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March 2016

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MUCH ADO ABOUT MONEY AND HOW TO SPEND IT! ANALYSING 40 YEARS OF ANNULMENT CASES AGAINST THE EUROPEAN UNION COMMISSION

Publication Details:

Bauer, Michael W./Hartlapp, Miriam, 2010: Much ado about money and how to spend it! Analysing 40 years of annulment cases against the EU Commission, in: European Journal of Political Research, Vol. 49, No. 2, 202-222.

Preprint No. 35

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Abstract. This article analyses four decades of annulment cases against the European Commission brought before the European Court of Justice by dissatisfied Member States. Annulment cases are interpreted as incidents of a struggle between Member State governments and the Commission about policy decisions. Studying annulment cases for the first time in comparative perspective, three important patterns of variation are identified: with respect to the evolution of annulment cases over time, as regards the Member States as plaintiffs and in view of policy fields. Subsequently the data are interpreted on the basis of structure, agency and policy field specific explanatory mechanisms. Leaving the aggregate level, the two policy areas that account for more than 80 per cent of annulments are analysed: EU agriculture and competition policy. In the vast majority of cases, the dominant rationale behind annulments is not national objections to the supranational exercise of delegated powers per se or in specific policies (as most structural theories would expect) but to the way the Commission uses these competences to restrict how national governments may allocate European or national funding.

Introduction

Annulment actions are cases brought before the European Court of Justice (ECJ) by Member States of the European Union (EU) claiming that the European Commission has wrongly interpreted or overstepped its sphere of competence. Annulment actions are thus observable incidents of political conflict between Member States and the Commission. They capture part of the everyday political struggle between national and EU actors about how to use delegated powers and how to exert supranational discretion in an ever closer Union.

Notwithstanding the role annulments have played in selected case studies,[1] there is no interpretive overview, let alone systematic attempt to analyse annulment actions at the aggregate level as a particular set of cases in their own right. We want to contribute to filling this gap and, for a start, we attempt two things. First, we aim to uncover patterns in annulment cases over time and to compare them across policy sectors and plaintiffs (Member States). Second,

we discuss the fit of potential explanations for the patterns we observe. Unlike what much of the literature would predict, conflict is not a function of allocation or supranational extension of decision power in the EU multilevel system, but is largely driven by economic interest. Although the analysis is exploratory and thus our results have to be treated with some caution, we think that there are good grounds to argue that these insights provide a fresh perspective on the factors influencing the course ofintegration.

We proceed as follows. We start with a discussion about the quality of annulment actions as a new indicator, followed by developing some theoretically informed general hypotheses about mechanisms and driving forces of policy-related conflict between national and supranational actors. We then present descriptive evidence concerning the fit of expectations advanced in the literature on EU policy making and annulment patterns observed with respect to the evolution of annulment cases over time, across Member States and policy fields. Finally, we summarise our findings.

Annulment actions as data

Any EU institution as well as legal or private persons, if affected by a particular decision adopted within the EU system, can instigate annulments. Given the prominence of explanations that refer to the Commission as a pro-active motor of European integration (Haas 1958) and given the Commission's importance for EU policy expansion (e.g., Hooghe 1996), the subset of annulment cases brought by Member States *against* the Commission appears to be of highest theoretical interest. In this respect, Article 230 EC Treaty says that the ECJ 'shall review the legality of acts adopted by ... the Commission.... It shall for this purpose have jurisdiction in actions... brought by a Member State... on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.'

The reason for Member State(s) to start an annulment is that they see the Commission overstepping its competence and thus trying to enhance its influence – against the wishes of the Member State(s). Thus we assume that all annulment cases taken against the Commission are evidence of conflicting political or strategic interests between the Member State(s) and the Commission.[2] In this analysis, we use data on annulment actions taken before the ECJ from 1966 to 2006.

Our data have both advantages and drawbacks. The key advantage is that by providing empirical information on conflicts about the use of delegated powers, they allow us to go beyond existing research, which is often either

theoretical and formal (as is the case for much of the principle agent (P-A) literature) or based on single empirical cases (as in most of the EU policy analysis literature). A drawback is that annulment actions may be interpreted as the 'tip of the iceberg' as regards national reactions to the way the Commission uses its discretionary power. We expect that there are many other cases of contested application of delegated powers where Member States do not call the Commission before the ECJ, for example, because they lost similar cases in the past, because of a lack of resources or political will to undertake such a legal contest, or because they await decisions on similar cases to assess their chances for success. By contrast, rulings of the ECJ may be seen by the actors as having the character of 'decisions in principle' with the (potential) consequence of changing subsequent behaviour without more cases being brought before the ECJ.

Moreover, at the chosen level of analysis, the data cannot distinguish between use and abuse of delegated powers. Assuming that the ECJ is strictly neutral we can, however, indicate a tendency. The large majority of cases are judged to be unfounded and are decided in favour of the Commission (185 out of a total of 317, or 58 per cent).[3] In almost a quarter of all the annulment proceedings (74 cases), the ECJ declared the usage of delegated powers to have been unlawful. Finally, a substantial number of cases were judged to be ambiguous with both parties having been right in part of their claim(s) (49 out of 317, or 15 per cent).[4]

Finally, our data at times do not allow us to *test* hypotheses in a strict statistical sense. Rather, and following an exploratory logic, we aim to bring as much structured information as possible to bear on theoretical propositions in order to render confirmation or rejection at least plausible. Hence, in analysing annulment actions against the Commission, this article does not aspire to settle, but simply to further the debate on delegation and entrepreneurship in EU public policy making.

