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AVRUPA ARAŞTIRMALARI ENSTİTÜSÜ

AVRUPA SİYASETİ VE ULUSLARARASI İLİŞKİLER ANABİLİM DALI

THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE PROCESS OF EUROPEAN INTEGRATION: A NEOFUNCTIONALIST ANALYSIS

YÜKSEK LİSANS TEZİ

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Marmara Üniversitesi
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ABSTRACT

This thesis evaluates the role of the European Court of Justice (ECJ) in the process of European integration under Neofunctionalism. The main argument of the thesis is that the ECJ, as an autonomous political actor, has successfully influenced the Union's policies, changed the political elites' preferences, and made substantial contributions to creating legal principles to foster and maintain the momentum of European integration under the Neofunctional logic, especially the notion of spillover. Chapter 1 introduces various narratives of the role of the ECJ and the notion of spillover under Neofunctionalism. Neofunctionalism is taken as the primary theoretical framework to analyze the role of ECJ during European integration in this thesis. Chapter 2 offers an overview of the ECJ and assesses the role of the ECJ under a Neofunctionalist analysis. Chapter 3 provides two legal principles elucidated by the ECJ within the integration process: 'the mutual recognition principle' and 'the right to be forgotten.' These principles corroborate that the ECJ produces spillovers to influence European integration. The thesis concludes that the role of the ECJ nicely dovetails with the concept of spillover under Neofunctionalism and that the ECJ produces spillover effects, which have successfully influenced the European Union's policies.

ÖZET

Bu tez çalışması, Neofonksiyonalizm çerçevesinde Avrupa Birliği Adalet Divanı'nın (ABAD) Avrupa entegrasyonu sürecindeki rolünü değerlendirmektedir. Bu tezin temel argümanı, özerk bir siyasi aktör olarak ABAD'ın Birliğin politikalarını başarıyla etkilediği, siyasi elitlerin tercihlerini değiştirdiği ve Avrupa Birliği'ne entegrasyonun ivme kazandırılması ve sürdürülmesi için yasal ilkelerin oluşturulmasında ve de özellikle Neofonksiyonel mantık çerçevesinde 'spillover /yayılma' kavramına önemli katkılarda bulunduğudur. Tezin ilk bölümü, ABAD'ın çeşitli rol anlatımlarını ve Neofonksiyonalizm çerçevesinde 'spillover/yayılma' kavramının açıklamaktadır. Bu tez, Neofonksiyonalizmi temel teorik çerçeve alarak, Avrupa entegrasyonu sürecinde ABAD'ın rolü analiz etmektedir. Tezin ikinci bölümü, ABAD'a genel bir çerçeve sunar ve Neofonksiyonel analiz kapsamında ABAD'ın rolünü değerlendirmektedir. Tezin üçüncü bölümü, 'karşılıklı tanıma ilkesi' ve 'unutulma hakkı' olmak üzere ABAD'ın Avrupa entegrasyonunu etkilemek için spillover/yayılma ürettiğini doğrulamak amacıyla iki belirgin örnek sunmaktadır. Bu ilkeler ABAD'ın Avrupa entegrasyonunu etkilemek için spillover/yayılmalar ürettiğini doğrulamaktadır. Bu çalışma, Neofonksiyonalizm çerçevesinde ABAD'ın Avrupa Birliği politikalarını başarılı bir şekilde etkileyen spillover/yayılma etkileri yarattığı sonucuna varmıştır.

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ABBREVIATIONS

AEPD	Agencia Española de Protección de Datos
CEEP	Centre Européen des Entreprises Publics
COREPER	Comité des Représentants Permanents
DG	Directorates-General
DSM	Digital Single Market
DPA	Data Protection Authorities
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EP	European Parliament
EU	European Union
FIDE	Fédération Internationale pour le Droit Européen
GDPR	General Data Protection Regulation
P-A Thesis	Principal – Agent Thesis
SEA	Single European Act
SEM	Single European Market
SME	Small & Medium-sized Enterprises
TEU	Treaty on European Union
TFEU	Treaty on Functioning of the European Union
UNICE	Union of Industrial and Employers Confederations of Europe

INTRODUCTION

This thesis employs Neofunctionalism, particularly the concept of spillover, to explain the role of the European Court of Justice (ECJ), to analyze the structure and functioning of the ECJ, and to evaluate the spillover produced by the ECJ in the cases of the European Single Market and the Digital Europe Program. The thesis evaluates how a judicial supranational actor plays its role in the integration dynamic. In the past few decades, the role of the ECJ has been subject to various kinds of analysis in the political science literature (see for example Volcansek, 1992; Weiler, 1993, 1994; Garrett, 1992; Alter & Meunier, 1994; Stone Sweet, 2010, 2012; Kennedy, 2006; Alter, 2000; Saurugger & Terpan, 2017; Schmidt & Kelemen, 2013; Schmidt, 2018; Azoulai & Dehousse, 2012). Some researches are also conducted based on a realist point of view to determine the role of the ECJ in economic integration (Garrett & Weingast, 1993). Various other studies explore Neofunctionalism to explain the process of 'legal integration,' which the ECJ, as a supranational actor, lays the legal foundations for an integrated European economy and polity (Burley & Mattli, 1993). Moreover, some other researchers explore the role of the ECJ in the process of policy-making through a series of case studies (Wincott, 1995). Furthermore, studies have focused on incorporating Neofunctional theory, especially the spillover concept, into the judicialization and governance of the ECJ (Stone Sweet, 2010 and 2012).

Neofunctionalism seeks to explain the mobilization of policy-making authority from national governments to the European Union (EU) level. Prosaically, it claims to account for why, and how, that regional integration occurred. Neofunctionalists assume that supranational institutions become the locus for a new sort of politics and governance, which is no longer controlled by national governments but rather private actors and transnational interest groups. As a focal point of political activities transfer to the EU level, some forms of feedback create a new cyclical policy-making loop, which Haas called 'spillover' (Haas, 1964). In Neofunctional dynamics, spillover occurs when actors realize the transnational policies cannot be attained without enlarging supranational authorities (Stone Sweet, 2012: 8). This thesis revisits and reinterprets Neofunctionalism in order to explain how supranational institutions produce and maintain the stable integration impetus. In general, Neofunctionalists

prefer to take the EU Commission as a suitable example to validate the theory. They suppose the Commission acts not only as a mediator between national interests and the Union's interests, but also as a 'policy entrepreneur' (Jensen, 2003: 85). However, an unsung political actor, namely the ECJ, should be mentioned in the field of politics and international relations. Accordingly, the thesis discusses the role of the ECJ in the process of European integration.

Volcansek (1992) recognizes the ECJ can be regarded as one of the principal motors for European integration (p. 109). The ECJ upholds integration by means of interpreting EU law in pro-integration posture. The following instruments are key to the EU legal integration made by the ECJ: the machinery of the preliminary ruling procedure, the direct effect principle, and the supremacy of EU law principle. These instruments remarkably provide a self-reinforcing influence in shaping the EU policies. Thus, during the process of European integration, it is necessary to comprehend the role of the ECJ.

Conceptual Framework:

This thesis adopts Haas and Lindberg's views on the concept of integration. They asserted that integration is referred to as a process whereby the creation and role expansion of regional institutions occur (Niemann & Schmitter, 2009: 47). Lindberg (1963) argues that integration occurs on the premise of Member States waive their national sovereignty and then delegate it to a new supranational center (p. 6). By doing so, integration results in the shift of political elites' loyalties, expectations and political activities so that the decision-making process would transfer to the new center at the supranational level (Haas, 1958: 16).

Neofunctionalists seek to apply the notion of spillover to encapsulate the integration process, including functional, political, and cultivated spillovers. First, the functional spillover indicates the knock-on effects occur because an original objective can only be assured by taking further integrative actions (Lindberg, 1963: 10). In addition, an original goal and further integrative actions are interdependent and the new governance would superimpose over the pre-existing one (Nye, 1970: 804).

Second, the political spillover points out the preferences of governmental or non-governmental elites are persuaded to have recourse to supranational intuitions where are better protected their interests (Tranholm-Mikkelsen, 1991: 4-6). Thirdly, the cultivated spillover is concerned with the notion of 'upgrading the common interest' (Groom, 1994: 4-6). It underlines that national states would spontaneously reach decisions beyond a 'lowest common denominator' and stimulate further integration.

Stone Sweet (2012) elaborates Haasian Neofunctionalism by incorporating different concepts and theoretical arguments, such as institutionalization and path dependency (p. 9). Stone Sweet (2012) established three constituent elements:

(1) Supranational organizations enjoy autonomous discretion to overcome integration difficulties and make rules and law. These organizations tend to make law and implement policies that national states are not likely to adopt through intergovernmental forum. European citizens, businesses, interest groups can circumvent their national governments to engage in the Union's policies. (Mazey & Richardson: 2001, as cited in Stone Sweet, 2012: 12)

(2) The gradual appearance of cross-border transactors shows up in a transnational society. The demands of these transactors result in the new rules, standards, and dispute resolution mechanisms at the Union's level. The foregoing demand-supply mechanism forms cyclical feedback loops, producing spillover effects to influence the EU's policies. Accordingly, feedback loops – or in other words spillover – are indispensable to European integration.

(3) Institutionalization can also be observed in integration process. The more highly institutionalized sector or policy, the more integration occurs. Stone Sweet claims actors pursue their interests and values within normative structures, thereby as they encounter gaps, ambiguities, and contradictions, they expect the supranational institutions to create new rules and law in order to entrench their interests. By doing so, institutionalization is expected to produce incidental effects that open new arenas for politics so as to generate cooperation.

An Overview of the Role of the ECJ and its Jurisprudence:

The ECJ has played a crucial role in the EU politics and daily lives of its nationals. The ECJ contributes to the creation of a new legal order, which confers upon private individual rights that the ECJ must protect (Van Gend en Loos, 1963). In addition, the ECJ provides an alternative to advance European integration when problems cannot be resolved through regular intergovernmental bargains immediately. The ECJ develops its pro-integration preference, demonstrated in its rulings, because of divisions between provisions of the treaties and the intention of legislators (Pollack, 2003; Tallberg, 2002). In this regard, litigations may thus be served as one of the instruments in making Union's policy, replacing more traditional modes of regulation and governance (Keleman, 2011). However, its influence is rather limited because the ECJ has no power of initiative (Wincott, 1995). Before an unexpected consequence occurs, the ECJ must wait for cases referred by national courts through preliminary ruling procedure. Accordingly, the ECJ is rather a reactive actor in the process of policy-making, which relies on the support of multiple other actors (Conant, 2012: 11). As long as the cases have been referred to the ECJ, spillover will correspondingly occur.

Spillovers produced by the ECJ's case law are related to the three main instruments: preliminary ruling procedure, the direct effect principle, and the supremacy of EU law principle. Pursuant to Article 267 of the *Treaty on the Functioning of the European Union* (TFEU), national courts can raise legal questions concerning EU law and then refer to the ECJ. By doing so, the ECJ has an opportunity to clarify the meaning of provisions and make pro-integration judgments. In addition, the principle of direct effect and the supremacy of EU law principle ensure the ECJ's rulings will be enforced within the Union.

The *Van Gend en Loos* case (1963) and the *Costa v. ENEL* case (1964) remarkably influenced the European legal system and the ECJ jurisprudence. In the *Van Gend en Loos* case, the ECJ audaciously created the principle of direct effect (Van Gend en Loos, 1963). The direct effect principle results in 'unexpected expansive consequences' to European integration. Private individuals can invoke their

rights based on the provisions of the EU treaties or its secondary legislation when the texts of treaties or secondary legislation have met the specific criteria. Accordingly, the ECJ enables to consider private individuals' claims and unifies the implementation of EU law. In the following year, the ECJ further elaborated the principle of supremacy of EU law in the *Costa v. ENEL* case (1964). This principle illustrates the EU law is precedence to national law. Thus, the principle enhances the effectiveness of EU law and guarantees the implementation of EU law. These landmark cases have significantly contributed to European integration. The ECJ's rulings are beyond the Member States' expectations, which perceive the ECJ as a docile actor.

Based on three main instruments of the ECJ, the following EU case law generates spillover effects not only through the Union's level to a national level, but also within a variety domain of policies, in particular the free movement of goods, services, people, and capital. In this regard, the ECJ has produced a self-reinforcing process of judicialization that has expanded and deepened integration (Stone Sweet & Brunell, 1998).

The Argument and the Research Questions of the Thesis:

The main purpose of the thesis is to evaluate whether Neofunctionalism, particularly the concept of spillover, can explain and dovetail nicely with the role of the ECJ in the process of European integration. This thesis takes an interdisciplinary approach, adopting the concept of spillover, to connect EU politics, international relations, and EU law. The research provided shows how the ECJ has successfully influenced the Union's policies under Neofunctionalism, particularly the notion of spillover.

This research attempts to answer the following questions:

1. Does the spillover concept under Neofunctionalism nicely dovetail with the role of the ECJ in the process of European integration?
2. How does the ECJ function in the process of European integration and then influence the Union's policies?

3. Has the ECJ, as an autonomous political actor, successfully influenced the Union's policies, changed the political elites' preferences, and made substantial contributions to creating legal principles and the Union's norms in the process of European integration?

The ECJ, as a autonomous political actor, has successfully influenced the Union's polices, changed the political elites' preferences, and made substantial contribution on creating legal principles and the Union's norms to foster and maintain the momentum of European integration under Neofunctional logic. The following are summary answers for the research questions:

1. The notion of spillover under Neofunctionalism can perfectly explain the role of the ECJ in the process of European integration, especially how the ECJ involves in policy-making process and upgrades its preference at the supranational level.
2. The ECJ influences the Union's policies by means of three instruments that produces various kinds of spillover: the preliminary ruling procedure, the principle of direct effect, and the supremacy of EU law principle.
3. The ECJ has successfully influenced the Union's policies, changed the political elites' preferences, and created legal principles in the cases of 'mutual recognition principle' and 'the right to be forgotten'.

Overview of Chapters:

Chapter 1**:** Section 1 offers an overview of three narratives on the role of the ECJ, which are the legal narrative, the international relations narratives, and comparative narrative. Each of them will be presented to compare their similarities and differences. Eventually, this thesis selects Neofunctionalism to be the main conceptual framework, especially the spillover concept, to ascertain the role of the ECJ in the process of European integration. Subsequently, Section 2 addresses the historical development of Neofunctionalism to explore its origin, to enumerate the criticism against Neofunctionalism, to elucidate the Neofunctionalists' responses, and to signify its reinvigoration. Section 3 defines the purpose and features of Neofunctionalism. It also

explores the preconditions designed by Neofunctionalism. This section clarifies when the expected integration could occur based on specific circumstances. Lastly, Section 4 introduces a Neofunctional analysis, proposed by Burley and Mattli (1993), to be a theoretical basis for the following application (pp. 41-76).

Chapter 2: Section 1 provides a brief historical retrospect of the ECJ. Section 2 explains the structure, power, and authority of the ECJ. In particular, this section focuses on the preliminary ruling procedure, the direct effect principle, and the supremacy of EU law principle, which can be regarded as the important and the most regular applied instruments. Section 3 elaborates on the application of Neofunctionalist analysis to examine the ECJ in four elements. The application determines the nature of the ECJ and answers the question as to whether the governance of the ECJ corresponds to Neofunctionalism.

Chapter 3: This chapter conducts empirical case studies to substantiate the argument that the ECJ is an autonomous political actor to produce various spillovers as well as sustaining European integration. Section 1 introduces the evolution of the European Single Market to the Digital Europe Program. Section 2 demonstrates two examples to corroborate that the ECJ has successfully influenced the Union's policies. The first example is related to the mutual recognition principle. Then, the different spillovers, produced by 'the mutual recognition principle,' are elaborated. Lastly, 'the right to be forgotten' is introduced and analyzed in the same manner of the prior part.

In sum, the thesis seeks to substantiate the argument that the ECJ, as an autonomous political actor, has successfully influenced the Union's policies by means of its case law and jurisprudence, which generates spillover effects. In particular, the cases concerning 'the mutual recognition principle' and 'the right to be forgotten' are pertinent to demonstrate how the ECJ involves in the policy-making process and upgrades its preference at the supranational level.

1. THEORETICAL FRAMEWORK: FROM LEGAL AND POLITICAL THEORIES OF THE ECJ TO NEOFUNCTIONALISM

Several approaches to the role of the ECJ at its inception, including legal, international relations, and comparative politics narratives, have been examined in the first section of the first chapter. There are four main approaches to the role of the ECJ in European integration: Realism, Principal-Agent thesis, Trusteeship thesis, and Neofunctionalism. Here, within the present thesis, it attempts to demonstrate the importance of Neofunctionalism in explaining the role of the ECJ.

Whereas the re-evaluations of Neofunctionalism have been made (Moravcsik, 2005: 349-86; Niemann & Schmitter, 2009: 45-65; Jarvis, 1994: 17-33; Nye, 1970: 796-835; Burley & Mattli, 1993: 41-76), the following sections introduce and revisit a conceptual framework of the theory: Neofunctionalism, its theoretical development, purpose, main propositions, features, constituent elements, in order to highlight its importance to the explanation of European integration. Eventually, this thesis adopts a Neofunctional analysis contended by Burley and Mattli (1993). The Neofunctional analysis will be insightful in analyzing actors in the process of European integration, especially the primary subject of this thesis - the European Court of Justice (ECJ).

1.1 Four Narratives on the Role of the ECJ

The role and identity of the ECJ can largely be divided into three parts: legalist narrative, international relations narrative, and comparative politics narrative (Alter, 2008: 212-9). They are relevant to the dichotomy between ‘supranationalism’ and ‘intergovernmentalism’. In this context, the debate on the role of ECJ is concerned with ‘supranational’ judicial activism and the ‘intergovernmental’ act of deference to Member States’ interest and affinities in the process of European integration (Schmidt, 2018: 14-5). Although pro-integrative judicial activism seems favorable to European integration, Rasmussen (1986) warned that excessive activism of the ECJ might be detrimental to its authority and legitimacy. However, the thesis does not examine the debate between supranationalism and intergovernmentalism. On the contrary, the

thesis focuses on the governance of the ECJ in the process of European integration, particularly the role of the ECJ, to discover how the ECJ influences the Union's policy. Therefore, this section explores the literature on the role of the ECJ and brings out their similarities and differences. The role of the ECJ gets clarified under Neofunctional narrative later.

The legalist, international relations, and comparative politics narratives will now be addressed.

1.1.1 The Legalist Narrative

According to legalism, the European integration starts and terminates with law, and the foundation of Europe's integration is based on the logic of the "rule of law". Shapiro (1980) concurs with this view and believes that the Community is built on written constitution and professional commentary, and the ECJ's case law (p. 538). The case law is the blueprint that guides the Member States to achieve the objectives of the Treaties. In a nutshell, the juristic idea and constitutional teleology of the ECJ have shaped and developed the EU. Legalism rejects the existence of ideological and sociopolitical influence on the ECJ's jurisdiction (Burley & Mattli, 1993: 45).

In legalists' opinion, the role of the ECJ in European integration is absolutely decisive. Burley and Mattli (1993) attribute the substantial contribution of the juridical method of treaty interpretation of the ECJ to European integration. The European legal system is mainly formed by a relatively small group of judges and lawyers that have a good knowledge of legal interpretation to emphasize the Union's Treaties (Alter, 2008: 212). However, legalist narrative overlooks the efforts of private litigants who began referring cases to the ECJ.

Legalists purport that the authority of law can be hermetically independent from any power politics and self-interests (Burley & Mattli, 1993: 45). Alter (2008: 212) cited lots of examples to show how the independence of the ECJ can be established. Starting from the cases of *Van Gend en Loos* (1963) and *Costa v. ENEL* (1964), Robert Lecourt, together with Pierre Pescatore and Federico Mancini, show how

European integration came about through law (as cited in Alter, 2008: 212). Moreover, these firm Euro-federalists also panned legal rulings, wrote articles, gave speeches, and told tales of Champagne brunches wherein national judges were convinced of the endeavor of constructing Europe through law. Furthermore, the International Federation for European Law (Fédération Internationale pour le Droit Européen) published articles in national journals to publicize the EU norms among national legal fraternity and even was involved in private diplomacy with skeptical national judges to clarify the status of EU law.

Scharpf (1988) proposed that the "joint decision trap" indirectly results in the autonomy of the ECJ (pp. 239–78). The accumulation of case law produces the joint decision trap. The increasing case law made by the ECJ is more or less concomitant to the intensity of the joint decision trap effect, which is irreversible and inexorable. For instance, a treaty amendment to circumscribe the power of the ECJ by British Government was rejected by the other Member States. Accordingly, Member States cannot limit the excessive and expansive power of the ECJ. In addition, the joint decision trap prompts a Member State to contemplate its national interest in the long term and from a comprehensive perspective, the most relevant example being that of *Cassis de Dijon* case (1979). In this case, the German and French governments accepted the ECJ's ruling, whether favorable or not. They realized that respect to the Union's legal system is a corollary to protecting their national interests as a whole, as the national and supranational interests in terms of law cannot be easily separated. Both have blended with each other to a great extent. Hence, states, even the most intransigent ones, have no choice but to cooperate with the ECJ.

In conclusion, Renaud Dehousse (1998) asserted that the ECJ is a strategic political actor to shape European integration, particularly legal integration through EU law (as cited in Alter, 2008: 214). When the Union's policies are unable implemented or Member States refuse to comply with their obligations, the ECJ dutifully intervenes and temporarily assumes policymaking role to prevent the rapid legal erosion of the Union (Burley & Mattli, 1993: 46). However, the legal approach overlooks diversified tools, which can also facilitate cooperation and integration. The overemphasis of the law underestimates the importance of intergovernmental

negotiation and the institutions' efforts related to their preparatory work. There is no denying that because of the delegation by the Member States, the EU law and the ECJ sparkle their beam to the specific parts of European integration. Secondly, the legal approach lacks a precise explanation for the causality between increasing case law and booming integration. The legalists argue that the more case law is created, the deeper and broader are the integration. However, this argument has not been proved by any statistic so causal relationship cannot be established. Therefore, the conclusion, which the active ECJ results in the more profound European integration, seems more or less arbitrary.

1.1.2 The International Relations Narratives

The dichotomy of international relations between supranationalism and intergovernmentalism is not the only method to ascertain Europe's governance and integration, but different perspectives can also be used to examine the role of the ECJ in the process of European integration. In what follows, Realism, Principal-Agent thesis, and Trusteeship thesis will be presented and further elucidated.

1.1.2.1 Realism

Instead of highlighting the status and importance of international organizations or private individuals, Realism accentuates that the role of sovereign states is superior to that of international organizations. Realists note that institutions reflect state calculations of self-interest based on the logic of power politics and the balance of power. From its perspective, international organizations are by and large ineffectual at conducting their political agenda without the states' consent. In addition, realists maintain that institutions are so insignificant that their performance has no substantial and tangible effect on the state's behavior.

In sum, the main arguments provided by realism are: (1) states are primary actors in international politics, which are rational unitary actors; (2) the ultimate purpose to states is to survive; (3) the international system is anarchic and that disputes, conflicts or even wars can occur; (4) state interactions are typically zero-sum and thus are determined by relative power; (5) international norms, such as international law, serve as an instrumental tool controlled or likely enforced by hegemonic states (Wohlforth, 2008: 133). Unlike legalism, more or less idealism, the real political process underscores the consensual decision and *ex-ante* convergence of public opinion at the national level, but not international law, not to mention the judicial organ in international institutions.

1.1.2.2 Principal-Agent (P-A) Thesis

The Principal-Agent thesis can be traced back to rational-choice institutionalism (Pollack, 2007: 3). In addition, the P-A thesis is broadly congruent with Intergovernmentalism integration theory (Stone Sweet, 2010: 20). This approach indicates the relationship between the EU's Member States as principals and EU supranational actors as agents. Basically, the relationship between them is similar to that between a master and a servant. However, the difference between realism and P-A thesis is whether states have direct or indirect control over supranational institutions and the concept of power delegation. The former emphasizes states, as unitary actors, directly control international institutions only to serve as a forum and that there is no delegation of power. By contrast, the latter indicates that states set up *ex-ante* and *ex-post* oversight and sanction on errant agents.

From the P-A dimension, agents are able to act on behalf of the principal as they have been delegated the required authority. The delegated authority refers to the authorization of the principal allowing agents to act within a particular domain. However, the alleged delegated authority can be retracted when the agents make decisions without the principal's prior authorization or contrary to his interests.

Under the P-A thesis, the ECJ is conceptualized as a relatively servile agent vis-à-vis the powerful Member States (Carrubba, Gabel & Hankla, 2008). In this context, P-A theorists assume that the ECJ might avoid infringing the Member States' interests at all costs out of fear of being vengeful or worried about non-compliance. In addition, Member States specify detailed and restricting rules and procedures, retain for themselves the power, and ultimately reserve the authority to recontract with the agent by changing the Treaties (Pollack, 2007: 10).

1.1.2.3 Trusteeship Thesis

A trusteeship analysis assumes that the ECJ generates pro-integrative policy outcomes based on the Treaties and the interpretations of EU law, rather than being subjected to the Member States (Pollack, 2003; Stone Sweet, 2004). This analysis can also be regarded as a variant of Neofunctionalism, which expects the ECJ to expand the domain of EU law from sector to sector. The most significant difference between the P-A approach and the trusteeship thesis is whether the zone of discretion exists or not. Trustees can be regarded as 'discretionary authorities,' for which their principal has entrusted the power to them (Grand & Keohane, 2005: 31). By contrast, agents can only be deemed as instrumental agents, which are relatively controlled by their principal.

