



The Political Side of EU Annulment Litigation

There is more to annulment actions than political science or legal scholarship have so far brought to our attention. As we showed in this book, annulment actions are part of the struggle about money, policies, competences, and votes in the emerging multilevel political order of the European Union (EU). Annulment actions embody vertical and horizontal tensions among public and private actors that purposefully take their conflicts to the European judicial arena. Annulment litigation works as a defence attempt of last resort; annulments are regularly the last chance to undo actions by supranational institutions. Against this backdrop, we have investigated the genuine political nature of annulment litigation with three analytical focal points: actors' motivations to litigate, actor configurations in court, and the outcome and impacts of annulment judgements. We now turn to the insights gleaned from our empirical analysis regarding these three aspects of annulment litigation dealing with the emergence, structure, and outcome of annulment actions.

While we separated these aspects of annulment litigation analytically by discussing them within individual chapters, our argument and analysis overall is driven by the assumption that it is crucial to understand the interrelatedness of emergence, structure, and outcomes of annulment litigation. Together, these aspects constitute a causal chain. To separate them is, of course, vital for analytical reasons. However, emergence, structure, and outcome of annulment actions are not independent from one another. Rather, they co-determine each other. A major insight of

our analysis is that the three-fold elements of the annulment struggle feed into each other, thereby amalgamating the legal with the political struggle of EU multilevel policy making. This is why throughout this study we have developed a sequential approach to analyse annulment litigation.

THE MOTIVATIONS BEHIND ANNULMENT ACTIONS

The first set of questions we raised dealt with the motivations of policy actors to take legal steps and turn to the Court. The EU policy process involves many distinct actors located at different governmental levels and active in different arenas. As a result, a wide array of interests, political preferences, values, cultures, and understandings interact and often clash. Annulment actions constitute one possible legal channel for transferring policy conflicts into the judicial arena, and annulments are raised regularly by a large variety of private and public actors that can be located on the subnational, national, European, or—in the case of multinational companies—even the global level.

While the litigation literature generally investigates the conditions under which specific actors decide to litigate, we focus on their motivations for litigating. In other words, since we already know from existing literature when actors are likely to go to court, we decided to focus on the ‘why’ question. Why do actors raise annulment cases in front of the Court and what are their objectives? What kind of utility do they associate with annulment litigation? What are they really after?

These questions are usually hidden as implicit assumptions in the litigation literature, which has essentially focussed on companies and non-governmental organizations (NGOs) (Gould 1973; Bouwen and McCown 2007; Vanhala 2011). While companies are generally assumed to litigate to maximize material gains, NGOs are seen to litigate to push for their ideological and policy preferences. These assumptions are plausible; however, they do still need to be substantiated empirically—especially when other actor categories come into play. Indeed, we also have some indications in the litigation literature that financial and ideological payoffs may not always be what litigants seek when turning to the courts. Influencing a court’s legal doctrine or gaining bargaining power (Galanter 1974; Schmidt 2000; Granger 2004) can also be important objectives for litigants when turning to courts. Assuming a dominance of financial concerns and ideology in litigation decisions seems, especially

for public actors, overly simplistic. Public actors are, after all, committed to a variety of objectives, not least keeping or expanding political power and institutional competences in addition to securing financial resources.

This study showed that in annulment actions, it is the multilevel political context that prompts litigants' decisions to turn to court. Locating actors' action in the context of the struggles they go through in the multilevel policy process allows identifying their needs and subsequently the utility they associate with litigation. We found four types of motivations driving the use of annulment actions; litigants turn to the EU Court to maximize material gains, institutional competences, ideological and policy preferences, and political trust. While these four motivations constitute real types, they are not mutually exclusive at the level of empirical cases; in other words, one annulment action can be driven by more than one motivation. Yet our case studies allowed for the identification of the single most dominant motivation underlying a particular case.

First, material gains constitute the quantitatively most important motivation. In these cases, litigation is pursued when success in court would significantly improve the litigant's budget situation, by either avoiding substantial expenses or maximising revenue. This motivation is crucial for governments and for regional, subnational authorities confronted with Commission decisions imposing financial corrections in agriculture or cohesion policies. This motivation is also important for companies having benefitted from domestic state aid that is later declared illegal by the Commission. In these cases, litigating is often the only option that can help to avoid having to pay back subsidies.

