Under which conditions do courts declare their *Kompetenz-Kompetenz*? A fsQCA analysis of rulings on the Lisbon Treaty

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Abstract

National constitutional jurisdictions' statements of Kompetenz-Kompetenz are not only the expression of courts' wish to empower, as literature suggests, but the result of the interaction between explanatory conditions that play a role both at the level of courts and at the level of rulings. By reviewing their rulings on the Lisbon Treaty, we demonstrate that courts' capacity to review European Union secondary law is a core structural element in explaining their reception of the doctrine of the "ultimate say". In the presence of such structural element, unleashing factors such as the need to content Euroskeptic sectors or, alternatively, an institutional setting allowing them to pursue their own goals, explain courts' declarations of Kompetenz-Kompetenz

8737 words

I. *Kompetenz-Kompetenz*: Who's got the ultimate say?

The so-called "judicial dialogue" (Jacobs, 2003) between the European Court of Justice and national constitutional jurisdictions is one of the most salient topics in the field of European judicial integration. Particularly, the warnings by some constitutional jurisdictions to declare inapplicable European Union secondary law in conflict with core constitutional provisions or adopted *ultra vires* (*Kompetenz-Kompetenz*) have been the object of significant academic interest. Law scholars have devoted attention to certain rulings by national courts which included statements of *Kompetenz-Kompetenz* (see *inter alia* MacCormick, 1995; Weiler, 1999, Baquero, 2008; Grosser, 2009; Kiiver, 2010), but their approach is mainly doctrinal and not explanatory. Meanwhile, political scientist have only underlined the interest by national courts in reinforcing their own power (Alter, 1997; Stone Sweet, 2004;), but from this viewpoint all national constitutional jurisdictions should have adopted in some or another form the doctrine *Kompetenz-Kompetenz*, which is not the case. Variation in national courts reception of the doctrine *Kompetenz-Kompetenz* remains unexplored. This article suggests that statements of *Kompetenz-Kompetenz* in rulings issued during the process of ratification of the Lisbon Treaty were the result of the interaction between different explanatory conditions: in the presence of an structure of incentives determined by courts' powers to review EU secondary law, courts' capacity to pursue their own agenda or, alternatively, the need to give a consolation price to Euroskeptic sectors explain courts' stances regarding their ultimate capacity to review EU secondary legislation.

According to Closa (2013:99) "cases concerning the constitutionality of EU reform treaties provide a golden opportunity for courts to deliver powerful decisions that assert the supremacy of national constitutions". During the process of ratification of the Lisbon Treaty, a large number of constitutional jurisdictions were asked to intervene (see Wendel, 2011). Given the large number of rulings, the homogeneity in the object of review, the homogeneity in the context, and the fact the "constitutional" law of the EU was at stake, the process of ratification of the Lisbon Treaty proved to be ideal in order to test variation in national courts' positions. This article examines all of those rulings that were issued when the treaty was in process of being ratified[1]: two rulings by the Belgian Constitutional Court[2], two by the Czech Constitutional Court[3], and one by the French Constitutional Council[4], the German Federal Constitutional Court[5], the Latvian Constitutional Court[6] and the Polish Constitutional Court[7]. In four more cases, petitions were rejected in formal grounds so courts did not enter into the merits of the case and could not address the issue of

[1] Therefore, cases initiated when the treaty was already ratified were excluded from the analysis, given the heterogeneity in the context.

[2] Cases 58/2009 *Treaty of Lisbon I*, decision of 19 March 2009 and 125/2009 *Treaty of Lisbon II*, decision of 16 July 2009.

[3] Cases PL ÚS 19/08 *Treaty of Lisbon I*, decision of 30 Sept. 2008 and PL ÚS 29/09 *Treaty of Lisbon II*, decision of 3 Nov. 2009

[4] Case 2007-560 DC *Lisbon Treaty*, decision of 20 Dec. 2007

[5] Case 2 BvE 2/08 et al. *Treaty of Lisbon,* decision of 30 June 2009

[6] Case 2008-35-01 *Treaty of Lisbon*, decision of 7 April 2009

[7] Case K32/09 *Treaty of Lisbon*, decision of 23 November 2010

their *Kompetenz-Kompetenz*[8]; for that reason, they were excluded from this study. In half of the cases rulings approached in some form the question of courts' *Kompetenz-Kompetenz*, while the rest ignored the topic. This article is intended at explaining why.

The next section will review the scarce literature capable of answering our research question and will formulate a configurational hypothesis based on that literature. After that, we will explore the methodology that this article uses: fs/QCA. Subsequently, we will review the rulings and their approach to the doctrine *Kompetenz-Kompetenz*. Next, we will explore our different explanatory conditions, before presenting the analysis. In the last section we will offer some brief conclusions.

