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To what extent and under which circumstances is the Court of Justice of the European Union (CJEU) judicially active?

Gregory Paul Mason
S1234552

Supervisor
Dr Jan Oster

Tutor
Dr Laura Bertens

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INTRODUCTION

To what extent and under which circumstances is the Court of Justice of the European Union (CJEU) judicially active?

On December 18th, 2014, the CJEU handed down Opinion 2/13, concerning the accession of the European Union (EU) to the Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). This decision, to the effect that the draft agreement on the accession of the EU was not compatible with EU Treaties, shocked many in the European legal sphere, and has been regarded by some as a modern day landmark decision (see Christoph Krenn in "Autonomy and Effectiveness as Common Concerns: A Path to Accession After Opinion 2/13"). The case adds to the wealth of decisions that have been scrutinized by scholars to try to understand the role that the CJEU (and judicial activism) plays in European integration.

In previous studies, the role of the CJEU has been considered from multiple standpoints: from that of a primary, independent actor in pursuit of its own goals; a tool of the Commission in achieving integration; or indeed a tool of the Member States in slowing integration down. Building on these previous studies, this thesis intends to place Opinion 2/13 in light of other historic, seminal rulings to look for and identify an historic trend. By viewing each decision through the lenses of neofunctionalism, intergovernmentalism, and new-institutionalism, each of which is defined in Chapter 1, while paying close attention to contextual factors such as pressure from other European actors (both institutions and Member States), it is hoped that new insights can be offered to better explain the role of CJEU jurisprudence in EU development.

The reason for this is that in reviewing previous literature on the CJEU, it becomes apparent that the above lenses (or frameworks) have been applied in such a way that they try to explain the role of the Court on their own, in isolated frameworks, rather than in conjunction with one another. It is instead posited here that the frameworks may be used to better explain the role of CJEU as it has developed in different time periods and under differing circumstances. Donald J Puchala once likened these theories to "several blind men trying to grasp the appearance of an elephant", and building on this analogy, it is here argued that the CJEU has developed in such a way that the 'blind men analogy' can be revisited and applied in different time periods, each with a better understanding of 'the elephant' in different stages of its life. This leads to the research question of this thesis: "to what extent and under which circumstances is the CJEU judicially active"?

To best approach this question, this thesis is structured as follows. The first chapter will look at the theoretical framework used in analysing CJEU jurisprudence. This is necessary to fully outline and identify the tools with which a principal-agent analysis can be utilised, as well as to provide an understanding of how these tools have been used in previous studies. The second chapter will then apply these tools to various, seminal CJEU rulings over time. By looking at which frameworks best explain CJEU activism in different time periods and rulings, we can better explain outside pressures and ultimate constraints (or indeed, encouragements) facing the Court. The third chapter then fully assesses Opinion 2/13, placing it in the wider context identified in chapter 2. In understanding this decision, it can be asked the extent to which the CJEU can be described as activist today, and if so, is it for the same reasons as it perhaps was during the European Coal and Steel Community almost 70 years ago. If not, what has changed over time and why? What can then be expected in future rulings from the Court, and for what reasons?

Relevance Note

With regards to the relevance of this study, it is intended to identify and understand the circumstances under which the CJEU is judicially active. This is the primary research question of this thesis. What factors allow the CJEU to act in an activist fashion, and why? Is the CJEU limited or constrained in any way, or is it actually encouraged by other institutions? In short, what is the institutional relationship in Europe, and how is this evidenced in CJEU rulings?

This adds to the wider debate on EU expansion and overreach, particularly with regards to the role of institutions in driving integration. What this thesis intends to do, is to go beyond previous studies, which most often employ or adhere to only one framework, and instead provide an historical analysis of the CJEU from multiple perspectives. It would then be hoped that this method of principal-agent analysis could be expanded in later studies to include other EU institutions, understanding their role in EU integration over time as well. It can further be argued that, through understanding the circumstances under which the CJEU is judicially activist, we can better understand the character of the Court itself. Is it merely the guardian of the treaties, there to ensure uniform application of EU law as envisioned by the founders? Or is it a more fickle institution, bending to the will of the Member States or to other European institutions at different times? Such questions challenge fundamental conceptions of the nature of the European legal order, and the role it played and continues to play in the integration process.

Undoubtedly there has been a rise in Euroskepticism in the modern European zeitgeist, particularly evident in the rise of nationalist parties such as UKIP in the United Kingdom and Front National in France. As this thesis is being written, the Conservative Party has won a majority in the 2015 election in the UK, and has promised a referendum in its manifesto regarding a possible "Brexit" (Britain leaving the EU). Lauren McLaren, of the School of Politics and International Relations at the University of Nottingham considers this Euroskepticism is to a large extent fuelled by institutional distrust (13, 14). Understanding the operations and constraints of EU institutions thus coincides with the wider debate on the arguably controversial development of the EU as a whole.

CHAPTER 1: THEORETICAL FRAMEWORK

Before an analysis of CJEU cases can be conducted, it is firstly important to outline the theoretical frameworks to be employed. This chapter will define the frameworks of neofunctionalism, intergovernmentalism, and neoinstitutionalism, and discuss previous works in which they have been utilised.

Neofunctionalism

Neofunctionalism and intergovernmentalism often go hand in hand when looking at the EU, and are often dubbed the "grand theories" of European integration. According to Teodor Lucien Moga (2009), "both neofunctionalism and intergovernmentalism are macro-level theories of international relations, which are designed to describe, clarify and predict the European integration as a process. In essence, these macro frameworks shed light on what might be called history-making decisions." (796).

