

Héritier, Adrienne; Moral Soriano, Leonor

Working Paper

Differentiating and linking politics and adjudication: The example of European electricity policy

Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, No. 2001/16

Provided in Cooperation with:

Max Planck Institute for Research on Collective Goods

Suggested Citation: Héritier, Adrienne; Moral Soriano, Leonor (2001) : Differentiating and linking politics and adjudication: The example of European electricity policy, Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, No. 2001/16, Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, Bonn

This Version is available at:

<https://hdl.handle.net/10419/85125>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Gemeinschaftsgüter: Recht, Politik und Ökonomie

Preprints
aus der Max-Planck-Projektgruppe
Recht der Gemeinschaftsgüter
Bonn
2001/16

Differentiating and Linking Politics and Adjudication. The Example of European Electricity Policy

von
Adrienne Héritier/Leonor Moral Soriano

I. Introduction

This paper analyses how two disciplines, law and political science, answer similar questions in the context of policy-making. While the questions to be raised are by no means new for the two disciplines, elaborating the differences and establishing links in the ways these disciplines answer them is novel. There are numerous questions: ‘How do political and legal institutions deal with the central problems of a society within their respective remits?’ ‘How do they differ in the selection and definition of the problems that they are processing within their institutions?’ ‘By which means do they typically solve the conflicts that are inevitably linked with the attempt to solve these problems, and how do they legitimise these solutions?’ Answering these requires pointing out specific differences and complementarities; for while there are clear differences in how politics and law institutionally deal with societal problems, frequently the respective avenues for processing problems are intimately linked and mutually dependent upon each other.

The choice and definition of a problem to be dealt with in the political arena is frequently embedded in a power-driven political conflict among political groups, which can be decisively influenced by an entrepreneurial political actor; external events, court imposed decisions or problem diffusion – among other factors – play an important role, too. Emphasizing one or another aspect of a multi-faceted problem implies an important normative choice for particular policy actions to follow. The selection of legal problems by courts, by contrast, is driven by procedural rules. Indeed, when two litigants raise a problem to a third impartial actor – the judge or the arbitrator – this actor has to deal with it if the conditions concerning *locus standi*, jurisdiction, and justiciability are fulfilled. The definition of the legal problem depends on the particular perspective of the parties involved: from the viewpoint of the litigating parties, it depends on the latter's strategic interests and the outcomes the respective parties seek; from the court's point-of-view, by contrast, categorizing legal problems aims at systematizing the legal problems and the legal answers.

A legitimate solution to the conflicts in politics that unavoidably arise as the problem solution is being shaped takes place in a context of formal democratic decision-making rules. They form the background of voting processes and negotiations between the more or less powerful actors involved, who have to remain within the legal and constitutional limits.¹ In adjudication, legitimately solving a conflict is a matter of interpreting and applying existing law and justifying a decision in *legal* terms.

This rough outline of the questions posed by political science and law shows that there are differences. But there are also characteristic ways of linking the different avenues of politics and adjudication in selecting and defining problems, and in legitimately solving them. With respect to the selection and definition of problems, courts may impose problems on politics when they solve inconsistencies in the existing law and the problems that arise in politics have to be selected and defined within the parameters of valid law and the constitutional framework. Addi-

1 That is, the fact that political decisions are covered by the law and constitutional principles.

tionally, politics seeks to make strategic use of law: and in particular of litigation. That is, one of the contending parties will seek to unilaterally use the judicial procedure to obtain an outcome serving her objectives.. So, if the political arena is in a state of deadlock, an attempt is made to shift the arena, in the hope of obtaining a favourable ruling through adjudication or in the hope of at least breaking up the gridlock and pressuring the interacting political partners to make concessions. By contrast, the judiciary claims not to take political concerns into account when legally processing a conflict. Yet it has to be aware of its political environment. Legally processing a problem simultaneously consists in two things: the judge's attempt to solve the particular conflict raised by the litigants, *and* his attempt to elaborate a ruling in such universal terms that it can be applied to similar cases in the future, and fit together with the set of common values (principles and goals) shared by the community. Once the problem has been legally solved, the ruling has political repercussions, especially concerning the distribution of competences, or the requirements to be met when elaborating certain policies.

In this article we will try to systematically show what differentiates and what links politics and adjudication in problem selection and problem definition as well as legitimate conflict solution. More specifically, we will raise these questions in regard to decision-making processes in European electricity policy, that is, in regard to the liberalization of energy markets.

II. Problem Selection and Definition

In this section we argue that problem selection and problem definition in politics and adjudication differ at two levels: with respect to the source of the problems to be dealt with and with respect to the procedure for defining the problem at hand. In politics there are multiple sources of 'policy problems-to-be', and there is a lot of latitude regarding whether to incorporate them into the political agenda or not. Factors that play an important role in problem selection and definition are for example: the political pressure of powerful groups and actors, external events, and the diffusion and imposition of problems by courts. In adjudication, by contrast, there are only two sources: a litigant party can appeal to a court or address a preliminary question to the European Court of Justice (the Court hereinafter).

In politics the process of defining the problem is part and parcel of political conflicts among actors with different goals. It evolves as a collective process, while in adjudication problem definition confronts the individual litigant and the court against the background of two different rationales: While the litigants seek a strategic advantage, the courts seek problem solution, with an interest in the consistency and coherence of the legal system.

While there are clear differences, there are also links. Courts force political decision-makers to deal with particular problems; and political decision-makers seek to use court rulings to enhance their own position in political contests.

1. Selection and definition of problems in the political arena

Political decision-makers have a lot of latitude in selecting and defining the problems that are subsequently to be dealt with in the political decision-making process. At any point in time a perplexingly large number of issues are competing for the attention of political decision-makers. Hence, the attempt to gain access to the political agenda is highly contested. The following factors are the most important in determining which problems are treated and how they are defined: powerful collective actors may seek to pressure political decision-makers to deal with a problem they are concerned about or to bring a case to court; a policy entrepreneur may take the initiative and organize a supportive coalition in order to put an issue onto the agenda; competition between bureaucratic units eager to expand their territory may influence the selection of a problem; external events creating an atmosphere of crisis may pressure politicians to act; a problem may make it onto the policy-making agenda at regular intervals and consequently have to be dealt with routinely; diffusion may also play a role (that is, problems might be selected as problems by one political body because other political bodies have selected them, too); and, finally, courts may force politicians to take up an issue.

Several of these factors came to bear in selecting and defining energy policy as a problem to be dealt with at the European level. Powerful collective actors, industrial users, and political sub-units (that is, particular member states) exerted pressure to put energy policy on the agenda. A policy entrepreneur, the Commission, played a crucial role in liberalizing the energy markets. The sense of crisis existing after the oil price shock exerted influence. The diffusion of the idea of market liberalization from other sectors and countries played a role. In addition, from the very beginning, in an effort to make Member States lift their import and export monopolies and increase their willingness to envisage a general European energy-market liberalization policy, some Member States were threatened with legal proceedings.

