

JUSTICE AND POLITICS IN THE EUROPEAN UNION: THE COURT OF JUSTICE  
AND THE FUTURE OF EUROPEAN INTEGRATION  
*JUSTIÇA E PODER NA UNIÃO EUROPEIA : O TRIBUNAL DE JUSTIÇA  
E O FUTURO DA INTEGRAÇÃO EUROPEIA*

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**Abstract:** During the process of European integration, the main institutions created since the founding Treaties of the European Communities have played a decisive role in pushing the European project forward. Among these institutions, the Court of Justice of the European Union (EU)<sup>1</sup> is said to be the most neglected by the academics, although it has extended significantly the EU policy for decades. This article reviews the Court's evolution, function and main decisions and discusses its role, not only as an exclusively legal institution but also as a political player capable of driving forward European integration.

This article claims that the Court has pushed forward integration process in some important ways, clarifying and extending EU law. However, the Court is primarily a legal institution of an intergovernmental organization, the European Union. Thus, its political power and role is limited to Treaties' provisions and the Member States remain the key-actors of the EU's decision making system until today.

**Keywords:** European integration, justice, politics, neo-functionalism, liberal intergovernmentalism

**Resumo:** *Durante o processo de integração Europeia, as principais instituições criadas a partir dos Tratados fundadores das Comunidades Europeias desempenharam um papel decisivo no desenvolvimento do projeto europeu. Entre estas instituições, o Tribunal de Justiça da União Europeia (TJUE) é referido como sendo o mais negligenciado pelos académicos, não obstante a sua ampla contribuição para a consolidação institucional da UE.*

*Este artigo examina a evolução, função e principais decisões do TJUE e discute o seu papel, não só como uma instituição exclusivamente judicial, mas também como um interveniente na cena política e institucional da UE, capaz de conduzir e promover a integração europeia.*

*Este artigo argumenta que o Tribunal tem potenciado o processo de integração em alguns aspetos importantes, esclarecendo e ampliando, por exemplo, o direito da União Europeia. No entanto, o Tribunal é principalmente uma instituição judicial de uma organização intergovernamental, a União Europeia. Assim, o seu poder de intervenção política e papel institucional alargado é limitado às disposições dos Tratados, permanecendo os Estados-membros os atores-chave do sistema de tomada de decisão da UE.*

**Palavras-chave:** *Integração europeia, justiça, política, neo-funcionalismo, intergovernamentalismo liberal.*

## 1. Introduction

*It is no secret that the case law of the Court has been a major driving force towards European integration.<sup>2</sup>*

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<sup>1</sup> As named under the Lisbon Treaty.

<sup>2</sup> Vassilios Skouris quoted in *The Economist* – Charlemagne. Government by judges? The European Court of Justice emerges blinking into the limelight, 15<sup>th</sup> of January, 2004. Available on line: [http://www.economist.com/node/2349980?story\\_id=E1\\_NPQJJRD&CFID=168245426&CFTOKEN=56411237](http://www.economist.com/node/2349980?story_id=E1_NPQJJRD&CFID=168245426&CFTOKEN=56411237) Last access: 1<sup>st</sup> of September, 2011

In the first part of the twentieth century, two schools of thought, Federalism<sup>3</sup> and Functionalism<sup>4</sup>, dominated the theoretical debate over European integration, contemplating mainly the avoidance of future wars in the European continent.<sup>5</sup> Yet, later theories about European Integration grew out of this intellectual context and sought to explain more issues as how the creation of supranational institutions as the Court of Justice could accelerate the process of political integration in Europe.

Indeed, neo-functionalist scholars<sup>6</sup> have asserted the Court's legitimacy as the legal actor. The Court has power and autonomy to rule against the interests of the Member States.<sup>7</sup> Intergovernmentalists<sup>8</sup> though claim that the Court simply applies Treaty provisions and rules formulated by the Member States of the EU. According to this school, Court's interpretation is mainly a translation of the rules into operational language.<sup>9</sup>

Moreover, as Andrew Moravcsik has claimed, the explanation for European integration is to be found in the factors that created the Treaties. Supranational institutions, thus, tend to make cooperation more likely. This is mainly because once the procedure for negotiations in the EU has been decided; all subsequent negotiations become easier and less costly than the first negotiation.<sup>10</sup>

Today, given the current financial crisis, the academic and political discussion over the future model of the European Union regains an exceptional interest. The question is: Are we going towards a federal union of states or towards the end of European integration and in what ways the Court's powers shall be affected?