Neofunctionalism, according to Griffiths et al. (2002), is a later permutation of the original functionalist framework. According to Griffiths et al., functionalism must be understood in the context of the process of integration between states, and that as opposed to political and constitutional forms of integration, governments would instead transfer responsibility over an issue to an international agency, and that over time continued transfer of power between states to such an institution would weaken territorial and sovereign principles, thus leading to integration (119). Originally functionalism was intended to be a global solution after the Second World War to provide welfare to citizens in ways governments could not achieve in isolation. Later, however, this was criticised for making the assumption that political issues could be solved in the same way as technical ones, and that generally the issues that would integrate were based on western, liberal ideology and thus no universally applicable nor achievable. (Griffiths et al. 119)

Following these criticisms, neofunctionalism was then developed based on the model of European integration. This was based largely on the works of Ernst Haas, who argued that neofunctionalist ideas would be better achieved by a series of neighbouring states with a shared history and identity (Griffiths et al. 120). By integrating an increasing number of policy areas and competences for international institutions, integration is achieved through 'spillover'. Essentially, as policy is integrated in one area, it becomes necessary to integrate other areas as well over time.

Neofunctionalism as a whole was somewhat discarded after the 'empty chair crisis' in the 1960's, which saw De Gaulle boycott European Institutions due to issues he had with European Commission proposals, and which slowed integration and renewed the "recognition of the importance of individual leaders as constraints on the process of integration" (Michelle Cini 2010, 66). However, the 1990's saw a resurgence of neofunctionalism, after the Single European Act in the mid 1980's created a single market and developments that seemed in line with neofunctionalist thought (Cini 67).

As a final note, Griffiths et al. claim "neofunctionalism depends upon the ability of political entrepreneurs and technical experts to apply consensual knowledge to the solution of common problems" (120), thus stressing the need for states to socialise and work together. Arguably it is in this regard that the EU is somewhat considered a 'technocracy' today, particularly by those on the Eurosceptic political right such as Nigel Farage, who, when speaking of Herman van Rompuy (the European Council President), declared "I said you would be the assassin of Nation-state democracy, and sure enough, in your dull and technocratic way, you've gone about your course" (qtd. Pastien, NY Times).

To give a precise understanding for this thesis, neofunctionalism here refers to integration by spillover: the idea that transferring power to institutions in one area will eventually extend to the transfer of power to other areas.

Intergovernmentalism

Intergovernmentalism, on the other hand, as defined by Jan Pêt Khorto, is an "approach to regional integration proposed by Stanley Hoffman that treats states as the primary actors in the integration process" (5). Essentially, it is argued that states are the primary drivers of integration, with the power to control its speed and depth irrespective of other groups or actors. Geoffrey Garrett and George Tsembelis go further in their definition, by noting that it is through treaty revisions that states wishes are clearly demarcated, and provide a contrast to neofunctionalism in that, where intergovernmentalism takes place *with* treaties, neofunctionalism takes place *between* treaties (269).

Andreas Grimmel notes "the role of the ECJ in the liberal intergovernmentalist theory can be described as a servant of national interests, not as a servant of the law" (6). Again, for clarity, drawing on these definitions and thoughts intergovernmentalism is here defined as sovereign state

driven regional integration, in which the state ultimately controls the pace and nature of said integration.

Neoinstitutionalism

The third and final framework to be utilised in this study is neoinstitutionalism. Institutionalism, as outlined in "The New Institutionalism" by Walter W Powell of Stanford University, looks at institutions as actors competing for power against external pressures from outside and against pressures between each other. Institutions, in this framework, form social stable patterns that become reproduced through coercive, normative, and mimetic processes. Drawing on the work of Scott, 2001, Powell notes three "pillars" of the institutional order: regulative, normative, and cultural, where regulative pertains to sanctions and rule setting; normative through an evaluative and obligatory dimension; and cultural involving shared conceptions (2). Central to this study , as noted by Powell, is that when assessing institutions it is important to "ascertain which factors are important in particular contexts" (3). This is therefore understood as the socialisation and competition between institutions as they compete for power in their collective system.

These are the three frameworks employed here to understand the circumstances by which the CJEU can be, or is, judicially active. It is therefore important to also consider both the limitations of these frameworks, and how to utilise them most effectively. Indeed, Andreas Grimmel has criticised studies that have utilised these frameworks as "based on a generalizing, linear, and mechanistic understanding of rationality" (1). He argues that, although these frameworks are distinct from one another in terms of which actors or groups they emphasize in driving or controlling the integration process, "the glue that binds this community of supra- and subnational actors is self-interest" (qtd. in Grimmel 7). Each actor in these frameworks is merely assigned different degrees of power to enforce their own 'rational' will. For example, Grimmel asserts that, among neofunctionalist thinkers, the CJEU has significant power to enforce its 'rational' will through Article 267 of the Treaty on the Functioning of the European Union (TFEU), in which it holds the expressed powers to interpret both the wording of the treaties, and rule on the validity of the actions of Member States and European institutions based on the treaty provisions (7). But this, he argues, is flawed, as it leaves little room for the context of the law, which is instead seen as an independent variable used and twisted where suited, and that has led to severe and somewhat unfounded criticism of the CJEU (11).

