THE LONG PATH TO COURAGE

A Historical Institutionalist Analysis of the Right to an Individual Enforcement of EU Law

MA THESIS INTERNATIONAL RELATIONS

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1. Introduction

What is the relationship between the law and individuals? In which form does it affect them – does it only impose obligations, or does it grant rights? How are these rights enforced and protected? While these questions have kept academics and practitioners alike busy for centuries, they have usually been considered against one of two backgrounds: either against the background of a national legal system – where the law (or at least part of it) directly applies to individuals and usually grants them certain rights, which are protected to varying degrees by either public or private enforcement – or against the background of international law. This does traditionally not affect individuals directly, and while rights are often granted indirectly they usually cannot be enforced by individuals before national courts.

These two backgrounds were uniquely and decisively merged when in 1963, the young institution of the European Court of Justice (ECJ)[1] answered a question on the interpretation of the Treaty establishing the European Economic Community (EEC Treaty): were nationals living in the Member States (MS) of the European Union (EU)[2] entitled to derive individual rights from the Treaty? In its answer – which today is known as the landmark ruling of *Van Gend en Loos (VGL)*[3] – the Court pointed to both the singular nature of EU law and the right of EU citizens to invoke it before national courts. It thereby laid the foundation for the long and complicated relationship between EU law and EU citizens, a relationship which continues to be important – and changing – to this day. It faced its last major re-examination almost 40 years after that initial ruling when the Court decided in *Courage v Crehan (Courage)*[4] that EU citizens could enforce EU competition law not only vis-à-vis the MS and the EU institutions, but also against other private parties. This development was far-reaching not merely in that it further strengthened the protection of the rights EU citizens derive from EU law and can invoke before their national courts (EU individual rights, in the following IR), but also in that this protection took on the form of private enforcement. This is a relative novelty for EU law, and makes the development of IR leading to this point all the more intriguing.

[1] Considering that this paper focusses on the case-law of only the Court of Justice, the term 'European Court of Justice' is used in place of 'Court of Justice of the European Union'.

[2] The original question referred to the European Economic Community. For reasons of simplification, this paper will use the term 'European Union' also for all predecessors of the current Union.

[3] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos tegen Nederlandse administratie der belastingen [VGL]*

[4] Case C-453/99 *Courage Ltd v Crehan [Courage]*

This paper aims to contribute to the question of how the ECJ established and developed the right of EU citizens to invoke EU law before national courts. It argues that the extent to which European citizens can rely on IR today is the result of a path dependent development of these rights. Through the powerful manner in which the ECJ introduced IR and further prompted by the actions of private litigants and national courts, the Court established an argumentative path which it maintained and continuously deepened throughout its subsequent decisions on IR.

The analysis for a path dependence in the development of the right of EU citizens to invoke EU law is divided into three parts: first, the emergence of IR is considered as a potential source of path dependence; second, the subsequent case-law on IR is analysed for decision-making patterns indicating a path dependence; and third, the wider context of the development of IR is analysed for conditions increasing the likelihood of a path dependent development.

2. Literature Review

In order to understand the long path towards the current level of availability and protection of IR, it is crucial to appreciate the importance of past judgements and their influence on more recent decisions. Therefore, a brief outline of the development of IR is given in this section.

2.1 The development of EU individual rights and Courage v Crehan

In November 2014, the European Council passed the so-called Damages Directive[5], which aims to facilitate the process through which cartel victims can claim compensation for their suffered damage. The Damages Directive is the latest act in a consolidation of IR which has been taking place over the past 60 years. Over the course of this time, IR have permeated various areas of EU law, resulting in the creation of rights such as equal pay for equal work[6], the free movement of goods[7] or the repayment of unjustly levied charges[8]. Today, EU citizens can invoke all EU law provisions which confer upon them rights vis-à-vis either the MS, EU institutions or other private parties.

Among the more recent developments in the field of IR the most outstanding is arguably the ECJ's decision in *Courage* (Chalmers et al 2014; Gutman 2016; Jones, Beard 2002; Komninos 2002; Milutinovic 2010; Reich 2005). *Courage* is considered so important mainly because of its contribution to the protection of IR. While theoretically, EU citizens had been able to enforce EU law vis-à-vis private individuals since the 1970s (as are outlined in the analytical part), this had de facto not been possible due to a lack of individual liability. Whilst the MS and EU institutions could be held responsible for a breach of EU law, that was not the case for private individuals. This was problematic especially in the competition field: until *Courage*, the only repercussion of a breach of the prohibition to participate in cartels or other forms of anticompetitive behaviour[9] was that, once detected, such agreements were declared void. Considering the far-reaching impact cartels have on the functioning of the single market, this was considered a serious shortcoming (Komninos 2002). In *Courage*, the Court filled this gap by establishing a further-reaching remedy than nullity, namely, compensation in the form of damage claims. The ruling is therefore not only seen as "a milestone in the […] development

[5] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the MS and of the European Union
[6] Case 43/75 *Defrenne v SABENA (No. 2) [Defrenne]*
[7] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur/ Factortame*
[8] Case 199/82 *San Giorgio*
[9] Art. 101 of the Treaty on the Functioning of the European Union

of remedies for the breaches of [EU] competition law" (Reich 2005:38), but also as an extension of the Court's jurisdiction on liability: through declaring individuals liable for breaches of the cartel prohibition, the Court ensured that EU law infringements could be prosecuted "irrespective of the perpetrator" (Komninos 2002:476). Consequently, *Courage* served as the basis for both more detailed case law on damages actions[10] and the Damages Directive.

While the existence of strong IR and remedies has by now become a natural part of EU law, this has not always been the case. Contrary to the rights EU citizens enjoy in their national states – which are codified in their national constitutions – there was for a long time no mention of IR in the EU Treaties. Instead, IR were established and developed exclusively through the case-law of the ECJ, beginning with the Court's seminal decision in *VGL*. To consider that the whole infrastructure of IR, from their introduction to their effective protection, has no basis in the Treaty is a sign of both the extraordinariness of the EU legal system and the power of the ECJ.

While there is academic consensus on the ECJ's far-reaching power, there is also agreement that the manner in which the Court wields this influence is characterised by a high degree of opacity (Alter 2009; Shapiro 1998; Stein 1981; Weiler 1991). Consequently, scholars have searched for manners in which to explain the Court's decision-making; the two most popular theories are (i) that the Court's decisions are influenced by either judicial activism, covertly promoting an integrationist agenda, or (ii) that they pursue institutionalist motives in cementing the ECJ's position as the EU's supreme court (Alter 2009; Dawson et al. 2013; Eeckhout 2015; Krenn 2015). Yet, there is one other, lesser known theoretical framework, which might be used to explain the ECJ's jurisdiction: the concept of path dependence.

2.2 Historical neo-institutionalism and path dependence

The study of institutions as a part of political science first began around the dawn of the 20th century. Yet, while institutions have thus formed part of political debates for a considerable time, the earlier debates were mostly confined to the question whether institutions carried any political importance at all. It was only in the 1970s and '80s that academics began to consider not only if, but how and when institutions influence political processes (Benk 2018; Fioretos et al 2016; Lecours 2005). In this time three different strands of new institutional analysis arose in the United States (US): rational choice, sociological and historical neo-institutionalism. While all three schools share the conviction that institutions are paramount for political

[10] Joined cases C-295/04 etc. *Manfredi*, Case C-360/09 *Pfleiderer*, Case C‑199/11, *Otis and Others*, Case C‑557/12 *Kone and Others*

developments, they differ in their analytical approaches and the fields which they were originally applied to. While rational choice institutionalism was developed as a predominantly economic principle and retains the focus on the role of formal structures in institutions, sociological institutionalism emerged as a sociological concept and relates to the influence of the cultural and organisational environment on institutions (Benk 2018; Hadler 2015:188; Hall, Taylor 1996). As historic neo-institutionalism forms the theoretical basis of this paper, this concept is outlined in more detail below.

2.2.1 Historical neo-institutionalism

Historical neo-institutionalism centres on the causal impact historical events and processes can have on institutions – and thus, political life – over time. Historical neo-institutionalism asserts that the principal force behind institutional behaviour is found in neither the purpose for which they were set up nor the individuals inside, but in their own history: choices made at an earlier point in the institution's development are credited with long-lasting effects, powerful enough to impact decisions made in the present. Considered as more than brief moments of the past, such choices are thought to "persist [...], thereby shaping and constraining actors later in time" (Benk 2018, Pollack 2009, p. 128). As a result of the power of past decisions, the decision-making scope of institutions in the present is considerably restricted (Benk 2018; Hadler 2015; Hall, Taylor 1996; Lecours 2005; Pollack 2009).

2.2.2 Path Dependence

Before historic neo-institutionalism can be applied to IR, an understanding of the concept of path dependence is essential. Indeed, path dependence is the analytical concept most closely associated with historic neo-institutionalism (Fioretos et al. 2016; Pierson 2000; Pollack 2009). Emerging in economics, path dependence was infrequently applied to political processes before being established as a historical neo-institutionalist concept through the work of Pierson (1993, 1996, 2000, 2004). While there are a number of definitions of path dependence, many are confined to the rather insignificant statement that 'history matters' (Pierson 2000). A more concise definition presented by Levi (1997:28) states that "path dependence […] mean[s] […] that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice."

