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Author(s): Hartlapp, M.

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Why some EU institutions litigate more often than others: Exploring opportunity structures and actor motivation in horizontal annulment actions

Miriam Hartlapp
Centre for Comparative Politics: Germany and France
Otto Suhr Institute of Political Science
Freie Universität Berlin
Ihnestrasse 22, 14195 BERLIN
miriam.hartlapp@fu-berlin.de

EU scholars have studied mobilization as a cross-level phenomenon. Individuals and organized interests seek preliminary rulings with the Court of Justice of the EU to challenge national rules. Likewise, the Commission takes member states to court where they infringe commonly agreed rules. However, litigation can also run horizontally in the EU system. EU institutions can go to court to annul actions of other EU institutions. Studying this so far neglected phenomenon of litigation, the paper analyses differences in mobilization across European Parliament, Council and Commission. To this aim it conceptualizes litigation decisions as resulting from an interplay of agency and structure. Decision-making within organizations and in the EU political system as well as different motivations of actors are presented to explain differences in horizontal litigation. Methodologically the analysis combines a database covering 160 horizontal annulment conflicts (1957 to 2017) and case studies based on expert interviews.

Keywords: annulment, legal mobilization, EU institutions, organizational, Court of Justice of the European Union, opportunity structure

1 Introduction[1]

In the EU multilevel system, scholars typically study legal mobilization from a cross-level perspective. Individuals and organized interests at the national level seek preliminary rulings to challenge the interpretation of EU rules by other national actors via preliminary rulings. Likewise, the Commission takes member states to court where they infringe commonly agreed rules and standards. However, litigation can also run horizontally in the EU multilevel system. At the EU level, institutions can ask the Court to annul actions of other EU institutions for lack of competence or breach of procedural rules. Who are the EU-level actors that go to court in such horizontal conflicts and which factors contribute to understanding the litigation patterns that emerge across the European Parliament (EP), the European Commission (Commission) and the Council?

In addressing this question, the paper has two goals. First, it raises attention for a so far neglected group of litigants. Existing research highlighting the power of litigants and the logics of mobilization focuses on organized interests as well as sometimes on individuals (Dumas 2017; Evans Case and Givens 2010; Slepcevic 2009; Hilson 2002). Private economic actorssuch as companies (Adam 2016) as well as public actors are hardly analyzed (but see Bauer and Mathieu in this volume, as well as Granger 2004; Bauer and Hartlapp 2010). Research on EU institutions as litigants has been limited to the Commission launching infringement actions (e.g. Hofmann 2013). Other EU institutions such as the EP or the Council have not been studied. Thus, an analysis of litigation by EU institutions against EU institutions allows complementing existing legal mobilization research in terms of actor constellations. At a time where the rise of tensions and crises on the global scene has intensified the potential for conflict within the EU, developing this line of reasoning is particularly relevant.

Second, the paper explores causes for differences in litigation activity. Litigation is understood as a channel to articulate interests. Structural as well as agency-based factors influence the usage of this channel. Theoretically, structural factors matter because they constitute the conditions under which litigation decisions are taken, and thus render a decision to litigate more or less likely. Following the structural perspective country differences in litigation activity have been assigned to political (Kitschelt 1986; Epp 1998) and legal opportunity structures (Alter and Vargas 2000; Vanhala 2011; Andersen 2005; Conant *et al.* 2017). Coming to grips with the

[1] An earlier version of this paper was presented at the CES 2017 conference in Glasgow. I would like to thank the participants, in particular Andreas Hofmann, and two annonymous reviewers for constructive criticism and valuable comments. Tobias Hübler provided excellent research assistance.

explanatory power and the causal connections between these diverse sets of structural factors is challenging. Methodologically, focusing horizontal annulment actions allows keeping some of the structural factors constant. Therewith, the paper has the potential to bring out more clearly the relevance of others. In particular, I draw on organizational structures within the litigant institutions and the EU political system. EP, Commission and Council differ regarding how decisions to go to Court are taken internally. In order to litigate, the EP needs support in the plenary and the Council even unanimity among its 28 member states. Inside the Commission the organization of a decision to go to Court is much less prone to blockage. Similarly, the organization of decision-taking in the EU political system structures who is more likely to use litigation. Where EP and Council act as co-legislators and take the final vote, they have little incentives to go to Court. This is different for the Commission whose role is that of an agenda-setter. In addition, in areas where the Parliament is not a co-legislator the legal avenue gains attractiveness to secure interests. Thus, organizational features of decision-taking in the EU and inside its main institutions differ. Yet, as such organizational structures do not create litigation. It is where actor's motivations interact with organizational features that we can use their explanatory power to understand legal mobilization. Here public actors have so far received least attention. Powerful examples exist how private norm entrepreneurs have pushed forward particular ideological positions via litigation (e.g. Cichowski 2004). Enterprises in turn, frequently go to court to secure financial benefits (e.g. Gould 1973). I theorize litigation motivations by drawing on classical agency concepts of public policy scholars. Three actor motivations to litigate are developed as ideal types and exemplified on the basis of two short case studies each: material gains, policy goals and institutional interests. Our material does not allow to systematically assess the relative importance of the different motivations. Yet, it emerges that clear-cut material and institutional motivations allow for legal mobilization even where the internal organizational process to decide to go to Court is demanding. More complex and potentially controversial policy motives, in turn, lead to legal mobilization where the organizational structure across and inside institutions provides greater opportunities to take the legal avenue. Combining the argument that organizational structures matter with these different motivations is quite powerful in explaining differences in litigation patterns between EU institutions.

