

THE POLITICAL ROLE OF THE EUROPEAN COURT OF JUSTICE: HOW THE EU INSTITUTIONAL THRESHOLDS SHIELD THE INTEGRATIONIST POWER OF THE COURT

EL PAPEL POLÍTICO DEL TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA. CÓMO LOS LÍMITES INSTITUCIONALES DE LA UE BLINDAN EL PODER INTEGRADOR DEL TRIBUNAL

Roberto REYES IZQUIERDO
College of Europe¹
<https://orcid.org/0000-0001-6825-9711>

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ABSTRACT

The aim of this paper is to analyse how the European Court of Justice (ECJ) has been a fundamental factor in the integration process of the European Union, in spite of the obstacles posed by the intergovernmental dynamics that have traditionally hindered the construction of a stronger, cohesive and more integrated Europe. Important principles such as direct effect or supremacy of EU law have been developed through ECJ rulings and case law, even when such principles were not literally foreseen in the foundational Treaties. Therefore, this paper argues that the role and power of the Court as an “indirect law-maker” have been essential for the construction of the European Union, and this has been possible due to the complexities and weaknesses of the legislative process involving the three main decision-makers: the Commission, the Council of the EU, and the European Parliament.

Keywords: European Court of Justice, ECJ case law, Dynamic Court View, Constrained Court View, EU Institutional Thresholds.

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RESUMEN

El objetivo de este artículo es analizar cómo el Tribunal de Justicia de la Unión Europea (TJUE) ha representado un factor fundamental en el proceso de integración de la Unión Europea, a pesar de los obstáculos planteados por las dinámicas intergubernamentales que tradicionalmente han dificultado la construcción de una Europa más fuerte, cohesionada e integrada. Multitud de sentencias y jurisprudencia del Tribunal de Justicia de la UE han contribuido al desarrollo de importantes principios jurídicos como el efecto directo o la supremacía del Derecho de la UE, incluso cuando tales principios no estaban literalmente previstos en los Tratados fundacionales. Por lo tanto, este artículo sostiene que el papel y el poder del Tribunal como “legislador indirecto” han sido esenciales para la construcción de la Unión Europea, y esto ha sido posible debido a las complejidades y debilidades del proceso legislativo en el que participan las tres principales instituciones decisoras de la Unión: la Comisión, el Consejo de la UE y el Parlamento Europeo.

Palabras clave: Tribunal de Justicia de la Unión Europea, Jurisprudencia del TJUE, Visión Dinámica, Visión Restringida, Límites Institucionales de la UE

SUMMARY: I. INTRODUCTION. II. DYNAMIC COURT VIEW VS. CONSTRAINED COURT VIEW. III. THE ECJ AS A LAW MAKER: THE PRINCIPLE OF PRECEDENCE AND THE PRELIMINARY RULING PROCEDURE. IV. INSTITUTIONAL THRESHOLDS. V. CONCLUSION. VI. BIBLIOGRAPHY.

I. INTRODUCTION

The role played by the European Court of Justice (ECJ) is often disregarded in studies on European integration. However, the influence the Court exerts on the development of EU law and the promotion of further integration is of utter importance, as well as its interaction with the legislative and political institutions of the EU when it comes to the legislative decision-making process. This interaction and influence of the Court on the legislative process has been a consistent subject for debate between those who defend that the activity of the Court highly constrains the room for manoeuvre of the other institutions; and those who, on the contrary, consider the ECJ to be extremely dependent on the preferences of the EU political actors and Member States. This debate confronts two different views on the power of courts to foster political change: the “dynamic” and the “constrained” court views (Martinsen, 2015: 3).

This debate is relevant to the question under scrutiny because of the conflicting theoretical approaches of both views regarding the strength of the Court of Justice in its interaction with the political decision-makers of the EU, involved in the legislative process: the Commission, the Council and the European Parliament.

