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CORE ANALYSIS

The Court of Justice of the European Union as a legal field

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Abstract

Reflexive sociology can contribute to a more holistic understanding of the role of the Court of Justice of the European Union (CJEU/Court) as a relational actor. This article draws on the Bourdieusian concept of (legal) field as an analytical framework to trace the power relations between the Court and its interlocutors. The analysis develops around four distinct conceptualisations of the Court as a legal field, ranging from its institutional architecture to the three mainstream judicial routes for a case to reach its docket (preliminary reference procedure, action for annulment and infringement procedure). These showcase the varied interactions among the different actors that either shape the Court as an institution or engage with it in the course of its adjudicative function. According to field theory, these interactions take the form of power struggles between the actors comprising a legal field in order to take control of the determination of the law. The actors of a legal field enjoy different positions that formulate their objective relations, and which are contingent on their disposition and capital. Each of the conceptualisations of the Court as a legal field in this article points to distinct power struggles and relations among a similar set of actors. Consequently, using field theory can be a very useful tool to contextualise the role of the Court and to systematically study its judgments, modus operandi and position in the European legal field under a reflexive lens that accentuates the significance of social space and power relations, and pushes for socio-legal and empirical insights.

Keywords: European Union Law; Court of Justice of the European Union; Bourdieu; field; reflexive sociology

1. Introduction

How can Bourdieu's work help us to better understand the power dynamics within the Court of Justice of the European Union (CJEU/Court) and its adjudicative processes? This article provides an answer to this question, drawing on a socio-legal analysis of the Court, both as an institution and a judicial arena, rooted in the work of the French sociologist. By adopting such an approach, the article complements the rich interdisciplinary scholarship that offers varying perspectives on the CJEU, its contribution to European integration and its interaction with other stakeholders and actors.[1] It also joins an increasing number of studies, including a number of articles in this special

[1]Indicatively see: E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' 75 (1) (1981) American Journal of International Law 1; JHH Weiler, 'The Transformation of Europe' 100 (8) (1991) Yale Law Journal 2403; A-M Burley and W Mattli, 'Europe before the Court: A Political Theory of Legal Integration' 47 (1) (1993) International Organization 41; KJ Alter, 'The European Court's Political Power' 19 (3) (1996) West European Politics 458; G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press 2002); A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); SK Schmidt and RD Kelemen (eds), *The Power of the European Court of Justice* (Routledge 2013).

issue, that put forward new narratives regarding the Court's role, heavily drawing on socio-legal and multidisciplinary traditions.[2] Finally, by focusing on the main judicial body of the European Union (EU), the article adds another area of the European project to the literature that has already engaged with Bourdieusian concepts in the context of EU law or international adjudication more broadly.[3]

Bourdieu offers various concepts with notable explanatory power for the processes taking place within EU law and within the CJEU in particular. More specifically, Bourdieusian concepts such as those of habitus, capital, and field, are of particular relevance. Habitus combines social and psychological processes, and as such has been used to identify judicial habits, practices, and standards of interpretation in international adjudication.[4] Similarly, capital, a concept with various forms that denotes the power possessed by an actor,[5] has been relied on to explain the role of the Commission in EU internet regulation,[6] as well as to trace the structurally disadvantaged position of women litigants in EU equality case-law.[7] Finally, field is a broader concept that denotes a specific social space and the power dynamics existing therein. Consequently, field is the most central – and free-standing – of the three Bourdieusian concepts, and sets the parameters for habitus and capital, but also for other concepts, or frameworks, to operate.[8]

In law-related settings the concept of field takes specific expression in the form of the legal field, which Bourdieu himself introduced in his seminal article entitled 'The Force of Law'.[9] A legal field constitutes a social space where 'actors and institutions [are] in competition with each other for control of the right to determine the law'.[10] The notion of legal field is not only a robust concept but also a particularly malleable and flexible one, as this article will explain in more detail below. Thus, it should come as no surprise that it has been featured in several studies that focus specifically on the European context.[11] The intricacies of European integration and law-making, with the multitude of actors and stakeholders involved and the associated supranational and transnational challenges, render the concept quite apt indeed. *Mutatis mutandis*, the same can also be said about the CJEU.

The CJEU, as the final arbiter of disputes about the interpretation of EU law, has had an influential role in the latter's development and in the trajectory of European integration more broadly. Through its sui generis structure and adjudicative processes, the Court inevitably interacts in one way or another with a diverse set of interlocutors, ranging from other EU institutions to national courts, and from its own bureaucracy to the wider society. Framing these

[2]M Rasmussen and D Sindbjerg Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European studies' 25 (3) (2019) European Law Journal 251; T Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022); MR Madsen, F Nicola and A Vauchez (eds), *Researching the European Court of Justice* (Cambridge University Press 2022).

[3]S Caserta and MR Madsen, 'The Situated and Bounded Rationality of International Courts: A Structuralist Approach to International Adjudicative Practices' (2022) iCourts Working Paper Series, no. 289; A Cohen, 'Bourdieu Hits Brussels: The Genesis and Structure of the European Field of Power' 5 (3) (2011) International Political Sociology 335; Y Dezalay and MR Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' 8 (2012) Annual Review of Law and Social Science 433; N Kauppi, 'Bourdieu's Political Sociology and the Politics of European Integration' 32 (5/6) (2003) Theory and Society 775; A Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' 2 (2008) International Political Sociology 128.

[4]Caserta and Madsen (n 3).

[5]Namely economic, cultural, symbolic, or social. P Bourdieu, 'The Forms of Capital' in J Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood 1986) 241.

[6]K Sideri, 'Questioning the Neutrality of Procedural Law: Internet Regulation in Europe through the Lenses of Bourdieu's Notion of Symbolic Capital' 10 (1) (2004) European Law Journal 61.

[7]K Alexandris Polomarkakis, 'Gendered Capital and Litigants in EU Equality Case-Law' 85 (6) (2022) Modern Law Review 1387.

[8]Dezalay and Madsen (n 3) 442.

[9]P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' 38 (1987) Hastings Law Journal 805.

[10]Ibid., *816*.

[11]Cohen (n 3); Kauppi (n 3); Vauchez (n 3).

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relationships as belonging to a discrete legal field, assists in observing and dissecting the power dynamics among the actors and stakeholders of that field. In other words, the concept of legal field can provide persuasive answers to a series of questions, such as which actors and stakeholders play a key role in the adjudicative process at a given time? How do these different actors and stakeholders interact with each other? How and why do these interactions vary depending on the subject matter of dispute and/or type of action? What are the factors that can explain inconsistent outcomes in similar cases? As mentioned earlier, the concept of legal field has significant explanatory power in this context.

By showcasing how the CJEU can be framed as a legal field, as well as the different manifestations of the latter *vis-à-vis* the Court's institutional architecture and judicial avenues that end up bringing cases in its docket, this article underscores the relevance of Bourdieu's reflexive sociology for studies of European integration and courts alike. The popular image of the Court as central in advancing and interpreting EU law downplays its role as a relational actor. By framing the CJEU's internal and external processes as distinct social spaces or field formations, its power relations with its interlocutors can come to the fore. To advance the foregoing, the article is structured as follows. First, the concept of the legal field is set out in more detail within the wider context of Bourdieu's field theory, focusing on its significance for EU studies and the CJEU in particular. Following from that, the article expands on the different possible framings of the Court as a legal field, paying attention to the Court's institutional structure and focusing on the three mainstream actions available under the Treaties (preliminary reference procedure, action for annulment and infringement procedure). Finally, the conclusion proceeds to reflect on other potentially helpful uses of the concept of legal field when studying the CJEU, bringing together the key points of the article's overarching argument.

2. Bourdieu's field theory, the legal field and the CJEU

A. Field theory

Field theory preoccupied Bourdieu early on in his writings.[12] Although Bourdieu introduced the theory as part of his contribution to sociology, the concept of field already existed in other disciplines, such as physics, mathematics and psychology.[13] In sociology, Bourdieu's field theory traces its origins in Weber's 'spheres of value',[14] and could also be linked with the work of Elias, especially the idea of 'configurations'.[15] They might all share a common epistemology, as well as some cross-fertilisation and overlap, but Bourdieu's theory retains its autonomy.[16] This is the case because Bourdieu's field theory goes hand in hand with the idea of the social space, which encapsulates the various social interactions in the world.[17] The social space encapsulates different domains. Each domain is characterised by its own set of actors. It also possesses the qualities of being distinct and distinctive, whose position is relative to other domains.[18] Locating the relations and interactions of different domains and their actors in a specified social space gives away the essence of a field.[19]

[12]P Bourdieu, '*Champ intellectuel et projet créateur*' 246 (1966) *Les Temps modernes* 865; P Bourdieu, '*Champ du pouvoir, champ intellectuel et habitus de classe*' 1 (1971) *Scolies, Cahiers de recherches de l'École normale supérieure* 7; P Bourdieu, '*Genèse et structure du champ religieux*' 12 (3) (1971) *Revue française de sociologie* 295.

[13]M Hilgers and E Mangez, 'Introduction to Pierre Bourdieu's Theory of Social Fields' in M Hilgers and E Mangez (eds), *Bourdieu's Theory of Social Fields: Concepts and Applications* (Routledge 2014) 2–5.

[14]JL Martin, 'What Is Field Theory?' 109 (1) (2003) American Journal of Sociology 1, 20.

[15]B Paulle, B van Heerikhuizen and M Emirbayer. 'Elias and Bourdieu' 12 (1) (2012) Journal of Classical Sociology 69.

[16]For an evolutional account of field theory in sociology see Martin (n 14).

[17]Y Patte, '*Sur le concept de "champ": L'approche "more geometrico" d'un débat public, la prostitution en Belgique*' 38 (1) (2006) *Sociologie et sociétés* 235, 240.

[18]P Bourdieu, *Méditations pascaliennes* (Éditions du Seuil 1997) 161.

[19]Patte (n 17) 241.

