problem-solving in issues of mutual recognition that are below the level of a formal infringement procedure.

compliance' (Conant 2002) where the relevance of case law was assumed to be only *inter partes* (interviews Federal Ministry of Economics 5 and 19 November 2009). The Commission explained the complicated case-law regime in numerous communications. Different Council and Parliament decisions aimed to enhance compliance.

It is important to understand that, in light of the situation-specific nature of case law, a less radical solution, which results in further responsibilities for companies, might not have achieved the goal of enhanced legal certainty. Legislation had to extract a general rule out of partly contradictory case law. In order to ensure that the Commission and the Court would have no reason to intervene any further, it was necessary to regress to the lowest permissible level of national competence (Schmidt 2011b). Similar to the Services Directive, not all participants in the negotiations understood the implications of the complex regulation.[22] Even after the agreement, some member states assumed that they still retained regulatory control.[23]

In the negotiations, major discussions also revolved around the question of prior authorization procedures, which the regulation does not abolish. These particularly affect precious metals. The UK controlled jewellery before releasing it on the market, and this practice had been passed by the Court (C-293/93). Italy, as the largest exporter of jewellery, wanted to abolish these procedures through the regulation. As Italy was unsuccessful, it voted against it.[24] The Commission stated, in its first report to follow the regulation, that most notifications have come up in this area: of the 1,524 notifications between May 2009 and December 2011, 99 per cent concern precious metals and 1,378 stem from one country (COM (2012) 292 fin, p. 8).

Another contentious area is food supplements. The Commission has issued a reasoned opinion on the basis of the regulation against Poland from 2013,[25] which had put the burden of proof on economic operators, even though food supplements were already marketed in other member states. It is most likely that this question would have been significant in the negotiations had the Commission not begun infringements procedures in a divide-and-conquer fashion. As Schreinermacher (2013: 215) has shown, compared to the period from 1999 to 2003, during which the Commission launched eighteen infringement procedures against member states that dealt with the free movement of goods, in the period from 2004 to 2008, these went up to thirty-four. This compares to 109 and 110 preliminary procedures in these two periods respectively. Following the ruling in Case C-24/00 *Commission v France*,

[22] Interviews: Permanent Representation Germany 22 June 2009; Commission 24 June 2009.
[23] Interviews: Permanent Representation UK 22 June 2009; Commission 24 June 2009.
[24] Interviews: Commission 24 June 2009; General Secretariat Council 25 June 2009.
[25] 21 Feb. 2013. <http://europa.eu/rapid/press-release_MEMO-13-122_en.htm> [accessed 10 May 2017].

which dealt with a prohibition on selling the energy drink Red Bull in France, France simplified its procedures (Décret no 2006-352, 20 March 2006), leading to requests for the commercialization of 8,000 to 9,000 new products (Schreinermacher 2013: 229). Another relevant case is C-192/01 *Commission v Denmark*; Denmark had barred food additives in cases where there was no nutritional demand among the population for such additives. The Court required Danish authorities to prove that these products posed a danger to health (Schreinermacher 2013: 190).

SUMMARIZING THE ARGUMENT

The path of an interpretation based on non-restriction began with the interpretation of the free movement of goods. Many years of a regulatory regime based on case law followed, at least for those 20 per cent of goods for which there was no specialized secondary law. The disadvantages of the regime were the degree of legal uncertainty in terms of the rights and obligations of private and public actors. This resulted in an uneven take-up of the rights, as large companies were better placed to deal with legal uncertainty, as well as the uneven implementation of case-law requirements across member states, which harmed the idea of a level playing field. The lack of political salience this area attracted, compared to the previous Services Directive, shows that trade in goods governed by mutual recognition does not raise as many issues for redistribution.

For the question of how the negative consequences of legal uncertainty influence actors' bargaining positions, I argue that legislating in the shadow of the Court will advance extreme positions (namely the most liberal or those that advocate the most regulation, in the rare cases where the Court interprets the Treaty narrowly). The individual balancing the Court performs cannot be generalized. Secondary law does not overrule primary law. At most, the legislature can hope to signal to the Court how it wishes to understand the Treaty's implications. The Court, and particularly the Commission, interpret secondary law in the light of their understanding of the Treaty. If secondary law is kept behind the case law, this poses the danger that it will not be interpreted as it was intended and nothing will be gained in terms of legal certainty. Moreover, incentives for litigation persist.

That the Services Directive and the regulation on mutual recognition of goods go beyond case law testifies that legal certainty can only be established when one takes the most extreme positions of the ECJ into account. The examples that I have analysed further liberalization. The cases for car emissions and the Posted Workers Directive from 1996, which were mentioned previously, are examples of when the exception granted by the Court furthers a

reregulatory logic in the Council. For member states, the legal certainty of codification strengthens equality before the law among private actors and ensures a more level playing field among member states. Member states are likely to implement ECJ case law unevenly. Some will implement it in a rule-of-law fashion. Others will deny its *erga omnes* effect. It is not surprising that Germany made a considerable push for the regulation on the mutual recognition of goods. Member states that export fewer goods would profit from legal uncertainty, as individuals forgo some of their rights under such a condition. In the next chapter, I will discuss the Citizenship Directive and the Patient Mobility Directive. These show that if member states' policy interests are markedly opposed to the direction of case law, they may favour unclear codification in order to constrain its impact.

CONCLUSION: IS THE JUDICIARY OVERSHADOWING THE LEGISLATURE?

While the European Union can be analysed in the same way as other political systems, it has specific features that are not present at the national level. Notable among these is the great amount of material detail that the constitutionalized treaty contains, which implies that judicial policymaking partly becomes an alternative to legislative policymaking, as it needs to be included in the analyses of the latter as the default condition.

Regulation based on case law has certain constraints. The example of mutual-recognition clauses most clearly shows that where case law in one instance seems to provide the basis for the requirement of certain regulations, in another instance this basis can suddenly be withdrawn. By taking the example of the regulation on mutual recognition, I have argued that secondary law that seeks to ensure legal certainty has to radicalize its meaning. Where the Court takes member states' regulatory objectives into account with its proportionality principle, the Commission cannot translate this balancing into general rules, as national regulatory goals are only justified under very specific conditions.

In addition to the policy preferences of member states, their position on legal uncertainty has to be taken into account. Legal uncertainty hampers long-term private or public investment. But even if legal uncertainty is beneficial to states, as individuals do not exercise their rights to a great extent, there is an incentive to re-establish legal certainty. This strengthens equality before the law. Codification creates a level playing field among member states, and member states can hope to influence the Court's interpretation of the Treaty through secondary law (the 'signalling effect'). But once case law is established,

and if preferences to re-establish legal certainty are high, the legislature has to be oriented towards the most far-reaching interpretation of the ambiguous case law.

There are fundamental differences between regulating by legislation and regulating through case law. The former establishes general guidelines, while the latter draws conclusions from general principles for a specific dispute. In the national context, if the legislature wants to act, it can do so. In the EU, however, the constitutional nature of case law constrains the legislature. Its distinctive mode of balancing safeguards the interests of the general public in a single case, but this balanced outcome cannot be transformed into general rules. It is an individual assessment. The relationship between case law and codification differs in nature between the national and the supranational level, given the EU's over-constitutionalization.

By taking the two examples of the Services Directive and the regulation for goods into account, what do we learn about legislative actors' awareness of the constraints of case law? The Commission is known to combine its role as a guardian of the Treaty with a formal monopoly for agenda setting (Schmidt 2000). The Services Directive and the regulation for goods show how the Commission bases legislative proposals on earlier infringement procedures, using these for potential strategic preparation for a divide-and-conquer approach. But what about the EP and the Council? Both have more legitimacy than the Court to determine the course of integration. It is, therefore, not clear why they should accept that the Court has more 'sovereignty' than themselves. The EP, as was made apparent in the Services Directive, partly ignores the extent to which case law predetermines legislative outcomes.

Member states appear more cognizant of the impact of case law, but they differ in their national legal systems, traditions of judicial review, and relative lengths of EU membership. Thus, for the UK, which has a common-law system and a polity based on parliamentary sovereignty, the idea that case law can be codified is strange, as is the acceptance of case-law constraints on the legislature (interview Permanent Representation UK 22 June 2009). Germany, in contrast, which has a strong tradition of judicial review carried out by the Constitutional Court, is much more likely to accept such constraints, as well as the idea of codification (interviews Permanent Representation Germany 22 June 2009; German Federal Ministry of Economics 19 November 2009).

However, it is not necessary for all participating actors to be aware of the impact of case law through the default condition of legislation. The Services Directive shows that a highly politicized legislative process will nevertheless end up being very close to the case law. How the Commission acts is crucial here, as it drafts the proposals and interprets the secondary law afterwards, by initiating infringement proceedings in cases of non-compliance. The Commission's legal services and the Council are deeply involved in the drafting of

legislation, as they are able to point out the limits that case law imposes. Although, according to their understanding of themselves and their legitimation, the Council and the EP are the ones who should decide on the framework that the Court then interprets, the lawyers in the Council and Commission's legal services will point out when proposals 'do not fly' (interview Commission 24 June 2009), thereby steering the legislative process in a direction that conforms to case law.

It should finally be mentioned that there is a discrepancy in political salience between these two cases. Hardly any political attention was paid to the regulation of goods. The country-of-origin principle has very different implications for services than it does for goods. It is politically much less contentious when goods that are regulated differently have to compete on the same market, since regulations are decided upon politically and implemented in the respective home countries. Goods travel by themselves; they are in direct price competition, but manufacturers do not work side by side. Differences in production are hidden. Service providers, in contrast, may work side by side in a single location, although they are regulated very differently. This raises significant issues concerning equal treatment among EU citizens. As a result, governments can no longer guarantee equal treatment to their own citizens and are forced to allow reverse discrimination against nationals if they want to maintain stricter domestic regulations than those of other member states. Arising from these injustices, lawyers have discussed whether or not EU law prohibits reverse discrimination against nationals. In addition, the difficulty of controlling home-country rules in service provision is exacerbated further, as parts of this control can only be exercised in the host country, where the home-country administration has no jurisdiction. This, in turn, also explains the frequent rule violations in trade in services (Mankowski 2004: 388–9). Finally, posted workers often offer their services at a wage that can only allow them to subsist in their home country, but not in the host country (Streeck 2000). Thus, home-country regulation, and an approach to the interpretation of the fundamental freedoms based on non-restriction, clearly raises significant redistributive issues when it is transferred from goods to services. This shows the inefficiencies of the path-dependent development of case law.

5

Reaching Beyond the Market into State Responsibilities

The last chapter showed through the example of some individual but empirically important cases—the liberalization of former utility services and the liberalization of goods and services markets—how the ECJ's case-law development can drive EU legislation forward. The EU's over-constitutionalization implies that policymaking falls under the shadow of case law. The codification of this case law promises greater legal certainty and improved equality before the law, and re-establishes the responsibility of the legislature for policy development. At the same time, such codification is under pressure to take interpretations of case law to extremes in order to avoid the all too clear incentives for future litigation by private actors.

This chapter assesses whether this argument also fits other cases. If market regulation is overshadowed by the judiciary, this might not be so relevant, after all. While regulatory policies also have redistributive implications, which were clearly apparent in the debate around the Services Directive, the regulation of markets is arguably not very sensitive to sovereignty and legitimacy. Many instances of market regulation are delegated to private actors' self-regulation, for example in standardization organizations. Distributive and redistributive policies are more closely tied to state sovereignty and are in need of greater legitimation. If they are shaped by the judiciary, this is more problematic. Welfare-state policies are redistributive, as are the taxes that are needed to finance them partly. Equally closely connected to the core of state responsibilities are questions concerning citizenship rights, which define those that have rights and duties in a given state territory. In this chapter, I discuss how case law also influences these sensitive issues.

The Citizenship Directive of 2004 and the Patient Mobility Directive of 2011 are examples of secondary law that are heavily influenced by case law. The Citizenship Directive specifies when EU citizens acquire the same set of rights so that they are treated on a par with nationals. The Patient Mobility Directive is only concerned with a small area of member states' health markets: the cross-border demand for goods and services. However, the precondition for allowing

such reimbursement has far-reaching consequences for health systems, in particular those that follow a benefits-in-kind model, which now have to attach prices to their goods and services.

In this book, I analyse how constitutionalized case law, as an independent variable, impacts EU policymaking, as the dependent variable. To provide conclusive evidence and to avoid selection bias, it is beneficial to include cases that give different values for the dependent variable, instead of only analysing cases of one kind (Geddes 1990). Luckily, there are prominent examples in which continued case-law development failed to stimulate legislation: the Monti II regulation, which aimed for reregulation after the contentious 'Laval quartet' rulings, and the case of direct company taxation. The discussion of these cases concludes this chapter and allows me to be more precise about the impact of case law on legislation.

Before analysing these case studies, it should be noted that the increasing relevance of the ECJ to these core areas of statehood has also been interpreted favourably. Caporaso and Tarrow have made the argument for a 'Polanyi in Brussels', viewing the ECJ's case law as supportive of the development of a social-market economy (Caporaso and Tarrow 2009). Countering Scharpf's and others' criticism of a negative integration bias, Caporaso and Tarrow emphasize that there has been a Polanyian re-embedding of markets. They see 'a structure of *supranational embedded liberal compromises*' (emphasis in original, p. 594) emerging through the Court's case law on the free movement of labour. Drawing on the arguments of Conant (2002) and Cichowski (2007), they regard the transnational mobilization behind case-law development as an alternative way to legitimize the EU (p. 613).

Contrary to the optimistic analysis from Caporaso and Tarrow, Höpner and Schäfer (2012) have argued that policies that move non-discrimination forward and enforce the market, which the ECJ can advance, only further individual rights at the expense of solidarity. Höpner and Schäfer thus make an argument similar to that of Scharpf, who believes that liberal rights are strengthened at the cost of republican ones (Scharpf 2009). I will return to this discussion after an analysis of the cases. The analysis begins with the two examples of successful codification, the Citizenship and the Patient Mobility Directives, and then turns to Monti II and taxes.

THE CITIZENSHIP DIRECTIVE

With the provisions for the free movement of workers and the freedom of establishment, the Treaty grants those citizens who are economically active far-reaching rights to non-discrimination throughout the Union. The inclusion of EU citizenship in the Treaty of Maastricht laid the foundation for the

expansion of these rights to all EU citizens. Such an extension had been debated since the 1960s, thereby making it necessary to adopt a more historical perspective. Case law played an important role in this whole process by repeatedly interacting with legislation, as we will see. At Maastricht, member-state governments had aimed to keep control over their citizenship rights: 'The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.'[1] But the Court's dynamic case-law development has meant that member states have partly lost their earlier autonomy.

The Historical Origins of Citizenship Rights

As it was originally founded as an economic Treaty, workers were privileged. Article 48 of the Treaty Establishing the European Economic Community (EEC Treaty/TEEC) demanded the abolition of discrimination against workers on the basis of nationality for Employment, remuneration, and other conditions of work and employment. Employment within the public sector was exempted (Article 48(3) of the TEEC). Article 51 of the TEEC targeted the coordination of national social-security systems, which are subject to unanimous agreement in the Council. If rights to social benefits cannot be aggregated across member states, this is an important barrier to free movement. The veto power of each member state was continued in the Treaty of Amsterdam, which only granted co-decision powers to the European Parliament (EP). The Treaty of Lisbon changed this to the ordinary legislative procedure of a qualified majority but adopted an emergency brake (Article 48 of the Treaty on the Functioning of the European Union (TFEU)) for member states that disagreed (Hofmann 2013: 203).

The historical foundation of the free movement of workers lies in the interests of five member states in importing labour and in Italy's labour surplus (Menéndez 2009: 4). Starting in 1958, different regulations and directives were adopted that detailed the rights of migrants and their families to gain non-discriminatory access to employment, social advantages and benefits, training, housing, taxes, and trade-union membership (Hofmann 2013: 207). 'The case law of the European Court of Justice enlarged the scope of the provisions on free movement of workers by expanding the understanding of who was entitled to the right to free movement, and by means of recharacterizing the value basis of free movement of workers' (Menéndez 2009: 5–6). As Hofmann describes, in these early decades the Commission itself often sided with member states in judicial disputes that arose from preliminary

[1] Council of Heads of State and Heads of Government at their meeting in Edinburgh, Dec. 1992, cited in Jessurun d'Oliveira 2011: 146.

procedures. The first important conflict concerned the definition of 'wage earner', which the Court viewed as subject to community definition in Case 75/63 *Hoekstra* in order to prevent member states from undermining the rights of migrant workers. The Court opted for a broad definition, which included all those who are covered by the different social-security systems (Hofmann 2013: 207–8). Regulation 1408/71 on the coordination of the social-security systems took up this case law. In the 1970s, the Commission followed suit, arguing that exemptions to rights to free movement had to be small. While member states had considered the public sector to be exempted from the Treaty provisions, the Court, now backed by the Commission, argued in Case 152/73 *Sotgiu*, which concerned the German postal sector, that the public-sector exemption exclusively applies to those parts of the sector that deal with public authority. Subsequently, the Commission aimed to enforce this narrow definition in an infringement procedure against Belgium (149/79), with Belgium receiving the support of France, Germany, and Britain through interventions (Hofmann 2013: 210–11). On the basis of the Court's support here, the Commission then acted to liberalize employment in the public sector (Hofmann 2013: 212).

The idea that European citizenship confers rights irrespective of economic activity has been intermittently discussed since the early 1960s by Commissioners and in the EP, and reached the summit in Paris in 1972 (Hofmann 2013: 217). Rights to free movement were seen 'as a vehicle of both economic and political integration' (Menéndez 2009: 10). In 1977, the EP asked the Commission to act and they submitted a directive on citizens' rights of residence to the Council in 1979. At this time, the EP were already arguing that member states should refrain from demanding sufficient resources as a precondition for rights to free movement, leading member states to fear potential burdens on their social-security systems (Hofmann 2013: 221). This legislative proposal stalled over the next decade, and progress was left to the Court. An example was Case 53/81 *Levin*, which concerned a British woman living in the Netherlands in part-time employment and earning less than the Dutch minimum wage. Her application for a residence permit failed for her third-country national partner. Against the Dutch and also the Danish governments, who defined the status of being a worker as the ability to be self-subsistent, the Commission argued for a broad definition of worker, which was backed up by the Court (Hofmann 2013: 225–6).[2] The Court held that work had to be 'effective and genuine' and not 'purely marginal and ancillary', attributes that remain important to this day. Case 139/85 *Kempf* dealt with social benefits. A German music teacher had applied for an income supplement in the Netherlands, as he earned less than the Dutch minimum wage.

[2] Hofmann mentions the following similar cases, which were all preliminary references: 66/85, 197/86, 196/87, 344/87 (2013: p. 227, n. 95).

Again, the Court sided with the Commission against the Dutch and the Danish governments (Hofmann 2013: 227).

Despite these judicial advances, the legislative process stalled, leading the Commission to split up its proposal on citizenship rights into three directives: for students, pensioners, and a general residence directive for those who have sufficient resources and health insurance (Hofmann 2013: 229–30). They were agreed upon in 1990 (directives 90/364, 90/365, 90/366). Shortly afterwards, the heads of the member-state governments included EU citizenship in the Treaty of Maastricht. Article 8a of the Treaty Establishing the European Community (TEC) reads that 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.' For member states, this article was a merely symbolic addition (Aziz 2009), but for the Court and the Commission, it laid the foundation for the broadening European rights.

One central aim of the Commission was to expand the social-security coordination rules of regulation 1408/71, which only covered economically active persons at that point, to include all insured citizens. It submitted a proposal to the Council in 1991 (Hofmann 2013: 234–5), which also stalled. New impetus was achieved when at Amsterdam the Council agreed on an action plan for the full implementation of the single market, which led the Commission to propose the different pieces of legislation that dealt with the free movement of workers, aligning it with existing case law (Hofmann 2013: 235–6). In 1998, proposals followed to expand social-security coordination to all insured EU citizens, resulting in the revisions of Regulation 1408/71 (now 883/2004) and Regulation 1612/68 (now 492/2011).

The 1998 proposal for an amendment of Regulation 1612/68 emphasizes the advances made by case law as follows:

> The Commission intends to ensure that these proposals succeed in their aim of improving conditions for freedom of movement to reflect the spirit expressed by case-law. The latter is a basic step forward for the European citizen and the Commission will ensure that discussions in the Council do not lead to the loss of the headway made by case-law. (COM 98/394, p. 6; see also Hofmann 2013: 240)
>
> The rules are now 30 years old, however. Over this period, the Court of Justice has repeatedly ruled on the texts and interpreted them. As a result, a whole corpus of case-law to interpret the wording of the legislation has been created. To strengthen the security and transparency of the law on behalf of the citizen, it is now time to bring the texts into line with existing case-law. (COM 98/394, p. 4)

Nevertheless, reaching an agreement proved difficult and protracted, and was only successfully established in 2004 and 2011 (Hofmann 2013: 237). Parallel to these negotiations, the Commission submitted a proposal in 2001 that consolidated the legislation on residence rights, bringing together what it had

not managed to do in the 1980s. The resulting Citizenship Directive (2004/38/EC) was adopted at the same time as Regulation 883/2004, and we will address it in a moment.

Case-Law Development

While negotiations stalled in the 1990s, the Court's case law accrued. The Commission's behaviour is highly interesting in this respect: Hofmann emphasizes that it largely refrained from infringement procedures and only joined preliminary references, in contrast to the market for goods and services (Hofmann 2013: 233). Moreover, for quite some time, the Commission only favoured a partial extension of rights in its observations. While pushing to expand residence rights, it often sided with member states' restrictive position when litigants demanded access to social benefits (Hofmann 2013: 239, 242–3, 245).

The first important case here was C-85/96 *Martinez Sala*, which concerned a Spaniard with legal residence in Germany, whose application for child-raising allowance had been denied since she was not working and, therefore, was not covered under the right to free movement (Menéndez 2009: 12–13). After Maastricht, the Commission argued, the Treaty covered her rights of free movement and residence. The Court sided with the Commission and against interventions by the German, French, and British governments (Hofmann 2013: 238–9). Moreover, the Court held that an economically inactive EU citizen lawfully residing in Germany had to have the same access to child-raising allowance that Germans have (Tryfonidou 2010: 39).

Case C-413/99 *Baumbast* concerned a German who was married to a Colombian and wanted to stay in the UK after his job there had ended. The Commission argued that he needed health insurance and sufficient resources to gain residence rights in another member state according to the Treaty (Hofmann 2013: 239).[3] But the Court found that EU citizens enjoy the right of residence and free movement through the direct application of Article 18(1) of the TEC (Wind 2009: 256, 259; Menéndez 2009: 13–15; Wollenschläger 2011). As Menéndez holds, the 'main concrete implications of *Martinez Sala* and *Baumbast* for the supranational citizen has been access to non-contributory social benefits' (Menéndez 2009: 18). Nevertheless, he does not consider these cases to be 'revolutionary' but rather to push the existing case law to its 'logical conclusion' (Menéndez 2009: 26). This view supports my path-dependent analysis.

Also, in Case C-184/99 *Grzelczyk*, the Commission came down against an extension of rights by arguing that students cannot claim social benefits

[3] The Court diverted here from *Lebon* (1987) in which it had rejected an instance of non-discriminatory access to unemployment benefits (Hailbronner 2004: 2186, 2189).

(Hofmann 2013: 239). A French student had applied for Minimex social support for his last year of study in Belgium. The ruling established that right of residence also applied to economically inactive EU citizens who required assistance, and this was decided in the midst of the negotiations on the Citizenship Directive (see next section). The decision was reached that only in cases where EU citizens place an 'unreasonable burden' on a member state can this right be withdrawn; up until that point, they have to be treated on a par with nationals in terms of social assistance (Tryfonidou 2010: 39). The Court thus diverted from the student directive (93/96/EEC), which denied social assistance to students. It even argued in C-184/99 No. 39 that, although the directive did not establish entitlement to assistance, it also did not 'preclude' such benefits (Hailbronner 2004: 2186). In Case C-209/03 *Bidar*, the Commission again denied that students should have access to maintenance grants (Hofmann 2013: 240). This case concerned a Frenchman who had moved to the UK to live with his grandmother. After completing secondary education there, he started university, but his application for a student loan was denied. In support of the Commission, the UK, Denmark, Germany, France, the Netherlands, Austria, and Finland all participated with interventions that argued for the exclusion of students from host state's social assistance and study grants. Diverting from the previous Case C-39/86 *Lair* and Case C-197/86 *Brown* in 1988, the ECJ ruled that assistance needed to be given as the Maastricht Treaty had included education (Wind 2009: 243, 262). Case-law development for citizenship thus illustrates how the expansion of rights does not depend on central orchestration by the Commission. Preliminary references can drive the process forward as well.

Negotiating the Citizenship Directive (2004/38/EC)

As we have seen, the Commission's initial attempt to legislate rights to free movement in a comprehensive way failed in the 1980s and early 1990s. The Citizenship Directive realizes this comprehensive legislation by consolidating nine different directives, as well as amending Regulation 1612/68 by explicitly taking the case law into account. In its first proposal for this directive (COM (2001) 257 final), the Commission referred to the ECJ in its explanation for fourteen articles (6, 8, 12, 13, 19, 21–3, 25, 28–31, 33), as well as in Recital 21. Negotiations in the beginning were slow; member states were reluctant to see the broad proposal as pertaining to the single market, and several Council working groups felt responsible.[4] In addressing the rights of third-country national family members to accompany EU nationals to other member

[4] Interviews: Permanent Representative Austria 26 June 2009; German Federal Ministry of Labour and Social Affairs 17 Nov. 2009.

states, immigration questions were touched upon that were already part of Regulation 1612/68. And by dealing with conditions of expulsion on grounds of public security or public order, the directive engaged with matters of justice and home affairs.

In the following section, my focus will be on EU citizens' access to social benefits, which became important in the negotiations after the *Grzelczyk* ruling. This made the negotiations more contentious in comparison to the original emphasis on rights to free movement that member states had supported (Schreinermacher 2013: 88). In its revised proposal (COM (2003) 199), the Commission responded to eighty-two amendments that were put forward by the EP. Notably, the EP called for non-discriminatory access to welfare assistance after six months of residence, a priority it had pursued for a long time (A5-0009/2003). This put the member states that wanted a directive on rights to free movement under pressure, as they could only revise the Commission's proposal unanimously.

The Commission's original emphasis on rights of free movement, instead of access to welfare, is in line with its opinions in ECJ cases from that time. Both the amendments to the directive that the EP requested and the developing case law then led the Commission to change its position (Schreinermacher 2013: 85–6). The Commission justified the revision of its proposal with several references to recent case law, most notably to: Case C-459/99 *MRAX* (2002) on family members not needing visas (Article 9(2a)); Case C-413/99 *Baumbast* (2002), which concerned residence rights for parents (Article 12(3)); and Case C-184/99 *Grzelczyk* (2001), in terms of the important Article 21(2) on equal treatment. Relating to welfare assistance, it rescinded the original exclusion of economically inactive persons with no permanent residence status. In the revised proposal (COM (2003) 199), Article 21(2) only excluded maintenance grants for students, whereas before the sentence had included the underlined section of the following: 'the host Member State shall not be obliged to confer entitlement to social assistance on persons other than those engaged in gainful activity in an employed or self-employed capacity or the members of their families nor shall it be obliged to award maintenance grants to persons having the right of residence who have come there to study.'

As one might suspect, member states did not simply accept the new emphasis in free movement on equal treatment in the access of welfare assistance. Agreement on the directive only succeeded shortly before the accession of ten new member states in May 2004. Interestingly, the Commission failed to align the rights of economically active and inactive citizens, as it had hoped to do. As a result, Recital 9 speaks of 'a more favourable treatment applicable to job-seekers'. Distinctions between economically active and inactive EU citizens pervade the directive and are also mentioned in Recitals 16, 19, and 21, and in Article 24(2).

The directive differentiates residence rights according to citizens' length of stay in a member state. The terms here changed during the course of negotiation. Originally, the Commission had planned to grant unconditional residence rights for six months and to allow permanent residence after four years. The final directive distinguishes rights in the first three months, when every EU citizen may reside in any EU member state. After five years, permanent residence sets in. In the interim period, EU citizens and their families can stay for more than three months on the condition that they have health insurance and sufficient resources in order not to become 'an unreasonable burden on the social assistance system of the host Member State', according to Article 7 (1). Overall, the directive mentions that EU citizens should not become such a burden eight times. This very much reflects the Court's argument in the *Grzelczyk* case (Hailbronner 2004: 2187) and later in *Trojani* (Wind 2009: 243, 262), but also draws on the fourth Recital of Directive 90/364 (Hofmann 2013: 171).

In the final directive, Article 24 spells out the extent of rights to equal treatment. 'Article 24 was widely understood as an attempted override' of the case law, Davies (2014: 1600) argues. Paragraph 2 sets out that member states are not obliged to grant social assistance during the first three months or, 'where appropriate, the longer period provided for in Article 14(4)b'. The latter demands that EU citizens may not be expelled if they continue to seek work and 'have a genuine chance of being engaged'. This is another reference to case law (Case 75/63 *Unger*). Host states are not obliged to give out student grants or loans before permanent residence is granted. It becomes apparent that the directive is a response to case law but, as such, it does not eliminate the resulting legal uncertainty. As Schreinermacher (2013: 92) argues, member states deliberately left the rights to welfare benefits of economically inactive EU citizens—between month four and the granting of the final residence status after five years—open in the directive. After all, Grzelczyk was able to access benefits after three years, whereas in the Citizenship Directive this was only possible after five years. Following this judgment, it was no longer possible simply to exclude EU citizens from benefits, as the Court had spoken of a certain amount of financial solidarity between the citizens of different member states (No. 44) (Giubboni 2007). As Article 14(3) determines, 'An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.' Secondary law could not reverse case law, given the latter's constitutional nature (Wasserfallen 2010: 1140). 'Representatives from Luxemburg, the UK, Belgium, Ireland and Denmark still remained critical about this legislative confirmation of the Court's jurisprudence. But throughout the policy-making process, the leverage of reluctant member states continuously declined to the point where this coalition was too weak to prevent the institutionalization of case law' (Wasserfallen 2010: 1141). At the

same time, Wasserfallen (2010: 1142) points out that member states took the legislative process as an opportunity to signal to the court that they did not approve of EU nationals' rights to social assistance.

It is plausible that member states felt under pressure. The upcoming Eastern enlargement would have made agreement on a directive much more difficult (Interview German Federal Ministry of Labour and Social Affairs 17 November 2009). At the same time, once the Commission had begun to move across to a position that favoured access to benefits, there was the danger that it would pressure member states with infringement procedures to push them in this direction. In Case C-138/02 *Collins*, the Commission argued that EU citizens must be permitted access to jobseeker's allowance, even if citizens had no connection to the given member state (AG Colomer 10 July 2003, No. 57) (Schreinermacher 2013: 101). In autumn 2003, it handed an infringement procedure against Belgium to the Court (C-408/03). In it, the Commission opposed the Belgian rules that required EU citizens to have sufficient personal means as a precondition for their right of residence. Schreinermacher (2013: 101) argues that this communicated the Commission's greater assertiveness to the member states. Advocate General (AG) Colomer, however, took the problem of abuse of citizenship rights seriously in the opinion he gave to *Collins*, arguing that member states could restrict access to welfare services through transparent, non-discriminatory means (No. 75).

Moreover, it has to be kept in mind that member states were put under pressure from preliminary procedures. The long-term restraint of the Commission had no parallel in domestic courts. Preliminary procedures drove case-law development. As Schreinermacher (2013: 109) shows, German courts were actively taking up the reasoning of the ECJ through fifty-six references to the *Grzelzcyk* ruling between 2001 and 2011. In these cases, however, German courts often denied the relevance of the ruling. But a restrictive stance in domestic courts may be only temporary. There was always the fear that, by forwarding a preliminary reference, German courts could undermine crucial elements of the German welfare-state system.[5] Britain was directly involved with the *Collins* (2004) and *Bidar* (2005) court cases, which concerned benefits for students. Its domestic courts also took up European case law to push for restriction (Schreinermacher 2013: 112–13). In France, domestic courts largely backed the actions of the administration, as is made apparent by the fact that there were fewer preliminary references (four) than infringement procedures (seven) between 1995 and 2004 that concerned rights of free movement (Schreinermacher 2013: 116). French courts did not refer to the ECJ's crucial case law from *Grzelczyk*, *Collins*, or *Trojani* (Schreinermacher 2013: 117). This significantly lessened the pressure on the French government.

[5] This happened from 2013 onwards with the reference of the German federal social court concerning the restriction of not paying Hartz IV social benefit to EU citizens; see Chapter 7.

As we have seen, the case law on EU citizens' access to welfare services took some years to develop. The first case, *Martinez Sala*, was a very specific one, as the woman had already lived in Germany for a long time, and member states did not need to worry about EU citizens' rights to benefits, as long as they themselves determined the conditions of entry to and expulsion from their territory. However, gradually these rights were increasingly defined at the European rather than the national level. Thus, in *Collins*, the Court argued that the rights of residence granted by member states are merely declaratory and not legally constitutive (Groß 2005: 83), since residence rights are 'conferred directly by the Treaty' (No. 40). For member states that were anxious to restrict access to their welfare services, a directive that remained opaque as to the extent of entitlements was far better than one granting far-reaching rights after a three-month stay. Given member states' disagreement on many aspects of the directive, the text was bound to be ambiguously worded in many instances, reflecting the underlying political compromises.[6] Schreinermacher (2013: 234–5) argues that case law may pay more regard to autonomy than secondary law, as it does not generalize legal rights but partly hides them under a screen of legal uncertainty. Actors that favour far-reaching rights and liberalization will therefore opt for codification, while actors that favour restrictions will prefer case law.

Case-Law Development After the Directive

As I have mentioned, some governments hoped that the Citizenship Directive would signal member states' preferences to the Court. Were they successful? The case-law development that followed the directive shows that the Court was not responsive for a long time.

> One might have expected the Court's approach to the conditions in the Directive to be inspired by a desire to understand what compromise exactly the legislature sought to make. Instead, to a significant extent, it has placed the Directive within its own framework of purposive free movement principle, and interpreted the Directive in that light, with the result that several of its conditions have been deprived of at least some of the consequences they were intended to have.
>
> (Davies 2014: 1599)

Although the member states had largely incorporated the existing case law into the Citizenship Directive of 2004, the Court's activism could not be curbed. In Cases C-22/08 and C-23/08 *Vatsouras* (4 June 2009), the Court went so far as to overrule the recent directive by arguing that financial benefits

[6] Interviews: Permanent Representative Austria 26 June 2009; German Federal Ministry of Labour and Social Affairs 17 Nov. 2009; European Civil Action Service 27 Oct. 2010.

intended to facilitate access to the labour market were not 'social assistance' as defined by Article 24(2) of the directive but that the equal-treatment provision of Article 45(2) of the TFEU applied instead. A 'real link' of citizens to the member states was, however, required (No. 38–40) (Barnard 2010: 285).

> Thanks to *Vatsouras* social assistance appears to have become a residual category. It is perhaps ironic that measures taken precisely in order to make domestic access to benefits harder and stricter now have the legal effect of making them easier to obtain for migrants. (Davies 2014: 1600)

Case C-310/08 *Ibrahim* (February 2010) was a landmark ruling in the enhancement of migrants' access to social assistance. This case concerned a Somali woman who had remained in the UK after her Danish husband, who had worked there previously, left the country. She was granted the right to social assistance given that her children—Danish nationals—were going to school in the UK. It is interesting that the legal proceedings were paid for by Shelter, a UK charity that supports homeless people.[7] The activities of non-governmental organizations (NGOs) and the Commission, in its attempts to broaden access to EU rights, may offer support to individuals who do not have access to the financial means of corporate actors.

It was not only access to social benefits that generated contentious case-law development. The ECJ also proceeded to claim its competence in defining the residence rights of EU citizens' third-country national family members. The ruling in Case C-127/08 *Metock* (25 July 2008) was particularly contentious here, given that Article 35 of the Citizenship Directive allows member states to challenge the abuse of rights or fraud.[8] This case concerned four third-country nationals who were illegally resident and then married EU citizens who were not nationals of Ireland. Previously, in Case C-109/01 *Akrich* (23 September 2003), the ECJ had argued that the right of third-country nationals to accompany an EU citizen was dependent on having prior legal residence. This condition was now abolished. *Metock* overturned member states' agreement in the Citizenship Directive, which allowed third-country national family members to join EU citizens who were residing in another member state. *Metock* and other cases transformed this, granting privileged residence conditions to EU citizens' third-country national family members as soon as there is a cross-border dimension and, therefore, EU law applies. This gives incentives for migrants to use the 'Malmö route' or the 'Dublin hop', through which Danish or UK families move for a limited time to qualify as EU citizens in order to profit from family unification (Martinsen 2011: 957; Wind 2014:

[7] They recruited Nicola Rogers, a solicitor who works for Garden Court Chambers, a large barrister firm, to argue this case at the ECJ: <http://www.gardencourtchambers.co.uk/ecj-rules-on-right-of-residence-of-parent-caring-for-child-of-migrant-worker> [accessed 9 May 2017].