Grimmel likens such reasoning to a "trivial machine" connecting actor to action merely through rational interest, in which the context and limitations of the law is not considered as an independent variable (17). Heinz von Foerster notes "(trivial) rationalism offers us an account without law and an account of the ECJ that fails to recognize its function as a Court within the institution of law" (qtd. in Grimmel 17). Instead, Grimmel offers a "context rationality" model, which accepts the variable nature of the law, but in the context of historical, locational, and functional developments (17-20). While this account is somewhat reductionist, viewing the CJEU merely as a functional Court bound to the letter of the law, it is certainly understandable that the historic, locational and functional context of the law itself must be taken into account.

To consider and properly address these criticisms to this study, the nature of the rulings with regards to their respective legal underpinnings must also be taken into account. This will be seen in looking for disjunctures between rulings i.e., has different legal reasoning been applied to very similar cases. If, of course, the answer is no then it may well be that the CJEU can be seen, based on the case law here analysed, to be merely interpreting Community law to the extent that is needed to achieve its mandate.. However, it can also be argued that Grimmel's interpretation is reductionist and fails to take into account new evidence that the workings of the European Union and nature of the European legal order in fact allow a great deal of space for the CJEU to exercise self-rewarding judicial activism.

Roland Vaubel has provided such evidence in a study on the rule of law in Europe after the sovereign debt crisis. He argues in a somewhat neofunctionalist fashion that, through economic or other crises, additional power and competence is transferred to European institutions, and that this has involved stretching the meanings of the EU treaties "beyond recognition" (2). How then has the CJEU been able to do this? Vaubel argues that because many assumed that the Court would back the Commission, they (other political actors) are not likely to complain (9). This is precisely what this study is looking for, as it highlights a circumstance under which the CJEU can be, or is at least seen to be judicially active. Can this be seen at other times in CJEU history, and if so, which actors provided, or failed to provide, adequate constraints to CJEU activism? It the CJEU a tool of institutions or Member States? Or does it act according to its own will outside of the wishes of these other actors? Or, most importantly, can both cases be seen at different points over time?

To summarize this chapter, the three frameworks that are utilised in this analysis are defined; where neofunctionalism refers to integration through 'spillover'; intergovernmentalism through the will of the sovereign Member States; and neoinstitutionalism describing the integration

process through socialisation between institutions. Criticism of these frameworks has been discussed with regards to the research of Andreas Grimmel, but contrasted with the findings of Roland Vaubel, who essentially argues that certain institutions have allowed the CJEU to exercise judicial activism. These are utilised in a theoretical framework looking at constraints on the CJEU through the lenses of neofunctionalism, intergovernmentalism and neoinstitutionalism over time.

CHAPTER 2; ANALYSIS OF CJEU RULINGS OVER TIME

In this chapter, the cases are discussed in chronological order and are analysed through the frameworks outlined in the previous chapter. What is sought is a trend across the cases with regards to the degree of judicial activism, including a possible lack thereof, by the CJEU. By explaining any variation in judicial activism across time through the frameworks, it is hoped that constraints, or indeed encouragement, from other actors are discovered.

Van Gend en Loos (C-26/62 - 1963), and Costa v. ENEL (C-6/64 - 1964)

The first decision considered here is the landmark *van Gend en Loos (1963)* case, which established first and foremost the *doctrine of direct effect* in the new European legal order. This case, as well as *Costa v. ENEL* discussed below, has been viewed as "[a] unique moment[] of revelation", and leaves it "hard to imagine what EU law would have been without [*van Gend en Loos*], and, consequently what Europe would have been without the European Court of Justice" (Vauches 2010, 1-2). Vauches, in an analysis of this case, argues that it is not simply the doctrine established in *van Gend* that is important, but rather that it marked the beginning of 'Europeanization through case law" (1) which has places the CJEU at the very heart of the integration process (3). Of particular relevance to this thesis, Vauches further notes that "this Court centred theory [Europeanization through case law] is not taken as an explanatory frame [for European integration] but rather as the phenomenon *to be explained* and accounted for" (2).

What then explains this? How can we account for the Courts ability at this stage to position itself so centrally in the integration process? Looking at historical accounts of CJEU developments, it appears that numerous actors in the European Community (hereafter EC) were divided and uncertain over the role the CJEU should play. Ditlev Tamm, in his history on the CJEU, notes that whereas the Benelux countries wanted a Court accessible by the Member States (but, importantly, not individuals) to bring action against the High Authority, the Germans wanted a Court similar to their constitutional Court, accessible to private enterprises (17). The French on the other hand wanted a very limited Court, feeling that one with the power to question the legality of decisions or for private litigants to sue in the Court was a step too far (Tamm 17). The end result was indeed far closer to the limited ideal of the French, than to the German or Benelux (Tamm 17). Similarly, Morten Rasmussen notes that Jean Monnet, the first president of the High Authority of the Coal and Steel Community was "reluctant to see the establishment of a European Supreme Court during the

negotiations of the Treaty of Paris, as he believed it would undermine the crucial role of the [High Authority]" (377).

Further, and of remarkable interest to this study, is that in the early days of the Court it was itself very reluctant to exercise judicial activism. Vauches indeed argues that many of the judges were fairly self-restrained at this time, "[closing] the door to any extensive interpretation of individual legal standing in a decision delivered only a couple of weeks before *van Gend en Loos*" (7). Perhaps embodying this sense of judicial restraint at this time in the Courts history is a quote by the Advocate General Maurice Lagrange, who states, "it ought not be the function of the judge to correct the treaties" (qtd. in Vauches 8).

