

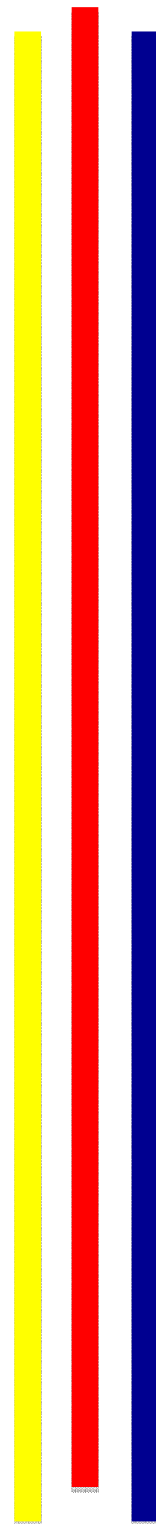
**SPECIAL SERIES ON
THE FEDERAL DIMENSIONS OF
REFORMING THE SUPREME
COURT OF CANADA**

**The Court of Justice of the European Union:
Federalizing Actor in a Multilevel System**

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The European Union (EU) is a highly institutionalized multilevel system, but not formally a federation. In spite of the considerable power and sophisticated legal architecture of the EU institutions, sovereignty formally rests with the twenty-seven member states. Both in a historical and in a legal sense, the EU is their creation. It was established through international agreements concluded between the member states, and all changes of the EU Treaties (the Union's so-called "primary law") still require member-state ratification. The member states also exercise ultimate control over the EU's finances, and it is their administrative agencies that are charged with implementing most EU rules. Nonetheless, in the past decades, the political autonomy of EU institutions and the legal impact of EU rules have grown immensely.

It is now fair to say that the EU possesses quasi-federal features. In its legislative processes, supranational institutions that are not controlled by the member states – most importantly the European Commission and the European Parliament – act as crucial agenda setters and veto players, and the EU's main intergovernmental body – the Council – decides most issues per qualified majority voting, which means that individual member states can be overruled. Moreover, once passed, EU legislation (the Union's "secondary law") is binding on all member states. Lastly, and most importantly for this paper, disputes about the EU's primary and secondary laws are also decided by a body with a distinct supranational character, the Court of Justice of the European Union (CJEU).¹

In this paper, we analyze the role of the CJEU in the EU's quasi-federal system. We begin by outlining the CJEU's structure and composition, as well as its competences in deciding various categories of cases. In this first section, we demonstrate that the court's powers in the EU's legal system allow it to play a role closely resembling the function of "federal arbiter" that is often associated with supreme courts in full-style federations. In the second section, we describe how the CJEU has used these powers to make a number of far-reaching decisions that have propelled the EU further into a federal direction. These decisions, with some justification, have led to the perception of the CJEU as a federalizing actor in the EU system, one whose neutrality in controversies between EU institutions and the member states has sometimes been disputed. In the third and final section, we show that dissatisfaction with some CJEU decisions has resulted in attempts legally or politically to rein in the powers of the CJEU. We argue, however, that the effects of these attempts have been – and are likely to remain – limited. The CJEU will continue to be a core actor in the incremental federalization of Europe.

1. Composition and competences

The CJEU was established in 1952, originally as part of the European Coal and Steel Community (ECSC). With the growth of the European construction, its caseload grew rapidly, necessitating an internal differentiation of the once unitary institution. Since 2005, the CJEU consists of three component courts, all located in Luxembourg: (a) the Court of Justice (CJ), charged with making decisions on the most important controversies of EU law, including all cases in which member states are a party to the proceedings; (b) the General Court (GC), which deals with cases of a

¹ Before the reforms of the Lisbon Treaty, which came into effect in December 2009, the CJEU used to be called European Court of Justice (ECJ). While the old name is still used quite frequently in political and academic debates, this paper follows the new terminology.

more routine nature, such as legal challenges by business corporations against decisions that the European Commission makes on mergers and acquisitions under the EU's competition policy; and (c) the Civil Service Tribunal (CST), which decides in disputes between EU institutions and their staff.² The three courts stand in a clear hierarchical relationship to each other. Under some conditions, rulings by the GC can be appealed to the CJ, and rulings by the CST to the GC. The CJ and the GC each deal with about 500 to 600 new cases per year, the CST with about 100 to 150 cases.³ Between all three levels of the judiciary, the CJEU employs a workforce of about 1500 permanent and 500 temporary staff members.