[8] Interviews: Permanent Representative Germany 24 June 2009; German Federal Ministry of Labour and Social Affairs 17 Nov. 2009.

166–7). An important issue here is the requirement for the amount of time that has to be spent abroad. Two preliminary rulings from the Netherlands on Cases C-456/12 and C-457/12 asked whether family reunification must also be granted to frontier workers and to those who have lived in another member state for a short time. In her opinion, AG Sharpston argued for a broad approach, which would include rights derived from the freedom to provide services. In its rulings in 2014, the Court held that residence in another member state needed to be 'sufficiently genuine' in order for third-country nationals to have rights conferred upon them.

Recently, the ECJ has also favoured more restriction in the opening up of non-contributory social benefits to economically inactive EU citizens. In Cases C-333/13 *Dano*, C-67/14 *Alimanovic*, and C-299/14 *Garcia Nieto*, the Court held that Germany could restrict its non-contributory Hartz IV social benefit to nationals under certain conditions. I will discuss these cases in Chapter 7. It is noteworthy here that, in being more constrained, the Court has not abandoned its path of interpreting the fundamental rights according to a principle of non-restriction. It has not argued for a distinct interpretation of citizenship rights thus far. However, it is refraining from extending its interpretation further, thereby reducing the legal uncertainty related to the reach of EU law and taking away incentives for further litigation.

Some years ago, Kadelbach warned that case law may have ambivalent effects. If it broadened social entitlements, member states would likely restrict residence rights in response (Kadelbach 2003: 563). After the introduction of the Citizenship Directive, the ECJ has made it much more difficult for member states to expel EU citizens or their family members. This may give incentives for cutting down on social benefits in general (Scharpf 2009; Wiesbrock 2012: 93). Conant (2002: 194) mentions a scrapped German plan for a supplementary old-age pension as an example of this: 'Ostensibly "progressive" case law contributed towards a marked lack of progress for poor pensioners in Germany.' The debate on the Brexit referendum similarly brought general cuts such as these onto the agenda. Out of its struggle with the non-discrimination provision of the Treaty, and in line with incumbent party ideology, the UK's Conservative government has cut student assistance for UK and EU students alike (Schenk 2016). During the Brexit discussion it aimed to bar all EU citizens from access to benefits during their first four years of residence in the UK.

Thus, the development shows that the ECJ has not only repeatedly deviated from established case law, for instance in *Grzelczyk* from *Brown*, and in *Baumbast* from *Lebon*, but it has also frequently departed from the secondary law of the Council and the EP. Wollenschläger (2012: 327) has even argued that the Court has avoided 'open conflict' as it could have declared the legislation as 'void' by infringing primary law. The explicit reference to secondary law in Article 21 of the TFEU stands in opposition to this; the

Article would mean that the Court must 'articulate a retreat of almost all of its other citizenship case law' (Shuibhne 2012: 360).

In continuously extending the entitlements of EU citizens, the ECJ has been supported by a legal profession that has been united in its teleological legal interpretations. Citizenship rights have come to play a central role here, as these promise to transfer individuals' allegiance from the nation state to the EU.

> Notwithstanding this, the political elite of Europe has mismanaged the EU's constitutional process by failing to place the citizen at the center. This failure is especially important, since without the support of its citizens, European integration as a democratic project becomes meaningless. The same cannot be said regarding the judicial elite, who have championed the cause of citizenship to a considerable extent. (Aziz 2009: 282)

Whether this will play out as planned once citizens realize that there will be a concomitant loss in the national ability to shape the welfare state democratically is questionable. Research shows that support for the Union is low when citizens perceive their national welfare systems to be under threat from the EU (Beaudonnet 2014). In the Brexit referendum, the perceived loss of influence over the conditions of free movement and citizenship led the British electorate to vote to leave the EU.

Conclusion

The development of citizenship rights has been hailed as an important move away from the exclusive market orientation of the EU, by embedding the oft-criticized neo-liberal EU integration project in strengthened social rights (Caporaso and Tarrow 2009). Lawyers generally support an expansive interpretation of EU citizenship. One of the few pronounced critics is Menéndez, who points to the increasing 'judicialisation of major areas of national law and policy' (Menéndez 2009: 27) as a process in which the Court takes power from the national representative institutions, and therefore from nations' ability to democratically shape the integration process. Moreover, and in a similar vein to Scharpf (2009), he criticizes individualistic, as opposed to collective and solidarity-based, outcomes: 'Pretending that the extension of welfare rights always lead to a better protection of the welfare objective is simply illusionary, because the key point of any redistributive program is to use the taxes collected from some to comply with the obligation of distributive justice they had towards others' (Menéndez 2009: 30). Mobile individuals are strengthened at the expense of immobile ones. Though the individuals in these cases do not appear privileged, by being mobile and able to enforce their EU rights, they belong to the better off (Menéndez 2009: 30–1). Only a minority of citizens has

the skills and the means to operate within the scope of community law. 'Individualism explains the substance of European citizenship' (Somek 2007: 815). If member states lose the power to determine the recipients of their non-contributory benefits and cannot control the costs, it may serve as a disincentive for the expansion of their welfare systems.

Bellamy (2008b) provides another argument against the increasingly independent status of citizenship, which had been planned as a complementary status. As he argues, belonging, rights, and participation constitute national citizenship and are all closely intertwined: 'regular and open-ended interaction between repeat-players reduces the incentives for free-riding and defection and builds confidence in the possibility of collaboration. It helps engender the bonds of reciprocity needed to produce benefits that are diffuse and public rather than direct and purely personal' (Bellamy 2008b: 599). The EU, in contrast, has instilled hardly any sense of belonging in citizens (Bellamy 2008b: 603). Contrary to Habermas's belief that rights can be a basis for solidarity and replace a sense of belonging, Bellamy sees them as 'at best a necessary rather than a sufficient condition of subjective legitimation' (Bellamy 2008b: 604). He therefore contends that EU rights ought to be supplementary and should not 'disrupt the rights enjoyed by national citizens—not least with regard to their access to domestic services' (Bellamy 2008b: 606). In contrast to European lawyers who assume that meaningful rights can only be granted at the European level (Kochenov 2013), constructed by lawyers and courts rather than the democratic process, Bellamy gives a strong argument for taking the member states seriously: 'Unlike subjects, citizens are equal before the law because they enjoy an equal influence over the making of the laws through being participants in a democratic process' (Bellamy 2008b: 600). In contrast to Kochenov, he argues for citizenship rights to be coupled with duties (Bellamy 2015).

If member states have been put under sufficient pressure by case law to codify far-reaching citizenship rights, what do we know about the implementation of the directive? In its first report on the directive, the Commission noted immense implementation deficits. 'In the thirty months since the Directive has been applicable, the Commission has received more than 1800 individual complaints, 40 questions from the Parliament and 33 petitions on its application' (COM (2008) 840/3, p. 9). The Commission initiated nineteen infringement procedures against member states between mid-2006 and early 2007 (COM (2008) 840/3: 3). Among other problems, twelve member states transposed the 'sufficient resources' requirement incorrectly (p. 6), and thirteen member states allowed expulsion of EU citizens as an automatic response when social benefits were taken up (p. 7).

But in its 2013 action plan, the Commission is much more positive and observes that '90% of transposition issues' have been solved due to its 'rigorous enforcement policy' (COM (2013) 837 final, p. 2). The European Citizen

Action Service (ECAS), an NGO that runs the Your Europe Advice helpline for EU citizens and is sponsored by the Commission, is much more negative in its assessment. EU citizens find help here in exercising their citizenship rights; they received more than 17,000 inquiries, which were handled by sixty legal experts, in 2012 (ECAS 2013: 10). In its report titled *Mind the Gap*, which was published in 2013, ECAS argues that it 'does not see improvements on the ground' (p. 10), due to a 'lack of political will on the part of Member States' (p. 10), and that the citizenship directive has 'resulted in more, rather than fewer restrictions on the free movement of citizens' (p. 9).

THE PATIENT MOBILITY DIRECTIVE

Health services are another important case where the internal market reasoning became relevant through case law, despite member state opposition (Greer 2006; Martinsen 2005). It is also interesting because Martinsen discussed it in her book, where she uses it to refute the activist court perspective (Martinsen 2015).[9] Originally, the Services Directive draft from January 2004 included an article on patient mobility, which aimed to codify the existing case law. Given the general debate around the Services Directive, patient mobility was dropped after a resolution of the EP in 2005 argued for a separate approach to healthcare (OJ C 124 E, 25 May 2006, p. 543). The EP then called upon the Commission 'for a codification of existing case law on the reimbursement of cross-border health care law in order to ensure the proper application of the case law by all Member States' (A6-0173/2007, No. 35). After a consultation process, the Commission published its proposal for a directive on patient mobility in 2008, leading to its adoption in March 2011 (Rosa 2012: 26–7).

The close link to ECJ rulings since the late 1990s pervaded the whole legislative process. In fact, of all the examples discussed, the rationale of having to codify case law was strongest in the case of the Healthcare Directive (Rosa 2012; Hancher and Sauter 2010: 117). 'The directive proposal thus aims to codify the court's interpretation of the scope and limits of intra-European healthcare' (Martinsen 2005: 1049). Contrary to Martinsen's (2015) more recent argument, the EU legislature could not overcome or modify these judicial constraints in any meaningful way, as I will show.

As early as 2002, a high-level group of experts from the member states had been assigned the task of exploring ways to increase legal certainty in view of the ECJ's case law on patient mobility (Rosa 2012: 25). Due to the heterogeneous health systems of the member states, which often treated health

[9] I have profited greatly from my collaborative work with Marzena Kloka on this directive (Kloka and Schmidt 2015).

services as benefits-in-kind, the implications of case law were difficult to determine. In the politics of health, judicialization resulted from individual complaints. It is striking how the case-law development was driven exclusively by preliminary procedures and that hardly any infringement measures were initiated by the Commission (IP/07/1515). The restrictive Commission position is reminiscent of its position on citizens' rights. Obermaier argues that the Commission opted to follow up the case law with codification, instead of intensifying infringement procedures (Obermaier 2009: 146, 151).

In the following section, I will first discuss the case-law development that put pressure on the legislature to act. Secondly, I will analyse the Council negotiations, as these show that member states reacted in different ways to the constraints of existing case law on legislative options. Some governments wanted to seize the opportunity to influence future case law through secondary law, moulding it more closely to their political preferences. Other governments, notably those of the new member states, opposed the idea of subjecting their health services to greater market freedoms. They seemed to prefer to let case law reign, rather than generalizing these legal positions through secondary law, which would require far-reaching changes to their systems.

Existing Case Law on Patient Mobility

The Treaty (Article 152(5) of the TEC, now Article 168(7) of the TFEU) regards health as a competence that is shared between the EU and member states. It protects member states' autonomy to regulate their health systems, giving limited competence to the EU for public-health measures (Hatzopoulos 2002: 685). In order to allow for the treatment of patients in other member states, member states agreed on coordination rules at an early stage: Article 22 of Regulation No 1408/71 established a system (called E112)[10] that allowed a patient in need of treatment during a stay abroad to access 'the benefits in kind which the host state provides to its own insured persons or to cash benefits which are to be paid by the home state and which permit patients to defray the cost of healthcare in the host State' (Ackermann et al. 2008: 1326). For patients actively seeking treatment abroad, the regulation includes a procedure for prior authorization.

From the late 1990s onwards, this status quo, which was regulated by secondary law, changed, as several cases reached the Court through preliminary procedures. Disrespecting the prior authorization required by secondary law, patients sought treatment in other member states and attempted judicial redress against the limited or entirely absent reimbursement offered by their

[10] Regulation 883/2004 adapted it into the European Health Insurance Card (EHIC).

health insurance. Remarkably, instead of simply referring to the existing framework of secondary law and the rules that the legislature thought should govern patient mobility, the Court ignored these in favour of 'creating an alternative source of rights in the same field' (Davies 2014: 1603). This case law culminated in the directive.

As Dorte Martinsen (2005: 1037–8) points out, national healthcare systems had already been challenged by Cases C-117/77 and C-182/78 *Pierik* in the late 1970s, which required the member states to refund treatment abroad even if the domestic health services did not provide for this. The treatment only needed to be internationally recognized as necessary and effective. The ruling thus took away member states' authority to determine the scope of their health services. It resulted in an instance of legislative overrule in which the Council reacted by unanimously amending the secondary law in question so as to restrict reimbursement to only those treatments that were agreed upon by the national health system (Martinsen 2005: 1038–9).

As early as 1984, the ECJ established that healthcare fell under the freedom of services (*Luisi and Carbone* 286/82 and 26/83). This was reiterated in Case C-159/90 *Grogan*, but it did not have much impact (Hatzopoulos 2002: 688). Momentum only began to gather in 1998 when Cases C-120/95 and C-158/96 *Kohll* and *Decker* took place, which were both initiated by citizens of Luxembourg. Decker had bought glasses abroad, while Kohll's daughter had had dental treatment that would have been available in Luxembourg. Both cases related to the passive freedom of services. Neither had sought prior authorization. When their reimbursement was refused, they litigated. With the submission of opinions by Luxembourg and eight other member states, member states signalled clearly to the Court that they attributed high levels of importance to the prior authorization procedure and wanted to keep their social-security systems separate from the single market's principles. But the Court argued that the freedom of services applied here, turning prior authorization into a disproportionate burden on patients. It is interesting and fairly typical of such rulings that the Court nevertheless referred to 'the powers of the Member States to organise their social security systems' (No. 17 *Kohll*, No. 21 *Decker*), as if the need to comply with market freedoms would not impact this autonomy. The existing regulation, which required such authorization, did not stop the Court.

Case C-157/99 *Smits/Peerbooms* in July 2001 was the next one of relevance. Two Dutch patients left the country for treatment: one to Germany and one to Austria. However, it was not part of Dutch standard treatment and was therefore not reimbursed. The situation was comparable to the early *Piriek* cases (Martinsen 2005: 1040). As *Smits/Peerbooms* concerned hospital care, ten member states intervened against the application of single-market rules, given that care was 'provided in the context of a social security scheme' (Hatzopoulos 2002: 691), but the Court argued that these were services like any other and prior authorization was a restriction. The authorization procedure

could only be seen as proportionate, according to the needs of hospital planning, if it was transparent, timely, and based on non-discriminatory criteria. Moreover, standard treatment needed to be based on 'international medical science' (Martinsen 2005: 1042). The case law was affirmed in Case C-56/01 *Inizan* (Martinsen 2005: 1043).

Case C-368/98 *Vanbraekel* was decided on the same day as *Smits/Peerbooms*. It raised another noteworthy point. The Court argued that in those cases where non-domestic treatment was less expensive, the patient had a right to claim the surplus. Otherwise, the application of the freedom of services could be hampered (No. 45, 53) (Hatzopoulos 2002: 690; Krajewski 2010: 172; van de Gronden 2009: 714–16).

Case C-385/99 *Müller-Fauré & Van Riet* followed in May 2003. It concerned an instance where reimbursement in the Netherlands had been denied for dental treatment and hospital care because of a lack of authorization. Nine member states, together with Norway and Iceland, submitted opinions. The Court saw no justification for an authorization procedure for non-hospital care. Jeopardy to the financial balance of the social-security system needed to be proven, but the planning that was required could possibly justify prior authorization for hospital services, allowing member states greater leeway. The case is also relevant as it explicitly referred to the reimbursement of providers that did not have a contract with the national health insurance programme (named 'non-contracted providers'). These became a major concern for Eastern member states in the negotiations of the directive.

Case C-372/04 *Watts*, which was decided upon in May 2006, concerned a woman named Ms Watts, who had avoided the waiting times in the NHS by going to France to get a hip replacement. The case is significant, as the NHS is a pure benefits-in-kind system and, as such, had hoped to evade the market logic of the freedom of services. Though it does not attach prices to its services, it was subjected to the market freedoms. The Court's ruling forces member states to come up with transparent cost calculations for their hospital services in order to allow the necessary transborder reimbursement (van de Gronden 2009: 720). Moreover, the ECJ dealt with the issue of waiting times, providing criteria for what it held to be undue delay. Nevertheless, Ms Watts could not recoup her travel costs. Even after *Watts* it was still unclear to what extent tax-funded national health services, such as the NHS, fall under the freedom of services (No. 91) (Krajewski 2010: 170).

In the judgment on Case C-444/05 *Stamatelaki*, reached in April 2007, the Court held that member states cannot simply refuse to reimburse hospital costs from other member states on the basis that they were incurred in a private hospital without a contract with the national health system. After all, these non-contracted providers are subject to the quality controls of the home member state, and the professionals working for them have to comply with formal qualifications (No. 37). Thus, under single-market rules, fewer

constraints are put on cross-border than domestic service provision, as non-contracted providers have access to cross-border reimbursement.

Negotiating the Patient Mobility Directive

After the failed attempt to include the provision and consumption of health services in the general Services Directive, the Commission proposed its directive on patient mobility in 2008 (COM (2008) 414 final). Inside the Commission, responsibility for the directive had changed from the Directorate-General (DG) for Internal Market to the DG for Health, which began to pursue a broader approach to health than simply strengthening the market (Hartlapp et al. 2014: 110–13). The DG for Employment was also involved and was responsible for Regulation 883/2004. The DG for Health found itself positioned between the market-making and case-law codification approach of the DG for Internal Market and the regulatory approach, guided by the conviction that health should be an exception from market principles and come under the common good, which was advanced by the DG for Employment.

Despite the fact that the DG for Health pursued a broader approach to the Patient Mobility Directive, there were ample references to the case law in the proposal for the directive, leaving the distinct impression that legislation was being driven by the Court (COM (2008) 414 final). The rulings of the ECJ were referred to twenty-two times in the proposal, and the Commission repeatedly emphasized that there was a lack of legal certainty as to the level of reimbursement patients should receive for medical treatment in other member states, which the directive had to address.

The proposal was part of a larger initiative, the programme on 'the social dimension of the internal market'. The interpretation of the ECJ's case law that the Commission put forward left member states with little control over medical tourism. The proposal differentiates between the member state to which the citizen is affiliated and the host member state, where the treatment takes place. Their respective rights and duties are set out. Most importantly, this concerns the member state of affiliation's right of *ex ante* authorization, which is limited to those cases where the financial viability of the health service would otherwise be put at risk. The host state has the duty to ensure non-discrimination in the treatment of EU citizens (p. 12 of the proposal, No. 12 and 13).[11] The relation of the directive to existing regulations is also important. The directive does not replace but complements the authorization procedure that Regulation 883/2004 establishes. Should patients choose to follow the

[11] In the final directive, the requirement of non-discrimination according to nationality is weakened, so as not to increase patient waiting times (No. 21), which allows member states measures to ensure access to healthcare in their territory (Article 4(3)).

latter procedure, they will be fully reimbursed for the treatment. If, in contrast, they exercise their right to the passive freedom of services, as detailed in the case law and the directive, the patient will be reimbursed only up to the cost of medical treatment in their member state of affiliation.

As occurred in the other examples that have been discussed, the motivation to reinstate legal certainty made the Commission's proposal more restrictive than the case law at times. In relation to *Vanbraekel*, the proposal required that patients would need to be reimbursed up to the equivalent cost of treatment in their member state of affiliation (pp. 7, 13). Further deviations of the Commission's proposal should be noted. The possibility to refer to the common good in the authorization of non-hospital services was prohibited, while the Court had only subjected it to adequate proof of negative financial consequences (Krajewski 2010: 178). Furthermore, the Commission requires clear proof that patients seeking external treatment somehow jeopardize the financial viability of the healthcare system, whereas the Court had only set out the requirement that it should be made plausible. This amounts to a reversal of the burden of proof, which implies that costs generally have to be reimbursed (Krajewski 2010: 179).

Next to the codification of case law, the directive (2011/24/EU) includes new patient rights in the realm of health services in relation to quality and safety standards according to international best practice, as well as the right to a complaint and redress procedure (Article 4). In the end, these additions may prove to be of great significance (Sauter 2009: 121–2). Chapter IV of the proposal originally provided for further supranationalization through enhanced cooperation in healthcare, but, as it lacked sufficient support from member states, it was dropped during the negotiations. The Council reached a political agreement within only twenty-three months, engaging with the presidencies of France, the Czech Republic, Sweden, and Spain. The relative speed at which the agreement was reached, however, should not be taken to mean that the dossier was not contentious.

As Kloka (2013) shows, it was particularly the UK, the Netherlands, France, Sweden, and Germany that pushed for a directive. They wanted to regain legal certainty through codification, with the additional hope that political agreement would put an end to the string of cases coming before the ECJ, which necessitated continual changes to domestic health policy. In contrast, the new Eastern and the Southern European member states, in particular, opposed the idea of partly liberalizing their health systems, given that the Treaty only granted limited rights at the EU level.

Germany, for its part, was the most keen to ensure that long-term care would not be covered by the directive. It succeeded, and the exclusion was written into the final directive in Article 1(3). Even though such an exclusion only means that the general rules of the Treaty apply, and there was existing and pending case law on this issue (C-208/07 *Chamier-Glisczinski*), the

minister at the time, Ulla Schmidt, fought fiercely for this exclusion, though her own ministry remained sceptical (Kloka and Schmidt 2015). While this serves as an example that the consequences of the Treaty in terms of policy are not understood, it may be a case of successful signalling. Subsequently, the Court argued in Case C-562/10 *Commission v Germany* (No. 57) that since there was only a coordination of social systems among member states, one had no right to the same level of treatment when moving between member states. The Commission failed in its argument that the free movement of services demanded the inclusion of the full portability of rights in German long-term care regulation. For the UK, it was important that the directive did not undermine the central role of the general practitioner (GP) in the NHS, who decides on the rights of patients to treatment. In Recital 37 of the directive, the UK received this assurance (Kloka and Schmidt 2015).

In contrast to the Western European supporters of the directive, the Eastern and Southern member states were not subject to health-related preliminary references. Therefore, they were less familiar with the case law, for which they rejected *erga omnes* obligations. They objected to the introduction of market principles into healthcare, denied the competence of the EU in this matter, and also pushed to base at least parts of the proposal on Article 168 of the TFEU pertaining to public health. In particular, they feared domestic repercussions and large costs if they had to reimburse non-contracted service providers from other member states. Germany, however, had managed the reimbursement of such providers established in other member states in 2003 without such negative consequences (Krajewski 2010: 195–6). But this question was not only a matter of European law. National non-discrimination rules may prohibit reverse discrimination against nationals and may therefore demand such reimbursements. Given the existing case law, it was impossible to exclude non-contracted providers from the directive altogether, so the legal service of the Council and the Commission argued, although a majority of member states would have preferred this step (Kloka and Schmidt 2015).

The Southern and Central Eastern European (CEE) member states that opposed the directive could have mustered a blocking minority, as Marzena Kloka (2013) argues, but they did not succeed in countering the older member states that were pushing for legislation. Poland, Slovakia, Portugal, and Romania were eventually outvoted, as they were not able to secure a compromise on non-contracted providers. As they were not in favour of applying market freedoms to health services, these member states preferred to have case law, rather than general secondary law, set out the rules. A case-law-based regime would limit the application of the freedom of services much more than general secondary rules that made rights clear to all (Kloka and Schmidt 2015).

In summary, the Patient Mobility Directive (2011/24/EU) is another example in which ongoing case-law development, fuelled by preliminary procedures, made it preferable for most member states to agree on a directive

as a 'lesser evil'. To leave the shaping of this policy field in the hands of the Court risked ongoing case-law development and continued legal uncertainty. Moreover, in the eyes of the member states, to stay inactive in an important area was a significant reproach to the representation of 'social Europe', as they were instead leaving policymaking to the Court. For instance, the Commissioner-designate for Public Health, Androula Vassiliou, emphasized that 'the proposal was needed soon to avoid policy being decided by the Court of Justice and lawyers rather than politicians.'[12]

Conclusion

The implementation deadline of the directive passed in October 2013. On the basis of her detailed research, Martinsen (2015) finds that it has not resulted in much cross-border demand for health services. Greer perceives there to be insufficient support among actors for the directive's material policy aims (Greer 2013), resulting in minimum adaptation, leaving open the question of how the directive will actually work. He suspects that this will give rise to a new round of litigation, as patients are bound to sit on their bills due to the unclear procedures for reimbursement and the reality that going to court is their only recourse. He also expects that patient associations for rare diseases will push case-law development further, when seeking access to new medications that are only available in a few member states (Greer 2013: 417–18).

In terms of the agreement on the directive, Martinsen downplays the importance of the Court rulings by arguing that member states succeeded in modifying the impact of case law through the directive (Martinsen 2015: 175, 178). However, she does not attribute much significance to the constitutional nature of case law. By searching for instances where the Court dictates policy, she refutes its impact, since 'the Court pays attention to politics' (Martinsen 2015: 180). 'Where the "judicialisation of politics" theoretical approach assumes politics to be the receptive part of judicial dialogues, we find that politics also influences the judiciary' (Martinsen 2015: 180). However, the fact that judges are receptive to political preferences does not discount the grave impact of constitutionalized case law on secondary law. Court rulings necessarily focus on specific disputes, around which the legislature builds general rules. Since it cannot overrule the Court or assert legislative will in place of rules established by case law, the Court remains important. The conflict on non-contracted providers gives strong evidence for this.

The Commission's report from February 2014 (COM (2014) 44 final) is particularly interesting in relation to Martinsen's (2015) conflicting analysis

[12] Summary of hearing of Androula Vassiliou, Commissioner-designate for Health, 1 Apr. 2008. REF.: 20080331IPR25292.

that views case law as being subject to political modification. In the report, the Commission emphasizes the difficulty of having two parallel procedures for reimbursing transborder treatment, according to either the established regulation or the directive. As we have discussed, each allows for different sorts of reimbursement. In accordance with the regulation, all planned treatment needs to be authorized; in accordance with the directive, only some kinds of treatment have this requirement. Based on the directive, all sorts of treatment can be reimbursed, but not necessarily at full cost to the patient; based on the regulation, the full cost is covered, but only for those medical services under contract within the public health system (p. 7). There are additional difficulties in relation to pensioners who live in a host country but are insured by the home country, as for them each kind of legislation provides a different solution (pp. 8–9). This shows how difficult it can be to integrate case law into a general legislative solution.

As for the Court itself, some see a shift in its case law, which gives more scope to member states' regulatory authority. This is also what Martinsen (2015: 173) argues. In cases that have been ruled upon in parallel to the final negotiations, the Court has resisted interfering any further with member states' rights. As a result, it backed the need for preauthorization for the non-hospital use of major medical equipment in Case C-512/08 *Commission v France*, which was decided upon in October 2010. It also argued not to undermine Regulation 883/2004 in Case C-211/08 *Commission v Spain*, which was decided upon in June 2010. Hatzopoulos and Hervey, therefore, identify a new restraint on the Court. They argue that in the patient mobility cases the Court has opened the door to new rights. However, in light of low-level demand for these rights, and given the response of the legislature in the Patient Mobility Directive and the revision of Regulation 883/2004, the Court now is reluctant to interfere still further in the field (Hatzopoulos and Hervey 2013). Their analysis is taken up, for instance, by Larsson and Naurin (2016: n. 72) as an argument for the receptiveness of the Court to member states' preferences.

However, in Case C-173/09 *Elchinov*, which was also decided upon in October 2010, the Court followed its previous line of assuming the authority to decide on standards of treatment. The case concerned a Bulgarian citizen suffering from a rare form of eye cancer. Without prior authorization, he sought out treatment in Berlin that was not available in his home country. In Bulgaria, the decision by the lower court to grant reimbursement was overruled by the higher court. Instead of succumbing to the judicial hierarchy, the lower court turned to the ECJ, where the AG argued that this was a question that concerned the domestic constitutional order. However, the Grand Chamber found that lower courts were right not to abide by the rulings of their high courts when coming into conflict with EU law. In addition to reading into EU law that the duty of member states was to reimburse the most advanced

treatment within the community, the Court interfered in the organization of the member states' judicial systems.

When there is restraint, it is important to realize that any receptiveness on the Court's part only concerns future case-law development. The Court has hardly ever been seen to alter its existing case law. If the Court is seen to be 'receptive', it only means that it will not extend the reach of case law any further. This more restrained position taken by the Court is also apparent in a few cases where it was not patients but health-service providers that litigated under EU competition law.[13] Contrary to the expectation that competition law would provide a further important lever against member states' regulation of their health systems, the Court refrained from taking this step (Hancher and Sauter 2010).

In summary, the likely future development of case law is hard to predict. The Court has adopted a more restrained position, a development which can also be noted in the realm of citizenship and social rights since 2008, and particularly since 2014. There has not been much support from patients claiming their rights. Nevertheless, it could well be that the directive achieves the opposite of what member states intended. They wanted to curb the further development of case law. The directive could give way to a new wave of litigation, as Greer expects.

FAILED CODIFICATION

With the Citizenship Directive and the Patient Mobility Directive, the EU legislature codified case law, thereby broadening access to the rights and, to some degree, improving legal certainty. Davies (2016a) takes these two examples, along with the Services Directive and the regulation on the mutual recognition of goods, which I discussed in Chapter 4, to argue provocatively that the EU legislature is an 'agent' of the Court. While this term bluntly expresses the problem that constitutionalized case law poses to the legislature, as it needs to endorse certain policies, 'agent' also implies that the Court as principal can direct it. But a legislative body is not a lone actor. What happens if a legislative body does not command the necessary majorities?

In the following section, I will discuss two examples of such a situation. The Monti II regulation was proposed in 2012 as a follow-up to the contentious *Laval* and *Viking* rulings, which limited unions' ability to revert to industrial

[13] See Asklepios (T-167/04) versus the Commission concerning state aid for hospitals and BUPA (T-289/03), in Feb. 2008, versus the Commission, again concerning state aid in Ireland (Greer 2012: 280).

action in the rulings' requirement that measures had to be proportionate with regard to the four freedoms. National parliaments enacted the new yellow-card subsidiarity procedure, and the proposal was withdrawn. This case is also discussed by Martinsen (2015), and I will therefore discuss it succinctly. The second example is tax competition. Given the complexities of the case law that pertains to my second example, tax competition, a discussion of this area merits greater detail.

The Failed Monti II Regulation

The rulings in the *Viking* and *Laval* cases certainly count among the Court's most politically contentious. By arguing that the freedom of establishment and the free movement of services also have a horizontal direct effect, these rulings have wide repercussions (Fabbrini and Granat 2013: 127–8). Private actors have to see that their actions can be justified under the proportionality principle if the freedoms are interpreted in this way. As strikes directly impede the free provision of services and/or the freedom of establishment, as had been the situation in the *Viking* and *Laval* cases, unions, in particular, were particularly concerned by the ruling. Not surprisingly, critics of the Court's interpretation mounted demands to counter the Court politically so as not to allow the unions' power to be curtailed judicially.

Two legislative proposals were inspired by these wishes. The Posted Workers Directive needed a revision, as the Court had interpreted its provisions as providing for maximum protection, whereas the political consensus was that Article 3 provided for minimum protection rules. I will not focus on this process here, which would be a long case study in its own right. Martinsen (2015) discusses the reform of the Posted Workers Directive, which resulted in Directive 2014/67. The process is ongoing with a new proposal in 2016. Even more interesting from our perspective of over-constitutionalization is the attempted legislative reaction to the freedoms' horizontal direct effect with the proposal for a Council regulation 'on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services' (COM (2012) 130 final). The proposal was named after the former European Commissioner Mario Monti and was dubbed 'Monti II'. The name Monti II refers to a report by Monti from 2010 and relates to the Monti I Regulation (2679/98/EC) on the functioning of the internal market (Fabbrini and Granat 2013: 131).

As Martinsen (2015: 199) shows, the EP had been particularly vocal in demanding a political response to the case law in the debate about the rulings. It actually tied its support for the re-election of Barroso to this question, and the Commission president promised to deliver such a response in 2009. It was

delayed until March 2012, at which point the Commission presented the Monti II Regulation, demonstrating the difficulty of drawing up a proposal.

Within the Commission, the DG for Internal Market and the DG for Employment struggled to strike a compromise between the constitutional constraints of case law and the political exigencies of granting the right to strike. This mirrored the conflict around social partners in which employers largely welcomed and unions opposed the case-law development (Martinsen 2015: 200). The compromise, which took so long to be reached within the Commission, however, did not calm the critics. Unsurprisingly in light of our analysis so far, the Commission could not alter the constitutionalized case law with secondary law. Those who made the criticism that the right to strike has to safeguard fundamental freedoms after *Viking* and *Laval* could not find consolation in the Monti II proposal.

In it, the Commission closely followed the case law. It emphasized that the Court had recognized the right to take collective action as a fundamental right, while it set the requirement for a proportionality test to respect the fundamental freedoms. However, it was precisely this 'balancing' that unions opposed. The proposal also included some details on dispute resolution and proposed a new EU-wide alert mechanism for strikes that disrupted the internal market.

The political reaction, once again, was pronounced. Those that were unhappy about the case law remained so (Ewing 2012). All the Commission had done—and could only do—was codify the case law. This political debate, which was coordinated by the Danish Parliament, resulted in the first yellow-card procedure under the subsidiarity protocol of the Maastricht Treaty (Martinsen 2015: 203; Fabbrini and Granat 2013: 135). Fabbrini and Granat criticize the way in which the procedure was misused, as national parliaments did in fact disagree with the contents of the regulation on political grounds and did not act based on reasons that concerned subsidiarity (Fabbrini and Granat 2013).

In September 2012, the Commission withdrew the proposal. Legal uncertainty subsists concerning the limits of collective action as defined by the Treaty (Martinsen 2015: 204). I disagree with Martinsen's expectation that non-adoption will 'push the Commission to adapt its position and to present a proposal that modifies the course of legal integration. This is a likely future scenario for the relationship between free movement and the right to take collective action' (Martinsen 2015: 220). Modification, in contrast to Martinsen's argument, is not an option open to the legislature if primary law is at issue. All member states can aspire to do is to give intimations of their political consensus on the policy to the Court to inform its subsequent decisions. It is generally uncertain whether the Court will follow the legislature as often as the Court reinterprets secondary law in light of the Treaty. By leaving the contentious area ruled by case law, rather than generalizing

the rule it establishes through codification, the subsisting legal uncertainty may restrict the use of the market freedoms against strikes.[14] Therefore, by neither codifying case law nor generalizing the rule it establishes, the best solution was probably reached, short of a treaty change.

It is striking that, although the cases of *Viking* and *Laval* illustrated the danger of constitutionalized material policy positions so clearly, and the Commission's failed Monti II Regulation demonstrates the impossibility of altering the Court's interpretation politically, the limits of modification are still not recognized. One can only support Gareth Davies's observation that most commentators and politicians still fail to acknowledge the problematic nature of judicial governance in the EU (Davies 2016a: 16).

Integrating Member States' Tax Policies

The power to tax is a core competence of the sovereign nation state and is crucial to its operation and existence. It is therefore not surprising that EU member states have largely resisted moves towards integration of this crucial policy. Harmonization measures still depend on unanimity in the Council, and the EP is restricted to consultation rights. It is only in relation to indirect taxes, which notably includes value added tax, that member states have agreed on several harmonization measures. Indirect taxes have the closest relationship to the single market (Genschel 2007).

Since the 1990s, an increasing number of ECJ cases have put member states' power over direct taxation in jeopardy. Given the heterogeneous interests of member states, such pressure from the Court has not succeeded, however, in gaining Council agreement on the harmonization of direct taxes (Genschel 2011). This makes tax policy very interesting within the context of this book. What happens if the Court's case law pushes for integration but member states do not comply?

In the following section, I will map the development of case law for direct taxation. Given the extreme technicality of the subject and the complicated facts in the relevant cases, this can only be an attempt to convey the basics. I will show how court cases, often based on the preliminary procedure, have progressively undermined the autonomy of member states to decide on direct taxation. However, the Commission's attempts to achieve the harmonization of direct taxes based on this track record have failed. As Wasserfallen (2014)

[14] It should be noted that Martin Höpner argues that secondary law could be used in this case to overrule the Court, given that the right to strike is a fundamental one. Fundamental rights, in his interpretation, allow the EU legislature to engage in full harmonization, subsequently binding judicial interpretation (Höpner 2016).

has shown, after the Eastern enlargement, the increasing heterogeneity of member states makes it highly unlikely that harmonization will ever succeed. In this situation, some have perceived a lessening in pressure from the Court, as the Court has, in some cases, accorded the member states greater leeway in the design of their tax systems (Genschel et al. 2011). Clearly, it is hardly possible for the Court to take responsibility for a deteriorating ability of member states to tax. Yet member states' autonomy is markedly circumscribed by the EU's legal interpretations.

