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Citation

Strelkov, A. (2018). 'EU Justice Scoreboard: a new policy tool for "deepening" European integration?'. *Journal Of Contemporary European Studies*, 27(1), 15-27.
doi:10.1080/14782804.2018.1534729

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).



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To cite this article: Alexander Strelkov (2018): 'EU Justice Scoreboard: a new policy tool for "deepening" European integration?', *Journal of Contemporary European Studies*, DOI: [10.1080/14782804.2018.1534729](https://doi.org/10.1080/14782804.2018.1534729)

To link to this article: <https://doi.org/10.1080/14782804.2018.1534729>



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Published online: 19 Oct 2018.



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ARTICLE



'EU Justice Scoreboard: a new policy tool for "deepening" European integration?'

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ABSTRACT

Since its introduction in late 2013, the EU Justice Scoreboard allows the European Commission to obtain information on the performance of national judicial systems. This article argues that despite being a technical policy instrument, the EU Justice Scoreboard has the long-term potential to affect the division of competences between member states and supranational institutions in the domain of rule of law. Drawing on three meta-theories of EU integration, neofunctionalism, new intergovernmentalism and governance, this article investigates which theoretical approach best explains the functioning of this policy instrument. Although it is considered that in the case of the EU Justice Scoreboard, insights from both neofunctionalism and new intergovernmentalism have better explanatory power, this article stresses the need to combine various theoretical accounts for a more comprehensive understanding of EU policy processes.

KEYWORDS

Rule of law; EU Justice Scoreboard; integration theories; European Union

Introduction

The creation of the EU Justice Scoreboard by the European Commission under consecutive leadership of José Manuel Barroso and Jean Claude Juncker has added to the pool of EU policy instruments in the domain of Justice and Home Affairs. As a 'soft governance' tool for comparing the quality of member states' judicial systems and highlighting 'best practices' in the organization of the judiciary, it aims at ensuring high efficiency of judicial proceedings across the EU territory without directly enhancing supranational competences within the EU. Since 2013, the European Commission has published six editions of the Scoreboard, stressing its importance not only for the rule of law as such but also for securing a sound regulatory and investment-friendly environment as well as upholding EU values (European Commission 2014a, 2014b, 2015, 2016).

In this article, we argue that the EU Justice Scoreboard can have important long-term consequences for the 'deepening' of EU integration. On one hand, EU Justice Scoreboard is an instrument which relies exclusively on peer pressure and voluntary provision of information by member states: It does not directly alter the division of competences between supranational institutions and member states. On the other hand, EU Justice Scoreboard sets an important precedent. Previously, the European Commission got directly involved with national judicial systems only in cases of member states' non-compliance with *acquis communautaire*. With the introduction of the EU Justice Scoreboard, the European Commission is able to provide an overview and give recommendations about the routine working of national judicial systems, becoming closely involved in monitoring the day-to-day administration of justice. Given that EU member states have always been reluctant to pool

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sovereignty in the domain of justice and home affairs (Trauner and Ripoll Servent 2016), the fact that they agreed to a form of external assessment of their judicial systems is puzzling. In the long term, the European Commission's involvement in the technical aspects of national judicial systems provides an opportunity for the expansion of supranational competences, as has been in the case in other policy domains (Pollack 2000b; Citi 2014b).

As provision of rule of law and justice remains one of the key prerogatives of EU member states, the creation of EU Justice Scoreboard, first, reopens the debate as to what is the optimal division of labour between EU intergovernmental and supranational bodies in this policy domain (Carrera, Guild, and Hernanz 2013) and, second, poses the question about the direction of European integration. Even if some member states such as Romania, Bulgaria, Poland and Hungary have various challenges with the rule of law and the quality of their judicial systems (Dinan 2017b), EU attempts to redress the situation through monitoring and sanctioning have produced mixed results at best (Dimitrov, Harlampiev, and Stoychev 2016b). Respective policy solutions face the challenge of combining national sovereignty with external oversight of the rule of law, while securing accountability at the same time – goals that are difficult to accomplish simultaneously. Any of the policy solutions taken to address the rule of law challenges and the quality of justice through involvement of the European Commission will affect the direction of EU integration as it is likely to reshape the division of competences between supranational institutions and member states. Even if EU Justice Scoreboard remains a very technical instrument, rule of law policies provide an important test-case for various theoretical approaches to dynamics of EU integration (Trauner and Ripoll Servent 2018). The focus of this article is not on the motivations of particular stakeholders to partake in the EU Justice Scoreboard (this article does not aim to assess whether they are driven by rational or normative goals) but on understanding how the functioning of the EU Justice Scoreboard can be explained by different EU integration theories. This article endeavours to test how three meta-theories of EU integration (new intergovernmentalism, neofunctionalism and governance) assess the functioning of the EU Justice Scoreboard, considering their explanatory value as well as shortcomings. These three accounts provide different assessments of the political dynamic of the EU and present alternative visions of the EU Justice Scoreboard's impact. For example, voluntary information-sharing and lack of supranational sanctions within the EU Justice Scoreboard clearly relate to intergovernmentalist accounts, while the progressive expansion of European Commission's remit to include criminal justice into the policy instrument appeals to functionalist accounts. Governance accounts highlight the multilevel nature of the EU political system and stress opportunities for building trust among actors that the EU Justice Scoreboard offers.

