Master Thesis

The Court of Justice and EU secondary legislation: How can Court's rulings influence decision-making ?

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Abstract

Does the Court of Justice of the European Union have a significant influence over European secondary legislation? Existing research struggles to determine whether the Court is actually able to push for its own political agenda through its audacious rulings, or whether the decisions only have an impact when they are supported by the majority of European member states. Research on the topic is not yet fully developed. Most studies tend to focus on a single or very few cases analyses. They analyse the impact of the CJEU on specific fields of law, however, no overall theory exists on the potential influence of the Court over EU law. This thesis will attempt to establish *through what mechanism a Court's decision can be codified in the secondary legislation*. Hence, this research will be studying the overall mechanism of codification and presupposed underlying mechanisms. Codification is defined as the integration of Court's interpretations in an EU policy output and is used as an indicator of influence. Beginning with the assumption that Court has a definitive impact, this study tests the theoretical framework with a two case analyses. It tests the theoretical framework with two case analyses. The first case concerns the legal framework on direct injection transmissions technique for radio and TV broadcast protected content. The second case concerns the scope of application of personal data protection. Through this analysis, an assessment can be made that the Court's influence is dependent on several conditional variables, in particular, the Commission's will to launch a legislative proposal, and the European Parliament's need to strengthen its position in negotiations with the Council. However, other contextual variables also exist that are less influential on the result. To conclude, the Court can influence EU secondary legislations, to the condition that European legislators have an interest in its codification.

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Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
COREPER	Committee of Permanent Representatives
CPT	Causal Process Tracing
DAE	Digital Agenda for Europe
DPD	Data Protection Directive (directive 95/46/EC)
ECHR	European Convention of Human Right
EEC	Treaty establishing the European Economic Community
EU	European Union
GDPR	General Data Protection Regulation
ICT	Information and Communication Technologies
OLP	Ordinary Legislative Process
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union

Chapter 1. Introduction

- The Court of Justice of the European Union's influence over the European integration process.

The Court of Justice of the European Union (the Court, CJEU) became an object of interest for political science and legal scholars in the 60's, after it issued two landmark decisions: *Van Gend den Loos*[1] and *Costa*[2] (Scheingold, 1965). In 1963, a Dutch transport firm began a national ruling procedure against taxation at the border between the Netherlands and Germany. The national tribunal asked the CJEU[3], through a preliminary ruling procedure, whether individuals are directly affected by the new European community laws. The answer of the European Court was particularly audacious. It stated that the states, by giving up a part of their national sovereignty, created a new legal order. The subjects to this new order were not only the states, but also their citizens[4]. On year later, the Court ruled, in *Costa v E.N.EL.*, that European legislations were superior to national law, and invalidated the decision of Italy to nationalise the distribution of electric energy[5]. Through those two rulings, the CJEU clarified the constitutional order of the European communities, establishing a principle of direct effect and supremacy of EU laws. Those federally inspired doctrines offered a new dimension to European law (Rasmussen, 2012, p. 375), and changed the interpretation certain member states had on the role and place of the European communities. Hence, those two rulings are the base of the current European 'constitutional legal order' (Rasmussen, 2014, pp. 136–137; Stein, 1981) and their principles were later enshrined in the European Treaties. After this moment, political, legal and historical scholars started to research the relationship between law and politics, and its impact on European integration (see for example: Garrett et al., 1998; Martinsen, 2015; Rosenberg, 2008).

Today, it is well admitted that the CJEU played a major role in the integration process. Its decisions pushed the integration process when politics found itself in deadlocks (Craig and Búrca, 2011). Depending which disciplines they belong to, the studies on influence uses different tools to analyse the phenomenon. Legal studies go deep into the analysis of the jurisprudence, and the Court's methods of interpretation; historians and political scholars look more closely at the political conditions and motivations surrounding audacious interpretation (Terpan and Saurugger, 2018). Hence, recent

[1] CJEU, Judgment of the Court of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62, ECLI:EU:C:1963:1

[2] CJEU, Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., Case 6-64, ECLI:EU:C:1964:66

[3] The name of the Court of Justice changed through the political integration of the European Union. It was established in 1952 as the Court of Justice of the European Communities (CJEC). It is with the entry into force of the Lisbon Treaty, in 2009, that the Court got its current name : The Court of Justice of the European Union. This name includes two sub-divisions, the European Court of Justice and the General Court. In order to facilitate the reading of this research, the author only referred to the CJEU. The name CJEU will also be used to refer to the institution, at any time in the history.

[4] CJEU, 1963, *van Gen den Loos*, Case 26-62

[5] CJEU, 1964, *Costa*, C 6-64

research views the Court as a political actor, and tends to forget its role as a judicial actor, as stated in the European Treaties.

As the impact of the CJEU over European integration is well admitted, scholars still argue whether this is a good thing or not. Some argue that the Court closed the exit (Alter, 2009, p. 3; Weiler, 1991) for member states to avoid their legal obligations, when other claims that the Court's influence create a 'government of the judges' (Conant, 2002, p. 233) and hamper democratic ideas.

Yet, most of the existing research on the Court's influence focuses on primary legislations, the treaties (Martinsen, 2015, p. 6). The texts on which the delegation of sovereign powers from the member states to the European Union (EU) are based. In comparison with a national legal order, the primary legislation is similar to constitutional law. From those primary legislations, can secondary legislations be derived. Secondary legislations are either directives, regulations, recommendations or decisions. They legislate on topics for which the EU has competences. Hence, the existing studies on the Court's influence look at first at the impact of the CJEU on the European constitutional order. Nevertheless, the Court also influenced secondary legislation. One of the most famous examples is the *Defrenne v SABENA*[6] case and its impact on EU legislations related to anti-discriminations (Martinsen, 2015, pp. 67–68). Besides research on those important and visible rulings, very few research has been conducted. Studies on the Court's influence over secondary legislations might have stayed limited because the impact is less visible. Moreover, part of the literature still emits doubt on the actual influence of the Court, especially in secondary legislation, and whether it is able or not to push its own political agenda (see for example: Carrubba et al., 2008; Larsson et al., 2017; Larsson and Naurin, 2016; McCann, 2009; Rosenberg, 2008; Wasserfallen, 2010).

Existing findings also diverge depending on the definition of influence and the methodology used in the research. Some research argues that the Court's influence EU secondary law, when political actors modified the legislative framework following a Court's ruling (Alter, 2009). Other authors define the Court's influence as its ability to impose its own legal interpretation, against the will of the legislators (Larsson and Naurin, 2016). Between those two extreme definitions, exists a variety of ranges, whether the opposition of member states matter or not, or whether modification of the case law is also a sign of influence or not. This thesis will look at the specific phenomenon of codification of case law. Based on Martinsen's definition of codification (Martinsen, 2015, p. 36), the research consider codification as the incorporation of the Court's position and interpretation in a future secondary legislation.

[6] CJEU, Judgment of the Court of 8 April 1976, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, Case 43-75, ECLI:EU:C:1976:56

- Societal and academical relevance of the research

As a political science research, this study attempts to assess whether, in less visible situations, the Court can still have influence over secondary legislation. Influence is defined by Dür (2008, p. 561) as the ability of an actor to shape decisions according to its preferences (Dür, 2008, p. 561). This paper is not meant to assess whether the Court's influence over EU legislations is a good thing or not. It presupposes that the CJEU has some impact on EU law and is able to shape secondary legislation according its own preferences. Once those assumptions are made, it will attempt to discover through what mechanism CJEU's jurisprudence actually shape EU laws. This research was built on already existing studies and attempts to complement them through a mechanism-based explanation of the phenomenon of codification. Mechanimistic research will highlight whether the Court has a full influence, or if its impact can still be kept under safeguard by the executive and legislative powers.

To conclude, having a clear understanding of the mechanism will be of great interest for the research for two main reasons. First, it will provide a better framework for any research on the Court' influence over secondary legislation. It will be easier to debate whether the Court actually impact EU law if the "How" question is answered. Second, it will now be possible to assess whether the Court can influence legislation despite all opposition (hell and high water), or whether the European legislators have tools to control the influence.

- Theoretical framework for analysis

To guide the study, a number of theoretical frameworks will be used. There are two distinct universes in the literature on supra-national courts' impact over governance, general theories on all supra-national courts, and more specific theories on the CJEU. First, on the general literature, the principal-agent theory will help to explain how the Court reversed the safeguards established in the treaties and extends its initial powers (Stone Sweet and Brunell, 2013). From this set-up, derives the theory on judicialization. Judicialization refers to the idea that international courts have a growing importance in supra-national governance (Cichowski, 2007; Kelemen, 2013). Despite the courts' growing influence, states do not try to limit them, and comply with their decisions (Conant, 2002). This raises questions on judicial institution legitimacy, especially in a democratic system (Walker, 2008).

Second, on the specific theories related to the CJEU, judicial activism researches argue that the Court of Justice, makes the law, instead of speaks the law (Terpan and Saurugger, 2018). Through activist interpretation of existing legislation, the Court can push for its own political preferences (Burley and Mattli, 1993). Yet, Dorte Sindbjerg Martinsen concluded that the CJEU's influence was conditional (Martinsen, 2015, pp. 229–235). She identified four variables that plays a role in the Court's impact over secondary legislation (Martinsen, 2015, pp. 229–235). She also created a typology to analyse

Court's ruling effects on legislations (Martinsen, 2015, pp. 35–36). Secondary legislation reacting to the case law, can either codify, modify, ignore, or override the legal interpretation of a Court's decision. In codification, the legal interpretations are incorporated in the legislation. It means that the Court has influence. In modification, the European legislators change the implication of the Court, but do not fully oppose them. Finally, in override situations, the new European legislation goes in the opposite direction than the case law (Martinsen, 2015, p. 36).

As explained above, this study uses existing theory to assume that the Court has an actual influence. Influence is here defined as the inclusion of a Court's position or interpretation in an EU secondary legislation. Hence, the theoretical framework serves as a basis to build a theory on the mechanism. Mechanism will then be used as an indicator for influence.

- Research question

Ergo, this thesis will build on the Martinsen's framework of analyses (Martinsen, 2015) but will go further in the research and look at the specific mechanism. This study will try to answer the question:

"*Through what mechanism are CJEU's rulings codified in EU secondary legislation?*"

As this question is a general question on mechanism, it is necessary to dissect into sub-questions. Those sub-questions will guide us through the analysis, and be more specific about each actor and contextual variables at stake in the mechanism:

- What actors are necessary for codification to occur ? and what is their role ?
- What contextual factors need to be present in the process for codification to occur ? and what is their role ?
- How variables interacts with each-others ?

- Overview of the research design

Even though the topic could be researched from both lenses, legal and political, this specific thesis will consist of a political science analysis, and hence, used the according research design. Thus, no legal analysis should be expected.

To realise such a study, this paper will use an abductive logic through a causal process tracing (CPT) analysis (Bennett and Checkel, 2015, p. 17). Such designed are used to reveal the proverbial black box of a mechanism (Bunge, 1997). First, a theory will be established with deductive logic. Second, this theory will be tested through two case studies. The first case will be on the EU legislations related to direct injection of TV and Radio broadcasting transmission. The second will be on the material scope

of application on the General Data Protection Regulation[7] (GDPR). Finally, after the assessment of the first theory, in light with the case study, the theoretical framework will be adapted to the findings. This is the inductive logic part of the global analysis.

- Reader's guide

The research will consist of eight chapters. The introduction attempts to give the reader the keys necessary for the understanding of the topic, the societal and academic relevance of the research, and state the research questions. Chapter two, will provide the reader with a summary of the existing literature on the topic. This will give a clear picture of what is already known, and ergo will also highlight the existing gap in the current knowledges. The third chapter will build a theory, based on the literature review. This will provide the research with a clear framework for analysis. Chapter four will develop on the research design. It is meant to offer the reader with the strength and also the weaknesses of the used methodology. Chapters five and six will be the two case studies. The first case concerns the European legislation on direct transmission of radio and TV broadcast transmission. The second case analyses the scope of application of personal data's protection. Chapter seven will assess the initial theoretical framework establish in chapter three, in light of the analyses conducted in Chapter five and six. All the hypotheses presented, will be tested and discussed. Finally, chapter eight will conclude this thesis. It will summarise the overall findings, answer the research question, conduct a critical evaluation of the research and give potential avenues for future research.

[7] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Chapter 2. Literature review

The topic of supra-national court's influence is no new. Several research on the matter were develop since the mid-20th century (see for example: Rosenberg, 2008; Stein, 1981). As the current study will be based on some existing theory, it is important for the reader to have an overview of the exiting literature. Hence, the following chapter attempt to explain the basic theories related to supranational courts' influence. The subsequent theories will be explained : principal-agent set-up, judicialization, judicial power and judicial activism, member states compliance and the legitimacy of international courts. Finally it will summarise the research conducted by Martinsen in 2015, and her theory on the conditional influence of the CJEU (Martinsen, 2015). This overall theoretical framework gathers both general literature on supra-national courts, and more specific literature on the Court of Justice of the EU. Both domains are built on each other and are complementary, thus, the study will use both field of research.

2.1. Principal agent theory – The Court as an agent who took power over the principal

We assist, since the late 1940s to the increase of governance's internationalisation (Slaughter, 2009, p. 8). This means that states decide collectively to delegate part of their decision power from the national level to the supra-national level. This delegation often gives birth to new international organisations, in charge of safeguarding the rules established by the states and maintaining the cooperation framework (Tallberg, 2002, p. 23). Several states gather under those organisations and take decisions together or even submit a part of the decision's power to the organisations itself. This phenomenon happens at various levels; internationally with, for instance, the creation of the United Nations; regionally with the most famous and developed example being the European Union; or even in some federal states, as we could observe in the United-State of America or Germany, that used to be independent small states, which gather under a unified federal state.

States transfer an important part of their sovereign power because it will benefits them (Stone Sweet and Brunell, 2013). Still, it only benefits them when all their counterparts respect the established delegation framework. If a member of an agreement does not obey and instead acts according to its own interest, it could harm the other members. Therefore, states want guaranties that the other members will follow specific rules. It is important to make sure the other members will conform to the principles and rules agreed to create this supra-national level of governance (Tallberg, 2002, p. 26).

To have a guarantee about their fellow members' compliance, states nominate dedicated agents able to sanction non-respect of the rules (Stone Sweet and Brunell, 2013). This new agent is the

international court. International courts then have to make sure that members of the organisation respect the established rules and framework of cooperation. If members disregard or disobey, the courts can impose a sanction (Stone Sweet and Brunell, 2013, p. 61).

In this classic international delegation configuration, member states of the supra-national organisation are the principals. They delegate the power to ensure compliance with the rules and sanctions to the agent: the court. The international court is hence provided with some political powers to enhance compliance with the supra-national regime (Majone, 2001). International governance literature talks about "trustee courts" (Stone Sweet and Brunell, 2013).

In the European Union, member states are the principal, and the agent is the trustee court: the Court of Justice of the European Union (Pollack, 1997). Stone Sweet and Brunell (2013) define that in the EU context, the Court is meant to ensure an acute commitment from the member states who might face difficulties to cooperate, due to problems associated with market and political integration (Stone Sweet and Brunell, 2013, p.62). Article 19 of the Treaty on European Union (TEU)[8] establishes that the CJEU rule on actions brought by a member state, a European institution, or a natural person; give preliminary rulings, at the request of courts or tribunal of the member states, on the interpretation of Union law or the validity of acts adopted by the institutions; rule in other cases provided for in the treaties[9]. Hence, it aims to ensure that member states, and institutions comply with the legal order, and ensure a good understanding of European legislation.

The literature on international courts established that the trustees usually increased their power and autonomy through their ability to interpret the rules (Stone Sweet and Brunell, 2013). This part of the literature is very relevant in the context of the European Union and the CJEU.

Courts are in charge of interpreting Treaties. Treaties are the result of bargaining between sovereign states, who wants to delegate some part of their power to a supra-national level. Yet, states do not always agree successfully on every aspect of the delegation. The treaties are then an "open-textured and incomplete bargain" (Davies, 2016). When disputes arise on an uncleared or unagreed part of a treaty, the court is in charge of its interpretation (Stone Sweet and Brunell, 2013, p.62). Again, this role of interpretation is clearly stated in Article 19 TEU.

To a greater extent, the CJEU used the opportunities of some rulings to change the power structure of the organisation and partly, at least, decided of the meaning of its mandate (Davis, 2016, p.848). As the agent in charge of ensuring members' compliance with the rules, the Court occupies a

[8] European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht* , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

[9] EU, *TEU*, Article 9

position of structural supremacy in relation to states. It has been able to dominate the evolution of the organisation they belong to.

Through its interpretations, the CJEU not only changed the power structure and defined its own mandate, it also pushed its own political agenda (Burley, and Mattli, 1993). If the European Union was firstly based on economic cooperation, the Court successfully strengthened the protection of fundamental rights, particularly gender equality, and notably through the *Defrenne*[10] case (Martinsen, 2015, p. 67). In this jurisprudence, the CJEU established that Article 119 of the Treaty Establishing a European Economic Community (EEC)[11], on equal pay, had direct effect from the date of applicability of the treaty, even so, no secondary legislation précised this disposition. It is only after this ruling that the Council adopted several secondary legislation on equal pay (Martinsen, 2015, p. 68). Overall, it forced politicians to take into account non-economic values in economic laws (Davies, 2016, p. 850). Thus, the court was able to frame the political evolution of the European Union according its own preferences, and independently from political actors.

To conclude, the relationship between the Court of Justice of the European Union and the member states can be analysed through a classis principal agent set-up (Pollack, 1997). Principals, the states, delegated a task to the agent, the Court, and the latest used its mandate to increase its power and influence (Stone Sweet and Brunell, 2013). This increasing power of international courts is usually referred as "Judicialization".

2.2. Judicialization – The Court's growing influence

Theories on judicialization belong to international courts studies (Cichowski, 2007, Kelemen, 2013; Stone Sweet, 2000, 2004). Judicialization is defined differently by authors in the literature (See for example Kelemen, 2013, p. 295; Terpan and Saurugger, 2018, p. 1). Yet, the term always implies the idea of the growing importance and involvement of an international court in supra-national governance. This increasing influence is usually explained as a consequence of the principal-agent set up. Interactions between the judicial and the political are framed under a logic of delegation. Despite their role as agents, courts exerted an increasing influence, and through the years, legislators became used to including the feedback from courts on their legislation when discussing new ones (Stone Sweet and Brunell, 2013, p. 62). They relied more on courts to find solutions on societal issues.

[10] CJUE, Judgment of the Court of 8 April 1976, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Case 43-75, ECLI:EU:C:1976:56

[11] European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957

Some authors, such as Hirschl (2008), imply that civil but also political actors rely now more on court's rulings to address major public policy issues and disentangle political disputes (Hirschl, 2008). Instead of addressing issues on the political stage, actors bring the topic to the judicial stage. This phenomenon should be the consequences of the greater reliance of courts, according Kelemen (Kelemen, 2013, p. 295).

Judicialization seems to be especially salient in western countries (Abebe and Ginsburg, 2019, p.522). Resorting to a third party, independent from the dispute seems to be a more common things in the EU and the US. According to rights theory on judicialization, geographic variations are explained by the fact that judicialization is developed when fundamental rights consciousness arises (Abebe and Ginsburg, 2019, p. 523). Indeed, the European Court first influenced European legislation and legislator on issues related to fundamental rights, such as gender equality, in the late 1970s (Martinsen, 2015, pp. 67–68).

Ergo, because of political actors increasing leaning on Courts to settle disputes, the latest had more opportunities to strengthen their political power and push for their own agenda. This new ability for the Court to influence political decision, lead them to become more politically active (Stone Sweet and Brunell, 2013). This phenomenon is sometimes referred as Judicial Activism.

2.3. Judicial power and judicial activism – making or speaking the law ?

Judicial activism is a notion that mostly came from studies on the Court of Justice of the EU. It is described by Terpan and Sauruger (2018) as a situation where the Court's 'makes the law, instead of speaking the law' (Terpan and Saurugger, 2018, p. 1). Ruling includes legal interpretation that modifies the initial meaning of the law. Ergo, the Court acts as a political actor. When judges have to interpret the law, they give it a clear and precise meaning, and thus, orient its substance. Hence, interpreting legislative text, is somehow making the law (Terpan and Saurugger, 2018).

Further, the Court interprets the law according to its own position on a certain topic rather than on the position of the legislators who wrote the text, or on the position of member states governments (Larsson and Naurin, 2016). Scholars identified different reasons why the court give activist interpretation to a law. According to legal studies, activists interpretations happens when the Court goes beyond the exact wording of the legislation because it looks more at the global objectives of the treaties and the legislation. For political science scholars, activism interpretation of the Court is the result of a strategical positioning according the political opinion of the Court itself (Terpan and Saurruger, 2018).

However, this idea of a strategical positioning of the Court, and even the more global idea of judicial activism is contested in the literature. The debate on the political activism of the CJEU can be resumed as the opposition between the constrained and the dynamic view on the court, which will be explained hereafter (Martinsen, 2015, pp. 24-37)

- The dynamic court view

The dynamic court view is the classic interpretation of the Court of Justice political power. Through its rulings, the judicial institution was able to push its own agenda into political discussion (Burley and Mattli, 1993). In the classic literature, academics argue that the Court broadens its scope of intervention through its creative interpretation of treaties provision (Stone Sweet and Brunell, 2013; Terpan and Saurugger, 2018). Stein (in Alter, 2009, p. 3) stated that the CJEU made a constitution for the European Union. In this theory, authors demonstrate that the Court's changed the legal structure of the EU through its two most famous cases, *van Gend en Loos*[12], and *Costa*[13]. By means of those two decisions, European law acquired direct effect in national legal order, and supremacy over national law. It changed the usual norms hierarchy, giving the European treaties the value of a constitution (see for example Alter, 2009; Martinsen, 2015; Stone Sweet and Brunell, 2013). Other rulings, such as the *Cassis de Dijon*[14] case, that establish the mutual recognition principle and strengthened the internal market, were able to enhance European integration at time when the process was stagnated (Alter and Meunier-Aitsahalia, 1994). As a result of these actions, the European Court of Justice is now often considered as one of the most influential and powerful international Courts (Alter, 2009, p. 3). The analysis of the Court's intervention in the early development of the EU framed the dynamic court view position.

Nevertheless, even this part of the literature recognises that external support for the Court's position is essential to positively shape the influence of the Court (Alter and Meunier-Aitsahalia, 1994). The most famous example is the impact of the *Cassis de Dijon* case on European legislation and integration, compared to the impact of the *Dassonville*[15] case. The reflexion of the Court is similar in both rulings, yet, only the *Cassis de Dijon* case triggered a counter-reaction. The reason why the *Dassonville* ruling was less politically significant, was because it triggered the interest of legal circles. The political and civil spheres stayed rather silent on the decisions (Alter and Meunier-Aitsahalia,

[12] CJEU, Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62., ECLI:EU:C:1963:1

[13] CJEUJudgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6-64, ECLI:EU:C:1964:66

[14] CJEU, Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78, ECLI:EU:C:1979:42.

[15] CJEU, Judgment of the Court of 11 July 1974, procureur du Roi contre Benoît *Dassonville,* Case 8/74, EU :C :1974 :82

1994). This demonstrates that the Court's rulings can be very influential and have major impacts on the institutional settings of an international organisation. Yet, the actions of the Court itself is not sufficient if no one reacts to its rulings.

Still, the dynamic court view argues that member states are bounded by the court's decision (Stone Sweet and Brunell, 2012). This means that even if states disagree with the Court's decision, they have to comply with it (Larsson and Naurin, 2016). They cannot cancel the decision or decide to act un-accordingly. Authors talk about the "myth of the override" (Davis, 2016, p.849). They first argue that most of the Court's judgments are interpretations of the treaties of the Union. Hence, an override would be possible only through the modification of the treaties. This option is not really possible due to its high political cost. It is then easier for the legislator to amend a secondary legislation or pass a new one when it disagrees with a court's interpretation. Still, the Court can always annul the new legislation, it was for instance the case in the *Test-Achat*[16] judgement. The Court invalidated a provision of the Council Directive 2004/113/EC[17], that established differential treatment for men and women in insurance (Davies, 2016). Ergo, the dynamic court view authors argue that member states do not try to oppose the Court or reduce its powers, but rather try to write more carefully new EU laws (Alter, 2009, p. 8).

- <u>The constrained court view</u>

On the contrary, the constrained court view claims that member states control the Court's influence, and the latter cannot push its own political agenda against their will (McCann, 2009; Rosenberg, 2008). If a court's ruling is too profoundly opposed to what legislators want, they can override it (Carrubba et al., 2008; Wasserfallen, 2010). Legislators have many resources to act against a court decision. First, they can do nothing and ignore the decision. Ergo, the ruling has no power and the court's legitimacy is put at risk. Second, they can pass a new legislation to limit the scope of the ruling. This is for instance what happened after the *Barber*[18] case. Member states attached an additional protocol to the EEC Treaty[19] to limit the retroactive effect of the judgement (Stone Sweet and Brunell, 2004, pp. 172–175). Hence, the Court has to rule according the ability of member states to override its decision (Larsson and Naurin, 2016).

[16] CJEU, Judgment of the Court (Grand Chamber) of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministers*, Case C-236/09, ECLI:EU:C:2011:100.

[17] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

[18] CJEU, Judgment of the Court of 17 May 1990, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, Case C-262/88, ECLI:EU:C:1990:209.

[19] European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957

Besides, constrained view authors argue that the court is conditioned by member states preferences (see for example Larsson and Naurin, 2016 or Carrubba and Gabel, 2015). The Court takes into account the positions and opinions of the political actors in its decisions. Those researchers analysed the impact of the member states observations on the jurisprudence. They assert that the Court evaluates the possibility of a legislative override, or the cost of compliance for member states when taking a decision. It is possible in the EU for member states to send observations to the CJEU about a specific dispute. Hence, the position of the legislators is set as known. The Court can see if the majority of members would try to override its decision or not. Ergo, for the constrained view, the Court's decisions are the result of the calculation between, the judges' preferences, and the member states position (Larsson and Naurin, 2016). Judges are always constrained by the risk of override or non-compliance.