Second, litigation is pursued when the Court's interpretation of unclear legal concepts may significantly improve the litigant's institutional and decision-making competences. This motivation is often found among public actors, both national and European, in the face of a measure adopted that appears to the litigant as a competence-stretch threatening to reduce its own institutional powers.

Third, ideology drives litigation when this provides an opportunity to defend or promote an important ideological or policy position by establishing or keeping a normative order. In the cases we have explored here, ideology is most likely to show when strongly politicized actors such as NGOs (private litigants) become involved or public actors engage in party politics.

Fourth and finally, annulment litigation can also be used as a political symbol to signal responsiveness and trustworthiness to the litigant's

electorate or to important political partners. This motivation is current among actors that are directly elected at the subnational, national, or supranational level, such as governments or the European Parliament. Analysing annulment actions with the frame developed in this book thus allows capturing the conflictive dimension of EU multilevel governance. Annulment politics highlights that multilevel interaction in the EU has more to it than the processes of cooperation and coordination often dominating scholarly focus.

We have emphasized the political character of annulment actions. This is not to say that legal factors are irrelevant. On the contrary, legal aspects do play a crucial role in actor's decisions to engage in litigation. Legal factors, however, usually relate to the 'when' question; they are located on a different analytical plane as the identification of actors' motivations to engage in litigation. Even when actors are motivated to litigate, very bleak chances of legal success can nevertheless lead them to dismiss this option. As we showed, once we understand what actors are seeking, we can clarify the conditions for their decision to opt for litigation in order to achieve their objective. This is where legal factors come in.

The literature on litigation economics emphasizes the probability of winning as an essential element in litigants' risk-benefit analysis underpinning their decision to litigate (Gould 1973). While this is hard to refute, our findings give more nuanced insights into its role in the litigation decision. More often than not, the benefit considered is political rather than financial. This considerably limits litigants' capacity to quantify the benefits they expect to gain. Consequently, risk-benefit assessments of the utility of litigation often need to be far less scientific and objective as assumed within economic models of litigation.

Second, we found that chances of legal success in front of the Court—though important—are not systematically considered as such by potential litigants. Often—and this is particularly true for public actors—litigants are satisfied with the presence of a certain legal uncertainty, while the exact scope of legal uncertainty hardly plays a role in their decision to litigate. Since the economics of litigation literature refers implicitly to chances of success, it considers that legal uncertainty is measurable in one way or another and that the scope of legal uncertainty—the litigant's chances of success—is a determinant factor in the decision to litigate (Gould 1973; Landes 1974). By contrast, as soon as the financial, institutional, ideological, or political stakes of the case become important,

most of the public actors we talked to were satisfied with a small degree of legal uncertainty that would allow them to present decent legal arguments in court without risking their reputation in Luxembourg. When limited resources force them to select cases for litigation among several conflicts, it is more the political, institutional, or material relevance of the case than its legal merits that dominates the filtering process.

The importance of the legal factor, in the form of chances of success, also varies depending on the litigant. The risk-benefit analysis found in the economics of litigation literature is certainly important to private actors, particularly to companies. For them, the costs of preparing annulment litigation are non-trivial, and the expected benefits strongly depend on judicial success. In contrast, as we show in the case studies, public actors' individual decisions of litigation do not impose significant additional costs, and the utility of annulment litigation does not systematically require judicial success. Hence, as public actors are facing different incentives and constraints, their decisions to litigate are much less dependent on the scope of legal uncertainty surrounding the case than for private companies. While the legal uncertainty surrounding the conflicts does play an important role, this role is not as dominant as economic models of litigation suggest.