Expectations

Studying annulment actions systematically for the first time we draw on a broad range of theoretical approaches from EU studies and other sub-disciplines of political science to explain conflict over the use of delegated powers. We consciously refrain from focusing on a particular theoretical approach out of fear that selecting the theoretical focus too early would risk missing other (yet unknown) relationships of perhaps equal (or even higher) significance. We employ three approaches to order the variegated theoretical discussion: structure, agency and policy field.

Arguments deriving from structural approaches see the most important factor to be the quality of the development of supranational powers. In simple terms, the mechanism that is usually invoked to explain conflict between levels is the ever greater transfer of power to the supranational entity. From a P-A perspective, delegating powers always implies the emergence of a certain margin of autonomy for the agent since it is impossible to settle in advance all the contingencies that may emerge (e.g., Thatcher & Stone Sweet 2002). More decision powers provide the Commission with an enlarged basis for policy making – unless efficient control mechanisms are introduced at the same time. They increase the likelihood that some Member States will view the use as unauthorised trespassing. At the same time, more power transfer substantially alters the complex balance between Commission policy-making resources and Member State decision-taking powers. Historically, excessive attempts by the Commission to extend its powers could be countered very simply by a Member State veto (e.g., Weatherhill 1995).With the increasing use of qualified majority voting, annulments seem to have gained in importance as an avenue to signal opposition to EU policies. Both arguments lead to the expectation that the more competences are transferred, the more conflict is likely to emerge. *Since supranational policy involvement has increased over time, the absolute level of annulment actions should also increase over time.* Given that competences are transferred in the various policy sectors in varying quantity and quality, one would expect variation between policy fields in annulment conflicts. *In a policy field in which the supranational level has been granted substantial competence (in terms of scope and decision rules), the occurrence of conflicts should also be high.* Arguments deriving from constellations of actors and their interests to enhance influence in the EU system are more variegated. Conflict is under- stood to be driven either by the interest of an actor to maximise its benefit in policy making, even at the expense of opposing interests of other actor(s), or by the heterogeneity of the decision taker. A prominent approach sees the Commission as a purposeful (and sometimes cunning) opportunist aiming at enhancing its own influence on EU policies or even to establishing new policy competences at the supranational level (Cram 1994; Héritier 1997). The point here is that the Commission is conceived as the central actor in what is basically an unfinished political system. Hence, it is an entrepreneur with the objective to conquer policy competences for the emerging system (and therefore also for itself as its principal executive agency; Bauer 2008). Any new competence for the supranational level is thus equally welcome. *If this were the essential mechanism to explain conflict about delegated competences, one should expect a relatively equal distribution over policy fields.*

Rather than focusing directly on the Commission to explain political conflict within the EU system, other approaches focus on the *Council* and how

Member State governments handle conflicts of interest there. Policy conflicts can be explained by socio-economic differences among the Member States and by the resulting group dynamics and interest collisions (along a north-south divide (Mattila & Lane 2001); or more pronounced in specific policy fields (Hayes-Renshaw et al. 2006)). With respect to what we know from national political systems, greater ideological dispersion (e.g., in terms of party politics) should also lead to more conflictual policy making (Schmidt 1996). *We would thus expect patterns of conflict to emerge in policy areas and times of greater dissent in the Council.* What is crucial for our argument is that according to both logics, conflict could be read as the result of preceding incoherent political decision making within the Council. The implementation of dubious supranational compromises bridged by formal compromises and side-payments automatically leads the Commission into conflict with individual Member States in the subsequent implementation phase. Rather than an indicator for Commission (ab)use of powers, annulments are in this view a necessary evil and side effect of diverging Member State positions.[5]

The third line of reasoning focuses on policy-field-specific explanations. Conflict is specific of the policy field and thus a function either of problems inherent in the policy issue or of the dominant institutions and actors' interests prevailing in the area. Sectoral regulatory output should capture both dimensions of decision-taking difficulties – that is, conflict related to the use of sector-specific delegation of powers and actor constellations within the policy field. *From this perspective, annulments should be expected to show an inverse relationship to the regulatory output within a policy field.*

A second line of argument emphasises the importance of material interest. Putting money into the centre of attention, this logic leads us to expect economic interest to be a good indicator of the emergence of conflict. Conflicting economic interests in the Council are most directly at stake in the context of distributive EU policies, but they can be equally affected where regulation interferes with distribution (Majone 1994). *Policy fields that channel money from the EU budget into the Member States or that regulate spending at national level should therefore show high numbers of annulments.*

Basing our investigation upon these three approaches provides us with the needed theoretical guidance for what in essence is an empirical exercise.[6]

Annulment cases against the European Commission

This section is based on recently collected data on annulment actions taken before the ECJ (1966–2006). We found 317 annulment cases initiated against the Commission in the EUR-Lex legal database.[7] Joint cases, where multiple

Member States accused the Commission were disaggregated into single cases, while cases raised by one Member State and combined under one ruling by the ECJ were counted separately.[8] We assigned the cases to the year in which the complaint was actually filed, not the year of the final ECJ judgement. Therefore, although using EUR-Lex data up to February 2008, our latest cases date from 2006. We also calculated the average length of an annulment action from its initiation to the ruling reached by the ECJ (29 months). In the following we wish to draw attention to three distinct dimensions of variation in annulment cases: time, policy field and Member States.

