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It is not always about winning – Domestic Politics and Legal Success in EU Annulment Litigation Beyond Judicial Constraint

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It is not always about winning – Domestic Politics and Legal Success in EU Annulment Litigation Beyond Judicial Constraint

Abstract:
We ask in this article why EU member-state governments have such varying degrees of success when they initiate annulment actions against the European Commission. Scholars interested in the relationship between member states and the European Court of Justice (ECJ) use data on governments' litigant success to assess the ECJ's judicial independence. This article shows that such an approach can be problematic when applied to annulment litigation because governmental annulment actions are often part of a two-level game in which the value of the legal conflict to a national government can be independent of or even negatively related to legal success in court. The reasons are that governments reap immediate benefits from communicating the initiation of annulment actions to voters and that negative rulings can be used as normative levers in domestic reform processes. The statistical analysis shows that the latter argument, in particular, systematically influences governments' litigant success rates.

1. Introduction

Recent data on annulment litigation at the level of the European Union (EU) reveal that some member states are more successful than others when they appeal to the European Court of Justice (ECJ) against the European Commission.[1] We analyse why this is so and argue that because of the multilevel structure of EU politics, the fact that a member state takes an issue to the ECJ 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. This is so because they 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 when bargaining 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 ECJ and, in particular, to the strand of literature that analyses litigant success in order to draw conclusions about ECJ independence. Specifically, this line of research evaluates whether credible threats of non-compliance and legislative overriding of ECJ rulings influence the probability of legal success by member states. To this end, scholars analyse not only member states' litigant success in the context of preliminary reference proceedings (Article 267 TFEU[2]) and infringement proceedings (Article 258 TFEU), but also their success with respect to Article 263 TFEU annulment actions (e.g., Carrubba et al., 2008). Our results suggest that the use of annulment actions for this purpose can be misleading. Whenever actions for annulment are not exclusively manifestations of conflict between the Commission and the member states, rather are part of a two-level game (Putnam, 1988), governments can 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 actually emerge from domestic politics. If such complexities resulting from a two-level logic of annulment litigation are ignored, drawing conclusions about ECJ independence from patterns of legal success becomes problematic.

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

2. Annulment litigation and legal success in the EU

Actions for annulment are instruments of judicial review with which member states can request the ECJ to evaluate the legality of actions by the European Commission.[3] The ECJ 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).

[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 talk about the ECJ in general to refer to both competent courts.

[2] Treaty on the Functioning of the European Union.

[3] In actual fact, member states and – to a certain degree – even private actors can use this instrument to have the ECJ review the legality of the actions of any EU institution. Since 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.

Annulments can be directed at regular legal acts, such as directives, regulations and decisions, or at any action with binding effect. Between 1957 and 2009, we can count 440 actions for annulment initiated by national governments against legal acts adopted by the European Commission.

[see figure 1 in appendix]

However, the governments that have initiated annulment actions have not been equally successful (see Figure 1). Whereas the UK won 60% of its actions for annulment against the Commission, Germany only succeeded 38% of the time, while Belgium won only 14% of its 21 cases.

From a legalistic perspective, varying degrees of legal success might very well be considered a random variation. Since the probability of legal success is highly contingent on the specifics of individual cases and ECJ judges do not necessarily have uniform preferences regarding the development of the EU's body of law (Malecki, 2012), any aggregate-level variation of legal success might simply be the product of chance, untouched by the structural characteristics of member-state litigants and their strategic interactions with the ECJ. 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 usually discussed 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 have more resources, which are necessary to frequently engage in legal conflict. The combination of resources and experience continuously enhances their legal capacity and helps actors with abundant resources to be systematically more successful than actors with scarce resources. The relevance of capacity is also emphasized by studies analysing governmental litigation in the context of the World Trade Organization's system of dispute resolution. Only governments with a high degree of executive effectiveness are found to be able to navigate the complex procedures, learn effectively from experience and keep 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 ECJ as it tries to avoid non-compliance and legislative overrididing of its rulings. From this perspective, active participation in judicial proceedings by more powerful member states is likely to constrain the ECJ 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 seen to be less susceptible to the reputational costs resulting from non-compliant behaviour (Börzel et al., 2011; Keohane and Nye, 1977), the probability with which the ECJ should be found to agree with the 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 the 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 heatedly debated, however (Carrubba et al., 2008, 2012; Stone Sweet and Brunell, 2012).