For the purpose of this study, the period examined lays between the creation of the Court in the 1950's till its current formation, following the entry into force of the Lisbon Treaty in 2009. This period forms an era rich in political decisions and actions by Europe's institutional structures and particularly by the Court towards a more federal model for Europe.

Firstly, the present article weights claims and facts, seeking answers to the following research questions:

<sup>3</sup> For instance, Altiero Spinelli and Ernesto Rossi have produced some very influential work which has affected the course of modern federalism. See: SPINELLI, Altiero – "The Growth of the European Movement since the Second World War", in HODGES, Michael (ed.) – *European integration: selected readings*, Harmondsworth: Penguin, 1972, p.p. 43-68. For a thorough analysis over European integration theories see also: WIENER, Antje and DIEZ, Thomas – *European Integration Theory*. Oxford: Oxford University Press, 2004 and ROSAMOND, Ben – *Theories of European Integration*. Palgrave: Basingstoke, 2000

<sup>4</sup> MITRANY, David – The Prospect of Integration: Federal or Functional, in GROOM A. J. R. And TAYLOR Paul (eds.) – *Functionalism: Theory and Practice in International Relations*. London: University of London Press, 1975, p.p. 53-66

<sup>5</sup> In order to avoid war, Federalism advocates the creation of a European political federation. On the other hand, Functionalism focuses on common interests shared by states. It supports the cooperation model among countries through the integration of one or more highly important economic function shared by all of them.

<sup>6</sup> A key architect of neo-functionalism was Ernst HAAS, whose major work, *The Uniting of Europe*, published in 1958, is still one of the main theoretical texts of European integration theory. See: HAAS, Ernest – "International Integration: The European and the Universal Process", in *International Organization*, Vol. 15, No. 3. Summer, 1961, pp. 366-392

<sup>7</sup> See also: ALTER, Karen J. – "Who are the 'Masters of the Treaty? European Governments and the European Court of Justice" *International Organization*. Vol. 52, N° 1, 1998, p.p. 121-147; ALTER, Karen J. – Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration in WEILER, J.H.H, SLAUGHTER, Anne-Marie, SWEET, Alec Stone – *The European Court and National Courts* (Eds). Oxford: Hart Publications, 1998, p.p. 227-253

<sup>8</sup> HOFFMANN, Stanley – "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe", *Dædalus* 95, 1966, p.p. 862-915

<sup>9</sup> BURLEY, Anne-Marie and WALTER Mattli. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization*, Vol. 47, N° 1, 1993, p.p. 47-76

<sup>10</sup> For more on liberal intergovernmentalism, see MORAVCSIK, Andrew – "Negotiating the Single European Act: national interests and conventional statecraft in the European Community". *International Organization* Vol. 45, N° 1, 1991 p.p. 19-56. MORAVCSIK, Andrew – *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht*. NY: Cornell University Press, 1998

1. To what extent the Court can be considered a powerful political institution capable of driving forward European integration, with or without nation-states' will (or is an exclusively legal institution with limited powers)?
2. Is the current economical crisis a reason for extending or diminishing Court's powers?

Under this prism, the present article firstly introduces this unique legal institution, its competencies and evolution. It then moves to an empirical and theoretical analysis of the Court's legal and political achievements until today.

Last but not least, the present paper frames Court's political role *vis a vis* Europe's current political challenges trying to define its strengths and limitations in drawing EU's future path.

## 2. The Court of Justice of the European Union – What Mission?

The Court of Justice of the European Union, which has its seat in Luxembourg, consists of three Courts: the Court of Justice, the General Court (formerly called the Court of First Instance) and specialised Courts.<sup>11</sup> The Civil Service Tribunal was created in 2004.

Since the establishment of the Court of justice of the EU in 1952 until today, its mission has been to guarantee that the law is observed in the interpretation and application of the Treaties.