We propose that in its current form, the EU Justice Scoreboard is best assessed through a synthesis of the above-mentioned approaches. This article draws on Haugton's (2016) claim about the urgency to reignite the debate on the drivers and destination of European integration, especially given the series of crises that the EU has been facing as well as the conceptual challenges that they present. The comparison of various theoretical accounts is done on the basis of what Blatter and Haverland (2012, 144) call congruence analysis: small N research design where case studies are used 'to provide empirical evidence for the explanatory relevance or relative strength of one theoretical approach in contrast to other theoretical approaches'. In doing so, this article draws on interviews conducted in November–December 2016 with various actors (European Commission, European Fundamental Rights Agency (FRA), European Parliament (EP), Council General Secretariat, non-governmental organizations (NGOs) and stakeholders)¹ which have been involved in the set-up and functioning of the EU Justice Scoreboard.

EU Justice Scoreboard: setting the scene

The EU Justice Scoreboard is an information tool that has been set up by the European Commission at the end of 2013. The underlying objective is to assist the EU and member states 'to achieve more

effective justice' through the provision of reliable and comparable data on the quality, independence and efficiency of justice systems in all member states as well as uphold EU founding values.

The introduction of the EU Justice Scoreboard was presented by the EU Commissioner Viviane Reding (2013) as an answer to the so-called Copenhagen dilemma, namely the insufficient means to control compliance of member states with the founding principles of the EU after accession. Later, however, the European Commission's rhetoric has changed. The EU Justice Scoreboard was not presented as a tool to address systematic abuses of democratic and rule of law principles across EU member states (Bogdany and Ioannidis 2014b). Rather, it has been framed as an integral part of the European Semester, a set of measures to mitigate the consequences of the Eurozone crisis. EU Justice Scoreboard links effectiveness of justice with investment attractiveness and ability to guarantee transparent business climate. Moreover, it is highlighted that EU Justice Scoreboard is 'part of an open dialogue with member states to help them achieve more effective justice systems' (European Commission 2017a).

EU Justice Scoreboard does not rank judicial systems of member states in terms of performance, does not envisage any sanctioning mechanisms and does not promote any particular 'template' of organizing judicial institutions. Being a 'soft governance' tool, its added value lies in the provision of a systematic long-term annual overview by collecting information on aspects of national judicial systems, for example, caseload, length of court proceedings, anti-corruption measures and access to justice among disadvantaged groups. At the end, no single ranking is created but rather a comparative overview of how each national judicial system functions. Information is obtained from a variety of sources: Council of Europe (CoE) Commission for the Evaluation of the Quality of Justice (CEPEJ), officials from national judiciaries and ministries of justice, Eurostat and a host of other stakeholders. Member states may receive specific recommendations about their judicial systems, yet these are always framed as part of the European Semester, not as 'independent' EU Justice Scoreboard recommendations.

Theoretical approaches and propositions

The functioning of the EU Justice Scoreboard is considered from the point of view of three grand meta-theories of EU integration – neofunctionalism (Niemann and Ioannou 2015b), new intergovernmentalism (Bickerton, Hodson, and Puetter 2015b)² and (multilevel) governance (Pagoulatos and Tsoukalis 2012b). These approaches have been selected as they highlight the issue of the finalité of EU integration and the interplay of different levels of competence within the EU political system. This article highlights the key propositions of each theoretical approach broadly defined rather than deals with the subbranches of each theoretical configuration. Different theoretical approaches are not considered to be mutually exclusive: A number of EU integration studies (Houghton 2016b; Jones, Keleman, and Meunier 2016b; Saurugger 2016b) have convincingly shown that combining different theoretical accounts provides a more comprehensive and realistic assessment of the policy process. An important point is that 'theories are not reduced to single independent variables but are treated as comprehensive worldviews that are specified through a set of constitutive and causal propositions' (Blatter and Haverland 2012b, 24). Nevertheless, this article endeavours to find the best match between the three theoretical accounts and the empirical reality of EU Justice Scoreboard functioning through congruence analysis. Table 1 presents the key parameters of each theoretical approach as well as formulates a number of propositions about how each approach would address the functioning of the EU Justice Scoreboard.

