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IT'S NOT ALWAYS ABOUT WINNING: DOMESTIC POLITICS AND LEGAL SUCCESS IN EU ANNULMENT LITIGATION

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Abstract
Why do EU Member State governments have such varying degrees of success when they initiate annulment actions against the European Commission? Usually litigant success is associated with arguments about judicial constraint or litigants' capacity. This article sheds light on domestic politics as an additional factor that can affect governments' success record in court. It is argued that governmental annulment actions are often part of a two-level game in which the value of the legal conflict for a national government can be independent of, or even negatively related to, legal success in court as governments may reap immediate benefits from communicating the initiation of annulment actions to voters. In addition, negative rulings can be used as normative levers in domestic reform processes. The statistical analysis indicates that the latter argument systematically affects governments' success records.

Introduction

Recent data on annulment litigation at the level of the European Union reveal that some Member States are more successful than others when they appeal to the Court of Justice of the European Union (CJEU) against the European Commission.[1] We analyze why this is the case and argue that because of the multilevel structure of EU politics, the fact that a Member State takes an issue to the CJEU does not necessarily mean that it always wants to 'win' the case. In fact, the benefits that governments obtain from annulment litigation are often independent of or even negatively related to legal success. For one thing, governments can use the initiation of annulment litigation to reap immediate benefits by signalling commitment to domestic constituents. Furthermore, negative rulings can be used as normative levers in negotiations with veto players in domestic reform processes. Although only the latter mechanism can be shown through regression analysis to systematically influence Member States' degree of legal success in Europe, the article presents anecdotal evidence for the relevance of both arguments.

With this finding, the article directly contributes to the literature on the relationship between EU Member States and the CJEU and, in particular, to the strand of literature that analyzes litigant success. Whereas previous research has usually emphasized the relevance of judicial constraint for Member States' probability of legal success, this article sheds light on the domestic politics that can affect Member States' success records. To this end, we focus on Article 263 TFEU actions for annulment initiated by Member State

[1] Depending on the legal context, either the Court of Justice or the General Court deals with actions for annulment. Our data include annulment actions brought before each of these courts. For the sake of simplicity, we refer to the CJEU in general to denote both competent courts.

governments against the European Commission. When such actions for annulment are not exclusively manifestations of conflict between the Commission and Member States but instead form part of a two-level game (Putnam, 1988), governments may be indifferent about legal defeat or even favour defeat over success. In such cases, the determinants of litigant success go beyond a logic of judicial constraint and can be rooted in domestic politics.

The article proceeds by first presenting the empirical patterns of successful annulment litigation. Second, two hypotheses about systematic influences on governments' legal success rates are derived. Third, we review the data and the method used to assess the theoretical arguments. Finally, the findings of the regression analysis are discussed.

I. Annulment Litigation and Legal Success in the EU

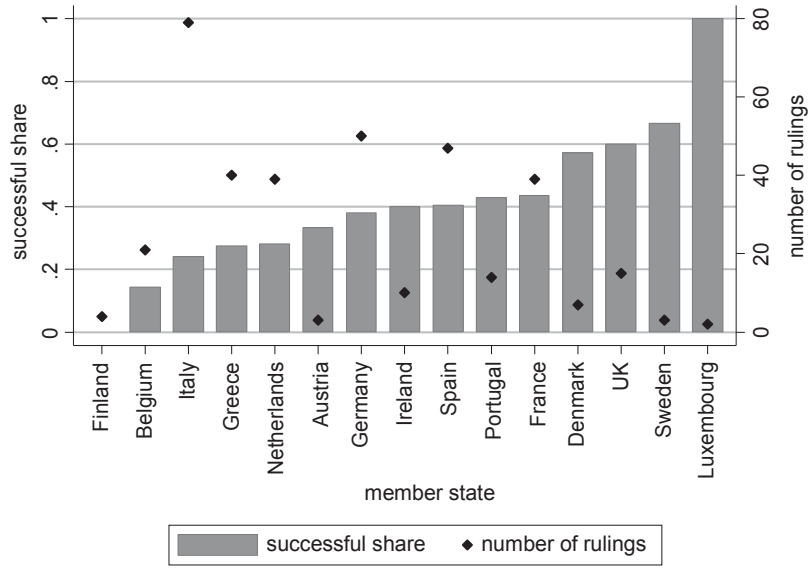
Actions for annulment are instruments of judicial review through which Member States can ask the CJEU to evaluate the legality of actions of the European Commission.[2] The CJEU can declare European legal acts to be void 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers' (Article 263 TFEU). Annulments may be directed at regular legal acts (such as directives, regulations and decisions) or at any action with a binding effect. Between 1957 and 2009, we can identify 440 actions for annulment initiated by national governments against legal acts adopted by the European Commission. However, the governments that have initiated annulment actions have not been equally successful (see Figure 1). Whereas the United Kingdom won 60 per cent of its actions for annulment against the Commission during this time period, Germany only succeeded 38 per cent of the time, and Belgium won only 14 per cent of its 21 cases.