*The Court of Justice of the European Union shall, in accordance with the Treaties:*

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
- (b) give preliminary rulings, at the request of Courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
- (c) rule in other cases provided for in the Treaties.<sup>12</sup>

So, the most common types of cases brought before the Court of Justice of the EU are:

1. Requests for a preliminary ruling – when national courts ask the Court of Justice to interpret a point of EU law
2. Actions for failure to fulfill an obligation – brought against EU governments for not applying EU law
3. Actions for annulment – against EU laws thought to violate the EU treaties or fundamental rights
4. Actions for failure to act – against EU institutions for failing to make decisions required of them
5. Direct actions – brought by individuals, companies or organisations against EU decisions or actions.<sup>13</sup>

The Court's competences, as defined in the Treaties, demonstrate the importance of this body. This legal framework is EU's unique feature that distinguishes it from the other intergovernmental organizations. It is important to mention also that the judges act independently from any national order. Yet, there are some important points in article 19 of the Treaty on European Union (TEU) that remind and highlight the intergovernmental character of the EU and thus the certain limitations of Courts' decisions.

*It shall ensure that in the interpretation and application of the Treaties the law is observed.*<sup>14</sup>

But, Treaties are agreements between states, a conciliation of interests. Hence, the European law is the product of the Members States' will and legislation. Indeed, sensitive policy areas as taxation, social security, education, health care, pension systems, foreign policy, common

<sup>11</sup> Article 19, Treaty of the European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*. Official Journal of the European Union, C 83, Volume 53, 30 of March 2010, p. 27

<sup>12</sup> *ibid*

<sup>13</sup> Gateway to the European Union. Official Site available at: [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm)

<sup>14</sup> Article 19, TEU, paragraph 1, p. 27

defence even the jurisdiction of the Court in the area of intellectual property are still governed by unanimity.<sup>15</sup> In other words, the most interesting political items for the public opinion of the Member States do not fall under European jurisdiction. This means that the Court defends the law that is the result of an intergovernmental accord, at least on issues which are vital to the national interest and sovereignty of the 27 Member States.

The Treaty also provides that the judges shall be elected and then appointed not by a supranational European authority but *by common accord of the governments of the Member States for six years*.<sup>16</sup>

### 3. The evolving Treaty Framework

The Court of Justice, created as soon as the first European Community, assumed responsibility for all three Communities when the European Economic Community (EEC) and the Euratom Treaties entered into force in 1958. Since then, the Court of Justice is charged with the duty of ensuring that the law is observed in the interpretation and application of the Treaties.

Under the Maastricht Treaty, signed in 1992, the European Union based on a three pillars structure was created<sup>17</sup>. The influence of the Court resided clearly in the first pillar, the Community pillar, having limited power concerning the remaining two: the Common Foreign and Security Policy (CFSP), and the Justice and Home Affairs (JHA).<sup>18</sup>

Later on, with the signing of the Amsterdam Treaty in 1997, the Court extended its powers. Indeed, issues from the third pillar<sup>19</sup> were transferred to the first pillar like asylum policy, migration and judicial co-operation in civil matters.<sup>20</sup> Previously, these issues were settled between the Member States, on a clearly intergovernmental basis.

With the Treaty of Nice signed in 2001 preparing the EU for its future enlargement with ten new Member States, the Court gained further competences in a wider range of political areas. It is granted jurisdiction in disputes relating to EU industrial property rights.<sup>21</sup> The Treaty envisaged the creation of specialised judicial panels to hear cases in specific areas. Accordingly, following a practice in the Member States, a specialised EU tribunal could be created to deal with disputes in the field of employment and industrial relations.<sup>22</sup> Indeed, one such specialised tribunal has been created to deal with cases involving staff employed by the EU institutions: the Civil Service Tribunal.