II. Seeking empowerment: explaining statements of *Kompetenz-Kompetenz*

Courts' interest in reinforcing their own institutional power has been a common explanation in literature on European Judicial Politics, referred to national lower courts (Stone Sweet, 2004), national high courts (Baquero, 2008; Weiler, 1999), or in general in Alter's "inter-court competition" theory (Alter, 1997). Declarations of *Kompetenz-Kompetenz* could be seen precisely as that: as the expression of courts' wish to defend and widen their own powers vis-à-vis the European Court of Justice. However, although empowerment theories

[8] Austrian Constitutional Court, case SV 2/08-3 et al. *Treaty of Lisbon I*, decision of 30 Sept. 2008 and case G149-152/08-5 et at. *Treaty of Lisbon II*, decision of 11 March 2009. Belgian Constitutional Court, case 156/2009 *Treaty of Lisbon III*, decision of 13 Oct. 2009. Slovenian Constitutional Court, case Ul-49/08 *Treaty of Lisbon*, decision of 17 Oct. 2008

may be an interesting theoretical background to be taken into account when accounting for our object of study, it is flawed in that the interest in empowerment is conceived as shared by all constitutional jurisdictions, but not all of them have made statements of *Kompetenz-Kompetenz*. This means that "empowerment theories" are a necessary, but not sufficient, part of the explanation.

In turn, with regards to variation in courts' reception of the *Kompetenz-Kompetenz* doctrine, few scholars have dared to formulate concrete hypotheses. The review of the existing literature points however to a few explanatory conditions.

a. *Preferences*. One possible explanation lays with Sadurski (2008) "reassurance strategy". Sadurski (2008) focuses on courts' need for legitimacy and to appear as a neutral actor. In his theory of the triadic dispute resolution, Stone Sweet (1998) shows how courts face difficulties when solving disputes: their legitimacy derives from the fact that they appear as neutral actors vis-à-vis the parties in a conflict, but in solving a dispute courts have to take a position themselves, thus giving rise to a situation of two against one. When studying the ruling of the Polish Constitutional Court on the Accession Treaty, Sadurski interpreted the behavior of the court as a strategy trying to overcome such problem. In declaring the constitutionality of the treaty, the court was satisfying the demands of one of the parties, the most Europhile sectors. However, Euroskeptic sectors received a consolation prize when the court stated that it would guarantee that the core of the Polish sovereignty would remain safe. This strategy would permit the court to "minimize the costs of creating 'winners' and 'losers', and establish a high degree of legitimacy for himself".

Drawing on this theory, declarations of *Kompetenz-Kompetenz* could be seen as a consolation prize for Euroskeptic sectors. But in this case, the need to follow the doctrine *Kompetenz-Kompetenz* will only exist if there are relevant Euroskeptic sectors, and only to that extent.

b. *Powers of review*. The absence of mechanisms through which courts can review the constitutionality of EU secondary law may prevent them from declaring their *Kompetenz-Kompetenz*. Dyevre (2012) has been the first in explicitly reflecting on how institutional constraints may be part of the explanation for variation of courts' stances. In his view, the different approaches by the German and French constitutional jurisdictions regarding the issue of *Kompetenz-Kompetenz* may be explained by the fact that the later suffers from severe limitations in its capacity to review legislation. This explanation points towards the capacity of courts to review European Union secondary law: in case courts' powers of review are restricted in these regards –for whatever reasons- it is unlikely that they will threaten with declaring contrary to the constitution a piece of European Union legislation that they will never have the chance to assess.

c. *Independence*. Neoinstitutionalism –dominant also in the field of Judicial Politics (Redher, 2007)- assumes that the design of institutions may condition the behavior of actors in pursuing their institutional goals (Hall and Taylor, 1996). One of the most salient features of courts' institutional design is their guarantees of independence (Melone, 1997; Larkins, 1996). As Herron and Randazzo assert (2003:425) "courts with greater guarantees of independence should be freer to

exercise their own will". If courts with higher guarantees of independence are deemed to be more capable of setting an agenda of their own and to pursue their goals, this may explain why some courts have made greater emphasis in their powers to review European Union secondary law and thus have declared their *Kompetenz-Kompetenz*.

d. *First cases*. Following a common practice in QCA studies (see Yamasaki and Rihoux, 1009: 125), we draw on preliminary empirical evidence to present a last explanatory condition. *Ceteris paribus*, we observed a variation in the cases before the Czech Constitutional Court: in its first Lisbon ruling it clearly stated its *Kompetenz-Kompetenz*, while in its second ruling it watered down its approach and offered an alternative to inapplicability of European Union secondary law in conflict with the national constitution: constitutional amendment. This may be due to the fact that once declared its "last say" for a treaty, the court considered that new statements of *Kompetenz-Kompetenz* were superfluous: insisting on the doctrine the court could have been considered as an unnecessarily challenging and recalcitrant institution. In any case, given that the rest of conditions –politicians' preferences, powers of review, judicial independence, the object of assessment, etc.- were constant for both the first and the second Lisbon rulings, only the involvements of reiteration may explain the different outcomes of the cases.

Our view is that these explanations do not exclude each other. In the next pages we will show that all of these explanatory conditions are important in order to understand the outcomes of the cases; but we will also show that, alone, they are not a sufficient

explanation for none of the rulings, and that only understanding the interactions between explanatory conditions a complete and comprehensive narrative emerges. Two of these conditions seem to be structural: courts' powers of review and being the first case. In the absence of any of them, it is improbable that courts will declare their *Kompetenz-Kompetenz*. The two other conditions seem to act as "unleashing factors" and are alternative: in the presence of the structural conditions, either being a highly independent court or the existence of significant minorities against the treaty may be sufficient for courts to declare their *Kompetenz-Kompetenz*. Thus, our configurational hypothesis, expressed in Boolean language –see next section-, suggests that:

REVIEWPOWERS*FIRST_CASE*(preferences+INDEPENDENCE) → KOMPETENZ

III. Methodology and operationalization

In order to carry out our analysis, we used "fuzzy sets/Qualitative Comparative Analysis" (fs/QCA). QCA is a methodology originally intended at moderate N analysis grounded in set theory and based in Boolean algebra (see Ragin 1987;2000). QCA pays attention to causal complexity and tries to identify combinations of conditions driving to an outcome. The presence or absence of a certain condition, or combinations of present or absent conditions, is deemed to drive to different outcomes. QCA uses different notations to express such solutions. In this research, we use the classical notation, where inclusion of a case in a set (presence of a condition) is expressed with the name of such condition in upper-case, exclusion of a case from a set (absence of a condition) in lower-case, and where

logical AND (*) refers to the intersection of sets and logical OR (+) to the union of sets (see Vis, 2011:244).