From a legalistic perspective, varying degrees of legal success might very well be considered a random variation. Because the probability of legal success is highly contingent on the specifics of individual cases, and because CJEU judges do not necessarily have uniform preferences regarding the development of the EU's body of law (Malecki, 2012), any aggregate-level variation in legal success might simply be the product of chance, unaffected by the structural characteristics of Member State litigants and their strategic interactions with the CJEU. This null hypothesis can be tested against several theoretical arguments that suggest that part of the variation is systematic. Capacity and judicial constraints are two factors that are often viewed as implicated in systematic variations in the distribution of litigant success.

Galanter (1974) argues that the ' "Haves" come out ahead' in court simply because they possess more of the resources necessary to frequently engage in legal conflict. The combination of resources and experience continuously enhances their legal capacity, helping actors with abundant resources to be systematically more successful than actors with limited resources. The relevance of capacity is also emphasized by studies analyzing governmental litigation in the context of the World Trade Organization's system of dispute

[2] In actual fact, Member States and – to a certain degree – even private actors can employ this instrument to ask the CJEU to review the legality of the actions of any EU institution. Because we are interested in the political role played by annulment litigation in the context of policy implementation, we focus on the actions initiated by national governments against the Commission.

Figure 1: The Number of Actions for Annulment Decided by the CJEU between 1957 and 2009 and the Share of Annulments that Received a Ruling that was Partially or Completely in Favour of the Applicant Government



Source: Authors' data collection extending Stone Sweet and Brunell (2006).

resolution. Only governments with a high degree of executive effectiveness are found to be capable of navigating the system's complex procedures, learning effectively from experience and keeping up with the constantly changing body of case law (Davis and Bermeo, 2009; Kim, 2008).

Another conventional argument is that judicial constraint can systematically affect litigant success. Studies in this line adopt a principal-agent perspective and assess whether national governments are able to effectively constrain the CJEU as it attempts to avoid non-compliance and legislative overriding of its rulings. From this perspective, active participation in judicial proceedings by more powerful Member States is likely to constrain the CJEU's in its rulings because their threats of legislative override and non-compliance with rulings are more credible (Carrubba *et al*., 2008; Garrett *et al*., 1998; Garrett and Weingast, 1993). Given that more powerful states are viewed as less susceptible to the reputational costs resulting from non-compliant behaviour (Börzel *et al*., 2011; Keohane and Nye, 1977), the probability with which the CJEU would be expected to agree with a litigant government increases with this government's degree of political power. Such structural reasoning has recently been revived in an argument stressing structural factors as an explanation for variations in the number of preliminary references from Member State judiciaries (Broberg and Fenger, 2013).

Similarly, a threat of legislative override becomes more credible when several Member States reveal their preferences to the court. In contrast, when the Member States appear to be divided over the legal question, the threat of legislative override in the EU context (which regularly demands high degrees of consensus or even unanimity in the Council)

becomes less credible. Whether or not there is empirical support for these theoretical propositions remains controversial, however (Carrubba *et al*., 2008, 2012; Stone Sweet and Brunell, 2012).

II. Theory and Hypotheses

Complementing the conventional arguments presented above, we propose the existence of two additional structural influences on governments' varying degrees of success before the CJEU. First, we suggest that litigant governments are indifferent to the outcome of legal conflict when they can obtain immediate benefits from initiating litigation while postponing the potential costs of legal defeat into the indefinite future – a situation we refer to as 'politicized annulment litigation' (or 'politicization'). Since such politicized litigation is initiated for reasons other than winning, it should be less successful on average. Second, we argue that litigant governments prefer legal defeat over legal success whenever defeat helps them to reform policy arrangements that are being effectively protected by domestic veto players. This preference is relevant for national governments that operate in highly fragmented political arenas. We therefore label this influence 'fragmentation'. These two arguments are presented in greater detail below.