The CJ and the GC are each made up of 27 judges, one per member state. The CST consists of seven judges. In the CJ, judges are assisted by eight advocates-general, who are charged with an initial assessment of the incoming cases that often forms the basis of the court's eventual decision.⁴ Under Article 253 of the Treaty on the Functioning of the European Union (TFEU), judges and advocates-general are appointed "by common accord of the governments of the Member States" to a renewable six-year term. The judges in turn elect one of their number as president. In the past, each government has tended to nominate its judge more-or-less autonomously. This might change as a result of a new provision in Article 255 TFEU, which establishes an expert panel to scrutinize national nominations, but it is too early to assess the precise effects of this change. There has always been more intergovernmental debate about advocates-general. According to an informal convention, the five largest member states can each nominate one advocate general, with the remaining posts rotating among the other member states. Article 253 of the TFEU specifies that judges and advocates-general must "possess the qualifications required for the appointment to the highest judicial offices in their respective countries" or be "jurisconsultants of recognized competence". This leaves open the possibility of nominating personalities without previous judicial experience; many CJEU judges in fact have held governmental or academic positions before taking office in Luxembourg.

While the appointment of judges and advocates-general is controlled by member-state governments, the CJEU's working methods clearly mark it out as a supranational institution. Most importantly, cases are not heard by the full court, but usually by chambers of three or five judges. The judges' nationality is not a factor in the allocation of cases to the chambers. Article 18 of the Statute of the Court explicitly forbids parties to demand a change in chamber composition based on a nationality argument.⁵ While the GC always meets in chambers, the CJ will convene a Grand Chamber of 13 judges if an EU institution or a member state so requests, but only about 10% of cases are decided in this fashion. The connection between the judges and the nominating governments is also severed by the fact that judges may not issue separate (concurring or dissenting) opinions. Rather the court always speaks with one voice.

The judicial competences of the CJEU encompass two main categories of cases: *Direct action* cases are brought directly to the CJEU to challenge either the legality of activities by an

² It is important not to confuse the CJEU with the European Court on Human Rights (ECtHR), located in Strasbourg, which is not part of the EU, but governed by the Council of Europe.

³ For detailed statistics, see the CJEU's Annual Report (CJEU 2010).

⁴ The composition of the CJEU is regulated in Articles 251-255 TFEU. For more details about the court's composition and working methods, see Arnulf 2006, 7-25; Nugent 2010, 214-18.

⁵ The Statute of the Court has formal treaty status as Protocol (No 3) TFEU.

EU institution or the way in which a member state has transposed and/or implemented EU legislation. *References for a preliminary ruling*, by contrast, are cases that originate in national judicial proceedings; they reach the CJEU because member-state courts are required to request the CJEU's legal opinion whenever a case before them hinges on an interpretation of EU primary or secondary law.⁶ In practice, most direct action cases in which activities of an EU institution are at issue are decided by the GC. The most important types of cases in this respect are intellectual property cases in which decisions on EU trademarks are being challenged (36% of all new GC cases in 2009) and other actions for annulment in which individuals or companies seek legal remedies against acts by EU institutions that directly concern them, most importantly decisions by the Commission in competition cases (38% of GC cases). By contrast, the CJ deals with all references for a preliminary ruling (54% of new CJ cases in 2009). The other main types of cases handled by this court are direct action cases brought by the Commission against member states for incorrectly transposing and/or implementing EU legislation – so-called infringement procedures or procedures for failure to fulfill an obligation (25% of CJ cases) – as well as appeals from the GC (19% of CJ cases).

While many decisions by the CJEU concern fairly technical matters, the court's judicial competences give it important powers to shape the EU's legal system. Most crucial from the perspective of federalism is the court's ability to decide on questions that concern the distribution of powers between the EU and its member states. The internal architecture of the CJEU ensures such cases tend to be decided by the CJ. They originate most frequently in the preliminary reference procedure, which gives the court the power to determine the scope and limitations of the powers conferred to EU institutions in primary and secondary law. However, infringement procedures are also significant in this respect, as they allow the court to define the duties that the member states incur by becoming part of the EU legal system. Both procedures allow the court to play a role that closely resembles the function of a "federal arbiter" that is often associated with supreme courts in classic federal systems.