Alter in her 2008 article illuminates that Trustees are actors created through revocable delegation act where the Trustees are: (1) selected because of their personal and/or professional reputation; (2) given authority to make meaningful decisions according to the Trustee's best judgment; and (3) are making these decisions on behalf of a beneficiary (Alter, 2008: 39). Each characteristic will be addressed here:

(1) Professional and functional know-how:

Barnett and Finnemore (2004) argue that the source of Trustee's authority can be categorized into expert authority, moral authority, and rational-legal authority. (p. 22) Expert authority means the authoritative capability of specialized knowledge. As for moral authority, it results from the common shared value or ideology cultivated by the principals and trustees. Rational-legal authority comes from the regularity of implementing existing rules, such as procedural justice and neutral fairness, so that trustees turn out to be disinterested actors. Unlike the P-A thesis, trustees not only have been delegated authority but also inherently incorporate moral, rational-legal and expert authority in them. As a result, the trustee is not easily replaceable because it enjoys a greater source of independence and authority. In a nutshell, trustees, as authoritative actors, are chosen because of their professional knowledge or skills.

(2) Power delegation to trustees:

Trustees have been given the power to decide based on their best judgment. The mandate given by the principal enhances the credibility and legitimacy of the decision. On the other hand, if the principal chooses not to participate in the process of making decisions, can endorse the trustee's decisions to buffer public opinions at the national level. The process of delegation is based on a 'fiduciary relationship.' Majone (2001) claims that a fiduciary relationship creates the "complete and irrevocable authority to a certain degree," thereby transferring the principal's "political property rights" in a given issue-area to their trustees (p. 113).

In terms of EU politics, Member States, as principals, have delegated powers in EU treaties primarily to ensure credible commitments, and in these areas, the institutions enjoy substantial amounts of discretion. The doctrine of conferred power is a pertinent example to show the concept of power delegation. Article 5(2) of the Treaty on European Union (TEU) states that the Union shall act only within the limits of competences conferred upon it by the Member States in the Treaties. By contrast, competences not conferred upon the Union in the Treaties remain with the Member States. In this regard, trustees, such as the Commission and the ECJ, have confined the remit of competences to exercise their authority. There is also another example to prove the delegation process. According to Article 1(1) of the Treaty on the Functioning of the European Union (TFEU), this Treaty outlines the functioning of the Union and determines the areas, delimitation, and arrangements for exercising its competences. These Articles show that the EU Treaties determine the power and authority of the trustees. Accordingly, the EU institutions cannot act beyond them even if they wish to.

(3) Representative of trustee's beneficiary:

Unlike the P-A thesis, the trusteeship relationship is not only related to the principal but also includes the relationship between the trustee and the beneficiary. The recognition of the third party, beneficiary, means that the principal is not hierarchically supreme anymore. In addition, while considering the distribution or

balance of collective interests, the trustees should also consider the beneficiary's interests. This would lead to a counter-balance system between the principal and the beneficiary. In this regard, the principal cannot control the trustee because she may damage the beneficiary's interests. Accordingly, the threats or concerns of non-compliance by the P-A thesis are contrary to these findings. First, trusteeship theorists contend that threats by the principal would be less effective against actors (Johnston, 2001). Secondly, when the decisions made by the trustee are legal and legitimate, the principal is less likely to convince the beneficiary to overturn them. As Stone Sweet (1994) says legal norms and the ECJ are, to some extent, empowered by social interest, which is far superior to the interests of a specific group of elites (p. 11). Hence, the trustee would recognize the collective interest much more; similarly, international courts emphasize the so-called 'international community' and 'universal values.'

1.1.3 The Comparative Politics Narrative

Rather than merely adopting the views of the 'heroic-ECJ' or 'agent-ECJ,' Alter (2008) suggested that the 'interlocutor-ECJ' narrative to determine the role of the ECJ is relatively a moderate model, which combines the political and legal aspects (p. 217). In order to fully comprehend the role and the machinery of the ECJ, she divided the process of ECJ decision-making into several steps, which the 'heroic-ECJ' and the 'agent-ECJ' narratives would only focus on the part of the process (Alter, 2008: 217). Considering the two articles of Alter (2000 and 2008), a well-founded process of legalization or judicialization can be divided into at least four steps.

(1) The establishment of sources of law:

First, to bring domestic legal issues at the EU level, the private litigants must embrace European litigation strategies. Before allowing the private litigants to capitalize on the Union law, the European law must exist in the first place. In this sense, Alter (2000) contends that EU law cannot be applied in all cases of national policies, namely, not all aspects of issues can be brought to the ECJ. In general, EU law can directly or indirectly influence national policies. The prior refers to regulations, which are directly applicable in the national realm, and are invoked by private litigants before their national courts; by contrast, the latter means because of the doctrine of direct effect, private litigants can invoke the law to protect their rights conferred by the EU law.

According to Alter (2000), the EU law is mostly concerned with economic issues with a transnational dimension, and thus economic issues involving transnational elements are more likely to be affected by EU litigation. Thus, with transnational element, the EU law associated with the free movement of goods, services, people, or capital is more likely to be drawn by private litigants before national courts.

(2) The entry of legal disputes related to EU law:

The second step deals with the questions as to who can raise cases against breach and when actors prefer to apply the existing EU law. In order to secure the enforcement of EU law or promote particular policy objectives, the Commission or private individuals can raise cases against Member States. The Commission can bring cases before the ECJ, but for a variety of reasons it often chooses not to. In this sense, since the Commission usually does not launch Article 258 of the TFEU to raise cases against Member States, private litigants must mobilize domestic litigation to apply the EU law to pursue their interests and inflate their value. Also, her assumption has been proved by Dehousse that private litigant cases often exceed those brought by the Commission by a rather significant margin (Dehousse, 1998: 52).

However, Alter has concluded that at least four factors influence actors' preference to choose the EU law. Basically, they can be categorized into external and internal limitations. First, Alter finds the domestic legal system not encouraging private individuals from approaching the ECJ. For instance, variations in restriction of legal standing and procedural rules may prevent private individuals from relying on the EU law. Second, Lisa Conant (1998) contends that actors with abundant financial resources and professional legal knowledge tend to employ litigation to pursue their EU legal claims (as cited in Alter, 2000: 497). In addition, Christopher Harding (1992) argues that interest groups, large firms, and lawyers who can offer their services are the privileged actors to achieve their policy objectives through the ECJ (as cited in Alter, 2000: 497). Thirdly, it is related to the nature of the actor's interest. Conant (1998) offers that when the potential benefits are salient for an individual or group, they have more tendencies to mobilize litigation with EU law (as cited in Alter, 2000: 498). Moreover, Alter and Vargas (2000) add that interest groups with the more narrow organized interests are more likely to have recourse to a litigation strategy. Fourthly, different national legal cultures may influence the preference of private litigants to turn to litigation. For example, Alter (2000) shows that German citizens raise far more legal cases than do British or French citizens (p. 497).

(3) The willingness of national courts to refer cases to the ECJ:

Despite excluding the barriers to procedures, it is not clear whether national courts refer cases to the ECJ. In practice, national courts have the discretion to decide whether to refer a case to the ECJ. Although national courts might be willing to refer a case to the ECJ, various considerations still influence their decision to refer a case to the ECJ. Accordingly, in step three, national judges create a crucial link to make references to the ECJ.

In this step, national judges play a significant role as they can decide whether or not to refer a case to the ECJ, which is related to questions of EU law. Thus, many scholars attempted to examine the differing factors which influence the willingness of national judges to make reference and implement the EU law, such as whether a national legal system (Monist or Dualist) influences the national reference rates or not (Bebr, as cited in Alter, 2000: 500), or whether a tradition of judicial review existed in the country or not (Vedel, as cited in Alter, 2000: 500), or whether the national legal system has a constitutional court or not (Cappelletti & Golay 1986). However, Alter (1998) refutes these arguments and attests to the increased reference rate and the reasons why national judges accept the EU jurisprudence (as cited in Alter, 2000: 500). Despite considering studies by Stone Sweet and Brunell (1998) of a correlation between variation in national reference rates and the level of transnational activity, it was still impressionistic to an extent. According to them, the more the transnational activity exists between the member states, the more the conflicts are between national and EU law, and thus more references by national courts. That is, increased number of reference cases might be attributable to the conflict between national law and the EU law. However, Jürgen Schwartz (1998) disputes their contention with an example that 40 percent of the cases are still related to the validity of the EU law and the Commission's decisions. Seemingly, not all referrals are absolutely related to the conflicts between national law and the EU law (as cited in Alter, 2000: 500). In addition, Alter (1996) points out that rather than genuinely accepting EU jurisprudence, adopting the EU legal system can be regarded as a means of coercing national governments to accept private litigants' agenda. Moreover, Alter enumerated some examples of why the number of references alone cannot be evidence of

supporting the EU law by national courts. For instance, she indicated that Stone Sweet and Brunell did not distinguish the situation where some courts directly apply the EU law without referring a case to the ECJ, while other courts do not refer to the ECJ because of the rejection of the EU law. Also, their findings did not consider a circumstance where some courts deal with only narrow technical questions about the EU legal system but still heavily rely upon their own domestic legal system.

Considering these deficiencies, Alter (2000) conducted research and interviewed judges, lawyers, and government officials to elucidate the varying factors that affect judicial behavior related to national court's preference to refer a case to the ECJ (pp. 502-6). She has identified five factors responsible for variation in the behavior of the national courts vis-à-vis EU law.

First, she argued that if the EU legislation is more harmonized, more courts dealing with this legislation will consult with the ECJ. That is, national courts will tend to be more involved with EU legal integration because of the consequences of EU law- harmonized policies.

Secondly, the more lenient access rules are and the more friendly the national courts are, the greater will be the willingness to refer cases to the ECJ. She indicated that the lack of support from national courts to challenge national policy is the main reason for lesser participation of private litigants to use the EU law.

Thirdly, she underlined that judicial identity shapes the national judges' behavior and preference to refer a case to the ECJ. She indicated that 'judicial identity' is formed by the training of judges, the selection process for judges, and the internal rules of each domestic legal system. For example, the judges sitting in ordinary courts, tribunals, or high courts receive varied training and thus develop a different understanding of EU law and their positions. Alter gave another example wherein some tribunals or arbitrating bodies do not consider themselves as qualified under Article 267 of the TFEU to refer cases to the ECJ, making them not to use the EU legal system to settle legal disputes.

Fourthly, Alter suggested that if more EU laws and ECJ are regarded as undermining the influence, independence, and autonomy of national courts, the more reluctant will be the national courts to apply EU law and refer a case to the Court. This also explains why lower courts are often more welcoming to accept EU law or to make a reference to the ECJ. Additionally, her findings corresponded to several discoveries (Alter & Vargas, 2000). The cases referred to by national lower and midlevel courts constitute 73 percent (Alter, 2000: 505), and by lower courts 62 percent.

Fifthly, Alter noted that the political implication of the ECJ's rulings affects the willingness of national courts to make a reference to the ECJ. Dehousse also commented that because the EU law can be perceived as a source of disruption to the national legal system, which is alien to its traditions and which may affect its legal structure, and thus threatens their existence, the national courts perhaps would be more cautious in referring cases to the ECJ (Dehousse, 1998:173).

(4) The enforcement of ECJ rulings:

Lastly, successfully translating a legal victory into a policy victory can indeed be considered as a complete and substantive influence on the Member States by the ECJ. The decisions made by the ECJ should be duly enforced, which will change national policies, if inconsistent with EU norms and law. In this step, the government may alter its domestic law to align with the EU law or simply compensate the litigant but leave the law unchanged (Alter, 2000: 507). The reasons for not modifying the domestic law could be technically avoiding the rulings of the Court or solely ignoring adverse ECJ rulings since ignorance will not affect an election if the state failed to fulfill its EU obligations (Alter, 2000: 507). According to Slaughter (1995), EU Member States and their domestic politicians tend to criticize the infringement of governmental actions violating the principle of rule of law so that the governments are willing to change their policies based on ECJ's rulings (as cited in Alter 2000, 507). In addition, Dashwood and Arnull (1984) further underscored that high-politics cases, which can exert political pressure, have a high possibility to cast aspersions on the governments so as to influence national policies. Similarly, Alter (2008) had argued

that ECJ's decisions need 'follow-through' to proffer political influence, implying that mere legal victories would not be spontaneously transformed into political victories (p. 219). As a result, it is not only depending on compliance by the Member States, but also somehow rely on the Commission. The compliance bargaining applied by the Commission has efficiently forced the Member States to defer to the EU legal system (Tallberg, 2002 and 2003).

1.1.4 Neofunctionalist Narrative

In 1958, Ernst Haas, in his study *The Uniting of Europe* (Haas, 1958), as a pioneer to account for regional integration, constructed a theoretical framework called Neofunctionalism, aiming to propose the new logic of economic and political integration. It is related to explaining the process of integration, especially regional integration. Specifically, it seeks to answer "why and how the national states are willing to forgo their sovereignty and to transfer it to the supranational organization in order to achieve cooperation, and how the supranational institutions maintain cooperation or propel the cooperation from one sector to the other sector" (Haas, 1970: 610). Therefore, Neofunctionalism concentrates on observing and systematically analyzing the changing process, whereby political actors or elites are convinced to shift their localities, expectations, and political activities toward a new and larger center (Haas, 1958: 12).

In this context, integration is constituted by a series of continuous cooperation, which may begin with intergovernmental conference or supranational institutions. It shows that supranational bodies become the locus for international relations studies as well as transnational associations, and interest groups. Besides, supranational bodies control the degree of cooperation. As cooperation starts to connect with each other, the constellation of cooperation is called 'spillover.' That is, the original scheme or program in one policy sector necessitates cooperation from another sector. Therefore, Neofunctionalists perceive that spillover is the primary momentum to develop further integration and sustain the cooperation. However, Haas would generally employ the concept of spillover to explain the overall but general circumstance of European integration instead of focusing on any specific European institution.

Until 1993, Burley and Mattli (1993) in their pioneering study "Europe Before the Court: A Political Theory of Legal Integration" attempted to apply Neofunctionalism to examine the role of the ECJ in legal integration of Europe. Therefore, they employed the Neofunctional analysis to ascertain the role of the ECJ in the process of European integration. In their findings, functional and political spillovers were highlighted. First, they agreed on the logic of spillover in which

functional spillover begins in an agreed objective and together with the authority and power of the institution, the original objective would expand from one field to another. Secondly, they suggested that the common expectations, changing loyalties, and evolving values would gradually develop in the process of integration. Functional spillover signifies the human needs and performs as a way to satisfy such demands. In this regard, the demand of functional spillover will never stop but only somehow decrease. On the other hand, political spillover addresses the adaptive process to develop a self-sustaining and self-reinforcing environment to boast further integration. In the case of ECJ, functional and political spillovers can be overtly observed. The law is the main instrument to constitute functional and political spillovers. The law functions as a solution to resolve disputes and as a catalyst to shift elites' expectations from national level to supranational center. The judicial governance of the ECJ supports Neofunctionalist's assumptions in the process of European integration in legal areas, particularly in legal integration. Accordingly, Burley and Mattli basically had already discovered that 'spillover' refers to the law in terms of legal integration propelled by the ECJ.

Until 1999, Stone Sweet (1999) contended that the concept of spillover can be regarded as the process of institutionalization. He suggested three constituent elements for constructing regional integration, which are: (1) cross-border transactors with transnational goals and interests; (2) an autonomous and delegated supranational organization; (3) the rules system—institutionalization (pp. 147-84). It is the process by which rules are created, applied, and interpreted by those who live under them (Stone Sweet, 2012: 15). In practice, as actors confront disputes with the other and expect to have recourse to rules and law, the independent supranational institutions, whether executive, legislative or judicial bodies, create, apply or interpret rules and law, which may give feedback for subsequent activities (Stone Sweet, 2012: 15). When actors cannot distribute resources fairly equally to damage their interests, new institutional arrangements or normative rules would be formulated (Sandholtz, 2007; Stone Sweet, 1999). In the case of European integration by the ECJ, as the ECJ discovered insufficiencies or ambiguities in EU law, it created or adopted pro-integration interpretation. These new rules or principles create legal rights and opene new arenas for political discussions, and even provide chances for codification

of the ECJ's interpretation. Afterward, actors, including governments, EU bodies, and individuals, adapted to the new rules and generate new values or identities.

In addition, Stone Sweet (2012) claimed institutionalization is cyclical and matches the nature of spillover as well (p. 16). First, institutionalization is unpredictable which cannot be expected from *ex-ante* forecasts (Stone Sweet, Sandholtz & Fligstein, 2001). Second, the new modified rules would enlarge and become more formal and specific over time. Moreover, institutionalization is related to the concept of path-dependence, and has prevented the Member States to withdraw their previous consent of changing rules. As Pierson (1998) argues, institutional change is a path-dependent process, which explains well the situation where the ECJ rules the cases. This also demonstrates the feature of functional spillover. Furthermore, Stone Sweet (2012: 17) concluded that institutional and policy outcomes become 'locked in,' adjusting actor's interests and values. It had dovetailed the concept of political spillover. Eventually, after the actors learn to accept and adapt to the ECJ's decisions, this will cultivate the new value, which is beneficial to the next level of integration.

In 2010, Stone Sweet, in his article "The European Court of Justice and the Judicialization of EU Governance" provided a great insight into institutionalization in the case of the ECJ becoming judicialization. Indeed, judicialization can be classified as spillover, including functional, political, and cultivated spillover. Additionally, research on judicialization is helpful when we seek to ascertain the role of the ECJ in the process of European integration. This study corresponds to the studies of Neofunctionalism, which blends rational choice and sociological-constructivist approaches to institutional change. That is, the research of judicialization also focuses on actors, instrumentality, especially law and norms, value and identity, and socialization.

Judicialization proceeds only to the specific feedback loops delegated by the Member States' Governments, connecting judicial lawmaking, legislative procedure, and policy implementation. When discussing and analyzing the role of the ECJ in the process of European integration under Neofunctionalism, Stone Sweet and Burley

share similarities when they analyze the ECJ's behavior based on Neofunctionalist logic. Stone Sweet also addressed four questions in turn: (1) who activates the judicialization as a new legal system? (2) What interests or values are actors pursuing when they adjudicate legal disputes? (3) What lawmaking techniques do actors use to influence the current integrative policies and the future decision-making of non-judicial actors in policy process at supranational level? (4) What is the feedback and response of non-judicial officials to judicial lawmaking that imposes constraints on their original power?

First, research on judicialization also focuses on specific institutions or group of people. For instance, Stone Sweet pointed out that the Commission and the Parliament may turn to the ECJ under Article 263 of the TFEU to undermine Member State claims of national regulatory autonomy, or the council of Minister's control of the policy process. Another example is of transnational actors litigating to remove national barriers against their cross-border activities. In addition, individuals and groups relying on referring cases by national courts to the ECJ. This demonstrates that domestic politics would be more Europeanized, changing national rules and practices to the EU level.

As for motivation of the ECJ, Stone Sweet summarized that the ECJ supports and promotes integration enshrined in the EU Treaties. In addition, based on their legal profession, the ECJ has an interest in maximizing the coherence and consistency of EU law so as to ensure legal certainty and hence to build the political legitimacy for its lawmaking role. Moreover, Maduro (1998), in his study *We, the Court: The European Court of Justice and the European Economic Constitution,* suggested that the primary motivation of the ECJ follows the concept of "majoritarian activism." He argued that the ECJ upholds national measures in situations in which no dominant type of regulation exists, namely, the ECJ is willing to create new principles or overthrow national law or practices contrary to EU law when major applicable law is absent or merely there is no law.

Instrumentality applied by the ECJ is concerned with the capacity of the ECJ to alter the underlying "rules of the game" that govern policymaking in any given field. The ECJ's decisions provoke expansive judicialization and then stimulate the EU legislative bodies to adopt and apply the ECJ's case law. In Neofunctionalist terms, judicialization plays as a functional spillover. When the ECJ chooses to apply Treaty law to policy areas or adopt teleological treaty interpretation to signify the constitutional status of the EU law, the ECJ's decisions will spillover from judicial bodies to legislative bodies, from the EU level to the national level. Meanwhile, it also demonstrates the political spillover in which political elites will alter their preferences, expectations, and political activities to the new supranational center. The more judicialized any policy domain, the more we can expect the individuals, firms, interest groups, national judges, and EU organs, such as Commission or the Parliament, to supervise closely the policy process, and to leverage the ECJ's jurisprudence for their own purpose (Dehousse, 1998).

For the impact of the ECJ, as judicialization is an inherently political process, it also has political implication or backlash. Judicialization should be clarified whether it either represents an instrument or method of institutionalization, or be understood as an empirically observable outcome. A judicialized policy process usually starts from the existing ECJ's case law to future litigation. The more EU governance is judicialized, the more legal system will produce new "rule of the game" that will be institutionalized as governance arrangements. This is related to the nature of spillover process. Accordingly, Stone Sweet considered that the theory of judicialization and Neofunctionalism intersect at certain crucial points. Judicialization registers spillover. The present thesis argues that when the ECJ successfully established the principle of direct effect and supremacy of EU law principle, Member States' governments are inevitable to adapt to the ECJ's jurisprudence.

In summary, the following narratives have their advantages to interpret the role of the ECJ in the process of European integration. Legalist narrative underscores the importance of the ECJ and EU law, but overlooks sub-national actors, such as interest groups and private individuals. Realism emphasizes the dominant control of states, but underestimates the role of international organizations and the function of

international law. Contrary to legalist narrative and Realism, the P-A and Trusteeship thesis explain the relationship between actors in detail; yet fail to capture the process of transformation. The comparative politics narrative effectively analyzes the ECJ into different phases, but lacks to establish a theoretical framework. To clarify the perception on *sui generis* international court, ECJ, Neofunctionalism covers multiple actors and describes the dynamic of integration. Therefore, the trajectory of legal integration in Europe can be well explained in Neofunctional terms, particularly the notion of spillover. That is, Neofunctionalism is in its element (Burley & Mattli, 1993: 51).

1.2 The Historical Development of Neofunctionalism

Until the 1960s, Neofunctionalism was an alternative to other main International Relations theories as it is the first theory, which focuses on 'integration' induced by supranational institutions and non-state actors, and was tailor-made theoretical toolkit to account for the process of 'dynamic.' The development of Neofunctionalism is star-crossed and rugged, so Neofunctionalists had to modify and refine arguments and contentions to complete its theoretical framework. Consequently, this section presents the central question: What is neofunctionalism? To answer it, we have to understand its epistemology and ontology as for its provenance, development, criticism and renascence.

1.2.1 The Genesis of Neofunctionalism

Scholars often attribute the origin of Neofunctionalism to Ernst B. Haas' book: *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* published in 1958. However, the prehistory of Neofunctionalism cannot be overlooked inasmuch as the legacy of Haasian Neofunctionalism was based on the conceptual stimulants — Federalism and Functionalism (Jarvis, 1994: 17-33).

The catastrophes of Second World War had caused international disorder and some scholars pessimistically asserted that the nature of war is endless and repeated since international politics are based on power politics, absolute gain, and an anarchy of international society, and hence history will repeatedly occur (Bull, 2012). Scholars believe that states are competing with each other so as to continue their existence in the jungle of international community. However, some political scientists advocated the concept of multistate cooperation in combating conflicts and anarchy. Forming the great union of nations instead of resorting to state's own power can maintain each security and rights (Krosigk, 1970: 198). This was the very first time for international relations scholars to focus on the concept of international cooperation. In the context of collaboration, federalism is so influential that it has played an irreplaceable role after the Second World War and has been widely applied as the establishment of the Europe Coal and Steel Community (ECSC). By 1946, Winston Churchill claimed that

Western Europe is keen to build a kind of United States of Europe so as to disengage the unrelenting loop of European antagonism. Moreover, this idea was amplified by Jean Monnet and Robert Schuman. Monnet construed that if Europeans choose cooperation rather than disputing with each other, this will enable the European states to achieve the common goal based on common interests as a whole. Furthermore, this idea was put into practice in the 1950 Schuman Declaration, which was enunciated to frame common rules and institutions to redistribute common resources and create the greatest solidarity among Europeans.

Nevertheless, most Western European countries agreed that cooperation between states is necessary and the best solution to assure its independence against both Washington and Moscow is to become a 'Third Force' (Haas: 1958, 455); the method of cooperation was highly debated between intergovernmentalism and supranationalism. Apparently, the European countries chose the latter one, which the Member States shall delegate a degree of state sovereignty to a supranational authority (Diebold, 1959). Further, Member State governments confronted a conundrum in which some sort of states' sovereignty can be transmitted to the organization. Since peace and security were the most desperate need for Europe, noted Schuman, to make war in European unthinkable and materially impossible, rapprochement is imperative between France and Germany, and common bases for economic development. Monnet concurred with this view as a process of sectoral integration (Urwin, 2003: 17), and coal and steel were identified as two keys sectors in the first phase as part of economic development. Monnet's program had not only shown the light of federal ambition but was also implemented according to functionalist logic (Jarvis, 1994: 20).

Functionalism, as envisaged by David Mitrany (1965 and 1975), refers to all states to have a 'common index of need' that will lead to regional integration in functional-technical of specific sectors of industries or economies. In short, the outcome of integration would be due to technical 'functional interdependence' of modern nation-states (Puchala, 1971: 273). However, political amalgamation was not in its argument. Functionalist regarded 'politics' as an anathema and would be obsolete in the future forum of politics. As a result, Neofunctionalism was envisaged

to explain the process of European integration, with the advent of supranational organization with a motive of federal Europe capitalizing technical-apolitical instrument. What Neofunctionalism had presumed was highly validated through the early period of European cooperation and the transformation from ECSC to European Economic Community (EEC) because the so-called political and economic integration fitted in the Neofunctionalist paradigm empirically.

