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**Running head:** Power shifts via the judicial arena

# **Power Shifts via the Judicial Arena: How Annulments Cases between EU Institutions Shape Competence Allocation\***

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## **Abstract**

Besides infringement and preliminary ruling procedures, actions for annulment form a third important category of procedures brought before the Court of Justice of the European Union (CJEU). A subset of these actions is ‘horizontal litigation’, where EU institutions litigate against other EU institutions. Based on a new dataset covering all horizontal annulment conflicts (1957–2017), this contribution analyzes conflict patterns. I identify the most typical litigant constellations and link them to substantial battles over competences including winners and losers. Using the example of EU external affairs, I show how annulment actions have shaped the relationship between EU institutions over time, with impact as significant as treaty changes. In sum, the analysis of this so far ‘forgotten’ type of procedure furthers our systematic understanding of policy development and competence allocation in the EU system.

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**Keywords:** action for annulment; EU external affairs; horizontal litigation; competence conflict; Court of Justice of the European Union

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## Introduction

When the European Court of Justice (today Court of Justice of the European Union, CJEU) was formed, a key intention was for it to provide checks and balances to EU institutions – particularly the High Authority. To this end, a third important category of procedures (besides preliminary ruling and infringement procedures) was created, whereby private and public, national as well as EU-level actors can seek judicial review of actions of EU institutions. Under Art. 263 TFEU the CJEU ‘shall review the legality of legislative acts [other than recommendations and opinion]’. Most frequently, the ground on which these acts can be challenged is a ‘lack of competence’, or an action where no competences have been transferred. Other grounds include the ‘infringement of an essential procedural requirement’, such as consultation, or ‘of any rule of law relating to the [...] application’ of the Treaty, such as principles of legal certainty and legitimate expectations and, finally, the ‘misuse of powers’.

The literature has paid attention to annulment actions in cases where claimants at the national level have challenged the legality of actions by supranational actors, mostly the Commission (Adam *et al.*, 2015; Bauer and Hartlapp, 2010). I call such conflicts that emerge between the distinct levels of the EU multilevel system ‘vertical litigation’. But annulment actions can also pit supranational actors against each other. The European Commission (Commission), the European Parliament (EP), the Council and possibly other EU institutions argue about the application of competences, policy arrangements and procedural practices. Since claimant and defendant are located at the same level of the EU multilevel system – the supranational – I call these ‘horizontal litigation’. Despite its increasing empirical importance, both in absolute numbers and relative to vertical annulment conflicts, to date horizontal litigation has received virtually no scholarly attention. Consequently, many questions have been left unanswered. When and where do annulment actions between the EU institutions occur? What are typical horizontal conflict-constellations and how likely are plaintiffs to win in front of the Court? What are the effects of the rulings on the relationship and competence allocation between EU institutions in the contested areas? By exploring these questions, this article seeks to draw attention to this specific category of cases and to show how they matter to at least three different strands of literature. First, to European Integration research, where the allocation of competences between the EU institutions has been at the core of the research agenda. In this research strand, intergovernmentalists have traced competence allocation to Treaty reforms and to Member State interests (Moravcsik, 1991). Others have highlighted that developments between the formal treaty changes should be viewed as endogenous shapers of competence

allocation. This perspective is interested in understanding the allocation of power between Council, Parliament and Commission in legislative political bargains (Farrell and Héritier, 2004) and in the judicial arena (Jupille, 2007). Rather than being restricted to formal Treaty negotiations, power shifts result from informal in-between dynamics. Horizontal annulment actions are a novel indicator for systematically addressing the informal dynamics of such interstitial power shifts. Going beyond punctual case law analysis (AETR case C-22/70 in Cremona, 2011; ECOWAS C-91/05 in Hillion and Wessel, 2009)<sup>1</sup> the new comprehensive dataset allows for the general identification of patterns of conflict over competences. It covers all annulment actions launched by an EU institution against another EU institution since 1957 and that have resulted in a judgment by the CJEU up until the end of 2017. Developments and distribution across policy fields provide new insights on how the Commission, and increasingly the EP, have shifted and expanded their powers through competence battles in the judicial arena. Over time, some power shifts have become enshrined in new treaties. Such feedback effects underline that power shifts are a continuous game that actors play. Of course, the relationship between the EU institutions is neither exclusively, nor primarily, shaped by horizontal litigation. Other instruments certainly matter. And yet, horizontal annulment actions provide an important contribution to explaining factual and formal competence allocation between EU institutions.

Second, the exploration of patterns in annulment actions adds to a better understanding of implementation and conflict in the EU multilevel system. Here, preliminary rulings are instruments that allow us to address questions about the interpretation of EU legislation from the bottom-up (see, for example, Alter and Vargas, 2000). Infringement procedures, on the other hand, allow the EU level to ensure the application of EU-legislation from the top-down (see Hartlapp and Falkner, 2009). Infringements are particularly relevant in the fields of environment, mobility and transport, as well as for the internal market and taxation (European Commission, 2015, p. 15). Meanwhile, preliminary rulings matter most in taxation, justice and home affairs and consumer protection (European Commission, 2015, p. 101). Annulment actions concern conflict either between different levels, such as in agriculture and state aid (Bauer and Hartlapp, 2010) or between EU institutions (such as external affairs). Thus, complementing the existing sectoral patterns in preliminary and infringement actions with annulment actions advances our understanding of the incentives and opportunities that distinct

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<sup>1</sup> Cases are referred to by number and year and can be retrieved from the Courts website [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/)

types of legal procedures before the CJEU hold for actors in different sectors of the multilevel system.