However, the constrained court view recognise that the court can sometimes have political influence. Still, this influence depends on the socio-political context (Rosenberg, 2008). Judgements are supposed to have consequences *inter partes* only. To have weight beyond this *inter partes* scope, the decision needs to create a social or political response. Court rulings can affect further legislation only in a favourable context. When social and political actors have high expectations or severe concerns about a specific topic, they can use jurisprudence to strengthen their claims. Yet, if no social considerations exist, judicial decisions will not impact policies. Rosenberg (2008) describe this phenomenon as the "hollow hope"; court rulings influence politics only through societal actors (Rosenberg, 2008).

To conclude on the dynamic and constrained court view, both frameworks recognise the influence of the Court of Justice rulings on the EU secondary legislation. Both views acknowledge that the Court's influence is highly dependent on the socio-economic context and general reaction to a specific decision. Yet, the constrained court view emphasises the possibility for member states to override the court's decision (Carrubba et al., 2008; Wasserfallen, 2010), while the dynamic court view considers that the possibility to override is a myth (Davis, 2016, p.849). Moreover, the constrained view also argue that the Court bases its decisions on member states preferences (Larsson and Naurin, 2016 or Carrubba and Gabel, 2015), when the dynamic view emphasizes on the ability of the Court to push its own agenda (Burley, and Mattli, 1993).

Hence, another important aspect to have in mind when studying the CJEU influence on EU secondary legislation, is the reasons why sovereign states comply with the supra-national court's decisions.

2.4. Member states compliance – The ability of the Court to impose its decisions

The question why to states comply with international court's decision have always attracted the attention of international governance researchers (see for example Conant, 2002; Hatzopoulos and Hervey, 2013).

Scholars are interested to understand why some sovereign states decide to submit themselves to the decisions of an international institution (see for example: Alter, 2008; Conant, 2002; Hatzopoulos and Hervey, 2013). The phenomenon is even more intriguing when we look at the norms' hierarchy in most national legal order. International law is not above national law and international treaties are below national constitutions. Hence, decisions from international courts should also be below national constitutions. Despite this norm hierarchy, states are usually complying with court's rulings. Rationalist theory on international governance explains that states comply because they need international courts to be seen as powerful and legitimate. If one state does not comply when they are sanctioned by the court, they have no guarantees that others states would later comply (Alter, 2008). Hence, complying with international courts is essential for member states to ensure the respect of the international norms they agree upon with the other members.

In the European Union context, research revealed that the CJEU established its authority by delegating the ability to rule on EU law to national courts and tribunals (Eberlein and Newman, 2008). Most of interpretation of EU legislation are made through preliminary rulings (European Commission, 2016d). This procedure involves that national courts, suspend a national ruling, to refer a question on the meaning or the scope of application to the CJEU. Once the Court of Luxemburg ruled on the preliminary ruling, the national court of tribunal apply the given answer on the legislation interpretation (European Commission, 2016d). National courts have accepted to become the judges of European law, because it could allow them to by-pass some national and constitutional constrains. It also has for consequences, that member states cannot directly oppose to a CJEU jurisprudence. If they override a decision of the Court, it put at risk the legitimacy of the judgment of their own national jurisdictions. Ergo, member states are now complying with the CJEU jurisprudence, because it established its legitimacy through cooperation with national courts. If member states do not respect EU law, or CJEU's decisions, they will be sanctioned by their own national institutions (Eberlein and Newman, 2008).

As national governments found themselves bounded by the CJEU case law, the Court is now able to push its own political agenda and force sovereign states to respect its position and political

matters (Burley and Mattli, 1993). Nevertheless, this ability of the Court to act as an agenda-setter brings concerns about the overall power of the Court and its legitimacy.

2.5. Legitimacy of the Court – Should the Court be able to make law ?

Here come the actual societal concerns of the topic. Separation of power models, as they are applied in Europe, are based on parliamentary sovereignty (Stone Sweet and Brunell, 2013, p. 65). Parliaments, composed of elected deputies, are in charge of making the law. Courts are in charge of ensuring the compliance from citizens and national entities with those laws. It is very important that the institution that ensure the respect the law is different and independent from the one that makes it. Each institution gains its legitimacy from constitutional text, and because society entitle them to do so. Yet, they should not take over more power than the one that was attributed to them. Hence, the legitimacy of the CJEU derive from its role as the neutral institution of the law (Burley and Mattli, 1993). They are not legitimate to act outside of their scope of competence. Still, as the literature on judicialization and judicial activism highlighted, international courts and especially the Court of Justice of the European Union, are making the law and influencing the legislation through their activity (Stone Sweet and Brunell, 2013; Terpan and Saurugger, 2018). Hence, judicialization and the current level of judicial power can bring some legitimacy concern. Some academics talk about the 'government of the judges' (Conant, 2002, p. 233).

According to the principal agent theory, legitimacy of the agent flows from the principal (Pollack, 1997). The principal has to give a 'meaningful discretionary authority to an agent' for it to be able to fulfil its primary responsibility and reach goals its was created for (Stone Sweet and Brunell, 2013, p. 64). It becomes a problem when the agent uses its primary discretionary area to pursue its own interests and create policies unforeseen and unwanted by the principal. This discretionary authority problem is well acknowledged in the literature and constantly looked at by the principal. The latest can, hence, think about it and establish safeguards before it actually delegates part if its power to the agent (Stone Sweet and Brunell, 2013, p. 64). For instance, in the European Union and the CJEU case, Court's interpretations are limited to the scope of the legislation. In the context of a preliminary ruling, it can only give answers to questions, referred by national courts, related to European law. Moreover, it can only give interpretations on legislations brough to its attention. It cannot decide on its own to start a procedure on a specific Eu legislation.

Nevertheless, those safeguards did not work efficiently for international courts and especially the European Court (Stone Sweet and Brunell, 2013). Despite the well-establish issue of delegation to an agent, the CJEU successfully, through the integration process, reinforced its powers. As recalled earlier, the Court of Justice of the EU changed the nature of the EU legal system with famous rulings,

such as *van Gend en Loos*, *Costa v. E.N.E.L.*, and *Cassis de Dijon* (Alter, 2009). Supremacy of the CJEU, ergo, touched upon parliamentary sovereignty, the sanctity of national constitution, and the separation of authority (Alter, 2009, p. 96).

However, Alter (2009) claims that the ECJ has a fragile legal authority (Alter, 2009, p. 8). This means that the Court gains its authority and legitimacy from its synchronisation with major societal interests. It is more likely for political actors to comply with rulings when the latter meet a broad consensus within society. Once, again the literature recognises that the court's influence highly depends on the reception of the case law by the larger civil population (Alter and Meunier-Aitsahalia, 1994).

2.6. Limit to the impact of jurisprudence - The conditional influence of the Court

As the influence of the CJEU is well recognised over the EU legislation, the literature tried to identify, more precisely, what make that a jurisprudence frame a specific EU legislation. The most advanced research on this specific question was realised by Dorte Sindbjerg Martinsen in 2015 (Martinsen, 2015).

Martinsen used a law attainment approach to research "whether the rules, principles, and interpretations generated by the Court are attained in legislative acts, or whether they are overridden" (Martinsen, 2015, p.9). She defined that judicial influence was established when the interpretation of the rules and norms made by the CJEU, are transposed in the final policy output.

The author designed a general taxonomy of the different possible responses by the European legislators to a court's jurisprudence (Martinsen, 2015, p.35-36). This set up can be used in research on the judicial influence on legislations, for every topic and issues the Court deals with, even though she focused her study on EU social policy. According to this classification, the legislators can react in four different manners. First, they can codify the case law. It means that the court's interpretation of a text, or the court decision is later incorporated in the EU policy output. Second, the legislators can modify the case law. It means that the court's interpretation is changed or adapted by the legislators in the final policy output. The third possibility is "non-adoption". No political agreement is reached, ergo, no new legislation is passed on the issue of the court's case law. Finally, the last possible reaction of the European legislators, is the override of the case law. The new legislation has an opposed meaning of what the court's interpretation was. The jurisprudence is then overturned (Martinsen, 2015, p.35-36). This taxonomy allowed her to establish a different degree of judicial influence in the European secondary legislation.

In line with the constrained court view, she agreed that EU political actors are not too fragmented to override or modify case law (Martinsen, 2015, p. 229). There is empirical evidence that political actors can mobilise and respond to the jurisprudence. This was for example the case in the new Geo-blocking Regulation[20], that directly contradicted the *Murphy* case[21]; or also the case of the Regulation on social security schemes to employed persons and self-employed persons[22], that override the *Giletti*[23] joined-cases (Martinsen, 2015, p. 89). Thus to influence EU legislation, case law has to have a favourable social and political context (Rosenberg, 2008).

She concluded, as other before her (see for example: Alter, 2009), that judicial power varies over time (Martinsen, 2015, pp. 185–224). Thus, she established that the Court's impact was a conditional one (Martinsen, 2015, pp. 229–235). It means that some elements, variables, plays a role in the level of influence the jurisprudence can have over EU secondary legislation: The number of political actors present in the legislative process, the salience of the topic, the decision making rules of the legislative process, the role of the Commission. She concludes, trying to explain the role of each variables in the process. A summary of the conclusion and role of each variables is provided hereafter.

- <u>The number of Political actors present in the legislative process</u>

Chapter 2 part 6 of the Treaty on the Functioning of the EU (TFEU)[24] establishes the framework to pass European legislation. Several procedures exist depending on the topic of the proposed legislation. The most commonly used procedure is the ordinary legislative procedure (OLP), based on Articles 289 and 294 of the TFEU[25]. The OLP requires that a legal text is proposed by the European Commission, and then voted in the European Parliament and in the Council of the European Union (Thereafter: The Council). The European Commission is the only entity that is entitled to initiate a legislative proposal. It has an exclusive initiative proposal power. The Parliament and the Council are, thus, named the co-legislator. Each of them needs to vote on the text under negotiation, in the exact same wording, at a majority voting. Codification of case law into legislation, hence, requires the establishment of a political majority within every institution present in the legislative process, but also

[20] European Parliament and Council, Regulation (EU) 2018/302 addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, *OJ L 60I , 2.3.2018, p. 1–15*

[21] CJEU, Judgment of the Court (Grand Chamber) of 4 October 2011, *Karen Murphy v Media Protection Services Ltd*, Case 429/08, ECLI:EU:C:2011:631

[22] Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self- employed persons and to members of their families moving within the Community, *OJ L 136, 19.5.1992, p. 1–6*

[23] CJEU, Judgment of 24 February 1987*, CRAM Rhône-Alpes / Giletti,* C-93/86, (379, 380, 381/85 and 93/86, ECR 1987 p. 955) ECLI:EU:C:1987:98

[24] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, Part 6, Chapter 2

[25] Ibid. Article 289 and 294

a political agreement in-between institution. Therefore, the more actors that are present in the negotiations, the more interests are to be defended. As internal conflicts arise, it is more difficult to find a position that satisfies everyone. It becomes then onerous to establish an overall consensus (Martinsen, 2015, p. 231).

Moreover, through the integration process, interests in the EU becomes more and more heterogenous. The successive enlargements created increasing divergences in the socio-political context. Asymmetric shock created by the 2008 financial crisis, and the possibility of more to come with the current pandemic, also increase socio-economic divergences. Hence, the overall increasing heterogeneity creates less likely conditions for codification of case law in the current European Union settings. Martinsen (2015) used this explanation to explain why codification was more likely to happen before 2004 (Martinsen, 2015, p. 55).

- Time and learning process

It appeared in her research that legislators were less willing to codify case law over time (Martinsen, 2015, p. 230). She explained these variances by the fact political actors have learned how to answer jurisprudence and are now less willing to codify them into policy outputs. Political voices reacting to Court's decisions are now louder. European legislators are also more organised and are not too fragmented to override or modify a jurisprudence (Martinsen, 2015, p. 230). Hence, judicial influence relies on socio-political context, and the willingness of European legislator to include the Court's position into EU secondary legislations.

- The Decision-making rules

The decision-making rule determines the number of political actors that have a voice in the political process, and their relative power. Therefore, in the OLP, Martinsen identified three veto points in the process of codification or override of the Court's case law: The European Commission, the European Parliament and the Council (Martinsen, 2015, p.231). Majority votes is the official rule, but the Council maintained a culture of unanimity, and attempt to find a consensus between all the countries before a proposal is put to vote (Martinsen, 2015, p. 65). Hence, the threshold of agreement to reach is still relatively high. This makes it harder for case law to be codified in new legislation.

- The Commission as the gatekeeper

The Commission plays the role of the 'gatekeeper' (Martinsen, 2015, p. 48). It filters the judicial decisions which will influence secondary legislation. This role is the result of the Commission's exclusive power for legislative initiatives. Without the Commission proposing legislation, new legislation can never happen.

When the Commission wants to codify a court's decision, it will refer to it in its proposal. Jurisprudence are used to justify the need to take a legislative action. Martinsen called this strategy the use of "the voice of law" (Martinsen, 2009; Martinsen and Falkner, 2011). The Commission tends to refer to Court's rulings when it seems that other political actors, especially the co-legislators will be opposed to the proposal. The reference is used to strengthen the proposed text. Yet, if the Commission disagree with the court view, it can decide to not propose legislative text or to propose one that opposes and overrides the case law. This was for instance the case with the Posted Worker Directive[26] (Martinsen, 2015).

Hence, this research was able to identify few conditioning factors that generate favourable contexts for case law to be codified in EU legislation. Yet, the research did not, up until now, identify the relationship between those variables and their specific roles. It did not open the black box of the mechanism. Hence, based on what was previously identified, I will try to draw a theory on the specific mechanisms at stake and analyse how each actor impacts the ability of the court to influence EU legislation, and what conditions have to exist for the process to be successful.

[26] Directive 2014/67/EU on the posting of workers in the framework of the provision of services

Chapter 3. Building a framework for analysis : drawing the role of each variables.

According to the literature review and theoretical research, I was able to identify some actors and events, and their role in the process of codification of CJEU case law. From that departure point, I will try to draw a first theory of the mechanism at stake in the court's influence process. This theoretical framework will be tested through a small-N case study and revised after the analysis. However, it is important to already have a general idea of what to look for. In order to procced clearly, I will first explain the role I think each actor plays in the process, and secondly explain the importance of contextual variables. For each variable, I developed a hypothesis about its role in the process of codification, but also an alternative hypothesis developed on the basis of the opposite scenario. Those alternative hypotheses are based on the same reasoning as the initial hypothesis. Hence, if they are confirmed, it will not validate the initial hypothesis, but it will confirm the reasoning. Finally, I will draw a hypothetical mechanism that will highlight the role of each variable in relations with the others.

3.1. Actors variables

Drawing from Martinsen's analysis (Martinsen, 2015), the three major actors are the one playing an active role in the legislative procedure: The Commission, the Parliament, and the Council (Martinsen, 2015, p. 231). I will define and explain hypotheses on each of their roles within the Court's influence process.

3.1.1. The role of the European Commission.

- <u>The European Commission as the gatekeeper</u>

The European Commission is recognised broadly within the literature as a key player in the influence of case law in EU secondary legislation (see for example: Alter and Meunier-Aitsahalia, 1994; Burley and Mattli, 1993; Larsson and Naurin, 2016; Stein, 1981; Stone Sweet and Brunell, 2013). It plays the role of the 'gatekeeper' in the influence process (Martinsen, 2015, p. 232). The Commission owns the exclusive right of legal initiative in the EU. This is the only institution allowed to propose new legislation or propose reforms to legislation. Hence, the European Commission decide whether or not it wants initial a legislative proposal in order to codify or not the case law of the court (Martinsen, 2015, p. 232).

The literature argues that the Commission uses case law as a medium to drive important changes (Martinsen, 2015, p. 47). Case law is used as a justification for creating a new legal framework codifying all or parts of the case law. In situations where the court's ruling is contested in the political

sphere, the Commission used it as an argument against the potential opponents of the proposal and to push for a legislative codification. If European legislators do not react, the court ruling might become the new rule, or the court could give an even broader or narrower interpretation in the near future. Hence, codification of the state of law, as established by the court, is the 'lesser evil' solution for European member states (Martinsen, 2015, p. 48).

Although, it happens that political actors would like to see the Commission launch a legislative proposal to codify a jurisprudence, and the Commission does not react. Sometimes the Commission prefers to let the jurisprudence establish the legislative framework for the matter. This is seen in the case of data retention legislations. In 2014 through the *Digital Rights Ireland*[27] case, the Court annulled the data retention directive[28] of the European Union. Since then, member states have tried to push the Commission to propose a new legislation, codifying the case law. Yet, the Commission is reticent to initiate such a proposal and nothing is done (Vogiatzoglou, 2019).

Still, this is not because the Commission does not want to codify the case law, that it does not happen. The European co-legislator can amend the Commission proposal and end up codifying or overriding the case law. In those situations, either the legislator completely changes the meaning of the proposal, or simply adds an article about a specific topic. This was, for example, the case of the European Parliament and Council Directive 2019/790 on copyright and related rights in the Digital Single Market[29], where the legislator added article 14 related to the definition of "Creation of content" in the context of copyrights as mandated by the CJEU in the 2009 *Infopaq* decision[30]. This article codified the court case law (Rosati, 2019).

Thus, as the gatekeeper, the Commission decides whether a legislation on a topic related to certain case law, will or will not be. However, the Commission does not have the full power to decide whether a specific jurisprudence will be codified or overridden. It can happen that what the Commission wants, will be amended through the legislative process. Hence, the essential event to look at when analysing the role of the Commission in the case law influence over secondary legislation, is

[27] CJEU, Judgment of the Court (Grand Chamber), 8 April 2014, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238

[28] European Parliament and Council, Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *OJ L 105, 13.4.2006, p. 54–63*

[29] European Parliament and Council Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, *OJ L 130, 17.5.2019, p. 92–125*

[30] CJEU, Judgment of the Court (Fourth Chamber) of 16 July 2009, *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, ECLI:EU:C:2009:465.

whether the Commission launched a proposition on a topic for which the Court as already handed down a decision. From there, first hypotheses can be drawn.

H1. A): *The Commission has to launch a proposal.*

H1. B): *The proposal does not have to include a provision related to the jurisprudence but has to be in relation with a matter on which the court of justice already handed down jurisprudence.*

- The Commission's uses of case law

It is interesting to look at when, and in which circumstances, the European Commission refers to the Court's decisions in legislative proposals. It does so when it wishes to codify the case law. References to a jurisprudence strengthen the proposal, as it capitalises on the court's legitimacy to strengthen its legislative actions (Alter and Meunier-Aitsahalia, 1994, p.542). References happen also more often when the Commission fears the opposition of certain political actors at the veto point of the legislative process (Martinsen, 2015, p. 178). This was, for instance, the case with the nontariff barriers' legal framework. The European Commission referred to the *Cassis de Dijon* case to justify its harmonisation policy, knowing that several member states were opposed to it (Alter and Meunier-Aitsahalia, 1994, pp. 551–552). Hence, by referring to jurisprudence, and thereof, state of the legal order, the Commission capitalise on the legitimacy of the CJEU.

However, when the Commission is opposed to the Court's rulings and launches a legislative proposal to overturn the case, no reference to jurisprudence is made in the proposal. Logically, the Commission will not quote a ruling if its proposal attempts to override the Court's decision. It might, however, explain that the Court's ruling created an unlikely framework in the European Union through its impact assessment, that justifies the need for the proposal.

H2. A): *The Commission will not refer to the jurisprudence of the Court, if it attempts to override the case law.*

H2. B): *The Commission will refer to the jurisprudence of the Court, if it attempts to codify the case law.*

3.1.2. The role of the European Parliament

The European Parliament plays an important role as co-legislator. When the legislation is passed through the ordinary legislative process, the Parliament is a veto player (Martinsen, 2015, p. 232). For a bill to pass, the Parliament has to vote it with a majority threshold, in a plenary session. Ordinary legislative process is for few years now, the more commonly process used.

In the legislative process, the Parliament is the institution representing and defending citizens (Meislova, 2019). This position, as the citizens' representative, mainly comes from its appointment procedure. The Parliament is the only directly elected European institutions. This does not mean that the Parliament, in itself, is a united institution, no doubt internal divisions exist. Yet, according to the rule of procedure, Parliament votes by majority, and not unanimity. Hence, potential internal division matters less, as long as a majority can agree. Moreover, in topics where concerns for citizens is high, the Parliament tend to speak with one voice. This is for example the case in the Brexit negotiations, where the Parliament spoke with a united voice, with their primary concern of citizens' interests (Meislova, 2019, p. 240).

This behaviour can be analysed through the lens of the right theory (Abebe and Ginsburg, 2019, p. 523). The Parliament will push for codification of case law when such codification will secure citizens' rights and interests. The Parliament will not always be on the side of the jurisprudence, however, will support the court and codification of its case law when it represents interests of the citizens and/or their rights. Further, it will oppose the view of the court and its case law when it represents a disadvantage for European citizens' or their rights.

To conclude, the European Parliament, when defending European citizens, will use case law of the Court as justification to push for more legislation in the interest of European citizens. On the contrary, when case law risks harm to citizens' interests, the Parliament will push for a legislation that override the case law.

H3. A): *The European Parliament will push for codification of case law when it is in the interest of citizens.*

H3. B): *The European Parliament will push for override of the case law when it is harming the interests of the citizens.*

3.1.3. The role of the Council of the European Union

The Council of the European Union is the second co-legislator. This means that in the ordinary legislative process, it also has to vote on the proposal. Officially, this is supposed to be a majoritarian vote, even though in practice, member states attempts to reach a unanimous compromise (Martinsen, 2015, p. 65).

The Council of the European Union is the legislative actors that represent member states interests. Yet, all the countries in the Council have different socio-economic context, geo-political situations and political ideologies and therefore, contrasting interests (Moravcsik, 1998). These

divergences increased over time partly because of the successive enlargements. Hence, the Council is often internally highly divided.

When the Council is highly divided, it becomes a dreadlock point for draft legislations. This is due to the culture of unanimity. The institution will try to find the consensus over political division that will satisfy most, if not all, members. In order to find this consensus, the Council will modify the Commission's proposal (Martinsen, 2015, p. 232).

In the specific context of codification of jurisprudence, some member states might have already complied and applied the court decision with its own interpretation. Other countries, not party to the case of the Court might also have adapted their legislation accordingly with the CJEU ruling (see for example: Martinsen, 2015, p. 164). Those situations create an even more conflicting situation, where governments will try to defend their position in order to not have to change their national legal order. Thus, the Council, if divided, will either try to find a consensus over a legislative proposal, probably modifying the case law of the court, or will not reach such a consensus and becomes a dreadlock place.

However, member states' position on certain issues changes over times (Martinsen, 2015, p. 51). The position of each member states depends on the socio-economic and political context in the territory. Some drafts or issues will be discussed in the Council for a long period of time. This is for the example the case with the Directive on anti-discrimination[31] that is blocked in the Council since 2008. Over this period, national context can evolve, for example elections or changes in governments can happen, economic wellness can change, or even new social actors might emerge and make their voices heard. Besides, political actors can convince each other they need to retake control over judges' rules, or changes in alliance can change the majority defending a legislation (Martinsen, 2015, p. 234). Thus, if at a specific time, the Council block a legislative proposal, it does not mean that the situation will be forever blocked.

H4. A): *The Council represent member states national interests.*

H4. B): *The Council will push for codification of the case law if it is in the interests of the member-states*

H4. C): *The Council will push for override of the case law if it is not in the interests of the member states.*

[31] European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, /* COM/2008/0426 final - CNS 2008/0140 */

3.2. Contextual variables

3.2.1. The importance of legal certainty

Legal certainty, as defined in the European Union, states that *"rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly"*[32]. Legal certainty was recognised by the CJEU jurisprudence as a general principle of the EU in 1962[33].

The principle takes many forms in its application. The two mains ones are the non-retroactivity of legislation and the duty of clarity and precision of the law. The duty of clarity and precision is the most important one for this research. It requires that those subjects to the law should be able to identify their rights and obligations. The major goal of the principle of legal certainty is to protect subjects of the law against negative secondary effects of the law, namely inconsistency, overcomplexity and too frequent changes in any regulations (Chalmers et al., 2019, p. 381).

There are a few reasons why the principle of legal certainty is put at risk by certain case law or the reaction to them. First, an active interpretation of the court can sometimes change the meaning of the law, or at least the interpretation used so far (Terpan and Saurugger, 2018). Hence, subjects of the law find themselves in unclear territory. They might have been acting according what they believe the law meant, and do not know if they have to change their behaviours now. Another issue is that case law is supposed to apply to only the specific case. It also raises the question of whether a single case can overturn the entire legal practice or does the Court's case law need to mature (Blauberger and Schmidt, 2017, pp. 910–911). Hence, actors can find themselves in delicate situations, unsure whether they should adapt their behaviour directly after the Court's decision or wait for other rulings to see if the Court is consistent in its interpretation or reverts back to the usual interpretation of the text.

Legal certainty is also put at risk when legislation is applied differently in each member state (Martinsen, 2015, p. 164). The degree of interaction between actors of different European countries is high. Yet, it might happen in certain cases that the law is enforced differently or interpreted differently among member states. This increases the level of complexity and blurs the understanding of the regulation by actors subjects to it. It, thus, contravenes to the principle of legal certainty (Chalmers et al., 2019, p. 381). The same issue arises when member states respond unequally to the case law (Davies, 2016). Some states find themselves subject to a new court-created regime, while others are

[32] CJEU, Judgment of the Court (Grand Chamber) of 10 March 2009, *Gottfried Heinrich*, C-345/06, EU :C :2009 :140, para. 44.

[33] CJEU, Judgment of the Court of 6 April 1962, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, C-13-61, ECLI:EU:C:1962:11

able to avoid it. This difference can be the result of the individual application of the case law, or to the strictness of the different domestic legal systems in each member state. This was, for example, the case for the patient right's Directive[34]. According to Greer and Rauscher (2011), the court-created regime was imperfectly applied in some states, but it was sufficiently implemented by other states (Greer and Rauscher, 2011). Hence, the situation was unequal enough to push the legislator to create an actual written legal framework.