Politicization

In her explanation of CJEU independence, Alter (1998) emphasizes the relevance of actors' time horizons – a factor that may lead governments to accept the possibility of costly implications of CJEU rulings in the future as long as short-term political costs can be controlled. Assuming that the time horizon of elected and vote-seeking officials is aligned with the national electoral calendar, the typically long duration of annulment proceedings effectively decouples the pay-off governments receive from the final ruling from the immediate pay-off they obtain from filing an application for an annulment action. On average, annulment proceedings span a period of 2.5 years from the initiation of the case to the adoption of a ruling.[3] For governments that think in terms of national election cycles, this is not a trivial interval. Rulings – when they are made – might very well affect successor governments or occur within a completely different political context. Any pay-off, positive or negative, is thus substantially discounted. Consequently, the further this outcome lies in the future, the less relevant to politicians it becomes.

At the same time, the *initiation* of annulment litigation can be immediately beneficial to politicians. Governments deciding to 'sue the Commission' can communicate this step to the domestic electorate; in doing so, they signal that they are prepared 'to stand up to Brussels' and 'fight for the national interest'. Whether this 'fight' has any chance of success is irrelevant to the decision to initiate litigation, as any potential legal defeat will take place in the distant future. This argument can be illustrated with the help of two examples.

In the first case, the Austrian government initiated an action to annul a Commission decision refusing to reduce the quota of freight trucks that could legally transit through Austria. This quota had been introduced before Austria joined the EU in order to reduce

[3] Authors' own data.

the country's environmental burden from haulage companies travelling back and forth between Germany and Italy. If the number of trucks in transit through Austria exceeded a certain threshold in any one year, the quota would be lowered the following year in order to compensate for the excess. The Austrian authorities installed a system whereby trucks in transit were counted electronically. Based on this data, in 2001 they requested that the Commission lower the quota. However, the Commission refused to accommodate Austria's application because it had well-reasoned doubts about the correctness of the data the country had presented. The CJEU subsequently supported the Commission's decision (C-356/01).

The initiation of the action for annulment was worthwhile for the Austrian government. Due to public protest, including several blockades of the Brenner motorway (the most important transit route through Austria, connecting Germany and Italy) in 1998 and 2000, the formation of social movements such as *Transitforum Tirol* and the involvement of environmental organizations (e.g., *Alpenforum*), transit traffic became a highly politicized issue in Austria.[4] With voters organizing around this issue, Austria's government likely feared that accepting the Commission's position would endanger its perceived integrity, particularly in the affected regions. The annulment actions thus enabled the government to communicate its loyalty and commitment to national constituents, and it aggressively publicized the legal conflict in the media.[5] Signalling commitment to affected constituents seems to have been a more dominant rationale for the initiation of litigation than the prospect of legal success. The government's indifference towards the legal outcome of the dispute was even openly voiced by Austria's transport minister, Hubert Gorbach, who calmly explained in 2003 that the court's dismissal of Austria's action for annulment had no implications for the country anyway.[6]

The second example deals with a conflict over a Member State's right to reduce the number of allowances for CO_2 emissions during allocation periods. The EU's Greenhouse Gas Emissions Trading System (ETS) has been in operation since 2005. Despite the strong emphasis on the market mechanism within the ETS, governments play a vital role in the functioning of this market by determining the number of certificates for which national emitters are eligible. This number is defined in a national allocation plan (NAP), which is subsequently scrutinized by the Commission. When the Commission forbade Germany to reduce the number of certificates allocated to individual emitters *ex post* – that is, after the initial NAP had been adopted – the German government initiated an action for annulment (T-374/04). This initiation of annulment litigation could be exploited for political benefit by government officials from the Green Party (Greens), who aggressively communicated their decision to 'sue the Commission'. Their benefit becomes apparent when we consider the political context of the legal conflict. The government coalition between the Social Democrats (SPD) and the Greens had experienced great difficulty in their attempts to adopt the NAP. Specifically, the diverging sectoral priorities of the Ministry for the Environment (BMU) and the Ministry for Economic Affairs (BMWi), as well as the

[4] 'Brüssel gibt Ökopunkte-Kontingent frei', *Die Presse*, 24 July 2002; 'EU überfährt Österreich bei Ökopunkten: Wien bekräftigt Klagsdrohung', *Die Presse*, 25 July 2002; 'Österreich beharrt auf Reduzierung der Ökopunkte', *Die Presse*, 19 September 2002; 'Vierzehn gegen Österreich', *Die Presse*, 20 July 2002 ; Hussl (2005).
[5] 'EU überfährt Österreich bei Ökopunkten: Wien bekräftigt Klagsdrohung', *Die Presse*, 25 July 2002; 'Österreich beharrt auf Reduzierung der Ökopunkte', *Die Presse*, 19 September 2002.
[6] 'Ökopunkte-Urteil: EU zählt richtig', *Die Presse*, 20 November 2003.

ideological differences of the people in charge of the two ministries – Wolfgang Clement (SPD) at the BMWi and Jürgen Trittin (Greens) at the BMU – intensified the inherent tensions between the parties.