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Stemming from the foregoing, field theory, according to Bourdieu, takes the form of a social topology, 'but one that is differentiated into several domains that, while connected in the substratum of the same social space, may be treated as analytically distinct'.[20] Accordingly, the position of each actor within a field becomes key in order to determine their relations.[21] These relations are further mediated by other factors, such as the actor's class, their disposition, or habitus, as well as their capital.[22] The latter largely determine the distribution of actors within a field, as well as their positions, and, *mutatis mutandis*, their relations.[23] The power relations amongst the actors are often termed objective, because there is little influence their own intentions or interactions alone, emancipated from the afore-mentioned concepts of class, capital and habitus, can exert on determining their position.[24] Social fate, thus, plays a notable role therein.[25] It is influenced by the amount of power, actual and potential, each actor possesses, 'as well as by their objective relation to other positions (domination, subordination, homology, etc.)'.[26]

Fields are sites of struggle, where the actors involved try to dominate each other and climb up to the upper echelons of a field. In Bourdieu's words, 'every field is the site of a more or less overt struggle over the definition of the legitimate principles of division of the field'.[27] Only those positioned at the top of the field's hierarchy would normally enjoy the power to determine the overarching principles of that field.[28] The image of a struggle evokes eloquently the power relations among the field's actors, which, as said above, are partly pre-determined by factors such as their capital. In other words, actors can instigate change, and topple the field's defining hierarchy, but, at the same time, they are constrained as to how far they can go by their own position within that field. An alternative visualisation of the field theory is that of a game with changing rules.[29] The power relations amongst a field's actors pinpoint to that field's dynamics, which, in turn, 'involve expectations, expectations that may be violated, as social contestation is often a poorly policed game'.[30]

Field theory has powerful explanatory potential, not least due to its dynamic nature. Indeed, Martin observes that '[f]ield theory is an analytic approach, not a static formal system'.[31] In addition to being an open concept, field is also key to a deeper understanding of the social world, in accordance with reflexive sociology. Associated with Bourdieu, reflexive sociology holds that '[t]o understand fully the conduct of an individual acting in a space is tantamount to understanding the necessity behind what he or she does, to render necessary what might at first appear contingent'.[32] Part of the toolkit for such reflexive analyses, field theory is particularly apposite for large-scale analyses of political, institutional, and legal settings.[33] In turn, this makes it rather pertinent to the European setting, where the boundaries between the notions of 'political', 'institutional' and 'legal' are often blurred.

As a dynamic, malleable concept, it is difficult to pin down the exact limits and frontiers of a field. These depend on the research one undertakes, its parameters and chronology, and on the

[20]Martin (n 14) 23.

[21]P Bourdieu, 'Structuralism and Theory of Sociological Knowledge' 35 (4) (1968) Social Research 681, 690–1.

[22]Ibid.; P Champagne and O Christin, *Pierre Bourdieu: une initiation* (Presses universitaires de Lyon 2012) 147–83.

[23]P Bourdieu, 'The Social Space and the Genesis of Groups' 14 (6) (1985) Theory and Society 723, 724.

[24]Ibid.

[25]Martin (n 14) 24.

[26]P Bourdieu and L Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992) 97.

[27]Bourdieu (n 23) 734.

[28]As Bourdieu noted in his seminars, the notions of field and position are interdependent. P Bourdieu, '*Séminaires sur le concept de champ*, 1972–1975' 200 (2013) *Actes de la recherche en sciences sociales* 4, 13.

[29]Albeit not without its critics. For more see: Martin (n 14) 33–34.

[30]JL Martin and F Gregg, 'Was Bourdieu a Field Theorist?' in M Hilgers and E Mangez (eds), *Bourdieu's Theory of Social Fields: Concepts and Applications* (Routledge 2014) 48.

[31]Martin (n 14) 24.

[32]Bourdieu and Wacquant (n 26) 199.

[33]Martin (n 14) 3.

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questions posed within that context.[34] Trying to delimit a field is not an easy task. the ostensibly limitless number of potential fields, in combination with their lax boundaries, can lead to uncertainty.[35] Yet, if the primary aim of drawing on field as a concept is to utilise it as an analytical approach and research tool, then it needs to be adaptable and fluid. Adjusting the scope of a field allows the concept to remain relevant depending on the level of analysis undertaken. Although a general all-encompassing field can exist and has indeed been studied as such, more often than not, a field is conceptualised as a 'self-contained realm of endeavour'.[36] Bourdieu's work touched on a wide range of specific fields, such as those of religion, culture, and academia, constantly refining the applicability of the theory to these diverse areas.[37]

B. The legal field

Most importantly for this article, Bourdieu also discussed the notion of legal field in detail in 'The Force of Law'.[38] The endgame of the actors involved in the legal field is to take control of 'the right to determine the law'.[39] Their position within the legal field, and their interactions with their peers as part of the legal field's power struggles, will decide how much control, or influence, they can have in that regard. Yet, the actors are constrained by the internal logic of the law, which only allows for certain outcomes, limiting how far their control of its determination can go.[40] They might not be able to successfully push for a particular interpretation of the law in question, for example, because it would be *contra legem*. They might also be constrained by the type of action they have chosen to pursue.

'The Force of Law' mainly referred to a juridical vision of the legal field in a traditional sense, where the law itself affects the power relations among its actors, who are divided in theoreticians and practitioners.[41] In this context, the judges are the most obvious actors, tasked with delivering -what appears to be- their determination of the law through their rulings. However, in a legal field, 'the judgment is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence'.[42] The judicial decision-making process is merely seen as providing judgments with the required degree of legitimacy through the rationalisation process.[43] The judgment, thus, takes on the form of a façade, underpinned by the struggles among the actors of the legal field to take control of the determination of the law. Taking a step back, it is worth reiterating that the legal field, similar to any other field and like its other Bourdieusian siblings, habitus and capital, is an open concept. Its definition is relative. It can only be pinned down accurately 'within [its] theoretical system' and it is 'designed to be put to work empirically in systematic fashion'.[44]

Drawing on the above, the concept of field, and that of legal field in particular for the purposes of this article, is a great analytical tool. To be applied robustly though, it is crucial not to merely transplant the concept, but to use it methodically as a research tool combined with 'the notion – and practice – of a reflexive sociology'.[45] It is not enough to define a particular space as a field, or even a legal field, but its parameters and properties have to be laid down too, and the position and

[34]Bourdieu (n 26) 18–9.
[35]Martin (n 14) 24.
[36]*Ibid*., 23.
[37]Hilgers and Mangez (n 13) 5–6.
[38]Bourdieu (n 9).
[39]*Ibid*., 816.
[40]*Ibid*.
[41]*Ibid*., 822.
[42]*Ibid*., 827.
[43]*Ibid*., 828.
[44]Bourdieu and Wacquant (n 26) 96.
[45]Dezalay and Madsen (n 3) 436.

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conduct of its actors properly considered. The roots of the concept of field in Bourdieu's sociology mean that it is often discussed alongside concepts such as those of habitus and capital. This is part of its systemic and systematic nature as an open concept. Yet, studies can choose to focus on the concept of field alone, in order to sketch out its limits, components and actors in detail. This does not make such analyses less systematic, nor does it devalue their significance, so long as they remain faithful to the tenets of reflexivity.

C. The European (legal) field and the CJEU

Like the overarching concept of field in Bourdieu's sociology, the legal field manifests itself in different formations, which can account for actors beyond the legal professionals, or for legal settings beyond the judicial one. Indeed, it has been argued that the legal field is not synonymous with the legal system as a whole, but with 'specialised areas of practice'.[46] These specialised areas have included aspects of the European project, from the idea of a European field of power, to that of a field of European integration, albeit mostly of political nature.[47] Most notably, Schepel and Wesseling wrote explicitly about the existence of a European legal field, defining it 'as all those institutions and practices involved in the production, application, interpretation, and teaching of European Law'.[48] More recently, Vauchez framed the European legal field as distinct, yet interdependent with other fields that, together, constitute the European polity.[49] By centring the analysis on professional actors, the so-called Euro-lawyers, he observes a relatively weak field, in terms of its autonomy and distinctiveness from other legal fields, but with notable social effects.[50] The propagation of a common sense of Europe is arguably the most prominent of these effects.[51]

The Euro-lawyers might have contributed to building that common sense of Europe, reflecting the porous structure of the European legal field, with shared trajectories and mobility among its professionals, but this is not without contestations. These contestations range from methodological to pragmatic ones.[52] After all, the legal field, as any other field, is a game with an outer goal, the determination of the law, as its reward. Sometimes, other actors can defy expectations and push forward their own interpretation of the law. Such an occurrence has also taken place in the European context, with instances of successful legal mobilisation by active minorities.[53] This is yet again proof of the field's powerful analytical potential to explain the power relations among different actors in a delineated space, and to shed light on how their positions, as well as the interactions thereof, influence the (judicial) law-making process and its outcomes. Even a seemingly disadvantaged actor can take control of the determination of the law, if they possess the right attributes, and their position *vis-à-vis* their peers allows them to do so.

Using the concept of legal field to conceptualise the CJEU will not only add another area of the European project as part of the field studies cited *supra*, but it will also enable a dissection of the

[46] *Ibid*.

[47] Cohen (n 3); Kauppi (n 3).

[48] H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' 3 (2) (1997) European Law Journal 165, 170.

[49] Vauchez (n 3). See also: A Cohen and A Vauchez, 'Law, Lawyers, and Transnational Politics in the Production of Europe 32 (1) (2007) Law & Social Inquiry 75.

[50] Vauchez (n 3), 137.

[51] *Ibid*., 141. This propagation built on efforts by legal entrepreneurs to create the European legal field during the cold war era. See: A Cohen and MR Madsen, '"Cold War Law": Legal Entrepreneurs and the Emergence of a European Legal Field (1945–1965)' in V Gessner and D Nelken (eds), *European Ways of Law: Towards a European Sociology of Law* (Hart 2007) 175–202.

[52] On the relationship between the notions of profession and field see: Bourdieu and Wacquant (n 26) 241–5.

[53] K Alexandris Polomarkakis, 'Social Policy and the Judicial Making of Europe: Capital, Social Mobilisation and Minority Social Influence' 1 (2) (2022) European Law Open 257.

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Court's functions under a reflexive lens. Madsen argues that in the cadre of reflexive approaches, 'the notion of field [.. .] precisely matches the ambition of developing an object of study that as its basic goal seeks to understand the formation and transformations of symbolic spaces as the product of a varied but specific social input'.[54] Accordingly, the object of study (here, the CJEU), 'becomes the symbolic space that exists as a set of objective relations between positions and which is being transformed by their constant interplay over the domination and control of the subject of [EU law]'.[55] Madsen has also extensively traced the contribution of sociological approaches to international courts, including reflexive and Bourdieusian approaches, noting that 'they give rise to different kinds of inquiries, which, in some cases, challenges widespread assumption of what [international courts] are in the first place'.[56]

A reflexive turn to the study of the CJEU rooted in field theory, thence, contributes to more eloquently showcasing how actors in constant dialogue with the Court in the various available judicial avenues, as well as the Court itself as an institution, act the way they do, framing their position and consequently the objective relations that exist among them. Consequently, the power struggles in the quest for the desired interpretation of the law can be unveiled. Utilising the concept of the legal field leads to a clearer elucidation of the social interests among these actors, which form the basis of new observable practices, and of the closely associated 'political and institutional effects of socio-legal struggles over domination'.[57] It could also unveil systems of reproduction,[58] be it at institutional, national or supranational level, tracing the efforts of elites to dominate in intra-institutional and inter-institutional competition, or to transcend their national boundaries.