More in detail, the Commission – which, with its right of legislative initiative, is the policy entrepreneur par excellence in Europe – played a crucial role in selecting and defining the problem. Under the general impact of the liberalization philosophy in Western democracies and the 1985 Single Market Programme, it moved step by step to incorporate more and more public sectors into the Single Market Programme. This was reflected in the fact that the energy problem was selectively defined as a problem of market liberalization. Other aspects of energy policy could have been emphasized, such as the security of provision or aspects of research and technology, the environmental sustainability of energy provision, or trans-European network infrastructure, etc. (Schmidt 1998, 191; Matlary 1996), but the emphasis was clearly on dismantling state and regional monopolies and creating network access for providers and users. After the Council had formulated the general goal of a European energy policy in 1986 (Schmidt 1998, 191), in order to offer industrial users and transmission and distribution enterprises direct access to the resource, the Commission put forward a White Paper that aimed at an integrated European energy market in electricity and gas (Eising 2000, 200; Matlary 1996). This proposal went much beyond what the Council had asked for. The White Paper called for the realization of the Single Market

Programme in the energy sector, and asked the Commission to resolutely apply Community law and to achieve a satisfactory balance between energy provision and environmental protection.

In order to select and define the liberalization of the energy markets as a problem for European policy, the Commission sought to gain the support of powerful actors, in particular the large industrial users, and Member States in favour of opening up network access, specifically France and Britain. France supported the step because it wanted to export its over-supplies of electricity (resulting from its nuclear power plants); legal aspects of the application of competition law also played an important role. France had brought a complaint to the Commission because Germany, with its coal subsidies (*Jahrhundertvertrag* and *Kohlepfennig*), reduced France's possibilities for exporting electricity. It also drew the Commission's attention to the fact that Spain was preventing energy exports to Portugal by prohibiting transmission (Schmidt 1998, 193). The Commission had already brought infringement procedures before the Court. Britain welcomed the Commission's programme because it had already embarked upon liberalization (Schmidt 1998; Eising 2000).

Diffusion also played an important role in shaping the definition of the problem and the agenda. The idea of market liberalization was carried over from other sectors, in particular telecommunications, and other countries, such as the United States and New Zealand (Eberlein 1998) and, in the European context, Britain. A perception of crisis, the oil crisis, increased the pressure to arrive at a common definition of the problem and to bring the issue onto the European agenda. Already in the 70s, attempting to use the oil crisis as a window of opportunity, the Commission had sought – albeit unsuccessfully – to put energy policy on the European agenda. And when, in 1986, the falling oil prices raised concerns about the security of electricity provision, the Council asked the Commission to submit a proposal for a European energy policy.

2. Legal aspects of selecting and defining problems

A political problem may become a legal problem if the actors become litigants, that is, if a judicial action is brought before a judge or court. The selection of a legal problem by litigants is guided by both their indirect and direct strategic approach to the judicial process. The indirect strategic approach implies the use of the judicial process as a tool to alter or influence the behaviour of the litigant's opponents. For example, quite often the Commission threatens to initiate infringements procedures on Member States if they continue to fail to fulfil treaty obligations, or to transpose directives into domestic law. The threat of judicial action is part of the Commission's general strategy to persuade failing Member States to comply with European law. This approach is particularly clear in the European energy sector, where, to bring liberalization onto the agenda, the Commission sought actions against the exclusive import and export rights that Member States granted to certain electricity companies.

Even judicial procedures that lack confrontation, such as the preliminary ruling procedures, can be used strategically by the litigants.² Although they provide the national courts and the Court with a means of communication about the interpretation and validity of EC law, the litigants may ask the national court to address a preliminary question to the Court as a means of delaying the domestic judicial process. That is, the litigants may have a strategic aim when selecting a problem.

Private parties and corporate actors also have a direct strategic approach to the judicial process if they do not seek to alter or influence their opponent's behaviour, but rather at the most beneficial outcome of the process, i.e. a judicial ruling which upholds their claims. It would be fallacious to argue that the two parties seek the right answer when they disagree about how to rule a particular case and consequently pose the problem to an impartial third-party actor (the judge or the arbiter). The judge or the arbiter does aim at finding the correct interpretation and application of legal rules, but the litigants aim at obtaining a favourable outcome, and they use the confrontation structure of the judicial process for that purpose.³

Unlike private parties and political actors, the judiciary does not have leeway in selecting legal problems. Once the litigants have brought a problem to the court or tribunal, procedural rules determine whether or not the judiciary can deal with it. These rules regulate the applicant's *locus standi*, whether the matter can be subject to judicial scrutiny, and whether the judicial body has jurisdiction to solve the conflict.

At the European level, unlike political actors – and in particular the Commission – that can decide which conflicts to deal with, the Court cannot but solve the conflicts that have been posed to it if the following requirements are met: *locus standi*, jurisdiction, and justiciability. These determine when the wrongdoing can come to the Court. Similar requirements apply to preliminary questions. These have to be posed by a national court or tribunal and should concern the interpretation and validity of European law. Unlike infringement procedures against Member States, the Court may decide to send the question back to the referring court and withdraw the preliminary reference by applying the *acte clair* doctrine.⁴

While procedural rules regulate the selection of legal conflicts, they do not regulate the definition of the legal problem. This depends very much on how the parties categorize it. It is important to

2 By contrast, the national court's aim is at clarifying the interpretation of the Treaties or the validity of secondary legislation. The inter-courts relationship is one of co-operation.

3 The disparities between the litigant parties' aims – seeking the best outcome – and the judge's scope – finding the correct answer – become less obvious if the judicial process lacks confrontation. This happens when a court or tribunal addresses a question concerning the interpretation and validity of legal rules to higher courts (e.g. constitutional courts and the European Court of Justice). Indeed, when a national court refers a preliminary question to the Court, both courts aim at solving a problem concerning the interpretation and validity of European law. The preliminary ruling procedure can be seen as a cooperation process rather than a vindicating one.

4 The *act claire* doctrine establishes that when the Court has made a ruling on exactly the same point, then there is no need for national courts to request new interpretations (Bengoetxea 1993, 204). By the *act claire* doctrine the Court guarantees its monopoly in the interpretation of Community law (Bengoetxea et al 2001, 56).

bear in mind that the definition has to be put in legal terms; and that, principles and colliding interests shaping political problems might not be translated into legal terms. For example, when the Commission brought the infringement actions in the European energy sector before the Court, it defined the legal problem as an internal market problem, whereas, in the political arena, the Commission defined it as a problem of market competition.

Although it is up to the litigants to categorize the legal problem, more often than not the Court may have a slightly different approach to the legal case, and they may even rephrase the preliminary question or the legal problem posed by the appellant party: whereas the litigants conceive of the judicial action as part of a wider strategy and seek the most beneficial outcome to the judicial process, the judge defines legal problems in such a way so as to deal with the posed conflict and improve the consistency and coherence of the legal system.