Third, studies of the Court have typically assumed that the CJEU tends towards fostering integration (Burley and Mattli, 1993; Larsson and Naurin, 2016). While different causal explanations exist for why this is the case, it is widely accepted that the respective legal procedures advance some interests over others. This can be seen either optimistically (Caporaso and Tarrow, 2009) or critically (Höpner and Schäfer, 2010). So far, these debates have taken little interest in annulment actions. However, on the basis of a case study of annulment actions in the field of EU external affairs, this article explores how annulment rulings have contributed to a deepening of integration. By tracing the substantial conflicts and outcomes behind the aggregate patterns, it shows how the Commission and increasingly the EP have shifted and expanded supranational competences as well as their institutional prerogatives in external affairs – an area historically in the hands of Member States. Importantly, the Commission and EP as plaintiffs are somewhat more likely to win an annulment action than the Council as defendant. Thus, rather than considering annulment actions to be legalistic review instruments, they should be understood as strategic instruments used to systematically push competence extension. In cases where litigation runs between EU institutions, the question of who wins and who loses has a direct impact on their relationship.

The article proceeds as follows: In the next section, I outline my approach to horizontal litigation as procedural politics and discuss annulments as indicators of conflict and power shifts in the EU political system. I then introduce data, case selection and my empirical approach. Next, I turn to the analysis of actor constellations and successes in annulment actions at an aggregate level, before zooming in on the area of EU external affairs. Here, I link actor constellations to typical conflicts over competence and trace the effect of the rulings. The conclusion summarizes the main points and discusses their implications for the three literature strands identified above.

## **I. Conceptualizing Annulments as Indicators of Conflict and Power Shifts**

According to the principle of conferral, all EU legislation must be based on a Treaty article that confers competences on the EU to act and prescribes a procedure to be followed. However, which treaty basis applies might be ambiguous. EU institutions can play a ‘treaty base game’ (Rhodes, 1995) where they strategically shift the legal reference point of an act, in order to increase their influence over the substance and to make successful adoption through a decision-

making procedure more likely.<sup>2</sup> What is more, actions of EU institutions can stretch treaty articles, expanding factual competences beyond what is clearly assigned. Jupille (2004) has theorized the argument as ‘procedural politics’. In contrast to big treaty bargains the contestation of competences takes place in day-to-day processes in the EU (Farrell and Héritier, 2007). They are visible in ‘the renegotiation or re-interpretation of incomplete institutional rules and policy decisions’ (Héritier, 2013, p. 234). When we translate this argument to the context of annulment actions, we can expect actors to play ‘procedural politics’ in order to keep or expand their prerogatives in EU policy-making. The specific actor constellation indicated by annulment actions should thus reflect underlying conflicts.

Where conflict lines produce systematic winners or losers, they will also feed back into the relationship between institutions. I expect successes in horizontal annulment actions to cause shifts in the relationship and relative power between EU institutions outside of treaty changes. Such shifts can occur at the level of formal or informal institutions. At the moment of treaty change, they might translate into new or reformed articles altering formal procedural rules. Consequently, we can understand the dynamics of power shifts as endogenously shaping primary law.

## **II. Empirical Approach**

The empirical basis of my argument is all annulment actions between EU institutions launched since the founding days of the EU. In these cases, the defendant is per definition always an EU institution, most importantly the EP, the Commission or the Council. In horizontal conflicts between institutions, the plaintiff is also an EU institution. I set up a new comprehensive dataset that contains 147 annulment actions. To this end, I extracted cases from the Stone Sweet and Brunell (2008) *Data Set on Actions under Article 230: 1954–2006* that display EU institutions as both plaintiffs and defendants, updated my selection on the basis of CURIA and EURLex (2006 up to 31 December 2017) and completed all entries. Based on the judgments of the CJEU, I added information on the title and substance of the case, on actors intervening in the case, as well as on who won or lost the case (using the judgment’s decision on costs as indicator). Every

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<sup>2</sup> The example explored by Rhodes is the EU working time directive (93/104/EC). By proposing the act as a health and safety at work instrument rather than as general labour law, the Commission made adoption with qualified majority possible. Otherwise the unanimity requirement would have blocked the directive in the Council.

case refers to a factual CJEU judgment. A judgment may combine court cases, and there were 12 cases with more than one claimant. I disaggregated these cases and entered them as individual cases for the part of the analysis that focuses on bilateral claimant-defendant constellations ( $N$  thus increases to 160).<sup>3</sup>

To better understand the nature of so far little studied horizontal annulment conflicts, I chose one policy field for a more in-depth analysis. The selection was based on the frequency of annulment actions. We can best understand the quality of conflicts, their broader context and feedback effects for institutional relations in areas most susceptible to annulment litigation. To this end, I categorized the treaty article(s) referred to in the judgment into broader policy areas based on the codebook developed by Stone Sweet and Brunell. For example, for external affairs, I selected all cases coded as dealing with external relations [matter 412], with common and foreign security policy [matter 384], development co-operation [matter 338/ 419], and integrated Mediterranean programs [matter 423]. Where multiple treaty bases applied that did not correspond to the same policy area, the substance of the case was assessed in detail to identify the dominant policy field.

Accordingly, external affairs is the area with the highest number of annulment cases (47 cases, 32 per cent). The second most frequent area is ‘staff regulation and institutional provisions’ (22 cases, 16 per cent), followed by environment and energy as well as justice and home affairs (14 and 15 cases, respectively, with the latter seeing a substantial hike over the last 3 years), agriculture and fisheries (11 cases), community budget (8 cases), state aid (8 cases) and taxes (6 cases). The number of annulment cases is negligible in all other policy fields. Based on this cross-policy distribution I chose external affairs as the subject matter of a closer case study. Here, I read all rulings in detail, combined with other primary and secondary sources. I also conducted six expert interviews to explore causes and effects behind the court cases in more depth and used insights from the advisory procedure as background material.<sup>4</sup> These semi-structured interviews were carried out between February and June 2016 with officials from policy departments and legal services in all EU institutions as well as national administrations involved in procedures before the CJEU (see the List of Interviews).