II. DYNAMIC COURT VIEW VS. CONSTRAINED COURT VIEW

The dynamic approach consists of what is commonly known as the “judicialisation of politics”. According to it, there is an on-going and continuous involvement of judicial bodies into the policy-making process, and this new function can be reinforced thanks to the incapability of political and legislative institutions to override the decisions and judgements of these bodies (Martinsen, 2015: 3), that is, to “nullify the effects of controversial ECJ rulings” (S. Sweet & Brunell, 2012: 204) through new legislation (modifying the treaties or passing new secondary legislation).

Against the dynamic court view, the constrained court view argues that courts do not influence the behaviour of political institutions, but rather the opposite. Courts would depend on political power and its capacity and prerogative to enforce the law. Besides, judicial bodies would also take into account political preferences in their judgements

to avoid the overruling of their decisions or non-compliance with them (Martinsen, 2015: 3-8). However, where these circumstances are easier to find in the national context, at a European level the chances are deemed to be low. As we will see, the institutional thresholds of the political institutions of the EU and the nature of the ECJ itself render the overriding of the Court highly unlikely, difficult to achieve. Thus, this paper aims to prove how the dynamic court view has a stronger standpoint on the role of the ECJ in the European Union and make a brief assessment of such role.

III. THE ECJ AS A LAW MAKER: THE PRINCIPLE OF PRECEDENCE AND THE PRELIMINARY RULING PROCEDURE

The ECJ's involvement in political change has its origin in its teleological method of interpretation of EU law².

In interpreting EU law, the ECJ takes into consideration the evolving nature of the EU and thus interprets EU law in the light of new needs which did not exist at the time of ratification of the founding Treaties (Conway, 2015: 200).

The Court is the only institution with the maximum authority when it comes to interpreting the whole set of rules that constitute the EU legal order. In consequence, to maintain the autonomy, coherence, unity and homogeneity of EU law, the European Court of Justice has become a sort of law maker (Kaczorowska, 2016: 148-49). Sometimes, provisions of the Treaties or secondary legislation leave some matters rather undeveloped, with a general approach or even void of content. Therefore, the ECJ has taken upon itself the duty of interpreting EU law on the basis of wide EU objectives, values, and principles. Its main purpose is to fill the gaps existing in primary and secondary legislation through its specific case law. In fact, as a result of this method, the ECJ has been able to lay down important principles such as direct effect (Van Gend en Loos case, C-26/62), thanks to which all individuals can invoke rights conferred to them

² This means that, "in its interpretation Courts sometimes do not follow strictly the literal meaning of the provisions, but understand them in broad ends or objectives of the treaties" (Morten Kallestrup, 2009: 9)

by EU law before national courts; supremacy of EU law over national law (*Costa vs. Enel* case, C-6/64); or state liability for breaches of EU law against individuals (*Francovich* case, C-6/90); principles that have been developed and complemented further with ensuing additional case law by the Court.

In this regard, the influence of the Court goes beyond the mere literal interpretation, since its decisions, being binding, become a full source of EU law and one of the main tools for its development. Hence, thanks to its teleological method of interpretation³, the Court's rulings have had spill-over effects resulting in the laying down of new legal principles and rules that have been fully integrated into the EU legal order, but were neither explicitly foreseen in the Treaties, nor codified through secondary legislation (Sandholtz & Stone Sweet, 1998: 4-5).

Since the recognition of the principle of direct effect of EU law⁴, as well as supremacy of EU law or the principle of liability⁵, those individuals, and not only states or EU institutions, were able to denounce before the Tribunals the violation of rights derived from EU laws or provisions of the Treaties. As a result of the gradual consolidation of these principles, the preliminary ruling has increasingly become one of the most frequent procedures the ECJ has had to deal with, and the most important tool at its disposal in order to carry out

³ The Court interprets EU law (primary and secondary) in light of its core values, principles, purpose and goals, beyond a literal interpretation and reading of the treaties, resolutions, directives, and so on.

⁴ "The doctrine of direct effect means that certain provisions confer direct rights on individuals and equally impose obligations on national authorities, without these necessarily having been implemented by national law" (Martinsen, 2015: 19).

