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See You in Luxembourg?

EU Governments´ Observations Under the Preliminary Reference Procedure

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THE EU'S POLITICAL AND CONSTITUTIONAL SYSTEM

Per Cramér, Olof Larsson,
Andreas Moberg and Daniel Naurin

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Preface

Created in 1952 as an integral part of the European Coal and Steel Community (ECSC), the European Court of Justice (CJEU) has proven to have considerable judicial authority. The main task of the Court is to act as a judicial arbiter and the ultimate interpreter of Union law. This function creates an arena for settling disputes which contributes to the political orientation of Union law, and by extension for European integration.

When Member States' courts are hesitant about the correct interpretation of Union law at a national level, they shall request a *preliminary ruling* from the CJEU, thereby opening the process scrutinized in this report – *the preliminary reference procedure.* In this process, all Member States' governments are allowed to present their observations, i.e. arguments and positions, to the Court regarding how that particular piece of legislation ought to be interpreted, in their view. The Court's answer to questions posed by the national courts will then gain uniformity throughout the Union. This study shows that submitting observations and taking an active part in the preliminary reference procedure do make a difference, and, thus, it presents the Member States with a clear opportunity to shape EU legislation and direct European integration in a desired direction. The results of this study makes a valuable contribution to better understanding the CJEU as a political arena for European integration.

This study is based on a unique archival material documenting the Member States' observations provided by the Swedish Ministry of Foreign Affairs and it is published in the context of SIEPS´ research project *The constitutional development of the European Union*.

Eva Sjögren
Director

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Executive summary

Historically, the Court of Justice of the European Union (CJEU) has played a central role in the development of the EU's legal system. Although it is a judicial institution, the Court's decisions are often regarded as "political" because of their strong impact on the economic and social conditions of Member States. For instance, the CJEU has had a considerable influence, not only on areas affecting the labour market such as the right of EU citizens to move freely within the EU to study and work, but also in other key spheres including cross-border healthcare and internet integrity.

It is the task of the CJEU to interpret EU law, and as EU laws are often open to different interpretations there is room for the CJEU to push the development of the law in a desired direction. Historically, such expansion of the law has seldom occurred without protest from one or more of the Member States, clamouring for another verdict. One Swedish example is the widely-debated Laval judgment from 2007 which has had great impact on Swedish labour market conditions.

This SIEPS report deals with the juridico-political tension in the development of EU law. It presents some of the main findings of a research project from the University of Gothenburg which explores the relationship between the CJEU and Member State governments in the interpretation of EU law. In cases dealing with so called *preliminary rulings* – which are the most important judicial instruments in the development of a unified legal system throughout the EU – Member State governments are allowed to raise their views on the matters at issue. The request for a preliminary ruling is originally submitted by national courts, seeking guidance from the CJEU on how to interpret EU law. The views which may be communicated by the governments in a pending preliminary ruling before the CJEU are called "observations to the Court of Justice of the EU", and are required to be submitted in writing within two months of receiving notice from the CJEU. Consequently, there is an opportunity for the political executives to counsel, guide, or, perhaps, push the CJEU in a desired direction by these observations. This possibility to raise one's voice should be of great importance to Member State governments considering the impact that CJEU rulings have had on central policy areas in European politics.

However, the report reveals a considerable variation regarding Member States' exploitation of the opportunity to influence the CJEU by their observations. Certain governments are considerably more active than others. This is noteworthy, not least because another important result presented in the report is that active involvement often "pays off" in the sense that the court is influenced by the views expressed by the national governments. We find a clear relationship

between the views expressed by the governments and the decisions made by the court, also taking other plausible factors into consideration.

The empirical material in this report is based on a large collection of data including qualitative coding of 3845 legal questions posed to the CJEU during the years 1997-2008. In each of the questions, we have identified, not only the positions of the CJEU, the Commission and the General Advocate, but also the observations made by the national governments of the EU. The latter is significant as, since 1994, the CJEU no longer publishes the "Reports for the Hearing" where these observations are summarised. This project however received access to these reports through the Swedish Ministry of Foreign Affairs.

The varying degrees of activity between Member States, and the distinct correlation between the views of national governments and the CJEU's decisions are two of the most important results of this report. The fact that the CJEU is influenced by the views of national governments is likely due to several causes. On the one hand, the views of national governments can be regarded as interjections in a mutual dialogue about the development of EU law between political and judicial actors in the EU system. On the other hand, the behaviour of national governments and the CJEU can be understood as a game of strategy where both sides, in a relationship of mutual dependence, try to achieve their respective objectives.

The material also shows patterns which reveal the way in which different actors interpret EU law from their particular perspectives. There is a clear divide between the CJEU and the Commission, on the one hand, and Member State governments, on the other hand, regarding stances on the degree to which EU law should be broadened and deepened at the cost of existing national laws and rules. The CJEU shows a clear tendency to favour a deepening of the integration of EU law and thus its own institutional status.

However, we also find important differences between member state governments. To some degree this applies to attitudes regarding deepened integration, but above all it relates to issues concerning left-right policies. Historically, Member States have chosen different ways to organise their welfare systems, regarding the labour market, taxes and social expenditure. These differences are most clearly reflected in member states' observations, exemplifying the political tension inherent in many of the decisions issued by the CJEU.

From a Swedish viewpoint, the results of the report appear paradoxical: on the one hand, during the period covered by our research, Sweden has been a surprisingly passive actor in the European legal arena. Of all the countries who have been Member States of the EU during the entire period of the research, Sweden has submitted the smallest number of observations in the context of

preliminary rulings. On the other hand, Sweden has been the most successful of all Member States in achieving its goals in the CJEU. Therefore, its passivity with respect to filing observations appears a wasted opportunity for influencing policy areas touching on Swedish interests. As far as policy goes, therefore, our conclusion is that the Swedish government should undertake a review of its protocols regarding how and when it decides to voice its concerns towards the CJEU.

1 Introduction

The Court of Justice of the European Union (CJEU or 'the Court') is often described as the world's most powerful international court.[1] By virtue of the Union Treaties, it has explicitly been given the responsibility to ensure correct interpretation and application of the Treaties. Over the years, in exercising this responsibility, the CJEU has been hailed for its remarkable "constitutionalisation" of the EU treaties.[2] The Court has been found to apply a teleological interpretation of EU law having regard to the Union's fundamental objective; to establish *an ever closer union among the peoples of Europe*.[3] As a consequence, European Law has been endowed with characteristics that are found in federal constitutional systems such as direct effect of European Law, which confers rights on individuals which may be invoked before Member States' courts, and supremacy of European Law, by which EU law takes primacy over conflicting provisions in Member States' legal orders. This was accomplished by decisions of the CJEU[4], in which the judges deliberately sought to differentiate European Law from traditional public international law by emphasising its autonomy and endowing it with constitutional qualities.[5]

Member States have tacitly accepted the legal doctrines developed by the Court. In day-to-day affairs, national public authorities accept the exclusive jurisdiction of the CJEU, and national courts apply the principles of direct effect and supremacy with a high degree of probity. However, at the bottom line, Member States tend to underline the Union's basic character as a structure based on the principles of international law: they recognise the supremacy of European Law, not as an effect of the inherent quality of EU law as interpreted by the CJEU, but rather by reference to national laws on accession, i.e. laws that may be repealed by a national parliament.[6] Moreover, Member States have consequently held that they retain the right to set aside provisions of secondary European Union Law

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1 Alter 2009.

2 Weiler1991. This is most pertinently formulated by Stein: "Tucked away in the Fairyland Duchy of Luxembourg and blessed until recently with benign neglect by the power that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe". Stein, 1981 p. 1.

3 TEU, article 1. Hartley 2007 p. 7.

4 Case 26/62 *Van Gend en Loos* v *Nederlandse Administatie der Belastingen*, 5 February 1963, ECLI:EU:C:1963:1, Case 6/64 *Flamino Costa v ENEL,* 15 July 1964, ECLI:EU:C:1964:66, Case 11/70 *Internationale Handelsgesellschaft mbH mot Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* 17 December 1970*,* ECLI:EU:C:1970:114.

5 Mancini 1989, p. 595, p. 596.

6 Compare: MacCormick 1999, pp. 101-102. In Sweden, European Union Law, including the judgments delivered by the CJEU, is incorporated into the body of national law through *Anslutningslagen* SFS 1994:1500, a law that may be repealed by a simple majority in Parliament.

that are adjudicated as falling outside the powers that have been conferred on the EU institutions by the Union Treaties. [7]

Thus, a highly sophisticated balance has developed over time in the constitutional relationship between the Member States and the CJEU. Through a conditional acceptance of the doctrine of supremacy, the Member States, with reference to their national constitutional sovereignty, have reserved a right to revolt against the exclusive competence to adjudicate on the validity of secondary Union Law, claimed by the CJEU.[8] The Member States have shown their swords but so far have never used them. It is likely that the retained national right to revolt in exceptional cases has been a necessary prerequisite for the acceptance by Member States of the supremacy of Union Law in day-to-day situations.[9]

The constitutionalisation of the EC Treaty and the role of the CJEU in establishing a supranational legal order has been the focus of much research and debate.[10] Much of the previous research, especially in the neo-functionalist tradition, has emphasised the *neglect* by Member States of the process of European legal integration.[11] The political powers of Europe were lured by the "mask and shield of law"[12], and consequently they missed the "quiet revolution"[13] unleashed by the Luxembourg judges. Recent research challenges this view, arguing that Member State governments have been aware of the Court's preoccupations, and have, indeed, signalled their preferences to the Court.[14]

Against this backdrop, this report focuses on an important facet of the dynamic interaction between the CJEU and the Member States; the role of Member States' observations in preliminary reference procedures. The right to submit observations, i.e. to provide positions and arguments in relation to legal issues raised by national courts in referrals to the CJEU, is the primary channel by

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7 The most sophisticated argumentation along this line was formulated by the German Constitutional Court in its ruling on the constitutionality of a German decision to ratify the TEU 1994 in cases 2BvR 2134/92 and 2153/92 *Manfred Brunner and others v the European Union Treaty*, BverGE 155, reported in English in [1994] 1 CMLR 57. This argumentation was confirmed by the German its ruling on the ratification of the Lisbon Treaty, 30 June 2009, GFCC, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421).With regard to Sweden see: Declaration by the Joint Committee on Constitutional Issues and Foreign Affairs, 2003/2004 KUU1, p. 51.

8 Case 314/85 *Firma Foto-Frost* v *Hauptzollamt Lübeck-Ost*, 22 October 1987, ECLI:EU:C:1987:452. It is interesting to note that there is no article in the Treaties that gives the Court the exclusive competence to invalidate EU legislation.

9 Cramér 2006.

10 See, for instance, Rasmussen 1986; Weiler 1991; Burley and Mattli1993; Garrett1995; Mattli and Slaughter 1998; Carrubba 2008, Carrubba, Gabel and Hankla: 2012; Stone Sweet and Brunell: 2012, pp. 204–13; Larsson and Naurin 2016; Larsson, Naurin, Derlén and Lindholm forthcoming.

11 Stein 1981.

12 Burley and Mattli 1993.

13 Weiler 1994.

14 Conant 2002; Carrubba, Gabel and Hankla 2008; Davies and Rasmussen 2012; Larsson and Naurin 2016.

which Member State governments may make their presences felt and argue their cases with respect to the development of case law. It is by submitting observations that member states have a chance to potentially influence the process of legal integration pursued by the Court. Thus, studying how the Member States have leveraged this opportunity, and how the CJEU has reacted to the positions and arguments voiced by governments, may contribute to a better understanding of the balance between law and politics in the European Union.