How did the CJEU go from this reluctance to establishing a new legal order with itself at the very centre? Certainly intergovernmentalism fails to explain this. The Member State governments were opposed to the direct effect of treaty articles established in *van Gend* out of principle (Vauches 12). They similarly opposed the notion of the CJEU deciding itself on the very problem in question, as the question does not pertain to an interpretation of the treaties (as can be seen in the observations made by the respective governments as set out in the Opinion) . Therefore the outcome of the case cannot be explained by intergovernmentalism. While neofunctionalism appears to give a satisfactory explanation, that the established legal doctrine in this case is merely spillover from the transfer of authority to the community institutions with a mandate to eliminating potential barrier to the common market (Vauches 7), if we look at the actual institutions involved in the process, and thus review the case through a new-institutionalist perspective, it offers a deeper understanding of the very circumstances under which the CJEU made the decision.

As mentioned, the role of the CJEU at the time was still uncertain, and Vauches further notes that initial attempts to unify community law on a "product-by-product" approach through the Commission and Council, had stalled, leading to a lack of political will to complete the task. Such a failure, Vauches argues, "does not *explain* the judicial redefinition of Europe…[but] it certainly is a critical *pre-condition* to such developments" (9). In light of this, as well as with regards to the Courts' own restraint in actively interpreting the treaties, other actors/ institutions must be considered.

After the Treaty of Rome (1958) had come into effect, these other actors, or "circles of Euro-implicated lawyers" (Vauches 9), became particularly concerned with both the interpretation of the new treaty and its legal effect. These actors were the individual legal services of the three

branches of the European Community, and the pan-European Lawyers Association (10). These two groups were particularly concerned with the 'self-executing' aspects of the treaties, and the Dutch branch of the pan-European Lawyers Association combed through the treaties article by article to identify such 'self-executing', or articles with 'direct effect' in 1961 (Vauches 10). There was therefore a general movement within the European institutions for direct effect to be fully established. This idea is referenced in a memo by Michel Gaudet in 1962, who made it very explicit that "EC law 'ha[d] to be' of direct effect and 'ha[d] to prevail over contrary national law, and even over subsequent rules" (Vauches 11). There was therefore a push for the Court to actively establish such doctrine in the EC legal order, despite the fact that the Member States themselves rejected direct applicability on principle (Vauches 12). This led the Court to rule on the matter, and although it did establish the direct effect that the Commission, through Gaudet, pushed for in the 1962 memo, it did so in a much more reserved manner, recognising 'direct effect' only as a negative obligation for Member States to not act in ways that would be to the same effect as a barrier to trade (Vauches 12). Indeed, the decision was made by a very narrow vote of four/three, reflecting the Courts' still restrained nature at this time despite pressure from the Commission (Vauches 12).

Thus, socialisation between actors of the European Community, viewed through a new-institutional lens, appears to best explain how and why the Court ruled the way it did in the *van Gend* case. To compare these facts to the definition of new-institutionalism posited by Walter Powell…

> This new orientation proposed that formal organizational structure reflected not only technical demands and resource dependencies, but was also shaped by institutional forces, including rational myths, knowledge legitim[ized] through the educational system and by the professions, public opinion, and the law. The core idea that organizations are deeply embedded in social and political environments suggested that organizational practices and structures are often either reflections of or responses to rules, beliefs, and conventions built into the wider environment. (Powell 1)

…we see that the CJEU actively interpreted European law as a reflection of the wider environment and institutional forces (i.e. the 'push' from actors in the Commission and other legal experts). This in itself appeared to have creating new institutional norms in the Community, namely that at times in which intergovernmentalist attempts fail, the Court would take over to further drive integration. According to Vauches this was espoused in a presidential address welcoming a newly elected ECJ judge:

> Since the political impetus [for European integration] will possibly slacken for some time to come, it is incumbent upon the organs [of the Communities] to be all the more conscious of their role as the institutionalized carriers of the European idea. (Vauches 16)

This, arguably, was the beginning of an institutional norm for the CJEU, even if in this context the judicial activism was led more by the legal service of the Commission rather than the Court itself. Thus the CJEU reflected the beliefs of the legal service, which was noted by Rasmussen to have "adopted a federal and consequently a constitutional understanding of European law as early as the first case before the ECJ in December 1954" (378). Indeed, the conservative nature the Court itself had, prior to influence from the legal service, is stressed by Rasmussen, who notes that the Court in the mid 1950's was dominated by the personalities of Otto Riese, Jacques Rueff and Adrianus van Kleffens, who for a variety of reasons initially rejected the federal understanding of European law (380). The legal service, led by Michel Gaudet, continued to press the CJEU towards a more interpretive and federal understanding of European law throughout the 1960's, and Gaudet is noted to be "more optimistic" about the new composition of this Court, as it included a new member, André Donner, who Gaudet felt recognized the "eminent role of the Court in the European construction" (Rasmussen 383).

Indeed, the legal service under Gaudet was instrumental in the *van Gend en Loos* case, and was just as essential in the ruling of *Costa v. ENEL,* establishing in 1964 the supremacy of Community law over national law. While the CJEU in this case appears to be more willing to act in an activist fashion (in contrast to the character of the Court prior to *van Gend*), the legal service is again noted by Rasmussen to have pressed for the ruling. However, we see here a slight shift in the explanatory framework for these decisions. While *van Gend* appears to be best explained by new-institutionalism, the arguably logical next step *Costa v. ENEL* represents appears more neofunctionalist.

Institutionally, *van Gend* established the CJEU as a Court with the ability to achieve 'Europeanization through case law', a role as aforementioned not particularly intended by the Member States, which then allowed the Court to act as a channel for neofunctionalist spillover. Therefore, we see how *Costa v. ENEL* represents spillover from one area to another, namely the expansion of European law from direct effect to full supremacy over national law.