Based on this definition, Pierson (2000, 2004) highlights the importance of positive feedback[11] as the crucial feature behind path dependent processes. Positive feedback results from self-reinforcing processes through which the benefits of a chosen activity increase over time while the costs of reversing the chosen path and selecting an alternative increases. While at the point of choosing a path several options might have seemed valid, after one option is selected its continuation becomes more likely with every step down the path.

A second feature of positive feedback is the significance of the timing and sequencing of events, as the sequencing of formative events early on in a path is said to determine the scope of decisions which can be taken later. Such formative events, which signify the choice between the continuation of a certain path or the beginning of a new one, are called *critical junctures.* Importantly, critical junctures do not have to be 'big', remarkable moments; they might initially seem unnoticeable, with their true impact only revealed over time. They are critical because "they place institutional arrangements on paths or trajectories, which are then very difficult to alter" (Capoccia, Kelemen 2007; Pierson 2000, 2004:135; Stone Sweet 2002, 2004). A further feature of positive feedback processes is the possibility of a *lock-in*: if positive feedback mechanisms have been active for some time, the path chosen in a critical juncture is likely to be continued even if it is known to be less efficient than an alternative.

While it was developed as an economic concept, Pierson (2000, 2004) emphasises the significance of path dependence for political analysis, as he considers politics as a field particularly susceptible to positive feedback processes.

2.2.2.1 Path dependence applied to European integration

Due to its origin in US political science, early historical neo-institutional analysis took place almost exhaustively in a US context. Yet, beginning in the mid- 1990s, scholars have increasingly begun to consider European integration and the jurisprudence of the ECJ from a historical institutionalist perspective, with a particular focus on path dependence.

One of the earliest attempts to analyse European politics through a historical institutionalist approach is provided by Pierson (1996). In his work, he presents historic institutionalism as a 'third way' to analysing European integration: an opposing narrative to the liberal intergovernmentalism proposed most popularly by Andrew Moravcsik[12] and a theoretically

[11] In economic analyses of path dependence, positive feedback mechanisms are called 'increasing returns'. In line with most political studies, here the term positive feedback is used.
[12] See Moravcsik (1993).

stronger alternative to neo-functionalism. The historical institutionalist framework Pierson (1996) proposes accepts the intergovernmental basic premise that the MS are the most powerful actors within the EU. Yet, he argues, their margin of manoeuvre is constrained by the actions of other, more supranational actors (such as the European Commission or the ECJ) who gain power by exploiting gaps in the MS' control. Such gaps emerge when divergences develop between the interests for which MS originally set up institutions and policies and their actual functioning. Divergences arise due to both the supranational actors' continuous attempts to increase their competences and strategic missteps by the MS, such as unintended consequences of prior choices. Once emerged, Pierson argues, these gaps are very difficult for the MS to close, enabling the more supranational actors to consequently shape the common playing field – and thus further integration.

One reason Pierson identifies for the MS' inability to fill power gaps even when identified is a 'lock-in' resulting from decisions made at an earlier point: once a certain path has been chosen, intricate social and economic networks arise, making a policy reversal very costly even if in the current interest of the MS. Thereby, path-dependent institutional and policy choices of the MS – and their unintended consequences – significantly impact European integration.

It should be noted that Pierson's arguments remain challenged by the intergovernmentalists. Moravcsik (2005:21) in particular claims that the argument of the impact of unintended consequences arises only because "H[istorical] I[nstitutionalist] theorists overlook the foresight of governments because their analyses are rarely based on a detailed primary-source analysis of national preference formation". Nevertheless, Pierson's arguments were embraced by a significant number of scholars and the historical institutionalist approach has by now been applied to various fields of European integration (Alter 2001; Capoccia, Kelemen 2007; Dimitrakopoulos 2002; Moravcsik 2005; Pollack 2009; Stone Sweet 2004; Tsarouhas 2005).

2.2.2.2 Path dependence applied to jurisprudence

While historical institutionalism has thus been used to analyse European integration, it has also increasingly permeated the area of judicial analysis (Schmidt 2018). The first scholar to apply path dependence to legal institutions was Stone Sweet (2002, 2004). In his work, he adopts Pierson's premise that decisions made at an earlier point in an institution's history significantly impact its actions, and room for action, in the present. Stone Sweet (2002, 2004) then highlights the high likelihood of such a path dependence in the context of case-law development, given the tendency of courts to base their decisions on precedent. One the one hand, Stone Sweet

(2002) argues, the reliance on precedent is essential to ensure legal certainty. Yet, on the other hand, by basing a decision more on a particular sequence of historical events rather than on the purely functional logic of the case at hand, decisions are not made 'freely' but bound by the precedent-setting decision and the path chosen therein. This resulting suitability of path dependence to analyse legal institutions and rules has consequently been acknowledged by other scholars (Fon et al. 2005; Hathaway 2003; Schmidt 2010, 2012, 2018; Stone Sweet 2002, 2004).

The second main source of path dependence in a judicial context are positive feedback mechanisms (Schmidt 2010, 2012, 2018; Stone Sweet 2002, 2004). These refer to certain standards of behaviour which are repeatedly reinforced and thus become institutionalised practices. Legal positive feedback mechanisms, in turn, are most likely to be generated through litigation: through their litigation, private actors prompt courts to further elaborate on a legal issue, which then in turn constitutes the basis for further litigation on the issue – and so forth. These feedback loops tend to continuously reinforce themselves, moving judicial rule-making down a certain path (Fon et al. 2005; Schmidt 2010, 2012, 2018; Stone Sweet 2002, 2004). As can be seen, the characteristics of the legal field make path dependence a particularly suitable concept for the analysis of jurisprudence.

2.2.2.3 Path dependence applied to the ECJ

While there has been a considerable amount of research directed at the ECJ in recent years, only few scholars have so far concerned themselves with the development and the consequences of the Court's jurisdiction (Schmidt 2018). Fewer yet have used path dependence to analyse its institutional and case-law development. Among those who have[13], the work of Schmidt (2010, 2012, 2018) is the most comprehensive.

In her analysis, Schmidt (2018) – the same way as Stone Sweet (2002, 2004) – focusses on positive feedback cycles as the most important source of path dependence. She acknowledges the effect precedent can have on future jurisdiction and the need for the ECJ to provide legal certainty to safeguard the correct enforcement of EU law. Nevertheless, Schmidt (2018) emphasises that the ECJ is not bound by precedent, and thus not by critical junctures. Consequently, the impact of precedent on the ECJ's development of case-law does not extend to all cases. Without positive feedback, however, a path taken (at a critical juncture) might be abandoned or reversed. Schmidt (2012, 2018) asserts that for the ECJ's case-law development,

[13] See, e.g., Benk (2018), Heine, Kerber (2002) or Linos (2011).

too, litigation is the main cause of positive feedback – brought by private actors invoking their rights, defended by EU lawyers advocating for the broadening of EU law, and enabled by the willingness of national courts to apply EU law directly or refer preliminary references to the ECJ.

Schmidt (2018:61) also recognises the role of critical junctures in path dependent processes as those moments when "break[s] in the […] path occur […] from which a new path can develop". The importance of critical junctures in the ECJ's case-law had already been evaluated by Stone Sweet (2004) and Capoccia and Kelemen (2007). Both contributions argue that decisions made by the ECJ can be seen as critical junctures if they "constitute the necessary causal conditions for subsequent doctrinal developments" (Stone Sweet 2004:188). Yet, the contributions differ in their assessment of two particular decisions by the ECJ: Stone Sweet (2004:31), on the one hand, asserts that "the Court's decisions on direct effect and supremacy were an obvious critical juncture in European legal integration" because of their causal conditioning of the subsequent judgements in these fields. Capoccia and Kelemen (2007), on the other hand, do not consider the two decisions as critical junctures, as their effect was not immediate but was incrementally established over a longer period of time. This evaluation, in turn, is rejected by Schmidt (2018:61), who also emphasises the "enormous" impact the two judgements in question had on the ensuing case-law.

In her most exhaustive work, Schmidt (2018) applies path dependence to analyse the Court's jurisprudence on the fundamental freedoms[14], concluding that this development took place as a path-dependent process. She identifies the rulings in *Dassonville*[15] and *Cassis de Dijon*[16] as critical junctures from which on the prohibition of a restriction of the freedom of goods was continuously transferred to the other freedoms through private litigation. Schmidt (2018:63) further argues that this path dependence has led to a "dysfunctional lock-in", as due to said transferral, economic actors were enabled to select MS for the freedoms' establishment according to their regulatory requirements. This, in turn, negatively affected those MS with higher requirements and prompted fears of a regulatory race to the bottom. In the context of this paper, Schmidt's (2018) work serves as a valuable demonstration of the usefulness of path dependence to analyse the development and consequences of ECJ jurisprudence.

