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Summary

This paper provides an overview of litigation activity under Articles 226, 230, and 234 TEC, and an assessment of the European Court's consequent impact on integration. It should be read in conjunction with the paper, "Note on the Data Sets: Litigating EU Law under the Treaty of Rome," which describes the data we have collected and suggests various ways in which these data might be used. When we compare what the ECJ does under Article 226, Article 230, and Article 234, we see that the ECJ actually presides over three quite distinctive systems. Each system has developed its own evolutionary dynamics, and each has impacted on European integration in different ways.

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I. The Community Courts

The European Court of Justice (ECJ) has never been, and has not become, a "Supreme Court" in the American sense of that term. There are no "European Union" courts of first instance, regional courts, or "federal" courts within national territory (though some scholars think that there should be).[1] The implementation of EC law at national level is left to the national courts, which have been assigned the dual function of administering national and EC law. Technically then, the term, "Community Courts," covers all national courts within the European Union that administer and apply EC law, in which sense it is used to emphasise the double loyalty of national courts to the national legal order and to the Community.[2] It is the function of these courts to see that EC law is integrated into the national legal system.

Under Article 226, the ECJ adjudicates suits brought by the Commission against Member States for non-compliance with EC law. Otherwise, neither the European Court of Justice (ECJ) nor the Court of First Instance (CFI)[3] have jurisdiction over the acts or omissions of national governments and administrations. Technically, under Article 234, these Courts only advise national judges on matters at national bar, although the ECJ's doctrine of supremacy lends an edge to that term. National courts, on the other hand, are not competent to question the validity of acts of the Community and its institutions, a competence which is the province of the ECJ and the CFI under Article 230 (action for annulment). This division of competences gives the legal order its unique character.

II. Article 226: International Law "Plus"

In the Treaty of Rome establishing the EC (TEC), the Member States neither provided for the supremacy of EC law in national legal orders, nor for the direct effect of Treaty provisions and EC directives (but see part III). Instead, they designed an enforcement system that we would characterize as "international law plus," the "plus" being (a) the compulsory nature of the Court's jurisdiction, and (b) the participation of a supranational authority – the European Commission – in various proceedings. Under Article 227 TEC,[4] a Member-State may bring a

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1 Notably Jean-Paul Jacqué and Joseph Weiler, "On the Road to European Union - A New Judicial Architecture. An Agenda for the Inter-Governmental Conference," 27 *Common Market Law Review* (1990): 83. See also Taki Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?," in T. Tridimas and P. Nebbia (eds), *European Union Law for the 21st Century* (Oxford: Hart Publishing, 2004, vol. 1).

2 See Imelda Maher, "National Courts as EC Courts," 14 *Legal Studies* (1994): 226; Imelda Maher, "Community Law in the National Legal Order: A Systems Analysis," 36 *Journal of Common Market Studies* (1998): 237; Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing, 2005).

3 The European Court of Justice was established by the Treaty of Rome in 1957, and the Court of First Instance was added by the Treaty of Nice in order to deal with the serious overloading and backlog of cases in the ECJ. TEC Article 220 provides the two courts with an identical remit: "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed."

4 Article 227 EC: "A Member State which considers that another Member State has failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice."

complaint against another Member-State; if the Commission determines that the complaint is founded, and if the defendant state refuses to settle, the case could go to the Court. Article 227 is a virtual dead letter, having been used on only a handful of occasions.

Under Article 226 TEC,[5] the Commission may initiate "infringement proceedings" – also called "enforcement actions" – against a Member State for non-compliance with EC law; rounds of negotiation with the government then ensue; if these fail, the Commission may refer the matter to the Court for decision. The Commission is under no obligation to bring proceedings; its discretion under Article 226 is absolute. The Treaty of European Union added a new provision (to Article 228 TEC[6]) enabling the ECJ to fine Member States for failure to comply with an enforcement ruling.

The Commission was reticent to use enforcement actions aggressively until the late-1970s, a posture it gradually abandoned as legal integration through Article 234, and the drive toward completing the Single Market (harmonization) proceeded. In the 1980s, the Commission began, in Snyder's words, to use "litigation as an element in developing longer-term strategies. Instead of simply winning cases, it is able to concentrate on establishing basic principles or playing for rules."[7] The Commission also uses its prosecutorial powers in the service of its legislative agenda. Prior to the signing of the Single Act, for example, it initiated a wave of proceedings to give agency to an emerging "mutual recognition" strategy first suggested by the ECJ in its famous *Cassis de Dijon*[8] decision in the domain of free movement of goods. At the same time, it began to prosecute Member States more aggressively for failures to properly implement EC directives governing the Common Market (coded as "approximation of laws"). After 1986, this latter activity becomes the dominant source of enforcement actions, and free movement of goods proceedings drop off sharply. As the EC legislator pushed to "complete" the internal market by 1992, it withdrew whole classes of potential disputes from the Court's free movement of goods docket, while making the politics of harmonization and implementation more salient.[9]

It was not until the 2002 *White Paper on Governance* that the Commission established a transparent set of enforcement priorities.[10] Today these include: the effectiveness and quality of transposition of directives (described as the most effective way of avoiding individual problems arising at a later stage); situations involving the compatibility of national law with fundamental Community principles; cases that seriously affect the Community interest (e.g., cases with cross-border implications) or the interests that the legislation intended to protect;

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5 Article 226 EC: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

6 The relevant provision states: "If the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it." The first Member State to be fined under this provision was Greece (Commission v. Greece, ECJ C-387/97, 2000).

7 Francis Snyder, "The Effectiveness of European Law," Modern Law Review 56 (1996): 19; Tanja Börzel, Tanja Börzel, "Guarding the Treaty: The Compliance Strategies of the European Commission," 6 The State of the European Union: Law, Politics, and Society (2003): 197-220..

8 Cassis de Dijon, Case 120/78 [1979] E.C.R. 649.

9 Alec Stone Sweet, The Judicial Construction of Europe (Oxford: Oxford University Press, 2004): ch. 3.

10 Twenty-first annual report on monitoring the application of Community law COM (2004). European Governance: A White Paper, COM (2001). These criteria are elaborated in (the follow-up) Commission Communication, Better Monitoring of the Application of Community Law COM(2002)725 final/4 at 11-12.

cases where a particular piece of European legislation creates repeated implementation problems in a Member State; and cases that involve Community financing.

Until recently, social scientists did not produce much serious empirical work on Article 226 activity, though Jonas Tallberg's work is an important exception.[11] As far as we are aware, Tanja Börzel's project on the politics of compliance and enforcement actions is the most systematic, and a series of new papers will be forthcoming soon.[12] Stone Sweet collected and analysed data on who wins and loses once enforcement action reaches the ECJ. In the domains of the free movement of goods, sex equality, and environmental protection, the Commission prevails against Member States in well over 90% of all cases.[13]

II.1 Procedures[14]

Article 226 provides for a two-stage process in cases of infringement, part administrative, part judicial. Stage 1 involves delivery of a "reasoned opinion"; stage 2 forsees application to the Court, and a judicial ruling on the merits. In the absence of further instructions, the Commission used wide discretion to devise procedures. Although the only reference is to the reasoned opinion, the development of the process saw the decision-making chain lengthened. Typically, the Commission initiates matters with an informal letter indicating its reasons to suspect a violation and demanding further information and observations. Then there is the "formal phase" of the administrative stage, inaugurated by the "Article 226 letter," a formal request to the Member State to submit observations (a response). Despite the mandatory wording of the Article, the Commission resorts to a reasoned opinion only if no agreement can be reached, and only at this point does it take an explicit decision as to whether there has been non-compliance such as to warrant proceeding to the judicial stage.

The Commission sees the primary objective of infringement proceedings to be Member States *compliance* with EC law. The expansive procedural development at the administrative stage reflects and reinforces the idea of a co-operative enterprise culminating in voluntary compliance. Craig and de Burca observe that the Commission "makes much of and clearly values, this 'elite cooperation' dimension of the infringement procedure which enables disputes over enforcement to be resolved without actual recourse to the Court."[15] Snyder, in his analysis of the process as it operated around 1990, characterised the procedure as the "administrative negotiation of effectiveness," with the "main form of dispute settlement" being negotiation, with litigation a "sometimes inevitable but nevertheless generally a minor part" of the process.[16]

In this view, the Court is essentially an adjunct to a political and administrative procedure and, until very recently, the Commission has stood on this position. In contrast, the ECJ has always stressed the judicial aspect of the procedure, seeing itself as a central player. Its pre-

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[11] E.g., Jonas Tallberg, "Paths to Compliance: Enforcement, Management, and the European Union," 56 *International Organization* (2002): 609-43.

[12] See Börzel, "Guarding the Treaty: The Compliance Strategies of the European Commission," op cit.; Tanja A. Börzel, Tobias Hofmann, and Diane Panke, "Who's Afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance," ECPR Joint Sessions, Granada, April 14-19, 2005 (paper on file with the authors).

[13] Stone Sweet, *The Judicial Construction of Europe*, op cit.

[14] This section is based on Carol Harlow and Richard Rawlings, "Accountability and Law Enforcement: The Centralised EU Infringement Procedure," 31 *European Law Review* (2006): 447-475.

[15] Paul Craig and Grainne de Burca, *EU Law. Text, Cases and Materials*, (Oxford: Oxford University Press, 2003): 401.