Litigating Direct Domestic Taxes at the ECJ

While indirect taxes, in particular value added tax, have been harmonized since the 1960s, member states kept control over direct taxes.[15] However, within an open economy, tax coordination becomes important. Companies may evade taxation, or they may be taxed in both their home and their host state, neither of which is desirable. Governments may discriminate against companies as host states, or home governments may restrict the freedom of establishment of their companies. To avoid double taxation in cases of transborder private and business transactions, there is a coordination system of bilateral tax treaties under the general purview of the Organization for Economic Cooperation and Development (OECD). For member states, it became apparent in the mid-1980s that the possibility of blocking harmonization decisions on direct taxes did not mean they would retain full sovereignty over this area. In 1986, the ECJ decided in Case 270/83 *Avoir Fiscal* that the principles of community law also apply to the direct tax systems of the member states. It is important to note what is self-evident from the beginning here: tax case law has 'an inherent tax reduction bias' (Genschel et al. 2011: 599), as litigants only sue on the basis of EU law to reduce their tax payments.

Avoir Fiscal 'marked the date of birth of European direct tax law' (Pistone 2008: 713). The background to the infringement procedure is illuminating. In 1977, the Commission put forward a proposal for company taxation in order to eliminate discriminatory practices among the member states. The Council, however, rejected a negotiation of the proposal. Sometime later, the Commission attempted to put judicial pressure on the member states (Genschel 2002: 176–89, 267). Thus, we find another example here of the Commission's ability to combine its legislative functions with its capacity to initiate infringement procedures, as discussed in Chapter 4. The Commission pursued Case *Avoir*

[15] I am very thankful that I was able to draw on a report on tax case law prepared by Tilman Krüger within the framework of our project. Special thanks also go to Philipp Genschel for helping me with his expertise.

Fiscal against France for not giving shareholder tax credit, which was granted to French companies, to French branches of insurance companies established in other member states. This discriminated against these companies and violated the freedom of establishment (O'Shea 2008: 261). France argued that, as long as there was no tax harmonization, the distinction between residents and non-residents that underlies international tax treaties could also be upheld in the European Community. The Court rejected this argument (O'Shea 2008: 262), setting out the requirement that France, as a host state, had to treat branches of French and other EU companies alike. In subsequent case law, the Court confirmed this position. As O'Shea (2008: 270) notes, the Court applies a national treatment test in the different cases that relate to discrimination against the host state, which requires that national and EU companies have to be treated alike.

Another set of cases concerns origin or home member states that hinder their companies' freedom of establishment. This series of cases begins with Case 81/87 *Daily Mail* in 1988 (O'Shea 2008: 271–5). The Daily Mail company wanted to transfer its seat from the UK to Luxembourg for tax reasons, but the Treasury refused to grant the necessary permit for this move. The company considered its freedom of establishment to have been violated, and a preliminary ruling followed. The Court did not uphold all the company's arguments. While member states could not restrict the freedom of establishment, the lack of harmonization had to be taken into account. The UK could set its own rules for companies that want to relocate their headquarters while preserving their legal personality as a UK company (O'Shea 2008: 271). The *Marks & Spencer* ruling, which I will discuss later as a crucial turning point in the case law that gave more leeway to the member states, also belongs in this category. The case concerned the rules for group relief that applied to domestic subsidiaries of UK companies and were not granted to subsidiaries of other member states. Another case, C-471/04 *Keller Holdings*, which was decided upon in 2006, dealt with the German imputation system. It treated domestic indirect subsidiaries and those in other member states, in this case Austria, differently. Germany justified the difference by arguing that only the dividends of indirect domestic subsidiaries were taxed in Germany, so the same tax advantage could not be given to indirect subsidiaries in other member states that paid their taxes elsewhere. However, the ECJ rejected this argument, as it has done in other cases, arguing that it does not matter where an indirect subsidiary is established (O'Shea 2008: 273–4).

The essence of these arguments is that they undermine the link between taxation and territory. This is a radical step for nation states whose existence depends on fiscal autonomy over a defined territory. Taken as a whole, the ECJ's case law has tackled different discriminatory practices. It has ensured that: non-resident EU and resident companies have to be treated equally; personal allowances for non-resident EU citizens have to be the same as those for

residents; deductions have to be made for contributions paid to non-resident EU pension funds, as well as to interest payments to non-resident EU companies; and group-relief arrangements have to include non-resident EU companies (De Goede 2003: 206–7).

O'Shea (2008: 268) argues that the Court's case law has led to a 'mantra' with which the Court justifies its competence over direct taxation, despite it being formally within the member states' jurisdiction: 'although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on grounds of nationality' (Case C-250/95 *Futura*, No. 19). This mantra reflects what we know from other areas, such as health, where the Court also holds that single-market principles have to be respected, although member states have kept certain competences exclusively for themselves.

The early court cases concerned the principles of company taxation, which had to be aligned with the freedom of establishment and later with the free movement of capital. Following the move to the single market, companies were motivated to use member states' heterogeneous systems of taxation to their advantage. After a delay of a few years, individual litigants also challenged their tax bills, with the help of EU law, based on the free movement of workers. Central here is Case C-279/93 *Schumacker*. In fact, *Schumacker* is one of the cases the Court itself cites most, as Derlén and Lindholm show in their network analysis (Derlén and Lindholm 2013: 673). In this case, a non-resident worker earned almost all his income in Germany. This barred him from applying for exemption from taxes in his country of residence, Belgium. Workers who do not live and work across borders consequently received more tax benefits. International tax law grants the responsibility for tax exemptions to the country of residence. However, if hardly any taxes are paid there, there is no scope for exemptions. Similar to the assessment of company taxation, the Court analyses whether the principle of non-discrimination or the fundamental freedoms are violated by personal tax rules and whether there are sufficient justifications for restrictions (Malherbe et al. 2011: 25–6). As O'Shea (2008) shows, the case law concerning personal taxation can also be divided along lines of discrimination from the perspective of the host or home state.

In general, companies are much better placed to exploit the overlapping EU legal order than private individual actors, given the significant expenditure of time and money necessary to pursue preliminary reference proceedings. Nevertheless, private actors have also instigated important court cases, which have partly led to significant tax losses for member states. In addition to *Schumacker*, Cases C-292/04 *Meilicke I* and C-262/09 *II* of 2007 and 2011 are noteworthy, the German response to which will be analysed in Chapter 6. The issue here was the old imputation system of company taxation on

dividends that Germany only granted for German shares.[16] Because of the general retroactive application of case law—after all, the Court only elucidates what EU law has required all along—rulings may lead to retroactive entitlements. In the *Meilicke* cases, which built on the free movement of capital that had become directly effective in 1988, the German government feared significant tax loss because of retroactive claims.

More recently, the Commission has started to analyse tax distortions that prove to be disincentives for cross-border workers (Agence Europe, 3 April 2012, 20 January 2014), which may mean that the Commission will also put greater emphasis in the future on pursuing infringement procedures related to personal direct tax distortions.

> To date, the ECJ has decided more than one hundred cases involving income tax issues, with the vast majority striking down member states' tax provisions on the ground that they violate either one of the four freedoms guaranteed by the treaties or the treaties' bar against discrimination on the basis of nationality.
>
> (Graetz and Warren Jr 2006: 1186)

In their analysis of these cases, Graetz and Warren Jr explicitly reject the idea that case law can be explained through the Court's alignment with majoritarian activism, as Maduro's theoretical argument (1998) holds (Graetz and Warren Jr 2006: 1193). The Court does not push for harmonization according to the preferences of the majority of member states. Time and again, the Court has rejected arguments about budgetary concerns, such as revenue loss or an erosion of the tax base (Cordewener et al. 2009: 1957–63).[17] Member states can only pursue their domestic taxation priorities when they are a justifiable exception to the freedoms, and the Court defines these exceptions narrowly. This results in a potentially devastating effect of case law. The familiar arguments about the application of the Treaty in other policy fields are relevant here as well:

> According to the Court of Justice, overt discrimination may be justified by those grounds set out explicitly in the EU Treaty (such as public policy, public security and public health) whereas a restrictive measure is permissible 'only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest'. Furthermore, it must 'not go beyond what is necessary to attain the objective pursued'. (Malherbe et al. 2011: 21, No. 25)

[16] Traditionally, member states avoided the problem of double taxation through imputation systems, where investors, in addition to their dividends, receive a tax credit for the taxes the company has paid. Given the case law of the Court, these systems were replaced with dividend exclusions, where the dividends received are exempted from taxation (Graetz and Warren Jr 2006: 1208–12; Graetz and Warren Jr 2007: 1591).

[17] Relevant cases here are: C-264/96, ICI C-307/97 *Saint-Gobain*; C-35/98 *Verkooijen*; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Hoechst*; C-136/00 *Danner*; C-385/00 *De Groot*; C-319/02 *Manninen*; and C-196/04 *Cadbury Schweppes*.

This broad interpretation disregards member states' preservation of their prerogative for direct taxation in the EU treaties. The gist of the ECJ's case law until the mid-2000s can be summarized as the active and gradual removal of discriminatory tax measures by making references to the fundamental freedoms (Genschel et al. 2011: 600; Cordewener et al. 2009: 1951–2; Aujean 2007: 330; Pistone 2008: 713).

An Impossible Quest?

Considering the explicit wish of the masters of the Treaty to keep tax policy under national control, it is not only the legitimacy of the Court's case law that needs questioning. Fundamentally, the Court lacks a reference tax system for the pursuit of its non-discrimination approach. In order to avoid double taxation, as well as non-taxation, controlling for non-discrimination has to use the perspective of either the home or the host state. Graetz and Warren Jr (2007) make this point.

> We have shown here that the ECJ's nondiscrimination jurisprudence reveals an impossible quest: to eliminate discrimination based on both the origin and destination of economic activity. We have also shown that this quest necessarily must fail in the absence of harmonized corporate income tax bases and rates among EU member states. This implies that the court will find it necessary somewhere along the way to retreat, creating not only legal uncertainty, but ultimately doctrinal incoherence. (Graetz and Warren Jr 2007: 1253)

As the authors explain, tax neutrality can be realized as capital import neutrality, where all economic activity within the country is taxed the same, regardless of whether the capital is domestic or foreign. Alternatively, capital export neutrality can be achieved by taxing the income of residents in the same way, whether it is earned at home or abroad. As long as tax rates differ among countries, both kinds of neutrality cannot be achieved at the same time. Thus, the Court would need to decide on one principle over the other, but it has no basis for this choice (Graetz and Warren Jr 2007: 1582). As the authors show, this problem of the Court's lack of a reference point leads to some significant contradictions between rulings, where the Court decided in one or the other way.[18]

Similarly, Pantazatou (2013: 95) argues that member states' tax systems include few directly discriminatory measures, but that discrimination arises

[18] For instance, they mention *Denkavit* and *ACT Test Claimants* (Graetz and Warren Jr 2007: 1615). The criticism of the lack of a reference system was taken up by the Advocate General in a proceeding against the annulment of a Commission decision on state-aid allegations against Gibraltar (C-106/09). The Court did not follow the argument, however. (EU) EU/CJEU: 'Advocate General proposes to uphold 2004 Gibraltar corporate tax ruling', Brussels, 7 Apr. 2011 (Agence Europe).

from the interaction of two different systems. Critically, Graetz and Warren Jr argue that this tax case law means that the EU is becoming 'a place where corporate income can easily escape tax. . . . Thus, the ECJ decisions raise the possibility of a United States–European race to the bottom in corporate income taxation' (Graetz and Warren Jr 2006: 1252–3).

In addition, the Commission foresaw the shortcomings of a court-driven European tax policy, despite its general interest in taking advantage of the momentum generated by case law to foster integration. Frits Bolkestein, Internal Market Commissioner from 1999 to 2004, complained that 'company tax law must not be made in court' and that the ECJ's 'taking over the role of lawmaker on crucial tax issues in Europe, not least in the area of company taxation' was unacceptable (*Financial Times*, 21 October 2003). But of course, the Commission itself was not innocent of the Court's activities. After the Court had made inroads through case law into member states' tax sovereignty on the basis of preliminary rulings, there was a 'considerable increase in the number of infringement procedures . . . in the field of direct taxes' (Pistone 2008: 727) from the 1990s.

The Commission re-emphasized its willingness to put member states under pressure through infringement procedures in 2001 (COM (2001) 260 final, pp. 21–2). Even after the Court became more careful in 2005 (see next section), the Commission did not refrain from using infringement procedures against member states in the field of direct taxation. Fifty-six infringement cases were completed up until March 2016. Figures 5.1 and 5.2, which are based on the Commission's report on important ECJ cases in the area of direct taxation,[19] show when and where the Commission has intervened, putting several member states under pressure, some of them repeatedly. In this way, the Commission partly compensates for the uneven development of preliminary proceedings across the EU, within which some domestic courts refer frequently and others not at all. Pantazatou (2013: 115) even argues that courts in those member states that rely on tax competition, such as Ireland or Cyprus, were careful not to undermine the business model of their national economy by presenting a preliminary reference to the ECJ. Figure 5.2 differentiates tax cases according to member states and shows that this is not the case for Luxembourg. However, Pantazatou also mentions that the courts of the member states that were hit by fiscal debt (the GIPSI countries: Greece, Ireland, Portugal, Spain, and Italy) did not respond by changing their referencing behaviour (Pantazatou 2013: 116). Thus, with respect to tax competition, member states' courts should not be assumed to simply follow the 'national' interest.

[19] Date of document: 9 Mar. 2016, on file with author. The current version can be found under: <http://ec.europa.eu/taxation_customs/infringements/eu-court-justice-case-law_en> [accessed 9 May 2017].

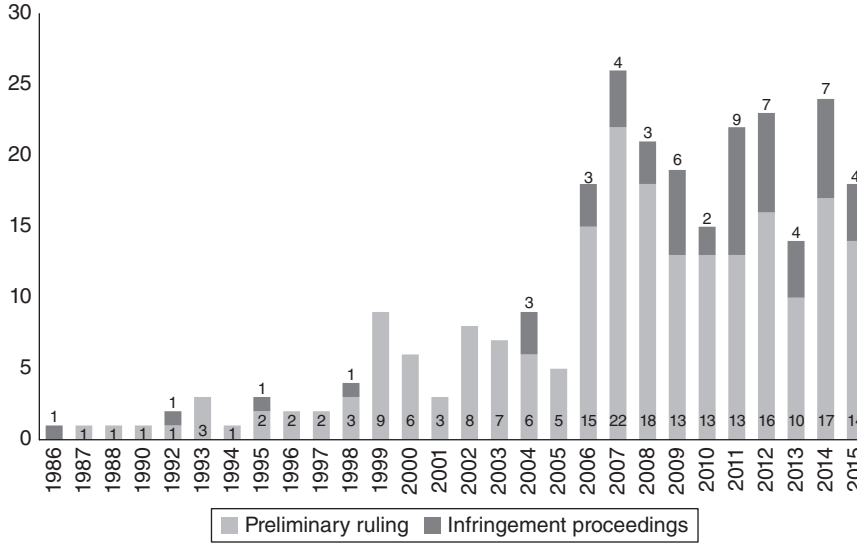

Figure 5.1. Infringement cases and preliminary rulings on direct taxation (by year)

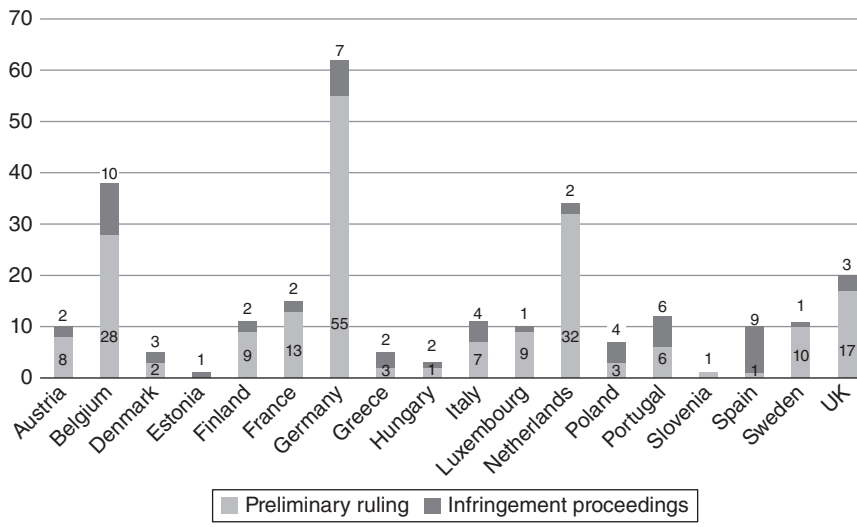

Figure 5.2. Infringement cases and preliminary rulings on direct taxation (by member state)

The Court's Response—Switching to a Lower Gear

Despite the pressure the case law places on member states' tax systems, and the inherent contradictions of the case law, member states did not manage to agree on secondary law as a means to intervene in the case-law development. The Court thus found itself in a difficult situation. It had instigated the application of EU law to member states' direct tax systems—a process which gathered significant momentum, fuelled by the interests of mainly corporate litigants and their ability to use the preliminary procedure. While the Court had to deliver judgments on the cases brought to its attention, it did not find any guidance in secondary law that could have legitimated its approach.

In this situation, the Court took up a strategy that was familiar from other areas and engaged in the fine-tuning of its case law, which has been interpreted by some as a break from the previous line of reasoning. Its judgment in Case C-446/03 *Marks & Spencer* (13 Dec. 2005) is regarded in the literature as the turning point, after which the Court began to grant member states greater leeway in deciding on their tax policy (Tiedtke and Mohr 2008: 428; Sutter 2006: n. 2). The company Marks & Spencer had aimed to deduct losses incurred through discontinued subsidiaries in France, Germany, and Belgium from its UK tax. However, the British group-relief rules viewed this possibility as only being for domestic subsidiaries. This violated the freedom of establishment in the Court's opinion, but it conceded that EU member states could, in principle, exclude the deductibility of losses incurred by subsidiaries in other member states (No. 59). It even held that the non-deductibility of losses could be the rule rather than the exception (Lang 2006: 54). It added a balanced allocation of the power to tax (No. 43–46) to its 'overriding reasons in the public interest' (No. 51), avoiding the risk that losses might be deducted twice (No. 47–8) or taxes avoided altogether (No. 49). However, measures had to be proportionate and the deductibility of losses could not be refused if there was no other way to take them into account (No. 55).

By broadening the scope of legitimate objectives, the Court diverted from the opinion of AG Maduro, and it surprised EU tax law experts (Lang 2006: 54). EU finance ministers were relieved that the Court had awarded them some more legitimate reasons for protecting their tax base (Jochum 2006: 621), but the final losses of EU foreign subsidiaries had to be offset as a tax exemption for the income of domestic parent companies, though these subsidiaries could not be taxed. 'The big difference, of course, is that the domestic subsidiaries are subject to tax at the same rate as the parent, while the foreign subsidiaries can be in Estonia, where there is no corporate tax, or in Ireland, where the tax rate is only 12,5%' (Avi-Yonah et al. 2007: 468).

After *Marks & Spencer*, other rulings have confirmed the Court's revised position (Lang 2009).[20] 'The "outright activism" of the years 1995 to 2004 gave way to a certain deference to the fiscal sovereignty of the Member States (since 2005)' (Wattel 2008: 205). Member states lost fewer cases (Genschel et al. 2011). But where exactly does the fiscal sovereignty of the member states end, and what are the limits of the freedom of establishment and the free movement of capital? In particular, questions of cross-border loss relief or the deductibility of foreign losses, incurred by a company in the discontinued operation of subsidiaries and permanent establishments in other EU member states, were subject to many decisions. Thus, it is unclear when losses have to be regarded as final to become deductible (Jochum 2006: 622; BDI and PWC 2011). Secondly, the *Marks & Spencer* decision contains three justifications that member states have to invoke (the balanced allocation of the power to tax, the risk of a renewed deduction of losses, and tax avoidance), which raises the question whether all justifications need to be present simultaneously. Subsequent case law gave further guidance. In Case C-231/05 *Oy AA* (No. 44-60), the ECJ found that two justifications were needed to restrict freedom of establishment legally, namely the balanced allocation of tax jurisdiction and a risk of tax avoidance. In Case C-414/06 *Lidl Belgium* (No. 38-42), the ECJ required again only two justifications: next to the balanced allocation of tax jurisdiction, the risk of a renewed deduction of losses. In Case C-337/08 *X Holding* (No. 33), the ECJ found that the balanced allocation of tax jurisdiction alone was sufficient to justify the discriminatory measure. As a study of the EP shows, it becomes apparent again that policy guided by case law implies significant legal uncertainty (Malherbe et al. 2011: 21, No. 25).

Other open issues can be mentioned here, such as the question of whether subsidiaries and permanent establishments have to be treated alike (Lang 2009: 98–106). The result was a constant stream of cases, which, however, has produced 'an intractable ball of unacceptably inconsistent case law, as the court was regularly backing out—without saying so—of consequences of its previous vigorous case law' (Wattel 2008: 205). For private litigants, the ambiguities of case law provide sufficient incentives to go to court, as the continuous flow of preliminary rulings shows (Figure 5.1), but for member states legal uncertainty reigns over the limits of their fiscal sovereignty. The extent to which the fundamental freedoms have eroded their ability to tax—and the scope companies have to avoid taxation—create an urgent need to establish common rules. The ECJ's tax cases 'substantially inhibit the flexibility of EU Member States to address the vexing issues of multiple corporate taxation, economic taxation, and international double taxation. It is impossible, in our

[20] These include: *Lidl Belgium* and C-157/07 *Krankenheim Ruhesitz am Wannsee* on subsidiaries; *Oy AA* and *X Holding* on permanent establishments; and even judgments on corporate income tax (such as C-418/07 *Papillon*).

view, to identify consistent tax policy norms that would explain these results' (Graetz and Warren Jr 2007: 1618).

Legislative Responses at the EU Level

Political agreement on tax coordination is highly difficult to achieve, as is apparent from the persistence of the unanimity rule in the Council on tax matters. For member states, their fiscal autonomy is too central to their functioning for them to give up their veto power (Genschel and Jachtenfuchs 2011). Nevertheless, there is some secondary law on direct taxation. Instruments of positive integration that have been adopted include the code of conduct for business taxation (1997), the Parent-Subsidiary Directive (1990/2003), the Fiscal Merger Directive (1992/2006), the Interest and Royalty Directive (2003), and the Savings Directive (2003). While these steps are limited in scope—they typically deal with the balancing of tax jurisdictions and with certain tax avoidance practices—they indicate that national rules on direct taxation have an increasingly visible European dimension. It is widely recognized in the literature that the pressure on the legislature emanates from the case law. 'It is widely believed that the ECJ ruled the way it did in order to force the political branches of the EU to move toward corporate tax rate harmonization, as the Commission has advocated (to no avail) for many years. But here the ECJ can learn a lesson from the US Supreme Court: deciding cases in order to force action by the legislature can be dangerous' (Avi-Yonah et al. 2007: 468–9).

Given the issue of case law undermining the tax sovereignty of member states, while lack of agreement prohibits unanimous decisions on a common tax policy, the Commission drew up plans to harmonize the corporate tax base in the 2000s, as a way to provide a minimum level of harmonization. Member states would still be free to set their tax rates, but the tax base, namely the kind of corporate profits to be taxed, would be harmonized. The Common Consolidated Corporate Tax Base (CCCTB) has been the most significant project carried out by the Commission. The scheme aims to avoid discrimination, double taxation, and non-taxation, while lowering the compliance costs of firms that are subject to different tax jurisdictions (Agence Europe, 20 December 2006). According to the scheme, companies that do business in more than one member state can opt to apply a single set of tax rules and keep up contact with a single tax authority. Losses and profits made in different member states can be balanced. Goods transferred between different subsidiaries no longer need to be priced separately. Double taxation and administrative burdens can be avoided (Agence Europe, 10 February 2011). What sounds convincing here may, however, have significant problems of incentivization among member states. If a single member state administers tax

collection on the behalf of others, there is the danger of a 'competition in laxity' (Genschel 2007).

The Commission first envisaged publishing such a proposal in 2006, with the aim of making it effective in 2008, based on a communication on company taxation from October 2001. However, it was already known then that the UK, Ireland, Slovakia, Malta, Lithuania, Latvia, and Estonia objected to the plan (Euractiv, 4 April 2006). To cut a long story short, a decade later the issue is still on the agenda. In the meantime, the Commissioner responsible for this area repeatedly attempted to gain the support of the Economic and Financial Affairs (ECOFIN) Council.

Parallel to the debate on harmonizing the tax base, the Commission developed plans from 2001 onwards for the experimental use of 'home-state taxation' for small- and medium-sized enterprises (SMEs), as for them the tax issues that trans-border transactions entailed often proved prohibitive. The idea here was that the company calculates its taxes according to the tax-base rules of its home country, and the taxes are then paid to the host country according its tax rate. SMEs and member states were invited to opt for this pilot scheme, based on a bi- or multilateral treaty among member states (Agence Europe, 11 January 2006). However, member states did not take up this idea.

The financial crisis of 2008 and its aftermath appeared simultaneously as an opportunity to advance harmonization and to bring more pressing issues than the CCCTB onto the ECOFIN Council's agenda.[21] Ireland was put under pressure by some member states to raise its corporate taxes of 12.5 per cent as part of the bailout—but it successfully resisted (Agence Europe, 15 March 2011). France and Germany in particular aimed to advance the issue of tax harmonization, engaging in bilateral plans to bring about a common corporate tax beginning in January 2013 (Bundesministerium 2012b). The change in the French government after the election of President Hollande brought this to a halt. The Commission published its 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)' (COM (2011) 121/4) in 2011, but the proposal stalled.

A more recent priority for the Commission has been the fight against tax evasion at EU and member-state levels (COM (2015) 302 final). After a long period of fostering tax competition, this may seem surprising. Nevertheless, the financial crisis and the large extent of VAT 'carousel fraud', which reached new heights after the Eastern enlargement, has shifted the Commission's attention.[22] The Commission realized that the member states' insufficient fiscal revenues are

[21] Euractiv, 7 Jan. 2010, 'Parliament Sees Crisis as "Opportunity" for Tax Harmonisation', <www.euractiv.com/innovation-enterprise/parliament-sees-crisis-opportuni-news-223363> [accessed 10 May 2017].

[22] Euractiv, 12 Sept. 2012, 'Šemeta: Fiscal Union Involves Tax Cooperation', <http://www.euractiv.com/section/euro-finance/interview/emeta-fiscal-union-involves-tax-cooperation> [accessed 10 May 2017].

also an EU problem. Accordingly, the Commission began an initiative to fight letter-box companies which are established solely to save taxes. Such an active approach to the 'abuse' of the freedoms is new,[23] as the Commission and the Court have for a long time predominantly argued against the view that the freedoms can also be abused (Engsig Sorensen 2006; Kjellgren 2002; Schammo 2008). Reports in late 2013 on large multinational corporations' tax evasion in the EU, by the likes of Apple, Google, Starbucks, or Amazon, renewed interest in the CCCTB.[24] Interestingly, these discussions moved into different arenas, as the OECD and the G20 also took up the issue. Tax competition in the EU not only impacts EU member states with high taxation. The US has the highest corporate tax rates of any industrialized country (Genschel and Schwarz 2011) and is therefore highly concerned by the judicial facilitation of tax evasion in the EU. At the same time, the multinational companies whose tax practices were critically discussed in the EU operate globally.

Consequently, from 2013 onwards, the talks at the OECD on base erosion and profit shifting (BEPS) dominated supranational attempts to harmonize tax policy, resulting in concrete policy recommendations in 2015. It is interesting for our context that the constitutionalized case law of the ECJ was also significant for the discussion of policy recommendations in these OECD talks. To the surprise of non-EU OECD members, in some of the action areas, policy options that seemed desirable to other participants could not be considered, given that countervailing ECJ case law does not permit it (interview German Federal Ministry of Finance, 28 September 2015). The serious constraints case law poses were particularly apparent in the discussion of BEPS Action 3 on strengthening controlled foreign company (CFC) rules (OECD 2015) and BEPS Action 6 on preventing treaty abuse (Kemmeren 2014). It is interesting that, in addition to constraints on policymaking at the European and domestic levels, the constitutionalization of policies is now also making itself felt in international negotiations. Since global tax evasion is a serious problem, it has also become a concern beyond the EU that member states have lost a great deal of policy options.

Conclusion: No Exit from the Joint-Decision Trap

Through its case law, the Court can introduce powerful incentives for legislation at the EU level through which deadlock in decision-making—the joint-decision

[23] Euractiv, 26 Nov. 2013, 'Commission Starts Fight Against "Letter-Box" Companies', <http://www.euractiv.com/section/innovation-industry/news/commission-starts-fight-against-letter-box-companies> [accessed 10 May 2017].

[24] Euractiv, 19 Nov. 2013, 'Furore Over Tax Evasion Opens Door to New EU Proposal on Corporate Tax', <http://www.euractiv.com/section/innovation-industry/news/furore-over-tax-evasion-opens-door-to-new-eu-proposal-on-corporate-tax> [accessed 10 May 2017].

trap—can be overcome (Falkner 2011). But, in terms of taxation, pressure from the Court is not sufficient for the alignment of the preferences of an increasingly diverse set of member states, which are different sizes and are at very different stages of economic development. The Court's far-reaching case law to foster tax competition, therefore, has not led to an agreement on tax harmonization. In view of legislative deadlock, the Court started granting more leeway to member states, beginning with its *Marks & Spencer* ruling. However, this about-turn does not mean that the problem of case law interfering with member states' tax policies has vanished. Many options that were previously available to member states through tax policies have now been foreclosed. The constraints of constitutionalized case law even hamper international agreements, and the high number of preliminary references shows that, notwithstanding the Court's more cautious position, private actors are still motivated to litigate in order to lessen their tax bills.

In addition, the implications of the general retroactive effect of case law are particularly striking in this area. If the basis of tax policy can be altered retroactively, enormous sums may be at stake. In Case C-475/03 *Banca Populare*, €120 billion were claimed to be in question (Pantazatou 2013: 107–8). Of course, member states will overstate the damage incurred in court proceedings, but it is also then not entirely possible for the Court to take political responsibility for such sums of money.

Member states thus find themselves in a predicament. They cannot agree on harmonization, but nor can they live well under the constraints of case law. Much, therefore, depends on the leeway that domestic courts allow the executive, by referring or not referring cases, and whether the domestic administration follows all the rulings. We will turn to the crucial member-state level in the next chapter. It is interesting that, in this situation, pressure from international organizations like the OECD and the G20, which are much more loosely institutionalized than the EU, becomes relevant. Given the dilemma of judicial pressure and the political inability to act, tax policy may be an area where alternative policy measures need to be sought out. In view of the limited policy options available under case-law development, the more recent attempts to find a solution appear to have led to placing transparency obligations on multinationals for the paying of taxes in different jurisdictions and placing those same obligations on governments for tax deals that have been granted to them.

CONCLUSION

The cases in this chapter have shown how the market freedoms encroach on policies that member states have attempted to keep separate from the EU

through special provisions in the Treaties. The fundamental freedoms are interpreted broadly and are enforced by the Court, which is also the case in areas where member states have retained competences. To this end, the Court repeatedly reverts to formulations such as 'the powers retained by the Member States must nevertheless be exercised consistently with Community law' (*Schumacker* C-279/93 No. 21), which is called the ECJ's 'retained powers formula' by Azoulai (2011). '[A]lthough direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law' (C-374/04, No. 36).

In the area of citizenship and patient mobility, the Court has additionally repeatedly disregarded secondary law, as decided by the Council and the EP. In relation to the free movement of labour in particular, it should not be forgotten that the Court has time and again intervened against forms of discrimination that have arisen against EU citizens working in other member states. The Court, therefore, provides a necessary corrective. However, the extent of reverse discrimination against nationals demonstrates that the Court continuously seeks to broaden rights as a way of fostering integration. In doing so, it demands a 'certain amount of financial solidarity' from the member states. Can this be taken to imply that a re-embedding of markets has been taking place, as Caporaso and Tarrow hold? In such a process, the Court fosters social policy that member states would not agree upon, given the significant heterogeneity of their interests (Caporaso and Tarrow 2009). As Höpner and Schäfer (2012: 447) rightly point out, the Court neglects the necessary reciprocity between benefits and duties. It is likely, therefore, that the extended access to social services will result in a cutback in their provision. In negotiating the directive, the member states' governments were not willing to yield to the Court in the way they had done in relation to the Services Directive and the mutual recognition of goods regulation, which were discussed in the last chapter. Therefore, they left the rights of non-economically active EU citizens to access social benefits deliberately open in the directive. They opted for continued legal uncertainty rather than codification.

This chapter not only confirmed that taking a re-embedding perspective on the ECJ is overly optimistic the Patient Mobility Directive also showed how difficult it can be to codify case law, even if there is a sufficient majority. The new legal status quo raises many questions and falls far short of a desired level of legal certainty. The Patient Mobility Directive is also interesting, as it is the only case I have discussed in which the new member states had a particular position. They had not been targeted by case law at the time, in contrast to the old member states that were pushing for the directive. They objected to the right of the EU to interfere in this policy area. Some of them denied that case law has *erga omnes* effects. From what we know from the old member states, who also took time to understand the implications of direct effect and supremacy, it is plausible that the new member states differ in their cognizance

of case law. However, the preference to keep the polity reined in through case law is a rational strategy for containing its impact, as secondary law generalizes the effects of case law. We could therefore hypothesize that member states that oppose the direction of case-law development will resist its codification—in particular, if they do not trust the Court to be attentive to member states' signals. From the divergent assessments of EU law due to its broad expansion in membership in recent years, we can hypothesize that there are additional incentives for codification. The more member states differ in whether they follow the supreme and directly effective case law, the more it ought to be in the interest of those member states that adhere to case law to opt for codification, as a way to ensure a level playing field.

The failed Monti II regulations and the taxation case, finally, show the limits of pressure applied by the Court. Though case law set incentives for codification, member states could not agree on how to respond. In the case of Monti II, the frustration that secondary law could make a difference to constitutionalized case law resulted in failure. Unions and all those actors who disagreed with *Laval* and *Viking* preferred to live with case law than with codification that set out these constraints on collective action openly. For taxation, the Court backed down somewhat in 2005, in an about-turn that possibly amounted to reversion, lessening the legal pressure. However, the continued flow of preliminary references shows that private actors still have reason to expect a lessening of their tax bills with the help of the Court. In this situation where tax competition provokes more and more political contestation, we see repeated attempts to cope with this state of affairs, for instance by the Commission requesting that the member states' governments publicize their tax deals with large companies or by demanding that multinationals make how much tax they pay transparent in each of the member states. Reversion would set in were the Court to grant member states leeway that had been taken away before.

Nevertheless, the situation is puzzling. On the one hand, it has been claimed that single judgments by the Court can cost member states more than the bailout of Ireland (Pantazatou 2013: 78). On the other hand, collective action through legislation will fail. Secondary law can give the Court indications of member states' policy priorities, but it cannot divert from case law that interprets the Treaty. Moreover, the Court often does not follow secondary law but applies the Treaty, as was apparent in the case law on patient mobility where a regulation that set out a policy existed. Therefore, there is also a rationale to go along with case law that is not codified and generalized. It is puzzling that the far-reaching constraints of constitutionalized case law are not discussed more broadly in political terms. However, we have not yet analysed how member states react to case law in domestic politics when codification is absent. It may be the case that it does not impose many constraints in this arena with implications for their preferences on EU legislation. The next two chapters will focus on this question.

6

Europeanization With and Against the Odds

The Cases of *Meilicke* and *Zambrano*

The European Court of Justice's (ECJ) case law, as we have seen in the previous chapters, can deeply influence the course of European legislation, or even replace it. However, the European legislator does not necessarily respond, as the example of taxation showed. In addition to the European level, European case law may have significant domestic effects. By interpreting European law as supreme and having direct effect, and by attributing broad meaning to its rules, such as the four fundamental freedoms (of goods, services, persons, and capital), the Court imposes potentially significant constraints on the possibilities for member states to govern their economies and welfare systems.

Because of its constitutional nature, European case law is supposed to take immediate effect in the member states. Domestic courts must apply EU law directly if its meaning is beyond doubt (*acte clair* doctrine) or once its implications have been settled through ECJ case law (*acte éclairé*), without beginning another preliminary procedure. Established member states' policies are therefore vulnerable to becoming incompatible with European law in the course of ongoing case-law development. From this perspective, given the extent of competences that have been transferred to the EU, it has become increasingly difficult for member states to use their remaining national competences (Scharpf 2009). In cases of dispute, what remains of national autonomy to act depends on the ECJ (Everling 2003: 878).