Thus, legal uncertainty is not created by the Court's decision themselves, but rather by the reaction of third parties and member states; whether they apply or interpret the case law uniformly is what matters. Variation in responses creates a destabilizing effect, which will encourage the European legislator to create a regulation framework. A situation of legislative uncertainty, or more precisely unequal application of a European regime, will not decide whether the court's case law will be modified or overridden, but rather will give a strong incentive for the legislator to regulate. It is thus a good indicator of whether the legislator will in the future attempt to propose a legislative framework at the European level.

H5.: *If case law produces legal uncertainty in the legislative framework, directly or indirectly, European actors will push for new legislation in order to bring certainty back.*

3.2.2. The degree of reaction to the case law

There are many ways a Court's decision can trigger reactions. It can be ignored by the political sphere, or it can trigger negative reactions from the political and/or civil sphere, or it can be loudly welcomed by the political and/or civil sphere.

3.2.2.1. The impact of the salience of an issue

Existing literature highlights that the Court's influence varies over time and subjects (Abebe and Ginsburg, 2019, pp. 522–523). The most striking example, is the difference between the impact of the Court on gender equality between the 70s and the 90s, compared to its impact on the same matter nowadays (Martinsen, 2015, p. 230). In fact the *Defrenne* ruling coincided with the rise of the second-wave feminism, and the emancipation of women (Hantrais, 2007, p. 123). On a case study on the impact of the Court to the Council Regulation 1408/71[35], Martinsen highlighted that most if the

[34] European Parliament and Council Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare, *OJ L 88, 4.4.2011, p. 45–65*

[35] Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, *OJ L 149, 5.7.1971, p. 2–50*

amendments codifying Court's rulings related to 'politically uncontroversial or even technical' issues (Martinsen, 2015, p. 81).

Salience is defined as 'the importance an actors attaches to an issue' (Warntjen, 2012, p. 169). Hence, what influences the degree of salience for political actor, is the interest of the civil society for a specific topic. The political agenda adapt to these objects of interest (Weaver, 1991). Hence, when a topic is high on the political agenda, decision makers are more careful on related new legislations. They know that new legislations will be more carefully scrutinised by the civil society and bring more reactions. Ergo, the political costs of mistakes are higher. Thus, when a new European legislation is discussed, the more the matter is salient, the more each member states will have important interests to defends (Martinsen, 2015, p. 84). It is very unlikely, as the socio-economic and political context diverge, that all governments will have similar positions, or will want the same legal dispositions to be passed at the European level. If the new legislation deals with a salient topic related to case law, some states might see opportunities to adapt the jurisprudence according their own interests, either by going further than the case, or going back. Yet, when the topic brings very few or no interest from the civil sphere, legislator might rather codify the case law as it is an already existing solution. A Court's ruling on a non-politically controversial topic will create less intense negotiations between legislators. To conclude, the salience of an issue can be an indicator of the likelihood of codification of jurisprudence.

H6. A): *When the issue at stake is politically salient, debates will be more intense and codification of the case law is less likely to occur.*

H6. B): *When the issue at stake is not politically salient, or very technical, codification of the case law is more likely to occur.*

3.2.2.2. The impact of the reaction from the political or/and civil sphere

Reaction to the case law will first and foremost raise the interest for a specific court's ruling. It does not primarily matter, whether the reaction is welcoming the decision or condemning it, nor who is reacting, the civil society and interests groups or the political actors engaged in the legislative process. What does matter is the communication surrounding the court decision, placing it at the centre of the debate (Alter and Meunier-Aitsahalia, 1994, p. 545). A decisive example is the comparison

between the *Dassonville*[36] case and the *Cassis de Dijon*[37] case. As explained in the previous chapter, the *Dassonville* and the *Cassis de Dijon* cases give both similar interpretation of the Treaties, yet, the *Cassis de Dijon* is more famous because of the responses and counter-reactions it triggers. As Martinsen (2015) concluded, when a court decision does not attract important political attention, Commission's proposals are more easily approved (Martinsen, 2015, p. 231).

Thus, reaction and communication about a specific case law will raise it salience and potential of influence over EU legislation, if this reaction reach beyond the legal circles.

H7. A): *When the reaction to a court's decision reaches beyond legal circles, codification is less likely to occur.*

H7. B): *When the reaction to a court's decision does not reach beyond legal circles, codification is more likely to occur.*

3.2.3. The impact of the rules of the decision-making process

The importance of the rules of decision making matter in the influence of the case law over secondary legislation as they define the veto players (Martinsen, 2015, pp. 203-231). The more commonly used legislative process is currently the "Ordinary legislative procedure". This means that the Commission launches a legislative proposal, and the co-legislator has to adopt it. Adoption happens when the Parliament votes the proposal in plenary session, by qualified majority, and the Council of the EU vote on the same text as adopted by Parliament, also by qualified majority voting.

Qualified majority voting matters because one states alone cannot block a draft legislation. A consensus needs to be reached in each institution and also in-between the two legislators. According to Martinsen (2015), this is why codifications and overrides becomes less likely to happen over time (Martinsen, 2015, p. 231). Through the OLP, a legislation needs to go through three veto points. Each of these veto points have to find consensus among themselves. As the number of actors who need to reach a consensus increased it becomes harder to simply agree on codification of case law, even more when they are politically salient.

H8. : *The more actors involved in the decision process; the less likely codification of the case law will occur.*

[36] CJEU, Judgment of the Court of 11 July 1974, procureur du Roi contre Benoît *Dassonville,* Case 8/74, EU :C :1974 :82

[37] CJEU, Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78, EU :C :1979 :42

3.3. A summary of the theory

To sum up, the influence of the Court's case law is constructed through a complex mechanism involving several variables and possible interactions. Through its rulings, the Court can interpret European legislations, while attempting to give it more clarity (Terpan and Saurugger, 2018). Yet, those interpretation of the law have social, political and legal consequences. First, those interpretations can create legal uncertainty by changing drastically the meaning of the text (Terpan and Saurugger, 2018). Second, it can also be that civil society react to the case law increasing its visibility and therefore its salience, to push legislator to act on a certain topic (Alter and Meunier-Aitsahalia, 1994). Third, it can be that member states react differently a jurisprudence and the lack of harmonisation creates the need for need legislation (Greer and Rauscher, 2011; Martinsen, 2015, p. 164). Nevertheless, the European legislator only have the authority to codify those jurisprudence within future European legislations. The Commission at first act as the gatekeeper. It chooses whether a new legislation will be negotiate (Martinsen, 2015, p. 232). When this institution agrees with the case law, and want to push its codification, it will refer to it in the legislative proposal. Then, the European co-legislators, naming the European Parliament and the Council, will negotiate on this proposal. At this stage of the process, every can still happen. Each institution will push for codification or override of specific Court's rulings depending the interests they represent. The Parliament will represent the interests of the citizens (Meislova, 2019), when the Council represent the interests of the member states (Moravcsik, 1998). Thus, both parties need to agree on the codification for it to happen. Figure 1 sums up the theory previously explained and illustrates the mechanism.

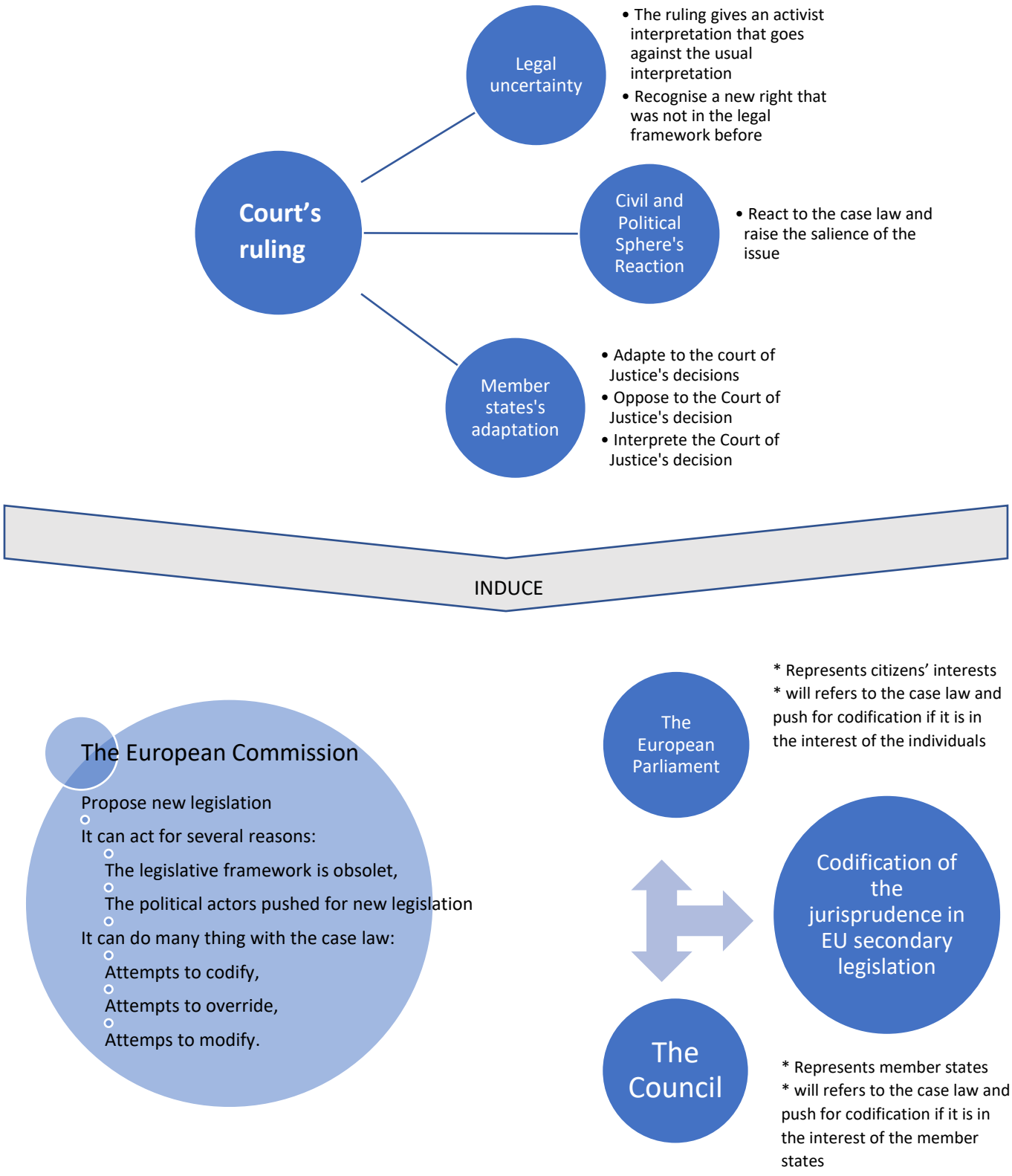

Figure 1 : Mechanism of the CJEU case law's influence over EU secondary legislation

Chapter 4. Research Design – A causal process tracing analysis

Now that a theoretical framework was established, it has to be tested. This methodological chapter explain to the reader the used research design.

The main goal of this research is to understand the mechanisms through which CJEU rulings end up being codified in European law. So far, we have reviewed the literature on the topic of International and European court's influence on international governance and more precisely, on the CJEU's influence on EU secondary legislation. Derived from this literature review, I have drafted a theory about the potential mechanism allowing Court's ruling to be codified in EU secondary legislation. This theory has yet to be tested. To verify this theory, I will conduct a small-N case study using causal mechanism process tracing analysis.

4.1. What is causal process tracing analysis

- Causal mechanisms

"A mechanism is a process in a concrete system that is capable of bringing about or preventing some changes in the system" (Bunge, 1997). Mechanism based explanations became popular in the past decades (Hedström and Ylikoski, 2010, p. 50). This new methodology aims to make up for the imperfection of the covering law account of explanations and purely statistical explanations. Mechanisms, even if they involve a relation of causality, are not statistical explanations but aim at unveiling the cogs and wheels of an event (Hedström and Ylikoski, 2010).

Existing research on the topic of CJEU influence on EU secondary legislation has, so far, not used mechanism-based approaches. Very few quantitative studies exist on the matter, and those belong to the constrained view and analyse the impact of member states positions on CJEU's rulings (Carrubba et al., 2008; Carrubba and Gabel, 2015; Larsson et al., 2017; Larsson and Naurin, 2016). Those studies analyse the mechanisms legislative override (Larsson and Naurin, 2016) and non-compliance (Carrubba and Gabel, 2015). Yet, they do not look at the specific policy output, but only at the mechanism of strategic positioning of the Court, according the risk of override (Blauberger and Schmidt, 2017). Moreover, Davis (2016) contest their argument, and argue that override is a myth and only inaction is the real 'weapon [of the governments] against the Court' (Davies, 2016, p. 850). More quantitative studies exist on the matter. Those focus rather on the political responses to CJEU's case law (Blauberger and Schmidt, 2017, p. 907). The more in depth research, conducted by Martinsen (2015), uses a covering law account (Martinsen, 2015, p.9). Covering law accounts are deductive arguments that have descriptions of the explanandum phenomenon as a conclusion and one or more empirically validated general law statement and a set of statements describing particular facts and its

premises. Yet, they are unable to make sense of the asymmetry explanatory relation (Hedström and Ylikoski, 2010). The author herself recognises that her methodology is 'unable to open the black box progress through which influence is exercised' (Martinsen, 2015, p.9). Hence, her research does not analyse the dynamics between politics and law and is unable to map out the judicial importance of different political positions. The interest of mechanism-based explanations is that it gives a new approach and complete and/or correct theories establish under other research.

Mechanism is a causal notion (Elster, 1989). Mechanistic research points to the causal process between entities that produce the effect of interest. It gives a dynamic explanation of the process and gives more information than a simple description. Mechanism explanations aim at lighting up the structure underlying the relationship between two variables. It makes visible how the participating entities and their properties, activities and relations produce the effect of interest. A mechanism based explanation does not aim at an exhaustive account of all details, but seeks to capture the crucial elements of the process by abstracting away the irrelevant details (Hedström and Ylikoski, 2010). Understanding the mechanism of interaction between two variables is essential to assess their causality. Mechanisms have a crucial role to play in distinguishing between true causal relations from spurious correlations (Hedström and Ylikoski, 2010). It gives a clearer picture of how variables interact with each other. Mechanistic explanations involve mechanistic law statements and goes beyond simple description of interaction. It is meant to understand the proverbial black box. This strengthens the assessment of existing causal relationships (Bunge, 1997). Causal mechanisms are meant to answer "how" questions.

Any mechanism is likely to be a combination of various underlying mechanisms (Bunge, 1997, p. 417). This methodology recognizes that the unveiling of a mechanism at one level can only happen if it presupposes that other mechanisms happen at other levels (Hedström and Ylikoski, 2010, p. 50). It is said that there is a hierarchy, hence, in this specific research we will only look at the overall mechanism of influence, and not at the underlying ones.

To conclude, causal mechanisms allows us to open the proverbial black box and analyse influence mechanisms between two variables (Bunge, 1997). However, numerous types of approaches exist in causal process research.

- <u>Causal process Tracing approach</u>

The three more popular methodologies are the co-variational approach, the causal process tracing approach and the congruence analysis approach (Blatter and Blume, 2008). Co-variational approach is looking for causal effects of selected variables and is a variable-centred approach. Causal process tracing approach (CPT), is looking for causal mechanism, turning point, critical junctures and

necessary and sufficient conditions. It is a case centred analysis. The congruence analysis approach aims at demonstrating the explanatory power of a particular theory, and is therefore theory centred (Blatter and Blume, 2008).

This research will use a causal process tracing approach. The causal process tracing approach is used to establish what exactly happened between two variables and why it happened. This analytical method uses configurational thinking (Blatter and Haverland, 2012, p. 81). It presupposes that a plurality of factors are working together to create an outcome and causality plays out in time and space. There are two types of causal configurations: causal conjunctions and causal chains (Blatter and Haverland, 2012, p. 94). A causal conjunction is a causal configuration in which multiple causal conditions work together (in additive or interactive ways) at a specific point in time or over a short period of time to produce the outcome of interest. The causal conditions work together in a specific situation. A causal chain is a causal configuration in which specific causal conditions form the necessary and sufficient preconditions for triggering other necessary and sufficient causal conditions or configurations at a later point in time, and this causal chain leads to the outcome of interest. The causal conditions work together in a specific sequence (Blatter and Haverland, 2012, p. 94).

However, it is really important to distinguish the free mechanism from the context. Causal process tracing is strongly connected to the context and is accurate only in that specific context. Process tracing has an important time dimension, as it draws on theory to explain each important step that contributes to causing the outcome (Bennett and Checkel, 2014).

CPT attempts to identify turning points, critical junctures, contributing factors and necessary and sufficient conditions (Blatter and Haverland, 2012, p. 92). Turning points are when the situation takes an important yet not decisive turn. Critical junctures are situations where the process takes a turn that makes the outcome (almost) inevitable. Necessary conditions are conditions that have to be present for an outcome to occur and where the absence of this conditions results in an absence of the outcome. Sufficient conditions are causal factors X when the outcomes always occur when X exist. Nevertheless, the outcomes can also happen when the sufficient factor X does not exist. Contributing factors contribute to the configuration of factors that makes the outcome more likely (Blatter and Haverland, 2012, p. 92). By identifying all these different elements and factors, CPT provides the research with a strong analysis framework and serious results.

However, there is ongoing debate concerning the ability to generalise causal process tracing analysis beyond the case analysed (see for example: Blatter and Haverland, 2012, p. 82; Bunge, 1997). In fact, due to the small number of cases analysed, it is difficult to assess whether the same observations can be generalised to a larger population of cases, or those specific few cases are deviant

cases, meaning really different from the overall population. Yet, Bunge (1997), emphasised on the desirability of possibility for generalisation in system-specific mechanism (Bunge, 1997). As this research focus on the general system-specific mechanism, it will be possible to make a configurational generalisation of the findings. This is only possible because generalisation will not be about the effect of one single variables, but about the whole set of causal configuration that made the outcome possible (Blatter and Haverland, 2012, p. 136).

Thus, causal process tracing gives a 'full-fledged recipe for making an outcome of interest possible' (Blatter and Haverland, 2012, p. 81). It reveals not only the necessary and sufficient ingredients but also when and how the ingredients have to be brought together to create the outcome of interest.

4.2. Why is this methodology adapted to this research

So far, the theory of this research was based on other theories and few empirical observations. Therefore, it is a conjecture. To give it some scientific values, this conjecture has to be tested and confirmed (Bunge, 1997).

Using causal process tracing analyse is relevant in this research for three reasons. First, it would complete the already existing academic research. Courts and legislator's interactions have a certain influence on each other. Authors identified a relation of causality in some specific situations (see for example: Alter and Meunier-Aitsahalia, 1994; Martinsen, 2015), however, few factors involved in this causal relation have been identified. Additionally, the literature review revealed no research able to draw the actual causal configuration of this process. Existing work on the topic only identifies case specific mechanisms. Almost always, it is admitted, that the implication of the European Commission plays an important role (see for example: Alter and Meunier-Aitsahalia, 1994; Burley and Mattli, 1993; Larsson and Naurin, 2016; Martinsen, 2015; Stein, 1981; Stone Sweet and Brunell, 2013), but it is not assessed if this is a necessary role, nor to what extent it plays a role. The goal of this research would be to identify a more general mechanism that could be used to understand more than just one case.

Second, it is important to have a clearer picture of how the Court influences the EU legislations. It would make it easier, for political actors, to respond to rulings. As mechanism are systemic in nature, they are supposing to be predictable. Therefore, actors should be able to anticipate their effect and able to control and lead them. It would also be easier to establish more effective and relevant safeguards.

Third, the current literature on the impact of the Court in secondary legislation focuses primarily on overrides and leaves aside the analysis on codification (see for example: Carrubba et al.,

2008; Larsson et al., 2017; Larsson and Naurin, 2016). The analyses on override are very important in understanding what blocks the process of codification; however, it does not draw a mechanism where codification does work. Hence, this paper will give better framework of analysis for the future research on the topic

To conclude, using a CPT approach in this mechanimistic study, will fill a gap existing in the literature and help unveiling the actual mechanism at play in the process of codification. The following part will lead the theory to the practice and explain the reader how this study will actually proceed.

4.3. How will I process

I will conduct a small-N case study analysis, studying two cases where court's rulings, previous to Commission proposal, were codified in two different EU secondary legislations. These analyses aspire to identify all the variables playing a role in the codification process and establish the configuration of the process. I chose to select two cases where intervening factors are as different as possible. This is to be able to identify what variables are necessary, or sufficient, or just contributing to the outcome.

Process tracing becomes more accurate if we proceed through an abductive logic, a combination of induction and deduction methods (Bennett and Checkel, 2015, p. 17). The analysis will therefore be guided by the theory established above. It was established after a lot of reading and deductive logic. After I conduct the case analysis, I will revise the theory delivered above and try to qualify more precisely the role of each variables in chapter 7. I will try, from the case study, to re-generalise the theory, using inductive logic. This analysis will check, confirm, and correct the established theory.

The analysis will be limited to post-Lisbon situations. By limiting the research to this timeframe, I hope to restrict the influence of the system on the mechanism and increase the ability to generalise my theory within a specific configuration. The EU has known plenty of variation in its structures and system throughout its construction. These variations changed the role and influence of the different actors. Thus, it is to be expected that the influence mechanism may have changed overtime. Before 2004, fewer countries were part of the Union, and those present were more socially homogeneous. Prior to 2004, the Council also had to take decisions in unanimity. Furthermore, the powers of the European Parliament increased throughout the integration process, with it now an important actor in the decision-making process. All these evolutions might have changed the influence of the Court (Martinsen, 2015, p. 230).

Obviously, as the EU is in constant evolution, it is hard to find two cases that have the exact same political configuration. The presidency of the Council changes every six months and the leading country has a strong influence on a legislation's result (Tallberg, 2004). As literature showed, the Belgium presidency had a tendency to ease compromises and find solutions at a greater rate than any other countries (Kerremans and Drieskens, 2003). The result of a country election and what party lead it also influence the final result. Therefore, two cases with the exact same system configuration is almost impossible to find.

Yet, I believe that if I limit my research to post-Lisbon situation, it limits the change of structure and actors involved and the power of those actors. It also allows me to look for case in an eleven-year timeframe, which should be sufficient enough to find all the cases I need for this research.

I also decided to limit the research to one area of EU legislation. I chose to look at legislations related to the digital market. No research on the Court's impact over secondary legislation exist yet on the influence of case law on digital legislation. This field of research has so far focussed predominantly on human rights (see for example: Hantrais, 2007), internal market (see for example: Alter and Meunier-Aitsahalia, 1994), and social policy (See for example, Martinsen, 2015). Therefore, the research might not be able to give a clear overview of the influence's mechanism for every European legislation. Yet, as I base my theory on existing research and extend the field of analyse, I am able to create a theoretical framework that could be used for further research. Moreover, the issues related to digital matters have gained an increasing importance in the past 10 years, especially since the scandals exposed by Edward Snowden (Rossi, 2018, p. 95). As technology becomes increasingly used by every actor within society, the topic will remain salient in the coming years.

Cases were selected depending on two variables. It first required that a ruling was handed down by the CJEU, previously to a Commission's legislative proposal. The ruling must have modified the European legislative framework, either through regulating a situation that previously was unregulated, or through giving an interpretation of existing law that was not in line with traditional interpretations. It could either be an innovative interpretation of existing legislation, or a new principle not previously discovered in the EU legal system. The second variable considered was the actual codification of this ruling into new EU secondary legislation. The main goal of this second variable is to be sure I could focus the analysis on codification and not on override situations.

Hence, I chose to analyse the Directive 2019/789[38] on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and the Regulation 2016/679[39] on the protection of natural persons with regards to the processing of personal data and on the free movement of such data (GDPR). For my first case, analysis will be focus on debates related to a technical topic, namely "direct injection". The debate on this provision involved case law of the court, which stated who should pay rightsholders in TV transmission through direct injection. Hence, this topic is more related to the functioning of the single market. The second analysis will focus on the scope of protection of personal data, limited to natural person and recognised as a non-absolute fundamental right.

The cumulation of those two cases are important. It allows the research to analyse various situations, one related to fundamental individual's rights, and one related to the efficiency of the single market, while still focusing the analysis on one topic. I hope to be able to see different configurations of actors, and thus, be able to identify which variables are necessary, sufficient or conditional to the mechanism.

[38] European Parliament and Council, Directive (EU) 2019/789 of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, *OJ L 130, 17.5.2019, p. 82–91*

[39] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119, 4.5.2016, p. 1–88*

Chapter 5. Case 1: Direct injection transmission of Radio and Television Broadcast: what act of communication and responsibility to clear rights and ? (Directive 2019/789)

The first case analysis will concern the sensitive question of copyrights holder's payments in broadcasting transmissions using direct injection technics. Based on the theory framework established in Chapter 3, we will analyse the negotiations that took place around direct injections provision in the European Parliament and Council Directive 2019/789[40] (thereafter: The Online Broadcasting and Retransmission Directive). Figure 2 gives a timeline of the case.

Copyrights matters are cautiously kept under national competences by member states (Synodinou, 2020, p. 136). Yet, with the development of the European Union, and therefore of the circulation of copyright protected content, more and more issues arise from the legislative fragmentation (Cabrera et al, 2019). Besides, looking especially at the diffusion of audio-visual works, European legislations used to legislate on specific technologies used in broadcasting (Cabrera et al, 2019). Hence, new problems arise when the technology evolves. One important issue at stake is the question "*Who has to pay copyright holders?"*. As we will see in the analysis of this case, the European framework used to be silent on certain matters. Disputes were brought before the Court of Justice. Existing legislation was interpreted and adapted to some specific situations. After some years, the European legislator tried to clarify the initial framework, and the European Parliament and the Council had intense negotiations whether the case law should be codified or overridden in the new legislation.