Last but not least, our findings emphasize the multilevel and multi-actor nature of annulment actions. Far from being restricted to conflicts between the Commission and the member states (in the case of infringement proceedings) or formally channelled through an interaction between national and European judges (like preliminary rulings), annulment actions are a direct strategy to 'judicialise' (as we refer to the process) conflicts between a wide variety of actors located on different governmental levels in the European Union. The material gains motivation for litigation coins conflicts between member states governments and EU institutions and between national companies and the Commission. The institutional competences motivation generally drives conflicts between member states governments and the EU and between EU institutions among themselves; the ideological motivation is found in vertical conflicts between member states or NGOs and EU institutions and among EU institutions. The political trust motivation generally underpins annulment actions in which national or regional governments judicialise conflict with an EU institution to send a positive signal to their constituency at home. In sum, annulment actions truly are a judicial manifestation of the multilevel and multidimensional nature of the EU policy process.

ACTOR CONFIGURATIONS IN ANNULMENT CONFLICTS

The multilevel governance approach conceives EU governance as composed of a variety of interactions between a wide range of actors in the EU public policy process (Benz and Eberlein 1999; Benz 2007; Schakel et al. 2015). Judicial proceedings can involve several actors and may feature private companies, NGOs, subnational governments, and other EU institutions, such as the European Central Bank or the European Parliament. In a large number of cases, the number of actors engaged in the legal conflict rises beyond the typical face-to-face duel between one applicant and one defendant as other actors join the conflict to support either applicant or defendant.

Often, it is not only the number of actors engaged in the conflict that increases, but also the variety of types of actors involved and governmental levels they are associated with. We often see highly complex multilevel actors' configurations, where different conflict lines and litigation motivations overlap and interact. As discussed in Chapter 6, litigant configurations in the context of annulment litigation are highly diverse. We employed a rather basic distinction between simple (1 v. 1) configurations and complex configurations (all other constellations). Complex constellations amount to around 26% of all vertical annulment conflicts. They come in many different forms and while they are more frequent in horizontal conflicts—a vast majority of all horizontal annulment cases are by our definition complex (81%)—they generally emerge in various different contexts. How can we explain their emergence? How can we account for the rise of multilevel complexity in annulment actions?

We are far from claiming the ability to predict the emergence of a complex actor constellation in a specific case. What we do see is that complex litigant configurations often emerge in situations of institutional turbulence. In situations in which existing institutional arrangements are in flux or are going through a phase of substantial revision, annulment litigation dealing with these unsettled institutional arrangements often involves more than just two actors. Why is this the case? First, the status quo represents a negotiated temporary equilibrium situation that tends to involve a substantial number of stakeholders. This temporary equilibrium comprises a financial dimension, an ideological dimension, an institutional or competence-related dimension, and a political or electoral dimension. Therefore, threats of disrupting the status quo hold the potential to trigger litigation by actors based on all four motivations we

described in Chapter 5. Institutional turbulence unsettles the established order in many different ways. Hence, a wide range of actors, each for its own reasons, are likely to be discontented with the change and to engage in a struggle to maintain the status quo through litigation. Likewise, the multidimensional character of institutional turbulence is likely to appeal to a wide range of stakeholders interested in moving away from the status quo and ready to engage in the conflict to protect the disrupting measure. In short, as institutional turbulence disrupts different dimensions of the existing status quo, turbulence increases the stakes in different regards and affects a wide variety of policy stakeholders. Annulment litigation gives them a chance to shape their prerogatives within the emerging order.

Secondly, situations of institutional turbulence are more likely to produce legal uncertainty. Unstable situations are critical junctures where it is not yet clear which (legal) path will be chosen by a ruling. As contested measures represent a move away from the preexisting legal and policy path, whether and how the preexisting case law applies is largely unclear. The existing legal stock does not allow drawing clear conclusions and making safe predictions regarding the Court's reaction. For applicants, which have to consider an overall success rate of 24.7%, and in view of the legal uncertainty of those cases, which pushes the chances of success towards 50%, turbulence thus creates higher incentives to litigate. After all, as seen in Chapter 5, the chance of legal success is an important factor encouraging the use of litigation—although relatively more determinant for private actors and regional authorities than for member states and EU institutions. Likewise, in a situation of high legal uncertainty, actors whose interests align with those of the defendant cannot rely so much on the Court's tendency to protect EU measures challenged via annulment actions. The unpredictability of the Court's ruling serves as an incentive for these actors to actively engage in the litigation in support of the defendant, hoping their intervention can make a difference in the ruling. Put differently, whenever the status quo is disrupted, the unclear legal situation holds a substantial potential for triggering judicial law making (Adam 2016). Situations of institutional turbulence increase not only the stakes for many different policy stakeholders, they also increase the uncertainty about how the Court will rule. That, in turn, increases policy stakeholders' incentives for getting actively involved in the legal conflict. While we have highlighted above the danger of

overstressing the role of expected chances of legal success promoted by economic models of litigation, it is similarly problematic to assume that legal uncertainty and the legal merits of a case systematically affect neither litigants nor the Court. In this sense, we believe legal uncertainty has to be taken into account much more than is currently the case in political models of litigation and judicial behaviour.