In the European energy sector, there *Gas and Electricity Monopolies* cases⁵ exemplify the shift in perspective adopted both by the parties who address the Court and by the Court itself when defining the legal problem. These cases arose when the Commission brought infringement actions against the Netherlands, France, and Italy for failure to comply with EC Treaty obligations, in particular those related to the free movement of goods and non-discrimination against products. The legal problem was defined by the parties' pleas: the Commission argued that by granting certain undertakings exclusive rights to import and export electricity, Member States failed to fulfil the obligations for the free movement of goods under Articles 28 and 31 EC. The fact that the Commission did not found its actions on the infringement of competition law – more related to the liberalization of the energy markets – has been explained as strategically using the judicial process; that is, the Commission's main interest was not in the outcome, but rather in the possibility of altering the behaviour of those parties involved, i.e. in forcing them to accept the definition of the problem by permitting a judicial process. In the *Gas and Electricity Monopolies* cases, the defendant Member States argued that, in spite of the restrictions to free trade and competition, the granting of exclusive rights to import and export electricity could be justified under Article 30 EC (public security) and Article 86(2) (public service obligations, PSOs hereinafter). The Court defined the legal problem in rather systematic terms, namely in reference to whether state intervention and, in particular, granting exclusive rights to guarantee the provision of public services, should be assessed under free trade rules (Articles 28, 30 and 31 EC) or under competition rules (Articles 81, 82 and 86(2) EC). The Court classified the case as one of conflict between free trade rules and competition rules, a conflict which was giving rise to great legal uncertainty, for it was unclear whether the legality of state intervention – which affected both internal market and undistorted competition – should be assessed by the strict control imposed by the free trade rules, or by the more relaxed controls applicable in the exceptions to competition law, enshrined in Article 86(2) EC. By defining the legal problem in terms of 'competition' between two sets of rules, and by clarifying which rules apply when state intervention is justified on the

5 Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699; Case C-159/94 *Commission v French Republic* [1997] ECR I-5815; Case C-158/94 *Commission v Italian Republic* [1997] ECR I-5789.

basis of PSOs, the Court aimed at improving the consistency and workability of the European legal system.

Table 1: Problem Selection and Definition.

Problem Selection and Definition	Politics	Adjudication
Source	Multiple: <ul style="list-style-type: none"> ■ Policy entrepreneur ■ Powerful political groups ■ External events ■ Diffusion ■ Court rulings ■ <i>et al</i> 	Two: <ul style="list-style-type: none"> ■ Litigants' pleas ■ Preliminary rulings <p>Subject to conformity with procedural rules of:</p> <ul style="list-style-type: none"> – <i>Locus standi</i> – Jurisdiction – Justiciability
Process	Collective power driven process	Two rationales: <ul style="list-style-type: none"> ■ Litigants: strategic goal oriented ■ Court: consistency and coherence of legal system
Links	Political actors impose a decision agenda → Strategic use of judicial actions →	← Courts impose policy problems

III. Conflict Solution and its Legitimation

In this section we argue that legitimate decision-making differs in politics and adjudication: the source of legitimacy relevant in politics derives from democratic legitimacy and output legitimacy, but also from the legality and constitutionality of political processes. The source of the legitimacy of adjudication, by contrast, consists in legal rationality. Legal reasoning ought to satisfy two requirements: consistency (i.e. there ought to be no contradiction between supporting reasons) and coherence (i.e. strong supportive links are needed between given reasons).

Under conditions of diversity, the processes of conflict solution in politics are based on deliberation and negotiation. The processes of conflict solution in adjudication entail the interpretation and application of legal rules and the justification of judicial decisions. The political and the legal arenas also differ in that the political decision-making process can be terminated without a decision being made, whereas in the adjudication process a decision must be brought to an end. Despite these differences, politics and adjudication in legitimate conflict solution are also linked in important ways. Politics seek to use adjudication as a way of speeding up decision-making processes and of avoiding non-decision-making: In a situation of deadlock, politicians turn to courts, hoping to obtain a ruling in their favour, but also to make sure that a decision is taken at all.

1. Political aspects

In discussing political aspects of conflict solution one has to distinguish between the process of decision-making as such and the legitimacy aspects from the input- and output perspective.

From the input-perspective, the legitimacy of conflict solution in politics basically derives from different sources: from democratic decision-making – that is, the majority voting of popularly elected representatives, plebiscites by citizens, deliberation and consensus formation or negotiations and compromise-building among members of an elected body or among delegates of elected bodies. Political decisions are considered to be legitimate if they can directly or indirectly – through representatives or a democratically elected government – be traced back to the popular will.⁶ Apart from this central strand of input-legitimation based on democratic participation, there is, secondly, also a strand of output-legitimation based on the fact that a government is only considered legitimate if it is able to solve societal conflicts satisfactorily and to provide the basic conditions for the well-being of the population. Output legitimation can be enhanced if balanced expertise is used to improve the quality of legislation. However, output legitimation, as such, without input legitimation, does not suffice to provide legitimacy to a government.

There are three basic decision-making modes: voting, negotiations and deliberation. If decisions are made across governmental levels and arenas, decisions are arrived at through negotiations. Negotiations are frequently preferred to voting because they work in accord with a unanimity rule and consequently avoid minorization. The negotiation in the sense of a defence of status-quo interests may, however, be preceded by a phase of deliberation in which all parties concerned seek to propose new solutions on the basis of new information and expertise, advantageous at all.

In order to speed up decision-making processes and to avoid gridlock, the parties involved tend to turn to courts in order to gain support for the outcome they are pursuing. In other words, there is a unilateral attempt to use the judicial process. In shifting the issue to a different arena – that is, to the courts – the process will be moving again. Threats of a judicial procedure may be enough to make the negotiating partners more willing to compromise.

Looking at the political decision-making process in European electricity liberalization, two aspects are prominent: first, the strong need for consensual decision-making and respect for the Community solidarity principle under conditions in which Member States' preferences are diverse; and second, the link to competition law and the involvement of the Court sought by the Commission in order to speed up the negotiation process.

The sheer amount of time needed to bring about liberalisation is striking. It took ten years to proceed from selecting and defining the problem to making a political decision. In 1989 the Commission first proposed relatively modest measures: for example, the transparency directive to facilitate the comparison of prices in the electricity and gas markets to which the Member States

6 Under conditions of unanimity, negotiations by government representatives derive their legitimacy from the fact that none of the participants can be outvoted, and they will hence only support a decision if it does not leave them worse off (Scharpf 1999).

had relatively easily agreed in 1990; the electricity transmission directive, which was also agreed to with relative ease because it restricted itself to the introduction of cross-border trade between electricity providers. By contrast, regulation requiring utility providers to give notification of their investment decisions to coordinate national investment was not accepted in the Council (Eising 2000, 202).

When, in 1991, the Commission submitted a draft proposal to introduce competition in the national electricity sectors, it simultaneously established two expert committees:⁷ one of Member State representatives, the other of sectoral experts. Since, as shown above, the issue was defined as one of market integration, no members of environmental associations or of the DG XI (environment) were represented in the first committee. The second committee was dominated by representatives of electricity providers, but it also included representatives from consumer associations and trade unions (Eising 2000, 212). However, by making the proposals and considerations in the committees anonymous – so that the sectoral and national background of those who made the proposals were not known – the Commission introduced a decision-making style that allowed new solutions to be proposed and deliberated upon, thus facilitating the formulation of compromises (Eising 2000, 212). Its main goal was to ensure that energy users and energy distributors would be able to choose their electricity provider. A regulated transmission procedure, known as third-party access (TPA), was to guarantee access to the network. However, this proposal met with the resistance of most Member States, in particular the continental members of EURELECTRIC (European Grouping of Electricity Supply Industry), except for the British electricity providers (Schmidt 1998) and the user industry (Eising 2000, 213).