The paper proceeds as follows: In the next section, I introduce annulment actions as a category of cases and present the data I use to describe differences in recourse to horizontal litigation across EP, Commission and Council (2). Against this puzzle, chapter 3 conceptualizes litigation as an interplay of opportunity structures and agency, while focusing on the organizational

structures as a feature that has so far received little attention in litigation research. Next, I empirically discuss opportunity structures EP, Commission and Council face when deciding to litigate (4) before I develop and illustrate three motivations that typically characterize horizontal litigation (5). The conclusion summarizes the main points and discusses implications for future research (6).

2 Annulment actions and horizontal litigation

In the EU, there are three main types of legal procedures: infringements, preliminary rulings and annulment actions. Scholarly attention has focused on infringement procedures and preliminary rulings. The Commission can launch infringement procedures against member states for breach of community law. Preliminary rulings in turn assure consistent interpretation and application of EU law in the member state. Here, cases emerge bottom up and typically confront individuals or organized interests with national governments. Thus, both procedures indicate vertical conflicts running between the different levels of the EU system.

Annulment actions, in contrast, have received less scholarly attention (but see Adam 2016; Bauer and Hartlapp 2010). Historically, annulments have their origin in the interest to provide checks and balances to EU institutions – particularly to the High Authority. The Court of Justice of the European Communities (today Court of Justice of the European Union) "shall review the legality of legislative acts [other than recommendations and opinions]" (Art. 263 TFEU). They allow private and public, national as well as EU level actors to seek annulment of actions of EU institutions. Thus, in annulment actions the defendant is per definition always an EU institution, most importantly the EP, the Commission or the Council. Other EU institutions, such as the European Central Bank or the European Investment Bank, can also be subject to annulment actions– but this is rarely the case (Hartlapp, forthcoming). The grounds on which their acts can be challenged are a "lack of competence", i.e. action where no competences have been transferred or in case of breach of the institutional balance, "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, for "misuse of powers". Who are the litigants in annulment actions?

Figure 1 shows an overall increasing number of annulments, in particular since the 1980s. Private actors are clearly the most important litigant group. Litigation by public actors from the national level (member state governments and regional entities) has been in decline in the last

15 years. Public actors at the EU level, in contrast, have become the second most important group of claimants. This particularly dynamic group of litigant actors forms the empirical core of this paper.

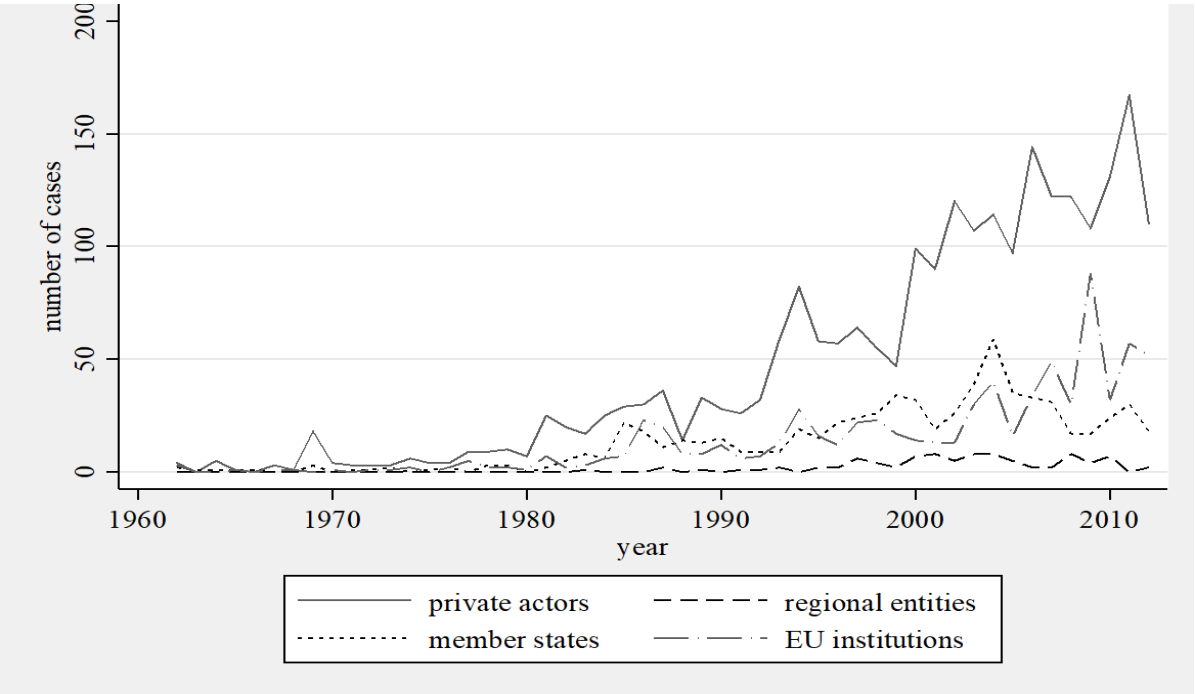

Figure 1: Annulment actions by type of claimant (1960-2012)
Sources: Adam et al. (forthcoming, chapter 1)

A new comprehensive data set was build that covers all horizontal annulment actions since the EU's founding days. To this aim, we extracted cases from the Stone Sweet and Brunell (2007) *Data Set on Actions under Article 230: 1954-2006* that display EU institutions as plaintiffs as well as defendants. The selection was updated from CURIA and EURLex (2006 up to 31.12.2017) and information was added e.g. on the title and substance of the case to allow assessing differences across policy fields. There is a total of 160 court rulings; a ruling may combine court cases and there can be more than one claimant to a case.[2] Descriptive information for litigant activity in horizontal conflict comes directly from this database.

