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NOT INDICTED, AND YET THEY DO CARE

Why EU Governments file Observations to Cases before the ECJ

Julian Dederke

Centre for European Research (CERGU)
University of Gothenburg
Box 711, SE 405 30 GÖTEBORG
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Abstract

The European Court of Justice (ECJ) has been described not only as Europe's constitutional court, but also as a politico-legal arena. Inter-institutional dynamics and conflicts between the branches of power manifest here. In this context, third-party interventions in court procedures deserve additional attention. It is mainly member state (MS) governments who act as third parties in ECJ cases by filing 'observation' letters in preliminary reference procedures (PRP) during which national courts refer questions to the ECJ. Recent research shows that number and preference of MS observations indeed have an effect on ECJ rulings. Third-party involvement evidently makes a difference at court. However, little is known about the factors that motivate governments to participate as third parties. Building on theory and empirical insight in *amicus curiae* participation before the US Supreme Court this paper asks which factors explain why and when EU MSs file observations in PRP. Should it only be the legal importance of a case which is decisive or do MSs care about court cases due to political reasons? The statistical analysis builds on two datasets. One covers all PRP referred by national courts between 1997 and 2008, including all submitted observations. It is matched with data that provides insight into political positions of MS governments and the political salience of issues that were controversial among MSs during the legislative process. The matched data allows a logistic regression for 915 country-cases. It is shown that it is not only the legal importance of a case but also sincere political positions which drive third-party involvement at court. MSs care about PRP because of their political salience. A major contribution is the differentiation and operationalization of legal importance and political salience of a court case.

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Abbreviations

COM	– European Commission
DS1	– dataset 1
DS2	– dataset 2
ECJ	– European Court of Justice
EP	– European Parliament
EU15	– 15 member states of the European Union prior to 1 May 2004
IC	– international court
MS(G)	– EU member state (government)
PRP	– Preliminary reference procedure
USSC	– United States Supreme Court

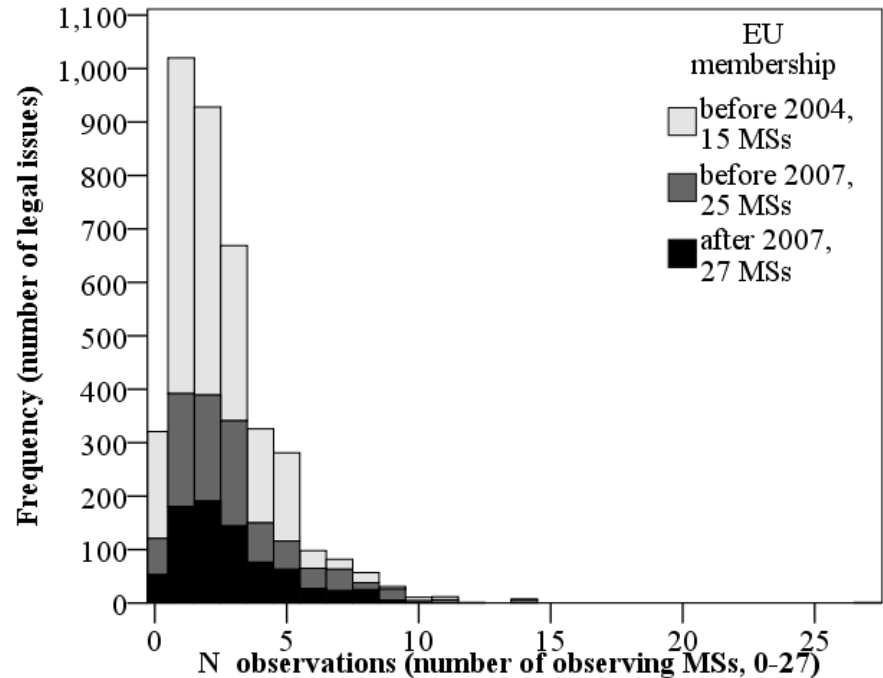
1 Introduction

Judicial review in the European Community (EC) and the EU played an important role in course of the European integration process. In landmark judgements the European Court of Justice (ECJ) established general legal principles which contributed to a “constitutionalization” of the EU (cf. Christiansen and Reh 2009, ch. 1; Pollack 2013, 1260). This facilitated the emergence of a constitutional equilibrium or “architecture” (Hix and Høyland 2011, 101). The ECJ has been described not only as Europe’s constitutional court (Weiler 1991, 2417, 2428-9), but also as a politico-legal arena (Naurin and Cramér 2009). Inter-institutional conflicts and dynamics between the branches of power manifest here. Judges serve as final arbiters at court, but also member state governments (MSGs) play important roles in court procedures. They can be either parties to the dispute in a court case or take part in a court procedure as so-called ‘third parties’ through filing intervention or observation letters. These ‘third-party’ letters make a difference in court procedures. Observation letters to the Court are an instrument for governments to engage in the EU’s legal arena, and to have a say in court procedures which have proven to shape the EU and its integration process. At the same time, observations also provide the Court with legal interpretations and with information on political positions of the observing MSGs. Prominent articles in the American Political Science Review resulted in a debate on the influence of such observations on ECJ judgements (Carrubba *et al.* 2008; Stone Sweet and Brunell 2012; Carrubba *et al.* 2012). Similar to studies on the effect of third-party letters in other courts (cf. Collins 2007; Collins *et al.* 2015) recent research shows that EU MS observations indeed have an effect on ECJ rulings (Carrubba and Gabel 2014; Larsson and Naurin 2016). The number of observing MSs varies considerably across court cases and across legal issues. In the prominent *Laval* case (C-341/05), for example, fourteen MSs handed in observations to the Court, while in many other procedures there are mostly one to three MSs who send their opinions to the EU’s highest court. A frequency distribution reveals substantial variation in the cumulated number of MS observations (figure 1). This variation is not only present across different court cases (figure 1.1), but different MSs do also use the instrument of observations with varying frequency (figure 1.2; also cf. Cramer *et al.* 2016). The explanation of this phenomenon has not been covered by empirical research so far and little is known about governments’ motivations to participate as third parties in ECJ cases. It is unclear, what draws a government’s attention to a case, which cases are considered relevant enough, and when observations are filed. Given that observations have an effect on court rulings, their variation

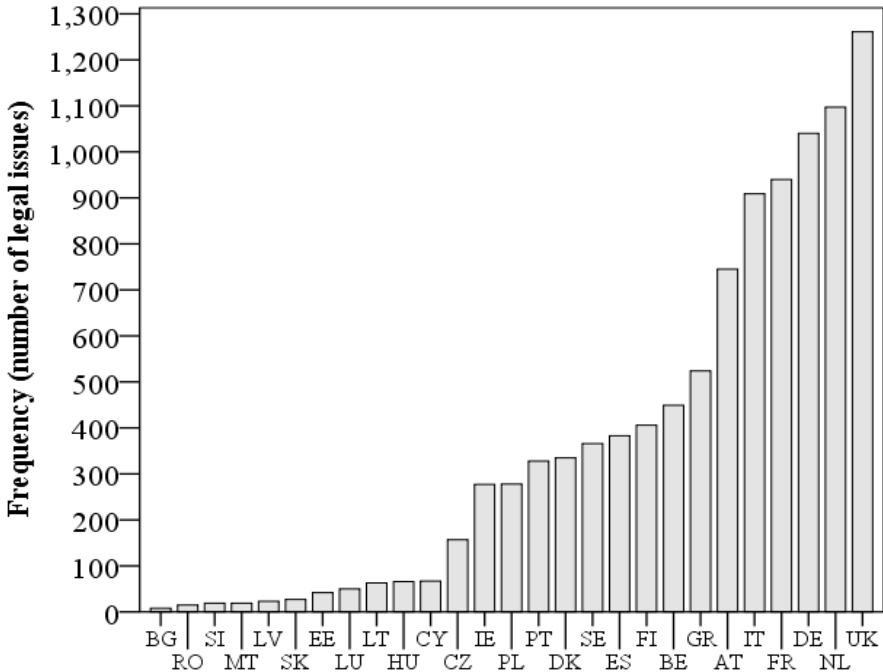
is an interesting phenomenon for empirical investigation here and in future analyses. In order to address the identified research gap, this paper asks: *Which factors explain why and when EU MSs file observations in cases before the ECJ?*

Figure 1. Unexplained variation of MS observations in ECJ procedures

1.1. Distribution of the cumulated number of MS observations (0-27) for 3845 legal issues



1.2. Frequency of observations per MS for 3845 legal issues



Source: dataset Naurin et al. (2013), which is structured alongside legal issues. Further explanation for this structure will be provided later on in section 6; created with IBM SPSS Statistics 23.

2 Objectives and Outline

There are two underlying goals driving this analysis. The *first objective (i)* is to discover predictors for the behavior of MSGs as third parties before the ECJ. This can give insight into the reasons why governments participate in court procedures, even if they are no direct parties to the dispute. It will shed light on situations when governments employ the instruments they have at hand to get involved in legal procedures. This can facilitate a better understanding of the relationship between EU governments, which are also part of the EU legislature (Council of the EU), and the judiciary.

A *second objective (ii)* is to discriminate between factors that express political salience of a legal conflict on the one hand and legal importance on the other hand. Judicial decisions are usually considered as insulated from political pressure and public attention. Courts are largely seen as neutral arbiters, sheltered by the law which serves as a “mask and shield” (Burley and Mattli 1993, 72). But there are reasons to assume that although court procedures take place in a primarily legal sphere, political motivations should matter as well when MSGs engage in ECJ cases. Although governments might have a hard time to fully grasp the developments in the legal sphere (which is “masked” by the law), they might still watch the Court due to the political relevance of its actions. Such findings could substantiate the claim that the ECJ as well as courts in general should be considered as legal *and* political arenas (Naurin and Cramér 2009) in which both, political as well as legal mechanisms, take place. Therefore, this paper will capture and test the difference between legal importance and political salience of ECJ cases. In order to discriminate between both concepts, two hypotheses will guide this paper:

H1 (legal importance): The higher the legal importance of an ECJ case is, the more likely MSs will file observations.

While the legal importance should be expressed with values that describe stable characteristics of the respective court case, the political salience of a case should vary for each MS:

H2 (political salience): The higher the political salience of an ECJ case is for a MS, the more likely that MS will file an observation.

These hypotheses will be embedded in the theoretical context and linked to previous research later on, thereby showing that a clear research gap is addressed with this paper. For the outlined

purpose and for the hypothesis test a quantitative analysis based on several statistical models will be conducted, measuring effects-of-causes (cf. Goertz and Mahoney 2012). The study follows a positivist understanding of reality and the way in which relationships between and patterns of phenomena can be captured. A deductive approach will be applied, building on existing theoretical expectations that guide the empirical analysis. The analysis builds on two datasets. One offers variables that capture the characteristics of many ECJ cases (Naurin *et al.* 2013) and a second one allows the operationalization of political salience (Thomson *et al.* 2012; Thomson 2011). Both will be introduced in greater detail later on.

Before the research question will be addressed again in a direct way in order to operationalize the key concepts and connect them to an analytical model, this paper stresses the relevance of the ECJ for legal and political science scholarship (section 3). That part also covers the relationship between legislature and judiciary in the EU, which is reflected in the overarching theoretical debates in EU integration studies and the opposition of intergovernmentalist and supranationalist school of thought. Thereafter, section 4 offers insight into previous research and theoretical considerations that further specify the relationship between governments and courts. The following section (5) reintroduces and refines the hypotheses based on insights from the previous sections and outlines the analytical model. Section 6 elaborates on the data and methods used in this paper. Thereafter, analysis and results are presented (section 7). Section 8 summarizes and discusses the findings, thereby also taking into account avenues for future research. The paper concludes with section 9.

3 The European Court of Justice and its Role for the Union

ECJ judgements affected the European integration process considerably. Prominent rulings built on one another step by step and contributed to the ECJ's primary goal to construct and maintain an "effective legal system" (Wincott 1995, 584). Making use of its mandate as the Community's judiciary, the ECJ consolidated the legal system around core legal principles ('doctrines'). Influential and much-noticed court rulings were the basis for these principles, such as the judgements which established the doctrines on *direct effect* (Van Gend en Loos, C-26/62) and *supremacy* (Costa vs. ENEL, C-6/64) or *mutual recognition* (Cassis de Dijon, C-120/78). In that way, *integration through law* contributed to European integration considerably (Kelemen and Schmidt 2012; Scharpf 2012; Stone Sweet 2004). This development resulted in an intense public and academic debate on the direction of the integration project. It also triggered the question whether MSGs remained the true "Masters of

the Treaty” (Alter 1998, also cf. Alter 2000). The Community was faced with a court that seemed to induce a lasting “Transformation of Europe” (Weiler 1991). This led to an ongoing debate about which role legal integration has and if the effects of an integrationist court have (not) been foreseen by the MSs. The dividing line runs between intergovernmentalist scholars on the one side (Garrett 1992; Garrett 1995; Garrett and Weingast 1993) and neofunctionalist or supranationalist scholars on the other one (Burley and Mattli 1993; Alter 1998; Stone Sweet and Brunell 1998; Stone Sweet 2004). A core question connected to that debate is in how far the Court acted beyond the limits of the mandate its creators (MSs) intended for the EU’s judiciary.