⁵ This principle was originally laid down by *Francovich* case (Joined Cases C-6/90 and C-9/90 and C-9/90, [1991] ECR I-5357), where the ECJ considered a Member State could be liable for damage caused to individuals by breaches of EU law for which the Member State in question can be held responsible.

"In *Andrea Francovich and Others v. Italian Republic*, workers who suffered damage when their employer became insolvent were entitled to compensation under an EC directive (Directive 80/987/EEC), which required Member States to secure their protection. Since Italy had failed to implement the directive, the individual workers brought a claim before their national courts for compensation for the damage they had suffered due to this failure" (*Francovich Principle*, Eurofound, available at: <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/francovich-principle>).

its functions and develop its role as judicial legislator and promoter of EU integration through case law.

Nowadays, most of the cases brought to the Court consist of preliminary rulings. In 2018, 66% (568) of the cases brought to the Court (out of 849) consisted of preliminary rulings, and 68.42% (520) of the cases solved (out of 760) were also preliminary references from national courts (ECJ, 2019: 126-131).

The procedure started to proliferate due to the principles previously mentioned, which were consolidated by the Court's incremental case law through its judgements on preliminary rulings. This increase in the number of cases brought before the ECJ through the preliminary ruling procedure has resulted in a complex hierarchical system between the European Court and national courts. Indeed, the ECJ's case law must be considered by every tribunal in every member state while judging their own domestic cases. It is then binding for all⁶. This general effect of the Court's case law is known as the principle of precedence, which contributes to the efficiency and rationality of the EU legal system and facilitates the possibility for the European Court to "create new EU rules through its interpretations" (Alter, 1999: 1). The principle of precedence was itself laid down through several preliminary rulings⁷. Therefore, even though national courts may pose preliminary questions to the ECJ on similar matters and policies, the European Court has the prerogative to dismiss those which are considered identical to questions that have been previously ruled on by the Court.

⁶ "The relevance of an ECJ ruling, however, is not restricted to the dispute at hand, since it has *erga omnes* effect. Once the Court clarifies a legal matter, this ruling is valid throughout the EU, and takes direct effect for national administrations, for the EU and Member States' legislatures, as well as for member state courts" (Blauberger & Schmidt, 2017).

⁷ In Case 283/81 CILFIT, the ECJ states that "the Authority of an interpretation under Article 177 (now Art. 267 TFEU) already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case" (Case 283/81 CILFIT).

In the same line, in the joined Cases 28-30/62 Da Costa, the ECJ held that "the questions of interpretations posed in this case are identical with those settled (in the case of Van Gen den Loos) and no new factor has been presented to the Court. In these circumstances the Triefcommissie must be referred to the previous judgement" (Joined Cases 28-30/62 Da Costa).

The principle of precedence implies that national tribunals in each member state must know and apply previous ECJ's rulings (interpreting or validating an EU legislative act or provision) while giving their own judgments. Consequently, the Court's case law has an impact on the whole legal system of the EU, not only on those tribunals that made the reference. The ECJ could even reject a preliminary reference when that specific act had already been interpreted or (in) validated, even if the "earlier cases were different, and even though the types of legal proceeding in which the issue arose differed" (Craig & Búrca, 2011: 475). Thus, "the relationship between national courts and the ECJ was altered. It was no longer bilateral, where rulings were of relevance only to the national court that requested them. It became multilateral, in the sense that ECJ's rulings had an impact on all national courts" (Craig & Búrca, 2011: 475).

The effectiveness and rationality of the preliminary ruling procedure, that resulted from this development after *Da Costa* and *CILFIT* cases, facilitated the work of both national courts and the ECJ, avoiding overlapping judgments. In this new hierarchical legal system, the European Court of Justice would be the centre and the national tribunals its "delegates" (as far as the interpretation of EU law is concerned) (Craig & Búrca, 2011: 475), evolving from a scenario of cooperation to one of coordination where the ECJ nowadays has a multilateral relationship with national courts, in contrast with the traditional bilateralism that characterised these dynamics (Kaczorowska, 2016: 391).