New intergovernmentalism

New intergovernmentalism (Bickerton, Hodson, and Puetter 2015b; Pollack 2012b) considers member states as drivers of the integration process. This approach aims to address the paradox of member states pursuing the process of integration without significant and lasting transfers of decision-making power, something that liberal intergovernmentalism allegedly fails to account for.

Table 1. Theoretical approaches to EU integration.

	Neofunctionalism	(New) intergovernmentalism	Governance
Key actors	Supranational institutions	Member states	NGOs and sectoral stakeholders at both national and international levels
Preferences	Enhancing the 'depth and breadth' of integration through spillover	Retaining control of the integration process as a precondition for collaboration in new policy domains	Third parties and stakeholders move between national and supranational levels to maximize their benefits
Ideational change	New supranational loyalties	No/limited	New loyalties/building trust

Through focusing on the norms of consensus and deliberation as well as creation of '*de novo* institutions'³ in a context where distinction between high and low politics is blurred, member states continue to be in charge of the integration agenda.

A new intergovernmentalist reading of the Justice Scoreboard would imply that

- Member states will retain control over the operational aspects of the EU Justice Scoreboard;
- EU Justice Scoreboard will be limited to monitoring of member states judicial systems and will have no independent sanctioning capacity;
- Although EU Justice Scoreboard is based on information-sharing and deliberation, it will not lead to any shift of loyalties or ideational transformation of member states.

Neofunctionalism

The neofunctionalist account (Sandholz and Sweet 2012b) focuses on the notion of spillover, the spread of EU competences from one policy field to the other. In the case of the EU Justice Scoreboard, it can be argued that there is a functional spillover (Niemann and Ioannou 2015b): Objectives of developing a single market cannot be obtained without further integrative action in the judicial sector. The neofunctionalist account would stress that member states would not be able to limit and control the scope of the EU Justice Scoreboard as actors involved in its implementation will develop their own agenda and will attempt to expand its scope. A number of propositions can be formulated:

- Supranational institutions (EP and European Commission) will be interested in enhancing the scope and range of competences related to the EU Justice Scoreboard;
- Supranational institutions will strive for greater independence from member states in exercising tasks related to the EU Justice Scoreboard;
- EU level/supranational level becomes a 'reference point' for stakeholders in the policy sector

Governance accounts

Governance accounts (Pagoulatos and Tsoukalis 2012b) highlight the multilevel nature of the EU political system: Actors 'move' between national and supranational levels of the system, searching for the optimal venue to pursue their interests and 'strategically using Europe' (Woll and Jacquot 2010b). Although Schakel (2016b) highlights that multilevel governance approaches do not provide immediate hypotheses about the behaviour of actors, we can formulate a number of assumptions about how governance accounts take stock of the EU Justice Scoreboard:

- NGOs as well as key sectoral stakeholders will proactively address the European Commission and be interested in the expansion of its remit;

- NGOs, national and supranational stakeholders in the rule of law domain will try to promote their policy preferences on the organization of the judicial sector within the EU Justice Scoreboard process;
- Deliberation and dialogue that are central to the EU Justice Scoreboard would lead to ideational change and growing mutual trust due to the non-hierarchical, non-coercive nature of this policy instrument.

Key actors

Along the lines of a new intergovernmentalist approach, member states are ‘gatekeepers’ of the EU Justice Scoreboard, any changes in its scope or competences have to be agreed by them. A respondent from the EP (A1) illustrates this point:

For me personally the most logical step would be to revise the mandate of the Fundamental Rights Agency ... The problem is that for the sake of political compromise we had to drop this idea because we realised that actually any developments that would require some legislative changes is a no-go for the Council, at least for the time being.

Member states also remain ‘gatekeepers’ in the process of information provision. For example, a representative of the European Commission (A6) mentions that it is the member states who decide who exactly is going to be the interlocutor of the Commission’s officials. Commission requests for meetings are sent through a Permanent Representation and subsequently member states decide who will be in touch: The European Commission cannot directly approach a national ministry of justice. A representative of a stakeholder involved in the EU Justice Scoreboard (A7) confirms the ‘gatekeeping’ function of member states: ‘Commission cannot go beyond the member states if they want to have these kinds of meetings with national contact points’. Moreover, the members of the above-mentioned group of contact persons on national justice systems are nominated by national administrations, not chosen by the Commission (Dori 2015b; European Commission 2017a). Any rotation that happens within the group is the result of internal change in national ministries, not any exogenous pressure, explains a representative of the European Commission (A6a).