While the Commission pursued the legislative goal of market liberalisation, it also used a second, legal strategy to liberalise the market and to speed up the political decision-making process. In other words, it applied a dual-track strategy. It used and threatened to use European competition law instruments – that is, firstly, individual infringement procedures, and secondly, Commission directives under Article 86(3) EC. “There is much to be said for a dual track policy. Competition policy can be used to liberalise markets in a very effective way. Where accompanying measures are needed to facilitate liberalisation, for instance by harmonising standards, the necessary proposals can be put forward to the Council of Ministers” (Sir Benjamin Brittan, quoted in Schmidt 1998, 212). Thus, in 1991 it announced infringement procedures against the import and export monopolies in the gas and electricity sector in ten Member States (Schmidt 1998). “I will take the Member States to court, in the hope that the sector will get the message and will be prepared to enter into debate for a common policy...even if it takes time and a step by step approach to get there” (Karel Van Miert (ECE 53/15 May 1993 – cited by Eising 2000, 225 FN 87).

Determined to signal to Member States that it was serious about using the tools provided by European competition law should Member States not agree on a Community policy for energy

7 The scientific debate was quite critical of the Commission’s proposal, even the neoliberals were. They considered the transit and transparency directive and investment notification ordinance to be part of an administered European electricity market with a system directing prices and investment (Schmidt 1998:200).

market integration, DG IV (competition) sent out letters to the national governments, calling for compliance in accord with the procedure under Article 226 EC. These were timed so that the deadline expired about the time the Energy Council met in November 1992 (Schmidt 1998, 247).

The second competition path which the Commission considered pursuing – following the successful example of telecommunications policy – was to issue a Commission directive regarding the liberalization of universal services (Article 86(3) EC); in using a Commission directive it does not have to include the Council and the EP in the decision-making process. It was DG IV (competition) that proposed proceeding along these lines. DG XVII (energy), by contrast, was in favour of using the legislative route of market integration (Art. 95 EC), which includes the Council and the EP in the decision-making process. In the face of the lack of consensus about market liberalisation among Member States, and the strong opposition of the sectoral actors in the energy industry as well as the European Parliament, it was considered imprudent to simply use a Commission directive (Schmidt 1998, 213ff.; Eising 2000, 217; Matlary 1996).

Proceeding thence along the market-integration route, the Commission proposed a Community-wide competitive regime based on regulated third-party access to the network, the abolishment of exclusive rights for the construction of power plants and lines and unbundling, that is, the separation of the organization of and financial management of the production, the transmission, and the distribution of electricity in order to prevent cross-subsidies (Eising 2000, 218).

This proposal – not taking the different traditions in Member States into account – met with resistance. While most Member States in principle supported the introduction of competition, they held very diverse views on the draft directive, pointing out its incompatibility with their respective national regimes. Those with nationalised regimes, that is, France, Greece, Italy and Portugal, opposed regulated third-party access, while Ireland – envisaging a reform itself – was more favourable. Of the countries with mixed economies, Belgium, Spain, and the Netherlands opposed regulated third-party access, while Germany, Denmark and Luxembourg awaited further developments. Only Great Britain unequivocally supported the reform (Eising 2000, 220). Particularly fierce opposition came from continental sectoral associations, which pointed out that such a reform would jeopardize affordability, environmental protection and the security of provision. They basically opted to maintain the status quo. Industrial users, by contrast, supported the draft directive (Schmidt 1998).

The co-decision procedure under which the directive was decided upon implies a possible deadlock between the Council and the EP, hence it created a new need for negotiations. The responsible committee rapporteur (Committee for Energy, research and technology) was close to the views of the large national energy providers, who were keen to maintain the old regulatory regime in order to secure general interest services. This opposition from the EP, as well as from many Member States, had a mitigating effect upon the pro-liberalisation position of the large industrial users, inducing them to come up with the proposal for ‘negotiated-third-party access’ to the network. Under this concept, network owners and large industrial users and distributors negotiate the conditions of access among themselves. The Commission accepted this proposal,

issuing from the first reading in the EP, as a compromise in order to overcome the deadlock and to incorporate it into the draft directive (Eising 2000, 221).

In the meantime, however, under the threat of an impending infringement procedure and with the aim of defending the French regime in the Council negotiations, France had developed a counter-proposal, known as the 'single-buyer model' (Schmidt 1998, 235ff). In accord with this concept, the 'single buyer' is responsible for securing the provision of electricity, for co-ordinating all the system elements, and for long-term planning (Schmidt 1998, 236; Eising 2000, 234/5). This model was supported by Member States with nationalized regimes as an alternative to the negotiated-third-party access model. Belgium, Greece, Luxembourg, Spain and Italy opted for the possibility of choosing between the two models in the directive, while Germany, Britain, the Netherlands, Sweden and Finland insisted that the single-buyer model had to guarantee market access to independent producers (Eising 2000, 236).

In spite of these diverse interests, it was possible to build a consensus during negotiations in the Council, because, first of all, the general working atmosphere in the intergovernmental body of the Council is defined by diffuse reciprocity and a hesitance to put individual players into a minority position, let alone into a structural minority position. Member states are aware that they could also be a part of such a minority in the future and would thus need the co-operation of others (Eising 2000; Héritier 1996; 1999). This atmosphere has been shown to be helpful in applying fair procedures. In other words, if a Member State has to place its concerns in the context of the Council decision-making process – particularly when complex questions are at stake – preferences may be subject to change during the process (Eising 2000; in the light of the concerns of the other actors involved (Schmidt 1998, 255) as it gradually evolves as negotiations proceed. The prevalent norms of institutional and substantive fairness support this. Procedural fairness criteria are reflected in the fact that Member States often seek a consensual decision, even when they are not formally obliged to do so (Héritier 1998; 1999), so that no Member State is systematically placed into a minority position. Given the established norms of fairness and the typical mode for structuring the decision-making procedure, even in highly contested cases, the Council has shown that it can successfully process interest conflicts in multidimensional sequential negotiations.

The decision-making process is divided into multiple steps. In the brief sessions of the Council's COREPER working groups, national differences are bundled into various principally contested issues, for which compromise proposals are developed. Contested problems are separated from national positions and individual interests, allowing for a more abstract and analytic discussion of problems. This forces Member States to present their arguments in reference to the interests acceptable to other states as well (Eising 2000, 232).

Systematizing problems and underlying conflicts also helps to separate problems that are easily solved from those that are more difficult. The 'easy' problems are tackled first and then incorporated into the conclusions, which are drawn bi-annually. Thereby they become part of the 'consensus acquis' of the dossier, which is not challenged in subsequent negotiations. In this way an

incremental mechanism of negotiative progress is set into motion that proceeds from easy problems to more difficult ones. Regularly stating the achievements in the official Council creates a certain momentum which – also in view of the time and effort spent – makes it difficult to break off negotiations entirely (Eising 2000, 232).

The problems not accessible to this treatment are prepared for package deals and log rolls (Benz 1997; Scharpf 1997; Zintl 1997.); possible solutions in the form of compensation payments and flexibilization are pointed out (Eising 2000, 233).

In our empirical case, the Council decision-making process on the electricity directive, we indeed find the deliberation and negotiation techniques reflected in the decision-making process. First the generally contested problems were identified and systematized, in separation from national and sectoral positions; fair compromise principles were established; sequential processing was carried out from least contested to most contested problems, in which the ‘consensus acquis’ was periodically defined and still contested issues were identified. In the end such still contested issues were subject to compensation payments and flexibility solutions.

Given the complexity of the subject area and the fact that the electricity sectors in the Member States were themselves in a state of flux, from the beginning the preferences of the Member States were neither clear-cut nor simple (Schmidt 1998, 244); instead, they only partially emerged during negotiations, or they changed during negotiations. Because of the importance of the subject area at stake, a consensus emerged early on that solutions should seek to accommodate the interests of all states, in particular of the large players, France, Germany and Britain. Thus France and Germany decided not to let each other be outvoted.