By creating an effective community legal system with legal provisions that outweigh national ones (‘supremacy’) the EU’s highest court clearly shaped the integration process. The ECJ allegedly “expanded its jurisdictional authority well beyond its original narrow boundaries” by means of “creative interpretation” (Alter and Meunier-Aitsahalia 1994, 535). These changes in the community legal system have also been accepted by the national courts in the MSs, as Weiler shows (Weiler 1991, 2418, 2451). However, the MSs’ consent with all these developments is far from unquestioned. There is evidence for resistance among the MSs against the expansion of the ECJ’s authority. It was exemplarily shown in the cases of the ‘Luxembourg protocol’ (Fritz 2015), the ‘Barber Protocol’ and the treaty article 173 (Pollack 2013, 1289). This kind of resistance justifies doubts about the picture of the ECJ as a court that is ‘running free’, pursuing its own agenda. It could illustrate effective efforts to fence in a court with strong preferences for further integration. Meanwhile, the profound political impact of the ECJ’s rulings are beyond question. However, while court rulings and procedures undoubtedly have (had) a high importance for the European integration process, MSs’ role in those procedures is still debated and unclear to a large extent. This justifies a closer look at the roles MSs take at court and the debates surrounding these roles.

3.1 EU member states before the ECJ – a story of principals, agents, parties and observers

The relationship between MSs and the ECJ can be described in various ways, attributing MSs a certain role in the EU’s inter-institutional framework. In delegation theory MSs are considered ‘principals’ who delegated tasks to other institutions such as the ECJ. The Court as an ‘agent’ fulfils a specific mandate (EU’s judiciary) and has been empowered with authority to a certain degree (Pollack 2003). This authority, however, is conventionally considered to be

constrained in principal-agent theory as well as in intergovernmentalism in EU studies. The Court is constrained to act within the boundaries of its mandate and crossing these boundaries can lead to repercussions from the side of the MSGs which could have severe implications for the ECJ and its judges. A main question is how independent an institution like the ECJ is (or has become) from its creators. In the debate on the ECJ's independence some scholars maintain the (intergovernmentalist) view that MSs can alter the EU's legal order and competences of the ECJ at any time. They claim that there is *no* court-driven integration dynamic emerging independently from MS preferences (cf. Garrett 1992; Garrett 1995; Garrett and Weingast 1993). Others, however, consider the ECJ as “profoundly independent and largely unconstrained” by MSGs (Pollack 2013, 1267; also cf. Burley and Mattli 1993; Stone Sweet 2004; Kelemen 2012). In this view the ECJ is an agent ‘running free’ beyond its mandate (‘agency drift’). Most recently, the MSs have even been described as agents of the ECJ (Davies 2016), thereby reversing the conventional view on the relationship in which MSs as principals are under control of the institution they created.¹ Beyond these big theory strands the position of MSs in the EU's inter-institutional setting can be tested better on basis of the specific roles MSs take. While MSGs assume the role as legislator in the Council of the EU (besides EP), they also oftentimes assume a role as parties to the dispute in a court case (typically infringement procedures, cf. e.g. pending case *COM vs. UK*, C-308/14), or as third parties who intervene in or send observations to court cases.² It is the latter role as third parties before the ECJ which is of specific interest here and which will be analyzed later on.

3.2 Why court rulings matter, and why we should care

Courts represent final arbiters who settle disputes between conflicting parties. They evaluate the facts of a case and interpret it based on previous case law and fundamental legal provisions such as constitutions, treaties or codes of law. At the same time, they can also be considered as policy-makers (Wasserfallen 2010) whose decisions have profound political impact.

It is only quite recently that empirical studies matured that ask for the relative power of the Court vis-à-vis the other political institutions and whether the ECJ is even “ever more powerful” (Martinsen 2015a). Early political science research on the ECJ engaged first and foremost in a (mainly theoretical) debate on the Court's role for the integration process (for a

¹ For the Court as object vs. subject of delegation also cf. Pollack (2003, 156).

² The term ‘interventions’ is used in case of infringement procedures, while ‘observations’ are filed to preliminary reference procedures (PRP). The focus on PRP in this paper will be explained later on in section 3.3.

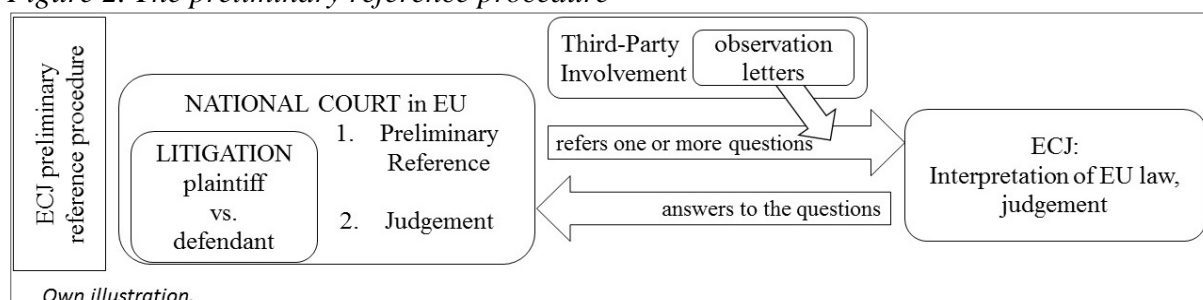
literature review cf. Conant 2007). It provided rather anecdotal evidence on the relationship between the Court and governments or focused on the qualitative analysis of certain landmark rulings. More recent research focuses on the penetration of national policies by ECJ judgements (Schmidt 2014), national responses to court judgements (Blauberger 2012; Blauberger 2014), and “judicial influence on policy outputs” (Martinsen 2015b). Another strand of literature employs advanced inferential statistics with large datasets on ECJ cases. The authors aim at results that allow generalizable statements about the dynamics that are at play at court (Carrubba *et al.* 2008; Stone Sweet and Brunell 2012; Carrubba *et al.* 2012; Carrubba and Gabel 2014; Larsson and Naurin 2016). The fact that political scientists increasingly engage in research on the ECJ shows that it is worth to look at it as an institution among others and to apply social scientists’ methodological toolbox to study a sphere which is the natural habitat of law scholars.

Courts are not only worth to be studied as actors and institutions among others, but also because their actions have profound impact on political and societal developments. In recent years a broad international trend of ‘judicialization’ is detected across different political regimes (Hirschl 2009). It refers to the development that an increasing number of societal questions is finally decided by courts or arbitral tribunals. With this “ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies” (Hirschl 2008, 94) judicialization is an expression of the increase of the judiciary’s authority. Similarly, the increasing caseload of the ECJ (cf. Alter 2014, 107) is an expression of authority increase. Judicialization is expected to be particularly strong in the EU (Kelemen 2013, 295; Hirschl 2009, 122). As the authority of courts seems to increase, it is of particular interest, how governments react to this. How do they exercise their authority in the realm of law and how do they use the instruments they have at hand in order to engage in court procedures? One of these instruments is the involvement in court cases as a third party, articulated through observations in preliminary reference procedures (PRP). PRP are those procedures before the ECJ in which national EU courts send questions to the ECJ regarding the correct application of EU law. Many of the most important judgements in the history of European integration were based on these preliminary references.

3.3 Court rulings matter, and PRP even more

Beyond the question whether the effects of important rulings in history of the EU were in line with MSGs' preferences, the ECJ has proven to be an engine of integration (Pollack 2003, ch. 3). It was preliminary references from national EU courts which provided the basis for the establishment of core legal principles ('doctrines') such as *direct effect*, *supremacy*, and *mutual recognition*. Also cases like the highly controversial *Laval* ruling (C-341/05), rulings which filled the earlier rather 'empty' concept of EU citizenship (*Grzelczyk*, C-184/99; *Trojani*, C-456/02) and, more recently, controversial cases on social benefits for non-national EU citizens (*Dano*, C-333/13; *Alimanovic*, C-67/14), do all rest upon preliminary references. In all of them national courts asked the ECJ to clarify questions related to EU law (cf. figure 2 for illustration).

Figure 2. The preliminary reference procedure



Preliminary rulings based on the procedural rules of Art. 267 of the Treaty on the Functioning of the EU (TFEU) have in fact been the most important judgements in the history of European integration. The PRP is considered as “the powerbase” of the ECJ (Hornuf and Voigt 2015, also cf. Carrubba and Murrah 2005). It provides the ECJ with cases in which it interprets legal disputes on national level in face of community law, applies the core doctrines of EU law, and embeds new legal conflicts in earlier case law (cf. Derlén and Lindholm 2015 on the characteristics of so-called ‘precedent’, i.e. previous case law).

Much scholarly attention has been paid to the interaction of national courts and the ECJ. A primary topic of interest is the explanation of substantially different referral rates – i.e. the amount of preliminary references – from different MSs (Golub 1996; Tridimas and Tridimas 2004, 130–131; Wind *et al.* 2009; Wind 2010). National courts in some MSs were identified as “reference-averse” while others are “prone to refer” (Broberg and Fenger 2013, 501). Recently, Hübner (2015) provided the most extensive study in the field, identifying those factors which have core explanatory power for the question of whether a procedure is referred to the ECJ by a national court or not. In order to identify reasons for the phenomenon that

courts from some MSs use the instrument of preliminary references more often than those from other MSs all these studies employ *references as the dependent variable*. This strand of research gives an insight into the relationship between national courts and the ECJ, and the character of the PRP as an empowering instrument for the ECJ. Besides these court-court relationships it is the relationships between different branches of power which are of particular interest here.

3.4 The relationship of legislature and judiciary: judgements in PRP are influenced by MS observations

This paper aims to contribute to the knowledge on government-court relations with a quantitative empirical analysis of MS observations to ECJ procedures. It engages in the debate on legislative-judicial relationships which matters for both, legal as well as political science scholarship, and in particular for the research field of ‘Judicial Politics’. This field considers courts and judges as policy-makers whose preferences for a certain policy outcome influence their judgements.³ The ECJ has been accused of ‘judicial activism’, i.e. decisions at the edge of or beyond its mandate that have profound political consequences (Stone Sweet and Brunell 2013). It has been argued that the ECJ was enabled by a “close to unlimited” latitude (Stone Sweet 2004, 9). In line with integrationist preferences of EU judges (Vauchez 2012), such an activist decision-making lets the Court appear as a key driver of integration and also liberalization in the EU (cf. Pollack 2003; Höpner and Schäfer 2010). However, the ECJ is also part of an inter-institutional environment. When looking at judges and courts as policy-makers, their actions are expected to be closely watched by other political institutions and societal groups. These actors might try to prevent courts to decide in one or the other way and might seek to influence a judgement. Governments have political preferences and own positions on legal issues. They might not be willing to grant the ECJ unlimited latitude. This perspective justifies a general call for an increased understanding of the relationship between legislature and judiciary (cf. Hübner 2015, 81).

Judicial activism can be met with resistance and might be constrained due to MS opposition (cf. Pollack 2013, 1265). The ECJ’s independence from MS positions is in fact one of the most vigorously discussed topics regarding legislature-judiciary relationships, partly resembling the US literature on judicial independence (Cross 2009). Governments do not only

³ While research on judicial politics has a long tradition in the USA (Spaeth 2009), connecting the disciplines of Law and Political Science, it is much younger in Europe and still an evolving research area.

have instruments at hand to make themselves heard in court procedures (observations). There are different instruments through which the MSs as a collective can exert pressure on the Court (Larsson and Naurin 2016, 385–387) if it judges in a way that antagonizes MSs. As the legislature within the EU (Council, besides the EP) they can even change the legal framework as a reaction to a court ruling. Such legislative changes in reaction to court rulings can reverse or alleviate the effects of a judgement and are therefore called ‘legislative override’. This possibility of legislation that alters or negates the effect of court rulings are a threat for the ECJ, its authority and its independence. In order to explain the conflictual relationship between legislature and judiciary, legislative override will be used here as the most illustrative example among the mechanisms through which the Court can be constrained by MS positions.

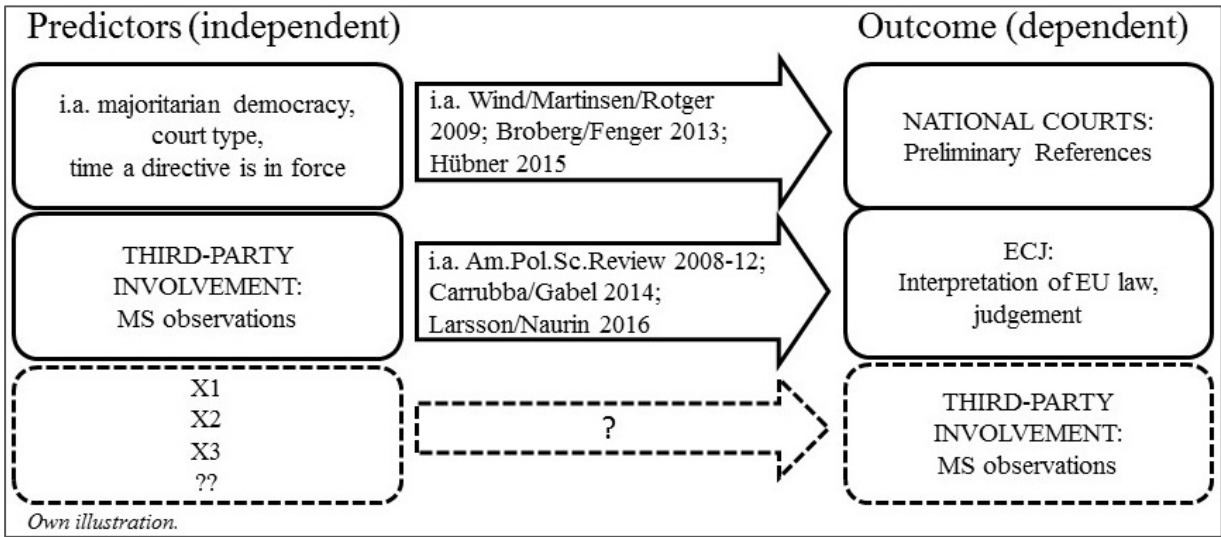
The question in how far the MSs as part of the EU legislature (Council) impose credible constraints on the ECJ culminated in a prominent debate in the *American Political Science Review* (Carrubba *et al.* 2008; Stone Sweet and Brunell 2012; Carrubba *et al.* 2012). Carrubba *et al.* showed with their analyses that there are threats for the court and its authority. With new laws the legislature could make a court ruling void and ‘override’ court decisions. A MS could also decide not to comply with an unpleasant ruling (‘non-compliance’). According to Carrubba *et al.* such threats let the ECJ alleviate its decisions. The Court partly adapts its rulings based on the signals it receives from the MSs. These signals, transported by observations, provide the Court with information about what is and what is not tolerable for the MSs. They function as indicators for MSs’ discontent or potential resistance. Based on the positions MSs articulate in observations the ECJ adjusts its position in order to „mollify those political interests responsible for compliance and legislation” (Carrubba *et al.* 2008, 449). Stone Sweet and Brunell (2012), on the other hand, rejected this view and consider the ECJ as largely autonomous and as uninfluenced by MS positions. However, Carrubba *et al.* in a later paper (2012) substantiated their findings and once again contradicted the view that the Court had a “close to unlimited” latitude (Stone Sweet 2004, 9). Taking up that debate, Larsson and Naurin (2016) provided further empirical evidence for credible constraints imposed by the legislature on the ECJ. While the ECJ is influenced by the latent threat of override, it will try to prevent such situations in order to uphold its authority and independence. Antagonizing a significant number of MSs is a risk for the Court. But it is “concerned and uncertain about the probability of override, and therefore sensitive to cues about the state of play in the political institutions” (Larsson and Naurin 2016, 383) and “the court’s decision will depend on the