The overall purpose of the project has been to study the interactions between the political and judicial spheres of decision-making in the European Union, and, in particular. the CJEU and EU Member State governments.[15] We have applied a multidisciplinary approach, combining theory and methods from legal and political science. A specific rationale behind the project was the unique opportunity we had to access archival material, documenting the observations – including written positions and arguments – submitted by Member States' governments in the context of the preliminary reference procedure. The systematic coding of these observations, in combination with other related material – including qualitative interpretations of the legal issues involved and the positions taken on these issues by the central actors – constituted the core of the database that was created and utilised for the project.

The research questions addressed in the project relate to theories of European integration, but also, more generally, to comparative and international judicial politics.[16] The questions concern classic problems relating, not only to the independence and effectiveness of courts working under political constraints[17], but also to what we perceive to be the somewhat under-researched implications of judicialisation. The latter includes the dimensionality of the legal conflict space, i.e. the question of who has conflicting opinions with whom and about what, in the issues addressed by the CJEU.[18] It also concerns individual-level variation in Member State behaviour and influence. Are some Member States' governments more active and/or successful than others in the legal proceedings, and, if so, why?

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[15] The report is based on the data collection of the research project The European Court of Justice as a political actor and arena: Analyzing Member States' observations under the preliminary reference procedure. The project was financed by Riksbankens Jubileumsfond, and led by Daniel Naurin and Per Cramér at the Centre for European Research at the University of Gothenburg (CERGU). We would like to acknowledge our gratitude first and foremost to Anna Falk at the Swedish Foreign Ministry for invaluable support concerning access to documents at the Swedish Foreign Ministry. Allison Östlund, Sara Lyons and Julian Dederke contributed with crucial research assistance. We would also like to thank Gitte Stadler of the Info and Press Service of the CJEU and Anne-Andreev Winterfeldt of the Swedish Foreign Ministry for support and documentation, Felix Boman, Kajsa Pettersson, Niklas Martinsson, Antonia Häller and Erika Strandén for contributing to the coding, and Fabian Lidman and Stellan Östlund for contributing with customised computer software.

[16] See, for example, Staton and Moore 2011, and references in supra note 11.

[17] Larsson and Naurin 2016.

[18] Larsson et.al. forthcoming.

The report is structured as follows. After a brief introduction to the procedure for preliminary references in the EU legal structure, we address the issue of coding. We describe the documentation that was used, reveal the unit of analysis applied, identify the system of classification adopted, and, consider the reliability of tests performed. Thereafter, we describe and comment on certain of the findings, most of which have been, or will be, published elsewhere.[19] The findings include descriptive statistics, not only on the activities of Member States with regard to submitting observations, but also on variations in the patterns of their participation in the preliminary reference procedure over time and across policy areas. We analyse the positions taken by the relevant actors from the perspective of whether these imply greater European legal integration or alternatively preservation of national sovereignty. We also investigate the possibility of the existence of other conflict patterns in the positioning of the actors. Finally, we examine the extent to which, and in what circumstances, the positions taken by governments correlate with the Court's decisions.

We found that active Member State participation through filing observations in the context of the judicial decision-making process–was an important, but sometimes underutilised, instrument for influencing the development of European Law. On the one hand, there was evidence that the observations submitted by Member States had an impact on the Court's rulings, and that governments deployed such observations to promote legal interpretations that favoured their respective national welfare-state systems. On the other hand, there were significant differences between the Member States both with respect to active usage of the right to file observations, and in relation to their rates of success in terms of the final decisions of the Court.

From a Swedish perspective, it can be concluded that, while the government has been relatively successful in filing observations with the CJEU, it has used this instrument surprisingly infrequently for influencing the development of European law. Sweden, thus, seems to have missed out on an important opportunity for influencing the development of European Law, both in cases of national importance as well as in cases concerning general principles, pivotal to the evolution of the European legal order.

[19] Larsson and Naurin 2016; Larsson et.al. forthcoming; Larsson and Naurin 2015.

2 The preliminary reference procedure

The areas of competence reserved to the CJEU were defined in the Community Treaties of 1958 and have remained largely unaltered since. By virtue of these treaties, an independent supranational court was created, seated in Luxembourg, with exclusive competence to administer the EU legal system. Moreover, the Court was given jurisdiction to take direct action both against the Union institutions where they omit to exercise their attributed legislative and executive powers[20], and against Member States where they fail t o fulfil their obligations under Union law.[21] Thus, the Court was entrusted with the roles of both an international court and a specialised intra-Community constitutional court.

In order to facilitate the uniform application of the rules of the Union's legal order by national courts in Member States, the Court's jurisdiction in direct actions was supplemented by jurisdiction to give preliminary rulings. This procedure, known as the preliminary reference procedure, enables the Court to exercise indirect judicial control over the interpretation and validity of Union law.[22]

The primary objective of the preliminary reference procedure is to ensure that EU law is given a uniform normative meaning when applied in the national legal systems of the Member States. In most legal orders, this task is entrusted to the courts of last instance, but as the CJEU is not hierarchically superior to the national courts, a decision by a national supreme court cannot be appealed to the CJEU. Instead, the preliminary reference procedure aims to establish constructive co-operation between the CJEU and the national courts based on mutual trust without in any way formally limiting the judicial autonomy of Member States.

A national court may therefore request the Court to give a ruling on the interpretation of primary and secondary EU law or on the validity of secondary EU law. Whenever a court in a Member State finds that it needs to make a reference to the CJEU, it stays the proceedings before it and refers one or more questions to the Court. The Court will then answer the questions posed by the national court in the form of a preliminary ruling, which enables the national court to proceed with the case. The Court's answer is binding only on the

[20] Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26.10.2012, p. 47, articles 263 and 265.
[21] TFEU, articles 258 and 259.
[22] TFEU, article 267.

national Court, but the authoritative interpretation of the rules laid down by the Court is valid for every court applying the rules in question. All national courts, against whose decisions there is no judicial remedy under national law, are *obliged* to request a preliminary ruling where there is any uncertainty concerning the correct interpretation, or validity, of provisions of EU law.[23] This, as noted, is to ensure that the application of EU law remains constant and uniform.

In combination with the principle of direct effect, the preliminary reference procedure constitutes an important supplement to the infringement procedure reinforcing a coercive apparatus for procuring Member States' compliance with their obligations under EU Law. The instrumental role of the preliminary reference procedure in driving the process of legal integration of the European Union is thereby enhanced. Such a consequence was explicitly envisaged by the CJEU in case 26/62 *Van Gend en Loos* in which the court proclaimed the direct effect of clear and unconditional provisions of European Union Law. The practice of national courts' requesting preliminary rulings, the court ventured, would lead to a situation where "[t]*he vigilance of individuals concerned to protect their rights[would amount] to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States*".[24]

Accordingly, the rulings of the CJEU in preliminary references may have implications impacting on the boundaries of national autonomy.

2.1 The right to submit observations

Provisions of Union law are in many instances the result of complicated political compromises and often leave substantial legitimate room for judicial interpretation. Moreover, it is clear that a large number of references for preliminary rulings requires the CJEU, to not only interpret Union Law, but also to properly understand the political intention underlying the national legal provisions and to appreciate the specific application of such provisions to the episode-in-suit.

Accordingly, the right of Member States to submit observations to the CJEU in the context of preliminary references is of pivotal importance to the proper

[23] TFEU, article 267(3); Case 283/81 *Srl CILFIT et Lanificio di Gavardo SpA* v *Ministero della Sanità*, 6 October 1982, ECLI:EU:C:1982:335.

[24] Case 26/62 *Van Gend en Loos* v *Nederlandse Administatie der Belastingen*, 5 February 1963, ECLI:EU:C:1963:1, p. 13. The present numbering of the articles establishing the procedure for infringement proceedings referred to by the Court are TFEU articles 258 and 259.

functioning of the system.[25] The instrument gives the Member States governments the possibility to argue their preferred interpretation of the rules of Union law. It also provides an opportunity, to not only explain the intent of the national regulations, but also to expound the interpretation of the regulations as they apply to the episode-in-suit, and to clarify specific national circumstances which the court should take cognisance of in its process of adjudication. In this way, the CJEU is provided with a better understanding of the specific circumstances of the case as well as a general understanding of the different socio-political perspectives informing Member State governments' interpretative choices. Depending on the responsiveness of the CJEU to the arguments presented, necessary trust between the court and the Member States may be enhanced, thereby augmenting the effectiveness of Union Law as an instrument of integration.

The possibility for direct communication by political actors in a judicial sphere of decision-making, in the context of a particular episode-in-suit, was not a novelty when established by the European Treaties. The 1945 Statute of the International Court of Justice, in cases concerning the interpretation of a convention, gives all States that are parties to that convention a right to file observations in the proceedings.[26] With respect to the Rome Treaty, the negotiators at the 1956 Messina conference, when drafting the Treaty, were probably also inspired by similar procedures in Germany and Italy whereby the *Länder* or *Regioni*, with respect to the laws they had passed, were given the right to submit observations to the national constitutional courts in cases impugning the constitutionality of such laws.

Key actors in the early development of the European Community, such as Walter Hallstein and Michel Gaudet, considered law to be the fundamental basis of the community, and the preliminary reference procedure to be a key instrument for establishing a uniform interpretation of law across the community. Nevertheless, we can only speculate as to whether the signatories of the Rome Treaty actually foresaw the fundamental importance that the procedure would gain. Today, a reference for a preliminary ruling is the most important and frequently invoked of EU legal procedures and the mechanism by which most key judicially-developed changes in EU law have been effected.[27]

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[25] Member States' right to submit observations is granted by article 23 of the Court's statute, which is annexed to the Treaties, Protocol (No 3) on the Statute of the Court of Justice of the European Union, hereinafter "the Statute". A consolidated version of the Statute, following amendments made to the Statute after the latest changes to the Treaties, is provided by the Court on its website: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf (last visited 2016-01-19).

[26] Statute of the International Court of Justice, San Francisco 26 June 1945, 1 UNTS XVI, article 63.

[27] Broberg and Fenger 2014.

3 Documentation and coding

As mentioned above, the preliminary reference procedure allows Member States to submit observations to the CJEU, i.e. statements containing positions and arguments in favour of their preferred interpretations of the legal rules raised by the questions posed to the CJEU. These observations may be interpreted as revealed preferences on the issue of legal integration, and therefore constitute highly valuable data for studying judicial politics. However, the observations are not available to the public. The Court treats them as "property" of Member States, and instructs researchers to request the documentation from the Member States themselves. Any concerted attempt to procure such documentation is unlikely to be successful.

Historically, another option for collecting data on Member State observations on a more systematic basis was the *Reports for the Hearing* prepared by the Judge-Rapporteur. These reports were made when the reference procedure included a hearing of oral argument, which is the usual practice (although decreasingly so in recent years as will be seen below). Approximately three weeks before the court hearing, the Report for the Hearing would be issued to the interested parties: the counsel, the participants, and other stakeholders.[28]

These reports comprised a description of the legal and factual background to the case, and a note of the questions referred by the national court (including the answers proposed in the written observations lodged by the litigants before the national court, as well as by other interested parties or participants). According to the Court, the arguments put forward in support of the proposed answers were normally not recorded.[29] However, having coded almost 1600 of these reports, we take the view that both positions and coherent arguments may be derived from these documents.