The two proposed models – the single-buyer model and the negotiated-access model – had polarized the decision-making process. Aiming to establish objective and fair criteria for solving conflicts, the Council started out by establishing principles of reference, which were separated from the more specific contents of the discussion. The central principle that was accepted called for ‘specific reciprocity’ in opening markets (Eising 2000, 237). An expert report produced evidence that the negotiated-third-party access allows for more competition and therefore more specific reciprocity in opening markets than the single-buyer model (Schmidt 1998, 239ff; Eising 2000, 239). As a result, the Commission proposed six changes in the single-buyer model, which would have meant far-reaching changes for the Member States with nationalised regimes; it hence provoked their opposition. By contrast, however, the supporters of liberalisation did not consider them to be going far enough (Eising 2000, 240). In the periodic conclusions drawn by the Council, a juxtaposition of the two models was decided; but the changes to be required in the single-buyer model were not clearly stated. The multilateral negotiations in the Council were accompanied by bilateral negotiations between the presidency and individual Member States. This continuous process increased the willingness to come to an agreement, but it met its limits in the contrasting positions of France and Germany, reinforced by powerful sectoral actors. When the bilateral negotiations failed, the question was transferred to the European Council, where the two states signalled to sectoral interests that they had to stand back in favour of an agreement and

diffuse reciprocity (Eising 2000, 243; Schmidt 1998, 250f.). While specific reciprocity led into deadlock, ‘diffuse’ reciprocity guaranteed fairness over time and made compromise possible in an area with multiple negotiation issues and multiple negotiation partners, and in which it is not entirely clear which partner exchanges goods of equivalent value with whom (Keohane 1986). Thus the structuring of the process, the mode of incrementally securing the results and the criteria of mutual fairness made a consensus possible. While Member States first asked for specific reciprocity and ended up in deadlock, diffuse reciprocity at the next higher level facilitated compromise (Eising 2000, 243).

How was the Council decision-making process linked to judicial procedures? Has the Commission’s threat to use competition measures hastened negotiations? As mentioned in the section on problem-selection/definition, the Commission initially sought to create support for liberalization by threatening to take a number of Member States to court because of their import and export monopolies rights. Thus France was induced to propose its own model of liberalization, the single-buyer model, and some Member States changed their national legislation (Schmidt 1998, 269). However, as soon as the Council negotiations had begun, the Commission did not want to disturb the search for a compromise by pushing the individual procedures (Schmidt 1998, 268). The use of legal procedures was rendered more difficult, too, because there were not enough large users to bring complaints to the Commission (Schmidt 1998, 254). However, the pending cases facing the Court served as an incentive for Member States to come to an agreement in the Council negotiations.

2. Solving Legal Conflicts

Although the legal conflict may have been posed because of lack of agreement on the substance of a policy – e.g. liberalization of energy markets – a legal conflict does not consist of the adjudicative elaboration of this policy. Legal conflicts are thought of as discrepancies concerning how to interpret and apply legal rules; solving them in the judiciary is a matter of interpreting the law and justifying the judicial decision. Certainly, legal interpretation and legal justification pose the question of the conceptual connection between law and politics. This is not going to be dealt with here. Instead, the analysis of judicial reasoning is undertaken to better understand how the legal avenue of problem-solving differs from and is linked to the political avenue.

Interpreting or ascertaining the meaning of legal norms is more complex than simply reading the text to see what it says. Some lawyers argue that literal interpretation is crucial when dealing with juridical texts such as the European Treaties (Hartley 1999). However, these lawyers forget that there are many other valuable and equally crucial interpretative methods: historical interpretation; systemic or contextual interpretation (logical arguments,⁸ antinomy solutions, arguments from competence, etc.); and dynamic interpretation based on consequences and purposes (teleological interpretation). Indeed, the Court’s purposeful style of legal interpretation has been criti-

8 Arguments *a fortiori*, *a pari*, *ad absurdum*, *a contrario*, analogy etc.

cised by those who argue in favour of the correctness of literal interpretation over other methods. However, this criticism completely misses the core of legal interpretation: that is, the fact that the words of legal norms are not and could not sensibly be read in isolation. Legal texts are sensitive to the context; and the Treaties are an important part of this context: They are drafted in general terms; they sketch out policies and portray values that belong to the whole European constitutional enterprise (Bengoetxea et al 2001, 82).

In order to apply legal norms, they first have to be ascertained: The meaning will determine whether or not certain facts can be subsumed under the legal norm, and therefore, whether the legal norm is appropriate to rule a particular case, legal interpretation makes it possible to link the particular, i.e. the relevant features of a case, with the universal, i.e. the legal valid norm. This is the dimension of legal syllogisms: a logical-deductive structure of reasoning that links legal norms and facts in order to make the final decision.⁹

Finally, interpretation and application require justification. In interpreting and applying a legal norm, decisions have to be made. These concern the applicable rules, the validity of rules, the need to interpret, the interpretative techniques, and the establishment of facts. These sub-decisions entail choices that have to be justified; that is, reasons have to be provided to support them. The critical question is what kind of reasons have justifying power in legal reasoning. Here, a comprehensive account of legal reasons is sought, that is, an account which includes both reasons based on authority – legal norms, precedents and legal doctrine – and substantive reasons – principles, rightness reasons, and reasons based on goals. Of course, any legal decision has to be grounded on a valid legal norm; however, legal interpretation is by no means exhausted in the use of reasons based on authority. On the contrary, using only reasons based on authority will condemn law to isolation, disconnecting it from its context. Reasons can be seen as too modest a tool, however, despite their modesty. The obligation to state the reasons supporting a choice is the strongest barrier against judicial arbitrariness: Judges are held accountable on the basis of the reasons they provide in justifying a decision.

An example of how the Court uses the basic tools of judicial decision-making, namely legal syllogism and a comprehensive account of reasons, is provided by the *Dutch Gas and Electricity Monopoly* case. Both the skills of the Court and the deficiencies in its judgments can be seen in this decision.

The *Gas and Electricity Monopolies* cases concern the conformity of exclusive rights to import electricity, which Member States have granted on the basis of PSOs, under the rules for the free movement of goods – Article 28 EC (restrictions on import) and Article 31 EC (non-discrimination regarding the conditions under which goods are produced and marketed).

9 Legal syllogism (or deduction) provides the structure of reasoning. Although legal justification is not exhausted by this logical structure, it works as a negative test: if the decision does not follow from the major premises, then it can be said that the decision is not justified, at least not formally justified.

The judgment is framed around two main questions: First, which are the *applicable rules*? And second, *how should they be applied*?¹⁰ Paragraphs 10-33 focus on the first question, which is determined by the Commission's claim; i.e. the application of the rules for the free movement of goods to matters of state intervention in the public service sectors. This is the starting point of the Court's judgment. The next step is to identify the major premise, which is stated as follows: "The argument concerning Article 31 EC (discriminatory measures restricting free trade) should be examined first" (para. 12).