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<sup>3</sup> The cases are C-103/12, joint cases C-124 & 125/13, C-132 to 136/14, C-181/91, C-378/00, C-178/03, C-122/04, C-299/05, C-411/06, C-427/12, C-43/12, C-88/14.

<sup>4</sup> Cases in the advisory procedure often address similar competence conflicts, but do not lend themselves well to a systematic analysis as they refer to the negotiation of international law treaties not yet signed.

Two questions need to be addressed before we turn to an analysis of the empirical material. They concern the validity of litigation as an indicator for conflict over competences and the relevance of conflict in policy-making. First, does litigation reflect conflict over competences or are participants driven by other motivations? For a large-N study, a hands-on approach is to analyze whether conflict over competences and prerogatives mattered to the participants in the cases of interest. To this end, I looked at the claims brought forward by the EU institution approaching the CJEU. Competence struggles seem to be at the root of all rulings in the field of external affairs: all 47 cases either contained the term ‘legal basis’ in the summary title or the text explicitly made reference to distinct treaty articles and related procedures, with one EU institution questioning the applicability of one treaty article and suggesting another legal basis. The second question that needs to be addressed is whether the phenomenon I am interested in is actually relevant. Do EU institutions battle over the execution of external powers in their day-to-day policy-making? This is difficult to answer, since of course we do not know how many (potential) conflicts translate into litigation and whether the most important conflictual issues are even brought before the Court. However, what I can do is compare the frequency and substance of horizontal litigation to EU policy output in the area. Roughly three-fourths of the 47 horizontal litigation cases in the field of external affairs concern conflicts over trade agreements or commercial issues. A brief look at the number of existing trade agreements concluded by the EU (31 in force and 48 partly in place at the end of 2017)<sup>5</sup> suggests that litigation does seem to be a frequent factor in the negotiation of trade agreements.

### **III. Aggregate Patterns in Horizontal Litigation**

Above we established that annulment cases are indicators of conflict over competences and prerogatives in the EU multilevel system. Thus, patterns in horizontal litigation can provide insights about developments over time and about the constellation of claimants and defendants in front of the CJEU.

#### *Development Over Time*

Figure 1 displays all horizontal annulment actions that have resulted in a judgment by the CJEU from 1957 until today. In correspondence with the CJEU’s increasing caseload overall, the dotted line shows an upward trend in the number of annulment actions from the 1970s onward. However, as the solid line shows, the trend is marked by substantial up- and downward swings.

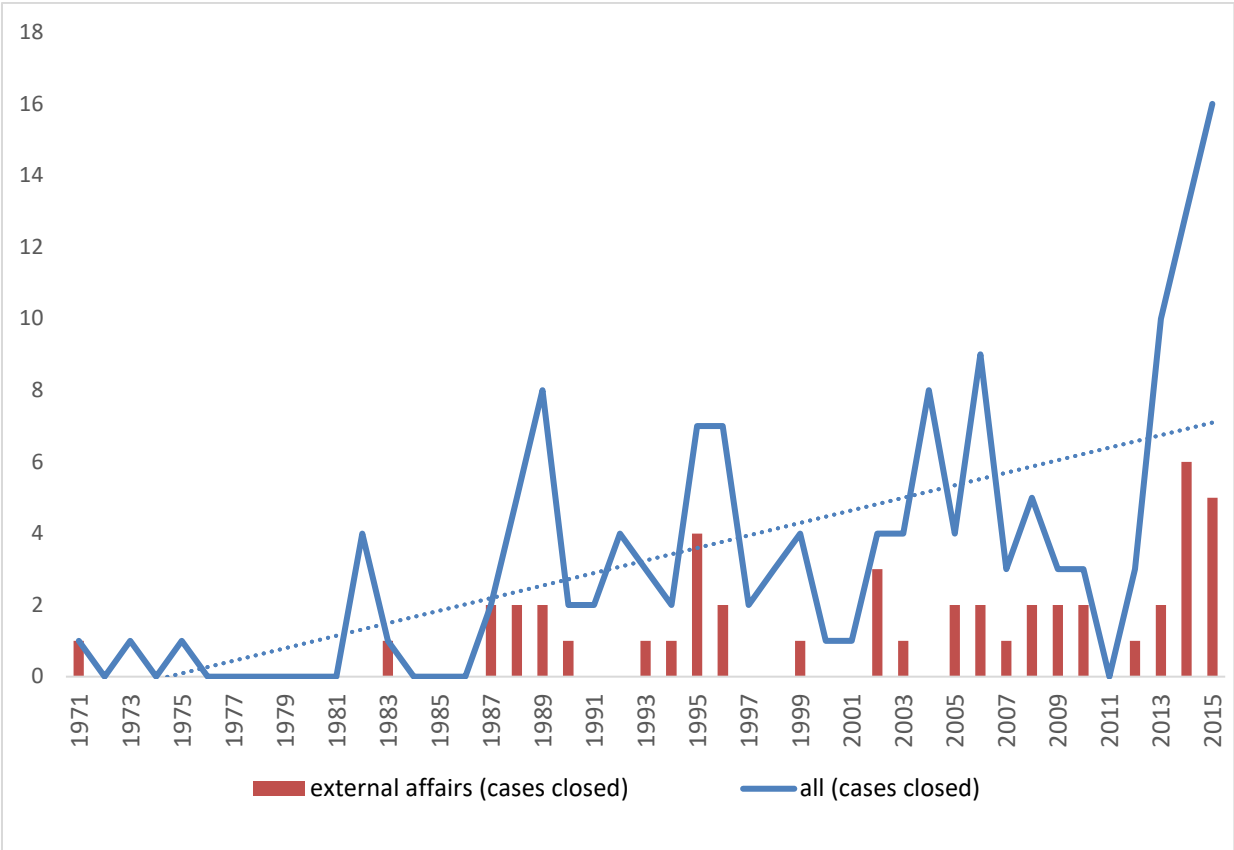
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<sup>5</sup> Information from the homepage of DG Trade <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>, retrieved 17 January 2018.