1.2.2 The Challenges against Neofunctionalism

Neofunctionalism faced setbacks and challenges during the 1970s and until the early 1980s. The critiques can be classified into two groups based on theoretical and empirical consideration. From theoretical perspective, Andrew Moravcsik (2005) maintained that Neofunctionalism is a mere framework instead of a theory insofar as a comprehensive synthesis is without a set of reliable theoretical elements (p. 355). Moravcsik further argued that each element proposed by Neofunctionalists was based on speculation but not testable; that is, they are too inconclusive that the so-called theory cannot explain or predict integration. Additionally, Moravcsik reckons that Neofunctionalism overemphasized the role of supranational institutions to play down the role of states bargaining which is based on the state basic need, which is survival. Also, Neofunctionalism neglects the beginning of the formation of state preference in domestic politics. Moreover, he further challenged if the spillover is not automatic (Niemann & Schmitter, 2009: 51). If states are unwilling to consent on cooperation, integration will not happen successfully. In response, Neofunctionalists agreed that a certain degree of delegation by states is vital and indispensable to ensure integration (Lindberg, 1963: 11). Furthermore, Taylor (1990) found paradoxical situation concerning elite socialization and the perception of pluralism (p. 180). First, Member States mostly tend to assign nationally orientated civil servants in the supranational institution, which will dilute the density of supranational identity, and that states will capitalize the supranational institutions to gain their political state interests, instead of common good. Similarly, pluralism may also diverge common interest so that each actor would only independently seek its own best interest, which may in turn disintegrate the supranational body (Hansen, 1969).

1.2.3 The Adjustments of Neofunctionalism

In response, Haas also acknowledged that the supranational organization may be a tremendous regional bureaucratic appendage to an intergovernmental mechanism (Haas, 1975: 6). Lastly, scholars point to the absence of external factors under Neofunctionalism; it failed to take international context into consideration in the scope of regional integration (Rosamond, 2005: 16). Later Haas (1968) also agreed that a lack of exogenous thesis is a serious shortcoming of the theory. As for empirical deficiency, Hoffmann, around the mid-1960s, remarked that Neofunctionalism cannot clearly explain the empty chair crisis in 1965 resulting from the French boycott or British policies under Margaret Thatcher (Jensen, 2003: 88). The ascendant position of de Gaulle against the Hallstein's Commission demonstrated the priority of national interests triggered by nationalist sentiment (Hoffmann, 1966, 862-915).

In response, Haas (1968) agreed and added the existence of 'dramatic actors' and the concept of 'spillback;' however, it did not change the essence of the ECSC, which was based on the logic of functionalist, incrementalists and technocrats (Rosamond, 2005: 16). Moreover, the predicted EEC economic integration was not formed in the 1970s. Rather than spillovers from economics to politics, Europe plunged into stagnation of economic integration and inertia of bureaucratic reforms. All in all, when Haas (1975) published his essay "The Obsolescence of Regional Integration Theory," Neofunctionalism was destined to embark on the journey of a stream of modifications and refinements.

1.2.4 The Renaissance of Neofunctionalism

As noted by Haas (1975), "the prognoses often do not match the diagnostic sophistication, and patients die when they should recover, while others recover even though all the vital signs look bad" (p. 5). This obviously showed the malaise of European integration. Neofunctionalism had undergone revival in the late 1980s and during the 1990s (Jensen, 2003: 83). Its rebirth can be attributed to three main reasons: empirical validity, theoretical reforms, and a new focal point of European integration.

By mid-1980s, Neofunctionalists had succeeded in their argument over European integration. The enactment and conclusion of Single European Act and the establishment of a single market remarkably demonstrated the application of spillover. In addition, Neofunctionalists turned to explore specific sectors of European integration instead of a 'grand theory' (Jensen, 2003: 90), such as in the areas of defence (Guay, 1996), social policy (Jensen, 2000), telecommunication (Sandholtz, 1998) and so on. Moreover, the attitude of Neofunctionalists toward dichotomy between intergovernmentalism and supranationalism became murky as they do not regard them incompatible with each other (Stone Sweet & Sandholtz, 1998: 9). Furthermore, the notion of spillover turned out to be more concrete and then be considered as 'transaction-based' theory (Stone Sweet & Sandholtz, 1998: 11). This modification gave a better description of cross-border transaction in the field of trade, communication, and travel (Jensen, 2003: 90).

Accordingly, this will stimulate and propel the Member States to cooperate with each other to achieve further integration as well as institutionalization; meanwhile, it will form the supranational governance. Ultimately, the function of the ECJ had been noticed to provide a different perspective of European integration. And surprisingly, the nature of the ECJ and the accretion of ECJ's rulings signify the Neofunctionalists propositions of European integration dynamics.

Section 2 provides a historical evolution of Neofunctionalism, which can be regarded as the synthesis of federalism and functionalism. According to Neofunctionalism, functional-sectorial economic integration is expected to turn into political amalgamation. Haas incorporated the concept of spillover into functionalism and then applied it to explain European integration. Nevertheless, Neofunctionalism was under accusations that it was not a solid theoretical framework and lacked of empirical examples. Until the mid-1980s, Neofunctionalism has again become a popular theory to explain and predict European integration in the case of the single European market.

1.3 The Purpose, Features, and Preconditions of Neofunctionalism

This section will outline the purpose of Neofunctionalism and it will then turn to the features of its theory, which is pertinent to describe the process of regional integration. Hence, why Neofunctionalism is an appropriate theory to account for integration will be examined. Additionally, to theorize regional integration, certain preconditions must be clarified to outline the anticipated integration properly. That is, the expected integration has not always happened but only when certain conditions have been met.

1.3.1 The Purpose of Neofunctionalism

Neofunctionalism aims at explaining why the initial technical or economic integration will result in a political amalgamation. Subsequently, political convergence will shift loyalties or identities to the supranational center. More simply, Neofunctionalists will attempt to seek to answer why, and how the interstate cooperation happened (Stone Sweet, 2012: 6). Additionally, scholars will endeavor to find in which conditions and to what extent further integration will occur and be hindered by which unfavorable factors. Therefore, Neofunctionalists seek to explain and define the concept of integration.

Despite the fact that there is no single and authoritative definition of integration, both Haas (1958) and Lindberg (1963) still consider it as a process contrary to an outcome or end-state; namely, the process of integration is both dynamic and changeable. They stressed that regional institutions will be created and expanded in integrative dynamics. In addition, they also agreed that participating actors in the integrative process would gradually change their preferences, expectations, and activities. Compared to Haas, Lindberg did not suggest any endpoint for the integration process, but acknowledged that the breadth and depth of integration could be in constant flux (Niemann & Schmitter, 2009: 47). Additionally, political actors will not shift their loyalties to supranational institutions, but will gradually rely on the supranational mechanism to resolve their problems or disputes with the other Member States (Lindberg, 1963: 6).

Accordingly, the process of integration can be deemed as: (1) states are voluntarily to forego a part of sovereignty to make joint decision or to delegate authority to make decision in the new center; (2) new localities, expectations, and political activities different from national governance will occur; (3) the end result of a process is ultimate political integration, superimposed over the pre-existing ones (Haas, 1958: 16). The so-called integration could reshape the interstate sphere of economy and politics; however, there is a danger to cause the aggressiveness of backfire.

1.3.2 The Features of Neofunctionalism

Haasian Neofunctionalism, as a contemporary integration theory, was a pioneer of theorizing and conceptualizing intellectual routes of institutionalization, which combines social and historical aspects (Fligstein & Stone Sweet, 2002). Additionally, Jarvis (1994) suggested that it combines the nature of federalism and functionalism (p. 18), and shows the logic of pragmatism (pp. 19-20). Compared with federalism, the method of legalism would achieve a federal Europe. However, this would merely remain a type of idealism. Furthermore, Rosamond (2005) reckoned Neofunctionalism is a variety of rationalist theory (p. 7). It indicates that social actors based on 'soft' rational choice will choose reasonable means to achieve their value-derived interests under democratic order (Haas, 2004: xv).

Notably, Rosamond (2005) pointed out five features of Neofunctionalism as follows (p. 6). First, it does not focus only on the unitary actor, nation states, but also on the dynamic too. It is a theory, which attempts to explain and predict the phenomenon of cooperation. Second, it had refuted the conventional view of interest-based Hobbesian anarchy. Neofunctionalists believe that because of complex modern societies, security imperatives had changed. Third, Neofunctionalism emphasizes the importance of organized interests and the role of supranational actors and their dynamics. Fourth, the relation between nation-states and supranational institutions instead of replacing or substituting that supranational polity might be 'superimposed' over the previous one (Haas, 1958: 16). That is, it accepts the existence of multi-tier polity. Additionally, different level of politics can co-exist and

then integrate with each other. Fifthly, Neofunctionalism is known for the element of 'pluralism'. It assumes that plural complexity of societies is most likely to develop further integration, namely, the more plural societies are, the more invocative and dramatic integration will be. Therefore, plural complexity is the fundamental ground of regional integration.

1.3.3 The Preconditions of Neofunctionalism

In order to obtain state's initial cooperation in regional integration, a few fundamental preconditions should be met. According to Haasian Neofunctionalism, actors first, due to the impact of globalization and under post-industrial society, are labeled as rational-self-seeking actors (Jarvis, 1994: 22). Since individuals are driven by self-interest in their personal life, it will reflect on state policies and in turn at the supranational level. In regional integration, interest groups, transnational businesses, or individuals, despite sticking to their respective views and interests, will still come together for common functional needs (Jarvis, 1994: 22). Hereafter, the decisions made by supranational authorities will channel their integrative force to each nation-state. Accordingly, functional associations of government, adaptive interest groups, bureaucracies, and technocrats will increase and turn to be functionally pragmatic (Heathcote, 1975: 39).

According to Haas, integration would be effective to some degree only when (a) transnational activities have increased and then economies between states become more interdependent; (b) due to increased transnational activities, elites are aware of the importance of regional solutions to deal with problems; and (c) supranational institutions through common normative rules settle disputes to satisfy their needs (Haas, 1961).

Later, Stone Sweet (2012) refined the conditions. He pointed out (a) a transnational society must be established. Cross-border transactors which need European rules, standards, and dispute-resolution mechanisms exert pro-integration pressure on their own national governments to establish supranational governance as separate national legal or executive practices hinder cross-border transaction (pp.

9-10); (b) Secondly, supranational institutions are capable of independently making law and effectively implementing it. For instance, the ECJ and the Commission have routinely created rules and policies that the member governments would not have agreed upon through intergovernmental bargaining; and (c) lastly, based on supranational arrangement, normative value, and structure have been well institutionalized. He regarded that institutionalization is the process by which rules are created, applied, and interpreted by those who live under them. Such changes are related to path-dependent process. Once institutional changes have been instigated, actors adapt to them and frequently make significant investments in them (Pierson 1998). Eventually, it will create specific feedback loops or cycles of institutionalization. For example, EU law and ECJ's case law gradually become connected to one another and 'locked-in', channeling behavior and politics, which will facilitate cross-border interaction. Since institutionalization has a cyclical charter, it is not predictable from the *ex-ante* perspective (Stone Sweet, Sandholtz & Fligstein 2001). Importantly, the foregoing conditions are cumulative and that integration would come about only when these occur at once.

All in all, a successful integration not only necessitates the abovementioned individual and cumulative conditions but also the following structural conditions and perceptual conditions (Nye, 1970: 814-21).

(1) Structural conditions:

Nye (1970) argued that a well-functioning economic integration is based on the following conditions (pp. 814-8):

A. A society under pluralism:

The backdrop to integration should be along with the nature of societal pluralism (Rosamond, 2005: 18). According to Joseph Nye, why Western Europe can overcome drastic opposition by Eurosceptics and also foster the momentum of its integration is due to the functionally specific, universalistic, achievement-oriented groups (Nye, 1970: 817). In so doing, without the participation of these plural groups, he further

predicted that integration would seem impossible because the exclusive control of information would only flow within the bureaucratic system but not to the public (Nye, 1970: 817). The plural societal groups can break down this dominant position of holding policy-information by governments so as to make it transparent and reachable by indefinite groups or individuals. However, some argued that it is not the decisive factor demonstrated in articles by Mario, Barrera, and Haas (1969: 150-166). All in all, the element of pluralism of a society is so essential that it will bring an opportunity to begin integration and further to continue it in stealth by the public. Additionally, the added value is that plural groups help and stimulate regional integration faster as well as showing various dimensions to consider different sectors of integration.

B. Elite value complementarity

Nye (1970) argued that the elite as decision-maker do matter in the success of regional integration. Under Neofunctionalism, the relation between integration and elite is complementary as the elite who are technocrats trumpet regional integration to solve cross-border problems. Therefore, the more elites with effective and adequate power over political-economic realm, faster would be the integration (Nye, 1970: 817).

C. Symmetry or economic equality of units

It suggests that a concordance of economic size between Member States is vital for the development of regional integration. Russett (1967) holds that Member States are not necessarily to be equal to each other because differences within the group lead to further integration (p. 21). Nye (1970) also concurred that the existing gap between Member States is proper and provides a chance to cooperate with, but the extreme disparity between the rich and poor countries may cause a ‘backwash’ effect, which may generate disintegrative consequence (p. 814). Therefore, egalitarian union is more likely to result in a stable and long-term association, which Member States can voluntarily coordinate with each other.

D. A capacity of adaptation

Nye (1970) contended that the capacity of Member States to adapt and respond indicates whether the government can offset the repercussions of integration and to what degree. A smooth integration is that the capacity of adaption at least should be commensurate with or should exceed the magnitude of its negative consequence. On the other hand, he further argued that with greater capacity of adaption and response, governments are more likely to keep their commitments for their societies. Therefore, it shows the flexibility and agility of Member States to accommodate to the new and challengeable tasks of integration.

(2) Perceptual conditions:

Regional integration is very much affected by the following three perceptual conditions. (Nye, 1970: 818)

A. Perceived equity of distribution of benefits

It is about the mindset, which decisionmakers should know the process of cooperation is not a zero-sum game by heart but is about the redistribution of benefits. Member States feel gratification and improvement when they stay in the group. Nye (1970) argued that notwithstanding some States may dismay about the result of integration in reality, and successful integration would make them feel that it would have not been better without integration. Consequently, he summarized that when Member States more value in distributional justice in the Union, the better would be the condition for European integration. Accordingly, the ECJ balances various interests between actors as it is an important factor to European integration.

B. Perceptions of external cogency

Nye referred to a common perception of the cogency of external dependence which links to economic, political, and military factors. This identifies the common position of states to other states or other international organizations. The

formation of a common position is a prerequisite to develop external cogency. In addition, the process of shaping a common position can be regarded as the responsive or reactive machinery. For instance, he gave an example of Europeans having common stance toward their threats or neighborhood countries. As a common external cogency has developed, it will constitute a favorable condition for regional integration (Nye, 1970: 820). Therefore, a sense of external dependence as a subjective element is vital for states to perhaps induce further integration.

C. Low visible costs

In order to implement the concept of integration by stealth, the notion of low visible costs should not be overlooked. Also, it corresponds to the essence of Neofunctionalism, a rational economic calculation. Actors during the process of integration, especially in the initial steps, tend to calculate their own economic or political gains. If the expected gains are smaller than their anticipated costs, states would reject to launch regional integration schemes. Conversely, if the costs were apparently nominal, states would be willing to cooperate with each other. Nye then commented that utmost integrative projects will be carried out and achieved when nation-states do not realize the visible costs or they find a way to exclude them at the pre-integration stage (Nye, 1970: 820).

Section 3 presents the purpose of Neofunctionalism and aims to explain why nation-states agree to delegate its power to supranational institutions, and how integration can be sustained. In this regard, Neofunctionalism differs from traditional political narratives, and considers the role of supranational actors and sub-national actors. Neofunctionalists, particularly Haas and Stone Sweet, suggest that regional integration would only occur when several preconditions have been met. Post understanding the preconditions of integration, the next section explores the process of integration to demonstrate how integration is fostered and maintained under the concept of spillover.

1.4 The System and the Process of Neofunctionalism

This section is divided into two parts: the 'system' and the 'process' based on the Neofunctional analysis provided by Burley and Mattli (1993). The analysis will help us inspect regional integration from various dimensions. The system of Neofunctionalism indicates the basic constitution of regional integration and pinpoints to the fundamental variables of the theory. In the beginning, the first part will introduce the protagonists of regional integration. The varying actors, whether supranational, national or below the state or not, will be ascertained. Additionally, the second part will examine their preference for cooperation. Accordingly, it will confirm the subjects and specify their intentions in the process of integration based on the above analysis.

On the other hand, the second part will then turn to the process of integration, which signifies the interaction, whether horizontal or vertical, between actors. From the outset, the possible methods exerted by actors will be enumerated. Importantly, the core integrative force, termed as 'spillover', will be presented as one of the most effective measures and further classify them as functional, political and cultivated spillovers. Eventually, the last part concerning content will detail the context of regional integration in terms of its nature and procedure on the basis of Neofunctionalism.

1.4.1 System: Actors and Affinity

Compared with other regional integration theories, such as intergovernmentalism, Neofunctionalism not only focuses on nation-states, but mostly concentrates on interest groups and supranational institutions. In this regard, the agenda of regional integration is not solely controlled by states through negotiations; other actors yet still can participate in the process of forming integration policies.

This section is divided in two parts, which are objective and subjective parameters. From an objective perspective, actors precisely refer to interest groups and to the European institutions, including the European Commission, the European

Parliament (EP) and the ECJ. In subjective aspect, it prosaically points to the preference of actors. In regional integration, it generally refers to pro-integration, anti-integration or neutral stance. Simply put, the motivation for choosing its position will be a focal point in this part.

1.4.1.1 Plural Actors

Unlike orthodox realists, Neofunctionalists have broader view of subjects which not only include nation-states but also comprise supranational institutions, interest groups, political parties, and individuals. A hierarchy from the top to the bottom is supranational organization, nation-states, interest groups, and individuals in sequence (Burley & Mattli, 1993: 54). In this part, we will briefly examine each one in turn so as to subsume their common similarity and distinguish their differences.

(1) Supranational level:

The EU Commission is a significantly important actor of European integration. It has been accorded the status of a 'political entrepreneur' as well as a 'mediator (Jensen, 2003: 87).' The Commission has the authority to initiate proposals to urge greater cooperation between the Member States, which will construct a sense of community to create greater tendency of supranational decision making (Scheingold & Lindberg, 1970: 92).

As for the EU Council, it typically can be seen as an institution where national interests are defended. Additionally, the Council is the main decision-making body of the EU. National governments represent national interests and make collective decisions at the supranational level.

By the mid-1990s, the European Parliament empowered by the 1992 Maastricht Treaty had turned itself from a marginal institution, mocked as a 'multilingual talking shop', into an executive oversight and co-decision-making body together with the Council. It is labeled as the 'voice of the people' which is directly elected by Europe's citizens.

(2) National governments:

From the outset, it should be noticed that Neofunctionalists do not deny the contribution of states' governments. Neofunctionalism, however, disputes that national governments are capable of ordaining the integration process (Schimmelfennig, 2018: 2). Hence, states may also play an important role during regional integration. However, the attitudes toward regional integration is usually responsive but not proactive (Burley & Mattli, 1993: 54).

(3) Individuals and interest groups:

Interest groups, as non-state actor, have played their role as intermediaries and interlocutors at the interface position vis-à-vis national governments (Eising, 2003: 205). The existence of interest groups in the civil society can be regarded as indispensable not only because they continually demonstrate and represent the voice of citizens but also because they function as 'schools for democracy (Eising, 2003: 193).' In addition, owing to the participation of interest groups, the European civil society has a chance to join in EU policy-making and institution-building (Heinelt, 1998). The interest groups connect European-level institutions to the national citizens of the EU so that diffused interests can be assembled so as to distill into collectively common normative value and rules. Such value and rules even if they have not been taken into account by supranational institutions will be considered by supranational organizations, national governments and citizens and then possibly be accepted in the future.

Generally speaking, the subject of interest groups can be observed from two angles. First, it is about relations between interest groups and EU institutions. Surprisingly, for the relationship between interest groups and EU Commission, interest groups have spent rare time to approach instead of the Commission but to sustain its stable relations with the Directorates-General (DGs) (Eising, 2003: 195). As for relations with the European Parliament (EP), the EP would not have close relations with interest groups since it does not enjoy more power than the Commission or the Council. Some analysts claim a subtle connection between the

MEPs and interest groups which would have a chance to develop into 'coalitions of the weak' (Kohler-Koch, 1997 : 6-7). EU Council is the most popular target for interest groups to influence its decision-making. However, interest groups seldom choose to directly lobby with the Committee of Permanent Representatives (Coreper) at the supranational level but opt to exert their influence at the national level from the outset. Interest groups would make their demands and covey their concerns to particular departments at the national level regarding specific issues. Nevertheless, the effect of influence by interest groups may be far less than we imagine because it will be diluted by intergovernmental compromises, the limitation being the president to set up agenda.

Secondly, it is related to the classification of interest groups. As the polity environment of the EU is highly dynamic, complex, multi-level and based on consensus, the EU interest group landscape is diverse (Eising, 2003: 193). Generally, interest groups can be divided into EU and national groups, or business and non-business (social) groups. As for first classification of national and Euro-groups, the former representing national interests act with national governments and administrations. Arguably, the proposals of Euro-groups should be for EU interests. On the contrary, Euro-groups are still driven by self-interest but they value the EU-level mechanism of decision-making. That is, Euro-groups are willing to use or cooperate with supranational institutions to achieve their goals as they are far more visible than national associations (Eising, 2003 : 205-6). In the dichotomy of business and non-business nature, the latter is far more plural and diversified. Non-business interest groups suggest huge and heterogeneous interests in different sectors or levels. On the contrary, business interest groups are also vital to European integration as they are in majority and are quickly responsive to EU policies (Eising, 2003: 200). For instance, Rainer Eising (2003) mentioned that UNICE (Union of Industrial and Employers Confederations of Europe) and CEEP (Centre Européen des Entreprises Publics) are important social partners with the EU and enjoy a privileged status (p. 200). Additionally, he maintains that EUROCHAMBERS constituted by small and medium-sized enterprises (SMEs) importantly promotes Single European market.

1.4.1.2 Preference and Interest

Internal factors have an impact on the formation of national interests and preferences, emanating from historical experiences, geography, and the perception of protective mechanism against threats or overcoming national vulnerabilities. Generally, after countries adapt themselves to change or conceive a new perception of national interests and preferences, states would spell out their preference into relations with other actors, including Member States, non-Member States, or international organizations.

Neofunctionalists believe that actors participating in regional integration are driven by the utilitarian concept of interest politics (Burley & Mattli, 1993: 54). Therefore, any postulation of goodwill, harmony of interests, or dedication to the common good need not be applied in Neofunctionalism since it assumed that the motive behind the willingness to cooperate as long as regional integration is considered to be 'instrumental self-interest' (Burley & Mattli, 1993: 54). In this sense, each actor in the process of integration holds a different perspective of interests and affinities. Although it makes harder to define the preferences and interests of actors, it provides a flexible and adaptable concept related to national preference. Eventually, an interesting question arises: how do they cooperate with each other despite they being in different positions with different needs? This issue will be addressed in the next part concerning the integration process.

Since different actors represent their respective interests, various preferences have emerged. However, the essence of such preference is related to utilitarianism and egoism. In addition, actors would develop a sense to approach the supranational center to resolve their issues (Haas, 1958: xiv). Meanwhile, supranational actors would increase their powers and enlarge their abilities to promote further integration (Burley & Mattli, 1993: 55).

1.4.2 Process: Instruments and Content

As for the process in the realm of Neofunctionalism, instruments arguably

denote the means employed by supranational or private actors to promote regional integration. The concept of spillover perfectly fits in it. Together with the development of Neofunctionalism, the notion of spillover has been expanded from functional spillover and political spillover to cultivated spillover, geographical spillover and 'policy cycle type of functional spillover' (Scholten, M. & Scholten, D. 2017: 1-18).

1.4.2.1 Instruments: Various Integrative Forces: Spillovers

This part aims to categorize the integrative mechanisms amid regional integration under neofunctionalist conception. Traditionally, spillover is the core contention which explains how the regional integration starts and maintains.

Three types of spillover basically can be distinguished: functional, political and cultivated spillover (George & Bache, 2001; Lelieveldt & Princen, 2015; Nye, 1971; Tranholm-Mikkelsen, 1991). The notion of spillover is to account for the reason why regional integration occurs. That is, Neofunctionalists attempted to use the concept of spillover to explain why Member States are willing to delegate their power to the supranational center and how and why actors in Member States shift their loyalties, expectations and political activities to the new center (Haas, 1958: 16).

The spillover does not occur automatically. It has to meet certain criteria, such as shared common values and identity, a certain degree of homogeneity in levels of political, social and economic development, a network of transactions, comparable decision-making processes and compatibility of expectations (Groom, 1994: 114). Moreover, spillover would happen only when tasks are assigned to supranational organizations rather than being launched by Member State governments (Lindberg, 1994: 107). Furthermore, spillover is an alternative when intergovernmental cooperation is insufficient to resolve problem to meet the satisfaction of needs and a belief that national elites would uphold integration to protect their best interest. Accordingly, spillover is 'manually operated' and 'semi-automatic' which must be pushed by Member States, firms, transnational interest groups, or individuals in the first place (Macmillan, 2008: 39).

Nye pointed out besides spillover being an integrative force, there are other integration mechanisms that should not be overestimated, such as elite socialization, regional group formation, ideological-identity appeal, and the involvement of external actors (Nye, 1970: 803-11). However, this thesis will only focus on the concept of spillover as this will be consistent with the following Neofunctional analysis invented by Burley and Mattli (1993).

(1) Functional spillover:

Functional spillover means that states collaborate with each other from one sector to another to achieve the original goal of cooperation of functional necessity (Jensen, 2013). The cooperation that emerges is for the satisfaction of the previous functional need and such need will generate further action for cooperation (Lindberg, 1963: 10). In a nutshell, supplies of functional spillover resolve new problems triggered by the original projects of integration (Tranholm-Mikkelsen, 1991: 4-6). The relation between problems and solutions in the integrative process constitutes a series of cooperative efforts; for Neofunctionalists it is spillover.

In Haas' opinion, the functional spillover is more or less automatic because it is based on the nature of modern industrial economy where they are interdependent on each other (Burley & Mattli, 1993: 55). In addition, Haas holds that sector integration starts from its own impetus and later will permeate all levels of economy (Haas, 1958: 297). However, the production of spillover is not spontaneous at first; conversely, it must rely on the first delegation of member state governments.