However, courts are 'reactive' actors (Conant 2012), dependent on the implementation of their rulings. Member states could simply insist that they are not concerned. They may argue that case law only relates to specific cases and has no generalized *erga omnes* effect, as it is only valid *inter partes* for the parties involved in the judicial dispute. If domestic courts turn a blind eye—and member-state governments, administrations, and parliaments do not react—the impact of case law will be small if the Commission does not apply pressure.

Research on Europeanization analyses how integration affects member states. However, it focuses predominantly on the implementation of European secondary law. It mirrors the research on European integration processes as both share a tacit assumption that integration only proceeds when member states and the EU's political institutions explicitly agree to pool policies. Similar to the European level, the impact of the Court is also neglected at the member-state level. Such a narrow focus could be entirely suitable for Europeanization research should far-reaching case law only be significant when it is codified in secondary law. This argument is advanced by Wasserfallen:

> When we take implementation problems and contained compliance seriously, it becomes evident that the potential of judge-made law is limited. Ipso facto, I argue that activist judicial decisions in salient policy fields will influence integration and the everyday lives of Europeans after being incorporated into new legislation. (Wasserfallen 2010: 1142)
>
> In salient policy fields, activist Court decisions cannot by themselves effectively influence Europeans' everyday lives. (Wasserfallen 2010: 1142)

Following Wasserfallen's argument, we should not be able to detect any direct effects of Europeanization, as derived from case law, on member-state policies. This might be regarded as the equivalent to a null hypothesis for analysing the impact of case law on member states. According to Wasserfallen, case law's sole importance is its impact on the process of European integration, which I analysed in the previous chapters. From this perspective, Europeanization research justifiably has a narrow focus. The opposite assumption would be that member-state executives, legislatures, and courts do in fact abide by the ECJ's case law, given its supreme nature. Thus, member-state administrations, in their understanding of themselves as operating under the rule of law, would automatically adapt to supreme European case law, just as they would take up the rulings of their own domestic high courts. Consequently, research on Europeanization would have a blind spot.

One can thus set out to study the Europeanization effects of case law with very contradictory expectations. Research on Europeanization may justifiably only focus on implementation research when there is no direct reaction from the member state to case law. There is 'contained compliance', as Lisa Conant (2002) has argued. However, if there are national responses to EU case law, the impact is much more complex. In contrast to secondary law, which is shaped by the member states collectively in the Council, the implications of case law for member states are more legally uncertain. Secondary law consists of rules that have to be implemented. Case law rarely makes prescriptions in this sense; it results from the examination of single issues, in one of the current twenty-eight member states, and has uncertain implications for similar but distinct conditions in other member states. In this way, member states' domestic regulations face challenges to their legality under European law. Moreover,

when the ECJ is called upon to rule on an instance of incompatibility between a domestic and a European norm, it often prohibits certain existing practices that are followed by member states or forecloses previously available political options. Examples of 'non-action' are, however, difficult to research (Bachrach and Baratz 1962; Schmidt et al. 2008). When policy options are foreclosed, member states may also search for alternative means to realize their policy objectives. These compensatory measures, then, are also a Europeanization effect.

In the following section, I briefly recapitulate how research on Europeanization has a blind spot when it comes to the impact of European case law. Case law can necessitate decisions, as well as non-decisions (Bachrach and Baratz 1962). Given higher levels of legal uncertainty, and the possible double emphasis of both demanding and prohibiting certain actions, it is likely that case law serves as an opportunity structure for different actors. In order to approach the topic, I will contrast two case studies in which markedly different member-state reactions to case law arose: the German reaction to the *Meilicke* tax cases and the Irish reaction to the *Zambrano* case. Germany had feared high tax losses from the *Meilicke* tax cases. As might be expected from a contained compliance perspective, this was resisted as much as possible. *Meilicke* thus confirms the 'null' hypothesis that case law has no or little direct impact on the member-state level. In a second judgment, the Court fine-tuned its case law, thereby limiting its potential implications. A much more unexpected development resulted from the *Zambrano* case in Ireland. Although it was a case from Belgium in a politically salient policy field—the citizenship rights of third-country nationals—Ireland responded with several measures. As a result, this case allows me to refute the 'null' hypothesis by demonstrating that member states *do* respond directly to case law. The juxtaposition of these two cases provides the foundation for studying the issue of member-state reactions to case law more systematically in the chapter that follows this one. It should not be forgotten that the question of member states' responses to case law also feeds back into the processes discussed in Chapters 4 and 5. If member states implement changes to domestic policies in response to case law, they will pursue different preferences in relation to codification than if they simply ignore the implications of case law.

RESEARCH ON EUROPEANIZATION

Research on Europeanization analyses the impact of integration on member states. This research, however, has largely concerned itself with how member states comply with European secondary law and therefore focuses mostly on the implementation or, more specifically, the transposition of directives. This

shows how deeply integration research is still rooted in the intergovernmentalist paradigm: member states, it is assumed, give themselves rules at the European level, which they then have to implement. That European integration also develops outside of the control of member states is acknowledged abstractly, in particular when the ECJ's power is discussed, but little attention is paid to its implications. In one of the few early articles to explicitly refer to the domestic impact of European law, Knill et al. (2009) only mention that regime competition between administrative systems has an indirect effect. They regard this as one 'neglected face of Europeanization'.

The narrow focus of research on Europeanization is surprising. Regulations that are already directly effective, although they make up the bulk of European secondary law, are rarely analysed (Treib 2014: 16). This probably has methodological reasons. Data on infringement procedures against member states are as readily available as parliamentary documents on the national transposition of directives (Töller 2010). Regulations that are directly effective, in contrast, would need to be researched in relation to their implementation, namely the way in which their stipulations are handled by the domestic administrations of the current twenty-eight member states, which is much more difficult. In his overview of research on Europeanization, Treib (2014) distinguishes between four different waves of research. Research originally assumed that member-state compliance was largely determined by the 'goodness of fit' between domestic policies and European demands (Knill and Lenschow 1998; Börzel and Risse 2003; Héritier 1995). This institutionalist approach proved too simple, however, as it assumed that all domestic actors prefer the status quo policy. As many domestic actors seize on EU legal requirements as an opportunity structure, it is relevant to focus on their preferences. In his research on compliance with EU directives, Treib (2014) shows that research on Europeanization has become very complex, no longer lending itself to simple hypotheses, such as the one on 'goodness of fit' between EU law and domestic conditions that determine compliance.

The impact of case law is particularly difficult to research (Schmidt et al. 2008). Treib (2014) includes this research under the most recent fourth wave. The ECJ's case law, typically, decides on the compatibility of a specific member-state rule with supreme European law. Due to institutional heterogeneity among member states, the implications for other member states are often contested and unclear at the national level until further court cases evolve. Moreover, case law does not necessarily only require decisions, but also non-decisions, where governments are asked to halt certain policies (Schmidt et al. 2008). Alternatively, they may not be directly called upon to take action at all; instead, they may only face strong indirect pressures, as is the case in regulatory competition.

When considering these differences between the transposition of directives and the impact of case law, the typologies of member states' reactions, which

are identified in the literature on Europeanization, may need some modification. They do not capture the ambivalence of case law, which does not give general policy directions. They do not pay attention to non-decisions and neither do they take the indirect effects of case law into account, such as regime competition or compensatory measures. To give an example, Radaelli, in a much-cited typology, distinguishes between inertia (no domestic response), absorption (limited response), transformation (far-reaching change), and retrenchment (active resistance) (Radaelli 2003).[1] Börzel and Risse distinguish between different degrees of compliance in the form of absorption, accommodation, and transformation (Börzel and Risse 2007). In her early research on the impact of case law, Conant found contained compliance (Conant 2002). While single judgments may be far-reaching, member states draw no general policy lessons from them, Conant argues; consequently, their impact scarcely surpasses an individual case. She distinguishes between contained compliance, restrictive application in secondary law, and pre-emption, which avoids future judicial interference, as the dominant responses to case law (Conant 2002: 32–3). This finding resonates with Wasserfallen's argument, cited earlier. Should this prove to be the case, a typology of member states' reactions to case law would have to focus more on retrenchment and inertia rather than on absorption and transformation.

With an explicit focus on the impact of case law, Blauberger (2012) differentiates between escape routes, through which member states attempt to find alternative means of realizing original policy goals, and regulatory surrender. When adapting to case law, member states may choose 'emulation' as a strategy, where they adopt policies which have been vetted by the Commission and/or the Court in other member states (Blauberger 2012). In an attempt to come to grips with the question of when member states are likely to follow up on ECJ rulings—and when they are more likely to simply 'contain justice'—Blauberger (2012) holds that it is crucial to ask to what extent member states can tolerate the legal uncertainty that results from ongoing case-law development. Thus, he includes the ambiguity of case law, which is absent from other Europeanization typologies. Blauberger argues that member states respond partly with contained compliance and partly with 'anticipatory obedience'. Member states are unlikely to react if the challengers of the regulatory status quo have to bear the cost of legal uncertainty. However, if legal uncertainty and ongoing case-law development imply costs for member states, it is much more likely that they will respond proactively. The costs of legal uncertainty depend on 'Time constraints, the population of similar cases and each party's worst case scenario for an eventual ECJ ruling' (Blauberger 2014: 458).

[1] For an application of these distinctions, see the example of the implementation of the case law from *Rüffert* in the German states as discussed by Sack (2012).

Furthermore, he specifies: '[W]hen legal uncertainty undermines political planning capacity or even involves great financial risks, and when the spectrum of potential litigants becomes too vast, member state governments anticipate future legal challenges by adjusting domestic regulation' (Blauberger 2014: 472).

Thus, Blauberger focuses on the cost of ignoring case law and of risking further case-law development. For member states, it is crucial, if the worst-case scenarios that result from case-law development include liability issues or other costs that are incurred from periods of disobeying case law. As has been mentioned, given that the ECJ interprets EU law as it stands, rulings normally have retroactive effect. This does not matter for all legal issues in an equal way. For instance, one would expect an individual third-country national who is denied certain rights to be much less likely to claim compensation than a company if tax privileges are at stake. In addition, special attention must be given to non-decisions as reactions and to the indirect effects of case law.

Against this background, summarized in Figure 6.1, I will now analyse two case studies concerning member states' reactions to ECJ case law. Both deal with an area of significant political salience: corporate taxation and the residence rights of third-country nationals. These two case studies, which have very different outcomes, show that member states' reactions to case law do not follow a simple contained compliance approach. On this basis, the following chapter will systematize the findings on the Europeanization of case law.

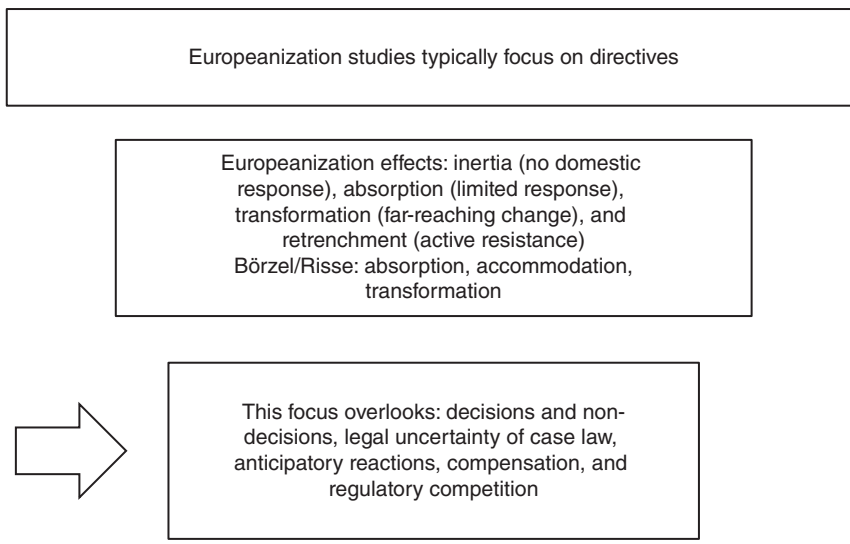

Figure 6.1. The blind spot of research on Europeanization

THE *MEILICKE* CASES

The *Meilicke* tax cases (C-292/04, 6 March 2007, and C-262/09, 30 June 2011) are a suitable starting point for our discussion of the effects of case law on member states, as they present a national worst-case scenario. The cases were referred by the lower tax court of Cologne and dealt with the question of discriminatory tax discounts for the dividends of EU companies under the imputation system that was valid in the 1990s. In the second referral, the Cologne court asked procedural questions that arose from the first judgment. In the *Meilicke* case, an individual litigant (a lawyer) gave the German tax system a serious blow. Germany claimed possible tax losses of €5–10 billion (interview Federal Ministry of Economics, 12 February 2013). Therefore, the cases are an example of how member states deal with judgments that potentially impose high budgetary costs upon them, while illustrating the motivation of litigants to seek the assistance of European law. If the Court is assumed to be responsive to member states' worries about case law, as an intergovernmentalist position would hold, the result would be reduced incentives for litigants to take the time and cost of litigation upon themselves. The more the Court is prepared to harm member states' interests to the benefit of litigants, the higher incentives for litigation will be. *Meilicke*, therefore, provides evidence of the threat individual litigants pose in bringing down member-state policies with the help of EU law.

In the following, I will start with an outline of the litigant: Meilicke. I will then go on to give the factual background for the case and will continue by discussing the Court's rulings and their consequences.

Meilicke

The heirs of Heinz Meilicke initiated the case that led to the two references. Heinz Meilicke was a tax lawyer, practising in Bonn. His son, Wienand Meilicke, was of the same profession and a partner in the same office. As a specialist in tax law, Wienand Meilicke had already gathered experience in using EU law as a lever against German tax law. The first case was C-83/91 *Meilicke v ADV/ORGA AG* and was related to the second company law directive. This case was about shareholders' rights to information concerning the financial health of the company. As AG Tesauro noted in his opinion on the case, Meilicke had initiated it in order to receive a comment from the ECJ on 'his writings concerning the legality of the theory of disguised non-cash subscriptions' (Arnull 1993: 616). In doing so, the ECJ would also provide a comment on the Bundesgerichtshof (Federal Court of Justice), which had

developed the case law that Meilicke was criticizing in his writings. The ECJ, however, refused to rule on the case, which it considered to be hypothetical. In parallel to the cases on dividend taxes, Meilicke also initiated Case C-76/05 *Schwarz and Gootjes-Schwarz* (11 September 2009), which dealt with the discriminatory taxation treatment of boarding-school expenses. German tax law only allowed deductions for German schools but not for expenses incurred from schools in other member states, in this case Scotland (Herlinghaus et al. 2010). Moreover, Meilicke was active in pushing the Commission to start an infringement procedure against Germany for not implementing the consequences of the *Centros* and *Überseering* rulings, which related to certain kinds of non-resident companies that had been excluded from its fiscal-unity regime (*Organschaft*) for corporation tax. This case was closed once Germany changed its law (Meilicke 2009).[2]

The Facts Concerning *Meilicke I*

At issue in the case were the dividends paid by Danish and Dutch companies to the late Mr Meilicke between 1995 and 1997. Before 2001, Germany taxed dividends according to the imputation system. To avoid the double taxation that arises when companies pay taxes on their profits and shareholders pay taxes on the dividends, shareholders received a tax rebate on their income tax of three-sevenths of the dividends for the company taxes that had been paid. These were only granted, however, to dividends paid by German companies. This discriminatory rule violated the free movement of capital, making an investment in companies in other EU member states less attractive. As the free movement of capital had been directly effective since 1988, Germany would have had to compensate for discriminatory tax treatment since that date. The heirs to the late Mr Meilicke addressed the tax authorities in October 2000, after the ruling in Case C-35/98 *Verkooijen*. In this case, the Court had ruled against a discriminatory income tax exemption on dividends. When the German tax authorities rejected income tax credit for dividends from companies in other member states, Meilicke initiated the proceeding at the lower tax court in Cologne, whence the request for a preliminary ruling resulted (Rainer 2005). It should be mentioned that, during the legal procedure, Meilicke repeatedly aimed to expand his claims,

[2] The case reference number was 2008/4909. In Mar. 2012, the Commission handed the case to the ECJ (IP/12/283). The proceeding was then closed, after Germany changed its legislation.

including dividends from companies situated in the European Economic Area (EEA) and also overseas.[3]

Germany changed the law in 2001, ending the discriminatory treatment with the *Halbeinkünfteverfahren*.[4] The question raised in the *Meilicke* case was to what extent shareholders could claim tax credit for the dividends of EU companies between 1988 and 2001. The case was unusual, as opinions from two Advocate Generals (AGs) were given. In the first opinion in November 2005, AG Tizzano argued that dividends had to be treated in a non-discriminatory way, but that the retroactive effects of the case should only go as far back as mid-2000, when the *Verkooijen* case had been ruled upon. This would have been a good outcome for Germany, but because limiting the temporal effects of the case would have been a bold judicial step, the case was transferred to the Grand Chamber, which reopened the oral procedure. A second hearing took place, in which eleven member states (Germany, the Czech Republic, France, the Netherlands, Denmark, Greece, Spain, Hungary, Austria, Sweden, and the UK), the Commission, and Mr Meilicke all gave opinions (AG Stix-Hackl, No. 5a). AG Stix-Hackl issued her opinion in October 2006 (Rainer 2006). She argued against a retroactive limitation of the case. Such a limitation could only be granted in exceptional circumstances as the Court had done in the *Defrenne II* ruling (No. 12). An 'overriding reason in the general interest' could not be related to the budget, she argued (No. 16). A limitation of the temporal effect needed to be restricted to the member states to which it was granted (No. 14) and could only be given in a judgment that interpreted the contentious norm for the first time (in this case, the *Verkooijen* and *Manninen* (2004) rulings, No. 19). She also claimed that the German government had not provided sufficient evidence as to the 'serious economic repercussions' (No. 7, 62) of the retroactive ruling. Moreover, she pointed out that the fact that the German government had submitted the draft law to change the taxation of dividends in 2001, before the *Verkooijen* ruling, showed the government's awareness that it had breached EU law (No. 55).

This opinion gave rise to a very critical press release from the German Federal Ministry of Finance.[5] In this statement, the Ministry argued that it could face losses of up to €5 billion in 2005 and 2006, endangering fiscal consolidation, which was characterized in the AG's opinion as *grotesk* (preposterous).

[3] European Commission, Schriftsatz Rechtssache C-262/09, 27 Nov. 2009, pp. 28ff. JURM 2313 (Meilicke II, Opinion of the Commission, on file with the author). However, the Cologne court refused to expand the case.

[4] The half-income procedure charges income tax on only half of the dividends received.

[5] Bundesministerium der Finanzen, Pressemitteilung 121/2006: 'Verfahren vor dem EuGH gefährdet massiv deutsche Haushaltskonsolidierung', 5 Oct. 2006, <http://presseservice.pressrelations.de/standard/result_main.cfm?aktion=jour_pm&r=250777&quelle=0&pfach=1&n_firmanr_=100106&sektor=pm&detail=1> [accessed 10 May 2017].

The Court's Ruling

In its ruling on the *Meilicke I* case in 2007, the Grand Chamber emphasized that it had already decided on the violation of the freedom of capital through an imputation system in 2004 in the Finnish Case C-319/02 *Manninen*. Articles 56 and 58 of the Treaty Establishing the European Community (TEC) (Articles 63 and 65 of the Treaty on the Functioning of the European Union (TFEU)) precluded a restriction of tax credit on dividends paid by German companies. The real relevance of the ruling was, therefore, not that the imputation system violated the Treaty but that the Court refused to limit the retroactive scope of the ruling, despite the fact that Germany claimed significant tax losses. The Commission and the eleven intervening member states had argued in favour of such a limit, when member states could claim serious economic harm. In addition, AG Tizzano had argued for limiting the temporal effect back to the date of the *Verkooijen* ruling in mid-2000, while AG Stix-Hackl had taken another view.

The litigant himself interpreted the ruling as requiring the Court to determine any retroactive effects when first deciding on a case (in this instance, *Manninen*). Only in this way could discriminatory treatment among member states be avoided. Otherwise, there was a danger that some member states would change their tax rules only to find that others would be later exempted from a retroactive effect, as the Court was lenient with the largest violators of treaty obligations. As a consequence, after the *Meilicke* case, member states would have to state any serious economic consequences of tax rulings the first time that the ECJ rules on a question. Germany, in contrast, had foregone the opportunity to submit an observation to the *Manninen* case, despite the similarity between the German and Finnish imputation systems (Meilicke 2007).

Meilicke II

In the second Meilicke case, the German court asked how it should apply the previous ruling, as the amounts of company tax paid in other member states were difficult to determine. The question was whether shareholders could claim a lump sum or act on an estimate, what kind of documentation they would have to provide, and whether German tax authorities were in any way obliged to seek the assistance of tax authorities in other member states in order to determine what taxes had been paid there.

A further question in the *Meilicke II* case concerned a change of Section 175 para. 2 of the German General Tax Act. In this section, a second sentence had been inserted after Case C-319/02 *Manninen* on the Finnish imputation system, which prohibited the late submission to the authorities of further

evidence on taxes paid in other member states. Effectively, this hindered taxpayers from claiming retroactive tax credit that was due after *Meilicke I*. In its ruling on *Meilicke II* in 2011, the Court stated that Germany had violated the *effet utile* of the Treaty by this addition to the Tax Act. Tax authorities could not apply this rule when they dealt with companies from other member states. Shareholders had to have a transitional period for claiming their tax credit. It was for the member-state court to establish the modalities. Tax authorities are not allowed to simply act on an estimate or a lump sum. They are also not required to acquire information themselves on the basis of the cooperation agreement between member states' authorities. Instead, shareholders must submit documentation on the taxes paid in other member states, and the tax credit that would be claimed was limited by this amount.

The Federal Fiscal Court (Bundesfinanzhof) gave its final judgment in the *Meilicke* case in early 2015 (Sydow 2015).[6] It demanded the documentation of taxes paid in other member states that were of an extent that the litigants were unable to meet. Despite the originally bold ruling of the ECJ, there were only meagre direct benefits for the Meilicke heirs. As a consequence, Meilicke sent a complaint to the European Commission requesting an infringement procedure[7] and also initiated a constitutional complaint at the German Constitutional Court (Meilicke 2015). With many tax statements still open, the final consequences of the Meilicke ruling remain unclear. The considerable time lag between the start of the litigation in the year 2000 and the final judgment fifteen years later points to an additional factor that makes research into the Europeanization effects of case law difficult. While EU secondary law comes with clear transposition dates, the drawn-out process of case-law development ameliorates and blurs its effects to a great degree.

Assessing *Meilicke*

It is difficult to assess the real importance of the *Meilicke* cases. By imposing relatively strict requirements for documentation on shareholders, the Court cushioned the *Meilicke* ruling. While the Court outlined that demands for documentation must not be prohibitive, it put the burden of proof (for the company taxes that had been paid) on the shareholders that claimed income tax credit. This limited the fiscal repercussions. The Court, it appears, shied away from the high figures that had been claimed by Germany, tax losses for which it was difficult to take political responsibility. However, Germany had to adapt its tax rules, as *Meilicke* was another example of an ECJ

[6] BFH, Urteil v. 15 Jan. 2015—I R 69/12; published 10 June 2015.

[7] Available at: <http://www.meilicke-hoffmann.de/Beschwerde%20EU-Kommission.pdf> [accessed 10 May 2017].

ruling that restricted member states' leeway. In light of the risk of rulings having retroactive effects, member-state governments need to take great care in their monitoring of tax cases at the ECJ.

The German reaction to *Meilicke* conformed to theoretical expectations, but only in part. Germany appeared to be relatively passive, as it clearly opposed the fiscal implications of the *Meilicke* case. This follows the argument that member states ignore and oppose case law whenever this conflicts with their policy preferences. Nevertheless, after Case C-35/98 *Verkooijen* in mid-2000, Germany changed its dividend tax law in 2001 in the *Steuersenkungsgesetz (StSenkG)*, which was part of the general company law reform of the red–green coalition. It had thus realized the *erga omnes* effects of *Verkooijen*, although this was not noted in the legal proposal or the parliamentary debates.[8] Graetz and Warren Jr claim that several member states abandoned their imputation system in anticipation of *Manninen* (Graetz and Warren Jr 2006: 1211). In addition, a study of the EP argues that, after the *Manninen* case in 2004, the German legislator was well aware of the incompatibility of the German tax system with the Treaty but deliberately stayed passive. In allowing member states to limit the retroactive effects of rulings, as requested by the German government in the *Meilicke* case, incentives for non-compliance would be created (Malherbe et al. 2011: No. 51).

Despite the significant potential fiscal costs, there were no apparent moves to avoid the case-law development of *Meilicke I* and *II*. This points to an additional relevant consideration: in very high-cost situations for governments, it may be advisable to wait for additional case law rather than to avoid it (interview Federal Ministry of Finance, 28 September 2015). This allows the opportunity for the Court to fine-tune its case law and ameliorate its impact.

We will now turn to the *Zambrano* case, and the Irish reaction to it. Since it concerns the residence rights of third-country nationals, the case similarly dealt with a politically salient issue. The case originated in Belgium, so one would not have expected there to be large repercussions in other member states like Ireland. Nonetheless, there was a marked Irish response, which is interesting in how it contrasts to theoretical expectations, as well as in light of the findings in the *Meilicke* case.

THE COURT'S ACTIVISM ON CITIZENSHIP RIGHTS

As we saw in Chapters 3 and 5, the Court has developed EU citizenship into a status that provides comprehensive rights in other member states. The Court

[8] See the documents on this law at: <http://dip.bundestag.de/extrakt/14/019/14019321.html> [accessed 10 May 2017].

has done this in two ways. On the one hand, it has extended the privileges of free movement for workers to those who only engage in limited work and are not able to cover the costs for their subsistence. On the other hand, it has transformed symbolic EU citizenship, arguing that it 'is destined to be the fundamental status of nationals of the Member States' (*Grzelczyk* C-184/99 No. 31). It is based on an analysis of these Court-driven citizenship rights that Wasserfallen (2010) has argued that case law is only significant when it is codified in secondary law.

Might member states simply ignore the case law on citizenship rights if there is no legislative follow-up? Do they only respond when they are under pressure from the Commission? Or are they obedient compliers, making the necessary changes that arise from case law as the rule of law requires? The *Zambrano* case can be regarded as one of the most notable instances of judicial activism in recent years. The Court significantly broadened the residence rights of third-country nationals (TCNs) in a purely internal situation, where EU law does not normally apply. This ruling, with its high disregard for sovereignty, makes it a least-likely case for member-state compliance (Gerring 2007). The same can be said in relation to the addressees: individual actors are less apt to enforce their rights than corporate actors are. This should be particularly true for TCNs. As a least-likely case, we would expect that if case law leads to domestic adaptations here, case law should generally be influential.

THE *ZAMBRANO* CASE

Case C-34/09 *Zambrano* (8 March 2011)[9] was a reference from a Belgian court. A Colombian couple, Mr and Mrs Zambrano, had lived in Belgium, initially without refugee status and then with registered residence status; they had not been deported because of the civil war in Colombia. Mr Zambrano had worked since 2001 for extended periods without a work permit while paying social security. Their two children, born in 2003 and 2005, had Belgian nationality, which had been granted at the time by the Belgian Nationality Code (Article 10(1), see Opinion AG Sharpston No. 16).[10] When Mr Zambrano lost his job, his lack of a work permit meant that he did not receive unemployment benefits. The Brussels court posed several questions to the ECJ, concerning the right of residence and to work of Mr Zambrano. The case's allocation to the

[9] This part of the chapter draws on Schmidt (2014).

[10] From Dec. 2006 onwards, this possibility no longer existed in cases where parents could apply for another nationality for their child (Opinion AG Sharpston, No. 17), which the Zambranos could have done.

Grand Chamber underlined its legal relevance. Six governments participated in the case with observations (Germany, Austria, Denmark, the Netherlands, Poland, and Greece). All governments argued—along with the Commission, it should be noted—that this was a purely internal case with no transborder element, having no relation to EU law. However, in her opinion, AG Sharpston supported the position of Mr Zambrano and pointed out several possible legal justifications. Her far-reaching interpretation of EU legal entitlements attracted a good deal of attention. Most notably, she argued against the view that it was a purely internal case and for a prohibition of reverse discrimination against nationals. This would imply a major extension of the relevance of EU law, as well as the ECJ's case-law development.

With the argument that children could not be deprived of the benefits of their EU citizenship, the Court followed the AG in its ruling, giving Mr Zambrano the right of residence and to work. However, the Court was silent on which parts of the AG's reasoning it followed. While rights established for cases with a cross-border element were extended to internal situations, the scope of these rights remained unclear (Van den Brink 2012: 286).

Fine-Tuning *Zambrano*

Drawing on Obermaier's finding that the Court fine-tunes its case law in order to keep its implications within acceptable limits (Obermaier 2008b: 746, 751), it is relevant to ask how case law developed after *Zambrano*. The implications of the *Zambrano* case would clearly be very different for member states, depending on which TCN family members could indirectly profit from the EU citizenship of relatives. Between the decision on *Zambrano* in the spring of 2011 and late 2012, several cases were decided upon, specifying the ruling's meaning and effectively narrowing down its scope (see also De Somer 2016).

Case C-434/09 *McCarthy* (5 May 2011) followed soon after *Zambrano*. A British citizen, who also held Irish citizenship, had never left Northern Ireland, where she lived from social assistance. After getting married to a Jamaican citizen, who had no right of residence in the UK, she got an Irish passport in order to argue that she was an EU citizen living in the UK with the right to family reunification. The UK, Denmark, Estonia, Ireland, and the Netherlands intervened. The third chamber of the Court denied McCarthy's claim, as it could not be established that she would be forced to leave the EU, while emphasizing that EU citizens cannot be deprived of the 'genuine enjoyment' of their EU citizenship. Again, some issues remained unclear. As Wray (2011) argues, the ECJ failed to clarify whether McCarthy could not be joined by her spouse on the grounds that she was economically inactive or because

she had never moved. However, the implications of the *Zambrano* ruling were narrowed—or fine-tuned—(Obermaier 2009: ch. 9) by this judgment.

The same can be said of Case C-256/11 *Dereci and others* (15 November 2011). There were five joined cases handed to the ECJ by the Austrian administrative court, and they were ruled upon, as *Zambrano* had been, by the Grand Chamber. In all these cases, which had different factual circumstances (one also involved the association agreement with Turkey), Austria had not allowed the TCN spouses of Austrian citizens residence or had denied it to the grown-up children of TCN Austrian residents, although these children were economic dependants. Again, several member states joined the case: the governments of Austria, Denmark, Germany, Ireland, Greece, the Netherlands, Poland, and the UK all argued that this was a purely internal situation with no relevant connection to EU law. For the member states, this was an important case, and the fact that the Court had allocated it to the Grand Chamber could have signified important new legal developments. A transfer of the *Zambrano* argument on dependent children to different kinds of TCN family members would have had significant quantitative consequences for migration, and member states were still concerned about AG Sharpston's arguments in the *Zambrano* case that reverse discrimination against nationals was prohibited in EU law. This would have seriously hampered member states' regulatory autonomy. The Court again emphasized genuine enjoyment of EU citizenship, which, however, only sets in if 'the territory of the Union as a whole' had to be left. EU law did not grant the right of family unification as such. Therefore, as far as all the cases were concerned, right of residence in Austria did not follow from EU citizenship rights. AG Mengozzi had argued similarly.

Case C-40/11 *Iida*, for which a decision was reached in November 2012, concerned a referral from a German court and was ruled upon by the third chamber. The governments of Germany, Belgium, the Czech Republic, Denmark, Italy, the Netherlands, Poland, and the UK joined the case, demonstrating once more the great importance governments attach to citizenship cases. Mr Iida, a Japanese national, worked in Germany and had joint custody of his German child with his German wife, from whom he had separated and who had moved to Austria with their daughter. He could have received right of residence on the basis of his work permit, but he demanded it as a spouse of an EU citizen. The Court, however, ruled that Mr Iida could not derive right of residence from the EU citizenship of his family.

Cases C-356/11 and C-357/11 *O and S Maahanmuuttovirasto* (6 December 2012) questioned whether the principles established in the *Zambrano* ruling also cover a TCN stepfather who is an economic dependant. These two cases, which were decided upon by the second chamber, were referred by a Finnish court, and the Finnish, Danish, German, Italian, Dutch, and Polish governments joined the case. The Court ruled that Article 20 of the TFEU did not

deny member states the right to refuse a residence permit, but that the court that had referred the case had to ascertain whether the genuine enjoyment of the children's EU citizenship rights was violated or not, also taking into account the provisions of the Family Reunification Directive. As a result, the *Zambrano* reasoning was again not extended but rather handed over to the domestic court for it to reach its own decision.

Several cases also followed in 2013 that refined the *Zambrano* reasoning still further. Case C-87/12 *Ymeraga*, which was decided upon in May 2013, involved a situation similar to that in the *Dereci* case. On this occasion, Luxembourg had denied residence to a third-country national parent. Again, the Court saw no general right to family reunification. Case C-86/12 *Alokpa* from October 2013 concerned children of French nationality, who had never resided in France and had no contact with their French father. The question was whether Luxembourg could expel the TCN mother, if this resulted in the children having to leave the EU. As they had the possibility to live in France, the Court backed Luxembourg's right to deny residence.

Cases C-456/12 *O* and C-457/12 *S*, which were decided upon in March 2014, questioned to what extent transborder movement is necessary to enjoy the privilege of family reunification with TCN family members under EU law. AG Sharpston had raised this point in her opinion in the *Zambrano* case. In relation to its purely internal nature, she had asked whether it would have made a difference if neighbours had taken the children to 'Parc Astérix in Paris' (No. 86), which raises the difficult question of whether a single visit is sufficient for establishing relevance to Community law. In these cases, a Dutch national had lived abroad for some time, and another Dutch national had worked abroad on a regular basis. The Court clarified that residence for more than three months in another member state is necessary to establish residency rights for TCN family members and that regular weekly trips to another member state are insufficient.

In summary, this series of cases closely corresponds to Obermaier's argument on the fine-tuning of jurisprudence. The original *Zambrano* case, taken together with AG Sharpston's far-reaching argument and the scant reasoning that the Court itself provided, threatened to constrain member states' migration regimes in a serious way. However, between March 2011 and December 2012, the ECJ limited the impact of the *Zambrano* ruling to cases where EU citizen minors would be forced to leave the EU were TCN family members not allowed to stay. The Court confirmed that EU citizenship does not encompass a right to live in a particular member state with all family members but that it is up to the member states whether they grant these rights. The speed of this fine-tuning is very interesting. It shows how the EU's legal community, along with lawyers and courts in the different member states, quickly took up the opportunity provided by new case law and sought to establish the scope of its meaning.

However, the fine-tuning should not be mistaken for a reversal of the previous case law. With the *Zambrano* ruling, a bold step in broadening the implications of EU law was taken. Subsequent fine-tuning did not reverse this case; the Court only elucidated which family members could profit from the legal reasoning, thereby refraining from extending the reasoning beyond dependent children. Nevertheless, in light of the research finding that case law has a restricted impact when it is not followed up by secondary law, we should expect the *Zambrano* ruling to have little impact on member states. However, this highly controversial ruling led Ireland to react immediately, without playing for time.

MEMBER STATES' REACTIONS

TCNs are comparatively weak political actors with few rights. Governments do not have to fear liability claims when they restrict their rights. However, they may possibly be fearful of politicization through active NGOs and pro-bono legal services. This situation is basically the same in all member states. However, member states were not all affected in the same way by the *Zambrano* judgment. The largest impact results from *ius soli* nationality being granted at birth (Honohan 2010), which was only the case in Ireland up until 2004. Member states' citizenship regimes are quite complex, generally combining *ius soli* and *ius sanguinis*, and have different conditions attached, such as prior parental residence or parental birth in the country.

Alongside citizenship, some other legal positions are relevant. The Family Reunification Directive (2003/86/EC) gives TCNs the option of applying for the right of residence of their spouse and minor children, under the condition that the applicant has had a residence permit for at least one year; this includes the option of long-term residence. Ireland, however, had opted out of this directive (Becker 2014: 105). Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter of Fundamental Rights of the EU defend 'respect for private and family life'. The ECHR is relevant for purely domestic situations, while the Charter only applies when member states implement EU law (Article 51(1)) (Van den Brink 2012: 283). However, in its interpretation of Article 8, the European Court of Human Rights (ECtHR) argues for a narrow interpretation, in which childbirth alone does not grant an entitlement to stay, given that the family could live together in another place (Van den Brink 2012: 285).

This proactive Irish stance allows for the further analysis of the conditions under which member states comply with case law.