3. The CJEU as a legal field

The concept of legal field could be used in all sorts of ways when discussing the CJEU. From considering the Court as an actor in the European legal field, or in the legal field of a particular manifestation of EU law, to asserting that it constitutes a legal field – or more – on its own. The interactions on the one hand within the Court as an institution and its bureaucracy, and on the other hand between the CJEU and other EU institutions, the Member States, national courts, lawyers, collective actors and private litigants, all open up numerous possibilities to set forth the existence of different formations of a legal field.[59] The distinct types of actions that can be brought before the CJEU further corroborate this observation.

Semantically, when referring to the CJEU as a legal field, this tends to be a colloquialism. The notion extends beyond the inner workings of the Court, which is the closest the latter can formally constitute a distinct field. The CJEU as a legal field then is an umbrella term that covers instances where the Court is the most prominent actor in a social space, the mouthpiece of a legal (sub)field, and therefore, tends to be academically studied as such. For example, most case analyses tend to focus on the Court as a unitary actor, with some – but not always deeply – contextual discussion as secondary. Calling the Court a legal field, and pushing for more reflexive, empirical, and socio-legal approaches to its study, the article hopes to raise awareness that behind its judicial decision-making capacity, a whole lot of social practices takes place. The Court as a legal field, thus, comprises the amalgam of social spaces in which the CJEU appears to be the most prominent actor.

[54]MR Madsen, 'Reflexivity and the Construction of the International Object: The Case of Human Rights' 5 (2011) International Political Sociology 259, 260.

[55]*Ibid*., 263.

[56]MR Madsen, 'Sociological Approaches to International Courts' in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 411.

[57]Dezalay and Madsen (n 3) 439.

[58]*Ibid*.

[59]Alexandris Polomarkakis (n 53).

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When framing the Court as a legal field, parallels can be drawn with the wider notion of the European legal field as discussed by Vauchez.[60] Although more abstract in scope, the European legal field revolves around the centrality of lawyers and the law, as shaping the agenda of European policy. These Euro-lawyers were omnipresent and influential across all institutions, and in particular the Court. The most active players in the judicial arena are the lawyers after all, a term that also includes those sitting on the bench. Euro-lawyers' mobility, especially in the early stages of European integration, inevitably influenced the power relations among the actors of the legal field, including the social spaces comprising the Court's institutional and judicial arenas. Moreover, by stressing law's centrality, the European legal field also accentuates the role of the most legal of the institutions par excellence, which is the CJEU. The weak character of the European legal field, attributed to its 'porous internal and external borders',[61] is a characteristic that has given rise to, but at the same time has been passed on to any conceptualisation of the CJEU as a field. Although interrelated and largely overlapping social spaces, focusing on applying field theory to the CJEU gives added layers of nuance to the interactions taking place before and within the judiciary of the EU legal order. Put simply, the CJEU is part of the European legal field, having its own agency therein, but there is merit in studying its most-closely associated social spaces and practices in more detail. This is because the overarching logic might be for the most part shared with the European legal field, but there is a slightly different configuration of actors and resulting power relations in each, partly due to varying (procedural) rules that, inevitably, in field logic become (some of) the rules of the game.

Of course, the different formations of the Court as a legal field operate within the wider European field. The practices of the latter, itself interdependent with national and transnational fields, have informed and determined the social space of the Court.[62] Not only that, but they have also laid down ground rules that define the judicial architecture of the CJEU and the different procedures in place. These ground rules may appear as formal institutional and legal boundaries for the various field formations the CJEU can be conceptualised as constituting, yet, they are the outcome of power struggles within the wider European field. They are social spaces that have been sketched out, but they have not been fully delineated by the practices of the European (legal) field. The latter has pre-determined some of their rules, exerting some, but by no means total, influence on the power relations among the actors. What might be considered as procedural dichotomies, are in fact a set of practices that have created a series of somewhat distinct social spaces, in which a new set of practices can take place. These social spaces are interconnected and interrelated, but there is merit in sketching them out separately, to better showcase how field theory, or even just field dynamics can be discussed with more granularity in each context.

Trying to situate the many practices within a series of interconnected social spaces in their own right,[63] this section discusses how the CJEU can be conceptualised as a legal field, and it sketches out some of the different formations it can take. Although it was mentioned that it is difficult to exhaustively enumerate all the formations of the concept the CJEU can be framed as pertaining to, the present analysis focuses on two aspects of the Court's practice. First, the Court as an institutional arena, and second, the Court as a judicial arena. By delineating the most likely conceptualisations of the CJEU as a legal field in these areas, the discussion can centre on the power relations among the – often unseen – actors within the internal logic of the Court, as well as to take account of the distinct positions and interactions of the Court, which vary depending on the type of action it is set to adjudicate. Likewise, the power other actors enjoy in the judicial arena and the influence they can exert on the game of determining the law, also depend on the type of action at hand. Consequently, framing – and discussing –

[60]Vauchez (n 3).
[61]*Ibid*., 136.
[62]Vauchez (n 3).
[63]Madsen (n 54) 264.

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each type of judicial proceeding before the CJEU as a distinct formation of a legal field is essential in order to elucidate a reflexive approach to the idea of the Court as a relational actor. It also better helps to trace the temporalities of each formation, as their underlying practices often developed differently.[64] Finally, framing the CJEU as a legal field of multiple formations also helps to better explain the divergence in the literature surrounding the Court's autonomy.[65] Simply put, the Court can act either as a principal or an agent, depending on the specific power relations underpinning the field formation at hand.

When studying the interrelated social spaces that constitute the Court's field formations, it is important to keep in mind the variations in terms of 'the degree of consensus and contestation', 'the nature of the symbolic opposition', and 'the distribution of different types of capital across positions'.[66] From a field theory perspective, it is also important to go beyond certain strands of sociology of institutions.[67] Although there might be constraints on what actors can do in a given social space, they retain their agency. Their agency can influence the comportment of their institution, and *mutatis mutandis* that of the field in which they operate. It is through the practices of these actors that the process of institutionalisation takes place, including in relation to international courts such as the CJEU.[68] It is the actors, operating both in the forefront and background of these institutions that shape their agendas, power and capital, and through their power struggles and practices, in turn, exert influence on the trajectory of judicial decision-making. This is the overarching viewpoint that field theory puts forward.

A. The institutional arena: a legal field of its own or an agent in the European legal field?

The CJEU asserts itself as the mouthpiece of EU law, the almost unequivocal final arbiter of disputes that have an EU law element. As such it is important to understand how it operates internally as a key player in any manifestation of the European legal field. Upon closer look, the so-called mouthpiece of EU law is composed of many different voices, which are concealed by its cryptic, authoritative and deductive judgments.[69] Written in a 'magisterially institutional voice',[70] and making it difficult to discern any tensions, the Court's judgments give away its continental institutional architecture. This institutional architecture makes it difficult to decipher the power struggles within the actors that form the institution that is the CJEU. The only rupture that can be observed is that between the Advocate General and the members of the Court, when the latter choose not to follow the former's Opinion. Even then, though, no overt disagreement or justification is provided, blurring the line between clear opposition to and mere disagreement over the proposed adjudication of a case. In other words, to dig deeper and get a better understanding of the power relations among the Court's constituents, a reflexive approach is needed.

Beneath its magisterial appearance, the CJEU constitutes a distinct area of social interactions and power relations, which, in turn, means that it can be framed independently as an autonomous, as in self-standing, social space or legal field. At the same time, any internal practices also help shape other manifestations of the European legal field more broadly, including the European legal field itself, the Court being a major player therein. The complexity of its institutional architecture means that the Court is comprised of various actors, each taking on a particular position in the

[64]*Ibid*., 265.

[65]KJ Alter, 'Agents or Trustees? International Courts in their Political Context' 14 (1) (2008) European Journal of International Relations 33, 37.

[66]M Krause, 'How Fields Vary' 69 (1) (2018) The British Journal of Sociology 3, 11.

[67]For example, see the discussion in Madsen (n 56) 405.

[68]*Ibid*., 406.

[69]M De S-O-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009) 351–2.

[70]*Ibid*., 107.

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legal field. The judgment handed down by it is no more than a façade that hides any underpinning tensions. These tensions could have taken place between the members of the Court, either due to disagreement or simply because the latter were rushing to comply with internal deadlines.[71] It is no surprise that commentators are on the lookout for signs to decode. Institutional tensions and frictions are important, for they can influence how the actors comprising the CJEU may choose to behave in the context of one of the judicial arenas described below. For example, frictions about the nature of European integration may influence the Court's receptivity to expansive interpretations of EU social laws.

In this institutional microcosm, the most visible actors are the judges of the Court of Justice and the General Court, followed by the Advocates General. These are assisted by law clerks, the so-called *référendaires*. Moreover, the judges of each court select a President among them, serving a renewable term of three years. Depending on the approach taken to studying the CJEU, attention could shift from the Court of Justice to the General Court, and their respective practices in a given social space. Sometimes discussion can also centre on the interaction between the two in the context of certain issues or procedures.[72] For example, the Court of Justice can occasionally act as an appellate body for rulings of the General Court, something that influences the power dynamics particularly insofar as the social space of annulment actions is concerned. Not only that, but there have been long-standing rifts between the two, with the General Court appearing institutionally subordinated to the Court of Justice,[73] leading to certain figures within the General Court openly expressing their discontent.[74]

The institution is further supported by its bureaucracy, led by the Registrar within each court. In 2022 the number of these posts was 2254.[75] Although not all of the bureaucracy plays a role in the institutional legal field of the CJEU, those working in legal translation and interpretation hold key positions in such a multilingual environment.[76] They may be relatively unseen actors, but their contribution is key in ensuring an as accurate reflection of the Court's documents, including its judgments, as possible, inevitably playing a part in the nitty-gritty of the determination of the law. Similarly, other departments can also influence the trajectory and direction of the Court as a legal field, as well as its study as such. By making access to the CJEU's archives a complex task, for example, the Court's 'magisterial voice' is preserved, at the expense of transparency, openness, and research advancement.[77] Considering the media communications of the Court, it is clear how the CJEU as an institution wants to control the narrative – and *mutatis mutandis* the field in which it operates, through its managed openness.[78]

Shedding light on the Court's internal workings is crucial to understanding the institutional constraints that are in place and influence its adjudicative practice. The concept of legal field allows to dissect the various actors within the CJEU and attributes to them certain positions

[71]E Sharpston, 'Making the Court of Justice of the European Union More Productive' 21 (4) (2014) Maastricht Journal of European and Comparative Law 763.

[72]For the purposes of this analysis, such distinction is not required. Any reference to terms like judges, President, or law clerks applies *mutatis mutandis* both to the Court of Justice and the General Court.

[73]H de Waele, 'Re-appraising Success and Failure in the Life of the European Court of Justice' 23 (2021) Cambridge Yearbook of European Legal Studies 54, 68–71.

[74]EU Judge Dehousse's Farewell Address to the CJEU (EU Law Analysis 2016) <http://eulawanalysis.blogspot.com/2016/10/eu-judge-dehousses-farewell-address-to.html> accessed 19 July 2023.

[75]The Court in Figures <https://curia.europa.eu/jcms/jcms/P_80908/en/> accessed 19 July 2023.