In the early years of integration, the EU institutions did not use their right to initiate actions for annulment against each other. The first case wasn't launched until 1970, and even then annulment actions remained exceptional for another two decades. Where conflict over competences between EU institutions did exist, it was not carried out in front of the CJEU. It is only in the second half of the 1980s, after the adoption of the Single European Act, that horizontal litigation gains frequency.

**Figure 1: Number of Judgments in Annulment Actions by an EU Institution against another EU Institution (1957–2017) by year of decision**



*Notes:* N=147.

*Sources:* Author's own collection based on Stone Sweet and Brunell (2008) and updated from CURIA (cut off 31 December 2017).

Taking into account the average duration of legal proceedings (22 months), upward and downward swings seem to – at least partially – correspond to Treaty changes. Treaty changes result in greater legal uncertainty because new competences can raise questions of interpretation and positioning relative to existing rules and practices. After new competences have been transferred, EU institutions are more likely to be in conflict over how to translate them into

policies (Bauer and Hartlapp, 2010). Following this argument, the first peak (1989, 8 cases) can be linked to the power transfer under the Single Market Programme as established by the Single European Act (1987). The second peak of 1995/96 (7 cases each) seems to reflect competence transfers in the Maastricht Treaty. In contrast, the Amsterdam Treaty does not seem to have initiated many inter-institutional conflicts before the Court. The delegation of further competences under the Nice Treaty, which entered into force in 2003, is again followed by higher numbers of horizontal litigation with two peaks in CJEU decisions in 2004 and 2006 (8 and 9 cases, respectively). The final surge starts 2 years after the Lisbon Treaty enters into force (2009) with strikingly high numbers in 2014 (13 cases) and 2015 (16 cases).

The overall picture is partly shaped by annulment actions in the field of external affairs (columns in Figure 1). External affairs comprise diverse EU activities directed to the exterior, such as trade, security policy and defence policy. External affairs concern ‘core state power’ (Genschel and Jachtenfuchs, 2013) that had remained in the hands of Member States for much of the integration process. However, competences have since gradually been transferred to the Community level. Competences for economic trade negotiations date back to 1957, while competences for a Common Foreign and Security Policy (CFSP) were introduced under the so-called (intergovernmental) second pillar of the Maastricht Treaty. Lisbon created the EU as one legal entity, with a High Representative of the Union for Foreign Affairs and Security Policy as its leading diplomat. In addition, a (limited) amount of defence co-operation is now organized under the Common Security and Defence Policy (CSDP). In this setting ample room for conflict exists as specific institutional interests of the EP, Commission and Council are often at loggerheads with a common interest to maximize power over bargaining and to ‘speak with a single voice’ in the international realm (Meunier and Nicolaïdis, 1999; also Smith, 2017).

Thus, diverse interests meet a complex net of treaty articles dealing with external affairs. While, commercial or trade policy (Art. 207 TFEU, ex. Art. 133 TEC), development co-operation (Art. 208 TFEU) and humanitarian aid (Art. 214) follow the Ordinary Legislative Procedure, the CFSP (Art. 3(5) and 21 TEU) is the more intergovernmental part of EU external affairs procedures. These treaty bases offer very different capacities to influence EU external affairs. Most relevant in this respect is the distinction between exclusive and shared competences. In areas of exclusive competence, such as in trade and commercial policy, marine biological

resources, as well as in the case of ‘implied powers’,<sup>6</sup> the Commission negotiates with the trading partner on behalf of the EU (Art. 218 TFEU). To this end, the Commission requests from the Council an authorization to negotiate, which then sets out the general objectives to be achieved. While the Commission proposes this authorization, the Council adopts it with qualified majority. The Commission conducts the negotiation in consultation with a Special Committee appointed by the Council. Once negotiations have been completed, the Commission hands a case over to Council and EP, so that they can formally agree on the outcome and sign the agreement. Exemptions apply for transport (Art. 207[5]), trade in services and intellectual property, as well as foreign direct investment (Drake and Nicolaidis, 1992). Here, Member State influence is greater because the Council acts under unanimity (Art. 207[4]). In all other areas, Member States share external competences either bilaterally or multilaterally. Thus, a mix of actors carries out negotiations and both the EU and the Member State(s) reach agreements. Sometimes the CFSP is subsumed under shared competences, too. Member States decide about common CFSP guidelines in the Council and the Commission supports CFSP activities. Here, the powers of the EP are weaker than in non-CFSP policies, as these matters do not fall under the jurisdiction of the Court. However, despite its lack of competences over CFSP the CJEU has ruled directly or indirectly on CFSP (see *Rosneft C-72/15* and cases below).

Ultimately, in the field of external affairs, it is often difficult to decide whether an exemption applies or an international agreement spans different treaty articles or former pillars of the treaties. This allows for considerable room for interpretation on how to implement articles, for example when it comes to the specific prerogatives. Interviewees explained that surges in Figure 1 result from the legal uncertainty introduced with the Maastricht Treaty and particularly with the Lisbon Treaty in ‘the vast area of external affairs’ (Interviews COM\_2, CONS\_1, EP\_1). Thus, treaty changes are followed by periods of greater legal uncertainty that seem to provide a breeding ground for competence conflicts, in turn leading to more litigation. To learn which actors challenge each other in these conflicts, who wins, and who loses, I now turn to conflict-constellations and success rates.