In the analysis, I combine these insights with mobilization research and related EU studies as well as with original material from expert interviews. Five semi-structured interviews were carried out in June 2016 with officials from policy departments and legal services (SJ) in the

[2] There are twelve cases in total with two claimants (C-103/12, joint cases C-124 & 125/13, C-132 to 136/14) or defendants (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). All cases can be accessed via the webpage of the Court: https://curia.europa.eu/jcms/jcms/j_6/en/

EU institutions (see annex). Interview material is combined with a careful reading of rulings and accompanying material such as press releases, legal opinions and secondary sources.

3 Conceptualizing litigation while accounting for organisational differences

Litigation can be conceptualized as a channel to articulate interests. Usage of this channel is influenced by an interplay of structural and agency-based factors. Mobilization and implementation scholars provide for a rich list of structural factors rendering litigation more or less likely. Simplifying somewhat, the literature distinguishes political and legal opportunity structures that influence actors' decisions to turn conflict into litigation. In his classical study on anti-nuclear protest movements Kitschelt (1986) showed that differences in the openness of national political systems for input and differences in their capacity to implement policies shape the level of protest (cf. also Epp 1998). Where more access points exist in a political system, e.g. through separation of powers between executive and legislature or decentralization of the state, there are fewer structural opportunities for protest and litigation.

Legal opportunity structures, in turn, comprise two elements of national legal systems: access to courts and 'legal stock' (Vanhala 2011; Hilson 2002). Access is enabled or constrained by laws on *locus standi* or standing rights of the claimant to file suits, court control of their docket or length of procedures as well as by legal cost rules. While emphasis varies across countries, there is consensus that high costs as well as the risk to bear the others' costs when losing a case ("English rule") render litigation less attractive (Evans Case and Givens 2010; Hilson 2002). Weak or unclear standing rights – that is the right to sue – can impede actors from litigating, as can legal representation requirements (Vanhala 2011). In addition, available precedent or statutory basis to which the conflict can be linked matter. This "legal stock" helps jurists to formulate and carry through a legal challenge (Andersen 2005).

Such political and legal opportunity structures have also been studied for the EU. Granger (2013: 62–3) describes how the organization of legal action at the level of the national administrative and political systems influences whether or not member states are likely to join as interveners before the CJEU. Other scholars have highlighted how the EU has empowered weak actors representing diffuse interests in areas such as environmental policy, consumer rights or equal treatment (Alter and Vargas 2000; Tesoka 1999; Hilson 2002). Access to courts has been strengthened directly by shifting burden of proof (e.g. in EU anti-discrimination

directives) and indirectly by increasing information and support on legal questions e.g. when setting up supportive bodies and counselling or when slowly altering discourse via expert lawyer networks (Falkner *et al.* 2005; Hartlapp 2008; Hofmann 2013).

These works on political and legal opportunity structures have substantially improved our understanding of what shapes decisions to go to Court. However, much of this research is interested in explaining cross country variation. Explanations focus on national level factors (but see recently Kelemen and Pavone 2016 for subnational variation), which in turn limits explanatory power for differences within the same politico-legal system. And as litigants are typically private actors, the political opportunity structure remains an exogenous factor. Where litigants are part of the political system themselves, however, this outsider perspective might be misleading. Organizational theory seems particularly promising to complement these existing perspectives with a more fine-grained approach that captures differences within the EU political and legal system.

Organizational theory assumes that institutions are not unitary actors. Rather, "actors in organizations have preferences and intentions […] which they attempt to have implemented" (Pfeffer 1981: 29). Research seeks to explain how "the goals to be achieved, the rules the members of the organization are expected to follow, and the status structure that defines the relations between them" structures their behavior (e.g. Murdoch 2015: 1677). Consequently, organizational structures can be expected to bring out differences in the constraints public actors face when litigating against each other in two regards.

First, *across* the EU as an organization the EU institutions are endowed with a particular role and ensuing rights in decision-taking. Such opportunities matter for how much influence an actor can take in a decision in a first place. Indirectly, they also influence the decision to seek annulment of this decision later on. Thus, we can give the political opportunity structure argument an organizational turn. Organizational structure influences who has a right to propose legislation, shapes its substance and decides about adoption. In particular, the final decision-takers should be less likely to go to Court to seek annulment of EU decisions.

Second, research has demonstrated that the EU institutions are far from being unitary actors (e.g. Hartlapp *et al.* 2014). *Who* are the actors that decide *inside* the litigating institution? *Where* are decisions for litigation taken under which rules? Organizational structures influence who has a right to decide or to veto a decision. Where multiple actors have to agree on a decision, or where unanimity is required to go to court, claimants are less likely to launch a case. Actors at the political top are more likely to be receptive to public debate. In contrast, we can expect

officials working in the administration to give more weight to technical arguments when deciding to turn conflict into litigation (Weber [1925] 1978).

In sum, across the EU institutions and inside EU institutions organizational reasoning can complement existing opportunity structure explanations. Against these expectations it is to empirical insights on horizontal annulments in the EU political system that we now turn.

4 Assessing litigation empirically while accounting for organisational differences

Figure 2 displays differences in annulment actions by European Parliament (PARL), Commission (COMM) and Council (CONS). It demonstrates how frequently the claimant launches annulment actions against another EU institution.