[14] The fundamental freedoms refer to the free movement of goods, services, capital and persons within the EU.
[15] Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville*
[16] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [Cassis de Dijon]*

In this literature review, the particular nature of IR in the EU has been outlined. Although they form a central part of EU law, they are a result not of the Treaties, but of the jurisdiction of the ECJ. Over a period of almost 40 years, IR were developed by the ECJ in a series of decisions, culminating in the introduction of an EU right to damages in *Courage*. Furthermore, path dependence has been presented as theoretical concept for the analysis and explanation of institutional decision-making. Contrary to other approaches, it focuses on neither judicial activism nor institutional power struggles and thus provides an alternative explanation for the ECJ's jurisprudence. This paper uses path dependence to analyse the ECJ's development of IR. In doing so, it is aimed to increase the understanding of both the ECJ's decision-making and the far-reaching consequences it has.

Consequently, this paper considers following issue:

"To which extent was the ECJ's development of the right of EU citizens to invoke EU law before national courts characterised by path dependence?"

To answer this question, three hypotheses are formulated which all consider different parts of the development of IR.

Hypothesis one centres on the establishment of IR in *VGL* and argues that '*The ECJ's development of IR was to a high degree influenced by the critical juncture presented by the judgement in VGL.*'

The second hypothesis is used to analyse the case-law development after *VGL* and states that *'The case-law development of IR is characterised by decision-making patterns favouring maintenance of the path begun in VGL'*.

To evaluate the influence of the context in which the development of IR took place, hypothesis three is formulated as *'The development of IR after VGL took place in a context characterised by positive feedback'*.

3. Methodology

This paper aims to establish whether the broad infrastructure of IR existent in the EU – the development of which is still ongoing and which affects increasingly more areas of life of EU citizens despite not occupying a major role in the Treaties – can be attributed to the path dependent development of these rights. This analysis might not only provide an explanation of why this development could take place as it did, but might also contribute to a better understanding of the Court's decision-making in general.

3.1 Research method

According to Pierson (2000), Schmidt (2018) and Stone Sweet (2004), two factors are necessary for case-law to exhibit path dependent tendencies: first, there must be a main critical juncture, in which a new 'path' – such as new legal tradition – breaks off from the old path, and second, positive feedback must occur to reinforce this new path. Furthermore, the Court's decision-making patterns in the decisions on IR following *VGL* are taken as a third factor potentially indicating a path dependence. In the following, the methods applied to test for these factors and the underpinning academic concepts are presented.

3.1.1 Hypotheses 1: Analysing the influence of *VGL*

Hypotheses 1 focusses on the establishment of IR in *VGL*. To consider the influence of *VGL* on the subsequent development of IR, Schmidt's (2018:61) definition of a critical juncture in the case-law of the ECJ is used. This definition of a critical juncture as a "break in the […] path […] from which a new path can develop" finds the defining characteristic of a Court decision creating a critical juncture in the presence of a distinctive 'before' and 'after': through the judgement, the status quo is questioned and overturned, resulting in the 'after'. Thus, to consider whether *VGL* constituted a critical juncture, the existence of such a break in the path is analysed.

3.1.2 Hypothesis 2: Analysing the post-*VGL* development of IR

The second hypothesis concerns the development of IR through the ECJ's case-law subsequent to *VGL*. In order to examine this development for a path dependence, the Court's case-law on IR is evaluated. While for an exhaustive analysis, every Court decision involving these rights would have to be considered, this would exceed the scope of this paper. The case selection is thus restricted by the use of another criterion: only those cases which contributed to the development of IR through adding new features – both expansive or restrictive – to the then existing structure of IR are included.

To analyse the ECJ's development of IR after *VGL*, its line of argumentation is retraced throughout the landmark cases contributing to that development. For each case, the structure of IR as it was before that case is presented and the effect the Court's decision had on it is shown. Then, the choice the Court was confronted with when giving the ruling is analysed with respect to both the decision the Court took and the existence of a potential alternative decision it might have taken. If a clear alternative decision is discernible, it is evaluated if this alternative might have been an equally beneficial or even more beneficial choice for the Court. Choices are considered beneficial if they benefit the ECJ as an institution, by, e.g., increasing its competence, maintaining legal certainty or finding MS acceptance.

The aim of this is not only to present the path eventually taken by the Court. Rather, in showcasing also those alternatives *not* taken, it is hoped to create a picture of the many crossroads the ECJ faced in its development of IR. This approach might help to expose patterns in the Court's decision-making, which in turn could give an indication of a potential path dependence: if it is found that despite the presence of beneficial alternatives, the ECJ repeatedly chose that option in line with its previous argumentation on IR, this is taken as an indication of a path dependence. If, however, the ECJ is found to have regularly opted for that option seen as the most beneficial, a path dependence is considered less likely.

3.1.3 Hypothesis 3: Analysing the policy context of IR

Analysing path dependent processes in the development of video technologies, Arthur (1994) developed four conditions in a technology and its context under which positive feedback is likely to arise (which in turn causes path dependence). North (1990) transferred these conditions to the field of institutional study, Pierson (1993, 2000) demonstrated their suitability for the analysis of public policies and Benk (2018) applied them to the jurisdiction of the ECJ[17]. To evaluate whether the development of IR was characterised by positive feedback, the policy context of IR is analysed for these conditions, which are outlined in the following.

3.1.3.1 Condition 1: a high set-up cost

The first condition indicating the presence of positive feedback is given if the establishment of a policy involved a *high set-up cost*. This cost can consist of internal institutional restraints (such as a high bureaucratic or procedural effort needed to establish a policy) or external restraints (such as opposition to the policy from actors outside the institution). Pierson (1993,

[17] The application of the four conditions builds on and further develops the ideas of a paper submitted by Benk (2018) for the course Justice and Home Affairs.

2000) argues that the higher the set-up cost of a policy, the higher the unwillingness to give up on this investment through a reversal of the policy – even in the face of the inefficiency of the policy.

3.1.3.2 Condition 2: learning effects

After a policy has been developed for a certain period of time, the institution responsible for its development begins to reap *learning effects* from its experience with the policy. This leads to a smoother and more efficient running of the procedures required for the implementation of the policy, as well as to further research in associated fields. Both factors increase the likeliness of a continuation of the policy and increase resistance against alternative policy choices, which would require a 'starting from zero'.

3.1.3.3 Condition 3: coordination effects

The third condition Arthur (1994) found to generate positive feedback are *coordination effects*. Coordination effects arise if a policy is approved and picked up by an increasing number of actors, leading to both the spread and the reinforcement of the policy and enhancing the probability that it is maintained even in the face of other, more beneficial alternatives with less support.

3.1.3.4 Condition 4: adaptive expectations

With the continued development and implementation of a policy, actors are likely to begin to assume a further continuation of the policy, and to align their own actions with this assumption. If this phenomenon reaches a certain extent, these actions based on the assumption of a further continuation of a policy can become powerful enough to bring about the actual maintenance of the policy and thus constitute *adaptive expectations,* the last of Arthur's conditions causing positive feedback.

While there are four features generating positive feedback, one is treated differently here: while the features of learning effects, coordination effects and adaptive expectations all occur at later stages of the development of a policy, the feature of a high set-up cost focusses on specific characteristics of the beginning of this policy. Consequently, it is used in this paper for the analysis of the establishment of IR in *VGL* and not, as the other three conditions, to analyse the context of the development of IR.

In this methodological section, the three factors indicating a path dependence were outlined: the presence of a critical juncture with a high set-up cost (hypothesis 1), decision-making

patterns favouring the maintenance of the existing path (hypothesis 2), and sources of positive feedback (hypothesis 3). In the following analysis, these factors are tested for in the development of IR.

4. Analysing path dependence in the development of IR

In this analysis, the origin of IR in the judgement *VGL* is considered. In Chapter 4.1, it is evaluated whether this judgement was a critical juncture, and whether it had the potential to influence the following case-law on IR (hypothesis 1). In Chapter 4.2, the subsequent development of IR is analysed for decision-making patterns indicating a path dependence (hypothesis 2). Lastly, in Chapter 4.3, the wider context of the development of IR is checked for the conditions suggesting the presence of positive feedback (hypothesis 3).

4.1 *VGL* and the origin of IR

As mentioned before, IR did not appear in the Treaty of Rome when it came into force in 1957. Yet, their introduction dates back almost equally long: their existence was first mentioned and highlighted in the landmark ruling of *VGL*. Responding to the question of whether citizens of the MS can "lay claim to individual rights which the courts must protect"[18] on the basis of EU law, the Court stated that EU law "not only imposes obligations on individuals but is also intended to confer upon them rights [...] which can be invoked before [national] courts"[19]. With this judgement, it laid the foundation for the principle of the direct effect of EU law provisions and the right of EU citizens to invoke it.

4.1.1 *VGL* – a critical juncture?

The main significance of *VGL* in the context of this paper lies in its departure from the traditional perception of EU law as a form of international law, applicable only to the governments of its MS. Instead, it introduced a more constitutional interpretation in which the Treaty applied to all citizens of the MS.