[16] Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques," op cit.:19, 27.

ferred vision is of a two-stage procedure, in which the first, Commission-executed, administrative stage is gradually re-modeled as the pre-litigation stage of a judicial process, a change accelerated by reforms inside the Commission and by the transformation of Article 228.

In line with the Commission's view of the procedure, the initial informal phase will, in Hartley's words, "be conducted with discretion: the Commission will try to avoid press publicity and the embarrassment that might result for the defendant Member State."[17] Third parties – individuals and companies – can and do lobby the Commission to bring Article 226 actions, and they work to provide the Commission with evidence on non-compliance on the part of Member States. Access to documentation, notably the formal letter of notice and the reasoned opinion, however, has not been granted to third parties, an unvarying source of complaint.

The attitude of the ECJ to Article 226 procedure has been spelled out in three rather different lines of cases. In the first, the Court confirmed the Commission's position at the heart of the process and constructed a wall around Commission discretion. Attempts by informants to compel the Commission to take court action are characteristically rejected out of hand, each new case confirming the so-called "Star Fruit principle," according to which an attempt by a third party to attack the Commission's decision-making under the first stage of Article 226 is inadmissible.[18] In the early cases, the Court's chosen ground was that "the part of the procedure which precedes reference of the matter to the Court constitutes an administrative stage." It followed that no measure taken by the Commission during this stage could be attacked because it had no binding force.[19] Later cases invoke lack of standing or interest to sue.

In a second line of cases, the ECJ emphasized accountability and transparency. Beginning to treat the administrative stage as "pre-litigation procedure," the Court grafted on to it the judge-made "essential guarantees" generally accorded to parties involved in administrative procedures. The reasoned opinion must be carefully drafted. It stands as the basis of the court proceedings and the Commission is held firmly to the grounds of complaint set out there, which must precisely specify the grounds of complaint and cannot be varied.[20] The defendant state must be granted an opportunity to submit observations, a reasonable time to prepare a "defence," a date by which to comply, and so on.[21]

A third line of cases sees the Court reflecting on Article 226 proceedings in the course of litigation relating to the workings of specific regimes of enforcement. A leading example is the recent *max.mobil* case, brought under the parallel provision of Article 90 TEC (which is applicable in competition cases). The ECJ's ruling effectively confirms the restrictive jurisprudence on the "standard" infringement procedure. We emphasize this case because it clearly demonstrates how much enforcement actions remain an affair between the Commission and the Member States, with individuals left on the sidelines.

In the 1990s, a mobile telephone operator challenged the Commission's refusal to bring infringement proceedings against Austria under Article 90 TEC. The Commission, analogizing from Article 226, argued that it was entitled "freely to decide what action to take, without

[17] Trevor Hartley, *The Foundations of European Community Law* (Oxford: Oxford, Oxford University Press, 2003): 311.

[18] Case 247/87 *Star Fruit v. Commission* [1989] E.C.R. 291.

[19] Case 48/65 *Lutticke v. Commission* [1966] E.C.R. 19.

[20] Case 293/85 *Commission v Belgium* [1988] E.C.R. 305; Case 439/99 *Commission v Italy* [2002] E.C.R. I-305; Case C-350/02 *Commission v Netherlands* [2004] E.C.R. I-6213.

[21] There is a copious case law stretching back many years. For the modern approach, see Case C-1/00 *Commission v France*, discussed fully below.

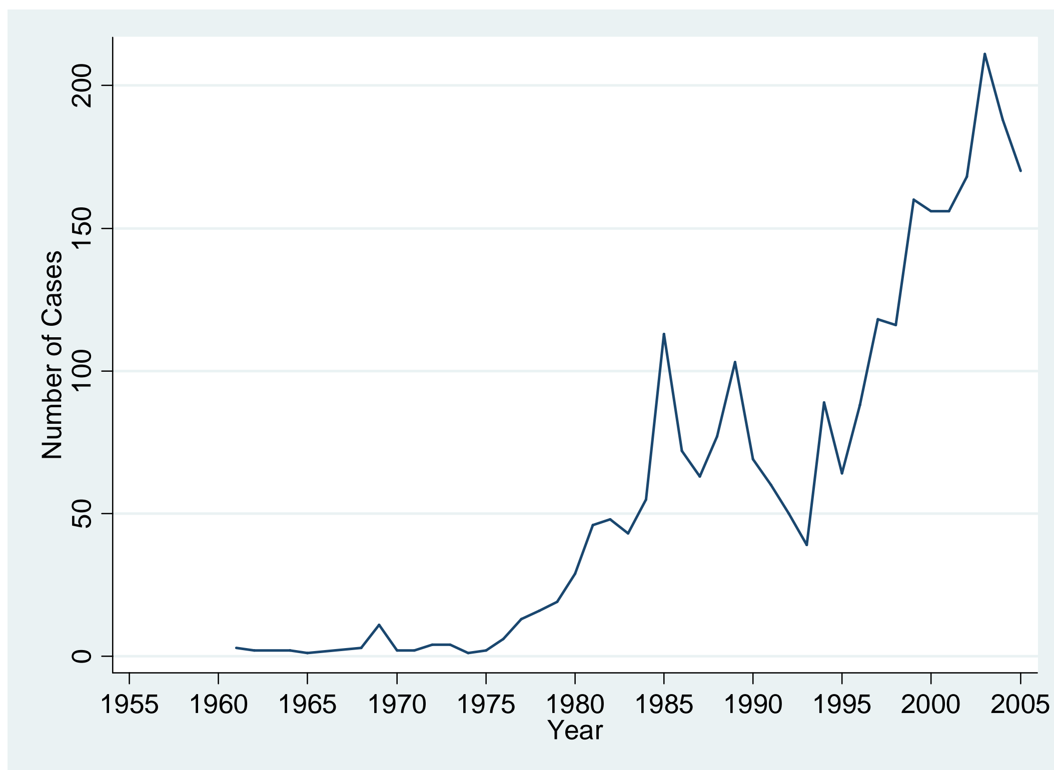
having regard to complaints or even the interests of private individuals."[22] Advocate General Poiares Maduro declared himself not much impressed, although he did admit that – exceptionally – the company was "individually concerned." Regarding Article 226, the Advocate General saw "a fundamental difference in the conception and nature of the controls provided for in the Treaty." Article 226 was a procedure "closed to private persons," which conferred no rights on them and by which "no direct relationship with individuals" is created. To put this somewhat differently, Article 226 proceedings involve only the general public interest. In the Grand Chamber of the ECJ, the case was thrown out on standing grounds. A determinedly "international law plus" model of Article 226 was confirmed, stifling development of a more participatory, individual-oriented system.

II.2 Article 226 Activity

The data set comprises information on the first 2,647 infringement proceedings brought to the ECJ, byt the Commission, through 2006. In these actions, the European Commission raised 5,002 separate claims alleging that Member States were in violation of one or more provisions of EC law. For each case, we collected the following information: the name of the defendant Member State; the year and case number given to the action by the Court; the status of the case at the time we coded the data (withdrawn, pending, disposed of by a judgment); the date of the Court's decision where a judgment on the merits was reached; the substantive area(s) of EC law in which the Member State is alleged by the Commission to be in violation. Figure 1 plots the annual number of infringement proceedings, from the first enforcement action (1961) through 2005. Since the late-1990s, the Court has received between 150 and 200 Article 226 actions annually.

[22] Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] E.C.R. II-313, at para 21. See also on the relationship between Articles 226 and 90, Case C-107/95P *Bundesverband der Bilanzbuchhalter v Commission* [1997] E.C.R. I-947.

Figure 1: Infringement Proceedings under Article 226, per Year



Source: Alec Stone Sweet and Thomas L. Brunell, Data Set on Infringement Proceedings in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2006).

Table 1 charts Article 226 activity by policy domain: the subject matters of enforcement actions aggregated into the thirteen most important meta-domains in EU law.[23] The Table can be read as an indicator of how the Commission's priorities have changed over time, as a record of implementation failures on the part of the Member States, and with reference to the complex politics of implementation that take place in the EU. Notably, infringement proceedings constituted 25% of all enforcement actions brought to the Court in the 1981-85 period, a figure that has declined to 6% in the most recent period. Establishment (freedom to set up business and to provide services) has risen from less than 1% of proceedings in the 1981-85 period, and is now almost 25% of them.

[23] For an explanation of "meta-domains," see the Codebooks for the data sets.