The conflict culminated in a last-minute compromise that was negotiated late into the night, involving mediation efforts by Chancellor Gerhard Schröder and Foreign Minister Joschka Fischer (Sattler, 2004). However, Trittin and the Greens were heavily criticized for the resulting compromise. In particular, environmental interest groups and the Greens' party base accused Trittin of having betrayed the goals of Kyoto by yielding to Wolfgang Clement and industrial interests and over-allocating German emitters with certificates (Germanwatch, 2004; Zahrnt *et al*., 2004). Against this background, the Commission's rejection of *ex-post* reductions as part of the German compromise provided the Greens and Jürgen Trittin with the opportunity to restore their integrity in the eyes of constituents and environmental interest groups by signalling commitment to a strict enforcement of the ETS. This interpretation is supported by the open communication of the annulment application prior to its referral to the CJEU, with Trittin and his spokesperson clearly stating that they would not accept soft enforcement by the Commission in the matter (Wilhelm, 2004).

The decoupling of the decision to take an active part in judicial proceedings from expectations about the outcome of such proceedings is thus a result of the long duration of proceedings and the short time horizons of elected officials who are able to reap immediate benefits from the initiation of litigation. When politicians opt for legal conflict based on its value for populist signalling and not on the probability of legal success, legal defeat is likely to be more frequent.

If every government initiated some such politicized annulment litigation, this would not give rise to a systematic variation in success rates. However, signalling a willingness to stand up to Brussels is particularly valuable for those governments facing public opinion that is sceptical of the process of EU integration. The combination of high pay-offs from signalling opposition to Brussels and strongly discounted pay-offs from rulings in the distant future allows these governments to worry less about legal success. As a result, they are likely to receive negative rulings more frequently than governments that litigate with the intent of actually winning the legal dispute. Similarly, where public opinion is overwhelmingly favourable towards EU integration, the benefits associated with the signalling of opposition to the Commission are small. Whether such governments litigate should thus depend on the expectation of positive pay-offs resulting from a favourable ruling; this should lead, in turn, to a better record of success before the CJEU.

> *H1*: The more sceptical public opinion of EU integration is, the lower the government's chances of legal success.

From this perspective, what reduces national governments' legal success before the CJEU is their indifference to the outcome. In such cases, it is just not that important whether one wins or loses; what is important is the potential of the legal conflict to allow the government in question to engage in signalling to EU-sceptical constituents.

Fragmentation

We argue that governments sometimes actually favour negative rulings. Even when they have actively initiated litigation against the Commission, national governments might very well prefer to lose certain annulment proceedings. At first glance, this argument may

seem paradoxical. Nonetheless, Whittington (2005) has convincingly argued in the context of American politics that when government officials are unable to change the *status quo* according to their preferences, judicial review can serve as a useful challenge. When representatives of the executive branch have to formally defend the *status quo* in the event of a judicial review, this can lead to situations in which the defendants actually want to lose their case. Whittington describes how the fragmented nature of the American political system contributes to the usefulness of the judicial process in this regard. Specifically, he considers federalism, entrenched interests and coalitional heterogeneity to be effective constraints on political coalitions that enhance the usefulness of the judicial process as a political tool.

In the context of actions for annulment, a similar logic is reflected by a German case of litigation dealing with suckler-cow premiums. Losing this particular legal conflict was valuable because it helped the German government to reform a structural moral hazard built into the national system of federalism. Specifically, the German system for spending EU agricultural funds involved the federal government lending money to the states (*Länder*), which were then responsible for the actual allocation. When these states violated EU rules or did not meet EU requirements for supervision and control, the Commission would refuse to reimburse the funds concerned. This sanction primarily hurt the federal budget from which the money had been advanced as no formal compensation rule between state and federal budgets existed in this regard. This system created moral hazard on the part of the states, which could reap benefits for their farmers without having to bear the costs of potential sanctions from the Commission. Due to the fragmented nature of German politics, this situation could not be resolved without the consent of the states.[7] When the CJEU decided against Germany in 2004 and underlined the problem inherent in the German system (C-344/01), the federal government was able to use the normative leverage of the ruling to push for changes in the arrangement in ongoing reform negotiations with the states. In fact, the federal government managed to successfully negotiate an amendment to the German constitution (Article 104a) in July 2006, mitigating the moral hazard by specifying that where the *Länder* implement Germany's supranational responsibilities, 15 per cent of any resulting financial corrections will be covered by the federal budget and 85 per cent by the *Länder* budgets.