information it receives” (ibid., 385). Not only the number of and articulated positions in observations affect the ECJ’s judgement pattern. Also the modus matters in which the Council of the EU as legislative body representing MSGs could potentially override judicial decisions (qualified majority or unanimity voting). Overall, the empirical evidence speaks for credible constraints for the ECJ. It has been shown that legislative override is a threat for the Court and that MS observations in court procedures provide the ECJ with information on potential MS resistance. Informational uncertainty and third-party involvement make a difference since they cause the ECJ to partly adjust its decisions. All these studies (Carrubba *et al.* 2008; Stone Sweet and Brunell 2012; Carrubba *et al.* 2012; Carrubba and Gabel 2014; Larsson and Naurin 2016) measure the effect of MS observations on ECJ rulings, thus employing *ECJ judgements as the dependent variable* in statistical models. But which factors explain why MSs file observations? When do they actually use the instruments they have at hand to exert pressure on the Court or at least to just try to make the Court listen?

3.5 When do member state governments engage in PRP?

As shown in the previous section, there is a growing body of empirical research which describes how and explains why the number of preliminary references differs between different countries and different kinds of courts (references as dependent variable, section 3.2.1). There is also a growing body of literature on the question if and how strongly MS positions and potential resistance against the Court’s actions, articulated through observations, can affect ECJ judgements (judgements as dependent variable, section 3.2.2). The question when and why MSs are filing observations and which patterns can be observed, however, is still largely unexplored, with a few exceptions of qualitative and descriptive statistical nature (van Stralen 2015; Cramer *et al.* 2016). Statistical analyses with MS observations as dependent variable that measure the effect size of different predictors are not available so far. This shows that most scholarly attention on the relationship between MSGs and ECJ focuses on questions like *(When) Does the Court listen?;* or *Does the input of MSs have an effect on the Court?* This paper shifts the focus towards MSs’ decisions to participate in a case, thus asking *(When and Why) Do the MSs try to make themselves heard?* Other than in previous seminal work on the MS-ECJ relationship, MS observations will serve as dependent instead of independent variable here (cf. figure 3).

Figure 3. The research gap



It was shown earlier that this phenomenon deserves attention due to the considerable variation in MS observations, across court cases and across MSs, which is unexplained so far (cf. figure 1, p. 2). Accordingly, this paper focuses on the refined research question: *Which factors explain why and when EU MSs file observations in preliminary reference procedures before the ECJ?* Based on this design choice the analytical model will be explained later on in section 5.

The previous section stressed the relevance of inter-institutional and inter-branch relationships in the EU’s political system in light of integration theory and the role of the ECJ for the integration process. This framework mainly serves as a clarification of relevance for the issues analyzed here. In order to draw empirical inferences for the question posed in this paper, however, one has to build on more fine-grained, middle-range theoretical perspectives and analyze MSs and their relation to the Court in their *specific role as third parties* in legal procedures.

4 Theory and previous Research – Governments as third Parties

4.1 The role of third parties in court procedures

Overall, the literature on the role of MSs as third parties before the ECJ remains rather limited in its theoretical endeavors (for rather tentative exceptions cf. Mortelmans 1979; Granger 2004; Granger 2006). Van Stralen (2015) in his qualitative account provides some initial insight with theory-building character. Beyond that, it stills seems most promising to lean on theoretical contributions which clarify the role of third parties before other courts than the ECJ, most prominently literature on the US Supreme Court (USSC; Caldeira and Wright 1990; Collins and Solowiej 2007; Collins 2008).⁴ There are various courts and tribunals in which third-party involvement takes place (Carrubba and Gabel 2014, 21 et seq.). But it is in particular the political science and legal research connected to the USSC which offers a broad account on the dynamics of third-party involvement in court cases.

Court procedures can be disaggregated into several stages for analytical purpose. Instead of analyzing mobilization in the initial litigation stage between plaintiff and defendant (Zemans 1982), it is the stage of third-party intervention which is in focus here. The paper aims to explain why and when *MSGs as third parties* are mobilized to partake in a court procedure. Consequently, this paper relies on a dispute-centered approach to processes of legal mobilization, wherein the initial litigation is “just one potential dimension or phase of a larger, complex, dynamic, multistage process of disputing among various parties” (McCann 2009, 524). This *multi-stage perspective* fits particularly well to the PRP before the ECJ, which is by definition only invoked when a case is referred to the EU-level, on which MSGs can appear as observers (cf. figure 2, p. 8). A court dispute can evolve between direct parties of a case; it can be intensified through the gathering of actor coalitions on one or the other side of a procedure – whereby third parties can align to one of them –; and dispute can also crystallize between third parties themselves. Finally, conflict can also materialize between legislature and judiciary within the concerned political system. The latter conflict is articulated in the judicial politics game outlined above, in which the potential for legislative override of judicial decisions is a threat for the court.

⁴ Third parties in court procedures in the US but also other contexts are mostly called ‘amicus curiae’. Further specification of the term will be provided in section 4.2.

Courts evaluate the facts of a case and interpret it in face of previous case law and fundamental legal provisions such as constitutions, treaties or codes of law. Their way of handling a procedure is based on factors such as the legal regime (common vs. civil law context), a court's institutional design, and the regulations of the specific legal procedure. Among them are also the rules that regulate under which conditions third parties have access to a procedure. The information a court receives through third-party letters is highly important for it (Larsson and Naurin 2016, 389). Under conditions in which legislative override has been identified as a credible threat for a court's authority (cf. above), gathering information on legislators' preferences is crucial for the judiciary. At the same time, it is a precious tool for third parties to articulate their positions. Participation as a third party should be seen as one of the ways through which actors are granted "court access" (Hönnige 2010, 351). Third-party letters are tools states/governments have at hand to exert pressure on a court. In sum, letters which provide information on third parties' positions are key instruments for both sides: (a) the court which gathers information, and (b) the third parties which want to state their positions and to make themselves heard. Thus, third-party involvement serves the reduction of incomplete information as well as the articulation of positions.

4.2 The friends of the court: Amici curiae between provision of information and representation of interests

Given the high importance of theoretical as well as empirical literature on the USSC, the import of some key vocabulary seems appropriate and should also be advantageous for comparative purposes. A third party in court procedures in the US context is usually called 'amicus curiae'. The Encyclopædia Britannica (Encyclopædia Britannica 2016, n.pag.) defines an amicus curiae as

"(Latin: 'friend of the court')[...] one who assists the court by furnishing information or advice regarding questions of law or fact. He is not a party to a lawsuit and thus differs from an intervenor, who has a direct interest in the outcome of the lawsuit and is therefore permitted to participate as a party to the suit."

While procedural rules of different courts or tribunals might either allow interventions or amicus curiae briefs,⁵ the role of these two different sorts of third-party involvement does not differ fundamentally in effect. In fact, the character of amicus curiae briefs rather underwent a

⁵ The 'letters' sent by third parties are called 'amicus briefs'.

substantive transformation from a purely informational role in Roman law to a more partisan one in the US and UK judicial context (Collins 2008, 37–41). It changed “from neutral friendship to positive advocacy and partisanship” (Krislov 1963, 697), which shows that also amici can have a clear interest in the outcome of a lawsuit (also cf. Gleason and Provost 2016, 251).

While insight into the dynamics of third-party involvement in ECJ procedures remains limited so far (cf. above), a broad literature exists on the role of amici curiae in other courts or dispute settlement bodies, first and foremost on the USSC (cf. Caldeira and Wright 1990; Spriggs and Wahlbeck 1997; Comparato 2003; Collins 2008, ch. 3; also cf. Busch and Reinhardt 2006). However, even here the amount of literature on *intentions and causes* for amicus participation remains limited (Hansford 2004) apart from noteworthy, more recent exceptions (Lemos and Quinn 2015; Zuber *et al.* 2015; Gleason and Provost 2016). By contrast, the *effects and success* of amicus participation are focus of numerous articles (cf. i.a. o’Connor and Epstein 1983; Ennis 1983; Songer and Sheehan 1993; Kearney and Merrill 2000; Collins *et al.* 2015). Overall, the literature does not only allow initial insight into the dynamics of amicus participation, but offers theoretical guidance and the potential to contrast it with the situation before the ECJ.

Collins and Solowiej stress that the USSC is open to participation of many different interest and amici groups and that the cases dealt with at court are “salient” to a broad spectrum of actors or interests (2007, 955). However, they do not define *salience* or any threshold for it. They conclude that “group participation in the [USSC] is marked by substantial coalition formation and competition” (Collins and Solowiej 2007, 980), yet without observing direct conflict between the amici. A general need for research is emphasized to “identify the groups that forge long-term alliances with each other in their attempts to influence [...] courts” (ibid.). Identifying such alliances and comparing them to the ones that appear before the ECJ is also a potential avenue for future research. Both courts’ design and the regulations of their procedures highlight a key difference: Compared to the broad and diverse field of ‘organized interests’ that can be amici curiae before the USSC (cf. Zuber *et al.* 2015, 124 for an illustrative list), the instrument of observations in ECJ procedures is clearly restricted to some actors. While in context of the USSC also private parties can serve as amici curiae, the right to submit amici briefs to ECJ procedures is only granted to MSs, some other institutional

actors, and the parties to the dispute.⁶ In contrast to private parties, MS governments are granted preferential access to the ECJ as *amici curiae*. Therefore, a focus on MSs as *amici curiae* is more obvious here than in the US context. In general, the function of amicus briefs is the same in the US and EU context. With this comparative perspective and the imported vocabulary in mind one can recall the conclusion of the previous section. Amicus participation serves both sides' purposes: (i) *the judiciary* wants to collect information which is provided by *amici curiae*, (ii) and the latter ones are concerned with interest representation.

4.3 Governments as *amici curiae* before courts in a (quasi-)federal context

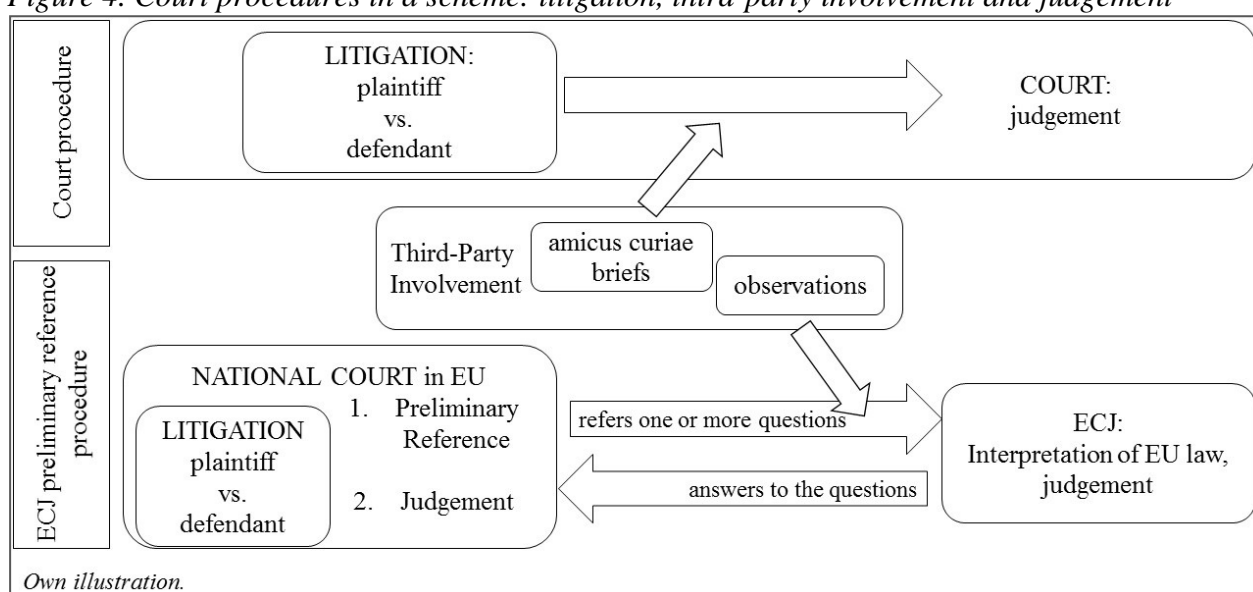
Although a broad variety of actors can participate as *amici curiae* before the USSC, “not all amici receive equal consideration. The most successful class of amici is governmental actors, particularly the federal solicitor general and state attorneys general” (Gleason and Provost 2016, 248). Each US state is represented by such an attorney general who is “the chief lawyer of a country or state who represents the government in legal matters” (Merriam-Webster 2016, n.pag.). Although the US is – other than the EU – a federal state, the role of single US states as third parties before the USSC comes very close to the one EU MSs take as amici before the ECJ. Similarly, the state attorney generals' decisions to (not) file an amicus brief come closest to the decisions of the legal advisors of EU MSs to (not) file an observation. Since governmental actors' amicus briefs are the most successful and therefore most relevant ones in the US context, they represent a good proxy to develop theoretical arguments, generate hypotheses and structure the empirical analysis envisaged in this paper.