This departure from tradition presented a substantial change in the EU legal system, with equally substantial reactions: already in advance, *VGL* was opposed by the MS[20], and it was advised against by the Advocate General[21]. Consequently, the Court was presented with a clear choice: it could either take the side of the MS and the Advocate General and leave the question to the national legal orders to decide – or it could dismiss the interventions and proceed with its own intentions. Despite the significant opposition, the ECJ vied for the second option, pointing out the special status of EU law, the nationals' right to invoke it before their national courts and

[18] Case 26/62 *VGL* p. 3
[19] Case 26/62 *VGL* p. 12
[20] Case 26/62 *VGL* p. 5-10
[21] Case 26/62 *VGL*, Opinion of Mr Advocate General Roemer

its own competence to determine in which cases and according to which criteria[22] this could be done. Furthermore, while the Court mainly referred to the right of individuals to enforce EU law vis-à-vis the MS, it did not restrict its jurisdiction to this vertical dimension of direct effect. In highlighting the "possibility, in actions between individuals before a national court, of pleading infringements"[23] it already referred to the potential of invoking EU law in relations between private parties. The significance of *VGL* as a crossroads has been widely recognised in the literature, with the judgement being called "a constitutional juggernaut", "a genuine revolution" or "[t]he cornerstone for the constitutional evolution [of EU law]" (Halberstam 2010:28; Rasmussen 2014:136; Weiler 1981:3).

As it clearly renounced the manner in which EU law was interpreted up to this point and replaced it by a fundamentally different understanding with an emphasis on the rights of individuals, *VGL* is considered a critical juncture. As pointed out before, this finding is corroborated by Stone Sweet (2002, 2004) and Schmidt (2018).

4.1.2 The cost of *VGL*

According to Arthur (1994) and Pierson (2000), critical junctures are particularly likely to induce path dependent developments if the selection of the new path involved a high cost, as the hesitation to abandon this investment leads to the continuation of the path even if it is known to be inefficient. Thus, to consider whether *VGL* as a critical juncture was likely to lead to a path dependent development of IR, the cost of choosing the path of the establishment of IR is analysed.

This cost is considered as two-fold: first, the Court faced external opposition against the judgement and second, it had to overcome internal resistance. It may be argued that the Court faced more hurdles (such as the lack of a legal basis for the direct effect of Treaty provisions); these two are considered most important for the purpose of this paper.

4.1.2.1 External opposition

Arguably the highest hurdle for the Court to overcome in its establishment of IR was the resistance from the MS. At the time of the passing of *VGL*, the MS mostly considered the EEC Treaty as a traditional international treaty which was binding only to its signatories, and the interpretation, scope and applicability of which were controlled by the MS alone (Rasmussen

[22] The criteria developed in *VGL* for a provision to have direct effect were its clarity, unconditionality, negative phrasing and self-sufficiency without legislative action (see Case 26/62 *VGL*, p. 13).
[23] Case 26/62 *VGL*, p. 13 §3

2014). It is therefore not surprising that when faced with the far-reaching implications of the introduction of direct effect – most particular, the weakening of the MS' control over EU law to the benefit of the citizens – half of the MS at that time submitted written observations, challenging both a potential introduction of direct effect and the Court's general competence to decide on the matter. This was a serious concern for the Court, as it heavily relied on the MS' acceptance and cooperation for the principle to be successful. The risk it took in dismissing the MS' observations regardless of this dependence can be considered a high set-up cost indeed.

4.1.2.2 Internal opposition

Resistance against the judgement was not limited to the outside of the Court. When analysing the development of *VGL* from an internal perspective, there are two points suggesting the existence of tensions within the Court regarding the scope of the Treaty: these are a judgement the Court had given shortly before *VGL* and the opinion of the Advocate General in *VGL*.

Several months before *VGL*, the Court's ruled in the case of *De Geus*[24]. The facts presented were similar to those in *VGL*, and the question referred by the national court (also a Dutch court) was also on the interpretation of the Treaty. The national court even contemplated in its reference whether certain Treaty provisions "are […] directly applicable to nationals of the signatory States"[25]. More astounding yet is the opinion of the Advocate General in De Geus: pre-empting *VGL*, he argued that "[s]ince the Treaty, by virtue of its ratification, is incorporated into the national law, it is the function of national courts to apply its provisions"[26]. But where the Advocate General based this opinion on the "'context' or 'spirit'"[27] of the Treaty, the Court was more careful and eventually refused its jurisdiction. Thus, in De Geus, the Court still acknowledged the traditional interpretation of the Treaty as a standard international treaty in control of the MS. The fact that not even a year later it overturned this judgement to pursue an entirely different line of jurisdiction indicates both the existence of diverging opinions within the Court and the complexity of finding common ground.

The second sign of internal tensions is the Advocate General's opinion in *VGL*[28]. In his assessment of the case, he treaded much more carefully than the Court would ultimately do, stating that although EU law could potentially be directly effective, this was only the case under

[24] Case 13-61 *De Geus v Robert Bosch GmbH [De Geus]*
[25] Case 13-61 *De Geus* p. 48. For a more thorough analysis of the relationship between *Van Gend* and *Bosch* see Rasmussen (2014) or Halberstam (2010).
[26] Case 13-61 *De Geus*, Opinion of Mr Advocate General Lagrange p. 65
[27] Case 13-61 *De Geus*, Opinion of Mr Advocate General Lagrange p. 70
[28] Case 26-62 *VGL*, Opinion of Mr Advocate General Roemer

very specific conditions – which were not given in *VGL*. Considering the Advocate General's eminent position within the ECJ, the Court's divergence from his opinion carries a significant weight.

To fully appreciate these costs it must be considered that at the time of *VGL*, the ECJ was still a very young institution with unclear remits and competences, and entirely dependent on the goodwill and cooperation of the MS. The Court's freedom of action was restrained and it was significantly reliant on sources of legitimacy for its rulings. The MS' position and the Advocate General's opinion formed two of the most essential sources of such legitimacy. Dismissing each of them was an enormous risk for the Court to take – a risk so high that once taken, the Court was highly unlikely to reverse its investment by abandoning the new path. Thus, *VGL* is considered not only as a critical juncture, but as a critical juncture powerful enough to influence the development of subsequent case-law on IR.

4.2 Decision-making patterns in the development of IR

The existence of a powerful critical juncture in *VGL* suggests a continuation of the selected path. Consequently, in the following, the development of IR after *VGL* is analysed to see whether in its argumentation in the following cases, the Court continued the reasoning begun in *VGL*, deviated from it, or even abandoned it.

4.2.1 *BRT v SABAM*

While after *VGL*, there were some other cases in which the Court further established the principle of direct effect[29], the next major development of IR occurred in 1974 with the ruling in *BRT v SABAM (BRT)*[30]. In this case, the Court ruled on the interpretation of Regulation 17/62[31], which outlined the implementation of the competition provisions. The Court clarified in particular whether a certain article should be interpreted as prohibiting a national court from investigating a suspected breach of the competition provisions if the EC was investigating the same case[32].

In its answer, the Court confirmed the national courts' competence as deriving directly from the competition provisions, "which tend by their nature to produce direct effects in relations between individuals […] [and] create direct rights in respect of the individuals which the

[29] Case 9-70 *Grad v Finanzamt Traunstein*, Case 2-74 *Reyners v Belgian State* and Case 41-74 *Van Duyn v Home Office*
[30] Case 127-73 *BRT v SABAM [BRT]*
[31] First Regulation implementing Articles 85 and 86 of the Treaty (outdated)
[32] The article in question is Art. 9(3) of Regulation 17/62 (outdated).

national courts must safeguard"[33]. With this statement, the horizontal direct effect of Treaty provisions already hinted at in *VGL* found its full expression in *BRT*.

Yet, in contrast to *VGL*, the Court was not *required* to elaborate on IR; it *chose* to do so. Although one of the referred questions specifically mentioned "rights in respect of private parties which national courts must safeguard"[34], both the European Commission and the defendant dismissed it as irrelevant in this context[35]. The Court could have equally disregarded it in its judgement; and to an extent, this is precisely what it did: its line of argumentation on the national courts' competence is coherent even when skipping the paragraphs on horizontal direct effect[36]. Yet, in abandoning its previous dismissal, it chose to include IR nevertheless in what appears like a detour from the actual judgement. This strongly suggests that the Court did recognise the question's inherent opportunity to broaden the principle of direct effect and seized it – and thus followed the steps already laid out in *VGL*.

4.2.2 *Defrenne v SABENA*

Only two years later, the notion of horizontal direct effect was further extended. Brought about by a former air hostess' resistance against the unequal working conditions for women and men at her former employer, the Court was asked to clarify whether the equal treatment provision contained in the Treaty[37] was directly effective and thus enforceable in court by individuals[38]. This issue was politically explosive, as granting direct effect to the provision would have implied the introduction of the 'equal pay for equal work' rule into all MS, including those which by that time had no comparable national legislation.

The centre of the choice the ECJ faced in this case was one of social policy and its implications: should this field remain a question of national policy – or were there certain principles that required a Union-wide implementation? This primary choice was mirrored at a lower level in the choice of whether or not to give direct effect to the equal treatment provision. There were good arguments against this: as a general principle and requiring further national legislation, the provisions complied only with half the criteria originally deemed necessary for direct effect. Granting it nevertheless bore not only the risk of antagonising the MS but also of a questioning

[33] Case 127-73 *BRT*, p. 62 §16
[34] Case 127-73 *BRT*, p. 54
[35] Case 127-73 *BRT*, p. 56, 58
[36] See Case 127-73 *BRT*, p. 61 §7 – p. 62 §14; p. 63 §18 – p.63 §24
[37] This was then Art. 119 EEC Treaty and is today Art. 157 TFEU.
[38] Case 43/75 *Defrenne*

of the purpose of these criteria. Consequently, not granting direct effect might have been the more effective alternative.