Additionally, economic integration fosters not only deeper economic integration but may eventually result in political integration (Tranholm-Mikkelsen, 1991: 60). Ultimately, the economic and political interests could be in constant flux so the regional organization would require a degree of supranational governance. The most credible example of functional spillover is the establishment of the Single European market. The elimination of trade barriers is no longer sufficient, but common rules governing the working environment must be revived as well (Jensen, 2003: 85). Finally, owing to the Single European Act, the EEC transformed it into a closer union

than ever before that Member States envisaged by the Maastricht Treaty in 1992 and then achieved a *sui generis* political international organization.

(2) Political spillover:

Political spillover involves the build-up of political pressures by national interest groups in favor of further integration within the states involved (George & Bache, 2001). Political spillover refers to the process of adaptive behavior, namely, traditional political actors incrementally alter its expectations, values, and identities to the new center at the supranational level. It occurs when ongoing cooperation in certain areas empowers supranational officials to act as informal political entrepreneurs in other areas (Moravcsik, 2005: 352). Political spillover can also be regarded as the certain type of 'deliberate integration,' emanating from political or ideological reasons, not pure functional necessity (Nye, 1970: 202). Accordingly, political spillover is usually produced by political elites; however, some studies show that it could also be generated by public opinion and NGOs (Marsh, 1999: 198).

In order to manage political pressure to transmit from one to other sectors, rational state governments must delegate discretion to experts, judges and bureaucrats, thereby creating powerful new supranational actors with an interest in cooperation (Haas, 1958: xii). Henceforth, new lobby groups at supranational level exit and exert their influence to blend actors' interests together. For instance, NGOs may lobby on the ECJ and the EP as well as the Commission because interest groups may realize that their interests are better served by Brussels. Accordingly, the formation of 'package deals' to this end has been completed to secure their discrete interests on respective issues (Lindberg & Scheingold, 1970: 116).

(3) Cultivated spillover:

When it comes to regional integration, forming a solid coalition is a tactic to enhance integration. In principle, it is based on the application of 'cultivated spillover'. It means that supranational actors are not mere mediators to balance national or group interest but also represent as 'policy entrepreneurs' directly

participating in the dynamics of integration at play (Jensen, 2003: 85). Cultivated spillover describes the process which supranational institutions are likely to develop as increasingly independent identity that cannot be easily erased by a single national-state. For instance, it usually can be observed in circumstances where supranational institutions attempt to press a transnational agenda, notwithstanding Member State governments having no interest in it (Jensen, 2003: 85).

For instance, Haas found the Commission to be the primary actor supporting the underlying logic of functional-economic interdependence through gradual expansion of its authority, which is tantamount to be the breadth and depth of integration so that it generates an integrative impetus (Haas, 1961: 369). In addition, because of the introduction of collaborative decision-making through Maastricht Treaty, it provides the EP a new opportunity to develop pan-European loyalties overriding national interests (Jensen, 2003: 87). Moreover, the role of the ECJ in terms of generating cultivated spillover cannot be underestimated. Because of the principle of direct effect, the doctrine of supremacy of EU law, and the teleological treaty interpretation, the ECJ set up the new common value for the Union as a whole. Subsequently, the new created value dilutes national interests so that these interests gradually get closer to common interests. Eventually, the ECJ's case law and jurisprudence gives effect to reshaping the Union policies.

Unlike functional spillover is based on technological necessity, and Nye (1970) argued that cultivated spillover was derived from 'deliberate linkages', which associates with political and ideological sentiment (p. 806). This somewhat drives states to build a coalition but mostly it will be organized and coordinated by the supranational organization. He further noted that international or regional organization performs as honest brokers during states' negotiations.

Nevertheless, he warned that cultivated spillover may also cause the breakdown of the coalition when only a small group of people enjoys the benefits of the coalition. That is, if the alleged common interest cannot justify what supranational actors have done, the people outside the group may rebel to terminate the relation of cooperation so as to withdraw the consent for integration.

1.4.2.2 Content: Integration with the Nature of Functionality and Apolitical Tendency

Broadly speaking, the content of regional integration can be associated with various kinds of sectors and topics. The issues can cover a lot of subjects, such as economic, social, legal or any other technical perspectives. Notably, what Neofunctionalists posit is the content of integration is predominantly functional. Haas has accepted the view that functionalism, which asserts that functional cooperation must begin at a relatively low politics, such as noncontroversial economic and social realms (Haas, 1968: 152). However, Haas later added that economic and social problems are inseparable from political problems. Arguably, even if integration was launched from functional or technical plane, the integration problems would sooner or later converge into a political dimension, which are expected to be resolved by political resolution. Here, Haas (1968) pointed out that political force or influence would infiltrate in various ways, so it is difficult to ignore political implications when it comes to regional integration (p. 152). In addition, Haas considers the participation of political significance as indispensable factor to determine economic or social decision. Furthermore, Haas argued that the content of integration should be economically essential and endowed with a high degree of functional specificity so that integration can be transformed from low politics to high politics.

Section 4 discusses Neofunctional analysis, which consists of actorness, motivation, instrumentalities, and integration content. The analysis provides an explicit explanation on how supranational institutions and sub-national actors involve in the process of regional integration. Notably, the concept of spillover encapsulates the reason behind regional integration. In what follows, Chapter 2 applies the Neofunctional analysis to ascertain the role of the ECJ in legal integration of Europe.

2. SUBJECT OF RESEARCH: THE EUROPEAN COURT OF JUSTICE

The ECJ not only plays the role of a guardian of the EU law but also acts as an institution that invents alternative openings for integration when European integration is in doldrums. The notion of spillover offered by Neofunctionalism pertains to explain the process of European integration bolstered by the ECJ. The spillover produced by the ECJ's case law increasingly influences other institutions or the Member States.

In Chapter 2, Section 1 introduces and discusses the ECJ's function conferred by the Treaties and the principles developed by the ECJ, which are vital to European integration. Section 2 applied the Neofunctional analysis to ascertain and analyze the ECJ for its actorness, motivation, instruments, and contents.

2.1 Overview of the European Court of Justice and Three Edifices of EU Law

This section first presents the brief history of the ECJ, covering three phases: (1) the initial period of searching for a role (1952–1958); (2) the heyday of the ECJ (1958–1992); and (3) the receding period from judicial activism (1992–). The second part introduces the membership of the ECJ, including its internal structure, composition, and governing principles. In what follows, the third part introduces the ECJ's function and authority, focusing on their legal and instrumental background, which is twofold: direct and indirect actions. Eventually, the fourth part introduces the direct effect principle and the supremacy of EU law doctrine based on several landmark cases and then addresses the importance of these principles to European integration.

2.1.1. The Historical Development of the ECJ

This section offers an overview of the ECJ in its different periods. Each period carries different nature and the ECJ exercises distinguished missions to produce different effects on European integration. Overall, the development of the ECJ

consists of the initial period, the judicial activism period, and the backlash against the judicial activism period.

2.1.1.1 The Initial Period of Searching for a Role (1952–1958)

In the initial period of the ECSC, the judicial bodies were considerably overlooked because the judicial system of the ECSC was a mere complementary idea for the separation of power under the 1950 Schuman Declaration, stating "appropriate measures would be provided for means of appeal against decisions of the Authority" (Saurugger & Terpan, 2017: 12). The idea of separation of power was concurred by German and Benelux (Belgium, the Netherlands and Luxembourg) governments to prevent the Authority from abusing its power and to counterbalance the executive power (Tamm, 2013). Soon afterward, the separation of power principle was included in the Paris Treaty. Furthermore, Walter Hallstein conceived the ECJ as a constitutional court, which could interpret the provisions of the Treaties and can settle disputes relating to the Community. However, the French delegation objected to allowing private litigants bringing cases to the Community would potentially jeopardize the Member States' sovereignty. Accordingly, only Member States are permitted to have access to the ECJ under the Paris Treaty.

The ECJ's primary mission is to assure that the ECSC accurately enforces its obligations under Article 2 of the Paris Treaty, which addresses that the ECSC should promote economic expansion, decrease unemployment, and maintain a higher standard of living through common market scheme of coal and steel. In 1952, France argued that the concessions to German steel companies granted by the Authority breached the European law, enabling German companies to derive advantage from the market (French Republic v. High Authority of the ECSC, 1954). In response, the ECJ ruled in favor of France and the decisions made by the Authority had been annulled (French Republic v. High Authority of the ECSC, 1954). Afterward, the ECJ realized that to fulfill its mission, setting up European constitutionality is so vital that Treaty interpretation is not confined in the single Article at issue, but need to consider the 'entirety of the treaty.'

By May 1956, the permanent status of the ECJ was confirmed in the Spaak Report, which dealt with new institutional arrangement (Brussels Report, 1956). Henceforth, the 1957 EEC Treaty possessed the feature of constitutional elements, which are crucial and fundamental for development of future EU law (Saurugger & Terpan, 2017: 17). In the Treaty, the ECJ depends on several provisions that expand its power to participate in Europe's further integration directly. First, the provision on preliminary ruling, according to Article 177 EEC (Art. 267 TFEU), allows national courts to refer questions when they confront difficulties in interpreting or implementing the European law. Although this preliminary ruling mechanism did not set out the 'exclusive' constitutional position of the ECJ, it provided a chance to associate it and national courts (Boerger-de Smet, 2012: 352.). Secondly, the ECJ has the power to review the legality of Community acts under Article 173 EEC (Art. 263 TFEU). It preserves the principle of separation of powers to counterbalance the powers between Community institutions.

Thirdly, the ECJ can not only review the acts made by the Community but also supervise the compliance of Community law by Member States based on Article 228 EEC (Art. 260 TFEU). It was a great leap for the ECJ to extend its power compared to the period of ECSC because the examination of the legality of Member States' acts was left only to the Authority. The two-step procedure enables the Commission to deliver a reasoned opinion to the Member State, which violates the EU law; and if it continues its violation, the Commission can bring the case before the ECJ.

To sum up, the current ECJ can be traced back to 1952. The ECJ was not devised for supervising the Member States complying with Community law. On the contrary, it was expected to protect the interests of the Member States from damage by the supranational institution. The ECJ expanded its power until the conclusion of the Rome Treaty, which provides various legal instruments to supervise the implementation of the EU law by EU institutions and Member State governments. Moreover, this is the first time that nationals had access to the ECJ through preliminary ruling procedure. The preliminary ruling procedure paved the path for the ECJ to make the influential principles: the direct effect principle and the supremacy of the EU law principle by its case law.

2.1.1.2 The Heyday of the ECJ (1958–1992)

In the wake of institutional reforms, the ECJ ruled several landmark judgments in the 1960s to establish the new legal order. In this period, the ECJ took steps little by little to build its constitutional status, which are in sequence: (1) the direct effect principle; (2) the primacy of EU law; (3) the protection of individual fundamental rights; and (4) the enhancement of the internal common market (Rasmussen, 2012).

After the conclusion of the Rome Treaty, the ECJ began urging Member States to comply with the Community law. These included the most remarkable cases, such as the *Van Gend en Loos* (1963) and *Costa vs. ENEL* (1964) in fundamental rights, *Plaumann vs. Commission* (1963) in acts of institutions, and free movement of goods in the cases of *Commission vs. Italy* (1969). These cases helped pave the way for European integration and to develop its unique legal order.

(1) *Van Gend en Loos* and the direct effect of Community Law:

Apart from the European Commission, the ECJ, as a judicial organ of the Community, became an alternate supranational actor and developed gradually but strikingly in the 1960s in terms of participating in European integration (Dinan, 2004: 118). *Van Gend en Loos* case (1963) arguably can be deemed as one of the most revolutionary case ever given by the ECJ (Chalmers, Davies & Monti, 2010: 14). The ECJ promulgated the key principle, which had considerably advanced the speed of European integration.

Van Gend en Loos case (1963) concerned a reclassification for purposes of customs duties of a chemical product imported into the Netherlands. Van Gend en Loon, a Dutch trucking firm, invoked Article 30 of the TFEU in legal proceedings against Dutch customs on the ground that an imported duty imposed on the plaintiff breached the treaty's common market provisions. The plaintiff contended that Article 30 of the TFEU prohibits customs duties or charges having equivalent effect imposed on the movement of goods within the Community. Subsequently, the Dutch court referred the case to the ECJ inquiring whether the provision of the Treaty had 'direct

applicability' at the national level (Van Gend en Loos, 1963). In response, the ECJ held that not only the Member States but also their nationals are under international treaties' obligations. Thus, Community law not only imposes obligations on individuals but also confers upon them rights that are protected by the ECJ (Van Gend en Loos, 1963). The ECJ further elaborated that an expansive interpretation is allowed while it considers the spirit, the general scheme and the wording of the Treaty (Saurugger & Terpan, 2017: 20).

Afterward, later cases rendered by the ECJ also supported and reinforced the principle of direct effect (Lutticke, 1966; Reyners, 1974; Van Duyn, 1974; Ratti, 1971; Becker, 1982). During the deliberation of the Van Gend en Loos case, the French Robert Lecourt and the Italian Alberto Trabucchi supported the ECJ to interpret the Treaty systematically (Saurugger & Terpan, 2017: 21). They also influenced other judges, such as Italian Rino Rossi and the Belgian Louis Delvaux, who supported the narrow interpretation (Tamm, 2013). Moreover, the ECJ proactively encouraged the judges who are in national courts to adopt expansive integration. Such promotion from the ECJ was regarded as a 'narrative of empowerment' (Burley and Mattli, 1993: 62-3). For instance, through seminars, dinners, regular invitations to Luxembourg, and visits around the Community, the EC judges sought to convince the national courts to apply actively and comply with European laws (Burley and Mattli, 1993: 62-3). Furthermore, in 1963, they used the private group of Europeanized lawyers, International Federation for European law (FIDE), to promote the principle of direct effect (Saurugger & Terpan, 2017: 21). Remarkably, lawyers in general supported the principle of direct effect. Accordingly, this has a great impact on the following cases, such as the *Costa v. ENEL* case (1964) and the *Simmenthal* case (1978).

(2) *Costa v. ENEL* and the primacy of EU law:

Some Member States argued that despite the adoption of the principle of direct effect, the later or special national law should take precedence over the EU law according to the legal doctrine of '*lex specialis derogate legi generali*,' and '*lex poster derogate lex priori*.' Under this circumstance, the subsequent case of Costa vs. ENEL had been ruled in 1964, which consolidated the new legal order of Community

law, and establish the hierarchy between the EU law and national law.

In this case, a shareholder claimed that the Italian nationalization law was not consistent with the Community law. Although the Italian government argued that the national court should undoubtedly apply the subsequent domestic law after 1958, the national court in Milan still felt the need to refer the case to the ECJ. The ECJ repudiated that since the Member States have delegated their sovereignty to a certain extent to the Community, it cannot simply be overruled by national legislation (Costa v. ENEL, 1964). Moreover, the ECJ spelled out that the limitations on States' sovereignty are permanent and their effect in any subsequently unilateral act is invalid if incompatible with the Community law. Therefore, the EU law will not defer to any domestic law to secure its uniformity and to attain the objective of the Treaty. Furthermore, the ECJ, in the cases of *International Handelsgesellschaft* (1970) and *Simmenthal* (1978) explicitly articulated that to safeguard the effectiveness of the Community law, any provisions of a national legal system and any legislative, administrative or judicial practices which are contrary to the essence of European law and thus are likely to impair the integrity of European law will be set aside automatically. It is crucial to establish the principle of primacy of EU law; otherwise, the principle of direct effect would be ineffective.

(3) Protection of individual fundamental rights:

There is another important contribution by the ECJ, besides the principle of direct effect or the primacy of EU law, which also influences the relations between the ECJ and national courts. To lower resistance against the principle of supremacy of EU law from all Member States, the ECJ began formulating the constitutionalization of fundamental rights (Rasmussen, 2012). Based on two main reasons, the ECJ started to constitutionalize fundamental rights in accordance with the European Treaties. First, because the European Treaties comprise economic and fundamental rights, and rights for citizens, the ECJ must unavoidably protect the rights incorporated in the Treaties (Dehousse, 1998). In this regard, the ECJ has authority to lay down consistent protection of the rights within the EU. Secondly, conflicts had occurred in interpreting fundamental rights by national constitutions or EU law. Thus, the ECJ have to clarify

the true meanings of the treaties so that the legal certainty would be assured. Accordingly, states, the EU institution, interest groups, and individuals would exercise their rights and practice their obligations properly. In the 1970 International Handelsgesellschaft case, for instance, the ECJ demonstrated that national constitutional rights could be regarded as an indirect source of European law (Saurugger &Terpan, 2017: 27). In the *Nold* case (1974), the ECJ reaffirmed that the protection of fundamental rights is the general principle of law, which can be the source of European law. Accordingly, the ECJ must consider the Member State's constitutional traditions so that the measures taken by the ECJ are not incompatible with their legal tradition. On the other hand, Member States should follow and respect their international obligations arising out of international treaties that they have signed (Nold v. Commission, 1974).

(4) Enhancement of internal common market:

The *Dassonville* case (1974), as a prelude to Europe's integration of the internal market, triggered the demand for further cooperation in establishing a single market. The ECJ upheld that any trading rules enacted by the Member States that may cause impediment directly or indirectly, actually or potentially to the internal market would be regarded as measures of equivalent effect to quantitative restrictions (Dassonville case, 1974). Given the *Dassonville* case (1974) ruled by the ECJ, the *Cassis de Dijon* case (1979) took much more proactive stance on economic integration. In this case, the ECJ considered that a minimum requirement of alcohol content for alcoholic beverages constituted a measure of an effect equivalent to quota restrictions on imports, which hinders Europe's integration (Cassis de Dijon case, 1979). Furthermore, the ECJ devised the principle of mutual recognition that Member States are obliged to remove trading restrictions to harmonize their trade standards with others.

Besides, not only has trade rules been redefined by the ECJ, but also social policy has been influenced by this trend. In the *Defrenne* case (1976), a Belgian flight attendant was paid less than her male colleagues who did identical work (Defrenne v. Sabena, 1976). As a result, Mrs. Defrenne contested that the treatment by the Sabena

airlines had violated her right to equal pay under Article 119 EEC. The ECJ audaciously ruled that the principle of equal pay for equal work enshrined in the European treaties does not merely have a binding effect on the Member States, but also includes private individuals. In doing so, the ECJ expounded that European treaties do not merely confer rights on the Member States' nationals but also have direct effect between individuals.

The ECJ, as mentioned above, intentionally attempted to manage a part of European integration in the manner of its legal ruling (Cappelletti, Seccombe & Weiler, 1986). The ECJ has first established a legal epistemic and discursive community between the early 1960s and late 1980s which was generally regarded as the ECJ's activism (Maduro & Azoulai, 2010). In this context, the ECJ empowered the national courts under Community law to ensure that the domestic law was under considerable scrutiny for alignment with the European law (Dehousse, 1998). Accordingly, the majority of judges sitting in national courts were keen to apply Community law affirming the position of ECJ's jurisprudence in Member States. However, national constitutional courts challenged the ECJ a number of times. The French Conseil d'État, France's highest administrative court, refused to accept the principle of direct effect and the supremacy of EU law (Saurugger & Terpan, 2017: 33). Similarly, the German constitutional court also disagreed with the principle of supremacy of EU law (Solange I, 1970). Both courts were concerned about the erosion of state's sovereignty made by the European law. Until the 1980s, both the courts had accepted the principles declared by the ECJ (Solange II, 1986).

2.1.1.3 Backlash of Court activism (1992-Current)

As mentioned by Haas, the ECJ had successfully set up a European legal order with contributions from its network of professionals with known expertise and competence in the domain of European law, and authoritative rulings on policy-relevant knowledge (Haas, 1992). However, this momentum seems to have been halted in the 1990s. Scholars encapsulated some evidence, which shows retreat from activism (Saurugger & Terpan 2014).

First, the 1986 Single European Act and the 1992 Maastricht Treaty awarded the power of the Council of Ministers to ECJ to use QMV voting to overrule its rulings through new regulations or directives (Garrett, Kelemen & Schulz 1998; Garrett & Tsebelis 2001). Secondly, the ECJ cannot disregard the increasing impact of populism. In fact, besides the governments, media and nationals are also interested in the ECJ's rulings (Saurugger & Terpan, 2017: 37). The matter, which can attract audience, can be divided into two parts. One is the ECJ ruling related to fundamental rights or the new rules, which would have an impact on macroeconomics; the other is the ECJ reforms concerned with its institution (Saurugger & Terpan, 2017: 37). For instance, since 1996, the Santer Commission had carried out a first regulatory simplification initiative (SLIM), in which the context was 'to do less in order to do it better.' (European Commission, 1996) In 2002, the Commission consolidated this precept by implementing a second regulatory reform action plan in which the title was 'simplifying and improving the regulatory environment' to enhance the competitiveness of European economies (European Commission, 2002). Again, in 2005, a project for 'better regulation' had been launched (European Commission, 2005). This had the concurrence of the President of the Commission, Jean-Claude Juncker, and then limited the regulation agenda of the EU (European Commission, 1996). Meanwhile, the ECJ, to align itself with the Commission, is more reluctant from making ambitious or far-reaching rulings (European Commission, 1996).

Thirdly, concerned with the composition in the ECJ, all judges until the 1990s almost had a legal background (European Commission, 1996). The recent judges are more cautioned about their rulings, refraining from making groundbreaking ones, as they realize the complex legal system between the EU and the Member States and knowingly avoid taking a politically sensitive position (Saurugger & Terpan 2016). Lastly, increasing the number of 'soft law' had emerged. This enables Member State governments to escape the control of the ECJ in terms of employment, social and environmental policies (Terpan, 2015). This change was in parallel with the introduction of the Maastricht Treaty and further enhanced in the 2000 Lisbon Strategy. Although the new model of governance served as a flexible and informal approach for Member States to enjoy a broader discretion in policy-making, this has considerably limited the ECJ's capacity in which the ECJ has no power on the 'soft

law' (European Commission, 1996).

On the contrary, some scholars have argued that the progress of the judicialization of the EU allows the ECJ to adopt a more active stance in the original domain or the renewed policy-making areas (European Commission, 1996). The ECJ was engaged in various and extensive range of policies from employment discrimination to consumer protection to securities regulations to competitive rules to the free movement rights of workers, students or medical patients (Saurugger & Terpan, 2017: 39). The strongest reason behind this is the codification of Single European Act (SEA), which confers rights on different and new actors in the EU policies, such as interest groups, companies, NGOs and newly created regulatory authorities (Saurugger & Terpan, 2017: 39). This has changed the traditional policy-making process in which mainly Member States and supranational institutions participated. Additionally, a weak administrative apparatus has led to the establishment of a robust judicial system (Grimmel, 2012). Specifically speaking, the fragmentation of power creates distrust and deadlock between regulators and regulated actors in a liberalized market thereby leading to the importance of judiciary organs to establish strict, transparent and accountable rulings (Black, 1976; Kelemen, 2011; Pollack, 2003). Therefore, the ECJ capitalized on such a situation to protect itself from ambushing by national governments via overruling its rulings. Moreover, the ECJ endeavored to extend social rights for European citizens and to eliminate discriminatory treatment (Stone Sweet 2004; Cichowski, 2007). Furthermore, the ECJ was bold enough to invalidate or outlaw national rules of administrative nature and offer protection to individuals (Kelemen, 2011: 54). The ECJ gradually gathered its jurisprudence of fundamental rights to establish the 'constitutionalization' of fundamental rights in the EU (Schimmelfennig, 2006).

Another salient example is the draft of the Charter of Fundamental Rights of the EU, which has enabled the ECJ to gain greater influence on the protection of individual rights. Ahead of the conclusion of the Charter, the European Convention in 1999 aimed to draft the Charter of Fundamental Rights, which will comprise social, economic and political rights. Until 2001, the Charter was attached to the Treaty of Nice and later was enhanced by the Treaty of Lisbon in 2019, which has accorded the

same value to other European treaties that have a binding effect on Member States (Saurugger & Terpan, 2017: 40-41).

2.1.2 Membership and Authorities of the ECJ

Determining the role of the ECJ is not an easy task since it requires an interdisciplinary perspective, familiarity with comparative methods, an understanding of politics at both the EU and national levels, and knowledge of how multiple legal systems work. Consequently, this part attempts to illustrate the ECJ's structure, component and internal rules and principles, and further elucidate why such judicial arrangement had been set up. Historical and socio-historical scholars deserve all the credit for piercing the ECJ veil so that people now have a clear and comprehensive understanding of the functioning of the ECJ (Cohen, 2012; Rasmussen, 2012; Bobek, 2015; Chalmers, 2015).

2.1.2.1 General Structure

The ECJ has remained unchanged over the years. Along with the progressive development of the European organization, the judicial organ of the EU is also gradually upgrading itself to get closer to the supranational model. The entry of force of the Lisbon Treaty, on December 1, 2009, has made essential modifications to the EU constitutional architecture. The new Treaty further strengthens the supranational features of the system with qualified majority voting and co-decision now being the presumptively "normal" procedure for legislating; Parliament's powers have also widened in other ways (Stone Sweet, 2010: 40). In addition, with the entry into force of the Lisbon Treaty, the EU is now governed by two basic laws. The first is the Treaty on the Functioning of the European Union (TFEU), which is the new name for a reorganized and consolidated Treaty of Rome. The second is the Treaty on European Union (TEU) which, compared to the TFEU, is relatively more concerned with institutional architecture and general principles of EU governance.

Instead of being an external appendage to EU law, the European Council, that most intergovernmental of institutions, is currently a proper subject of EU law. In

addition, Stone Sweet contended that the Member States did not diminish the Court's authority and discretion: the ECJ's Trustee status is rather intact (Stone Sweet, 2010: 40). Surprisingly, they extended the ECJ's "normal" jurisdiction to matters that formerly constituted the "third pillar." Additionally, they declared their acceptance of the ECJ's supremacy of EU case law, for the first time.