In sum, conflicts that take place at critical institutional junctures or at critical policy junctures are most-likely cases to attract not only one but several actors. There is a greater probability that different motivations are coming into the play. At the same time, there are higher incentives to take the conflict emerging from these motivations to court. Taking treaty changes as manifestations of potential turbulence, we found strong empirical evidence for this theorized nexus between institutional turbulences and complex actor constellations. For years with treaty modifications entering into force, we observe an average of 15% of annulment conflicts featuring a complex litigant configuration where we observe only an average of around 7% for years without such events. Our case studies further support this argument and interpretation.

The finding that institutional turbulence plays an important role in triggering such complex multilevel litigant configurations highlights one important difference between the cooperative and the conflictive dimension of multilevel governance in the EU. Multilevel governance refers to a process dominated by the superposition of coordination and interaction practices among different types of policy stakeholders located on different levels. While the cooperative side of this multilevel process seems to be a pervasive feature of the day-to-day functioning of the EU, conflicts within this process—particularly judicialised conflict—are more limited and reserved to specific situations, such as situations of institutional turbulence.

SUCCESS, FAILURE, AND FEEDBACK EFFECTS

The third analytical focal point of the book is the analysis of effects of annulment actions analysed in Chapter 7. We differentiated between legal outcomes, based on who was successful in the legal case, and the more far-reaching implications of rulings on the multilevel political context from which litigation emerged.

Legal outcomes, in terms of applicants' success rates, differ substantially depending on the actor configuration involved. We have seen that

in cases with certain complex litigant constellations, success rates are slightly elevated (for example, to about 32% when at least one member state and at least one private litigant jointly accuse an individual EU institution). Strategic approaches to judicial decision making assume a causal impact of litigant configurations on judicial behaviour since many powerful litigants might be able to effectively constrain the Court. We propose a fundamentally different explanation for observed correlations between litigant configurations and legal outcomes: the relationship between complex actor constellations and higher success rates in annulment actions is not primarily a causal relationship. Instead, the empirical association is merely a result of the fact that specific conflict situations not only affect the emergence of specific litigant configurations but also the emergence of certain rulings. More specifically, situations of institutional turbulence not only foster legal uncertainty. Such situations also facilitate the emergence of complex actor configurations. In this sense, we promote a similar argument as Davies (2018), who claims that the recent tendency of the Court of Justice of the European Union (CJEU) to side with member states rather than with private litigants over questions of rights associated with EU citizenship cannot easily be attributed to a changing judicial perspective or increasing member state influence. Rather, one has to consider that it has not been the Court that has changed but rather the cases that have been brought before it. With less meritorious cases brought by private litigants, lower success rates are inevitable.

We do not refute the possibility of a causal effect of litigant configurations on legal outcomes completely. Yet we do focus on the ability of litigant configurations to influence judicial behaviour by increasing the variety of legal arguments presented to the Court rather than by putting political pressure on the Court. While political models of judicial behaviour typically treat actor constellations as exogenous factors, we see it as important to integrate the theorization of the emergence of these configurations into these models. Different policy conflicts not only come with various degrees of legal certainty and predictability of court behaviour; they also attract different litigant configurations. Assuming that litigant constellations are completely independent from the legal merits of cases is therefore misleading.

Our findings suggest heading for a new approach of judicial politics. Up to now, research on judicial decision making has downplayed the impact of the political context and the nature of the conflict at stake, in

particular the legal uncertainty underpinning the case, on judges' decisions. Yet if one acknowledges that case law creates legal path dependence (Schmidt 2012), one has to recognize the highly constraining power of the existing legal stock on judges' decisions. We agree in this context with Susanne K. Schmidt, who has pointed out the crucial role played by litigants in activating case law to their advantage and, thereby, pushing judges into forging and consolidating a given legal path (Schmidt 2012, 2018).