It is important to note that in the CJEU's exercise of this function, the internal logic of both the preliminary reference and the infringement procedure tends to favour decisions that expand the EU's competences at the expense of the member states. Preliminary rulings are usually initiated by private parties in national courts who argue that member-state authorities have not granted them their rights under EU law; infringement procedures are started by the European Commission when it considers a member state to be in violation of EU rules. By contrast, cases against EU institutions under the action for annulment procedure can be brought by private parties *only* if an EU act directly affects them (which is usually not the case because the implementation of EU law occurs at the member-state level); such cases are handled by the GC, but may reach the CJ on appeal. Cases in which member states challenge an EU institution for overstepping its legal powers exist on paper (they go to the CJ), but are virtually non-existent in practice – only one such case was brought in 2009. The absence of such cases is mainly due to the fact that member states tend to address such constellations politically before a contentious decision is even made. If a state is seriously concerned that a piece of EU legislation would

⁶ The Treaty articles governing the most important direct action cases are Articles 258-260 TFEU (failure to fulfill an obligation) as well as Article 263 TFEU (application for annulment). The preliminary ruling procedure is governed by Article 267 TFEU. For details about CJEU procedures, see Arnulf 2006, 34-155; Nugent 2010, 218-23. SC Working Paper 2011 - 01 © IIGR, 2011

undermine its legal competences, the Council – where a consensual policy-making style prevails – will usually not go ahead with the decision, even if qualified majority voting rules would make it possible in principle to overrule the member state in question.

2. The CJEU’s federalizing role

However, the political mechanisms that prevent unacceptable shifts of powers from the national to the supranational level do not apply to power shifts brought about by the jurisprudence of the CJEU itself. As we have seen, the composition and modus operandi of the court secure its independence from direct national influence. The court hence possesses the ability to use its powers in a way that strengthens the scope and autonomy of EU law against national law. As we will show in this section, the court has made deliberate use of this ability by developing an activist jurisprudence which has generally tended to drive the European integration process forward even over objections from individual member states.

The federalizing impact of CJEU decisions can be seen most clearly in a number of paradigmatic decisions on the constitutional nature of EU law. These established two legal principles that do not appear explicitly in the Treaties, but are now widely accepted as the fundamental principles of EU law – direct effect and supremacy.⁷ *Direct effect* means that EU law directly creates rights and obligations for the citizens of the member states, and not just for the member states themselves. This principle was established by the CJEU in a series of “landmark” decisions. In the first of these, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62 [1963] ECR 1), the court held that citizens can take legal action against a member state’s failure to comply with a Treaty provision preventing the creation of new trade barriers. Even though the provision in question – Article 12 of the Treaty Establishing a European Community (TEC, now Article 30 TFEU) – was explicitly addressed only to the member states, the court argued that EU primary law which is clear, unconditional and not qualified by any reservation should be seen as generating rights and obligations for natural and legal persons as well.⁸ This logic was later expanded in several directions: from Treaty provisions that impose *negative* obligations for the member states (i.e., outlaw certain behaviour) to provisions that create *positive* obligations (i.e., require member states to act in a specific way);⁹ from direct effect of EU *primary law* to direct effect of some pieces of EU *secondary law* (most regulations and some directives);¹⁰ and from *vertical* direct effect – between the citizens and member-state governments – to *horizontal* direct effect between various private parties.¹¹

⁷ On the development of these principles, see the detailed analysis in de Witte (1999), Stone Sweet (2004, 45-107), as well as Arnulf (2006, 149-252). Since the entry into force of the Lisbon Treaty, the principle of supremacy (or primacy) is indirectly acknowledged in Declaration 17, annexed to the TFEU.

⁸ The CJEU has also ruled on a number of cases where direct effect was not applicable to the Treaty provisions, in these cases the court has followed the basic formula of clarity and unconditionality. The most important of these cases are: *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* – Case 28/67 [1968] ECR 143, *Tribunale civile e penale di Bolzano v Casati* – Case 203/80 [1981] ECR 2595, and *Hurd v Jones* – Case 44/84 [1986] ECR 29.