3. Theory and hypotheses

In contrast to the conventional arguments presented above, we propose the existence of two additional structural influences on governments' varying degrees of success before the ECJ. Firstly, we suggest that litigant governments are indifferent to the outcome of legal conflict when they can draw immediate benefits from initiating litigation while postponing the potential costs of legal defeat into the indefinite future. This is what we discuss under the label of "politicized annulment litigation" (in short, "politicization"). Since such politicized litigation is initiated for other reasons than winning, it should be less successful on average. Secondly, 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 influence is relevant for national governments operating in highly fragmented political arenas (which is why we label it "fragmentation"). These two arguments are presented in more detail below.

Politicization

In her explanation of ECJ independence, Alter (1998) emphasizes the relevance of actors' time horizons in leading governments to accept the possibility of costly implications of ECJ 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 (authors' data). For governments thinking in terms of national election cycles, this is not a trivial interlude. Rulings – when they are made – might very well affect successor governments or fall within a completely different political context. Any pay-off, positive or negative, is thus substantially discounted. In consequence, the outcome of legal disputes becomes less relevant to politicians the further this outcome lies in the future.

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 and in doing so 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 it because potential legal defeat is far away in the 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 declining to reduce the quota for freight trucks that could legally transit through Austria. This quota had been introduced before Austrian membership of the EU in order to reduce the country's environmental burden from haulage companies simply travelling back and forth between Germany and Italy. If the number of trucks on 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 thus installed a system whereby trucks on transit were counted electronically. Based on this data, it requested in 2001 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 ECJ subsequently supported the Commission's doubts (C-356/01).

Nevertheless, the initiation of the action for annulment was worthwhile for the Austrian government. In the light of 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 (Die Presse, 2002a, b, c, d; Hussl, 2005). As voters organized around this issue, Austria's government had to fear that accepting the Commission's position would endanger its integrity with voters, particularly in the affected regions. The annulment actions thus enabled the government to communicate its loyalty and commitment to national constituents. Consequently, it communicated the legal conflict aggressively in the media (Die Presse, 2002b, c). 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 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 Austria anyway (Die Presse, 2003).

The second example deals with conflict over member states' right to reduce the number of allowances for CO2 emissions during allocation periods. The EU's Greenhouse Gas Emissions Trading System (ETS) has been in operation since 2005. Despite the strong emphasis of the market mechanism within the ETS, governments play a vital role regarding the functioning of this market by determining for how many certificates 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 – i.e., 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 the government officials of the Green party, who aggressively communicated the 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 Green party (Greens) had experienced great difficulty in trying 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 ideological differences of the people in charge of the two ministries – Wolfgang Clement (SPD) at the BMWi and Jürgen Trittin (Greens) in the BMU – intensified these inherent tensions. The conflict culminated in a last-minute compromise that was negotiated over 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 result of this compromise. Environmental interest groups and the Greens' party base, in particular, 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 integrity with its 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 prior to its referral to the ECJ, where Trittin and his speaker made clear that they would not accept a soft enforcement by the Commission in this 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 the 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 such politicized annulment litigation every now and then, 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 surrounded by 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 makes these governments worry less about legal success. In consequence, they are likely to receive negative rulings more frequently than governments that litigate with a view to really winning the legal dispute. Similarly, where public opinion is overwhelmingly favourable towards EU integration, the benefits associated with such 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 and this should lead, in turn, to a better record of success before the ECJ.

H.1: The more sceptical public opinion of EU integration is, the lower is a government's chances of legal success.

From this perspective, what reduces national governments' legal score before the ECJ is their indifference to this score. 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
Secondly, we argue that governments sometimes actually favour negative rulings. Even though they have actively initiated litigation against the Commission, national governments might very well prefer to lose annulment proceedings. This argument seems paradoxical at first glance. Nonetheless, Whittington (2005) has convincingly argued in the context of US politics that when government officials are unable to change the status quo according to their preferences, then judicial review can be a useful challenge to the status quo. 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 defendants actually want to lose judicial proceedings. Whittington describes how the fragmented nature of the American political system contributes to the usefulness of 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 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 national government to reform a structural moral hazard built into the national system of German federalism. Specifically, the way the spending of EU agricultural funds was organized in Germany saw the federal government lend money to the federal states, which they, in turn, could then spend themselves. When these states violated EU rules and did not fulfil EU requirements for supervision and control, the Commission would refuse to refinance the amount of money concerned. This sanction primarily hurt the federal budget from which the money had been advanced because no formal compensation rule between the state and the federal budgets existed in this regard. This system created moral hazard on the part of the