The Court, however, chose to grant direct effect. Apart from the major implications this had for the MS' social policies, it also had two important effects on the development of IR. On the one hand, the Court used its ruling to for the first time contrast vertical and horizontal direct effect and thus clarified the distinction between the two: while the equal pay provision is enforceable vis-á-vis public authorities, it "also extends to all [collective] agreements […], as well as to contracts between individuals"[39]. As pointed out above, the roots of this development can be clearly traced back through *BRT* to *VGL*. On the other hand, *Defrenne* also marked the first time the Court used IR not as an aim on their own, but as a means to reach another aim. While the extraordinary nature of the rulings in *VGL* and *BRT* lies in the Court's practice of granting rights to individuals, *Defrenne* might be considered crucial primarily for the Court's *use* of this practice to implement social policy. In making IR an instrument for the implementation of policy – which could potentially be applied to any Treaty provision – the Court significantly broadened the reach of the concept and continued the path begun in *VGL*.

A year after the successful litigation of Ms. Defrenne, Directive 76/207 was passed, requiring the MS to ensure the equal treatment of men and women regarding access to employment, vocational training, promotion, and working conditions (Council of the European Union 1976). Part of the Directive was a clause instructing the MS to introduce measures enabling victims of a breach of the non-discrimination principle to invoke their right to equal treatment before court. The directive's transposition, however, did not go smoothly, and it took several interventions by the Court to ensure its correct implementation in the MS.

In 1985, the Court ruled that the German interpretation of the Directive, in which damage claims were selected as a sanction for non-compliance, was not in conformity with the Directive[40]. The Court stated that although the MS were free in their choice of sanctions, and damage claims per se were an appropriate solution, any chosen sanction had to "guarantee real and effective judicial protection" and "have a real deterrent effect on the employer"[41]. The German system, under which the only damage victims could claim were the expenses resulting from the application process (in one specific case, these expenses comprised the travel cost and letter

[39] Case 43/75 *Defrenne*, p. 476 § 39
[40] Case 14/83 *Von Colson*
[41] Case 14/83 *Von Colson,* §23

postage, amounting to approximately €3.7)[42] clearly did not meet these requirements. The Court repeated and further substantiated its statements in cases throughout the 1980s and '90s[43].

In these decisions, the Court vehemently insisted on the effective protection of the right to equal treatment. Yet, it faced ferocious opposition from the MS in this endeavour – above all, from Germany. German lawyers and scholars were alarmed by the Court's stipulations on the height of damage claims: from their perspective, grounded in the profoundly German understanding of damage claims as a mere compensation of the accrued damage, the form of damage claims demanded by the Court vastly exceeded this compensatory function (Adomeit 1997; Müller 2000; Volmer 1997; Wagner 2006).

Faced with both this high degree of opposition and the prospect of a fundamental clash between its jurisdiction and the legal tradition of one of the largest MS, the Court had enough reasons to lower the protection of the right to equal treatment. Its insistence on a remarkably high level of protection despite compelling reasons not to do so is therefore seen as conditioned by the jurisdiction in *Defrenne*, *BRT* and *VGL* and a result of the previous development of IR.

4.2.3 *Rewe-Zentralfinanz*

By the mid-seventies, the Court had established that through the direct effect of Treaty provisions, individuals in the MS were entitled to rely on the rights contained in the provisions before their national courts. So far, however, there were no remedies available for cases in which these rights were breached.

This changed in 1976, when the Court ruled on the question of whether individuals had a right to a refund of the damage suffered through a breach of EU law – even if this was contrary to specific national procedural provisions[44]. In its answer, the Court reemphasised the national courts' duty to protect IR. Yet, it also stated that "in the absence of [Union] rules on this subject", the competence to decide on the precise procedures to protect those rights lied with each MS[45]. Consequently, remedies for a breach of EU law should be available, but could be determined on a national basis – under the condition that they were not "less favourable than those relating

[42] Case 14/83 *Von Colson,* p. 1893
[43] Case C-177/88 *Dekker v VJV-Centrum*, Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority*, Case C-180/95 *Draehmpaehl v Urania Immobilienservice*
[44] Case 33/76 *Rewe-Zentralfinanz*
[45] Case 33/76 *Rewe-Zentralfinanz*, p. 1997 §5

to similar actions of a domestic nature" (principle of equivalence) and could be obtained without undue burden (principle of effectiveness)[46].

This reasoning is not entirely consistent with the Court's previous development of IR: while so far it had seemingly grasped any opportunity to further expand IR, it now seemed to let precisely such an opportunity pass. Indeed, the Court would have been able to give a different ruling: in asking "[i]f a right to a refund is held to exist under [Union] law"[47] and enquiring about the details of such a right, the national court in question provided the Court with an excellent reason to further broaden IR. It would not even have had to go that far; ruling that in case of a breach a remedy – devised by the MS – must be available even if contrary to national procedures would have been less far-reaching, but still in conformity with the previous argumentation.

The ruling in *Rewe-Zentralfinanz* is thus exceptional as it seems to mark the Court's turning away from the path it had followed so far in the development of IR. Instead of a continuous and increasing consolidation of the right of EU citizens to invoke EU law it now seemed to pursue a path more characterised by national judicial autonomy. This notion was reinforced four years later by the ruling in *Rewe Handelsgesellschaft Nord*[48], in which the Court stated that "it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law"[49].

4.2.4 *Francovich*

Although the question of remedies was revisited several times in the following years, the next major development of EU law remedies came with the Court's ruling in *Francovich*[50]. While the Court had already held that national legal provisions which conflict with EU law must be disapplied[51], and that in case of a MS's unjust enrichment to the disadvantage of individuals there was an obligation to repay the unjust charges[52], the management of remedies for other breaches of EU law was still an exclusive MS competence. Thus, apart from in the aforementioned cases, the Court's rulings made in the *Rewe* cases still seemed to apply.

In *Francovich*, however, the Court exposed a further flaw in this system of MS responsibility: if a MS had breached EU law in the form of its failure to transpose an EU law provision into

[46] Case 33/76 *Rewe-Zentralfinanz*, p. 1997, 1998 §5
[47] Case 33/76 *Rewe-Zentralfinanz*, p. 1991
[48] Case 158/80 *Rewe-Handelsgesellschaft Nord*
[49] Case 158/80 *Rewe-Handelsgesellschaft Nord*, p. 1838 §44
[50] Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian Republic [Francovich]*
[51] Case 106/77 *Simmenthal*, Case C-213/89 *Factortame*
[52] Case 199/82 *San Giorgio*

national law, it was impossible for individuals to rely on these provisions vis-á-vis their state. Consequently, it was also impossible to obtain any form of remedy from the state. To close this loophole, the Court ruled that where a MS's breach of EU law has caused damage to individuals, it is – under certain conditions – the competence of the Union to hold the responsible state liable. With this assertion, the competence to create remedies for the protection of EU law was no longer reserved to the MS and the Union remedy of state liability was created. As it had been done in the preceding remedy cases[53], this approach was justified by stating that without the possibility of redress from the MS, "[t]he full effectiveness of [Union] rules would be impaired and the protection of the rights which they grant would be weakened"[54].

With respect to IR, *Francovich* thus represents another crossroads. The Court could have chosen to continue the hesitant, "no new remedies" argumentation which it had introduced in the *Rewe* cases and not wholly abandoned in its following judgements on remedies[55]. To do so, it could have merely closed the discovered loophole (in claiming the competence to remedy damages resulting from the non-transposition of EU law) and otherwise left the responsibility to remedy MS breaches of EU law with the MS. This procedure would have been in line with both the MS' expectations and the Court's own jurisdiction. The Court, however, went well beyond this: it claimed the competence to remedy every form of breach of EU law committed by the MS. In creating the principle of state liability, it thus provided EU citizens with a powerful instrument to claim their rights – and returned to its old path with force. *Francovich* is therefore considered a further step along the path of a gradual consolidation of the principle.

This path was further continued with the judgement in *Brasserie du Pêcheur/ Factortame*[56] in which the Court defended the reach of state liability against MS observations[57], developed it in more detail and further consolidated it by stating that "the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained"[58].

[53] Case 106/77 *Simmenthal*, Case C-213/89 *Factortame,* Case 199/82 *San Giorgio*
[54] Joined cases C-6/90 and C-9/90 *Francovich* §33
[55] For it might be argued that although the Court had already introduced the remedies of the obligation to disapply conflicting national provisions and the obligation to reimburse damages resulting from an unjust enrichment, this was done in a more cautious, gradual way than the far-reaching sweep with which all Member State breaches of EU law were submitted to a review through the Union.
[56] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur/Factortame*
[57] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur/Factortame* §18-22
[58] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur/Factortame* §22

In its development of IR, the Court had so far established the right of EU nationals to invoke EU law as a principle, elaborated on its vertical and horizontal dimensions, broadened its reach by employing it as an implementation instrument and – after a short detour – guaranteed its enforcement in the case of a MS infringement on a right. Thus, within the vertical dimension, both the right of individuals to invoke EU law and a Union remedy for an infringement of these rights were given. Within the horizontal dimension, however, only the right of individuals to invoke EU law was given – there so far existed no remedy for the non-compliance with EU law if it was committed in a relation between individuals.