We are not, however, simply trying to reiterate the conditioning effect of case law or Schmidt's argument about the role of litigants' legal strategies in creating legal paths. Rather, we emphasize the crucial role of the nature of the conflict situation and of the specific political context in influencing the eventual impact of case law. The activation of existing case law is dependent not only on litigant's legal strategies. Litigants' capacity to mobilize existing case law highly depends on whether the case at hand lends itself to it. When annulment actions are directed against a supranational act that is very similar to previous acts and was adopted on the same legal basis, applicants enjoy a relatively high level of legal certainty. The Court's past decisions on these similar acts form well-informed expectations about their ability to win the respective case. As soon as previously established case law becomes less instructive—because of a changing legal basis or as a result of a changing content of the legal act—the less predictable judicial behaviour becomes. Consequently, a political context characterized by institutional turbulence produces legal uncertainty, which reduces the predictability of rulings and ultimately brings success rates closer to 50%.

In this sense, research that analyses the relationship between litigant configurations and legal outcomes without taking legal uncertainty into account risks suffering from a substantial omitted variable problem. In the context of annulment litigation, institutional turbulence and the legal uncertainty that comes with it act as a confounding variable that influences litigant configurations as well as legal outcomes. This only comes to light when the political context—most importantly in terms of actor motivations and institutional turbulence—is given appropriate analytical space. As a result, our approach can contribute to better understand court agency (Saurugger and Terpan 2017) and to the debate about court constraint and legislative override (Carrubba et al. 2008, 2012).

Moreover, our cases also provide insights into the wider redistributive political effects of annulment actions—beyond judicial success or defeat. In this respect, two observations stand out. First, we showed that successful litigation does not necessarily rely on winning legal proceedings. We argue that the success of litigation should always be conceptualized broadly and assessed based on litigants' general objectives and motives for entering into conflict. Chapter 5 showed that actors seek different objectives when going to court. Hence, there are many cases where the redistributive effect of the rulings on policy actors does not coincide strictly with the Court's decision about who the winner of the judicial conflict is. This disconnection between redistributive effect and ruling is particularly clear when the annulment action is raised with a view to maximize political trust domestically or to clarify (rather than maximize) the distribution of competences. This finding echoes the literature on the legal mobilization of social movements, which highlights the beneficial (secondary) effects of litigation for social movements even in case of judicial defeat (Scheingold 1974; McCann 1998; Lobel 2003; NeJaime 2011; Vanhala 2011). We go one step further by explicitly underlining that litigants' major objective, and therefore major benefit from litigation, does not need to be connected with judicial success. This argument further highlights the potential disconnection between judicial success and the functional utility of litigation. We argue that understanding this particular functional utility of litigation requires delving into the multi-level political context from which the conflict emerges. Policy stakeholders use litigation, as one tool among others, to navigate the complex EU's multilevel system. This further underlines the relevance of our multilevel policy approach to litigation.

Second, complex constellations, as they involve a higher number of litigating actors, tend to involve different types of motivations for litigation, which is particularly visible in cases featuring the involvement of different types of actors. In other words, different actors, because of their diverse positioning in the multilevel political context responsible for the rise of the conflict, seek different objectives in the judicial proceeding. When several actors intervene, several litigation motivations overlap and several conflict lines are intertwined in a single judicial proceeding, the redistributive impact of the ruling is multidimensional. The very same ruling can produce more than one winner—and more than one loser—on these different dimensions. Wider policy impacts of annulment

conflicts with complex configurations are thus particularly nuanced and likely to reflect the complexity of their actor configuration.