Thus, where legal disputes affect domestic reform issues in which national governments that are seeking reform encounter strong opposition from effective veto players, negative rulings challenging the legality of existing domestic arrangements can be used as a normative lever in domestic bargaining processes. Such motivations (whereby national governments litigate but profit from negative rulings) are likely to be more relevant for governments that have to negotiate domestic reform processes. In other words, this motivation only becomes relevant where governments act under horizontal or vertical political constraints, such as coalition partners, second legislative chambers or federalist structures. A centralist government consisting of an ideologically homogenous coalition that is not reliant on regional actors to adopt and implement political reforms is simply not in need of such a normative lever. This argument is tested by assessing the following hypotheses:

[7] What was actually required was an amendment to the financial constitution that demands super-majorities in the *Bundestag* and *Bundesrat*. In the practice of German constitutional negotiation package deals, this means unanimity.

H2a: The stronger the political constraints under which a government operates, the lower the government's probability of legal success.

H2b: The more regionally fragmented a system is, the lower the central government's probability of legal success.

Consequently, we expect constrained governments to have a worse record in judicial proceedings not because they are weaker litigants, but simply because they may want to lose, or at least want to pursue different objectives with annulment litigation.

III. Data and Method

To test these hypotheses, we examined data on annulment actions initiated between 1996 and 2006 by national governments from the initial group of EU-15 Member States against legal acts adopted by the European Commission. Although we were able to build on an existing data set provided by Stone Sweet and Brunell (2006), we had to invest efforts of our own in data collection in order to distinguish plaintiffs from intervening parties, identify joined cases and – most importantly for this article – code litigant success. Whenever the CJEU partially or completely annulled the Commission's legal act, we coded this as an instance of legal success for the Member State. Thus, the dependent variable is of a binary nature, taking on the value of 1 for instances of Member State success and 0 for Member State defeat. Cases in which Member States withdrew their actions before a ruling was adopted were coded as success on the part of the Commission. The exclusion of such cases would potentially have led to a systematic overestimation of governments' success rates. Where individual actions brought by different governments were joined under one CJEU ruling (joined cases), two coding options were considered: Joined cases could be disaggregated into their constituent actions, such that one joined case would enter the data set in the form of multiple individual observations; alternatively, joined cases could be treated as just a single observation. In the latter case, multiple plaintiffs would be grouped together, making it difficult to decide which values to use for the independent variables. The obvious trade-off is between the independence of observations of legal success, which is compromised in the first option, and the loss of information regarding observations of plaintiff characteristics associated with the second option. We opted for a practical solution. Where the constituent actions were brought by different plaintiff governments, we applied the first option, disaggregating joined cases into their constituent actions. There are two of these joined cases in the data set, which have been disaggregated into a total of five observations. Where all constituent actions came from the same plaintiff government, however, we entered only one observation in the data set. There is only one such joined case in the data set. To ensure that the handling of these three joined cases did not affect our results, we conducted the statistical analysis both with and without them.[8]

To test our two main hypotheses, we relied on measures of the national degree of EU scepticism and the degree of fragmentation of Member States' domestic political systems. We used data from the Eurobarometer surveys as a means of measuring the degree of EU scepticism expressed in public opinion. Specifically, we used the percentage of people responding that their country has not benefitted from EU membership as a measure of EU

[8] Even though we do not report these additional analyses, the results are robust across both analyses.

scepticism among the general public.[9] Since two surveys are usually conducted per year, we used the yearly average of the surveys. In addition, we included the Member State-specific trend of this indicator of EU scepticism. This measure reflects the percentage points by which EU scepticism had increased or decreased in a Member State since the previous year. Furthermore, we included data from the Comparative Manifesto Project (Volkens *et al*., 2011). Specifically, we captured the relative frequency of hostile mentions of the EU and expressed opposition to specific European policies preferred by European authorities in party manifestos. To avoid bias resulting from extreme fringe parties, we weighted parties' criticism of the EU using the share of votes they received.