[76]K McAuliffe, 'Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ' in LM Solan and PM Tiersma (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 200–16.

[77]F Nicola, 'Waiting for the Barbarians: Inside the Archive of the European Court of Justice' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford University Press 2020) 62–91.

[78]P Minkinnen, 'The Court of Justice of the European Union as a Media Actor' (17.12.2021) <http://www.panuminkkinen.eu/2021/12/the-court-of-justice-of-the-european-union-as-a-media-actor/> accessed 9 August 2023; A Vauchez, 'From Close-Ups to Long Shot: In Search of the 'Political Role' of the Court of Justice of the European Union' in Kilpatrick and Scott (n 77) 60.

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therein, depending on their interactions, but also on the amount of power, or capital, they enjoy. A powerfully positioned actor within this field is arguably the President. In the context of the structural imbalance between the Court of Justice and the General Court, their respective Presidents become crucial figures in setting the tone of intra-CJEU relations.[79]

Aside from the symbolic capital the position of President carries, its holder has the power to assign cases to a judge-rapporteur. This assignment is ostensibly tied to the prestige associated with a particular judge within the Court, and, arguably, their standing amongst their peers.[80] The judge-rapporteur is presumably the most influential figure of the Court for the adjudicative outcome of a case.[81] The draft judgment they author automatically gives them a head start in the determination of the law, even among their peers. Not only that, but the judge-rapporteur also interacts the most with other actors during the hearing of the case.[82] Research revealed the power relations ingrained in the patterns existing in the allocation of important case files to certain judge-rapporteurs.[83]

The President also assigns a case to a chamber, the latter's composition ranging from three to five, to the so-called Grand Chamber of 15 judges, and is some rare circumstances to the Full Court of 27.[84] Naturally, the more important a case, the larger the Court's formation will be, and vice versa. The position of large formations, and of the judges sitting in those, is, thus of an increased normative importance in this particular field, and so is their power to control the determination of the law.[85] Taking part in such a formation will inevitably increase an individual judge's cachet and capital, and relations among judges become key in that regard. There would be particular scrutiny placed in the determination of the law in this context, with the power dynamics between the members of the Court forming a more complex matrix in the Grand Chamber or Full Court compared to a small chamber.

Although hailing from different branches of the legal – and in the Court's early years political – profession, many of the judges of the Court, especially at the beginning of its existence, belonged to established families that dominated the social and political elite.[86] More recently, the actors involved in the Article 255 TFEU panel play a crucial role in selecting the members of the Court, and, by doing so, become indirectly involved in the determination of the law.[87] The judges' varied professional background can influence how they see their role, as well as their interpretation of EU law. Quantitative studies of chambers' outputs have shown that CJEU judges harbour divergent preferences.[88] Yet, there is an underlying self-serving motivation to support European integration, which can dominate the judicial discourse over any personal and policy preferences.[89] Having shared beliefs, though, still facilitates alliance-building, and has had an impact on the trajectory and interpretation of EU law, if one considers the circumstances that gave rise to landmark

[79]de Waele (n 73) 70.

[80]C Krenn, 'Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success' 19 (7) (2018) German Law Journal 2007, 2015.

[81]SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018) 30.

[82]C Krenn, 'A Sense of Common Purpose: On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice' in Madsen, Nicola and Vauchez (n 2) 192.

[83]Ibid., 201–2.

[84]Most recently in the rule of law conditionality judgments in Cases C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[85]For example, Bobek talks about a hidden constitutional court. M Bobek, 'What Are Grand Chambers for?' 23 (2021) Cambridge Yearbook of European Legal Studies 1.

[86]A Cohen, 'Scarlet Robes, Dark Suits: The Social Recruitment of the European Court of Justice' (2008) EUI Working Paper RSCAS 2008/35 10–2.

[87]M de S-O-l'E Lasser, *Judicial Dis-Appointments* (Oxford University Press 2020).

[88]M Malecki, 'Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers' 19 (1) (2012) Journal of European Public Policy 59.

[89]Schmidt (n 81) 30.

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judgments like *Van Gend en Loos*.[90] Shared values and beliefs among its judges can make the Court receptive to certain lines of argument, especially when considering how members of the CJEU have been repeat players in the European legal field, having occupied various judicial and non-judicial roles.[91]

A very prominent actor in the legal field of the CJEU as an institution is the Advocate General. Their appointment process is similar to that of judges, and they have played an influential role in the development of EU law, even when the content of their Opinion is not reflected in the Court's judgment.[92] They are the most exposed actors of the field, in that they 'must argue without the institutional authority and protection afforded by the Court's own impersonal, unsigned, and collegial style'.[93] Their increased exposure prescribes their reasoning, which is usually more elaborate, cautious and relativised.[94] Advocates General take on various roles, often simultaneously, ranging from framers and controllers, to researchers and innovators, testers, explainers and dissenters, depending on their disposition and qualities.[95] Their functioning within their role, then, largely depends on the dynamics of the field. Considering that some Advocates General in the past changed positions and eventually became judges of the Court, their comportment and track record, in terms of their suggestions regarding the determination of the law at stake, must play at least some part in their nomination and appointment. Conversely, any ambitions to judgeship could influence their behaviour in their current role.

Admittedly of more limited influence in terms of their actual power in determining the law, the *référendaires* are an important part of the legal field, in that it is their work that the CJEU judges and Advocates General 'revise, challenge or accept'.[96] There is a sense of trust in the *référendaires*' work, since it is the members of the Court that choose them, meaning that the members' preferences are reflected in the recruitment process, and the temporary nature of the role. Despite the latter, some *référendaires* manage to weaponise their agency, by valorising their expertise, enjoying a quasi-permanent trajectory.[97] Qualitative research has unveiled that these 'career' *référendaires* can 'exert some measure of undue influence upon their judges', due to the level of trust built in their expertise.[98] Yet, there has been no evidence of them 'replacing' a member of the Court.[99] It is not uncommon for some *référendaires*, albeit very few in light of their large number, to end up becoming judges or Advocates General.

A big part of the Court's internal or institutional field becomes apparent in the social spaces built around the different judicial avenues that represent manifestations of the European legal field. The majority of the Court's personnel, and all its major stakeholders (judges, Advocates General, *référendaires*), have a legal background, making them Euro-lawyers, whose key role in the

[90]M Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos Judgment' 12 (1) (2014) International Journal of Constitutional Law 136, 148.

[91]A Vauchez, 'The Court of Justice in the Archives Project: An Initial Reflection' 6 (1) (2021) European Papers 533, 535.

[92]T Tridimas, 'The Role of the Advocate General in the Development of Community Law: Some Reflections' 34 (6) (1997) Common Market Law Review 1349, 1385.

[93]Lasser (n 69) 204.

[94]*Ibid*.

[95]M Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' in C Barnard, M Gehring and I Solanke (eds), *The Cambridge Yearbook of European Legal Studies* (Hart 2012) 552–9.

[96]M Cohen, 'Judges or Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 64.

[97]I Streho, 'The Référendaires, the Chambers, Staffing and Recruitment Matters' in E Guinchard and M-P Granger (eds), *The New EU Judiciary. An Analysis of Current Judicial Reforms* (Kluwer 2017) 4.

[98]Cohen (n 96) 74. This depends on the member of the Court. See: Sharpston (n 71) 767.

[99]S Kenney, 'Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court' 33 (5) (2000) Comparative Political Studies 593.

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European legal field was narrated by Vauchez.[100] As he notes, in light of the mechanics of the European legal field, 'this alleged capacity of Law to be the science of EU polity lies in the fact that it provides a genuine metaphysics of Europe, which turns the lawyer, and especially the judge, into the ultimate engine of European integration processes'.[101] Like the European legal field though, the institutional architecture of the Court shares the characteristics of a weak field, namely its porous boundaries. It is often a 'field which is completely immerged into other fields that are mapped out and constituted more firmly',[102] be it in regard to the transnational diplomacy, which continues to underpin the nomination and appointment process, or the social spaces of the various procedures to which the Court appears to play an important part as an agent.

There are many actors comprising the CJEU as an institution. The matrix of their complex power relations is what eventually frames the Court's worldview on the determination of the law. Therein, the standing of each member of the Court, in terms of their position in the Court's internal hierarchy, their perception by their peers, and the exercise of their duties, becomes a crucial determinant of their role in the field. Moreover, the Court's everyday practice can enable less obvious actors, such as the *référendaires* to exert a higher level of influence in shaping the reasoning of a judgment or Opinion. The life of the members of the Court prior to becoming such may also shape their interaction with other actors in the judicial arena. Relatedly, the inner workings of the Court can accentuate the role of seemingly minor actors, like the translators and interpreters, whose outputs can define the impact of a CJEU judgment in certain Member States. Last but not least, the legal framework underpinning the Court's procedures, itself the byproduct of power struggles and practices of the wider European legal field, pre-determines to some extent the relationships among its actors, drawing parallels with the idea of social fate discussed above.

When looking at the institutional arena of the CJEU as legal field, but also more broadly, it is worth stressing again how crucial it is not to assume that the behaviour of the various actors is tied to their institutional role. While it is true that the applicable legal provisions, themselves the outcome of legal and social practices, may influence the behaviour and power of these actors, field theory invites us to look beyond that. These actors retain their agency and as such can influence the practices of the social space under examination. Accordingly, the institutional arena of the CJEU as a field formation takes the form of a social space, shaped by the practices and interactions of its actors, but also by other interrelated spaces and practices, endogenous and exogenous to it. For example, the social, educational and professional background of a *référendaire* influences and interacts with their position in their role, which, in turn, can affect the stance of the judge-rapporteur, whose own background, capital, agency and position is then bound to influence the Court's judicial decision-making process and output, transforming the latter into a sympoietic process.

B. The judicial arena: a matrix of interrelated social spaces

The discussion of the institutional arena as a legal field inevitably centres on the Court itself. This was not done in order to re-assert the CJEU's monopoly in academic analyses of European integration. Instead, by focusing on the complex matrix of actors that comprise the Court as an institutional social space, the diverse interests of the Court's constituents, which, in turn feed into its practice, come to surface. Indeed, Cohen observed that the Court's internal logic is influenced by a series of structural tensions, which are underpinned by 'opposing types of capitals'.[103] The amalgam of actors with diverse interests is in contrast with the formal view of the Court as

[100]Vauchez (n 3).

[101]*Ibid*., 134.

[102]C Topalov, '*Le Champ réformateur*' in C Topalov (ed), *Laboratoires du nouveau siècle. La nébuleuse réformatrice et ses réseaux en France 1880–1914* (Éditions de l'EHESS 1999) 464.

[103]A Cohen, 'Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)' 32 (1) (2007) Law & Social Inquiry 109, 129.

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magisterial and unitary. The latter only refers to the performative aspect of the Court's judicial decision-making, deflecting attention from the processes and power struggles underpinning the Court's adjudicative function.