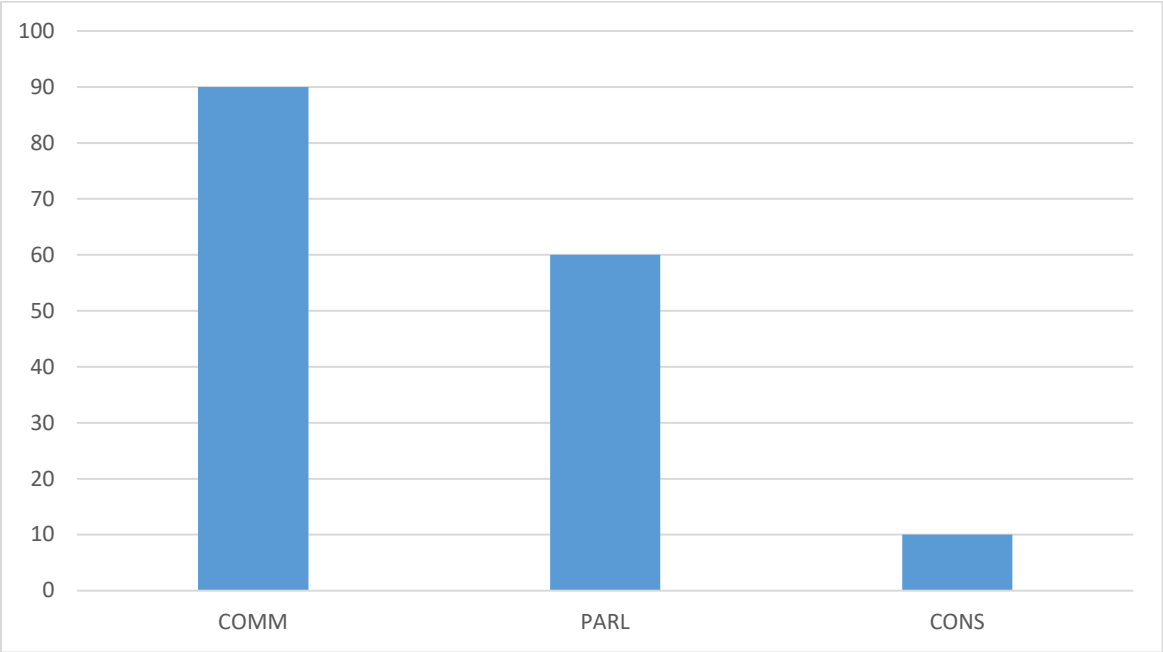

Figure 2: Annulment actions by EU institution (1960-2017, N=160)

Sources: own collection based on Stone Sweet, Brunell (2007) & CURIA (cut off 31/12/2017)

Horizontal annulments are in their majority lodged by the Commission (90 cases, 56%). The second most active plaintiff is the EP (60 cases, 38%). The Council lodged annulment complaints against other EU institutions in ten cases only (6%). These differences in mobilization across EP, Commission and Council render exploration of the causes promising. We start by briefly discussing classical legal opportunity structures before we turn to a more

detailed analysis of the contribution organizational structure can make to understanding these litigation patterns.

The literature has highlighted access to court and legal stock as relevant explanations shaping legal mobilization. The *control* the Court of Justice of the European Union can exert over its *docket* as well as the *length of procedure* does not differ across EU institutions. For any EU act, claimants have a time period of two months to decide whether they want to seek annulment in court. Cases launched by the Council take on average nine months, by the Commission 20 months and those initiated in the EP 22 months. In principle shorter procedures should incentivize the Council to go to Court more often. However, interview material does not indicate that these differences affect decisions to litigate. Rather they are due to the different complexity and substance of cases. More importantly, historically, *standing rights* differed across the three institutions. Originally only the Commission and the Council enjoyed full rights to file suits. When Article 263 was written, they were given privileged applicants rights to sue other institutions via annulment actions. The EP did not hold such 'privileged applicant' rights. It could litigate only where it could argue that the case was relevant to protect its prerogatives. Starting in the late 1970s (C-302/78), case law successively established the right of the EP to use annulments passively (C-294/83) and actively. Having gradually gained greater power in the legislative process, the Parliament found itself unable to protect its new prerogatives. To remedy this procedural gap, the Court started to systematically admit annulment actions brought by Parliament (C-70/88). The Maastricht Treaty follows up on these increased standing rights by formally according the EP privileged actor's status to sue in Court (EP_1). These differences in standing rights can contribute to a better understanding why propensity to litigate was lower for the EP in the early decades of the integration process. *Legal cost* rules do not differ across claimants. Formally, in annulment decisions, the English rule applies. This means that the party losing the case has to bear the attorney costs of the other party. Yet, interview partners explained that *de facto* annulments do not generate any costs other than the time in-house lawyers have to invest in preparing and defending a case and travelling costs to go to Luxembourg. Among EU institutions, an unwritten agreement exists that when going to Court, "every party carries its own costs" (CONS_1, similarly COM_1 and EP_1). What does matter, is the relative size of the legal service, though. Strictly speaking, manpower of a claimant is not a feature of the legal system. Yet, we argue that it matters when assessing the legal opportunity structure as it is an indirect indicator for the legal costs incurred for a potential litigant. If the absolute number of officials dealing with annulments is smaller, relative costs of launching cases are higher in terms of manpower. Staff numbers of the legal services differ strongly across the EU institutions. The

Commission legal service counts 385 plan posts, the Council 244 and the Parliament 68.[3] These differences were mentioned as a relevant factor in decisions to go to Court in particular for the understaffed EP legal service (EP_1, COM_2).