Nevertheless, one can make an argument against presenting member states as key actors in the development of the EU Justice Scoreboard. Namely, member states do not seem to be preoccupied with the EU Justice Scoreboard. A representative of the Council General Secretariat mentions that the first and last time the EU Justice Scoreboard was discussed dates back to 2014 (A8), while a stakeholder deeply involved in the EU Justice Scoreboard process says that ‘the Council does not know it exists’ (A7). Representatives of the Commission (A6) also confirm that the Council discussed the EU Justice Scoreboard only once (Council of the European Union 2014b), when the instrument was introduced, ‘now it is not on the radar any more’. This alleged lack of attention by the member states does not correspond well with inbuilt tabs on Commission’s autonomy in developing and potentially expanding the EU Justice Scorecard, as a new intergovernmentalist approach would suggest. At the same, the alleged lack of member states’ interest in the EU Justice Scoreboard does not imply that it is unimportant: Other EU policy actors – namely the EP as well as several NGOs – see it as an opportunity to expand EU’s oversight and presence in the rule of law sector. The functioning of the EU Justice Scoreboard can be presented as a case of ‘unintended consequences’ of member states coordination, agents of member states escaping their individual or collective control, – all these arguments supporting a neofunctionalist, rather than new intergovernmentalist account.

Following a governance approach that stresses the multilevel character of the European polity, it could be argued that through the EU Justice Scoreboard, the European Commission develops extensive network ties with a large number of actors (European Commission for the Efficiency of Justice/CEPEJ, Venice Committee, European Network of Councils for the Judiciary (ENCJ), etc.), not

only allowing them to gather information and obtain leverage in a non-hierarchical manner (Coman 2016b) but also giving them a voice in the EU political setting. As the EU Justice Scoreboard is heavily dependent on these networks for information provision, NGOs and sectoral stakeholders become one of the key players in this policy setting. Nevertheless, what the governance approach does not take into account is that the responsibility to uphold the rule of law is shared between national governments and EU institutions, not sectoral stakeholders. The actual design and functioning of the EU Justice Scoreboard is the result of negotiations over the division of competences, and the governance approach does not help account for them. As one of the interviewees (A7) puts it, 'you can measure the number of trainings but whether someone who took part in trainings has actually learned something – it is another issue'. Other involved parties share this conviction: 'figures alone don't prove anything' (A4), 'if you do only numbers, it can be misleading' (A8). Even if the figures presented in the EU Justice Scoreboard are not contentious, the interpretation of such rule of law indicators is wrought with conflict (Ginsburg 2011b). Interestingly, interviews (A6) show that although various CoE bodies and NGOs are involved in providing information to the European Commission for the development of the EU Justice Scoreboard, these interactions have not necessarily been formalized, embedded into a regular policy cycle and often happen in an ad hoc manner. It is more often the case that the European Commission approaches sectoral stakeholders, NGOs and CoE bodies, not the other way around.

Ultimately, even if there is no denial of sectoral actors' involvement in the policy process of the EU Justice Scoreboard, its functioning hinges on the relationship between member states and supranational bodies. Member states may be disinterested, yet they remain authoritative 'gate-keepers' that can veto any expansion of the Justice Scoreboard's remit, while technical work has been formally delegated to supranational bodies.

Preferences

At first glance, the creation of the EU Justice Scoreboard neatly fits the so-called integration paradox that new intergovernmentalism professes. Member states want to pursue integration but do it outside of the 'straightjacket' of the Community method: They cannot afford to ignore problems with the rule of law, but they create weak mechanisms with little coercive power out of fear of endangering their sovereignty. Hence, delegation takes place not to supranational institutions but to '*de novo*' bodies that are less autonomous. In fact, the European Commission does not have the powers to independently monitor, assess and enforce the rule of law. Not only is it deprived of any sanctioning powers, it is highly reliant on third parties to obtain information which it cannot gather independently. Some member states often do not provide all information that is gathered within the framework of the EU Justice Scoreboard, limiting its monitoring capacity.⁴ This means that member states limit potential interference of the EU into their judicial systems.

Moreover, there is a certain self-limitation of the European Commission in terms of using and assessing the wider implications of the EU Justice Scoreboard. Respondents from the Commission have stressed that it is not an instrument to address the 'Copenhagen dilemma', potential democratic backsliding of member states. For example, 'the EU Justice Scoreboard is established as an information tool and hopefully will stay short and distilled. It is 50 pages or so, not bloated. If we want to include something else, we need to get rid of something', argues a representative of the European Commission (A3). This illustrates that Commission anticipates a negative reaction from member states about any expansion of EU Justice Scoreboard scope, supporting an intergovernmentalist interpretation.

However, the introduction of the EU Justice Scoreboard can be considered as an example of a spillover, the functional pressure created by the attempts to address the 'Copenhagen dilemma' (Coman 2014b) or secure quality of judicial procedures for the sake of buttressing the single market. In comparison to a situation of late 2000s when 'there was no one in the Commission with this portfolio, no one thought about horizontal issues in the justice sector'

(A7), the creation of the EU Justice Scoreboard is a major success in flagging up this new issue on the EU agenda. The logic of the spillover would imply that the decline of rule of law in a member state creates negative externalities for other states. The incomplete character of integration creates risks for member states and provides opportunities for supranational actors to expand their leverage.