Besides distinguishing the current reforms, a retrospect of the ECJ will also be briefly examined. By 1952, the ECJ had only one self-sufficient chamber to deliberate cases. Subsequently, because the ECJ had to respond to the impacts of (1) external pressures, (2) an increasing workload and caseload, (3) strengthening of institutional role, and (4) the EU enlargement, a certain extent of transformation was urgently required (Saurugger & Terpan, 2017: 43). Thenceforth, the transformation seemed an unstoppable and incremental movement starting in 1988 up to the present. In 1988, the Court of First Instance (CFI) was established but attached to the ECJ (Council Decision 88/591). Later, the Civil Service Tribunal was created to resolve disputes between the Union and its staff in 2004. In 2015, the Council, together with the Parliament, adopted to change the CFI to the General Court. In the present, the ECJ comprises the Court of Justice and the General Court.

2.1.2.2 Composition of the ECJ

In the present, the Court of Justice has one judge per member state, appointed for a six-year renewable term (TEU, Art. 19). With successive enlargements, the ECJ faced the question of maintaining the mechanism of each state having at least one representative judge. The answer is affirmative. According to Saurugger and Terpan (2017), the designation of judges from all Member States perhaps offers the element of diversity to EU law since each judge came from a different national legal system (p. 46). The diversified knowledge of law, background, knowhow and expertise will enrich the content of EU law to later develop the unique nature of pan-European legal order and system. Accordingly, the ECJ will be a collegiate clique, instead of a deliberative assembly. In addition, they hold that it would strengthen the legitimacy of rulings by the ECJ because the judges are appointed by respective states and they share equal seat and weight. In consequence, national governments might feel it easier

to accept the rulings of the ECJ. Moreover, Saurugger and Terpan suggested that to overcome the overwhelming caseload, the number of judges be increased and allotted in 3, 5 or 15 groups as a unit in each chamber.

2.1.2.3 Governing Principles of the ECJ

In order for the ECJ to function smoothly with other supranational institutions or the Member State governments, the judges must comply with three requirements: (1) representativeness; (2) independence; and (3) accountability. Saurugger and Terpan hold that although they are not explicitly stipulated in the Treaty, they are, however, derived from the treaties and orthodox legal doctrines.

(1) Representativeness:

Under Article 253 of the TFEU, the judges of the ECJ shall be appointed by the common accord of the governments of the Member States for a term of six years (TFEU, Art. 253). However, the judges would preserve an exclusive 'bond' with their Member States. This has a favorable implication that EU law and domestic law will intrinsically and functionally be interconnected between the Member States and their judges. Saurugger and Terpan asserted that supranational legal tradition would be profoundly molded into national courts since the judges in the national courts can take the ECJ for a model in terms of EU law. In sum, each Member State would have at least one voice and one vote in the ECJ to maintain the neutrality of the ECJ in principle. It is presupposed that the judges would defend their respective national interests; however, it turned out that they were committed to protect the Union's interest as a whole as also the rights of private individuals.

(2) Independence:

The judges are selected from among persons whose independence is beyond doubt and who possess qualifications required for appointment to the highest judicial offices in their respective countries or who are 'jurisconsults' of recognized competence (TFEU, Art. 253). Article 253 of the TFEU also indicates that the

candidate of judges possibly can be a person who worked in the highest judicial offices or "in academic and civil service lawyers." All in all, the judges can be chosen from civil service, national judiciary, the bar, or academia.

Saurugger and Terpan (2017) summarized several ways how the ECJ's system maintains the independence of the judges. First, they enjoy the right to immunity from legal proceedings. Secondly, they cannot participate in any activities, which are incompatible with their functions. Thirdly, they must perform their duties impartially and scrupulously. Fourthly, the rulings rendered by the ECJ during deliberations should be kept secret.

Despite there being specific rules that prevent the ECJ being partial when the judges rule cases, the governments of Member States apparently can still control the ECJ, especially the judges, at the stage of their appointment. In this scene, the Member States have a high probability of selecting docile or easily controllable judges. Hence, there was concern about the independence of judges.

However, scholars have repudiated such contention. First, Saurugger and Terpan (2017) argued that the environment of the court is usually highly socialized. Hence, the judges apparently immerse themselves in legal matters, so they know that they are subordinated underneath law, but not under politics (Saurugger & Terpan, 2017: 52). The judges should refrain from being emotional but use 'language of reasoned interpretation, logical deduction, systemic coherence' to safeguard legality and legitimacy (Mattli & Slaughter, 1998: 197). Despite the judges enjoying great power to make decisions, they are also constrained by law to a great extent (Alter, 2008: 47). Secondly, Saurugger and Terpan contend that it is hard for the Member States to disregard the rulings made by the ECJ. Thus, the ECJ generally is not threatened by Member States and thereby disregards their preference but pursues supranational interests (Burley & Mattli, 1993; Beach, 2001; Stone Sweet, 2004; Alter, 2009). Thirdly, the secrecy of deliberation of the ECJ provides a great protection against interventions from Member States and public opinion. The principle of secrecy of deliberation not only refers to deliberations being made in secret but also the judges cannot publish any concurring or dissenting opinion. Since the judgments are made

collectively under consensus or a simple majority voting, it is hard to infer each judge's real preference. Fourthly, the judge would generally avoid the conflict of interest in the case. In this regard, a case that came from a Member State is not given to a judge from the same country. Accordingly, if the judges are professional to resolving legal disputes and personally far from outside interventions or threats, they could be impartial.

(3) Accountability:

Accountability indicates that when the judicial body, such as a court or a tribunal, decides a case, it must comply with the principle of the rule of law to make clear on its legal reasoning. Additionally, a court or a tribunal is responsible for what it had accounted for in its decisions. In this regard, the principle of accountability will safeguard the court from an arbitrary judgment and maintain legal certainty.

In the ECJ, judges must be appointed and perform their duties consistent with EU Treaties and the Statute of the Court. For example, the allocation of chambers must be carried out according to objective rules established previously; hearings must take place in public; judgments must state the reasons on which they are based and contain the name of the judges who took part in the deliberations; and judgments are to be published on the ECJ's website (Saurugger & Terpan, 2017: 54). Given that the ECJ complies with Treaties and their internal rules or principles, such firm accountability will legitimize its rulings so that the Member States and their nationals will comply with the EU law.

2.1.3 Judicial Power of the ECJ: Direct and Indirect Actions, and its Principles

This part provides a general overview of the power of the ECJ. This will demonstrate how the ECJ interacts with other main institutions, Member States, and individuals in the political system of the EU. In general, the ECJ can resort to direct and indirect actions to interact with other actors according to Article 19(3) of the TEU. Direct actions refer to the Member States, institutions, or a natural or legal person who can invoke the proceedings before the ECJ. On the contrary, indirect action is

dependent, which needs other actors to start the process. For instance, national courts refer to legal questions on treaty interpretation and its application through the procedure of preliminary ruling.

2.1.3.1 Direct Actions

Börzel and Tallberg (2002) discovered that the Commission often launches infringement proceedings based on Article 258 that has steadily increased since the big bang of the 1986 Single Act. Basically, the infringement can be roughly divided into three categories: (1) failure to comply with the treaties' obligations or regulations promulgated by the Commission; (2) failure to transpose the EU secondary legislations, such as directives, properly or on time; and (3) even if a Member State has been duly legislated in the domestic parliamentary, a state fails to properly and accurately apply the substantive terms of the directive once transposed.

Tallberg presumed the reason why states choose to violate the EU law rather than comply with it. Based on the concept of fit and the cost of adaptation, he claimed that if the alleged new EU directive already 'fits' the current national legal, administrative arrangements or practices, the cost for the Member States to implement would be less and they would implement it (Börzel, 2000). Conversely, states would choose their national law over the Union law. The ECJ, under Article 19(3) TEU, is able to take direct and indirect action. In what follows, several types of direct actions will be addressed and the ECJ's jurisprudence will also be elaborated in detail.

(1) Action for annulment:

Based on Article 263 TFEU, the ECJ is entitled to review all legislative acts adopted by the Council and the European Parliament and non-legislative acts, which have legal effects on third parties. Non-legislative acts refer to the legality of acts of bodies, offices or agencies of European institutions. However, there are still some exceptions that the ECJ neither can review recommendations and opinions because they have no binding force nor can adjudicate on 'internal' acts of institutions, which are mere preparatory acts of legal actions. As for the period to raise the actions, the

proceedings shall be instituted within two months of the publications of the measure, or of its notification to the applicant, or of the day on which it came to the knowledge of the notification if it was in absence (TFEU, Art. 263). Under Article 264 together with Article 266 TFEU, if the action is well founded, the ECJ shall declare the act concerned to be void and thereby the institution whose act has been declared void shall be required to take necessary measures to comply with the ECJ's judgment.

The parties, which can raise actions of annulment, can be classified as privileged applicants, semi-privileged applicants, and natural or legal persons. First, the privileged applicants have full capacity to invoke a judicial review. For instance, the Member States, the Commission, the Council and the EP can always bring an action for judicial review under Article 263(2). Secondly, semi-privileged applicants, such as the Court of Auditors, European Central Bank and Committee of the Regions, endow with limited capability to bring actions, which are only confined to protecting their prerogatives (Saurugger & Terpan, 2017: 76.). Thirdly, when a natural or legal person can demonstrate that his/her rights have been impaired by the Union's acts, he/she can challenge these illegal acts of European institutions (TFEU, Art. 263).

Article 263(2) has enumerated the acts of EU institutions without competence, infringement of an essential procedural requirement, infringement of Treaties or any rule of law relating to their application, or misuse of power, which can be challenged. First, without authorization by other institutions or Member States, the acts which lack competence would be voided (TFEU, Art. 264). Secondly, when the adoption violates an essential procedural requirement, such as decisions taken, which are not in accordance with treaties or voting arrangement. The third ground is EU acts, which are arguably not in accordance with treaty obligations as the EU is a party of international agreement. Fourthly, misuse of power is a circumstance where the EU institution has abused its power and is not on the basis of EU law. The last one must rely on the systemic interpretation of EU treaties. According to Article 5(4) TEU, the principle of proportionality, which is also recognized as a general principle of law, shall be taken into consideration by the Member States. In the *Kadi* case (2008), the ECJ ruled that a regulation freezing the assets of people suspected to be associated with Al-Qaeda restricted the right to property of the applicant in a disproportionate

manner. In 2002, the Council adopted the Regulation 881/2002 for the purpose of fighting against terrorism. Because Mr. Kadi learnt his name was on the list, he brought the case for annulment before the Court of First Instance. However, the CFI ruled unfavorably for Mr. Kadi and hence he appealed the case to the ECJ. The ECJ held that the decision made by the CFI had infringed the applicant's right to judicial review and the right to property. Therefore, the ECJ annulled the Regulation 881/2002 insofar as it concerned Mr. Kadi and Al Barakaat.

(2) Actions for failure to act:

Actions for failure to act, as defined under Article 265, allows the Member States, the institutions of the Union and natural or legal person to bring an action before the ECJ when the European Parliament, the European Council, the Council, the Commission or the European Central Bank, as well as EU bodies, offices or agencies of the Union fail to act in accordance with the Treaties. To a certain extent, action for the failure to act is complementary to action for annulment (Saurugger & Terpan, 2017: 81). Unlike Article 263, Article 265 can be instituted in the situation where preparatory acts by the Union violate its obligation to exercise (Parliament v. Council 377/87). However, Article 265 requires that the defined action is a compulsory legal obligation to adopt specific measures rather than a merely general obligation to develop a policy (Parliament v. Council 13/83.). The procedure of actions for failure to act can be segregated into two phases: administrative and judicial. To begin with, the institution concerned should act in two months. If not, it will come for judicial review in the next two months (TFEU, Art. 265). The case of *Asia Motor France and Others v. Commission* (1996) is a good example of this failure to act. In 1989, the Commission ignored the issues raised by a group whose interests had been hurt by five importers of Japanese cars. When there was no response from the Commission, the applicants brought the case to the CFI. The ECJ ruled that the Commission had failed to act in accordance with Article 6 of Regulation 99/63.

(3) Plea of illegality:

The plea of illegality is often regarded as a 'parasitic procedure' vis-à-vis Article 263 TFEU (Chalmers, Davies & Monti, 2014: 457). Article 277 allows the applicant to launch the plea of illegality, notwithstanding the expiry of the period laid down under Article 263 TFEU, namely, even after the two-month period during which parties can bring an action for annulment before the ECJ, and any party may still invoke its right before the ECJ. By doing so, the procedure of illegality compensates for the rigid time limit of Article 263 TFEU (Saurugger & Terpan, 2017: 81). Nevertheless, the plea of illegality still has some limitations. First, it has to be brought under another procedure rather than an independent proceeding. Specifically, the precondition of launching Article 277 depends on Article 263. Secondly, parties shall have had recourse to an earlier opportunity to challenge illegal action based on Article 263. However, in *Spain v. Council* case (2008), the ECJ held that applicants could use Article 277 even if they had not used the opportunity available earlier in Article 263 TFEU. In the *Simmenthal* case (1978), the ECJ ruled that both the alleged regulations and notices contested by the applicant can be challenged before the ECJ. This shows that the plea of illegality is considerably lenient than the annulment actions on the expiry of the period and the subjects which can be challenged.

(4) Actions for damages:

Since the applicant will not only be seeking merely annulment of the measures but also damages from the EU institutions, actions for damages are governed by Article 268 and 340 TFEU. Article 340 had laid down more detailed rules relating to compensation for damage and liabilities of the Union. In this context, Article 340 TFEU differs between contractual and non-contractual liability. The liability action is an independent proceeding established based on Article 340 TFEU (Lütticke et al. v. Commission, 1966). This provision further elaborates that all damages caused by the EU institutions and their servants should be compensated (TFEU, Art. 340). Additionally, there are no time limitations compared with the action for annulment. However, three conditions must be met: (1) the rule of law, which had infringed, must confer the rights to individuals; (2) the violation must be sufficiently serious; (3) the

alleged breach of obligation and incurred damages must have a causal link (Bergaderm et al. v. Commission, 2000).

In relation to actions for damages, the ECJ had set aside the difference between administrative acts and legislative actions until *Bergaderm et al. vs. Commission* in 2000. In this case, Bergaderm sought compensation from the Commission as the latter prohibited the use of a chemical, bergapten, in sun oils on the ground that it was carcinogenic. Following this decision, the company went into liquidation and later sued the Commission on the ground that it had misinterpreted scientific evidence. Although the applicant did not obtain the desired outcome, the ECJ laid down new parameters to decide whether Article 340(2) TFEU constitute or not. Secondly, the ECJ will no longer differentiate between administrative acts and legislative action. The ECT stated that the nature of the measure taken by an institution is not a decisive criterion for identifying whether the subject can be challenged by the applicant or not if three conditions had been met. Thus, there is no need to distinguish between the nature of administrative or legislative action, and substantive or procedural acts; serious breach of any EU legal obligation is sufficient to complain before the ECJ.

2.1.3.2 Article 267 of TFEU: Preliminary Ruling Procedure

The preliminary ruling procedure works as an efficient mechanism to blend separate legal systems into one for compliance (Stone Sweet, 2010: 31); namely, to ensure the consistent application of the EU law, Article 267 of TFEU lays down a procedure that enables national courts to refer questions of treaty interpretation to the ECJ. Precisely, a national court would consider and decide whether the case is related to the EU law. As the legal action brought in by individuals is concerned with the EU law, the national court will refer questions relating to the interpretation of the EU law through preliminary ruling procedure. After the oral stage, the ECJ will judge on the interpretation of the treaties or validity of the acts or the secondary legislation. Eventually, its judgment is binding on the national court and thus will apply the ruling to its own decision. The function of 'reference' demonstrates an interlude to national courts until they apply the ECJ's interpretation. This has provided the chance for the ECJ to reconsider and re-evaluate the EU legislation and thus influence directly the

application of the EU law to the Member States (Arnull, 2003: 182).

Why do national courts cooperate with the ECJ? In general, because of the alleged 'jurisprudence of constitutional conflict,' the constitutional court and its national courts are posited in a competitive position (Kumm, 2005). Logically, national courts would not easily accept the jurisdiction of international courts over themselves. In the European context, while accepting the principles of supremacy and direct effect, judges need to abandon specific rooted domestic rules or doctrines which are contrary to the EU standard, and then have to adopt the new norm according to the ECJ's ruling (Stone Sweet, 2010: 31). However, there are several plausible reasons why national courts choose to cooperate with the ECJ. First, Weiler contended that because the ECJ's constitutional nature and jurisprudence under judicial empowerment, most domestic judges, not the least those sitting in lower courts tend to uphold pro-integrative direction (Weiler, 1991 and 1994). Second, Stone Sweet and Brunell state that national judges seek the efficiency and proficiency of their own legal analysis, under the shelter of Article 267, and the alliance with the ECJ will help them get relief from the pressure of heavy caseloads. As discussed, the ECJ's constitutional jurisprudence has guided national judges to shape and develop pro-integrative standing. Also, with heavy caseloads related to EU law, national judges generally turn to the ECJ for authoritative interpretation to resolve problems based on self-interest. As the extent of EU law gradually expanded into more areas, larger number of national judges are inclined to apply the Union law (Stone Sweet, 2010: 32). Therefore, the willingness of national judges to apply the EU law and its scope are positively correlated.

The preliminary ruling procedure enhances the judicial authority within the national legal system progressively and increases the effectiveness of the decentralized system of monitoring and enforcement of the EU law (Stone Sweet, 2010: 34). In addition, a complicit relationship between the ECJ and national courts is vital to the process of judicialization or constitutionalization under Article 267. The "unintended consequences" of preliminary ruling procedure have a great impact on national law and policy.

Surprisingly, Nyikos (2003, 2006) found that only in less than 3% of cases national judges choose to turn down or ignore the EU law or not agree to apply the ECJ's rulings. Although there are only a small percentage of national judges who ignore the EU law, there are at least four factors, which influence the willingness of the public to fight cases in national courts (Slepcevic, 2009). First, only well-organized and resourceful litigators can initiate protracted litigation within the preliminary ruling of the ECJ. Secondly, they must have standing and their cases must have accessibility and admissibility before national courts. Thirdly, they must have the capacity to convince the national judges to interpret and apply the EU law fiducially even when it conflicts with the domestic law. Lastly, the rulings are faithfully enforced by other executive organs when the outcome is in favor of the litigant.

The preliminary ruling procedure provides chances for the ECJ to make landmark decisions, such as the *Van Gend en Loos* case (1963), *Simmenthal* case (1978), or *C.I.L.F.I.T.* case (1982) in which references made by the national courts are vital to the whole EU law system since it has provided a possibility to open up a wide interpretation and increase interactions between the ECJ and the national courts. Especially in the case of *CILFIT v. Ministry of Health* (1982), the ECJ held that a national court is under no obligation to refer when the issue is *acte clair* or when the ECJ has already ruled on the question of interpretation of cases referred to by the national court. The reason for non-referral, such as the doctrine of *acte clair*, performing as a valve is to defuse the potential conflict between the ECJ and the higher national courts. Hence, the preliminary ruling procedure, as a political mean, should not always be regarded as the panacea for resolving the hiatus to European integration. More objectively, the ECJ can step a little further and involve itself in the policy-making process or keep itself away in a safe zone in the guise of law.

2.1.3.3 Doctrine of Direct Effect

The direct effect doctrine can be regarded as a constitutional principle, which upholds the whole EU judicial system and provides for enforceability of the EU law. Stone Sweet explained that the doctrine is derived from the gaps and vagueness in the

Treaties so that the ECJ can take advantage of it to expand its power to promote pan-European ideas and secure its existence. Accordingly, this crucial doctrine can be deemed as a cornerstone of all ECJ's rulings and it is a starting point for the ECJ to spillover its power and to influence from sector to sector.

In *Van Gend en Loos* case (1963), the applicant, a Dutch company, importing a chemical substance from Germany into the Netherlands, argued that the customs duty imposed on the goods violated Article 12 of the Treaty. However, the Dutch court was unsure of the interpretation of Article 12 of the EC Treaty, so it referred the case to the ECJ as to whether the Article confers rights on individuals whom the national courts should protect. The ECJ held that Article 12 has direct effect according to the spirit, the general scheme and the wording of the Treaty. In addition, the ECJ predicated that the EC Treaty does not merely regulate mutual obligations between Member States, but also function as evidence to show that they are willing to limit their sovereign rights to delegate to a supranational organization. Moreover, the ECJ outlined three criteria as to whether or not the text of treaties, the EU law, would render the direct effect, that is, whether or not the provisions have to be unequivocal, unconditional and absolute (Van Gend en Loos, 1963). These criteria formulated by the ECJ were a beginning. Afterward, they became so lenient that the doctrine of direct effect could be easily granted (Defrenne v. Sabena, 1976; Reyners, 1974). Accordingly, a sudden spurt in case rulings during the 1960s and 1970s remarkably enlarged the application of the EU law that private individuals could invoke their rights before the ECJ.

The implication of the doctrine of direct effect created after the case of *Van Gend en Loos* (1963) was an 'unexpected consequence' to the European Member States, which is applied by the ECJ to various sectors. This also includes the negative effect on national sovereignty. In addition, the direct effect principle has opened up the judicial gate to private parties to challenge the national law, whenever it is contrary to the EU law. This helps the ECJ to secure the integrity of EU supranational governance. Moreover, the doctrine of direct effect is not only enforced in the text of European treaties but also expanded to the Union's directives after the *Van Duyn* case (1974). This enhances the ECJ's potential power and influence over every EU legal

document. Furthermore, the direct effect functions as a cultivated spillover, which has 'forced a kind of indirect alliance between the private litigants and pro-integration forces' (Dehousse, 1998: 47). In sum, the doctrine of direct effect unexpectedly leads to the change of integration dynamics, providing one more approach to influence national policies.

2.1.3.4 Principle of Supremacy of EU Law

The principle of direct effect implied primacy doctrine (Saurugger & Terpan, 2017: 169). Stone Sweet (2004) concluded that both the doctrines are so indispensable that they enhanced the effectiveness of EU law and guarantee their implementation (p. 21). The concept of supremacy of EU law, known as the primacy or the precedence of EU law, can be categorized into absolute and relative primacy. Basically, they are adopted by different actors; for example, the prior is advocated by the ECJ and the latter was promoted by national constitutional courts. Nevertheless, the perspective of relative primacy has been replaced for several reasons. First, Article 4 TEU states that Member States shall take appropriate measure, general or particular, to ensure fulfillment of obligations arising out of Treaties or resulting from the acts of the institutions of the Union, namely, the principle of direct effect and the supremacy doctrine are inherent to the new European legal order. Secondly, Article 4 implies that the Member States and the Council have acknowledged the ECJ's constitutional role. For instance, the Member States shall refrain from any measure, which could jeopardize the attainment of the Union's objectives. The Union's objectives enshrined in the Treaties or secondary legislation are inviolable so that the principle of supremacy is necessary to secure the integrity of EU law. Thirdly, the ECJ contended that this doctrine is derived from the principle of law which is the fundamental rule in every legal system and thus there is no exception to the EU law system (Simmenthal, 1978).

The case of *Costa v. ENEL* (1964) ruled by the ECJ is a starting point for the supremacy principle. In this case, an Italian law was about to nationalize electricity production and distribution industries. Costa, a shareholder of Edison Volta, was negatively implicated by the said law and claimed that it breached the EC law. In

response, the respondent, the Italian government, argued that as the said Italian law was enacted after the EEC Treaty, the Italian law should take precedence over the principle of *lex posterior derogat lex priori*. The ECJ elucidated that as the EEC has created its own legal system and it has become an integral part of the legal systems of the Member States and which their courts are bound to apply, the measures enacted by the Member States cannot therefore unilaterally and subsequently be inconsistent with that of the EC law. Therefore, the principle "later law overrides the previous one" cannot jeopardize the integrity of the EC Treaty. In 1978, the ECJ reiterated the principle of supremacy of the EU law in the *Simmenthal* case (1978). It declared that any provision of national law must be set aside which is contrary to the Community law. Based on these landmark judgments, the ECJ acknowledged that the existence, power and authority of the ECJ not only originated from the Treaties but also mainly based on the delegation of Member States. The Member States willingly limited their sovereign rights to a certain extent, and thus it created the body of law, which binds their nationals themselves. As a result, the supremacy of EU law principle can be regarded as a transition of 'real power' from intergovernmental framework to supranational one. Dehousse (1998) attributed the supremacy principle to the attitude of national courts (p. 43). He perceives that lower courts often have ignored the high court's rulings and referred cases to the ECJ. In this respect, the principle of supremacy together with preliminary reference procedure offers an alternative to national jurisprudence and even the implication of the ECJ's rulings spread in areas that national elite has never envisaged (Alter, 1993: 467-8). Therefore, the ECJ preserves its autonomy precluding political intervention from Member States while successfully sticking to the essence of the EU law.

However, the principle of supremacy of the EU law is not absolute. First, when there are conflicting interests between the alleged principle and other principles of EU legal order, the more essential one will prevail over the other. In *Kühne and Heitz* case (2004), the ECJ allowed the breach of EU law because the principle of legal certainty takes precedence over the doctrine of supremacy of the EU law. In this case, Kühne, the applicant, expected to seek reimbursement from the Dutch authorities, which have classified his goods under a higher-duties category and levied taxes accordingly. The defendant contended that since the dispute had already been

adjudicated by a Dutch court, the case cannot be opened again. The ECJ alluded that there is no obligation to reopen a final administrative decision under the Community law unless four cumulative elements have been satisfied: (1) the national administrative authority has the ability to reopen the case; (2) the administrative decision is final as there's no higher instance; (3) a misinterpretation of the EU law and the national court failed to refer; (4) the party concerned immediately complained to the administrative body as it has knowledge of the ECJ's decision. Secondly, the primacy of European law cannot be accepted when it was enacted by unauthorized intuitions or without empowerment by the Treaties (Maastricht case, 1993). Honeywell decision made by the German Constitutional Court provides a good example of such type of exception. It is highly influenced by the *Mangold* case (2005). In this case, 56-year-old Mangold, who entered into an eight-month fixed-term employment contract with Helm company, invoked Directive 2000/78/EC to challenge the alleged contract on the ground that it is contrary to the EU law (Mangold v. Helm, 2005). However, the German government contended that the Directive 2000 did not have direct applicability and it had the freedom to choose the time for its transposition, so the alleged Directive is not applicable.