Table 1: Distribution of Infringement Proceedings by Legal Domain and Period (Art. 226)

*Subject Matter***		1958-05*	58-75	76-80	81-85	86-90	91-95	96-00	01-05
Agriculture	%	**16.5**	**21.4**	**18.9**	**14.8**	**19.9**	**29.3**	**17.6**	**9.5**
	n	826	9	28	89	159	179	210	152
Free Movement of Goods		**11.1**	**33.3**	**21.6**	**24.8**	**17.2**	**11.5**	**4.6**	**6.2**
		557	14	32	149	138	70	55	99
Social Security		**0.7**	**0.0**	**1.4**	**0.3**	**1.7**	**0.2**	**0.8**	**0.4**
		35	0	2	2	14	1	9	7
Taxation		**5.3**	**21.4**	**8.1**	**7.6**	**7.5**	**5.2**	**5.2**	**2.9**
		267	9	12	46	60	32	62	46
Competition		**3.4**	**7.1**	**5.4**	**5.1**	**3.0**	**2.5**	**2.7**	**3.5**
		169	3	8	31	24	15	32	56
Approximation of Laws		**18.2**	**4.8**	**23.6**	**16.9**	**17.7**	**23.0**	**20.1**	**15.5**
		910	2	35	102	142	140	240	249
Transportation		**3.6**	**0.0**	**2.0**	**2.0**	**2.6**	**1.6**	**4.9**	**4.6**
		178	0	3	12	21	10	58	74
Establishment		**17.5**	**0.0**	**0.7**	**14.5**	**11.6**	**11.3**	**20.7**	**23.6**
		876	0	1	87	93	69	247	379
Social Provisions		**2.7**	**0.0**	**0.0**	**2.5**	**1.4**	**1.3**	**3.3**	**3.7**
		133	0	0	15	11	8	39	60
External		**0.5**	**2.4**	**0.0**	**0.5**	**0.4**	**1.1**	**0.3**	**0.3**
		23	1	0	3	3	7	4	5
Free Movement of		**2.1**	**2.4**	**1.4**	**1.2**	**2.1**	**2.6**	**1.7**	**2.7**
Workers and Persons		106	1	2	7	17	16	20	43
Environment		**10.6**	**0.0**	**4.7**	**4.8**	**7.0**	**6.4**	**12.6**	**15.5**
		530	0	7	29	56	39	150	249
Commercial Policy		**0.1**	**0.0**	**0.0**	**0.0**	**0.1**	**0.7**	**0.0**	**0.1**
		7	0	0	0	1	4	0	2
Other Domains		**4.8**	**7.1**	**2.6**	**4.0**	**7.6**	**1.7**	**3.5**	**8.6**
		382	3	18	30	62	20	67	182
Total Proceedings by Domain		**4999**	**42**	**148**	**602**	**801**	**610**	**1193**	**1603**
% of Total Proceedings by Domain		100***	0.8	3.0	12.0	16.0	12.2	23.9	32.1

Note: the data reported are based on filing dates of infringement proceedings (not dates of decision), through 2005. Proceedings can be filed in more than one issue area for the same case, and the table counts each of these domains. Percentages are rounded. Source: Alec Stone Sweet and Thomas L. Brunell Data Set on Infringement Proceedings in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

III. Article 230: Administrative Law

Under Article 230, the ECJ is empowered to: "review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties." This is a standard statement of the competence of an administrative court, giving to the ECJ the power of "judicial review" or "jurisdictional control." In line with French administrative law, on which the procedure of the court was modeled, Article 230 is completed by Article 232, which authorises the Court to act where the Parliament, Council or Commission "*in infringement of this Treaty, fail to act*."

Today, these powers are shared between the ECJ and CFI. The ECJ has exclusive jurisdiction in actions brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one Community institution against another. The CFI has first-instance jurisdiction in all other actions of this type, particularly in actions brought by individuals. Appeal from decisions of the CFI lies to the ECJ for error of law. It was not at first anticipated that there would be many appeals and the ECJ certainly did little to encourage them. Given the nature of the actions heard by the CFI, however, appeals could have been predicted. Its docket includes actions brought by the Member States against the Commission and against the Council in the highly contentious fields of state aid and "dumping," as well as direct actions brought by natural or legal persons against the Commission in competition cases, such as appeals against a Commission decision imposing a fine. These are all areas likely to involve multi-national corporations (MNEs), whose in-house lawyers were quick to transfer experience gained in the USA to the new litigation field of the European Community and its courts, helping to substantiate the often-made claim of the ECJ of a Community "based on the rule of law."

Studies show that most of the litigation conducted in the Community Courts involves MNEs and other large corporations: Microsoft, Sony, Air France, British American Tobacco and Hoffmann LaRoche are all names found in the Courts' registers, often in multiple applications and with the support of accommodating Member States.[24] This has given rise to a form of litigation strategy, veritable "sagas," whereby monopolies and huge commercial concerns consistently fight, often for many years, to retain monopoly interests through the Courts,[25] usually grounding their appeals in defective Commission procedure.[26] This type of litigant is well able to balance the costs of appeal against the advantages of the delay inherent in judicial proceedings. It is not then surprising to find that appeals from CFI decisions have climbed sharply: from around 60 in 2000 to around 80 in 2008.[27]

Academic attention has begun to focus on a crack opening up between the two Community Courts, rooted perhaps in different self-perceptions of their roles. Judge Koen Lenaerts, who has held office in both Courts, has described the restructuring of the Community legal system

24 See e.g., the Table in Francine Fines, *Etude de la Responsabilité extra-contractuelle de la Communauté* (Paris: LGDJ, 1990).

25 Christopher Harding, "Who Goes to Court in Europe? An Analysis of Litigation against the European Community," 17 *EL Rev* (1992): 105.

26 A typical "saga" is the tobacco litigation: see Joined Cases 142 and 186/84 *BAT and Reynolds v Commission* [1987] ECR I-2629; Case T-111/00 *BAT International v Commission* [2001] ECR II-2997; Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

27 ECJ, *Annual Report for 2007*, Table 2.

by the Nice Treaty as a new partition of the judicial hierarchy. The role of the ECJ was to be confined "to the examination of questions which are of essential importance for the Community legal order," strengthening its claim to be the Community's Constitutional Court. The CFI would be "the Community court of general jurisdiction at first instance," [28] charged with the trial of complex and lengthy competition or state aid cases. The fact that the case load is largely made up of Article 230 actions for annulment,[29] has led to the view that the CFI is emerging (and sees itself) as the Community's administrative court, concerned with the design and enforcement of administrative procedures, and practising "hard look" review.

Sharp doctrinal differences of opinion are also beginning to appear. Martin Shapiro, an American political scientist, once predicted, for example, that the ECJ would follow American courts in introducing "hard look review," according to which administrative agencies have to justify to courts every step in the reasoning on which agency decisions are based.[30] This they certainly might have done, basing themselves on TEC Article 253, which lays a general duty on all Community institutions to give reasons for their decisions.[31] Such a duty, Shapiro further claims, is the basis of all judicial review.

In the event, the ECJ did not walk down this road, rather attracting the opposite criticism that it is not as impartial as it ought to be, but is instead notably "soft" on the Community institutions – part of a wider debate over pluralism and integration in the EU in which many scholars have taken part. In a celebrated polemic, for example, Hjalte Rasmussen castigated the activist, integrationist role of the ECJ which, he claimed, was steadily pushing Member States in a direction they had not intended.[32] More objectively, Shapiro too has described how the ECJ has turned the provisions of the Treaty against the Member States.[33] There are some signs that the CFI might be more demanding. In the *Max.mobil* case, for example, the CFI imposed on the Commission an extensive and novel duty to take care in administering a party's file, which the ECJ was quick to reject.[34] The environmental and toxic chemical cases in which the CFI has been asked to apply the precautionary principle of TEC Article 174 suggest to some writers that the Court may in fact be embarking on "hard look" review; environmentalist tend on the other hand to argue that the exhaustive scrutiny of the reasons and documentation in which the CFI routinely indulges is merely a cover for its disinclination to intervene in cases involving complex scientific evidence.[35] The importance of the Courts' atti-

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[28] Koen Lenaerts, "The Future Organisation of the European Courts," *European Navigator* at www.ena.lu.

[29] In 2007, for example, 47% of the CFI's case load was made up by Art. 230 actions with a further 2.30% actions for failure to act. The only type of case to run this close was intellectual property (32.15%).

[30] Martin Shapiro, "The Giving Reasons Requirement," *University of Chicago Legal Forum* (1990): 179. And see Case 37/83 *Rewe-Zentrale AG v Direktor der Landwirtschaftskammer Rheinland* [1984] ECR 1229; Case 68/86 *UK v Council* (Re Agricultural Hormones) [1988] ECR 855.

[31] Article 253: "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

[32] Hjalte Rasmussen, *On Law and Policy in the Court of Justice* (The Hague: Martinus Nijhoff, 1986).

[33] Martin Shapiro, "The European Court of Justice," in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999).