In Chapter 1 of this book, we underlined the relevance of annulments for seizing substantial impacts on policy and actor relationships. We traced these feedback effects on the bases of cases studies. Our case studies range from constitutionalisation to adjustment to policy change. Examples for constitutionalisation are the insertion of trade negotiations related to implied powers into the treaty (Cremona 2011)—EU level—and the modification of the German constitution following the suckler-cow premiums case (Adam et al. 2015). Adjustments of procedural rules governing the interaction of institutions are constituted by Articles 290 and 291 of the Treaty on the Functioning of the European Union on delegation in comitology. Policy changes are found in the Autogrill and Banco Santander cases, which significantly expanded the scope of EU competition law to the detriment of national autonomy in fiscal policies. Discussing such broader feedback effects, we conclude that annulments are politically as well as economically highly relevant and that the increasing frequency with which annulments are used reflects their rising importance as a genuine feature of the emerging multilevel conflict over supranational decision making and implementation in the European integration process.

BEYOND THE STATE OF THE ART: HOW EXPLAINING ANNULMENT CASES CHALLENGE COMMON RESEARCH PERSPECTIVES

Annulment actions have received substantially less attention than other forms of legal conflicts in the EU—wrongly so, as our study hopefully showed. The patterns of when and how annulments matter have important implications beyond specific empirical analysis. Annulment actions are more than technical review mechanisms. They are constitutive elements of the multilevel struggle for policy making in the EU. As soon as one opens annulment analysis beyond the examination of the ruling in a narrow sense and engages with the earlier steps feeding into litigation and with the feedback effects, the importance of underlying policy conflicts as a constitutive force in the EU multilevel system comes to the fore. Rather than a constraint (Scharpf 2006; Falkner 2011), the multilevel interaction, coordination, and cooperation of governments and non-state actors in the judicial arena can be understood as a continuation

of actors' attempts to influence specific outcomes in the policy-making arena. Analysing the sequence connecting conflict to resulting new dynamics, feedback effects, and structuring elements for policy and polity allows us to integrate judicial processes into the functioning of the EU multilevel system of governance. At a time when the rise of tensions and crises on the global scene have intensified the potential for conflict within the EU, developing this line of reasoning will further gain relevance in the European multilevel system.

Other scholars have studied the chain from societal conflict to legal disputes. Referring to a filtering process (Van Waarden and Hildebrand 2009), a delta (Glenn 1999), or a funnel (Klages 1983), these works all look at the chain as a narrowing passageway and seek to understand what shapes the amount of litigation at its end. In contrast, the contribution of this book consists in promoting a comprehensive approach to judicial proceedings as an element of the multilevel policy process. In essence, what distinguishes our argument from existing accounts is that we try to analytically connect the motivations underlying litigation, the conditions that promote the legal actions to unfold, the litigant configurations in court, the imminent legal outcomes of litigation, and the larger judicial impact of rulings on the multilevel political context.

Our findings reveal the important mediating role of institutional turbulence in the way judicial proceedings integrate into the multilevel policy process. The deeper the disruption of the status quo initiated by policy measures adopted by EU institutional actors, the wider the range of actors concerned by the impacts of the disrupting measure and the higher the legal uncertainty of the situation. This has two consequences. First, legal uncertainty goes with low legal predictability. Such cases are characterized by higher success rates; about half of these EU measures end up being annulled by the Court. In other words, the institutional turbulence created by the disrupting act creates legal uncertainty, which is then further amplified by the difficulty to anticipate the Court's annulment ruling—whether it will defend or annul the destabilizing measure. The chain that links policy conflict to judicial conflict to feedback into political contexts shows that status quo disruption is not the end of the story; destabilization inevitably comes with a certain level of uncertainty as to what the future will bring. Second, situations of institutional turbulence create multidimensional stakes for a wide variety of stakeholders. Consequently, annulment rulings also have multidimensional feedback effects on the various actors that are part of the multilevel policy conflict.

The use of judicial proceedings in situations of institutional turbulence thus mediate—and therefore amplify—highly instable, unpredictable, and multidimensional equilibria between a wide range of actors located on different governmental levels.