Precisely because of this system, and the tendency of national courts to refer to the ECJ when applying EU law in their rulings, the latter has progressively managed to accumulate a higher quota of "legislative" power, which runs in parallel to the power of the EU legislators, whose role as such is indeed foreseen in the Treaties: The Commission (*agenda-setter*), the Council of the EU and the European Parliament (*co-legislators*).

Principles like guarantee of fundamental rights (C-11/70, *Internationale Handelsgesellschaft*), free commercialization of goods (C-120/78, *Rewe*) or effective judicial protection (C-0432/05, *Unibet*) have emerged as a result of case law of the ECJ through preliminary rulings (Cienfuegos, 2014: 6). Regardless of whether or not these

principles would have eventually emerged through a modification of the treaties or secondary legislation, the ability to lay them down underlines the supranational nature of the ECJ and has exponentially increased its case law through the preliminary ruling procedure system (Art. 267 TFEU), influencing the evolution of EU law (extensively deepening EU integration) and the expansion of the Court's power (Kaczorowska, 2016: 391). Following Kelsen, "legal interpretation is not merely an act of cognition, it is an act of will and when interpreting the law, judges exercise a normative power" (Kelsen, 1967: 353-55). Therefore, thanks to the ECJ's rulings, the EU law has reached the level of complexity it enjoys nowadays and has also evolved to be in a privileged position over the national law of EU Member States.

At the same time, it is essential to underline that the Court of Justice is not constrained by the same decision-making thresholds imposed to the rest of the EU institutions involved in the legislative process. Otherwise, the already mentioned binding legal principles –the supremacy of EU law, state liability or direct effect– would have not emerged or been strengthened the way they have, since it would have been unlikely that the Member States had included these principles through a revision or amendment of the Treaties.

IV. INSTITUTIONAL THRESHOLDS

The EU is characterised by the fragmentation of its institutional structure: between the EU and the Member States, between the different EU institutions, and between the Member States. This fragmentation conditions the control or limits that the political and legislative actors of the EU can impose on the ECJ, whose high level of independence "emboldens it to make expansive interpretations of EU rights, to stand up to laggard Member States and to play an active role in the policy process more generally" (Kelemen, 2008: 35; Martinsen, 2015: 11). Institutional and political fragmentation, in consequence, increases the judicial influence of the Court of Justice and weakens the rest of the institutions': the Council, the Parliament and the Commission, which usually stand divided because of the diverging interests that motivate their decisions, and both their internal and inter-institutional negotiations. First, the internal divergences could make hard to achieve

the necessary majorities in each institution, and second, the inter-institutional differences could block decisions if one of the three “vetoed” them. A potential overriding of the Court becomes then a complicated process, and considerably difficult to carry out.

Besides overruling, there are other responses from the EU legislative institutions to the case law of the Court: codification, modification and non-application. Responses that we must address while assessing the Court’s power over the rest of the EU institutions (Martinsen, 2015: 16).

Sometimes, for the sake of legal certainty, EU legislators decide to codify the case law of the Court of Justice (Bickerton, Hodson & Puetter, 2015: 7). Usually, the Court’s case law is incremental, that is, the ECJ lays down new principles and legislation through the accumulation in time of different rulings referring to a concrete issue (Werner, 2016: 1454). As a result, it could be said that the Court’s function of law-maker works in the long term. Conversely, political and legislative actors often operate in the short term, reacting to social pressure, which may require more urgent decisions. In this context, it is understandable that sometimes EU legislators may need to push for the codification of certain decisions already taken by the Court regulating existing gaps of EU law. Consequently, such codification provides the EU legal system with more legal certainty on that specific area. Additionally, codification may happen when Member States attempt to “avoid further case law and regard political agreement on EU legislation as the ‘lesser evil’” (Blauberger & Schmidt, 2017: 907-918), which proves the political influence of the ECJ when it comes to law-making⁸.