With the Lisbon Treaty the three pillars' structure of the Maastricht Treaty disappeared.<sup>23</sup> Since 2009, the field of police and criminal justice became part of the general law. So, any national court or tribunal has now the ability to request a preliminary ruling from the Court. Yet, transitional provisions provide that full jurisdiction cannot apply until 2014.<sup>24</sup>

<sup>15</sup> BLANKE, Hermann-Josef and MANGIAMELI Stelio (Eds) – *The European Union After Lisbon: Constitutional Basis, Economic Order And External Action*. New York: Springer. 2011

<sup>16</sup> *Ibid*, paragraph 3, p. 27

<sup>17</sup> Three pillars: the European Communities, Common Foreign and Security Policy (CFSP), and police and judicial cooperation in criminal matters (JHA)

<sup>18</sup> GRIEGO, Joseph M. – The Maastricht Treaty, Economic and Monetary Union and the Neo-Realist Research Programme. *Review of International Studies*, Vol. 2, 1995, p.p. 21-40

<sup>19</sup> Pillar named under the Amsterdam Treaty: Police and Judicial Co-operation in Criminal Matters (PJCC)

<sup>20</sup> MONAR, Jörg and WESSELS, Wolfgang – *The European Union after the Amsterdam Treaty*. London: Continuum. 2001

<sup>21</sup> Article 262, Treaty on the Functioning of the European Union (TFEU)

<sup>22</sup> LAURSEN, Finn – *The Treaty of Nice: Actor Preferences, Bargaining and Institutional Choices*. Leiden: Martinus Nijhoff. 2006

<sup>23</sup> DUFF, Andrew – *Saving the European Union: the logic of the Lisbon Treaty*. London: Shoehorn. 2009

<sup>24</sup> In Article 10 of Protocol No 36 on transitional provisions (Official Journal 115, 09/05/2008 P. 0322 – 0326, also available on line at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/36:EN:HTML> Last access: 1<sup>st</sup> of September, 2011), it is provided that, as a transitional measure, the powers of the Court of Justice are to remain the same with respect to acts in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into

In addition, the Court has jurisdiction to rule on measures taken on grounds of public policy in connection with cross-border controls. Likewise, under the Lisbon Treaty, the Charter of Fundamental Rights of the European Union gained the same legal value as the Treaties.<sup>25</sup>

Yet, the Member States' preferences still define national participation. The EU remains a mainly intergovernmental organization although the European project has been developing and growing further over the years. For instance, the Charter of Fundamental Rights cannot be invoked against two Member States with significant population, United Kingdom and Poland. As Article 1 of the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom states the Charter does not extend the ability of the Court of Justice or of any Court or tribunal of those two Member States to find that any decision or action is inconsistent with the fundamental rights, freedoms or principles that it reaffirms.<sup>26</sup>

In addition, the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) still remain subject to special rules and specific procedures. Political decisions concerning Security and Defence remain highly intergovernmental, as national sovereignty and interests are the key determinants of these decisions. Therefore, the Court of Justice does not have jurisdiction to monitor provisions relating to those policies. The Court does only have jurisdiction to monitor the delimitation of the EU's competences and the CFSP, CSDP. For instance, it has jurisdiction over actions for annulment brought against decisions providing for restrictive measures adopted by the Council against natural or legal persons. The Court has jurisdiction in connection, for example, with measures combating terrorism.<sup>27</sup>

So, it is clear that, a number of important changes were made to the Treaties covering the EU's legal institution in order to prepare for enlargement, improving their function and amending their responsibilities. Indeed, all Treaties have strengthened the role of the Court and have advanced the integrationist process even in a minor way. And the Lisbon Treaty is the latest in a line of Treaties amending and extending Court's competencies. But, there is, for example, no fundamental upheaval in the EU's institutional structure nor a great extension to the institutional competencies, neither of the Court nor of any other institution. There is no attempt to transform the intergovernmental nature of the EU.

However, the current financial crisis seems to make this transformation more urgent than ever before. On 2 March 2012, the EU leaders with the exception of the United Kingdom and the Czech Republic signed a Treaty on Stability, Coordination and Governance (TSCG) in the Economic and Monetary Union. The main aim of the Treaty is to safeguard the stability of the euro area as a whole.<sup>28</sup>

*The EU Court of Justice will be able to verify national transposition of the balanced budget rule. Its decision is binding, and can be followed up with a penalty of up to 0.1% of GDP, payable to the European Stability Mechanism in the case of euro area member states.*<sup>29</sup>

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force of the Treaty of Lisbon. This transitional measure is to cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

<sup>25</sup> See Art. 6, paragraph 2, TEU that provides that 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. See, also, Protocol No 8 to the Lisbon Treaty that requires a certain number of substantive guarantees necessary in an agreement relating to the accession so that the specific characteristics of EU law will be preserved.