Taking *van Gend en Loos* and *Costa v. ENEL* as the first period in CJEU development, and through looking at the character of the Court prior to these decisions, we see a shift from an initially hesitant and self-restraining Court to one that is more willing to review cases and establish legal

doctrine. We see out of new-institutional analysis the reasons for the emergence of such a Court, and its resulting ability to create spillover through legal integration, much of which against the expressed wishes of the Member States.

Internationale Handelsgesellschaft (C-11/70 - 1970), Dassonville (C- 8/74 - 1974), and Cassis de Dijon (C-120/78 - 1979)

To begin with a background to this time period, the period up to around the 1980's was characterised by some, such as Anil Awesi (2009), as a one of 'Eurosclerosis', in which integration appeared to have stalled (at least when compared to the success of integrating the 'original six' in the Coal and Steel Community). Awesi notes that while stalling in this period is generally perceived to be explained by an intergovernmentalist framework, that is, the scepticism of the Member States over the role spillover would play in the integration process, there were still areas within the European project in which progress was made, among which judicial activism is cited (39).

The character of this judicial activism is however divided in various scholarly works. Whereas Jacot-Guillarmod notes that while legal scholars generally praise the Court during this time period for being able to "with the stroke of a pen [change] the playing field on which technical harmonization negotiations proceeded", Garret on the other hand argues that political scientists have looked at decisions made by the CJEU in this time period and concluded that it is merely a reflection of Member State interests (qtd. in Alter 1994, 537). The three cases analysed in this section should indeed shed some light on this dichotomy.

What the direct effect and supremacy of EC law established in *van Gend* and *Costa* did not clarify, was the relationship these doctrines would have with regards to the fundamental rights guaranteed by the constitutions of each of the Member States. This led to the question of fundamental human rights being raised in *Internationale Handelsgesellschaft*; also know as the *Solange I* ruling. The contention here stems from the lack of any guaranteed rights in the *Treaties of Rome*, and therefore the question as to whether or not community law will still have direct effect and supremacy if it infringes upon rights guaranteed by the national constitutions of the Member States. Indeed, such a contention arose in 1974 somewhat because of the originally self-restrained nature of the CJEU in pre-*van Gend* cases such as *Stork v. High Authority*[1], in which the Court "emphasized its narrow function in interpreting the legal effects of Community instruments" (E. R

[1] The facts of this case are beyond the scope of this thesis, what is important here is the contrast between the character of the Court pre-*van Gend* and later cases

Lanier 1988, 2). This essentially meant that the Court in *Stork* would neither review nor apply national constitutional provisions in its rulings.

According to Lanier, this ruling heightened German concern that the fundamental rights set out in its own constitution would be imposed upon or outright disregarded by Community law, leading to the question being raised in *Solange I* (4). In answering this question, the Court reaffirmed in its jurisprudence the supremacy of Community law over national law, and Lanier notes the German Constitutional Court disagreed with this (6):

> The [German Constitutional Court] therefore insisted on its continued exercise of the power to protect the integrity of fundamental rights in the German Basic Law, even against the European Court's interpretations of Community secondary law, "[a]s long as this legal certainty ... is not achieved in the course of the further integration of the Community...." (8)

Indeed, in reviewing the Court summary, it appears that, rather than addressing the actual facts of the case itself, the German government observed that for the Court to answer the questions raised by the case, fundamental principles would have to be established with regards to the relationship between national constitutions and community law. This at the very least highlights the concerns that Member States may have had with regards to the nature of European integration at this time and, despite the CJEU ruling, for almost a decade the German Constitutional Court "refused to uphold EC law where it enters into conflict with core provisions of the German Constitution, especially the constitutional Charter of fundamental rights" (Filip Dorssemont 2011, 10).

How then did the CJEU manage to again circumvent Member State interests? Certainly intergovernmentalism would suggest that the Member States would have ultimate control, particularly in a case such as this centred on conflicting legal orders. *Internationale Handelsgesellschaft* would appear therefore to be indicative of further neofunctionalist spillover of supremacy to encapsulate national constitutions. It could be speculated that this ruling was indeed possible in spite of Member State objection because of the principles already established in *van Gend* and *Costa*, thereby highlighting how the Court can expand the circumstances under which a decision is based on previous case law. Indeed, the lack of these two doctrines (direct effect and supremacy) being enshrined in a treaty provision arguably gives the Court a great deal of discretion in deciding the scope of their coverage once a base precedent has been set. Based on the development of these doctrines through the three cases discussed so far we see how the Court manages to gradually introduce and expand such principles over time, thus reducing the restrictions Member States may be able to enforce. This explanation was expanded upon by Alter (1998):

> A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed. (131)

In addition to this 'salami-tactic' (or, 'one slice at a time', as it was called by Henri de Waele 2010, 14), Alter further references the 'joint-decision trap' as an explanation for neofunctionalist success over intergovernmentalist constraints. Essentially, because "…ECJ decisions usually affect Member States differently, so there is not a coalition of support to change the disputed legislation" (136), we can see how in this case Member State interests were circumvented by the CJEU. This is somewhat a new-institutionalist explanation, as it highlights the formal relationship between actors and institutions in the European Union (in this case, the procedural requirements for Member States to amend Treaty provisions).