states, which could create additional 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.[4] When the ECJ 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 this ruling and push for changing 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) by July 2006, alleviating the moral hazard by specifying that where the *Länder* implement Germany's supranational responsibilities, 15% of resulting financial corrections will be covered by the federal budget and 85% by the *Länder* budgets.

Thus, where legal disputes affect domestic reform issues in which national governments are seeking reform but encounter strong opposition from effective veto players, negative rulings challenging the legality of current domestic arrangements can be used as a normative lever in domestic bargaining processes. Such a motivation, according to which national governments litigate but profit from negative rulings, are likely to be more relevant for governments that need 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 made up of an ideologically homogenous coalition that does not rely 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:

H.2.1: The stronger the political constraints under which a government operates, the lower is the government's probability of legal success.

H.2.2: The more regionally fragmented a system is, the lower is a central government's probability of legal success.

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

4. Data and method

To test these hypotheses, we use data on annulment actions initiated between 1996 and 2006 by national governments of the initial group of EU-15 member states against legal acts adopted by the European Commission. While 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 paper – code litigant success. Whenever the ECJ 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 binary nature, taking on the value of 1 for instances of member-state success and 0 for member-state defeat. Cases where member states withdrew their actions before a ruling was adopted were coded as success on the part of the

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

Commission. The exclusion of such cases would potentially have led to a systematic overestimation of the share of governments' success rates. Where individual actions brought by different governments were joined under one ECJ ruling (joined cases), two coding options were considered: joined cases could be disaggregated into their constituent actions so that one joined case enters the data set in the form of multiple individual observations; alternatively, joined cases could be treated as just a single observation. In this 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 come from different plaintiff governments, we opt for option one, 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 come from the same plaintiff government, however, we enter only one observation in the data set. There is only one such joined case in the data set. To make sure that the handling of these joined cases does not affect our results, we conduct the statistical analysis with and without these three joined cases.[5]

To test our two main hypotheses, we rely 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 way to measure EU scepticism. Specifically, we used the percentage of people responding that their country has not benefitted from EU membership as a measure of EU scepticism among the general public.[6] Since two surveys are usually conducted per year, we used the yearly average of both surveys. 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) is used as a measure of the degree of vertical fragmentation of member states' political systems. When this degree of fragmentation is high because regions have a high degree of authority, the need to find political compromise with regional actors is greater.

In addition, we include several variables to control for the impact of conventional arguments. As a proxy for governments' degree of legal capacity and their ability to engage in systematic and sustainable organizational learning to make use of their experiences, we use data provided by the World Bank on government effectiveness (Kaufman et al., 2007).

To assess the non-compliance argument, we control for 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), assuming that a qualified majority in the Council could already send a credible threat to legislatively override rulings.[7] In our view, this is necessary, even though Stone Sweet and Brunell (2012) claim that member-state non-compliance can never affect ECJ decision-making in the context of actions for annulment because the ECJ does not review member-state behaviour but

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

[6] 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)?"

[7] The values were taken from Paterson (2007).

the legality of legal acts adopted by EU institutions. In fact, we agree with Stone Sweet and Brunell only with respect to annulment actions dealing with Commission decisions regarding member-state compliance in the context of 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 refund. However, the Commission refinances this money only after the accounts have been cleared and compliance with EU law has been ascertained. In cases where 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 ECJ is indeed unconstrained by any threat of non-compliance by member 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. In the context of state-aid policy, the situation is different, however. Here, the Commission can also assess domestic state-aid spending by adopting legally binding decisions. If it finds that a certain domestic subsidy has distorted the Internal Market in an unacceptable way, the only effective way for member states to contest this Commission decision is to initiate an action for annulment. If the ECJ upholds the Commission's decision in this context, member states do have to react. Specifically, they now have to 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, a potential threat of non-compliance is unlikely to be negated too easily because 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). Thus, to effectively control for the non-compliance argument, the interaction between state power and compliance relevance is included in the analysis ("powerXcompliance").