The Irish Reaction

Of all the member states, Ireland was the one that was most affected by the *Zambrano* ruling, since it had granted unrestricted *ius soli* rights up until 2004. In the observation submitted in the *Zambrano* case, the government had warned of the 'floodgates' being opened were the Court to grant EU citizenship rights in this purely internal situation (AG Sharpston, No. 114). 'Counsel for Ireland painted a dramatic picture of the wave of immigration by TCNs that would inevitably result if Mr Ruiz Zambrano were held to enjoy a right of residence derived from his children's Belgian nationality' (No. 112). Coincidentally, one day after the ruling on 8 March 2011, the government changed and the new Minister for Justice from the Fine Gael party, Alan Shatter, immediately announced the initiation of a reassessment of all cases (approximately 120 of them) where deportation had been considered before the courts. The National Naturalization and Immigration Service (INIS), the administration responsible for this area, even looked into cases where deportation had already taken place. This is surprising, as one should expect little immediate government reaction to far-reaching court cases when no powerful actors are involved. To understand the Irish reaction, it is necessary to begin by giving some background on the development of citizenship rights in the country (Handoll 2012).

Citizenship Law in Ireland

Citizenship law in Ireland is closely connected to its division as a country and the wish to give everyone born in Northern Ireland the opportunity to gain Irish citizenship. As a common-law country, landmark judgments have shaped the citizenship regime. Of all the member states, Ireland stands out for its lack of family reunification legislation (Becker 2014: 105), which gives the Minister for Justice, Equality, and Law Reform a wide margin of discretion under the Nationality and Citizenship Act, subject to judicial review (Handoll 2012: 17–19). In 1989, the Supreme Court granted far-reaching residence rights to a couple who had been living illegally in Ireland for eight years and who had a daughter with Irish citizenship (*Fajujonu v Minister for Justice* (1989)). This allowed migrants giving birth in Ireland to receive residence rights (Handoll 2012: 8; Grossman 2004). Statistics on birthright citizenship are limited, and, since they never include data on the movement and residence of those who have obtained citizenship in this way, they are also hard to interpret (Grossman 2004: 111). Between 1996 and 2003, approximately 10,500 residence permits were given to the parents of Irish-born

children.[11] It has to be kept in mind that, during this period, when the economy was dubbed the 'Celtic tiger', immigration into Ireland rose in general, with work permits issued to migrants outside of the EEA rising from 5,750 in 1999 to 40,504 in 2002 (Mancini and Finlay 2008: 577).

In 2003, the Supreme Court supported a more restrictive decision by the minister to deny unconditional residence rights to parents who were illegally resident (Handoll 2012: 8).[12] As a consequence, the minister reviewed the residence procedure, which affected 11,493 outstanding cases.[13] Shortly afterwards in 2004, a referendum brought about a constitutional change that abolished the pure *ius soli* right. Since 2005, a parent has to be Irish, British in Northern Ireland, or to have been legally resident for three out of four years before the birth for children to qualify for citizenship (Handoll 2012: 11). This reform calmed political debate about the growing numbers of non-EU nationals giving birth in Ireland for citizenship reasons (Grossman 2004).

Interestingly, the change in Irish citizenship law also had a European dimension. Case C-200/02 *Zhu Chen* had revealed the externalities of the Irish *ius soli* right as they applied to other member states, which AG Tizzano emphasized in his opinion (De Somer 2012: 16; Mancini and Finlay 2008: 582). Here the Court decided that (Chinese) parents living in the UK could partake in the citizenship rights of their (Irish-born) daughter, whose EU citizenship rights would be violated if her parents were not allowed to live with her. The parents had deliberately arranged to give birth in Northern Ireland to profit from the Irish citizenship rule in order to take up their intended residence in the UK. AG Tizzano stated the following: 'The fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the ius soli, which lends itself to the emergence of situations like the one at issue in this case' (No. 124). Importantly, these externalities of the liberal Irish regime were discussed at the same time that the Supreme Court case of 2003 had made the regime in Ireland more restrictive (Handoll 2012: 9; Mancini and Finlay 2008: n. 38). The altered citizenship law of 2005 limited the impact of *Zambrano*.

The quantitative implications of the *Zambrano* ruling were continuously reported in the Irish press and discussed in the Dáil (lower chamber). In just four newspapers, twenty-two articles on *Zambrano* and its effects were published.[14] In no other member state has comparable attention been paid to the judgment. In October 2012, *The Irish Times* reported that 2,100

[11] *Bode (A Minor) v Minister for Justice, Equality, & Law Reform & Ors* (2007).
[12] *A.O. & D.L. v Minister for Justice* (2003).
[13] *Bode (A Minor) v Minister for Justice, Equality, & Law Reform & Ors* (2007).
[14] These are findings based on a search of the webpages of the examined newspapers and the Factiva database (keyword 'Zambrano'), Mar. 2013.

applications had been received after the *Zambrano* ruling; in response to these, 1,184 persons were allowed to remain in Ireland, 84 cases were refused, and about 800 still had to be settled.[15] In January 2013, the minister also elucidated the following criteria:

> each applicant parent must be a TCN who is residing in the State with their Irish born minor citizen child or children, they must be playing a significant role in the upbringing of their Irish born minor citizen child or children and the applicant parent's immigration circumstances must be such that if a decision was taken to refuse him or her a right of residency, the Irish born minor citizen child or children would be at risk of being expelled from the State and, by extension, the EU and, as such, they would not be able to enjoy the substance of their rights as an Irish and EU citizen.[16]

At the end of 2013, policy guidelines gave greater legal certainty on non-EEA family reunification, without altering the minister's discretion.[17]

Explaining Proactivity

The government's immediate reaction shows that there was no pressure from domestic courts to advance the application of EU law. This has to be explained politically. With the change of government prior to the ruling, the Fine Gael minister explained his reaction with reference to his disagreement with the previous government's immigration policy.[18] His predecessor from the Fianna Fáil party, Brendan Smith, had, in fact, presided over the highest number of deportations ever, deporting 416 migrants in only six weeks of office, possibly under the influence of AG Sharpston's opinion in the *Zambrano* case, which was delivered in October 2010.[19]

Ireland has an active civil society that informs TCNs about their rights, such as the Immigrant Council of Ireland, an advocate for migrants and their families. The Council stepped up its activities in the aftermath of the judgment and also noted a considerable increase in demand for its services.[20] Moreover,

[15] Pamela Duncan, 'State Pays €1.2m to Settle Cases with Non-EU Parents', *Irish Times,* 15 Oct. 2012.

[16] Houses of the Oireachtas 30 Jan. 2013, Written Answer No. 149—Citizenship Applications, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013013000075?opendocument#WRW01150> [accessed 9 May 2017].

[17] INIS, 'Policy Document on Non-EEA Family Reunification' (Department of Justice and Equality, Dec. 2013). On file with author.

[18] This link is made in the following article: Carol Coulter and Jamie Smyth, 'Case Review for Non-Irish Parents of Irish Citizens', *Irish Times,* 22 Mar. 2011.

[19] Jim Cusack, 'Smith Deported 416 in Six Weeks as Justice Minister', *Irish Independent,* 3 Apr. 2011.

[20] Immigrant Council of Ireland 6 Jan. 2013, 'Citizenship Queries Top Issue on Immigrant Council Helpline, Over 5,000 Inquiries from 145 Nationalities, Migrants Showing Commitment to Ireland'. 2 Feb. 2012, '50,000 People Accessed Information on Migrant Issues'.

the Irish Human Rights Commission often participates in cases as *amicus curiae*. There is also the Irish Immigrant Support Centre (NASC).

Additionally, before *Zambrano*, Ireland had already experienced transitional migration regimes. In 2005, the Department of Justice introduced the Irish Born Child Scheme (IBC/05) to allow the parents of Irish children without a residence status to apply for residence under a more favourable procedure than normal, which was initially granted for two years. Many of those who would potentially benefit from the *Zambrano* ruling already fell under this scheme. About 17,000 persons were granted residence.[21] Similar to *Zambrano*, it was often only the mother who could stay with the Irish children, who would possibly be joined by siblings without rights of residence in the EU.[22] As a result, many cases had already been settled. In comparison, *Zambrano* did not have such a big impact, resulting in only around 1,200 cases. While he followed a political approach that took 'the best interests of the eligible minor Irish citizen children'[23] into account, the minister also justified his proactive approach by avoiding the costs of unnecessary court cases from the very beginning:

> One possible approach in these matters is to wait for pending cases to be determined by the Irish Courts and for the Courts to interpret and apply the Court of Justice ruling. That is an entirely justifiable approach from a legal standpoint. However, in this case the Government has agreed that there needs to be a more proactive approach and that it should make a clear statement of its intention to take early action in these cases, insofar as it is unnecessary to await rulings of the Courts. We should not tie up the courts unnecessarily or ask eligible families to wait longer than necessary.[24]

As one of the eurozone countries that was bailed out, there were also incentives to comply with European legal demands.[25] Nevertheless, in late 2011, the government was facing legal expenses of over €100 million in 2,000 cases where it was fighting deportation injunctions that were granted by the High Court, although these cases were explicitly related to the *Zambrano* ruling.[26] Clearly, the government was employing a mixed strategy of trying to avert unnecessary court cases, while pursuing an approach that was not too liberal,

[21] *Bode (A Minor) v Minister for Justice, Equality, & Law Reform & Ors* (2007).

[22] Carol Coulter, 'Review Sought of Scheme Allowing Migrant Parents to Live in Ireland', *Irish Times*, 23 Mar. 2012.

[23] Department of Justice, Equality, and Defence, written answers Asylum Applications, 18 Jan. 2012. On file with author.

[24] Statement by Minister for Justice, Equality, and Defence, Mr Alan Shatter, TD, on the implications of the recent ruling of the Court of Justice of the European Union in the case of Ruiz Zambrano. 21 Mar. 2011. On file with author.

[25] I thank John Handoll for pointing this out to me.

[26] These costs mainly arise from the government having to take over legal expenses in lost cases. Jim Cusack, 'State Facing €100m Bill to Fight 2,000 Asylum Seeker Deportation Injunctions', *Irish Independent*, 11 Dec. 2011.

which could take into account the fine-tuning of the case law after the *Zambrano* ruling. Despite the proactive Irish approach, the settling of individual cases took a relatively long time. In this respect, it has to be noted that the High Court had a backlog of about 1,000 asylum cases, which led to a delay of about two years (Becker 2014: 109).

Interestingly, when one searches for explicit court references to *Zambrano*, the wide application of this ruling is not evident, either because the government grossly overestimated its implications or because the courts' citations of *Zambrano* underestimate its impact. The *Zambrano* judgment (or the opinion of AG Sharpston) was cited eighteen times (sixteen times by the High Court and twice by the Supreme Court) between January 2011 and 2013 in cases that concerned the residence rights of TCNs with dependent Irish citizens. Of these cases, *Zambrano* was causally linked to the right of residence or to judicial review in four cases.[27] In at least seven of the cases, *Zambrano* did not explicitly apply, but this did not necessarily exclude the granting of the right of residence. For instance, in one case, the right of a father, who was separated from the mother of the family, to rely on the *Zambrano* ruling was denied by the High Court, as the mother had refugee status. Nevertheless, an interlocutory injunction was granted to the father on the basis of the child's constitutional right to enjoy the company and care of their parents.[28] Thus, given the extensive rights granted by the Irish constitution, *Zambrano* did not necessarily grant additional further rights. It appears that both the High Court and the Supreme Court have not readily established a link to *Zambrano* if it can be avoided.

The active role of immigration NGOs, as well as recent legal changes, have meant that the issue is politically salient and has received political and media attention. The government has played an ambiguous role here. While it immediately implemented *Zambrano*, it clearly aimed to constrain rights. One parent suffices for the genuine enjoyment of EU citizenship. Interestingly, the right of contact to both parents could be argued on the basis of the Irish constitution. At the same time, the government's attempts to avoid the costs of court cases is also notable.

The Reaction in Other Member States

Due to its citizenship law, Ireland was particularly affected by the *Zambrano* judgment. The *Zambrano* ruling only has an impact on member states when

[27] The findings on judgments that reference the *Zambrano* case are based on a keyword search in 2013 on the website for the Courts Service of Ireland, <http://www.courts.ie/Judgments.nsf/advancedsearch?openform&l=en>. Keyword 'Zambrano', search Mar. 2013.

[28] Immigrant Council of Ireland, *ICI News Bulletin*, 102, 27 Sept. 2012. On file with author. *E.A & Anore v Minister for Justice & Anor* (2012); *Irish Times*, 11 Dec. 2012, 'Rights of the Child Mean Father Should Not Be Deported'.

their own citizens claim the right to live with a TCN family member and this right is not granted domestically. It is not necessary to refer to the ruling when EU citizens have taken advantage of freedom of movement and want to be joined by their TCN family members, which is clearly granted by EU law. In general, all families with a domestic and a TCN spouse can be concerned, where children have EU citizenship, and where the TCN spouse may want to claim rights from *Zambrano*, in particular after a separation from the partner.

How did the governments of the other member states react to the ruling (Fernhout 2012)? In the following discussion, I contrast the Irish experience with that in Belgium, which is the country where the *Zambrano* case originated; I go on to consider the UK, France, and Germany as countries with *ius soli* elements in which the case law could well have had a larger impact, given their population sizes, and finally the Netherlands.

In focusing first of all on press reports until early 2013, Ireland clearly stands out. In contrast to Ireland's twenty-two articles on the topic, hardly any attention was paid to it in the other member states; there was one article in six different papers in Belgium, one in forty papers in Germany, two in thirteen in Austria, and three in eighteen in the UK.[29]

Despite being the country where the *Zambrano* ruling originated, Belgium was not highly concerned by it, as the underlying citizenship law had already been changed. In addition, the administration interpreted the ruling restrictively from the beginning as only concerning dependent minors and not situations such as the one that was ruled upon in the *McCarthy* case (De Somer 2012: 15). In the courts, seventeen rulings cited the case, but only in three of them did the *Zambrano* reasoning make a positive difference until May 2013.[30]

In Germany, there were twenty-two rulings in this period that cited the *Zambrano* case,[31] and in four it made a positive difference. That the ruling would only be of marginal relevance was not apparent in the beginning, as is evident in a press statement from a European law professor just after the ruling, which claimed that up to one million people could be affected by it in Germany, since Germany had introduced restricted *ius soli* citizenship rights eleven years earlier and about 100,000 children are born each year with a non-German

[29] These findings are based on a search of the webpages of the examined newspapers and the Factiva database (keyword 'Zambrano'), Mar. 2013.

[30] The findings on judgments that reference the *Zambrano* case are based on a keyword search on the website of the Conseil du Contentieux des Étrangers. <http://www.rvv-cce.be/rvv/index.php/fr/arresten/arresten-rvv>. Keyword 'Zambrano', search May 2013.

[31] The findings on judgments that reference the *Zambrano* case are based on a keyword search on the websites of the Federal Administrative Court and the Beck-Online database. <http://www.bverwg.de/entscheidungen/entscheidungen.php> and <http://beck-online.beck.de/default.aspx>. Keyword 'Zambrano', search May 2013.

parent.[32] Although many of these parents are EU citizens or enjoy the right of residence for other reasons, Professor Thym nevertheless expected the case to be relevant for a few thousand cases.

The German legal profession was very responsive to the new legal development in the *Zambrano* ruling. It tested the limits of the new development, as the *Iida* case shows (Schönberger and Thym 2014: 580). Once subsequent case law had contained the revolutionary potential of the *Zambrano* ruling, the attention that was paid to it died down. The case also had less relevance in Germany, as courts already interpreted national law in light of the ECHR's requirements.

In the UK, the media attention that was paid to the ruling was a bit more pronounced (it resulted in three articles), and NGOs were also more aware of the ruling. Interestingly, the administration adapted its handling of cases immediately to the new legal background,[33] even before an official policy was devised in November 2012 (Sibley et al. 2013: 46).[34] The UK government also periodically reports the number of residences granted on the basis of the *Zambrano* case. Between 1 March 2011 and 30 September 2013, 115 cases out of 4,895 were granted on the grounds of the *Zambrano* case, with 1,470 still pending.[35] Another 105 cases[36] were granted in England and Wales between 1 March 2014 and 30 September 2014. Up until May 2013, there were twenty-seven rulings that cited *Zambrano*.[37] The residence status that was ultimately granted was partly based on *Zambrano* in only five of these cases; in all other cases, its relevance was denied. One parent's residence was generally deemed sufficient for the child to be able to stay. In one case, the court referred to

[32] Bleiberecht für ausländische Eltern: 'Wenn Luxemburg keine Ausnahmen zulässt, wären die Konsequenzen enorm', Legal Tribune Online, 10 Mar. 2011, <http://www.lto.de/persistent/a_id/2731> [accessed 10 May 2017].

[33] UK Border Agency, Letter from Jonathan Devereux, Head of European and Nationality Operational Policy to Sophie Barrett-Brown, Chair of the Immigration Law Practitioners Association. Home Office, Derivative rights of residence—Ruiz Zambrano cases, 12 Dec. 2012. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257807/zambrano.pdf> [accessed 9 May 2017].

[34] The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (SI 2012/2560) of Nov. 2012 includes the Zambrano criteria in § 15A.

[35] Home Office, Mar. 2014: 'Zambrano Cases Processed and their Outcome', <https://www.gov.uk/government/publications/zambrano-applications-processed-and-their-outcome-from-2011-to-2013/zambrano-applications-processed-and-their-outcome-from-2011-to-2013> [accessed 10 May 2017].

[36] Home Office, 11 Feb. 2015: 'People Granted the Right of UK Residence under the Zambrano Ruling from 1 March 2014 to 30 September 2014', <https://www.gov.uk/government/publications/people-granted-the-right-of-uk-residence-under-the-zambrano-ruling-from-1-march-2014-to-30-september-2014/people-granted-the-right-of-uk-residence-under-the-zambrano-ruling-from-1-march-2014-to-30-september-2014> [accessed 9 May 2017].

[37] The findings on judgments that reference the *Zambrano* case are based on a keyword search on the website of the British and Irish Legal Information Institute. <http://www.bailii.org/form/search_multidatabase.html>. Keyword 'Zambrano', May 2013.

British constitutional principles to grant residence.[38] Since then, references to the *Zambrano* ruling in court cases have become ubiquitous, with 297 UK court rulings citing the case in early 2016.[39] While 'Zambrano carers' receive a residence and work permit, their access to social assistance was restricted in November 2012, excluding them from child and housing benefit and income support in order for them not to be treated on a par with EU citizens.[40] Since lack of resources may lead to a situation where the child will be deprived of the benefits of their EU citizenship, the *Zambrano* ruling gave rise to several more court cases. In February 2015, the Court of Appeal held in the case of *Sanneh and Secretary of State for Work and Pensions* that 'Zambrano carers' do not have a right to non-discriminatory access to social benefits. Authorities only have to ascertain that this does not impede the EU citizenship rights of the child.

In France, a circular from September 2010, issued after the *Metock* judgment, had already granted right of residence to the TCN parents of an EU child (Fernhout and Wever 2011: 73). In the courts, there have only been five cases up until May 2013 that have referred to the *Zambrano* ruling, which served as a basis for residence in one of them.[41]

In the Netherlands, the government took a very restrictive approach in implementing the consequences of the *Zambrano* case, even arguing that it would suffice for grandparents to take care of the child, which the domestic court rejected. The judicial division of the Council of State passed two judgments in March 2012 elucidating guidelines for how the 'genuine enjoyment' of EU citizenship can be safeguarded (De Hart et al. 2012: 61–2); they hold that it is sufficient for one parent to be present. According to the court, even if this parent has problems caring for the child due to a medical or a psychological condition, there is no reason to grant residence to the TCN parent as public assistance could be sought out (Fernhout 2012: 10). Currently, there is a preliminary reference at the ECJ (Cases C-133/15 *Chavez-Vilchez and Others*), which is concerned with TNC mothers who face expulsion from the Netherlands, despite the fact that they are the primary carers of their children. Although the fathers are partly absent or not really available to raise the children—some also do not have custody—the authorities have argued that for the raising

[38] England and Wales Court of Appeal (2012) EWCA Civ 1363. 23 Oct. 2012.

[39] <http://www.bailii.org/form/search_cases.html>, keyword 'Zambrano', Jan. 2016.

[40] NRPF (no recourse to public funds) network factsheet, Birmingham Community Law Centre, <http://www.nrpfnetwork.org.uk/Documents/Zambrano-Factsheet.pdf> [accessed 10 May 2017]. Department for Work and Pensions, Oct. 2012, 'Access to Benefits for Those Who Have a "Zambrano" Right to Residence and Work', <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220300/eia-zambrano-right-to-reside-and-work.pdf> [accessed 10 May 2017]. The Social Security (Habitual Residence) (Amendment) Regulations 2012, No. 2587, <http://www.legislation.gov.uk/uksi/2012/2587/pdfs/uksi_20122587_en.pdf> [accessed 10 May 2017].

[41] Cour Administrative d'Appel de Lyon—11LY01612. 7 June 2012.

of the children it is sufficient for these, mainly Dutch, fathers to be present in the country (Biersteker et al. 2015). It remains to be seen how these follow-up cases will be decided upon. The Dutch case shows that, if governments are reluctant to implement them, very few rights may follow from the *Zambrano* ruling. However, it also shows that courts do impose constraints.

In general, we can thus conclude that member states respond to case law beyond what one would expect from a contained-compliance perspective. The report of the Fédération Internationale pour le Droit Européen (FIDE) on citizenship rights, which documents reactions in twenty-two member states, shows clearly how administrations and courts take up ECJ case law. New member states, such as Bulgaria, may face difficulty in knowing how to apply case law alongside secondary law (Kornezov 2014: 351). The report from Denmark is also of particular interest in our context, since the country takes a very restrictive stance on immigration. As domestic courts rarely address the ECJ, direct pressure through the judicial system is low (Jacqueson 2014: 476). Nevertheless, the administration is responsive, as is apparent, for instance, in the briefing note from the Ministry of Integration in May 2011, which clarified that Zambrano grants residence rights if the child would otherwise be forced to leave (Jacqueson 2014: 470). The official homepage also sets out these guidelines in English.[42]

CONCLUSION

In the literature, it is a point of contention whether case law has implications for member states' policies outside of its codification in generalized policies. This chapter has analysed member states' reactions to two court cases, showing that we find both rejections in the form of inertia, on the one hand, and active responses, on the other. While the way that member states respond cannot be explained in a monocausal way, it is apparent that research on Europeanization needs to pay more attention to the effects of case law.

The German reaction to the *Meilicke* case is marked by inertia. Given the potentially significant fiscal costs, the executive responded with a two-pronged approach: legislative adaptations were made relatively early on to restrict the retroactive impact of the case law. And the executive aimed to contain justice, including waiting for further case law in the hope of more favourable fine-tuning. This strategy paid off. With significant requirements for documentation,

[42] See the official website of the Ministry of Refugee, Immigration, and Integration Affairs, 'new to Denmark': <https://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/family_reunification_under_eu-law/reopening_cases.htm> [accessed 9 May 2017].

and the time that has elapsed, the impact of the case law is more manageable in Germany. As case law may take a very long time to materialize within the hierarchy of courts, member states can absorb its impact incrementally, allowing them to cope more easily. Nevertheless, the general constraints that case law puts on policy choices are grave and should not be underestimated.

Case law that reduces fiscal revenue is unambiguously negative for executives. Opposition to it is, therefore, not surprising. The *Zambrano* case dealt with another salient policy field: the citizenship rights of third-country nationals. However, the range of reactions demonstrates some proactivity. The costs of responding were clearly not as high as they were in the tax case, and there were benefits involved as well, given that human rights are politically salient. Thus, the new Irish government explicitly wanted to present itself in a different light to its predecessor. For some lawyers, litigants, and lower courts, the *Zambrano* case opened up 'a whole new world of EU law-argumentation' (Shuibhne and Shaw 2014: 149). It led to significant judicial activity in many member states, as it gave an incentive to use a 'Union light at the end of the national tunnel' (Meduna et al. 2014: 284).

Executive reactions to the *Zambrano* case can appear puzzling. It is not so much that there are striking differences in reaction among the member states, but rather that member states react with a strange mixture of responsiveness and resistance. One might have expected a reaction of contained compliance, since TCNs are relatively weak litigants and political actors. However, there are numerous examples where member-state administrations have published circulars that respond to *Zambrano* or similar cases. On the one hand, this is in response to the activities of lawyers and litigants, as well as the attempts of lower courts to establish the precise meaning of new case-law developments. The EU is a multilevel system, in which member-state governments have long lost their gatekeeping role. On the other hand, executives operate within a rule-of-law context, which results in administrative circulars that take up new case-law developments, which is additionally the case where pressure from domestic courts is low. There appears to be no fundamental difference between when an administration adapts to a national high-court ruling or to one from the ECJ. The implications of ECJ rulings are real, even in the case of TCNs where political mobilization is restricted and there are no significant costs to the executive from legal uncertainty. However, it is likely that there will be a wish to keep follow-up court cases to a minimum in order to constrain the evolution of further case law. As the many interventions at the ECJ show, member states do not respond to case-law development, because they endorse its thrust politically. Instead, they aim to contain it.

In the *Zambrano* case, this strategy was successful, as case law was not extended to other family members. In addition, domestic courts appear to be ambivalent about the ruling. They apply it, but often deny its relevance, restricting its impact to the right of only one parent to stay in the relevant

member state. If they act more generously, there is a tendency to link this generosity to national constitutional principles or the ECHR.[43]

Although the Irish reaction to the *Zambrano* case appears to be strong at first sight, it was not so different after all, given the extent to which Ireland was actually affected by it. In political terms, the *Zambrano* case could be used to demonstrate the pursuit of a more liberal approach after a change in government. Nevertheless, taken as a whole, the differences among member states are slight. While the administrations appear to operate in a multilevel system, without differentiating between European and national high-court decisions, governments and lower courts seem to regard the ECJ's legitimacy to develop such far-reaching case law as being more contested. Governments have intervened steadily in a large number of cases. They have also signalled that the Citizenship Directive requires changes. The ECJ has fine-tuned its case law in response. Additionally, lower courts have applied the *Zambrano* ruling restrictively.

Finally, this discussion gives some insight into the motivations of individual litigants. To pursue preliminary references takes a long time, and it is expensive. To the extent that the Court is responsive to member states' worries, as some authors find (Carrubba and Gabel 2014; Larsson and Naurin 2016), it is questionable why litigants pursue this route at all. However, the example of the *Meilicke* case shows that some litigants' interests can reach beyond the case at hand. If tax lawyers initiate litigation this also allows them to promote their services to potential clients. The same proves true if the cases themselves do not secure individual gains but result in general legislative changes. While the logic of collective action would suggest that many interests will not be pursued, due to insufficient returns, there are added incentives because of the reach of the ECJ's rulings. In light of the *erga omnes* effect of the ECJ's rulings, the rationale to undertake litigation does not solely have to be supported by the individual case, as the broader implications may well be worth pursuing. The broader these effects are, given the size of the Union, the more likely it becomes that there will in fact be actors who opt for litigation. A specialized tax lawyer would gain from such a process through the advertisement it provides for their company and through the opportunity to demonstrate their legal skills. Large corporate actors may be in a position where the likelihood of gains from an individual case justify the risks and costs of litigation, and NGOs and lawyers offering pro-bono services may face still different incentives.

[43] A similar finding was identified by Stone Sweet and Stranz, who argued that the German Federal Constitutional Court did not challenge the activism of the *Mangold* case, as this could have meant that the German Basic Law was positioned behind EU law for the question of fundamental rights (Stone Sweet and Stranz 2012).

7

The Europeanization Effects of Case Law

In Chapter 6, I argued that the literature on Europeanization focuses in a one-sided fashion on the question of whether member states comply with EU secondary law in general and the implementation (or merely transposition) requirements of EU directives more specifically. The typologies within this work overlook the specifics of member states' reactions to case law. An example of this is Radaelli's differentiation between inertia (no domestic response), absorption (limited response), transformation (far-reaching change), and retrenchment (active resistance) (Radaelli 2003). The literature that discusses the implications of case law partly denies that member states are responsive when social groups do not mobilize for their rights. Such opposition could be seen in the previous chapter in relation to the *Meilicke* case, but the resistance of the German government was also motivated by the wish to fine-tune the case law. The *Zambrano* case, in contrast, showed that there may be proactive responses that are also driven by the hope of avoiding further case law. Typologies geared towards the specifics of the legislative process cannot capture this kind of interaction between member-state governments and the Court. As I argued in Chapter 6, anticipatory obedience (Blauberger 2014: 458) may be as important as attention to non-decisions and indirect effects, as are instances where member states find alternative means to realize policy objectives once earlier policy options are foreclosed by the Court.

Compliance with secondary law requires the implementation of specific policies, but case law cannot make comprehensive policy prescriptions. Instead, it normally prohibits certain member-state policies by declaring them to conflict with EU law. Following the *Zambrano* ruling, member states are not allowed to expel the third-country national (TCN) parents of children who are EU citizens if this deprives them of their EU citizenship. Following the *Meilicke* ruling, member states are not allowed to treat cross-border dividends differently from dividends from domestic shares. Thus, case law also requires non-decisions from member states, leaving the exact type of response much more open than secondary law does, due to its design of certain policies.

The previous chapter showed that we cannot assume that member states simply ignore case law that does not match their preferences, as the contained-compliance perspective would argue. Case law, as my analysis of the *Zambrano* and *Meilicke* cases shows, gives rise to multiple Europeanization effects. In order to better understand its impact on the national level, it is important to be aware of the variety of different possible reactions. It is only on this basis that we can begin to understand them.

Since the Europeanization effects of case law have been researched to a much lesser extent than secondary law, I will give an overview of the different reactions, which I structure according to the different relevant actors. While compliance with EU secondary law predominantly requires the executive and legislature to act, responses to case law are not only restricted to these actors. The domestic judiciary fosters or constrains the domestic impact of EU law (G. Davies 2012), and the same is true for societal actors that make active use of the alternative EU legal order. For the empirical work, I partly draw on my own research and partly refer to existing studies. Due to the relative neglect of the Europeanization effects of case law, there is a somewhat German bias in the analysis. However, the traditional literature on Europeanization that analyses the transposition of directives also has a bias towards the large, old member states, with Germany, France, and Britain disproportionately represented (Treib 2014).[1] From an empirical perspective, I will focus again on the four freedoms and citizenship rights. I will only delve into anti-discrimination law for one example because of the availability of a particularly interesting case study (Stone Sweet and Stranz 2012). However, it should be clearly pointed out here that I do not discuss the wide range of possible domestic responses to anti-discrimination law; the same is true for EU competition law. Examples that could be given here are the different liberalization measures for utilities but also, for instance, the reform of the German public banks (Smith 2005; Seikel 2014a) and procurement law.

In the following section, I start by giving a simple explanation of member-state reactions to case law. I will then elucidate the cognitive foundation for these responses. On this basis, I discuss examples of executive, legislative, and judicial reactions, turning last of all to societal actors. The chapter concludes by summarizing the variety of European responses to case law.

[1] The larger membership of the EU and the increased heterogeneity of member states imply that Europeanization effects will become less uniform. There are few studies on the new member states. While their transposition of secondary law was assured under the conditions of accession, studies have found this to result in a world of 'dead letters' (Falkner et al. 2008), where European law hardly plays a role in day-to-day administrative practice.

EXPLAINING MEMBER STATES' REACTIONS TO CASE LAW

Whether actors respond to a stimulus, we can assume, depends on the prior recognition of the stimulus, and on the costs and benefits of reacting to it (Conant 2002: 32). If actors neither comprehend the supremacy and direct effect of the Treaty nor realize that the Court's interpretation of the Treaty in an individual case has *erga omnes* effect for all actors that are bound by the Treaty, we cannot expect any response. This cognitive aspect is not trivial, as the history of the EU contains many examples of actors having first of all to learn of the Treaty's direct relevance to them.

Once actors become aware of the relevance of case law, their reactions are mediated by different interpretations of its reach, given legal uncertainty. Case law serves as an opportunity structure. It affects the power balance between different coalitions of actors at the domestic level. By favouring the position of certain actors over others, they can advance their interests more easily in the domestic policymaking arena.

What determines actors' responses? Put abstractly, whether a response characterized by inaction (namely, the policy status quo) will be an actor's preference depends on the related normative or material costs, as well as the benefits, that are attached to either maintaining the status quo or changing policy instruments. The costs of maintaining the status quo, for instance, may relate to further case-law development that actors might seek to evade; to enforcement from the Commission demanding a generalized response; to the costs of unequal access to rights based on case law; or to the cost of regime competition, which results from a broad interpretation of the fundamental freedoms. There are, therefore, direct responses that either implement or resist judgments, as well as indirect responses to the effects of judgments, most notably regime competition. A central finding of the research on Europeanization is all the more relevant to the impact of EU case law, namely that there is no single dominant independent variable, such as policy misfit, that can explain member states' reactions (cf. Treib 2014). Different reactions, therefore, can be explained successfully *ex post*, but generalizations remain difficult.

The possible costs of a response may be that the original status quo receives broader societal backing and/or provides a better solution to a policy problem. However, the opposite may also be true if the status quo is only supported by a powerful minority veto. Needless to say, the different kinds of relevant actors rarely share the same set of preferences. For some actors, there are costs of maintaining the status quo, and for others there are costs of reform.

With this general explanation in mind, the rest of this chapter will summarize empirical findings on member states' reactions to case law, paying

specific attention to the four fundamental freedoms. Much more than is the case for implementations of secondary law, responses to case law (or the anticipation or avoidance of further case law from the Court) also include strategic considerations. It is a response to an external actor rather than the implementation of joint decisions, and all three branches of government are relevant alongside societal actors.

When considering actors' reactions, it is important to keep in mind that case law may demand either decisions or non-decisions, or it may lead to indirect effects. Because of the liberal bias of the fundamental freedoms, actors can overcome national regulatory restrictions and choose the most permissive regulatory order within the EU. Regime competition is a relevant indirect response here, as long as the interpretation of the fundamental freedoms does not prohibit reverse discrimination against nationals, which allows member states to preserve restrictive national regulations. Since member states remain politically responsible for their domestic policies, while they are constrained by EU law (Scharpf 2009), there is an incentive to use institutional equivalents as escape routes to pursue their policy goals. The institutional equivalents that are available may include pacts with societal actors or contracts with member-state governments outside the EU legal regime, as we will see later.

While typologies geared towards implementation differentiate between degrees of compliance (Radaelli 2003), such as absorption, accommodation, or transformation (Börzel and Risse 2007), the greater variety of responses to case law leads me to distinguish indirect from such direct responses. Indirect reactions include regime competition or measures to compensate for lost policy instruments. Direct responses may require decisions or non-decisions, and they can be characterized by resistance, accommodation, and also anticipatory obedience. Figure 7.1 summarizes these direct and indirect effects.

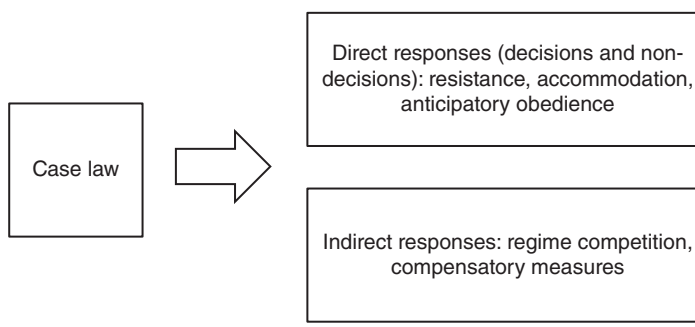

Figure 7.1. Direct and indirect responses to case law

THE COGNITIVE DIMENSION OF RESPONSES TO CASE LAW

If actors' responses to case law depend on the way that they perceive the costs and benefits that arise from a given ruling, how actors interpret the relevance of case law is decisive. Compared to the implementation of secondary law, there are not only more diverse reactions to case law from more actors to be kept in mind, but the cognitive perceptions of the domestic legal requirements also differ to a larger extent. As I have argued, the implications of case law are marked by a higher degree of legal uncertainty, as it is case-specific and actors have not participated in the legislative process that designs the rules. Actors' reactions are always mediated by their world views. This is particularly significant for the impact of case law, which is very open to interpretation.

In not having complete information about all the relevant developments that influence the realization of their preferences, actors always act with uncertainty. However, in comparison to EU secondary law, the implications of case law are much more uncertain, which makes the way that relevant actors interpret case law decisive. To give an example, the UK government long disputed the relevance of the case law on the freedom of services as it applied to its National Health Service (NHS). After all, there are no market transactions in the NHS, since it is a pure benefits-in-kind system (Obermaier 2009: 137). The difficulty of analysing to what extent national reforms can be seen either as responses to case law or to be domestically motivated is related to the uncertain implications of rulings. To stick with the same example, the introduction of some elements of marketization into the NHS was regarded by some as a response that had been induced domestically to tackle the politically contentious long waiting times patients had to endure. However, there are also clear indications that the government was under pressure to accommodate the ECJ's case law in this way (Obermaier 2009: 130–1).