Furthermore, presenting the Court's institutional aspects as a field formation provides useful information on how the comportment of the Court is formulated, including in its interactions with other players in other social spaces of the European legal field. In the formations of the judicial arena, the Court does not retain the upper hand, but simply the performative monopoly, meaning that the determination of the law as manifested in its judgments might have to be attributed to another – powerful – actor of the respective field formation under scrutiny. Who that actor might be depends on the power relations in situ, which are framed by the capital and disposition of the field's players, as well as by the legal framework underpinning each procedure.

In its judicial function, the Court interacts with a number of actors belonging to different positions and possessing different levels of capital. From other EU institutions and the Member States to national courts, to lawyers, collective actors and private litigants, the Court would inevitably interact in one way or another with some if not all in a dispute. The dynamics of that interaction depend on the actors' position and capital, but also on the type of proceeding at issue. The distinct actions available under the Treaties, and framed within the broader European legal field, give each actor varying degrees of influence as to the scope and magnitude of their contribution to the determination of the law, and shape their interactions differently. This is the reason why there are separate discussions on how the preliminary reference procedure, the annulment action and the infringement procedure can be conceptualised as distinct formations of the CJEU as a legal field.[104] Not only that, but the existence of the same actors under different capacities also supports a cross-fertilisation between the analyses in each sub-section.

Touching on cross-fertilisation, the role of the Euro-lawyers cannot be ignored. They are active agents that staff most actors in the interrelated social spaces of the judicial avenues under examination. As a whole, they have shaped the overarching European legal field. Not only that, but they also have cemented its importance when studying the EU. As Vauchez notes:

> the variety of roles lawyers actually play in European affairs (as consultants or advisers for national governments or European institutions; as experts and academics involved in political or civil society mobilizations; as legal practitioners and judges), and the variety of clients they actually serve (individuals, firms, national governments, EU institutions), is not peripheral but central to an understanding of law's position within EU polity.[105]

Their mobility across the key actors of the social spaces forming part of the broader European legal field, exerts an undeniable influence on the motivations, capital and practices of these actors, ultimately affecting the power relations among them. The common goal of these Euro-lawyers during the proto-federal era of European integration has been well-documented. Nowadays, they may not share a common goal, but they are connected by a common language, that of EU law, which makes them powerful agents in the legal field. However, the increased involvement of elites from other (non-legal) backgrounds, and the more adversarial interests of the parties they represent, has certainly affected the field dynamics, which further support empirical analyses that disaggregate the social spaces of the European legal field's judicial arena. The discussion that follows highlights the most apparent, from a field perspective, points where power struggles are at play, inviting further empirical exploration of the practices taking place in these social spaces.

[104]Due to limited space, other, less frequent, actions were omitted from the analysis, although they could admittedly constitute distinct field formations on their own. Nevertheless, it is hoped that the analysis in this article offers directions for applying Bourdieu's field theory to actions beyond those studied in detail.

[105]Vauchez (n 3) 129–30.

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Preliminary reference procedure

Cases brought through the preliminary reference procedure, enshrined in Article 267 TFEU, account for the majority of the Court's workload nowadays. The indirect nature of the preliminary references, in that the disputes originate in national courts as opposed to directly being brought before the CJEU, render them a more complex field formation compared to the annulment action and the infringement procedure. This is so mainly because of the interplay between the European and national level, which affects the power relations between the CJEU and its national counterparts, as well as between national courts and litigants, constituting a transnational social space. As with almost every formation of the legal field, it is overlapping with other formations, namely those at the national level of adjudication, which can partly explain the mechanics and underlying motives for a preliminary reference being made by a national court.

As with every type of proceeding, the Court finds itself as the most prominent actor of the constructed field formation. Through the preliminary reference procedure, the Court hands down judgments that answer questions pertaining to the interpretation or validity of EU law, amplifying its afore-mentioned 'authoritative tone'. Indeed, once a reference has been made by a national court, the Court enjoys broad discretion on how to answer it, potentially even fully re-imagining the essence of the questions asked.[106] The preliminary reference procedure has been associated with the Court's most notable contribution to the European project, its so-called transformation of Europe, the creation, through its judgments of doctrines of constitutional magnitude like supremacy and direct effect.[107] Although according to some legal accounts the Court was to be credited as holding the reigns of the determination of the law in these particular instances in the field under examination, the view that the creation of such doctrines was the result of an alliance of actors within that field formation has gained momentum.[108] That view directly points at power struggles among a series of actors beyond the Court, whose practices underpin the judicial decision-making process.

The Court has taken advantage of its position as the mouthpiece of EU law to assert its authority in this legal field formation, at times going beyond a mere interpretation of EU law, to provide a precise solution to the adjudication of the case at hand.[109] As its popularity grew, so did the answers given to the questions referred, often directly tackling the compatibility of national norms with EU law, and becoming further implicated in matters that were not initially envisaged in the Treaties.[110] The turn to more concrete rulings in this context has changed the power dynamics within the field, with the Court trying to assert its authority over the determination of the law. Occasionally, this has led to misinterpretations of national norms, which in turn resulted in the reaction by national courts, such as in the *Taricco* saga.[111] At the same time, such instances provide a window into the tensions that may emerge in the field, and they showcase how the Court's seemingly authoritative tone does not automatically lead to obedience by other actors who feel wronged. Going back to the institutional field formation, the assessment of the situation by the judge-rapporteur, who is of a different Member State to that where the reference originated, and who is assigned to a case by the President, as well as its reception by the Court's chamber, showcase the overlapping power dynamics that transcend field formations.

The Court takes on a key role in determining the competence allocation, by asserting the exercise of some sort of docket control mechanism, which it has nevertheless not used

[106]KJ Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' 54 (3) (2000) International Organization 489.

[107]Weiler (n 1).

[108]Rasmussen and Sindbjerg Martinsen (n 2).

[109]T Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' 9 (3–4) (2011) International Journal of Constitutional Law 737.

[110]See V Passalacqua and F Costamagna in this special issue.

[111]*Ibid*.

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frequently.[112] Especially insofar as the admissibility of questions pertaining to internal situations is concerned, the Court engages in fact-finding and an evaluation of national norms, which entail tensions in its interactions with its national counterparts. Apart from tensions, instances of over-engagement with national norms by the Court can also be framed as a way to highlight the importance of the information provided to the Court regarding national norms and the facts of the case at hand, which are mainly the responsibility of the referring national judge.[113] What the latter includes in the reference is bound to shape the determination of the law.[114] The referring judge, thus, enjoys some power in this field formation.

Focusing on the national courts, it is important to reiterate that they enjoy a peculiar position in this legal field. Simply put, the CJEU cannot be involved in the power struggle for the determination of the law unless the national court makes a preliminary reference. Under Article 267 TFEU national courts have discretion to make a reference, unless against their decisions there is no further remedy. Not only that, but due to the division of functions in the preliminary reference procedure, the CJEU's role is formally limited to interpreting or reviewing the validity of EU law, with the national referring court tasked with applying the Court's judgment to the facts of the case. Even though the CJEU is the mouthpiece for the interpretation of EU law, national courts can still distort or even override a CJEU judgment when applying it to the facts, having the final say in the determination of the law in regard to a particular dispute, at least at the national level.[115]

Due to their crucial position, national courts had to be mobilised by the CJEU to make use of the preliminary procedure in the early years of European integration, in order to establish a constructive relationship. The most subtle step the Court took was to adopt a welcoming and accepting stance in terms of answering the questions referred. In the past, the Court even organised seminars for national judges, to acclimatise them with EU law and its functions.[116] Keeping its interaction with national courts in check was a priority for the Court, reflecting the power relations at play in the examined field. These relations depend on the national court, and even on the national judge(s) adjudicating the case, as well as on the particular context of a dispute. There have been interactions leading to *Taricco*, but also instances where detailed guidance or output judgments were perceived by some national judges as assisting them in the determination of the law, despite criticisms about blurring the lines between the formal division of functions under Article 267 TFEU.[117]

A more assertive power move by the Court was the declaration of its normative authority to determine the law 'over national courts, national law, and the interpretation of the EU treaties'.[118] By conceiving a quasi-precedent effect for its judgments in *Da Costa* and *CILFIT*, the Court can now use its case-law as a yardstick.[119] The Court's overarching approach certainly shaped its relationship with lower courts, which have been perceived as receptive to the preliminary reference procedure, at least insofar as making use of Article 267 TFEU is concerned.[120] Of course,

[112]T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' 40 (1) (2003) Common Market Law Review 9, 22–3.

[113]See Passalacqua and Costamagna in this special issue.

[114]Although that is not always without interference by the CJEU, which can engage in reformulation, ranging from stylistic to substantive.

[115]Even in Costa v ENEL the Italian magistrate partly rejected the reasoning of the Court. See: M Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' 21 (3) (2012) Contemporary European History 375, 394.

[116]Schepel and Wesseling (n 48) 178.

[117]Yet, the Court remains cautious not to overstep the boundaries and openly push for a resolution in a pro-integration way. G Davies, 'Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context' 19 (1) (2012) Journal of European Public Policy 76.

[118]CJ Carrubba, M Gabel and C Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' 102 (2008) American Political Science Review 435, 436.

[119]Lasser (n 69) 109.

[120]W Mattli and A-M Slaughter, 'Revisiting the European Court of Justice' 52 (1) (1998) International Organization 177.

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reasons behind the receptiveness of lower courts could be attributed not to a power imposition by the CJEU in the examined field formation, but to pressure by other interested parties to activate the field, like the so-called Euro-lawyers,[121] or by power struggles in the national legal field. The latter inevitably influences the predisposition and capital of national courts in the European legal field.

Higher national courts, particularly supreme or constitutional courts, arguably possess higher status in national legal fields, something that they try to capitalise on in the field formation of the preliminary reference procedure. As courts against whose decisions there is no further remedy, they tend to be under an obligation to make a preliminary reference. However, that obligation is not clear, meaning that by classifying a matter as an issue of application in lieu of interpretation, they retain some discretion as to whether they will refer or not.[122] They can also avoid such an obligation by arguing that the matter in question falls within the *acte clair* doctrine. That way higher national courts can choose whether to activate the field or not, with limited repercussions, mainly of theoretical nature, if they ought to have initiated a reference.[123] Having said that, higher national courts nowadays dominate in sending preliminary references to the CJEU.[124]

Their increased engagement with the CJEU does not negate the growing instances where apex courts of certain jurisdictions openly dispute the Court's authority as the final arbiter in the interpretation of EU law.[125] Although there are different underlying motivations for doing so,[126] the fact remains that such situations are the most obvious examples of open confrontation between two actors within the field in order to have the final say on the determination of the law. These events showcase how national courts can be 'both allies and a source of resistance and restraint' in their interactions with the CJEU in the social space of the preliminary reference procedure.[127] National courts do not take on a predetermined role based on their legal position in the process, but have, similar to the rest of the actors in the social space of the preliminary reference procedure, their own agency to shape the practices and norms of that space.