If the parties were unhappy with the summary of their positions in the Report for the Hearing, they could inform the Registrar at the Court before the hearing and

[28] These include the EU member states, the Commission and any other EU institution who is responsible for any legislative act, the validity or interpretation of which is under scrutiny in the case. There are other potential participants listed in article 23 of the Statute of the Court of Justice of the European Union.

[29] "Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities", February 2009, available of the website of the CJEU, http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf (2016-01-23), p. 23.

"suggest such amendments as they consider appropriate".[30] Ultimately, however, the Report for the Hearing was a report presented by the Judge-Rapporteur to the other members of the Court, and it is for him or her to decide whether it needs to be amended.

The Reports for the Hearing thus contained crucial information on Member States' positions and arguments before the Court. It is therefore unfortunate, from the perspective of transparency, that the Court, in 1994, limited access to these reports, and then, in 2012, stopped producing them altogether. The reason for this, according to the Court, was a combination of constrained resources and a steady increase in the number of cases that it was being required to deal with.[31] This means that, since November 2012 – when the new Rules of Procedure for the CJEU took effect – there has been no way to gain access to Member States' observations to the Court. Until 1993, the Reports for the Hearing were translated into English and published in the European Court Reports (ECR). From 1994 onwards, however, the Reports for the Hearing were no longer translated and published. They were still available upon request from the CJEU in single case format, but only in the language in which the case was presented.

Fortunately, we were able to find another source where the Reports for the Hearing were systematically archived – also covering the post-1993 period – and most of them in a language that our research team could understand (French, English, Swedish or Danish). This source was the archives of the Swedish Ministry for Foreign Affairs, which houses the Reports for the Hearing that had been prepared since Sweden became a member of the EU in January 1995. We were allowed access to the reports in confidentiality conditions, necessarily implying that we could use the documents for the purpose of preparing the database, but were not at liberty to publish or disseminate the documents themselves.

We requested access to the Reports for the Hearing in respect of 1896 preliminary reference cases during the period 1997-2008. We eventually received and coded 1599 of these (84 per cent). The discrepancy between the number of reports requested and actually received is largely attributable to the fact that reports were not produced where no oral hearing was held – a feature of 241 of the cases. The data appendix to this report discusses in more detail the scope of the documentation.

The coding required considerable capabilities in legal analysis. For this reason, we recruited graduates and advanced-level students at the Law School of the University of Gothenburg. The bulk of the work was undertaken by two graduates, Sara Lyons and Allison Östlund. For some of the variables, such as

[30] "Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities", February 2009, p.23.

[31] See the Press Release at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/cp120122en.pdf.

the nationality of Judges and Advocates General, and legal acts relevant for the case, the coding was automated using web data extraction programmes.

Significantly, we did not choose as the main unit of analysis in the coding each of the 1599 requests for preliminary references. As most requests consisted of several questions, and as these questions were often constructed as follow-up questions depending on whether the answer to the previous question was in the affirmative or the negative, we were not satisfied that using the questions as formulated by the national court as our main unit of analysis would elicit the answers to our research questions. Instead, we decided to use 3845 legal *issues* raised by the submitting national courts in their references to the CJEU. These legal issues were formulated as the result of an interpretation of the questions posed by the national court, and thus, even though there were many instances where one question comprised only one legal issue, the number of *actual questions* posed by the national court cannot be automatically inferred from the number of issues listed in our dataset. In certain cases, one (numbered) question from the national court comprised two (or more) legal issues, whereas in other cases two (numbered) questions were overlapping and were merged into one. Whether or not the coder engaged in such splitting and merging of the original questions is indicated in the dataset.

An inter-coder reliability test was carried out for the qualitatively coded variables in the data set. The test was based on a randomly selected sample of 50 cases including 91 questions from national courts, defining, in total, 658 actors' positions. The coders recoded cases previously coded by others, without first taking part in the original coding.[32] The two sets of codings were then compared, and notes were made on whether there was any disagreement between the two coders' evaluations. The codings that were found to be incorrect were subsequently corrected in the original database. The results of the test are described in detail in Naurin et al.[33] Generally, the reliability was sufficiently high for our purposes, even for the variables based on more complicated analysis of legal argumentation.

One of the most important variables that was coded concerns the implication of the positions promoted by different actors with respect to the status of national laws and regulations versus EU law. This coding was included in order to study a key question in the literature, namely the extent to which different actors in practice promoted greater European legal integration as opposed to preservation of national sovereignty. The coding of this variable proceeded as follows. If a position implied that EU law restricted the autonomy of Member States, it was given the code 2 (we will refer to that as 'More Europe'). If no clear implication

[32] If the random draw produced a case which the coder had coded herself this case was dropped and a new draw was made.

[33] Naurin, Cramér, Larsson, Lyons, Moberg and Östlund 2013.

in terms of legal integration could be drawn from the position, the code 1 was applied (Ambivalent). If the position implied that EU law should not be interpreted as constraining the Member States in the particular episode-in-suit the code 0 was selected (Preserved National Sovereignty).

The case C-293/2006 *Deutsche Shell*[34] may illustrate the application of this coding method. One of the issues raised by the national (German) court in this case was the following:

> Is it contrary to Article 52 and Article 58 EC for Germany, as the State of origin, to treat a currency loss of a German controlling company resulting from the repatriation of so-called start-up capital granted to an Italian establishment as being part of that establishment's profits and to exclude that loss, on the basis of the exemption under Articles 3(1), 3(3) and 11.1(c) of the Double Taxation Convention between Germany and Italy from the basis of assessment for German tax?

In more simple terms, the German court was asking the CJEU whether the German tax authorities could treat this particular tax issue in this particular way, or whether they were precluded by EU law from so doing. Two distinct positions were noted in the documented responses from the different parties and actors involved – yes or no. As the question was negatively formulated ("Is it contrary to…?"), in this case, "yes" implied More Europe and "no" meant Preserved National Sovereignty. "No" was argued by the German and Dutch governments, which had submitted observations. The Commission and the Advocate General, on the other hand, argued for "yes". The Court in its judgment decided for "yes".

The inter-coder reliability test showed that the coding was reliable. The More Europe variable had 83 per cent inter-coder agreement, which was clearly acceptable according to established conventions.[35]. Furthermore, almost all the differences between the coders on this variable were such that one coder had indicated More Europe or Preserved National Sovereignty, whereas the second coder had indicated ambivalent. Only three cases (2 per cent) of contradictory coding was found, where one coder had indicated More Europe whereas the other coder had noted Preserved National Sovereignty.

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[34] C-293/06 *Deutsche Shell GmbH* v *Finanzamt für Großunternehmen in Hamburg*, 28 February 2008. ECLI:EU:C:2008:129.

[35] Lombard, Snyder-Duch and Campanella Bracken 2002.

4 Findings

We will now turn to the presentation of certain of the results of the project. For the purpose of this report, we have chosen to focus on questions concerning (1) the extent to which the Member States used the right to submit observations, (2) the degree to which the actors favoured more European legal integration or preserved national sovereignty, (3) whether there were any general patterns of conflict between groups of actors, (4) the correlation between Member States' positions and arguments on specific legal issues, and Courts' concluding judgments, and (5) whether certain Member States had more success than others with respect to outcomes in the Court.

4.1 Frequency of observations

To what extent did Member States engage in the preliminary reference procedure by submitting observations to the CJEU? As noted in the introduction, the literature on legal integration in Europe has sometimes alluded to Member States' governments not being entirely aware of the proceedings of the Court, and the importance of the Court's decisions.[36]

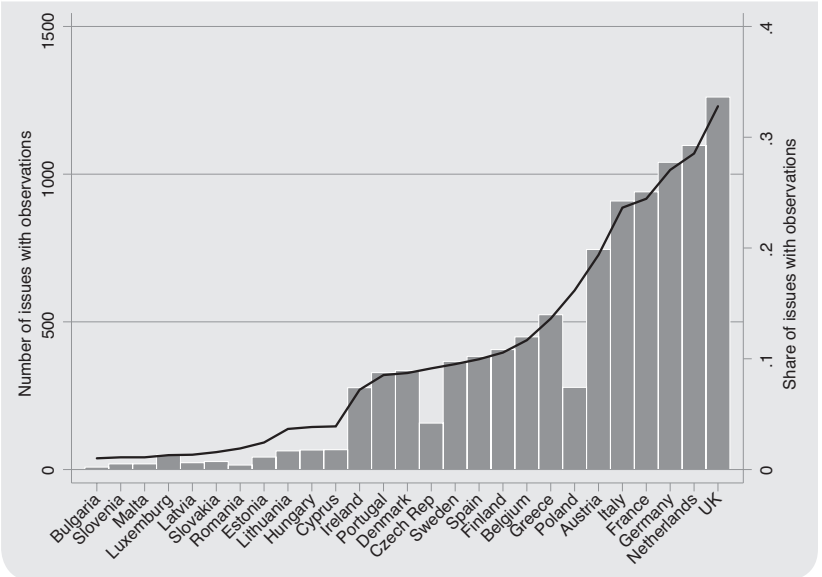
However, our data showed that the level of activity varied substantially between Member States. Figure 1 displays the overall activity in the period 1997-2008. The bars indicate the total number of legal issues for which observations were submitted (measured on the left hand side). The line in the figure takes into account the fact that some Member States became members of the EU only in 2004 or 2007. It shows, during the time in which a Member State had been a member (measured on the right hand side), the share of legal issues where observations were made relative to the number of legal issues raised by national courts,

The most active Member State was the UK, recording observations on 1261 issues in total during the selected period, followed by the Netherlands, Germany and France. Least active were smaller and newer Member States. Nevertheless, new Member States, Poland and the Czech Republic, were more active than several of the older Member States. It should be noted that the numbers in Figure 1 refer to legal issues, not cases (see section 3). This was a more informative measure of activity as it took into account not only the number of times a Member State submitted an observation, but also the extent to which those observations addressed all the legal issues raised in the case.

One probable reason why Member State size was important for activity is that states with larger economies have salient interests in more issues than smaller

[36] Burley and Mattli 1993; Stone Sweet and Brunell 1998; Stein 1981.

Figure 1 Frequency of observations by Member State 1997 – 2008



Note: Bars indicate the total number of legal issues in which observations were submitted by the respective Member State (left side). The line shows the share of issues where observations were made, relative to the number of legal issues raised during a Member State's time as a member of the EU (right side).

states. The same pattern was found in the research on the Council of the EU, where large Member States tended to express more salient positions in the negotiations.[37] State resources are also likely to make a difference, with larger states having better opportunities to address more legal issues due to a larger number of staff within the government ministries.

The difference between, for example, the activity of the UK and Ireland is rather striking. Whereas the former had submitted an observation in every third legal issue, the Court heard from the Irish government in only about 7 per cent of the issues. Furthermore, size does not explain why, for example, Austria submitted observations on twice the number issues as Sweden. One could argue that Austria has a stronger tradition of judicial review than the Scandinavian countries, which may affect its attitude towards the political importance of judicial decision-making. On the other hand, the Netherlands – another medium-sized state, which was even more active than Austria – also lacks a tradition of judicial review.

[37] Thomson 2011.