Given that the implementation requirements of case law are, in general, more open to interpretation than secondary law, we should expect to find significant differences between member states. As cognitive differences may under- or overestimate the pressures of EU law, it may be empirically difficult to distinguish cognitive aspects from preferences. Actors may take up policy instruments that are no longer available under EU law or they may not be aware of EU legal constraints. On this basis, we will turn now to the responses of different actors.

ACTORS' REACTIONS

In the following section, I will begin by discussing executive reactions to case law, before going on to consider the legislature and the judiciary. Last of all,

I will pay attention to societal actors. Needless to say, in empirical cases there will often be an interplay between these different reactions from actors. Discussing them separately will increase awareness of the variety of different responses. I will distinguish between accommodation, resistance, and, where relevant, the indirect effects of compensation and regime competition.

EXECUTIVE REACTIONS

Member-state governments can accommodate EU case law either through administrative guidelines or by initiating legislation. Alongside direct responses, there is the indirect option of compensation, which draws on alternative means of action in order to alleviate the pressure of European case law. Increased administrative controls or bilateral agreements may help to counter, for instance, incentives for illegal activities that result from liberalization. Alternatively, the government may foster private modes of governance to compensate for legal restrictions. Bearing in mind that the executive is broadly involved in domestic reactions, I will begin by discussing executive responses in the narrow sense.

Reactions will be costly if the case law does not happen to push for reforms that correspond to the policy preferences of the executive. However, as we saw in the previous chapter, conforming to the supranational demands of the rule of law is a consideration of its own. In the extreme example of the *Meilicke* case, where a ruling imposed fiscal costs, the executive may aim for concretization or fine-tuning in a subsequent ruling. Nevertheless, a case like *Zambrano*, which had less pronounced costs, shows that violating the rule of law is not an easy option for executives. In addition to governmental preferences, the kind of pressure that is applied is significant, whether this is internal (from domestic litigants and courts) or external (from the Commission, regulatory competition, or evolving case law).

Administrative Accommodation

If EU case law cannot be contained, member states have to respond by accommodating the case law, safeguarding their original policy goals as much as possible. Case law is not subject to the same need for transposition as is the case for European secondary law. By publishing an administrative circular, executives can order their administrations to change their administrative practice, doing justice to the rule of law in the multilevel system. The Irish reaction to Case C-34/09 *Zambrano* (8 March 2011), which I discussed in the previous chapter, is a case in point, demonstrating such changes to administrative practices.

One advantage of accommodating case law is that additional European case law can be avoided. Obermaier (2009: 136–7) found that, following the ECJ's case law on health services, British authorities began a generous administrative practice of reimbursement for health services from other member states in order to avoid further ECJ rulings.[2] Such a strategy is only plausible when domestic institutional conditions are so particular that the case law that originates from other member states will not have the same impact. However, we saw in the follow-up case law for the *Zambrano* case, and also for *Meilicke*, that further court cases may also lead to fine-tuning and a deradicalization of the implications of case law, which can produce incentives to provoke further rulings by the ECJ.

Residence rights of third-country national family members

The executive reaction to *Zambrano* was not exceptional, as can be demonstrated when one looks into member states' reactions to the Court's case law concerning the residence rights of third-country national (TCN) family members of EU citizens (De Somer 2016). The residence rights of TCNs are restricted by many member states, for instance as a measure to combat marriages of convenience. In 2003, the ECJ argued in Case C-109/01 *Akrich* that the right of a TCN family member to accompany an EU citizen depended on the prior legal residence. However, soon afterwards, in 2008, in Case C-127/08 *Metock*, which was a preliminary ruling from Ireland, the ECJ ruled against this requirement. Against interventions from ten member states, the Court argued that the Community, and not the member states, is authorized to regulate the conditions of lawful residence for TCN nationals when they join EU citizens who have taken advantage of their right to freedom of movement. As the Treaty requires a cross-border element, immobile member-state nationals cannot rely on EU law.

The *Metock* case is highly interesting, as it provides a rare example in the literature in this area where the national consequences of case law have been discussed. After *Akrich*, Denmark, the UK, the Netherlands, and Finland formulated the requirement that prior lawful residence was a precondition for family reunification (Thorp 2009: 5). Also after *Metock*, the conditions for family reunification were eased in Denmark (Wind 2014: 169–70), and the number of individuals that were granted the right to family reunification tripled in 2009 in comparison to 2008 (Martinsen 2011: 958). In Germany, administrative instructions from the federal government issued on 29 July 2009 referred to *Metock* and lifted the general requirements, such as basic knowledge of German, for this group of people. Additionally, Italy and Ireland

[2] I thank Michael Blauberger for pointing this out to me.

swiftly adapted their legal and administrative practices, as did Finland and the UK (Fernhout and Wever 2011: 15, 54–5; Costello 2009). UK courts even extended eligibility for the *Metock*-type rule to non-dependent family members (Fernhout and Wever 2011: 62).

Since the Court interprets restrictions on EU citizens' TCN family members as constraints on EU citizenship, EU citizens may be privileged in cases of family reunification in comparison to nationals. The Citizenship Directive codifies these privileges (for instance, Article 20 and Article 16(2)). In their transposition of the Citizenship Directive, several member states have explicitly agreed to reverse discrimination against their nationals (the UK, Denmark, Germany, Sweden, the Netherlands, Austria, Slovenia, Ireland, Poland, and Estonia). Others have opted to grant their nationals the same right (Spain, Portugal, Italy, Hungary, Malta, Cyprus, Finland, Croatia, and the Czech Republic) (Shuibhne and Shaw 2014: 74).

When opting in favour of or opposition to discrimination against nationals, member states face a trade-off between pursuing their domestic policy objectives against interference from the ECJ and their responsibility for the well-being of their own citizens. As AG Sharpston put it in her opinion on Cases C-456/12 and C-457/12:

> Why a Member State would wish thus to treat its own nationals less favourably than other EU citizens (who, except for their nationality, might very well be in identical or similar circumstances) is curious. So is the fact that, by denying residence, that Member State might be at risk of de facto 'expelling' its own nationals, forcing them either to move to another Member State where EU law will guarantee that they can reside with their family members or perhaps to leave the European Union altogether. (No. 86; Shuibhne and Shaw 2014: 150)

Reverse discrimination against nationals may not only be politically insensitive, but may also be constitutionally problematic to regulate nationals in a stricter way than migrants. Regulation restricts personal freedoms, and constitutional law may require that there are sufficient reasons for such a restriction. If EU nationals can use the fundamental freedoms to become economically active under laxer rules, a restriction of rights is hard to justify. Courts in Austria, Italy, and France have found constitutional problems in reverse discrimination against nationals (Tryfonidou 2009: 121–2). Consequently, Italy is one of the countries that has opted to oppose discrimination against nationals by extending the benefits of family reunification for the TCN family members of EU citizens to nationals (Fernhout and Wever 2011: 57–8). If this route is taken, case law simultaneously changes domestic regulations and EU rules. As a result, in Italy, the implications of the ECJ's case law on migration are much more far-reaching.

As I discussed in Chapters 5 and 6, reverse discrimination against nationals gives incentives for citizens to take the 'Malmö route' or do the 'Dublin hop',

with Danish or UK families moving abroad for a limited time to profit from more favourable regulations for EU citizens (Martinsen 2011: 957). This raises questions concerning the necessary time that must be spent abroad in order to qualify for EU legal benefits. In the aforementioned Cases C-456/12 and C-457/12, the Court held that neither the passive services freedom nor regular visits suffice, but that residence for more than three months in another member state is required.

Child benefits

Another example of prompt administrative accommodation of case law concerns the German payment of child benefit for children living in other member states. Regulations 883/2004 (formerly 1408/71) and 987/2009 outline which member state has to pay this social benefit. In a nutshell, the member state where someone is employed and pays taxes is responsible for paying child benefit. Otherwise, the country of residence takes on the responsibility.

The ECJ required Germany to pay child benefit to seasonal and posted workers, who were paying taxes in Germany, for children living in their home member states. The key issue in Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, which were decided upon in June 2012, is that, according to regulation 883/2004, the home state would be responsible for paying benefits to seasonal and posted workers, and Germany would have no responsibility. Because Germany gives benefits to everyone subject to income tax, irrespective of the country of residence, it could not exclude those receiving benefits already in another member state. The Court held that Germany could go beyond the provisions of the regulation as this was benefiting workers, but excluding all those being eligible for benefits in other member states was infringing the free movement principle. With this ruling, the ECJ changed its earlier interpretation of an exclusive competence of one member state, based on the social security coordination regulation, to an orientation on the most favourable solution with view to the free movement principle. By changing its case law, the Court undermined the regulation's attempt at coordination (Weimar 2014: 1, 3).

The ruling attracted significant media attention. The rate of child benefit in Germany is relatively high, at €184 per month for the first two children, €190 for the third, and €215 for the fourth and all further children. This is in the range of the median monthly income in Central and Eastern European member states, which is €273 in Bulgaria and €176 in Romania (Blauberger and Schmidt 2014: 5). The government set aside €200 million in November 2012 as a compliance cost for the judgment (Bundesministerium der Finanzen 2012a). In the highly politicized debates on welfare migration in 2014, the cost of child benefit for EU children not living in Germany was often put

at €1 billion, since child benefits can be claimed for four years retroactively.[3] The number of administrative positions dealing with these claims had to double between 2013 and 2014.[4]

In order to prevent abuse, the government changed the law to include the requirement for a tax identification number and more extensive proof of the existence of children in other member states. Interestingly, however, in the political discussion there has been no mention of the fact that, according to the European social regulations, Germany could also deny its responsibility for claims from seasonal and posted workers. The Federal Fiscal Court, in its judgment after Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, openly stated that it was up to the legislature to change the law.[5] To the extent that posted and seasonal workers claim child benefits for children living in other EU member states, the generous benefits are a cross-subsidy for poorly paid jobs (Schelkle 2017: 262).

In line with the generally politically contentious discussions about welfare migration (Blauberger and Schmidt 2014), the conditions for eligibility to child benefits has become important in other Western member states as well. For example, the UK's EU referendum debate focused on this issue, with the Conservatives aiming to ban EU migrants' access to child benefits, along with other social benefits, for four years.

Executive Resistance

The discussion so far has shown that governments do follow case law, even if this imposes costs and requires greater administration, which is very different to Conant's finding (2002: 69) that administrations are unlikely to introduce broader changes. However, if their policy preferences largely diverge from the demands of case law, the costs of opposing the demands of EU law and violating the general principles of the rule of law may appear lower than the costs of implementing policy choices that are not preferred. This is particularly the case if legal uncertainty gives competing interpretations the benefit of the doubt. An example that illustrates executive resistance particularly well is the language test

[3] *Tagesschau*, 13 May 2014, 'Verwirrspiel mit geschätzten Zahlen. Kindergeld für EU-Saisonarbeiter', <https://www.tagesschau.de/inland/kindergeld132.html> [accessed 9 May 2017]. Spiegel online, 12 May 2014, 'Anspruch von EU-Ausländern: Eine Milliarde Kindergeld für Saisonarbeiter', <http://www.spiegel.de/wirtschaft/soziales/kindergeld-fuer-eu-auslaender-deutschland-muss-milliarden-zahlen-a-968828.html> [accessed 9 May 2017].

[4] BMF, 25 June 2014, Letter to MP Franziska Brantner, on file with author.

[5] 'Somit obliegt die Entscheidung, den Kindergeldanspruch solcher als unbeschränkt einkommensteuerpflichtig behandelter Personen, die gemäß Art. 13 ff. der VO Nr. 1408/71 den deutschen Bestimmungen über soziale Sicherheit nicht unterliegen, durch Änderung oder Aufhebung des § 62 Abs. 1 Nr. 2 Buchst. b EStG zu versagen, allein dem Gesetzgeber.' BFH-Urteil 16 May 2013, III R 8/11 (published 28 Aug. 2013).

for TCN family members that some member states, such as the Netherlands and Germany, use as a requirement before residence is permitted (De Somer 2016: 233–4). It is important to note that this example is based on secondary law, namely on the Family Reunification Directive (2003/86/EC), which regulates the right of TCNs living in the EU to have their family members join them, if they have sufficient financial means and health insurance and pose no threat to public order. The directive gives member states the option to demand integration measures according to national law (Article 7(2)). Legally and politically, it is contentious whether language tests count amongst these measures, in particular as member states like the Netherlands, France, and Germany often subject only some TCNs to this requirement, while exempting others, such as citizens of the USA. I am including this case, despite its legal basis in secondary law, as it is a notable example of executive resistance.

An interesting case in this context is C-155/11 *Imran*, which concerned an Afghan woman with eight children who wanted to join her husband in the Netherlands. While her children could move to the Netherlands, she was denied residence after failing the test. Following legal action, the case reached the ECJ in 2011. For the Dutch government, but also for the governments in Germany, Austria, and France, this posed a threat to their attempts to make family reunification for TCNs subject to more demanding integration requirements. Shortly before, in Case C-578/08 *Chakroun* (March 2010), the Court had held that such measures are not allowed to undermine the rights of the Family Reunification Directive. Although the processing of Mrs Imran's application had been going on for almost two years, within days of the case reaching the ECJ, the responsible Dutch minister used his discretion to grant the residence permit in order to avoid the constraints of a court case (Arcarazo and Geddes 2013: 189–91). Case C-513/12 *Ayalti* was also cancelled; it concerned a reference from Germany that was withdrawn after the woman involved in the case passed the language test. Here German inaction was certainly assisted by the domestic courts. The German Federal Administrative Court, as well as the German Constitutional Court, rejected a preliminary proceeding in 2010 and 2011,[6] with the Federal Administrative Court arguing that the question was sufficiently clear and fell under the *acte clair* doctrine. During this time, the Commission emphasized in 2011 that it regarded the language test as a violation of EU law.[7] In the Bundestag, the Social Democratic and Green party groups launched a legislative proposal to abolish the language-test requirement that had been introduced in 2007 (BT Drs. 17/8921;

[6] BVerwG, Urteil of 30 Mar. 2010, Az. 1 C 8.09; BVerfG, Beschluss of 25 Mar. 2011, Az. 2 BvR 1413/10.

[7] *Der Tagesspiegel*, 1 Aug. 2011: 'Sprachtest darf Zusammenführung von Familien nicht verhindern', <http://www.tagesspiegel.de/politik/integration-sprachtest-darf-zusammenfuehrung-von-familien-nicht-verhindern/4453702.html> [accessed 9 May 2017].

BT Drs. 17/1626). Members of the ruling Christian Democrat/Free Democratic (liberal) coalition argued in the parliamentary debate that the test facilitates integration and enhances women's emancipation. Predominantly female Muslims have made use of subsequent family migration. Knowledge of the national language facilitates their societal integration.[8]

Member states could not ultimately prevent a Court ruling. In 2014, the ECJ ruled upon Case C-138/13 *Dogan*, which was a reference from the Berlin Administrative Court involving a Turkish woman, who was illiterate and had failed the test (§ 30 Abs. 1 Nr. 2 AufenthG). Drawing in part on the Association Agreement with Turkey, the ECJ demanded that cases be assessed individually, and found an automatic denial of residence to be out of proportion with the policy goals of achieving integration and hampering forced marriages.

In Germany, a member of the Bundestag from Die Linke, Sevim Dagdelen, who herself has Turkish roots, has been particularly actively engaged in the question of language tests for TCN family members, repeatedly initiating oral requests for information about the actions of the German administration in response to the constraints of EU law (BT Drs. 17/14046; BT-Drs. 18/937; interview Federal Ministry of Economics, 12 February 2013). While the government has introduced administrative adaptations, meaning that a failed language test no longer entirely prohibits migration into Germany, TCN family members must show that they have made efforts to pass the integration test for at least one year. Following the *Dogan* case, the Commission addressed the German government with a pilot procedure (3395/12/ELAR), requesting information on how the government implements the ruling, which led to an official letter from the Commission.[9] While the government responded to the *Dogan* case with an administrative circular introducing a proportionality test in August 2014, it continued to support the language requirement. Exemptions are only granted by the Foreign Office directly. Thereby, the German government resisted, as much as possible, the pressure from EU law (BT Drs. 18/4598, pp. 12–13).

More recent cases may have settled this contentious matter. In Case C-579/13, mandatory integration measures for TCNs, who have long-term residence status in the Netherlands, were passed by the ECJ, as long as these measures are proportionate and do not hinder the aims of the Family Reunification Directive. Case C-153/14, which was also decided upon in 2015, concerned the Dutch language test, which also examines knowledge about the country. The Court allowed member states to use the requirement of a language test if it is

[8] Plenarprotokoll 17/240, 16 May 2013, pp. 30337–43. <http://dipbt.bundestag.de/doc/btp/17/17240.pdf> [accessed 9 May 2017].

[9] BT Drs. 18/4001. <http://dip21.bundestag.de/dip21/btd/18/040/1804001.pdf>, pp. 23–4. BT Drs. 18/4598, p. 16.

proportionate and pays attention to the specificities of individual cases. The German legislator subsequently included the possibility of adding exceptions into the law (Thym 2015). The issue of language tests for TCNs appears, therefore, as a further example of fine-tuning in which member states can reconcile their policy priorities with case law by emphasizing their policy preferences and resisting the pressures of EU law. As I have mentioned, however, this example is based on secondary law provisions. For the Court, therefore, the threat of override is stronger than is the case when it is interpreting the Treaty. This may be the reason why I am not aware of a comparable example for successful executive resistance to the interpretation of the Treaty.

Executives not only have the option of resistance as a means to pursue their own policy preferences. They can also seek compensatory measures, to which I now turn.

Executive Compensation

Europeanization through case law not only requires specific acts of implementation. Some policy options are foreclosed, non-decisions are required, and governments may have to seek out alternatives. In his analysis of member-state reactions to the case law on golden shares, Werner (2016: 14) speaks of 'autonomy-protecting equivalents'. The example of the freedom to provide services, and its impact on Germany, is interesting in this respect, as it shows how member states can try to compensate for the implications of European law. After the Eastern enlargement in 2004, Germany had used the option of postponing the free movement of workers for 2 + 3 + 2 years until May 2011. However, soon after the accession of new member states in 2004, it became clear that the posting of workers from Eastern Europe posed a significant challenge, as it fell under the freedom of services provision and the Posted Workers Directive. Different to the free movement of workers, where workers are integrated into the regulatory environment of the new home state, under the freedom of services provision, this state is the host state, and the pay and labour conditions of the home country apply. Posted workers can only take up work on a temporary basis, interpreted as up to two years, in the host country and are not allowed to be fully integrated into the work processes there; otherwise, the provision for the free movement of workers would be relevant. Important here is that Germany did not have a general minimum wage until 2015 but relied heavily on collective agreements. While the host country's legally binding minimum wages apply to posted workers, collective agreements cannot be enforced. They only commit the relevant parties to the agreement. As they do not cover all employers in the host country, it would be discriminatory to require them from posted workers.

With an average German hourly wage, inclusive of social-security contributions, of €26.90 in 2004, Eastern enlargement applied great pressure as a result of posted workers. At the time, the average Polish wage was €4.74 (European Commission 2008: 133). This competitive pressure resulted in legislation for different sector-specific minimum wages—these are discussed later in greater detail as a legislative reaction—which preceded the general German minimum wage that was introduced in 2015. However, this was not the only reaction. The freedom to provide services through posted workers also facilitated fraud, as the regulation and administrative control of this area is the responsibility of the home country, not the host country where services are provided, and where the costs of non-compliance accrue (Schmidt 2007, 2009). In addition, this complicated division of labour between the different member-state administrations was ill understood. The Eastern European administrations responsible were quoted in the press as claiming that it was not their duty to control their companies' activities in the West.[10] Instances of fraud were reported, as mere letterbox companies were posting workers on a permanent instead of a temporary basis; as such, these workers were fully integrated into the world of work and were thereby replacing regular workers. Maximum working times and minimum wages were often violated, and workers were crowded into camp accommodation that was overpriced, to cite some of the complaints (Interview Ver.di, 30 March 2006, Berlin). Even where detected, German authorities often could not act on fraud, as responsibility lay with the home state. The ECJ emphasized in a ruling that the host state even had to accept certificates (E-101 for posted workers) that were obviously forged, due to the rules on administrative cooperation in the EU. Germany, as a host state, would need to address the home state directly through an infringement procedure brought before the ECJ (C-2/05, 26 January 2006). Consequently, we have a striking example here of an instance where case law required a non-decision. Germany could no longer implement certain controls and was deprived of important policy instruments. In this situation, Germany reacted with compensatory measures.

Given the formal administrative responsibility of the home state, Germany bolstered its administrative controls on illegal activities. The ECJ (C-490/04, 6 October 2007) allows member states to examine some translated documents (labour contract, details of wages, and evidence of working time and the payment of wages). In late 2003, the previously separate controls that were carried out by the labour administration and customs were merged in the Finanzkontrolle Schwarzarbeit (FKS; financial control of illegal employment). In mid-2004, the law to intensify the control of illegal work and tax evasion (SchwarzArbG) bundled together and harmonized existing rules. In early

[10] *Taz* (13 Nov. 2003), Das miese Geschäft mit den Schlachtern.

2005, the Federal Ministry for Economics and Labour and the Federal Ministry of Finance built a joint taskforce to control abuse of the cross-border freedom to provide services and the freedom of establishment.[11] In addition to intensifying the cooperation of the state and federal administration, its task was to enter into bilateral negotiations with the administrations of other member states. A new law required that all E-101 certificates for posted workers had to be sent to the central office for old-age insurance in Würzburg, which was tasked with detecting forged certificates (BT-Drs. 16/5098, p. 18). Moreover, the Federal Ministry of Finance published a guide to the rules concerning the exercising of the freedom to provide services and the freedom of establishment (Bundesministerium der Finanzen 2006).

In addition to strengthening its domestic administration, Germany engaged in regular bilateral talks with old (Denmark, the Netherlands, and Austria) and new (Poland, Hungary, the Czech Republic, and Romania) member states in order to reach a common understanding of the conditions for the legal posting of workers, as well as on the criteria for determining their abuse, for instance through letterbox companies. It has to be emphasized that the ECJ has shown little concern about abuse. 'Therefore, in conclusion the free movement rights generally protect the use of letterbox companies and have done more to promote their use than to limit it' (Sorensen 2015: 93). One goal of the talks was to reach an agreement on the joint control of illegal activities.[12] It is interesting that member states revert to bilateral or multilateral agreements not only in the absence of political consensus at the European level but also in view of legal difficulties.

Finally, the problems that arose from the posting of workers within the context of the Eastern enlargement also gave rise to legislative negotiations at the EU level. The revision of the Posted Workers Directive (2014/67/EU), which also stood in the context of the *Laval* and *Viking* rulings, was agreed in spring 2014, and it includes specifications for the 'genuine' establishment and posting of workers in order to counter fraud (Article 4). The directive, moreover, pays attention to the problem of subcontracting liability, allowing member states to introduce non-discriminatory measures of control (Sorensen 2015: 99–100). With another proposal for a revision tabled in 2016 (COM (2016) 505 final), difficulties appear ongoing.

In summary, it is not unusual for executives simply to comply with the demands of supranational law. They do this in areas where one can assume that they have other policy preferences too. We also find an example of

[11] 'Task Force zur Bekämpfung des Missbrauchs der grenzüberschreitenden Dienstleistungs- und Niederlassungsfreiheit.'

[12] Interview BMAS (29 Mar. 2006); interview BMWi (29 Mar. 2006); *Die Welt* (12 Apr. 2005), 'Lohndumping: Regierung verhandelt mit Polen'; *Financial Times Deutschland* (26 Apr. 2005), 'Dienstleistungen: Rüge aus Polen'; Bundesministerium der Finanzen 2008.

successful resistance in the case of the language test for TCN family members. This success most likely hinges on the fact that member states generally comply with rulings, so instances of resistance are taken seriously by supranational actors and are consequently met with responses. Given that the legality of the language tests was based on secondary law, and not on the Treaty, the more credible threat of legislative overrule is likely to have helped the cause of member states' executives. Lastly, we also find indirect responses in the form of compensation.

LEGISLATIVE ACCOMMODATION

Given the parliamentary systems of EU member states, reactions from the legislature that are not supported by the executive hardly ever occur. Legislative reactions will normally be prepared by the executive, but the executive also reacts by drawing on its administrative powers, as we just saw, which makes it valid to discuss legislative reactions separately.

The Reform of Limited Companies

A notable example of legislative reform is the response to regulatory competition that resulted from Case C-212/97 *Centros*. In the case, the ECJ ruled that a Danish couple who had founded a limited company in the UK, solely for the purpose of circumventing stricter capital requirements in Denmark, could rightly demand the authorization of their branch office in Denmark. As a result, the ECJ affirmed that the freedom of establishment protects regulatory arbitrage (Steindorff 1999). Before we look in greater detail at this instance of company reform, it is important to ask what kind of Europeanization response we can identify here. With the ruling on the *Centros* case, the ECJ did not impose requirements on member states to react in a certain way. It simply allowed regime competition, by enforcing mutual recognition. It is, thus, an indirect Europeanization effect and does not fall within notions of compliance. Company law regulates how companies can be established and operated. These rules are important for the different stakeholders, the management, shareholders, creditors, employees, and also consumers (Blauberger and Krämer 2014: 788).

Following the *Centros* ruling from the ECJ, the establishment of British limited companies became very popular in Germany and also in other member states. Different to the US, in the EU, competition for incorporations is not fuelled by franchise taxes, but there are political interests in not losing control over the regulation of companies employing and trading in the member state

(Becht et al. 2008). The status of being established as a limited company does more than allow the bypassing of German co-determination rules for large companies. More relevant here are liability issues, which are settled outside of company law in Britain. By transferring only parts of a regulatory system, in this case rules of establishment, regulatory gaps may result. As the German rules on the liability of limited companies do not apply to limited companies established in the UK, these companies are insufficiently regulated in Germany (Horn 2004: 900).

In response to the significant regime competition fostered by the *Centros* ruling, several member states lowered the minimum legal capital requirements in their legislation. Blauberger and Krämer (2014: 794) list the following reforms: France 2003/2008; Finland 2006; Germany 2008; Poland 2009; Denmark 2010; Sweden 2010; Bulgaria 2010; Portugal 2011; the Netherlands 2012; Italy 2012; Greece 2012; Austria 2013; Luxembourg 2013; and the Czech Republic 2014 (see also Bratton et al. 2009; Ringe 2011). In Germany, capital requirements to establish a limited company were originally set at €25,000. After the *Centros* ruling, consulting firms offered help in founding limited companies in Germany and disseminated information about this possibility through the internet (Höpner and Schäfer 2010: 360).

The German *MoMiG* reform[13] relaxed requirements in 2008, introducing the option of a 'mini-GmbH' that can be established with upwards from €1, but 25 per cent of annual profits have to be put aside until reserves of €25,000 are reached. In addition to rapidly evolving regime competition, there were also domestic motives for the reform. Partially as a result of this legislative response, regime competition has become less of an issue in German company law. The costs of being established in the UK as a private company limited by shares became more widely known. While these companies are quick and easy to establish, they are comparatively difficult to maintain as they have significant yearly reporting and testifying duties. Consequently, the Chamber of Crafts in Cologne reported in late 2010 that of the 220 limited companies that had originally been established in the area, only 78 continued to exist. The issue is that a company is automatically erased from the register if it fails to comply with their reporting duties. Once this happens, owners are personally liable and find themselves in the exact situation they wanted to avoid by founding a limited liability company in the first place.[14]

In their analysis of company law, Blauberger and Krämer (2014: 795) argue that the reform of limited companies is an extreme case of regulatory competition, and also of legislative response. It is rare that case law triggers such a race to the bottom.

[13] Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG).

[14] Handwerksblatt, Nov. 2010: Good bye limited, Tschüss Geld.

The Posting of Workers

Earlier in this chapter, I discussed German attempts to counter the increase in fraud following the posting of workers after the Eastern enlargement through administrative controls and bilateral agreements.

In Germany, the posting of workers brought the introduction of minimum wages onto the agenda since, in contrast to collective agreements, they can be a requirement for posted workers. After Eastern enlargement, the pressure on low-skilled German jobs was significant. The meat industry union complained in 2005 that one-third of all jobs had been replaced by posted Eastern Europeans, which amounted to 26,000 jobs.[15] The accession of Bulgaria and Romania worsened the situation; the union spoke of hourly wages of €1.90 and estimated that 90 per cent of posted workers worked illegally.[16] According to the union, 69 per cent of workers in the meat industry were posted (Hassel et al. 2016: 1225). German wage advantages also led the Danish meat companies Danish Crown and Tulip to relocate production to Germany. Employment in meat production in Denmark almost disappeared, leading Danish politicians to support the introduction of a minimum wage in Germany (Hassel et al. 2016: 1230).

A prolonged discussion surrounded the general introduction of a legally binding minimum wage. In the domestic arena too, the traditional system of collective agreements had come under pressure due to decreasing membership in employer associations and unions. After the Eastern enlargement, several sectors were added to the list of those that had a minimum wage (the building sector was the first in 1997, and was then joined by cleaning, postal services, security, mining, laundry services, the waste industry, including street cleaning, public training, and care services). However, it took until August 2014 to agree on a minimum wage in the meat industry, the sector which had the biggest problems. In an unusual move, the Belgian government handed a complaint about Germany to the Commission in 2013, as the lack of a German minimum wage was ruining the competitiveness of Belgian slaughterhouses.[17]

Finally, from 2015 onwards, Germany introduced a general minimum wage, which was a significant change to the domestic institutions of capitalism because of the importance of collective agreements. In this context, I only wish to point out that Europeanization added incentives for this major reform. The introduction of a minimum wage is one possible unilateral move that is acceptable within the ECJ's interpretation of the Treaty.

[15] FTD (9 Feb. 2005), 27; *Der Spiegel* 7/2005, 32–5.
[16] FTD (24 May 2007), Hängepartie im Schlachthof.
[17] *Süddeutsche Zeitung*, 10 Apr. 2013, 'Bulgarische Billig-Fleischer erzürnen Belgiens Metzger', <http://www.sueddeutsche.de/wirtschaft/protest-gegen-minijobs-in-deutschland-bulgarische-billig-fleischer-erzuernen-belgiens-metzger-1.1645144> [accessed 9 May 2017].

The Laval Quartet

The series of rulings on the *Laval*, *Viking*, *Rüffert*, and *Luxembourg* cases, which were issued in late 2007 to 2008, restricted domestic options to foster collective agreements against wage dumping, as they interpreted the provisions of the Posted Workers Directive as rules for the maximum protection of workers. In particular, the ECJ argued that the right to strike needed to be assessed against its implications for the freedom to provide services and the freedom of establishment, and therefore necessitated a proportionality test. As strikes are only effective if they hurt economically, this was heavily criticized by the unions (European Trade Union Confederation 2008). The rulings attracted significant political attention, and they required domestic legislative changes. At a time when memories of the conflicts around the Services Directive were still fresh, the rulings backed up criticisms that accused integration of having a neoliberal bias.

It is not possible to do justice here to the wide range of literature that recounts member-state reactions to this series of cases (Malmberg and Sigeman 2008; Zimmer 2011; Bücker and Warneck 2010). I will only outline some of the reactions. In Sweden, legislation had to be changed that had allowed unions to take collective action against companies that adhered to collective agreements under foreign law (Blauberger 2014: 467–8). As a result, the protection of posted workers deteriorated (Seikel 2015: 1176–7). Reform in Sweden was difficult as employers backed a loosening of the protections for workers (Davesne 2009; Woolfson and Sommers 2006; Rönnmar 2010). Compared to Sweden, Denmark managed to react much more quickly in an example of anticipatory obedience (Blauberger 2014: 468; Blauberger 2012: 117). Reform in Denmark was greatly helped by the larger societal consensus among unions and employers on regulating posted workers (Refslund 2015; Seikel 2015).

The *Rüffert* ruling concerned the Public Procurement Act of the German state of Lower Saxony. Construction firms had to commit to collective agreements for winning public tenders. A German firm subcontracting to a Polish company failed to make sure that sufficient wages were being paid, which resulted in a fine and the annulment of the contract. This led to the preliminary ruling in which the ECJ found that the Public Procurement Act violated the freedom of services and the Posted Workers Directive. As a consequence, several federal states reformed their Public Procurement Acts as well. As Sack has shown, party differences in the governments played out in these reforms (Sack 2010, 2012; Blauberger 2012: 120). Centre-right governments were happy to take up the opportunity to abolish collective-agreement declarations (Blauberger 2012: 121). However, governmental concerns about the possible liability claims of companies who were unlawfully excluded from public tenders were also an important

consideration in enacting reforms after the *Rüffert* ruling (Blauberger 2014: 470; Seikel 2015: 1178–81).

The *Luxembourg* case was the only infringement procedure of the four. Luxembourg had extended all the terms and conditions of employment regulation to posted workers, thereby violating the freedom of services and the Posted Workers Directive. As Blauberger (2012: 122) argues, the Luxembourg government had deliberately tested the waters with its law by interpreting the Posted Workers Directive in the broadest possible sense. After the ruling, the government gave in and reformed the regulations. However, what appeared to be regulatory surrender, Blauberger argues, still allowed the defence of much of the government's original policy aims. He calls the strategy 'emulation', through which member states adopt a policy solution that the Court has already vetted as a template for their own policies (Blauberger 2012: 114). This happened in the Luxembourg case, as the country used the different policy solutions member states had reached after the *Laval* and *Rüffert* rulings for orientation.

Reform of Social Benefits in the United Kingdom

In the context of the referendum on Brexit, EU citizens' access to social benefits in the UK has been a central cause for concern. In line with the country's increasingly eurosceptic political climate, the UK government has continuously reduced EU citizens' access to different social benefits through various legislative reforms. Just as the *Centros* ruling led to several legal reforms for domestic companies, these cuts are also a response to the different ECJ rulings that have facilitated EU citizens' access to non-contributory social benefits in other member states. These rulings have, on the one hand, broadened the definition of who enjoys worker privileges under the free movement of workers and, on the other hand, linked more entitlements to the status of being an EU citizen under the Treaty's provisions. Chapters 3 and 5 discussed this.

After the Eastern enlargement in 2004, the UK was one of the few member states (in addition to Ireland and Sweden) not to use the transitional option of suspending the free movement of labour for 2 + 3 + 2 years, in the expectation that net migration from the Eastern accession countries would amount up to 13,000 a year (Drew and Sriskandarajah 2007). However, by September 2006 almost half a million people had registered to work in the UK (Drew and Sriskandarajah 2007). With access to non-contributory benefits for EU citizens being originally generous, the UK government has struggled with ECJ case law in carrying out cuts (O'Brien 2015), repeatedly demanding the right to deny access to social benefits during the first four years of EU citizens' residence in the country. In a period of austerity that followed the financial

crisis, access to social benefits became a dominant topic in the EU referendum debates. It is important to observe how case law structured these reforms, although the Citizenship Directive only grants EU citizens' equal access to benefits after five years of residence. However, there must be an 'individual assessment' (C-140/12 *Brey*), and benefits can only be denied to citizens who are an 'unreasonable burden' (C-184/99 *Grzelczyk*) on the state. While there is a requirement for a 'certain degree of integration into the society of that State' (C-209/03 *Bidar*), case law demands a 'certain degree of financial solidarity' (C-184/99 *Grzelczyk*), and the privileged status of workers with the right of free movement applies as soon as work is not 'only marginal and ancillary' (C-53/81 *Levin*). Moreover, the Court requires authorities to assess the specific situation of each EU citizen on a case-by-case basis, making it very difficult to handle mass applications (Blauberger and Schmidt 2017). The debate is interesting because it demonstrates the difficulty of translating rules that have been introduced by case law into general policy.

Under the Conservative government in 1994, the UK had already introduced a habitual residence test, in order to counter fears of possible 'benefit tourism', as income support had previously been granted irrespective of the length of stay in the UK. The notion of habitual residence follows Regulation 883/2004, where it establishes the responsible member state. The definition of habitual residence draws heavily on case law. The test does not apply to EEA migrant workers to the UK. Since its introduction, British citizens returning to the UK also have to pass the test in order not to violate EU non-discrimination rules. In fact, a review of the test under the Labour government in the late 1990s criticized the way in which returning UK citizens were the ones most affected by the requirement. Residence requirements were then cut from five to two years. In 2008, almost 3,000 British citizens failed the test (Kennedy 2011b: 3, 6–8). The underlying legislation does not clearly define habitual residence, but the test takes into account the length of residence, prospects of employment, existing links to the UK, and the intention to settle there.