The EP, for example, clearly wants to increase the scope and leverage of the Justice Scoreboard: Although EP political groups have different views concerning the desirability of stronger EU oversight in the rule of law sector, there is a broad agreement that rule of law deficiencies in member states have to be addressed. An interviewee from the EP (A1) expands on this: 'The parliament treated the EU Justice Scoreboard as one of the steps in the positive direction but not necessarily the final step, it was just the first step'. Moreover, the October 2016 report by Sophia in 't Veld (ALDE) argues that the EU Justice Scoreboard should be incorporated into the EU pact on democracy, rule of law and fundamental rights (EP 2016); she stresses yet again that criminal justice should also be included in the Scoreboard.

Nevertheless, the neofunctionalist account that focuses on the 'spillover' of supranational preferences has its limitations. For example, the level of spillover remains limited: Although the EP intensively lobbies to include criminal justice into the Scoreboard, it still predominantly applies to civil, administrative and commercial law cases. 'This is one of the first samples of having a permanent monitoring situation and gradually expanding this monitoring', mentions a staff member of the EP (A1). Basically, from the very introduction of this policy instrument the EP wanted to expand its scope but was not successful, no further spillover has taken place. A staff member of the EP (A9) summarizes the situation in following terms:

Council is playing ostrich policies, waits until it comes to boil. There is no collective capacity to deal with it (*rule of law challenges* – authors) on a systematic level. On the positive side, however, some time ago such a dialogue would not have been possible at all

As an interviewee from the EP mentions (A2), the EP has not specified how exactly it suggests including criminal law in the EU Justice Scoreboard, although there are several distinct approaches. This gives the European Commission somewhat of *cart blanche* on defining the specific method. However, contrary to the neofunctionalist account, it is actually very cautious for a 'expansionist' interpretation of the EU Justice Scoreboard, potentially anticipating resistance from member states. For example, mentions a representative of a stakeholder (A4), introducing criminal law to the EU Justice Scoreboard through data on time spent in custody or alternative modes of punishment are relatively uncontroversial, and member states could potentially agree to this. However, data on reasons for incarceration, for example, are politically sensitive and technically complicated as not all EU member states have identical definitions and categories of criminal offences. Representative of the European Commission (A6) points out similar challenges with introducing criminal law to the EU Justice Scoreboard:

One aspect is the political context, another one is the availability of data, another – how do you define criminal justice? We are exploring the availability of data and this is the most difficult one. If only some member states are going to provide data we are not going to include it (*criminal law* – author)

However, in the 2017 EU Justice Scoreboard, some initial reference to criminal justice was done – through providing information on case proceedings in money laundering. If one assumes that the introduction of the EU Justice Scoreboard is the result of 'spillover', then it is surprising that supranational institutions which are considered to push for the expansion of EU competences have different views on the matter and do not coordinate their actions. For example, even when consultations between the Council and the European Commission on the EU Justice Scoreboard have taken place, EP representatives have never been invited, argues one of the interviewees (A1). The same situation repeats itself with any follow-ups to the recommendations from the EU Justice Scoreboard – the EP is not involved, mentions an interviewee (A1):

We have not had any exchange with the Council or the Commission, structural exchange I mean, for example reports of the Council, follow-ups to the recommendation etc. So I would say that the Council relies on the Commission to follow up on this and to indicate if there are any problems in this context.

Another example is that the European Commission has also been very cautious in reacting to the EP's proposal on the creation of the EU mechanism on democracy, which also implied embedding the EU Justice Scoreboard in a more ambitious framework (European Commission 2017b). Interestingly, interviewees highlight that even if the EP aims at increasing the scope of the EU Justice Scoreboard, it does not have a clear policy plan. There are concerns about the ability of members of the EP to actually use EU Justice Scoreboard in daily work: 'this is a very useful tool for experts but not so much for the politicians', argues a staff member of the EP (A1). It is also mentioned that despite the Scoreboard's connection to the European Semester, it is still different groups of Members of the European Parliament (MEPs) who address economic and rule of law issues, limiting potential use of this policy instrument and any purported spillover effect (A1, A2).⁵ Ultimately, along the lines of a neofunctionalist explanation, agents should deviate from the preferences of principals. However, the European Commission seems to be less willing to 'deviate' in comparison to the EP. The latter, even pushing for the expansion of EU Justice Scoreboard, may find it difficult to explore its potential due to the technical complexity of interpreting and using the data. Spillover does not automatically translate into capacity to act: Even if neofunctionalist preferences exist, there are not necessarily articulated into political practice.