The Court referred to the Commission's view that granting exclusive rights to import is a discriminatory state intervention measure. There is no justification for analysing *discriminatory effects* flowing from exclusive import and export rights before analysing the *restrictive effects* on free trade flowing from these exclusive import and export rights. And yet the decision is not innocuous. Whether a state measure infringes on the free movement of goods because it restricts trade (Article 28 EC) or because it has discriminatory effects (Article 31 EC) will determine the sort of reasons that can be used to justify the restriction or the discrimination. If granting exclusive rights is found to be contrary to Article 28 EC, then Member States will rely on mandatory requirements – an open catalogue – in order to justify the restriction. By contrast, if the measure is found to be discriminatory, it can only be justified by one of reasons mentioned in the derogation clause on the free movement of goods, namely Article 30 EC.¹¹ Hence, by starting legal reasoning from Article 31 EC (rather than Article 28 EC), the Court implicitly has made two decisions: first, that non-discrimination is the touchstone of integration; and second, that state intervention is subject to the stricter judicial scrutiny of Article 30 EC.

The next step regards the interpretation of the chosen legal proviso. This interpretation did not start from scratch, for precedents provide examples of how to interpret a legal norm. Indeed, the Court referred to precedents stating the meaning of Article 31 EC – the *Manghera*¹² and the *Commission v Greece*¹³ judgments – and held that the objective of Article 31 EC would not be attained if the free movement of goods from other Member States was not ensured. Moreover, the free movement of goods is impeded by the very existence of exclusive rights since:

[E]conomic operators in other Member States are thereby deprived of the possibility of offering their products to customers of their choice in the Member States concerned (para. 23).

Once the legal proviso has been interpreted, the Court will state the law; that is, the major premise is formulated in such a manner that it covers the facts of the case. Indeed, Article 31 EC has

10 For an extended analysis of the sub-decisions that the process of judicial adjudication is made of, see Bengoetxea et al 2001.

11 Article 30 EC is the derogation clause of the obligations imposed by the free movement of goods rules. According to it, infringements of these rules are justifiable if founded on the following grounds: public morality, public policy, and public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. These grounds have been interpreted in a very strict manner by the Court to avoid transforming it in a general derogation clause that Member States can use to escape from Treaty obligations.

12 Case 59-75 *Pubblico Ministero v. Flavia Manghera and others* [1976] ECR 91.

13 Case C-347/88 *Commission v Greece* [1990] ECR I-4747.

been interpreted in relation to the exclusive import and export rights, even though it refers to state monopolies with a commercial character.¹⁴

The next step is to establish the facts. In this case, this was easy to do, for the fact that certain Member States granted exclusive import rights to gas and electricity companies was not disputed. Finally, the facts will be subsumed under the major premise in order to make the final decision. From the facts of the case and the interpretation of the discussed proviso, the Court logically concluded that granting exclusive rights to import electricity was contrary to Article 31 EC.

Despite the formal correctness of this decision, what follows in the judgment is a good example of jumps in legal reasoning – that is, unjustified, erratic decisions made by the Court:

Since SEP's exclusive import rights are thus contrary to Article 31 EC it is unnecessary to consider whether they are contrary to Article 28 EC or, consequently, whether they might possibly be justified under Article 30 EC (para. 24).

Nevertheless, it is still necessary to verify whether the exclusive rights at issue might be justified, as the Dutch Government has contended, under Article 86(2) (para. 25).

In the former paragraphs, from the legal point of view (and not only that one) the Court made and avoided making some very interesting decisions. First of all, without providing a justification, it decided that discriminatory effects flowing from state intervention measures could not be justified on the basis of Article 30 EC – the Dutch Government argued that discrimination arising from exclusive rights to import electricity was justified on the basis of public security (of the supply), as mentioned in Article 30 EC.

Second, it established that *the cause* of these discriminatory effects could, nonetheless, be justified under competition rules. That is, the Court decided that state intervention relating to the provision of public services (electricity supply) is a matter of PSOs, rather than a matter of restrictions on the free movement of goods. Competition rules are the appropriate rules for assessing the validity of these measures, especially the derogation clause of Article 86(2) EC. In an implicit way, the Court justified why Article 86(2) EC was the applicable norm: unlike Article 30 EC which tackles state intervention in general terms, Article 86(2) EC is *lex specialis* concerning state intervention in public services.

It is important to bear in mind that the Court not only solved the legal problem posed by the Commission. It also solved a legal problem on its own agenda; namely, the conflict between

14 Article 31 EC presupposes, on the one hand, that public monopolies are legal under Community law and, on the other hand, that they do not quite comply with Community law, because they cause discriminatory market restrictions. This schizophrenic character of Article 31(1) EC and the deliberate ambiguity of the text are the result of the thorny political problem this proviso tries to solve: the limits of national economic policy in the context of a common market (Buendía Sierra 1999). Indeed, whereas national monopolies were a policy instrument widely used by the founding Member States, this was incompatible with the idea of creating a single market, free from restrictions and barriers, imposed by Member States. The compromise between, Member States' interests, on the one hand (i.e. protecting their discretionary powers), and Community's interests, on the other hand (i.e. unrestricted intra-Community trade), consists in the obligation to adjust state monopolies of a commercial character to the principle of non-discrimination in intra-Community trade.

rules for the free-movement of goods and competition rules arising from the granting of exclusive import rights. The Court resolved this in favour of competition rules: The legality of state intervention measures, if they aim at guaranteeing the provision of public services, has to be assessed according to competition rules, and in particular, according to Article 86(2) EC, even if the measure restricts the free movement of goods. From a legal perspective the novelty is that the derogation clause of Article 86(2) now applies not only to competition rules, but also to the rules for the free movement of goods.

From the legal point of view, such a decision simplifies the control of state intervention measures in the field of public services: both restrictive effects on free-trade and restrictive effects on competition are going to be evaluated according to the threshold of Article 86(2) EC. From a political point of view, this decision results in a less strict application of judicial scrutiny than would have been the case had the free movement rules (Article 31 EC) and the free movement derogation clause (Article 30) been applied. As a result, Member States' discretionary powers are backed, and intrusion into Member States' financial, economic and political decisions is reduced.

To sum up, so far the Court's reasoning has been devoted to solving a single legal problem: which is the applicable legal norm? The answer is Article 86(2) EC. The next major question is how to apply the chosen legal proviso. Here a new line of reasoning starts, which focuses on the *proportionality* of the measure, i.e. the proportionality of the granting exclusive rights in the field of public services. This new line of reasoning aims at determining the level of restriction on competition and the free movement of goods that is necessary to guarantee the provision of services of general economic interest. To this aim, restrictive means – namely state intervention – is weighted against desirable aims – namely non-distorted competition and public services.¹⁵

The first step in undertaking this balancing exercise is to identify the relevant features (interests) of the case that have to be weighed against the value of undistorted competition. The Court has identified the following: First of all, it referred to the Member States' discretion in using certain enterprises, in particular in the public sector, as instruments for economic or fiscal policy (para. 39 following *France v Commission*). Second, it has established that, when defining the services of general economic interest, Member States cannot be precluded from taking objectives pertaining to their national policy into account or from endeavouring to attain them (para. 40).¹⁶ And third, it has emphasised the importance of PSOs; namely, the importance of the uninterrupted supply of electricity to everyone throughout a territory, in sufficient quantities to meet the demand at any given time, at uniform tariff rates, and on terms that may not vary.

15 For an extensive analysis of the structure of legal reasoning when applying the proportionality test, see Ben-goetxea et al 2001.