As suggested, presence or absence of conditions may be understood, in terms of set theory, as inclusion or exclusion from a certain set. In "crisp" conditions, inclusion is a set is dichotomous. "Fuzzy conditions" indicate "fuzzy" inclusion in a set (Ragin, 2000). Unlike crisp sets, in which cases may only score 0 or 1, in fuzzy sets scores range from 0 to 1, with 0.5 being the intermediate point which indicates full equidistance from inclusion and exclusion in the set. Fuzzy sets are not, thus, "quantitative variables". Instead, they combine the quantitative logic with qualitative knowledge on the cases through the use of "calibration": the specification of the concrete point at which a case can be said to belong or not to a certain set (Rihoux and Ragin, 2009). In this research, two conditions were fuzzy –"independence" and "preferences"- while the rest of conditions and the outcome were crisp. Operationalization of the conditions proceeded as follows:

- For "judicial independence" we partially followed the operationalization of Ishiyama and Ishiyama (2002) to construct a quantitative index of independence. Five different issues were taken into account: term of office in comparison to that of the other actor –executive or legislative- with a longest mandate –scoring 1 if lifelong, 0.66 if longer than two mandates of the other relevant actor, 0.33 if shorter than two mandates, and 0 if shorter than one mandate-, dismissal of justices –scoring 1 causes for dismissal are listed by a law, and 0 if dismissal at discretion of one actor-, renewability of justices –scoring 1 if justices were not renewable, and 0 if renewable-, nomination procedure –scoring 1 if not elected by political actors, 0.8

if at least 3/5 supermajority in the legislative chamber is necessary, 0.6 if a lower majority in the legislative chamber is sufficient but at least two more actors participate in the nomination, 0.4 if a similar majority in the legislative chamber is sufficient and less than two more actors participate in the nomination, 0.2 if elected by two or more actors not including the legislative chambers, and 0 if elected by only one actor different from the legislative chambers-, and professional background –scoring 1 legal background required for all justices, 0.5 if required for some them, and 0 if not required at all-. Adding up the scores we obtained a quantitative index of independence, ranging from 0 to 5. To transform it into a fuzzy set, we followed Ragin's direct method of calibration (Ragin, 2008). Our first calibration point was 4.5, which is close to 5, the maximum score; courts scoring 4.5 or higher are deemed to fully belong to the set of courts with high guarantees of independence. The lowest calibration point was set at 3.5, in order to account for the fact that these courts had only half of the possible score in at least three out of the five issues; courts scoring 3.5 or below were deemed to be fully excluded from the set of courts with high guarantees of independence. The intermediate calibration point was set at 4, since having only half of the possible score in two out of five items –or a score of 0 in one of them- indicated already a transition towards courts for which judicial independence could be undermined in some regards.

- For "preferences" of political actors we used as a proxy the results of the vote in the legislative chamber –the lower chamber in the case of bi-cameral countries- in the ratification session of the Lisbon Treaty. We constructed our fuzzy set in two phases. Firstly, we created an index of preferences, by simply subtracting the share

of votes against the treaty to the share of votes in favor. Secondly, and following Ragin's direct method of calibration, we chose our calibration points. Since in all the cases the majority of votes were in favor of the ratification of the treaty, we took into account whether minorities against it were significant or not: our first calibration point was 0.90, for which a high consensus existed in favor of ratification; our last calibration point was an "ideal" 0 –no cases actually scored 0 or around 0-, in which the share of votes in favor and against the treaty would be the same. The intermediate calibration point, marking the transition from the set of cases "with high consensus for the treaty" to the group "with significant minorities against the treaty" was 0.50, in which the partisans of blocking the ratification, still being a minority, were already significant. Note that the absence of the condition, and not its presence, is to drive to the presence of the outcome.

- The rest of our conditions, as well as our outcome, were crisp in nature. Assignment of scores for each condition is justified in a qualitative fashion along sections IV and V in this article.

Finally, this research makes a limited use of remainders. Remainders are combinations of conditions lacking empirical cases (Rihoux and Ragin, 2009). Such combinations of conditions are formally -although not always theoretically- possible: they are counterfactuals. QCA allows for three kinds of solutions, depending on the treatment given to remainders ("simplifying assumptions"): "complex", "parsimonious" and "intermediate" solutions. In the "intermediate" solution remainders are only used if there are empirical

grounds to believe that, although they lacked empirical cases, had they had them, they would have produced the outcome of interest. This article uses the intermediate solution. Expectations about the behavior of the conditions are made explicit and justified.