⁹ *Lütticke v Hauptzollamt Saalouis* – Case 57/65 [1966] ECR 205.

¹⁰ *Van Duyn v Home Office* – Case 41/71 [1974] ECR 1337.

¹¹ The most significant cases on horizontal direct effect are: *BRT v SABAM* – Case 127/73 [1974] ECR 51, *Walrave v Union Cycliste Internationale* – Case 36/74 [1974] ECR 1405, and *Defrenne v Sabena* Case 43/75 [1976] ECR SC Working Paper 2011 - 01

By dismissing the initial claims of the member states that EU law only establishes a relationship between their governments, the court created the nucleus of what would later be called EU citizenship. The idea of direct effect means that citizens of EU member states may bring to their national courts proceedings that seek to ensure that their rights under EU law are not being infringed upon; these can then be forwarded to the CJEU via the preliminary reference procedure.¹² Therefore, the development of direct effect is not only the first but also the most significant example of CJEU decisions that have expanded the competences of the EU and restricted those of the national governments, moving the EU from a classic international organization towards an entity with quasi-federal characteristics.

The second fundamental principle of EU law established by the CJEU is that of *supremacy*. It implies that both the primary and the secondary EU law take precedence over national laws. This means that national laws, including constitutional principles, which are incompatible with EU law must be set aside by the member-state judiciaries. The supremacy doctrine was established in two major cases. The first case that raised the issue was *Costa v ENEL* (Case 6/64 [1964] ECR 585). In this case the court ruled that national law running contrary to EU law must be considered as inapplicable or invalid. The court's main argument was that if member states could avoid their obligations under EU law by a simple act of national legislation, this would call into question the very legal basis of the Community as a whole. The second case, *Internationale Handelsgesellschaft mbh v Einfuhr-und Vorratsstelle Getreide* (Case 11-70 [1970] ECR 1125) was different in that (a) the national law conflicting with EU law was enacted before the entry into force of the Treaties, and (b) the national law was in fact a constitutional provision. Still, the CJEU upheld the unconditional supremacy of EU law even in this case. In further cases, it established the rules that are to govern how national judiciaries may remedy breaches on the basis of the supremacy doctrine.¹³ In essence the development of the doctrine of supremacy ensured that national law, regardless of its time of inception (prior to, or following the coming into effect of EU law) or legal standing (constitutional provision or legislative acts), cannot be employed to trump the effects of EU law. The significance of this is evident. The broad interpretation of the Treaty by the court has effectively awarded the Treaty a quasi-constitutional status, thus providing legal protection to the former and future expansions of EU competences.

The federalizing role played by the CJEU is evident not only in major constitutional decisions, but also in its more policy-oriented jurisprudence. For example, the court greatly facilitated efforts to create the EU's flagship project, a *single market* in which goods, services, people and capital can move freely across internal borders, by establishing a very sweeping interpretation of the trade barriers that are to be abolished under Article 34 TFEU. According to

455. Horizontal direct effect of EU directives (as opposed to treaty provisions) was denied in *Marshall v Southampton and South-West Hampshire Area Health Authority* – Case 152/84 [1986] ECR 723.

¹² The existence of this procedure, which would have little meaning if there was no direct effect, is in fact one of the strongest legal arguments supporting the CJEU's interpretation that the EU Treaties were intended to create individual rights for natural and legal persons.

¹³ In *Amministrazione delle Finanze dello Stato v Simmenthal* (Case 35/76 [1976] ECR 1871), the court decided that even lower level judges at the national level are able to determine that provisions of national law that violate EU law do not hold "legal effect". This decision is reiterated in *Ministero delle Finanze v IN. CO. GE. '90 and Others* (Joined Cases C-10/97 to C-22/97 [1998] ECR I-6307), where the court clarified that the national court "was merely obliged to 'disapply' the inconsistent rule of national law" (Arnulf 2006, 183).

its decision in *Procureur du Roi v Benoît and Gustave Dassonville* (Case 8/74 [1974] ECR 837), this provision can be applied to any national measure that may “directly or indirectly, actually or potentially hinder” intra-EU trade. This decision was later reinforced in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, better known as the “Cassis de Dijon” case (Case 120/78 [1979] ECR 649), in which the court held that there is generally no valid reason why a product that is lawfully marketed in one member state should not be introduced in another member state.