Observations are instruments of EU governments to introduce their legal standpoint. But they can also serve the purpose of clarifying their political positions. They represent a means to signal the court and other parties what outcome of a case is preferred by the state and what is tolerable for the respective government. This gives the court an indication about which questions are uncontroversial and which could result in MS resistance if a ruling contradicts governments' preferences. Gleason and Provost state very clearly that in the US the state representatives “have strong policy preferences and often seek to shape case law in line with

⁶ According to Art. 96 of the Rules of Procedure of the European Court of Justice observing parties can be “the parties to the main proceedings”, the MSs, COM, “the institution which adopted the act the validity or interpretation of which is in dispute” (i.e. EP and Council of the EU), EEA states, EFTA surveillance authority and “non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement” (European Union 2012, 24).

their preferences” (2016, 248). States seek to influence court rulings in line with their policy positions. Moreover, they pursue this goal while at the same time governments have under certain conditions the power to override a court ruling if it violates their positions. Both these facts in combination once again strengthen three points: (a) it underlines the importance of legislature-judiciary relationships, (b) it justifies the focus on *governments* as amici curiae, and (c) clarifies the potential for a comparative perspective between USSC and ECJ. Drawing on existing research about amici participation in courts and bearing in mind similarities and differences of court design and procedural rules facilitates future comparison across courts and potential for the generalizability of findings (cf. figure 4).

Figure 4. Court procedures in a scheme: litigation, third-party involvement and judgement



Gleason and Provost stress the necessity to not only understand the success of states as amici curiae, “but also the mechanisms which prompt [state representatives] to participate” (Gleason and Provost 2016, 249). This strengthens the argument carried out earlier in this paper, that it is not only the question when the Court listens and how successful amici curiae are in influencing court decisions. For a profound understanding of causes and intentions of amicus participation we need to *ask if, when, and why MSs try to make themselves heard*.

4.4 Legal importance and political salience as determinants of amicus participation?

“When asked why they join amici briefs [...], state [attorney generals] ranked the importance of the issue ahead of everything else, even the probability of winning the case” (Provost 2011, 8, referring to Waltenburg and Swinford 1999).

This quote shows that state amici care about what is at stake in a court case. However, the “importance of the issue” is a rather vague concept. Neither Provost nor Waltenburg and Swinford differentiate between *legal* importance and *political* importance. In their study, state attorney generals are only asked to rate the item “importance of issue” on a scale (Waltenburg and Swinford 1999, 130), without specifying what this concept exactly refers to. Legal and political factors are likely to blur based on this measurement which makes it difficult to tell why exactly amici curiae care about a case. No matter whether one talks primarily about the realm of law or considers the ECJ as an arena of political conflict,⁷ the importance of a case is certainly a key to understand amicus participation. But how is it possible to differentiate legal importance and political salience of a case? Only if both can be separated conceptually, amicus behavior can be identified as guided by legal factors or political factors, or both to a certain extent.⁸

Most previous attempts to operationalize the *importance of a case* do not distinguish between legal importance and political salience. The available studies on state amicus participation in the US (Provost 2011; Gleason and Provost 2016) do also employ ‘case importance’, ‘political salience’ and ‘case salience’ as predictors for amicus participation (also cf. Zuber *et al.* 2015). However, also their operationalizations are not the most appropriate or/and suffer from the flaw that legal importance and political salience tend to blur, as will be shown later on. In the US context Cook (1993) stressed the point early that the importance of a case has a political and a legal dimension. The same should hold for ECJ cases. In line with the objectives of this paper (cf. p. 3) this section will first describe options to capture the legal importance of procedures and thereafter engage in a discussion on how to capture the political salience.

⁷ For a chapter on the challenge to determine the boundaries between Law and Politics cf. Shapiro (2009).

⁸ While ‘importance’ and ‘salience’ are linguistically close and often used interchangeably, legal importance and political salience will be differentiated from here on in order to guide the reader and to facilitate the conceptual differentiation in this paper also by wording.

Larsson et al. argue that the ECJ's decision on the size of the court chamber that deals with a case relative to the ECJ's full bench of judges (e.g. 5 out of 15) expresses how salient a case is "in the eyes of the court" (2016, 21). They employ the chamber size as a proxy for legal importance. What is convincing as an independent or control variable in their explanatory model, however, could be rather problematic here. The decision to allocate a court case to a certain court chamber is made only after MSs have submitted observations to a case.⁹ Therefore, the Court's decision on the chamber size might be influenced by the number of observations which were handed in and thus influenced by instruments which are part of the judicial politics game. As such, the chamber size could be an expression of a combination of both – the legal importance of a case and political salience, which makes it a suboptimal proxy. In the US context Bailey *et al.* (2005) could be identified as one of the few studies which make a clear distinction between political salience and legal salience. Legal salience is for them given in "cases in which the Court [...] either struck a law down as unconstitutional, or overturned or altered precedent [i.e. earlier case law, JD]", making it a dichotomous variable (Bailey *et al.* 2005, 79). Similarly, Collins uses a dichotomous "measure of *Legal Salience* that is scored 1 if the majority formally altered precedent or declared a local, state, or federal [law] unconstitutional and 0 otherwise" (Collins 2008, 157, emphasis in original). Bailey and Maltzman also stress the distinction between legal and policy motivations, stating that "[s]tatistically, [the] muddle of policy preferences and law creates an identification problem" (Bailey and Maltzman 2008, 1). This argument, applied by the authors to judges' preferences, should also be upheld when studying the behavior of amici curiae. Based on the aim to "identify legal concepts that may influence justices" the authors employ three legal doctrines "because of their salience in American jurisprudence" (Bailey and Maltzman 2008, 371). Connections to core legal doctrines (in the EU e.g. the principles of supremacy, direct effect) should in fact load a case with legal importance. Such legal importance should not only matter for judges (Collins 2008, 157–162), but equally so for any party involved in a legal case, also for governments as amici curiae. Besides the relevance of doctrines each court case concerns a varying number of legal acts. Arguably, the more legal acts a case concerns, the broader or more deep-rooting the imprint of the court's decision on the legal framework should be. Therefore, the number of legal acts a case concerns appears as an indicator for legal importance, supplementing affected doctrines as a criterion.

⁹ The information was gathered through direct email communication with the ECJ registry (cf. appendix A4).

The measurement and operationalization of political salience is certainly no easy task and is subject to the specific actor which is expected to consider a certain issue salient or not (Thomson *et al.* 2012, 612-613). Until now there have been various attempts in previous research to operationalize the political salience of court cases. Not all of them address the fact that political salience of a court case differs for different actors. Vining and Wilhelm mention that case complexity has been used as a proxy for political salience, “suggesting that as more legal areas are involved, a case becomes important to more observers [...]. Increased complexity therefore indicates the likelihood for greater policy consequences (or impact)” (Vining and Wilhelm 2011, 561). However, using complexity as a proxy for political salience in this way seems rather simplistic. Also the case subject matter has been used to identify cases that are particularly salient due to political reasons (e.g. those on death penalty; *ibid.*). Even the occurrence of *amici curiae* itself has been described as a proxy for case salience, however, without further theoretical elaborations or empirical proof that this measure is a valid one (Vining and Wilhelm 2011, 562). The approach seems problematic, was met with distinct critique (Collins 2008, 148–149) and does not discriminate between legal and political factors. Epstein and Segal (2000) developed a case salience measure based on whether a USSC judgement was reported on the front page of the New York Times. It is probably the most prominent operationalization of case salience in the US literature and rather associated with political salience (Bailey *et al.* 2005, 78–79; Collins 2008, 157–158; Gleason and Provost 2016, 257). Collins and Cooper (2016) offer an index for the salience of USSC cases. Although these US indicators are strong, such case salience data is unfortunately not available for EU court cases (so far). Furthermore, the term ‘case salience’ does again not distinguish between the legal and the political salience of a case. Such conceptual flaws have to be avoided and the goal to differentiate legal importance and political salience has to be kept in mind.

The various attempts to capture case salience in the US context, most prominently Epstein and Segal’s (2000), employ the variable in different designs, sometimes as dependent, independent or control variable. Case salience (here: media coverage) is also used as a predictor for amicus participation (Zuber *et al.* 2015). The available studies on *state* amicus participation in the US (Provost 2011; Gleason and Provost 2016) do also employ case importance and political salience as predictors for amicus participation. Based on the discussion above, however, also their operationalizations are either not the most accurate and suffer from the flaw that legal importance and political salience tend to blur. Provost tries to

capture the ‘policy importance’ of a case to explain amicus participation and operationalizes it with three variables: (a) the direct participation of the state as a party to the dispute, (b) the party membership of the state representative, and (c) whether “unresolved constitutional or statutory issues” are affected by the case (Provost 2011, 10). All three seem rather suboptimal attempts and the latter does rather capture legal importance. Gleason and Provost (2016) employ the media coverage measurement by Epstein and Segal (2000) as a proxy for case salience and as predictor for state amicus briefs, meanwhile admitting that it is not ideal. Besides the fact that it is not ideal as a measure for political salience, media coverage might also not capture the phenomenon which is relevant for the analysis in this paper for another reason. The conventional case salience measures capture *postdecision* salience, as opposed to *predecision* salience (Clark *et al.* 2015), which in itself can also be measured in different ways. What is under consideration here is the political salience a court case has *to a government prior to the judgement*. While media coverage after the judgement rather indicates the public salience of the judgement, the political salience for a (US or EU) MS which should affect whether a state government (representative) files an amicus brief, might be another one than what public media covers.

Because of the variety of ways to operationalize, it should be most advantageous to approach the term ‘political salience’ based on its underlying meaning. Drawing on Thomson’s approach to issue salience (2011, 44–47), one can suggest that political salience is the political importance of a (more or less) controversial issue for a certain actor. A court *dispute* is certainly always a *controversial* issue since it was only invoked based on conflicting views on a particular question. Thomson and Stokman refer to two interpretations of salience:

“In the first, salience is interpreted as the proportion of an actor's potential capabilities it is willing to mobilise in attempts to influence the decision outcome. In the second, salience is understood as the extent to which actors experience utility loss from the occurrence of decision outcomes that differ from the decision they most favour.” Moreover, “[a]ctors who attach high levels of salience to an issue are highly sensitive to small deviations from their most favoured positions, while actors who attach low levels of salience are less sensitive” (Thomson and Stokman 2006, 41–42).

Overall, one can say that while legal importance is a more static concept which expresses the extent to which a court procedure is loaded with law-based significance, political salience is a rather preference-based expression of the extent to which an actor considers an issue relevant.

Put differently, political salience “describes the sharpness in the curvature of the actor's loss function” (Achen 2006, 120). In order to prevent a loss “an actor with a high level of salience will put a high proportion of its potential to influence other actors and the decision outcome into effect” (Thomson *et al.* 2012, 612). It will use available instruments to direct decisions in the direction of its preferred outcome. The question is whether this also holds for amici curiae at court.

Although operationalization might be a challenging task, there is clear indication that political salience as well as legal importance should be taken into account as important explanatory factors for the question when and why a government's attention is drawn to a court case. Based on these considerations, an effort to discriminate political salience and legal importance from one another empirically will be offered in the following section.

5 Analytical Model and Hypotheses – Explaining MS Observations

In the EU context the submission from a national court has been identified as an important condition that frames the study of state amici briefs (van Stralen 2015; Cramer *et al.* 2016). MSGs mostly file observations to cases stemming from courts in their own country (‘internal’ observations) as a matter of principle. If the question referred to the ECJ stems from a certain national court, the respective government of that country will most probably file an observation in the procedure, suggesting a certain automatism for internal observations. Meanwhile, the pattern for observations to cases from other MSs (‘external’ observations) might differ completely. Thus, an analysis of MS observations should always discriminate between this internal and external dimension. Beyond the focus on internal observations it is so far largely unclear when and why MS governments *pay attention* to one PRP but neglect another. As we have seen, potential factors which could explain higher/lower attention from the side of MS governments are the political salience of a PRP, and the legal importance of a PRP. It was argued that it is necessary to separate both conceptually and empirically. This serves the main aim of this paper as stated in section 2. Therefore, the two hypotheses which were already presented in the introductory part will guide the analysis. To some extent they are refined in their wording based on the insights from previous sections:

H1 (legal importance): MS governments consider a PRP more relevant the more legally important it is. Therefore, the higher the legal importance of a PRP is, the more likely MSs will file observations.

While the legal importance should be captured with values that describe stable characteristics of the respective court case which, the political salience of a case should vary for each MS:

H2 (political salience): MS governments consider a PRP more relevant the more politically salient it is. Therefore, the higher the political salience of a PRP is for a MS, the more likely that MS will file an observation.