When analysing the frequency with which Member States make use of their possibility to file observations with the Court, it may be useful to make a distinction between different types of interests that may motivate a Member State to act. Two basic categories of motivating forces may be distinguished, which may, however, coincide on several occasions; the existence of a specific state interest at stake, and a general principled interest relating to the development of European Law.

The typical case in the first category is where the reference for a preliminary ruling concerns the interpretation of a national law in the referring State. From a Swedish perspective, a clear example occurred in case C-189/95 *Franzén* in which the Swedish government, desiring to protect a national interest, filed an observation on the interpretation of Union law in relation to the national regulation on the sale of alcoholic beverages.[38] The second category includes cases that relate to the development of principles of constitutional importance for the relationship between Member State Law and European Law. An illustrative example from this category is case C-91/93 *Faccini Dori,* which primarily concerned the constitutional question as to whether rules in a non-implemented directive, following expiration of the time period for implementation, should be applied by a national court in a dispute between private parties, i.e. be given horizontal direct effect.[39]

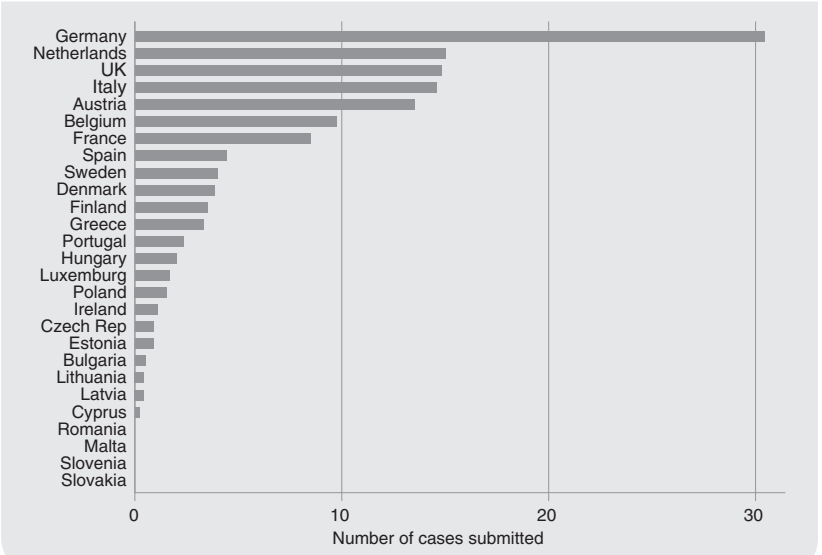
An example that contained a mix of the two types of motives is case C-341/05 *Laval un Partneri,* which concerned the highly contested and politically sensitive question of which national legal order should regulate the conditions for labour employed by an employer in one Member State (Latvia) but temporarily stationed to deliver a service in another Member State (Sweden).[40] From a Swedish perspective, this case also constituted a direct challenge to the national organisation of the Swedish labour market and the Swedish government – with a view to protecting a specific national interest – filed an observation.

In the first category, where there is a clear direct national interest, we would expect to see a correlation between the number of referrals from the national courts in a Member State and the same Member State's interest in filing an observation to the Court. In the second category, which relates to more principled long-term concerns, we would expect that Member States would regularly submit observations, also when questions are raised by other Member States' courts.

Thus, part of the variance in Figure 1 is likely to be explained by the fact that some Member States' courts were more willing to ask the CJEU for preliminary

[38] C-189/95, *Criminal proceedings against Harry Franzén*, 23 October 1997, ECLI:EU:C:1997:504.
[39] C-91/92, *Paola Faccini Dori* v *Recreb Srl*, 14 July 1994, ECLI:EU:C:1994:292.
[40] C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 18 December 2007, ECLI:EU:C:2007:809.

Figure 2 Frequency of national court referrals to the CJEU by Member State 1997 – 2008



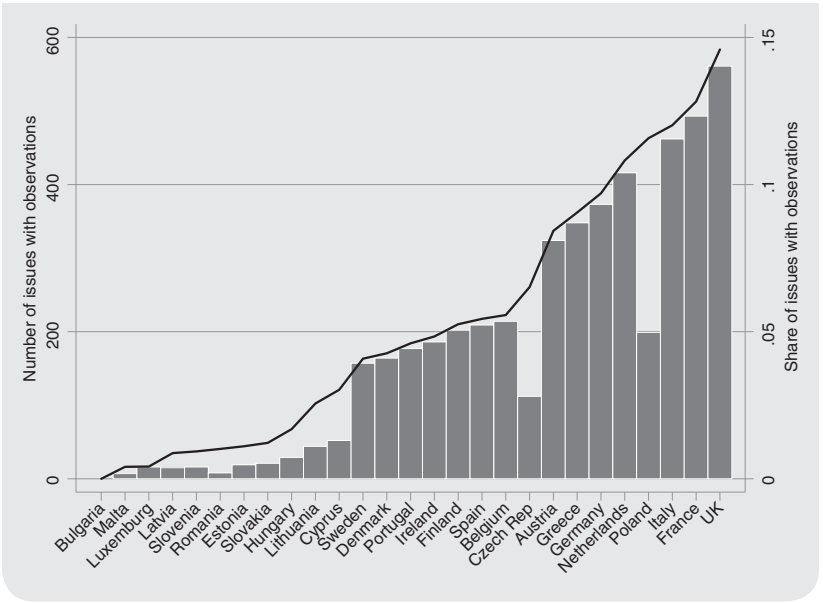
Note: Average number of cases per year that were submitted by national courts in the respective Member States. Note that the unit of analysis here is cases rather than legal issues.

rulings. Figure 2 demonstrates that most requests for preliminary rulings in the period 1997-2008 came from German courts, which had submitted on average 30 references for a preliminary ruling per year, followed by Dutch, British and Italian courts (all with an average of about 15 cases per year).

It seems reasonable to expect that Member States whose national laws and regulations were directly at stake in the proceedings would have exhibited a higher tendency to submit observations in the proceedings. Therefore, the question necessarily arises as to whether the difference in activity between, for example, Austria and Sweden is attributable to different levels of activity among Austrian and Swedish courts, rather than governments.

Figure 3 demonstrates that this is only a partial explanation. The figure shows the activity of Member State governments in cases originating outside their borders. Although there is some shifting in positions compared to Figure 1 – Italy and France, for example, now emerge as being more active than Germany and the Netherlands – the overall order is fairly stable. The UK is still clearly the most active government, stating positions in 15 per cent of all legal issues coming from other European courts, whereas Sweden is the least active among the older Member States. The Court rarely (only in 4 per cent of the legal issues) hears

Figure 3 Frequency of external observations 1997 – 2008

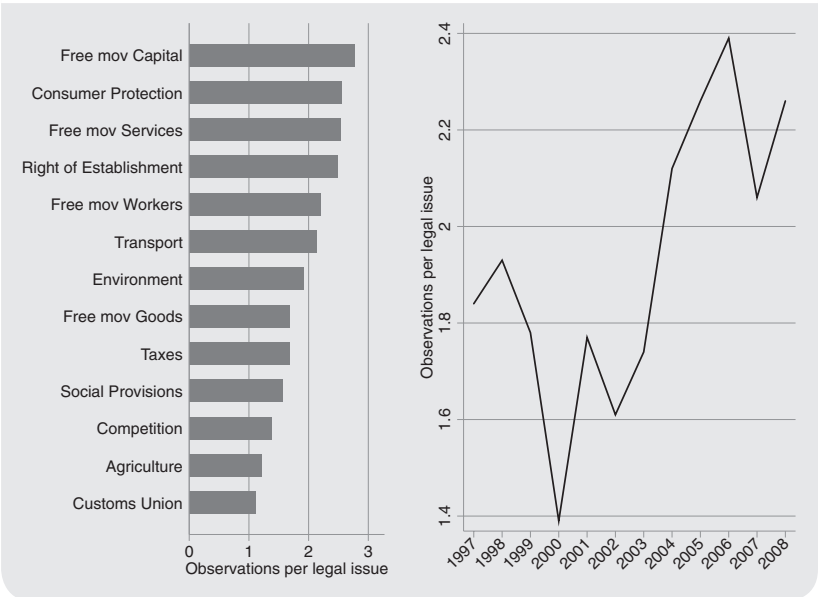


Note: Bars indicate the total number of legal issues in which observations were submitted by the respective Member State in cases originating outside that state (left side). The line shows the share of issues where observations were made, relative to the number of legal issues raised during a Member State's time as a member of the EU (right side).

from Sweden in cases originating from outside Swedish borders. We cannot say with certainty that 'internal observations' are less principled and more narrowly focused on short-term national interests than 'external observations'. Nevertheless, from a Swedish perspective, it is worth noting that there are even fewer – relatively speaking – external observations filed by the Swedish government compared with other Member States.

Figure 4 (below) shows the variation in activity of the Member States depending on policy area and over time. As seen in the left hand panel, there is substantial variation between different policy fields. Whereas cases concerning free movement of capital on average generated almost 3 observations per legal issue, cases relating to customs and agriculture rarely engaged more than one Member State per issue, which was normally the Member State in which the case originated. Following our previous discussion, this would indicate that such policy areas are those where fewer principled and controversial issues concerning the long-term development of EU law were at stake during the period analysed.

Figure 4 Frequency of observations over policy areas and time



Note: Left hand panel shows the average number of observations per legal issue in different policy areas. Right hand panel shows the average number of observations per legal issue per year.

The right hand panel shows the variation in activity over time, again measured as the average number of observations per legal issue. The enlargement of EU membership explains the sharp break in the trend in 2004, as 10 new states entered the EU in May of that year. Taking into account the number of Member States, the trend in activity is similar over the entire period. Thus, despite the fact that we are studying a period when European integration both deepened and widened, and when the CJEU made several important moves to promote such integration, Member States' interest in contributing to this development by filing observations remained unchanged.

4.2 How do the actors position themselves on legal integration?

As noted above, actors involved in the legal proceedings of the EU – including the CJEU judges – are likely to be coloured by their policy interests and values when they formulate their legal opinions. As with national law, EU primary and secondary law often gives room for different interpretations. This is an inherent quality of all legislation, as, in essence, legislation is the result of political compromises between the underlying interests. Typically, this means that EU legislation is characterised by open-ended language, especially

where negotiations have been difficult. The EU legislator may also sometimes deliberately pass secondary legislation where potential underlying conflicts of interests are unresolved, leaving it to the Court to reconcile such interests. Thus, in most preliminary ruling cases, the Court has discretion and, within its legitimate scope of interpretation, may decide on either More Europe or Preserved National Sovereignty.

The Member State governments, in particular, are fundamentally political actors, who are unlikely, as a matter of principle, to engage with the preliminary reference procedure only for the purpose of strengthening the coherence of EU law. It is reasonable to assume that – to the extent that they are able to see through "the Mask of Law", as previously discussed –governments will safeguard their political interests in the proceedings. Furthermore, both the Commission and the Court have often been described as supranational actors with strong preferences in favour of legal integration.[41] The sources of this "More Europe" bias have been identified as the institutional interests in strengthening EU law over national law, and the on-going socialisation of judges into a European judicial *esprit de corps*.[42]

Although legal opinions may to some extent be grounded in political and societal preferences, there is an expectation that "legal politics are different than electoral politics and diplomacy".[43] Thus, while clearly structured conflict dimensions based on ideology and interests, such as the left-right or pro-anti EU dimensions, are expected – and even normatively applauded[44] – in the Council and the European Parliament, such structures are better hidden in the legal arena, where the rule of law necessarily applies.