There are no indications that *legal stock* differs systematically across litigant institutions. Legal sociological research on the EU system has characterized the group of EU lawyers as relatively small and homogenous. Jacquè (2013: 44) describes an “inner circle” of ca. 200 lawyers "who know each other inside out and are used to working together notwithstanding their institutional background" (similarly Vauchez 2015; Bailleux 2013). Moreover, interviewees described exchanges among the legal services of the three institutions as frequent and friendly (COM_2, CONS_1). Thus, there are no signs that *legal culture* systematically differs across the three institutions studied. Rather evidence points at a united legal culture, aptly using legal stock produced within a homogenous legal community.

Table 1 summarizes the legal opportunity structures. EU institutions are provided with similar incentives to litigate regarding control of the docket, costs as well as legal stock and culture. Differences regarding the length of procedure do not seem to hold explanatory power. Differences in manpower as well as the historically limited standing right of Parliament, in turn, seem to matter for differences between Commission and Parliament in particular. The substantially lower litigation motivation of the Council in turn requests additional explanations. In section 3 we argued that organizational features shape *who* are the actors that decide *and where* a decision is taken under which rules. Therefore, we now turn to organizational structures inside and across EU institutions that matter for legal mobilization.

[3] Number are taken from the most recent Annual Activity Reports from the legal services of the Parliament (2015), Commission (2016) and the Council (2016). Administrative support is excluded.

	European Parliament	European Commission	Council
legal opportunity structure			
length of procedure (average)	22 months	20 months	9 months
costs	*de facto* bearing of own cost		
manpower	68	385	244
standing rights	until 1992: limited to protect prerogative since 1992: privileged applicant	privileged applicant	privileged applicant
legal stock and culture	consensual disregarding institutional background		
organizational structure			
across institutions	co-legislator	agenda-setter	co-legislator
inside institutions	Plenary, prepared by SJ via legal affairs committee	College, prepared by SJ	COREPER in collaboration with SJ

Table 1: Legal and organizational opportunity structures for horizontal litigation

The legislative architecture of the EU system provides the three EU institutions with different *roles*. Typically, the Commission acts as agenda setter and proposes a policy measure. Depending on the legislative procedure, the Council or the Council and the EP adopt the policy. Having the final say in the legislative process, incentives for the Council are low to use litigation as a means to secure a position. In contrast, when the Council or the Council and the Parliament adopted substantial changes on an act and the Commission would like to see EU policy return on the position it had proposed initially, annulments become an attractive channel to do so 'through the backdoor'. Consequently, the Council is a defender rather than a plaintiff in annulment actions between the institutions.[4] The role of the EP in the decision-making process has changed over time. The Nice Treaty turned the Parliament into a fully-fledged co-legislator and changed its role from loyal ally of the Commission to a more distant player. In sum, the Commission faces strongest incentives to mobilize and the EP does so increasingly, in particular since the Maastricht treaty.

Important differences prevail in terms of internal decision taking, too. The *Commission* is structured into policy Directorates General (DGs) and services. The legal service (SJ) prepares

[4] What is more, Member States may simply abstain from Council activity and act multi- or unilaterally. Such strategies may be less costly in terms of resources and offer more certainty about the positions pursued.

and leads all legal proceedings, including annulment actions. The SJ is part of the Secretariat General (SG) and has been described as the oldest and "best known" legal service of the institutions (Jacqué 2013: 44; also Bailleux 2013). Decisions to go to Court, i.e. to launch an annulment action, are taken by the highest political forum, the College of Commissioners. Nevertheless, the SJ has substantial leeway in deciding to mobilize the law. In the SJ, infringements and preliminary rulings are typically run by desk officers. "[F]ormulation of an intervention take place at a lower level within the hierarchy" (Hofmann 2013: 78). Annulments, in contrast, are directly dealt with by the Director General of the SJ "because they are legally important" (COM_1). They allow for a more direct impact, rendering them more suitable as instruments for strategic policy-influence. Where "fundamental judicial questions and positions are at stake we cannot wait for a preliminary ruling to come up" (COM_1, similarly COM_2). Rather than between the political and the administrative level within the SJ, tensions sometimes emerge vis-à-vis the centre (SJ) and the responsible policy DG (Hofmann 2013: 78–9; Hartlapp et al. 2014: 255-258). Typically, the policy DG is eager to secure accomplishments from the legislative process and thus prefers other channels such as "a protocol explaining why we regret a decision or why we consider it unlawful – but not in Court" (COM_2). In sum, inside the Commission the SJ takes the decision to mobilize the law embedded in a complex organization but largely independent.

The *European Parliament* also knows differences between the political body composed of MEPs and its administrative section. The administrative body has grown over time and officials have turned from "paper keepers" to "policy shapers" (Neuhold and Dobbels 2014). This also applies to the legal service which provides legal advice to the committees and goes to Luxembourg to represent the EP in court. Growing standing rights have empowered the legal service within the institution (see above). However, to mobilize the law political authority is needed: "our basis for acting is the plenary resolution […] because obviously we cannot decide by ourselves to launch an action" (EP_1). Once this decision is taken, the position itself is decided by the EP president. (S)he is acting based on a recommendation of the legal affairs committee. An interviewee explained that in practice the SJ strongly influences this position: "We explain the situation and what the possible options are, what the deadlines are. Then, this note is discussed in a meeting and the committee takes a decision - they vote. And if they agree to go to Court we make a recommendation for the president" (EP_1). In sum, launching an annulment requires political support in Parliament, while the factual legal cause is prepared by the SJ rather independently.