<sup>26</sup> See Protocol No 30 annexed to the Treaty on the Functioning of the European Union (TFEU) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law).

<sup>27</sup> CROWTHER Simon – "EU court to rule on fairness of keeping evidence secret from terrorist suspects". *The Guardian*. 16<sup>th</sup> of June, 2011 Available on line: <http://www.guardian.co.uk/law/2011/jun/16/eu-court-evidence-terrorist-suspects> Last access: 12th of September, 2011

<sup>28</sup> Treaty on Stability, Coordination and Governance (TSCG) in the Economic and Monetary Union [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf)

<sup>29</sup> Press Release, Consilium Europa 2<sup>nd</sup> of March 2012: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/128454.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/128454.pdf) last access: 10th of July, 2012

Under this Treaty, the Court is gaining a central role in fiscal and welfare policy-making. The new law is to be introduced into the national law of each of the signatory states within one year of the Treaty coming into force and this introduction should be permanent and if possible constitutional. A constitutional alteration towards this direction would mean certainly a significant step towards further European integration.

#### 4. Case law and European principles

During the years, the Court itself, not only has interpreted law but has also helped Member States *to clarify and extend EU policy and develop and foster the EU's spirit*.<sup>30</sup> The Court of Justice goes beyond merely giving an interpretation of the written rules, it clarifies and extends them.

The Court has exercised the greatest influence in strengthening and extending EU policy competences in regard to the internal market.<sup>31</sup> Furthermore, the powers and functions of the European institutions have been affected considerably by the Court's jurisdiction.

The Court has set important principles that were never mentioned in the Treaties. These principles, which were created by Court's case-law, were innovative and revolutionary.<sup>32</sup> But, what were these original principles which were so important for the European integration?

For the purpose of this study, particular attention is given to the three principles that largely define the relation between the EU and national law, the principles responsible for offering what makes EU today a unique phenomenon in the international organizations' history: direct effect, primacy and state liability. In fact, ordinary international Treaties can only have an effect in the domestic legal order of a state if that state performs some act to introduce the Treaty contents into its legal order.<sup>33</sup>

In 1962, a Dutch national court referred a case between a Netherlands customs agency and a Dutch import firm, Van Gend en Loos, to the Court.<sup>34</sup> The firm claimed that the Dutch government had violated a Treaty provision prohibiting Member States from enacting new import taxes on goods once the state had entered the European Community (EC). In particular, it had violated Article 12 of the European Economic Community (EEC) Treaty which provided as follows:

*Member states shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.*<sup>35</sup>

*The result is first that the effect of Community law on the internal law of Member States cannot be determined by this internal law but only by Community law, further that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later.*<sup>36</sup>

<sup>30</sup> NUGENT, Neill – *The Government and Politics of the European Union*. 7th Edition. European Union Series: Palgrave Macmillan. 2010, p.225

<sup>31</sup> NUGENT, Neill – *The Government and Politics of the European Union*. 7th Edition. European Union Series: Palgrave Macmillan. 2010; POLLACK, Mark – *The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union*. Oxford: Oxford University Press. 2003; TALLBERG, Jonas – *European Governance and Supranational Institutions: Making States Comply*. London: Routledge. 2003

<sup>32</sup> WEILER, Joseph – *The Constitution of Europe: "Do the new clothes have an emperor?"*. Cambridge University Press, 1999

<sup>33</sup> The domestic law of every country contains constitutional rules which deal with the status of international law in their domestic legal system. It is these rules which determine how international law can take effect in national law.

<sup>34</sup> Judgment of the Court of the 5<sup>th</sup> of February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie – Pays-Bas. Case 26-62. 1963. Available on line in Eur- Lex. Access to European Union Law: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:NOT> Last Access: 1<sup>st</sup> of September 2011

<sup>35</sup> Article 12 of the European Economic Community (EEC) Treaty

<sup>36</sup> *Ibid*, Case 26/61, p. 7



The principle of direct effect was, thus, established by the European Court of Justice.