[34] Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] II-0313, on appeal as Case C-141/02P *Commission v T-Mobile Austria GmbH* [2005] ECR I-1283

[35] See Case T-13//99 Pfizer [2002] ECR II-3305 noted Ladeur (2003) 40 CML Rev 1455, Wolf (2004) 41 CML Rev 1175; Case T-70//99 Alpharma v Council [2002] ELR II-3475; Case T-229/04 Sweden v Commission (judgement of 11 July 2007). For the ECJ, see Case C-331/88 R v MAFF ex p Federation de la Santé animale (FEDESA) [1990] ECR I-4023. And see Karl-Heinz Ladeur, "The Introduction of the Precautionary Princi-

tudes cannot be over-estimated in a world where risk regulation is moving steadily to the transnational level with MNEs as the main players.[36]

III.1 Access to the Courts

A further area of disagreement between the two courts concerns the right of "individuals" to bring a direct action under Article 230 known technically as "standing" or "interest to sue." No procedural issue has absorbed more academic attention. Perhaps unfortunately, the courts' standing rules are embedded in the Treaty. TEC Article 230 provides that "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

The nub of the standing problem lies in the notorious "*Plaumann* test,"[37] according to which "individual concern" is limited to persons or bodies that can be "differentiated from all other persons." This test, which excludes members of even a small class or group, renders it virtually impossible for an "individual" (a term that includes private corporations) to challenge the legality of EC regulations before the ECJ. As EC measures cannot be challenged before national courts, a serious "gap" in effective judicial protection is created, which can only be filled if a Member State decides to intervene.[38]

By the standards of most national courts, these rules are restrictive and there is wide academic consensus that they are too narrow, bringing into being a vast literature that is highly critical.[39] A tortuous jurisprudence has also been generated in an attempt to circumvent a rule that many would like to see abolished. In *Unión de Pequeños Agricultores*,[40] the ECJ had the opportunity to modify the restrictive *Plaumann* test and replace it with the more flexible notion of "substantial adverse effect." The Court refused to do so, laying responsibility for providing effective judicial protection firmly on the national courts. In so doing, the ECJ failed to give adequate recognition (as Advocate General Jacobs had done in his radical Opinion) to the procedural difficulties of litigation in the Community: the Community institution is not the subject of national proceedings, is not before the national court, and can neither be examined nor (except perhaps through an intervention) heard. The Court, however, refused to follow the

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ple into EU Law. A Pyrrhic Victory…," 40 CML Rev (2003): 1455; Veerle Heyvaert, "Facing the Consequences of the Precautionary Principle in EC Law," 31 EL Rev (2006): 186.

[36] E Fisher, J Jones and R von Schomberg (eds) *Implementing the Precautionary Principle, Perspectives and Prospects* (London: Edward Elgar, 2006).

[37] Case 25/62 *Plaumann* [1963] ECR 95

[38] See the tobacco cases, cited above.

[39] Anthony Arnull, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty* 32 *CMLRev.* (1995): 7 is a good introduction to the arguments. For a useful bibliography see, C. Kombos, "The Recent Case Law on Locus Standi of Private Applicants under Article 230(4) EC: A Missed Opportunity or a Velvet Revolution?," 9 *European Integration Online Papers* (2005) available at http://eiop.or.at/eiop/pdf/2005-017.pdf And see Angela Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford: Oxford University Press, 2008).

[40] Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR II-2365 noted Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission* and *Unión de Pequenos Agricultores v Council*," *Modern Law Review* (2003): 124.

advice of its Advocate General and subsequently also overturned the much more generous judgment of the CFI in *Jégo-Quéré*.[41]

It is perhaps strange to find the heavily over-worked CFI voting for expansion. More Article 230 cases would undoubtedly mean more delays, a perennial cause of concern to the Community judiciary; currently the time taken to hear a direct action is around 26 months.[42] The explanation may lie, however, in the CFI's self-perception of its role as an *administrative* court, whose role is the protection of private parties and which should therefore be easily accessible to individual claimants. It falls to the ECJ on the other hand, as the constitutional court of the EU, to hold the balance with national courts, whose place in the system might be affected by a move from indirect (Article 234) actions to direct actions under Article 230. This issue and these cases – at first glance, highly technical and of interest only to lawyers – are of crucial importance, not least, in that they undercut the claim of the ECJ that the EC legal order, with its curious structure and divided jurisdiction can provide "effective judicial protection" for violations of EC law.

III.2 Principles of Review

Article 230 authorised the ECJ to "review the legality" of acts of the Community institutions, but contained no further instructions. Left with virtually untrammelled discretion, the ECJ turned to TEC Art 288 (2) which authorises the Court, in dealing with the non-contractual liability of the Community, to make its decisions "in accordance with the general principles common to the laws of the Member States." What has emerged is a set of general principles adapted to the needs of the Community as seen by the judges to which the laws of the Member States have contributed. To quote the American Bar Association:

> In spite of the limited scope of written Community law, a large number of judgments of the Court of Justice has gradually formulated a catalogue of general principles about administrative action and about the main procedural issues... These judge-made principles are in particular: the principle of legality of the administration and the prohibition of discrimination; the principle of proportionality; the principle of legal certainty and the protection of legitimate expectations; the principles concerning the rights of the defence and a good number of particular principles related to the idea of 'due process' (such as the right to a hearing). These principles are partly common to the Member States, partly typical of only some of them.[43]

The principles of supremacy (see part III) and the duty extrapolated by the ECJ from TEC Article 10[44] are, for example, unique features of Community law. The principle of legality, on the other hand, is recognised by every administrative law system as the foundational principle of judicial review. The principle of proportionality, used by the ECJ to evaluate the legality

[41] See Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365; Case C263/02P *Commission v Jégo-Quéré et Cie SA* [2004] ECR I-03425.

[42] See Alec Stone Sweet and Thomas Brunell, *Data Set on Actions under Article 230, 1954-2006*, EUI, RSC (2008) and "The European Court, and the National Courts: A Statistical Analysis of Preliminary References, 1961-95," Harvard JMWP 14/97.

[43] American Bar Association: EU Administrative Law Project, available on-line at: http://www.abanet.org/adminlaw/eu/home.html.

[44] Art. 10 provides: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

and propriety of administrative decisions, is a principle embedded strongly in German law but not used in the common law system of the United Kingdom,[45] before its diffusion through European law.[46] In contrast, procedural fairness or due process is accorded great importance by the common law, whence it has travelled into EC law.[47] The process of integration – through harmonisation and "cross-fertilisation" – is naturally of great interest to lawyers; it has spawned a considerable literature in several languages, was the subject of a Cambridge conference in 1998[48] and is the topic of regular discussion at meetings of the European Public Law Group, publisher of the *European Review of Public Law*.

III.3 A European Administrative Law

Two seminal studies by Professor Jürgen Schwarze, the doyen of EC administrative law studies, chart the growth of the general principles of EC law and differences in the legal systems of the first Member States.[49] At first these were seen either as principles of EC law or as the general principles of Community constitutional law. But it now clear that EC administrative law has emerged as a study in its own right with its own specific textbooks. Paul Craig's recent textbook, for example, which combines an account of the general principles with principles of administrative procedure and a short account of EC governance, has equivalents in other languages.[50]

The Article 230 action has been central not only to the development of a European law of proper procedures but also of a European system of governance. Its importance is shown by the steady increase in the case load of the two Community Courts. Over just seven years, from 2000-2007 the total case load of the ECJ moved from 503 to 580 cases annually, the highest in the Court's history and an increase of 22.3% over 2005; in the same period, the CFI's load rose from 398 to 522 despite the introduction of the Civil Service Tribunal. The CFI is a seriously overworked court. Its backlog has rised steadily: in 2007, when the court received 522 cases (currently around the annual average), 397 were completed and the backlog stood at 1154.[51] One explanation of the figures would be that the ECJ has simply down-loaded its docket problems, an effect accentuated by the steady expansion of CFI jurisdiction.[52] This is one pragmatic explanation for the *Union* jurisprudence, which throws the burden of effective judicial protection back on to national courts to provide a complete set of remedies for violations of EC law.

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45 Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999).

46 For an account of this diffusion, see Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," forthcoming, 47 *Columbia Journal of Transnational Law* (2008).

47 Case 17/74 Transocean Marine Paint v Commission [1974] ECR 1063.

48 See John Bell, "Mechanisms for Cross-fertilisation of Administrative Law in Europe," in J. Beatson and T. Tridimas (eds.) *New Directions in European Public Law* (Oxford: Hart Publishing) 1998.

49 Jürgen Schwarze, *Europäisches Verwaltungsrecht* (Nomos: Baden-Baden, 1988), transl. as Jürgen Schwarze, *European Administrative Law*, revised English edn with new introduction (London, Sweet & Maxwell, 2006) first published in 1992. And see Jürgen Schwarze (ed.) *Administrative Law under European Influence* (London: Sweet & Maxwell/Nomos, 1996).

50 Paul Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006). See also J-B Auby and J. Dutheil de la Rochère, *Droit administratif européen* (Bruxelles: Bruylant, 2007); M. Chiti and G. Greco (eds), *Trattato di diritto amministrativo europeo* (Milan: Giuffrè 1997). See also M. Ruffert (ed), The Transformation of Administrative Law in Europe (Sellier European Law Publishers, 2005).