Analysing annulment litigation from a perspective of multilevel governance, as has been done in this book, complements extant research on the nexus between courts and compliance in the EU based on infringements and preliminary rulings (Carrubba and Murrah 2005; Thomson et al. 2007; Hartlapp 2008; Hartlapp and Falkner 2009; Broberg and Fenger 2013; Kelemen and Pavone 2016). Our focus on annulments needs to transcend the top-down perspective typically applied to infringement rulings and the typical bottom-up perspective on preliminary references. Annulment actions are manifestations of conflict that are neither captured by preliminary rulings, which have to be handed up by national courts, nor lead to infringement procedures that EU institutions launch against noncompliant member states. After all, annulment actions represent a direct channel to the CJEU that can be used by a most diverse set of actors willing to challenge supranational actions. The conceptual contributions offered by this book reflect the resulting need for a truly multilevel perspective. We introduce the distinctions between horizontal and vertical conflicts, as well as the distinction between simple and complex conflict configurations, to capture essential features of this multilevel process while minimizing the risk of getting lost in the vast heterogeneity of these conflicts.

Future research might want to compare the use, functioning, and impact of these different legal roads to Luxembourg. Comparing the frequency with which annulment actions, infringement procedures, and preliminary references are used within different political contexts can be an interesting first analytical step in this direction. After all, there is interesting variation. In 2016, most infringement procedures were opened in the political contexts of the internal market, environment, financial services, mobility, and transport.¹ Preliminary rulings most frequently dealt with questions of the freedom of movement and establishment in the internal market as well as with intellectual property (Court of Justice of the European Union 2017, 28). Vertical annulment conflicts continue to be dominated by agricultural and state aid cases (Bauer and Hartlapp 2010), while horizontal annulment conflicts emerge most often in the area of external affairs (Hartlapp 2018). By analysing quantitative and qualitative differences between these different channels, future research

should develop a more nuanced understanding of the political role of litigation and the Court within different political contexts in the European Union. This should be of interest not only to scholars of judicial politics in the EU but also to scholars interested in policy implementation and compliance. We hope our book can contribute to these debates.

NOTE

1. Out of the 1657 infringement cases open in 2016, 270 emerge on questions of the internal market, industry, entrepreneurship, and SME; 269 on environmental policies; 230 from financial stability, financial services, and capital markets union; and 191 from mobility and transport. See COM (2017) 370 final report from the European Commission monitoring the application of European Union law 2016 Annual Report, p. 26.

REFERENCES

- Adam, C. (2016). *The politics of judicial review: Supranational administrative acts and judicialized compliance conflict in the EU*. Basingstoke, UK: Palgrave Macmillan.
- Adam, C., Bauer, M. W., & Hartlapp, M. (2015). It's not always about winning: Domestic politics and legal success in EU annulment litigation. *Journal of Common Market Studies*, 53(2), 185–200.
- Bauer, M. W., & Hartlapp, M. (2010). Much ado about money and how to spend it! Analysing 40 years of annulment cases against the European Union Commission. *European Journal of Political Research*, 49, 202–222.
- Benz, A. (2007). Accountable multilevel governance by the open method of coordination? *European Law Journal*, 13(4), 505–522.
- Benz, A., & Eberlein, B. (1999). The Europeanization of regional policies: Patterns of multi-level governance. *Journal of European Public Policy*, 6(2), 329–348.
- Bouwen, P., & Mccown, M. (2007). Lobbying versus litigation: Political and legal strategies of interest representation in the European Union. *Journal of European Public Policy*, 14(3), 422–443.
- Broberg, M., & Fenger, N. (2013). Variations in member states' preliminary references to the court of justice—Are structural factors (part of) the explanation? *European Law Journal*, 19(4), 488–501. <https://doi.org/10.1111/culj.12045>.
- Carrubba, C. J., Gabel, M., & Hankla, C. (2008). Judicial behavior under political constraints: Evidence from the European Court of Justice. *American Political Science Review*, 102(4), 435–452.