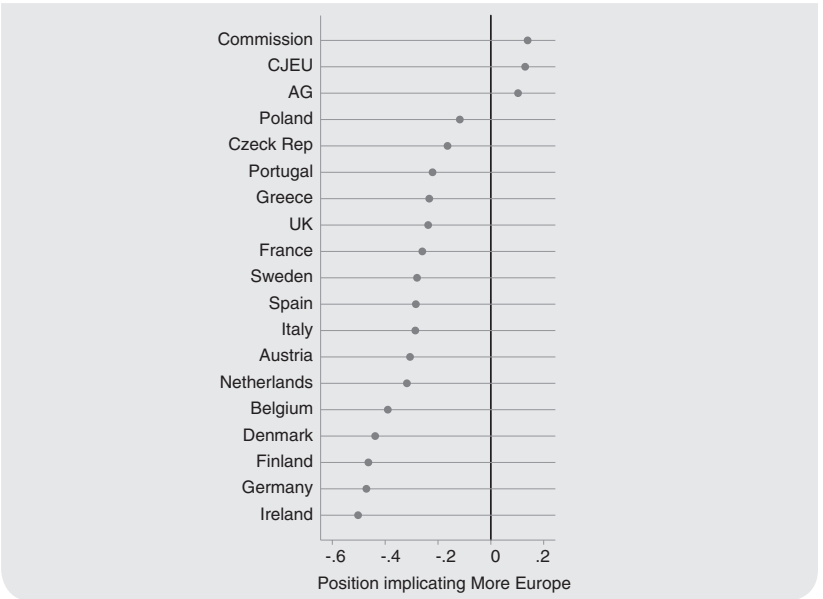
Our data are particularly suitable for identifying the conflict dimensions, if any, that structure the positioning of actors involved in the preliminary reference procedure. First, we have coded explicitly the positions taken by all actors on whether these imply more far-reaching legal integration or a defence of national rules and regulations. Secondly, by using dimensional analysis, we can explore and discuss any other conflict dimensions that we uncover.

How do the actors involved position themselves with respect to more legal integration in Europe? As can be seen in Figure 5, there is substantial variation in the data in this respect.

Most striking is the difference between the supranational actors, on the one hand, and the Member States, on the other hand. Whereas the Commission, the

[41] Pollack 2013.
[42] Garrett, Kelemen and Schulz 1998; Tsebelis and Garrett 2001; Vauchez 2012.
[43] Alter, 2014, p. xviii; See also Abbot and Snidal 2013, p. 41.
[44] Hix 2008.

Figure 5 Mean position on legal integration 1997 – 2008



Note: The X-axis indicates the balance between positions favouring More Europe vs. Preserved National Sovereignty

CJEU and the Advocate General (AG)[45] demonstrate a positive balance – they have overall more positions in favour of More Europe than in favour of Preserved National Sovereignty – all the Member States are on the negative side. The common perception of supranational actors pushing for more legal integration, while the Member States are holding back, is thus clearly confirmed.

Nevertheless, there is also significant variation between the Member States with regards to holding back the speed of legal integration. Ireland and Germany have a balance of around -0.5, which means that, for every observation filed in favour of More Europe, they submitted three observations arguing for Preserved National Sovereignty. Poland, at the other end of the scale, has a balance of -0.1. That means that, for every Polish position in favour of More Europe, they submitted 1.2 positions in favour of Preserved National Sovereignty.

It is not immediately clear what drives the variance between the Member States, and this is a question that requires further analysis. For example, there is no correlation with public opinion data on support for the EU from

[45] The AG's assist the Court. As a rule, every reference for a preliminary ruling has an AG assigned to the case. The AG's role is to independently analyse the law and deliver a reasoned opinion suggesting how the Court should handle the issues raised in the case. The AG's opinions are not binding on the Court.

the Eurobarometer. We compared the share of respondents in each country answering "yes" to the question "Generally speaking, do you think that (your country's) membership of the European Community is a good thing?" for the time period 1997-2010, and found a non-significant negative correlation with the values shown in Figure 5.[46] Thus, Member States with more Eurosceptic citizens do not defend national sovereignty more often than governments with more Euro-friendly citizens.

The only obvious distinguishing pattern emerging is that the new Member States seem to favour More Europe compared to the old. Furthermore, some differences are rather puzzling. Why, for example, is Ireland (-0.50) at the bottom of the scale, when the UK – which often has similar policy preferences to the Irish – is in the upper part (-0.24)? And why is Sweden (-0.28) favouring More Europe more often than its Nordic neighbours, Denmark (-0.44) and Finland (-0.46)?[47]

Figure 6 demonstrates that the gap between the Member States and the supranational institutions in terms of deciding in favour of EU law over national law is persistent over time. Although there is some variation for both types of actors, they follow a roughly similar trend over the years. The cases that were decided around the year 2002 contained a peak in terms of the share of issues that implied more legal integration. At the end of the period, however, the balance is back to the same level as in the late 1990s.

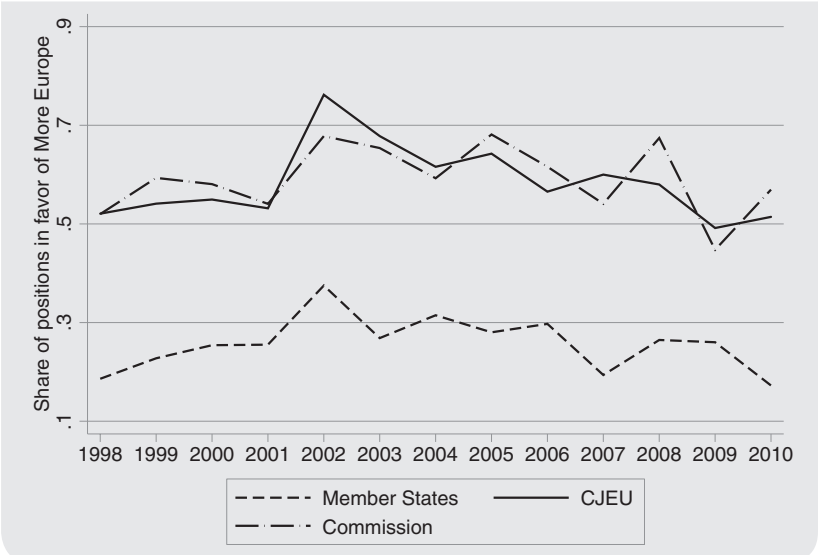
We were also interested in studying how the actors positioned themselves on the legal integration scale in different policy areas: In which fields was the drive towards more European legal integration strongest on behalf of the Court, and where did the Member States hold back most resolutely? Figure 7 illustrates, on the x-axis, the balance between CJEU judgments in favour of More Europe and Preserved National Sovereignty across policy areas. The Y-axis indicates the degree to which the Member States (net) concurred with the Court on the legal integration scale. The number of issues that the data contained for each policy area is shown in parentheses.

Consistent with the previous findings, the level of agreement was highest in those policy areas where the Court tended to have the highest share of positions in favour of Preserved National Sovereignty. The diagonal line indicates the correlation (Pearson R = -0.77, $p<0.01$). The only area in which the Court delivered more judgments in favour of Preserved National Sovereignty (indicated by the vertical red line in the figure) was competition law. This may be explained by the fact that national competition law is harmonised to such an extent that there was, generally speaking, no significant difference between EU competition law and Member States' competition law. The tension between More Europe

[46] Pearson R = -0.16, p = 0.61.

[47] All these differences are statistically significant at $p<0.05$.

Figure 6 Share of positions in favour of more legal integration over time



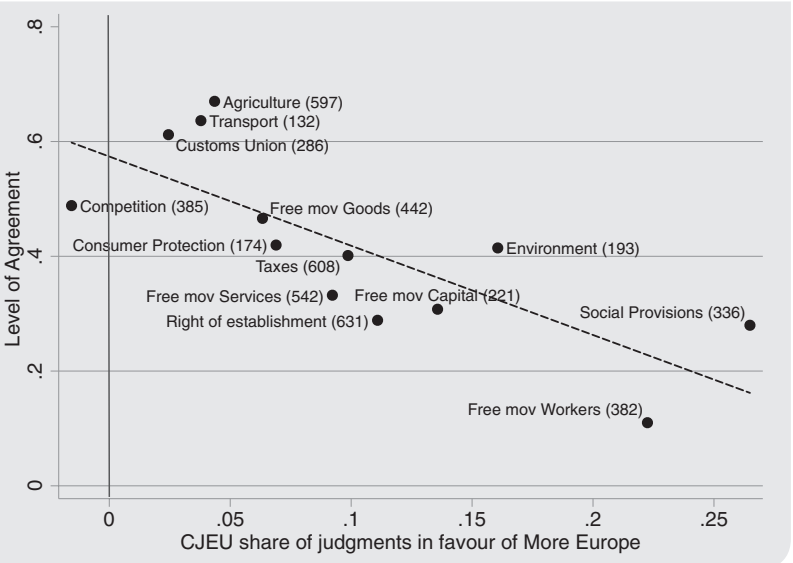
Note: Share of positions coded as either More Europe or Preserved National Sovereignty (ambivalent excluded). The years refer to the date of the final judgment.

and Preserved National Sovereignty was therefore low in this policy area. The level of agreement in the area of competition law was 0.5, which meant that for every conflicting issue there were three issues on which the CJEU and the Member States (net) concurred.

The highest degree of agreement was found in the areas of agriculture, transport and customs union, which was to be expected, given that, firstly, these areas had been on the political agenda since the early years of European integration, and, secondly, the Treaties – in order to speed up integration – had given the EU institutions far-reaching competences to adopt secondary legislation without the requirement of unanimous decisions. The highest level of conflict, on the other hand, was raised in relation to the free movement of workers. On this issue, the Court was pushing relatively energetically towards More Europe, against the will of more hesitant Member States. A similar pattern was found in the area of social provisions, although the Member States were somewhat more willing to accept legal integration in this area, compared with the free movement of workers

Nonetheless, it should be noted that, even with respect to free movement of workers – which is one of the most conflict-ridden fields – the Court and the Member States concurred more often than they conflicted. Figure 7 shows that the level of agreement was positive in all major policy areas. This is an important

Figure 7 Level of agreement and share of judgments in favour of More Europe across policy areas 1997 – 2008



Note: Level of agreement = (agreement-conflict)/total no of issues in the policy area, where agreement counts the number of issues on which the CJEU and the Member States (net) hold the same position (More Europe, Preserved National Sovereignty or ambivalent), and conflict counts the issues where the Member States (net) took a position either in favour of More Europe or Preserved National Sovereignty, while the CJEU took the opposite position. CJEU share of judgments in favour of More Europe = (the number of judgments in favour of More Europe minus the number of judgments in favour of Preserved National Sovereignty)/the total number of issues in the policy area. Only categories that contain more than 100 issues are shown. Categories are not mutually exclusive as the cases may concern more than one area.