IV. The "last say": declarations of *Kompetenz-Kompetenz*

The doctrine *Kompetenz-Kompetenz* was present in four out of the eight rulings. However, approaches greatly differed from one court to another. While the German and Czech Constitutional Courts were rather explicit in declaring their "last say", the Latvian and Polish Court took a much softer approach in which they avoided a hard stance on their eventual role in case of conflict between constitutional law and European secondary law.

The German court took an aggressive approach to the issue of *Kompetenz-Kompetenz* and even questioned the democratic legitimacy of the European Union or drawn red lines to the development on European Union law (Lock, 2009; Krämer, 2010). In one of the most remarkable paragraphs of the ruling, it declared that "Member States courts with a constitutional function may not, within the limits of the competences conferred on them - as is the position of the Basic Law - be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inviolable constitutional identity"[9]. The Lisbon ruling of the German Constitutional Court was a

[9] German Federal Constitutional Court, case 2 BvE 2/08 et al. *Treaty of Lisbon*, paragraph 336.

continuation of its Maastricht decision (Häberle, 2009) although longer, more detailed and probably more sceptical.

Also the Czech Constitutional Court mentioned the question of its *Kompetenz-Kompetenz* (Přibáň, 2009:357). In its first Lisbon ruling, it declared that "the Czech Constitutional Court also intends to review, as *ultima ratio*, whether the legal acts of European bodies remain within the bounds of the powers that were provided to them. In this regard the Constitutional Court basically agreed with certain conclusions of the German Federal Constitutional Court, stated in its Maastricht decision"[10]. However, unlike its German counterpart, the Czech Constitutional Court avoided sharp criticisms against the European Union. Its conception of sovereignty was closer to the ideas of pooled sovereignty (Krumma, 2010:44; Krämer, 2010:14). In addition, it explicitly refused the idea that representative democracy can only exist within states (Wendel, 2011:117). Remarkably, as was said in the introduction to this article, when the Czech Court issued a second ruling its approach notably changed: now, it suggested that in case of conflict between constitutional law and European Union secondary law the solution could consist in a constitutional amendment[11], which would avoid depriving European legislation from its primacy.

The Latvian and Polish rulings were far more restrained. In both of them, the involvements of the doctrine *Kompetenz-Kompetenz* were approached by the courts, although in an implicit manner. In the Polish Lisbon ruling, it can be read that "The allegations of the

[10] Czech Constitutional Court, case PL.ÚS 19/08 *Treaty of Lisbon*, paragraph 216.

[11] Czech Constitutional Court, decision Pl. ÚS 29/09 (*Lisbon II*), paragraph 172

applicant regard the possibility of applying the provisions of the Treaty in a way that broadens the scope of competences that have already been conferred, and therefore they refer to the ideas of the applicants concerning the way of applying the Treaty in the future. The Constitutional Tribunal is not competent to assess hypothetical way of applying the Treaty of Lisbon"[12], such statement being combined with an optimistic approach to European Union law (Czapliński, 2011). And a similar landscape may be found in the Latvian ruling, according to which "the Court can not assess *in abstracto* the claim regarding the eventual conflict of the different systems of protection of Fundamental Rights. Such conflicts have to be solved on the base of the individual cases"[13]. Although both courts seemed to avoid a definitive answer to the question, they seemed to be open to make use of their *Kompetenz-Kompetenz* when concrete and not "hypothetical" cases arouse demanding it. This is particularly clear for the Polish Court on the light of its previous case law: many authors have suggested that in its Accession Treaty ruling the court had stated its ultimate *Kompetenz-Kompetenz* (Craig and de Burca, 2008:373; Kruma, 2009:149). Its Lisbon ruling could be deemed as a polite manner to deal with the question without avoiding rejecting its former case-law.

With regards to the rest of the rulings –the French one, the two Belgian ones and the second Czech one-, the doctrine *Kompetenz-Kompetenz* is simply absent. Only the doctrine of the "essential conditions of national sovereignty" in the French ruling could be seen as a sort of *Kompetenz-Kompetenz à la française*. However, it is not: such doctrine served to justify

[12] Polish Constitutional Court, case K32/09 *Treaty of Lisbon*, Part III, section 2.6.

[13] Latvian Constitutional Court, case 2008-35-01 *Treaty of Lisbon*, section 18.8.

constitutional amendment before ratification of the treaty (see Wendel, 2011:123), and was not intended at questioning the primacy of EU secondary law once the treaty is ratified.

V. The explanatory conditions

a. An Europhile context: politicians' preferences

In general terms, the whole body of literature in Judicial Politics has underlined the impact of politicians' preferences in the behavior of courts (*inter alia* Vanberg, 2001; Lindquist and Solberg, 2007; Clark, 2009). As was said above, however, Sadurski's (2008) "reassurance strategy" theory may be the best explanation for why the existence of significant minorities against the treaty may lead to statements of *Kompetenz-Kompetenz* in our cases.