These explanations are similarly applicable in the *Dassonville* and *Cassis de Dijon* decisions in the same time period, but with regards to the single market rather than direct applicability and supremacy. Similar to the early days of the Coal and Steel Community, in which the ruling of the Court very much catalysed further integration, the decisions in both *Dassonville* and *Cassis de Dijon* are argued to have breathed new life into the stagnant community. A similar 'salami-tactic' could somewhat be argued in both these cases, where *Dassonville* established the legal precedent to challenge Member State laws said to create non-tariff barriers, and which *Cassis de Dijon* then built on this by arguing that, provided the product has been legally produced in one Member State, it may be sold in all other Member States (Alter 1994, 540).

Interestingly, Alter (1994) notes that Germany, the Member State that was the focus of the *Cassis* decision, had been challenged a few years earlier, (in 1975), by the Commission in respect of the prohibition of an alcoholic beverage manufactured in another Member State. Alter notes that while this case was eventually settled, the German law underpinning it remained very much intact and in effect. Arguably, because the Commission is far more limited, and does not enjoy the judicial independence of the CJEU (Susanne Schmidt 2000, 38), the Court has the ability to further the Commissions objectives. To further understand the role of the Commission in this regard, we see from the Court summary explicit mention in the opinion submitted by the Commission to this earlier proceeding against Germany (Rewe v. Bundesmonopolverwaltung 658). This would suggest

an institutional relationship underpinning, and thereby providing the circumstances for, neofunctionalist spill over based on incremental, 'salami slice' rulings.

At this stage, various observations can be made as to the circumstances under which the CJEU can be categorized as judicially active in its jurisprudence. Certainly, a variety of its rulings have been made as an expansion of precedent set in previous rulings. The doctrine of European legal supremacy over national states appears to be expanded upon in *Internationale Handelsgesellschaft*, and similarly *Cassis de Dijon* an expansion based on the precedent to challenge non-tariff barriers established in *Dassonville*. Further, there appears to be an institutional factor whereby the CJEU has most certainly bent towards the Commission in its jurisprudence and, from the evidence set out here, it could be speculated that whilst the CJEU is certainly more willing to be activist in its rulings in later periods than it was pre-*van Gend*, the Commission remains the primary proponent of spillover. Based again on the definition of new-institutionalism provided by Walter Powell, we can view the CJEU's jurisprudence as a reflection of the rules, beliefs and conventions of the Commission.

Opinion 2/94* and *the Kadi Litigation

In light of these observations, both *Opinion 2/94 (1998),* concerning the first attempt to accede the EU to the ECHR, and the *Kadi Litigation (2008)* can be discussed. While *Internationale Handelsgesellschaft* stressed the concept of human rights being raised in, and consider by, the CJEU (though was not the first case to do so, but is most relevant to this analysis), the later cases reviewed in this section are concerned with both the accession of the EU to the ECHR and the relationship between the European legal order and the international legal order arising under extra-European institutions such as the United Nations (UN).

To discuss firstly *Opinion 2/94,* it is necessary to provide a background to the ECHR and to the EU's accession to it. The ECHR is not a convention of the European Union itself, but one of the Council of Europe, a much wider international organization consisting of 47 Member States. This includes all twenty-eight members of the European Union, each of which is a party to the convention. Importantly, the EU itself is not part of the ECHR, but as a result of the *Treaty of Lisbon (2009)* the European Unions 'Charter of Fundamental Rights of the European Union' (CFREU) has legally binding effect and all members of the European Union are party to it. Lastly, it is important to note that the CJEU, based in Luxembourg, governs the CFREU, whereas the European Court of Human Rights (ECtHR), based in Strasbourg, presides over the ECHR.

While the CFREU only came into effect with the *Treaty of Lisbon* in 2009, the question of human rights in the European Community arose much earlier. The European Parliament for example urged the Community accession to the ECHR (A.K.A: The Convention), and the Commission has at various stages proposed the same, arguing in 1990 that such accession would "[fill a] conspicuous gap in the Community legal system" (Vaughn Miller 2011, 4). As seen, even the Member States have at various times shown concern with the lack of codified human rights at a European level, such as in the previously discussed *Internationale Handelsgesellschaft* case in 1974.

Despite this, and somewhat surprisingly given its tendency to follow the will of the Commission, the CJEU ruled in *Opinion 2/94, 1994* that the Community as it stood at the time did not have the competency to accede to the Convention. Arguably, this is a case in which the Court shows a somewhat uncharacteristically reserved approach to addressing the issue, and indeed one that is difficult to understand from both a neofunctionalist and intergovernmentalist perspective. This is a rather doctrinal approach under the 'Principal of Conferral'. Adhering to the letter of the treaties, the Court found that the treaties did not explicitly confer unto any European institution "power to enact rules on Human Rights [n]or to conclude international conventions in this field", and goes on to argue that such accession to the ECHR would entail significant change in the present system, and that such change would only be acceptable with a treaty amendment (Eeckhout 2002, 982). Eeckhout argues that this reasoning is flawed:

> The ECJ's argument about lack of competence is difficult to understand, particularly in the light of the distinction which the Court made between competence and compatibility […] that entry into the Convention system would have profound institutional implications and would thus be of constitutional significance appears to speak to the issue of compatibility rather than to that of competence.

We must then consider the wider implications that accession to the ECHR in this time period would have. Essentially, by acceding the EU and all its institutions to the ECHR, the ECtHR in Strasburg would have the ability to review acts of the Union, and thus the realm of European law would no long be the sole purview of the CJEU. Eeckhout indeed notes that, for the CJEU, "accession to the ECHR was simply a bridge too far" (983). In further analysis of the implications accession would have, Lock (2010) cites four potential points of contention that may arise with EU accession, the most important of which for this analysis is of course the relationship between the CJEU and the Strasburg Court, including the notion of the ECtHR having the ability to rule on EU cases not yet decided by the CJEU (778).