The governance approach would expect non-governmental actors to exploit various 'venues' of the EU political system to address their goals. In case of the EU Justice Scoreboard, the picture is mixed. On one hand, experts (Dallara and Piana 2015b) highlight that judicial networks are becoming increasingly important in reforming the rule of law sector, for example, through providing information and training. On the other hand, it has been highlighted that stakeholders in the judicial sector do not share the same vision on the involvement of a centralized Commission authority or new mechanisms of supranational judicial supervision (Coman 2016b).

Contrary to the expectations of the governance approach, staff members of the European Commission (A3) and stakeholders (A5) argue that in practice, interactions between the European Commission and NGOs relate purely to information gathering, not to deliberation or promotion of specific policy solutions. Another interviewee (A9) provides another example: Even during information exchange, the Commission and, for example, CEPEJ do not collaborate on developing a common pool of data, Commission just takes the information that is available from CEPEJ. In other words, currently, there are no instances when the preparation of the EU Justice Scoreboard has been used as a focal point to promote distinct agendas of policy actors. In fact, at times, NGOs and stakeholders in the judicial sector are weary of the European Commission's involvement. A staff member of the EP (A2) illustrates this point:

The Commission can draw on CEPEJ, Council of Europe bodies but it is never clear how the competences are divided. Council of Europe was reluctant to cooperate at times. Cooperation was taking place but there was a sense that the Commission started playing on the turf of Council of Europe ... This was not about policy solutions but about the division of competences. Previously Council of Europe was the key authority on the rule of law in Europe, now the EU starts to address this issue as well.

Other interviewees also allude to tensions during the information gathering process (A4, A5). An interesting example is presented by one of the stakeholders (A4):

CEPEJ was contacted by the Commission. For CEPEJ this was a commercial transaction, cash for data. It was happy to make it available for anyone, there was no problem in providing it. Council of Europe feared that the Commission will rank performance of countries, something that it does not do. For CEPEJ it was up to the European Commission what they do with the data. If they did not provide this data – someone else would.

The Council General Secretariat is also aware of this debate, questioning whether CEPEJ data can be easily summarized or reframed by the European Commission and stressing that it may lead to subjective assessment (A8). Ultimately, in the case of EU Justice Scoreboard, involvement of actors

from various levels of the multilevel system of the EU relates more to turf battles rather than promotion of specific policy solutions. While looking at the preferences of key actors, it seems that the new intergovernmentalist and neofunctionalist accounts provide a better account of the EU Justice Scoreboard. Nevertheless, in the absence of full-scale support of both European Commission and EP for expanding the scope of the Justice Scoreboard, the account provided by new intergovernmentalism is a more credible one.

Ideational change⁶

Theoretically, the non-binding character of the EU Justice Scoreboard, coupled with its focus on depoliticized peer assessment⁷ and benchmarking, could potentially help enhance trust between EU institutions and member states, making the policy instrument more acceptable to all involved parties. This is a key component that is largely lacking in both intergovernmental and functionalist explanations.

Interview data show that while a 'normative spillover', treating EU level as a 'reference point' for the judicial sector is highly unlikely, one can argue about a slow attitude change of key stakeholders in the sector, something what new intergovernmentalist accounts would not necessarily consider. Nevertheless, interviews do not provide a 'smoking gun evidence' that would support either of the theoretical accounts.

Many interviewees highlight that even if policy leverage of the EU Justice Scoreboard is currently limited, de facto it promotes mutual recognition of judicial decisions. For example, a stakeholder (A7) argues that the 'Justice Scoreboard gave insights into how other judicial systems work across Europe; before that there was nothing. This builds confidence'. A staff member of the EP (A10) argues along the same lines, mentioning that 'trust and credibility of data exchange between legal professionals is essential for mutual recognition of judicial decisions'. Staff members of the Commission (A3) also highlight the capacity of the instrument to build trust because 'it is not saying who is a good one and who is a bad one but developing a system that provides for good results'. Nevertheless, trust can remain problematic in case data are not reliable. The Commission and other stakeholders have no influence over the quality of data that are provided by national authorities, and occasionally, this has led to discrepancies and tensions between stakeholders, allude both interviewees (A4) and secondary sources (Dori 2015b).

Even if trust-building is a long-term process, the EU Justice Scoreboard shapes the agenda of the EU and changes the understanding of EU member states about the rule of law sector. In fact, interviewees (A1, A2) argue that without such attitudinal change, no expansion of the Scoreboard's remit is possible. According to a staff member of the European Commission (A6), the EU Justice Scoreboard has captured the attention of legal professionals and policymakers: It appears in domestic policy debates, it is referred to in the opinion of highest judicial authorities of some member states, it figures in publications of journalists writing about judicial matters. A staff member of the FRA (A5) elucidates on the Justice Scoreboard's capacity to raise awareness:

From several hundred pages of the CEPEJ report, the EU Justice Scoreboard is down to 30-40 pages. You cannot hide deficiencies in a 30-page report, while in the CEPEJ report things get easily lost. Justice Scoreboard reports become sensitive now – they highlight things with which some member states are not so comfortable.