Table 1. Stances regarding the Lisbon Treaty in the legislative chambers

Country	Vote	% In favor	% Against	Score	Calibrated Score
France	Ratification in the National Assembly	85	15	0.70	0.82
Czech Rep.	Ratification in the Lower Chamber	67	33	0.34	0.28
Latvia	Ratification in the Saeima	96	4	0.92	0.96
Germany	Ratification in the Bundestag	90	10	0.80	0.9
Belgium	Ratification in the Chamber of Representatives	87	13	0.74	0.86
Poland	Ratification in the Seijm	87	13	0.74	0.86

Source: Closa et al. (2009). Own elaboration

As can be seen in Table 1 Euroskeptic sectors were always a minority force. In almost every country, the share of votes in favor of the treaty was around 90 per cent, and in no country the process of ratification failed in the parliamentary arena. The majorities in favor of the treaty were overwhelming in all the cases, with the only exception of the Czech Republic. The majority of our cases, with only variations of degree, belong to the set of cases "with high consensus in favor the treaty" –above 0.5-, with the only exception of the Czech cases, in which only 67 per cent of deputies voted in favor ratification, and more than 30 per cent voted against –three times the share of Germany-. Other relevant information regarding the political process of ratification reinforced the impression that the operationalization and calibration points used mirrored real differences between the cases. The Czech and Polish cases had been the only ones in which members of the Executive had opposed the ratification of the treaty (see Closa and Castillo, 2012; Closa 2013). In both cases, the Head of State had tried to block ratification. In the Czech case, Vaclav Klaus

resorted to national traumas dating back to the second world war in order to oppose ratification (Corpădean, 2011:31), and supported the second suit against the treaty (Bříza, 2009:144). In Poland, President Kaczyński considered ratification "pointless" after the rejection of the treaty in a referendum in Ireland (Kaczyński, Kurpas and Ó Broin, 2008:12), but unlike in the Czech Republic, the Polish parliament had shown a strong support for ratification, with almost 90 per cent of deputies voting in favor. The Czech case was, in this sense, exceptional in the significance of opposition to the treaty. However, although the existence of significant minorities may be part of the explanation for why in the Czech case a statement of *Kompetenz-Kompetenz* was made, it does not explain statements of *Kompetenz-Kompetenz* in other cases or why in its second ruling the Czech Court watered down its doctrinal position.

b. Courts' guarantees of independence

As we said in section II, more independent courts are stronger vis-à-vis other actors, and may be presumed to be more akin to pursue their own goals. Courts' formal guarantees of independence differed from court to court. To account for this, we created an index of judicial independence, ranging from 0 to 5, in which five different issues were taken into account.

Table 2 Institutional design and degree of independence

Court	Term of office	Renewability of Justices	Dismissal of Justices	Nomination	Legal Background	Total Score	Calibrated Score
German F.C.C.	12 years (more than two legislative mandates)	No renewable	Legally fixed causes	Half elected by each legislative Chambers, super-majorities required	Yes	4.46	0.9404756
Belgian C.C	Lifelong	No renewable	Legally fixed causes	Appointed by the King from a list presented by each Chamber, passed by two thirds majorities	Half lawyers, half former MP's	4.3	0.8581491
Latvian C.C.	10 years (more than two parliamentary mandates)	No renewable	Legally fixed causes	7 Justices elected by the Parliament by absolute majority. 3 of them at proposal of at least 10 MP, 2 proposed by the Council of Ministers, and 2 by the Plenary of the Supreme Court	Yes	4.26	0.8263535
Polish C.C.	9 years (more than two mandates)	No renewable	Legally fixed causes	Proposed by 50 deputies or the President of the Seijm. Appointed by	Yes	4.04	0.5597136

				absolute majority.			
Czech C.C.	10 years (more than two parliamentary mandates)	Renewable	Legally fixed causes	Elected by the President of the Republic, confirmed by the Senate	Yes	3.06	0.196234
French C.C.	9 years (less than 2 presidential terms)	Elective members non renewable; ex-officio members enjoy lifelong term	Legally fixed causes.	Three thirds elected by the Presidents of the Republic, the National Assembly and the Senate. Former Presidents of the Republic are members *ex officio*	No	2.53	0.1062

Source: Constitutional and legal regulation. Own elaboration

Actual scores ranged from 4.46 –the German Constitutional Court- to 2.53 –the French Constitutional Council. Scores close to 0 were theoretically possible, but practically improbable, since courts in those cases would have no guarantees of independence at all. With our operationalization, the only courts excluded from the set of courts with "high guarantees of independence" were the French Constitutional Council -with one of the shortest terms of office, where the chambers of the parliament did not intervene in nomination, and where justices are not required to have a legal background- and the Czech Constitutional Court -where justices are even renewable-. Unlike the rest of the cases,

whose scores ranged from 4 to 4.8, the French and Czech cases scored 3.06 and 2.53; we believe that this gap indicates a strong qualitative difference between the cases, which is captured by our operationalization.

Judicial independence seemed to have a certain explanatory capacity for statements of *Kompetenz-Kompetenz*. The most "independent" court, the German Federal Constitutional Court, had not only made the harsher statement of *Kompetenz-Kompetenz*, but is responsible in the long term for the very creation of the doctrine. In its *Solange* saga, the German Court had already foreseen the possibility of declaring not applicable European Union secondary law violating the constitutional rights of German citizens (see Reich, 1996; Rosenfeld, 2008). And in its Maastricht ruling, the doctrine *Kompetenz-Kompetenz* was stated in its ultimate wording by the court (see MacCormick, 1995). Apparently, only a highly independent court could dare to make such a challenge to the European Court of Justice, even though later on other less independent courts followed the German path. These seem to be, to a certain extent, the cases of the Polish and Latvian courts: their softer and shier approaches to *Kompetenz-Kompetenz* could be correlated to their lower institutional power. However, this explanatory condition alone is not sufficient to explain our outcome; for instance, it cannot explain why the Belgian Constitutional Court, despite of its high guarantees of independence, did not make a statement of Kompetnez-Kompetenz; or why the Czech Constitutional Court did it, despite of its low guarantees of independence. The explanation for this, again, resides in the interaction of this explanatory condition with the other ones.