16 Similarly, the Directive 96/92 of 19 December 1996 concerning common rules for the domestic market for electricity, which had just been issued at the time of the Court's ruling, leaves the Member States broad leeway in defining public service obligations. Article 3(2) establishes that "Having full regard to the relevant provisions of the Treaty, in particular Article 90, Member States may...impose public service obligations....[S]uch obligations must be clearly defined, transparent, non-discriminatory and verifiable....[T]hey shall be published and notified to the Commission".

The second step in this balancing of reasons is to determine the level of restriction on competition that is *necessary* to conform to the mentioned considerations. Unlike the Commission, which argued for the economic survival of the undertaking, the Court decided that the appropriate threshold is rather the economically acceptable conditions under which the entrusted undertaking performs its activity. In this sense, it is crucial to bear in mind that the performance of the enterprise is determined by the obligations and constraints imposed by the Member States.¹⁷

In both steps – identifying relevant features and determining the necessity criterion – the Court upheld the discretionary powers of Member States in the area of services of general economic interest. This is even confirmed in the Court’s arguments that if the exclusive import rights granted to the Dutch electricity undertaking were removed, prices would be lower (para. 54); however, it would jeopardize the current service provision, which the privileged undertaking makes available at as low of a cost as possible and in a responsible manner (para. 55).

The great amount of leeway granted to Member States contrasts with the tougher attitude of the Court towards the Commission. The Court ruled that the Commission failed to fulfil its obligation as a judicial applicant; namely that Treaty obligations have not been fulfilled by the Netherlands, France and Italy. The Court blamed the Commission for concentrating too much on the legal reasons backing its claim, and too little on the facts. The Court devoted many words (para. 59-63 and 71) to the lack of a reasonable and coherent Commission statement, to its failure to provide evidence and, finally, to the failure to bring clearer initiatives to bear. This tough attitude on behalf of the Court may be explained by the fact that the Commission’s action was indeed very poorly justified, as it aimed at boosting slow-going negotiations at the Council. The Court clearly aborted the Commission’s strategic use of the infringement procedure, and reminded the parties – as if it were a referee – of one basic rule of the political game: namely, in absence of a common policy for liberalising the electricity sector, the Court is not the arena for establishing one.

It is certainly not for the Court, on the basis of observations of a general nature made in the reply, to undertake an assessment, necessarily extending to economic, financial and social matters, of the means which a Member State might adopt in order to ensure the supply of electricity on the basis of cost that are as low as possible and in a socially responsible manner (para. 63).

The Court’s conclusion reinforces its constitutional role, that is, its role in the institutional design of Europe. Rules for free movement and competition set the limits of the states’ discretionary powers, for both types of rules are intended to safeguard the European market from Member States’ intervention. These rules provide thresholds according to which the Court hereinafter controls the legality of national measures – the compliance of these measures with European law. By so doing, they establish the level of discretion of Member States that is compatible with European law. The effects upon competence matters make free movement and competition rules the keystone of the European Constitution; conflicts between these rules can be translated into

17 Also Article 3.3 of the Electricity Directive establishes that Member States may decide not to apply some of the obligations imposed in the Directive (which concern with the liberalisation of the electricity markets) insofar as the application of these obligations would obstruct the performance, in law or in fact, of the PSOs imposed on electricity undertakings in the general economic interest, and insofar as the development of trade would not be affected to such an extent that they would be contrary to the interests of the Community.

conflicts between competence and conflicts between competing models of institutional design in Europe.

Table 2: Legitimate Conflict Solution

Conflict Solution and its Legitimation	Politics	Adjudication
Source of Legitimation	<ul style="list-style-type: none"> ■ Democratic input ■ Policy output ■ Legality and constitutionality of procedures and policies 	Legal rationality: <ul style="list-style-type: none"> ■ Legal norms ■ Legal syllogism ■ Comprehensive account of reasons
Process	<ul style="list-style-type: none"> ■ Voting ■ Deliberation* ■ Negotiation* <p>* Can end with no decision</p>	<ul style="list-style-type: none"> ■ Interpretation ■ Application ■ Justification <p>Always produces a decision</p>
Links	Politics shift to the adjudicative arena to overcome gridlock → Policy and politics within constitutional terms →	← Choice of rules structures arenas

IV. Links and Overlap from a Legal Perspective

The relationship between politics and law, and, in particular, between politics and the adjudicative, is not one of hierarchical character. The particular policy field this article analyses shows the interaction between politics and law, describing how these two arenas are linked. The links between the political and the adjudicative arena describe how constitutional democracies function: Policy choices made in the political arena are transformed into valid rules, whereas, when resolving individual cases, the judiciary adjusts these policy choices at the same time that it increases the coherence of the whole legal system. Political actors may strategically use judicial actions to win their claims in the judiciary arena. This shifting from the political to the adjudicative arena leads to the juridification of policy process (Dehousse 1998), not only because policy choices are enshrined in judge-made law, but also because substantive policy choices are constrained by the judicial interpretation of law. Indeed, judicial rulings have political repercussions: problems are imposed on the political agenda by the judiciary.

Do the links existing between the political and the legal area undermine the rationality of judicial decision-making? Here it is argued that the interaction between law and politics does not undermine legal rationality: it rather reinforces it. From a legal reasoning perspective, legal rationality cannot possibly be achieved, either by disregarding a comprehensive account of reason that includes policy considerations, or, from a legal theory perspective, by isolating the judiciary from its institutional and policy-making environment. That is, law and politics overlap, and this overlapping area does not undermine legal rationality, it reinforces it.

Legal reasoning entails a comprehensive account of reasons that aim at including as many justifying elements as possible: What matters is not the kind of reasons used – whether it is a right or a policy – but the supporting force it has (Moral *forthcoming*). Policies ought to be part of the comprehensive account of reasons the judiciary may refer to. Following MacCormick, it is argued that, rather than two distinct and mutually opposed spheres, rights and policies are interlocking reasons. Policies are courses of action adopted to secure or tending to secure states of affairs that are thought to be desirable (MacCormick 1994, 261). In legal reasoning, policy arguments justify particular decisions on the basis that they tend to secure desirable states of affairs (MacCormick 1994, 263). The major contribution of policy arguments is that they raise a discussion about their desirability, and, in this sense, they are closely connected to rights and principles. This approach is extremely useful when dealing with EC law, especially since the Treaties are drafted in general terms, and they sketch out policies and portray values that belong to the whole European constitutional enterprise.