To measure the degree of horizontal political fragmentation at the national level, we used data provided by Henisz (2000) on political constraints. This index, which essentially combines the institutional architecture of the national political system with the degree of preference heterogeneity, is used as a measure of the feasibility of policy change. Specifically, Henisz counts the number of branches of government with effective veto power over policy change. The regional authority index provided by Hooghe *et al*. (2010) was used as a measure of the degree of vertical fragmentation of Member States' political systems. When this degree of fragmentation is high (that is, because regions have a high degree of authority), the need to reach political compromise with regional actors is greater.

In addition, we included several variables to control for the impact of conventional arguments. As a proxy for a government's degree of legal capacity and its ability to engage in systematic and sustainable organizational learning to benefit from its experiences, we used data provided by the World Bank on government effectiveness (Kaufman *et al*., 2007).

To control for the potential impact of the threat of non-compliance with rulings on the part of Member State litigants, we relied on two measures. First, we included the degree of state power in terms of the relative voting power of each Member State in the Council, as reflected by the Shapley-Shubik index (Shapley and Shubik, 1954).[10] Due to their political power, non-compliance will be less consequential for large Member States than for small Member States (Börzel *et al*., 2011). Thus, any threat of non-compliance will be more credible from the more powerful Member States in the Council. Yet, in some areas of annulment litigation, threats of non-compliance with rulings are never credible. Stone Sweet and Brunell (2012) take an extreme position, claiming that Member State non-compliance can never affect CJEU decision-making in the context of actions for annulment, as the CJEU does not review Member State behaviour but rather the legality of acts adopted by EU institutions. We agree with Stone Sweet and Brunell only with respect to annulment actions that concern Commission decisions on Member State compliance in the context of the domestic spending of EU funds. Member States usually advance money to be spent under the Common Agricultural Policy and Regional Policy in the expectation that the EU will reimburse it. However, the Commission refinances this money only after the accounts have been cleared and compliance with EU law has been verified. In cases in which the Commission identifies violations of spending rules, it keeps a proportional amount of the money. When such a decision is contested by an action for annulment, the CJEU is indeed unconstrained by any threat of non-compliance on the part of Member

[9] The specific question was: 'Taking everything into consideration would you say that your country has on average benefitted or not from being a member of the European Community (Common Market)?'
[10] These values were taken from Paterson (2007).

States. If it decides that the Commission was right to keep the money, non-compliance is not an option, simply because the money has not yet been received. However, in the context of state-aid policy, the situation is different. Here, the Commission assesses domestic state-aid spending by adopting legally binding decisions. If it finds (according to the criteria laid out in Articles 107 and 108 TFEU) that a domestic subsidy is incompatible with the Internal Market, the only effective way for the Member State to contest this Commission decision is to initiate an action for annulment. If the CJEU upholds the Commission's decision in this context, Member States will have to react. Specifically, they must now comply with the decision and the subsequent ruling by either dropping their plans to implement the subsidy, abolishing an existing subsidy or even reclaiming the money (with interest) already paid out to domestic beneficiaries. Similarly, when the Commission defines, amends or adjusts the set of rules with which Member States must comply when applying EU law by adopting implementing regulations and directives without the consent of the Council, any potential threat of non-compliance is unlikely to be easily negated as these directives and regulations are generally addressed to Member State administrations. In sum, the 'threat of non-compliance' argument cannot be rejected *a priori* in the context of actions for annulment. The dummy variable 'compliance relevance' distinguishes between policy sectors in which the relevance of compliance is considered to be low (0) and sectors in which compliance relevance is high (1).

Finally, we controlled for the potential impact of the threat of legislative override. To this end, we directly relied on the measure for 'net weighted political support' used by Carrubba *et al*. (2008). This measure captures the difference between the number of states intervening in support of a plaintiff government (support) and the number of states intervening in support of the Commission (opposition). Furthermore, it weights the support or opposition of each respective state with this state's political importance as measured by its share of votes in the Council. The assumption is that greater net weighted political support will constrain the CJEU by making a legislative override of an unfavourable ruling more credible.

Because the dependent variable takes a binary form (it can only take on the values of 0 or 1), a binary logit model (that is, a logistic regression model) was used (Long, 2005). Although we collected data on annulment litigation up to 2009, the period of analysis was restricted to 1996–2006. This restriction was made because of the limited availability of data for the independent variables. Specifically, Kaufman's indicator of government effectiveness is not available for the years before 1996, while the data on political constraints provided by Henisz are not (yet) available for years after 2006.