51 CFI, Annual Report 2007, Table 18.

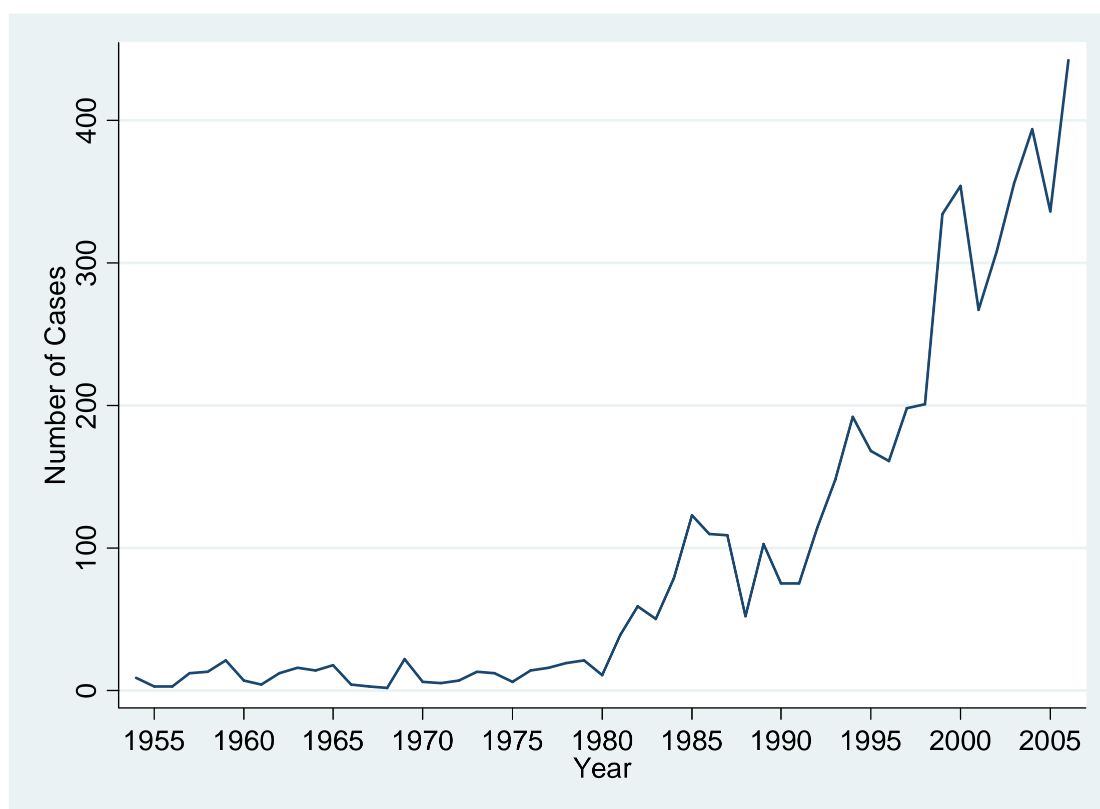
52 By Decision 93/350, (1993) OJ L144/21 and by amendment to TEC Article 225 inserted at Maastricht.

There has been significant debate about structural reform,[53] and it is hard to see how, without some such modifications, the Community Courts can retain their central position in the Community legal order.

III.4 Article 230 Activity

Our Article 230 data set contains the first 5,143 applications for annulment filed with the European Court of Justice, through 2006. Taken together, applicants invoked 11,973 separate claims involving one or more provisions of EC law.[54] Comprehensive data on Article 230 activity have never been collected previously. Figure 2 depicts the number of applications lodged since 1954 (the figure includes pre-1958 applications under the Treaty establishing the European Coal and Steel Community). The annual number of applications reached more than 100 per year in the 1980s, topped 300 in the 1990s, and climbed above 400 per year in 2005.

Figure 2: Actions for Annulment under Article 230, per Year



Source: Alec Stone Sweet and Thomas L. Brunell, Data Set on Actions under Article 230, 1954-2006. Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

Table 2 gives some indication of the subject matter of European administrative law. As the Table shows, litigation in just two domains – competition and agriculture – dominates, and has always accounted for the majority of all activity. For purposes of comparison, we have only included activity in the thirteen most important meta-domains of EU law *overall*, that is

53 See Catherine Turner and Rudolph Munoz, "Revising the Judicial Architecture of the European Union," 19 *Yearbook of European Law* (1999-2000): 1. And see Søren Schønberg, "Coping with Judicial Overload: The Role of Mediation and Settlement in Community Court Litigation," 38 *CML Rev* (2001): 333.

54 See the discussion of legal domains in the Codebook, on-line at this site.

with reference to Article 226 and 234 activity.[55] Annulment actions in these thirteen meta-domains comprise only 81.1% of the total, with "other domains" accounting for nearly 19% of activity. Note that litigation under several domains is insignificant (including taxation, transportation, social security, and free movement of workers). If we add three domains that are not included here (but which are insignificant to litigation under Articles 226 and 134) – Trademarks (n = 662), Iron and Steel (n=126), and Institutional Provisions (n=286), the table would account for over 90% of all actions.

[55] For an explanation of "meta-domains," see the Codebooks for the data sets.

Table 2: Distribution of Applications for Annulment by Legal Domain and Period

Subject Matter		1958-05*	58-75	76-80	81-85	86-90	91-95	96-00	01-05
Agriculture	%	**22.4**	**17.1**	**44.1**	**24.2**	**30.9**	**24.1**	**22.0**	**18.2**
	n	2198	96	82	146	381	343	542	608
Free Movement of Goods		**6.3**	**6.4**	**1.1**	**3.6**	**4.1**	**2.6**	**3.8**	**11.4**
		623	36	2	22	50	37	93	383
Social Security		**0.0**	**0.0**	**0.0**	**0.2**	**0.0**	**0.0**	**0.0**	**0.0**
		2	0	0	1	0	0	1	0
Taxation		**0.3**	**0.4**	**0.5**	**0.3**	**0.0**	**0.4**	**0.4**	**0.4**
		32	2	1	2	0	5	9	13
Competition		**34.7**	**27.9**	**29.6**	**21.2**	**16.2**	**43.0**	**40.3**	**37.7**
		3406	157	55	128	199	612	991	1264
Approximation of Laws		**1.7**	**0.0**	**0.0**	**0.2**	**1.5**	**1.5**	**1.9**	**2.3**
		164	0	0	1	19	21	46	77
Transportation		**1.3**	**2.5**	**0.0**	**0.2**	**0.3**	**2.1**	**1.7**	**1.2**
		131	14	0	1	4	30	42	40
Establishment		**0.8**	**0.0**	**0.0**	**0.3**	**0.2**	**0.4**	**1.4**	**1.0**
		77	0	0	2	2	6	35	32
Social Provisions		**0.5**	**0.2**	**0.0**	**0.2**	**0.3**	**0.1**	**1.0**	**0.4**
		46	1	0	1	4	1	24	15
External		**6.4**	**2.3**	**5.4**	**8.0**	**9.2**	**7.8**	**8.8**	**3.6**
		631	13	10	48	113	111	217	119
Free Movement of		**0.1**	**0.0**	**0.0**	**0.0**	**0.2**	**0.2**	**0.1**	**0.1**
Workers and Persons		11	0	0	0	3	3	2	3
Environment		**0.6**	**0.0**	**0.0**	**0.0**	**0.3**	**0.8**	**0.4**	**1.1**
		63	0	0	0	4	12	11	36
Commercial Policy		**5.9**	**0.4**	**9.7**	**8.8**	**12.9**	**7.2**	**6.4**	**2.**
		580	2	18	53	159	102	157	89
Other Domains		**18.9**	**43.0**	**9.7**	**32.8**	**23.9**	**9.9**	**11.8**	**20.0**
		1853	242	18	198	294	141	290	670
Total Claims		**9817**	**563**	**186**	**603**	**1232**	**1424**	**2460**	**3349**
% of Total Claims by Period		100**	5.7	1.9	6.1	12.5	14.5	25.1	34.1

Note: the data reported are based on the filing dates of each action for annulment (not the date of decision), through 2005. Percentages are rounded.
Source: Alec Stone Sweet and Thomas L. Brunell Data Set on Actions under Article 230, 1954-2006, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

IV. Article 234 and "Constitutionalization"

Under Article 234,[56] national judges send questions – in the form of a *preliminary reference* – to the ECJ in order to obtain a formal interpretation of European law (of the Treaty, secondary legislation, and so on) when that law is material to the resolution of a case at bar. The ECJ responds in the form of a judgment – called a *preliminary ruling* – which the referring judge is expected to use to resolve the case. The provision was designed to promote the consistent application of Community law within national legal orders. With the consolidation of the ECJ's jurisprudence of direct effect, supremacy, and related doctrines, the preliminary reference system became the linchpin of a decentralized system for enforcing EU law. It also organized a series of complex "dialogues" between the ECJ and national courts, interactions that, scholars famously claimed, "constitutionalized" the Treaty of Rome.

The *constitutionalization* of the EC system[57] refers to the process by which the Treaty of Rome evolved from a set of legal arrangements binding upon the Member States into a vertically integrated legal regime that confers judicially enforceable rights and obligations on legal persons and entities, public and private, within EC territory. The phrase thus captures the "transformation"[58] of an intergovernmental organization (of States governed by international law) into an integrated, quasi-"federal,"[59] legal system in which national judges are expected to act as European judges. Since the 1990s at the latest, the orthodox (but by no means unanimous[60]) position is that the EC/EU is a kind of constitutional polity, although it also accommodates strong anxiety about the constitution's aesthetic imperfections,[61] its piecemeal, judicial construction,[62] and its weak claims to "political" legitimacy.[63]

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[56] Article 234: The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

[57] The pioneering work is Eric Stein, "…"

[58] Joseph Weiler, "The Transformation of Europe," 100 *Yale Law Journal* (1991): 2403-83.

[59] Koen Laenerts, "The Many Faces of Federalism: Constitutionalism and the Many Faces of Federalism," 38 *American Journal of Comparative Law* (1990): 205-64.

[60] There remain good arguments for conceptualizing European law as treaty law; see Trevor Hartley, "The Constitutional Foundations of the European Union" 117 *The Law Quarterly Review* (2001): 225-46; Theodor Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations," 37 *Harvard Law Review* (1996): 389-409.