However, even after the doctrine of direct effect was created, the question of which law – national or European – was supreme if both coexisted, still remained. In 1964, the Court was able to resolve this conflict with the *Costa v. Enel* case. In this case, there was a conflict between Italian laws on the national electricity monopoly and EC provisions allowing for the free movement of goods. The Court of Justice established a clear hierarchy between European and national law, stating that:

*By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*<sup>37</sup>

Consequently, EU law constitutes an autonomous legal system, imposing obligations and rights on individuals and states, limiting their sovereignty. The unprecedented fact about this particular case was that it marked the first time a private actor claimed a European law in its own defense.

Member States initially gave the Court's powers to hear disputes between states and the EU's governing institutions in an effort to keep EU's institutions checked. With both the *Van Gend en Loos* and *Costa v. Enel* decisions, the Court established the core foundational principles of EU law, direct effect and primacy, constructing a decentralized enforcement mechanism for EU law. These decisions reinforced the role of the Court of Justice by allowing individuals to invoke European law in national courts.<sup>38</sup>

Over the decades, the Court of Justice has elaborated on this principle in a series of judgments, gradually expanding the scope of direct effect so that it now applies to most secondary legislation, namely directives. A situation that has provoked much criticism on the part of Member States, who argued that EU directives only acquire legal force once they have been adopted within national law.<sup>39</sup>

The Court of Justice continued to refine its legal doctrine throughout the 1980s and 1990s, and a good example is the 1991 landmark decision of *Francovich and Others v. Italy*.<sup>40</sup> In this particular case, *Francovich et al.* sued the Italian government for failing to provide them with their salaries even after their employer had become insolvent. In the *Francovich* decision, the Court ruled that individuals are entitled to financial compensation if they are “*adversely affected*” by the failure of a Member State to carry out an EU directive within the prescribed timeframe.<sup>41</sup>

In this manner, the Court announced the doctrine of state liability, which claimed that a national court can hold a state financially accountable for damages provoked by individuals due to the failure to implement correctly EU legislation. In other words, the *Francovich* ruling extended the Court's jurisdiction on matters relating to secondary legislation, or any regulations, directives or decisions made by the European Commission, Parliament, or Council. Consequentially, the

<sup>37</sup> Judgment of the Court of 15 July 1964 *Flaminio Costa v E.N.E.L.* Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. Case 6-64. Available at Eur Lex: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0006:EN:PDF> p. 593 Last Access: 1<sup>st</sup> of September, 2011

<sup>38</sup> ALTER, Karen J. – “Who are the ‘Masters of the Treaty?’ European Governments and the European Court of Justice” *International Organization*. Vol. 52, N° 1, 1998, p.p. 121-147

<sup>39</sup> NUGENT 2010, p. 292; Stone Sweet 2004, p. 68

<sup>40</sup> Judgment of the Court of 9 November 1995. – *Andrea Francovich v Italian Republic.* – Reference for a preliminary ruling: Pretura circondariale di Vicenza – Italy. – Social policy – Protection of employees in the event of the insolvency of their employer – Directive 80/987/EEC – Scope – Employees whose employer is not subject to procedures to satisfy collectively the claims of creditors. – Case C-479/93 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0479:EN:HTML> Last Access: 1<sup>st</sup> of September, 2011

<sup>41</sup> Gateway of the European Union: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0006:EN:NOT>

potential range of claimants bringing a case against a Member State to the Court became almost unlimited.

Certainly, the above mentioned cases have fundamentally transformed the role of the Court to a monitor of compliance by EU Member States. But what proves that Member States accept the Court's supremacy over national law?

Member States do respect and tend to comply with EU law. Without that compliance the EU could not continue to develop and advance. However, occasionally Member States do negotiate certain opt-outs from legislation or Treaties of the European Union. This means that certain members do not have to participate in certain policy areas. At present, five countries have such opt-outs: Denmark, Ireland, Poland, Sweden and the United Kingdom.<sup>42</sup>

For instance, the UK, as mentioned above, does not participate in the Chapter of Fundamental Rights of the EU. The related Protocol states that the Charter does not extend the ability of the Court to find that UK law is inconsistent with the rights and principles exposed in the Charter.