The analysis will proceed as follows: First, I will explain what direct injection is, in opposition to usual broadcasting transmission technics (5.1.); second, I will summarise the legislative framework previous to 2019 (5.2.); third, I will describe two major Court's rulings on the issue (5.3.); I will then quickly sum up the reaction from stakeholders to the case law (5.4.); This will lead to the explanation on the need to actualise the legislative framework (5.5.); I will then give the context of the Commission's legislation proposal (5.6.) and detail on the intervention of the European Commission (5.7.); I will then analyse the negotiations taking place between the European Parliament and the Council (5.8.). Once this analysis is done, I will explain the final legislation, and compare it with the

[40] European Parliament and Council, Directive (EU) 2019/789 of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, *OJ L 130, 17.5.2019, p. 82–91*

previous case law (5.9). Finally, I will conclude the analysis by reassessing the hypotheses made in Chapter 3 and defining the role of each variable (5.10.).

- **1993** - **Council Directive** 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning **copyright** and rights related to copyright **applicable to satellite broadcasting and cable retransmission**
- **2001** - **Directive** 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
- **2010 – Digital Agenda for Europe -** ensure a fair, secured and open digital environment
- **2011 - Airfield case** - C-431/09 – in a case of direct injection, signal distributors are making a secondary act of communication. Broadcaster and distributor interventions are regarded as a single and indivisible act of communication. Satellite television provider has to clear rights directly with the CMOs.
- **2015** – ***SBS* case** - Case C-325/14 – in case of direct injection, broadcasters are not engaged in communication with the public, only signal distributors have to clear rights, except when their intervention is purely technical.
- **August – November 2015** – **Public consultation** on the uses and limit of the 93/83/EEC directive.
- **May 2016** – **Parliament own assessment** of the 93/83/EEC directive – Emphasised the need for modernisation of the legislative framework.
- **September 2016** – **Commission proposal** for the modernisation of the 93/83/EEC directive.
- **November 2017** – The **Parliament adopted its position**
- **December 2017** – The **Council agreed** internally on a **first compromise** and got a mandate from the COREPER to negotiate in trilogues.
- **February – December 2018** – **Trilogues negotiations**
- **April 2019 – Adoption of the Directive 2019/789/EC** by the Council and the European Parliament

Figure 2 : Timeline of the Directive on copyright and rights related to copyrights applicable to satellite broadcasting and cable retransmission's negotiations.

5.1. What is 'direct injection' ?

Broadcasting organisations are entities transmitting television and radio programmes to the public. Signal distributors are intermediary actors, between the broadcasting organisation and the public, and make sure the public can receive the signal clearly. Cable operators are specific signal distributors using cable networks to deliver content to a public (Madiega, 2019, p. 5).

In traditional broadcast transmissions there is no direct contact between the broadcaster and the cable operator. The broadcaster sends a free-to-air transmission of radio and television programmes, which is received by the public. Cable operators, then, capture this signal and deliver it to the subscribers though an injection into its cable network (Madiega, 2019, p. 5). This system is illustrated in Figure 3.

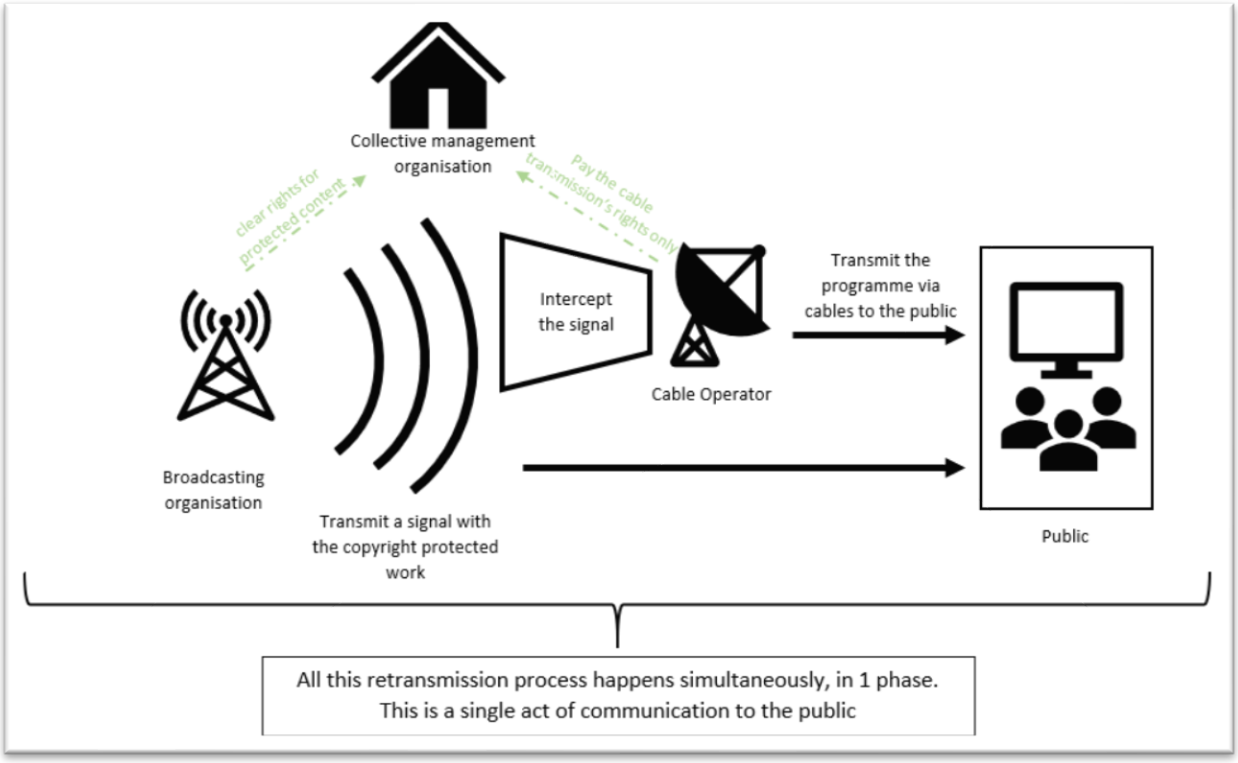

Figure 3 - Traditional TV and radio diffusion

In opposition, "direct injection" technologies are meant to bypass this traditional system (Madiega, 2019, p. 5). The new directive on Online Broadcasting and Retransmissions[41] clarify the definition of the notion. There is a direct contact between the broadcaster and the signal distributor. Direct injection happens when the broadcaster transmits the programme-carrying signal to signal

[41] Directive 2019/789/EEC

distributor, via a point-to-point private line. The signals are accessible to the public simultaneously[42]. Before this legal clarification, no technical definition of the system was commonly agreed (Madiega, 2019, p. 5). Yet, in practice, it was recognised that direct injection systems involved two-steps. This two-step process is still recognised within the European legal definition. First, the broadcasting organisation transmits a programme to a signal distributor. This first transmission is made through a private wired or wireless point-to-point line, or by satellite. During this transmission, the general public has no access to the signal. Second, the signal distributor receives the signal and then diffuses it to their subscribers (Figure 4) (Conseil supérieur de la propriété litéraire et artistique, 2016). This technology seems to be more and more used in radio and TV transmissions.

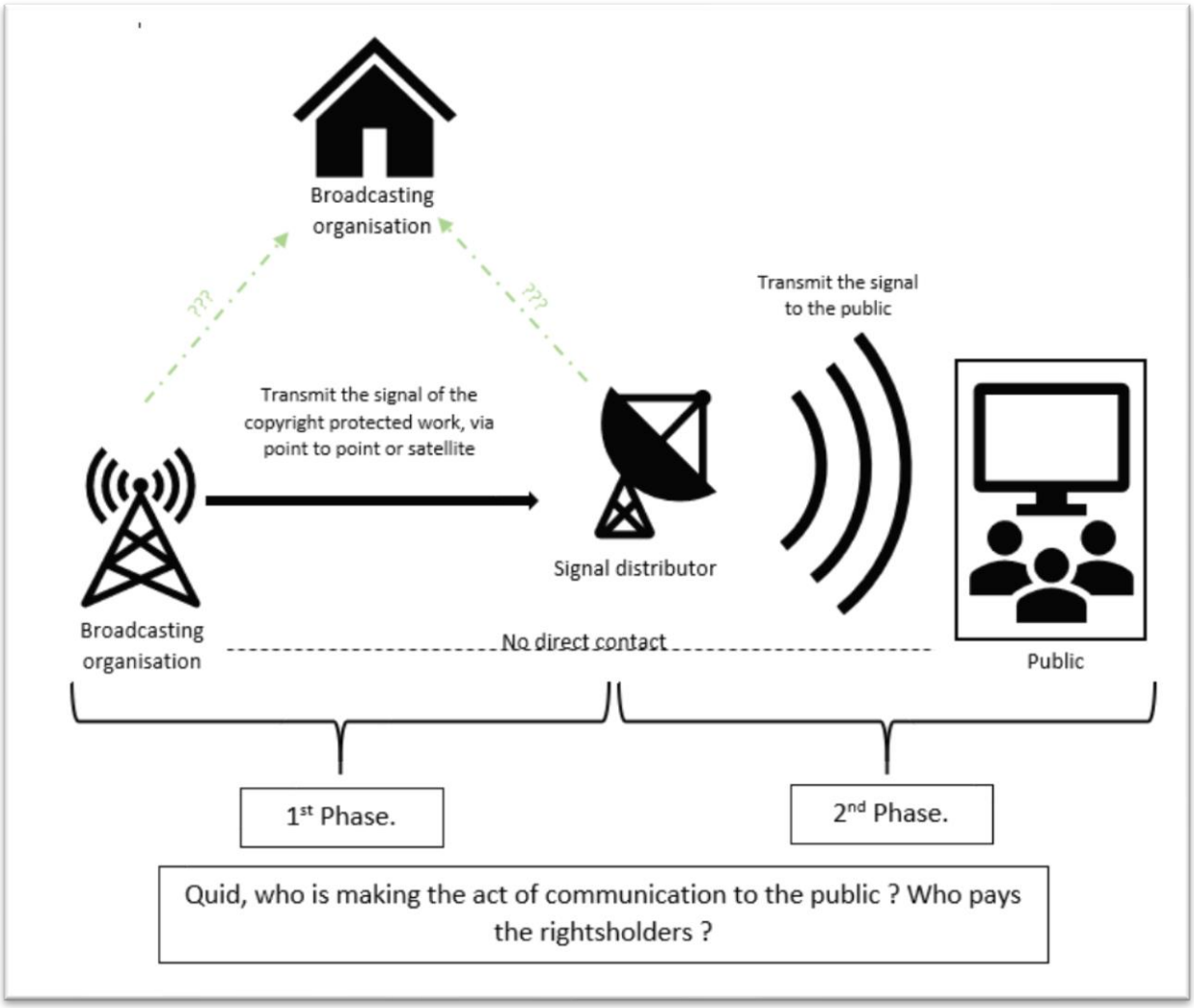

Figure 4 - Direct Injection Transmission

[42] Directive 2019/789/EEC, Article 2(4)

5.2. Direct injection before 2019 - The previous (incomplete) legal framework

Now that the definition and explanation of the technology are clear, it is important to look at the legislative framework previous to 2019. One of the main legal issues in radio and TV broadcasting is the question related to who pays the copyright holder. To clearly understand the problem at stake, two systems of copyrights legislation in the EU must be understood: the principle of territoriality, and the mandatory collective management system.

Copyright protected work in the EU, is protected by the principle of territoriality. No common EU copyrights exist (Cabrera et al, 2019). When broadcasters want to diffuse copyright protected content, they have to clear rights in every country in which they plan to transmit the work. Hence, to plan cross-border transmission, broadcasters have to engage in complex clearance processes. This involves high transaction costs. As a result, broadcasters have no incentive to provide cross-border services and install measures to prevent cross-border content access (Madiega, 2019, p. 3). This situation presents an important limit to the European single market.

Thus, in 1993, the European legislator passed a new directive, the Council Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission[43] (thereafter: the SatCab Directive). This legislation aimed at facilitating cross-border broadcasting services for programmes offered by satellite or cable retransmission (Cabrera et al, 2019, p. 14). The directive defined the act of "communication to the public" as 'the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth' (Directive 93/8/EEC, Article 1, (2a)) and organised a legal framework associated. This framework distinguished between "secondary communication" and "primary communication". Primary communications are transmission of content that have never been diffused and presented to a public. Secondary communication is defined as cable retransmission or every activity of re-broadcasting programmes initially broadcast by other organisations (Madiega, 2019).

Article 9(1) of the Directive[44] established that secondary communication to the public is subject to mandatory collective administration. As subject of the mandatory collective administration, broadcasting organisations have to clear the right of the copyright protected content they attempt to diffuse, with the collective management organisations. Collective management system was so far used

[43] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L 248, 6.10.1993, p. 15–21*

[44] Ibid.

only for cable transmissions. Television and radio broadcast programmes involve numerous copyright protected work. Cable operators diffuse a high variety of radio and TV programmes. It would create an unnecessary burden if they had to negotiate rights' clearance individually. With the collective management system, they have the possibility to clear rights only with one society representing all individual rightsholders (Madiega, 2019, p. 4).

Nevertheless, this legislative framework presented several shortcomings (Madiega, 2019, pp. 4–5). First, the scope of action of the directive did not include every modern transmission technique. The directive did not include "direct injection" situations and was unclear how "direct injection" should be qualified. The doctrine disagrees on whether direct injection is "cable retransmission" or not, and if it is one single or two distinct "communication to the public". Hence, actors such as broadcasters, signal distributors and copyright holders find themselves in blurry situations. Broadcasting and cable companies use this lack of clarity and argue that they are engaged in "primary communication to the public". Hence, they are not subject to mandatory collective management and do not have to clear rights with collective management organisations (Madiega, 2019, p. 5).

To conclude, the 1993 legislation facilitates cross-border transmission of radio and TV programmes, while respecting the competences of national states in copyright law (Cabrera et al, 2019, p. 14). It created a system that would make it easier for broadcasters and signal distributors to clear rights of diffusions. Yet, this directive limited its scope of application to specific technologies. With the development of new techniques, situations, once again, became ambiguous (Madiega, 2019, pp. 4–5). Disputes arose and some of them were brought to the Court of Justice of the EU.

5.3. Disputes and interventions of the Court of Justice of the EU

With the rise of new technologies, few disputes were brought to the CJEU (Van Leeuwen, 2016, p. 458). Through its case law, despite being very limited on the matter (Madiega, 2019, p. 6), the Court of justice defined more precisely the notion of "communication to the public", "direct injection", and attempted to clarify the notion of "technical means". In the following section, I will provide an analysis of the two most salient case on the matter, namely the *Airfield*[45] judgement and the *SBS v. SABAM*[46] judgement.

[45] CJEU, Judgment of the Court (Third Chamber) of 13 October 2011, Joined cases C-431/09 and C-432/09, *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA* (*Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA* (C-432/09), ECLI:EU:C:2011:648

[46] CJEU, Judgment of the Court (Ninth Chamber) of 19 November 2015, *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, Case C-325/14, ECLI:EU:C:2015:764

5.3.1. The Airfield judgement

On 13 October 2011, the Court ruled in *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA* and *Airfield NV v Agicoa Belgium BVBA*, that "a satellite package provider had to obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public."[47]. The case's situation is illustrated figure 5.

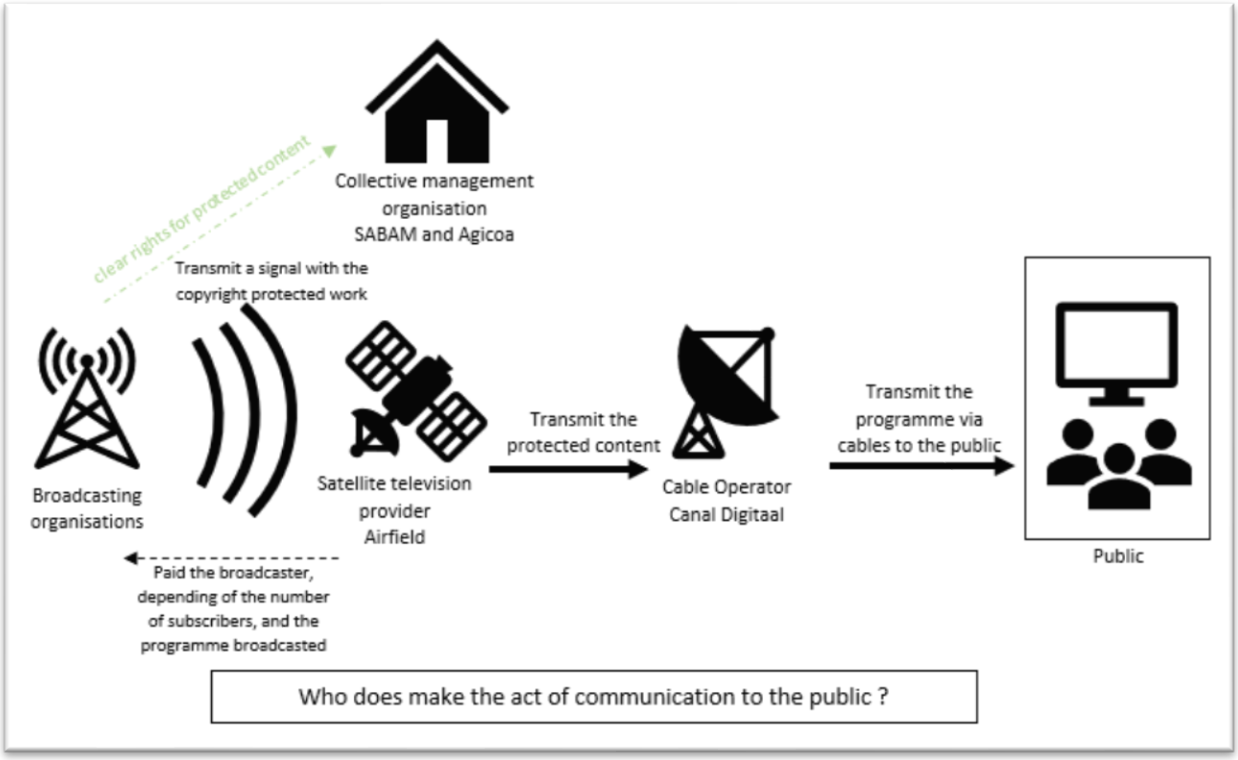

Figure 5 : The Airfield judgement – Who is engaged in an act of communication ?

- <u>Background of the Case</u>

Airfield was a satellite television provider and received signals from a broadcasting organisation. The satellite television provider offered two types of services, free-to-view programmes and encrypted ones. Encrypted transmissions could only be seen by a public if subscribed. Airfield then

[47] CJEU, 2011, *Airfield*, Joined cases C-431/09 and C-432/09, para. 85.

used the technical services of Canal Digitaal to offer its package of channels (van Leeuwen, 2016, p. 460).

Airfield received money from the broadcasting organisations for this service. The broadcasting organisations also allowed the satellite provider to diffuse their programmes simultaneously. Airfield, then paid the broadcaster in return depending on the number of subscribers and the programme broadcasted. The broadcasting organisation was then in charge of obtaining transmission authorisation from the collective management organisations for copyrights holders (Phillips, 2011).

However, those collective organisations (SABAM and Agicoa), argued that the transmission from the broadcasting organisation to the satellite television provider was the first communication to the public. Hence, Airfield was engaged in secondary communication to the public and was therefore subject to mandatory collective administration. Airfield and canal Digitaal disagree. According to them, they only provided technical facilities and their activity was not subject to copyright permission (Phillips, 2011).

The Belgian hof van beroep to Brussel decided to refer the following question to the CJEU : *"Does Directive 93/83 preclude the requirement that the supplier of digital satellite television must obtain the consent of the right holders in the case where a broadcasting organisation transmits its programme-carrying signals, either by a fixed link or by an encrypted satellite signal, to a supplier of digital satellite television which is independent of the broadcasting organisation, and that supplier has those signals encrypted and beamed to a satellite by a company associated with it, after which those signals are beamed down, with the consent of the broadcasting organisation, as part of a package of television channels and therefore bundled, to the satellite television supplier's subscribers, who are able to view the programmes simultaneously and unaltered by means of a decoder card or smart card provided by the satellite television supplier?"* [48].

- <u>The Court's decision</u>

The Court was called upon with the question in October 2011. It ruled that "Article 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission must be interpreted as requiring a satellite package provider to obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the right holders have agreed with the

[48] CJEU, 2011, *Airfield*, Joined cases C-431/09 and C-432/09, para. 34

broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public."[49]

Thus, the Court regarded the Airfield activities as a secondary act of communication. Both direct and indirect transmission of copyright protected content, by satellite, are a single and indivisible act of communication. Moreover, as the satellite television provider offered access to some protected work to a new public, it has to clear rights directly with the CMOs. This requirement holds for both direct and indirect transmissions (van Leeuwen, 2016, p. 460).

5.3.2. The SBS Belgium NV v. Belgische Vereiniging van Auteurs, Componisten en Uitgevers SABAM judgement.

On 19 November 2015, the Court of Justice ruled in its *SBS Belgium NV v. Belgische Vereiniging van Auteurs, Componisten en Uitgevers SABAM*[50] judgement (thereafter: *SBS*) , that in a situation of direct injection, the broadcaster organisation does not conduct an act of communication to the public, unless the intervention of the signal distributor is of purely "technical means" (van Leeuwen, 2016). The case is illustrated in the figure 6.

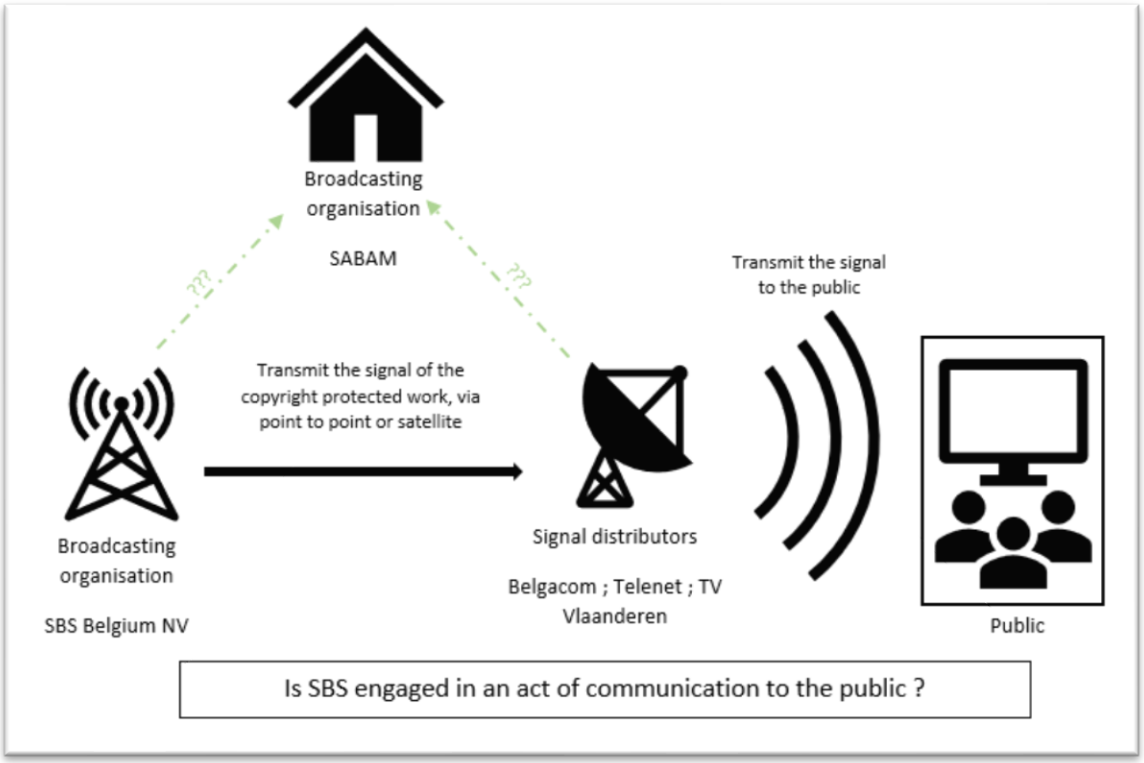

Figure 6 : The SBS judgement – who is engaged in an act of communication to the public ?

[49] CJEU, *Airfield* 2011, Joined cases C-431/09 and C-432/09, para. 85.
[50] CJEU, *SBS* 2015, Case C-325/14

- Background of the case

SBS Belgium NV is a TV broadcasting organisation and its programmes offer self-produced work, as well as work purchased from domestic or foreign production companies and programme suppliers. SBS used direct injection technologies to transmit signals to various distributors, e. g. Belgacom, Telenet and TV Vlaanderen. The public had no possibility to see the programme through that first transfer and could only access the content through the distributors' services (Van Leeuwen, 2016, p. 458).

The Belgian copyright collective management society SABAM argue that, according to the article 3 of the Parliament and Council Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society[51] (thereafter: the InfoSoc directive), SBS was making an act of communication to the public when transferring signal to distributors. They required that SBS would thus purchase the authorisation from the copyright's owners. SABAM argument made a parallel with the *Airfield* judgment where the broadcaster organisation, by transmitting signal to distributor via satellite was making an act of communication to the public.

Arguing against, SBS claimed that the signals distributors were making an act of communication to the public, but not the broadcasting organisation. They also stated that the InfoSoc directive and the *Airfield* judgment were not relevant in this situation. First, the present case had to refer to the SatCab directive and not the InfoSoc one. Second, the *Airfield* case was irrelevant because the public could access the content through the broadcaster signal directly.

The Brussel's Court of Appeal referred a question to the CJEU, through a preliminary ruling procedure, to know whether *"[…] a broadcasting organisation which transmits its programmes exclusively via the technique of direct injection — that is to say, a two-step process in which it transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSL-line), without the signals being accessible to the public during, or as a result of, that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes — make a communication to the public within the meaning of Article 3 of Directive 2001/29?"*[52]

[51] European Parliament and of the Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ L 167, 22.6.2001, p. 10–19*

[52] CJEU, SBS 2015, Case C-325/14, para.12

- The Court's decision

Because the preliminary ruling referred to the Infosoc directive[53] and not the SatCab[54] one, the CJEU ignored the Directive 93/83/EC and ruled exclusively on the InfoSoc one (Van Leeuwen, 2016, p. 458). This presents a first difference with the *Airfield*[55] ruling.