[61] Bruno De Witte, "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?," in T. Heukels, N. Blokker, and M. Brus, (eds), *The European Union after Amsterdam: A Legal Analysis* (The Hague: Kluwer Law International, 1998).

[62] Deirdre Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces," 30 *Common Market Law Review* (1993): 17-69; Kamiel Mortelmans, "Community Law: More than a Functional Area of Law, Less than a Legal System," 1 *Legal Issues of European Integration* (1996): 23-49.

[63] Jürgen Habermas, "Remarks on Dieter Grimm's "Does Europe Need a Constitution," 1 *European Law Journal* (1995): 282-302; Paul Craig, "Constitutions, Constitutionalism, and the European Union," 7 *European Law Journal* (2001): 125-150.

One of the dominant "meta-narratives" of European integration,[64] academic lawyers and social scientists have generated a huge literature on constitutionalization and its effects. Here, we provide an overview of the ECJ's "constitutional" jurisprudence, focusing on those legal doctrines that, once they were accepted by national judges, served to integrate the European and national legal systems. We then briefly survey the scholarly literature on the impact of constitutionalization, and discuss some of the basic data on preliminary reference activity.

IV.1 Doctrinal Foundations

The constitutionalization process has been driven primarily by the relationship between private litigants, national judges, and the ECJ, interacting within the framework provided by Art. 234. In the 1962-79 period, the Court secured the foundational principles of supremacy and direct effect. The doctrine of supremacy, first announced in *Costa* (ECJ 6/64, 1964), lays down the rule that, in *any* conflict between an EC legal rule and a rule of national law, the former must be given primacy. Indeed, according to the Court, every EC norm, from the moment of entry into force, "renders automatically inapplicable any conflicting provision of … national law" (*Simmenthal*, ECJ 106/77, 1978), including national constitutional rules. Where the doctrine of direct effect holds, EC norms confer – directly upon individuals - legal rights that public authorities must respect, and which can be pleaded in the national courts.

During this same period, the ECJ found that provisions of the Rome Treaty (*Van Gend en Loos*, ECJ 26/62, 1963) and a class of secondary legislation, called "directives" (*Van Duyn*, ECJ 41/74, 1974), were, under certain conditions,[65] directly effective. This latter move provoked a great deal of controversy, including heavy criticism from Member State governments,[66] since the wording of the Treaty (Art. 249) strongly implies that EC directives only acquire their legal force in national law once they have been fleshed out and transposed by national executive or legislative authorities.[67] The "regulation," the other major form of secondary legislation, is the only EC legal norm that the Member States meant to be directly applicable within national legal orders (Art. 249 EC). The supremacy of EC law was further reinforced by the doctrine of preemption (e.g., *Kramer*, ECJ 3/76, 1976), which holds that where the EC's competence to act is exclusive: the taking of measures by the Community deprives national authorities of their powers to act independently.

These doctrines – insofar as national judges accept them – integrate national and supranational legal systems, and establish a decentralized enforcement mechanism for EC law. The mechanism relies on the initiative of private actors, enabled by the doctrine of direct effect. Direct effect is actually shorthand for a complex set of rules and principles of construction. As a point of law, the Court distinguishes between "vertical" and "horizontal" direct effect. *Vertical direct effect* refers to the capacity of Community law to create rights that individuals may invoke against national governments - and virtually all other public authorities - in disputes before a national judge. The Treaty, EC regulations, and EC directives can produce such

[64] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004), ch. 2.

[65] The conditions are that the rights and duties created by the directive must be "precise" and "unconditional," and not depend upon further action by the Member States or EC legislative bodies.

[66] Paul Craig and Grainne De Burca, *EU Law* (Oxford: Oxford University Press, 2003): 204

[67] Art. 249 EC: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives ... A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. …"

effects. *Horizontal direct effect* refers to the capacity of Community law to create rights and obligations between any two private individuals or companies. Provisions of the Treaty and of EC regulations produce such effects, which allow, for example, a firm to sue another firm on the basis of such provisions, or an employee to sue an employer. After skirting the issue for a decade, the ECJ decided, in *Marshall I* (ECJ 152/84, 1986), that EC directives were not directly effective horizontally, that is, between two private parties. The Court's posture has been heavily debated and criticized,[68] and may appear as an anomaly, however justifiable,[69] in its otherwise consistent record of pushing hard to enhance the effectiveness of EC law within national legal orders. The Court subsequently resisted opportunities to reverse itself (e.g., *Dori*, ECJ C-91/92, 1994), choosing instead to develop other instruments to pressure governments to properly implement directives in a timely fashion. Direct effect, of course, depends on supremacy for its efficacy. The doctrine of supremacy prohibits public authorities from relying on national law to justify breaches of EC law, and it requires national judges to resolve conflicts between national and EC law in favor of the latter.

In a second wave of constitutionalization, the Court supplied national courts with enhanced means of guaranteeing the effectiveness of EC law. In *Von Colson* (ECJ 14/83, 1984), the doctrine of indirect effect was established, according to which national judges must interpret national law in conformity with EC law. In *Marleasing* (ECJ C-106/89, 1990), the Court clarified the meaning of indirect effect, holding that when a Member State has not transposed a directive, or has transposed it late or incorrectly, national judges are obliged to interpret the entire relevant corpus of national law as if it were in conformity with the directive. The doctrine thus requires national judges to interpret national statutes in ways that render EC law applicable, and thereby effective for individuals, even in the absence of implementing measures. Once national law has been so (re)constructed, EC law, in the guise of a *de facto* national rule, can be applied in legal disputes between private legal persons. The doctrine of indirect effect partly mitigates the problem that EC directives are not horizontally effective. In *Francovich* (ECJ C-6 and 9/90, 1991), the Court went even further, announcing the doctrine of state liability. According to this rule, a national court can, among other things, hold a member state financially responsible for damages caused to individuals due to the transposition or implementation failures. The national court may then require member states to compensate such individuals for their financial losses. As subsequently clarified in *Brasserie du Pecheur* (ECJ C-46 and C-48/93, 1996), individuals are entitled to reparation where Community law is "intended to confer rights upon them, the breach is sufficiently serious, and there is a direct causal link between the breach and the damage sustained by the individuals." Where state liability is found, it is up to the national court to assess damages (normally determined by the domestic law of remedies).

The ECJ has thus imagined a particular type of relationship between the European and national courts, a working partnership in the construction of a rule-of-law Community. In that partnership, national judges become agents of the Community order – they become Community judges – whenever they resolve disputes governed by EC law. The Court obliges national

[68] Takis Tridimas, "Horizontal effect of directives: a missed opportunity?," 19 European Law Review (1994): 621-636.

[69] The decision is typically defended with reference to principles of fairness (legal certainty). If directives had been held to be horizontally directly effective, firms or individuals could have been held responsible for failure to comply with, say, an improperly implemented directive, even though compliance with the directive would mean contravening national law on the books. Further, until the Treaty on European Union entered into effect, the EC was not required to publish directives, which would have placed a serious burden on private actors to continuously monitor the activities of the EC legislator.

judges to uphold the supremacy of EC law (even against conflicting statutes, and even where parliamentary sovereignty otherwise holds sway); encourages them to make references concerning the proper interpretation of EC law to the Court; and empowers them, even without a referral, to interpret national rules so that these rules will conform to EC law and to set aside national law that does not. The effectiveness of the system, therefore, depends critically on the willingness of national judges to refer disputes about EC law to the ECJ, and to settle those disputes in conformity with the Court's case law.

IV.2 The Impact of Constitutionalization

Scholars have studied Article 234 more intensively than they have adjudication under Articles 226 and 230. With constitutionalization, Article 234 became a kind of central nervous system for the regime, helping to organizing legal, economic, and political integration. Although there is much important work yet to be done, the literature on the impact of constitutionalization, and the adjudication of EC law in national courts, is rich and sophisticated. Here we discuss the literature on the impact of Article 234 on the relationship between the ECJ and national courts, and on European policymaking and integration broadly conceived.

IV.2.1 The European Court and the National Courts

The Court's vision of an integrated legal system, expressed most importantly in its doctrines of direct effect and supremacy, depended for its success on the willingness of national judges to accept these doctrines, and to participate in the progressive development of the system. Although national judges responded to the supremacy doctrine with differing degrees of enthusiasm, by the end of the 1980s every national supreme court in the EC had formally accepted it.[70] Why they did so has been the subject of a great deal of research and debate. Some scholars have focused on the logics of cooperation between the European Court and national courts, others on the dynamics of tension and conflict, although everyone recognizes that the relationship has been extremely complex and fluid.

Cooperation received most of the early attention, as a puzzle to be explained. In some national jurisdictions, supremacy required judges to abandon deeply-entrenched, constitutive principles, such as the prohibition against judicial review of legislation; and direct effect required some judges to set aside traditional rules of standing and recognition, and to evolve new ones. Further, supremacy forbids the use of traditional, dualist solutions to conflicts between national and international law (such as the *lex posteriori* doctrine) and direct effect enables private actors to sue member-state governments for non-compliance with EC law, including failure to implement EC secondary legislation. Because accepting supremacy entailed significant adaptation, it could not simply be presumed to follow automatically from the Court's pronouncements.