Evolution over time

Figure 1 shows that the number of annulment cases has increased substantially over time. Starting with very low numbers, the 1980s see the first substantial increase in the number of annulments, with a peak in 1985 (24 cases) and

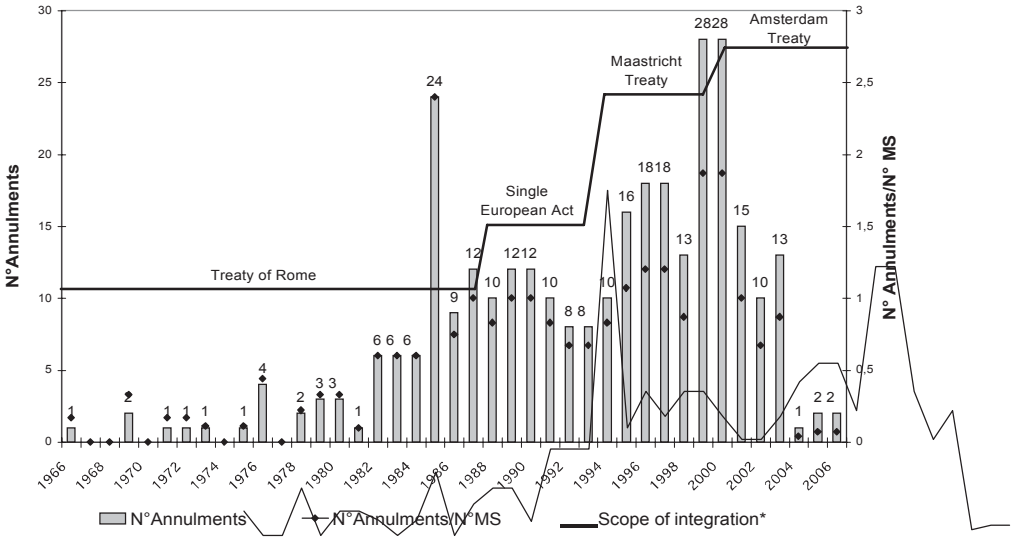

Figure 1. Trend for annulment cases, 1966–2006.
Note: * According to Börzel (2005: 220) 'scope of integration' comprises the level ('the locus where the competences for policy decisions reside; it is operationalized by the number of issues in a given policy sector for which the EU has the power to legislate') and the scope ('the procedures according to which policy decisions are taken focusing on the involvement of supranational bodies and Council voting rules') of task expansion. Both dimensions are measured using a five-point scale. We aggregated the values for level and scope of integration for each treaty in force.
Source: Authors' calculations on the basis of EUR-Lex data and Börzel (2005: 222–224).

decline afterwards. Member States again cited the Commission before the ECJ from the mid-1990s onwards. An all-time high of 28 cases was reached in 1999 and again in 2000. This trend is less pronounced when we consider that the number of potential plaintiffs increased as the EU expanded, although the general picture remains. From 2001 onwards, annulment cases have been on a steep decline (even when the backlog of cases still pending in front of the ECJ is taken into account). It remains to be seen whether this is a temporary low or a new trend possibly explained by a shift toward new instruments that render annulment cases less likely (e.g., the Open Method of Coordination), by increased difficulties to reach decisions under the Nice Treaty, or by a general (and conscious) restrictive use of legislation by a Commission attempting to simplify the *acquis communitaire*.

Turning to possible explanations, there seems to be some fit between overall task expansion in the period from the Treaty of Rome to the Amsterdam Treaty and the increasing level of annulment cases over that time. The increase in the late 1980s and 1990s seems to reflect the power transfer related to the Common Market Programme as established by the Single European Act. And the delegation of further competences under the Maastricht Treaty again corresponds to higher numbers of annulment cases.

This is generally in line with structural approaches, arguing that gains in delegated powers translate into more conflict. However, structural approaches cannot easily explain the larger numbers of annulment actions in the 1980s compared to much of the 1960s and 1970s, since the Rome Treaty, as the basis for actions, remained unchanged. A possible explanation relates to the fact that more basic rules on delegation of competences and influence were still in flux. Battles took place directly about, for example, the voting rules and the procedures of implementation in the comitology system. Contestation of these rules and procedures via annulments was not (yet) the mode of conflict.

Agency approaches bring light to another pattern revealed by Figure 1. There is a relatively larger increase in the number of annulment actions in the years when the Community saw the coming into force of a new treaty (the Single European Act and the Amsterdam Treaty) or in the years following its introduction (the Maastricht Treaty). This invites the tentative hypothesis of 'purposeful opportunism' with respect to two (not necessarily exclusive) mechanisms. Considering that final decisions at the Intergovernmental Conference adopting the new treaty are taken on the grounds of the then prevailing balance of powers, it makes sense for the Commission actively to pursue an extension of powers in the run-up of the negotiations. Part of this 'setting the scene' may result in instances of increased conflict about the use of delegated powers. Yet, the only example where the data seem to support such reasoning

coincides with a period where the Commission was known to be particularly active in seeking power extension anyway (that is under Delors; Ross 1995).

More support can be found for a second mechanism: the active stretching of competences first formulated or modified in a new treaty. The amendment of existing treaty provisions or the adoption of new rules often results in formal compromises and ambiguous wording, giving rise to legal uncertainty. Presuming the interest of the Commission to extend its powers, it might be particularly inclined to use these situations of 'legal flux' for testing out supranational room for manoeuvre. The concrete balancing of interests and legal interpretations invites a tug-of-war. This matches the observation that conflict about the use of delegated powers increases right after competence transfer to the supranational level has taken place. Overall purposeful opportunism appears to have some explanatory power.