Corresponding to the main aim of this paper, legal importance and political salience will serve as the core explanatory factors in the analytical model. Beyond these two there should be other factors which are relevant for predicting MS observations as an outcome. This has to be taken into account for potential control variables in the explanatory model.

One important assumption is that the MS authorities which are responsible for the decision to file an observation or not (mostly foreign ministries) have limited resources and limited time to process all procedures that might require attention. Van Stralen shows that the capacities of the respective ministries vary within a country as well as between countries (van Stralen 2015, 30-31, 34). This is supported by insights into amicus brief initiation from the US context which shows that the budget of the authorities filing briefs are a strong predictor for brief initiation (Gleason and Provost 2016, 259–260). While data for the budget of the respective EU authorities are not available for this paper, the gross domestic product of a MS could be a good option to control for resources. Based on van Stralen's qualitative insights in the amicus brief initiation process (2015) one can also argue that MSs could be restricted in the amount of observations they can process. More complicated court cases should represent more of a challenge to process in a short time. A time-constraint is given by the procedural rules of the PRP, which limits the time frame for a MS to file an observation to two months (Mortelmans 1979, 563). Thus, the complexity of a court procedure should be an important control variable and higher complexity should make it less likely that MSs file observations. Also the differentiation of traditions in legal systems (civil law vs. common law) has been identified as an important control variable in previous research on the legislature-judiciary relationship (Larsson *et al.* 2016, 17). Amicus briefs are more common instruments in common law systems than in civil law systems. A greater tendency of governments from the common law countries in the EU (Ireland, UK) to file amicus briefs could partly explain the high number of observations from the UK (cf. figure 1.2, p. 2).

6 Data and Method

Based on the theoretical considerations above, this paper will provide an important contribution to address the identified research gap by connecting two datasets. The first dataset (DS1) is an original collection of variables on all PRP referred to the ECJ in the years 1997 to 2008, in all of which the ECJ delivered a judgement between 1997 and 2012 (Naurin *et al.* 2013). It contains information on 1,599 PRP. Each PRP can include several questions/legal issues sent from a national court to the ECJ ($\bar{n}=2.405$; $n_{\max}=17$, C-372/06). In most instances a referred legal issue equals a question put by the national court and listed by the ECJ.¹⁰ The dataset is structured alongside these legal issues and sums up to 3,895 units of observation on issue level in total, which represent 1,599 court cases (i.e. PRP). In the prominent Laval case, for example, two questions were sent from the Swedish *Arbetsdomstolen* (labor court) to the ECJ, with both of them observed by fourteen MSs each. Fourteen MSs filed observations to the procedure and delivered an opinion on both legal issues.

Although limited to eleven years there are several factors which make this dataset unique and particularly valuable for empirical analyses such as the one conducted here. Besides other factors it is two main features which make the data outstanding: Firstly, it includes (almost) all PRP¹¹ in the time-period which makes it not only a representative sample, but allows to analyze the whole population of cases. Secondly, the sources which had been used for coding the variables (Reports for the Hearing) are not provided by the ECJ to the general public and are also no longer produced at all after 2012 (Naurin *et al.* 2013, 5). The reports were provided specifically for the research and coding project, which makes the database a unique source for the analysis of MS behavior as amici curiae. Compared to other datasets on ECJ cases, the data at hand investigates a somewhat shorter time frame, but gives a more complete and more recent picture on PRP within the period 1997-2008 (Naurin *et al.* 2013, 11–13). Compared to studies that explain state amici behavior in the US context this paper investigates a similar or longer time frame. Moreover, it will include *all* PRP from the included period instead of looking at a particular selection of cases (cf. Provost 2011; Zuber *et*

¹⁰ For exceptions of this rule, which root in conscious decisions regarding the specific coding procedure, cf. Naurin *et al.* (2013, 8–9, 14–16).

¹¹ For few exceptions and the respective explanation cf. Naurin *et al.* (2013, 39–41).

al. 2015; Gleason and Provost 2016).¹² Robustness tests for DS1 have been conducted by Naurin et al. (2013).

The second dataset introduced here (DS2) is one on decision-making in the EU. Among other variables it provides data on MS positions and is structured alongside controversial issues of negotiations in the Council of Ministers. These controversial issues were discussed prior or during the creation of a legislative act (Thomson 2011; Thomson *et al.* 2012). It provides scale values for MS positions on the respective controversial issue ranging from 0 to 100, as well as scale values for the political salience of the respective controversial issue for every single MS ranging from 0 to 100. One illustrative example from this dataset is a legislative proposal (CNS/1999/246) which resulted in a regulation on the common organization of the market in milk and milk products (CELEX: 31999R1255). Before the EU codecision procedure led to the final legislative act, the proposal contained two highly controversial issues among MSs. One of them was a controversy about the level of EU subsidies to the milk market, the other one about the fat content of milk included in the concerned subsidy scheme.¹³ Thomson's dataset provides scale values for the salience of these controversial issues for each EU MS. The scale ranges from 0 (not salient) to 100 (highly salient) and the values for each MS were derived from expert judgements. For the proposal on a common market for milk products France was given a high average salience value of 70, while Sweden cared only moderately about the proposal with an averaged salience value of 45.¹⁴ Dataset 2 provides data on 331 of such controversial issues, which were connected to 125 legislative proposals. Most of them led to a final legal act (regulation, directive or decision) and a few procedures were suspended or rejected. Validity and reliability of the data have been addressed by Thomson (2006).

Observations in PRP are considered as instruments that articulate the relationship between judiciary and legislature and enable MS governments to make themselves heard in those PRP about which they care due to political reasons. Therefore, governments are expected to file observations to those cases which are politically salient for them (as formulated in hypothesis

¹² Admittedly, it is other legal procedures before the ECJ which are completely excluded: infringement procedures, actions for annulment, actions for failure to act. But, as shown above, PRP are the most important ECJ cases in the history of European integration.

¹³ Not all controversies that are coded in the dataset are described in detail in the book (Thomson 2011). A list of all the coded controversial issues is offered on Thomson's website http://www.robertthomson.info/wp-content/uploads/2011/01/Issues_list_new_26March2012.pdf (last access 06 May 2016).

¹⁴ These are averages for the two(!) controversial issues which evolved from one proposal on a common market for milk products. The salience values were averaged by the author on proposal level for purposes of matching with DS1 based on the final legal act which evolved from the proposal.

2). This salience of a case prior to the judgement (*predecision*) can be captured with help of the salience of the political issues it concerns. Briefly speaking: if a government *did care* about an issue before and during a legislative process (high salience of the issue) it *will also care* about a court procedure in which the ECJ adjudicates on the correct application of the very same issue. This is the case when a court procedure concerns a legislative act(s) that resulted from the controversies covered in DS2. Consequently, political salience is operationalized with help of the data provided in DS2.

Applying the salience variable required the matching of the initial dataset (Naurin *et al.* 2013) with the data offered by Thomson *et al.* on basis of the legislative acts a PRP concerns. In order to explain this matching process one can look back to the example of a proposal for a common market for milk products. Each legislative proposal, identified with a number of the legislative procedure provided in the supplementary data to Thomson (2011), led to a final legal act. This legal act was identified with help of the European Parliament's Legislative Observatory.¹⁵ The proposal on a common market for milk products led to the regulation EC/1999/1255 with the CELEX number 31999R1255. As a next step, court cases which concerned the very same legal act were identified with another database – the National Decisions database (Dec.Nat., cf. Hübner 2016).¹⁶ This database offers a search engine for all national legal procedures in the EU and provides information on cases that have been sent to the ECJ (PRP) as well as those that have not been sent to the ECJ (cf. section 3.3). In order to match the legal acts which resulted from controversies covered in DS2 with the PRP covered in DS1, a three-step approach was applied:

1. Identification of all those national procedures which concerned a specific legal act (here: regulation EC/1999/1255 on a common milk market)
2. Among these national procedures: selection of all preliminary references and thus ECJ procedures which were invoked by national courts (here: all PRP that concern regulation EC/1999/1255 on a common milk market)
3. Among these PRP: selection of all those PRP which fit the time period that is covered by DS1 (1997-2008; Naurin *et al.* 2013).

For the regulation on a common milk market the final selection concerned three ECJ cases: C-14/01, C-283/03, C-313/04. These three PRP concern one legal act which evolved from a highly controversial issue. Since every MS has an averaged salience value per legal act, the

¹⁵ The EP's Legislative Observatory is publicly accessible via >><http://www.europarl.europa.eu/oei><<.

¹⁶ The Dec.Nat. database is publicly accessible via >><http://www.aca-europe.eu/index.php/en/dec-nat-en><<.

salience for a certain MS is the same for all these three court cases. Through this procedure, both datasets were matched for 73 court procedures based on 16 controversial legal acts. For these 73 court procedures, observation values and salience values vary for each MS. With a salience value for each MS each of the procedures can be multiplied by the number of analyzed MSs in order to receive the number of units of observation the final, matched dataset comprises. In this way, the number of units of analysis in the final dataset amounts to 1,971 country-cases for the EU27 ($N = 73 * 27 = 1,971$) or 1,095 country-cases for the EU15, respectively ($N = 73 * 15 = 1,095$). The structure of the matched data is illustrated in table 1 below. In this way the matching process and the (necessary) reduction of the time period clearly reduced the number of units of observation which are available for the analysis of political salience compared to the 1,599 PRP coded in DS1. However, it represents a major step to allow a well-founded operationalization of political salience as an explanatory factor for amicus participation in ECJ procedures. Moreover, the number of units is still large and allows reliable statistical analyses.

Table 1. Illustrating country-cases as the unit of analysis after dataset matching. A selection of dataset units and variables

Concerned legal act (among others)	Year when the case was lodged	Court case number	MS	MSobser- vation	Salience_ms
31999R1255	2001	14	AT (#1)	0	65
31999R1255	2001	14	DE (#2)	0	45
31999R1255	2001	14	FR (#3)	0	70
31999R1255	2001	14	... (#4-26)	[0;1]	[0-100]
31999R1255	2001	14	RO (#27)	0	n.a.
31999R1255	2003	283	AT (#1)	0	65
31999R1255	2003	283	DE (#2)	0	45
31999R1255	2003	283	FR (#3)	0	70
31999R1255	2003	283	... (#4-26)	[0;1]	[0-100]
31999R1255	2003	283	RO (#27)	0	n.a.
31999R1255	2004	313	AT (#1)	0	65
31999R1255	2004	313	DE (#2)	1	45
31999R1255	2004	313	FR (#3)	1	70
31999R1255	2004	313	... (#4-26)	[0;1]	[0-100]
31999R1255	2004	313	RO (#27)	0	n.a.

Source: dataset Naurin et al. (2013) matched with Thomson (2011)/ Thomson et al. (2012); MS selection: EU15.; full matched dataset contains 1,971 units. The table illustrates those three PRP which concerned the regulation on a common market for milk and milk products based on the referring national court's questions (EC/1999/1255; CELEX 31999R1255): C-313/04, C-283/03, C-14/01.

6.1 The dependent variable

The phenomenon which should be explained and therefore the dependent variable is represented by observations of MSs in PRP. It can be operationalized in two different ways:

either with (Y_{1-27}) dichotomous observation dummy variables for each MS (e.g. ‘ SE_{observ} ’ for Sweden), or with (Y_n) the cumulated number of MS observations per legal issue (‘ N_{observ} ’). N_{observ} adds the number of observations filed to a certain legal issue, and represents a count variable ($0 \leq N_{observ} \leq 27$)(also recall figure 1.1, p. 2). If used as dependent variable, it required the application of specific regression models (Cameron and Trivedi 2013; Long and Freese 2014, ch. 9). The cumulated number of MS observations (MS issue observations, ‘ N_{observ} ’) can be used as a dependent variable for all those analyses which build *only* on variables contained in DS1 (Naurin *et al.* 2013).¹⁷ However, the conceptually valuable matching process of DS1 with DS2 (Thomson *et al.* 2012) limits the number of court cases that can be included and also structures the data in a different way (cf. table 1 above).

The matched data is no longer structured on the level of legal issues (several per PRP), but alongside court cases with values for political salience and observations for each country. Based on this structure and since the central variation per court case occurs for each country, the variable to be explained does no longer express the cumulated number of observations, but the involvement as a third party by each MS as a dichotomous variable (fifth column in table 1). Each MS either filed an observation in a PRP/court case ($MS_{observation}=1$) or it did not ($MS_{observation}=0$). The time periods covered by the two datasets resulted in matched data which covers reliable salience values for 73 court procedures only for the EU15 MS group. MSs which became EU member later only showed missing values for the salience in the 73 matched cases. Therefore, the analysis has to be limited to the EU15 and the presentation of variables’ descriptive statistics will be limited to the EU15 group accordingly. With a dichotomous, categorical variable as the dependent variable (cf. table 2), the main analysis in this paper requires logistic regression models. Due to some system-missing values the regression model will be run on 915 units instead of the 1,095 units included in the matched dataset for the EU15.

Table 2. Descriptives of dichotomous dependent variable ‘MS observation’

	N	Minimum	Maximum	Mean	Std. Deviation	Variance
MSobservation	915	.00	1.00	.175	.380	.144

Source: dataset Naurin et al. (2013) matched with Thomson (2011)/ Thomson et al. (2012); MS selection: EU15.

¹⁷ A count dependent variable suggests either an overdispersed Poisson model or a negative binomial model (Cameron and Trivedi 2013, ch. 3, esp. pp. 88–89). For similar methodological considerations on amici briefs to the USSC cf. Zuber et al. (2015).