Finally, as a measure of international support for a governmental plaintiff, we code the existence of other governments formally joining annulment proceedings as interveners in support of the plaintiff government. Furthermore, when the ECJ joins several annulments by individual governments under the same ruling, we also code this as existence of international support. Similarly, the existence of international opposition is coded with value 1 when one or several member states join annulment proceedings as interveners in support of the Commission. The variables on international support and opposition are thus both coded as dummy variables. The data include an identical number of cases in which the plaintiff government enjoys international support and faces international opposition (n=20 each).

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

5. Statistical analysis

On the basis of the regression results, the politicization hypothesis emphasizing the relevance of populist signalling to the initiation of legal conflict has to be rejected.[8] None of the model specifications presented above support 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. While we have presented anecdotal evidence that national governments have used actions for annulment to engage in populist signalling without caring much about the contents of the eventual ruling, 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 judicial process for such political ends should be more valuable (i.e., in countries where EU scepticism is high) are by no means less successful before the ECJ. This challenges the notion that governments operating in EU-sceptical environments systematically care more about the value of populist signalling than about the content of eventual rulings. And it suggests that we might need to think about politicization of ECJ case law not only along the lines of conflicts over more or less integration but also in a partisan-politics dimension.

[see table 1 in appendix]

Regarding political fragmentation, horizontal political constraints at the national level cannot be shown to systematically alter member states' degree of legal success. Nonetheless, we do find support for the arguments emphasizing the role of political fragmentation. 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 ECJ 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 probabilty of legal success from about 50% to well below 20%. We argue that this is not because federalist states are worse litigants, are less fortunate when choosing cases for litigation or are discriminated against by the ECJ. Instead, we argue that these states more often than centralist states initiate litigation without the intention of winning. What seems to be an adverse ruling on the surface is often not an adverse ruling for the national government. On the contrary, ECJ challenges of the domestic status quo can be used strategically by national governments in negotiations with domestic regional actors to persuade them to change the status quo. In this way, states with a high degree of regional authority can use rulings by an apolitical institution with high normative leverage that challenge the domestic status quo so as to overcome domestic "joint-decision traps" (Scharpf, 1988; Scharpf et al., 1976) and initiate domestic reform processes.
In consequence, Hypothesis 2.2 cannot be rejected, while Hypothesis 2.1 has to be rejected on the basis of the regression results.

[see figure 2 in appendix]

This result remains robust when we control for the impact of conventional arguments. In fact, as far as the impact of state power is concerned, the analysis does not provide

[8] This result is robust for alternative specifications of the variable EU scepticism (e.g., trends) as well as for random-intercept specifications of the regression model that are not presented in the article.

robust results. Without controlling for the potential impact of EU scepticism and political fragmentation, there is no indication of a positive impact of state power. This is true for the naïve specification, which is ignorant of the relevance of compliance (Model I), and for the specification in which the impact of state power is modelled to depend on the relevance of member-state compliance (Model II). However, when we include regressors for EU scepticism and political fragmentation, the results change. When controlling for these confounding factors, state power appears to be positively related to the probability of legal success in annulment proceedings (Model IV). Interestingly, however, the mechanism underlying this relationship is unlikely to be one of judicial constraint due to a credible threat of non-compliance. Model specification V indicates that the impact of state power is positive even where the relevance of compliance is low. While this challenges the relevance of judicial constraint through threats of non-compliance, it ties in nicely with earlier observations we made about the fact that monetary conflicts account for an important share of annulment cases (Bauer and Hartlapp, 2010; Hartlapp and Bauer, 2011).

Finally, the analysis suggests that when a plaintiff government receives international support from other member-state governments, the predicted probability of legal success is significantly higher than when this is not the case. In contrast, when a plaintiff government faces international opposition, the probability of legal success is not significantly lower than when it does not. In other words, when the court deals with an individual plaintiff government, it is no more likely to rule against the plaintiff than when it is encouraged to do so by an international opposition of member-state governments.