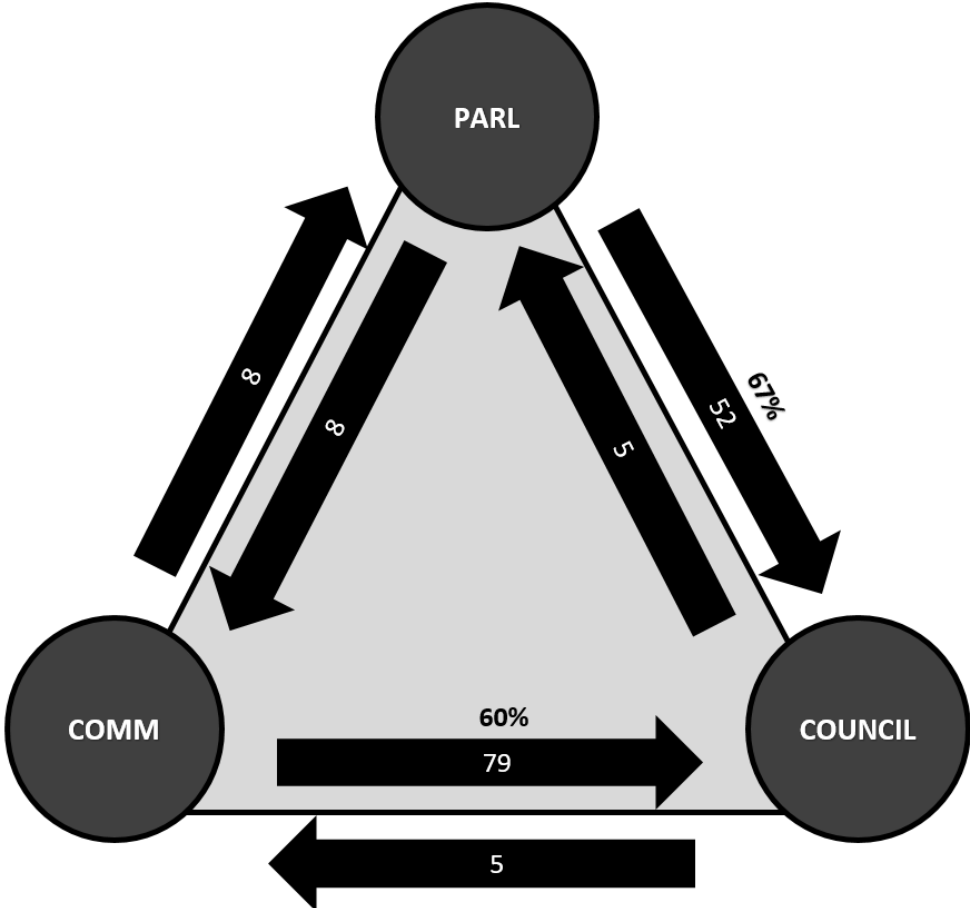
### *Conflict-Constellations and Success Rates*

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<sup>6</sup> ‘Implied powers’ means that, where a policy field is occupied by existing Union legislation (*pre-emption*) and a Union objective is attained by internal and external powers (*effet utile*), the Union is responsible for this policy aspect in external relations too.

Figure 2 visualizes the most frequent actor constellations as plaintiffs and defendants (1957–2017) across all policy areas. It contains the EP, the Commission and Council. In principle, other EU institutions, such as the European Central Bank or the European Investment Bank, can also act as plaintiff or defendant. In practice, this is only rarely the case (there are only three in total) and I have excluded these procedures to render the figure more accessible. The arrows run from plaintiff to defendant, visualizing the combination of actors opposing each other. The number in the solid black part of the arrows indicates the frequency of the respective conflict-constellation, while the percentages refer to success rates (see discussion below).

**Figure 2: Frequency and Success Rates of Opposing Actor Constellations (1957–2017)**



*Notes:* Cases with two claimants or defendants have been counted separately. Three cases with the Commission as claimant against the EIB (two cases) and ECB (one case) have been excluded to render the figure more accessible (N=159). Success rates have been calculated for frequent constellations only and exclude cases where no information was available on who won the case (25 cases, mostly from earlier years).

*Sources:* Author’s own collection based on Stone Sweet and Brunell (2008) & CURIA (cut off 31 December 2017).

Horizontal annulments are most frequently lodged by the Commission (87 cases, plus the three cases against EIB and ECB, 56 per cent). Most of these cases are launched against the Council (79). The EP is challenged in eight cases, all launched after 2002. The second most active plaintiff is the EP (60 cases, 33 per cent). It has litigated against the Council in 52 cases, while only 8 cases concern a conflict with the Commission. What the figure cannot show is temporal variation. The EP only gained real power to launch annulment actions in the 1980s, and initially did not often opt to do so. The EP was not a privileged applicant before the Maastricht Treaty, which means that it could only launch annulment actions in response to a direct challenge of its rights. Starting with C-302/78 (a case that specifically concerns the legal capacity of the EP to launch annulments), case law successively established the EP's right to use annulments both passively (*Les Verts v. EP*, C-294/83) and actively (*EP v. Council [Chernobyl]*, C-302/87) (see Terpan and Saurugger, 2017). Meanwhile, the Council lodged annulment actions against other EU institutions in only 10 cases (6 per cent); 4 against the Commission and 5 against the EP.

The patterns in external affairs (not displayed in the figure) resemble the cross-sectoral patterns: the Commission has launched most cases (31 cases, 61 per cent); 29 against the Council and 2 against the Parliament. The EP litigated 18 cases (35 per cent); 3 against the Commission and 15 against the Council. The Council acted as plaintiff only twice (C-409/13 and C-660/13, both against Commission).