6.2 The independent variables

Amici curiae are expected to care about legally important cases. Thus, legal importance should be one predictor for MS observations to PRP (*H1*). Thereby, legal importance is captured in two dimensions: an overall doctrinal one, indicated by the fact that core legal doctrines play a role in a PRP, and one that expresses the amount of ‘ordinary’ legal acts a PRP concerns. Both can be captured by variables in the core dataset at hand (Naurin *et al.* 2013). For this purpose, two variables will be employed. One of them indicates whether a legal doctrine is affected by a PRP or not (*doctrine_affected*={0;1}),¹⁸ the other one counts the number of legal acts concerned by the respective court case (cf. table 3 below). Additionally, legal importance could also partly be captured by the type of the submitting court (*court_type*), a dichotomous variable in the dataset which indicates whether a PRP was referred to the ECJ by a supreme court (*court_type*=1) or a lower court (*court_type*=0). A supreme court could be any court of last instance, such as a national constitutional court. Supreme courts have arguably a higher (legal) authority and deal with more fundamental cases and their decisions are more binding since there is no higher judicial instance (except for the ECJ). This indicates higher legal importance of those cases dealt with at supreme courts.

As mentioned earlier, the concept of political salience (*H2*) is more difficult to operationalize than legal importance. Measurements of case salience which are conventionally used in the US cannot be used since there are none available for ECJ cases so far. Moreover, the US case salience measure does not allow to properly distinguish between legal and political salience. Moreover, and as argued earlier, media attention might not even capture the phenomenon which is relevant for the analysis at hand. As was argued before (section 4.4), what is under consideration here in terms of an explanatory factor for third-party involvement in court cases is the political salience a court case has *to a government prior to the judgement*. The political salience of a court procedure for a government, which has the role as part of the legislature (Council) in the EU, should be expressed by the political salience of the legal acts a court procedure concerns. It is exactly this data that is provided by Thomson *et al.* (2012; Thomson

¹⁸ The five affected legal doctrines which were coded are direct effect, supremacy, state liability, loyal cooperation and non-discrimination Naurin *et al.* (2013, 26–28). Therefore, a count variable with a theoretical maximum value of 5 could have been an alternative to a dichotomous categorical variable. However, in reality a court case affected maximum three doctrines and the sample used for the main model in this paper included only one case which affects three doctrines and none that affects two doctrines. Since this indicated a lack of variation for the doctrine-count variable in the sample, a dichotomous variable is the methodologically appropriate alternative used here.

2011). Since it is positions and salience values prior to Council negotiations, which are captured through expert interviews, the data has a central advantage vis-à-vis Council voting data:

"[Voting behavior in the Council of Ministers] is distinct from the actors' policy positions, the 'inputs' [...]. States display some kind of dissent at the voting stage on only a small percentage of cases, by voting against, abstaining and/or entering a statement detailing their objections into the minutes. By contrast, there are usually some differences between states' initial policy positions and the decision outcomes contained in the laws that are adopted" (Thomson 2011, 34).

Although the values do not capture “hidden preferences”, but political positions based on “the stances taken” (Thomson 2011, 41), the values still express an unfiltered view of the governments on political questions which are supposed to be set in law. Other than Council votes these positions are not strategically compromised. Thus, a salience scale derived from expert judgements is the best way to capture ‘sincere’ positions and salience instead of strategic behavior like the one expressed by roll call votes in the Council (also cf. Franchino 2007, 123). MS positions prior to the establishment of a legal act are not bounded by the law. This leaves governments with considerable latitude to articulate their policy positions. If a MS cares about a legislative proposal at this stage, it is because the proposal is *politically salient* for the state. Court procedures, by contrast, concern the application and interpretation of already established legal acts. At court the space within which positions can vary is limited to a certain extent. But it might be the case that MS behavior at court is partly structured by their sincere political positions. If this is the case, parts of the variation of the dependent variable can be explained with help of the salience variable at hand. The independent variables capturing legal importance and political salience are presented in table 3.

Table 3. Operationalization of legal importance and political salience (H1, H2)

	N	Minimum	Maximum	Mean	Std. Deviation	Variance
salience_ms	1095	.00	97.5	55.063	22.004	484.164
doctrine_affected	915	.00	1.00	.197	.398	.158
count_legalacts	915	1.00	20.00	5.426	6.203	38.483
court_type	915	0	1	.41	.492	.242

Source: dataset Naurin et al. (2013) matched with Thomson (2011)/ Thomson et al. (2012); MS selection: EU15.

Obviously there is a time gap between the measurement of MSs’ salience values for a controversial issue and the court procedures in which the resulting legislative act is dealt with at court. Thus, one could also think of the party-political composition of governments and

government change as relevant control variables. However, Thomson finds that “[s]tates’ policy positions rarely correlate significantly with their national governing parties’ positions on salient dimensions in national politics” (Thomson 2011, 67). His findings rather indicate (cf. *ibid.* ch. 3) that government change is no important factor for the measured policy positions and salience values. Moreover, controlling for this dimension would go beyond the scope of this paper and is rather an option for future research.

Another important control variable is the complexity of a court case. A higher complexity should reduce the probability of a MS observation since a more complex case is less easy to process for MS authorities which are time- and resource-constrained. Also the complexity of court cases has been operationalized in different ways in the past, with the number of affected legal areas as one option (Vining and Wilhelm 2011, 561). Franchino (2007, 144–146) suggests the detail of legislation and information intensity of certain issue areas as another option. While the latter is attractive, complexity will be operationalized here based on the data at hand and articles that have already employed this data. Drawing on literature from the US context (Hume 2006; Lupu and Fowler 2013), Larsson et al. construct a complexity variable through a “factor analysis of two variables: the number of questions put to the CJEU by the national court, and the number of legal acts involved in the case” (2016, 16). This paper employs a similar factor analysis to introduce the variable *Complexity* in the regression model.¹⁹ It is similar and not exactly the same since there are reasons to assume that the number of legal areas that are affected by a PRP might capture the complexity even better than the number of legal acts. A high number of concerned legal acts could mean that many legal acts of one and the same legal area/treaty chapter are affected, which might be easy for a MS to process as long as it has the legal expertise in the respective policy field. Meanwhile, a PRP that affects many legal areas e.g. from the free movement of goods via services till the right of establishment is relatively complex (cf. e.g. case C-403/08). It might be more complicated for the responsible MS authorities to process in a short time than a procedure which concerns many closely related legal acts from one and the same issue area. Moreover, a model that uses the number of concerned legal acts as basis of a complexity factor could not include the variable *count_legalacts* at the same time for operationalizing legal importance, since this would imply conceptual flaws and multicollinearity problems. Therefore, the variable *Complexity* is based on the number of affected issue areas instead of the number of concerned legal acts in the factor analysis described above. While complexity can be expected

¹⁹ The Stata syntax for this factor analysis is provided in appendix A1.

to make less likely for a MS to file an observation, one could also argue that more affected issue areas increase the likelihood that at least one national ministry's attention is attracted by the procedure. This equally plausible assumption would result in a positive effect of the variable *Complexity* on the probability of filing an observation, instead of a negative effect. MSGs might also show an increasing willingness to use the instrument of PRP observations over time. Previous research indicates certain learning effects over time (Martinsen 2015a, 230) and governments might show a growing willingness to use observations as an instrument to engage in PRP. In order to take account of potential time effects, the year the case was referred to the ECJ ('*year_lodged*') will serve as a control variable, recoded for the years 2001-2008 ($1 \leq \text{'year_lodged'} \leq 8$). Also a variable distinguishing between civil law countries and common law countries (UK, Ireland) was identified as important control variable in the judicial politics literature (Lupu and Voeten 2012), however with ambiguous results (Larsson *et al.* 2016, 21). The categorical variable *commonlaw* will serve as a fourth control variable (cf. table 4).

Table 4. Introducing control variables

	N	Minimum	Maximum	Mean	Std. Deviation	Variance
complexity	915	-1.494	3.286	0	1	1
year_lodged	915	1	8	6.066	1.916	3.672
gdp	1080	24.829	3156.21	890.925	913.253	834031.6
commonlaw	1095	0	1	.133	.34	.116

Source: dataset Naurin et al. (2013) matched with Thomson (2011)/ Thomson et al. (2012); GDP: annual data from OECD in billion US\$; MS selection: EU15.

The described independent variables are used to operationalize legal importance and political salience. They are partly recoded or newly computed from the original variables in the datasets. On that basis the hypotheses (*H1*, *H2*) about the factors drawing MSs' attention to a PRP will be tested in logistic regression models including the independent variables²⁰:

- political salience of the case for the respective MS (*salience_ms*)
- dummy variable for affected doctrine (*doctrine_affected*),
- number of concerned legal acts (*count_legalacts*),
- type of the submitting court (*court_type*).

Furthermore, it was argued that several control variables should be taken into consideration, otherwise causing omitted variable bias:

- dummy variable for an internal observation (*internalobs*)
- A variable capturing complexity (*complexity*)

²⁰ A description of all variables in table format is also provided in table A1 in the appendix.

- the year the case was referred to the ECJ (*year_lodged*)
- annual gross domestic product of the respective MS (*gdp*)
- common law origin of the observation (*commonlaw*).

7 Analysis and Results

For initial bivariate tests the whole dataset DS1 is employed. This means a sufficiently large number of units of observation are available ($N=3,845$; corresponding to the structure of DS1). Since the data used here is relatively complicated material and DS1 has so far only been employed for hypothesis-testing in two studies (Larsson and Naurin 2016; Larsson *et al.* 2016), a level of $p < .05$ as a threshold for significance will be applied. As mentioned, a differentiation between internal and external observations is important. A certain *automatism* is expected when it comes to internal observations to cases referred by a national court. The respective MSG will most probably file an observation to all those cases which stem from a court in the respective MS. Binary Pearson Chi-square tests were conducted to test the strength of this relationship. These tests are the only suitable way to measure the relationship between two dichotomous variables. They revealed that for all countries the submission of an issue to the ECJ by a national court (*submitting court_MS*) shows a significant association with the dummy observation variable of the respective country (*MSobserv*, e.g. *SEobserv*) ($404.621 \leq \chi^2 \leq 1212.787$; $p < .001$). The effect size reaches from a medium up to a very strong effect ($.324 \leq \phi \leq .562$) (documented in appendix A2). This means that a relatively high proportion of observations for each country can be explained by a single dichotomous variable (national submitting court). It indicates a certain automatism for internal observations. MSGs pay attention to PRP stemming from a national court in the respective MS and most of the time file observations to these cases as a matter of principle. It could be argued either that MSGs file internal observations no matter how (politically and/or legally) relevant the respective issue is. Alternatively, one could assume that all cases stemming from a national court are regarded as highly relevant in principle by the respective MS. In fact, in the full dataset internal observations are filed in 79% of the 1,599 cases, in the matched sample MSs filed an internal observation in 72% of the country-cases that represent internal observations. While suggesting an automatism for internal observations, the results also show that external observations – those observations MSs file in PRP which stem from courts in other countries – are the more interesting ones to analyze. An automatism cannot be assumed in those cases. At the same time, the initial tests show that the dichotomous factor *internal observation* (0;1) is highly important as an independent or rather control variable in more complex statistical models. As an alternative, those cases which represent internal observations could be excluded so that a model is only run on the more interesting external observations (to cases that stem from another MS).

Section 6.1 showed that the cumulated number of MS observations to a legal issue (*'N_observ'*) is worth to be employed as outcome in a regression model for count variables. At the same time, it was argued that the matching process of two datasets provides conceptual advantages, although reducing the number of analyzed cases. This justifies the application of a different statistical model as basis for the analysis presented here. The different structure of the matched data makes it necessary to introduce *MSobservation* as a dichotomous dependent variable (0;1) in a logistic regression model (logit). Even with the reduction of the analysis to the EU15 group, for which reliable salience data in the 73 matched PRP are available, 1,095 units of observation remain. These 1,095 units represent country-cases as explained earlier and visualized in table 1 (p. 27). For each country-case the dichotomous dependent variable expresses whether the respective MS filed an observation to the court case (1) or not (0). Due to some missing values the regression model will be run on 915 units instead of the 1,095 units included in the matched dataset for the EU15. Nevertheless, also the matched dataset can be considered sufficiently large for statistical models.

Nowadays, studies in political science which use regression models conventionally report robust standard errors (King and Roberts 2015). This is also recommended in literature from other disciplines (Gujarati and Porter 2009, 391). Therefore, with *MSobservation* as the dependent variable the independent variables described above are introduced in a logistic model with robust standard errors. These independent variables are *salience_ms*, *doctrine_affected*, *count_legalacts*, and *court_type*. The variables *internalobs*, *complexity*, *year_lodged*, and *gdp* serve as important control variables. Table 5 shows the results of the model(s). While model 1 includes cases which represent internal observations, controlling for the variable *internalobs*, the other models are run only for external observations. The latter are the more interesting cases to investigate, as was argued before. Models 2-4 represent a stepwise procedure. First the effect of political salience is analyzed (model 2), then the effect of political salience as well as legal importance is measured, and finally (model 4) a model is presented that includes the control variables as well.