Nevertheless, this codification, which can be considered as the highest level of influence the Court of Justice exerts on the decision-making process, and is reserved for the political and legislative actors of the EU, must also overcome the thresholds that hinder the override by the Member States of certain rulings of the Court.

Codification is a proof of both the strength and the limitations of the Court in relation with its policy-making role. It is a strength because the legislators consolidate previous case law of the Court of

⁸ See Schmidt (2000).

Justice, which may have been deciding through its interpretations, contrary or at least not completely aligned with Member States preferences, achieving legal certainty and at the same time compliance by every Member State. That is, transforming case law into secondary legislation would avoid the claim of any member state of a potential *ultra vires* behaviour of the Court (going beyond its powers and competences), and then the possibility of non-adoption or non-compliance would be extremely low. Secondary legislation must go through the Council's "filter", the intergovernmental organisation of the EU, so given the case of codification, no member state would be legitimated to contest said legislation considering all of them have the opportunity to take part in the negotiations and hinder or eventually even block the codification process.

In this regard, for the Council of the EU, "the focus on codification is convenient" because "legislation by the Council is better than legislation by the Court" (Bickerton, Hodson & Puetter, 2015: 21). Codification also allows the legislators, and then the Member States, to frame the regulation of the issue according to their specific preferences, given that future case law of the Court of Justice would have to take into account the new legislation passed by the Commission, Council and European Parliament (Bickerton, Hodson & Puetter, 2015: 4). However, it is impossible to disregard that important judicial decisions furthering integration in certain areas not foreseen in the Treaties can still raise political costs for them in terms of autonomy and sovereignty. The most relevant point here lies on the fact that case law of the ECJ is an important promoter of integration legislation through codification or modification, regardless of the motivations guiding the decision-making (legal certainty or better control over the development of a specific legislative proposal).

Coming back to the institutional thresholds that constrain the legislative bodies of the EU, it is convenient to elaborate on them to better understand the limits of these institutions when it comes to restricting the power of the ECJ.

Parliaments are always dependent on the electorate and their own internal struggles and dynamics. The European Parliament also faces the difficulty posed by many of its members responding more to national rather than European preferences, which makes it harder

to reach agreements. Besides, the voting rules and their limitations within the institutional balance of the EU can be challenging as well, since its legislative decision-making power, framed by differently required majorities, is shared with the Council, and conditioned by the Commission, which monopolises the initiative power and becomes the agenda-setter in the EU.

On the other hand, the Council represents the interests and preferences of the Member States, which are rather reticent towards a too far-reaching level of integration, and it is formed by the national ministers of the Member States according to their portfolio⁹. The Council is the co-legislator along with the European Parliament, so its decisions must counter not only with its potential internal fragmentation, which could hinder negotiations and successful agreements under the qualitative majority voting rule (QMV) or the formation of a blocking minority; but also with the possible veto of the Parliament against a proposal approved by the Council. Moreover, within the Council, the prioritisation of the national interests of the Member States might quite likely enter into conflict with the integration effects of the ECJ's case law.

Finally, the Commission, as the agenda-setter, guardian of the Treaties, and monopoliser of the legislative initiative, holds the most important role within the institutional framework of the EU. As far as the ECJ is concerned, the Commission will be fundamental when it comes to either codifying the Court's case law or overriding its decisions, given that for both purposes the Commission must submit a proposal first. Member States could only try to lobby the Commission to start the process of overruling, but that decision lies ultimately on the Commission. Though we must consider as well the fact that the EP and the Council are the ultimate decision-makers and both their internal and bilateral negotiations will settle the issue of codification or overruling.

⁹ "There are no fixed members of the EU Council. Instead, the Council meets in 10 different configurations, each corresponding to the policy area being discussed. Depending on the configuration, each country sends their minister responsible for that policy area" (European Union Official Website, "Council of the European Union" in: *About the EU*. Available at: https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en).