In 2004, the test was complemented by the right to reside test, which was directly linked to the Eastern enlargement. In contrast to habitual residence, UK nationals are exempted from the right to reside test. The right to reside test is applied before the test for habitual residence and is relevant for different benefits, such as jobseeker's allowance (JSA) and child and housing benefits, and seeks to ensure that those EU citizens who settle in the UK are either self-sufficient or economically active. Because of the discriminatory nature of the test, the Commission began an infringement procedure in 2010 (Kennedy 2011a: 4, 15–16), which was taken to the Court in 2013 (Case C-308/14). While the Commission originally considered there to be a case for discrimination against EU nationals in relation to different benefits (Pension Credit, income-based JSA, Child Benefit, and Child Tax Credit), after the ruling in Case C-140/12 *Brey*, it restricted the infringement procedure to Child Benefit

and Child Tax Credit.[18] AG Cruz Villalón, in his opinion on the case in October 2015, argued that the test was proportionate and justified by the need to protect public finances. Shortly before the referendum, the Court followed this view in June 2016.

During the pending court case, the UK continued to restrict EU citizens' access to social benefits. In these attempts, it is striking how closely ECJ case law was followed. In late 2013, the government introduced a revised habitual residence test, which had more individualized questions and was guided by an intelligent IT system; it included questions about the individual's efforts to gain employment. This fulfilled the requirement for a case-by-case assessment process (Kennedy 2015: 8–9). From 2014 onwards, jobseeker's allowance has been cut for the first three months in the UK.[19] The allowance is only paid for the following three months, as member states may limit the right of residence of jobseekers to a period of six months; beyond this period, the jobseeker has to provide evidence of 'genuine chances of being engaged' (Case C-292/89 *Antonissen*, No. 21) in a Genuine Prospect of Work test introduced in mid-2014 for new applicants for JSA (Kennedy 2015: 17–19).[20]

Moreover, since 2014, having the status of a jobseeker no longer entitles an individual to housing benefits.[21] The UK government argued that, in view of the 3,000 EEA citizens who were claiming housing benefits, this could imply savings of about £10 million a year (Kennedy 2015: 24). Access to child benefits and tax credits was also cut in 2014 for the first three months of residence in the UK. The government set a minimum earning threshold of £150 a week in order to assess whether work is not 'only marginal and ancillary'. Those earning below this threshold are assessed individually as to whether they qualify as workers that fulfil the ECJ requirement. Detailed guidelines from the Department of Work and Pensions (DWP), which is responsible for this area, structure the assessments (Kennedy 2015: 21, 31).

Since 2013, Universal Credit has been introduced in stages, replacing six major means-tested benefits.[22] Its classification as social assistance makes it easier to exclude EU citizens, in comparison to unemployment-related benefits where the free movement of workers becomes relevant. Since June 2015,

[18] See Kennedy 2011a: 17–20 for the British response to the case and prognoses as to the fiscal costs of waiving the right to reside test.

[19] Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013 (SI 2013/3196), The Immigration (European Economic Area) (Amendment) (No. 3) Regulations 201434. <http://webarchive.nationalarchives.gov.uk/20140519141601/https:/www.gov.uk/government/uploads/system/uploads/attachment_data/file/269505/m-28-13.pdf> [accessed 9 May 2017].

[20] The Immigration (European Economic Area) (Amendment) Regulations 2014; SI 2014/1451.

[21] Housing Benefit (Habitual Residence) Amendment Regulations 201443.

[22] Income-based Jobseeker's Allowance, Income-related Employment and Support Allowance, Income Support, Working Tax Credit, Child Tax Credit, and Housing Benefit.

legislation has detailed that EU citizens who are seeking a job do not qualify to receive it (Kennedy 2015: 33).

Within our context, the way the UK has reformed non-economically active EU citizens' access to social benefits is interesting in several respects. First, it shows the difficulties of translating principles of case law into daily administrative practice. Courts have to make decisions on individual cases in terms of their eligibility, since no social policy legislation can capture all individual circumstances (Blauberger and Schmidt 2017). However, the Court's unwillingness to accept the five-year threshold of the Citizenship Directive and its demand for case-by-case assessments create a significant administrative burden, as well as a lack of legal certainty for those seeking social assistance. With its infringement procedure, the Commission pushed the non-majoritarian nature of these rights further, at a time when exit from the EU was increasingly being discussed as an alternative to not being granted a voice in discussions (Hirschman 1970).

To sum up, the different examples show that legislative responses to EU case law are common. In part, we find domestic responses that are directly triggered by case law, as in the examples of the *Laval*, *Viking*, and *Rüffert* cases. For the responses, national party-political reactions are significant. To some extent, case law heavily constrains domestic reforms, as was shown in the example of UK social benefits. Here, the difficulty of translating individual rulings into general rules is particularly pronounced. Finally, to different degrees, case law is only one factor among others. The reform of company law had additional motivations. The German minimum wage is co-determined by EU case law, but this link was absent in the public political debate.

JUDICIAL REACTIONS

When analysing the Europeanization effects of EU case law, domestic courts are crucial actors that can push or constrain the importance of EU law, thereby defining the political leeway accorded to domestic executive and legislative actors. 'In areas governed by direct effect and supremacy, national judges are expected to act as agents of the EU legal order, not the national legal order' (Stone Sweet and Stranz 2012: 95). When the issue is sufficiently settled either by EU law (*acte clair*) or by an ECJ ruling (*acte éclairé*), domestic courts are held to ignore national law that contradicts European entitlements. If domestic courts are non-responsive, in that they do not generally apply European law and address few demands for preliminary rulings to the ECJ, the pressure on domestic governance is much less than if domestic courts are activist, seeking to change the domestic legal setting through EU law. Domestic courts

are one important gatekeeper for the influence of EU law at the member-state level. I will discuss examples for both alternatives. If domestic courts build up pressure for policy change, reform deadlock at the national level may potentially be overcome at the European level, but the latter may also simply help to realize the policy goals of minorities. The prerequisite is the extent to which litigants take advantage of the opportunity structure that EU law provides to change their regulatory setting (Knill and Lehmkuhl 1999: 2, 8).

Member states differ in their judicial traditions, which influences the way domestic courts embrace the European legal order. Wind (2010) has argued that, because of the Scandinavian tradition of parliamentary sovereignty, lower courts in these countries are highly reluctant to set up preliminary proceedings, as they assume that the highest courts should decide on references. This leads to less pressure for domestic policy changes in comparison to a system of constitutional sovereignty, where it is common to accept judicial review and constraints on domestic policy (Abromeit 1995). By way of contrast, in another system of parliamentary sovereignty, but one that has a common-law tradition, such as the UK, there seems to be a great deal of awareness of the constraints of EU case law, as courts are an established source of rights (Blauberger and Schmidt 2017). Notwithstanding the different court reactions, the discussion of executive reactions has shown that Danish, German, Dutch, and British executives all implement ECJ rulings in the context of the rule of law. If lower courts refrain from initiating preliminary proceedings, as in the Scandinavian tradition, it is less likely that specific domestic questions will become subject to judicial review.

Finally, we can also hypothesize that the differences among member states relate to the length of their membership in the EU. It is plausible that newer member states, in particular those that have only regained full sovereignty recently, face more difficulty in accepting the constitutional nature of case law. This was apparent when discussing the example of the Patient Mobility Directive in Chapter 5 and the Eastern European member states. It is, therefore, likely that, with no external pressure, these member states are more likely to contain the impact of European case law. In fact, this may give an incentive for all other member-state governments to codify case law in EU secondary law in order to level the playing field.

Domestic Judicial Activism

Domestic courts may be activist and help to build and diffuse emergent European legal entitlements. Recent case law on age discrimination may serve as an illustration here. Although this relates to another area of European law, and not to the four freedoms, I shall present this example briefly, as it provides a very interesting case study. As Stone Sweet and Stranz (2012) show,

German labour courts have an activist tradition, which began in the area of sex discrimination. Progressive labour courts, which disagreed with the litigation on rights by the German Federal Constitutional Court (GFCC), addressed the ECJ at an early stage in order to pursue a line of adjudication that was not shared by the GFCC and went far beyond the constitutional court's line of reasoning. The important Cases 170/84 *Bilka* and 181/88 *Rinner-Kühn* were the result of references from the German labour courts. 'In their references, German judges made it clear that they considered these practices, and the national statutes that permitted them, to be a form of indirect sex discrimination, and therefore unlawful under ex-Article 119 TEEC. The ECJ responded by giving the referring courts what they wanted: a mandate to root out indirect discrimination in the workplace and in Germany's social policy' (Stone Sweet and Stranz 2012: 95). The authors argue that 'Put differently, the ECJ's key rulings in the area strengthened what labour judges were already pre-disposed to do' (p. 100).

Against this backdrop, a significant broadening of European discrimination rights was achieved through Cases C-144/04 *Mangold* and C-555/07 *Kücükdeveci*. The *Mangold* case attracted a great deal of attention in many areas. For once, it was a clearly constructed case. A lawyer, who had been politically vocal about his opposition to a labour-market reform, which allowed more lenient rules for limited labour contracts for those over 52 years of age, hired another lawyer under this reform with the explicit goal of challenging the rule in court. At the time, the deadline for implementing the 2000 EU directive on anti-discrimination had not yet passed. Judge Hauf of the repsonsible Munich labour court of the first instance nevertheless took the opportunity to refer the case to the ECJ. As the judge could not yet argue with the directive, she referred to the EU Charter of Fundamental Rights, which was not yet in force either. 'Taking its cues from Judge Hauf, the Court held that the German provision under review discriminated against older employees. . . . The ECJ then gave Judge Hauf what she wanted, authorization to enforce EU fundamental rights against the national rule under review' (Stone Sweet and Stranz 2012: 101).

Another example here is Case C-555/07 *Kücükdeveci*. In this case, the German rule at issue stated that working times for those under 25 years of age did not have to be included when calculating the length of notice for terminating work contracts. The Higher Labour Court in Düsseldorf referred the case to the ECJ. Its reference baldly stated that, given the GFCC's jurisprudence, a reference to the GFCC would be unlikely to help Ms Kücükdeveci: 'the judges made it clear that they believed that the part of the Civil Code under review violated the EU's age discrimination principle, and could not be justified under the EU's Framework Directive' (Stone Sweet and Stranz 2012: 103). The ECJ confirmed the contentious *Mangold* age-discrimination principle. In general, active labour courts that have linked up with the ECJ have

fundamentally transformed German labour law through European law. Domestic judicial activism, it becomes apparent through this case study, can make a difference in fostering ECJ rulings.

The reaction from the Swedish labour court after it received the ECJ's *Laval* ruling can be seen in a similar activist light. The court established an indemnity claim for the employer, although it stated 'that there was no explicit support in the case law of the ECJ for the proposition that an individual is to pay damages on an EU law basis to another individual upon a violation specifically of Article 49 TEC (now Article 56 TFEU)' (Rönnmar 2010: 282). Thus, despite the fact that the legal matter had been so unclear as to require the local court to address the ECJ—after which the ECJ produced an expansive ruling in a way that surprised and outraged the legal and political community—and that there was no clear EU legal requirement for liability, the union had to pay punitive damages of €55,000.[23]

The potential to be liable for the economic consequences of a strike may put a serious brake on industrial action. Thus, when British Airways (BA) planned to set up a subsidiary in another member state in 2008, the British Airline Pilots' Association (BALPA) wanted to strike in order to avoid social dumping impacting their members. BA, however, requested an injunction from the court, arguing that a strike would breach the freedom of establishment of Article 49 of the Treaty on the Functioning of the European Union (TFEU) and would, therefore, give grounds for claiming damages of approximately £100 million a day. Consequently, BALPA could not risk strike action (Zimmer 2011).

Domestic Judicial Restraint

Domestic judicial restraint in following a broad interpretation of case law lessens the pressure from EU law. If domestic courts are reluctant to refer to European law, justice may be 'contained', as executives and legislators are under little pressure to modify domestic laws in accordance with European demands. However, we have seen also that it appears to be quite common for executives to respond to ECJ rulings—this is also true for cases where their country is not directly involved—without gambling first on the reactions from the judicial system. Perinetto (2012) analyses why the important judgments of *Laval* and *Viking* have had no effect in Italy. As is the case in Scandinavia, in Italy it is up to the social partners to set tariffs, so one would expect the rulings to have a noticeable impact here. However, since wage levels between Italy and the new Eastern European member states do not differ so much, there is less of

[23] I thank Michael Blauberger for reminding me of this case. See Ewing (2012) for details.

a wage-differential to exploit. Moreover, labour courts demonstrate a great commitment to guarding the social rights of workers in their judgments, so they cannot be seen as natural allies of the ECJ in this respect. Perinetto, therefore, expects that the Italian Constitutional Court would explicitly reject the supremacy of EU law in this case, should Italian courts be pressed to follow the case law from the *Laval* ruling.

Another interesting example of an at least temporary restraint is the reaction to the case law on European citizenship rights. As was noted in Chapters 3 and 5, the ECJ has, over the years, built up an impressive body of case law, transforming an initially meaningless treaty article into far-reaching citizenship rights, including EU citizens' access to national schemes of social assistance that were previously reserved for nationals (Schmidt 2012). Importantly, the general article on non-discrimination is interpreted as partly prohibiting legal provisions that favour nationals over EU-citizens. As we have seen earlier, the Citizenship Directive of 2004 largely codifies the existing case law from the time, which was greatly influenced by the *Grzelczyk* ruling.

As Björn Schreinermacher (2013: 103–15) shows, by analysing the court cases in the UK and in Germany that referred to the *Grzelzcyk* case, it becomes clear that domestic courts supported a more constraining interpretation of the case law for some time. Numerous UK court proceedings have dealt with the habitual residence and right to reside tests. In mid-2011, the UK Supreme Court agreed in the *Patmalniece* case that the exemption of UK nationals from the right to reside test is indirectly discriminatory, but it argued for its proportionality, as granting equal benefits would result in the placing of an undue financial burden on the UK. Such a restrictive interpretation of national discriminatory principles clearly shields national administrations.

For some time, German courts excluded EU citizens who fell short of the five-year residence requirement from social assistance by making reference to the will of the European legislature.[24] Schreinermacher (2013: 106) argues that these largely restrictive interpretations by the courts allowed the German federal government to maintain its restrictive legislation that equates EU citizens with foreigners and only reserves non-contributory social assistance for Germans.

In late 2013, the first newspaper reports drew attention to social courts that opposed the legislative status quo and administrative practice.[25] Increasingly, courts turned to EU law to argue that Germany could not withhold social

[24] Landessozialgericht (LSG) Nordrhein-Westfalen, Beschluss of 15 June 2007, Az. L 20 B 59/07 AS ER, L 20 B 59/07LSG Niedersachsen-Bremen, Beschluss of 02 Aug. 2007, Az. L 9 AS 447/07 ER, LSG Hessen, Beschluss of 14 Oct. 2009, Az. L 7 AS 166/09 B ER. Cases where assistance was granted are: LSG Berlin-Brandenburg, Beschluss of 25 Apr. 2007, Az. L 19 B 116/07 AS ER, SG Wiesbaden, Beschluss of 15 Jan. 2008, Az. S 16 AS 690/07 ER, 16 AS 690/07 (cf. Schreinermacher 2013: 103–15).

[25] *FAZ* 2 Dec. 2013, '"Hartz IV" für Arbeitslose aus Rumänien'.

assistance from EU citizens automatically but that there needed to be case-by-case assessments, according to ECJ case law. While the German social administration was bound by exclusionary German law, once EU citizens increasingly sought judicial redress, a heterogeneous picture developed. Some social courts maintained restrictions, taking their guide from domestic social law, and some were permissive, following the EU non-discrimination rule. In 2014 and 2015, courts handed cases to the ECJ, asking for guidelines on when EU nationals may be excluded from benefits (Cases C-333/13 *Dano*, C-67/14 *Alimanovic*, and C-299/14 *Garcia Nieto*) (Blauberger and Schmidt 2014). In late 2014, the *Dano* case was decided upon, which involved a Romanian who had moved to Germany and never intended to work. The ECJ drew the line here and affirmed Germany's right to deny social benefits in this case. In the *Alimanovic* case that followed in September 2015, the Court supported the rule that unemployment benefits can be restricted to six months for those that have worked for less than a year. In these two cases, the ECJ refrained from engaging in judicial activism by permitting limits to 'financial solidarity'. At least some questions concerning the right of access to benefits are thereby settled.

In summary, the national judiciary has a significant degree of freedom to react to case law in responsive or restrictive ways. It is difficult to predict which way the judiciary will turn. If European law offers judges preferable legal dogma against domestic judicial opposition, there are significant incentives to turn to supreme European law. If judges, in contrast, defend upholding differences between EU nationals and nationals, or are inclined to guard national political autonomy, the impact can be contained to a greater degree. It then depends on external pressures, such as interventions from the Commission to change domestic policies, or on the executive and the legislature.

SOCIETAL ACTORS

Societal actors may drive or constrain the development of case law, putting pressure on domestic governance or helping to contain it. To the extent that the ECJ grants direct horizontal effect to the fundamental freedoms, private actors are also the direct addressees of EU case law, having to change their behaviour. Finally, private actors may be important collaborative partners for governments in containing the negative implications of case law.

It is more common in the US to regard litigation as one option, alongside lobbying in the parliamentary process that private actors can use to realize their interests (Conant 2006; Kelemen 2006). By actively seeking out the benefits of EU law, actors advance its applications, partly with the help of the Commission. Consequently, the Commission's intervention against German public banks on the basis of European competition law, most notably

the Westdeutsche Landesbank (West LB), was supported by complaints from German private banks (Smith 2005; Seikel 2013). Additionally, the action taken against Volkswagen's privileges was partly motivated by Porsche's complaint to the Commission (Blauberger 2014). Many interventions in the name of integration, therefore, reflect domestic political conflicts. As such, to answer the question of whether member states have political autonomy, it is paramount to ascertain whether the existing governance structure is broadly supported by domestic societal actors. Blauberger's (2012) analysis of the Danish and Swedish reactions to the *Laval* case shows that governments can be certain that domestic court cases will not challenge domestic laws when societal actors are sufficiently densely institutionalized and in agreement. In Sweden, the Confederation of Swedish Industry welcomed the pressure the ruling put on collective agreements. It even financed the legal dispute in the first place (Asteriti 2013: 78). When Sweden wanted to reach a new legislative consensus for posted workers, striking a compromise between the social partners proved difficult and led to a much more narrow definition of minimum pay than had been established in Denmark, where reform was also deemed necessary and was much easier to realize due to the broad consensus that existed between the social partners (Blauberger 2012: 118; Refslund 2015).

As Seikel (2015) shows, the difference between the Danish and the Swedish response can be successfully explained through the different structures of the building industries in both countries. The Danish building industry consists of small- and medium-sized firms, which are united in their interest in avoiding wage competition created by posted workers. In Sweden, in contrast, a few big players dominate the scene. For them, wage competition from posted workers is beneficial. By establishing a horizontal direct effect, the *Laval* and *Viking* rulings also address unions directly. In considering strikes, they have to ensure that the implications for the freedom to provide services and the freedom of establishment are proportionate. As mentioned earlier, as a result, a strike against BA in 2008 was halted through a court injunction.

The horizontal effect of the free movement of goods, established through Case C-171/11 *Fra.bo*, offers another example. In this case, an Italian manufacturer of copper fittings for water and gas pipes took legal action in Germany against a German standardization body, the Deutscher Verein des Gas- und Wasserfaches (DVGW), for denying certification under their standards. The Court backed Fra.bo's interpretation that this hindered market access and that the standardization body is bound by the free movement of goods. After this ruling in 2012, it took until May 2015 for an out-of-court settlement to be made, in which the DVGW promised to adapt its standards to meet Fra.bo's needs.[26] Up until that point, the

[26] DVGW, 22 May 2015: 'DVGW und Fra.bo beenden über 10 Jahre andauernde rechtliche Auseinandersetzung', <https://www.dvgw.de/der-dvgw/aktuelles/presse/presseinformationen/dvgw-presseinformation-vom-22052015> [accessed May 2017].

court case had been pending at the German Federal High Court of Justice (Bundesgerichtshof). When the ECJ grants horizontal effect to the fundamental freedoms, compliance demands that societal actors change their behaviour. In this specific case, the German government also had to change some statutes that referred to private standards. Should the ECJ broaden the horizontal effect of the fundamental freedoms in the future, Europeanization effects that concern private actors will become more important.

Private actors are not only relevant as potential litigants or addressees of case law. They may also act as partners to governments in the sense that they allow escape routes from the pressures of EU law.[27] In the German government's struggle against illegal activities related to the posting of workers, discussed earlier, the ministries responsible for this area sought to forge pacts against illegal work with the employers' associations and labour unions in those sectors that were particularly vulnerable to fraud (Schmidt 2009: 179). Pacts were agreed with the building industry (2004), the transport sector (2006), the meat industry (2007), and cleaning services (2008), all with the aim of increasing understanding of the negative implications of illegal work and raising awareness of the existing regulations.

CONCLUSION

In this chapter, I have argued that member states' reactions to case law can be explained with reference to the costs and benefits imposed on different actors. The preferences of the executive, legislature, and judiciary are as diverse as their responses. The costs for member states may be related to the impact of regulatory competition, liability claim cases, and further threats from European case law. The pressure to respond to EU law is low if the orientation of domestic courts and a high degree of societal consensus result in little litigation. It is obviously the case that governments may also welcome case-law induced reforms, which will give rise to a swift reaction. In processes of domestic reform, case law is often only one consideration among many. It is therefore difficult to tie domestic institutional changes exclusively to specific judgments, and, compared to the transposition of secondary law, the implications of case law are more fraught with legal uncertainty. That does not

[27] Töller found societal agreements in German environmental politics in which domestic environmental goals were achieved through self-regulation, as it was unclear whether legislation would be possible under European law. An example here is the prohibition of dangerous materials, such as asbestos, which could have been interpreted as a distortion of the free movement of goods. In order to evade such legal uncertainty, an agreement was sought with the relevant economic actors concerning the phasing out of this material (Töller 2004).

mean that case law is unimportant, however. Though EU law's exceptional nature is widely recognized, its consequences are still poorly understood (Davies 2016a). As we saw, in particular in Chapter 6 with the *Meilicke* case, the sometimes very drawn-out period of time until the implications of EU law are specified and domestic reactions are institutionalized helps to blur the link between case law and policy responses.

In order to make the multiple responses to case law more transparent, I differentiated between the reactions of executives, legislatures, domestic courts, and private actors. For all these actors, we can find direct and indirect reactions to case law. In part, there are also reactions that compensate for its constraints. Table 7.1 summarizes the findings.

In light of the contained-compliance perspective, the extent to which member states do in fact accommodate the demands of EU case law is surprising. This happens even if there is not a great deal of pressure from domestic courts. The residence rights of TCN family members and EU citizens' access to social benefits are costly and do not meet governments' preferences. Despite this, governments do respond, and they appear to set priorities. Some decisions they clearly resist, in particular when they have potentially large fiscal implications, such as in the *Meilicke* case. In such cases it is preferable to elicit another ruling from the ECJ in the hope of achieving fine-tuning and the circumscription of the impact of EU law. Other instances of resistance, such as the language test for TCN family members, are clearly politically motivated. However, resistance is by no means the rule, but rather the exception. When it does occur, the Court appears to be forthcoming and fine-tunes its case law. Such a reaction is

Table 7.1. Overview of responses at the member-state level to direct and *indirect* pressures

Executives	Legislature	Judiciary	Societal actors
Accommodation: - TCN family members - Child benefits	Accommodation: - *Reform of limited companies* - *Posting of workers* - Laval quartet - UK social benefits	Activism: - Mangold, age discrimination	Accommodation: - Laval in Denmark - Fra.bo
Resistance: - Integration test for TCNs - Meilicke		Restraint: - EU citizens' access to social benefits	
Compensation: - *Control of posted workers in Germany*			Compensation: - *Pacts against illegal posted workers*

probably more likely when resistance concerns secondary law, as was the case for the language test. These contrasting reactions of accommodation and resistance explain why both the perspectives of judicial activism and contained compliance persist in the literature in this area. Rather than attempting to solve this theoretical tension in one direction, the analysis performed in this chapter makes it more plausible to regard them as two sides of the same coin. Since executives normally implement case law in a rule-of-law fashion, they can trust that the Court will give them some leeway to be able to follow their policy preferences in cases of protracted resistance. This does not mean, however, that case-law development is supported by the political consensus of member-state governments, as some analyses put forward (Carrubba and Gabel 2014; Larsson and Naurin 2016).

The ECJ's case law can have a very disturbing influence on the member states' domestic institutions, as is often criticized. However, the ECJ is a reactive political actor and requires the support of litigants and lower courts, or the Commission. The domestic impact of European law shows that interlocutors from member states often have an interest in challenging the domestic policy status quo with the help of EU law. For the member states' courts, the question is whether they perceive there to be legal advantages in the broader application of EU law or whether they are interested in keeping the influence of EU law at a low level, which gives rise to containment.

Similarly, societal consensus is crucial in safeguarding the domestic institutional setting. If there is broad agreement about domestic institutions, they are less likely to falter, as no litigants will emerge, and the Commission is also more reluctant to turn to the Court in the absence of complaints. Under a condition of broad agreement, domestic institutions are more easily maintained. However, if there are vocal actors who stand to profit from a regime shift, it may be that a minority that could not have induced changes through legislation at the national level uses EU law to bring about institutional change. Age discrimination in the *Mangold* case and the liberalization of German public banks are clear examples of this, as are the reforms of limited liability companies. Given the leeway that case law can give a minority to push for reforms, it may be the case that homogeneous small member states are at an advantage. In larger countries that have a more heterogeneous economic structure, the heterogeneity of interest will be more pronounced, making the status quo, arguably, more vulnerable to internal contention. The comparison of the Danish and Swedish reactions to the *Laval* case may point to that. The reactions to the quartet of *Laval* cases, in which party positions and the degree of societal consensus made a significant difference, also show that there are some policy options when member states accommodate case law.

The problem of translating the demands of single judgments into general principles should also be noted, particularly in the case of the British social-policy example. The process of balancing that courts employ to fulfil the

requirements of the individual case cannot be generalized into universal rules. Due to their constitutional status, however, the principles derived from single cases cannot simply be ignored. This leads to increasing constraints on policymaking. In an administration that deals with mass application, it is simply impossible to take into account an unlimited range of individual aspects in order to enact a case-by-case decision. Moreover, it is highly questionable whether this is in fact desirable. Those who need social support are interested in clear rules as to their eligibility. They do not want to be referred on to the ever-changing development of case law, to which the Austrian website for public student support refers, for example (Schulten 2013: n. 124). The UK, in its quest to limit access to social benefits, aimed to design tests that reconciled individual assessment with mass application, which received heavy criticism from the Commission: 'Determining whether or not a particular person has a "right to reside" can be far from straightforward. Anyone refused benefits or tax credits on the grounds because they are deemed not to have a right to reside should seek professional advice' (Kennedy 2011a: 20).

In addition to case law leading to direct changes to domestic policies, EU case law also triggers indirect responses. This is particularly the case if regulatory competition is furthered by it, resulting in more restrictive national regulations coming under pressure. The *Centros* ruling is a remarkable example of this. It also shows that reactions may have been exaggerated and premature. After several years of limited companies being established on the continent, they now appear much less attractive than was initially the case when their reporting requirements were still ignored. In addition, the fraud related to the posting of workers can be regarded as an indirect effect of case law. As we saw, there are several examples of compensatory measures. The German government augmented its administrative controls, but it also forged pacts with societal actors and other member states.

Given the limits of my empirical basis and space constraints, I could only provide a preliminary overview on the Europeanization effects of case law. Empirical evidence is also highly biased in favour of the old member states, particularly Germany. To what extent can the German experience be generalized? On the one hand, Germany is the most important and powerful member state. This could lead one to assume that it is a least-likely case, as Germany would be less willing to accept case-law constraints outside of its political control than weaker member states. On the other hand, Germany has a strong constitutional court and a political system marked by constitutional sovereignty, in which responding to judicial constraints is normal. This tradition would make it into a most-likely case for abiding with case law. It seems very plausible that member states with weaker administrative capacities and weaker traditions of the rule of law would present a different picture.

In a multilevel system, actors' political preferences are subject to multiple influences. On account of directly effective and supreme EU law, actors do at times have the incentive to draw on this alternative legal order. ECJ case law rarely mandates the implementation of very specific policy measures in the way that secondary law does. Therefore, we find a much more complex picture when analysing the Europeanization effects of case law. There are often multiple ways to respond, including compensatory measures, which are more influenced by legal uncertainty. Options for blocking responses may be more varied than is the case for the implementation requirements of secondary law. Consequently, when analysing domestic reforms, reactions to case law may be just one consideration among many. How relevant was the impact of the posting of workers for the introduction of a general minimum wage in Germany? Such a question is difficult to answer.

The EU Treaty is unique in its multiple and far-reaching policy consequences. By summarizing various examples of its impact, this chapter has aimed to draw attention to its relevance in the process of pursuing a more systematic analysis. Clearly, a disregard for ECJ case law in political science cannot be justified, since member states do submit to sovereignty constraints.

8

Conclusion

Research on European integration readily recognizes the importance of the European Court of Justice (ECJ). However, in the study of European Union (EU) policymaking processes, its role is largely ignored. The Court is predominantly analysed in the context of research into compliance with secondary law, as infringement procedures are an important indicator of compliance problems. But beyond making agreements binding and credible, the activist development of case law by the ECJ influences many EU policy processes. The wide reach of the four freedoms into different policy fields integrates policies through case law, even if there is no European secondary law in sight. My book emphasizes how this largely neglected aspect of the Court's power casts a shadow over the policymaking processes of both the EU and the member states.

In order to make the argument that the Court has an important influence on policymaking, I had to show the following. First, it was necessary to substantiate the notion that dynamic case-law development based on the Treaty adds to its effect. If the Treaty had pretty much the same content that its masters had already agreed upon, the influence it has would scarcely be problematic. Secondly, I had to demonstrate that this case law is a constraint on legislation at the EU level. If member states could change the import of rulings by agreeing on secondary law, again, the constraint would be less significant. Thirdly, I shifted my focus to the member-state level to confirm that, independent of its codification in EU legislation, case law also has an impact when its content is controversial at the national level. This feeds back into the European decision-making process.

In terms of the dynamic development of case law, I argued that the extent of legal uncertainty as to the reach of the Treaty's rules is crucial. Direct effect and supremacy have established a constitutional supranational order, the implications of which are constantly changing. Given the enormous material details of this supranational legal order, in comparison to national constitutions, private actors may find alternative legal positions in this arena that they prefer to those they can pursue in the national legal setting. Through the preliminary procedure, private actors have indirect access to the ECJ. They

may find allies in national lower courts and collaborate to bring supranational law into effect. The ECJ, as is the case for all courts, is only legitimated to solve legal disputes. Courts may not draw up general policy rules. In preliminary procedures, the Court gives general guidelines as to the interpretation of EU law, but such principles of interpretation are not the same as clear policy rules. How the ruling on a specific legal case has to be generalized across situations in other member states is often hard to discern; this is particularly true in light of the increasing heterogeneity of member states after successive processes of enlargement. The detailed provisions of the Treaty that deal with material policy can therefore be used in multiple ways to overcome regulatory restrictions at the national level. The four freedoms, which were my central focus, touch upon all national regulation of economic activities for goods, services, persons, companies, and capital. The free movement of workers, taken together with more recently established citizenship rights, moreover, has direct implications for the national welfare state.

The Court's orientation towards a teleological interpretation of the Treaty, that is, 'towards an ever closer union', means that the respective competences of the national and the EU level are kept in flux. Legal uncertainty provides incentives for those actors that see potential benefits in using an expansive interpretation of EU law to address national courts. The ECJ, as I have shown, responds with a path-dependent interpretation of the four freedoms and citizenship, thereby providing doctrinal coherence and strengthening legal certainty. With its constitutional status, the Court's case law cannot easily be overruled politically, as Treaty changes are virtually impossible to achieve. Secondary law cannot modify case law that is based on the Treaty. Member states can only hope to signal their preferences to the Court through secondary law, alongside the possibility of intervening in Court proceedings with their observations. It is up to the Court to decide whether to modify its case law or even to make an about-turn by taking a new path. Most notably, this happened with the *Keck* ruling on the free movement of goods. While an extension of rights receives positive feedback through the process of litigants addressing the Court, this feedback is absent when the Court limits the reach of the Treaty and practises judicial restraint. There is no use in addressing the Court to limit EU law; such arguments are only made in interventions by member states when litigants are aiming for expansion. Judicial restraint is therefore up to the Court, and in the ECJ's institutional set-up, there is little support for its practice. The community of EU lawyers, which broadly favours an expansion of EU law, is important in this context.

Legal uncertainty also gives governments an incentive to codify case law in legislation, to re-establish legal certainty, and possibly to prevent future unwelcome case-law developments. As it is focused on the case at hand, case law by itself cannot ensure the complete regulation of a field, but it elucidates the relevant principles of the Treaty. A worker is not someone who works a

certain number of hours but someone whose work is 'not marginal and ancillary'. In particular, the single market for goods demonstrates the difficulty of regulation based on case law, since mutual recognition was codified at a relatively late stage. Secondary law cannot overrule the Treaty's interpretations but has to codify them. In doing so, secondary law necessarily adds onto case law, as single judicial cases cannot provide general rules. In contrast to Martinsen (2015), I argue that this does not mean that one should speak of legislative 'modification' of case law. The Commission, as the guardian of the Treaty, ensures that its proposals comply with case law and interprets political compromises on secondary law in light of this body of law. Case law takes generalized effect through codification in secondary law. As member states respond differently when implementing case law, several of them have interests in codifying case law in order to ensure a level playing field—even if they disagree with its content.

This interaction of case law with policymaking has not received sufficient attention in research on integration. Why is such an important feature of the EU polity relatively neglected? In contrast to American political science, European political science does not pay much attention to courts (Bellamy 2008a; Rehder 2006). The burgeoning literature on legislative EU policymaking (Hörl et al. 2005; Thomson 2011) neglects the judicial roots of legislation. European legal scholars, in contrast, do in fact look at the ECJ's case law closely. Distinct from political scientists, they are less interested in the conditions of legislative decision-making. Moreover, it is likely that the turn to comparative politics in European studies (Hix 1994) has blinded scholars as to the specific nature of EU case law. Additionally, in political systems such as the German one, which are characterized by a strong constitutional court, it is very common for court rulings to overshadow the legislative process (Hassemer 2008). However, in the EU's political system, case law cannot easily be overturned, and over-constitutionalization implies detailed material policy provisions. The interaction between judicial and legislative politics at the European level is very different from what we know from the national context.

Political science's ignorance of the way that case law overshadows the legislative process is particularly noticeable in the discussion of the Services Directive. Most scholars who analyse this legislative process have regarded it as an example of politicization, through which the European Parliament (EP) and trade unions made their preferences felt. While the political debate around the Services Directive brought the political disagreement about the course of case-law development into the open, this manifestation was largely symbolic. The directive could not redress case-law development, although members of the EP assumed that they could decide politically whether they preferred home-country or host-country rule. The Commission, bound by the Treaty, made clear that the directive needed to be interpreted along the lines the Court had previously set out.

In addition, the Citizenship Directive revealed the constraints of case law. In this case, member states were reluctant to follow the Court in its expansive interpretation of rights and so left some aspects of the directive deliberately open. The attempt to 'rein in' the Court has not necessarily been successful. Member states upheld EU legal privileges for the status of workers over EU citizens, not wanting equal access to non-contributory social benefits, but aiming to safeguard the privileged treatment of their nationals. Nevertheless, the subsequent actions of the ECJ and the Commission disregarded some specifications of the Citizenship Directive and continued for some time to push for the increasingly equalized status of EU citizens and nationals. The resulting legal uncertainty, concerning when economically inactive EU citizens can access national welfare services, has kept courts busy. It was in light of heightened economic heterogeneity after Eastern enlargement, and the fear that access to welfare-state services provides incentives for the 'abuse' of rights to free movement, that the Court has taken a more restrictive position in its more recent rulings. The Court agreed that member states can clearly exempt some categories of EU citizens from eligibility for social services, without having to undertake an individual assessment as to the extent that the individual is integrated into the relevant member state. Nevertheless, the UK chose to exit the EU.

Member states were divided on patient mobility. Some governments opposed codification altogether, but those hoping to re-establish legal certainty and stop case-law development gained the upper hand. While it is not clear yet to what extent the Court will take into account the wishes of the member states in subsequent case law, the legislative process clearly failed to re-establish legal certainty. Since the case law is based on the freedom of services and cannot be changed through secondary law, there are now two alternative processes that authorize cross-border healthcare that are not easily reconcilable with each other.