- Carrubba, C. J., Gabel, M., & Hankla, C. (2012). Understanding the role of the European Court of Justice in European integration. *American Political Science Review*, 106(1), 214–224.
- Carrubba, C. J., & Murrah, L. (2005). Legal integration and use of the preliminary ruling process in the European Union. *International Organization*, 59(2), 399–418.
- Court of Justice of the European Union. (2017). Communications Directorate—Electronic Publications and Media Unit. *Annual report 2016: The year in review*.
- Cremona, M. (2011). External relations and external competences of the European Union: The emergence of an integrated policy. In P. Craig & G. de Burca (Eds.), *The Evolution of EU Law* (pp. 217–268). Oxford, UK: Oxford University Press.
- Davies, G. (2018). Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication. *Journal of European Public Policy*, 25, 1442–1460.
- Falkner, G. (Ed.). (2011). *The EU's decision traps: Comparing policies*. Oxford, UK: Oxford University Press.
- Galanter, M. (1974). Why the “haves” come out ahead: Speculations on the limits of legal change. *Law and Society Review*, 9(1), 95–160.
- Glenn, H. (1999). *Paths to justice: What people do and think about going to law*. Oxford, UK: Hart Publishing.
- Gould, J. P. (1973). The economics of legal conflicts. *Journal of Legal Studies*, 2(2), 279–300.
- Granger, M. (2004). When governments go to Luxembourg...: The influence of governments on the European Court of Justice. *European Law Review*, 29, 1–31.
- Hartlapp, M. (2008). Extended governance: Implementation of EU social policy in the member states. In I. Tömmel & A. Verdun (Eds.), *Innovative governance in the European Union: The politics of multilevel policymaking* (pp. 221–236). Boulder, CO: Lynne Rienner.
- Hartlapp, M. (2018). Power shifts via the judicial arena: How annulments cases between EU institutions shape competence allocation. *Journal of Common Market Studies*, 56(6), 1429–1445.
- Hartlapp, M., & Falkner, G. (2009). Problems of operationalisation and data in EU compliance research. *European Union Politics*, 10(2), 291–315.
- Kelemen, R. D., & Pavone, T. (2016). Mapping European law. *Journal of European Public Policy*, 23(8), 1–21. <https://doi.org/10.1080/13501763.2016.1186211>.
- Klages, H. (1983). Ursachenfaktoren der Inanspruchnahme der Ziviljustiz. *Deutsche Richterzeitung*, 10, 395–436.
- Landes, William M. (1974). An economic analysis of the courts. In Gary S. Becker & William M. Landes (Eds.), *Essays in the economics of crime and punishment* (pp. 164–214). New York: Columbia University Press.

- Lobel, J. (2003). *Success without victory: Lost legal battles and the long road to justice in America*. New York: New York University Press.
- McCann, M. W. (1998). How does law matter for social movements? In B. G. Garth & A. Sarat (Eds.), *How does law matter?* Evanston, IL: Northwestern University Press.
- NeJaime, D. (2011). Winning through losing. *Iowa Law Review*, 96, 941–1012.
- Saurugger, S., & Terpan, F. (2017). *The Court of Justice of the European Union and the politics of law*. London: Palgrave.
- Schakel, A. H., Hooghe, L., & Marks, G. (2015). Multilevel governance and the state. In S. Leibfried, E. Huber, M. Lange, J. D. Levy, & F. Nullmeier (Eds.), *The Oxford handbook of transformation of the state* (pp. 269–285). Oxford, UK: Oxford University Press.
- Scharpf, F. W. (2006). The joint-decision trap revisited. *Journal of Common Market Studies*, 44(4), 845–864.
- Scheingold, S. (1974). *The politics of rights: Lawyers, public policy, and social change*. New Haven, CT: Yale University Press.
- Schmidt, S. K. (2000). Only an agenda setter? The European Commissions power over the council of ministers. *European Union Politics*, 1(1), 37–61.
- Schmidt, S. K. (2012). Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens. *Journal of European Public Policy*, 19(1), 8–24. <https://doi.org/10.1080/13501763.2012.632122>.
- Schmidt, S. K. (2018). *The European Court of Justice and the policy process*. Oxford, UK: Oxford University Press.
- Thomson, R., Torenvlied, R., & Arregui, J. (2007). The paradox of compliance: Infringements and delays in transposing European Union directives. *British Journal of Political Science*, 37(4), 685–709.
- Van Waarden, F., & Hildebrand, Y. (2009). From corporatism to lawyocracy? On liberalization and juridification. *Regulation and Governance*, 3(3), 259–286. <https://doi.org/10.1111/j.1748-5991.2009.01059.x>.
- Vanhala, L. (2011). *Making rights a reality? Disability rights activists and legal mobilization*. Cambridge, UK: Cambridge University Press.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