The *Council* secretariat is characterized by confidentiality, working as a broker in the background (Christiansen 2002: 81–2). To take an active role and mobilize the law, the SJ needs a specific authorization of the Member States. In these cases, discussions take place informally between the SJ and the COREPER working group level to elaborate a) whether to go for an annulment case rather than pursuing other options to solve the conflict and b) what should be the line of argumentation. Consequently, the Council only goes for a case if there is "a very clear majority among the member states" (CONS_1). Individual interests or positions questioning a majority do not make it through the internal decision process. Given that consensus among all 28 national delegations in the COREPER working group is required to go forward with an annulment action, mobilization is likely to take place only in exceptional cases. In sum, compared to EP and Commission, the Council is more constrained in its decisions to litigate.

Overall, organizational structures inside and across EU institutions add to our understanding of legal mobilization in horizontal annulment actions. In the legislative process the Council can assure its positions most easily. The Commission as agenda-setter, in contrast, faces strongest incentives to mobilize and the EP does so increasingly, in particular since the Maastricht treaty. Internal decision taking provides the Commission with most room to launch annulment actions, the Parliament is somewhat constrained by a possible negative vote in the plenary while the Council needs proactive agreement from all member states to launch an annulment. However, the analysis also showes that ultimately actors take the decisions to go to court – agency matters. In the following we will explore motivations underlying litigation and discuss how they link to the opportunity structures shaping these litigation decisions.

5 Exploring different motivations within the EU institutions

Motivations of political actors are often at the heart of studies trying to understand the functioning of political systems and policy-making. Yet, there is no general theory on behavior or preferences of actors when going to court. Starting from the general assumption that rational actors seek to maximize their interests, particularly among public actors there are huge differences in what these goals are. In line with the focus on horizontal annulments we will distinguish a material motivation, a policy orientation or an institutional logic (for vertical conflicts cf. Bauer and Mathieu in this volume). These three motivations are adapted from a general conceptualization of actor motivations in annulment conflicts (Adam *et al.* forthcoming). Each motivation will be conceptualized before it is linked to existing litigation

research and illustrated ‘at play’ with two empirical cases from our sample. Analytically distinct, these illustrations show that empirically motivations frequently co-exist in one case.

5.1 Material gains

A basic assumption about individual behaviour is that decisions are taken to maximize material well-being. Grounded in economic theories, litigation studies have searched the conditions under which private actors go to courts instead of solving conflicts via settlement or other types of conflict resolution mechanisms, such as arbitration (e.g. Gould 1973). Authors share the assumption that litigants are driven by an interest to maximise wealth. They examine the impact of information asymmetry, legal procedures, and probabilities to win on the perception of material benefits when deciding to go to court (Bebchuk 1984).

Wealth maximisation is obviously of particular relevance for understanding the behaviour of private actors—attempting to further their economic aims with the help of litigation. However, public actors, too, care about “their” budgets. Individual material gains can be crucial to explain public decisions (Downs 1966/1967). And, at an aggregate level, bureaucracies can be self-aggrandizing actors, searching to maximise their budget and expand their services (Niskanen 1971). For private and public actors alike, the motivational logic behind material resource protection or expansion is simple: annulment actions motivated by financial resources aim at revoking a decision of EU institutions that has a negative impact on another institution’s budget. While the overall EU budget is rather limited, many decisions do have budgetary implications. What is more, as in any polity, budgetary negotiations are ridden with inter-institutional conflict. In these conflicts the EP has frequently used judicial review to assure or expand its budgetary prerogatives. In sum, material motivation should matter for all EU institutions and particularly where they decide about or implement distributive instruments or regulatory instruments directly affecting the allocation of resources.

5.1.1 Illustration I: Salaries and work-related benefits of EU staff

Interests to maintain material benefits are at the heart of conflicts over salaries and work-related benefits. As such they affect all EU institutions. The Council accords changes to staff rules, reforms and adaptations. Where they touch upon financial revenues of officials working in the

EU institutions, the EP and the Commission might see their benefits negatively affected. Such conflicts motivated litigation in at least 16 cases in our sample.[5]

Salaries and pensions for officials working in the EU institutions are adapted every year. To this aim, the Commission proposes correction coefficients that adjust staff benefits to increases in overall cost of living. It was usual practice to time lag the coefficients to EUROSTAT data to technically ease calculation of the indices. However, in the midst of the financial crisis the Council refused to adopt the suggested coefficients. Given the serious and sudden deterioration in the economic and social situation the Council had decided to depart from the usual practice of time lagging since "the calculations, which came from the year before, brought a result that was unacceptable for the member states" (EP_1). Instead the Council used its role in the legislative process to ask for budget containment that would resonate with the austerity measures required in many EU member states. Yet, neither Commission nor Parliament staff was willing to accept this (CONS_1). The threat of lower than expected salary and pension adjustments for their officials motivated EP and Commission to launch a number of related annulment actions against the staff rules proposed by Council. Once the core case had been solved the other cases were withdrawn (e.g. C-453/12, C-68/13, cf. already C-272/02, C-273/02, C-548/03, C-549/03). This case illustrates how material interest interacted with the role of institutions in decision-making.