Taking a different perspective on agency, the party political affiliations of Member States governments provide us with information about (potential) dispersion of positions in the Council. According to this reasoning, we expect periods with a wide party political range of governments to exhibit high degrees of conflict about the use of delegated powers, while years with smaller ideological differences between the governments in power in the Member States are marked by lower degrees of conflict. If we take the data on the party political orientation of governments in power provided by Manow et al. (2007), the years 1966–1973 as well as 1999–2003 stand out for their relative ideological homogeneity. While the early phase is indeed marked by few annulments, the latter phase – contrary to the theoretical expectation – according to our data is the most conflictual period of the four decades studied.

Decision-making difficulties are another means to capture dispersion in the Council. They can be approached by measuring EU regulatory output in data banks such as EUR-Lex (König 2007). However, there is at best a very weak relationship between regulatory output for the years 1984–2002 and the number of annulments (although pointing in the right direction). Hence, on the basis of these operationalisations we can neither confirm nor reject the actor-centred expectation that in times of political heterogeneity within the Council Member States are more likely to go to court to attempt to have Commission actions declared void.

Variation between Member States

As apparent from Figure 2, Italy, Germany and France often brought the Commission before the ECJ for having allegedly overstepped its competences (64, 42 and 40 cases, respectively). More surprisingly, Spain is also one of the high-scoring Member States (38 cases). This is especially striking when we

consider the number of annulment cases in relation to years of membership. On the other side, the United Kingdom, Ireland and the Scandinavian Member States as well as Portugal, Austria and Luxemburg can be categorised as low scoring. Overall, more than half of the variance can be explained by Member State size, with larger Member States being more likely to initiate annulment cases (even when controlling for duration of membership). One caveat remains, however. These differences in observed behaviour might only partially reflect real country differences because not all cases of conflict affect all Member States equally, and some countries might face the consequences of power (ab)use more often than others.

According to theories of liberal intergovernmentalism, EU politics should typically reflect the interests of the decision-taking Member States (Moravcsik 1998). From this perspective, the founding Member States have been in the best position to decide for which policy area powers are delegated and even more, how the competence transfer was shaped in detail. We should expect them therefore to be in conflict with the use of these delegated powers less often. The strikingly high number of annulment cases for these Member States, however, challenges this proposition. In its traditional realist guise, intergovernmentalism would lead us to expect the larger and thus in terms of formal voting weight more powerful Member States to be in a better position to decide about the shape of EU politics (Keohane & Hoffmann 1991). However,

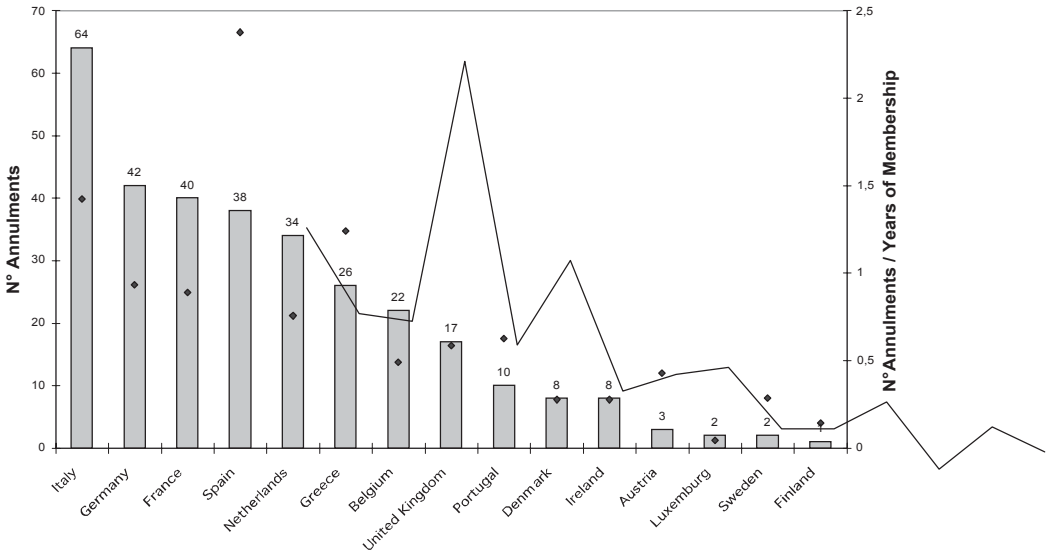

Figure 2. Annulment cases per Member State, 1966–2006.
Source: Authors' calculations on the basis of EUR-Lex data.

with Italy, Germany, France and Spain bringing annulment cases most often, greater Member State size seems to translate into higher, not lower, likelihood to be in conflict. A possible explanation is that the bigger Member States dispose of more resources – in particular a self-assured administration – and thus are more willing to engage in conflict with the supranational level.

Finally, cross-country patterns might be explained by national legal cultures accounting for differential Member State behaviour in calling upon the ECJ (Alter & Vargas 2000). Legal cultures typically are influenced by national factors such as legal standing, court systems, procedural rules on the filing of complaints or the availability of legal aid that should (indirectly) influence the inclination of a Member State government to resolve conflicts by judicial means. We should see the importance of legal cultures confirmed when high numbers of preliminary rulings coincide with high numbers of annulment cases. For 1966–2006, Germany, France and Italy – high scoring with respect to annulment cases – have transferred most cases to the ECJ for a preliminary ruling. Relatively low numbers for both types of legal procedures are recorded for Portugal, Ireland, Luxembourg, Finland and Sweden. However, the fit is poor for Spain as well as for Denmark and Austria – the former presenting few preliminary rulings and many annulments, the latter showing the opposite relationship (numbers on preliminary rulings are from European Court of Justice 2007: 99). Overall, legal culture seems relevant to the patterns of annulment cases across Member States. However, it is difficult to differentiate between the level of conflict over the use of competences and culturally based differences in the likelihood that these conflicts will become the subject of legal actions.