Of all the examples, the regulation on mutual recognition of goods is the least controversial. It is an area where sovereignty restraints are met with acceptance and where the political salience of these constraints is comparably low. For goods, the Commission managed to achieve relatively straightforward codification, as the case law was largely uncontroversial. Legislation, however, granted more extensive rights than the previous case law had done.

In all of the cases I have discussed, with the exception of the regulation of goods, codification was politically controversial. The Council's response was motivated, on the one hand, by the wish to codify existing case law in order to heighten legal certainty and to establish a level playing field, and, on the other hand, by the wish to pre-empt further case law by signalling its preferences to the Court. In all cases, the EU legislature faced the difficulty of accommodating existing case law based on the Treaty. It was confronted with rulings that concerned the details of individual cases that did not lend themselves to

general rules. Courts have to perform a case-specific assessment. In deducing abstract rules, the legislature may generalize the rights that the Court has granted to all cases that exhibit some of the same features. Such a broadening of rights from case law took place in the implementation of the regulation on the mutual recognition of goods, namely the decision that shifted the burden of proof of sufficient regulation from the manufacturer to the regulator. In the Citizenship Directive, member states did not want to generalize case-law rights in this way, leaving the directive with insufficient specification. And, in the case of patient mobility, the need to respect case law and the wish to establish general rules led to a fairly contradictory regime of two alternative options for enjoying cross-border healthcare.

Case law gives rise to a patchy and legally uncertain regulatory framework. Yet it cannot guarantee that the legislature will respond and provide general rules. This happened in the case of company taxation, where existing case law imposed constraints on member states, but they were unable to agree on a common policy. Although the Court subsequently practised more judicial restraint, this does not mean that sufficient policy options have been kept open. The recent attempt to counter global tax avoidance at the Organization for Economic Cooperation and Development (OECD) through common rules demonstrated this forcefully. Due to ECJ case law, EU member states could not agree on policy options that other OECD member states considered to be feasible and appropriate.

Case law also has implications at the domestic level for member states. Similar to research on European integration, research on Europeanization that analyses the impact of integration at the member-state level pays little attention to Europeanization through case law (Treib 2014). Direct responses to EU case law at the member-state level are not only important as a neglected element of research on Europeanization. Differences in member states' policy reactions to case law also feed back into their preferences for the codification of case law at the European level.

The EU relies on the implementation of its laws by its member states. By itself, the EU has little administrative power. If member states ignore EU case law, contained justice is the result, as Conant (2002) found. My detailed discussion of the reaction to two notable examples of case law, the *Zambrano* and *Meilicke* cases, can already demonstrate that the assumption of 'contained compliance' does not capture member states' reactions to case law. Within the context of the supremacy of EU law, it appears more plausible that member states respond to case law in a rule-of-law fashion, unless there are significant costs involved and subsequent ECJ rulings offer the promise of fine-tuning.

My analysis, which ranged across different cases, showed the variety of responses at the member-state level. The national legislature may change the law to implement case law, similar to the way it would react to European directives, but it may also seek to escape its constraints. While the literature on

Europeanization often looks almost exclusively at domestic parliaments, this is not sufficient when researching the impact of case law. Comparable to regulations that are directly effective, administrations may simply adjust their procedures. Independent of whether they adapt or not, they may also seek compensation for lost policy instruments or the negative implications of European rules, partly in cooperation with societal actors. In addition, the domestic judiciary is an important actor. Independent of whether the executive or legislature acts, the judiciary may simply follow European case law. It is only in the cases that it also rejects it that there is likely to be no domestic impact from ECJ case law. Finally, societal actors are important. Whether or not they are aware of their rights and push for them may be the decisive difference. If societal actors are not interested in their European rights, it is much easier for governments to turn a blind eye.

Thus, there is a significant array of Europeanization responses to case law. Surprisingly, the Western member states, if not the others, often appear to implement even politically contentious judgments in a straightforward rule-of-law fashion. Such standard implementation responses to case law, in the form of legislation or administrative circulars and information for potential beneficiaries on government websites, appear as a foundation from which governments hope to push successfully for the fine-tuning of case law, when they have different important policy preferences.

After the summary of the book's argument that I have just provided, my conclusion will now discuss the book's significance for several important themes in research. I will start by asking whether the ECJ is activist, which is a common topic in discussions on the Court's power. In light of this book's analysis, it seems questionable whether activism captures the Court's importance. Secondly, I turn to the time dimension, which is particularly relevant. Thirdly, I discuss the ECJ's legitimacy in determining policy to this extent. I then turn to the question of what this book's analysis implies for the empowerment of international courts, given that the ECJ is taken as a model in this respect. I close the discussion by asking where research in political science should go from here.

ACTIVISM?

Much of the debate on the importance of the ECJ focuses on the question of whether it is activist (G. Davies 2012; Keeling 1998; Solanke 2011; Saurugger and Terpan 2017). Analyses of the Court's activism vary according to what extent they show the Court deferring to member-state preferences (Carrubba and Gabel 2014; Larsson and Naurin 2016), and indeed my analysis of case-law development has shown that there are different paths of interpretation

that the Court can take. An interpretation of the four freedoms as prohibiting discrimination, I argued, grants much more autonomy to member states than an interpretation of them prohibiting restrictions. As the latter subjects all national regulations for economic activity to a proportionality analysis, the reach of European law would be much broader than is the case when employing a non-discrimination approach.

Since judicial activism is a matter of degree, it is therefore clearly present in the ECJ's case law. However, I argue that activist case-law development does not require an activist court. Proceeding in a path-dependent way, the Court's interest in the consistency of the law leads towards converging interpretations of the four freedoms and citizenship rights. Individual litigants with easy access to the Court fuel this development, as they steadily try to improve their regulatory position. The Court does not require much of an activist orientation to move this process along—it simply has to honour precedent and legal consistency, and maintain a cooperative spirit with lower courts. It is itself largely ignorant of its decisions' precise implications in the heterogeneous polities of twenty-eight member states. Operating within its setting, it is difficult for the Court to practise restraint. Throughout this book, I have emphasized that the ECJ is not a 'lone ranger' pushing the development of case law along but that there are multiple types of support for its expansionary case-law development. Its interlocutors push it towards broad interpretations: litigants address it in order to realize the more extended reach of EU law, and they are supported by lower courts that hand cases to the ECJ, as well as by the community of EU legal scholars, who provide arguments to defend the ever-increasing reach of EU law. Arguments for judicial restraint play a smaller part in this setting, which is why Davies (2016b) argues that domestic courts need to take on a more critical role so that the EU legal order has fewer disruptive effects.

Member states do in fact submit observations to this effect. The Court, as quantitative analyses can show, does take these into account. Qualitatively, however, we see in the case of many 'path-breaking' decisions that a significant number of member states intervened but could not prevent case law from expanding into areas where member states would like to maintain their policy competences: patient mobility, the residence rights of third-country nationals, EU citizens' access to welfare services, and taxation policy are all examples that were discussed in this book. It is interesting to ask how these different quantitative and qualitative findings can be reconciled. It is likely that this difference mirrors the process of fine-tuning case law, where the Court initially may subject a new policy field to case law and then subsequently adapts and refines its rulings in order to take member states' objections into account.

The ruling on the *Zambrano* case, which I discussed in Chapter 6, allows us to observe this process of fine-tuning. In the *Zambrano* case, the Court granted residence rights to third-country national family members of an EU

citizen within purely internal situations, where the EU Treaty normally does not apply. In the many follow-up cases that came after *Zambrano*, the Court took member states' objections into account and did not broaden the case law. Instead, they elucidated that it only applies to dependent children of EU citizens who would otherwise have to leave the EU. The *Zambrano* case may, thus, support the findings of quantitative studies, namely that cases where the Court takes member states' concerns into account outnumber the ones where it makes progress in broadening the reach of EU law. But as long as the Court does not engage in reversion and subsequently denies the relevance of EU law altogether—something which it is hardly ever known to do—its responsiveness to member states' objections does not mean that there has not been significant case-law development. My analysis has given multiple examples of the constraints that EU law places on policy options. Despite expectations that member states simply try to 'contain justice' (Conant 2002), the study of member states' responses shows that EU case law is implemented by member-state administrations in what appears to be a straightforward rule-of-law fashion. Based on case studies, it is not possible to say whether these findings can be generalized. My hunch would be that such compliance is quite common, and that member states only openly oppose case law when they absolutely feel that further fine-tuning is necessary. The second *Meilicke* ruling serves as an illustration of this. It should be noted, however, that all my examples are from Western states that have a long tradition of membership and strong administrations; newer member states may react differently.

So case law makes a difference, and member states respond to it. Even if the Court provides answers to the concerns of member states in general, the minority of cases where it does not do so may make an important difference to the acquis communautaire. In explaining the demands of the Treaty, much of the Court's impact depends on the way case law interacts with policymaking at the EU and member-state levels. As we saw, in proposing legislation the Commission has to base its proposals on the Treaty, of which the case law is a part.

Translating case law into general rules in secondary law poses specific challenges. Courts base their rulings on case-by-case assessments, taking into account the multiple aspects that make the case unique. The ECJ takes the broader perspective of devising more general guidelines for interpretation that are intended to direct national courts in applying EU law. Courts are not legitimated to devise general policy rules—but legislatures are. However, given the constitutional nature of case law, the legislature cannot be more restrictive than the Court. Otherwise, there is a risk of further litigation. But if the Court has decided that under conditions A, B, C, D, and E someone should have access to social benefits, what is the legislature supposed to make of it? The Court often keeps its reasoning opaque, as it is also motivated by the wish to keep the Treaty's meaning flexible in order to further future integration. It is

therefore not clear whether conditions A to E all need to be present, whether any of these conditions are sufficient, or whether condition C is the decisive one, as it is both necessary and sufficient. In the legislative process, there is consequently the option to either generalize case law in a way that broadens its impact, as was done in the regulation on the mutual recognition of goods, leaving the burden of proof to fall upon the state authorities, or to leave matters deliberately open, as was the case in the Citizenship Directive. If there is no EU codification, and member states respond directly with administrative changes, for instance, they face problems as the Court's guidelines for interpreting the Treaty are difficult to generalize and require a case-by-case approach. Translating constitutionalized case law into general rules, I argue, has expansive effects.

My analysis has shown the considerable policy implications of case law. These are larger if the Court is particularly activist, but they are also present if the Court practises some restraint. Rather than searching for activism—which does, of course, occur at times—it seems to be more useful to analyse judicial power, following the arguments of Staton and Moore (2011). '[B]inding constraints on governments' (Staton and Moore 2011: 555) accumulate in the EU because of the constitutional nature of case law. It is because the EU has a constitution that consists of a Treaty in which member states have inscribed multiple policy goals that the ECJ is so important. Since there is no parallel example at the national or supranational levels of polities being constrained to this degree in their policy decisions by case law, analysts overlook the constraints on the EU and the member-state level.

Consequently, we can observe a 'judicial coup d'état' (Stone Sweet 2007) at the EU level, the consequences of which are rarely recognized. However, we should not be misled about the extent to which courts can change societal development. This remains a 'hollow hope' (Rosenberg 1993). Courts are essentially reactive actors, dependent on others to bring cases before them and to implement their rulings. The ECJ is therefore also responsive to the way that member-state governments intervene, but this is not enough if case law lives on as part of the constitution. Although much of it is codified and implemented as standard rule-of-law practice, there is the latent danger that its constraints will foster opposition. The EU referendum debate reflected this. Part of the UK's discontent was being forced to a judicially driven position of non-discrimination against EU citizens, alongside having to engage in cumbersome administrative procedures related to EU citizens' access to social benefits. To the extent that leaving the EU and having a voice within it are related, following Hirschman (1970), the UK's inability to express themselves influentially on the laws of citizenship must be seen as one factor that drove their exit from the EU. Within this context of growing political opposition, the Court has recently practised self-restraint in relation to EU citizens' access to non-contributory social benefits in host countries where they have recently established themselves, surprising observers that

had expected more activist rulings. With such self-restraint, the Court has not abandoned its path of interpreting the Treaty, but it has refrained from extending its meaning further to cover EU citizens' full and equal access to benefits. This strengthens legal certainty about the reach of EU law vis-à-vis national law. The example shows that the Court can indeed choose between activism and self-restraint, but this choice should not overshadow the importance of over-constitutionalization and codification.

TIME

Differences in time horizons between the judiciary and political actors, who are dependent on the electoral cycle, are a central aspect in understanding judicial power. Time matters in several respects. It is known to be important for the development of legal doctrine. Alter argued early on that the Court may use time in its favour when it establishes new interpretations in cases where it first denies their relevance (Alter 1998: 131). In this way, the Court can test the waters. It is expected that opposition from member states will be lower if the new interpretation does not have an immediate impact. In later cases, then, the Court can refer to established precedent if it brings the principle to bear upon them, which shields the Court from political intervention (Kelemen 2001).

Taking into account how time can help us to understand the central puzzle that my analysis raises, we can ask the following important question: if constitutional case law restricts European policymaking, as I demonstrated in the analysis I conducted in Chapters 4 and 5, and also imposes multiple constraints at the national level, as I discussed in Chapters 6 and 7, how can we explain the way in which the research on integration largely neglects this fact? Why is there no coordinated effort from member-state governments to halt the EU's processes of over-constitutionalization? (And why do member states, in contrast, continue to inscribe further policy goals into the Treaty? This a question that I will discuss in the next subsection.)

The constraints of case law accumulate over time. Case law develops incrementally, and, as is true for all incremental changes, it is difficult to muster the political will to respond to such development. As part of these incremental shifts, the general implications of case law are not initially clear. In contrast to legislation, requirements from case law do not come with implementation deadlines. The *Meilicke* cases, which were discussed in Chapter 6, illustrate this in a striking way. Fifteen years passed between the first preliminary ruling that was addressed to the ECJ and the national court's final ruling. Even today, the judicial process around the *Meilicke* case may continue due to the complaint that was handed to the Commission. With such

long periods of legal uncertainty, during which the precise implications of EU law for national policy are left vague, it is likely that incremental steps will be taken to lessen vulnerability to a worst-case scenario at the national level. Such steps are part of 'anticipatory obedience' (Blauberger 2014: 468), which is difficult to link to case law.

In addition, political and academic debate on the Services Directive demonstrated the neglect of the constraints of case law. However, even if some political actors fail to comprehend the constraints of case law or are unwilling to accept them, as we saw, the Commission, in its proposals for secondary law, honours the case-law constraints. However, there is no need to resort to conspiracy theories. Many governmental actors are aware of the constraints the Treaty places on policy options. Not all constraints are unwelcome in day-to-day governmental policymaking. In addition, and more importantly, member-state governments' preferences should not be regarded as unmovable and fundamentally opposed to those at the EU level. The EU has long developed into a multilevel system in which few national preferences are as clear-cut as intergovernmentalism assumes. Moreover, member states are not gatekeepers to the supranational system, as different actors have access to EU policymaking—and to EU litigation. Most of these actors who push for EU legal constraints on domestic policies are also important actors for national governments. As I have argued, governmental preferences in the medium to long term are fluid and responsive to the case-law constraints that arise. Litigation at the Court shows governments the policy preferences of important national actors, and the constraints of EU case law facilitate the necessary national reforms. 'Blame avoidance' (Weaver 1986), traditionally, is an important asset that European integration offers to member-state governments. Edgar Grande has termed this a 'paradox of weakness', as governments are strengthened vis-à-vis societal actors by being able to point to EU constraints (Grande 1996).

Incremental change, the long drawn-out judicial process, fluid governmental preferences, and the interests of governments in facilitating domestic reforms by being able to draw on EU constraints all consequently explain our puzzle, in which political interventions against over-constitutionalization are absent. Importantly, if governments can live with the outcomes of ECJ case law in most instances—if only at a particular moment, in comparison to the cost of intervention against an independent court—this does not equate to their consent, or to an existing majority to back the development.

LEGITIMACY

Is the constitutionalization of case law problematic? After all, it is member states' governments that agree to add detailed material policy aims to the

Treaty, Treaty reform after Treaty reform. Since supremacy and direct effect date back to the early 1960s, governments have had ample time to observe the consequences of having such detailed Treaty rules. As governments are well legitimated, there is no reason to problematize the workings of the ECJ, which essentially does what it has to do: it interprets relatively vague Treaty articles and derives solutions to the dispute at hand from them. Christoph Möllers (2015) makes this argument. In light of what I have said about the importance of time, I would hesitate to legitimize over-constitutionalization in this way. Given their more short-term political perspective, member-state governments do not attach much political importance to defending more long-term policy options. In agreeing to and pushing for detailed rules during Treaty reforms, they often respond to the demands of important constituents. Since national constitutions contain significantly different constraints to the European one, societal actors have little basis for understanding the implications of writing their concerns into the Treaty.

An analysis of Treaty reforms was not the subject of this book. However, we have seen in the examples of the Services Directive and the Patient Mobility Directive how societal actors aspire to exempt certain areas from a directive: social services in the example of the Services Directive, long-term care in the example of the Patient Mobility Directive. But exempting an area from a directive does not mean that it falls under national prerogative. As the Court states again and again through its 'retained powers formula', member states also have to comply with EU law in the areas where they exercise their retained powers, for instance in the fields of taxation, education, or social services.

> Literally this formula means that the scope of application of EU law extends beyond the subject areas over which the EU has been given jurisdiction. By dissociating the *existence* of state powers from the *exercise* of such powers, the Court legitimizes the application of EU law in any domain that is not a priori within the Union's scope of intervention.
>
> (Azoulai 2011: 194, emphasis in original)

This stands in marked contrast to the attempts of member states to circumscribe the reach of EU law, for instance with the subsidiarity principle. Despite frequent Treaty revisions, member states do not legitimize the extensive reach of EU law. There are additional arguments from the rich debate on the legitimation of European integration that are relevant in this context.

Joerges makes an interesting argument for why the EU strengthens legitimation. He refers to the democratic deficit member states experience when their decisions have cross-border effects without those that are affected having a say in these decisions. To reconcile these different interests, he argues for a conflict-of-laws approach and regards the supremacy of EU law as compensating for this deficit of national decision-making (Joerges 2007). Neyer (2012)

expands on this argument, embedding it in political theory. However, the extensive broadening of EU law through the legal profession can hardly be encapsulated within this argument. Joerges himself agrees that, ultimately, input legitimacy is decisive for supranational law. Similarly, Conway makes the criticism that the extensive interpretation of the Treaty by the Court is political and not legitimized by output legitimacy.

> Innovative interpretation downplays traditional rule of law and democratic objections to an 'activist' judiciary or *'gouvernement de juges'*. Its main justification relates to consequentalist or output-oriented legitimacy. This often implicit reliance on output legitimacy, is, however, problematic, since the outcome that is claimed to be good in the EU, enhanced integration, has no apolitical validity. Conversely, conserving or originalist interpretation privileges input-legitimacy, which dovetails with a traditional rule of law emphasis on formal legality understood as requiring certainty and predictability in the law. (Conway 2012: 113)

I demonstrated in Chapter 3 how the extensive interpretation of the free movement of goods serves as a focal point for the subsequent interpretation of the other freedoms. The far-reaching case-law development culminates in the extension of citizenship rights, which link citizens directly to the EU. Setting up and strengthening this direct relationship, citizenship rights receive particular normative elevation. Wiesbrock has shown how legal scholars and practitioners, most notably the AGs, establish a core of citizenship rights through self-citation that are far removed from what member states originally intended.

> The interpretation and analysis of the Court's judgments by legal scholars has to a large extent served to justify the expansive case law of the Court. EU legal scholars have generally defended the 'quasi-legislative' role of the Court. . . . EU legal scholars, who have an active interest in the extension and increasing importance of EU law, have thought to present the progression towards more extensive free movement rights as an inevitable step towards further integration.
>
> (Wiesbrock 2013b: 148)

My analysis of the difficulty of translating case law, which has a constitutional status, into general secondary law and/or administrative practice adds a further legitimacy concern to supremacy: the danger of inequality before the law. Legal uncertainty about the reach of EU law automatically leads to heterogeneous decisions. The rationale of the preliminary procedure is the necessity of 'preserving the unity of EU law' (Chalmers et al. 2010: 160–2). However, the sheer complexity of the regulatory framework, which is driven by case law, is actually resulting in 'dis-unity', as national administrations and EU citizens will make sense of and practise the complicated legal regimes in very different ways. When applying ECJ case law at the member-state level, the requirement for case-by-case assessments on the basis of complex, unfamiliar EU law leads to highly divergent decisions among administrators.

Within the EU polity, the EP is the actor that claims that it is strengthening the legitimation of the integration process. It should therefore be the actor that politically confronts the judicialization of politics, criticizing the withdrawal of policy options from majoritarian rule. Within the cases I have discussed, the EP took a particularly prominent position in the debate on the Services Directive. It largely ignored the case-law constraints, but the Commission's implementation document for the directive reflected more closely the position of the Court than that of the EP (European Commission 2007). It is doubtful whether the EP could develop into a bigger opponent of the ECJ. In general, one could argue that the EP, as a whole, is less concerned with the material impact of policy decisions than the Council would be. This can be identified in its successful strategic extension of its competences, as analysed by Farrell and Héritier (2003). They show that, wherever possible, the EP puts its own institutional interests before material policy interests. Apparently, the EP is less likely to be punished in elections for failing to pursue material policy interests than member-state governments, otherwise it would be impossible to pursue this strategy. And since the EP will always favour more rather than less integration—as long as eurosceptic parties do not dominate—it is highly unlikely that it will openly oppose the constraints on policy options set by the Court.

The accumulating constraints of case law imply that the politicization of EU politics will encounter difficulties in fostering legitimation (Zürn 2016). Politicization is expected to benefit European integration by showing that there are different options for shaping integration politically. In this way, it may help to overcome the 'constraining dissensus' of public opinion (Hooghe and Marks 2009) and avert the danger of disintegration (Webber 2014). The literature on the democratic deficit has argued strongly in favour of increased politicization (Føllesdal and Hix 2006; Kriesi 2009). The Services Directive is a prominent example here. Clearly, though, analysing this case makes it questionable why one would aim to increase legitimation through politicization, if what matters in the end is the ECJ's interpretation of the Treaty. Bartolini (2006) emphasized at an early stage that the ECJ's case law serves as a counter-argument to politicization. A mere symbolic discussion of policy options, given legal constraints, rather delegitimizes the political order of the EU.

It is also useful to compare the EU level to the national level. In those member states that have strong constitutional courts, their legitimation to protect basic liberal rights is not contentious (Syrpis 2012), but constitutional courts tread much more carefully when dealing with social, positive rights, in relation to which they heed judicial self-restraint (Sieberer 2006). It is not just for courts to decide how taxpayers' money should be spent. In relation to social rights, national constitutional courts do in fact intervene when they wish to guarantee non-discrimination (Sieberer 2006). In a way, this is also what the

ECJ is doing, as much of its citizenship case law responds to discriminatory practices in the granting of social rights under conditions of increasing transborder mobility. However, in granting social rights, the ECJ intervenes in the allocation of welfare-state services, which rely on an informal contract among creditors and beneficiaries within a system characterized by national and not European membership. This risks a domestic political backlash.

In terms of the legitimacy of the EU, therefore, a restrictive interpretation of the Treaty appears to be more desirable from a normative perspective.

> The perspective argued for in this chapter is that conserving or originalist interpretation is both epistemically possible and normatively preferable than evolutive interpretation. The latter rests on essentially political preferences as to what is a desirable outcome and is difficult to reconcile with the requirement of predictability as a key feature of formal legality and with the democratic authority of the law-maker (and the comparative lack of democratic or representative legitimacy of the judiciary, despite occasional, strained arguments to the contrary).
>
> (Conway 2012: 106)

Moreover, it should not be forgotten that my analysis highlighted how the supremacy of EU law threatens to undermine legitimacy at the national level. Mobile actors are, at times, more equal than others and can use EU law as an alternative set of rights, which partly results in conspicuous inequalities, for instance when one considers the rights of third-country national family members, as I discussed in Chapter 7.

Finally, reference should be made to the difference between negative and positive integration. I have not emphasized this difference; as such, it has remained a somewhat hidden dimension of what I have analysed throughout this book. Scharpf has repeatedly shown how there is a bias towards negative integration in the EU, as liberalization policies can draw directly on the Treaty and the Court, while positive integration, in the form of harmonization policies, requires demanding legislative processes (Scharpf 1996, 1999, 2000b). This bias between negative and positive integration in the EU is relevant not only because some policies are favoured over others at the European level, namely liberal over republican ones (Scharpf 2009, 2010), it is, moreover, normatively important as member states with their heterogeneous political-economic institutions are constrained in very different ways by this kind of European integration (Callaghan and Höpner 2005; Höpner and Schäfer 2010, 2012). Although I have not emphasized these implications, this does not mean that I do not share these concerns. However, my suspicion is that the debate on positive and negative integration has partly hidden the importance of over-constitutionalization and the Court. The normative dimension of positive and negative integration, it appears to me, has led observers to take sides, either welcoming or criticizing liberalization effects. What has been overlooked is the importance of the judicialization of

policymaking, through which the constitutional nature of case law takes political decisions away from majoritarian decision-making. To me, this is the more fundamental normative dimension, and it is most likely to be one around which critics and supporters of negative integration could unite.

THE RULE OF LAW BEYOND THE NATION STATE

What can we learn from my analysis of the discussion about international courts? International courts have grown tremendously in importance. The ECJ, with its far-reaching competence and relatively low threshold of access, is a 'model' for international courts (Alter 2014). What does this model provide? A Treaty, as a constitution, presents very different challenges than those we are familiar with in a national constitution. The latter focuses on rules for state organization and the protection of individual liberal rights. A Treaty lays down material policy goals. It is likely that the specific institutional conditions of the EU allow for greater dynamism than we see in other areas of supranational law. The thresholds to access the ECJ are lower than are found elsewhere, resulting in more case-law development. However, under less favourable conditions there may also be important constitutionalized case-law development, as the example of the European Court of Human Rights shows (Stone Sweet 2012). Due to international anarchy and massive human-rights violations, actors in international relations predominantly discuss increasing judicialization as a positive development (Zangl 2005; Zangl and Zürn 2011). However, there are also important studies on the costs of this development (Hirschl 2008; Bellamy 2013).

My analysis has shown how the ECJ's judicial power leads to far-reaching constraints on policymaking in the EU. One might argue that judicial independence is instituted in order to foster such constraints. However, in the EU the constraints are so far-reaching as to remove otherwise feasible policy options from the agenda (Scharpf 2016). This is the consequence of the detailed policy prescriptions in the Treaty. As a result of the ECJ's institutional set-up, highly activist case-law development may follow without the need for judges to overstretch their mandate constantly, as I have shown. Supremacy and direct effect constitutionalize the material policy provisions of the Treaty, and the case law that spells out its content is difficult to translate into meaningful general administrative rules or secondary law. Each ruling provides for a process of balancing in a single and often unique situation. The different conditions that lead to a decision do not provide a coherent whole, and the latter cannot be designed politically under the constitutional constraints of this case law. While it is convincing to legitimate supremacy and direct effect with the need to compensate for the negative externalities of

national democratic rules for other member states, as Joerges and Neyer do (Joerges 2007; Neyer 2012), the consequences for problem-solving are overlooked. This is the main point this book wishes to communicate about international law that aims to create binding, constitutionalized obligations for members. However, the EU has a unique legislature, which allows for the interaction of judicial and legislative policymaking. With less dynamic case-law development in other international regimes, and no legislature to codify these rulings, pressures will be lower.

Supranational constraints arise as a result of a supranational legal order supplanting national legal orders. Such overlapping of legal orders also has normative consequences. I have emphasized that the dynamic interpretation of supranational law results in legal uncertainty as to the reach of the supranational Treaty. Legal uncertainty, as a possible consequence of integration in the EU, is interesting because it contrasts with expectations in the literature on international relations of increased legal certainty resulting from international trade regimes (Zürn 2001). This argument relates to the increased certainty of trade under an international regime in comparison to the previous situation of relatively unconstrained national competence over the conditions of market access, complete with all its surprises. The expectation of increased legal certainty may depend, however, on an unrealistic assumption of relatively clear borders between different legal regimes. As this book has shown, dynamic supranational case-law development constantly questions such demarcations. In addition, when they use their retained competences, member states have to comply with the demands of the Treaty. A comparable situation of legal uncertainty arose, for instance, when Canada challenged the French ban on asbestos as a barrier to trade under World Trade Organization rules in the 1990s (Howse and Tuerk 2001). Increased legal certainty with regard to transborder transactions coincides with increased uncertainty about the legality of domestic rules.

The lack of legal certainty that results from the unclear demarcation of different legal regimes is also problematic in another respect. It makes some actors more equal than others, as they can seek the legal regime that is most appropriate for them. In the EU, mobile actors are favoured, and while the four freedoms are rightly needed to compensate for discrimination against transborder situations by national rules, whenever they lead to reverse discrimination against nationals, they overcompensate and invite rule arbitration. If some people are able to pick and choose the legal regime that is most beneficial to them, within the context of overlapping regimes, inequality is the result. To the extent that the rule of law constrains public authority, overlapping legal regimes, by adding legal justifications, expand the exercise of state power.

Reflecting on the rule of law in the EU, recent contentious reforms of the judiciary in Hungary and Poland have highlighted the limits of the EU's competence when confronting member states' deviations from judicial

independence. Despite the details it contains, in this central task the EU's constitution lacks competence and the tools of intervention for strengthening the rule of law in member states (Blauberger and Kelemen 2016; Kelemen and Orenstein 2016). This failure reveals the peculiar nature of the EU's constitution, as it is strong on material policy goals and weak on classic elements of the rule of law.

WHERE SHOULD POLITICAL SCIENCE GO FROM HERE?

Constitutions ensure the rule of law and constrain majoritarian decision-making. Over-constitutionalization hinders democratic politics. After half a century of case-law development, the disadvantages of EU constitutional constraints shaping material policy decisions in significant detail have become increasingly apparent. Any constitution, particularly if it is only implicitly recognized, as the Treaty is, can only play its role when it concentrates on those principles that require constitutional status. For the EU, this would imply taking the four freedoms and competition law out of the Treaty, which would be a very far-reaching step indeed. If we try to imagine how European integration would have progressed without these fundamental cornerstones of the Treaty, it shows this clearly. Where would the single market be without the *Cassis* ruling? In its absence, it is most likely that there would be no mutual recognition, for instance. At the same time, it should not be forgotten that the harmonization of rules is much more far-reaching in the EU single market than it is in the US (Egan 2015).

In times of crisis, as these are, it is particularly unlikely that the Treaty's scope will be cut back to such an extent. However, there are also less radical ways to counter the development described in this book. Some years ago, Scharpf argued that the European Council should be empowered to check the Court's case law. Whenever a member state feels unduly constrained by case law, Scharpf argues, the state should make the ruling's recognition subject to the backing of a majority of governments in the Council. In this way, case-law development could be checked, while keeping the credible commitment function of the Court intact (Scharpf 2009, 2010).

By providing a check on the judiciary through the European Council, this proposal could be criticized for violating the balance of powers and breaching judicial independence. In light of this book's analysis, this concern appears to be less relevant. In the EU, taking over-constitutionalization into account, the Court encroaches upon legislative decision-making to an extent that goes beyond what occurs in the national realm. The balance of powers in the EU

is already skewed. Therefore, it does not seem problematic to subject the Court to enhanced political control.

The analysis has shown, moreover, that there are not many alternatives. Secondary law does not overrule case law that is based on the Treaty. Member states can use secondary law to signal their political preferences to the Court, but the latter is free to decide as it sees fit. The case law on patient mobility illustrates very clearly how little the Court feels itself to be bound by the legislature's wishes. In this area, secondary law provided rules on how cross-border healthcare should be reimbursed. With its different rulings, the Court established an alternative regime alongside the regulation. In order to provide greater legal certainty and improve equality before the law, member states codified these rules in the Patient Mobility Directive. However, since it was impossible to alter the constitutionalized case law, there is now a regime in place that is overly complicated and contains several contradictions between regulation 884/2004 and the directive. If we take this example and assume that those governments that intervene at the Court would have backed an intervention against these rulings in the European Council, this would have been an early signal to the Court to stop this line of case law.

In Cases C-120/95 *Decker* and C-158/96 *Kohll*, which began the development, seven governments (Luxembourg, Belgium, Germany, Spain, France, the Netherlands, and the UK) intervened in *Decker* and six governments (Luxembourg, Germany, Greece, France, Austria, and the UK) intervened in *Kohll*. In the next significant case, C-157/99 *Smits/Peerbooms* from July 2001, ten governments intervened (the Netherlands, Belgium, Denmark, Germany, France, Ireland, Portugal, Finland, Sweden, and the UK, alongside Iceland and Norway in the European Economic Area). Since there were only fifteen member states at the time, at this point it would have at least been possible to rein in the Court.

In light of the limits of political intervention, as things stand everything depends on whether the Court fine-tunes its case law once it learns of undesirable consequences. In the case of patient mobility, this fine-tuning did take place, according to the assessment of Obermaier (2008a), who analysed this area. Taking into account the overly complex legal regime that currently exists, however, it has to be judged as too little, too late. In the recent decisions the Court has made in the area of EU citizens' access to non-contributory social services, we can witness another instance of fine-tuning. After a long period of continuously expanding EU citizens' right to access social services in other member states, the Court has become more cautious since the *Dano* case. The Court previously always demanded individual assessments of whether a person was sufficiently integrated into a member state or whether an undue burden on the member state was the result of broadening access to social benefits. Recently, however, the Court has acquiesced to the legislator's wishes and has made reference to the period of

residence, as set down in the Citizenship Directive. In cases where EU citizens are not seeking work at all or have only arrived in a member state recently, member states can refuse to offer support.

However, it is questionable whether it is sufficient to rely on the Court's own assessment of where to draw the line in terms of the extension of rights. In the area of social services, fine-tuning took place against mounting criticism, of which the UK's EU referendum discussions were the most prominent sign. As we have seen, through its right to reside test, the UK aimed to restrict EU citizens' access to benefits, but they encountered significant legal constraints in doing so. The UK's administrative response to the case law on social benefits demonstrates the difficulty of implementing the Court's requirements in daily administrative practice. Although the Court is the actor that is least held back from doing about-turns, there is no reason to assume that this question should be left solely in its hands. Davies (2016b) argues that member-state courts have to be much more critical when engaging with the ECJ.

Scharpf (2015) has proposed the 'deconstitutionalization of European law', meaning there would no longer be an economic constitution. In addition to different rules for opt-outs, which would allow differentiated integration, member states would be able to repoliticize the current acquis, opening it up to majority rule and the political preferences of member states. Related to this change would be the need to make political decisions on how to order markets, rather than hiding behind judicialization. In another paper, he has argued that infringement and preliminary procedures should be restricted to secondary law, as a way to contain case-law development and make it subject to majoritarian decision-making to a greater degree (Scharpf 2016: 14). In order to enable a larger win-set, he also proposes cutting the option of Commission vetoes by abolishing its monopoly of legislative initiative.

Academic monitoring of the development of judicial power in the EU that is more critical will certainly help lead towards its more sensible use. Of the different cases that I have analysed to show the interaction of ECJ case law and EU legislation—the Citizenship Directive, the Services Directive, the regulation on the mutual recognition of goods, and the Patient Mobility Directive—it is notable that the broad attention that has been paid to the Services Directive in political science shows how little the constitutionalized nature of case law is understood within the discipline. For the study of legislative processes in the EU, it is common to assume that—as the analogy to domestic political systems has long suggested—the default condition of European decision-making is sustained national competence or previous EU legislation, but not case law. Moreover, even in instances where case law is taken into account, and the interaction of judicial and legislative policymaking is explicitly analysed (Martinsen 2015), it is normally assumed that politics has the upper hand, and secondary law can overrule the judicial interpretation of the Treaty. EU lawyers, in contrast, are aware of the constraints, to the extent that

they declare the legislature to be an 'agent' of the Court (Davies 2016a). However, the teleological interpretation of the Court is generally supported, and critical analyses of European legal integration are rare (Conway 2012). The same pretty much holds for political science in which increased integration has largely been welcomed (Majone 2014). It may be that the debacle around the euro, a stage in integration that few politicians and political scientists would probably support again, will bring about a change here.

In the national context, we find very different conditions. Constitutional courts are embedded in the national political discussion. To the extent that their rulings have policy implications, judges can assess these quite well. Since national constitutions are much leaner than the Treaty, national constitutionalized case law has fewer policy implications. If case law is not supported by politics, it will be overruled by secondary law in the national context. In the EU, in contrast, this is not possible. Treaty changes are hardly feasible. The inscription of national prerogatives into the Treaty are always subject to the Treaty's goals and provide little help. However, the inability of politics to rein in the Court does not make the latter more powerful in the long run. In the lack of incremental political feedback the Court receives on its case-law development, there is the clear and present danger of radical responses that question European integration in itself.

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