Table 5. Logistic regression with robust standard errors: The effect of several independent variables on MS observations to a PRP

DV: MSobservation (0;1)	Model 1 Odds Ratios	Model 2 Odds Ratios	Model 3 Odds Ratios	Model 4 Odds Ratios
IV: internal observation (0;1)	12.9037*** (4.3306)	[cases for internal obs. excluded]	[cases for internal obs. excluded]	[cases for internal obs. excluded]
political salience (0 – 100)	1.0102* (0.0051)	1.0091 (0.0051)	1.0121* (0.0049)	1.0109* (0.0054)
doctrine_affected (0;1)	1.9117* (0.4936)		1.7514* (0.4428)	1.8207* (0.5059)
count_legalacts (0 – 20)	1.0556** (0.0165)		1.0286 (0.0152)	1.0509** (0.0175)
court type (0;1)	0.8524 (0.1755)		0.8591 (0.1749)	0.7911 (0.1737)
complexity (-1.494 – 3.286)	0.6469*** (0.0773)			0.6113*** (0.083)
recoded year_lodged (01 – 08)	0.9639 (0.0530)			0.9365 (0.239)
gdp	1.0004*** (0.0001)			1.0005*** (0.0001)
Constant	0.0484*** (0.0236)	0.0954*** (0.0296)	0.0643*** (0.0223)	0.0541*** (0.0268)
Log likelihood	-354.420	-341.527	-337.362	-318.215
Nagelkerke's R ²	0.234	0.007	0.025	0.103
AIC	726.841	687.053	684.723	652.430
BIC	770.211	696.558	708.484	690.448
N	915	856	856	856

* $p < .05$ ** $p < .01$ *** $p < .001$. Odds ratios reported. Robust standard errors reported in parentheses. Data: CJEU Preliminary Reference Procedure Database (Naurin et al., 2013) matched with Thomson (2011)/ Thomson et al. (2012); GDP: annual data from OECD in billion US\$; MS selection: EU15.

The fact that a PRP was referred by a national court is a strong predictor for a MS observation (model 1). When the variable changes from 0 to 1, the probability of a MS observation increases considerably, with the odds expected to change by a factor of 12.904, all other variables constant. This confirms the findings above that internal observations are more of a principle than the exception.

Model 2 seems underspecified with *salience_ms* not showing a significant effect as a single independent variable. For the other models the following results can be reported: Except for the variables *court_type* and *year_lodged* (and *count_legalacts* in model 3) the confidence

intervals for the b-values do not include zero or one (the latter criterion is important for logit models). Apart from the high court/low court distinction the independent variables political salience, affected doctrine and number of concerned legal acts have significant effects on the probability of a MS observation. Also the control variables for *internalobs*, *complexity* and *gdp* are significant. Therefore, one can conclude that there are genuine positive relationships between these independent/control variables and the outcome (genuine negative relationship for *complexity*, respectively, since the odds ratio lies below 1). These variables have genuine effects on the dependent variable and the odds ratios of these variables can be interpreted in a meaningful way.

Although *court_type* does not have a significant effect, the significance of the variables *doctrine_affected* and *count_legalacts* confirm a positive effect of the legal importance of a case on the probability for a MS observation. This confirms *H1*. The fact that MSs are not more likely to observe PRP that stem from high courts could reflect that the assumption is flawed that references from supreme courts are legally more important.

Similar to the legal importance, the political salience of a procedure for a MS makes it more likely that the MS will engage as amicus curiae and file an observation. This confirms *H2*. For a unit change in the salience value in model 4 the odds of filing an observation are expected to change by a factor of 1.011, while all other variables are hold constant. This means that for a 50-unit increase of the salience value on the 0-100 scale (from *salience_ms*=0 to *salience_ms*=50) the odds of a MS to file an observation are $e^{0.01082 \cdot 50} = 1.718$ times larger. For a 100-units increase the odds are $e^{0.01082 \cdot 100} = 2.95$ times larger.

Complexity and *gdp* are important control variables showing significant effects. The year the case was lodged, however, does not have a significant effect. While it could mean that there is no time effect and MSs do not learn to use the instrument of observations more frequently or more strategically over time, it could also just reflect that the time period covered (2001-2008) is too short for observing such an effect. The negative relationship between complexity and a MS observation (odds ratio below 1) expresses that a MS will less likely file an observation the more complex a case is. It will have difficulties to process the procedure, perhaps due to a lack of expertise in many issue areas that are affected by a case at the same time and reinforced by the time-constraint of two months MSs are granted to submit their observation. The positive relationship between the gross domestic product of a state and the probability to file an observation fits to the expectation that MSs with more resources are

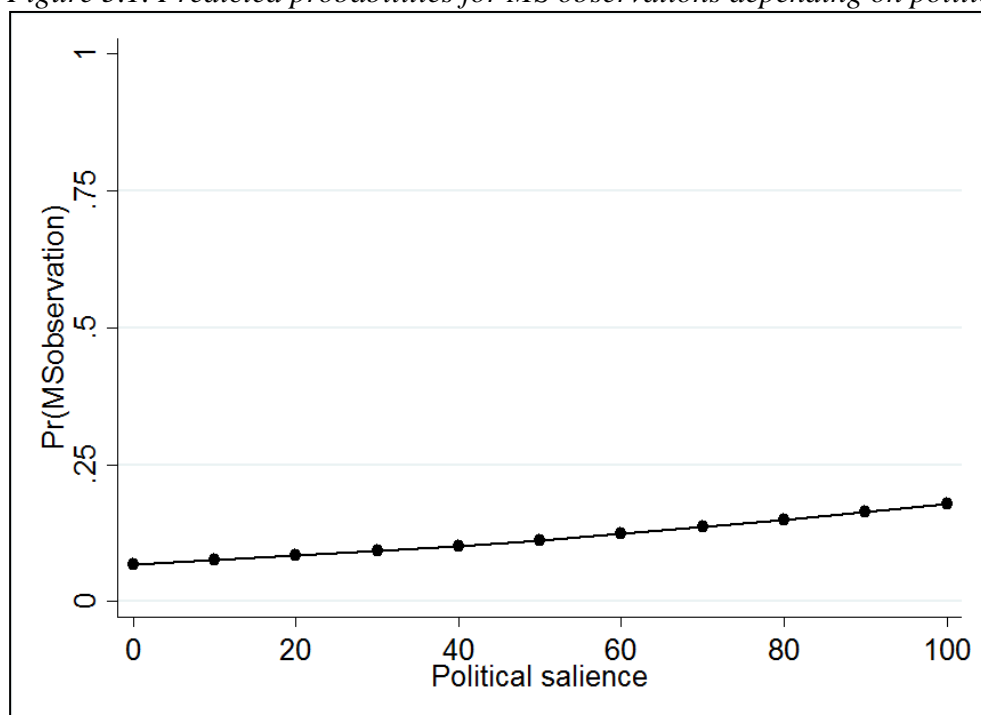
better able to process a case and to submit an observation where necessary. This mirrors insights from the US context, although the budget variable used by Gleason and Provost (2016) is a more direct and therefore better operationalization for the resources of those state authorities responsible for amicus briefs.

Model 4 has also been checked for the effect of the additional control variable *commonlaw* (UK, Ireland) since it was argued that amicus briefs are more common instruments in common law systems than in civil law systems. However, the variable was not significant and its inclusion in the model was problematic because it correlated with the other variables *court_type*, *doctrine_affected*, *count_legalacts*, *gdp*, as well as *salience_ms*. When model 4 was run with both *gdp* as well as *commonlaw* as control variables, the model fit (BIC) decreased considerably. Moreover, the so-called Wald test provided evidence that *commonlaw* does not have an independent effect on the outcome in such a model. The effect of GDP and a common law background were equal in that model ($\chi^2 = 1.89$; $df = 1$; $p = 0.169$). Thus, a model with both variables does not produce valid results.

A comparison of model fits is less straightforward in logistic regression than it is in an ordinary linear regression (OLS) model. The indicated pseudo- R^2 (Nagelkerke's) does not represent the explained variation, other than R^2 in OLS regression. Long and Freese (2014, 218–222) suggest that it is rather the Bayesian information criterion (BIC) that can give an indication for the model fit. The results table 5 shows that based on this criterion model 4 fits best and is to be preferred to the other models since it has the lowest BIC-value. This is not unexpected since the additional variables introduced in model 4 have significant and substantial effects on the outcome. Often the so-called Hosmer-Lemeshow statistic is also used as an indicator for the fit of a model, which compares predicted probabilities with the actually observed data. However, the test has been met with critique and is not recommended by Long and Freese (2014, 223–224).

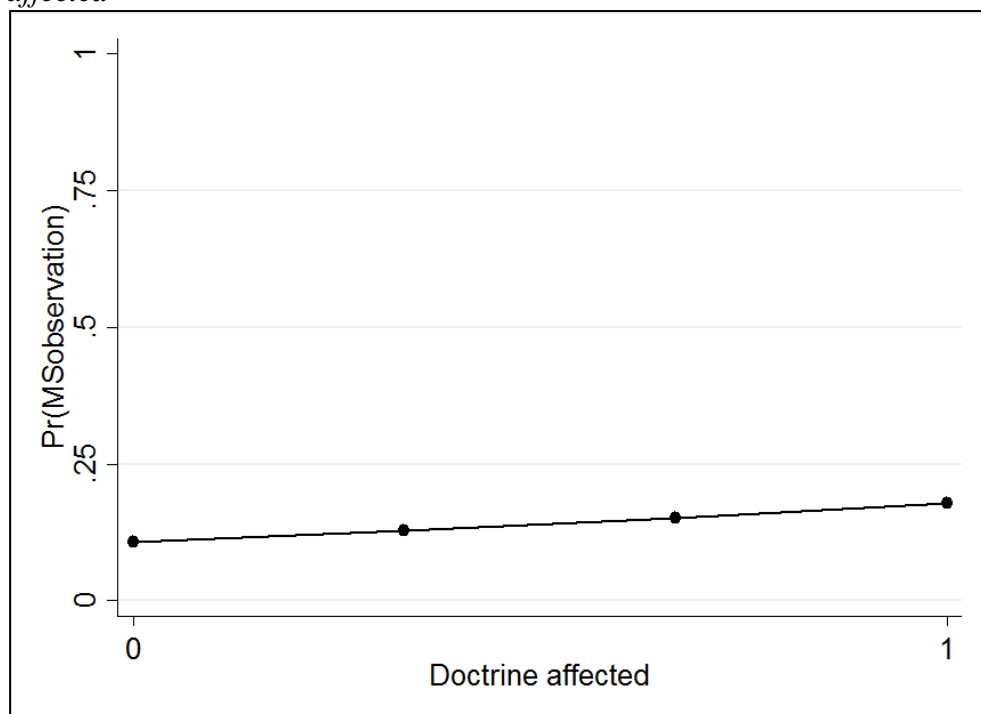
The summary statistics of predicted probabilities shows that the predicted probabilities in the sample range from .0221 to .647 with a mean predicted probability for a MS observation of .138. A majority of the observations have a predicted probability below .2 (cf. plot A3 in appendix). This corresponds to the fact that there are many more cases in which MSs do not file observations than those in which they do file observations. Figures 5.1 to 5.3 show the effect of an increase in the main independent variables on the probability of a MS observation occurring (*MSobservation*=1) based on the predictions of model 4.

Figure 5.1. Predicted probabilities for MS observations depending on political salience



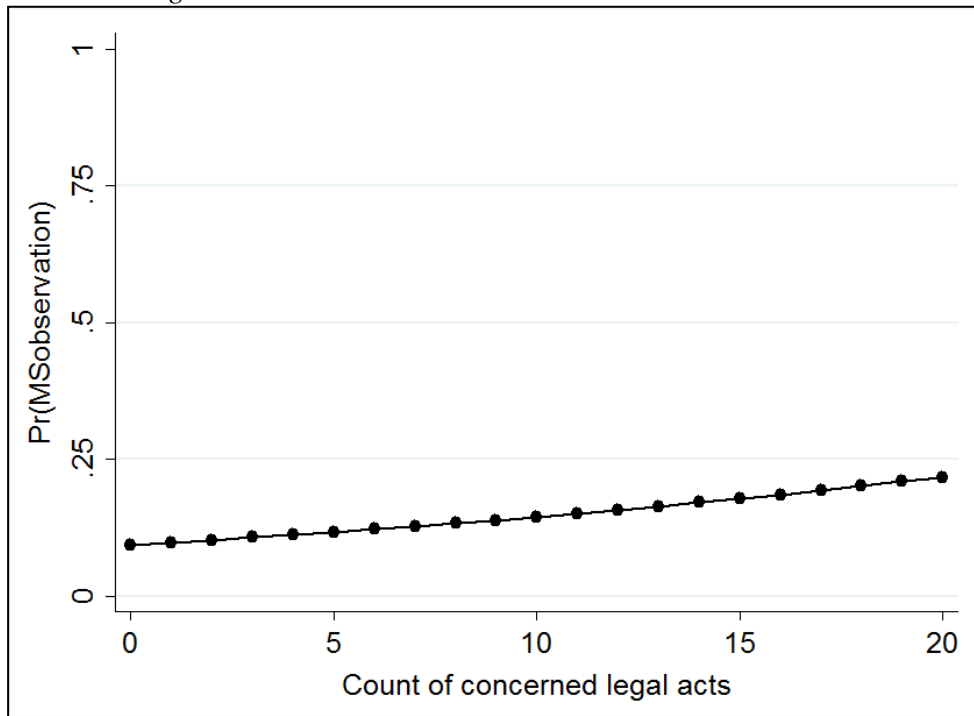
Source: dataset Naurin et al. (2013 matched with Thomson (2011)/ Thomson et al. (2012); MS selection: EU15; created with Stata 14; Political salience (*salience_ms*) varies from its minimum (0) to its maximum (100) while other variables are held at their means.

Figure 5.2. Predicted probabilities for MS observations depending on whether a doctrine was affected



Source: Like previous; *doctrine_affected* changes from its minimum (0) to its maximum (1) while other variables are held at their means.

Figure 5.3. Predicted probabilities for *MS observation* depending on the number of concerned legal acts



Source: Like previous; Count of concerned legal acts changes from its minimum (0) to its maximum (20) while other variables are held at their means.