Variation between policy fields

Figure 3 shows the distribution of annulment cases across policy fields. It also gives evidence on policy field specific transfer of powers.[9] We find policy areas with no or low numbers of annulments on the left-hand side of the graph. These are also areas where formal supranational competences are rather 'thin'. The right-hand side, indicating higher levels of integration, also features policy areas with relatively larger numbers of annulment cases. Strikingly, agriculture (172 annulment cases) and competition and industry (92 annulment cases) are the areas where the data indicate substantial conflict over power use. This also holds true if we look only at the cases where the Commission was judged to have indeed wrongly interpreted or overstepped its competences. Regional, economic and social cohesion and economic external relations follow.[10] The number of annulment cases is negligible in all other policy fields.

It is quite intriguing to ask why, according to our annulment data, conflict stands out in only two policy fields, agriculture as well as competition and industry, while it seems to be a marginal phenomenon in all others. As has been stressed when explaining the evolution of annulment cases over time, structural approaches assume that the more powers are delegated in a policy area, the more use the Commission will make of them, and therefore the greater the likelihood that some Member States will view this use as unauthorised trespassing. Figure 3 shows that the highest degree of constitutional power transfer in the area of agriculture is matched by the greatest number of annulment cases. The same holds, albeit to a weaker extent, for the area of competition and industry. However, despite remarkable extension of delegated powers in areas such as environmental policy or occupational health and safety, the number of annulment cases remained low. Overall, variation in constitutional power transfer across different policy fields seems to be a rather crude tool for explaining the usage of delegated powers by the Commission. Thus, we can discard the hypothesis that Europeanisation of an individual policy field – in other words, more supranational involvement over time – would *per se* lead to more contestation over delegated powers.

Turning to agency approaches and stressing the policy-field-specific degree of conflict in the Council, we should expect cleavages to be pronounced in

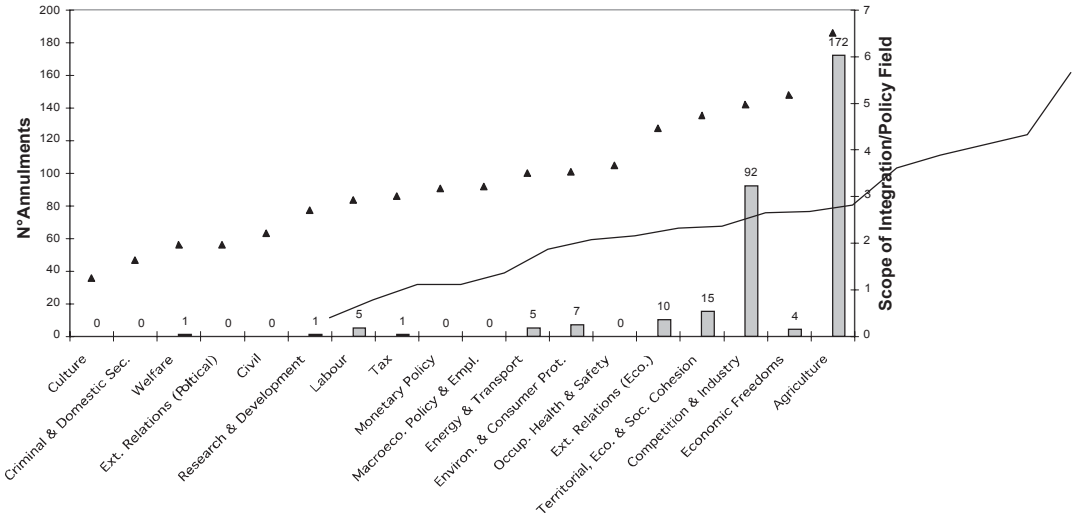

Figure 3. Policy field specific task expansion and annulment cases, 1966–2006.*
Note: * Policy fields refer to the categories used by Börzel (2005) to make data comparable. Policy fields not listed were not subject to annulments.
Source: Authors' calculations on the basis of EUR-Lex data and Börzel (2005: 222–224).

areas where national policies and institutions are deeply entrenched and highly salient. However, the policy field specificity of this argument does not allow elaborating in depth on the underlying mechanisms within this article. What becomes apparent, however, is that we only find 15 annulment cases for the area of regional, economic and social cohesion. In this area, typically categorised as belonging to the field of distributive politics, the logic of policy specific degrees of conflict in the Council would have predicted many contestations. Against these rather unsatisfying results, we decided to take a closer look at agriculture as well as competition and industry. Why do we find a huge majority of annulment cases in these policy fields?

Annulments in agriculture and competition

We will first analyse what is specific about agriculture as well as about competition and industry that render conflict about the use of delegated powers by the Commission more likely. We then turn to explaining the pattern of annulments over time. The Common Agriculture Policy (CAP) has multiple (and partly contradictory) functions. It aims to increase agricultural productivity, stabilise markets and secure supplies. All this is to be done at reasonable prices for consumers while generating fair income for farmers (Article 33, EC Treaty). More recently, environmental and food safety objectives have been added to this list. The CAP relies on financial redistribution between Member States and is one of the oldest, most highly segmented and most opaque EU policies. At the same time, CAP has undergone various reforms, all aiming at rendering CAP more efficient and more effective in the face of enlargements and external pressure for trade liberalisation.