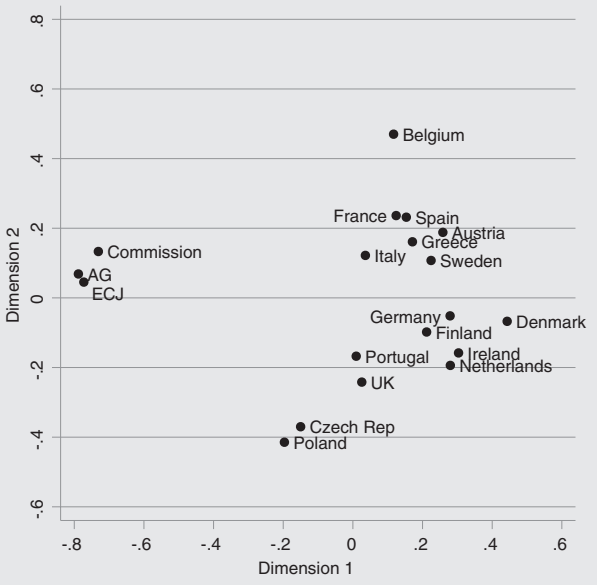
finding to keep in mind. Whereas the scholarly literature tends to emphasise the differences between the CJEU and the Member States, in reality – with regard to interpreting EU law in the cases that are brought to the Court in the preliminary reference procedure – agreement is more common than disagreement.

4.3 Conflict dimensions in the legal proceedings

Thus far, we have discussed only how the disagreements in positioning relate to the question of EU law versus national law. Are there any other important conflict dimensions underlying the positions taken? Can we, for example, find traces of a Left-Right dimension, which has proven to be important at the national level in European politics, and increasingly relevant also in the European Parliament?[48]

[48] Hix 1999; Marks and Steenbergen 2004.

Figure 8 Mapping the legal policy space



Note: Multidimensional scaling of pairwise similarities. Eigenvalues: 2.51 (dim 1) and 0.91 (dim2).

In order to address these questions, we conducted an explorative dimensional analysis on the data. We used multidimensional scaling for that purpose, which means that we measured the distance between every pair of actors, based on how often they took the same position, in cases in which both actors submitted observations. The result is illustrated in Figure 8, which may be read as a distance map. The closer two actors are to each other in the picture the more often they tended to have similar positions in the preliminary reference proceedings.

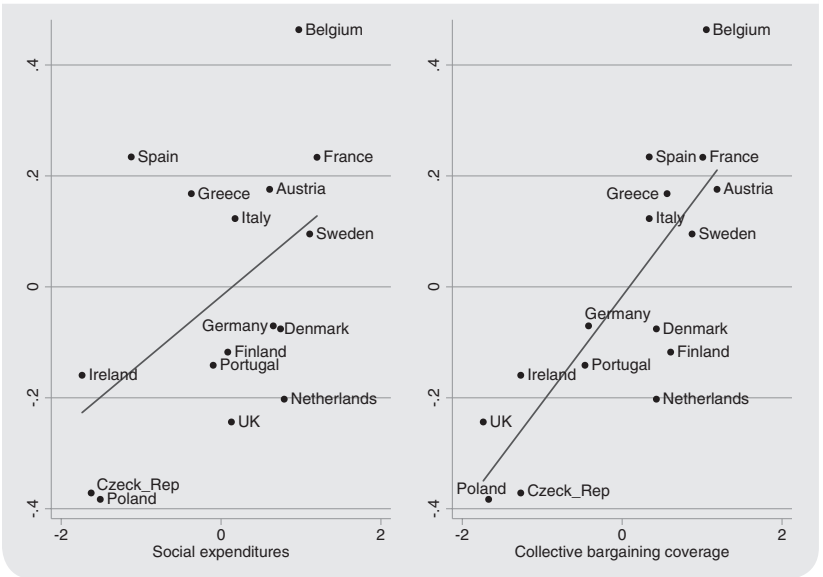
The multidimensional scaling provides the dimensions that explain most of the variance in the data. However, the researchers must perform the substantive interpretation of these dimensions themselves. The most immediate pattern that we see, again, is the distance between the supranational actors and the Member States. As we already know from our previous analysis that this difference correlates strongly with the legal integration scale, we can be fairly confident that the first dimension in the picture relates to More Europe versus Preserved National Sovereignty.

But what about the second dimension? Here, we have Poland and the Czech Republic at one end, and Belgium at the other. Furthermore, when looking at the large Member States, we see that the UK and France tend towards opposite ends, whereas Germany is in between. Again, more work needs to be done in

analysing the content of this dimension in detail.[49] However, the most credible interpretation, we believe, is that the second dimension is related to what political economists call "the varieties of capitalism", and the categories of liberal and social market economies.[50] In brief, liberal market economies (LME) are characterised by low levels of taxes and social expenditures, and decentralised labour market relations, whereas social market economies (SME) score high on these scales.

The second dimension in Figure 8 is clearly related to the SME-LME distinction. Figure 9 plots the values from the second dimension (Y-axis) against the level of social expenditures and the degree of collective bargaining coverage in the Member States (X-axes). There is a strong correlation between both indicators of varieties of capitalism. This shows that Member States with similar welfare state models and labour market relations tend to take similar positions in the observations they submit to the Court.

Figure 9 Varieties of Capitalism in the Court



Note: The y-axis is the second dimension of the MDS solution in Figure 8. The x-axes measure the sum of all social protection expenditures as a percentage of GDP (left panel) and the collective bargaining coverage (right panel) for the year 2006.[51] *The bi-variate correlations between the second MDS dimension and social expenditure and collective bargaining coverage is 0.50 and 0.80 respectively (p<0.05).*

[49] See Larsson and Naurin 2015.

[50] Höpner and Schäfer 2012, pp. 429–55; Hall and Soskice 2001.

[51] Source: Höpner and Schäfer 2012, p. 437. The variables are standardised to facilitate comparison.

This analysis shows that the conflicts adjudicated by the CJEU concerned not only the balance between European legal integration and national sovereignty, but also the tensions between different European welfare state models raised by the integration of the common market.[52] It also shows that Member State governments acted according to a political rationale when they submitted observations to the CJEU, trying to steer the decisions towards their preferred social models. The fact that the supranational institutions were positioned towards the centre of the second dimension in Figure 8 indicates that their main focus was on the status of European law compared with national law, rather than the effects of law on the socio-economic dimension. However, more detailed analyses must be performed before any firm conclusions can be drawn on the salience to the CJEU of the second dimension and on the CJEU's positioning on this dimension.[53]

4.4 Who wins in the Court?

The previous discussion demonstrated a clear tension between the positions of Member States and the judgments of the Court on the legal integration dimensions. Does that mean that the Court has become a "runaway agent", promoting its own preferences on European integration effectively insulated from control by Member State governments, as sometimes described in neo-functionalist accounts of European integration?[54]

First, as discussed in section 4.2, we should note that the dominant pattern in the data was, in fact, *consensus* rather than conflict. Most of the time, the majority of actors agreed on how to interpret the law in the cases raised through the preliminary reference procedure. The overall pattern of consensus is most likely a reflection of the fact that, even though the law is open for interpretation, some interpretations are more reasonable than others. The conflicts that existed were resolved within the constraints of law and in compliance with the requirement that positions in this arena require to be backed up by rational-legal arguments.[55]

Furthermore, the fact that the Court's decisions more often favoured More Europe, compared with Member States' observations, does not necessarily mean that the judges did not take the governments' arguments and positions into account. The Court's judgments promoted European law over national law in about 36 per cent of the issues, and Preserved National Sovereignty in 25 per cent of the issues (the remaining issues were coded as Ambivalent in terms of legal integration). It is likely that the share of decisions in favour of More Europe would have been even higher in the absence of objections by governments.

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[52] Höpner and Schäfer 2012; Scharpf 2010.
[53] Larsson and Naurin 2015.
[54] Stone Sweet and Brunell 1998; Alter 1998.
[55] Alter 2008.

Figure 10 plots the bivariate relationship between Member States' observations and the CJEU's judgments on the More Europe scale. The X-axis indicates the net number of governments that explicitly signalled that they were in favour of or against More Europe, and the Y-axis, the net position of the CJEU (the share of CJEU judgments in favour of More Europe minus the share of judgments in favour of Preserved National Sovereignty). The sizes of the circles correspond to the number of legislative issues in each category. The largest circle (42 per cent) is at zero on the X-axis, showing that there were either no Member State observations, or, alternatively, an equal number of Member States on each side. At that point, the number of CJEU judgments in favour of More Europe were 25 percentage points higher than those in favour of Preserved National Sovereignty. Most of the issues (83 per cent) were in the interval of -2 to 1 Member State in favour of More Europe.

The correlation between the positions of the signalling Member States and the CJEU's judgments is almost perfect (Pearson R = 0.97) and clearly visible in the figure. It demonstrates that the higher the number of governments filing observations in favour of Preserved National Sovereignty the more likely was the Court to decide in favour of that position.

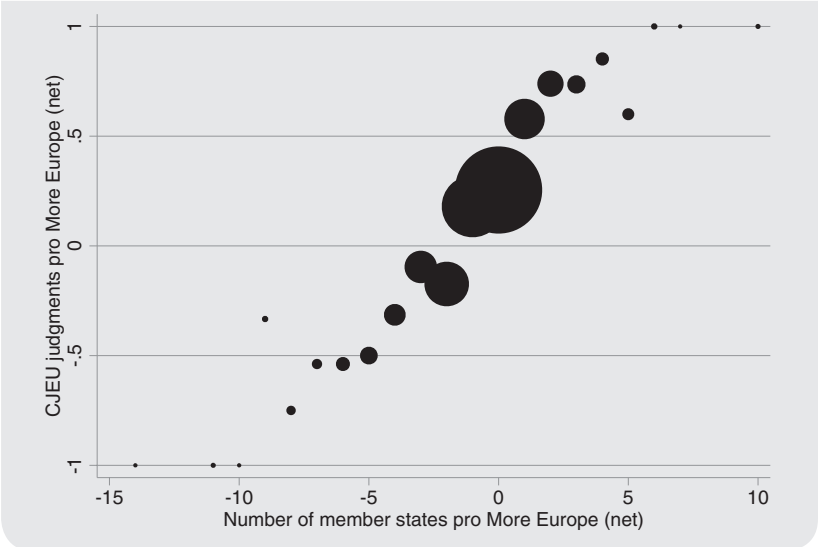
In a different article emanating from the project, Larsson and Naurin undertook an in-depth analysis of whether governments' observations influenced the decisions of the Court.[56] The multivariate regression analysis conducted in that study showed a significant relationship between governments' observations and the CJEU's decisions, even when taking other factors into account, such as the positions of the Commission and the Advocate General, as well as chamber size (as a proxy for the salience of the issue).[57] It also showed that a single Member State observation did not match the influence of the observations submitted by the Commission. Only when a group of Member States was able to demonstrate a strong united voice in a particular direction, did it achieve the same level of influence as the Commission.

Thus, those governments that made themselves heard by submitting observations to the Court stood a fairly good chance of being listened to. But, does the Court listen equally to all governments, or are there differences in terms of who gets what they want from the Court? Figure 11 shows the overall success rate for Member States, the Commission and the Advocate General, over the entire period 1997-2008. The y-axis indicates the share of observations that were successful, in the sense that the Court took the same position in its decision. The

[56] Larsson and Naurin 2016.