It is here argued, based on this information, that new-institutionalism might best explain the Courts decision. Firstly however, to rule out intergovernmentalism and neofunctionalism, certainly the interest the Member States have regarding rights being fully codified by the Union shows their full support behind accession, and the result of Opinion 2/94 indicates no spillover of competencies into new areas. Indeed, quite the opposite is true, with conferred responsibilities being rigidly contained in the Courts' jurisprudence. What is clear from Lock's analysis however is that accession to the ECHR would involve new institutional factors, with a clear loss of exclusive jurisdiction from the CJEU.

This analysis is also evidenced by the *Kadi litigation*, in which a similar question of interaction between different legal orders is entertained. Indeed, in her analysis of this series of litigations, Esme Shirlow (2014) notes that it does indeed clarify some of the questions over the role human rights plays in the European legal sphere, as well as the role the CJEU plays in enforcing the autonomy and authority of the EU legal order against all others (2).

In an effort to hinder the ability of terrorists to finance their activities, the United Nations Security Council established a 'black list', from which Member States of the UN (including the European Union Member States) would be required to freeze bank accounts and assets of individuals named therein. In 2001, Yasin Kadi was added to the list, and subsequently had his assets frozen in the European Union. Kadi challenged this at the CJEU, claiming that such action violated his human rights under the EU in a variety of ways. The case was heard by the Court of First Instance (the CFI), The General Court (GC), and the European Court of Justice (ECJ) (Shirlow 2-4).

There appears to be a lack of consensus between these constituents of the CJEU. Whereas Shirlow notes that the CFI held that the UNSC measure was correctly implemented and perfectly justifiable in the European legal order, the ECJ itself overturned this ruling, stressing both the autonomy and supremacy of EU law in the European Union (5). Later, the GC further reviewed the continued listing of Kadi on the black list, and held that his rights had indeed been violated, and that the ECJ's ruling did in fact amount to a review of all UNSC resolutions to be implemented in the European Union, thereby posing an issue for the Member States of the EU to the UN. Nonetheless, Shirlow notes that the GC applied the ECJ's judgement, but did so in such a way that it would only review UNSC resolutions in cases where rights are not guaranteed, similar to the approach of the German Constitutional Court after *Internationale Handelsgesellschaft* (6).

As we saw in Opinion 2/94, various Member States, the Commission, and indeed lower Courts of the CJEU each expressed concern with the ruling of the ECJ in this matter (Shirlow 7). To compare this case with Opinion 2/94, it can clearly highlight the tendency of the CJEU to strongly assert the autonomy of EU law over others, such that it will unilaterally seek to review cases that might infringe on this autonomy and block attempts to share competence (such as with the question of accession to the ECHR).

This is a remarkable shift in the attitude and character of the CJEU from the 1950's to early 2000's. Indeed, much of this suggests that institutional relationships and norms play a significant role in the nature of CJEU activism. This trend, and reasons therefor, can now be discussed in light of the recent ruling "Opinion 2/13".

CHAPTER 3: ANALYSIS OF OPINION 2/13 IN LIGHT OF EARLIER RULINGS AND DISCUSSION

To recapitulate what has been observed in Chapter 2, a developing trend has been seen from the early *van Gend en Loos* case up to today. The CJEU at its inception was clearly a far more self-restrained Court than the one seen fifty years later. It would appear that while intergovernmentalism may have merit in explaining the development and constraints of other European institutions in the integration process, it appears to have had little effect in explaining circumstances of CJEU judicial activism. Rather, neofunctionalist spillover coupled with new-institutionalism provides a far better understanding of the circumstances under which the CJEU is judicially active.

This was seen in the early *van Gend en Loos* and *Costa v. ENEL* cases, in which the Commission sought the establishment of supremacy and direct effect, and from this an institutional relationship developed whereby the CJEU largely reflected the wishes of the Commission over the Member States. This stage in EU development is marked by institutional pressures on the CJEU to rule in a certain way, and shared views on European integration were seen in both the CJEU and the Commission.

Then, through establishing principles in these early rulings, neofunctionalist spillover was made possible through what has been called 'salami slice' tactics. Such was seen particularly in *Dassonville* and *Cassis de Dijon*. In each of these cases the CJEU arguably again mirrored the wishes of other European institutions, incrementally expanding the scope of EU law, even against the wishes of the Member States. In addition to the 'joint decision trap', the lack of Member State control could also be explained by different 'time horizons', as termed by Alter (1998):

> A different explanation is that politicians and judges have different time horizons, a difference which manifests itself in terms of differing interests for politicians and judges in each court decision. Because of these different time horizons, the ECJ was able to be doctrinally activist building legal doctrine based on unconventional legal interpretation and expanding its own authority, without provoking a political response. (11)

The CJEU however appears far more reluctant in cases where an expansion of EU would result in infringements on CJEU (and EU law) independence. Cases pertaining to the accession of the EU to the ECHR, and resulting inclusion of the ECtHR in the EU legal sphere, have been met with contention from the CJEU, seemingly jealously guarding its purview. This particular contention can again be seen in Opinion 2/13, the second opinion barring EU ascension to the ECHR. This chapter

places this ruling in light of the trend identified previously, and tries to understand how and why the Court ruled as it has by looking at possible motivation or pressures.