Competition is also among the oldest EU policy areas. In order to promote and maintain the competitive functioning of common markets, the treaty articles on competition and industry provide the Commission with especially far reaching competences over private actors and enterprises – competition has thus been characterised as the EU's 'first truly supranational policy' (McGowan & Wilks 1995: 142). For our analysis it is important to note that there is not *one* competition policy. We can discern three policies to counter different anti-competitive practices: 'restrictive practices' (Article 81) in case of cartels; 'monopoly control' (Article 82) to prevent excessive concentration; and 'state aid' (Article 87) where public subsidies endanger market function.

Why is it precisely these two policy areas that seem much more likely than any other to be subject to conflict in the EU system? The answer seems simple. Both are areas where EU policy directly decides about the distribution of substantial financial resources. CAP still accounts for the greatest proportion –

now down from more than 70 per cent to 46 per cent – of the budget of the EU.[11] Much of CAP expenditure goes for storage and export subsidies (roughly 20 per cent) as well as, since 1992, increasingly to direct aid for farmers. Competition policy indirectly interferes with national budget allocations. This is most visible in the area of state aid, where the national public budget is at stake, but also holds true for antitrust control, which is closely linked to national industrial policies. It thus appears that the distribution of money – state subsidies be they European or genuinely national – lies at the heart of these policies. Might it be that the conflict made visible by annulment cases is basically fuelled by the most classic unit of politics – namely public spending?

This thesis is supported by looking at the details and substance of the issues at stake. Virtually all agriculture annulment cases are about financial issues. Two reasons to appeal to the ECJ against the use of delegated powers by the Commission are most common. First, the Commission refuses to refinance certain distributions of EU subsidies undertaken by the Member States in the name of the CAP guarantee regime. For example, butter will be bought and put into storage when market prices fall below the EU intervention level. However, if this butter is of poor quality (in the Commission's opinion), the Member State is not allowed to do so – and thus EU appropriations cannot be used, or if EU money has already been spent, the national government has to pay it back (ECJ 1999; ECJ 2000b). Second, after the reform strategy emerged to reduce quotas and set aside land in order to limit production, increasingly complex rules opened incentives for fraud. As punishment for insufficient national controls, the Commission often cuts 2–5 per cent of the subsidies in 'affected' sectors throughout the Member State – disregarding regional differences (notoriously the wheat and the beef markets; ECJ 2003b; 2003a). Member States often object to these Commission decisions. They claim money back or urge the Commission not to cut subsidies (ECJ 2004; ECJ 2002b). A few other cases are of a more regulatory quality, but still translate directly into economic gains or losses.

A detailed look at annulments in competition and industry confirms the thesis that a decisive rationale for Member States to appeal to the ECJ against the Commission is money and how to spend it. State aid accounts for the overwhelming majority of cases; only eleven cases relate to rules applying to undertakings and there is only a single annulment case on an issue of antitrust. Some annulment cases in state aid relate to the fact that Member States had not complied with their obligation to notify to DG Competition new aid prior to issuing payments, and hence can be characterised as procedural in nature. The majority of annulment cases, however, deal with the granting of illegal aid. They question Commission decisions to limit national support to declining

industries (or to foster sunrise economies). Typically, nationally important or internationally (increasingly un-)competitive industries are at stake, such as shipbuilding, steel and mining or textile. Often cases deal with concrete interpretations of exemption possibilities granted under Article 87, paragraphs 2 and 3, where the anti-competitive effect of state aid clashes with environmental protection or regional development aims. These may be tax provisions favouring undertakings in the New Länder after German unification (ECJ 2000a) or employment promotion in the form of a reduction of social security contributions in Italy when fixed term contracts for young workers are converted into open ended schemes (ECJ 2002a).

Thus, as is the case for agriculture, EU competition policy and especially state aid is an area in which EU policy implications are directly felt by national government since they interfere with decisions about the allocation of costs and benefits to national actors.[12] Beyond mere financial implications, conflict in competition might be related to what is perceived as the adequate relationship of state and market. However, we note that undertakings and antitrust, where this should be equally visible, are marked by a lower number of annulment cases than state aid that is directly linked to the flow of money.[13] We now turn to connecting patterns of annulments with the policy dynamics within these fields over time.

Annulment cases in the area of agriculture are quantitatively more important than in competition (Figure 4). They show substantial variation over time. They first peaked in the mid-1980s (16 cases in 1985), coming down to two cases in 1993, only to swing up again in the mid-1990s (12 in 1997), dropping to four cases in 1998, before peaking again in 1999 (14 cases). The evolution of annulment cases in competition and industry took place at a much lower level and there was a more moderate but stable growth trend from an average of two throughout the 1980s to eleven cases in 1999 and 2000 (only 1990 shows an exceptional peak of eight cases). For both areas the 1990s are the most important decade numerically and for both areas a decline is visible in the new century.

We already stressed that in both areas much competence has been delegated to the supranational level from the beginning of the EU and that in both areas supranational decision powers have successively been increased. Looking to structural reasoning, we would therefore expect that the number of annulment cases brought before the ECJ would increase at a similar pace and according to a similar pattern as the delegation of further powers to the supranational level. Having used constitutional competence transfer as an indicator for overall power transfer, we now turn to regulatory output as a more fine tuned measure when it comes to the level of policies. For competition only the overall trend of annulments coincides with regulatory output, not the temporary peaks and lows

(especially in the early 1980s and 1990s). Evidence on agriculture gives even less support to the assumption. Declining regulatory output from the mid-1990s onwards is accompanied by some of the highest annual scores in annulment cases. Thus, at the aggregate level the data do not confirm the structural view on conflicts; rather what yields insight here is policy context.