The interaction between the national referring court and the CJEU has often been portrayed as a dialogue, which seems to denote relative parity in the capital and power relationships between the two. More recent empirical analyses have contested this portrayal. National courts have a key role in activating the field, and in setting the tone for the potential determination of the law through their order for reference, but once the latter is sent, their power to influence the power struggles is limited. They are no longer active players in the field, but 'spectator[s] for the remainder of the proceedings'.[128] The position of the referring court once a reference has been sent is partly determined by the Treaty architecture, applicable legal framework and judicial practice, with limited opportunities for it to change this predicament, other than to valorise its argumentation in the order for reference. Although studies showed that referring courts tend to exert only a modest influence on the CJEU, they play a more pivotal role in the determination of the law if their reasoning is more thorough.[129] It might be that when it comes to the performative

[121]On the intransigence of lower court judges to make references and the role of lawyers behind the rise of legal integration see: Pavone (n 2).

[122]Davies (n 117) 79.

[123]Although see more recently: C-416/17 Commission v France (2018) EU:C:2018:81.

[124]A Dyevre, M Glavina and A Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' 27 (6) (2020) Journal of European Public Policy 912.

[125]See more recently the German Federal Constitutional Court's PSPP judgment (2 BvR 859/15), the Polish Constitutional Tribunal's ruling in case K 3/21, and the Romanian Constitutional Court's Decision No. 390/2021.

[126]JA Mayoral and M Wind, 'Unleashed Dialogue or Captured by Politics? The Impact of Judicial Independence on National Higher Courts' Cooperation with the CJEU' 29 (9) (2022) Journal of European Public Policy 1433.

[127]M Pollack, 'Learning from EU Law Stories: The European Court and Its Interlocutors Revisited' in Nicola and Davies (n 96) 588.

[128]A Wallerman Ghavanini, 'Mostly Harmless: The Referring Court in the Preliminary Reference Procedure' 47 (3) (2022) European Law Review 310, 313.

[129]*Ibid*., 322.

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stage, the CJEU would rather pay more attention to insider players, hailing from its own institutional architecture. Of course, national courts' post-judgment practices can still influence the effectiveness of the judicial decision-making process.

The fact that once a reference is sent the national court takes on the role of spectator means that framing the preliminary reference procedure as a dialogue between judicial peers is debatable. Instead, approaching it as a field, a social space with a distinct matrix of power relations among judicial and non-judicial actors, is advisable. Indeed, after the order has been sent, parties other than the national courts, such as the litigants and their lawyers, but also EU institutions and the Member States, are given many more opportunities to share their views on how the law at stake shall be determined.[130] At the same time, the capital accumulation of each of these actors varies, which is going to be reflected in the extent of their influence in the field. Having the financial and symbolic backing of an EU institution or a Member State, certainly puts some actors in more privileged position than others.

Litigants, although *prima facie* of limited importance due to an ostensibly weak position of power within the field, have on second thoughts an important role to play, in that they are the ones who give the Court as well as the other actors in the legal field the chance to determine the law, by bringing their cases to justice. Private litigants are almost absent from other field formations in the judicial arena, given the limited standing rules in the annulment action, and the Commission's quasi-monopoly in the infringement procedure. Instead, the Court's transformation of the preliminary reference procedure into the main private enforcement route, itself the outcome of actions by private litigants, gave the latter some role to play in the examined field.[131] They are the ones giving the national court the opportunity to activate the field, even if unwittingly at times.[132] Overall, their position in the legal field tends to be limited, due to structural impediments to access to justice that the less privileged among them face, especially in cases pertaining to EU social law.[133] As one-shotters, who – without their legal representatives – often lack the understanding of the language of the field, their capital is lower than that of repeat players, like the EU institutions, resulting in a limited influence over the determination of the law.[134] Their position can improve by teaming up with collective actors and/or having aligned interests with other actors within the field.[135]

Coalitions of actors were key in promoting a particular interpretation of the law in the legal field of the preliminary reference procedure. Dehousse notes that the latter 'fostered a kind of indirect alliance between the private litigants and pro-integration forces'.[136] One such force has traditionally been the Commission, which, from the beginning of the European project, adopted a long-term, patient approach through the interactions of its Legal Service with the Court.[137] Indeed, the Commission has been consistently viewed as an influential actor regarding the determination of the law in the field, more so than the Member States.[138] Furthermore, the Commission's Legal Service played an influential role leading up to the constitutional judgments of the CJEU in *Van Gend en Loos* and *Costa v ENEL*, but also beyond, in establishing a pro-integration legacy among legal academics and practitioners.[139]

[130]J Hoevenaars and J Krommendijk, 'Black box in Luxembourg: The Bewildering Experience of National Court Judges and Lawyers in the Context of the Preliminary Ruling Procedure' 46 (1) (2021) European Law Review 61, 62. See also Passalacqua and Costamagna in this special issue.

[131]KJ Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' 52 (1) (1998) International Organization 121.

[132]Hoevenaars and Krommendijk (n 130) 69.

[133]Alexandris Polomarkakis (n 7).

[134]Hoevenaars and Krommendijk (n 130) 66, 70–1. Sometimes, they can even be completely absent like in Case C-189/14 *Chain v Atlanco Ltd* EU:C:2015:432. See also Passalacqua and Costamagna in this special issue.

[135]Alexandris Polomarkakis (n 53).

[136]R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Palgrave 1998) 47.

[137]MA Pollack, 'The New EU Legal History: What's New, What's Missing?' 28 (5) (2013) American University International Law Review 1257, 1280.

[138]Hoevenaars and Krommendijk (n 130) 67.

[139]Rasmussen (n 115).

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The pro-integration disposition of a number of actors in the examined field formation, arguably left its mark to the latter's power dynamics. Insider actors of the Court, its judges and Advocates General, shared that pro-integration feeling, which could overshadow their individual preferences.[140] The coalition of pro-integration actors surrounding the Court is commonly referred to as Euro-lawyers. Euro-lawyers are 'professionals of interdependence, positioning themselves in and between each of the constitutive poles of the emerging European polity'.[141] Not only did they instil that pro-integration sentiment to each other through their interactions, but by moving from one actor to the other, they were also able to spatially approximate their positions within the legal field in question. The emergence of Euro-lawyers elevated support of European integration to a value that was shared among a number of actors within a field, affecting their interactions, and uniting them in pushing for a common determination of the law, at least in broad terms. Successful strategic litigation on the basis of EU non-discrimination law shows coalition-building and constructive interactions among a range of actors in the field, namely the CJEU, private litigants, and the referring court.[142]

Finally, the role of the Member States should be touched on. Although more active in other manifestations of the CJEU's legal field, they have an important position within the preliminary reference procedure, as repeat players. First, Member States can intervene in all actions before the Court, including the preliminary reference procedure, and make their view on how the law at stake shall be determined clear, potentially siding with one of the parties, thus empowering the latter's position in the field. This is something they availed for themselves when they had decided on their viewpoint on the specifics of EU law as a legal field. Second, if the determination of the law that is laid down in the Court's judgment is not to their liking, they can contain the effects of the judgment by taking appropriate action, usually at the national level,[143] but at times also at the supranational level through follow-up EU rules and policies.[144] These attempts have led to shaky interactions with the Court, taking turns in adjusting the determination of the law.[145] Third, although rather subtly, the Member States' involvement in the appointment process of key figures within other actors in the field, such as the members of the Court, or the director and deputy-director of the Commission's Legal Service, and which is based on a combination of political, bureaucratic and judicial considerations, might end up playing some influence in the preferences of these actors, albeit not an overpowering one.[146] More recently, Member States' increased engagement and co-ordination have upped their prominence as a powerful actor in the field, being potentially involved in many of the social processes taking place therein.[147]

Action for annulment

Compared to the preliminary reference procedure, the annulment action, laid down in Article 263 TFEU, seems to constitute a more straightforward, if not narrower, field formation. The scope of the determination of the law is more limited compared to the preliminary reference procedure, in that a judgment can only deal with the validity of the EU law provision at hand. The context of the field is almost exclusively European in nature. Unlike the preliminary reference procedure, national courts are absent. There are also further legal constraints that limit the position of certain

[140]Schmidt (n 81).

[141]A Vauchez *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 104.

[142]RA Cichowski, 'Women's Rights, the European Court and Supranational Constitutionalism' 38 (2004) Law & Society Review 489.

[143]L Conant, *Justice Contained* (Cornell University Press 2002).

[144]Pollack (n 127) 597.

[145]A Arnull, 'Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law' 31 (5) (2007) Fordham International Law Journal 1174.

[146]Vauchez (n 3) 137.

[147]See Passalacqua and Costamagna in this special issue.

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actors, and shape the power relations among them. For example, the distinct standing rules that group different types of applicants in privileged, semi-privileged and non-privileged applicants acts as a system of access rules to the field. Moreover, the role of the defendant cannot be taken by actors outside of the EU institutions, adding a degree of predictability in the power relations of this field formation.

Despite the limitations to the structure of the field formation posed by the legal framework in place, the Court retains a powerful position, at least insofar as the semantics of the determination of the law are concerned. It is the actor that will formally declare the validity or not of a provision. Not only that, but the Court enjoys discretion in the interpretation of the admissibility conditions for an annulment action, being essentially able to tweak the scope of the legal framework in place. This discretion has been reflected in the interpretation of what constitutes a reviewable act by the Court, further showcasing how it can also determine the law incidentally in the context of a dispute,[148] with broader ramifications for the European project.[149]

The Court has exerted considerable influence in the position, or entry even, of other actors in the social space of the action for annulment. This refers predominantly to its interpretation of the standing rules. Although these rules are crystalised in the text of the Treaties, the inclusion of abstract concepts, such as those of direct and individual concern for the standing of non-privileged applicants, or, prior to the Lisbon reforms, the lack of reference to the standing of key EU institutions like the European Parliament, have provided the Court with additional interpretative capital. They also allowed for practices by various actors to shape the field. Perceptions regarding a potential actor's position in the field formation at issue could motivate the Court to act in a particular way. Those perceptions feed into the practices or social processes of the field. For example, there is an underlying assumption that private litigants seeking to challenge the validity of EU law would tend to harbour anti-integration views, which run counter to the Court's pro-integration agenda.[150] An alternative formalistic take views the Court as siding with the Member States' stance in relation to the limited standing of private litigants, as reflected in the text of the Treaties.[151] Through the determination of admissibility, the Court has a considerable say on the degree of participation of an actor to the social space in question. Accordingly, it seems to enjoy a more powerful position compared to the preliminary reference procedure, alluding to the procedural centrality of the action for annulment early in the European project.[152]

The Court might have held the upper hand in the determination of these abstract concepts or the filling of the lacunae that existed. From a reflexive point of view however, in its deliberations, the Court is also influenced by other actors through the submissions of the parties to the case, or by other considerations of the power relations between actors within both the specific but also other European legal field formations. For example, it was argued that the Court paid due attention to the norm of institutional balance when it facilitated the European Parliament's standing.[153] The same case was also seen as 'the starting point of a broader judicial enquiry into the appropriate place for the European Parliament as an actor in annulment proceedings'.[154] As such,

[148]Eg Case C-294/83 *Parti Ecologiste 'Les Verts' v European Parliament* EU:C:1986:166. See also: G Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: A Plea for a Liberal-Constitutional Approach' 16 (3) (2020) European Constitutional Law Review 466.