c. Courts' powers to review European Union secondary law

In general terms, courts have a wide variety of ways to control the constitutionality of legislation. "Abstract regulation control" allows for the constitutionality of legislation to be assessed *in abstracto*; it is usually political actors who can initiate this kind of proceedings before a constitutional court in order to assess, in general or regarding concrete questions, the constitutionality of legislation. "Specific regulation control" allows lower courts to bring a rule before the constitutional court for its review, when in a dispute that they must solve they face a piece of legislation that they believe that could be contrary to the constitution; given the centralization of constitutional review in Kelsenian systems, it is the constitutional court who solves the question of the constitutionality of the rule, and then the ordinary court continues the proceedings over the substantive dispute. Finally, "constitutional complaint" allows citizens to initiate a case before the constitutional jurisdiction when they believe that their constitutional rights have been violated; if this violation derives from a piece of legislation, the constitutional court may declare it contrary to the constitution, and thus null and void. All these kind of proceedings –and some others, according to the specific regulation in each country - give constitutional courts the chance to review pieces of legislation, and thus also, in some way or another, the possibility to exercise their *Kompetenz-Kompetenz* with regards to specific cases –i.e. to review European Union secondary law and declare it contrary to the constitution-. But in two of our cases, these powers of review were restricted with regards to European Union secondary law, thus rendering scarcely useful the reception of the doctrine of the "last say".

The first case is that of the French Constitutional Council. The French Constitutional

Council is the institution in which difficulties for the exercise of *Kompetenz-Kompetenz* were clearest, since they derived from the very design of the institution at the time of its Lisbon decision. In that moment, the powers of review of the Council were severely restricted in comparison to those of the rest of courts; as Garlicki (2007:45) said "France is [at that time] the only European country in which constitutional adjudication takes the form, almost exclusively, of a preventive review". Firstly, unlike the rest of courts, the French Constitutional Council lacked the capacity to receive constitutional complaints by citizens; as we saw, in the German doctrine the violation by European Union law of the constitutional rights of German citizens was one of the reasons that could move the court to declare the non-applicability in Germany of European secondary law; in the case of the French Constitutional Council, the fact that a constitutional complaint could not be initiated, rendered the German doctrine, in these regards, senseless. Secondly, the French Constitutional Council was allowed to review legislation only within sixty days from its entry into force; such deadline severely limited its capacity to review European Union secondary law, which many times requires a transposition into the internal legal system in order to display its full effect. Also Dyevre (2012) has pointed at this being the reason behind the different approaches to the doctrine *Kompetenz-Kompetenz* by German and French courts.

The second institution whose powers to review EU secondary law are restricted is the Belgian Constitutional Court. Although the formal design of the institution does not explicitly approach this question, the doctrinal consensus in the country points in this direction. That is the interpretation of the highest judicial institutions of the country: the

Cour de Cassation[14], the Council of State[15] and the very Constitutional Court[16] seem to agree in that the secondary law of the European Union enjoys immunity from judicial review by national judicial institutions. Even the former President of the *Cour d'Arbitrage* –current Constitutional Court-, Michel Melchior considered that a challenge to European Union secondary legislation would be inadmissible since that would involve the violation by Belgium of its international obligations (Claes, 2006:641).

Restrictions in institutions' powers of review may be a good explanation for why the French Constitutional Council and the Belgian Constitutional Court did not declare their *Kompetenz-Kompetenz*. However, things may change in the future. In 23 July 2008, a constitutional amendment "*de modernisation des institutions de la Vème République*" has introduced in France the *ex post* review of constitutionality, with the possibility for citizens to initiate a procedure for the violation of their constitutional rights (Fabbrini, 2008). This new mutation of the French institution may drive to different results in the future: declarations of *Kompetenz-Kompetenz* could now become a reasonable option for the Council.

[14] Belgian *Cour de Cassation*, case S.02.0039.N. of 2 June 2003

[15] Council of State, legislative division, legal opinion n° 37.954/AV, 15 February 2005 (*European Constitution*), *Doc. Parl.*, Senate, 2004-2005, n° 3-1091/1, pp. 526-546; Council of State, legislative division, legal opinion n° 44.028/AV (*Lisbon Treaty*), *Doc. Parl.* Senate, 2007-2008, n° 4-568/1, p. 343

[16] Belgian Constitutional Court, judgment n° 130/2010 of 9 December 2010

d. The number of the case

Finally, in some occasions the treaty was brought more than once before the court. This happened in the Belgian and Czech cases. The number of the case is a residual explanatory condition, but –given the specificity of QCA analysis- it was relevant in order to ensure the accuracy of the results. Instead of being derived from theoretical assumptions, it is derived from the empirical observation of the cases. In operationalizing our outcome, we observed and already described how the Czech Constitutional Court declared its *Kompetenz-Kompetenz* in its first Lisbon decision (Přibáň, 2009). However, in its second Lisbon decision it dramatically changed the approach to the question: instead of insisting in such doctrine, it emphasized its openness to collaborate with the European Court of Justice and, at the same time, it reminded that inconsistencies between European law and the national constitution could be solved by both the priority application of European law and by the means of constitutional amendment[17]. The explanation for this shift could lay in the political cost of such doctrine: once declared the doctrine of *Kompetenz-Kompetenz* in the first ruling, insisting on it in the second one would have made the Czech court appear as a extremely challenging institution vis-à-vis the European Court. In other words, once for the treaty was enough.