IV. Statistical Analysis

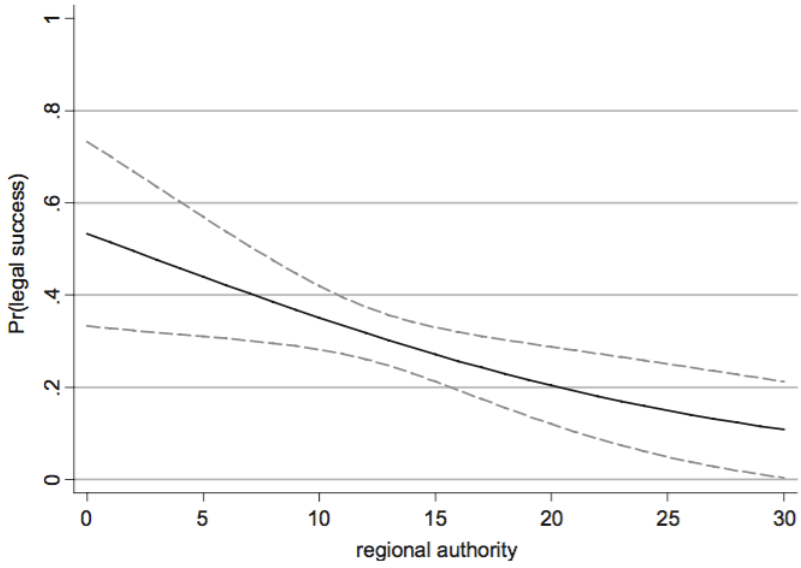
We present our statistical results in Table 1. In models 1, 2 and 3 we assess the impact of various dimensions of EU scepticism and political fragmentation while controlling for conventional arguments presented in the literature. There was no apparent effect on the probability of legal success due to the degree of EU scepticism expressed in public opionion, its trend or the degree of EU scepticism expressed in party manifestos. This result finds further support in models 4 and 5, which investigate the relationship between EU scepticism and legal success in a logistic regression with fixed effects. In this way, we have effectively controlled for all variation between Member States, focusing the analysis

Table 1: Regression Results

	(1) *Pooled logit*	*(2)* *Pooled logit*	*(3)* *Pooled logit*	*(4)* *Fixed effects logit*	*(5)* *Fixed effects logit*
H1					
EU scepticism expressed in public opinion	0.02 (1.65)			2.62 (2.71)	
Trend of EU scepticism expressed in public opinion		3.75 (4.06)			
EU scepticism expressed in party manifestos			0.34 (0.54)		0.35 (0.58)
H2					
Political constraints	0.79 (1.95)	0.86 (1.79)	0.98 (1.83)		
Regional authority	−0.08*** (0.03)	−0.08*** (0.03)	−0.07*** (0.02)		
Control variables					
Government effectiveness	0.55 (0.34)	0.56** (0.26)	0.51* (0.29)		
State power	0.13*** (0.04)	0.14*** (0.04)	0.12*** (0.04)		
Compliance relevance	0.39 (0.43)	0.42 (0.48)	0.39 (0.45)		
Net weighted political support	6.42** (3.18)	6.49** (3.18)	7.55** (3.77)		
Directive or regulation	−0.06 (0.56)	−0.06 (0.56)	0.05 (0.52)		
Constant	−2.24** (1.14)	−2.32** (1.05)	−2.37** (1.08)		
Observations	263	263	261	258	256

Source: Authors' own calculations.
Notes: * Significant at the 5 per cent level; ** significant at the 1 per cent level; *** significant at the 10 per cent level. Coefficients are unstandardized coefficients of the logistic regression model with standard errors in brackets.

Figure 2: Probability of Legal Success and Member States' Degree of Regional Authority



Source: Authors' own calculations.
Note: Effect is calculated on the basis of regression model 1. All other variables are kept at their respective means.

on developments within Member States. Is the increase in EU scepticism in any specific state associated with a decrease in this state's estimated probability of legal success? This is not the case. On the basis of these results, we have to reject *H1*. None of the model specifications presented above supports the claim that governments acting within domestic environments characterized by a high degree of EU scepticism were less successful litigants simply because they cared less about the outcome of legal conflict. Although we have presented anecdotal evidence indicating that national governments indifferent to the outcome of the eventual ruling have used actions for annulment to engage in populist signalling, the probability of such an event does not seem to be systematically influenced by the domestic degree of EU scepticism. At least, the data suggest that governments for whom exploitation of the judicial process for such political ends should be more valuable (that is, those in countries where EU scepticism is high) are by no means less successful before the CJEU. This challenges the notion that governments operating in EU-sceptical environments systematically prioritize the value of populist signalling above the content of eventual rulings. This suggests that we might need to consider the politicization of CJEU case law not only along the lines of conflict over more or less integration, but also in terms of a partisan-politics dimension.

