

Is the CJEU a political actor? Theories of judicial behavior

Reading questions: week 2

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To prepare for class, please familiarize with the assigned readings as well as the examples (press clips) we will rely on. The reading questions help you in your preparations. If you want to prepare in groups, you may reach out to the students you do your presentation with.

To what extent can we think of the Court of Justice of the European Union (CJEU) as a political actor? The CJEU can be political in many ways: As the constitutional court of the EU, it not only adjudicates on issues relating to the EU's political life (i), its rulings also have political consequences (ii). It grapples with the demands and resistance of political actors (iii), but we should also recognize that the judges may themselves hold an ideology or follow a specific agenda (iv).

The next few weeks, we will be looking at elements ii-iv in the context of the CJEU. That is, if rulings have political consequences, then we should care about how judges' political preferences are shaped, how they are expressed and what checks and balances we have on them.

This session also introduces three of the core positive theoretical approaches to judicial behavior: the legal, attitudinal and strategic approaches. The reading questions help you connect them to the CJEU.

Readings

- Hix and Høyland (2022): provide an overview of judicial politics in the EU and is useful roadmap for many of the topics covered this semester.
- Posner (2010) (with focus on pp. 19-45) provides an overview of different theoretical approaches to understanding judicial behavior.

Examples of the Court's role in the distribution of powers at the EU level and the (potential) consequences its decisions entail:

- [The isoglucosis case](#)
- [von der Leyen and the Covid vaccines: Politico](#)
- [von der Leyen and the Covid vaccines: Court press release](#)

Reading questions:

- How do Hix and Høyland (2022) define “judicial politics”?

- Referring back to Hix and Høyland (2022), what elements define judges' preferences? What defines their independence and constraints?
- Looking at the section on the “Constitutionalization of Europe” (Hix and Høyland 2022), to what extent do you think the CJEU is a constitutional/supreme court of the EU? Is its position qualitatively different from a domestic court?
- What was the institutional position of the European Parliament (compared to the Council) in 1981? How did the Court's ruling (the “Isoglucosis case”) impact its powers?
- Who brought the cases on the Covid vaccines to the CJEU? To what extent do you think the timing of the Court's ruling on von der Leyen's role in the EU's vaccine deals impact her chances of reelection?
- What is the “legal approach” to judicial behavior? According to Posner (2010), who espouses this approach and why? What role does this approach play in Burley and Mattli (1993) account of the CJEU's rise to power? (You might also find elements of it in the Hix and Høyland (2022) chapter) What are its main limitations?
- What is the “attitudinal approach” to judicial behavior? What is, according to Posner (2010), its main limitation? Can you find elements of it in the Hix and Høyland (2022) chapter?
- What is the “strategic approach” to judicial behavior (Posner 2010)? In your opinion, is it an independent theory? Can you find elements of it in the Hix and Høyland (2022) chapter?

Supplementary readings

- Burley and Mattli (1993) on the mask and shield of ECJ judging.
- Segal (2008) focuses on the two dominant approaches to judicial behavior among political scientists: the attitudinal and strategic approaches.

Bibliography

- Burley, Anne-Marie, and Walter Mattli. 1993. “Europe Before the Court: A Political Theory of Legal Integration.” *International Organization* 47 (1): 41–76. <https://doi.org/10.1017/S0020818300004707>.
- Hix, Simon, and Bjørn Høyland. 2022. “Chapter 4: Judicial Politics.” In *The Political System of the European Union*, 4th ed., 89–120.
- Posner, Richard A. 2010. “Nine Theories of Judicial Behavior.” In *How Judges Think*. Vol. Chapter 1. Harvard University Press. <https://doi.org/10.4159/9780674033832>.
- Segal, Jeffrey A. 2008. “Judicial Behavior.” *The Oxford Handbook of Law and Politics*, August. <https://doi.org/10.1093/oxfordhb/9780199208425.003.0002>.