VI. Paths to declarations of *Kompetenz-Kompetenz*: fs/QCA analysis

[17] Czech Constitutional Court, decision Pl. ÚS 29/09 *Treaty of Lisbon II*, paragraph 172

fs/QCA helped as to assess the explanatory capacity of our conditions. Instead of testing the explanatory capacity of individual variables in a model, fs/QCA helps in clarifying how different conditions interact with one another in creating particular outcomes. When obtaining the Truth Table we observed robust combinations having raw consistencies of either 1 or 0 –see Table A2 in the Annex-; this allowed us to set consistency cut-off at 0.99 in all combinations having at least 1 case, far above the standard cut-off of 0.8. In our analysis, we included the four explanatory conditions analyzed in this article. Although according to the latest standards in QCA (Marx, 2010; Marx and Dusa, 2011) four is relatively large number of explanatory conditions for only eight cases, we decided to include all of them in our analysis for three reasons; firstly, given the scarcity of explanatory theories for our object of study, we wanted to test the few explanatory conditions that the literature offered us; secondly, the mentioned standards are intended at avoiding results based on randomness, but the impact of our explanatory conditions have been justified theoretically and analyzed qualitatively; thirdly, such standards are mainly intended at "crisps sets analysis", while ours is "fuzzy". Expectations about the behavior of the explanatory conditions have to be made explicit for intermediate solutions. According to our theory, three of our explanatory conditions were deemed to contribute to the declaration of *Kompetenz-Kompetenz* when present: a highly independent institutional design of the court, wide powers of review, and being the first time the court assessed the Lisbon Treaty. The remaining explanatory condition –political support for the treaty- was deemed to contribute to the declaration of *Kompetenz-Kompetenz* when absent. After Boolean minimization, we obtained two different combinations of conditions:

Table 3. Solution for the presence of *Kompetenz-Kompetenz* in the ruling				
Combination	**Raw coverage**	**Unique coverage**	**Consistency**	**Cases**
REVIEWPOWERS*FIRST* preferences	0.250000	0.130941	1.000000	Cz1 (0.72,1)
REVIEWPOWERS*FIRST* INDEPEN	0.630694	0.511636	1.000000	Ge (0.940476,1) Lv (0.826353,1) Pl (0.559714,1)
Solution coverage: 0.761636				
Solution consistency: 1.000000				

The solution confirms our theoretical expectations. Two explanatory conditions were quasi-necessary: the existence of wide powers of review and being the first case; since these two conditions are present in both paths, they can be considered quasy-necessary but not sufficient combinations of conditions for statements of *Kompetenz-Kompetenz* to occur. They constitute the background over which, in the presence of "unleashing conditions", courts declared their Kompetenz-Kompetnez. Such unleashing conditions were a high judicial independence or the presence of significant Euroskeptic minorities.

In this first path, which explains the Czech case, the unleashing condition was the existence of significant Euro-skeptic minorities in the parliament. For this path, Sadurski's (2008) theory of the "reassurance strategy" seems to be the best explanation. In this ruling, the Czech Court declared the constitutionality of the Lisbon Treaty. However, opposition to the

Treaty was significant, even among the political elites (Corpădean, 2011; Bříza, 2009) with President Klaus and a large part of his party ODS trying to block ratification. The existence of these groups could have given the court an excuse for its declaration of *Kompetenz-Kompetenz*: in saying that it would ultimately watch over the respect by European law of the national constitution, it met the demands of the Euro-skeptic sector fearing an excessive loss of sovereignty by the entry into force of the Treaty. At the same time, the existence of Euro-skeptic sectors gave the court the excuse for an empowering statement of *Kompetenz-Kompetenz* in which it probably was interested. The Czech case, thus, may be seen as the convergence of different interests: pro-European sectors were satisfied by the declaration of constitutionality on the merits of the case, while Euro-skeptic sectors would receive the consolation prize of the declaration of *Kompetenz-Kompetenz*. By so doing, the court could appear as neutral actor and, at the same time, empower vis-à-vis the European Court of Justice.

The second path explains the German, Latvian and Polish cases. In this path, the additional condition was the high independence of the courts. Courts needed to be institutionally strong in order to challenge the European Court of Justice. In this sense, it is obvious that the German Federal Constitutional Court was one of the strongest, if not the strongest constitutional court in Europe, not only for its formal guarantees of independence but also for its prestige among its counterparts. Going beyond the purposes of this paper, we could even say that it is not casual that the first declaration of *Kompetenz-Kompetenz* was issued in the Maastricht-Urteil ruling of this court. It is true, however, that the Latvian and Polish courts were not as strong as the German Court; indeed, their formal guarantees of independence were lower than those of Karlsruhe. But this is congruent with their stance

regarding the question of *Kompetenz-Kompetenz*: while the German court phrased this doctrine in an aggressive and clear manner, the Polish and Latvian courts simply left open the possibility of reviewing "in particular cases" European Union secondary law in the case of a conflict with internal law.