Given the similarities in patterns and conflict-constellations across all cases and within the field of external affairs, these actor constellations underline that EU institutions clearly and enduringly differ in their applicable supranational competences and institutional prerogatives. Typically, the Commission and/or the EP call for the annulment of Council actions. The EP is less active than the Commission and somewhat less active in external affairs than across sectors. The Council rarely steps on the scene as plaintiff, despite being challenged so frequently. These conflict-constellations show that factual competence allocation in the decision-making process shapes constitutional dialogue between EU institutions. Typically, the Commission acts as agenda setter and proposes a measure. It is only when the Council alters a proposal, that the conflict may become apparent. The Commission and/or the EP call upon the Court to annul a Council action. This turns the Council into a defendant rather than plaintiff in the annulment actions between institutions. What is more, Member States can bring annulment actions against other institutions, collectively or unilaterally, outside the Council structure. Such strategies may be less costly in terms of resources, offer more certainty about the strategy pursued, and explain why the Council so rarely acts as plaintiff. Similarly, as the role of the EP in the decision-

making process changes over time, so do conflict patterns. The first action the Commission launched against the EP dates back to 2000, where it was testing the waters after the Maastricht Treaty had accorded the EP co-legislator competences. This shift from being a loyal ally of the Commission to a more distant player has been noted with regard to other developments in the EU too (see, for example, Ellinas and Suleiman, 2012, p. 21). Consequently, the Commission litigates not only against the Council, but also against the EP in cases where EP and Council joint legislation has overstepped or wrongly allocated competences in the eyes of the Commission. In sum, these conflict-constellations underline that conflict lines remain mostly stable and typically do not concern all actors in equal part, although over time additional conflict-constellations may emerge. I now turn to the outcomes of the judgments.

To assess the outcomes of the judgments, I coded whether it was the plaintiff or the defendant that was ordered to bear the cost, information that is usually covered in the last paragraphs of a judgment. More cases were won by the complainant (79 cases, 50 per cent) than the defendant (52 cases, 33 per cent).<sup>7</sup> Given the low absolute numbers for some of the constellations, only the success rates for Commission and EP litigating against the Council are presented as percentages in Figure 2. Outcomes in Commission actions challenging the Council are quite balanced, with the Commission winning slightly more than half of the cases (60 per cent). The EP wins out over the Council more often (67 per cent). On the basis of these numbers we should expect (in)formal power shifts that have empowered the claimants over time.

More strikingly, however, this picture of horizontal litigation shows notable differences to vertical litigation analyzed in previous studies. Outcomes in horizontal litigation are substantially more balanced. In annulments launched by Member States against the Commission, the Commission lost only in about 3 per cent of the cases (Bauer and Hartlapp: 204). This means that horizontal annulments hold a higher uncertainty for actors in terms of the potential pay-offs. Consequently, the feedback effects for EU policies, regarding the relation of actors and on formal power shifts, are much more difficult to anticipate. Against this background, in the following section I trace conflicts and feedback effects through specific case studies.

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<sup>7</sup> The remaining cases are split judgments (3 cases) or cases where no information was available – for example the judgment had been deleted from the register (25 cases).

#### **IV. Substantiating Conflicts: Zooming into External Policies**

External affairs are characterized by complex and fuzzy competences. Yet, conflict lines in horizontal litigation are surprisingly stable, pointing towards the relative endurance of the underlying conflicts and the strategic use actors seem to make of litigation in advancing their competences. In the following, this is illustrated by focusing on the two most active plaintiffs in horizontal litigation: Commission (31 cases) and EP (18 cases). For each of the four emerging constellations (Commission versus Council and versus EP, EP versus Commission and versus Council) I describe a typical conflict, contextualize it with other cases displaying similar conflict lines and point towards effects on the relationship between EU actors.

##### *Commission versus Council*

The most frequent actor constellation is the Commission challenging the Council. The 29 cases that fall in this group spread over the entire period of investigation. The first case is the AETR case (C-22/70 Commission v. Council). Here, the Council had authorized Member States to negotiate and conclude an international transport agreement that included social rules for the protection of drivers (ex. Art. 75). It did so by claiming that transport was an area of Member State competence. The Commission felt that the Council had overstepped its competences and launched an annulment action to shift the legal base of the agreement so that negotiation powers would fall to the Commission (Art. 207, ex. Art. 133 TEU). The Court agreed that the existence of *acquis communautaire*, which harmonizes social provisions in transport (Regulation 543/69), necessarily places competence to conclude an international agreement in this field with the Community. Consequently, the ruling of the Court excluded concurring powers of Member States. Winning this case enabled the Commission to expand external policy competences to areas where the Community held internal competences. This became known as the principle of ‘implied powers’ (Cremona, 2011).

A number of similar cases followed over the course of the 1980s. Building on the AETR ruling, the Commission systematically extended exclusive external policy competences by linking these to internal competences. ‘Implied powers’ proved particularly relevant after the Maastricht Treaty eased the adoption of regulative instruments in a number of policy areas, especially those concerning the freedom of movement/ common market (C-165/87). Here, linking transport agreements with third countries to trade in the internal market allowed for a sidelining of the existing exemption of transport from exclusive powers in external affairs (C-275/87, C-355/87, C-74/93, C-75/93, and C-211/01). Similarly, Member States hold power over social policy. However, in cases where international agreements on social provisions held links

to existing *acquis communautaire*, the Commission would claim exclusive competences (C-217/86, ILO convention on asbestos). These conflicts all revolved around the question of exclusive community competences versus shared powers. Moreover, with most of the cases won by the Commission, *de facto* competences in external affairs shifted to the supranational level. Legal developments were constitutionally fixed in the Lisbon Treaty where Art. 216 TFEU now links decision rules on international agreements to decision rules that apply to the respective internal area. With the widening of exclusive competences, more recently a second line of conflict between Commission and Council has become visible that concerns institutional prerogatives in negotiation processes

A good example for this line of conflict concerns emission trading (C-425/12). Australia had approached the Community to link the EU and the Australian trading schemes. Following the steps that negotiations on behalf of the Union allow for, the Commission proposed a negotiation position that detailed all substantial aspects of the deal. The Council added annexes to the document that would allow the Special Committee to establish detailed negotiating positions throughout the process. The Commission responded that such procedural powers would overstep the consultative role of the Special Committee (Art. 218[4]) and initiated an action for annulment. The CJEU's judgment was split, with neither side winning the case. This is typical for this type of conflict over prerogatives. Rulings seem to intentionally promote co-operation by appealing to Member States' and Commission's common responsibility for 'sincere co-operation' in negotiation, conclusion and implementation of international agreements. Thus, feedback effects here are more nuanced than for other lines of competence conflict.