[149]B de Witte, 'The Role of the Court of Justice in Shaping the Institutional Balance in the EU' in J Mendes and I Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018) 153.

[150]H Rasmussen, *The European Court of Justice* (GadJura 1998) 198.

[151]A Arnull, 'The Court of Justice Then, Now and Tomorrow' in M Derlén and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart 2018) 3.

[152]Ever since the Coal and Steel Community, and under heavy influence of French Administrative Law. Krenn (n 80) 2010.

[153]In Case C-70/88 *Parliament v Council* EU:C:1990:217. For more see: de Witte (n 149), 148–9.

[154]T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018) 139. Note that Horsley argues that the Court could be seen as going against the collective will of the Member States in this case.

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the judgment in that case can be framed as an attempted judicial determination of the power relations in the field formation at stake.

Another, possibly the main, power struggle in the legal field formation under examination, takes a triangular form and is comprised of the EU institution that adopted the act whose validity is questioned, the CJEU and the applicant of the case. The nature of the action for annulment makes the starting positions of both the applicant and defendant about the determination of the law pretty much settled. The applicant seeks to determine that the provisions of the EU law at issue are invalid, whereas the defendant institution states that they are valid. Their respective interactions with the Court and each other are crucial in terms of determining the outcome of the case, as well as the social processes that would give rise to the latter.

The most common applicants are the private litigants, followed in equal measures by the Member States and other EU institutions, while the most common defendant is the Commission.[155] This renders the field both a 'forum for interinstitutional debate' and a regulatory 'complaint board'.[156] The power struggles underpinning each triangular relationship are bound to influence the determination of the law. When both parties are EU institutions, then the Court becomes a quasi-arbitrator of the power relations between them.[157]

The possibility of appeal is another distinctive feature that further complicates the dynamics amongst the actors of this particular legal field. The positions of defendants and applicants can become interchangeable, with appeals casting doubt on the credibility of the determination of the law by the General Court. This bring the institutional field formation, which was discussed earlier, to the fore. The two-tiered adjudication in the context of the action for annulment creates a hierarchy among the two formations of the CJEU, putting the Court of Justice above the General Court. Whenever an appeal is sought, tensions internal to the CJEU are bound to surface, with the judicial arena providing insights into the power relations within the Court's institutional social space.

On a different note, mobilisation has been shown as key in terms of empowering an applicant's position. Indeed, Member States take on a much more active role in the action for annulment, compared to the preliminary reference procedure or the infringement procedure, in fact activating the process leading to the determination of the law.[158] There are a number of reasons why Member States could initiate an annulment action. First, an annulment action can point to power struggles with the Commission relating to how it exercised its competence or merely because of fractured relations and lack of trust towards it. Second, it can point to power struggles with fellow Member States as part of the law-making function of the Council. Third, an annulment action can act as cover up for the misapplication of EU law by the Member State bringing the action.[159]

Financial incentives are a big reason for activating the field, often leading to Member States challenging the Commission's decisions about funding allocation.[160] By activating and engaging in this field formation, Member States do not only aim at influencing the determination of the law, but also their relationships with their peers, often maintaining pre-existing political divides.

Aside from that, annulment actions initiated by Member States, or other parties, can more easily reveal the synergies existing among actors in the field. For example, in regard to the emergency scheme for compulsory relocation of asylum seekers within the EU, despite Slovakia and Hungary arguing that the decision-making process leading to the scheme went against the

[155]C Adam, MW Bauer, M Hartlapp and E Mathieu, *Taking the EU to Court* (Palgrave Macmillan 2020) 13–4.

[156]H Schepel and E Blankenburg, 'Mobilizing the European Court of Justice' in De Búrca and Weiler (n 1), 9

[157]Horsley (n 154) 156.

[158]C Adam, MW Bauer and M Hartlapp, 'Judicial Control of the Guardian – Explaining Patterns of Governmental Annulment Litigation against the European Commission' in J Ege, MW Bauer and S Becker (eds), *The European Commission in Turbulent Times: Assessing Organizational Change and Policy Impact* (Nomos 2018) 87.

[159]*Ibid*.

[160]MW Bauer and M Hartlapp, 'Much ado about Money and How to Spend It! Analysing 40 Years of Annulment Cases against the European Union Commission' 49 (2) (2010) European Journal of Political Research 202.

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rules regulating inter-institutional relations, the Court followed its long-standing approach not to intervene when there was agreement among the EU institutions involved.[161] The power relations in the field are telling, with the minority Member States in the political field maintaining a minority position in the legal field as well.[162]

More recently, a new rise of authoritarian-motivated actions for annulment in the context of the rule of law conditionality emerged, introducing a new norm that may influence the power relations within the legal field.[163] Drawing on previous research about Member States' motivations for making use of Article 263 TFEU, new value-based relationships within the legal field may not intend to take control of the determination the law, but to win concessions at fields outside of the one in question, primarily at the national level.[164] That way, Member States might activate the legal field, but their objective relations are such that do not posit them in an active struggle with that field's other actors in order to determine the law. Instead, annulment actions, in these circumstances, 'are part of the struggle about money, policies, competences, and votes in the emerging multilevel political order of the European Union'.[165] In other words, there is spillover with other legal and political fields.

Actions for annulment could also end up in a more complicated matrix of the social space than it first appears to be. Mobilisation at the national, and even regional level, could hint at a number of actors, who are hidden behind the overt ones that comprise the formal applicant of a case. Digging deeper, the *Spanish Coal Case* is a clear example of complicated litigation structures and strategies at the national level, and of the covert, yet still important role, unseen actors can take in affecting the power relations in the legal field.[166] How powerful an applicant or defendant is in the field continuum also depends on the support they have from others, which might not be apparent from merely looking at the parties to a case. For a series of non-privileged applicants, those that are not excluded from the strict standing rules in place in the field, annulment action is a last resort to obtain redress for what is perceived as undue EU interference.[167] Adopting contextual, socio-legal and empirical approaches when discussing CJEU case-law is, thus, essential from a field theory perspective.

Infringement procedure

The third, and final, type of action conceptualised as another social space of the CJEU as a legal field is the judicial stage of the infringement procedure against Member States for failure to comply with EU law, laid down in Articles 258–260 TFEU.[168] It is the most constrained social space of the three due to the rather prescriptive nature of the legal framework, which heavily dictates the positions and relations between the actors. It even dictates the actors that dominate

[161]Cases C-643/15 & C-647/15, *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:631; B de Witte and E Tsourdi, 'The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council' 55 (5) (2018) Common Market Law Review 1457, 1493.

[162]See also A Wallerman Ghavanini in this special issue.

[163]Most recently in: Cases C-157/21 *Poland v Parliament & Council* ECLI:EU:C:2022:98 and C-156/21, *Hungary v Parliament & Council* ECLI:EU:C:2022:97.

[164]C Adam, MW Bauer and M Hartlapp, 'It's Not Always about Winning: Domestic Politics and Legal Success in EU Annulment Litigation' 53 (2) (2015) Journal of Common Market Studies 185.

[165]Adam et al (n 155) 189.

[166]Case T-57/11 *Castelnou Energía v Commission* ECLI:EU:T:2014:1021. See also: Cases T-778/16 and T-892/16 *Ireland and others v Commission* ECLI:EU:T:2020:338 and at the time of writing pending appeal to the Court of Justice. For more see: *Ibid*., 1–4 and 147–8.

[167]*Ibid*., 3–4. For an interesting example see the Sharpston Affair: T-180/20 *Sharpston v Council and Conférence des Représentants des Gouvernements des États members* ECLI:EU:T:2020:473 and C-684/20 P *Sharpston v Council and Conférence des Représentants des Gouvernements des États members* ECLI:EU:C:2021:486.

[168]There are also other direct actions, such as the action for failure to act (Article 265 TFEU) and for damages (Art 268 and 340 TFEU), these have been omitted from the analysis for reasons of economy of space, since they are rarely used.

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the social space, namely the Court, the Commission and one or more Member States, although it is their interactions that shape the practices of that space.

There is not much discretion enjoyed by the Court to interpret the legal framework of the field, being restricted to determining the law in the context of the actual dispute. The dispute here has two levels, which do not have to be exhausted. The Court may thus only issue a declaratory judgment that a Member State has indeed failed to comply with EU law.[169] It is only if the Member State continues its non-compliance that the Court may issue a second judgment imposing a lump sum or penalty payment.[170] The determination of the law in the former rests on whether a Member State has failed to fulfil its obligations under EU law, and, in the latter, whether the Member State failed to comply with the declaratory judgment, and if so, whether financial sanctions ought to be imposed.

The determination of the law in the context of the infringement proceedings may appear limited as to the options available, but it still has powerful ramifications, symbolically and financially for the Member State concerned. From a field perspective, it also remains the outcome of social processes and practices. An actor that enjoys a prominent position in this context is the Commission. As the guardian of the Treaties, the Commission is central to the infringement procedure, and its only upon its suggestion that judicial proceedings can commence, or reach the second stage, in this context. If it chooses to do so, then it is likely that the Commission and the Court will be on the same side of the field, given the former's institutional proximity to the latter, and their overall shared pro-integration values.[171] Indeed the Court tends to follow the Commission's suggestions.[172]

Not only that, but when assessing the Member States' defence, the Court is likely to appear generous towards the EU institutions.[173] The rule of law crisis has shown how coalitions among EU actors in the political field are reflected in the uniform position of such actors in the judicial field too. Accordingly, the power relations in this field formation seem to be relatively static, usually consisting of a power struggle between the Member States on the one hand, and the other EU actors, including the Court, on the other.

Notwithstanding the foregoing, the Commission enjoys discretion as to when, if at all, and how far it will go in the course of the infringement procedure. Its interactions with its main antagonist in the examined field, the Member States, vary for a number of reasons and take place in an undisciplined manner, highlighting the relevance of social interactions and processes.[174] Consequently, the objective relations between the Commission and the Member States are shaped already before they emerge as actors in the legal field. In fact, the power dynamics between them prior to the judicial stage are what operationalises the legal field. Not only that, but the Commission also strategises the use of the judicial stage, depending on how confident it is that it will keep control of the determination of the law in the field.[175] Maintaining allies, or allocating resources to other legal fields are other possible reasons for the Commission's selective approach.[176]

[169]Art 260(1) TFEU.