4.2.5 *Banks*

This issue came to a head in the 1992 *Banks* case[59]. In this case, several preliminary questions were referred by a British court concerning the interpretation of the competition provisions contained in both the EEC Treaty and the Treaty establishing the European Coal and Steel Community. While several inquiries were made on this topic, there was one of particular importance in the context of this paper: the British court asked whether EU law enabled or even obliged national courts to award damages to individuals for losses resulting from a breach of the competition provisions. It is implied in this inquiry that the issue is not about a breach of EU law committed by a MS or its institutions – the competition provisions of both treaties are addressed to private enterprises, not the MS – and is thus not affected by state liability[60]. Thus, what the Court asked was whether individuals had a right to damages under EU law which they could invoke vis-á-vis *other individuals*.

Before the case was ruled on by the Court, it was submitted to Advocate General Van Gerven for his opinion. In his well-known assessment of the case[61], Van Gerven asserted that "[t]he general basis established by the Court in the *Francovich* judgment for State liability also applies where an *individual* infringes a provision of Community law […], thereby causing loss and damage to another individual"[62]. Van Gerven thus proposed to fill the gap in the protection of EU rights by establishing individual liability at the side of state liability. This clarification he

[59] Case C-128/92 *Banks*
[60] Furthermore, as pointed out by Advocate General Van Gerven (p. 1243-1244) in his opinion, the issue of state liability was already being dealt with in the *Brasserie du Pêcheur/ Factortame* cases, which were pending before the Court concurrently.
[61] Case C-128/92 *Banks*, Opinion of Mr Advocate General Van Gerven
[62] Case C-128/92 *Banks*, Opinion of Mr Advocate General Van Gerven p. 1249

thought urgently necessary[63] to allay the doubts as to whether the principle of state liability for breaches of EU law could be transposed to relations between individuals.

Yet, the Court acted differently. In stating that the relevant competition provisions did not have direct effect (and thus also did not grant IR), it diverged from the Advocate General's opinion at a relatively early stage. Denying the direct effect of the ECSC provisions a priori, the Court did not go on to address the issue of a right to damages.

Banks is a further intriguing point in the development of IR. With his opinion, the Advocate General provided the Court with a remarkable opportunity to further advance its development of those rights. Following it would have been beneficial for the Court for three reasons: first, in doing so, it would have complied with the Advocate General's opinion – a practice that to this day is considered the normal approach (Mayer 2010). Second, such a behaviour would have been in line with the majority of the Court's previous judgements on IR. Third, through enlarging the remedies available to the Court, a confirmation of the Advocate General's opinion would also have increased the ECJ's influence in enforcing EU law – an opportunity the Court has often seemed willing to take up.

While the Court's dismissal of the opportunity presented in *Banks* seems conspicuous, it must not necessarily be seen as an abandonment of the path it had mostly followed so far. This is the case especially given that the Court did not take a step in the opposite direction either (by e.g. stating that damages could only be invoked vis-á-vis the state). It seems more that by dismissing the issue in *Banks*, the Court missed a signpost guiding it to a point where it was to eventually arrive almost a decade later. Thus, *Banks* is considered an important step in the development of IR – albeit a missed one.

4.2.6 *Courage*

Nine years after *Banks*, the idea of an EU right to damages was revived. Ruling on a conflict between two former business partners, a British court asked the ECJ whether one party of an agreement prohibited under Art. 101 of the Treaty on the Functioning of the European Union (TFEU) had the right to sue the other party for damages (on the ground of the incompatibility

[63] See the Advocate General's explicit choice of words on the matter (p. 1248): "However, I would by no means recommend a solution of that kind [circumventing the question of individual liability] to the Court. It would allow substantial doubts to persist as to whether or not there is a basis under [EU] law for bringing an action for damages in respect of breach of [EU] rules of competition by private undertakings, to which those rules apply in the first place".

of said agreement with Art. 101 TFEU)[64]. This time, the ECJ took the issue into account in its judgement. In stating that "[t]he full effectiveness of Article [101] of the Treaty and […] the prohibition laid down in Article [101](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"[65], the Court affirmed the British court's question and thereby created an EU right to damages.

The Court's decision was not given in view of the facts of the case: considering that the party claiming damages for losses resulting from an anticompetitive agreement had been a voluntary part of this agreement, the Court could have ruled to not award damages in the specific case and refrained from making any further statements. It could have also continued within the 'no new remedies' spirit set in the *Rewe* cases, considering damage claims an issue of national law alone, subject only to the principles of equivalence and effectiveness. From the Court's first lines of reasoning, however, it became clear that this was not going to happen: in basing its subsequent argumentation on the premise that EU law is "intended to give rise to rights [to individuals] which become part of their legal assets"[66], the Court drew a direct line from *VGL* and *Francovich* to *Courage*[67].

With *Courage*, the Court thus eventually followed the reasoning of Advocate General Van Gerven in *Banks*. It was not only put back on the path begun with *VGL* but – with the establishment of a new and potentially very powerful Union remedy – further broadened this path.

Considering both the existence of a major critical juncture with *VGL* and the Court's subsequent continuation of the argumentation begun in it, is concluded that a clear pattern can be discerned in the Court's development of IR: apart from two instances, the Court repeatedly made decisions in line with its previous decisions on IR. Furthermore, the argumentation begun in *VGL* was not only maintained throughout the majority of the following landmark cases on IR, but was also significantly deepened and broadened. Yet, while the presence of a strong, costly critical juncture as well as the existence of a broadening path and the pattern leading to it provide an indication of a path dependent development of IR, there still exist other explanations for the Court's decision-making – such as a different perception of the Court concerning the

[64] Case C-453/99 *Courage*
[65] Case C-453/99 *Courage* §26
[66] Case C-453/99 *Courage* §19
[67] For an exhaustive analysis of the judgement, see Komninos (2002).

benefit of the available options as that presented here, or factors not covered by the analysis. Thus, in order to identify a path dependence in the development of IR, a further test is considered necessary.

4.3 Positive feedback in the development of individual rights

To conduct a further test for a path dependence in the development of IR, in the following, the context of this development is analysed for the presence of positive feedback. Such a presence would provide evidence that the path identified in the previous section resulted from a path dependence.

As discussed, positive feedback arises if four specific conditions are given in the development of a policy (Arthur 1994; Pierson 2000). One of these features is a high set-up cost of the policy in question; the presence of which has already been established in the first section. The other three features inducing positive feedback – learning effects, coordination effects and adaptive expectations – become more important at later stages of the development of a policy. Their potential existence in the case of the development of IR is analysed below.

4.3.1 Learning effects

Given that the introduction of IR in *VGL* and the last critical juncture analysed in this paper in *Courage* are separated by almost 40 years, the Court had ample time to profit from learning effects in its application of the principle. That it made use of this time seems clear at first thought: otherwise it would most likely not have been able to anchor a principle so averse to the MS' benefits so deeply within EU law. Yet, given that the MS' acceptance might be conditioned by other factors, a more precise evaluation of the Court's learning effects is necessary. This is done in examining two fields in which the Court might have benefitted from accumulated knowledge: the purposes for which it has used and expanded IR, and the occasions when it has done so.

4.3.1.1 The Court's use of purposes for rulings on IR

When considering the purposes for which the Court has introduced and further developed IR, it is conspicuous that the Court has not always applied the principle of direct effect in only one particular way and with one particular meaning. On the contrary, it has over time considered direct effect from different angles – and with different outcomes. This ambiguity is already given in *VGL*. It is expressed clearly, on the one hand, that direct effect is introduced to guarantee the legal protection of the IR of EU citizens[68]. Yet, on the other hand, the Court also

[68] Case 26/62 *VGL* p. 13 §4 "A restriction…"

recognises the principle's importance in securing the uniform interpretation and protection of EU law in general[69]. While these two meanings can be found in various judgements on direct effect[70], the Court's habit of giving the principle differing connotations in differing situations was developed further over the years. This is demonstrated in *Defrenne*: in this case, direct effect was not employed for the protection and uniform application of EU law which already existed, but for the introduction of a new principle of EU law[71]. To a certain extent, the same can be said about *Francovich* – while direct effect was still applied within the meaning of granting protection to EU law, it was nevertheless also used for the establishment of the principle of state liability. By learning how to adapt direct effect to different situations, the Court obtained not only a satisfactory solution to the case in question, but furthermore successfully managed to consolidate the principle in more and more areas of EU law.

4.3.1.2 The Court's use of opportunities to rule on IR

A second manner in which the Court's learning effects with respect to IR can be examined is its realisation of opportunities to further expand the principle. Here, the picture is less clear. On the one hand, the Court's first establishment of the concept in *VGL* was striking in its boldness, and there are a considerable number of cases in which the Court successfully seized the opportunity to broaden IR – such as in *BRT*, *Defrenne* or the cases on state liability. On the other hand, there is also a considerable number of opportunities lost. In both *Rewe* cases and, arguably most notably, in *Banks* the Court failed to act on the opportunity presented by the national courts' questions. This seems surprising, especially against the backdrop of the spectacular nature of some of the cases in this line of jurisdiction and the time point of these 'lost opportunities'. They took place not at the beginning, but at a comparably late stage in the development of IR – when according to the theory, the Court had already gained benefits from the cumulated learning effects.