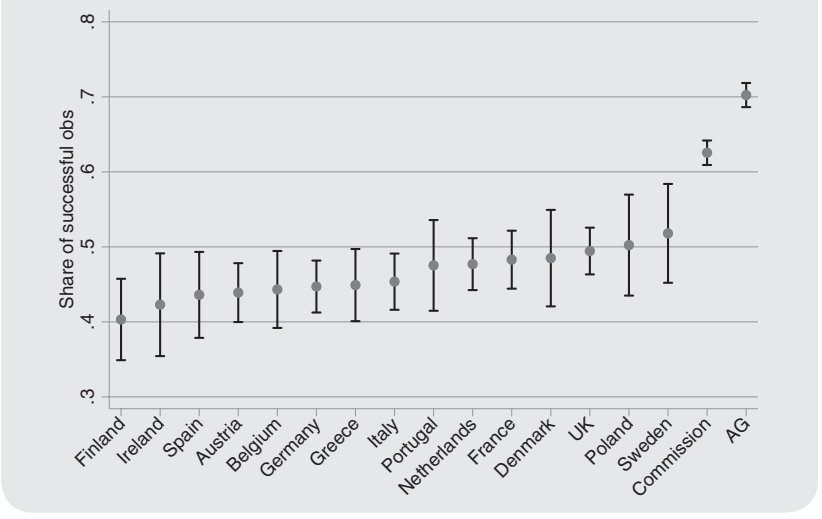
[57] The Court may sit in chambers of three, five, 15 (Grand Chamber) or 28 (Full Court) judges. The Court sits as a full Court when that is prescribed by the Statutes of the Court, or when the case is considered to be of exceptional importance. It sits in Grand Chamber when a Member State or institution which is party to the case so requests, or when the cases are particularly complex or important. In less complex cases, it sits in chambers of five or three judges.

Figure 10 Bivariate correlation between Member States net position and the CJEU's judgment on the legal integration scale



Note: Y-axis: Share of CJEU judgments pro More Europe (net). X-axis: Number of Member States pro More Europe (net). Size of circles = number of issues.

Figure 11 Overall success rate 1997 – 2008



Note: Circles indicate mean success rate, capped spikes the 95% confidence interval. Only Member States with a sufficient number of observations to generate reasonable certainty in the measures (se<0.4) are included.

circle indicates the mean overall success rate, whereas capped spikes illustrate the uncertainty of the estimate (95% confidence interval).

There is a clear hierarchy in the picture between the Advocate General, the Commission and the Member States. While the Advocate General had a success rate of around 70 per cent, and the Commission a rate of over 60 per cent, most of the Member States' rates ranged between 40 and 50 per cent. However, as discussed above, when several governments argue in the same direction they may weigh as heavily as the Commission.

With respect to most of the Member States the differences between them were relatively modest, although some of them are clearly worth exploring. For example, why is Sweden so much more successful compared to its Nordic neighbour, Finland? And why is Germany not as successful as the UK?[58]

The high success rate of the Commission in infringement proceedings has been explained, not only by its status as a "repeat player", but also by the fact that the Commission carefully selects cases where it is reasonably convinced that it will win.[59] Could it be that a similar mechanism is at work with respect to Member States, i.e. that some Member States are more selective when submitting observations, and therefore more successful on the occasions when they do submit such observations? We doubt that this is a factor, primarily because we did not find any correlation between the frequency with which Member States submitted observations (Figure 1) and the success rate.[60] For example, the UK was both the most active government in terms of delivering observations, and also one of the most successful in terms of seeing their preferred outcomes in the Court's decisions.

One factor that does make a difference for the chances of success is whether the observation was submitted by the Member State government from which the original request came, or whether it was an 'external' observation from another Member State. In the study, the external observations were generally more likely to be in line with the subsequent decision by the Court, although the difference was relatively modest. As can be seen in Figure 12, the ranking was relatively similar compared with Figure 11.

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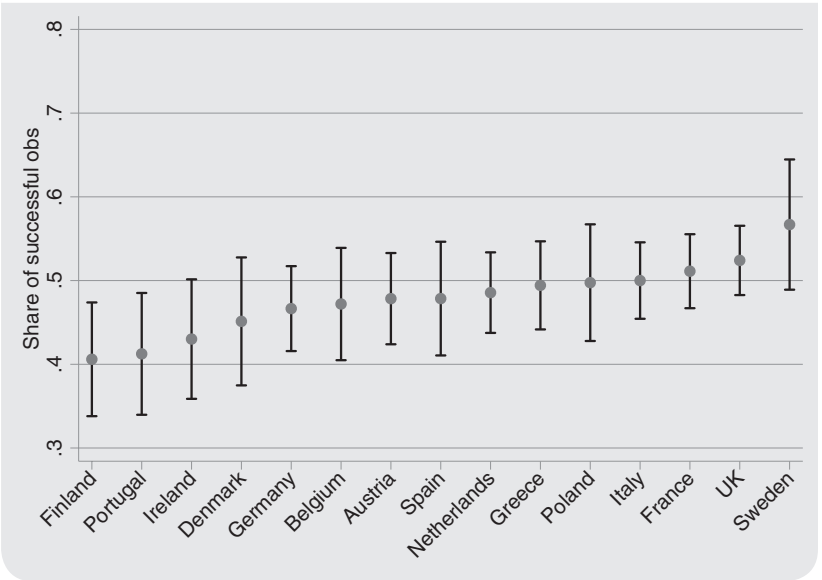
[58] These differences are statistically significant in pairwise t-tests, $p<0.05$. The success rate figures demonstrated here are based on the original positions of the Member States and the Court on the legal issues at stake. In some cases, a Member State may have a different answer to the question posed by the national court than the CJEU, but still have the same position on the legal integration scale. Therefore, we also measured success rate on the legal integration scale, i.e. whether the Member States' and the Court's positions were in favour of More Europe, Preserved National Sovereignty, or whether both positions were Ambivalent in that respect. The ranking was similar to that displayed in Figure 11, and the differences between Sweden and Finland, and between the UK and Germany, were significant also with the latter measure.

[59] Hofman 2013.

[60] Pearson $R = 0.09$, $p = 0.75$.

Figure 12 Success rate of observations submitted in cases originating from another Member State's court 1997 – 2008



Note: Circles indicate mean success rate, capped spikes the 95% confidence interval. Only Member States with a sufficient number of observations to generate reasonable certainty in the measures (se<0.4) are included.

We can see two potential reasons why external observations were more successful. First, external observations were submitted more selectively. Governments were probably expected to defend their national laws when these were directly addressed, as a result of a request from one of "their own" courts, even if the chances of success were low. Second, as previously discussed in section 4.1, governments defending their own laws and regulations may be perceived as self-interested parties, rather than "friends of the Court" concerned with general principles of European Law, and therefore be less convincing vis-à-vis the Court. Again, these are propositions that need to be tested more systematically before any firm conclusions can be drawn.

An even more important factor explaining success rates was the extent to which the observations argued were in favour of a position promoting more European legal integration. There was a strong positive correlation between success rate and observations favouring more integration, and a strong negative correlation with respect to observations arguing for preserved national sovereignty (as compared

with observations having an ambivalent position on the legal integration scale).[61] This factor partly explained the differences between, for example Sweden and Finland, and the UK and Germany, as previously discussed. As we saw in Figure 5, Sweden and the UK both had positions in favour of more integration more often than Finland and Germany. When controlling for this factor in a multivariate regression, the difference in the success rate between Germany and the UK was no longer statistically significant. However, Sweden was still significantly more successful than Finland when this factor was taken into account.[62]

[61] We performed a logit regression analysis on actors' success, controlling for a number of possibly confounding factors, such as Member State size, state of origin and size of deciding chamber (as a proxy for salience). The details are available from the authors upon request. The odds ratios for positions favouring more legal integration and preserved national sovereignty were 1.77 and 0.59 respectively.

[62] We included dummy variables for the actors involved in the logit regression model, and subsequently compared the effects.

5 Concluding remarks

The preliminary reference procedure has been a key factor underlying both the development of European Union Law and the promotion of European integration. It has given the CJEU a crucial position as the key interpreter of both primary and secondary legislation, leaving a large margin of discretion to the Court in determining the precise content of EU law.

As the objective of the procedure is to create a close linkage between the European and national legal systems based on co-operation, the right of Member States to submit observations to the CJEU is of great importance for its proper functioning. This report contained an in-depth analysis of the manner in which the Member States have made use of this instrument.

One of the findings of this report is that Member States have, indeed, taken that opportunity to varying degrees. Whereas some Member States, such as the UK, France and the Netherlands have been quite active, others – including Sweden and Denmark – have been heard with much less frequency in the Luxembourg court. Whereas larger states may have more resources to allocate to monitoring and acting in EU legal procedures, resources can only explain some of the variations in our data.

One possible explanation why Member State governments are not submitting observations to the extent that could be expected is that they are convinced that submitting observations will make little difference. It would be a mistake to take such a view. The findings indicate that the Member States who have been more passive have actually missed out on an opportunity to affect the course of legal integration. Our evidence shows that submitting observations makes a difference, in the sense that the Court is more likely to make a decision that preserves national sovereignty where several Member States argue in that direction (and vice versa if the observations favour more legal integration). The failure to submit observations does in fact equate to the failure to seize an opportunity to participate in shaping European law and politics.

Our analyses also demonstrate the political nature of the cases that are decided through the preliminary reference procedure. Conflicts relating to differences between European welfare state and labour market models divided Member States, as governments often entered the legal proceedings with an interest in defending their preferred national way of organising important socio-economic relations. Thus, the preliminary reference procedure is not simply a mechanism for achieving narrow legal-technical clarifications of "incomplete contracts" (although it is that too). It also affects core issues relating to highly salient welfare policies.[63]

[63] See also Höpner and Schäfer 2010; Höpner and Schäfer 2012.

The Swedish case is particularly striking in this respect, as Sweden is both one of the most passive Member States in terms of governmental activity, yet one of the most successful with respect to seeing its positions prevail in final Court rulings. We also saw that this is probably not a question of the Swedes being more selective – and therefore more successful – as there was no general connection between success rate and filing few observations. The UK, for example, was both highly active and successful in the proceedings. The passive attitude of the Swedes is also surprising given the fact that the Swedish welfare state and labour market model is particularly vulnerable to the liberalising tendencies of the Court's jurisprudence.[64] It may be that Swedish activity rates have increased following the period studied here (covering cases that were filed in 2008 and decided up to 2010), and in particular after the traumatic Laval case in December 2007. Future research will show whether this is the case.

The differences in activity rates may have to do with allocation of resources, as indicated above. However, it may also have to do with how the procedures for handling preliminary references are organised within government ministries. For example, Van Stralen has shown that Sweden and the Netherlands have different ways of deciding on whether an observation should be submitted. In the Netherlands, all preliminary reference cases are distributed horizontally to government ministries, along with a check-list that forces each ministry to consider every case, and evaluate whether there will be a potential effect on Dutch laws and regulations falling within their respective competences. In Sweden, on the other hand, the legal unit of the ministry of foreign affairs responsible for interactions with the CJEU makes a first sorting before sending out questions to the line ministries.[65] It may, therefore, be that the Swedes, Danes and other less active Member States would benefit from taking a closer look at how they organise their participation in this important channel for influencing the development of EU Law.

[64] Scharpf 2010.
[65] Van Stralen 2015.