5.1.2 Illustration II: budget prerogatives

A second case from our sample also illustrates the relevance of material motivations for litigants. As part of its budgetary prerogatives the EP originally held the final say on the major part of the European budget, the so-called non-obligatory budget. In 2009, the Lisbon Treaty finished with the differentiation between obligatory and non-obligatory expenditure, empowering the Parliament for all but agricultural spending. The Treaty now calls for the Parliament and the Council to act in accordance with a special legislative procedure when adopting the budget (Art. 314.9 TFEU). Conflict emerged over the 2011 budget, when the Council sued the Parliament for having signed a budget that had not followed the procedural requirements of the special legislative procedure (C-77/11). This is one of the rare cases where the Council acted in the unanimous interest of its member states. In light of the internal demand to have agreement among the 28 member states the decision to litigate was brought about where

[5] There is a further six cases for which information on the substance of the annulment conflict has been withdrawn and it is likely that these cases concern staff regulations as well.

clear-cut material gains overlapped with institutional interests to maximize its influence on the 2011 budget.

In sum, both cases underline that material gains are a relevant motivation to mobilize the law in horizontal annulments. Budget quarrels are known to be among the most stable sources of conflicts in political systems. And given the organization of decision-taking on remuneration it thus seems reasonable that material interests will continue to influence litigation, too. In horizontal annulment actions they are particularly likely to motivate litigation by Parliament.

5.2 Policy interests

Next to material gains, a decision to litigate can also be motivated by substantial policy interest. The ideological orientation of a group, such as organized interests or a political party, can explain a policy position. Where this ideology is at odds with a process or instrument chosen, or where it does not fit with the substance of an EU policy, conflict can emerge. Such conflict is analytically distinct from material motivations as it may occur independent of or even absent material motivation.

The extensive literature on the legal mobilization of social movements and non-governmental actors that developed in the United States from the 1970s onwards shows how litigation can serve actors to secure their policy goals (Scheingold 1974) and how litigation systematically alters the substance of public policies (e.g. Yandle *et al.* 2011). Similar results are found in the EU, where women activists (Alter and Vargas 2000; Cichowski 2004), environmental organizations (Slepcevic 2009) and other social movements (Hilson 2002) have used litigation strategies before the CJEU as a means to advance their policy agenda.

If this type of motivation for litigation appears particularly likely for social movements, it may also apply to the Council, the EP and even to the Commission. Since ideology matters even where these actors are formally independent from parties (e.g. Hartlapp 2014), we can reasonably expect that the willingness to defend a given policy line can explain legal mobilization of EU institutions against other EU institutions. Two cases from our database illustrate this motivation at play in litigant decisions.

5.2.1 Illustration I: passenger rights

Two closely related annulments launched by the EP against the Commission (C-318/04) and against Council (C-317/04) illustrate policy motivation. In the aftermath of the September 11 terrorist attacks, the US tightened legal requirements for air carriers flying to or over the US.

Passenger Name Records (PNR) have to be made available to the US Department of Homeland Security, Bureau of Customs and Border Protection. Aware of the potential conflict this would pose for European data privacy rules, the Commission negotiated an international agreement (decision 2004/535/EC) and the Council followed with a decision (2004/496/EC). The adopted rules clashed with the view the EP held on data privacy. For nearly a decade, in particular since the adoption of the first EU data privacy directive, civil liberty rights had been high on its agenda (Long and Quek 2002). Consequently, to the Parliament the agreements signed with the US did not only mean a setback, but it considered them a violation of fundamental individual rights (COM_2). The EP won the case and thus was able to defend a policy position that it had since developed further, prominently via the framework regulation 679/2016 for the processing of personal data. Given the strong position, the EP held on data privacy before and after litigation, it seems clear that securing existing policies and preparing the ground for future instruments had been a core motivation to go to court in this case.

5.2.2 Illustration II: pirates

Policy interests clearly motivated litigation in the so-called pirate case (C-658/11), too. As a part of the EU's anti-piracy operation off the coast of Somalia, the Council had signed an agreement with Mauritius regulating the transfer of suspected pirates and associated seized property from the EU naval force NAFOR to the Republic of Mauritius. Similar agreements exist with other African states. They contain rules that assure treatment in accordance with international human rights standards and prohibit torture, unfair trials and death penalties. At the same time, they allow transfer to countries in the region rather than trial and detention in Europe (Riddervold and Rosén 2016). Parliament stressed the importance of international human rights. Moreover, it called for information rights to secure democratic legitimation of a sensible international agreement. The final ruling of the Court argumentatively underlines the substantial motivation when ruling in favour of the EP and stressing democratic principles. Much like for the budget prerogatives in the case above, institutional interests seem to have mattered alongside ideological goals.

In sum, both cases illustrate how policy goals might motivate litigation for public actors under particular constellations. Interestingly, human rights as well as data privacy are high on the agenda of the EP. Here, keeping pledges to its constituency it had actively pushed policy-making at earlier occasions. However, unlike in classical legislative procedures Parliamentary influence on policy-making was limited in the decision at hand for its close link to development and security issues. This resulted in a move to use the legal arena to secure policy goals.

5.3 Institutional logic

In his seminal work on the functioning of democracies Downs (1957) argues that political actors are not interested in particular policies. Instead, what motivates them is institutional power and positions. This motivation should matter for conflict between EU institutions as we know that part of the EU's expansion of powers is due to competence creep, in particular initiated by the Commission. This makes the CJEU a likely venue to decide about conflicts that emerge from this competence creep. Adam even suggests that governments may use annulment actions 'for reasons that go beyond the desire to win a legal dispute [... and instead…] bring more general questions concerning the design of institutions […] to the CJEU's attention' (Adam 2016: 158). Across all three institutions litigation should be motivated by an interest to influence the distribution of decision-making competences in the long-term.