Interestingly, interview evidence points toward a causal link between these outcomes and an increasingly critical public assessment of 'EU only' international agreements. An interviewee mentioned the controversial debate on the involvement of national parliaments for TTIP and CETA negotiations (Interview D\_4). It remains an open empirical question whether this trend will stabilize and how it will affect the relationship between the EU institutions. Moreover, while in absolute numbers, conflicts over procedural competences have been limited in horizontal litigation, their relevance has increased over time.

#### *Commission versus Parliament*

The constellation that has the Commission lodging complaints against the EP is not very frequent in external affairs. The cases concern regulations adopted jointly by Council and



Parliament.<sup>8</sup> The legislative architecture had changed with the Maastricht Treaty, turning the EP into a co-legislator and consequently into a (joint) defendant in conflicts over competences with the Commission as agenda setter. The first conflict centered on the export and import of dangerous chemicals (C-178/03). The Commission claimed exclusive Community competences, since the goals to be reached were predominantly commercial goals (Art. 207, ex. Art. 133 TEU). The Council – after consultation with the Parliament – shifted the treaty base to include the environment (Art. 192 TFEU, ex. Art. 175 TEU) and argued that the agreement sought environmental goals and was not just a trade agreement *tout court*. The Commission won the case. The second case concerned the question of how to regulate the control of transboundary movements of hazardous wastes and their disposal (C-411/06). The Council had signed an international agreement claiming environmental policy goals (Art. 192 TFEU, ex. Art. 175 TEU). The Commission again stressed exclusive Community competences for commercial goals (Art. 207, ex. Art. 133 TEU) but this time lost the case. The question remains open as to whether this ruling (published in September 2006) was linked to the highly salient and controversial REACH proposal that the Commission was preparing internally for adoption in the College of Commissioners by October 2006.

Both cases exist in the context of a wider conflict over environmental prerogatives between the EU institutions in the 2000s. In addition to the conflicts between Commission and EP, the Commission also launched annulments against the Council, challenging attempts of the Council to keep competences in environmental policy. Examples are the Council signature to the *Energy Star Agreement* between the US and EC (C-281/01), the negotiation/authorization of the *Rotterdam Convention* on international trade in pesticides and other hazardous chemicals (C-94/03, similarly C-178/03), or the position to be followed for a *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES, C-370/07). Winning these cases enabled the Commission to expand external competences to environmental policy. Once this was achieved, litigation became less frequent. The Lisbon Treaty (Art. 216 TFEU, see above) then fixed the new allocation of competences constitutionally. Yet, even today, litigation seems to be chosen as a means to fight out a conflict over competences on politically salient issues, as the case on the movements of hazardous wastes and their disposal shows.

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<sup>8</sup> There are no annulment actions in external affairs where the Commission complains against the EP exclusively.

### *European Parliament versus Commission*

Due to a lack of institutional rights to launch annulment actions in much of the investigation period, only three cases in our sample pit the EP against the Commission. They all deal with budgetary aspects of humanitarian aid and development co-operation. In this area, Member States and the Community share powers. This reduces the influence of the EP (Art. 40 TFEU, ex. 47 TEC). Yet, over time, and related to the AETR ruling, the EP became inclined to use its budgetary prerogative to exert influence over the implementation of agreements with budgetary implications (Corbett *et al.*, 2011, p. 226). Two (joint) cases (C-181/91 and C-248/91) dealt with humanitarian aid granted to Bangladesh by Council and Commission (60 million ECU), the third with financial and technical assistance to the Philippines (C-403/05). In the joint cases the EP challenged Member State action by arguing that the Council should have acted instead. In particular, this concerned direct financial contributions of one Member State (Greece), rather than Council contributions. The conflict centered on a seemingly technical detail: Once the payment made by Greece had entered the Community budget, the EP argued it was no longer a matter of shared competences under Art. 40 but, instead, touched upon the EP budgetary prerogative in Community competences. This formalistic detail, however, meant that Parliament could extend its influence in an area formally defined as a shared competence.

The third annulment action was launched in 2005, at a time when the relationship of the first pillar and the second pillar on CFSP was very much contested (*cf.* case 91/05, Hillion and Wessel, 2009, pp. 553–554). The Commission had approved the financing of border security in the Republic of the Philippines from the Community budget. It did so on the basis of delegated implementing powers under shared competences for development policy (Art. 208 TFEU). The Parliament filed the action arguing that the objectives of the programme fell outside development policy. Rather, measures in the fight against terrorism and international crime were Common Foreign Security Policy (CFSP). Consequently, the treaty could not delegate the Commission implementing powers, but rather parliamentary budget prerogative applied. The CJEU judged that the Commission had overstepped its competence. All three cases explored here display technical budget questions. Yet, it is evident that the EP raised these questions and litigated to gain influence over external affairs *vis-à-vis* the Commission.

Particularly the third ruling may be understood as part of a broader line of conflict emerging from the former pillar structure in external affairs. Entering into force in 1993, the Maastricht Treaty structured external policy competences in different pillars (1993–2009). In the ECOWAS ruling (C-91/05) the Council had claimed that trade of small arms and light weapons

would be a second pillar competence (CFSP). The Commission, in turn, emphasized the overall frame of development co-operation under the first pillar. The Court judged that the Council had overstepped its competence under Art. 47 and encroached upon Community competences in development co-operation (Art. 208 TFEU). This conflict line resulted in a qualification of Art. 40 in the TFEU. The Community can now legislate on acts that also cover CFSP as long as the legal ‘center of gravity’ lies with its legislative competences – in the ECOWAS case with trade and development co-operation. This has substantially altered Community influence over foreign affairs, reducing the possibility of Member States ‘to act qua CFSP’ (Hillion and Wessel, 2009, p. 578). And while the Lisbon Treaty has formally solved the dilemma by bringing an end to the pillar structure, my cases show continuous conflicts along this line, see for example C-155/07, C-130/10 and C-658/11. Ultimately, winning these cases has further strengthened the powers of the EP in external affairs.