After the CAP crisis of the 1980s and subsequent reforms, the Commission was forced to apply rules on spending money more 'strictly' and to enforce Member State compliance more thoroughly in order to keep CAP self-induced problems manageable. Similarly in competition and industry, arguments linking structural reasoning with the specific nature of competition policy, and state aid in particular, are powerful explanations. Only with the completion of the Customs Union could conflicts of interest on the competitiveness of markets, such as abuse of market-dominant positions, emerge. That is why we see virtually no annulment cases up to the late 1960s, but even in the following years there were still relatively small grounds for conflicts about the use of delegated powers. This changed only when the EU moved to the completion of the Single Market and thus upset conventional barriers to trade – hence rendering recourse to other protective means at the national level more likely

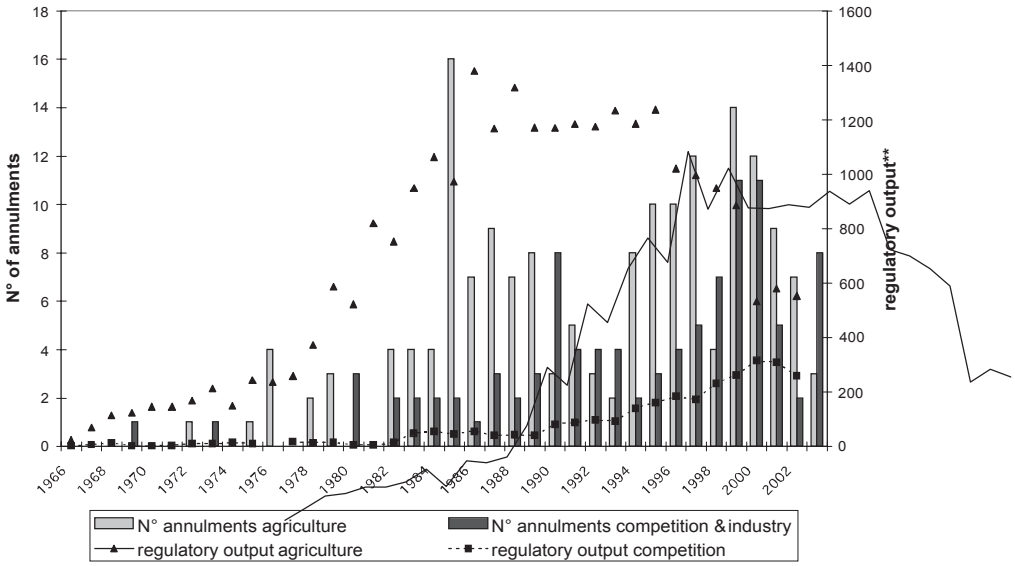

Figure 4. Evolution of annulment cases in Agriculture and Competition & Industry, 1966–2006.*

Notes: * So far no judgements were taken on cases originating after 2004. ** Regulatory output = regulations, directives, decisions and other acts.

Source: Authors' calculations on the basis of EUR-Lex data.

(Cini & McGowan 1998: 32). It is from that point onward that the Commission proactively made 'use' of the powers delegated (i.e., by having recourse to informal instruments; Lehmkuhl 2008: 143–144) – a situation likely to lead to conflict between Member States and the Commission.

Two related developments coincide with this observation. On the one hand, the Commission's practice to impose repayment of aid penalties was introduced in this period (Büthe 2007: 191). On the other hand, these changes are inherently linked to the leadership capacity of Commissioners Peter Sutherland (1985–1989) and Sir Leon Brittan (1989–1993), who prioritised the area of state aid within the broader competition context by establishing systematic inventories of state aid and publishing them (Cini & McGowan 1998: 34, 145) and by initiating landmark cases before the ECJ, such as the dispute between the Commission and Philip Morris (C-240/82 Judgment of the Court of 10 December 1985, *Stichting Sigarettenindustrie and others v. Commission of the European Communities*, for details see Lehmkuhl 2008: 144). Both developments further incited Member State opposition and changed the climate on competition policy in the EU system, thereby rendering conflict about the use of delegated powers by the Commission more likely.

Having emphasised that the majority of annulment cases in competition can be subsumed under state aid, the 1980s up to the mid-1990s also saw some cases related to undertakings. Again, policy context provides us with an explanation for this phenomenon. These annulment cases fall in the period where the Commission started deregulating traditionally state-owned enterprises such as in telecommunication, postal services or transport. In collaboration with the ECJ and step-by-step, the responsible Commission unit openly confronted reluctant Member States (Schmidt 2001: 180–184), thereby 'increasingly and very visibly' (Büthe 2007: 184) exercising supranational power. Taking annulments as an indicator of conflict about the use of powers delegated to counter the anti-competitive practices of formerly state-owned undertakings, they disappeared once regulation on full liberalisation was in place (e.g., for telecommunication: Directive 96/19/EC). This supports our argument that annulments can mark pre-regulation tussles and as such either are signals to more precisely fix the distribution of competence by means of a regulatory act, or they at least contribute to setting the scene for the battles to be fought during successive negotiations.