5.3.1 Illustration I: external affaires

Developments in the EU's external affairs drive the ups and downs in figure 1. With each treaty change external affairs have seen competence changes and competence conflicts. In particular, over the last decade of EU integration, new positions have been created, such as the High Representative and new institutions such as the European External Action Service with its hybrid organizational structure and its mix of officials from national foreign services, the Commission and the EU's diplomatic corps. While international trade is supranational, other closely related issues such as development aid are not. In this context the Commission, the Council and even the EP are seeking to keep or expand competences in an evolving area of EU policy-making. Interviewees from all three EU institutions describe tensions over competences, and more pronounced since the Maastricht treaty and particularly after adoption of the Lisbon treaty (COM_2, EP_1, CONS_1).

The oldest and certainly most prominent horizontal annulment case demonstrates institutional interests at play in external affairs: the AETR case (C-22/70 Commission v. Council). 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. Given that the Commission had been transferred powers on international trade policy, the Commission felt that the Council had overstepped its competences and launched an annulment to shift the legal base, so negotiation powers would fall on the Commission (Art. 207, ex. Art. 133 TEU). The Court

agreed that the existence of *acquis communitaire* harmonizing social provisions in transport (Regulation 543/69) necessarily vested any international agreement in community powers – consequently excluding concurring powers of Member States. Winning the case enabled the Commission to expand external policy competences to areas where the Community holds internal competences. The principle of "implied powers" (Cremona 2011) was raised to the echelon of primary law with the Nice Treaty.

5.3.2 Illustration II: comitology

Yet, conflict over institutional competences is not limited to external affairs. The Lisbon Treaty also changed the comitology procedure by redefining delegating and implementing acts (Art. 219 and 201 TFEU). Negotiations were controversial and the resulting treaty articles are complex and give rise to different interpretations (Brandsma and Blom-Hansen 2015).

The choice between delegating and implementing acts is not neutral in terms of institutional competences. While delegating acts empower the supranational institutions, implementing acts give more influence to the member states in the Council – much as under the pre-Lisbon comitology regime. Interviewees described that "the institutions try to win in Court what they could not win when negotiating the Treaty" (CONS_1) and that "obviously we do not try to turn into delegated [acts] whatever must be in implementing, but in borderline cases we would tend to shift to delegated acts" (EP_1). A number of annulment actions on seemingly unrelated topics such as toxic substances or terrorism emerged from this broader competence struggle. In C-65/13, the Parliament took the Commission to court over the question whether a pre-Lisbon empowerment to establish a European Information Exchange System on Labour Markets (EURES) could still be used as an implementing act even if the definition of implementing act had changed. Another example is C-88/14 where the Council and the Parliament questioned the use of an implementing act to alter the annex of a visa regulation. The Parliament argued that this would qualify as change to a legislative act, hence requiring a legislative process (EP_1). Seeking to uphold institutional influence the Commission litigated against the Council and the Parliament (cf. also C-427/12, C-540/13, C-317/13, C-679/13).

Across our cases, competence struggles seem by far most frequent at the origins of annulment actions. They are motivated by institutional interests to keep or expand influence on EU policy-making and implementation. Evidence suggests that all EU institutions mobilize the law to

serve these institutional interests, but that again the organizational opportunity structures in the EU system matter.

6 Conclusion

This paper analyzed litigation motivation in horizontal annulment actions. Focusing EU institutions as claimants it adds to existing research that has analyzed litigation running vertically across levels of the EU system. We raised attention for public actors as a so far neglected group of litigants and provided new descriptive information on litigant patterns. The Commission goes to court more frequently, while the EP still substantially outnumbers the Council in launching annulments against other institutions. Analysis of conflicts between the EU institutions and the ensuing litigant decisions is particularly relevant at a time when the rise of tensions and crises on the global scene has intensified the potential for conflict within the EU.

To explore causes for these differences in litigation activity across the three institutions we build on existing opportunity structure research. We show that political and legal opportunity structures can explain some of the differences Importantly, differences in manpower as well as the historically limited standing right of the Parliament seem to matter for higher mobilization of the Commission. Yet, we argue that is particularly helpful to add organizational features to the structures that shape litigation decisions. As the final decision taker, the Council can most easily assure its position in the legislative process, reducing incentives to annul new acts. The Commission as the agenda-setter, in contrast, faces strongest incentives to mobilize. The EP does so increasingly, too, in particular in areas where it is not a co-legislator (external affairs) and since the Maastricht treaty. Moreover, internal decision taking provides the Commission with most room to launch annulment actions, the Parliament is somewhat constrained by plenary approval, while the Council needs proactive agreement from all member states to launch an annulment. Case studies explored how these organizational features interact with actor motivations. Clear-cut material and institutional motivations allow for legal mobilization even where the internal organizational process to decide to go to Court is demanding. More complex and potentially controversial policy motives, in turn, lead to legal mobilization where the organizational structure across and inside institutions provides greater opportunities to take the legal avenue.

In sum, this paper explored organizational opportunity structures that situate actors in a political system and take their inner working seriously as explanation for legal conflicts between the EU

institutions. We can expect differences in who decides about litigation and where decisions to go to Court are taken for private actors, as well as for actors at the national level. Organizational structure as a category is very likely, to matter in these other claimant groups, too. Future research could benefit from considering this factor more systematically in explaining what motivates actors to go to Court.

Annex: List of Interviews

European Commission, Legal Service	16 June 2016	COM_1
European Commission, Legal Service	16 June 2016	COM_2
European Parliament, Legal Service	17 June 2016	EP_1
Council, Legal Service	17 June 2016	CONS_1
European Commission, DG TRADE	17 June 2016	COM_3

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