[170]Art 260(2) TFEU. Unless the non-compliance refers to lack of implementation of a Directive, in which case the Court may impose a financial sanction alongside its declaratory judgement according to Art 260(3) TFEU.

[171]Schmidt (n 81) 34.

[172]G Falkner, 'Fines against Member States: An Effective New Tool in EU Infringement Proceedings?' 14 (1) (2016) Comparative European Politics 36, 42.

[173]See Wallerman Ghavanini in this special issue.

[174]M Hartlapp and G Falkner, 'Problems of Operationalization and Data in EU Compliance Research' 10 (2) (2009) European Union Politics 281, 296–7.

[175]Conant (n 143) 75.

[176]M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' 24 (3) (2017) Journal of European Public Policy 321, 323–4.

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More generally, the Commission can strategise the use of the infringement procedure in order to exert influence in other fields. By pushing its own determination of the law forward in numerous infringement proceedings, the Commission has in the past laid the groundwork for initiatives in policy fields, such as legislative proposals on the subject-matter of the clustered proceedings.[177] Similarly, when the power relations in a particular formation of the judicial arena go sour (eg, in the form of non-compliance by Member States whose annulment action failed) they can end up activating another field formation (eg, infringement proceedings against the non-complying Member States), which takes over and maintains the same tensions in the power relations among the actors involved. This is yet another sign of the interrelatedness of the social spaces forming part of the broader European legal field, and especially those reflecting the Court's judicial arena.

On the other side of the struggle are the Member States, against which infringement proceedings commence. The commencement of such proceedings, together with the activation of the judicial arena, showcases the confrontational relations between them and the Commission as key actors of the legal field. It also assumes that informal bargaining between the two has failed, the Member States not being able on such occasions to exert considerable influence on the Commissioners' voting patterns.[178] Coupled with the Commission's discretion over the infringement procedure, the power relations between the two, therefore, originate in the pre-infringement stage, marking their positions in the judicial stage of the legal field as a result.[179] Reaching the judicial stage is a testament to two distinct worldviews on the determination of the law, and to a persistent, if not wholly genuine, non-compliance and resistance by the Member State concerned.[180]

This resistance by a Member State and adherence to its own determination of the law, has meant that occasionally a Member State may continue its non-compliance, despite the existence of CJEU rulings to that effect.[181] A recent trend of disregarding CJEU judgments in this context has risen in relation to the rule of law crisis in Hungary and Poland, where the authority of the judgments was not contested, yet the Member State pursued a strategy of delaying or avoiding compliance altogether.[182] The foregoing discussion showcases the complexity of relations amongst stakeholders at the national level. Together, they constitute and direct the behaviour of the Member States as actors in the legal field.

Article 259 TFEU as part of the infringement proceedings swifts the relations between the actors of the legal field. By allowing a Member State to bring an action against another, even if the Commission finds no breach of EU law or refuses to intervene by not issuing a reasoned opinion,[183] the Article changes the legal field to one of inter-state disputes, wherein the Commission takes the back seat.[184] That way the Member States initiating the proceedings can continue and bring their case before the CJEU, because they wish to circumvent the Commission's complacency, or, more often than not, because they are motivated by political reasons.[185]

[177]Schmidt (n 81) 124.

[178]SK Schmidt, 'Only an Agenda Setter? The European Commission's Power over the Council of Ministers' 1 (1) (2000) European Union Politics 37, 52–3.

[179]Or, as mentioned in the preceding paragraph, in tense power relations over the determination of the same law that arose in another field formation.

[180]HAD Mbaye, 'Why National States Comply with Supranational Law: Explaining Implementation Infringements in the European Union, 1972–1993' 2 (3) (2001) European Union Politics 259, 267.

[181]M Blauberger, 'National Responses to European Court Jurisprudence' 37 (3) (2014) West European Politics 457; TA Börzel, T Hofmann and D Panke, 'Caving in or Sitting It Out? Longitudinal Patterns of Non-Compliance in the European Union' 19 (4) (2012) Journal of European Public Policy 454. This happens even if financial sanctions are imposed. See: Falkner (n 172).

[182]RD Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' 79 (1) (2016) Law and Contemporary Problems 117, 131–2.

[183]C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65.

[184]G Butler, 'The Court of Justice as an Inter-State Court' 36 (2017) Yearbook of European Law 179.

[185]*Ibid*., 204.

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Relying on Article 259 TFEU sends strong political signals, hence why it is only rarely used.[186] If used, Article 259 TFEU creates a legal field of evident power struggles for the determination of the law. However, the underlying political motives might distort or even omit any quest for legal determinacy by the Member State bringing the action, hampering its chances of success in influencing the other key actors, namely the CJEU.[187] It has been argued that in the context of the rule of law crisis, a different kind of power relations shall emerge under Article 259 TFEU, centred on the need to safeguard fundamental EU values, as opposed to the political whims of a Member State.[188] No matter the motivations, the practices stemming from the interaction between the Member States are the most influential factors for the determination of the legal field under Article 259 TFEU.

Of course, when Member States are discussed in this field formation, but also in others, the emphasis falls on the actions of their governments and legal services, and their interaction with other players in the field. As the rule of law crisis has quite clearly shown, domestically, in national fields, a series of other power struggles exist, be it with parts of the population, civil society or even opposition by figures occupying key institutional or public roles, eg, within national politics or the judiciary. Although not perceived as active players in the legal field formation of the Court, their actions can influence the comportment of actors within the field, by signalling tacit support for a particular determination of the law.[189]

Private individuals and interest groups are such unseen actors in this field formation. Infringement proceedings being a public enforcement route activated by the Commission (and occasionally by another Member State), means that private litigants have to rely on the private enforcement route of bringing cases to national courts and prompting the latter to activate the legal field of the preliminary reference procedure, under the so-called citizens infringement route.[190] Where that is not possible, they can mobilise the Commission to commence infringement proceedings.[191] Although their power is limited, private individuals and interest groups alerting the Commission, and the latter picking up their complaints, underscores a shared understanding of the law, whose determination is sought to be controlled via the route of the infringement procedure. The existence of Euro-lawyers, and the pro-integration orientation of the Commission's own Legal Service provide additional ammunition in the form of an increased number of smaller actors grouped together by seeking the same outcome.[192] Their interactions and power relations further empower the Commission's position, and can push the latter into making use of the judicial arena and the legal field formation at hand.

4. Conclusion

The article discussed how the CJEU can be framed as a legal field, following the footsteps of Bourdieu's reflexive sociology. It showcased, by making reference to the CJEU's institutional architecture and the three mainstream judicial avenues available in the Treaties, how the actors

[186]KL Scheppele, DV Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' 39 (2020) Yearbook of European Law 3, 100.

[187]*Ibid*., 102. Although, there have been some successful cases. For example, see: Case C-591/17 *Austria v Germany* EU:C:2019:504.

[188]*Ibid*.

[189]See also J Bornemann in this special issue.

[190]B de Witte 'The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts' in B de Witte, JA. Mayoral, U Jaremba, M Wind and K Podstawa (eds), *National Courts and EU Law* (Edward Elgar 2016) 17.

[191]Schmidt (n 81) 62–3. Although the Commission is not under an obligation to do so. For a case-study in the area of environmental law see: M Eliantonio, 'The Role of NGOs in Environmental Implementation Conflicts: 'Stuck in the Middle' between Infringement Proceedings and Preliminary Rulings?' 40 (6) (2018) Journal of European Integration 753, 755–7.

[192]*Ibid*.

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and remit of the Court as a legal field vary, arguing that, in essence, the Court is comprised of a multitude of social spaces, or, in other words, legal field formations. The preceding analysis also noted how roughly the same group of actors, the Court of Justice or General Court, other EU institutions, the Member States, interest groups, private litigants and their lawyers, interact differently depending on the parameters of the examined legal field. Their positions and objective relations are contingent on the constellation that is under examination. This finding corroborates the established view that field theory shall be used as a flexible and malleable research tool, an analytical framework of socio-legal and empirical exploration of the Court's role as a relational actor, and not rigidly transplanted from the studies in which it originated.

What determines the parameters of a legal field? In the case of the CJEU, the legal framework, in the form of the Treaties, the Rules of Procedure, the Statute, the law at issue in a dispute, all exert their influence on the remit within which the actors interact with one another in the social space under investigation. This is the reason why there were separate discussions of the inner workings of the Court as a distinct social space or legal field formation, as well as of each of the main procedures. The Commission is arguably more empowered in the context of the infringement proceedings as opposed to the annulment action, for example. Even though a legal field is used to describe the power struggles of its actors, who wish to take control of the determination of the law, the extent of that determination is also partly constrained by the architecture of the legal field at hand.

Having said that, it is crucial to understand that from a field theory perspective the legal framework and institutional architecture may impose constraints on the mechanics of a social space, but it is the interaction among its actors, reflected in their social processes and practices, that determines the final output of the legal field. These interactions are not predetermined by institutional factors. After all, even the legal framework of both the institutional and judicial arenas is the outcome of power struggles and practices of the European legal field more broadly. Field theory enables us to look beyond institutions as faceless entities, to how they are comprised by different agents, with their own agendas, and who at some point may become synonymous to their institutions or not.[193] Under field theory, one has to look at all actors, going beyond the CJEU judges for example, and draw up a complex matrix, which reflects how these interact with one another, and how they are each influenced by the micro-societies they operate in. Relatedly, the legal professionals, no matter their role, may share the same specialised language, but not the same end goals in the field, seeking different interpretations of the law.[194] They are distinct actors, with their own interests (that can be sometimes shared), whose position in the field depends on their disposition and capital.

Of course, as with any macro-level studies the article was limited to discussing the overarching legal field formations the CJEU could be framed as constituting. Micro-level studies drawing on the concept could – and should – further delimit and empirically focus on the examined social space, to highlight its distinct features and nuances. After all, each field formation can interact with other field formations, some of them hiding under the guise of an actor. The macro-level analysis of this article showcased that the Court can take on both the role of a principal and an agent. As an important player in any legal field formation, including the European legal field more broadly, and given how its inner workings can amount to a field of their own, the Court has its own agenda about how the law is to be determined. At the same time, the CJEU cannot help but be influenced by its relations with other actors in the field; it might dominate some, but in the face of other powerful actors, or a coalition of them, the power struggle can end up in the Court demoted to an agent. This is another example of how framing the Court as a legal field can be useful.

Field theory elevates the informal processes, whose dynamics end up influencing more institutionalised social spaces, such as judicial decision-making. It also 'provides sophisticated

[193]Through for example, the use of prosopography. Madsen (n 56) 401.
[194]Bourdieu (n 9) 829.

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tools for an in-depth empirical encounter with the many microcosms of the larger [European] phenomenon'.[195] Overall, drawing on field theory, and on reflexive sociology more broadly, is key to not only to demystify the interactions among the different actors of a case, but also to achieve a contextual and systematic understanding of the Court's judgments, modus operandi and position in the European legal field more broadly.

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[195]Madsen (n 54) 272.

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