Conclusions

In this article we analysed four decades of annulment cases as instances of the everyday political struggle between Member State governments and the Com-

mission about the supranational use of delegated powers. For the first time, comprehensive empirical data on such annulment cases has been collected, patterns identified and the fit of potential explanations assessed. In our view, the value of our theoretically guided exploratory exercise lies in providing evidence about which kinds of potential explanations appear to work and which do not. With respect to what does not work, it stands out that ideological heterogeneity or socio-economic cleavages within the Council seem unrelated to the decrease or increase of annulment cases, as do competence transfers per se or in specific policy areas. Even though the logics behind these arguments are prominently used in contemporary explanations of EU policy making, our data attributes to them only secondary roles.

What seems to work in terms of providing explanatory leverage, however, is increasing competence as a necessary condition to create room for manoeuvre for the EU Commission. Turning to sufficient conditions, the most notable result of our analysis is that an overwhelming majority of annulment actions occur in only two policy areas: agriculture as well as competition and industry. Policy specific explanations proved to be most salient as it turned out that the central mechanism driving conflict between Member States and Commission is supranational restrictions on state governments' decisions about how to allocate public subsidies. To put it at its simplest, annulments are all about money and how national politicians fight Commission decisions that limit their autonomy to hand it over to national beneficiaries.

It should be noted that a supranational competition policy is obviously of little use in a Common Market where national governments can distort the market by distributing state aid at will to their favourites. Likewise, the CAP had to toughen spending control to keep dodgy national financial interventions at bay; otherwise such endemic practices would put the survival of that very policy at risk. We were thus able to connect the development of annulment cases in agriculture as well as competition and industry with specific intra-policy dynamics. In essence, annulment cases tend to rise when supranational sanctions against national 'shirking' become effective. In response to tougher EU decisions, national governments claim the 'overstepping of competences' by the supranational agent that enforces the EU rules – that is, the European Commission. As a last resort, national governments seek annulment of supranational decisions that restricted their national ability to hand out public benefits.

It is important to underline that this result is disturbing news as it goes against the general thrust of many political science conceptualisations of EU policy dynamics. One central, if often implicit, assumption made in many studies is that political conflict in the EU system emerges over policy content and ever greater supranational involvement in regulating the economies and the societies of the Member States. We find, however, few cases where annul-

ments are about policy substance, however vaguely defined. That means that in the mirror of annulment data, national governments are amazingly unconcerned about the supranational exercise of policy competences per se. In essence, what governments seem to care about is money and to keep their sovereignty as to national practices of distributing it.

Finally, our analysis raises the question of why national governments do not get discouraged taking the Commission to the ECJ again and again over similar cases, even though in the vast majority of the cases the Commission is vindicated. The answer may well have to do with the specific constellation behind annulment cases – that is, national politicians unable to distribute public money to chosen beneficiaries among their voters. To investigate further such national politics behind annulment cases appears of great potential for better understanding of political conflict in the EU multilevel system as expressed by our annulment data. In any event, the results of our analysis of annulment cases provide interesting empirical data and provoking propositions for the scholarly community.

Acknowledgements

We would like to thank Jacob Düringer, Paula Protsch, Philipp Studinger and Florin Vondung for research assistance; and the two anonymous referees, Dirk Lehmkuhl, Mark Thatcher, Christoph Knill and the participants of the panel 'PA-theory revisited: Agency problems within the EU system' at the ECPR Conference in Pisa (7–9 September 2007) for valuable comments.

Notes

1. We found evidence for the importance of annulments for poverty reduction programmes (Bauer 2002), for advertisement and sponsorship of tobacco (Tridimas & Tridimas 2002), on merger regulation (Bailey 2007: 103), for pension fund regulation (Hartlapp 2007) and on state aid to the motor vehicle industry (Lehmkuhl 2008: 145).
2. Such conflicts cannot be reduced to mere technical issues because these should generally have been addressed by other means.
3. This supports supranationalist integration theorists (e.g., Mattli & Slaughter Burley 1998) while at the same time fuelling critical quests for a 'neutral' forum when it comes to conflicts over competence allocation in the EU system.
4. The total of annulment cases further includes cases judged to be inadmissible, interlocutory in nature or where no decision was necessary.
5. Of course this does not rule out that the Commission can exploit diverging Member State positions to advance own interests.

6. Since we are not arguing for the supremacy of a particular theoretical approach, but at this point merely want to focus empirical analysis, the ontological heterogeneity of these approaches constitutes no obstacle.
7. We extracted information on the legal case number, title of the annulment procedure, plaintiff, starting date of the ECJ procedure, date of decision and outcome, policy field (as classified under EUR-Lex subject matter) and EUR-Lex number.
8. Joint cases brought by a Member State and a firm were counted as a single case because our focus is on the relationship between Member States and the Commission.
9. We are aware that such indicators capture the evolution of the constitutional base at best very roughly and do not reflect the sweeping impact of single provisions.
10. The number of annulments in the area of regional, economic and social cohesion might be slightly biased downwards. First, in a handful of cases regions engaged directly in an annulment case and are thus excluded from our sample on annulment actions by Member States. Second, some of the cases filed as belonging to competition and industry are in substance closely connected to regional, economic and social cohesion.
11. The main reason that the CAP budgetary share has declined is that the overall EU budget has been increased. Actually the CAP budget has increased over time.
12. A possible explanation for strikingly low numbers of annulments in other policy sectors that equally handle large sums of EU money (e.g., structural policy) is the design of allocation schemes in complex top-down and bottom-up style involving authorities from virtually all political levels (Bauer 2001). Central or state governments can less easily claim direct credit for increases in EU funding here; and losses of beneficiaries remain 'potential'.
13. A decisive answer requires a more detailed analysis of annulment actions in competition and industry, especially with regard to differences between Member States with closed/open economies.

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