It has to be noted that even if the EU Justice Scoreboard can in the long term generate trust between actors in the judicial domain, contrary to the expectations of the governance approach, it has not helped engage actors in the debate about the optimal solutions for judicial reform within the EU. Arguably, ideational changes experienced by EU institutions, member states and stakeholders do not necessarily translate it into cohesive policy preferences. Héritier (2013b) offers a potential explanation of why this is the case. 'Soft governance' tools in general – and EU Justice Scoreboard in particular – have little coercive power and are dependent on voluntary cooperation. Such instruments have a limited potential to promote convergence when the preferences of all

involved parties vary significantly, as is the case in the rule of law domain. Hence, even if the EU Justice Scoreboard helps develop a common understanding that rule of law challenges do exist, it has few means to secure a majority for a particular policy solution, for example, greater EU oversight of the rule of law sector. Moreover, even if all EU member states, institutions and stakeholders agree on the need to address rule of law challenges and conduct reforms that enhance independence of the judiciary as well as the quality of justice, they are likely to have different policy solutions.

Ultimately, available data do not allow us to tell that there is an ‘ideational spillover’, as neo-functionalists would suggest. In accordance with the governance approach, the non-hierarchical, deliberative elements of the EU Justice Scoreboard can help generate trust, yet the policy implications of this process remain unclear. A new intergovernmentalist account would actually highlight that deliberation does not necessarily lead to ideational change, yet one cannot disregard the fact that the introduction of the EU Justice Scoreboard has moved the borders of ‘acceptable’ topics within the EU and raised awareness of important issues.

Conclusion

The EU Justice Scoreboard is a ‘soft governance’ tool that allows information exchange and sharing ‘best practices’ in the rule of law sector. As an interview from the EP (A10) succinctly puts it, the EU Justice Scoreboard is ‘a tool for comparing judicial systems without any idea that it should lead to new rules and guidelines. It can go either way’. Different theoretical perspectives provide alternative views on key participants, their preferences as well as the extent of the ideational change that the EU Justice Scoreboard entails. Comparing these various theoretical accounts allows one to better grasp the functioning of EU Justice Scoreboard and its potential impact within the EU political system.

In terms of key actors, the EU Justice Scoreboard is primarily an interaction between member states and supranational bodies. Stakeholders and NGOs in the rule of law sector do play a role, yet they are not ‘veto players’. Member states can block further expansion of the Justice Scoreboard competence, even if the initial decision to introduce the policy instrument was framed and presented as the initiative of the European Commission. Even if EU member states endorse the need for further information-sharing and collaboration in the rule of law sector, they remain the actual ‘gatekeepers’. Hence, a new intergovernmentalist approach is the most adequate approach if one looks at the key actors.

Looking at the preferences, there are strong arguments in favour of both new intergovernmentalist and neofunctionalist accounts. On one hand, the policy instrument can be legitimately considered as an example spillover, expansion of EU tasks across new policy domains. On the other hand, member states resist the expansion of the Justice Scoreboard’s remit and supranational institutions adjust their policies accordingly. Moreover, not all supranational institutions are willing to support the expansion of EU competencies in the rule of law sector. Yet, even if there is currently no conflict over the functioning of the EU Justice Scoreboard, intergovernmental and supranational institutions have distinct ‘ideal points’ as to how such policy should evolve. Interestingly, sectoral stakeholders are currently not using the EU Justice Scoreboard to elaborate and push for their policy preferences. This goes against the expectations of the multilevel governance approach that highlights the ability and willingness of stakeholders to move between policy venues in search of maximizing their policy preferences.

Addressing ideational change within the EU Justice Scoreboard, it can be argued that even if the supranational level does not become the ‘normative reference point’ for dealing with the rule of law sector, there is potential for long-term attitude change through building trust and becoming aware of the various national practices. At the moment, however, increased trust among the participants of the EU Justice Scoreboard does not translate into particular policy choices.