However, the ECJ declined to accept the German government's argument. First, the ECJ directed that Member States should refrain from taking any steps which may undermine the functional of the Directive. Secondly, considering the nature of this matter, the Directive attempts to protect the fundamental principle of the EU law, and thus the mere reason of transposition period cannot be justified. Accordingly, the ECJ ruled that national courts must set aside any provision of national law which conflicts with the directive even before the expiry of the transposition period. In 2010 *Honeywell* case, the German Constitutional Court created an *ultra vires* test by which an act of the EU institutions in question is manifestly *ultra vires* and causes a structurally significant shift in competences contrary to the principle of conferral, and thus the act will be invalid. Thirdly, the ECJ noted that the principle of supremacy of EU law should be confined when primacy clashes with fundamental rights (*Solange I*, 1970). In the *Solange* case (1970), the German Constitution Court stated that the state should not jettison its prerogative to persist with German's fundamental rights when a conflict arises with the EU law. In conclusion, although the principle of supremacy of

EU law is widely and increasingly accepted by national courts, there might be some exceptions when it clashes with national constitutions.

As discussed, both principles developed by the ECJ lead to a situation where national audience can easily reach the core of the EU law without solely relying on governmental political elite. Additionally, both principles strengthen the function of the EU law and thus consolidate the position of the ECJ and national courts. Furthermore, both the principles have empowered the national courts than ever before. Every national court stretches its micro-influence as an ingredient of spillover. The ECJ, working as a valve, applies the principle of direct effect and supremacy of EU law to control the pace of European integration.

2.2 The Neofunctionalist Analysis of Structure and Function of the ECJ

As discussed in the first chapter, Neofunctionalism can be compressed into an analytical formula, which includes four parts to observe supranational actors during the process of regional integration. In what follows, this section focuses on four major parts: the actorness, motivation, instrumentality, and content.

2.2.1 The Actors

In this section, the composition of the ECJ will be examined. The members of the ECJ can generally be categorized as judges and advocates-general. However, it has more actors participating in the integration process, such as individuals, lawyers, or the ECJ's staff. They are specialized individuals, who possess functional specificity and accompany the supranational community environment (Niemann & Schmitter, 2009: 58).

2.2.1.1 Judges

Judges can be deemed as the principal and vital protagonists who are assigned by each EU country. Currently, the missions of the ECJ interpret the law, enforce it, annul EU illegal acts, ensure that the EU takes action, and sanction EU institutions. Before venturing into mission implementation by the Court nowadays, its power and authority did not abound with authority but were merely limited to ensuring correct interpretation and application of treaties of law in the early period of the ECSC. The envisaged role is based on the 'separation of power' to circumscribe the power of Authority. For instance, a few decisions made by the Authority were annulled by the ECJ (French Republic v. High Authority of the ECSC, 1954).

The existence of the actor is reflected by the interactions and responses of other actors. The founders of the EC, in light of the Treaty of Rome articles on the ECJ, wanted the Court to interact with other community organs and Member States (Burley & Mattli, 1993: 58). For instance, Articles 258 and 259 empower the Commission or other Member States to elaborate on noncompliance of community obligations against

infringement by any Member State. In addition, not only the Commission or other Member States but also the European Parliament and the Council, or any natural or legal person can bring cases to the ECJ (TFEU, Art. 263). Furthermore, the most utilized approach to connect the supranational organs with Member States and even their nationals is attributable to Article 267 of the TFEU. In this context, the procedure of preliminary ruling has provided a framework for links between the ECJ and other indispensable actors, such as private litigants, lawyers, and lower national courts (Volcansek, 1986: 247).

2.2.1.2 Advocates-general

Currently, eleven advocates-general assisted twenty-eight judges in the ECJ. Advocates-general are replaced every three years in order to ensure continuity of the ECJ's mission. Advocates-general are former judges, academics, high-ranking civil servants, and well-known lawyers. The duty of advocates-general is to make reasoned submissions on cases where judges confront with a controversial legal difficulty or a factual complexity. Therefore, advocates-general provide recommendations prior to the judges' adjudications and also between submissions by the parties.

Advocates-general must be independent, accountable and impartial to give opinions on legal and factual questions (Saurugger and Terpan, 2017, 47). However, they are allowed to choose radical positions of making their legal arguments based on selected texts and precedents. In response, the judges may adopt their opinions in their judgments. Accordingly, since the ECJ makes direct references to Advocates-general's opinions, advocates-general also participate in the formation of Union's policies to some extent.

Although the judges play a major role in adjudication, advocates-general also play a relatively important role in constructing European legal order and EU law. Saurugger and Terpan refer to Moser and Sawyer's book (2008), *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice*, acknowledged the dedications of Francis Jacobs in fields of fundamental rights, citizenship, international market, competition law, and intellectual property (as cited

in Saurugger and Terpan, 2017: 65).

2.2.1.3 Interest groups

Although interest groups and private actors are not tantamount to the judges or advocates-general in the ECJ, they also play a complementary role in the process of European integration. Interest groups can be regarded as 'organized private actors seeking to influence political decision-making' (Grossman & Saurugger, 2012). The features of interest groups are: (1) interest groups are organized as a group, which excludes unorganized movements and public opinion; (2) interest groups would influence policy outcome to obtain political interests; (3) interest groups instead of obtaining governmental positions or competing in elections frequently interact with politicians and bureaucrats (Beyers, Eising & Maloney, 2008). In the ECJ's context, interest groups represent an individual or have legal personality.

Interest groups apply at least four ways to influence the EU policies (Pollack, 1998; Greenwood, 2011). First, interest groups pursue a 'national route' of lobbying their governments to alter policies that are contrary to their interests. By doing so, Member States governments may discuss policies in the Council of Ministers. Second, interest groups follow a 'Brussels route' to convey their contentions to the EU Commission directly. In this regard, EU Commission may initiate a new policy based on the interest group's needs. Third, interest groups may pressure the EP to have a new legislation for their demands. Lastly, interest groups bring claims before the ECJ to file a lawsuit to their national courts and expect national courts to refer their cases to the ECJ. By doing so, interest groups may have a chance to defend their interests at the EU level.

Interest groups can have recourse to direct or indirect litigation to achieve their goal. As for the direct litigation route, interest groups as 'non-privileged applicants' are entitled to bring actions pursuant to Article 263 of the TFEU. Studies show that interests group increasingly to use litigation strategies to protect their interests (Jupille & Caporaso, 1998). For the indirect litigation route, interest groups rely on the preliminary ruling procedure under Article 267 of the TFEU. Preliminary rulings

offer the highest number of cases involving public interest groups (Saurugger & Terpan, 2017: 140). Saurugger and Terpan (2017) demonstrate how interest groups express their demands through the preliminary ruling procedure by several cases. They are concerned with environmental issues, women's rights protection, animal welfare, and LGBT movements. Their litigation strategies are to circumvent national governments and to influence national policies by the ECJ's case law (Vanhala, 2009). For instance, the *Defrenne* case (1971) was largely supported by labor unions, minority groups, and women's rights movements (Saurugger & Terpan, 2017: 149). The *Dekker* case (1988) is another example of interest groups to influence national policies – this case presented pregnancy rights. Mrs. Dekker's job application was rejected on the grounds of her pregnancy. The ECJ ruled that discrimination in employment and recruitment on the grounds of pregnancy is contrary to the Equal Treatment Directive. The ECJ adopts the same position in the following cases, such as the *Herz* case (1990), the *Haberman-Belterman v. Arbeiterwohlfahrt* case (1994), and the *British Webb* case (1994). Additionally, interest groups, such as well-organized trade unions, assisted private litigants by providing the abundant financial and social resources (Vanhala, 2010). Moreover, environmental interest groups successfully expressed their interests in the *Danish Bottles* case (1988). In this case, the ECJ ruled that a Danish recycling program, despite conflicting with free trade law, could in certain instances continue to operate its program. Interest groups rely on the ECJ's rulings and expect the ECJ to expand the EU law in order to protect their economic interests or values. Meanwhile, the participating citizens and civil groups legitimize the ECJ's rulings (Cichowski, 2007: 260). Accordingly, interest groups, in conjunction with the ECJ, as crucial actors, more or less influence the Union's policies.

2.2.2 The Motives

In general, the ECJ makes decisions based on the perception of 'self-interest' to cement its position in European integration. Burley and Mattli (1993) show that the ECJ created opportunities to a great extent, generating personal incentives for litigants, their attorneys, and lower national courts to access EU laws, while the community's legal system was being stitched altogether. At least three methods of the ECJ enhance

its power, namely, secure its position, and simultaneously other participants gain professional knowledge through the proceedings. Accordingly, it can be summarized as follows:

First, Burley and Mattli (1993) again underscore the importance of the 'constitutionalization' of the Rome Treaty, and the 'legalization' of community's secondary legislation (p. 60). They attribute the accomplishment of constitutionalization and legalization to the direct effect doctrine. The ECJ in *Van Gend en Loos* (1963) case claimed that the Community law is a new legal order, which not only limits Member States' sovereign rights, but also confers rights on their nationals. In Neofunctionalist terms, to achieve community goals and European integration, the ECJ built a pro-community atmosphere by providing private individuals a direct stake in the promulgation and implementation of the EU law. Only when private individuals take proper action to safeguard their rights arising from the EU law, can their interests be enhanced and protected. A number of scholars concur with the view that private actors are more numerous, more likely to raise cases that serve their interests, and are more likely to pursue their legal battles until their needs are met (Alter, 2001: 188-9). In addition, Burley and Mattli (1993) provided a different perspective to the obligations and rights dynamic between states and their nationals. Private individuals are entitled to the new rights on the agreed 'social contract for the EEC' since their governments agreed to delegate some portion of their sovereignty according to the Treaties. Hence, their nationals would urge their governments to keep their commitment, especially in the cases of a common market. Thus, the abovementioned mutuality between states and their nationals created incentives to integration by private individuals. Moreover, along with the development of the direct effect principle, the ECJ expands its scope and European integration that will grow steadily.

In Burley and Mattli's study (1993), the direct effect principle is also applied to secondary community legislation, such as council directives and decisions, although the ECJ later set up certain conditions only when member governments have failed to implement a directive correctly or in a timely manner (Yvonne Van Duyn v. Home Office, 1978). Eric Stein (1981) also agreed that the principle of direct effect had been

extended from a ‘negative’ treaty obligation to a ‘positive’ obligation, and from ‘vertical’ enforcement of a treaty obligation against a Member State government to one of ‘horizontal’ obligation between individuals.

Secondly, Article 267 TFEU, the preliminary ruling procedure binds the Union of supra- and subnational actors, which are the ECJ and national courts. The motivation of self-interest has played a significant role in European integration, especially in its constitutionalization. Shapiro (1991) was surprised that lower court judges who generally follow their national judicial system hierarchically were referring cases to the ECJ (p. 127). Weiler (1991) summarizes at least three reasons why lower national courts voluntarily refer cases the ECJ: (1) the rulings are usually delivered by respected ECJ’s judges, who would have served as national judges previously, with precise reasoning establishing the legitimacy of ECJ decisions (p. 2426); (2) the direct effect principle empowers the lower court judges with powers that often reserved for the highest national courts; and (3) based on the traditional role of the European courts, national courts show loyalty to the ECJ in all questions related to community law, and protect individual rights. Additionally, judges take oath to adjudicate cases impartially, independently, and not accountable to their home governments for their decisions (Burley & Mattli, 1993: 58). This demonstrates their intention to offer fair trials so that instead of perusing national interests, the Union’s interests as a whole are protected by the ECJ in any event. Moreover, Burley and Mattli offer that preliminary ruling procedure transforms the European legal system into a dual system in which the lower national courts recognize two separate authorities and sources of law; one the EU law and the other national law (Burley & Mattli, 1993: 63). Accordingly, Judge Mancini claims that the ECJ needs the cooperation and goodwill of the national courts (Mancini, 1989: 605).

Thirdly, the ECJ followed two approaches to empower itself. First, Burley and Mattli (1993) found that the ECJ would proclaim the dominant status of the EC law relating to its visibility, effectiveness, and scope of application, thus strengthening its prestige and power. Secondly, the ECJ empowers lower national courts to select cases related to the Union law and refer them to the ECJ. While assigning the task to national courts, the ECJ simultaneously enhances its legal legitimacy by alignment

with the national courts (Burley & Mattli, 1993: 64). That is, a portion of ECJ's authority stems from the willingness of national courts to cooperate. Rasmussen (1986) also concurs with the view that owing to the preliminary ruling procedure, the ECJ sides with the people and the national courts against state bureaucracies (p. 245).

Therefore, the ECJ seeks to balance the interests between actors and hence would usher in different consequences about whether to consolidate or restrain European integration. To realize the ECJ's objectives and to underline its position in European politics, the ECJ had provided individuals a 'personal stake' in community law, created relations of alliance with national courts, and enjoyed reciprocal empowerment.

2.2.3 The Applicable Instruments

Most scholars often highlight the legal instruments applied by the ECJ, namely, the doctrine of direct effect, the doctrine of supremacy of the EU law, and the preliminary ruling procedure (Stone Sweet, 2010; Kaya, 2010; Azoulai & Dehousse, 2012; Saurugger & Terpan, 2017; Schmidt & Kelemen, 2013). The concept of spillovers does obviously occur in the process of European integration to sustain the momentum of integration or boost it deeply, widely, and broadly. This part addresses the legal instruments: the direct effect principle, the supremacy of the EU law, and preliminary ruling procedure applied by the EC, and analyzed under the Neofunctional logic.

2.2.3.1 Functional spillover

There is no denying that 'law' can be regarded as a tool whose function is to develop and then maintain the order of the groups of people or states. In addition, the nature of law has endowed with greatly 'functional' particularity. The construction of a whole new legal system follows functional logic (Burley & Mattli, 1993: 65). Accordingly, the value of law depends on how it is interpreted and applied in practice. Hence, any legal method or instrument applied by the ECJ can be considered as functional means and its ensuing effects can also be seen as functional spillover.

Generally, functional spillover will lead to deepening or broadening effects in the policy arena. The former pinpoints to the intensity of cooperation in the same policy realm, and the latter denotes the cooperation in various but relative policy sectors. All in all, functional spillover can result in different dimensional policy cooperation between actors.

In the case of ECJ related to European integration, the functional spillover is derived from the existing treaties and their case law. Its logic is that "actors discover that they cannot satisfactorily attain A goal without considering B and/or perhaps C actions" (Lindberg & Scheingold 1970: 117). Likewise, the ECJ has to duly exercise its power under Article 267 of the TFEU to assure the objectives in the EU Treaties. In this regard, the preliminary ruling procedure serves as an intermediary to connect two goals—assurance of treaty objectives and dispute settlement. This functional spillover will not cease as long as supranational institutions, and Member States' governments and individuals enforce the ECJ's decisions. Thus, their enforcement would modify the sectoral policies at supranational or national level.

In addition, the direct effect principle and the supremacy of the EU law principle are the most explicit examples in the case of functional spillover. Without these principles, the linkage between the EU and the Member States on treaty implementation would crumble. Lastly, teleological interpretation by the ECJ also shows an expansive effect resulting in unexpected consequences to the Union's policies. In the *Van Gend en Loos* case (1963), the ECJ declared that Community law will be interpreted in consistence with the spirit, the general scheme and the wording of the Treaty. Thus, the ECJ is likely to adopt a broad interpretation. According to Judge Pierre Pescatore, the 'constructive method of interpretation' generates a coherent and authoritative body of community law consolidating the ECJ's authority (Pescatore, 1974: 89-90). Burley and Mattli (1993) found that some pro-Europeanism proponents buttress the method of 'systemic interpretation' (p. 65). It refers to how the EU law should be interpreted systematically based on the objectives of the Treaties, their drafts, and the preparatory work for a coherent, consistent and logically legal structure.

Stone Sweet (2010) shows how the ECJ constitutionalized or judicialized the EU norms to enhance the functioning and effectiveness of the EU law (p. 16). To this end, it would appeal more private actors for participation in litigation before the ECJ. Stone Sweet contends that more preliminary references would increase the intra-judicial dialogue between the ECJ and the national courts. As the EU jurisprudence expands, the functioning of the EU law will be strengthened so that the Union will be socialized. The ECJ has begun its mission for European integration since the cases of *Van Gend en Loos* (1963) and *Costa v. ENEL* (1964) established the principles of direct effect and the supremacy of the EU law.

2.2.3.2 Political spillover

Apart from spawning via functional necessity, political spillover is triggered by deliberate integration for political or ideological reasons for developing package deals or coalition. Together with the accretion of political pressures by various demands of individuals or entities, Member States' governments are involved in the process of regional integration since they realize their interests are better served by Brussels (George & Bache, 2001). Once a 'transnational incrementalism' takes place, both domestic and supranational institutions would have adopted an adaptive process of gradually shifting expectations, altering loyalties, and evolving values and norms (Haas, 1958: 12). Burley and Mattli (1993) argue alternation in political elites' expectations once Member States' governments accept the ECJ's decision as existing law and apply the case law as the benchmark in their policies (p. 67). Accordingly, political spillover would be immediately crystallized. Mattli and Slaughter suggest that interest groups, in shifting expectations, would rely on the EU law to protect their rights, in particular in employment and gender equality (Mattli & Slaughter, 1998).

In the case of interaction among the ECJ, national courts, and private litigants, Burley and Mattli argue that political spillover occurs when those actors adopt or accept the ECJ's decisions and then promulgate their rulings and employ them. This demonstrates a process of shifting their expectations and a voluntary agreement on assimilation. Indeed, law and rules again play an important role in changing national preferences. The primary reason why states or individuals shift their preferences or

expectations is probably because of the creation of common law and rules. In this regard, Burley and Mattli (1993) suggest that the stipulation and application of law is inherently a process of changing expectations. Such changes in expectations can be handled easily when a clear legal order and standard is available. Hence, the more robust the ECJ's case law is, the more effective the political spillover will be.

Even if Member States' governments are too recalcitrant to obey the EU law or to follow the ECJ's rulings, they surprisingly tend not to overrule the previous ECJ's rulings or established principles (Rasmussen, 1986, 275-81). In the *Sheep Meat* case (1979), the French government claimed that the French market organization for mutton complied with the EU law. In response, the ECJ reiterated that the Treaty prohibited intra-EC agricultural trade restrictions set by national market organizations for specific products. Instead of disputing the principles established in *Charmasson* case (1985), the French government sought time to implement its treaty obligations. As long as the ECJ makes clear and precise rulings supported by the Member States, political spillover would continue to happen. In sum, political elite as well as their citizens would willingly shift from national law to the EU law, reinforcing its power and its legitimacy.

2.2.3.3 Cultivated spillover

A successfully cultivated spillover demonstrates that even if state governments are reluctant to initiate or integrate further, supranational institutions can autonomously forward the integration process and uphold the transnational agenda (Jensen, 2003: 85). Haas and other scholars regard a well-functioned supranational institution as a policy entrepreneur to direct the dynamics of relations with various types of actors (Nye, 1970: 809).

Basically, cultivated spillover can rarely be activated in EU law since the ECJ can interpret the law only on referral basis from the national courts. However, once the ECJ makes the case law, it will lead to cultivated spillover improving European integration. Once the ECJ's case law is made, the cultivated spillover influences the Member States' legal system. Thus, the case law made by the ECJ becomes part of

the Member States' legal system.

Burley and Mattli (1993) argue that legal interpretation by the ECJ can be associated with the concept of 'upgrading common interests' (pp. 68-9). They contend that the process of upgrading common interest is built by reassertion of long-term interest and thus interest and value would be sonorously accumulated. Additionally, the "teleological method of interpretation," would prevail over state's negotiation and meet the needs of the elementary Union's goals rather than the rigid legal texts of the treaty or Union's secondary legislation. In this respect, once the ECJ declares the new rule or value, the new one will incorporate the previous one in a process called harmonization. Along with ongoing legal harmonization, the difference in values and interests will be mitigated. Therefore, Member States' governments are unlikely to adopt the common lowest denominator but pursue the Union's utmost interests as a whole.

The primary mission of the ECJ is to balance interests and to harmonize values so as to stimulate or at least maintain the momentum of integration through law. While each actor is driven by his/her inherited values to protect their interests in the process of regional integration, disputes between actors would perhaps occur. In the best scenario, actors, such as Member States, reach the 'lowest common denominator' so as to continue the integration agenda. However, when intergovernmental negotiation remains locked in a stalemate, the ECJ is able to break a political stalemate through law. The ECJ sometimes even involves in political disputes but it is not intentional; nevertheless, the unexpected consequence of the ECJ's rulings serve as a catalyst to accelerate the speed of European integration.

The spillover effect produced by the ECJ, which is essential for regional cooperation, creates a cyclic feedback loop to sustain European integration. The ECJ not only balances the interests between States but also cultivates the norm and value to harmonize various interests. Based on the ECJ's case law the ECJ incrementally alters the political preference of Member States' governments. Such alternations are not easily reversed as long as they are adopted and implemented at the domestic level. Specifically, the spillover emanates from the direct effect principle, the principle of

supremacy of the EU law, and the preliminary ruling procedures. They are interdependent on each other. In terms of horizontal relation, they are so indispensable that each of them necessitates each other. Once there is a missing part, the spillover will not be efficiently generated, namely, the political influence of the ECJ will decrease and thus it will become a mere 'servant' of States. Vertical relation fosters the coalition of judicial bodies in European integration between national courts and the ECJ. With preliminary ruling, national courts perform as intermediaries to trumpet pan-European value. In doing so, it is beneficial to European integration. While forming horizontal relation and vertical relation, the 'common value' grows and roots in each actors' mind.

To balance the interests of various States, the ECJ cultivates common value and standard to decrease the risk to cooperation. That is, the rooted value is the key to the ECJ on maintaining cooperation. In the context of international cooperation, judicial bodies are the most effective and efficient actors to form norms and values because the alleged value has been strictly selected under legal reasoning. In this regard, the spillover effect of the ECJ is robust and indissoluble. Therefore, ECJ in terms of maintaining cooperation between States is so vital that the part of European integration is attributable to the ECJ's case law, which satisfies the functional gaps, creates a new center to follow and cultivate the Union's common norms and values.

2.2.4 The Content

Based on Haas' assumption, the law in the integration process can be clearly distinct from politics. However, Shapiro (1978) repudiated such argument and said that an absolute division between law and politics, as between economics and politics, is rather infeasible (pp. 74-98). Later, Haas had softened his stance on the relation between law and politics in the process of integration. He commented that sometimes the legal decision could fill up political vacuum based on the premise of independent institution and nonpolitical content.

Burley and Mattli (1993) followed Haas' assertion and further elaborated that the ECJ intentionally refrains from rendering politically controversial rulings but

voluntarily restrains itself in the context of law. Burley and Mattli had summarized three methods which indicated how the ECJ segregates law from politics. First, the primary stance of the ECJ in the integration process has nonpolitical image. Rasmussen alluded to the overemphasis of the ECJ's political agenda that could impair its effectiveness in terms of implementing the EU law (Rasmussen, 1986: 147-8). In addition, Pescatore (1974) also signified the success of EU case law owing to the ECJ's custodian character (p. 89). Without the ECJ's contribution, neither procommunity value could be protected nor the text of treaties or EU legislation could be safeguarded. Thus, the ECJ regards legal-political divide as its fundamental principle.

Secondly, despite the approach of the ECJ to separate law and politics, it is possible that the ECJ may get embroiled in highly politically controversial cases. In this regard, Articles 258, 259 and 267 TFEU have played a crucial role in depoliticizing potentially fierce disputes into mere legal cases. Articles 258 and 259 stipulate that the Commission and a Member State can bring the matter to the ECJ against another Member State for failing to fulfill its obligation under the Treaties. The procedure directly brings the matter to the ECJ, which can turn the matter off politics into a purely legal matter. In this sense, Judge Pierre Pescatore commented that owing to the delicate nature of direct action against a breached Member State, the ECJ camouflages its political role with its professional legal knowledge so that the aggrieved Member States would perhaps more easily accept its decisions as the original complaint was raised by another Member State or the Commission (Pescatore, 1974: 80-2). In accordance with Article 267 TFEU, this procedure will enable private parties to engage in the construction of the Union's legal system. Additionally, it decreases the tension between the ECJ and Member States because the adversarial situation is between member states and private individuals or amongst individuals themselves. Accordingly, it helps the ECJ to remove its overtly political stance but still can 'indirectly' deal with its political implication by legal reasoning.

Thirdly, Burley and Mattli (1993) suggested that the law functions both as a mask and as a shield (p. 72). The ECJ has the dual role between law and politics, and the ECJ's political legitimacy is dependent on its legal legitimacy. The ECJ discreetly

balances its position between law and politics. Burley and Mattli (1993) argue that a neutral zone of law enables the ECJ to reach outcomes that are impossible to accomplish through political means. However, it does not mean that the ECJ does not have any political agenda, it would in fact deliberately hide and protect specific political objectives through the disguise of law; hence, the ECJ sometimes seems paradoxical as it attempts to widen the interpretation of the EU law but it also carefully restrains itself from judicial activism.