6. Discussion and conclusion

In this paper, we set out to explain the varying degrees of legal success experienced by national governments that refer actions for annulment to the ECJ. In this context, we argue that conventional approaches explaining litigant success in terms of legal capacity and judicial constraint provide an incomplete picture and that this is because they are based on the assumption that national governments always litigate to win. This assumption, however, underestimates the complexity of governments' political environments in determining the benefits they receive from litigation. We contend that governments' preferences to start litigation can be (a) independent of or (b) even negatively dependent on the expected legal success. In consequence, we hypothesized that governments operating in EU-sceptical political environments often engaged in politicized annulment litigation in which their potential to engage in populist signalling motivated the litigation rather than their chances of winning the legal dispute. While we supported this expectation with qualitative evidence, our regression results suggest that governments from EU-sceptic member states do not engage in politicized litigation systematically. In contrast, we did find 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. This is not, as we argue, because they have a lower capacity to litigate successfully, but because they regularly benefit from losing judicial proceedings. Such legal defeat can be used as a normative lever in domestic reform processes that are blocked by regional actors because such negative rulings challenge the status-quo policy arrangements. This is not to say that constrained governments never litigate to win. All we are proposing is that they do not always litigate to win the legal dispute. Governments seek to gain 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, legal defeat, or 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: legal capacity and judicial constraint.

Our finding that national governments do not always litigate to win complicates the inclusion of actions for annulment in research designs that draw conclusions about ECJ independence from existing or absent co-variation between political pressure and legal success. Since legal success cannot always be equated with political success, these research designs seem to rely on a "naïve court hypothesis" of an ECJ which is ignorant of any such complication. Researchers interested in the ECJ or EU legal politics might want to examine whether this is really a reasonable assumption.

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Appendix: Figures and tables

Figure 1: Varying degrees of legal success in governmental annulment litigation

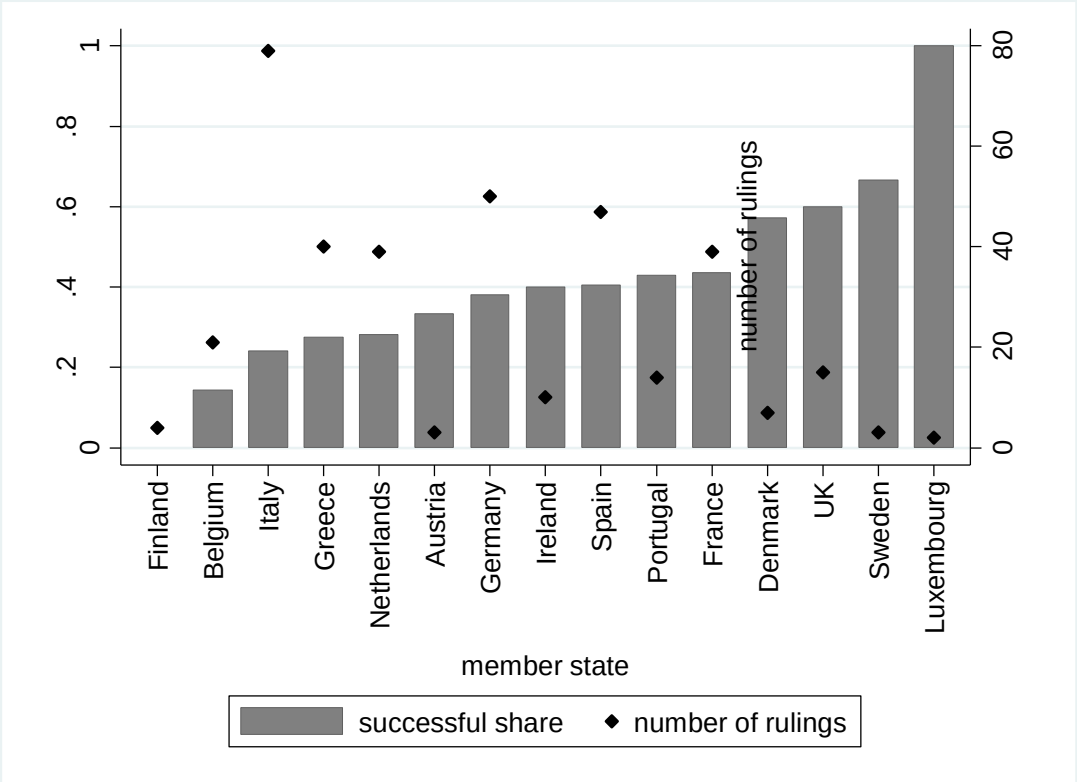
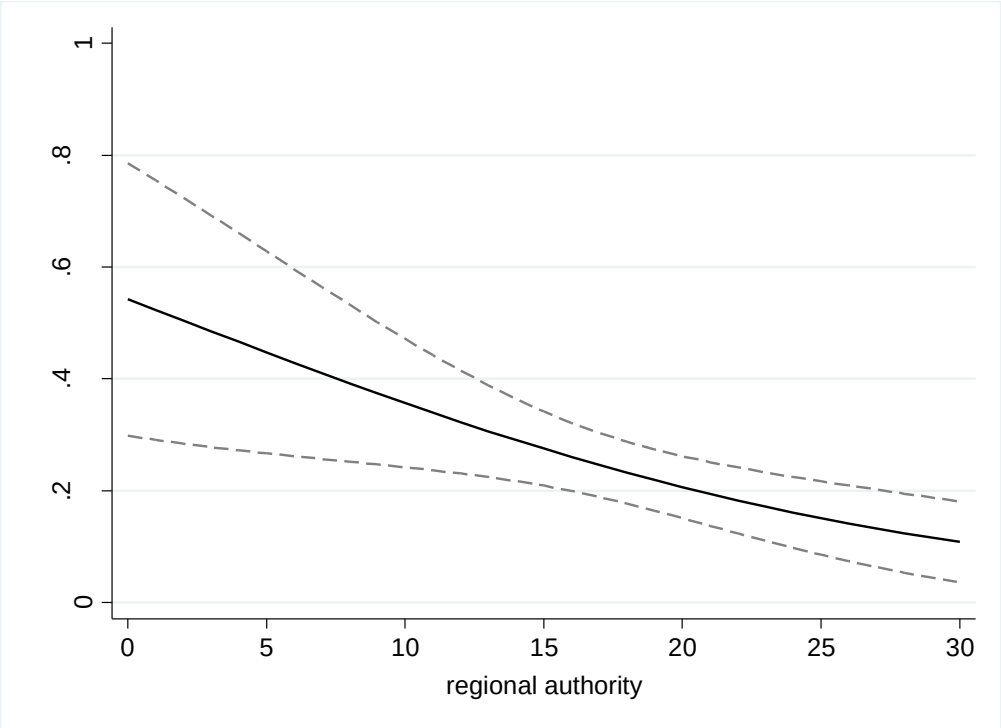