Similarly, national courts can and have shown disapproval of Court activism sometimes even threatening to disobey. The German constitutional Court in its recent judgment on the Lisbon treaty signaled that *should European law continue to threaten the core of the German constitutional settlement – the German “social state” – that Court would be obliged to disapply European law.*<sup>43</sup>

Member states have also taken to writing clauses into EU Treaties and legislation protecting national policies. For instance, the Danish government insisted on a provision in the Maastricht Treaty that allows it to ban Germans from buying vacation homes, and the Irish government demanded a protocol making it clear that nothing in EU law will interfere with Ireland's constitutional ban on abortion.<sup>44</sup>

Yet in many case, Member States had to accept legal decisions that really challenged the principle of national sovereignty. In the Cassis de Dijon case<sup>45</sup> the Court, in its preliminary ruling on a German regulation blocking the sale of a French liqueur because it did not meet particular German criteria on alcoholic beverages, declared that the German government's quantitative restrictions constituted an illegal barrier to trade. Similarly, the Kramer Case<sup>46</sup> concerning the establishment of a common structural policy for the fishing industry in the Netherlands, the Court stated that action by the EC in a particular area of competence deprives national authorities of their powers to act independently.

Yet, Member States continue to invest their trust in the Court's decisions in the long run, even though they may appear to be at odds with domestic interests in the short term.<sup>47</sup>

<sup>42</sup> TSEBELIS, George and GARRETT, Geoffrey. “The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union.” *International Organization*. Vol. 55, N° 2, 2001, p.p. 357-390; NUGENT, Neill – *The Government and Politics of the European Union*. 7th Edition. European Union Series: Palgrave Macmillan. 2010, p. 225; POLLACK, Mark – *The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union*. Oxford: Oxford University Press. 2003; TALLBERG, Jonas – *European Governance and Supranational Institutions: Making States Comply*. London: Routledge. 2003

<sup>43</sup> Federal Constitutional Court – Press office – Press release no. 72/2009 of 30 June 2009 Judgment of 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09. Available at: <http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html> Last Access: 1st of September, 2011

<sup>44</sup> ALTER Karen J. – “The European Union's Legal System and Domestic Policy: Spillover or Backlash?” *International Organization*. Vol. 54, N° 3, Summer 2000, p.p. 489–518

<sup>45</sup> Judgment of the Court of 20 February 1979. Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein. Reference for a preliminary ruling: Hessisches Finanzgericht – Germany. Measures heaving an effect equivalent to quantitative restrictions. Case 120/78. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978CJ0120:EN:PDF> Last Access: 1<sup>st</sup> of September, 2011

<sup>46</sup> Judgment of the Court of 14 July 1976. Cornelis Kramer and others. References for a preliminary ruling: Arrondissementsrechtbank Zwolle et Arrondissementsrechtbank Alkmaar – Netherlands. Biological resources of the sea. Joined cases 3, 4 and 6-76. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0003:EN:HTML> Last Access: 1<sup>st</sup> of September, 2011

<sup>47</sup> Geoffrey GARRETT, R. Daniel KELEMAN, and Heiner SCHULZ. The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 52 (1): 150.1998



The European Union has established a strong legal order over the years. The Court of Justice has been successfully pursuing its political programme of European integration, with important accomplishments taking place over the years. It must be noted, in this respect, that a total of 1.406 cases were brought before the three Courts comprising the Court of Justice in 2010. According to the 2010 Annual Review, this figure is the highest in the institution's history and reflects the constant increase in the volume of European Union litigation. However, the year 2011, with 1.569 new cases and 1.518 cases completed, was a year marked by an even more intense judicial activity.<sup>48</sup>

Certainly, the Court is neither a "master" nor a "servant" of the Member States. The institutions can determine the sequence of moves, the choices of actors and the information they control.<sup>49</sup> But, at the same time, states hold the power of policy decision and action.

These empirical conclusions have been put into perspective by some significant theoretical work too.

Neofunctionalism predicts that the drivers of EU legal integration are the supra-national and sub-state actors pursuing their own self-interest. So, the Court and the lower national courts of Member States are the key players involved in the development of a supra-national legal order in the EU.<sup>50</sup> Furthermore, as Sweet claims "*principals are not unified entity; rather they are represented by a multiple of governments who will typically exhibit divergent interests on any important policy issue on which the Court takes a position*".<sup>51</sup>

Yet, according to liberal intergovernmentalism, Court's policies make Europe quiet powerful and unique as an international actor.<sup>52</sup> The Court is itself limited by political and legal constraints imposed by Member States. Indeed, states remain important as the main political actors of the EU's decision making system and as the main agents that implement EU law.