The court first reminded that to be qualified as a communication to the public, a situation required two elements; first an act of communication, second, a public. In a situation of direct injection, broadcasters transmit their signal to distributors only. Referring to its previous rulings, the court recalled that "the term 'public' refers to an indeterminate number of recipients, potential television viewers, and implies, moreover, a fairly large number of persons (see, to that effect, judgments in *SGAE*[56] and *ITV Broadcasting and Others*[57])"[58]. The Court clarified that signal distributors were not considered as a public. Thus, broadcaster organisations using direct injection technologies do not engage in an act of communication to the public, they fulfil the first condition but not the second one (Van Leeuwen, 2016).

In consequence, distributors are responsible to clear rights for diffusion with rightsholders (Van Leeuwen, 2016, p. 460). However, the Court further explicates the situation and its argument. Distributors are responsible when their intervention is both technical and commercial[59]. In the SBS case, signal distributors receive revenues from subscriber subscriptions in exchange of their services. Hence, their intervention is commercial. To generalise, when the distributor is autonomous from the broadcaster and provides its service to a public with the intention to make a profit, he is making an act of communication to the public, and therefore responsible for clearing diffusion rights. In situations where the distributor is not independent from the broadcaster, and its services are purely technical, then the broadcaster, and not the distributor, is making an act of communication to the public, and therefore responsible.

5.3.3. Consequences of the two judgments

Emerging from the comparison of those two rulings, an ambiguity around the legislative framework arose. First, in the *Airfield* ruling the Court regarded the activity of the satellite TV distributor as a secondary act of communication. It implied that the transmission, from the

[53] European Parliament and Council Directive 2001/29/EC
[54] Council Directive 93/83/EEC
[55] CJEU, Airfield 2011, Joined cases C-431/09 and C-432/09
[56] CJEU, Judgment of the Court (Third Chamber) of 7 December 2006*, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, Case C-306/05, ECLI:EU:C:2006:764, para. 37-38
[57] CJEU, Judgment of the Court (Fourth Chamber), 7 March 2013, ITV Broadcasting Ltd and Others v TVCatchUp Ltd, Case C-607/11, ECLI:EU:C:2013:147, para. 32
[58] CJEU, SBS, 2015, Case C-325/14, para. 22
[59] CJEU, SBS, 2015, Case C-325/14, para. 32

broadcasting organisation to the distributor, was the primary act of communication to a public. This analysis was valid for a situation of direct and indirect injection. Yet, in the later *SBS v SABAM* ruling, the Court established that in case of direct injection, the broadcasting organisation was engaged in a secondary act of communication to a public (van Leeuwen, 2016, p. 460).

Second, this ambiguity had consequences for collective management systems (van Leeuwen, 2016, p.461). In fact, mandatory collective administration applies to situations of secondary communication. The Court ruled once that signal distributors were in charge of rights clearance, and then that broadcasting organisation were responsible for it.

To conclude, the intervention of the CJEU established a legal framework for direct injection transmission. This filled a legislative gap related to technological developments, but in the meantime, created new legislative uncertainty.

5.4. The reaction to the case law

The reactions to the Airfield and SBS decision were not politically strong. Most of the concerns were raised within the legal community, and they did not reach beyond these circles (European Commission, 2016b, p. 6). Several reasons could explain this mild collective reaction.

First, as stated by the literature, the salience of a topic depends on its impact on the civil sphere (Warntjen, 2012, p. 169). Yet, the Airfield and SBS judgment touched upon very technical issues. The Court had to decide who were responsible for clearing broadcasting rights of audio-visual protected content in specific retransmission situations. Both cases related to the same broadcasting techniques, specifically direct injection. The CJEU decisions were based on a really clear understanding of the technology (Van Leeuwen, 2016, p. 461). The main take away is that the organism that profits through consumers payment is the one responsible for clearing rights. If an actor is only purely technically involved in the broadcasting process, it is not responsible for clearing rights.

Moreover, this debate did not represent a concern for average individuals (Madiega, 2019, p. 8). Yes, the protection of copyright is a fundamental right recognised] by the European Charter, among other texts. Nevertheless, the issues related to specific mechanisms defining, in some technological contexts, which actor should clear rights of diffusion for protected content created disputes between the rightsholders, broadcasting organisations and audio-visual content distributors. Hence, only the actors directly concerned by the topic of copyright protected work diffusion.

To conclude, the civil society reaction to the case law and the coherence of the legislative framework was very low (European Commission, 2016b, p. 6). Political actors were not forced by the civil society and interests representant to clarify the legislation.

5.5. The Digital Agenda for Europe – Context of the Commission's proposal

In 2010, the European Commission planned the Digital Agenda for Europe (DAE) programme (Maciejewski et al., 2020). This programme was part of more global Europe 2020 strategy. The aim was to ensure a fair, secured and open digital environment and define the key role of the Information and Communication Technologies (ICTs) in the future of Europe. Between 2014 and 2019, the last Commission published 30 legislative proposals related to the digital sphere (Stolton, 2020).

With this change, new broadcasters and online video services tended to extend their offer across borders (e.g. Netflix and Amazon). Audio-visual content diffused by broadcasters involved a variety of copyright protected work. Yet, this copyright content answered to the principle of territoriality. Hence, broadcasters have to clear rights for all the relevant territories. This required them to engage in complex and expensive legal procedures. Thus, broadcasters often use geo-blocking techniques to make their content available only in certain member states. This resort fractures the European digital single market (Madiega, 2019).

The DAE recognised the need to modernise copyright legislations and aimed to fight against the fragmentation of the European Market (Maciejewski et al., 2020). Hence, in 2016 the Commission launched a proposal on a new regulation for the exercise of copyrights applicable for transmission of broadcasting organisations and retransmission of television and radio programmes[60]. This text was meant to replace the former 1993 SatCab Directive in line. The goal was to clarify the copyright payment system and harmonise all the different European legislations (Madiega, 2019, p. 6).

5.6. The need to modernise the legislative framework

The wish to actualise the existing legislative framework did not arise from pressure coming from civil society, but from the more general will of the European Commission to modernise copyright EU regulations. First, the Commission started by assessing the SatCab Directive[61], and then made a public consultation. Finally, the European Parliament published its own assessment of the Directive.

- <u>The assessment of the SatCab Directive</u>

After carrying out an assessment of the Directive 93/83/EEC, the Commission recognised its benefits (European Commission, 2016c, p. 31). Within its scope of satellite broadcasts and cable

[60] European Commission, 2016, Proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - COM/2016/0594 final - 2016/0284 (COD)

[61] Council Directive 93/83/EEC

retransmissions, the directive facilitated licensing and consumer access to cross-borders programmes. Yet, the evaluation recognised that the scope of the directive was limited by two factors. First, recent years have seen an increasing number of territorially limited satellite pay-TV. Second, new technologies emerged and are used for TV and radio broadcast transmission and retransmission but are not covered by the directive. It was explicitly mentioned, that the direct injection technique was out of the scope of the directive, due to its technology-specific nature (Madiega, 2019, p. 6).

To explain the issue in situation of direct injection, the Commission's assessment directly referred to the Airfield[62] and SBS decision[63] (European Commission, 2016d, p. 143). The evaluation concluded that those specific situations are not falling under the scope of the Directive on mandatory collective management. This created ambiguity and a legal uncertainty about what actor should pay CMOs. It recognised that the technology of Direct Injection represented a limit to the application of the directive.

- The Commission's public consultation

This directive assessment was followed by a public consultation (Madiega, 2019, p. 6). It was carried out from 24 August 2015 to 16 November 2015. Through these two and a half months, 256 answers were sent to the Commission. 56 answers came from individuals, and 200 from organisations, societies, or institutions. Among the non-individuals' answers, 25% came from collective management organisations and 19% from right holders. This data highlights that the topic was salient only for very specific actors, who were directly concerned (European Commission, 2016b, pp. 1, 6).

Still, among those specific actors, the interest for the issue was European wide. Respondents to the consultation came from 24 different member states: 41 answers came from Germany, 29 from the United-Kingdom, and 21 from Portugal. Every other European country provided on average 6.7 answers and 25 answers came from non-EU countries (European Commission, 2016b, p. 2). This repartition shows that the topic was of European wide interest. The differences between the number of answers from Germany and the UK, compared to other countries, could simply be explain by demographic differences. As a reminder, at the time, Germany and the UK were two of the three most populated European countries.

Nevertheless, in the public consultation's results, the issue of direct injection only comes out once. According to the study, some CMOs were worried about the application of licensing mechanisms. They argue that in some countries, cable operators challenged the retransmission regimes. Only CMOs brought up the topic in consultation (European Commission, 2016b, p. 6). It reinforces the idea that

[62] CJEU, Airfield 2011, Joined cases C-431/09 and C-432/09
[63] CJEU, SBS 2015, Case C-325/14

the topic is mostly salient for actors that are directly concerned and have the most to lose in those situations.

- The European Parliament's own assessment

The European Parliament published its own assessment of the directive in May 2016 (Remac, 2016). In its implementation appraisal briefing, the Parliament highlighted that the existing directive lead to numerous rulings where the CJEU had to clarify and interpret several principles. It referred, for example, to the *Luksan*[64] case, the *Airfield*[65] cases and the *Football Association Premier League*[66] ones. Those reference are present to highlight issues arising from the directive and explain the need for clarification and modernisation of previous legal framework (Remac, 2016, p. 8).

In its conclusion, the European Parliament stressed that the institution already called, on several occasion, for the modernisation of the existing legislation. New forms of broadcasting techniques developed after the implementation of the directive and are becoming more and more important. Hence, the legislation needs to adapt to the latest technological development, and regulate them (Remac, 2016, p. 8).

To conclude, from those three evaluations, only one really emphasized on the Court's case law, the European Parliament. It referred explicitly to the *Airfield* judgement, to highlight to issues of classification of secondary or primary communication, and divisible or indivisible acts of communication (Remac, 2016, p. 8). Only some CMOs raised the application of licensing mechanisms (European Commission, 2016b, p. 6). The European Commission did not analyse the issues of direct injection in its assessment.

5.7. The European Commission new regulation's proposal

Following all those reports on the SatCab directive, the Commission drew a proposal[67] in 2016 to adapt the legal framework to the new context. The proposal aimed to promote the diffusion and access to cross-borders online services, ancillary to broadcasts. To do so, the proposal attempted to

[64] CJEU, Judgment of the court (Third Chamber), 9 February 2012, Martin Luksan v Petrus van der Let, Case C-277/10, ECLI:EU:C:2012:65

[65] CJEU, Airfield 2011, Joined cases C-431/09 and C-432/09

[66] CJEU, Judgment of the Court (Grand Chamber) of 4 October 2011, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08), Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631

[67] European Commission, 2016, Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - COM/2016/0594 final - 2016/0284 (COD)

facilitate rights clearance. It proposed to extend the country of origin principle to online services and the mandatory collective management system scope (Madiega, 2019, pp. 6-7).

Despite the recognition that direct injection represents a limit to the application of the directive, and that some legal uncertainty raised from divergent court's ruling, the Commission's proposal only tackled the scope of the country of origin principle and the mandatory collective management system. It left aside any provision attempting to regulate direct injection situation (Madiega, 2019, pp. 6-7). No provisions mentioned the situation of direct injection, the Court of Justice's jurisprudence, the ambiguity surrounding those situations, neither in the explanatory memorandum, nor in the results of the ex-post evaluation, or in the final proposition text.

The lack of reference to the case law can easily be explained because the proposal did not include any provision on the topic of direct injection. Yet, it could also be viewed, under this research theoretical framework, and be the sign, that in fact, when the Commission does not wish to codify the jurisprudence, it does not refer to it.

5.8. The reaction of the legislators – What use of the jurisprudence ?

The Commission's text was then negotiated by the two European co-legislators, the European Parliament and the Council. The Parliament brought the issue of direct injection, and resisted the position of the European Council to not include such a provision (Madiega, 2019, p. 9). The part will first analyse the European Parliament position on the text, and second, the Council position.

5.8.1. The European Parliament.

Within the European Parliament, the proposal was referred to the committee on Legal Affairs (JURI). This committee is responsible for many institutional and specific policy competences. One of those specific field is intellectual property law[68]. Hence, as the proposal was related to copyrights legislation, the JURI committee took the responsibility of the proposal and the negotiations. Four other committees were asked for an opinion : CULT, IMCO, INTA, ITRE. INTA did not submit its opinion (Madiega, 2019, p. 9).

Throughout the negotiations, the Parliament showed internal unanimity concerning the addition of provisions clarifying situations of direct injection. The main goal of the Parliament was to ensure appropriate payment for the rightsholders (Madiega, 2019, p. 9).

[68] European Parliament, 2019, Rules of Procedures, Annex VI, accessible at : https://www.europarl.europa.eu/doceo/document/RULES-9-2019-07-02-TOC_EN.html, last consultation : 02/07/2020

Every single committee opinion added recitals and articles about direct injection. Even though they used slightly differed in wording, all wanted to include a definition of "direct injection" in the article 2 of the proposed regulation. They also all meant to declare that direct injection implied joint liability between the broadcaster and the signal distributor and stated that the act of direct injection constitutes a single and indivisible act of communication to the public. The committees IMCO et ITRE also intended to extend the "exercise of the rights in retransmission by right holders other than broadcasting organisation" to signal distributor using direct injection technology (European Parliament 2017). Yet, this definition was in opposition with the Court's rulings. As we can see, all amendments from the European Parliament committees attempt to override the case law of the Court of Justice. Therefore, as expected, they did not refer to the court or any of its decisions in the justification of their amendments.

After considering the committees' opinions, the JURI committee adopted its final report on 21 November 2017 (European Parliament 2017). In the same vein as the committee's opinion, the final report included two amendments for a recital about liability in the case of direct injection. Both stated that broadcasting organisations and signal distributors were jointly liable. Referring to article 3 of the InfoSoc Directive[69], it was affirmed that in the case of direct injection, broadcasters and signal distributors realised a signal and indivisible act of communication to the public. Hence, both entities should obtain rightsholders authorisation before diffusion of copyright protected content.

On the definition of "direct injection" in the future article 2, the JURI committee adopted the same position as the other committee. The final text took all the elements of definition present in the other amendments. Hence, in the final report, "direct injection" was defined as "*a two- or more step process by which broadcasting organisations transmit their programme-carrying signals for reception by the public to distributors that are organisations other than those broadcasting organisations in accordance with the Berne Convention point to point via a private line – by wire or over the air, including by satellite – in such a way that the programme-carrying signals cannot be received by the general public during such transmission; the distributors then offer these programmes to the public simultaneously, in an unaltered and unabridged form, for viewing or listening on cable networks, microwave systems, digital terrestrial, IP-based and mobile networks or similar networks*.". This definition is very technical and include all the elements that were usually recognised to form a situation of direct injection.

[69] European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

The final amendment on Article 8, touched upon the joint liability of broadcasters and distributor. It stated that the process was a single and indivisible act of communication to the public, and therefore both actors needed to clear rights before diffusion. In the explanatory statement, the rapporteurs stated that it was important, according to the Parliament to add provisions concerning direct injection liability. Yet, once again, no reference to the case law were made, has the amendment proposed was in contradiction with the CJEU ruling.

It might also be worth noting that no amendments of Article 3, on the application of the country of origin principle, aimed to extend its scope to direct injection situations specifically. Nevertheless, one amendment attempted to extend the principle of country of origin to transmission realised by other means than by cable. Here, the Parliament wanted to reinforce the application of the principle and gave it applicability beyond technical specification. With such a technical opening, the provision would have included situations of direct injection.

To conclude, the Parliament considered as necessary the inclusion of provision on direct injection, in order to ensure a fair revenues for rightsholders (Madiega, 2019, p. 9). Hence, it defended the interests of the individuals in possession of such rights. Yet, the final text proposed an override of the CJEU's case law, and hence, did not refer to it.

5.8.2. The Council of the European Union.

The Council could start internal negotiation about the Commission proposal on September 2016 as well. It agreed on a first compromise on December 2017 (Madiega, 2019, p. 9). In this first compromise, the Council highly disagreed with the Parliament on several issues, e.g. the scope of the country of origin principle. Among other things, the Council wanted to narrow down the scope of the country of origin principle (Madiega, 2019, p. 10).

Provisions on direct injection was another important point of disagreement. Already at the beginning of 2017, the Council shared doubts about the rationale behind the inclusion of such a provision. According to a Council's public note, direct injection was a key issue discussed by the Working Party on Intellectual Property on 2 March 2017 (Council, 2017). The Council was not keen to regulate direct injection liability in this regulation, arguing that no sufficient impact assessment existed on the matter. The Council feared that such a provision could not be correctly framed, nor implemented. The exact consequences of the inclusion of such a provision could not be known and could result in legal uncertainty.

Because of all those divergences between the Council and the Parliament, it was decided to bring the proposal to trilogue negotiations. The presidency of the Council got a mandate, in December

2017, from the COREPER, to negotiate directly with the Parliament. Trilogue negotiations could start (Madiega, 2019, p. 10).

5.8.2. Trilogue Negotiations

Trilogue negotiations started in February 2018, however, the two first meetings, in February and March, did not bring much progress. According to the Council, negotiations were stuck on very specific technical issues. After the second meeting, the two institutions decided to conduct intensive work on the technical issues. It was meant to clarify each party's position and work on a compromise (Council, 2018a). No further details on the technical issues or the negotiations processes can be found in the public Council's documents.

Once those technical issues were worked out, the third trilogue, in April 2018, could finally focus on the more political issues. The Council preparatory meeting documents highlights 4 mains political issues: The scope of application of the country of origin principle; Retransmission services covered by the mandatory collective management, Proposal of the Parliament to introduce provisions regulating "direct injection", and the transitional period and application date of the regulation (Council, 2018a, p. 2).

In the inter-institutional files, from the Council presidency, to the Permanent Representatives Committee, the president asserted that the Parliament had a strong position on the issue of direct injection. If the Council wanted to reach a final deal, it would have to show 'some flexibility' (Council, 2018a, p. 3). Again, the main issue for the Council, was the lack of knowledge about the consequences of such a provision on the market. Yet, from April 2018, the Council was ready to include a provision on direct injection. Nevertheless, it wanted to impose conditional clauses by way of compensation. The Council proposed to include a clause that would require an evaluation of preconditions to legislate on direct injection in the future. This clause was meant to ensure a certain protection of the market and showed the Council willingness to concede to the Parliament's position, while ensuring a proper assessment before any decisions would be taken.

Despite the Council concession, the April meeting was a deadlock (Council, 2018b, p. 2). According to the Council, the parliament threatened to stop the negotiations and required the Council to make concession for three out of the four main issues, naming the scope of the country of origin principle, the scope of mandatory collective management and the provision on direct injection. The Council files specified that the Parliament insisted that a provision on direct injection was included. Moreover, this provision had to 'safeguards appropriate payments to rightsholders for transmissions via direct injection' (Council, 2018b, p. 2).

The next meeting was planned for October 2018. The Council presidency prepared a compromise package. Concerning the direct injection issues, the Parliament previously refused the review clause. Hence, the Council came up with a new alternative and offered to distinguish “pure direct injection” and “parallel direct injection”. Pure direct injection refers to situation where the broadcaster transmits its signal to the public only via signal distributors. Parallel direct injection refers to situations where the broadcaster can transfer its signal direct to the public as well. The Council proposed that the normal retransmission regime apply to situation of parallel direct injection. It then agreed that the process of delivering a signal, from a broadcaster via a distributor, should be understood as one signal act of communication to the public. Both entities should obtain authorisation from rightsholders in line with their respective participation (Council, 2018b, p. 3).

Yet, the Council did not fully agree with the Parliament’s position and feared a consequent implementation burden for member states. It mitigated its position by offering alternative solutions and attempted to make the regulation easier for member states to implement it. It recognised that signals distributors should have access to mandatory collective management, that it would facilitate rights clearance for them. Still, member states should have the possibility to decide whether they want to give access for signal distributors to such arrangements. Hence, the Council defended member states interest and wanted to create conditions that did not impose an important burden on them. It campaigned for a framework where member states had room for manoeuvre to establish the modalities for obtaining authorisation from rightsholders (Council, 2018b, p. 2).

In order to facilitate implementation of such a provision, the Council argued that the nature of the legal text should be changed (Council, 2018b, p. 4). The text was proposed to be a Regulation by the Commission, but a regulation would not have let enough room for manoeuvre to member states. Therefore, the Council pushed for the final text to be a directive instead of a regulation, as directives are meant to give general objectives, and let member states implement the European legislation in the way they think is the best for their national context. Thus, one more time, the Council agreed to include a provision on direct injection, to the condition that the member states have the ability to implement it, with respect to their own national interest.

Moreover, the Council wanted to add, that in a situation where a signal distributor only provided technical means, it should presume that it does not contribute to an act of communication to the public (Council, 2018b, p. 10). For the first time in this negotiation process, political actors attempted to be in line with the Court’s jurisprudence. Still, no reference to the case law was written down in the compromise package proposal from the Council.

Finally, this last proposition from the Council allowed European legislators to reach an agreement about the inclusion of direct injection provision (Council, 2019).

5.9. The Final text – The Online Broadcasting and Retransmission Directive (2019/789) – What codification?

The final text was agreed in trilogues in December 2018. It was signed by the European Parliament and the Council presidency the 17 April 2019 (Madiega, 2019, p. 11). The final text legislated on the exercise of copyright applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes. It also included provision on direct injection. Hence, the new text replaced the former directive 93/89/EC (the SatCab Directive), adapted its provisions to the new digital area and extended its scope of application to direct injection situations. Table 1 summarises the situation under the SatCab Directive, the jurisprudence of the CJEU, and the new framework.

The new directive included a definition of direct injection. This final definition was the first one enshrined in a legal text. The final text did not include all the technical details established by the European Parliament in its first report. It was limited to the most basic elements. Article 2 (4) states that "'*direct injection' means a technical process by which a broadcasting organisation transmits its programme-carrying signals to an organisation other than a broadcasting organisation, in such a way that the programme-carrying signals are not accessible to the public during that transmission.*"[70]. It did not explicitly mention that direct injection was a two-step process, nor that the transmission between the broadcaster and the signal distributor was 'point-to-point', nor that the programmes were then distributed to the public simultaneously, in an unabridged and unaltered form. Hence, the final definition stays relatively broad.

Article 8 of the new Directive[71] answered the question of who should obtain diffusion's authorisation from rightsholders. It states that both the broadcasting organisation and the signal distributor should be regarded as participating in a single act of communication to the public. Yet, as the recital 20 clarified, they are not jointly liable. Paragraph 2 of article 8 explicitly mention that rightsholders are entitled to refuse the authorisation to signal distributors for a transmission through direct injection. This provision is a small codification of the CJEU's case law, which recognised that

[70] European Parliament and Council Directive 2019/789/EC, article 2(4)
[71] European Parliament and Council Directive 2019/789/EC, article 8

signal distributors were engaged in secondary communication to a public and should thus clear diffusion's rights with rightsholders.

To conclude, the new Directive offers a certain legal framework for transmission through direct injection. It filled a legislative gap created by the lack of legal provisions and the unclear jurisprudence of the Court of Justice. It codified the case law, as signal distributors are now recognise as taking part in an act of communication to the public and have to pay copyrights to rightsholders.

	Legislative framework before 2019	*Airfield* jurisprudence	*SBS v SABAM* jurisprudence	Directive 2019/789
Legislations on Direct Injection Transmissions	None	Both Broadcasting organisations and Satellite Television providers are engaged in a secondary act of communication to the public. Both have to clear rights with rightsholders	Broadcasting organisations are not engaged in a secondary act of communication to a public. They do not have to clear rights with rightsholders, to the condition that the implication of the cable operator is not purely technical.	Article 8 : both the broadcasting organisation and the signal distributor should be regarded as participating in a single act of communication to the public. **Codification**

Table 1: Summarize the codification of the CJEU's case law into the Online Broadcasting and Retransmission Directive.

5.10. Conclusion of the case analysis – pre-assessment of the theory

Through few rulings, between 2010 and 2015, the Court had to deal with copyright issues that were not regulated by a European legislation (Cabrera et al, 2019). The Court was the first European actor to define a framework for direct injection situations. Yet, maybe because only few disputes were brought in Luxemburg (Madiega, 2019, p. 6), and the case law did not have time to mature, the Court's case law was ambiguous. Legal uncertainty arose from the Court's rulings. Hence, despite the legal uncertainty surrounding the situation, only two out of the three European legislators pushed for a new legislation (Madiega, 2019, p. 6). This does not allow us to confirm hypothesis 5.

As we explain in the part 5.6., the European Parliament called several times for a new legislation that would regulate direct injection transmission (Madiega, 2019, p. 6). Yet, those calls were never heard and nothing happened at the legislative level. Six years later, the *Airfield* case the Commission decided to modernise the SatCab directive. In this new proposal, the Commission decided to not include a provision on Direct injection. Yet, by the end of the negotiations, the Parliament was able to make its wishes heard and the new proposal legislated on situations of direct injection. This does confirm hypothesis H1. A) and B). In fact, no codification happened before the Commission put down a new proposal, and this proposal was not directly related to the techniques of direct injection, yet provisions were included to regulate the system. It also confirmed the Hypothesis 2. A), as no mention of the case law was made in the Commission proposal nor in the staffs working documents.

The Parliament position was meant to protect rightsholders and creators of protected contents (Madiega, 2019). It argued that the system for right clearance should be clearer to ensure the revenue for the rightsholders (Madiega, 2019, p. 9). Hence, it did protect the interests of some individuals and not the one of the enterprises, such as broadcasting organisations or signal distributors. It also referred numerous times to the case law in its opinions and in the negotiations, to argue in favour of a codification. This confirm hypothesis 3. A).