Weiler's ingenious solution to the puzzle – sometimes called the "judicial empowerment thesis – dominates.[71] The argument proceeds on the assumption that judges seek to empower themselves: given the opportunity, judges will work to enhance their own authority to control legal and, therefore, policy outcomes, and to reduce the control of other institutional actors, such as national executives, parliament, and other judges. National judges could acquire, many for the first time, the power to control state acts previously beyond their reach, such as

[70] Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler, eds., The European Court and the National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context (Oxford: Hart Press, 1998).

[71] Joseph H.H. Weiler, "A Quiet Revolution: The European Court and Its Interlocutors," Comparative Political Studies 26 (1994): 510-34; Weiler, "The Transformation of Europe," op cit.

statutes; and the ECJ's authority would be enhanced to the extent that the national courts supplied it with a case load and properly implemented its preliminary rulings. Art. 234 not only legitimized what would become a complicit relationship between the ECJ and the national courts; it also afforded both judicial levels a good deal of protection from potential political fallout. The European Court responds to preliminary questions, as the Treaty requires, but the ECJ does not apply EC law within the national legal order; the national courts provide the ECJ with case load, but only "implement" the Court's preliminary rulings, as the Treaty requires. Thus, at critical moments, each court can claim to be responding to the requirements of the law, and the demands of the other court. Once national judges understood that they were advantaged by participating in the construction of EC law, the delicate mixture of the active and the passive in this new legal system flowed naturally, gluing the two levels together.

A second approach, first developed by Burley and Mattli,[72] emphasizes the role of transnational and other private actors in activating and sustaining European legal integration; the ECJ and at least some national judges are assumed to have an interest in expanding transnational society and in expanding the domain of supranational governance. Litigants and their interests are understood to be fueling a machine operated by judges. In this view, legal integration develops a self-sustaining logic. In announcing the doctrines of supremacy and direct effect, the ECJ opened up the European legal system to private parties, undermined certain constitutional orthodoxies in place in Continental legal systems, and enhanced the potential effectiveness of EC law within the Member States. Private actors, motivated by their own interests, provided a steady supply of litigation capable of provoking Art. 234 activity. Preliminary references generated the context for judicial empowerment, which proceeded in the form of a nuanced, intra-judicial dialogue between the ECJ and national judges on how best to accommodate one another. And, as the domain of EU law expanded, this dialogue intensified, socializing more and more actors – private litigants, judges, and politicians – into the system, encouraging still more use. Stated in this general way, the approach is broadly consistent with contemporary revisions of neofunctionalist integration theory.[73]

Stone Sweet and Brunell proposed a more mundane interpretation of national judicial behavior, without denying the "judicial empowerment" thesis. Judges who handle relatively more litigation in which EC law is material will be more active consumers of EC law, and more active producers of preliminary rulings, than judges who are asked to resolve such disputes less frequently.[74] As the percentage of cases involving EC law rises, so do judicial incentives to master the tools that are most appropriate for the job, and those tools have been supplied by the European Court. Judges that do not need these tools will be slower or more reticent to master them, and have less reason to be concerned with the overall effectiveness of EC law. The approach helps us to explain some of the variation we find within member-states, between autonomous court systems. We know, for example, that across the EC civil law jurisdictions typically accepted supremacy more quickly and with fewer reservations than did, say, administrative law courts, and they produced far more references.

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[72] Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," 47 *International Organization* (1993): 41-76; see also Alec Stone Sweet and Thomas Brunell, Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community,"92 *American Political Science Review* (1998): 63–81.

[73] Wayne Sandholtz and Alec Stone Sweet, eds., *European Integration and Supranational Governance* (Oxford: Oxford University Press, 1998).

[74] Alec Stone Sweet and Thomas Brunell, "The European Courts and the National Courts: A Statistical Analysis of Preliminary References, 1961-95," 5 *Journal of European Public Policy* (1998): pp. 66-97.

It is important to stress that those who focused on intra-judicial cooperation and empowerment did not ignore intra-judicial friction, but took friction for granted as the *expected* state of affairs. The trick, then, was to explain why the legal system had nonetheless taken off. Legal integration must be read largely as a narrative of how tensions between the ECJ and national courts have or have not been resolved. Some of the most important achievements of legal integration – such as the progressive construction of a charter of rights for the EU – are rooted in deep, as yet unresolved doctrinal conflicts between the ECJ and national courts. It is also clear that positive incentives "to play the Eurolaw game" do not apply to all judges, and that logics of empowerment can work in non-integrative ways. National constitutional courts have good reasons to resist the development of a European "constitutional" order that might subsume the national order. Other judges could foresee that the ECJ's case law might evolve in ways that would undermine their own case law, autonomy, or relations with other national governmental bodies, and they might choose to ignore the Court's pronouncements. Further, the development of EU law would, in effect, expand the "menu of policy choices" available to litigants and judges, and judges might exploit this development creatively, if not always in pro-integrative directions.

More recently, political scientists, in particular, have begun paying closer attention to legal integration from the perspective of national judges. Alter,[75] examined in detail how the Court's supremacy doctrine was accepted by French and German judges, paying full attention to how intra-judicial conflict and accommodation played out over time. She shows that there were multiple, overlapping, and ever-changing reasons for how national judges chose either to make use of EC law, or to ignore it. Nyikos,[76] has focused on the "strategic interactions" between the Court and national judges under Article. 234. She has found overwhelming evidence to the effect that when national judges have "signaled" to the Court a preferred outcome, the Court has responded favorably. She argues, convincingly in my view, that these interactions have been key to facilitating compliance with the ECJ's preliminary rulings. Nyikos has also compiled and published on-line a data set on the compliance of national courts with the ECJ's preliminary rulings.[77] Finally, Conant has argued that the ECJ's actual influence on national law and politics may be minimal. In her view, the scope and effectiveness of EC law will always be "patchwork" and "fragmented," not least because quasi-federal governance must be "negotiated" by organized groups and officials, operating at different levels of government, with different interests and possessed of varying amounts and kinds of resources to shape outcomes. Of course, these same points would apply to other federal polities, such as Canada and the United States.

IV.2.2 Constitutionalization, Policy, Integration

Today, academic lawyers and social scientists routinely describe and assess the impact of the ECJ and the national courts, interacting within Article 234 procedures, on lawmaking processes and outcomes at both the national and supranational levels. One simple cannot understand how policy is made, in a diverse range of policy domains – including market regula-

[75] Karen Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001).

[76] Stacy Nyikos, The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment, 4 *European Union Politics* (2003): 397-419;

Stacy Nyikos, "Strategic interaction among courts within the preliminary reference process – Stage 1: National court preemptive opinions," 45 *European Journal of Political Research* (2006): 527 – 550.

[77] Stacy Nyikos, Data Set on National Court Compliance with ECJ Decisions in EU Preliminary Reference Cases, 1958-2000, online at http://etext.lib.virginia.edu/ECJ/.

tion,[78] social security,[79] environmental protection,[80] anti-discrimination law,[81] and many other areas – without taking into account the role of the legal system. In short, national policymaking has been "Europeanized," and the constitutionalization process has been one important factor driving Europeanization. Why has this been so?

In response, we would emphasize three overlapping factors. First, the ECJ is the authoritative interpreter of the Treaty, while being largely insulated from direct Member State control. Member States can only reverse the Court's interpretations through Treaty revision, which requires unanimity, a difficult threshold to reach. In the jargon of delegation theory, the ECJ is not an "agent" of the Member States, but a "trustee" exercising a "fiduciary" responsibility with respect to the Treaty.[82] For their part, national judges are enlisted in helping the Court ensure the effectiveness of EU law, and they too are substantially insulated from direct governmental control. Second, as the EU's legislative activity expands to new areas, and deepens in traditional policy domains, the centrality of the courts – as monitoring and enforcement mechanisms – increases. Third, the constitutionalization process positioned national courts as important sites of policy innovation. Individuals litigate EU law before national judges, most importantly, for two reasons: to remove national barriers to their economic activities; and, to destabilize or reform national law and practices they do not like, with reference to European law. Often enough, this litigation has produced preliminary rulings that have ratcheted up Member State obligations under EU law. Through Article 234, in some areas, at some times, the courts have taken over the legislative process, preempting the authority of the EU's legislative organs.[83]

More broadly, there exists a social science literature,[84] which combines qualitative and quantitative methods, on how the constitutionalization process relates to other processes associated with integration. This research is motivated, in part, to test hypotheses derived from integration theory and other social science theories about the evolution of markets and political systems. It has been shown, for example, that the development of the legal system has spurred European trade.[85] Among other findings, Fligstein and Stone Sweet showed that trade, litigating EC law in the national courts, and lawmaking in the EU became causally connected to

78 Michelle Egan, Constructing a European Market: Standards, Regulations, and Governance (Oxford: Oxford University Press, 2001).

79 Paul Pierson, "The Path to European Integration: A Historical-Institutionalist Analysis," in W. Sandholtz and A. Stone Sweet, eds., European Integration and Supranational Governance (Oxford: Oxford University Press, 1998): 27-58.

80 Markus Haverland, "The Impact of the EU on Environmental Policies," in C. Radaelli and K. Featherstone, eds., The Politics of Europeanization (Oxford, Oxford University Press, 2003); Ludwig Krämer, EC Environmental Law (London: Sweet and Maxwell, 2006).