Additionally, it is necessary to make a distinction between the Court's decisions interpreting EU primary law and those interpreting EU secondary law. In this regard, to overrule the decisions of the Court that interpret a provision of the Treaties would only be possible through an amendment of the Treaties. Thus, when the Court's case law is based on an interpretation of the Treaties, the ECJ's "pro-integrative rulings are effectively insulated from member state override" (Stone Sweet and Brunell 2012: 205), since they cannot proceed via secondary legislation. Since they are a contract between the Member States, amending them would require an intergovernmental conference and a unanimous decision. However, Member States can still let the Court know about their preferences on specific cases – "ex ante through written observations and ex post in the process of codification" (Blauberger & Schmidt, 2017: 913). Eventually, though, the Court is the one making the decisions on whether to be responsive to those preferences or not, since "the Court's alignment to the other institutions, where it occurs, does so on an essentially voluntary/discretionary basis" (Hatzopoulos 2013, in Blauberger & Schmidt, 2017: 913).

As is the case for national constitutional courts, interpretations of the constitution become part of the constitution. Accordingly, if the ECJ interprets the four freedoms, EU citizenship, or European competition law in a certain way, the political institutions of the EU and its Member States cannot deviate from this interpretation of supreme EU law (Blauberger & Schmidt, 2017: 911).

Conversely, the overruling of judicial decisions on secondary legislation would be institutionally easier to carry out, since it would require a statute passed through the ordinary legislative procedure and not a unanimous agreement at the intergovernmental level (required for a modification of the treaties).

In any case, every attempt to take a decision to overrule the Court would be extremely problematic and costly. In fact, there have been very few examples of overriding of the Court included in the literature¹⁰, like the *Barber* judgement, a case of amendment to the

¹⁰ See Martinsen 2015: 95-7. Member States rarely override the Court's rulings. On the contrary, they tend to codify its case law when it deals with technical issues and limit

Treaties, “where the European Council decided on an addition to the Maastricht Treaty to reject a retrospective application of this judgement on equal access to occupational pensions for women working part-time” (Pierson, 1996: 151 in Bickerton et al., 2015: 5), or the “Protocol on the acquisition of property in Denmark annexed to the TEU” (Ritleng, 2016: 38). Therefore, it is only logical to assume that the Court of Justice enjoys a privileged and strong position within the institutional framework of the Union. The fragmentation and division that are bound to rise among the Member States in the Council and the democratic representatives in the European Parliament will inevitably hinder both institutions from reaching the required majorities (even more so if unanimity among the Member States is required). Given this circumstance, the institutional thresholds that constrain the legislative institutions of the Union frequently leave their hands tied when it comes to responding to the *ad hoc* legislative role of the Court of Justice or opposing/nullifying any of its rulings and decisions. Besides, taking into consideration the high level of independence that characterises the Court, as well as its exceptionally prolific case law (mainly because of the increasing relevance of the preliminary ruling procedure owing to the consolidation of the principles of direct effect, supremacy of EU law, and state liability), we could think of the Court as the strongest promoter of integration “in the shadows”. In many ways, its incremental case law regarding important political and social aspects can even influence the agenda-setting of the Commission, since many issues raised to the ECJ by the national courts may result in rulings that the Commission could deem worthy of further development.

The Court has more room for manoeuvre when rendering its judgements. However, it has to realise that the more controversial the problems it takes upon itself to resolve through judicial interpretation are, the more opposition to its rulings it may find among the Member States, and even the societies. This fact could very well contribute to undermining its legitimacy and independence, and prevent the “compliance with its case law” (Ritleng, 2016: 38). In fact, “as rational choice critics contend, the strength, particularly of international courts, is limited as they depend not only on the cases reaching them

its extensive influence in other more politically contested matters through “modification” or further legislation.

but also on the Member States complying with their judgements” (Bickerton et al., 2015: 6). Precisely, this is one of the challenges that the Court might face in the future, mostly in times of growing scepticism against European integration.