Yet, the Council defended the member states' interests. It did not want to codify the case law, nor regulate on direct injection because no assessments were made, and this could have generated a high cost of implementation in national legal order (Madiega, 2019, p. 10). It only accepted to include provisions on direct injection to the condition that the final text would be a directive instead of a regulation (Council, 2018b, p. 4). Hence, it allows member states some liberty of implementation, and the time to adapt to the new framework. This does also confirm hypotheses 4. A). Yet, it is not possible to assess whether the Council pushes for codification when this is in the interests of the member

states, or whether it pushes for override when this is contrary to their interests. In this specific case, the Council neither wanted to codify of override, it wanted to ignore the case law.

On the reaction to the case law, no strong reaction happened (European Commission, 2016b, p. 6). As we explained, the issues were very technical and did not have consequences for average individuals. Hence, the few mild reactions came for the people having direct interest in the topic but did not really reached beyond legal circles. This confirms hypothesis 6. B), and 7. B).

At the very end, despite the use of the ordinary legislative procedure, and the involvement of numerous actors through the negotiation's process, the case law was codified. This does not allow us to confirm hypothesis 8.

To conclude, despite numerous call of the European Parliament to legislate on direct injection techniques, nothing could be done before the Commission actually launches an new proposal related to TV and radio broadcasting. Hence, the Commission's launch of a proposal is a necessary variable and a turning point in this specific codification process. It was also necessary that at least one of the co-legislator negotiate in favour of a provision on direct injection. Yet, no critical juncture was reached up until both of the agreed and allowed the Court's system to be enshrined in the secondary legislation. Nevertheless, the contextual variables did not have an impact on the process. Nor, the legislative uncertainty created by the differences between the *Airfield* ruling and the *SBS* one, not the different national legislation, nor the reactions of the stakeholders have been influential variables in the codification process.

Chapter 6. Case 2: Data protection: what scope of application (Regulation 2016/679)

The second case analysis will focus on the scope of application of protection of personal data. Again based on the theoretical framework established Chapter 3, we will analyse the negotiations of the European Parliament and Council Regulation of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data[72] (Thereafter, General Data Protection Regulation or GDPR). Figure 6 gives a timeline of the case.

It is true that that other aspect of the GDPR have been influenced by the Court of Justice. The most striking example is the definition of the right to erasure by the *Google Spain* ruling of 2014 (Frantziou, 2014). However, this ruling occurred after the Commission launched a proposal and therefore, could not be consider in this analysis as it would not have respected the research design, and would have allowed the study to test for the contextual or Commissions hypotheses.

Personal data protection became a particularly salient topic in Europe after Edwards Snowden released the worldwide spying techniques of US intelligence agency scandal (Rossi, 2018, p. 95). Yet, the Council of Europe already put the topic on the political agenda back in the 70's (Hustinx, 2013, p. 4), and a first convention on data protection was ratified in 1981[73]. The European Union had its own legislation on the matter already in 1995[74] (Hustinx, 2013, p. 9). This early legislation was reinforced by the entry into force of the Lisbon Treaty in 2009, making binding the Charter of Fundamental Right of the EU[75]. Nevertheless, disputes arise from this legislative framework and lead to Courts' decisions, that clarify its scope of application (Hustinx, 2013, pp. 12–13).

In 2012, due to the evolution of the digital single market, and the use of technology, the Commission wanted to update the former legislation (Monteleone, 2016, p. 1). The co-legislator intensively negotiated this proposal, after the Snowden scandal, as it became more aware of the need to protect personal data (Coyne, 2019).

The analysis will proceed as follow: First, I will explain the legislative framework previous to 2016 and its limits (6.1.); second, I will summarise the different intervention of the Court of Justice and

[72] European Parliament and Council, Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[73] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, (ETS No.108, 28.01.1981)

[74] European Parliament and Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

[75] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

how it clarified the scope of application of the legislation (6.2.); third, I will quickly sum up the reaction from stakeholders to the case law (6.3.); fourth, I will describe the Commission comprehensible approach on a new legislation (6.4.); I will then explain the idea of the Commission's regulation proposal (6.5.); I will then analyse the negotiations between the European Parliament (6.6.) and the Council (6.7). Once this analysis is done, I will explain the final legislation and compare it with the previous case law (6.8.). Finally, I will conclude the analyse, reassessing the hypotheses made in Chapter 3 and defining the role of each variable (6.9.).

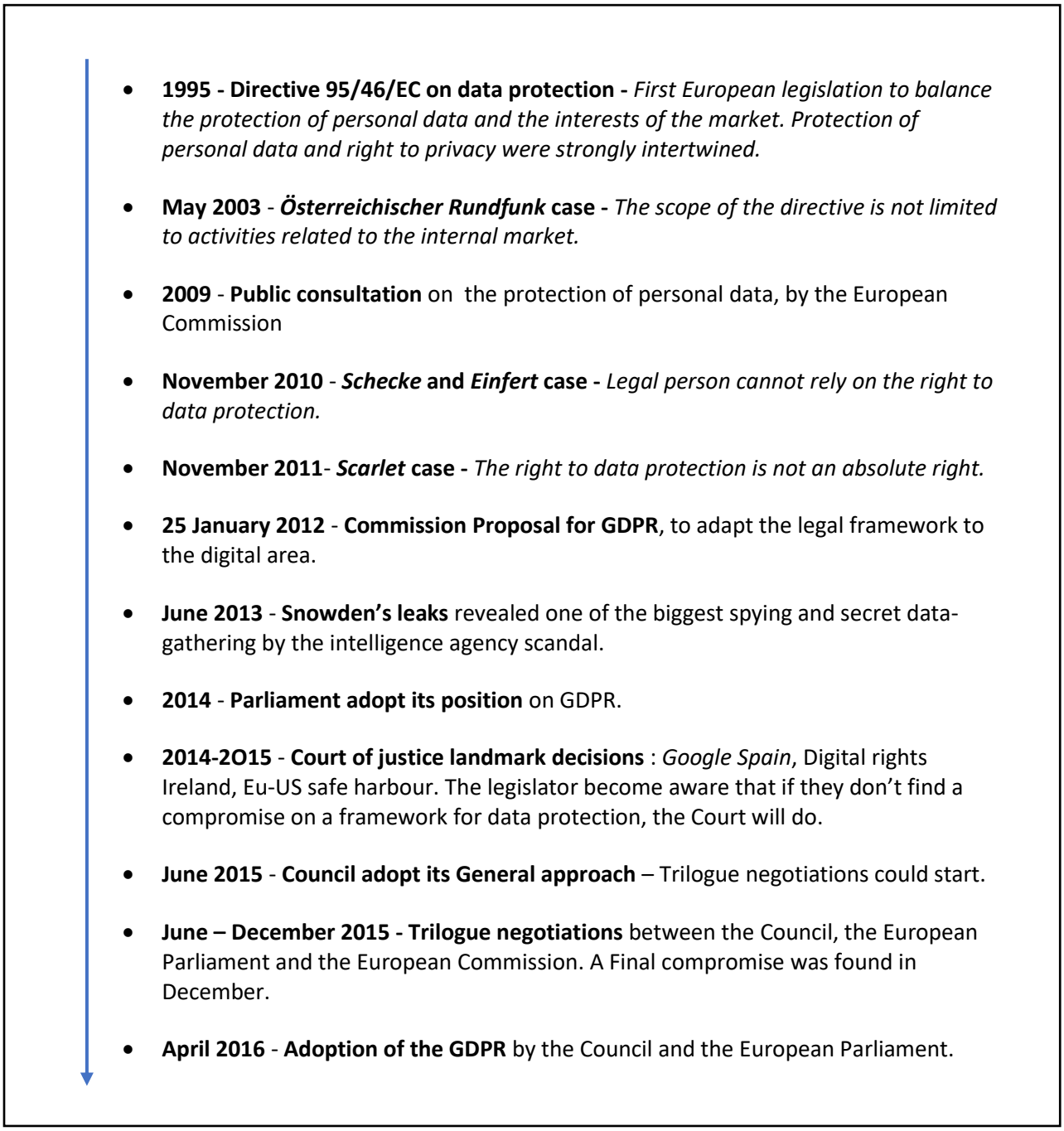

Figure 7: Timeline of the General Data Protection Regulation's negotiations.

6.1. Data protection before 2012 – A legislative framework

The issue of data privacy was first put on the political agenda by the Council of Europe in the 70's. It was strongly related to the Right to privacy. The concern was related to the uncertain respect of private life in the use of new technologies (Hustinx, 2013, p. 4). Ten years later, in 1981, most of the Council of Europe members ratified the convention on data protection[76] (thereafter the convention 108). The convention aimed to protect individuals against abusive use of their personal data and ensure the respect for individuals' rights and fundamental freedoms, in particular, with regard to the right to privacy (Hustinx, 2013, p. 4).

Still, each member states applied the convention according to their own views and interpretation. The European legal landscape was highly fragmented (Hustinx, 2013, p. 9). This heterogeneous application of international rights resulted in restriction of data flows. The European legislators worried that the disparate landscape would obstruct the development of the internal market, as the use of personal data came to take an increasing part, especially regarding the free movement of persons and services (Poullet, 2006).

In 1995, a new directive attempted to harmonise European legislations on data protection (Hustinx, 2013, p. 9), the European Parliament and Council directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data[77] (the Data Protection Directive, DPD). The directive was meant to facilitate the balance between the protection of fundamental rights and the achievement of the internal market, and in particular the free flow of personal data (European Commission, 2010. p.10).

In the directive, both notions, the right to privacy and the right to data protection, were strongly intertwined (Hustinx, 2013, p. 9). Member states had to protect fundamental rights and freedoms and, in particular, the right to privacy with respect to the processing of personal data. To ensure the protection of personal data, the directive was built on 7 principles: notice, purpose, consent, security, disclosure, access, and accountability (Lord, 2018). In short, the directive stated that the processing of personal data was legal only the data subject gave its unambiguous consent, or if the processing was necessary (Hustinx, 2013, p. 31).

A decade later, a new step was taken, with data protection enshrined in Article 8 of the Charter of the EU (the Charter). For the first time, data protection was not directly linked with the right to

[76] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, (ETS No.108, 28.01.1981)

[77] European Parliament and of Council, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*OJ L 281, 23.11.1995)*

privacy, which was enshrined in Article 7 of the charter (Hustinx, 2013, p. 16). The legislators based Article 8 on Article 286 of the Treaty Establishing a European Community[78], the directive 95/46/EC[79], as well as on article 8 European Convention on Human Right (ECHR)[80] and on the Convention 108[81] (Hustinx, 2013, p. 17). Specifically, Article 8 embrace the main principle of the DPD. It covers fair and lawful processing, purpose limitation, rights of access and rectification, and independent supervision. Yet, back then, it was just a political document (Hustinx, 2013, p. 16). It became binding only in 2009 after the entry into force of the Lisbon treaty.

Additionally, the Charter further clarified the issue of interferences of the right to data protection with other fundamental rights and freedoms. Article 8(2) states *"[Personal data] must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. […]*.". Hence, the charter recognised some specific situation where the right to data protection is limited, and interference permissible. The right to data protection is not an absolute fundamental right (Hustinx, 2013, p. 16).

Moreover, within that context, this legislative framework established a more or less clear liability system (Kokott and Sobotta, 2019, p. 225). The DPD[82] creates similar obligations for private parties and public authorities concerning the processing of personal data. Yet, when Article 8 of the Charter is read in the light of Article 51(1) of the same text, the right to data protection attempts to defends citizens and individuals against public authorities abuses and misuses, but not much against private parties' abuses. It seems to create minimal obligations for privates parties but rather focus on public authorities (Kokott and Sobotta, 2013, p.225).

Nevertheless, despite the high amount of legislation established in the European Union, the legislative framework was not fully clear. Disputes arose on the scope of application of the Data Protection Directive[83] and the scope of protection of Article 8 of the Charter[84] (Hustinx, 2013, p. 12).

[78] Treaty establishing the European Community *Official Journal C 325 , 24/12/2002 P. 0033 - 0184*

[79] Directive 95/46/EC

[80] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

[81] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, (ETS No.108, 28.01.1981)

[82] Directive 95/46/EC

[83] Ibid

[84] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

6.2. Disputes and intervention of the Court of Justice before 2012

Through the years, the Court had to rule several times and on various aspect of the data protection as a fundamental right. The rulings concerned numerous European directives, often including the Directive on Data Protection[85], and their relations with the European Charter or national law.

In 2003 the Court was confronted with the scope of application of the Directive 95/46/EC (Tzanou, 2013, p. 94), in the so called *Rechnungshof*[86]. Two Austrian tribunals, the Verfassungsgerichtshof (Constitutional Court) and the Oberster Gerichtshof (Supreme Court) referred two questions, formulated similarly in substance, on the interpretation of the directive 95/46/EC, in particular articles 1,2,6,7 and 22, in conjunction with article 6 of the Treaty of the European Union[87] and Article 8 of the ECHR.

The case related to an Austrian provision, according to which, all entities subject to control by the Austrian court of Audit had to provide the latter with information concerning the salary of their employees when those exceeded a certain amount. The Court of Audit then published a report on which stated the names and level of salaries of the individuals. The questions raised whether the Directive on Data Protection[88] was applicable to public authorities control activities, not in direct relation with the internal market (Tzanou, 2013, p.94).

The CJEU ruled that the scope of the directive was not limited to activities related to the well-functioning of the internal market. Data protection was instead connected to fundamental freedom, in particularly to the right to privacy[89] (Tzanou, 2013, p.94). The situation exposed that the Court should therefore be analysed in the light of the respect to the fundamental right to privacy.

In this first case, the Court failed to recognise the right of data protection as an autonomous fundamental right (Tzanou, 2013, p.94). All situations related to this issue had to be assess on the basis of the right to privacy. Yet, it is also important to remember that, in 2003, the European Charter of fundamental right did not yet exist.

[85] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

[86] CJEU, Judgment of the Court of 20 mai 2003, Joined Cases, *Rechnungshof* (C-465/00) v *Österreichischer Rundfunk and Others* and *Christa Neukomm* (C-138/01) *and Joseph Lauermann* (C-139/01) *v Österreichischer Rundfunk*, ECLI:EU:C:2003294

[87] European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht* , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

[88] Directive 95/46/EC

[89] CJEU, 2003, *Rechnungshof,* Joined Cases (C-465/00), para. 68

Five years later, in 2008, in the *Promusicae*[90] ruling, the court recognised the right to data protection as an autonomous fundamental right (Tzanou, 2013, p. 95). At that time, the Charter was ratified by all member states, yet not legally binding. Hence, the Court of Justice echoed the legal framework and the new charter, by recognising that the right to data protection was independent from the right to privacy.

In 2010, in the *Schecke* and *Einfert* joined cases[91], the court clarified the scope of application of the right to data protection. The ruling specified that legal persons can only rely on the right to privacy but not on the right to data protection (Kokott and Sobotta, 2019, p. 225). The court reasoning was based on the article 2(a) and Recital 2 of the DPD[92], and not on the wording of article 8 of the Charter[93] (Kokott and Sobotta, 2013, p.225). Hence, according to the ruling, the European legal framework on data protection was protecting natural persons but excluded legal entities, such as firms, from its scope of protection. This limitation was not explicitly stated before.

In 2011, the Court was confronted by a situation were two fundamental rights opposed each other, the right to data protection and the right to copyright. The *Scarlet*[94] case concerned a "peer-to-peer" situation and the practice of preventive files filtration (Keyder, 2012). SABAM, the management company representing authors and rightsholders of protected work, realised that users of the Scarlet website, could download and access protected work, without paying royalties, by means of a peer-to-peer network. The CMOs then demanded that Scarlet would install a filtration system and block all the illegal communication of protected work. Scarlet refused and argued back that it would harm the right to data privacy. If the Brussel's tribunal of Première Instance ruled in favour of the rightsholders representative, the Court of Justice of the EU argued in favour of Scarlet. It decided than a filtration measure would be an violation to the right to data privacy (Keyder, 2012, p. 383).

Nevertheless, the Court used the occasion to clarify that data protection was not an absolute right and had to be balance against the protection of other fundamental rights[95] (Keyder, 2012, p. 383). It stated that in situations where two fundamental rights are opposed to each other, a faire balance should be found, and none should be ignored[96]. Yet, in this argument, the Court did not mention that

[90] CJEU, Judgment of the Court (Grand Chamber) of 29 January 2008.Productores de Música de España (Promusicae) v Telefónica de España SAU. Case C-275/06. ECLI:EU:C:2008:54

[91] CJEU, Judgment of the Court (Grand Chamber) of 9 November 2010. *Volker und Markus Schecke GbR* (C-92/09) and *Hartmut Eifert* (C-93/09) *v Land Hessen*. Joined cases C-92/09 and C-93/09. ECLI:EU:C:2010:662

[92] Directive 95/46/EC

[93] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

[94] CJEU, Judgment of the Court (Third Chamber) of 24 November 2011. *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).* Case C-70/10. ECLI:EU:C:2011:771

[95] Ibid. $ 43 and 44.

[96] Ibid. $ 53

the right to data protection should be regarded in light with the functioning of the internal market. It recognised this right as independent from the function that legislators initially gave.

To conclude, throughout the years, the Court of Justice has specified the scope of application of the right to data protection (Hustinx, 2013, pp. 12–13). It based its rulings mostly on the DPD and the Charter of the European Union. By 2011, it had established that data protection was an autonomous fundamental right, independent from the right to privacy, but only applicable to natural persons, and it had to be balanced against other fundamental rights.

6.3. The reaction to the case law

In general, overtime, the civil society became more aware of data protection issues. Rulings setting higher standards in data protection were therefore welcomed by citizens associations, and some political figures.

The Scarlet ruling[97], and the fair balance with other fundamental rights, gives us a fair overview of civil reactions to data protection rulings. Citizens associations warmly received the court's decision, as it defended the right to data protection against the fundamental right of copyright (Europaforum, 2011). La Quadrature du net's speakers, Jérémie Zimmermann, highlighted that in the past years, copyrights matters seemed to have been more important than the protection of individual data. He also called for a new European legislation that was able to ensure the protection of protected work, as well as citizens' data, which is also a fundamental right. This ruling was thus welcome, as it stopped to favour the logic of filtration, attempting to the right of citizens. The European deputy, Françoise Castex (S&D), publicly approved the scarlet decision as well, "The CJEU decision bring to a standstill the filtration logic that prevailed in Europe. Those last years, some governments have wanted to sacrifice our fundamentals freedoms on the altar of copyrights"[98] (Europaforum, 2011).

Thus, civil society organisations have been struggling to make their concerns heard but welcomes the Court's actions when it is in favour of citizens' data protection. According to them, the issue was not taken under enough consideration by the existing legislation and citizens should care more about their fundamental right of personal data (Rossi, 2018, p. 101).

[97] CJEU, Judgment of the Court (Third Chamber) of 24 November 2011. *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).* Case C-70/10. ECLI:EU:C:2011:771

[98] Author's own traduction "La décision de la CEJ est un coup d'arrêt à la logique de filtrage qui prévaut en Europe. Ces dernières années, certains gouvernements ont voulu sacrifier nos libertés fondamentales sur l'autel du droit de la propriété intellectuelle"

6.4. The need to actualise the legislative framework

Already before the first jurisprudence on the Directive of Data Protection[99], the Commission conducted two reviews. The first in 2003 and the second in 2007. Both highlighted a number of issues, and a fragmentation of the European legal landscape on data protection. Yet, those two reviews concluded that the Directive was not at fault, but rather the various implementations by member states (Hustinx, 2013, pp. 24–25). Hence, both times the Commission decided to not amend the directive and chose to help member states to put in place better implementation.

Both reports acknowledged that the Data Protection Directive had a strong internal market dimension (Hustinx, 2013, pp. 24–25). One of the main goals of the directive was to ensure the free flow of personal data within member states. In its communication, the European Commission highlighted that stakeholders were often facing legal uncertainty due to the lack of harmonisation on data processing in the EU, also engendering important administrative burdens (European Commission, 2010, pp. 3-4). Despite the existing European legal framework, internal market harmonisation concerning data protection and the free flow of personal data failed, harmed the effectiveness of the framework.

Furthermore, the responsibility regime needed further consideration on the perspective of fundamental rights. According to some academics, fundamental rights are firstly supposed to protect individuals against the actions of public authorities (Kokott and Sobotta, 2019, p.226). Besides, the secondary legislation seemed to establish only minimal obligations towards private parties (Kokott and Sobotta, 2019, p.226). Yet, the role of private digital companies increased as more and more private individuals use digital technologies and companies to collect their data. Thus, it became clear that individuals' personal data should not only be protected from public authorities' actions, but also now from private parties.

Finally, the Commission recognised that the development of the new technologies also reduces the effectiveness of the directive (European Commission, 2010, p. 3). The way of collecting and processing data always becomes more complex. More personal data could be processed and used, making it harder for individuals to understand all the consequences of such data collection and processing. Hence, the Commission started new public consultations, to eventually lead to a new proposal for a more adapted European legislation.

[99] Directive 95/46/EC

6.5. The European Commission process for a new legislation's proposal

The Commission goals was to make sure a new regulation would be adapted to the new digital and social context (Monteleone, 2016). Hence, it launched several public or private consultations (Hustinx, 2013, p. 25), to have a clear ideas of the needs and expectations from the stakeholders and the citizens. Based on those consultations and assessments of the previous framework it drew a new proposal for a regulation on "the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)"[100].

- <u>The Commission comprehensible approach on new regulation</u>

In the late 2000s, the Commission adopted a comprehensible approach toward data protection legislation. It wanted to give opportunities for all the actors to communicate their opinion on the topic of personal data protection (Hustinx, 2013, p. 25). In 2009, two years after the last DPD[101] review, it launched a public consultation on the legal framework for the fundamental right of personal data protection. A second one was launched between November 2010 and January 2011 again on personal data protection in the EU.

The Commission approach was collaborative as it involved stakeholders and member states' public authorities. After the second review of the DPD directive, the Commission launched an impact assessment in line with the "better regulation" policy. The assessment looked at the three most important objectives of the data protection policy : improving the internal market dimension, improving the effectiveness of data protection, and making a more comprehensive and coherent data protection framework, covering all areas of EU competences (European Commission, 2012, p.4).

Those two consultations gathered a very large number of participations, coming from a wide range of stakeholders. For instance, the second consultation produced 305 responses. 54 responses were issued by citizens, 31 came from public authorities, and 220 from private organisations, in particular business associations and nongovernmental organisations . Further consultations were also conducted targeting specifically key stakeholders, member states authorities and privacy or data protection and consumer's organisations (European Commission, 2012, p. 3).

As a result of the consultations, it was found that the main goals of the directive remained well-founded. It was still relevant to ensure personal data protection while ensuring the proper functioning of the internal market. Yet, the framework needed to be adapted to the current context in

[100] European Commission, *Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* /* COM/2012/011 final - 2012/0011 (COD) */

[101] Directive 95/46/EC on data protection

order to deal with the rapid development of new digital technologies and their increasing uses. One of the main problems raised by stakeholders, was the fragmentation of data protection rules in Europe. This high-level fragmentation hampered international economic actors' business. As a remedy to this fragmentation, most of businesses transfer personal data from the EU to other parts of the world, avoiding the protection of European citizens' personal data (European Commission, 2012, p.4). Finally, the Commission decided to start preparing a proposal for a new legislation.

- The idea of the Commission's proposal

On the 25th of January 2012, the Commission issued a new legislative proposal to adapt the data protection framework to the new digital area (Monteleone, 2016): the proposal for a regulation on "the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)".

This new proposal arose in the context of the Digital Agenda for Europe, as explained in Chapter 5, and had three goals. First, it has to strengthen the European framework and solve the implementation fragmentation. Then, it also had to restore citizens' trust into data collecting and processing and finally, it had to ensure the well-functioning of the internal market (European Commission, 2012, p. 1).

Hence, the proposal was based on article 16(2) of the Treaty on the Functioning of the European Union (TFEU)[102], which refers to the protection of personal data for natural person and the free-flow of such data, and article 114(1)[103] which refers to the internal market.

One of the solutions to fix the first problem, the implementation fragmentation, was to strengthen the force of the European legislative framework. Hence the Commission proposed a Regulation and not a directive.

Concerning the lack of trust by citizens in data collection and processing, the European Commission acknowledge that the protection of fundamental rights was flawed (European Commission, 2012, p.6). Thus, the Commission proposal sought to create a more global and coherent framework related to data protection.

The proposal made it clear that this regulation aimed at ensuring the protection of individuals' fundamental rights (European Commission, 2010, p.2). The proposal invokes several times the

[102] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, Article 16(2)

[103] Ibid, Article 114(1)

European Charter Article 8[104] and the article 16 of the TFEU[105]. The proposal stated, in its Article 1[106], related to the objectives of the text, "*1. This Regulation lays down rules relating to the protection of individuals with regard to the processing of personal data and rules relating to the free movement of personal data. 2.This Regulation protects the fundamental rights and freedoms of natural persons, and in particular their right to the protection of personal data*.". Here, the legislators emphasized that data protection was a fundamental right, however, did not highlighted its interest for the internal market. It used the same reasoning that the European Court of Justice in the 2003 case *Rechnungshof*[107]*.* The Charter's goal is to protect natural person's fundamental rights, and not only in the interest of the Internal Market.

Moreover, the Commission decided to clarify the material scope of the protection of personal data. Even though the DPD implicitly limited its scope to natural person, the new proposal explicitly excluded legal persons from its scope of application in the recital 12 of the proposal[108]. This recital attempted to codify the ruling of *Schecke* and *Eifert.* Hence, the Commission affirmed that the legislation goal was to protect fundamental rights, and therefore applies to natural persons only.

Yet, the protection of individuals' fundamental right was not the only goal of this regulation . The Commission also wanted to ensure the free flow of personal data, necessary for the well-functioning of the internal market (European Commission, 2012, p.2). Hence, the proposal's last recital, recital 139[109], referred explicitly to the Court of Justice's jurisprudence and stated that the right to data-protection is not an absolute fundamental right. Data protection has a specific function in society, namely that citizens have to feel protected to use digital and numeric tools. If citizens are reluctant in using technologies, it could hamper the development and well-functioning of the market. The protection of personal data from natural persons has, then, to be balanced with the functioning of the internal market. This recital used the same argument than the CJEU in the *Scarlet*[110] ruling.