Concluding, it can be stated that the condition of increased learning effects is partly fulfilled. While the Court was successful in finding new contexts and purposes for which to develop direct effect – and thus IR – and did so on a continuous basis, it also missed opportunities which could have significantly accelerated the process.

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[69] Case 26/62 *VGL* p. 12 §3 "In addition…", p. 13 §5 "The vigilance…"

[70] Case 127-73 *BRT*, Case C-213/89 *Factortame* or Joined cases C-6/90 and C-9/90 *Francovich*

[71] While the protection of IR is also mentioned in *Defrenne*, the overall purpose in this case is considered the introduction of the principle of equal pay.

4.3.2 Coordination effects

When considering the Court's development of IR, two different forms of coordination effects can be identified: on the one hand, the principle has been continuously broadened by the rising number of EU citizens recognising the benefit of their IR under the Treaty and invoking them before national courts. On the other hand, in basing their argumentation upon that of previous enforcements of EU law, litigants transferred IR from one area of EU law to others. Furthermore, the principle was reinforced through the national courts' acceptance and picking up of the policy via the preliminary reference procedure.

With its explicit reference to IR in *VGL* and its discrepancy from national law, EU law offered itself up as a legal alternative for the enforcement of IR to the MS' jurisdictions from an early point on. Particularly when private interests were in direct conflict with national provisions, EU law became the preferred venue to pursue those interests via the enforcement of IR[72]. This led to two developments: first, with the first cases of enforcement of IR, it became public knowledge that such proceedings were an option, which encouraged other private actors to follow suit – whose (successful) litigation then worked as motivation for further action (Fon et al 2005; Keleman, Schmidt 2012; Schmidt 2018)[73]. Considering Stone Sweet's (2002:113) definition of positive feedback mechanisms as processes in which "a nascent, or maturing, standard of behaviour induces increasingly larger, and better networked, individuals to behave similarly, that is, in ways that adapt to, and thus reinforce, that standard", this can be directly applied to the manner in which IR were invoked.

Second, when claiming their rights, citizens began to rely on the already established direct effect of Treaty provisions in other areas of EU law. Applying the same conditions to their own case, they so initiated the transfer of IR from one area of EU law to others, broadening the principle's reach[74]. An example of this is how the litigation strategy of Ms. Defrenne eventually led to the transfer of direct effect from provisions in which IR were expressly and negatively phrased to comparably general, positively phrased principles. As can be seen from the written observations she submitted to the ECJ, Ms. Defrenne based her claim to equal pay on "[t]he criteria [for direct effect] laid down by the case-law of the Court of Justice"[75]. Although not all of these

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[72] Case 43/75 *Defrenne*, Joined cases C-6/90 and C-9/90 *Francovich*

[73] One source of such public knowledge was the high degree of publicity judgements such as *VGL* garnered already at the time of their passing (see e.g. Lecourt (1963).

[74] For an analysis of how legal principles developed within the free movement of goods were transferred to the 'other freedoms', see Schmidt (2018).

[75] Case 43/75 *Defrenne* p. 458 c)

criteria were applicable in her case[76], the Court accepted her argument. Ms. Defrenne had effectively transferred direct effect to a new legal area, resulting in the relaxation of the criteria for direct effect and the further dissemination of IR. Through initiating such transfers, private litigants thus worked as significant providers of positive feedback for IR.

Yet, while private litigation worked as an important accelerator of the dissemination of IR, "litigants do not provide positive feedback by themselves", as Schmidt (2018:62) notes: in order for the Court to rule on IR, a reference by national courts for a preliminary ruling is a necessary precondition. As a broadening of direct effect entails a broadening of the scope of the national courts' jurisdictions[77], the scenario holds a considerable appeal. Consequently, the preliminary reference procedure is considered another source of coordination effects. Thus, through the positive feedback provided by both private litigants and the national courts, the condition of coordination effects is fulfilled.

4.3.3 Adaptive expectations

As pointed out in the section on coordination effects, IR were developed through an interplay between private litigants, national courts and the ECJ. This interplay did not only contribute to the consolidation of IR through coordination effects; it also shaped the expectations of involved actors of how they would each behave – and thus created adaptive expectations. This can be seen in the interaction between national courts and the ECJ.

The ECJ continually developed IR over several decades and on the whole mostly furthered its advancement. It seems likely that this tendency did not go unnoticed by national courts and EU lawyers and that, as a consequence, they began to expect the ECJ to act according to it – and to adjust their own actions to these expectations. The most manifest example of this interplay between expectations and actions is, again, the preliminary reference procedure: expecting the Court to continue its jurisdiction on IR, the national courts referred to it certain cases and certain questions – which partly appear to almost prompt the Court to rule on the issue. The Court, in turn, usually confirmed those expectations by further establishing IR. This can be seen throughout the development of the principle: from *VGL* to *Courage*, all major developments of IR resulted from preliminary references. While this is not a phenomenon restricted to IR[78], it is

[76] As the concerned provision contains only the general principle of equal pay for equal work, the criteria of clarity and precision are not applicable.
[77] Given the national courts' responsibility to properly apply the Treaty, an increase in the number of directly enforceable provisions is also an increase in their scope of jurisdiction (see Chalmers et al. 2014:169, 170).
[78] According to Chalmers et al. (2014:174), "[a]lmost all of the Courts of Justice's significant rulings […] have come via the preliminary reference procedure".

still an important source of positive feedback. Given that the development of IR was characterised by adaptive expectations to such an extent, it can be stated that this last condition indicating increasing returns is also given.

In this analysis, the origin, further development, and context of IR were analysed. In Chapter 4.1, the origin of IR in *VGL* was found to have been a critical juncture powerful and costly enough to influence subsequent decisions on IR. In Chapter 4.2, the further development of IR was shown to exhibit decision-making patterns indicating a path dependence, as the Court mostly followed the argumentation begun in *VGL*. Lastly, in Chapter 4.3, it was demonstrated that the context of the development of IR was significantly characterised by positive feedback, as three of the four causing conditions were fully given and the fourth was given half.

5. Discussion and Conclusion

5.1 Findings

How has the right of EU citizens to invoke EU law before national courts become a fundamental part of the EU infrastructure, leading to such complex protection mechanisms as those specified in the Damages Directive – despite lacking a legal base in the Treaties for so long? Prompted by this conundrum and grounded in research on the path dependence of legal institutions in general and the ECJ in specific, this paper formulated the following research question:

"To which extent was the ECJ's development of the right of EU citizens to invoke EU law before national courts characterised by path dependence?"

To answer it, the development of IR was considered in three parts: first, in Chapter 4.1, the origin of IR was analysed for the existence of a critical juncture, and both the capability of this juncture to establish a new path and its impact on the new path were evaluated (hypothesis one). Secondly, in Chapter 4.2, it was considered whether the established path was maintained over the subsequent case-law on IR, and whether a pattern was discernible in the Court's decision-making favouring this path (hypothesis two). Third, in Chapter 4.3, it was analysed whether the development of IR after *VGL* was characterised by positive feedback (hypothesis 3).

With regards to hypothesis one, it was shown that the development of IR originated in the judgement of *VGL*. *VGL* was found to have been a critical juncture, as it constituted the beginning of a new path: the more constitutional interpretation of EU law as applicable not only to the MS, but to all EU citizens. It was furthermore found that the judgement's high cost led it to influence the subsequent development of IR in a path-defining manner. This high cost resulted from both external opposition against the judgement from the MS as well as internal resistance, stemming from the diverging opinion of the Advocate General and tensions within the Court itself. The resulting lack of legitimacy for passing the judgement presented a considerable risk for the ECJ as a young institution. Combined, the hurdles for passing *VGL* were so high that once overcome, they significantly increased the likelihood that the new path would be maintained. Consequently, hypothesis one is considered confirmed.

To evaluate hypothesis two, the major decisions in the ensuing case-law development of IR were analysed, and it was demonstrated that the Court maintained and further expanded the broad interpretation of IR initiated in *VGL*. Moreover, a pattern was found in the Court's decision-making as most decisions were made in line with previous decisions on IR.

Consequently, the development of IR was found to have been developed along a clearly discernible path and hypothesis two is also considered confirmed.

Considering hypothesis three, it was found that all three features indicating a path dependence in the later stages of a policy's development were present. The features of coordination effects and adaptive expectations were strongly given: coordination effects resulted mainly from private litigation through which IR were both reinforced and transferred from one field of EU law to others. Adaptive expectations were generated through the national courts' expectations that the ECJ would continue to broaden IR, which contributed to the actual fulfilment of these expectations. The feature of learning effects was given to a lesser extent: although the Court over time successfully developed IR in different manners and for differing purposes, it missed certain opportunities which would have considerably advanced this development. Yet, in light of the strength of the other two features – most especially, the coordination effects caused by litigation – the policy context of the development of IR is found to have been significantly characterised by positive feedback. The third hypothesis is therefore also considered confirmed.