These principles of the single market have in turn been used by the court to justify decisions that have a major impact on other policy areas. For instance, in a number of much-discussed recent decisions on social policy – an area in which the EU’s legislative competences are explicitly limited by the Treaties – the CJEU has used the single market as an argument to strike down national wage and employment legislation or to put restrictions on the rights of trade unions to initiate industrial action.¹⁴ These cases have raised concerns among some commentators, particularly from the political left, who have perceived a neoliberal bias in CJEU decisions (Scharpf 2009; Lillie 2011). They might also – perhaps unintentionally from the perspective of the court – lead to more involvement of EU’s political institutions in redistributive social policy, a domain thus far considered protected from EU influence. Be that as it may, the most important insight for the purposes of this paper is that the CJEU in its jurisprudence now regularly intervenes in member-state spheres of competence. Such interventions occur in virtually all policy areas. They indicate that the member states have lost full sovereignty and are now operating in a quasi-federal system in which the EU constitutes a legal and political entity with considerable autonomy. CJEU decisions are not the only reason for this federalization of Europe, but have been a major force driving this development.

3. Limits on the CJEU’s federalizing tendencies

The federalizing impact of CJEU decisions is not without its critics. As mentioned above, criticism has been particularly vocal from the political left, but it has not been limited to this part of the political spectrum. In Germany, for instance, both Roman Herzog, a conservative law professor,¹⁵ and Fritz W. Scharpf, a social scientist with social-democratic leanings, have recently issued strongly worded – and strikingly similar – indictments of the CJEU, accusing it of engaging in “judicial legislation” in areas where EU activities are explicitly prohibited by the Treaties (Herzog and Gerken 2008; Scharpf 2009). Both argue that the CJEU is systematically undermining the competences of the member states, and thus their ability to address the concerns of their citizens. This criticism raises the question of legal and political limits to the CJEU’s federalizing abilities.

¹⁴ Much discussed cases in this context include the following: *Werner Mangold v Rüdiger Helm* – 144/04 [2005] ECR I-998; *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, – 438/05 [2007] ECR I-1077; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* – 341/07 [2005] ECR I-11767; *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* – 346/06 [2008] ECR I-1989; *Commission of the European Communities v Grand Duchy of Luxembourg* – 319/06 [2008] ECR I-4323.

¹⁵ Herzog, of course, is also a former President of the Federal Republic, former Chief Justice of the German Constitutional Court, and former chair of the convention that drafted the EU Charter of Fundamental Rights.

The most obvious legal limit of CJEU activities lies in the provisions of the EU Treaties which regulate the powers of EU institutions. It is significant that in policy areas which are particularly important for member-state sovereignty, the Treaties explicitly rule out CJEU jurisdiction. Most importantly, the court is prohibited from hearing almost all cases relating to the EU's Common Foreign and Security Policy (Article 275 TFEU). Nor does it possess jurisdiction over activities of national law enforcement agencies in implementing EU justice and home affairs policies (Articles 276 TFEU). Furthermore, the member states in principle retain the ability to change the Treaties to overrule specific CJEU decisions (Garrett et al. 1998). This possibility is emphasized in many intergovernmentalist theories of European integration, which claim that the member states still dominate all important developments in the EU. There are, however, only few examples of Treaty changes triggered by CJEU judgements. The clearest of these is the addition of the so-called "Barber Protocol" to the Maastricht Treaty (now Protocol No 33 TFEU), a provision that rules out the retroactive application of the CJEU's decision in *Barber v Royal Guardian Exch. Assurance Group* (C-262/88 [1990] IRLR 240), a case on gender equality in pension systems. This example shows that member states can use their role as "masters of the Treaties" to rein in the CJEU. At the same time, it is clear that the unanimous agreement of all member states that is required for a Treaty change is difficult to bring about politically. Hence this mechanism of limiting the CJEU's powers is significant only in few and truly exceptional cases.