In conclusion, the Neofunctional analysis nicely evaluates the role of the ECJ in European integration through multi-dimensional parameters – actorness, motivation, instrumentality, and content. Unlike other integration theories, the Neofunctional analysis considers various actors, such as judges, advocates-general, national courts, interest groups, and individuals. These actors are part of supranational governance to exert their influences on European integration. In addition, the motivation of the ECJ is driven by the perception of 'self-interest' to consolidate its position in the process of European integration. Moreover, the ECJ generates three kinds of spillovers to enhance European integration by its case law. First, the ECJ's case law, especially the principle of direct effect and supremacy of EU law, results in *functional* spillover. Functional spillover begins with the existing EU treaties and the ECJ's case law, and then expands the application of EU law and reshapes the EU legal order. Second, the ECJ's case law successfully alters the actors' preferences on EU law and resulting in *political* spillover. Actors have increasingly relied on the EU law to settle their legal disputes. Third, the ECJ's case law significantly empowers itself to be a 'policy entrepreneur,' resulting in *cultivated* spillover. The direct effect principle and supremacy of EU law principle provide a sustainable momentum of integration. Hence, the ECJ has a chance to incrementally establish the common norms and values for the EU as a whole. Lastly, the ECJ uses the law as a mask to disguise its political ambition in European integration. On the other hand, the law also serves as a shield to protect the ECJ from the Member States' political interferences. Based on the examination of the Neofunctional analysis, the ECJ's contribution is so important that its case law is irreplaceable and a valuable asset of European integration.

3. CASE STUDIES OF SPILLOVER IN ECJ IN THE SINGLE EUROPEAN MARKET AND THE DIGITAL SINGLE MARKET

Over the past thirty years, the Single European Market (SEM) has become the cornerstone of European integration and the foundation of its market liberalization. The SEM has successfully morphed economic integration into political integration. This change is not only widening the European economy but also deepening the *acquis* to overcome the integration barriers (Pelkmans et al., 2011). In 2016, the President of the EU Commission, Jean-Claude Juncker, proclaimed: "digital technologies are going into every aspect of life. We need to be connected, our economy needs it, and people need it" (European Parliament, 2016). Andrus Ansip accentuated the importance of the plan of Digital Single Market (DSM) during the 2017 Estonian Presidency of the Council of the EU (DSM Conference, 2017). He believed that cross-border and data-focused economy will stimulate new markets, businesses, and create job opportunities. Hence, it is necessary to establish a fair, predictable, sustainable digital environment based on the 2018 General Data Protection Regulation (GDPR). In order to accomplish the SEM and DSM, the primary mission is to eliminate cross-border barriers and foster integration among Member States by adopting the common *acquis communautaire*. ECJ's commitment to Europe's integration and its contribution to judicialization cannot be underestimated.

Chapter 3 will cover the following: The first section provides a historical evolution of SEM to DSM, covering pre-Single European Act (SEA), post-SEA periods, and the DSM. The second section shows how the ECJ constructs judicialization fostering Europe's integration through various kinds of spillover, such as functional, political, and cultivated spillover. Several cases of spillover will be ascertained. To elaborate on SEM, the *Dassonville* case (1974) and *Cassis de Dijon* case (1979) on the principle of mutual recognition will be examined. To elaborate on DSM, the *Google Spain v AEPD* and *Mario Costeja González* case (2014) will be examined.

3.1 Historical Evolution of European Single Market to Digital Europe Program

This section consists of three parts: the first briefly introduces the causes, background, and preparatory negotiations between the Member States prior to the conclusion of the Single European Act (SEA). This section also particularly focuses on 'judicial activism' seeking to demonstrate the contribution of the ECJ to the process of European integration. The subsequent section maps out the content and the impact of the SEA, amendment to the Rome Treaty over the free movement of goods, services, people, and capitals, the codification of the ECJ's rulings, and institutional reforms. The last part presents an overview of the DSM, including its origins, development, and its content. This part addresses two ECJ cases, *Google Spain* case (2014) and *Uber* case (2017), to highlight the role of the ECJ in the policy-making process.

3.1.1 Origins and Vacillation of the Single Market: 1950s–1970s

The original idea of the SEM is attributable to distal and proximate causes. The distal causes refer to remote reasons why the Member States incubated the formation of the Single Market. Although economic integration was not progressing well in the beginning, the prototype of Single Market became the cornerstone of the 1992 Single Market Program. On the other hand, proximate causes, as a catalyst, simulate the Member States to launch the Single Market Program. Apparently, these causes are the direct linkage to the consequence. However, without the foundation of distal causes, transformation could not take place easily. In what follows, both of these causes will be discussed here.

(1) Distal causes of the single market:

First, the SEA dates back to the *Messina Conference* in June 1955 in which six European countries reached an agreement for economic unification. Economic integration would increase Europe's competitive ability and its international standing in global economy, while generally raising the living standard of its people. The logic behind the Messina Conference was to satisfy the "demand of institution's and

people's needs." In addition, the conference implicitly inferred that transnational cooperation should be continued to tackle interstate problems. According to Neofunctionalist's approach, the basis for the spillover must be developed to foster Europe's integration. Therefore, the Member States seemingly would agree to launch a series of integrative measures. In fact, the Six upheld to create a "common organization" with "accountable and legitimate means" and ensure "peaceful European development," and gradually achieve a "common European market" in the final communiqué of the Messina Conference showing the imperative of the Six to reform the institutional system, and gradually harmonize their economic and social policies (Gilbert, 2012: 96).

Secondly, a blueprint for inter-state economic cooperation was made in 1956 in the form of Spaak Report. This report did not give any insight into the establishment of a political union. Instead, it mostly tackled technical trade matters, such as free movement of goods, services, labor and capital, the elimination of customs duties and quotas restriction, the establishment of a common external tariff, and the harmonization of national legislation (Spaak Report, 1956). It set up a goal for the Commission to complete several tasks in the transitional or final phase. In addition, it aimed to abolish trade barriers, such as customs duties and quota restrictions. Moreover, the Member States are prohibited from meddling in the market, and thus decrease monopolistic governmental measures. Furthermore, the Member States were advised to follow common standards and harmonize national legislation.

Thirdly, the 1957 Rome Treaty, reflected in the nature of federalism, is another remote cause of the SEA. The relation between the Rome Treaty and the SEA is somewhat related as the SEA is the first revision of the Rome Treaty. The objectives of the Rome Treaty are to establish a common internal market amongst Member States, promote harmonious economic development, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living, and closer relations amongst States (Rome Treaty, Art. 2). In the Rome Treaty, Member States, on the one hand, had delegated their power to supranational institutions, and on the other have to facilitate tasks and cooperate with institutions. It ordained the Commission and the Member States to form a customs union step by step as per a

timetable. In addition, it laid down rules prohibiting customs duties on imports and export among Member States, and of all charges having equivalent effect, eliminating quantitative restrictions, and adopting common customs tariff, as also enabling free movement of persons, services and capital. The Rome Treaty has also rearranged the institutional setting of the EEC.

Lastly, ECJ's decisions to some extent indirectly influenced the creation of a Single Market. After the conclusion of the Rome Treaty, the ECJ had gradually played an important role in Europe's integration, as a political actor, to influence the Community's policies. Owing to the ECJ's audacious rulings, the solid single market came into being and would definitely have never been successful without the relevant case law rendered by Luxembourg (Waele, 2010: 6). The *Van Gend en Loos* case (1963) held that the EC Treaty constitutes a new legal order creating the direct-effect principle and the EU law strikingly permeates into the Member States. In the 1964 *Costa v. ENEL* case (1964), the ECJ affirmed the supremacy of the EU law principle, which shows that as the Member States had definitively transferred their sovereign rights to the Community, the EC law arguably could not be overruled by national law (Dinan, 2004: 118). Accordingly, these principles empowered the ECJ's authority and its decisions become more influential on Europe's integration overall.

In the case of free movement of goods, the most remarkable cases in this period are the *Dassonville* case (1974) and the *Cassis de Dijon* case (1976). The ECJ created the principle of mutual recognition to foster the harmonization of national legislation. Later, the Commission had also codified this principle in the SEA. In this respect, the ECJ's ruling can also be regarded as a way to formulate the Community's policies. Accordingly, the judicial activism of the ECJ entrenched its position and boosted the speed of European integration.

(2) Proximate causes of the single market:

By the 1970s, the 1973 oil crisis drove the entire international economy into economic stagnation. This resulted in the decline of Europe's investment and competitiveness, soared trade imbalances and deficits, increased unemployment and

inflation, as also increased economic disparities among Member States (Egan, 2012: 409). Besides, Eurosclerosis, owing to government's over-regulation and bountiful social benefits policies, led to economic stagnation in terms of European integration. Specifically, Member States' protective measures on import restrictions and discriminatory trade practices thwarted efforts to create a single market (Egan, 2003: 35). Hence, the alleged background and domestic difficulties became factors for the conclusion of the SEA.

Secondly, business interest groups pressurized the Commission to improve Europe's competitiveness wherein non-state actors participated in the Community deliberations from the bottom to the top for the very first time. The birth of the SEA can also be stemmed from interest groups, which are proactive lobbying, ambitious proposals, and visible engagement. With the participation of interest groups, Egan contended the Commission and Member States started a stream of studies, resolutions, and declarations about making the single market a reality. For instance, Member States adopted the Solemn Declaration in 1983, indicating a "renewed impetus" toward the completion of the single market. In addition, the internal Market Council, responsible for reviewing national measures in impeding cross-border trade, was established (Egan, 2003: 35).

Thirdly, a comprehensive and mature single market was not defined in the Rome Treaty. The Treaty was only dealt with only the free movement of goods, particularly of progressive elimination of tariffs and quantitative restrictions (Egan, 2012: 408). By contrast, it did not focus on capital and services liberalization. For example, obstacles to the free movement of labor hindered the efficiency of the free circulation of services (Hazakis, 2018: 134). In addition, differences in national legislation, such as safety and quality standards, exemptions to common rules of public undertakings, various rules of direct and indirect taxation, rigid national control over financial markets also made it insufficient for a single market (Hazakis, 2018: 134). Thus, a well-functioning single market could not be established under the Rome Treaty. Therefore, to fill this gap, the SEA was necessary to overcome the era of Eurosclerosis.

Lastly, the Delors Commission accomplished the final piece of the jigsaw puzzle of the single market. The Commission's President, Jacques Delors, and the Commissioner for Internal Market, Lord Cockfield, released the White Paper in 1985, entitled the '1992 Programme' with 310 directives and regulations which had been adopted by the Council of Ministers (White Paper, 1985). The White Paper outlined the panoramas of comprehensive integration by the end of 1992 (Sandholtz & Zysman, 1989: 114-5). It can be divided into three categories: removal of physical barriers, abolition of technical barriers, and elimination of fiscal barriers (Pelkmans & Robson, 1987: 181-92). Member States should remove internal barriers and frontiers for goods and people. For instance, the existing border controls and entry procedures should be simplified. In addition, removal of technical barriers involved various kinds of areas. It included the harmonization of company and intellectual property laws, the liberalization of the transportation sector and public procurement, the free movement of capital, services and labor, and coordination of product standards, testing, and certification. Lastly, fiscal barriers should be eliminated so that the Member States can harmonize divergent tax regimes. The White Paper constituted a detailed action plan that could lead to a single market. Eventually, the SEA became operative on July 1, 1987.

3.1.2 Post-Single European Act Era in European Integration: the 1980s and the 1990s

The SEA was so instrumental that it modified the Rome Treaty in other important ways. First, it indeed enabled all nationals the freedom of movement and of establishment within the Community. Interstate trades were progressed by the mutual recognition of professional qualifications and product manufacturing (Hazakis, 2018: 136). In the services sector, banks had freedom of establishment and insurance firms enjoyed the freedom to provide services. In addition, the transport sector—maritime, air, and road—as well as the telecommunications market were gradually liberalized by 1998.

The SEA brought about a radical transformation to European politics by changing the focus from national protectionism to economic liberalism. It mainly enhanced the development and implementation of the four freedoms of goods, services, persons, and capital, which contained two kinds of integration: negative and positive. Negative integration indicates the measures, which attempt to remove any trade obstacles, such as customs duties, quotas, technical barriers. On the other hand, positive integration measures urge the Member States to establish uniform standards, such as for health and safety standards. In doing so, the completion of the single market meant tackling politically difficult dossiers and ensuring that the legislation was put into effect in all Member States (Egan, 2003: 39).

Secondly, SEA has replaced the Community's decision-making procedures from the infamous "Luxembourg Compromise" to qualified majority voting (QMV) to key matters related to single internal market. In addition, the EP is empowered by the "co-operation procedure" so it has much more power to engage in European matters. It provides the right to the EP to conduct a second reading of draft European legislation. Accordingly, the EP would become more influential within the legislative process; on the other hand, it increased the legitimacy of Europe's legislation.

Thirdly, SEA introduced five new competences to the Treaties: monetary capacity, social policy, economic and social cohesion, research and technological

developments and environment (Cowles, 2012: 107). Accordingly, SEA gave expanded powers to the European Commission through the delegation of implementation powers by the Council.

SEA is extraordinary in terms of internal and external implications. As for internal influence, SEA dramatically changed the political environment of the EEC. The mobilization and advocacy of interest groups increased along with the adoption of SEA. In addition, supranational governance and decision-making had been expanded. Accordingly, EU politics is no longer controlled by Member States alone but also by the participation of interest groups and business organizations (Cowles, 2000: 159). Because of its external influence, non-European countries were concerned about SEA and its single market program that would create a "Fortress Europe," where Non-Member states would no longer have easy access. Hence, other countries started paying great attention to the direction of Europe's integration. Meanwhile, the existence of a European political entity called the EEC had been seriously recognized. SEA also laid the foundation for the creation of the EU, demonstrating that true economic cooperation can one day turn into a political union. The formation of the SEA was a major political turning point, which became irreversible (Dinan, 2004: 219).

3.1.3 The New Proposal: Digital Single Market

The current Digital Europe's precursor was the information society during the tenure of the Delors Commission (1985–1994). The White Paper on Completing the Internal Market not only indicated a series of solutions to eliminate physical, technical, and fiscal barriers, but also addressed the issues of "new technologies," such as audiovisual services, information and data processing services, and computerized marketing and distribution services, which would have chance to develop an unobstructed single market (White Paper, 1985). To cope with high competitive pressure from the US and Japan, cooperation was urgently needed in high-technology sector for Europe's integration (Delors, 1986) making information services widely traded and valuable commodities (White Paper, 1985).

Under Title VI of Article 24 of the SEA, the EC shall strengthen the scientific and technological base of the European industry and assist it to become more competitive internationally. Enterprises and interest groups can reinforce the confidence of the internal market by increasing their investment in R&D activities. The Commission adopted the Framework Program for technological development from 1987 to 1991. The Delors' Commission focused on information technologies and telecommunication, as well as the electronics industry as these form the backbone of the information society. To achieve the goal of "ever closer union," digital policies still remain important in the process of European integration in the 1992 Maastricht Treaty. According to Articles 7a and 130a of the European Union Treaty, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications, and energy infrastructure. In addition, the Community and Member States shall coordinate their research technological development activities to ensure that national policies and Community policies are mutually consistent. Currently, a digital single market is based on Article 16 of the TFEU. It articulates that the Union shall lay down the rules for the protection of individuals in the processing of personal data and rules for its free movement. Accordingly, the Union has obligation to enact the law on data free movement and well-protected privacy law. With the popularity of the Internet, the focal point of information society shifted to the digital market, and the Digital Single

Market Strategy had been released in 2015. Its objectives are digitization, namely, the conversion of the economy using ICT, removal of fragmentation, and advancement of digital economy. The strategy underpins all economic and social activities, and are related to digital technologies. Jean-Claude Juncker also commented that it is necessary to develop digitization to empower our citizens and economy (European Commission, 2017). The 2015 *Digital Single Market Strategy* has three pillars (p. 3): (1) the Union encourages consumers and businesses to take advantage of online services to formulate cross-border e-commerce rules. However, the consumer and contract law related to e-commerce is still inadequate. Thus, national legislation related to e-commerce must be harmonized (p. 4); (2) the Commission aims to create an e-friendly environment for cyber users. The Union has to build reliable and trustworthy ICT infrastructure since a secure ICT network is the backbone of DSM (p. 9); and (3) to protect people, particularly children and teenagers from accessing illegal and dangerous stuff on the web, such as hate speech, international terrorists, weapon trafficking, drug dealing and money laundering or other criminal acts, the Commission has imposed the greater responsibility on Internet intermediaries for peddling such information (p. 12).

The 2017 *Mid-Term Review on the Implementation of Digital Single Market Strategy* reviews the progress made at both EU and Member-State level and identifies where urgent improvements are needed. First, the EU institutions are politically responsible for key legislation on the Digital Market Strategy by the end of 2017. The 'trip win' package would abolish unjustified geo-blocking, such as the removal of retail roaming charges, and hence there would no longer be any discrimination against consumers from the other Member States. In addition, Member States will take coordinated cross-border measures to make high-quality and fast telecommunications networks, such as 5G. Secondly, to develop the European Data Economy, the Union must establish trustworthy cross-border free flow of non-personal data to foster economic growth and deliver social benefits to the European society as a whole. Thirdly, the Union should digitalize industries and service sectors, such as energy, transport, financial, as well as public services. Lastly, the GDPR is an essential tool to protect right to privacy related to personal data. In doing so, the GDPR unifies all Member States' rules related to data protection to resolve problematic issues

pertaining to legal uncertainty and fragmentation of law.

Not only the Commission but also the ECJ has participated in the final stages of the policy-making process of metamorphosis from information society to DSM. The ECJ has played a supplementary and a gradual seminal role in enriching its content through its inputs. The ECJ, in the *Uber* case (2017), attempted to manage digital transformation of the European society and economy. A Spanish professional association of taxi drivers accused the UberPop service of running of its business by non-professional drivers in their own vehicles and without administrative authorization, arguing that Uber provided urban transport services without authorization, which allegedly was tantamount to unfair competition. However, Uber responded that it carried out an intermediation activity, which was an information society service and not a transport service, so it enjoyed the right to provide service freely from any EU Member State. The ECJ ruled that an intermediation service, which connects the service supplier and consumers by means of a smartphone application, must be regarded as a transport service. Therefore, Uber must be classified as a service in the field of common transport policy and subject to prior administrative authorization. The ECJ has provided an analytical parameter, the decisive influence test, to determine whether a digital platform business should solely be regarded as information society service under Directive 2000/31/EC and thereby enjoy the right to provide services freely in the EU. Therefore, the ECJ resolves integrative disputes through law; simultaneously, the EU law has become expansive by its case law.

3.2 Neofunctionalist Analysis of the European Single Market and the Digital Europe Program in the case of ECJ's Spillover

This section discusses and examines two cases, the policies concerning mutual recognition and the right to be forgotten. The reasons for selecting these cases are: (1) the process of policy-making is complete. Each case has proceeded through the problem-discovery phase, the problem-solving phase, the solution-reinforcement phase, and the adoption and implementation phase; and (2) given space constraints, the present case studies do not cover the full range of ECJ's cases. The following parts offer details of development of 'mutual recognition principle' and 'the right to be forgotten.' Then, each part provides an analysis of the dynamic of spillover, and thus it is more understandable how the ECJ exerts its powers over Union's policies. The first and the second parts encapsulate the development of 'mutual recognition principle' and 'the right to be forgotten,' and then analyze the extent to which the concepts of function, political and cultivated spillover contribute to the integrative process.

3.2.1 Spillovers on the Mutual Recognition Principle

The Single Market seems to be built on the concept of mutual recognition (Schmidt, 2007: 667). Mutual recognition, allowing the integration scheme to adopt more flexibility, decentralization, and to increase public–private collaboration, has become a general principle of the EU law. The extent to which the mutual recognition principle is applied does not only confine to the free movement of goods, but also to the entire internal market (Chalmers, Davies & Monti, 2010: 763). In addition, it is a principle of tolerance, akin to multiculturalism in products, as it requires Member States to accept foreign products, foreign qualifications, tests and certificates, official documents and so on, which are different from their domestic markets (Nicolaidis & Shaffer, 2005: 317). Therefore, the principle of mutual recognition plays a pivotal role in the internal market as it compensates insufficiency of other integrative methods and speeds up European integration to some extent.

Mutual recognition has several features. First, it is not an overriding principle for Europe's integration. Instead, it complements the methods of liberalization and harmonization of national law. This also implies that it is a method to foster Europe's integration when normal methods are not effective or efficient. Secondly, it can be deemed as the *sui generis* novelty created by the ECJ, which neither presents in the WTO regime nor in other regional trade areas (Pelkmans, 2003: 3). Pelkmans suggested that this principle is a combination of the concepts of free movement of goods, free trade and the Supreme Court. Therefore, its profound effects seem difficult to export to other trade blocs. Thirdly, mutual recognition principle would only apply when no derogating situation exists. Otherwise, national rules would befall into the scope of national discretion. Fourthly, even without the harmonization of national legislation, mutual recognition principle ensures the free movement of goods or services into the single market. If a Member State's regulatory objectives and effects are similar to other Member State, they must mutually recognize each other's legislation, lowering the cost of integration.

The mutual recognition principle was derived from Articles 34 and 35 of the TFEU, articulating quantitative restriction on imports or exports, and all measures with equivalent effect are prohibited between Member States. The ECJ, in the light of the *Dassonville* case (1974), had a chance to interpret the provisions of these Articles. In this case, Gustave Dassonville, a wholesaler from France, had purchased two brands of whisky from French importers and distributors. But, Belgian authorities accused it of violating Belgian customs rules in import as it was without proper documentation. The plaintiff contended that the issued goods are legally imported into the French market, and thus the restriction imposed by the Belgian authorities was contrary to the EU law. The Belgian rule on the designation of origin constituted a strict walling-off effect against the market and the rule should be considered as discriminatory in trade between Member States. The plaintiff presented a series of Commission's directives on the abolition of quantitative restrictions, such as Directive 70/50 and the judgment of the ECJ in the case of *International Fruit Company v. Produktschop voor Groenten en Fruit* (1971) to define the meaning of measures having equivalent effect. Additionally, the plaintiff argued that the Common Market is aimed not only at the liberalization of direct trade between Member States, but also

in all subsequent trade within the framework of a single market. The Commission, in its observations, concluded that Belgian rules on designation of origin prevented the free movement of goods constituting a violation of the EEC treaty. Eventually, the ECJ held that national trade measures not part of the Treaties should not hinder intra-Community trade, and should be reasonable and be accessible to all Community nationals. In this case, what the Belgian authorities required the plaintiff to prove was the origin of a product resulting in serious difficulties and even impossibility to the plaintiff. Therefore, the ECJ ruled that "all trading rules which are capable of hindering trade, whether directly or indirectly, actually or potentially, are to be considered as measures having an effect equivalent to quantitative restrictions." The *Dassonville* case paved the way for a very broad interpretation of measures of equivalent effect. The wording, which the ECJ declared 'direct or indirect' or 'actual or potential,' gave the ECJ great flexibility in envisaging an exponentially broad interpretation of Articles 34 and 35 of the TFEU. However, the alleged mutual recognition principle was not mature yet until the ECJ ruled the *Cassis de Dijon* case (1979).

Cassis de Dijon (1979) is a case involving national rules related to the alcohol content of liqueurs, which constituted a violation of the free movement of goods for the single European market. In this case, Rewe, the plaintiff brought action against German authorities as it declined his request for the import of "Cassis de Dijon," which was classified as fruit liqueurs containing 15–20% by volume of alcohol. The German authorities prohibited its import into Germany because it did not comply with minimum alcohol requirement. The plaintiff claimed that "where imports are either precluded or made more difficult or costly than the disposal of domestic production and where such effect is not necessary for the attainment of an objective of Treaties, thereby the restrictive effects on the free movement of goods occur." Therefore, prohibition by German authorities constituted an arbitrary discrimination or a disguised restriction on trade between Member States. Germany argued that minimum alcohol requirement is necessary to protect consumers' health and prevent the spread of alcoholism. Besides, different minimum requirements in the percentage of alcohol are a tradition among Member States. In addition, as there was no approximation of such provisions in the Union, the German rules relating to manufacture and marketing

of it should stay. Lastly, the consequence of forcing Germany to adopt the French standard would endanger the sovereignty of Member States because such a decision should be relied upon Qualified Majority Voting (QMV). In this case, the German government alleged that the "Federal Republic of Germany would no longer be governed by German law, but by French law." Thus, the French law would invade the German territories. The ECJ held that based on the principle of mutual recognition and the concept of equivalence of national regulations, there were no valid reasons why products produced and marketed in one Member State could not be circulated in another Member State. In addition, the ECJ admitted that the derogations, such as health, safety, environmental protection and consumer protection, should prevail over free movement of goods. The ECJ however found the German justifications were insufficient. Finally, what the German Government was concerned about was the intrusion of its sovereignty. The ECJ implied that until the Council makes a decision on the production and marketing of alcohol, Member States still have the right to regulate it, but not on the free movement of goods. Since the free movement of goods has already been consented to by Member States, they had delegated their sovereign rights to the Union in matters relating to internal market. Therefore, the principle of mutual recognition in conjunction with the harmonization of national law strengthens the concept of single market, making circulation of goods easier within the EU even if there is no harmonization of legislation.

Since the 1992 Program was envisaged, the Commission attempted to implant this innovative concept into the service sector too. In this regard, a Member State cannot normally prohibit the provision of a service lawfully provided in another Member State, even if the conditions in which it is provided are different in the country where the service provider is established (Pelkmans, 2003: 17). Hence, the concept of "home country control" and "single license measure" had been initiated. Home-country control enables banks, insurance companies, and companies dealing in securities to offer the same services elsewhere in the Community that they offer at home. The single license measure means service sectors would only be licensed, regulated, and supervised for the most part by their home country. Moreover, the Commission in its 1985 White Paper reaffirmed the mutual-recognition principle that will act as a thrust to push Europe's integration, which is different from traditional

methods (White Paper, 1985: 4).

However, considering the nature of services, the influence of mutual recognition on the free movement of services is limited. First, Pelkmans contends that services markets, compared to goods market, are relatively highly regulated by states. In this sense, the transaction and transition costs of mutual recognition are likely to be much higher in services markets (Pelkmans, 2003: 18). Secondly, services are intangible, and hence difficult to evaluate quality as its products are either experience or credence goods. Before consumers receive services, it is impossible to assess their value. In addition, the value may not be real or standard. Thirdly, the EU Treaties have excluded some special regimes out of free movement of services, such as financial services, transport services and all services in network industries. Hence, mutual recognition principle is not applicable to these exempt categories. Lastly, from effects-based perspective, mutual recognition principle is more far reaching to free movement of goods than services. For the stimulation of internal market, mutual-recognition principle works better in cases of free movement of goods. Pelkmans considers that the nature of proximity, reputation, and confidence of two kinds of services have different effects on internal market. In the following, I investigate how the ECJ demonstrates functional, political, cultivated spillover in specific cases of mutual recognition principle, and then will analyze to what extent it impacts European integration.