Regarding political fragmentation, we do find support for the argument emphasizing the role of political fragmentation in models 1, 2 and 3. Specifically, the results indicate that Member States characterized by a high degree of vertical or regional fragmentation of their domestic political system are significantly less likely to be successful before the CJEU than their centralist counterparts. Figure 2 shows that the relationship between the degree of regional authority and Member States' probability of legal success is substantial. An increase in regional authority from its empirical minimum to its empirical

maximum is associated with a decrease in the probability of legal success from about 50 per cent to well below 20 per cent. This gives support to the argument that more highly fragmented states systematically initiate litigation without the intention of winning more often than centralist states. What seems on the surface to be an adverse ruling is often not an adverse ruling for the national government. On the contrary, CJEU challenges of the domestic *status quo* can be strategically used by national governments in negotiations with domestic regional actors to persuade them to persuade them to agree to reforms. In this way, states with a high degree of regional authority can use rulings made by an apolitical institution with high normative leverage that challenge the domestic *status quo* in order to overcome domestic 'joint-decision traps' (Scharpf, 1988; Scharpf *et al*., 1976) and initiate domestic reform processes. *H2b* thus cannot be rejected. In contrast, *H2a* (emphasizing the role of horizontal political constraints) must be rejected on the basis of the regression results.

This result remains robust when controlling for the impact of other factors that might potentially influence litigants' probability of legal success. Above all, political power seems to be positively related to the probability of legal success. This is reflected by the significant coefficient for the variable capturing the net weighted political support for an action for annulment. The higher the degree of political support, the more likely the litigant is to succeed. This can be interpreted as support for arguments emphasizing the relevance of judicial constraint when threats of legislative override are credible. Furthermore, the state power of the litigant government as expressed through its relative political weight in the Council further enhances the chances of legal success. While this can be interpreted as support for arguments emphasizing that threats of non-compliance can constrain the Court in its decisions, we do not find higher predicted probabilities of litigant success in areas in which compliance is more relevant than in areas where compliance is less relevant. This finding raises doubts as to whether judicial constraint through the threat of non-compliance is actually the mechanism underlying the positive relationship between state power and the probability of legal success in the context of annulment litigation. Furthermore, models 2 and 3 suggest that governments that are able to rely on a highly effective executive branch litigate more successfully than governments with a less effective executive. This effect is not robust across all model specifications, however. Finally, the analysis indicates that the probability of legal success is not affected by whether litigation is directed at a Commission decision or at Commission directives or regulations.

Discussion and Conclusions

In this article, we have explained the varying degrees of legal success experienced by national governments that refer actions for annulment to the CJEU. In this context, we argue that conventional approaches explaining litigant success in terms of legal capacity and judicial constraint provide an incomplete picture, primarily because they are based on the assumption that national governments always litigate to win. However, this assumption underestimates the complexity of the political environments that determine the benefits governments receive from litigation. We contend that governments' preferences to initiate litigation can be (a) independent of or (b) even negatively dependent on the expected legal success. Consequently, we hypothesized that governments operating

in EU-sceptical political environments would often engage in politicized annulment litigation in which the opportunity for populist signalling rather than their chances of winning the legal dispute motivated the litigation. Although we supported this expectation with qualitative evidence, our regression results suggest that the governments of EU-sceptic Member States do not systematically engage in politicized litigation. In contrast, we found support for the argument that governments facing domestic regional actors with a high degree of authority are systematically less successful in annulment proceedings than governments operating in more centralist systems. We argue that this is because they may in fact benefit from losing judicial proceedings. Legal defeat can be used as a normative lever in domestic reform processes that are blocked by regional actors as such negative rulings challenge the *status quo* policy arrangements. This is not to say that constrained governments never litigate to win; we are simply proposing that they do not always litigate to win the legal dispute. Governments may seek to benefit from litigation in the national political arena, for example, in order to win elections or push through domestic reform projects. These gains can result from legal success or legal defeat, or they may be completely independent of legal outcomes. Whether governments use litigation in such an instrumental way is not purely contingent on the specific case; rather, it is systematically influenced by the characteristics and constellations of national political systems. This finding holds true when we control for potentially confounding variables conventionally thought to be associated with legal success – namely legal capacity and judicial constraint.

Although the hypotheses presented only find partial support in the analysis, this article highlights the relevance of investigating the domestic politics of CJEU litigation. The combination of qualitative and quantitative research can do much to improve our understanding of the political role played by this kind of litigation in the domestic arena.

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