Figure 1: The number of actions for annulment decided by the ECJ between 1957 and 2009 and the share of annulments that received a ruling that was partially or completely in favour of the applicant government. Source: authors' data collection extending Stone Sweet and Brunell (2006).

Figure 2: Probability of legal success and member states' degree of regional authority.



Note: Effect is calculated on the basis of Regression Model V. All other variables are kept at their respective means.

Table 1: Regression Results

	Model I		**Model II**		**Model III**		**Model IV**		**Model V**	
	coef	std. err.	coef	std. err.	coef	std. err.	coef	std. err.	coef	std. err.
EU scepticism					1.00	(1.44)	–0.66	(1.58)	–0.89	(1.62)
political constraints					1.11	(1.35)	0.76	(1.95)	0.41	(1.97)
regional authority					–0.05*	(0.02)	–0.07**	(0.03)	–0.08**	(0.03)
government effectiveness	0.51	(0.32)	0.49	(0.32)			0.57	(0.40)	0.58	(0.40)
state power	0.03	(0.05)	0.09	(0.07)			0.14*	(0.07)	0.21*	(0.09)
power X compliance			–0.13	(0.10)					–0.13	(0.10)
compliance relevance			1.31	(0.91)					1.48	(0.93)
Cross-national support	1.82**	(0.52)	1.80**	(0.52)			1.90**	(0.53)	1.88**	(0.53)
Cross-national opposition	–0.14	(0.57)	–0.32	(0.58)			–0.22	(0.58)	–0.47	(0.60)
constant	–2.21**	(0.69)	–2.78**	(0.82)	–1.03	(0.78)	–2.13*	(1.02)	–2.56*	(1.09)
Pseudo R2	0.06		0.07		0.09		0.09		0.10	
Log likelihood	–137.32		–136.26		–132.74		–132.74		–131.28	
observations	261		261		261		261			

Note: */** reflect significance at the 5/1% level. Coefficients are unstandardized coefficients of logistic regression model with standard errors in brackets