The fact that rational judicial decision-making requires that policy considerations be taken account of does not mean that the role of the judiciary consists in making policy choices. The policy choices that courts make are choices between alternative principles (Bengoetxea et al 2001, 83). This is not a case of ‘policy as opposed to principle’, it is a case of policy expressed in principles, and particularly in a choice between rival principles. In this sense, the Court has been able to avoid the risk of the false antithesis between ‘principle’ and ‘policy’; for the very hallmark of judicial policies is that they are expressed in terms of principles. There is no point in saying that judges should not make policy choices of that kind, for when two avenues of principle are opened up by the problem posed in a case being decided upon, one or the other line simply has to be chosen and justified on what seems the best line of argument. The arguments are interpretative in that they try to make the best possible sense of the documents and decisions laid down by the authoritative decision-makers. They are not absolute and final, for the process of treaty revision have left it open to the states, through a later Intergovernmental Conference, to scrap the Court’s view if need be and explicitly favour a different one.¹⁸

Finally, legal theory also acknowledges the overlap between the political and the legal arena. The adjudicative function is essentially a normative activity concerning problems that are put in legal terms and solved by applying legal rules. However, whereas the normative content of the judiciary function guarantees the autonomy of the judiciary, this should not be done in complete isolation from the contexts in which it operates. The interaction between law and politics can be understood as the input the judiciary receives from its political and institutional environment

18 An excellent example is the reaction of Ireland after the *Grogan* case (Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685), a case on abortion which arose when students in the Republic of Ireland tried to publicize the names and addresses of abortion clinics in England. Since abortion is prohibited in the Irish constitution by Article 40.3.3, the private Society for the Protection of Unborn Children (SPUC) brought proceedings before the Irish courts. The students argued that abortion constituted a service and that Community law gave them the right to publicize the name of the clinics that provide the service. The Court held that abortion when performed according to the law of a state where it is carried out, is a service for the purposes of Community law. This judgment raised reactions in the Irish Republic, and as a consequence the Maastricht Agreement introduced Protocol No 17. It states that nothing in the Treaty affects the application of Article 40.3.3 of the Irish constitution. For more examples of expressed rejection of the Court’s judgments see T. Hartley 1999.

(Dehousse 1998 and Weiler 1999). The autonomy of the judiciary is to be conceived in relative terms (Stone 2000, 28).

The sensitivity of the Court to its institutional environment can be perceived in the *Gas and Electricity Monopolies* judgments. Here the Court focused on the functioning of the institutions: it got involved in a political decision, which it had been willing to avoid; and instead of elaborating the contended policy, it acted as a referee-like institution, which reminded the players of the European political game how this game ought to be played. This explains the Court's admonition of the Commission and recommendation that it pursue clear and well-founded initiatives under Article 226 EC, especially since the Commission's liberalising activity under the legislative activity of Article 86(3) EC was fully recognised by the Court in the *France v Commission* judgment.¹⁹ Moreover, in largely recognizing member states' political, economic and financial choices about the provision of public services, the Court indicates that if the Commission refuses to use Article 86(3) EC, then the political arena in which the liberalisation of the energy markets is to be carried out is the Council and the European Parliament. The Court understood that the flaw in the liberalization negotiations was not in its speed, but rather in the lack of consensus among institutions. Rejecting the Commission's judicial actions is a way of reinforcing a law-making process that involves a large number of institutions – the Commission, the Council and the European Parliament, and the member states via the Council – and favouring consensus among corporate actors.

In the relationship between law and politics, the Court can be depicted as an actor following a 'values agenda' enshrined in the Treaty, and interacting with its environment to obtain compliance. Indeed, the Court has consolidated its institutional position and the effectiveness of European law, but, as a consequence of the interaction with its environments, it does not get involved in political fights (Dehousse 1998, 185).

V. Conclusion: When Differences Constitute Links

In this article we have analysed how two disciplines, law and political science, answer similar questions in the policy-making context. We have elaborated the differences and established the links between these two decision-making arenas. We argue that what differentiates these two disciplines constitutes their very links; that is, the adjudicative and political arena are linked precisely because they are different at various levels. In the political arena, decision-making processes may terminate without any decision being reached (deadlock situations). In this case, political actors will shift to the judicial arena, where the adjudicative process ought to end with a decision. Furthermore, the normative nature of the judicial function and the fact that the judiciary is not perceived as a political strategic actor make the judicial arena very attractive for strategic actors who hope their policy choices can be supported by the Court's independent decisions.

19 Case C-202/88 *France v Commission* [1991] ECR I-1223.

Additionally, in case of a political deadlock situation, while the judiciary cannot elaborate alternative policies, it can function as a catalyst to set up a renewed policy-making process.

Bibliography

- Bengoetxea, J. 1993, *The Legal Reasoning of the European Court of Justice*, Oxford: Clarendon Press.
- Bengoetxea, J., MacCormick, N., Moral Soriano, L. 2001, "Integration and Integrity in the legal Reasoning of the European Court of Justice" in *The European Court of Justice*, G. de Burca and J. Weiler (eds). Oxford: Oxford UP.
- Benz A., 1998, Politikverflechtung ohne Politikverflechtungsfälle - Koordination und Strukturpolitik im europäischen Mehrebenensystem, *Politische Vierteljahresschrift* 39.
- Buendía Sierra, J.L 1999, *Exclusive Rights and State Monopolies under EC Law*. Translated by A. Read. Oxford: Oxford UP.
- Dehousse, R. 1998, *The European Court of Justice*. London: MacMillan.
- Edward, D. 1996, "Judicial Activism. Myth or Reality." In: A.I.L. Campbell and M. Voyatzis (eds.) *Legal Reasoning and Judicial Interpretation of European Law* Gostport.
- Eising, R. 2000, *Liberalisierung und Europäisierung. Die regulative Reform der Elektrizitätsversorgung in Großbritannien, der Europäischen Gemeinschaft und der Bundesrepublik Deutschland*, Opladen: Leske + Budrich.
- Everlin, B. (1998) Regulating Public Utilities in Europe: Mapping the Problem. RSC Working Paper No 98/42.
- Hartley, T. 1998, *Constitutional Problems of the European Union*. London: Hart.
- Héritier, A. 1999, *Policy-Making and Diversity in Europe: Escaping Deadlock*. Cambridge: Cambridge University Press.
- Héritier, A. 1998, *After Liberalization: Public Interest Services in the Utilities*. Preprint 1998/5, Max Planck Project Group, Common Goods: Law, Politics and Economics, Bonn.
- Héritier, A., Knill, Ch., and Mingers, S. 1996, *Ringiering the Changes in Europe: Regulatory Competition and the Transformation of the State: Britain, France, Germany*. Berlin, New York: de Gruyter.
- Keohane, R. 1986, Reciprocity in International Relations, *International Organization* 40:1, pp.1-27.
- Knight, J. and Johnson, J. 1994 'Aggregation and Deliberation: On the possibility of Democratic Legitimacy'. *Political Theory*, 22: 277-96.
- MacCormick, N. (1978) 1994, *Legal Reasoning and Legal Theory*. Oxford: Oxford UP.

Matlary 1996.

Moral Soriano, L. "A Modest Notion of Coherence." In *Ratio Juris*, forthcoming.

Pescatore, P. "Public and Private Aspects of European Community Competition Law." *Fordham International Law Journal* (1987): 373-419.

Scharpf, F. 1998, "Negative and Positive Integration in the Political Economy of European Welfare States In: M. Rhodes, Y. Mény (eds.), *The Future of European Welfare. A New Social Contract?* Basingstoke, London: Macmillan Press, 157-177.

Schmidt, S. 1998, "Commission activism: subsuming telecommunications and electricity under European competition law". *Journal of European Public Policy* 5:1, 169-84.

Stone, A. *Governing with Judges. Constitutional Politics in Europe*. Oxford: Oxford UP, 2000.

Weiler, J. 1999, *The Constitution of Europe*, Cambridge: Cambridge UP.

List of Cases

Case 59-75 *Pubblico Ministero v. Flavia Manghera and others* [1976] ECR 91.

Case C-347/88 *Commission v Greece* [1990] ECR I-4747.

Case C-202/88 *France v Commission* [1991] ECR I-1223.

Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699.

Case C-159/94 *Commission v French Republic* [1997] ECR I-5815.

Case C-158/94 *Commission v Italian Republic* [1997] ECR I-5789.