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Appendix

To gain access to the Reports for the Hearing we needed to request from them the archives of the Foreign Ministry in Stockholm. For this purpose, we prepared lists of all references for preliminary rulings submitted to the CJEU during the period 1997-2008. The chosen time period reflects our ambition to cover as much as possible of the period after the Court limited access to the Reports for the Hearing. If possible, we would have closed the gap back to 1994, but the coding job was very time-consuming and the resources limited. Nonetheless, we were satisfied in being able to cover this twelve-year period.

We used the EU's official search engine – *InfoCuria* – to source the jurisprudence of the CJEU in order to identify relevant cases. In total, we requested access to Reports for the Hearing in respect of 1896 preliminary reference cases. Of these, 1599 (84 per cent) were eventually received and coded.[66] The discrepancy between reports requested and received is attributable to the fact that reports were not produced where there was no oral hearing held – which happened in 241 of the cases.[67] Table 1 shows that the number of cases without oral hearings increased substantially following the Court's adjustments of its working procedures in order to accommodate the enlargement of the EU in 2004. The CJEU's Rules of Procedure govern the question as to whether or not there is to be an oral hearing in a case. For the relevant period covered by our data, the Rules of Procedure stipulated that, as a main rule, there should be an oral hearing in cases concerning requests for preliminary references. However, the rules also provided that oral proceedings could be replaced by a written procedure upon suggestion by the Judge-Rapporteur and upon approval by the Advocate General, as long as neither party, nor any of the interested parties, submitted that it wished to be heard.[68] In 2012, the Court's Rules of Procedure were changed in this respect. As of November 1, 2012, it is no longer necessary to elicit the acceptance of the parties or interested parties in order to dispense with oral proceedings, as long as the parties participated in the written stage.[69]

Does the fact that we are missing observations in about 20 per cent of the cases from the last years covered by the study produce a biased data set for these years?

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[66] A handful of these were requested directly from the CJEU, while the rest came from the Swedish Ministry for Foreign Affairs.

[67] We derived the information that there were no oral hearings held in these cases from the Court's Judgments or the Opinions of the Advocate General. Sometimes these included an explicit confirmation of this fact. In other cases, it could be inferred from the fact that there were no references made to either hearings or oral observations.

[68] Article 104, p. 4, Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, OJ L 176, 4.7.1991, p. 7–32 (as amended).

[69] Article 76, Rules of Procedure of the Court of Justice of 25 September 2012, OJ L 265, 29.9.2012, p. 1 (as amended).

Whether a data set is biased depends on the research question. Although there is no evidence that salient cases are not settled by written procedure only, we find it reasonable to assume that the parties would be even more inclined to retain the possibility of complementing their written submissions orally when more is at stake. For our analyses, it was sufficient to work with the cases that were considered most important by the parties.

There were also two other sources of missing reports, as seen in Table 1. In a few cases, no Report for the Hearing was drawn up because the case was processed according to the urgent preliminary ruling procedure. This procedure was introduced by Council Decision 2008/79 of December 20, 2007 and was applicable as of 1 March 2008 under (then) Art. 104b of the Rules of Procedure of the CJEU.[70] Seven such cases were found from 2008. Furthermore, Reports for the Hearing from 52 cases (2.7 per cent) remain uncoded because we received them in a language for which we did not have coding expertise. We have no clear explanation as to why the majority of archived Reports for the Hearing at the Swedish Ministry for Foreign Affairs were in French or English, whereas some were in the language of the state of origin of the case. Table 1 details which cases were missing from the data set, and for what reason.

Table 1 Number of cases included and missing from the data set, and reasons for missing cases

Year	*Total no requested*	*Total no coded*	*No oral hearing*	*Urgent procedure*	*Language*	*Other*
1997	152	134	3	0	15	0
1998	150	139	4	0	7	0
1999	152	145	2	0	5	0
2000	141	134	6	0	1	0
2001	145	142	1	0	1	1
2002	137	126	2	0	8	1
2003	140	115	23	0	2	0
2004	169	127	41	0	1	0
2005	168	131	35	0	2	0
2006	156	111	44	0	1	0
2007	177	143	29	0	5	0
2008	208	146	51	7	4	0
Sum	1896	1599	241	7	52	2

[70] Today, the urgent preliminary ruling procedure is governed by articles 107-114 of the Rules of Procedure of the Court of Justice.

The Reports for the Hearing were the core documents in the coding, in particular for the identification of Member States' observations. In addition, the coders also used the *Judgments* delivered by the CJEU and the *Opinions of the Advocate Generals,* which were available on the website of the CJEU. These documents contained not only the positions of the AG and the final decision by the CJEU, but also relevant background information and legal analysis of the cases, which proved useful for the coders when defining the legal issues and the positions of the participating actors. In those few cases where Member State observations were heard only orally, we used the judgment of the CJEU and the opinion of the AG to derive information on the content of the observations. For some of the other variables in the dataset other sources were used, including EUR-Lex and other websites.

Svensk sammanfattning

EU-domstolen har historiskt haft en central roll för utvecklingen av EUs rättssystem. Men trots att domstolen är en juridisk institution uppfattas dess beslut ofta som ”politiska” eftersom dessa har stor inverkan på ekonomiska och sociala förhållanden i unionens medlemsstater. Domstolen har haft stor betydelse till exempel inom områden som rör arbetsmarknadsfrågor, människors möjligheter att röra sig fritt i Europa för att studera och söka arbete, gränsöverskridande hälso- och sjukvård och integritet på internet. EU-domstolen har till uppgift att tolka EU-rätten, och eftersom den senare ofta är öppen för olika tolkningar finns utrymme för domstolen att driva utvecklingen i den riktning man föredrar. Historiskt har detta inte sällan skett under protester från en eller flera av EU:s medlemsstater som önskat en annan tolkning. Ett exempel från det svenska sammanhanget är den uppmärksammade Laval-domen från 2007, som har fått stor betydelse för förhållandena på den svenska arbetsmarknaden.

Den här rapporten behandlar spänningsfältet mellan juridik och politik i utvecklingen av EU-rätten. Den redogör för några av huvudresultaten från ett forskningsprojekt vid Göteborgs universitet, som har studerat förhållandet mellan EU-domstolen och medlemsstaternas regeringar när det gäller tolkningen av EU-rätten.[71] I ärenden som rör så kallade *förhandsavgöranden*, vilket är det viktigaste juridiska instrumentet för utvecklingen av en enhetlig rättsordning i EU, har medlemsstaternas regeringar möjlighet att komma med synpunkter på de frågor som reses. Sådana synpunkter benämns ”observationer till EU-domstolen”, och ska lämnas in skriftligt senast två månader efter det att ett ärende har väckts. Ärendena kommer i sin tur från nationella domstolar, som kan ställa frågor till EU-domstolen om hur de i enskilda fall ska tolka EU-rätten. Genom observationerna finns alltså en möjlighet för den exekutiva politiska makten i medlemsstaterna att ge råd, vägleda eller kanske trycka på domstolen i den riktning man önskar. Med tanke på den betydelse EU-domstolens avgöranden har fått på centrala policyområden i europeisk politik, borde den här möjligheten att göra sin röst hörd vara av stor betydelse för regeringarna.

Rapporten visar dock på en betydande variation när det gäller hur unionens medlemsstater har utnyttjat möjligheten att påverka EU-domstolen genom sina observationer. En del regeringar är avsevärt mer aktiva än andra. Detta är anmärkningsvärt, inte minst eftersom ett annat viktigt resultat som redovisas i rapporten är att aktivitet ofta kan ”löna sig”, i den meningen att domstolen tar intryck av de synpunkter regeringarna för fram. Vi visar att det finns ett tydligt

[71] *The European Court of Justice as a political actor and arena: Analyzing Member States' observations under the preliminary reference procedure*. Projektet har finansierats av Riksbankens Jubileumsfond. Projektledare har varit Daniel Naurin och Per Cramér vid Centrum för Europaforskning vid Göteborgs Universitet (CERGU).

statistiskt samband mellan den position regeringarna driver och det beslut domstolen fattar, med hänsyn taget till andra faktorer som också spelar in.

Det empiriska materialet i rapporten bygger på en mycket omfattande datainsamling, som innefattar kvalitativ kodning av 3 845 rättsliga frågor ställda till EU-domstolen under åren 1997-2008. I varje fråga har vi identifierat inte bara EU-domstolens, EU-kommissionens och generaladvokatens positioner, utan även de observationer som har gjorts av EUs regeringar. Det senare är unikt, då EU-domstolen sedan 1994 inte längre publicerar de *"Reports for the Hearing"* där dessa observationer sammanfattas, vilket har försvårat systematisk forskning i ämnet. Det här projektet fick dock tillgång till rapporterna genom det svenska Utrikesdepartementet.

Den skilda aktivitetsgraden mellan medlemsstaterna, och det tydliga sambandet mellan regeringarnas positioner och EU-domstolens beslut, är två av de viktiga resultat rapporten kan visa på. Att domstolen tar intryck av regeringarnas ståndpunkter har sannolikt flera orsaker. Å ena sidan kan regeringarnas inlägg ses som bidrag till en gemensam dialog mellan den politiska och den juridiska sidan av EU-systemet om hur EU-rätten bör utvecklas. Å andra sidan kan man också förstå regeringarnas och domstolens agerande som ett strategiskt spel, där båda sidor, ömsesidigt beroende, försöker nå sina specifika målsättningar.

Vi finner också mönster i materialet som tydligt visar hur olika aktörer tolkar EU-rätten utifrån sina specifika perspektiv. När det gäller inställningen till i vilken mån EU-rätten bör breddas och fördjupas, på bekostnad av befintliga nationella lagar och regler, finns en tydlig skillnad mellan EU-domstolen och kommissionen å den ena sidan, och medlemsstaternas regeringar å den andra sidan. Domstolen har en tydlig tendens att vilja fördjupa den europeiska rättsliga integrationen och därmed i förlängningen även sin egen institutionella status.

Men vi finner också viktiga skillnader mellan medlemsstaternas regeringar. Det gäller i viss mån inställningen till fördjupad integration, men framförallt i frågor som kan kopplas till det vi brukar betrakta som vänster-höger-politik. Medlemsstaterna har historiskt valt olika sätt att organisera sina välfärdssystem när det gäller arbetsmarknadsmodeller, skatter och sociala utgifter. Dessa skillnader reflekteras tydligt i regeringarnas observationer, vilket pekar på den politiska laddningen i många av de beslut EU-domstolen fattar.

För svensk del framstår resultaten i rapporten som en paradox: Å den ena sidan har Sverige varit en förvånansvärt passiv aktör på den europeiska juridiska arenan under den period vi har studerat. Av de länder som har varit medlemmar under hela undersökningsperioden, är Sverige det land som har lämnat in minst antal observationer när det gäller förhandsavgöranden från andra länder än det egna. Å den andra sidan är Sverige den medlemsstat som varit mest lyckosam av alla när det gäller att få som man vill i EU-domstolen. Sammantaget framstår

passiviteten som en bortkastad möjlighet att påverka i för Sverige viktiga frågor. Vår mer policyorienterade slutsats är därför att den svenska regeringen borde se över rutinerna när det gäller hur och när man bestämmer sig för att göra sin röst hörd gentemot EU-domstolen.

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"The Swedish case is particularly striking in this respect, as Sweden is both one of the most passive Member States in terms of governmental activity, yet one of the most successful with respect to seeing its positions prevail in final Court rulings."

Per Cramér, Olof Larsson, Andreas Moberg and Daniel Naurin

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