Considering the findings of all three parts, is therefore concluded that ECJ's development of the right of EU citizens to invoke EU law before national courts was to a high degree characterised by path dependence. This path dependence has led to a lock-in of the broad and expansive interpretation of IR, resulting in the extensive system of IR given today. While a comprehensive evaluation of this lock-in lies beyond the scope of this paper, the fact that the development of IR has not had clear negative consequences means that its locking-in cannot easily be dismissed as dysfunctional.

5.2 Anchoring the findings in the literature

Naturally, these findings do not exist in a vacuum. Already in 2002 (113), Stone Sweet argued that "[l]egal 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". To see to which extent the results of this paper confirm this and other academic claims regarding the path dependence of judicial institutions and the ECJ, they are now considered against the background of the relevant literature.

Two scholars provide the main reference points for this paper: one is Stone Sweet (2002, 2004), as he provides the most exhaustive work on the general applicability of path dependence to judicial institutions and their jurisprudence, and the other is Schmidt (2010, 2012, 2018), as her

work is the only contribution to apply Stone Sweet's findings to the case-law of the ECJ. Both scholars emphasise the importance of three path dependent concepts: critical junctures, positive feedback – of which the main source is litigation –, and the possibility of a dysfunctional lock-in. Schmidt (2018) and Stone Sweet (2004) agree that the legal tradition of precedent can turn judicial cases into critical junctures, as a precedent-setting case has a high impact on subsequent case-law. Yet, both also agree that critical junctures are not path inducing by themselves, as they rely on positive feedback for their reinforcement and lose all significance if the precedence set in them is reversed.

The findings of this paper come to a slightly different conclusion: while for the path dependent development of IR, the presence of positive feedback and the continued affirmation of the precedent set in *VGL* were crucial, *VGL* is considered to have contributed to the path dependence itself: the rift opened through the judgement between the 'old path' – the previous perception of EU law – and the 'new path' – the changed perception of EU law – was so deep, the immediate consequences so profound and the cost so high, that through the judgement alone it became nearly impossible for the Court to return to the old path without losing all credibility.

Positive feedback is broadly seen as the main source of path dependence, and both Stone Sweet (2002, 2004) and Schmidt (2010, 2012, 2018) see litigation as a major generator of positive feedback in legal contexts. In her analysis of the Court's development of the fundamental freedoms, Schmidt (2018) argues that private litigation was *the* most vital source of positive feedback. The findings in this paper are in line with this: private litigation cyclically reinforced the notion of IR and ensured its broad development by transferring it to new areas of EU law. While *VGL* as the critical juncture establishing the path had an inherent precedent-setting function, it is unlikely that IR would have become as extensive and consolidated as they have without the presence of strong positive feedback mechanisms.

The last central path dependent concept applied to (EU) law by Stone Sweet (2002, 2004) and Schmidt (2010, 2012, 2018) is the idea of a lock-in: once a legal path has been established in a critical juncture and is reinforced strongly enough through positive feedback, it can become locked in – that is, it is considered as the normal standard to such a degree that it is beyond repeal. Such lock-ins can be dysfunctional, if the affected path proves to be inefficient. While in the development of IR, a lock-in is given, resulting from the strong critical juncture in *VGL* and the presence of positive feedback mechanism, this paper's findings would suggest that the evaluation of this lock-in is more complex. Considering its contributions to the protection of IR

and the enforcement of EU law, this lock-in might even be considered as an overall beneficial development.

Concluding, the findings of this paper correspond well with the (scarce) existing literature – with the main exception that here, the significance of *VGL* as a critical juncture is found not only in its subsequent reinforcement through positive feedback but in its own, extraordinarily costly, outstanding nature.

5.3 Implications of a path dependent development of IR

Having found that the ECJ's case-law development of IR was indeed path dependent, what does this imply – for the Court's case-law in other fields of EU law and its analysis and, crucially, for EU policy-making as a whole?

5.3.1 Implications for the ECJ's case-law and its analysis

In her work, Schmidt (2010, 2012, 2018) has already established the path dependence of the ECJ's development of the fundamental freedoms. This paper adds to this the path dependence of the development of IR. The fact alone that two major fields of EU law exhibit path dependent characteristics gives reason to suspect a further-reaching extent of this phenomenon. What is more important, however, is that the mechanisms at the centre of this path dependence are neither unique nor limited to these fields: the ECJ has given landmark decisions with far-reaching implications on more than one occasion, and litigation is a defining characteristic of the development of all legal doctrines of the ECJ. Given that the documented presence of these features in two fields has led to path dependences in these two fields, and given that the same characteristics are likely to be present in many other fields of EU law, there is a considerable likelihood that the development of other EU law doctrines is equally affected by path dependence.

As outlined in the literature review, there is a significant amount of scholarship focussed on the ECJ and its powers, and its judgements are often the subject of in-depth analysis. When conducting such analysis, or when attempting to predict potential future developments of the case-law, the consideration of not only the factual situation and the legal arguments of the individual case at hand but also of the Court's previous decision-making on the issue in question and a potential path dependence might contribute to a more holistic evaluation. An example of this is the assessment of the Court's controversial Opinion 2/13[79]. While a vast majority of

[79] Opinion 2/13 pursuant to Art. 218(11) TFEU

academic comments on the opinion considered it as shocking surprise, its drafting appears coherent when considered in the Court's overall development of the principle of the legal autonomy of EU law[80].

5.3.2 Implications for EU policy-making

The impact of a path dependent development of (parts of) the ECJ's case-law extends beyond the merely legal context: it has significant implications for the policy-making within the EU. The majority of EU regulations, directives and decisions are based on the Treaties, which enjoy constitutional status and are very difficult to change. As it is the function of the ECJ to interpret the Treaties and guide the national courts in their application of them, both characteristics also apply to its case-law: it significantly influences policy-making (an example of this is how the Damages Directive builds directly upon the Court's ruling in *Courage*), and is revocable only by the Court itself. This implies that every judgement the Court gives is granted the same constitutional character the Treaties hold. The Court itself can only be restrained by a Treaty change, which requires MS unanimity. Additionally, while its judgements are bound to a certain degree by the policy preferences of the MS – which in this manner can theoretically influence case-law development – these policy preferences change with the coming and going of national governments. The Court's power to shape the policy process thus remains largely unconstrained. A sign that it makes use of this power is Schmidt's (2018) finding that since 1957, majority of changes in the Treaty's content went to the account of the ECJ. This constitutionalisation of the policy process is an issue of its own, as it transfers policy-making from democratic institutions to the ECJ (Schmidt 2018; Stone Sweet 2002). Yet, this existing problem is considerably exacerbated by a (partial) path dependence of the Court's case-law.

As outlined, path dependent processes lead to the reinforcement of a particular choice – and concomitantly, to the exclusion of other, potentially more beneficial choices. In the case of the ECJ's jurisdiction, such path dependent processes take place in the context of the constitutionalisation of EU law. Therefore, the resulting locked-in policy choices are both far-reaching and, once made, essentially irreversible. Accordingly, two problematic developments – the constitutionalisation of policy-making and the ECJ's path dependent jurisdiction – coincide and reinforce each other, leading to a significant reduction of policy choices "at a time

[80] For an analysis of Opinion 2/13 in the context of the ECJ's development of the legal autonomy of EU law, see Benk (2018).

when globalization and government debt have already decreased policy options" (Schmidt 2018:5).

5.4 Open questions

According to Schmidt's (2010, 2012, 2018) and this paper's findings, the ECJ's development of the fundamental freedoms and IR took place in a path dependent fashion. As stated earlier, it seems likely that such a path dependence is not restricted to these fields, as both positive feedback through litigation and landmark judgements creating critical junctures can be found in other areas of EU law. One interesting choice for a further historical institutionalist analysis might be the development of the principle of the legal autonomy of EU law: this development has been ongoing for an equally long period as that of IR and was begun in a judgement with equally far-reaching consequences as *VGL*[81]. Considering the significance of further proof of a path dependence of the ECJ's jurisdiction, such research would be a valuable contribution.

When analysing the evolution of IR, one of the most interesting findings was that while the Court generally maintained its broad interpretation of IR, there were also occasions when it did not: in the *Rewe* cases, it dismissed the opportunity to establish an EU right to damages and declared its intention to not create new Union remedies. Although these statements were later counteracted by the introduction of first state and then individual liability, the reasoning behind them remains intriguing. Almost the same can be said about *Banks*: presented with the powerful endorsement of the introduction of individual liability offered by Advocate General Van Gerven, what kept the Court from following this advice – and the path it had by then pursued for already 30 years? While these questions are beyond the scope of this paper, their analysis might offer further valuable insight into the reasoning of the ECJ.

In this paper, it was demonstrated that the development of IR through the ECJ was to a significant degree influenced by path dependence. This path dependence was identified by means of three hypotheses, focussing each on the origin, further development and wider context of IR. After a path dependence had been established, it was considered in the context of both previous research and its implications for EU law and policy making. Based on these steps, this paper concludes that the development of IR has indeed not only been a long process, but a long path – the long path to *Courage*.

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[81] Case 6-64 *Costa v E.N.E.L.*

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