Those two recitals, recital 12 and 139, are important in the analysis of the Court's influence. Recitals are meant to explain the reasons and justify the content of dedicated articles. The last recital of a legislative text usually is the concluding reasons, and hence the summary justification of the text (European Commission, 2019). Therefore, recital 12 clarifies the material scope of the regulation, and explicitly excludes legal persons. Recital 139 was meant to conclude and summarize the ideas behind

[104] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 8

[105] European Union, *TFEU*, *op.cit.,* Article 16(2)

[106] European Commission, Proposal for the *General Data Protection Regulation*, Article 1

[107] CJEU, 20 mai 2003, *Rechnungshof* (C-465/00)

[108] European Commission, Proposal for a *General Regulation on Data Protection*, Recital 12

[109] Ibid., Recital 139

[110] CJEU, 24 November 2011. *Scarlet,* Case C-70/10

the proposal. We could then conclude, according to this last recital, that the whole idea of the Commission's proposal is at first to protect individuals' fundamental right to data protection, but still, it must be considered in relation with its function in the society, specifically, the well-functioning of the internal market.

To conclude, the Commission attempted to strengthen the protection of natural persons' personal data while ensuring the free flow of that data in order to protect the internal market. Once the proposal was finalised, it was sent to the co-legislator.

6.6. The European Parliament's position during the negotiation

The European Parliament published a comprehensive approach on personal data protection in 2011 (European Parliament, 2011). Once again, the Parliament took the defence of European Citizens and especially the protection of their rights. Back then the Parliament supported the Commission wish to reform the data protection framework.

The Commission proposal was submitted to the European Parliament on 25 January 2012. The committee on civil liberties, justice and home affairs (JURI) was held responsible for the text, and appointed Jan Philipp Albrecht as rapporteur (Monteleone, 2016). Four other committees were asked for opinion, the committee on economic and monetary affairs (ECON), the committee on employment and social affairs (EMPL), the committee for the Industry, Research and Energy (ITRE), the committee for the internal market and consumer protection (IMCO). They all delivered an opinion, except the ECON committee.

This repartition in the committee reflects the two objectives of the proposal. According to the European Parliament's rules of procedures[111], the LIBE committee is responsible for "the protection within the territory of the Union of citizens' rights, human rights and fundamental rights" and specifically for all " legislation in the areas of transparency and of the protection of natural persons with regard to the processing of personal data". Hence, giving the responsibility of data protection to this committee highlighted the wish to strengthen protection of fundamental rights, before the wish to ensure the well-being of the internal market. The ECON and EMPL committees are more responsible for economic policies and internal market policies. This shows that the economic and market dimension of the regulation was also taken into account. Yet, the decision of the Parliament to held LIBE instead of another committee highlight the wish to ensure natural persons' rights protection.

[111] European Parliament, 2019, Rules of Procedures, Annex VI, accessible at : https://www.europarl.europa.eu/doceo/document/RULES-9-2019-07-02-TOC_EN.html, last consultation : 02/07/2020

Despite the salience of the topic, the European Parliament quickly adopted a resolution on 12 March 2014. The European Parliament's wish was to stress the importance of the protection of fundamental rights. By adopting a resolution, it wanted to pressure the Council of minister, who was then unhurried, to adopt their own position on the package. The Parliament was also motivated to adopt a resolution due to the upcoming election (Inside Privacy, 2013). Deputies wanted to let the next Parliament with a basis on which to work.

This resolution heavily amended the Commission proposal and the first LIBE report from 2013 (Monteleone, 2016, p. 2). Yet, the debate did not concern the material scope of the regulation. Recitals 12 and 139, attempting to codify the case law, did not bring intensive debates within the institution. The amendments related to those recitals just aimed at improving their redaction's quality. All the amendments for the recital 139 kept the mention to the Court's case law and did not wish to drop that down.

In that account, the European Parliament supported the Commission's ambition to strengthen the protection of fundamental rights, especially the right to data protection. It did not attempt to enlarge the material scope of the proposed regulation.

6.7. The Council of Ministers' position during the negotiations

Negotiation within the Council took more time than in the Parliament. A first General Approach was reached in June 2015 (Monteleone, 2016, p. 2). Some of the most contentious issues were the maximum amount of possible fines, the possibility to further process data for purposes that are incompatible with the initial purpose, the framework for international data transfers, obligations for controllers and processors, public sector and specific processing situations, and the main principles of the processing and the one-stop shop mechanism (Burton et al., 2016; Haas et al., 2015).

Negotiations within the Council were tedious because the issues at stake were salient and member states had divergent interests and opinions. In 2013, Edward Snowden released information on US mass surveillance, and how intelligence agencies used social medias consumers' data. The Snowden leaks had several consequences for the European digital legal landscape, as well as specifically impacting the GDPR negotiations (Coyne, 2019). It raised the salience of data protection issues and encouraged European legislators to take further steps to ensure the respect of citizens' fundamental rights. It also reduced the weight of stakeholders and lobbyist campaigning against data protection (Coyne, 2019). Thus, as the issue was high on the political agenda and in favour of strengthening fundamental right's protection.

In 2014 and 2015 the Court of Justice issued notable landmark decisions on data protection. At first, in April 2014, the CJEU invalidated the data retention directive, in the *Digital Rights Ireland*[112] case. The court ruled that the directive did not allow for proper protection of the fundamental rights to privacy and data protection (Burton et al., 2016, p.3). A month later, in May 2014, the Court affirmed, in the famous *Google Spain* case[113], that individuals had the right to have their data erased after request and that this right was applicable in the European Union (Frantziou, 2014, p. 761). Finally, in October 2015, the Court ruled that the EU-US Safe Harbour Framework was invalid[114] (Burton et al., 2016, p.3). This ruling also argued that the protection of citizens' personal data was not ensured. Those decisions substantially influenced the GDPR negotiations. It also incited the Council to speed up its internal negotiations. The legislator realised that data protection legislation needed to be updated urgently, and if the legislator would not offer a framework to ensure the protection of individuals' data, then the Court would do (de Ruyt and Vos, 2015). Ergo, the Council was strongly encouraged to find an agreement on the Commission's proposal, as otherwise it could risk losing the power to settle the data protection framework (Burton et al., 2016, p.3).

Hence, the Council, like the Parliament, negotiated in favour of a better protection for fundamental right. Yet, the Council wanted to emphasize that data protection could not be defended at any cost, and the interest of the market had to be preserved. To do so, the Council negotiated to move recital 139 of the proposal in the fourth position (Council, 2015). The Council intention was to not resume the whole text as a legislation, which primarily aims to define personal data protection as a non-absolute fundamental right. Placing this recital at the far end of the legislative text would have meant that the legislation aimed at balancing citizens' fundamental rights with market interests. The Council rather had this justification explaining early articles of the regulation, specifically, the article on material scope. Thus, the provision on non-absolute fundamental rights does not define the goal of the legislation, but just concern its material scope.

Moreover, the Council wanted to drop the reference to the Court of Justice's jurisprudence in the recital (Council, 2015). By not referring to the case law, the Council aimed at establishing data protection as a non-absolute right, in a more autonomous manner. The right to data protection is not absolute, not because the Court decided so, but because this is how it is meant in the Charter of Fundamental Rights. It emphasizes that fundamental rights status is defined and protected by

[112] CJEU, Judgment of the Court (Grand Chamber), 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238

[113] CJEU, Judgment of the Court (Grand Chamber), 13 May 2014, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12, ECLI:EU:C:2014:317

[114] CJEU, Judgment of the Court (Grand Chamber) of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14, ECLI:EU:C:2015:650

European primary legislation, and not by the Court of Justice. Here, the Council, does not try to override the case law of the Court when dropping the reference, but wants to give priority to the European legal order over the jurisprudence.

Limiting the scope of the directive to the protection of natural persons has never been an issue for the Council, and the recital 12 was only amended to improve the quality of the writing.

To conclude, the Council and the Parliament did not have opposed opinions on the scope of application for the protection of personal data. The main divergences were on the recital 139, whether it should include an explicit reference to the Court of Justice's case law, and whether it should be at the far end, summarizing the ambitions of the regulation, or just define the material scope of application of this regulation.

6.8. The final text – A General Data Protection Regulation (2016/679) – What codification ?

The final text was then agreed in trilogues in 2015 and voted, without amendment by the European Parliament, in early 2016. This text was built on the previous data protection directive from 1995 and the jurisprudence of the Court of Justice (Monteleon, 2018). Table 2 summarises the situation under the Data Protection directive, as established by the Court of Justice, and the final position of GDPR.

The regulation greatly strengthened protection of individuals' data, while guaranteeing the functioning of the internal market and the free flow of personal data (Monteleon, 2018). The co-legislator did not negotiate on the limitation of the regulation scope to natural person. The recital 12 of the initial proposal remained unchanged in its essence.

Concerning the statement on data protection as a non-absolute fundamental right, the initial recital was modified according the view of the Council[115]. Hence, the recital has not been used as the summary of the intentions of the regulation but was limited to explain the article related to the material scope of the directive. It also uses the terms of the Court of Justice ruling in *Schecke* and *Eifert*[116]. Yet, the explicit references to the case law was abandoned, making the status of data protection more autonomous towards the Court.

Accordingly, the final regulation is more focussed on the protection of fundamental rights than on the protection of the internal market.

[115] Regulation (EU) 2016/679 of 27 April 2016, Recital 4
[116] CJEU, *Schecke and Eifert*, Joined cases C-92/09 and C-93/09

On the right applicable to legal person, the GDPR does not protect personal data from legal entities, regardless of their legal forms. Recital 1[117] insists that the GDPR goal was to ensure the protection of individual with regards to their fundamental rights under Article 8 of the Charter and article 16 of the TFEU. It explicitly excluded legal persons from the scope of protection, as stated by the CJEU's jurisprudence (Voigt and Von dem Bussche, 2017).

To conclude, the final regulation of GDPR, does clarify the scope of application of protection of personal data compared to the previous Data Protection Directive, in accordance with the CJEU's case law. It reuses the same arguments of the Court to justify from the exclusion of legal persons and explicitly define data protection as a non-absolute fundamental right. I also codify the case law as the regulation is not exclusively based on the protection of the internal market, but first aims at ensuring the protection of individuals' fundamental rights.

	Legislative framework under directive 95/46/EC	Jurisprudence of the Court of Justice.	Final GDPR text
Scope's limitation to the functioning of the internal market	The directive balances the right to data protection with the interest of the internal market, especially the free flow of those data.	*Österreichischer Rundfunk* C-465/00, 2003, the scope of the directive was not limited to activities related to the well-functioning of the internal market	The regulation aims to ensure the protection of personal data at first, without being a prejudice for the internal market. This is emphasized by the fact that the main legal basis of the Regulation is Article 16 of the TFEU.
Applicability to natural or legal person	It was implied but not explicitly stated in the directive.	*Schecke* and *Einfert* C-92/09 and C-93/09 that legal persons can only rely on the right to privacy but not on the right to data protection.	Recital 14 – The protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data. This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person.
Absolute or not absolute right	The right to data protection is strongly dependant on the right to privacy.	*Scarlet* C-70/10 The right to data protection is not an absolute fundamental right.	Recital 4 - The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality

Table 2 : Summarize the codification of the CJEU's case law into GDP Regulation.

[117] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), recital 1

6.9. Conclusions of the case analysis – pre-assessment of the theory

Finally, through the rulings preceding 2012, the Court of Justice of the European Union clarified the legislative framework (Hustinx, 2013). It took the Court some years to mature its position, and to recognise the right to data protection as autonomous from the right to privacy[118]. By early 2010, the civil and political actors became more concerned about the protection of personal data (Coyne, 2019). Yet, despite several Commission's report on the existing legislation, the directive 95/46/EC[119], not much was done by the legislator to improve the framework and increase the protection of this right.

Moreover, the Court of Justice's case law did not create legislative uncertainty, it mostly clarified and limited the scope of application of a directive. The main legal uncertainty came from the different application of the DPD in each member states. Hence, this case does not really allow us to confirm Hypothesis 5.

In addition, despite the high salience of the topic, the Court of Justice position was not overruled. This contradicts the hypotheses 6. A) and 6. B). Hypotheses 7. A) and 7. B) were also contradicted in this case analysis. The salience of the topic reached beyond legal circles (Rossi, 2018), but the codification of the case law still occurred.

It is only after 2012, and because the Commission launched a new proposal that legislator tried to improve the protection of personal data belonging to individuals. This was not the result of the Court's jurisprudence, or of some legal uncertainty due to different application of the directive. The Commission decided to propose a new legislation as a part of its Digital Agenda, and because it realised that the digital framework had to be adapted to the current development of technologies and their use by individuals (European Commission, 2012, p. 1). This confirms our hypothesis 1, saying that for codification to occur, the Commission first has to launch a proposal on a topic related to some case law.

Moreover, in the explanation of its proposal, the Commission referred to jurisprudences as an attempt to strengthen its text. The part of the proposal that invoked case law, were part that codify them, either in their general idea or using the court's wording. This confirmed hypothesis 2. B).

Through that specific case study, hypotheses 1. B) and 2. A) cannot be confirmed. But this does not mean that they are overruled. It is just that this specific case did not allow us to analyse those specific configurations.

[118] CJEU, 29 January 2008. *Promusicae* Case C-275/06.
[119] European Parliament and Council, Directive 95/46/EC, 24 October 1995

This case also allows us to see that the Parliament defended citizens' interests and their rights in the process. The Parliament adopted an early agreement, arguing that citizens' rights had to be protected and a new adapted legislation could not wait any longer (Inside Privacy, 2013). It did not oppose the Commission proposal when it came to codifying case law strengthening personal data protection. It also argued with the Council to maintain the reference to the jurisprudence in the recital 139. This confirmed the hypothesis 3.A).

Within the Council, an internal agreement was harder to find. It took three and a half years before the institutions adopted its General Approach and could enter trilogues (Monteleone, 2016). The Council's internal negotiations took times for several reasons. First, member states had diverging interest in the proposal. Second, the number of issues at stake were high and disagreements existed on many points of the proposal. Finally, the topic of data protection was highly salient after the 2013 Snowden revelations, and the landmark court's rulings from 2014 and 2015. In this specific situation, member states had all interests in establishing a clear legal framework on data protection, adapted to the digital world. This situation confirms the hypotheses 4. A) and B).

Finally, the process surrounding the creation and negotiation of the GDPR involved a lot of actors. The regulation was adopted through the ordinary legislative procedure, which means that the Parliament and the Council had an equal voice. The Commission consulted numerous stakeholders before and during the process. Despite the high number of actors involved; the Court's jurisprudence was codified in the final text. This rejects hypothesis 8.

To conclude, it was necessary, in order to pass a new legislative framework on data protection, to have a Commission's proposal on the topic. In the GDPR case, the Commission proposal of 2012 was therefore a necessary condition but also a turning point, yet it was not a sufficient element to ensure codification of the case law. The intentions to protect personal data existed, however, it could have been balanced in favour of the interests of the market in the negotiation process. The final outcome reached a critical juncture after the Snowden leaks and several Court's landmark decisions from 2014 and 2015 (Burton et al., 2016, p. 3). Following These events, legislators pushed together to have a better protection of personal data. Hence, the court's early decision on directive 95/46/EC was contributing factor in the negotiation process.

Chapter 7. Final assessment of the theory

As it was explained in the methodology chapter, this research is meant to be abductive (Bennett and Checkel, 2015, p. 17). This means that I first established a theoretical framework, based on the literature review. Second, I tested this theory through two cases analyses, the codification of the framework for direct injection transmission, and the codification of the scope of application of data protection. Those two cases confirmed some hypotheses established in the Chapter 3. Finally, once the hypotheses are assessed, the previously established theoretical framework will be adapted according the findings of this research.

7.1. Actors variables

The first part of the mechanism theory was based on Martinsen's analysis of the three veto points in the codification or override process (Martinsen, 2015, p. 231). Hence, I did hypothesis on the role of the European Commission, the role of the European Parliament and the role of the Council of the EU.

- Hypotheses 1 and 2: The European Commission: gatekeeper

The first part of the theory established four hypotheses related to the role of the European Commission : H1. A): *The Commission has to launch a proposal;* H1. B): *The proposal does not have to include a provision related to the jurisprudence but has to be in relation with a matter on which the court of justice already handed down jurisprudence;* H2. A): *The Commission will not refer to the jurisprudence of the Court, if it attempts to override the case law;* H2. B): *The Commission will refer to the jurisprudence of the Court, if it attempts to codify the case law.* The first case confirmed hypotheses 1. A), 1. B) and 2. A). The second case confirmed hypotheses 1.A) and 2.B) and did not permit to test for hypotheses 1.B) and 2.A).

With those first confirmations, I can assess that the part of my theory, related to the role of the European Commission in the codification process, gives a rather correct explanation of the mechanism. The Commission acts as a gatekeeper (Martinsen, 2015, p. 232). It does decide what legislation on what topic will be proposed to the co-legislator. Hence, it gets to select if it wants case law related issues to be codified in the legislation. Yet, sometimes the co-legislator can extend the scope of proposed legislation to codify a jurisprudence. It was, for instance, the case with the clarification of the legal framework for direct injection transmissions. When the Commission does not propose new legislation, the European Parliament and the Council have no power to codify a case law. Hence, it can be affirmed that a Commission's proposal is a necessary condition in the process of codification, and a turning point.

Moreover, the Commission will refer to a specific Court's ruling to strengthen its position in a proposal. As Alter and Meunier-Aitsahalia (1994) highlighted in their research on the impact of the *Cassis de Dijon*[120] case, the European Commission 'capitalise on the Court legitimacy' (Alter and Meunier-Aitsahalia, 1994, p. 542). It will only refer to a jurisprudence when it attempts to codify its legal implications. When the Commission does not wish to codify a Court's decision, it will simply not refer to it. Yet, the two cases did not allow us to check for situations where the Commission attempted to completely override the case law. The closest situation we analysed, was the proposal for the new directive on broadcasting and retransmission directive. The Commission did not refer to the *SBS*[121] ruling and did not include any provisions on direct injection system. At the end of the negotiations the case law was codified in the legislation, therefore it can be deduced that the hypothesis is relatively true. Hence, the reasoning on the use of jurisprudence by the Commission is asserted. Yet, whether the Commission wishes to codify the case law or not, does not impact the final result of codification. This variable is not a necessary condition in the process, not is it a sufficient one. It is roughly a contributing factor.

- Hypotheses 3: The European Parliament: defender of citizens' interests

On the role of the European Parliament, I established one hypothesis and its alternative hypothesis : H3. A): *The European Parliament will push for codification of case law when it is in the interest of citizens;* H3. B): *The European Parliament will push for override of the case law when it is harming the interests of the citizens.* Both case studies confirmed the initial hypothesis 3.A).

Here again, I can assess that this part of my theory gives a correct explanation of the role of the Parliament in the codification mechanism. The European Parliament plays an important role when it comes to defending the interests of the citizens (Meislova, 2019). It will use case law to justify amendments that are in the interest of individuals. It was, for instance, the case in the Online Broadcasting and Retransmission Directive[122], where regulating situations of direct injection was meant to ensure fair revenue to rightsholders (Madiega, 2019, p. 9). The Parliament also wanted to maintain the explicit reference to the Court of Justice in the GDPR recital concerning the limit of the protection of fundamental rights. Hence, the Parliament does represent the interests of European citizens and does not hesitate to refer to Court's rulings when it can strengthen its argument in negotiations with the Council. Under the two case studies, the Parliament negotiated in favour of codification, and in favour of reference to the CJEU's jurisprudences. Hence, it could be argued that it

[120] CJEU, 1979, *Cassis de Dijon*, Case 120/78
[121] CJEU, 2015, *SBS*, Case C-325/14
[122] Directive (EU) 2019/789

is a necessary condition for codification. It cannot be a sufficient condition, as a Commission's proposal is required at first. It is also difficult to argue that it is a critical juncture, as it is not because the Parliament will argue in favour of a codification that it will necessarily happen. Hence, the intervention of the European Parliament is at best a necessary condition, or at least a contributing factor.

- Hypotheses 4: The Council : defender of the member states' interests

The theory emitted three hypotheses on the role of the Council: H 4. A): *The Council represents member states' national interests;* H4. B): *The Council will push for codification of the case law if it is in the interests of the member-states;* H4. C): *The Council will push for override of the case law if it is not in the interests of the member states.* Both case studies confirmed hypothesis 4.A). The case on direct injection confirmed hypothesis 4. C) and the study on GDPR confirmed hypothesis 4. B).

Thus, the findings also confirmed the hypotheses on the role of the Council. Both case studies showed a clear situation where the Council defended member states' interest. In the first case, it was important for the institution that the EU legislation keep allowing a certain flexibility for national legal framework. In the second analysis, we pointed out that it was in member states' interests to establish a clear and strong protection framework. In both cases, the two institutions had to agree on the principle of codification. In the GDPR study, codification was almost undoubtful, as both institutions had interests in it. Yet, in the first case, on direct injection, codification was not a granted outcome up until the Council agreed on it. The Council represents another veto point in the mechanism. Hence, the position of the Council, in line with the one of the Parliament, is also a necessary condition. Moreover, from the moment both institutions agreed, it is sure that codification will happen. This agreement is then the critical juncture of the codification process.

However, the second case study revealed a precision on the role of the Council in the process of codification. When it is not necessary, the Council negotiates to drop the reference to the jurisprudence. It does prefer to have legislation, independent from the Court's case law. It would rather have the case law as an inspiration for the new legislation, but not to reference them in the final legislations.

Ergo, I assess that the theory part on the role of each actors in the codification process is right and can be used as a more general framework to analyse the Court's influence over secondary EU legislations. One clarification can also be made, as the Council will negotiate in favour of a writing that does not mention the jurisprudence.

7.2. Contextual variables

Even though, the finding of Martinsen recognised several important contextual variables necessary for codification, this thesis did not identify significant effects of those elements. Hence, the results concerning the contextual variables hypotheses are more mitigated.

- Hypothesis 5: The legal certainty: a relative impact

On the importance of legal certainty, the theory hypothesised that : H5.: *If case law produces legal uncertainty in the legislative framework, directly or indirectly, European actors will push for new legislation in order to bring certainty back*. The first case on direct injection partly confirmed the hypothesis, but the second case study could not test for this specific hypothesis.

In the case of the legal framework for direct injection, two Court's rulings contradicted each other. Several times, the European Parliament called for a clarification of the European framework on the matter. Yet, neither the European Commission, nor the Council pushed for new legislation. The Council showed a lot of reticence to codify the jurisprudence, as no in-depth impact assessment had been conducted. Ergo, the hypothesis is not overruled, as the Parliament effectively pushed for a new legislation. Yet, its importance should be mitigated.

Nevertheless, the two case studies conducted in this research did not show important legislative uncertainty created by the jurisprudence of the Court. Other rulings previously studied in the literature analysed the impact of Court's decision that changed the entire framework, and not just a technical gap (Alter and Meunier-Aitsahalia, 1994; Hantrais, 2007). Ergo, we can suppose that the hypothesis is still relevant, as it has not been ruled out, but further research needs to be conducted on the matter. Legal uncertainty maybe more or less impactful in the process depending the level of actual uncertainty, and the number of actors touched by it. But from this research, legal uncertainty arising from the Court's rulings is simply a contributing factor in the codification process.

- Hypotheses 6: The salience of an issue: indicator of the length of negotiations, not the likelihood of codification.

On the salience of the issue the theory included two hypotheses : H6. A): *When the issue at stake is politically salient, debates will be more intense and codification of the case law is less likely to occur;* H6. B): *When the issue at stake is not politically salient, or very technical, codification of the case law is more likely to occur.* The first case study confirmed the hypothesis 6. B), but the second case disconfirmed both hypotheses.

In the conducted case studies, salience of the topic did not indicated the likelihood of jurisprudence's codification. Other researches on decision making in the EU rather use salience of an issue as an indicator of length for negotiations (see for example: Klüver and Sagarzazu, 2013; Martinsen, 2015, p. 81). In line with this literature, it appears that salience of the issue does not give hint about the occurrence of codification, but rather on the intensity and the length of negotiations between the European legislators. On the one hand, it is harder for the European co-legislator to find an agreement when the topic is high on the political agenda. Hence, as Martinsen argued, modification is more likely to happen. On the other hand, codifying a Court's decision relative to a salient topic might be easier, as it represents a costless option for the co-legislator. It is easier to agree on a solution that already exists, than finding a new one. Hence, it is hard to say whether the salience of the topic is a bad indicator to estimate the likelihood of codification, or maybe the theory on the matter is insufficient.

Thus, this hypothesis can be kept in a general framework of analysis but should not be taken as an absolute truth. It is always important to look at the salience of a topic, but it does not mean that this is a necessary condition in the codification process. Again, a like for the legal certainty variable, the salience of the topic is simply a contributing factor.

- Hypotheses 7: The civil and political reactions: indicator of the length of negotiations, not the likelihood of codification.

On the impact of the ruling beyond legal circles, two hypotheses were established: H7. A): *When the reaction to a court's decision reaches beyond legal circles, codification is less likely to occur;* H7. B): *When the reaction to a court's decision does not reach beyond legal circles, codification is more likely to occur.* The first case confirmed hypothesis 7. B). Yet, the case study on GDPR ruled out both hypotheses.

Findings on the matter are mitigated. Hence, it seems, like for the salience of an issues, that civil reactions predict the length of negotiations, rather than anything on codification. It can be explained because both variables are intertwined (see: Warntjen, 2012; Weaver, 1991), when an issue reach beyond legal circles it becomes high on the political agenda. Yet, it does not impact the process of codification.

- Hypothesis 8: The number of actors in the decision-process: a culture of compromises

On the number of actors involved in the decision process, I put out the hypothesis that : H8. : *The more actors that are involved in the decision process, the less likely codification of the case law will*

occur. This was ruled out by the two case analyses. In both cases, the ordinary legislative procedure was used, and both times, the jurisprudence was codified.