The reflection on key actors, their preferences and potential ideational change within the EU Justice Scoreboard shows that no single theoretical account is able to provide a full comprehensive account of the process. While new intergovernmentalism and neofunctionalism best explain the framework and the scope of EU Justice's Scoreboard application, the governance approach highlights potential long-term impact of this policy instrument. Given the fact that EU supranational bodies have used seemingly low-key, technical policy instruments to progressively expand their competences, it is possible to argue that the EU Justice Scoreboard has the long-term potential to 'deepen' EU integration. At minimum, it makes it acceptable to address technicalities of the rule of law sector at the EU level. Although member states agree to the necessity of the Scoreboard and tolerate it, any major expansion of its competences will be resisted while supranational bodies are not univocally willing to lobby for such policy change. Such a combination of theoretical accounts may hinder one's ability to provide a parsimonious argument, yet it also allows to see interesting parallels between the EU Justice Scoreboard and other policy instruments. For example, it can be argued that systemic challenges to the rule of law create functional pressure to 'deepen' EU integration in the rule of law sector, yet the specific instruments and technical solutions to this challenge are largely negotiated under member states control. This pattern is applicable not only to the EU policies in the rule of law sector but also to measures taken to address the Eurozone crisis. Contributions by Vilpisauskas (2013b) as well as Jones, Keleman and Meunier (2016b) highlight a similar pattern: 'spillover effect' in the economic sector requires pro-integration policy solutions, yet these are negotiated largely within an intergovernmental format. This results in what the abovementioned authors call a 'failing forward dynamic': Existing challenges are addressed in an intergovernmental mode along the principle of lowest common denominator, which is not sufficient, triggering another round of limited reforms and subsequent policy failure.

It is likely that the EU involvement in the rule of law sector could experience the same dynamic. Above all, the 'failing forward dynamic' (be it in the economic or rule of law sector) is clearly not sustainable in the long run as it negatively affects public trust. However, the EU Justice Scoreboards of 2016 and 2017 (European Commission 2016, 2017a) make explicit reference to Eurobarometer data and surveys on the perceived independence of the judiciary, something what was not done in the previous versions of the document. The fact that the European Commission presents the EU Justice Scoreboard as a response to real and significant grievances of the public may imply that the 'failing forward dynamic' can be stopped. Further research on EU involvement in the rule of law sector should assess how instruments such as EU Justice Scoreboard behave in a 'postfunctionalist moment' (Hooghe and Marks 2009), how (if at all) it interacts with mass politics as theoretical accounts addressed in this article do not comprehensively take this factor into account. In any case, potential policy consequences of the EU Justice Scoreboard call for a continuous debate and fine-tuning of theories of European integration, not just theorizing EU disintegration (Vollard 2012b).

Notes

1. Staff members of Permanent Representations in Brussels have not been interviewed as during fieldwork, it became clear that they act almost exclusively as a conduit for information requests by the European Commission.
2. This article selects new intergovernmentalism (rather than liberal intergovernmentalism) as it provides a more nuanced rendition of integration dynamics while still highlighting the crucial role of member states in the integration process. For an alternative opinion, see Schimmelfennig (2015b) and Haughton (2016b).
3. Various agencies and bodies with neither predominantly intergovernmental nor supranational features.
4. In some case, for example, Netherlands, specific types of data are unavailable because they are not routinely gathered by national authorities.
5. The interviewees have also mentioned that there does not exist any regular technical coordination between the European Commission and the European Parliament (EP) while the Justice Scoreboard is prepared. Interviewees have also highlighted that beyond members of Directorate-General for Justice and Consumers (DG JUST), there is no EU Commission staff that regularly deals with EU Justice Scoreboard. It is likely that expertise with this policy instrument is highly 'compartmentalized' within both Commission and the EP.

6. The article does not aim to provide a comprehensive overview of ideational change as experienced by actors in the judicial policy domain and, hence, does not adopt survey methodology. Given that a relatively limited number of EU officials are directly involved in the set-up of the EU Justice Scoreboard, interviews are gauged as a useful tool to provide preliminary insights.
7. The European Commission prefers not to use the term 'peer-review' in relation to the EU Justice Scoreboard because, in its opinion, it misleadingly connects the policy instrument to Article 70 of Treaty on the Functioning of the European Union (TFEU).

Acknowledgments

The author would like to express his gratitude to Prof. Christine Neuhold for commenting on the earlier draft of this article.

Disclosure statement

No potential conflict of interest was reported by the author.

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Interviews

- A1 – staff member of the European Parliament, partisan affiliation, Brussels, 09.11.2016
- A2 – staff member of the European Parliament, Skype interview, 22.11.2016
- A3 – staff member of the European Commission, Brussels, 14.11.2016
- A4 – representative of a stakeholder A, involved in the preparation of the EU Justice Scoreboard, Skype interview, 06.12.2016
- A5 – representative of the EU Fundamental Rights Agency, speaking in personal capacity, Skype interview, 25.11.2016
- A6 – joint interview with two staff members of the European Commission, Brussels, 16.11.2016
- A6a – follow-up information request, staff member of the European Commission, email exchange, 10.05.2017 & 16.05.2017
- A7 – representative of a stakeholder B, involved in the preparation of the EU Justice Scoreboard, Brussels, 16.11.2016
- A8 – representative of the Council General Secretariat, Brussels, 16.12.2016
- A9 – staff member of the European Parliament, Skype interview, 12.12.2016
- A10 – representative of the EP, Brussels, 14.11.2016