3.2.1.1 Functional Spillover

From Neofunctionalist perspective, functional spillover would happen when the supranational actor pursues integration policies at supranational level, as a consequence of earlier decisions. Since functional spillover produces a knock-on effect, the relation between policies is interdependent. Accordingly, the first step to discover functional spillover is to decide a supranational actor, who plays a key role in constructing and strengthening functional dynamics. The second step is to identify the original goal, as a basis, for further action. That is, it is essential to ascertain the starting point from where functional spillover takes place. The last step is to corroborate the interdependence between “original objective” and “requiring further

action" (Niemann & Loannou, 2015: 200).

Likewise, the ECJ is a supranational key actor in resolving intra-EU disputes and in interpreting the provisions of the EU treaties. The ECJ is more than a legal actor, which is solely under Member States' control. It has a chance to participate in policy-making progress although its role is not obvious compared to the other supranational institutions. In addition, the original goal of the ECJ is enshrined in the Preamble of the TFEU and Articles 1, 2, and 3 of the TEU. In case of establishing an internal market, Article 3 of the TEU underpins the imperative of maintaining an internal market, and in mutual-recognition principle, the specific role for the Court is to interpret Articles 34 and 35 of the TFEU ("all measures having equivalent effect"). Accordingly, the Court had clarified its meaning and also provided further action to enhance the free circulation of goods in the *Cassis de Dijon* case (1979). Eventually, this original objective leads to the concept of mutual recognition. Moreover, the mutual recognition principle conceived by the ECJ was later considered by the Commission and applied to the free movement of services as well. This principle paved the way for further European integration because it mitigates the costs of integration to Member States and overcomes insufficiencies in the methods of liberalization and harmonization of national law.

The principle of mutual recognition is a functional alternative of realizing the free movement of goods to achieve the functional single market (Egan, 2012: 411). Despite the methods of liberalization and approximation of national law based on treaties, it was still difficult for the EEC to foster the free movement of goods, and hence the ECJ was involved in the process of Europe's integration, which developed the concept of mutual recognition. Thus, largely intergovernmental cooperation turned out to be a supranational approach. The ECJ functionally crystallized one principle to resolve the stagnation of internal market, which resulted in an unexpected consequence to European integration.

The ECJ broadly interpreted Articles 34 and 35 of the TFEU. Its expansive interpretation in *Dassonville* case (1974) opened the road for the Court to invent the mutual recognition principle in *Cassis de Dijon* case (1979). Accordingly, the ECJ

developed the principle based on the original provisions of EC treaties to cases.

In addition, the ECJ rulings affect the Community's policies while considering the elimination of trade barriers, as shown in the 1985 *White Paper on Completing the Internal Market*. What the ECJ had achieved was beyond any Member States' imagination. The case law of the ECJ on mutual recognition principle resulted in the Regulation (EC) 764/2008 to supplement administrative procedures in technical rules, which otherwise would constitute unlawful barriers.

Furthermore, the mutual recognition principle also had its impact on the free movement of services and persons. The logic of Cassis de Dijon strengthened the 'market access.' The principle has been applied to services in the name of 'home country control' based on analogous case law. In the *Sager* (1991) case, the German government inhibited the British patent agents from offering services in Germany. The ECJ reaffirmed the logic of mutual recognition principle while adding several conditions to it. *Kraus* case (1993), a German, who had graduated with an LLM from Edinburgh University, challenged a German condition that required administrative authorization for higher education to those with foreign degrees. The ECJ prohibited any condition, which hindered economic activity on the use of a degree from abroad.

Therefore, the mutual recognition principle supplemented the integration method functionally by integrating the markets of different Member States to buffer internal competitive pressures and to compensate for any inadequacies in the harmonization method.

3.2.1.2 Political Spillover

Political spillover would focus on the transformative process of political elite, which can be classified into non-governmental and governmental. It occurs when the elite is aware of the benefits of supranational solutions (Niemann & Loannou, 2015: 205). In the mutual recognition principle, it is necessary to find national or non-governmental elite to have recourse to EU supranational institutions increasingly. Based on evidence, the mutual recognition principle can generate political spillover. A series of questionnaires run by the EU Commission, *Evolution of the Application of the Mutual Recognition Principle in the Field of Goods* (2015), shows that nearly half the public believes that mutual recognition principle promotes trade in goods amongst Member States (p. 44). Additionally, the company survey also shows that 40% of respondents think that the principle has lowered trade barriers amongst Member States (p. 45). In general, the principle is beneficial to European companies because they standardize their products and then sell in different markets in the EU, thus lowering costs. In addition, this would allow companies to operate on Europe-wide basis and encourage firms to rationalize production, and pursue mergers and acquisitions (Buigues, Ilkowitz & Leburn, 1990). Large enterprises are quite aware of the importance of the principle than small and medium-sized enterprises (SMEs) as they tend to have legal departments.

Political spillover takes place when Member States are knowledgeable about mutual recognition principle, and correctly apply it. In the 2015 evaluation, most national authorities are aware of the principle of mutual recognition and understand it, and 80% of them have expertise in it. The ECJ again plays a crucial role in promoting the principle of mutual recognition and by guiding the Member States in its correct application. The Member States would apply the mutual recognition principle until the ECJ clarifies in which categories of products it would become applicable. Consequently, national administrations need extensive knowledge of EU law to know if the principle is applicable to a specific product. Overall, since attempts to formulate detailed and European standards harmonization had failed, Member States and the Commission had called for a "new approach" to mutual recognition to foster European integration (Moravcsik, 1991: 20).

3.2.1.3 Cultivated Spillover

According to Neofunctionalism, cultivated spillover occurs when supranational actors seek to push forward a transnational agenda, even when the Member States are reluctant to accept further integration (Jensen, 2003: 85). Hence, the ECJ acts as a 'policy entrepreneur' in the case of the mutual recognition principle. The principle conceived by the ECJ not only provides an alternative to the integration of the internal market but also upgrades the common interest, which prohibits Member States from imposing discriminatory measures on goods, services, people, and capital, thus preserving the spirit of four freedoms within the EU. The process of cultivated spillover is implicit and incremental before it reaches the threshold. As long as it has reached the threshold, such cultivated value will circulate among supranational institutions, Member States, and private individuals. In the mutual recognition principle, the *Cassis de Dijon* case (1979) is a threshold on which the ECJ has made a bold ruling indirectly and then influenced the Community policies of the single market. Henceforth, its implementation is so inexorable that its effect is not retroactive.

3.2.2 Spillovers on the Right to be Forgotten

A strong Europe rests on a fully integrated internal market and an open economic system, especially in the digital era, and the Digital Single Market is a milestone to urge the EU Member States to upgrade their information industries. Meanwhile, the ECJ has particularly anchored the core value and fundamental rights and freedoms for fostering European integration and confronting global challenges related to data protection. The ECJ has played a key role in developing policies in the field of privacy protection and thus its contribution paves the way for the solid Digital Single Market. For instance, the 1995 *European Directive on Data protection* was replaced by a new and significant 2016 *General Data Protection Regulation*. The new regulation has upgraded the intensity and level of privacy protection within the Union. In what follows, the *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* case (2014) is presented as a great turning point which later changes European integration remarkably. This section examines the legal–political context of judgment, especially the *Google Spain* case (2014). In doing so, spillover from this case will be discussed and analyzed.

Personally, the *Google Spain* case (2014) is concerned with a European citizen who sought to defend his right to privacy against an international corporation. On the other hand, it is a case in which the ECJ has the capacity to engage in Union's policies through its case law. In 2010, Mr. Costeja González, as a plaintiff, filed a complaint to the Spanish data protection authority (AEPD) against *La Vanguardia Ediciones SL* (newspaper publisher) and Google Spain and Google Inc. (search-engine company & data processors) requesting the newspaper publisher and search-engine company to remove two announcements regarding his lawsuits (David, 2015: 655). Subsequently, the AEPD found that it has the right to order data processors to remove access to data that undermines the fundamental right to data protection and the dignity of persons in a broad sense. In response, Google Spain and Google Inc. appealed the decision to the administrative chamber of the *Audiencia Nacional*, Spain's national appellate tribunal for administrative proceedings. The Audiencia Nacional referred to a detailed set of preliminary questions concerning the interpretation of the 1995 European Directive on Data Protection to the ECJ. The

most important question was whether the Directive establishes the so-called 'right to be forgotten.'

The ECJ acknowledged the right to be forgotten or right to erasure, embedded in Articles 12(b) and 14(1)(a) of Directive 95/46, which allows the data subject to request for removal of his/her search results from the search engine. Pursuant to Article 12(b) of Directive 95/46, the data subject enjoys the right for rectification, erasure or blocking of data, the processing of which does not comply with the mentioned Directive. In addition, Article 14(1)(a) provides for the right of the data subject to object to the processing of data relating to him/her at any time on compelling legitimate grounds. In this context, the ECJ adopted systemic legal interpretation to elaborate Articles 7 and 8 of the *Charter of Fundamental Rights of the European Union* in conjunction with the Directive. The ECJ considered that the articles protect the data subject's rights by overriding economic interest and internet users' right to access information in some cases where the data in question relates to data subject's private life and has no public interest. Therefore, the ECJ ruled that Articles 12(b) and 14(1)(a) of the Directive confer on the plaintiff the right to require Google Spain to remove those links by invoking the right to be forgotten as it contains sensitive information on him.

In light of *Google Spain* case (2014), the ECJ has asserted that the right to be forgotten can be regarded as a variation of human dignity. The right to request the deletion of personal data is inherent to one's honor, dignity, and reputation (David, 2015: 633). James Whitman (2004) says that such a right is important for one's public image for a sense of personhood (pp. 1160-64). Accordingly, the right to be forgotten is a fundamental need for every human being and must be both protected and satisfied. In the case, the ECJ expanded the right to protect personal data through its judgment interpreting the right to be forgotten, thus creating spillover and having great implication to Europe's integration. In addition, the Court in effect enlarged its own role not only by recognizing the right to be forgotten and finding the search-engine's liability in data-protection area in matters of EU law, but also by circumscribing the adjudicative role of Data Protection Authorities (DPAs), national courts, and search-engine operators (David, 2015: 669). In this regard, this case recalled the role

of the EU and the governments of Member States to finalize the pending GDPR in 2016. Specifically, the *Google Spain* case (2014) vastly expanded the reach of fair information practices. This expansion was adopted in April 2016 when the EU promulgated the GDPR, which later became a binding law for all EU Member States in 2018 (Robert, 2018: 986). The threshold of spillover has thus been reached by the *Google Spain* case (2014) relaunching digital integration.

Subsequent to the *Google Spain* case (2014), almost 193,000 individuals invoked their right for erasure and requested Google to delete their digital information (Payne, 2015). As shown in the 2011 *Eurobarometer Report*, a clear majority of Europeans, around 75%, understand their rights and want to delete their personal digital information online (p. 2), with only 3% not being aware. The 2019 *Eurobarometer Report* results show that 73% of respondents have heard of their rights guaranteed by the GDPR, and particularly over 50% of respondents asserted that they know about the right to have their own data deleted (p. 3). In addition, 62% of the respondents care about their complete control over their own data (Eurobarometer Report, 2019: 39). In addition, 57% of the respondents are familiar with their national data protection authorities (Eurobarometer Report, 2019: 3). Since the awareness of individuals on their digital rights has increased, we can infer that enterprises and public authorities also pay more attention to the issue than ever before.

3.2.2.1 Functional Spillover

As per Neofunctionalists, functional spillover occurs when a supranational actor expands the objectives over the original goal. Rational interdependence enables linkages between agreed basis and necessary further action. Once the functional spillover dynamics is established, a series of functional discourses and policies will begin. In case of functional spillover related to the right to be forgotten, the ECJ, as a supranational actor, has identified several functional spillovers: (1) expansive functional spillover of the ECJ's judgments; (2) expansive functional spillover amongst the EU institutions; and (3) functional spillover between the ECJ and Member States.

Prior to the *Google Spain* case (2014), the ECJ had already adjudicated a great load of precedents relating to data protection (Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, 2014). It shows that until the threshold had been reached, the ECJ was concerned with the concept of data protection and built its own integrative momentum in stealth. In any case, the ECJ is ready to resolve any integration issues where necessary. Once the threshold had been reached, cases sprang up one after another concerning data protection, which demonstrates that the ECJ leads integration in data protection to the fullest extent.

The right to be forgotten has been developed to ensure human dignity. Directive 95/46 ensures a high level of protection of fundamental rights and freedoms of natural persons, in particular, right to privacy, relating to personal data (Google Spain, 2014, para. 66). The original goal of protecting the right to privacy is backed by Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (Google Spain, 2014: para. 69). In fact, the supposed rights relating to right to erasure were unclear. Accordingly, the ECJ ruled that Articles 12 and 14(1)(a) can be regarded as the right to be forgotten. Afterward, the right to be forgotten was codified and can be found in Article 17(2) of the GDPR so that such right is incorporated in hard law, instead of soft law.

In addition, the case has a rather straightforward effect based on ECJ's interpretation of the Directive. In what follows, there was an unexpected consequence, which is imposition of primary liability on search-engine operators. In this respect, the ECJ has drawn a blueprint to guide the government on managing digital companies in which it has explicitly stated the material scope of Directive 95/46 in regard to liability of the search-engine operator, and the rights granted to data subject. The Commission even had adopted the *Guidelines on the Implementation of the Court's Judgment on Google Spain Case* (2014). This case has also demonstrated the functional spillover from the *Van Gend en Loos* case (1963). The direct effect principle once again unifies the implementation of Directive 95/46. Therefore, the ECJ not only outlined the application of the Directive, but also opened the gate to dealing with the digital rights jurisprudence by rendering any person the right to request the removal of his or her information online.

3.2.2.2 Political Spillover

Neofunctionalists argue that integration is an adaptive process by which the Member States gradually shift their expectations, change their loyalties, and finally turn to new values (Haas, 1958: 12), because their interests are better protected or their problems are fairly resolved by a new supranational center (Tranholm-Mikkelsen, 1991: 4-6). In this regard, national or non-governmental elites in their best interest choose to support the supranational integration strategies (Macmillan, 2008: 39-40). Accordingly, to discover the evidence for the right to be forgotten interpreted by the ECJ results in political spillover, provoking political elite to be aware of it, and later put it into daily practices.

Mirela Mărcuț (2017) expressed that interest groups and companies constantly push themselves to pursue legislation or digital agenda at Europe level (p. 162). In the present case, telecom companies and consumer-protection organizations pay great attention to Internet users and seek to protect their connection to digital space and their interaction with it. For example, European Digital Rights are one of the biggest Europe-wide organizations concerned with digital space, and the priorities are "privacy, surveillance, net neutrality and copyright reform" (European Digital Rights, 2017). Mărcuț emphasizes that these organizations concert their efforts to balance the impact when public authorities implement a new legal framework on data protection.

After ruling the *Google Spain* case (2014), Google and other search-engine companies were inevitably under pressure to institute an internal protocols or rules to comply with the ECJ ruling, without the need to follow the GDPR. In addition, it can be implied that the *Google Spain* case (2014) outranks national courts to some extent in the field of data protection. In this sense, whenever the subject matter is concerned with the right to erasure, national courts must rule their cases in accordance with ECJ's jurisprudence.

3.2.2.3 Cultivated Spillover

Neofunctionalism considers that cultivated spillover takes place when a clear preference for further action exists, which will gradually evolve into a normative identity. The ECJ recognizes the common interests of Member States enshrined in the EU law; however, since there is uncertainty in law sometimes, the ECJ's involvement becomes necessary to interpret it to safeguard the consistency of EU law so as to protect the Union's interests as a whole. Before the ruling of the ECJ in the *Google Spain* case (2014), the EU institutions had already tried to ensure minimum standardized rules on the protection of personal data across the Union. However, the digitization or the rules concerning data protection were rather fragmented until the ECJ has clarified its position in the *Google Spain* case (2014).

As for regulatory framework, the EEC/EU first passes Directive 95/46 (Data Protection Directive) to ensure an equivalent level of protection of the rights and freedom of individuals in relation to the processing of personal data in all Member States. Later on, the Union enacted other new Directives relating to the digital single market, such as the e-commerce directive (2000), and e-privacy directive (2002). These Directives provided a leeway for Member States to harmonize their national law gradually and flexibly. Meanwhile, the fragmentation of law gave rise to different perspectives on data protection, leaving room for the ECJ to engage in when it felt necessary.

The EU Commission gradually underlines the norm of human rights protection, particularly the right to privacy on personal data. In 2012, Viviane Reding, the Commissioner for Justice, Fundamental Rights and Citizenship of the EU Commission mentioned the right to be forgotten is an important value to show that people have control over their data. In addition, the shadow of the right to be forgotten can also be observed in the Data Protection Regulation Draft (2012). On 12 March 2014, an overwhelming majority of Members of the EP voted for it. After two years, the Council adopted its position and the EP approved the package in plenary. Eventually, all Member States have obligations to implement the GDPR in May 2018. Based on the foregoing facts, data protection relating to the right to be forgotten was

already a core value of the EU before the ECJ's judgment. However, it was not a common concept to every political actor. It was not until the *Google Spain* case was settled that the ECJ balanced the interests of all stakeholders involved and then effectively nurtured the value, which encourages people to have control over their data information. In what follows, the ECJ later disseminated the cultivated norm and value to be a foundation of other actor's functional or political spillover.

In addition, the cultivated spillover generated by the ECJ is of high quality and thus it is more likely to be instilled in every actors' mind. During the process of selecting the norm and value by the ECJ, the normative logic is highly debated among actors, such as the plaintiff, the defendant, the Commission, and the Attorney General. In this sense, the ECJ can comprehensively consider all aspects of stakeholders and its decision should be strictly confined in law and its general principles. Accordingly, the legality and legitimacy of the decision are not questionable to some extent, as well as the norm and value. Eventually, the cultivated spillover will occur when the ECJ makes a binding judgment, which must be enforced. By doing so, the ECJ serves as a 'policy entrepreneur' to determine the common interest of the Union, which is expected to evolve into a clear preference for further integrative action.

CONCLUSION

This thesis evaluates the role of the ECJ in the process of European integration through a Neofunctional analysis. The main argument of the thesis is asserted that the ECJ, as an autonomous political actor, has successfully influenced the Union's policies, changed the political elites' preferences, and made substantial contributions to creating legal principles that foster and maintain the momentum of European integration under the Neofunctional logic. The ECJ's case law is a catalyst for the development of European integration. The three main instruments that produce various spillovers by the ECJ are: the preliminary rulings procedure, the direct effect principle, and the principle of supremacy of EU law.

Neofunctionalism has been selected as a theoretical basis for this thesis. Neofunctional theory covers comprehensive actors in the process of European integration, such as supranational institutions, interest groups, businesses, and individuals. In addition, the theory regards regional integration as a dynamic process. In particular, the notion of spillover describes the transformations in the process of regional integration. Accordingly, this thesis considers Neofunctionalism, particularly the concept of spillover, is the best theoretical framework to account for the role of the ECJ within the current EU integration. In order to ascertain the subject of the ECJ deeply, this thesis adopts the Neofunctional analysis, made by Burley and Mattli (1993).

The Neofunctional analysis on the role of the ECJ is divided into four parts: (1) Actorness; (2) Motivation; (3) Instrumentalities; and (4) Content.

Actorness:

Neofunctionalists underline the importance of supranational regional institutions interest groups, and individuals. The relationship between supranational institutions and sub-national actors, such as interest groups and individuals has been redefined. Promotion of regional integration is not an exclusive matter to national states; supranational institutions, interest groups, and individuals can also participate in the

policy-making process. The ECJ is the principal actor to foster European legal integration. The judges and advocates-general independently tackle with the EU law problems. Besides, the preliminary ruling procedure enables national courts and individuals to interact with the ECJ. This mechanism links the ECJ and national courts together. Simultaneously, the preliminary ruling procedure empowers national courts and individuals in the process of European integration.

Motivation:

'Self-interest' is the main motivation of actors in the process of regional integration. In the process of European integration, the ECJ created opportunities, offering various actors, such as individual litigants, lower national courts, even states, to peacefully settle their disputes so as to meet their functional demands. In the meanwhile, The ECJ enhances its own power and creates incentives for national courts, interest groups and individuals to rely upon litigations. With litigations, the ECJ has a more influential say in the Union's affairs.

Instrumentalities of Regional Integration:

Neofunctionalists adopt the concept of spillover to explain the dynamics of integration. Spillover is classified as functional spillover, political spillover, and cultivated spillover.

Functional spillover:

Functional spillover consolidates actors' functional demands in the process of regional integration. In this regard, further actions are launched for the purpose of achieving the original goal. Eventually, this impetus penetrates deeply and expands broadly in a variety of sectors and issues.

Political spillover:

Political spillover is beneficial to establish a new and authoritative

decision-making center. Governmental and non-governmental elites gradually realize that cross-border problems cannot be absolutely resolved by intergovernmental mechanism. Therefore, elites shift their expectations, loyalties, and political activities to a new supranational center.

Cultivated spillover:

Cultivated spillover influences regional normative structure in the long term. Supranational institutions incrementally develop their independent preference and identity to blend in integration policies. The ECJ produces spillovers through the preliminary ruling procedure, the direct effect principle, and the supremacy of EU law principle. First, the ECJ resolves the legal uncertainties in the treaties and secondary legislation. The case law rendered by the ECJ represents further actions for European integration. Second, national courts, interest groups, and private litigants are willing to have recourse with the ECJ. The ECJ becomes a new supranational center to settle legal disputes concerning EU law. Third, the ECJ rulings are not affected by the 'lowest common denominator' in the cases of 'the principle of mutual recognition' and 'the right to be forgotten.'

Content:

Neofunctionalists contend that regional integration gradually operates on the relatively low-key technical, economic, and social issues of political cooperation. In this regard, the most successful integration is concerned with apolitical issues. The ECJ disguises its pro-integration affinity under a mask of law. The ECJ transforms the controversial political issues into professional and technical legal reasoning. Besides, the ECJ protects itself behind the shield of law. In order to exclude Member States' intervention, the ECJ depoliticizes disputes into pure legal questions. The ECJ plays the role of a neutral mediator to balance interests and stakes between litigant parties. Therefore, given the nature of the ECJ and its instruments, ECJ has successfully propelled European integration.

Two examples are provided to specify and explain the ECJ's contribution to European integration: 'the mutual recognition principle' and 'the right to be forgotten.'

The Mutual Recognition Principle:

The ECJ has played an indispensable role in constructing European single market. The mutual recognition principle, made by the ECJ, is a legacy in single European market. The principle is derived from Article 34 and 35 of the TFEU. The ECJ developed the mutual recognition principle from the *Dassonville* case (1974) to the *Cassis de Dijon* case (1979). The principle is an alternative integration approach to achieve the single market. The Commission later adopted the principle in the 1985 White Paper on Completing the Internal Market. In addition, statistics show that the mutual recognition principle is known and accepted by governmental and non-governmental elites. Lastly, the ECJ successfully upgraded its pro-integration preference, which prohibits states from imposing discriminated measures on goods, services, people, and capital.

The Right to be Forgotten:

The ECJ has successfully expanded the Article 12(b) and 14(1)(a) of Directive 95/46 by teleological legal interpretation. The right to be forgotten has been declared by the ECJ in the *Google Spain* case (2014). The right to be forgotten serves as a functional protection of the right to privacy. The right to be forgotten has enhanced the protection of personal data information and laid more obligations on data controllers. Accordingly, the right to be forgotten is codified in the 2016 GDPR. In addition, the right to be forgotten, as an innovative human right, is surprisingly recognized and then implemented by European firms, interest groups, and people. As a result, governmental authorities have turned their attention to the implementation of the right to be forgotten. Eventually, The protection of data information is a foundation of promoting the digital single market. In order to promote free movement of digital information, the unified regulation of privacy protection should be established. In this sense, the right to be forgotten becomes an underlying principle of

the Union's policies.

The thesis revisits the Neofunctional analysis envisaged by Burley and Mattli (1993). Based on the analysis, not only does the thesis examine the role of the judges, but it also discusses the role of advocates-general and interest groups. With regard to the motive, the thesis elaborates how the ECJ balances the interests between actors and consolidates its position in the Union through the mechanism of preliminary ruling procedure. As for applied instruments, the thesis includes the concept of cultivated spillover. Once it reaches the threshold, the cultivated spillover produced by the ECJ will be beyond the 'lowest common denominator' of the Union. In addition, the thesis provides the development of Neofunctionalism, especially the application on the role of the ECJ. Furthermore, case studies of 'the mutual recognition principle' and 'the right to be forgotten,' prove that the ECJ participates in and influences the Union's policies to some extent. In particular, 'the right to be forgotten' in the protection of privacy can be regarded as a current case, which corroborates that the ECJ still fosters European integration. However, the thesis is not comprehensive so it can be improved in three points by those who would consider making use of this study to further explore the Neofunctional application on the role of the ECJ: first, another concept of Neofunctionalism should be included, such as the elite socialization thesis, the supranational interest groups thesis, and the concept of spillback. Second, the thesis should include a more comprehensive discussion on the other legal principle, such as the doctrine of indirect effect. Third, the thesis should employ the Neofunctional analysis in another Union's policy except for the single market.

In conclusion, the ECJ, as an autonomous political actor, has successfully influenced the Union's policies, changed the political elites' preferences, and made substantial contributions to creating legal principles to foster and maintain the momentum of European integration under Neofunctionalism. The ECJ produces spillovers to attain its pro-European goal in the cases of promoting the European single market and the protection of data information. Therefore, the role of ECJ fits well into the notion of spillover under Neofunctionalism, particularly in the cases of 'mutual recognition principle' and 'the right to be forgotten'.

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