#### *European Parliament versus Council*

Meanwhile, parliament acting as plaintiff against the Council has been a more frequent constellation (15 cases). Typically conflict centres on consultation rights of the Parliament or, again, on its budgetary prerogatives and signature rights. Where the Council bases a measure on shared competences and includes Member States, this reduces the role of the EP. In reaction to this the EP claims Community competences – which allow for consultation. A good example of this is the signing of a Memorandum of Understanding between the EEC and USA on public procurement (water, electricity, transport, telecommunications, C-360/93), which, according to the EP, should have been a classical trade matter falling under exclusive competences (Art. 207 TFEU, similarly C-65/93, and C-103/12). Where the conflict concerns regulatory instruments the EP seeks to keep or gain consultation rights.

Budgetary powers are contested in a number of spending instruments in development co-operation. Here conflicts subsequently became visible as legal action against the fourth Lomé Convention (C-316/91) (Cremona, 2011, p. 252), against financial transfers to countries of the former Soviet Union and Mongolia (C-417/93), against fishery agreements with the Republic of Mauritania holding financial implications (C-189/97), as well as against financial co-operation under the 4th African, Caribbean and Pacific Group of States (ACP) convention (C-316/91) and Community guarantees to the European Investment Bank for projects outside the Community (C-155/07). What is more, even in areas where the EP does not hold direct budgetary rights (such as defence policy), it uses annulment actions to insist on general information rights *vis-à-vis* the Council. At a discursive level, information rights are linked to

democratic principles, as was the case with an agreement regulating the transfer and treatment of pirates between the EU and Mauritius within the framework of an EU naval mission (C-658/11) (Riddervold and Rosén, 2016, pp. 7–8; Terpan and Saurugger, 2017). So far, this has not been codified in primary law, but the outcome clearly alters the relationship of the institutions by expanding the EP’s factual competences.

In sum, the Commission lodges complaints against the Council to expand exclusive competences over shared ones and – given its success in doing so – more recently also over procedural prerogatives when negotiating international agreements. Parliament has sought to advance its say in external affairs across the pillars by launching annulment actions against the Council over (lacking) consultation and, against the Commission over its budgetary prerogative. Returning to the expectations developed above, systematically differing success rates in horizontal annulment actions should have an effect on the relationship and relative power between EU institutions. In this sense, all of the above constellations clearly show ‘important consequences for actors’ power and policy outcomes’ (Jupille, 2004, p. 304) at an informal level, such as by altering procedures. In two conflict-constellations (Commission v. Council and Commission v. EP), rulings even empowered the claimant formally. Here, power shifts achieved through litigation became legally enshrined when a new treaty was negotiated.

### **Conclusion and Implications**

In this article I explored horizontal litigation in the form of annulment actions launched by one EU institution against another EU institution. Conflicts were conceptualized as a contestation of competences, where legal proceedings offer opportunities for actors to maximize influence. At an aggregate level, the specific plaintiff/ defendant constellation in annulment actions should thus provide insight into the underlying conflict structures. Differences in success rates should, in turn, lead to shifts in the relationship and relative power between EU institutions that may translate into formal power shifts when new treaties are negotiated.

A combination of quantitative analysis and case study evidence from the field of external affairs has showed that annulment actions have increased since the 1970s and, particularly, since the 1990s. With complex interests in the field, as well as an increase in competence transfers over time, conflicts emerged in cases where treaties failed to provide legal certainty. The specific litigant constellation, in turn, was strongly influenced by the role actors hold in EU policy-making, for instance whether they can veto decision-taking. Commission and EP litigate most frequently, while the EP has become more active over time. In the vast majority of cases, both institutions challenge the Council, but increasingly also each other. These litigation

constellations are rather stable, underlining that the analysis provides a general understanding of the conflict structure in the field and of the strategic use actors make of litigation to expand or hold on to their competences and prerogatives. These systematic, yet nuanced insights into the evolution of conflict over competences in the EU multilevel system contribute to an understanding of the procedural politics that shape European Integration between formal treaty changes and outside the legislative arena (Farrell and Héritier, 2007; Jupille, 2007).

In addition, the analysis of horizontal litigation provides fresh insights for research on implementation and conflict in the multilevel system. Annulment actions are particularly relevant in external affairs and increasingly in justice and home affairs – thus, they go beyond the regulatory polity of the EU and turn our attention to core state powers in front of the CJEU (Genschel and Jachtenfuchs, 2013). While this is interesting in and of itself, it also contrasts with the sectoral patterns discovered in existing implementation analyses that look at preliminary rulings and infringement actions. Here, insights from the analysis of annulment actions can complement our understanding of sectoral patterns. And it can provide the basis for an analysis of the factors that shape litigant decisions to use one or the other procedure before the CJEU.

Finally, it is noteworthy that success rates of plaintiffs and defendants are much more balanced in the horizontal litigation studied in this article than they are in vertical litigation. This could render them an interesting set of legal actions through which to revisit claims about court agency (recently Terpan and Saurugger, 2017) as well as court constraint and legislative override (Carrubba *et al.*, 2008, 2012; Stone Sweet and Brunell, 2012).

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### **List of Interviews**

D_4	Ministry of Economic Affairs, Germany	21 February 2016-
COM_1	European Commission, Legal Service	16 June 2016
COM_2	European Commission, Legal Service	16 June 2016
EP_1	European Parliament, Legal Service	17 June 2016
CONS_1	Council, Legal Service	17 June 2016
COM_3	European Commission, DG TRADE	17 June 2016