## 5. Some Conclusions and Future Perspectives for the Court

The Court is a key institution of the European Union. The Court, indeed, has pushed forward integration process, during its existence, in important ways, clarifying and extending EU law.

Under the current financial crisis, many scholars as well as politicians urge for deeper integration.

EU president Barroso claimed recently that "*If we do not move forward with more unification, we will suffer more fragmentation*".<sup>53</sup> Many scholars have claimed also that in a rather counterintuitive manner, crises tend to push integration forward.<sup>54</sup> The current crisis has, however, posed serious challenges regarding the future integration of the EU. Some significant

<sup>48</sup> In 2010, the Court had 631 new cases brought before it (without account being taken of the joinder of cases on the ground of similarity), which amounts to a very significant increase compared with 2009 (562 new cases). See: President Skouris and Annual Report 2011 [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/) Annual Report 2010: Available on Line: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010\\_version\\_integrale\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_version_integrale_en.pdf) Last access: 12<sup>th</sup> of September 2011

<sup>49</sup> TSEBELIS, George and GARRETT, Geoffrey. "The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union." *International Organization*, Vol. 55, N° 2, 2001, p.p. 357-390

<sup>50</sup> BURLEY, Anne-Marie and WALTER Mattli. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization*. Vol. 47, N° 1, 1993, p.p. 47-76

<sup>51</sup> SWEET, Alec Stone, "The European Court of Justice and the Judicialization of EU Governance". *Faculty Scholarship Series*. Paper 70, 2010

<sup>52</sup> MORAVCSIK, Andrew – *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht*. NY: Cornell University Press, 1998

<sup>53</sup> WATERFIELD, Bruno – EC president Barroso urges deeper economic integration. The Telegraph. 28<sup>th</sup> of September, 2011. Available at: <http://www.telegraph.co.uk/finance/financialcrisis/8793520/EC-president-Barroso-urges-deeper-economic-integration.html> Last access: 29<sup>th</sup> of September, 2011

<sup>54</sup> SCHMITTER, Philippe C. "The Future of Democracy in Europe". Lecture given at the Fundacao Getulio Vargas, Rio de Janeiro, 21 of February, 2011; TSOUKALIS, Loukas – *The New European Economy – The Politics and Economics of Integration*. Oxford University Press: Oxford. 1993.

divisions have urged debates not only on the possibility of further integration, but also on the form that this integration will be achieved.

Yet either outcome, more or less Europe, shall have an important impact on the future role of the Court both related to its power as the main legal institution of the EU and to its power as a political actor shaping the path for further integration.

Member States have already provided a lot of both political and financial capital. The European Financial Stability Facility (EFSF) is backed for a total of €780 billion by guarantee commitments from the euro zone Member States. It also has a lending capacity of €440 billion. Still, a European fiscal union remains a really ambitious project.

A fiscal union requires fiscal solidarity among taxpayers and a larger than the current EU budget. A fiscal union also requires the creation of a federal economic government. This means that the Commission must be made capable of running a common economic policy, with the power to coerce governments that disobey financial order, held to account by the European Parliament and fiscalised by the Court of Justice.<sup>55</sup> An important step towards this direction was made with the signing of the Treaty on Stability, Coordination and Governance on March 2012, as the Court gained a fundamental role in fiscal and welfare policy-making.

*For the euro area to be credible – and this is not only the message of the federalists, this is the message of the markets – we need a truly community approach.*<sup>56</sup>

Yet, EU leaders should follow the message of the markets and prove their commitment over and over again. Today as in the past, reacting to the pressure of facts may be the only way forward.

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<sup>55</sup> Andrew DUFF is a Liberal Democrat MEP and president of the Union of European Federalists. See article in *Financial Times*: <http://www.ft.com/cms/s/0/44758780-e80f-11e0-adbf-00144feab49a.html#axzz1ZelsBWsy> Last access: 3<sup>rd</sup> of October, 2011

<sup>56</sup> News available at the official site of Euro news at: <http://www.euronews.net/2011/09/28/barroso-urges-economic-union-in-face-of-euro-crisis/> Last access: 3<sup>rd</sup> of October, 2011

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