A second kind of legal limitation on the powers of the CJEU can emerge from opposition to its decisions in the high courts of the member states. A number of such courts, most prominently the German Constitutional Court, have never unconditionally accepted the supremacy of EU law; rather they have reserved the right, at least as an *ultima ratio*, to review whether EU law is in accordance with core principles of national constitutionalism (de Witte 1999; Albi 2007). This challenge to the supremacy of EU law has thus far been only rhetorical; even the most EU-sceptical courts have shied away from ever declaring that a particular EU law – or a judicial decision by the CJEU – violates the national constitution. Nevertheless, decisions by national courts may contain important messages to political and judicial decision-makers at the EU level. For instance, in its *Lisbon Treaty Judgement* (BVerfGE 123, 267), issued in June 2009, the German Constitutional Court erected significant legal obstacles to any further expansion of EU competences by claiming that EU powers have all but reached the maximum scope permitted by the German Basic Law. The Court explicitly declared a fully federal EU incompatible with the Basic Law¹⁶ and insisted that not only formal Treaty changes, but also incremental transfers of competence from the member-state to the EU level, which the EU Treaties enable (e.g., in Article 352 TFEU), require ratification by the German Bundestag. Crucially, however, the judgement did not address the incremental federalization of the EU brought about by CJEU decisions. It is much more difficult for national high courts to set limits to this type of federalization than to politically agreed-on policy transfers, as federalization by judicial means

¹⁶ This is stated, in a rather convoluted way, in para 264 of the judgement: "A structural democratic deficit that would be unacceptable pursuant to [...] the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level."

lacks an explicit authorization at the member-state level that could form the basis of a legal challenge under national law.

For this reason, both Herzog and Scharpf have argued that it is necessary to create an additional judicial or political counterweight to the CJEU. While Herzog prefers a judicial body – he envisages a “European Court for Competence Issues” as a more neutral arbiter between the EU and the member states (Herzog and Gerken 2008) – Scharpf argues that competence questions are best decided politically. His suggestion is to empower the European Council, the institution that brings together the member states’ heads of state and government for regular summits, to review CJEU decisions (Scharpf 2009, 199-200). In this proposal, member states would be able to refer CJEU judgements to the European Council, which would then decide by simple majority whether to affirm or set aside the decision. Irrespective of the merits of these proposals, it is important to note that both suggestions are evidence of a high degree of dissatisfaction in some parts of the legal community with the perceived lack of neutrality of the CJEU in exercising its quasi-federal arbiter function. While this dissatisfaction must be taken seriously by the CJEU, and might even serve as a kind of informal constraint on further decisions with an all-too radical federalizing impact, the idea of creating a formal institutional counterweight to the CJEU is not at present seriously considered by EU or member-state policy makers. The formal limitations on CJEU activities in the EU legal system continue to have relatively little bite.

Conclusion

In the EU’s multilevel system, the CJEU exercises a role that is comparable to that of some of the strongest supreme courts in full-style federations. As we have seen, the court is empowered to play the role of an arbiter between the EU and the member-state level, and it has used this power in a distinctive way: Based on procedures that implicitly privilege EU competences over those of the member states, the court has developed an activist juridical practice that has turned it into a major driving force of the integration process. This development, surprisingly perhaps, has not generated sustained opposition from the member-state governments. The main reason for this is that more often than not, member states actually profit from the existence of a strong court that prevents other EU states from undercutting common European rules to achieve a competitive advantage. As Bruno de Witte (1999: 195) has put it: “[A]ll member states have an interest that the rules which they made in common, or which were adopted by the institutions which they set in place, should stick. The fact that *their* national laws should occasionally be set aside is the price to be paid for the guarantee that *all* national laws shall be in conformity with [EU] law, thus protecting the achievements of the integration process.” In other words, competition – and a considerable degree of mistrust – between the member states have been important enabling factors that have allowed the CJEU to play its federalizing role.

Recently, there has been increased criticism of CJEU decisions in a number of member states. For the time being, however, it is unlikely that this criticism will have a major impact on the CJEU’s position in the EU multilevel system. As a matter of fact, it is not implausible to expect that the court’s importance for the EU’s development will even increase in the future. Given the current reluctance of EU leaders to contemplate major Treaty changes, after the many failed referendums on EU reform, and considering the hard-line position taken by the German

Constitutional Court against any further political supranationalization, the future progress of the EU might come to depend increasingly on incremental integration strategies. This would leave much room for the CJEU to shape European integration, most likely resulting in further steps towards the federalization of the EU.

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