It can be argued that European legislators, through the years, and out of interest, are used to finding compromises (Davies, 2016). Hence, the involvement of both the Council and the Parliament does not indicate any likelihood concerning codification. This is not a relevant variable for the theory. The opposite hypothesis could also be justified; the more actors that are involved, the more likely codification will occur. First because the cost of codification is minimum compared to lengthy negotiations, it represents an already existing solution. Second, because the more actors are involved, the more likely one of them will have interests in codification and therefore argue in its favour. Further research is required on this specific underlying mechanism.

To conclude, unlike previous research on the socio-political context of Court's influence have showed (Rosenberg, 2008), the role of contextual variables was mitigated in this causal process tracing research. Most of the hypotheses on contextual variables were confirmed by one of the case study but ruled out by the other. Hence, we can estimate that the contextual variables are less important in the codification process than it appears, and only the actor variables do really matter. This research hence confirms, as stated by McCann (2009), that the Court can exert and hold over EU legislations only if political actors are willing to let it do so (McCann, 2009). Based on this assessment of the theory, I will correct the analysis framework for the process of codification.

7.3. New theoretical framework, an answer to the research question

As the initial theory has been establish as a general theory on the Court's mechanism of influence, tested with two case studies, it is time to re-assess the initial framework in a purpose of generalisation. This new theoretical framework is meant to correct the previous theory established in Chapter three in light with the findings of the case studies and offer the research a general analysis framework for future research on the Court's influence. Again, the new theoretical framework will be built in two parts. First, I will re-assess the hypotheses on the actor variables. Then, I will modify the theory on the contextual variables.

The first part of the theoretical framework was tested and confirmed by the case studies. It constitutes a good framework for analysis. In line with Martinsen's theory, I state that he Commission acts as a gatekeeper (Martinsen, 2015, p. 232) and, as long as no proposal on a topic comes out of this institution, codification cannot happen. Yet, unlike Martinsen, this study unveiled the important role of the European Parliament. The institution will emphasize case law if the latest is in the interest of the citizens. It does not hesitate to refer to Court's rulings to strengthen its argument. In contrast with the

European Parliament, the Council defends the member states' interests. Yet, this research also suggested that this institution does not like to refer to case law in final text of EU law. Unlike the Parliament, the Council would rather negotiate to create autonomous provisions in a legislation.

For the second part of the theoretical framework on the contextual variables, in light with the conducted case studies, it is more difficult to give general hypotheses. Unlike constrained court view authors, arguing that the socio-political context was the basis of all Court's influence (Rosenberg, 2008), this research shows that the intervention of the European legislators impacts more the Court's influence than other external variables. None of the identified contextual variables in this research seemed to be necessary or sufficient. Yet, it does not mean that those contextual variables have no effect at all, but rather that their influences are minimal compared to the influences of actor variables. Future research should still consider those variables in their framework of analysis but maybe differently. The hypotheses on the legal certainty should not be considered as necessary in every situation. Its impacts might depend on the level of legal uncertainty. Further analyses on the impact of reactions to Court's decisions should differentiate whether the reaction supported or opposed the jurisprudence. The salience of the issues should be regarded as an indicator for the length of negotiations rather than an indicator of the likelihood of codification. Finally, the number of actors involved in the decision-making process does not play a significant role on the final result of codification. The only statement that could be made, as it was explained in the assessment, is that codification can represent an already existing solution to salient issues, and hence, constitutes a good basis for an agreement between several actors.

To conclude, despite the entrenched argument in the literature that the Court's influence over EU secondary legislation is conditional (Martinsen, 2015, pp. 229–235), very few contextual variables seems to influence the process of codification. It seems that the actions of the European legislators, and mainly, the European Commission and the European Parliament play important roles in the process. With those two actor variables, it is possible to explain most of the codification of case law. Nevertheless, it does not mean that contextual variables have no effect in any cases. Any future research should always consider contextual variables in their case analyses. The new theoretical framework is summarised in Figure 8.

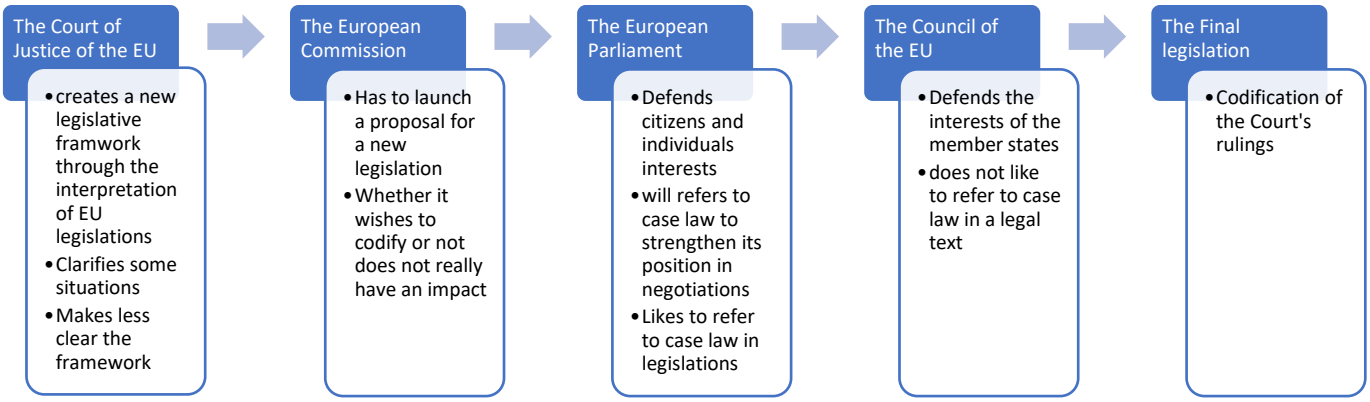

Figure 8. The re-assessed mechanism of codification

Chapter 8. Conclusion

The research examined *through which process Court of Justice rulings end up being codified in EU secondary legislations.* Two case studies highlighted that the role of European legislators; the European Commission, the European Parliament and the Council are essential in the mechanism of codification. On the contrary, contextual variables are not of primary importance in the process. Hence, the Court of Justice's influence over secondary legislation is not independent from European legislators' interests. In line with Martinsen, this thesis assesses that the impact of jurisprudence is conditional (Martinsen, 2015, pp. 229–234). Yet, contextual variables do not really influence the process. Mostly the intervention of the European Commission and the use of the case law by the European Parliament impact the process of codification. This concluding chapter will outline the interests of this research for the field of political science and European Governance. Nevertheless, the research is subject to certain limitations. As it was explained in the methodology chapter, this analyse attempted to draw a general mechanism of influence, yet the case selection focus on specifically on digital legislation in a post-Lisbon context. Moreover, further research should be conducted, either on the underlying mechanisms, or on the more general mechanism as well.

This research presents a relative interest for studies on the Court of Justice's influence on the European Union legislation. No significant discovery was made. Most of the variables that were assessed as relevant had already been identified in the literature. Hence, this research is in line with Martinsen's findings, who characterised the role of the European Commission, the European Parliament and the Council as veto-player in the process of codification (Martinsen, 2015, p. 231). No new variables were identified as necessary, or sufficient in the process of codification. Yet, this thesis attributes a clear role for those variables, in the view of causal process tracing analyses, either as necessary or contributing. It identified the moment where the Commission launched a proposal as a turning point in the codification process. Its intervention is essential as it is the only actor allowed to launch legislative proposal. It acts as the gatekeeper of the CJEU's influence. As codification cannot be granted as a sure outcome before the Council and the Parliament both agree on it, I assess that this interinstitutional agreement is a critical juncture. However, unlike Martinsen, this study drew more details on the role of the Parliament. It emphasises that the Parliament is more willing than the Council to refer to jurisprudence in EU legislation and does represent the interests of the citizens in negotiations.

A major interest of this research is that it establishes a relatively clear framework of analysis for future research on the topic. Even though the theory was tested only with two cases, related to one single area of EU legislation, namely digital legislation, it drew on research based on other domains

of EU laws. Hence, this theoretical part can be used to draw further research on the Court's influence over secondary legislation, especially research on specific case studies.

However, this research presents several shortcomings. First, the analysis focuses on only one area of EU law, digital legislations. It is then not really possible to assess whether this mechanism is accurate in other legal domains. Despite the efforts produced in this paper, mechanism studies are very complicated to generalise. They are meant to be case specific. The cumulation of the two cases allows for a relative generalisation of the findings, yet only in the specific field of the Court's influence over digital EU secondary legislations.

Second, both case studies analyse legislations arising in similar contexts. The research only looked for post-Lisbon situations to control for to high divergences in the socio-political context and in decision-making process. Moreover, the Digital Agenda for Europe started in 2010, one year after the entry into force of the Lisbon Treaty, and framed all the legislations proposed by the Commission related to digital matters, like the two used in the case studies. Hence, it could also be argued that the theory re-assessed in chapter seven, is only valid for digital legislation passed in the DAE framework and in the context of the Lisbon Treaty.

Third, this mechanism only analyses one 'road' of influence. The GDPR analysis highlights the importance of several landmarks rulings that happened during the negotiation process. It would also be interesting to analyse the more general impact of the *Google Spain* decision in the final GDPR text, as it recognised for the first time a right of erasure. The methodological and theoretical framework did not allow considering this situation as a case study. The theory was based on case law that preceded a Commission's proposal. Other mechanism-based studies should look at alternative path of influence. It would be interesting to further look at the impact of new Court's decision when a legislation is already under negotiation between the European Parliament and the Council. Such research could be based on the established and assessed theory of this paper and adapted to those specific situations.

More generally, further researches should be conducted on the Court's influence over secondary legislations. This study attempted to discover the general mechanism of influence. Yet, as in every mechanimistic study, it presupposed underlying mechanisms. It would, for instance, be interesting to analyse further in-depth, the use of jurisprudence in the negotiations within the European Parliament, or within the European Commission when it works on a future proposal, and whether or not making references to a jurisprudence weighs on an argument. The assessment of the case studies also dealt with the political cost of codification. Yet, more researches should be conducted on the specific mechanisms of the political cost in a codification process. In addition, more in-depth research on the topic should also be conducted in each areas of EU legislation and highlight why the

Court is more influential in some domains than in others. The current state of research on the mechanism of codification is, as of yet, just at its premise. It might be discovered that some variables are intangible to any situations, but contextual variables have different influences depending each EU law domain, or even each specific legislation.

References

Abebe, D., Ginsburg, T., 2019. The Dejudicialization of International Politics? International Studies Quarterly 63, 521–530. https://doi.org/10.1093/isq/sqz032

Alter, K.J., 2009. The European Court's Political Power Across Time and Space. SSRN Journal. https://doi.org/10.2139/ssrn.1334328

Alter, K.J., 2008. Delegating to international courts: self-binding vs. other-binding delegation. Law and contemporary problems 71, 37–76.

Alter, K.J., Meunier-Aitsahalia, S., 1994. Judicial Politics in the European Community. European Integration and the Pathbreaking Cassis de Dijon Decision. COMPARATIVE POLITICAL STUDIES, 26, 535–561.

Bennett, A., Checkel, J.T., 2015. Process tracing, in: Bennett, A., Checkel, J.T. (Eds.), Process Tracing. Cambridge University Press, Cambridge, pp. 3–38. https://doi.org/10.1017/CBO9781139858472.003

Bennett, A., Checkel, J.T., 2014. Process tracing, in: Bennett, A., Checkel, J.T. (Eds.), Process Tracing: From Philosophical Roots to Best Practices. Cambridge University Press, Cambridge, pp. 3–38. https://doi.org/10.1017/CBO9781139858472.003

Blatter, J., Blume, T., 2008. In Search of Co-variance, Causal Mechanisms or Congruence? Towards a Plural Understanding of Case Studies. Swiss Political Science Review 14, 315–356. https://doi.org/10.1002/j.1662-6370.2008.tb00105.x

Blatter, J., Haverland, M., 2012. Designing Case Studies: Explanatory Approaches in Small-N Research. Palgrave Macmillan.

Blauberger, M., Schmidt, S.K., 2017. The European Court of Justice and its political impact. West European Politics 40, 907–918. https://doi.org/10.1080/01402382.2017.1281652

Bunge, M., 1997. Mechanism and Explanation. Philosophy of the Social Sciences 27, 410–465. https://doi.org/10.1177/004839319702700402

Burley, A. M., Mattli, W., 1993. Europe before the Court: A Political Theory of Legal Integration. International Organization 41–76.

Burton, C., Boel, L.D., Pateraki, A., Cadiot, S., Hoffman, G., 2016. The Final European Union General Data Protection Regulation 14.

Cabrera Blázquez F.J., Cappello M., Fontaine G., Talavera Milla J., Valais S., 2019, Territoriality and financing of audiovisual works: latest developments, IRIS Plus, European Audiovisual Observatory

Carrubba, C.J., Gabel, M., Hankla, C., 2008. Judicial Behavior under Political Constraints: Evidence from the European Court of Justice. Am Polit Sci Rev 102, 435–452. https://doi.org/10.1017/S0003055408080350

Carrubba, C.J., Gabel, M.J., 2015. International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union. Cambridge University Press.

Chalmers, D., Davies, G., Monti, G., 2019. European Union Law: Text and Materials [WWW Document]. Cambridge Core. https://doi.org/10.1017/9781108654173

Cichowski, R.A., 2007. The European Court and Civil Society: Litigation, Mobilization and Governance. Cambridge University Press.

Conant, L.J., 2002. Justice Contained: Law and Politics in the European Union. Cornell University Press.

Conseil supérieur de la propriété litéraire et artistique, 2016, Mission droit de communication au public (English version: Mission of the CSPLA on the right(law) of communication for the public), p 30

Council of the European Union, 2019, Proposal for a regulation of the EP and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting and retransmission of television and radio programmes - Analysis of the final compromise text with a view to agreement, ST-5225/2019-INIT

Council of the European Union, 2018, Proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting and retransmission of television and radio programmes. - Preparation of next informal trilogue meeting, ST- 6728/2018-INIT

Council of the European Union, 2018, Proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting and retransmission of television and radio programmes. - Preparation for the trilogue, ST-12485/2018-INIT

Council of the European Union, 2017, Proposal for a regulation of the European Parliament and the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - Exchange of views on key issue, ST- 6610/2017-INIT

Council of the European Union, 2015, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Preparation of a general approach, ST-9565-2015-INIT

Coyne, H., 2019. The Untold Story of Edward Snowden's Impact on the GDPR. The Cyber Defense Review 4, 65–80.

Craig, P., Búrca, G. de, 2011. EU Law: Text, Cases, and Materials. OUP Oxford.

Davies, G., 2016. The European Union Legislature as an Agent of the European Court of Justice: EU Legislature as an Agent of the ECJ. JCMS: Journal of Common Market Studies 54, 846–861. https://doi.org/10.1111/jcms.12353

de Ruyt, J., Vos, S., 2015. The EU data protection regulation after 3 years of negotiation [WWW Document]. Inside Privacy. URL https://www.insideprivacy.com/international/european-union/the-eu-data-protection-regulation-after-3-years-of-negotiation/ (accessed 7.2.20).

Dür, A. (2008) 'Measuring interest group influence in the EU. A note on methodology', *European Union Politics* 9(4): 559–76.

Eberlein, B., Newman, A.L., 2008. Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union. Governance 21, 25–52. https://doi.org/10.1111/j.1468-0491.2007.00384.x

Elster, J., 1989. Nuts and bolts for the social sciences. Cambridge University Press.

European Parliament, 2017, on the proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (COM(2016)0594 – C8-0384/2016 – 2016/0284(COD))

European Parliament, 2011, resolution of 6 July 2011 on a comprehensive approach on personal data protection in the European Union (2011/2025(INI))

Europaforum, 2011. Selon la CJUE, le droit de l'UE s'oppose à une injonction, prise par une juridiction nationale, d'imposer à un fournisseur d'accès à Internet la mise en place d'un système de filtrage afin de prévenir les téléchargements illégaux de fichiers - Europaforum Luxembourg - Novembre 2011 [WWW Document]. URL https://europaforum.public.lu/fr/actualites/2011/11/cjue-filtrage/index.html (accessed 7.1.20).

European Commission, 2019. Publications Office – Interinstitutional Style Guide – 2. Structure of a legal act – 2.2. Preamble (citations and recitals) [WWW Document]. URL http://publications.europa.eu/code/en/en-120200.htm (accessed 7.2.20).

European Commission, 2016. Court of Justice of the European Union (CJEU) [WWW Document]. European Union. URL https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (accessed 7.1.20).

European Commission, 2016, Full reports on the public consultation on the review of the EU Satellite and Cable Directive, European Commission Reports and studies, DG CONNECT

European Commission, 2016, Staff working documents evaluation of the Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, SWD(2016) 308 final

European Commission, 2016, Staff working document impact assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, SWD/2016/0301 final - 2016/0284 (COD)

European Commission, 2012, *Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* /* COM/2012/011 final - 2012/0011 (COD) */

European Commission, 2010, communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - A comprehensive approach on personal data protection in the European Union, COM(2010) 609 final

Frantziou, E., 2014. Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos. Human Rights Law Review 14, 761–777. https://doi.org/10.1093/hrlr/ngu033

Garrett, Geoffrey, R. Daniel Kelemen, Heiner Schulz, 1998. The ECJ, national governments and European integration. International Organization 52, 149–176.

Greer, S.L., Rauscher, S., 2011. Destabilization rights and restabilization politics: policy and political reactions to European Union healthcare services law. Journal of European Public Policy 18, 220–240.

Haas, O., Marchiset, P., Nosareva, E., 2015. Trilogue is on: preparing for the EU General Data Protection Regulation [WWW Document]. Financier Worldwide. URL https://www.financierworldwide.com/trilogue-is-on-preparing-for-the-eu-general-data-protection-regulation (accessed 7.2.20).

Hantrais, L., 2007. Social Policy in the European Union, 3rd ed. 2007. ed. Red Globe Press, Basingstoke.

Hatzopoulos, V., Hervey, T., 2013. Coming into line: the EU's Court softens on cross-border health care. HEPL 8, 1–5. https://doi.org/10.1017/S1744133112000102

Hedström, P., Ylikoski, P., 2010. Causal Mechanisms in the Social Sciences. Annu. Rev. Sociol. 36, 49–67. https://doi.org/10.1146/annurev.soc.012809.102632

Hirschl, R., 2008. The Judicialization of Mega-Politics and the Rise of Political Courts. Annu. Rev. Polit. Sci. 11, 93–118. https://doi.org/10.1146/annurev.polisci.11.053006.183906

Hustinx, P., 2013. EU data protection law: The review of directive 95/46/EC and the proposed general data protection regulation. Collected courses of the European University Institute's Academy of European Law, 24th Session on European Union Law 1–12.

Inside Privacy, 2013. LIBE Committee Vote Completes Major Step Towards Adoption of EU Data Protection Regulation [WWW Document]. Inside Privacy. URL https://www.insideprivacy.com/international/libe-

committee-vote-completes-major-legislative-step-towards-adoption-of-the-eu-data-protection-regu/ (accessed 7.2.20).

Kelemen, R.D., 2013. Judicialisation, Democracy and European integration. Representation 49, 295–308. https://doi.org/10.1080/00344893.2013.830482

Kerremans, B., Drieskens, E., 2003. The Belgian presidency of 2001: Cautious leadership as trademark.

Keyder, V., 2012. Introductory note to the European Court of Justice: scarlet extended sa v. société belge des auteurs, compositeurs, et editeurs scrl (SABAM). International Legal Materials 51, 382. https://doi.org/10.5305/intelegamate.51.2.0382

Klüver, H., Sagarzazu, I., 2013. Ideological congruency and decision-making speed: The effect of partisanship across European Union institutions. European Union Politics 14, 388–407.

Kokott, J., Sobotta, C., 2019. The Contribution of the Case Law of the cjeu to the Judicial Enforcement of EU Environmental Law in the UK. J. Eur. Environ. Plan. Law 16, 109–124. https://doi.org/10.1163/18760104-01602002

Larsson, O., Naurin, D., 2016. Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU. Int Org 70, 377–408. https://doi.org/10.1017/S0020818316000047

Larsson, O., Naurin, D., Derlén, M., Lindholm, J., 2017. Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union. Comparative Political Studies 50, 879–907. https://doi.org/10.1177/0010414016639709

Lord, N., 2018. What is the Data Protection Directive? The Predecessor to the GDPR [WWW Document]. Digital Guardian. URL https://digitalguardian.com/blog/what-data-protection-directive-predecessor-gdpr (accessed 7.2.20).

Maciejewski, M., Næss, K., Gouardères, F., Hess, A.-E., 2020. Digital Agenda for Europe | Fact Sheets on the European Union | European Parliament.

Madiega, T., 2019. Regulating online TV and radio broadcasting. European Parliamentary research Service PE 620.217, 13.

Majone, G., 2001, Two logics of delegation: agency and fiduciary relations in EU governance. European Union Politics, 2(1), 103-122.

Martinsen, D.S., 2015. An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union. Oxford University Press.

Martinsen, D.S., 2009. Conflict and Conflict Management in the Cross-border Provision of Healthcare Services. West European Politics 32, 792–809. https://doi.org/10.1080/01402380902945466

Martinsen, D.S., Falkner, G., 2011. The EU's Decision Traps. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199596225.001.0001

McCann, M.W., 2009. Interests, Ideas, and Institutions in Comparative Analysis of Judicial Power. Political Research Quarterly 62, 834–839. https://doi.org/10.1177/1065912909347204

Meislova, M.B., 2019. The European Parliament in the Brexit process: Leading role, supporting role or just a small cameo?, in: Brexit and Democracy. Springer, pp. 235–261.

Monteleon, S., 2018. GDPR: A modern data protection framework. European Parliamentary Research Service 2.

Monteleone, S., 2016. Data protection final steps - Plenary At a Glance.

Moravcsik, A., 1998. The Choice for Europe: Social Purpose and State Power from Messina to Maastricht. Cornell University Press.

Phillips, J., 2011. Airfield v Sabam: just when you thought the Kats forgot ... The IPKat. URL http://ipkitten.blogspot.com/2011/11/airfield-v-sabam-just-when-you-thought.html (accessed 7.2.20).

Pollack, M.A., 1997. Delegation, agency, and agenda setting in the European Community. Int Org 51, 99–134. https://doi.org/10.1162/002081897550311

Poullet, Y., 2006. EU data protection policy. The Directive 95/46/EC: Ten years after. Computer Law & Security Review 22, 206–217.

Rasmussen, M., 2014. Revolutionizing European law: A history of the Van Gend en Loos judgment. International Journal of Constitutional Law 12, 136–163.

Rasmussen, M., 2012. Establishing a constitutional practice of European law: The history of the legal service of the European executive, 1952–65. Contemporary European History 21, 375–397.

Remac, M., 2016. The Satellite and Cable Directive. European Parliamentary Research Service.

Rosati, E., 2019. DSM Directive Series #3: How far does Article 14 go? The IPKat. URL http://ipkitten.blogspot.com/2019/04/dsm-directive-series-3-how-far-does.html (accessed 7.1.20).

Rosenberg, G.N., 2008. The Hollow Hope: Can Courts Bring About Social Change? Second Edition. University of Chicago Press.

Rossi, A., 2018. How the Snowden Revelations Saved the EU General Data Protection Regulation. The International Spectator 53, 95–111.

Scheingold, S., 1965, The Rule of Law in European Integration, New Haven: Yale University Press.

Slaughter, A.-M., 2009. A New World Order. Princeton University Press.

Stein, E., 1981. Lawyers, judges, and the making of a transnational constitution. Am. J. Int'l L. 75, 1.

Stolton, S., 2020. L'UE renforce les règles de concurrence dans les services numériques. www.euractiv.fr. URL https://www.euractiv.fr/section/economie/news/leak-digital-services-face-eu-competition-crackdown/ (accessed 7.2.20).

Stone Sweet, A., Brunell, T.L., 2013. Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization. Journal of Law and Courts 1, 61–88. https://doi.org/10.1086/668499

Stone Sweet, A., Brunell, T.L., 2012. The European Court of Justice, State Noncompliance, and the Politics of Override. American Political Science Review 106, 11.

Stone Sweet, A., Brunell, T.L., 2004. The Judicial Construction of Europe. Oxford University Press.

Synodinou, T.E., 2020. Geoblocking in EU Copyright Law: Challenges and Perspectives. GRUR Int 69, 136–150. https://doi.org/10.1093/grurint/ikaa001

Tallberg, J., 2004. The power of the presidency: Brokerage, efficiency and distribution in EU negotiations. JCMS: Journal of Common Market Studies 42, 999–1022.

Tallberg, J., 2002. Delegation to Supranational Institutions: Why, How, and with What Consequences? West European Politics 25, 23–46. https://doi.org/10.1080/713601584

Terpan, F., Saurugger, S., 2018. Assessing judicial activism of the CJEU the case of the court's defence procurement rulings. Journal of European Integration 1–19. https://doi.org/10.1080/07036337.2018.1537268

Tzanou, M., 2013. Data protection as a fundamental right next to privacy? "Reconstructing" a not so new right. International Data Privacy Law 3, 88–99. https://doi.org/10.1093/idpl/ipt004

Van Leeuwen, S., 2016. CJEU direct injection broadcasting not an act of communication to the public, SBS belgium nv v SABAM. uropean Intellectual Property Review 38, 458–461.

Vogiatzoglou, P., 2019. Data Retention Tales: The Council of the EU strikes back [WWW Document]. CITIP blog. URL https://www.law.kuleuven.be/citip/blog/data-retention-tales-the-council-of-the-eu-strikes-back/ (accessed 7.1.20).

Voigt, P., Von dem Bussche, A., 2017. The eu general data protection regulation (gdpr). A Practical Guide, 1st Ed., Cham: Springer International Publishing.

Walker, N., 2008. Taking constitutionalism beyond the state. Political Studies 56, 519–543.

Warntjen, A., 2012. Measuring salience in EU legislative politics. European Union Politics 13, 168–182.

Wasserfallen, F., 2010. The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union. Journal of European Public Policy 17, 1128–1146. https://doi.org/10.1080/13501763.2010.513559

Weaver, D., 1991. Issue salience and public opinion: Are there consequences of agenda-setting? International Journal of Public Opinion Research 3, 53–68.

Weiler, J.H., 1991. The transformation of Europe. Yale Law Journal 2403–2483.