Nonetheless, the Court has proven to be the most neglected EU institution in the eyes of the Member States, and mostly the public opinion, which helps maintain the Court’s legitimacy and authority. Moreover, its aforementioned incremental method of developing its case law complicates a hypothetical coordinated opposition of the Member States and the rest of the institutions. As mentioned before, when developing principles or legislation through case law, the Court of Justice carries out this function by the accumulation in time of various cases, incrementally. Indeed, even if to some extent the Court cannot ignore Member States’ preferences completely, given the risk of legislative override or non-compliance, the relevance of the judicial activism of the ECJ resides on this incremental effect of its case law. Its impact is expansive over time (Blauberger & Schmidt, 2017: 907-918). Thus, by isolating an individual case it is almost impossible to foresee its far-reaching consequences in the future when more interpretations on the same policy area will follow, and the response of the other actors is expected to be passive rather than proactively opposed.

In words of Werner,

When new advancements of case law take place in rather small steps, settling only the concrete question at hand and, thereby, leaving many implications for similar but different cases open to debate, it becomes unclear whether a problem really exists and how big it might be (Werner, 2016: 1457).

Regarding the possible non-compliance with the case law of the Court by the Member States, here again, the cost-benefit analysis turns out negative. Indeed, if an attempt to overrule the Court does not reach the required majority, the only alternative for one or several Member States would be non-compliance, which is a very costly political decision, since it would be seen by the rest of the European partners as a breach of the rule of law, and the non-compliers would

turn into unreliable and untrustworthy partners. On the other hand, at the domestic level, a decision of non-compliance is quite unlikely as well, since “national courts are usually not reluctant to apply ECJ case law” (Werner, 2016: 1452). The judicial system of the EU does not stop at the ECJ. On the contrary, it consists of a decentralised system, whose centre is the ECJ, where the national courts become its “delegates” for the application of EU law, including the case law of the Court (Craig & Búrca, 2011: 475). Besides, national courts’ lack of reluctance when it comes to referring to the ECJ’s case law in their rulings may be explained by the fact that, by applying it, national courts’ decisions become much more difficult to override by their governments (since this would require going through the institutional thresholds previously mentioned). Therefore, the acquiescence of national courts with the case law of the ECJ drives their governments into compliance (Werner, 2011: 1452).

The principles of direct effect, supremacy and state liability are good examples of principles laid down by the case law of the Court of Justice that contributed to undermining the autonomy and sovereignty of Member States to the benefit of supranationality and further integration. These sensitive and transcendental decisions were not contested by the Member States by overruling or direct opposition through non-compliance. Constitutional Courts in the Member States have been the main opponents to the principle of supremacy of EU law, for instance, since their traditionally privileged position within their national legal orders (being the guardians and guarantors of their respective national Constitutions, a manifestation of the state’s sovereignty) was bound to introduce challenges in light of the incremental expansion of the European legal order and its supremacy over national law. However, a direct conflict has not emerged yet, and it is highly unlikely to do so (Arigho, 2014: 7-23).

V. CONCLUSION

Having evaluated the different ways in which the legislative institutions of the EU can react to the case law of the ECJ, we can conclude that it is quite complicated to carry out any of them – overruling, codification, modification or non-compliance–, owing

to the institutional thresholds that characterise the decision-making process of these institutions. “One of the central characteristics of the Community method is that a strong judiciary is coupled with a relatively weak legislature at the European level” (Bickerton et al., 2015: 5). That is not to say the Member States cannot influence in any way the decisions taken by the Court, since direct opposition could always result in overruling, one way or the other. Thus, the Court will not ignore deliberately Member States’ preferences. However, the incremental character of the ECJ’s case law and the very same fragmentation that characterises intergovernmental dynamics within the EU reduce the credibility of a potential override and limit this influence ostensibly. This consequently underpins the independent character that must rule the activity of the Court.

All in all, this state of affairs, which agrees with the dynamic-court theoretical approach, also proves that the weaknesses of the Council, the Parliament and the Commission when it comes to controlling the decisions of the ECJ contribute, at the same time, to strengthening the position of the Court within the institutional framework of the EU and, as a result, consolidating its role as indirect “law-maker” and promoter of EU integration through case law.

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