81 Rachel Cichowski, "Judicial Rulemaking and the Institutionalization of EU Sex Equality Policy," in A. Stone Sweet, W. Sandholtz, and N. Fligstein, eds., The Institutionalization of Europe (Oxford: Oxford University Press, 2001): 113-36; Evelyn Ellis, EU Anti-Discrimination Law (Oxford: Oxford University Press, 2005).

82 Mark Thatcher and Alec Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions," 25 West European Politics (2002): 1-22.

83 The ECJ's preemption of sex equality law is a clear example, see Stone Sweet, The Judicial Construction of Europe, op cit., ch. 4.

84 Neil Fligstein and Alec Stone Sweet, "Constructing Markets and Polities: An Institutionalist Account of European Integration," 107 American Journal of Sociology (2002): 1206-43.

85 Stone Sweet and Brunell, Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," op cit., findings confirmed by Jean-Yves Pitarakis and George Tridimas, "Joint Dynamics of Legal and Economic Integration in the European Union," 16 European Journal of Law and Economics (2003): 357- 68.

each other in complex ways. These linkages, in turn, produced a self-reinforcing, causal system that has organized integration across time, and given the EU its fundamentally expansionary character. Finally, Cichowski has focused on how the relationship between the evolution of the legal system the mobilization of civil society (interest groups and social movements).[86]

IV.3 Article 234 Activity

Our data set on Article 234 contains the first 5,425 preliminary references filed, through 2006, references that invoke 8,638 claims involving one or more provisions of EC law. For each case, we collected the following information: the national origin of the court of reference; the year and case number given to the reference by the Court; the status of the reference at the time we coded the data (withdrawn, pending, disposed of by a judgment, etc.); the date of the Court's decision where a judgment on the merits was reached; the substantive area(s) of EC law invoked by the referring court in the reference. Figure 3 plots the annual number of references, from the first enforcement action (1961), through 2005. This measure is the best indicator now available of the degree to which EC law is litigated in national courts. It bears emphasis, however, that these numbers represent only the tip of the iceberg,[87] since today most cases that are resolved by national judges involving European law do not lead to a referral. The figure shows that levels of references were very low during the 1960s, and began to pick up after 1970, when common market rules entered into effect, and as the doctrines of supremacy and direct effect gradually diffused throughout the system. References doubled by 1980, leveled off in the mid-1980s, and climbed dramatically after the Single Act. Today, the system is chronically overloaded. National courts now send more than 200 references each year.

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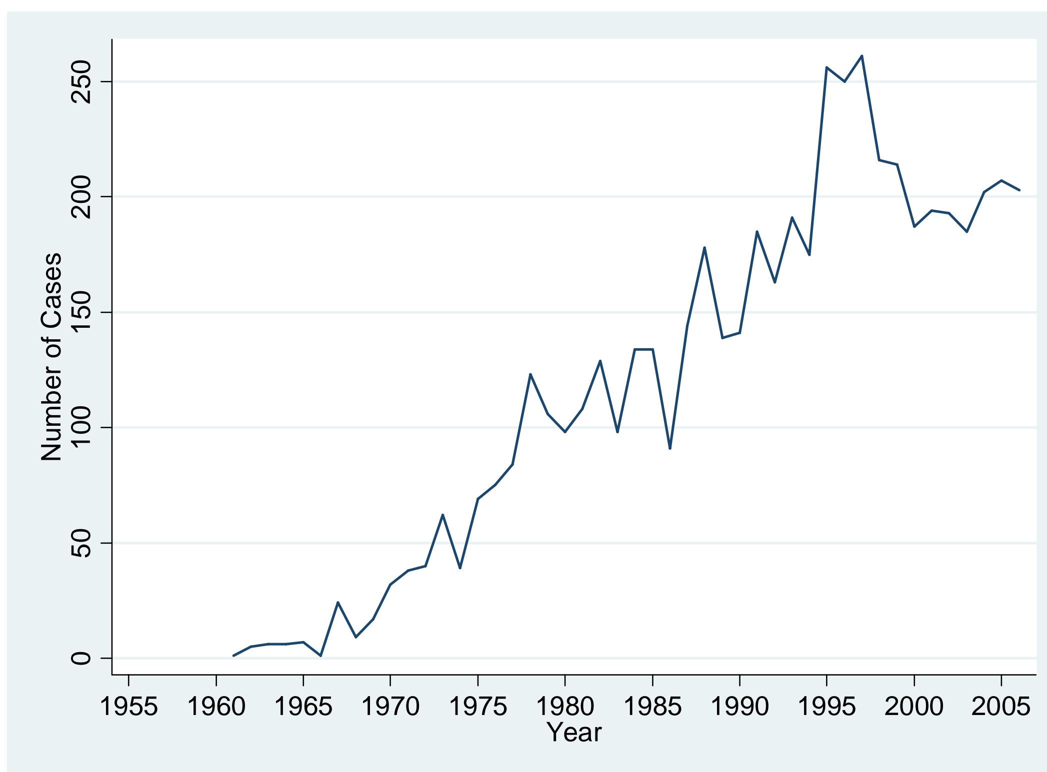
[86] Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2008).

[87] A far better measure of the "EC litigation" variable would be information concerning cases brought before national judges (over time, and across policy domains and jurisdictions) in which at least one of the parties based pleadings on EC legal norms. These data have never been collected.

Figure 3: Preliminary References under Article 234, by Year



Source: Alec Stone Sweet and Thomas L. Brunell, Data Set on Preliminary References in EC Law, European University Institute (San Domenico di Fiesole, Italy, 2007).

Table 3 charts the evolution of Article 234 activity by policy domain. During the 1970s, when levels of references first took off, the majority of all questions raised fell in just two domains: agriculture and the free movement of goods. Over the past decade, the overall importance of these two areas has been reduced by more than half. In the meantime, we see an important diffusion of reference activity to other domains, such as establishment, taxation, and approximation of law (harmonization). In the 1990s nearly one-in-twelve references concerned social provisions, the vast majority concerning sex discrimination law; references in that domain have declined thereafter.[88]

[88] For further discussion and analysis of the data, please the consult the Codebooks, and Alec Stone Sweet and Thomas Brunell, "Note on the Data Sets: Litigating EU Law under the Treaty of Rome," on-line at www.eu-newgov.org.

Table 3: Distribution of Preliminary References by Legal Domain and Period (Art. 234)

Subject Matter		1958-05*	58-75	76-80	81-85	86-90	91-95	96-00	01-05
Agriculture	%	**16.6**	**33.3**	**35.8**	**25.8**	**21.2**	**13.0**	**9.8**	**9.3**
	n	1324	166	251	194	173	155	187	198
Free Movement of Goods		**18.7**	**20.8**	**20.4**	**21.5**	**22.2**	**16.6**	**17.7**	**17.2**
		1490	104	143	162	181	198	337	365
Social Security		**6.7**	**14.6**	**10.3**	**8.4**	**9.1**	**9.6**	**4.9**	**2.3**
		538	73	72	63	74	114	93	4
Taxation		**9.5**	**5.6**	**4.7**	**5.6**	**8.0**	**8.6**	**11.8**	**12.5**
		759	28	33	42	65	103	224	264
Competition		**5.8**	**7.2**	**3.8**	**4.5**	**5.8**	**9.1**	**5.8**	**4.7**
		462	36	27	34	47	108	110	100
Approximation of Laws		**6.1**	**1.0**	**1.9**	**4.9**	**3.8**	**5.2**	**7.9**	**8.8**
		485	5	13	37	31	62	151	186
Transportation		**1.4**	**1.0**	**1.4**	**1.3**	**1.5**	**2.8**	**1.0**	**.9**
		109	5	10	10	12	33	19	20
Establishment		**12.0**	**2.4**	**3.1**	**3.3**	**6.6**	**8.0**	**16.3**	**20.9**
		961	12	22	25	54	95	310	443
Social Provisions		**4.4**	**.4**	**1.1**	**3.7**	**4.2**	**8.6**	**5.6**	**3.4**
		354	2	8	28	34	103	107	72
External		**2.3**	**2.4**	**2.4**	**3.1**	**1.1**	**2.1**	**2.5**	**2.2**
		180	12	17	23	9	25	47	47
Free Movement of		**4.2**	**3.2**	**2.0**	**4.1**	**5.0**	**3.3**	**5.2**	**4.3**
Workers and Persons		333	16	14	31	41	39	100	92
Environment		1.5	**0.0**	**0.4**	**1.6**	**.9**	**2.4**	**1.9**	**1.6**
		120	0	3	12	7	29	36	33
Commercial Policy		**1.3**	**0.8**	**1.4**	**1.5**	**1.8**	**2.4**	**0.7**	**0.9**
		100	4	10	11	15	28	13	19
Other Domains		**9.7**	**7.2**	**11.3**	**10.8**	**8.9**	**8.3**	**9.0**	**10.9**
		772	36	79	81	73	99	172	232
Total Claims		**7987**	**499**	**702**	**753**	**816**	**1191**	**1906**	**2120**
% of Total Claims by Period		100**	6.2	8.8	9.4	10.2	14.9	23.9	26.5

Note: the data reported are based on the filing dates of each preliminary reference (not the date of decision), through 2005. Joined references from the same court on the same date are excluded. References can be filed in more than one issue area for the same case, and the table counts each of these domains. Percentages are rounded.
Source: Alec Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).