To begin this analysis, it is first important to recall two things intergovernmentalism asserts Member States can do to 'control' the Court; they can either ignore the ruling ('non-compliance'), or; they can amend the treaties. Aiden O'Niell QC in his opinion in a European law blog post ("Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty"), argues that the latter can be seen attempted in the Treaty of Lisbon, in which Article 6 (2) notes:

> The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

It can be speculated that this entry is meant to appease some of the concerns the CJEU had in the 2/94 ruling. O'Niell concludes from this that, based on the ruling of Opinion 2/13, the CJEU is firmly stating that it will block any agreements that would have the effect of displacing it as the sole overseer of EU law. The CJEU here is uncharacteristically restrained. Based on the analysis of CJEU jurisprudence in this thesis, it would be expected, given pressure from both the Commission and the Member States, that the CJEU would allow the accession. Instead, the CJEU appears to be blocking access of the ECtHR to the EU legal sphere.

Based on this understanding there are clearly wider effects this ruling will have, particularly with regards to the ability of Member States to constrain the Court. The analysis of this thesis has found that intergovernmentalism appears to play little part in the decisions of the Court. Indeed, of the jurisprudence analysed in this thesis, the Member States have consistently shown reluctance or opposition. They are left usually with two options: non-compliance, or to amend the Treaties. Non-compliance appears largely ineffective, given the different time horizons discussed by Alter. That leaves only treaty amendments, which have been seen to be difficult to achieve because of the 'joint decision trap'[2]. The option of treaty amendment was however left open, and considered a possibility in extreme cases, but if the views of O'Niell are to be believed, then it would appear that the decision of the Court severely limits its use.

[2] Simply put, the jurisprudence of the CJEU in past cases has generally only affected a handful of Member States, whether it be Belgium no longer allowed to request a certificate of origin on whiskey imports, or Germany no longer allowed to restrict the sale of alcohol based on content, there was simply not enough opposition from multiple Member States to allow a treaty amendment, thus restricting the ability of Member States to constrain the Court

However, it should be considered that O'Neill's interpretation might not be true. It could be argued that the issue in Opinion 2/13 raises such fundamental questions about the EU legal order, that in this regard it is perhaps unfair to judge the Court as being jealous in guarding its position too soon. The Court's mandate is primarily the interpretation of the Treaties within the European legal sphere, and introducing the concept of accession to another supranational entity entails a great degree of hypothetical legislation. In this regard, the Court may indeed be fair in its jurisprudence, or to quote Catherine Barnard in her opinion on the ruling ("Opinion 2/13 on EU accession to the ECHR: Looking for the Silver Lining"), the Draft Accession Agreement proposed by the Member States and the Commission "failed to see the wood for the trees". By this, Barnard means that the agreement focused heavily on the individual details of the accession to appease the Court, but gave little regard for the wider implications accession would have on the EU legal structure.

In either case, whether one is to believe the CJEU is jealously guarding its position or acting in a purely doctrinal fashion, merely protecting the integrity of the EU legal order from outside influences, what is clear from this case is the inability of Governments or the Commission to influence the jurisprudence of the Court. Intergovernmentalism then does not, at any stage in EU development, explain Court-led integration, and Opinion 2/13 appears to remove it completely with regards to explaining the Court as an institution. While neofunctionalism and new-institutionalism provide good explanations for the circumstances and method of Court led integration, Opinion 2/13 is challenging because in this case the Commission was on the side of the Member States (whereas in cases such as *van Gend* the Commission and Member States were very much in opposition to one another with regards to the notion of 'direct effect'). Further, while neofunctionalism has explained much of the circumstances of Court led integration previously; it does not provide an explanation for this decision, as simply no spill over can be observed.

Rather, new-institutionalism appears to provide the best explanation. It could be argued that, based on institutional norms, the circumstances of Opinion 2/13 are new territory, and the expectations other actors had of the Court are proven wrong. While it may have been expected that the Court would side with the Commission, or that based on the addition of Article 6 (2) to the TEU by the Member States, that the Court would have no problem with the accession. These institutional misunderstandings of the Court in this particular ruling might explain the circumstances for the decision to be made: the false assumption that a treaty amendment and support from the Commission would persuade the Court.

What conclusions can be made from this? This clearly changes some of the inter-institution dynamics in the EU, and could potentially mark a new era in the character of the CJEU. If

intergovernmentalism is firmly put aside, with the option for treaty amendment proving ineffective, this may in the future force concerned Member States to pursue other options in trying to lead integration where the CJEU is involved. Further, it appears that the Court is very reluctant to expand EU law or legal structures if it were to involve allowing outside pressures greater influence. It could be speculated, based on this understanding, that with proposed agreements such as the Transatlantic Trade and Investment Partnership (TTIP), or other free trade agreements, that such a protectionist face of the CJEU will become more apparent, and that the Member States and Commission will, in cases where they stand opposed to the CJEU, require other tools to limit its activism (or lack thereof, as appears to be the case with Opinion 2/13). This very much appears to be a new era in the character of the Court, and indeed one that might become more apparent with greater globalization.

To conclude, in 'regular' EU integration (i.e., integration that does not include accession to extra-EU entities, such as the Council of Europe or ECHR), neofunctionalist spillover and 'salami slice' tactics appear to best explain the circumstances under which the CJEU is judicially activist. Often this is seen aided by new-institutionalism, with the Court largely reflecting the wishes of other actors. In *van Gend*, this was clearly seen to be from the Commission, and it was observed that both institutions shared similar views regarding European integration. However, in what could be considered 'irregular' cases, such as those involving the accession of the EU to other entities, these institutional norms and explanations are less applicable, and new ones may develop in future rulings of this kind. With greater globalization, intra-EU dynamics will be very interesting to see.

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