The combinations of conditions provided by the intermediate solution were theoretically sound and underlined the causal complexity of the cases, and had satisfactory consistency and coverage scores: coverage was 0.761636, meaning that more than seventy six per cent of the outcome of interest can be explained with this solution; the fuzzy nature of two of the conditions may explain why coverage was not 1.00000 even though all the rulings with statements of *Kompetenz-Kompetenz* were covered by our solution. Consistency was of 1.000000, meaning that the solution explains uniquely rulings with declarations of *Kompetenz-Kompetenz*.

Absence of statements of *Kompetenz-Kompetenz*, though, was explained by slightly different patters. For this analysis, consistency cut-off was set again at 0.99, given that all combinations had a raw consistency of either 1 or 0 –see Table A3 in the annex-. Expectations about the behavior of the explanatory conditions were the opposite to those for the presence of the outcome.

Table 4. Solution for the absence of *Kompetenz-Kompetenz* in the ruling				
Combination	**Raw coverage**	**Unique coverage**	**consistency**	**Cases**
first*indepen	0.236404	0.200942	1.000000	Cz2 (0.803766,1)
PREFERENCES*reviewpowers	0.635000	0.599537	1.000000	Bel1 (0.86,1) Bel2 (0.86,1) Fr (0.82,1)
Solution coverage: 0.835941				
Solution consistency: 1.000000				

The solution displayed in Table 4 shows again high coverage -0.835941- and consistency -1.000000- scores. Two different paths explain the outcomes. In the first path, which explains the second Czech case, we find a scarcely independent court combined with the fact that the Lisbon Treaty was being reviewed for the second time; this means that stronger courts may not avoid second statements of *Kompetenz-Kompetenz* even in second reviews of the same treaty, if these take place in the future. The second path accounts for the French and Belgian cases; for this path, courts not only did not have the incentive to give a "consolation price" to Euroskeptic sectors –since these were not significant-, but in addition their limited powers of review prevented them from doing it.

VII. Conclusions

Interest in "empowerment" is not, alone, capable of explaining statements of *Kompetenz-Kompetenz*. Such theory presumes an equal interest by all national constitutional jurisdictions in claiming their right to review European Union secondary legislation, but courts' behavior in these regards has registered a strong variation: while some institutions like the German Constitutional Court have aggressively stated their "last say", the issue seems to be out of the agenda of others ones, like the French Constitutional Council. During the process of ratification of the Lisbon Treaty, statements of *Kompetenz-Kompetenz* seemed to be the result of the interaction between different variables: when courts were capable of reviewing European Union secondary legislation, they threatened to do it in case they wanted to give a consolation prize to Euroskeptic sectors –in turn of declaring the treaty constitutional- or when they were institutionally strong courts, independent enough as to pursue their own interests and to challenge the European Court of Justice. At the same time, courts showed a strategic behavior and avoided repeating their challenge to the Court of Luxembourg twice for the same treaty. Statements of *Kompetenz-Kompetenz* thus can be seen as mainly guided by the interest in empowerment, but within this motivational frame concrete explanatory conditions may constraint courts' behavior and incentive or disincentive their approach to the doctrine of the "last say".

Further research on the subject is necessary. Causal and explanatory studies on the question of *Kompetenz-Kompetenz* are surprisingly scarce. This article has made a limited contribution in that it only studied rulings on the Lisbon Treaty. However, some important lessons can be learned from it. Firstly, nothing prevents our explanatory conditions from playing a role outside contexts of treaty ratification, and thus further research should take them into account. Secondly, it has to be noted that some of our explanatory conditions

were related to the rulings and their context; the selection of the level of analysis –courts or concrete rulings- may be a major issue in subsequent studies; studying statements of *Kompetenz-Kompetenz* at the level of analysis of courts may hide important elements which play a role in concrete rulings and that have a high explanatory capacity in order to understand causation of the doctrine.

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Annex for reviewers and digital edition

Table A1. Database					
case	**k-k**	**indepen**	**reviewpowers**	**first**	**preferences**
Fr_Lisb	0	0,1062	0	1	0,82
Cz_Lis_I	1	0,196234	1	1	0,28
Bel_Lis_I	0	0,8581491	0	1	0,86
Lv_Lis	1	0,8263535	1	1	0,96
Ge_Lis	1	0,9404756	1	1	0,9
Bel_Lis_II	0	0,8581491	0	0	0,86
Cz_Lis_II	0	0,196234	1	0	0,28
Pl_Lis	1	0,5597136	1	1	0,86

Table A2. Truth Table for the presence of the outcome						
indepen	**reviewpowers**	**first**	**preferences**	**number**	**K-K**	**raw consistency**
1	1	1	1	3	1	1.000000
0	1	1	0	1	1	1.000000
0	1	0	0	1	0	0.000000
1	0	1	1	1	0	0.000000
1	0	0	1	1	0	0.000000
0	0	1	1	1	0	0.000000

Table A3. Truth Table for the absence of the outcome						
indepen	**reviewpowers**	**first**	**preferences**	**number**	**~k-k**	**raw consistency**
1	0	1	1	1	1	1.000000
0	0	1	1	1	1	1.000000
0	1	0	0	1	1	1.000000
1	0	0	1	1	1	1.000000
0	1	1	0	1	0	0.000000
1	1	1	1	3	0	0.000000