The predicted probabilities remain below .25 no matter which of the three variables increases to its maximum while the others are held at their means. This result should be reflected in face of the predicted probabilities of the whole sample, which was reported to have a mean predicted probability of .138. When the salience value runs from its minimum to its maximum (figure 5.1) the predicted probabilities of *MSobservation* increase from .069 up to .178, i.e. the chances for an observation almost triple (2.6 times larger). Given that in most cases the probabilities are below .2, this represents a substantial effect confirming hypothesis 2. With the *doctrine_affected* variable changing from its minimum to its maximum (figure 5.2) the predicted probabilities of *MSobservation* increase from .107 up to .179, which represents an increase of 7.2 percentage points. While this is a substantial effect confirming hypothesis 1, it is a lower effect than the one of political salience. With the number of concerned legal acts running from its minimum to its maximum (figure 5.3) the predicted probabilities of *MSobservation* increase from .093 up to .217, which means that the chances for an observation double (2.3 times larger). This is a substantial effect that provides an even stronger confirmation of hypothesis 1. On the one hand, a high number of concerned legal acts results in higher probabilities for an observation than a high value of political salience (probability of .217 compared to .179 at the respective maximum). On the other hand, the increase of the chances for an observation is stronger with the political salience changing

from its minimum to its maximum (2.6 times larger chances) than with the count of concerned acts changing from its minimum to its maximum (2.3 times larger chances). Put differently, apart from other factors a maximum of legal salience of a court case makes an observation more likely than a maximum of political salience of a court case, but political salience constitutes a stronger lever to change the probability of an observation.

During diagnostic steps for the statistical model a number of cases were identified as potential outlier cases which could have an overly strong impact on the model. However, none of them turned out to be an influential case based on the Cook statistic ($\hat{\beta} < 1$ as the “counterpart to Cook’s distance for the linear regression model” (Long and Freese 2014, 215)). The findings reported in this section need to be reflected in face of the two underlying goals which were driving this analysis.

8. Discussion and Avenues for future Research

There were two main objectives driving this analysis. The first one was *(i)* to discover predictors for the behavior of MSGs as amici curiae before the ECJ. A second was *(ii)* to discriminate between legal importance of a court case on the one hand and its political salience on the other hand. With a confirmation of both hypotheses (*H1*, *H2*) it has been shown that besides the high probability of internal observations, the legal importance of a court procedure as well as the political salience are important predictors for MS observations. Both contribute to explain when and why EU governments participate in a PRP as a third party. Meanwhile, the legal importance of a case has a stronger effect on the probability that a MS files an observation, than the political salience this case has for a MS (based on the number of concerned legal acts). Whether the court which submits a case to the ECJ is a national court of last instance or a lower court does not contribute to explain why MSs submit observations. Moreover, the complexity of a court procedure and the resources of a MS (GDP) are important factors that influence these relationships. Given that it is the first multivariate statistical model that measures and compares effects of different predictors on the probability that a MS files an observation, these findings can be considered a solid contribution to the field and they build a fundament for future analyses of this kind. The identification of several predictors served the first objective *(i)*.

Distinguishing between the effects of legal importance and political salience as important predictors for MS behavior as amicus curiae did also serve the second purpose of this paper *(ii)*. The discussion in previous sections revealed that previous research on state amici

participation identified case salience as an important factor. However, the term ‘case salience’ is ambiguous. Previous research in the US context did not distinguish properly between static case-related factors that express legal importance of a court procedure and the actor-related political salience of a procedure. The line between factors that express political salience of a legal conflict on the one hand and legal importance on the other hand tended to blur. The operationalization offered in this paper allows to differentiate legal importance and political salience of court procedures and to discriminate between their effects. Thus, both main objectives of this paper (*i-ii*) have been covered by the analysis and the identified research gap has been addressed.

The analysis at hand does not only address a research gap regarding predictors for state amicus participation at the ECJ. It also enables us to better understanding the inter-institutional relationship between legislature and judiciary in the EU, and highlights how governments employ the instruments they have at hand to make themselves heard in legal procedures. The findings of this paper substantiate the claim that the ECJ as well as courts in general should be considered as *politico*-legal arenas (cf. Naurin and Cramér 2009). Purely legalistic interpretations of the interactions taking place at court are insufficient. Both political as well as legal mechanisms take place here. The participation of amici curiae does not only make a difference in the outcome of court procedures (cf. section 3.3). MSs do also use the instruments they have at hand to get engaged in procedures based on sincere political positions, reflected in the salience disputed issues have for them. These insights enable researchers to distinguish how strongly MSs’ attention is drawn to a specific procedure before the ECJ based on factors which can be considered as purely legalistic, compared to other factors that are rather political in nature. This can shed new light on different stages of litigation processes and the inter-institutional conflicts taking place there, which have a political character although taking place in a formally legal sphere.

There are various avenues for future research, some of which could build on this paper and also address limitations of the presented analysis. Only a few will be mentioned here. *In general (1)*, it is desirable to run the presented statistical models on an even larger number of cases. This is also the case despite the fact that the number of country-cases analyzed here is sufficiently large to produce valid and reliable results, and also to draw conclusions for the whole population of cases. An extension from the EU15 to the EU28, relevant in EU studies overall, is highly desirable. The number of the units of observation decreased due to the conceptually advantageous matching process of two datasets. If a matching of salience values

from dataset 2 with other data on PRP and MS observations beyond the year 2008 is possible, this would be a first attractive step for future projects.

Secondly (2), Warntjen (2012) emphasizes that there are different ways to measure political salience. While the sophisticated definition of salience and the high-quality data by Thomson et al. (2012) provided a solid ground for operationalization, future research should be open to further discuss pros and cons for different measurements of political salience. Only if a matching with data on PRP is possible, an alternative operationalization will be practically applicable.

Thirdly (3), future research could also try to connect insights in this paper to Martinsen's argument that "we should consider *learning* when assessing the relationship between law and politics" (Martinsen 2015a, 230). If learning effects are at play, MSs should not only be willing to reject displeasing codification of law more often. They should also be increasingly engaged directly in a politico-legal arena in which more binding decisions are taken over time. There are various tools states/governments have at hand "to exert pressure" on a court – with a wide range from subtle to direct instruments (Hönnige 2010, 352, also cf. Alter 2014, 337, footnote 1). MSs could discover the adversarial amicus brief as one instrument which helps them to exert influence on the ECJ. This should in particular be an attractive strategy for MSs in face of a judicialization trend, "the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (Hirschl 2008, 94; cf. section 3.2).

Fourthly (4), building on the theoretical background and empirical insights from the US context has proven to be advantageous. At the same time there are limitations to such an approach. A key difference in the US context when it comes to state amici at court is that the state representatives in the US (attorney generals) are elected officials in 43 states. These offices are considered important positions for future careers and are directly accountable to the public (Provost 2011, 7). This should make a difference, reflected also in the choice of independent variables in similar analyses on the USSC, which cannot be further discussed here. At the same time, there are findings from the US context showing that states over time professionalized in their use of amicus briefs. It remains to be seen if a maturation of MS amicus brief initiation, network building and coordination among MSs will take place in the EU similar to the development in the US (Provost 2011, 5, 6; Lemos and Quinn 2015, 1236–1239).

Lastly (5), the factors analyzed here could potentially not only explain amicus participation at the ECJ and USSC. Predictors which are relevant in both courts could express dynamics and patterns of amici behavior before courts in general, or of state/governmental actors as amici in particular. Future research should aim to formulate generalizable theoretical expectations and to build analytical models for these amici-court links. In order to incorporate the ECJ as the probably most powerful international court (IC) (Pollack 2003, 201) in comparative court research (cf. Alter 2014), a broader literature review on determinants of third-party involvement in ICs is desirable. While USSC and ECJ allow the analysis of state/governmental amici – i.e. MSs in a (quasi-)federal context – there should also be potential to develop an analytical model for ICs or courts in general.

9. Conclusion

In the history of the EC and EU the European Court of Justice has proven to be an engine of integration. With important rulings it furthered integration through law and it gained authority over time, adjudicating in more and more cases and more policy fields. Meanwhile, the preliminary reference procedure is the “the powerbase” of the ECJ (Hornuf and Voigt 2015). It provides the court with many cases referred from national EU courts and many core rulings in history of the EU rest upon a PRP. Because court rulings have politically important consequences, research on courts in general and the ECJ in particular receives increasing attention also from political scientists. They have made increasing efforts to describe the relationship between the ECJ in its inter-institutional environment. Particular attention is paid to the relationship of the ECJ to EU governments as creators and principals of the Court, since MSs do not only function as parties to legal disputes but are also part of the EU legislature (Council). As such, they can exert pressure on the Court, which is a potential threat for its authority and independence.

Previous research has shown that third-party involvement makes a difference at court. This paper asked for the factors which explain why and when EU MSs file observations to procedures before the ECJ, i.e. when governments appear as third parties in a court case (‘*amici curiae*’). Most scholarly attention on the relationship between MSs as amici and the ECJ hitherto focused on questions like *(When) Does the Court listen?*; or *Does the input of MSs have an effect on the Court?* This paper, however, shifted the focus towards the MSs’ decisions to participate in a case, thus asking *(When and Why) Do the MSs try to make themselves heard?* Other than in previous work on the MS-ECJ relationship, MS observations

served as the dependent instead of independent variable. The phenomenon of MS observations sent to the ECJ shows considerable variation which has not been explained so far. This represents a clear research gap which was addressed in this paper. Guidance was taken from theory and empirical findings on amicus participation at the USSC.

The ECJ is an institution whose actions have profound political consequences. Therefore, the political salience of the questions it deals with should matter. Unlike other actors, state representatives are granted preferential access to ECJ procedures as *amici curiae*. This gives EU MSs instruments at hand which are useful to make themselves heard in court procedures about which they care. Filing an observation to the Court is not a solely legal process executed by the legal advisors of MSGs, but it is a tool for governments to monitor the court in legal procedures which concern important policy positions of the states. Although literature on the USSC introduced several options to operationalize the salience of a court case, legal importance and political salience tended to blur in previous research. Earlier studies revealed difficulties to differentiate between legal and political factors that draw states' attention to a court case. As opposed to this, the paper at hand distinguished between legal importance and political salience conceptually and empirically and offered a solid operationalization of both. The presented analysis built on two datasets, with one (i) that offers data on 1,599 PRP, including MS observations (Naurin *et al.* 2013), and the other (ii) a dataset on the salience of legislative proposals which were controversial among MSs before the adoption in the Council of the EU (Thomson 2011; Thomson *et al.* 2012). Both were matched based on the concerned legal acts. A logistic regression analysis of 915 country-cases (856, respectively) was conducted. The analysis revealed that amicus participation can be partly explained by the static, *case-related legal importance* on the one hand, and on the other hand the political salience a case has for each individual actor (here MS). Moreover, the complexity of a court procedure and the resources of a MS (GDP) are important factors that condition these relationships (control variables). Legal importance is represented by stable characteristics of a court case and the political salience varies for each actor depending on its political positions. In that way it has been shown that politically controversial issues matter at court. The analysis did not only address the two objectives that were envisaged in this paper (i-ii, p. 3), but it also represents the first statistical model that allows to compare different predictors for MS observations and that measures their effect on the probability of observations.

One of the central insights of this paper is that MSs have a higher probability to engage in court procedures which deal with issues that were salient to MSs already before the adoption

of legislative proposals that concerned controversial issues. MSs do not only care about PRP based on static characteristics of a case that express its legal importance, but also based on the actor-related political salience of a legal dispute. Those issues which are controversial among MSs during legislation do also influence their behavior at court. This reveals that governments' behavior in the arena of judicial politics mirrors patterns of the legislative arena. Thus, not only the legal importance of a case explains the behavior of state amici, but it is also the policies that are at stake in a court procedure, which structure state amici's attempts to get involved at court. Based on these insights, a purely legal interpretation of the inter-institutional relationships at court seems insufficient. The ECJ is not only a legal arena but also a political one (cf. Naurin and Cramér 2009). Future studies should take this fact into consideration. It enables us to better understand states' behavior as amici curiae and the relationship between governments and courts more generally.

References

- Achen, Christopher H. 2006. Institutional Realism and Bargaining Models. In *The European Union decides*, edited by Robert Thomson, Frans N. Stokman, Christopher H. Achen and Thomas König, 86–123. Cambridge: Cambridge University Press.
- Alter, Karen J. 1998. Who Are the “Masters of the Treaty”? European Governments and the European Court of Justice. *International Organization* 52 (1):121–147.
- Alter, Karen J. 2000. The European Union's Legal System and Domestic Policy: Spillover or Backlash? *International Organization* 54 (3):489–518.
- Alter, Karen J. 2014. *The new terrain of international law: Courts, politics, rights*. Princeton, Oxford: Princeton University Press.
- Alter, Karen J. and Sophie Meunier-Aitsahalia. 1994. Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision. *Comparative Political Studies* 26 (4):535–561.
- Bailey, Michael A., Brian Kamoie, and Forrest Maltzman. 2005. Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making. *American Journal of Political Science* 49 (1):72–85.
- Bailey, Michael A. and Forrest Maltzman. 2008. Does Legal Doctrine Matter?: Unpacking Law and Policy Preferences on the U.S. Supreme Court. *American Political Science Review* 102 (3):369–384.
- Blauberger, Michael. 2012. With Luxembourg in mind ... the remaking of national policies in the face of ECJ jurisprudence. *Journal of European Public Policy* 19 (1):109–126.
- Blauberger, Michael. 2014. National Responses to European Court Jurisprudence. *West European Politics* 37 (3):457–474.
- Broberg, Morten and Niels Fenger. 2013. Variations in Member States' Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation? *European Law Journal* 19 (4):488–501.
- Burley, Anne-Marie and Walter Mattli. 1993. Europe before the Court: A political theory of legal integration. *International Organization* 47 (1):41–76.
- Busch, Marc L. and Eric Reinhardt. 2006. Three's a Crowd: Third Parties and WTO Dispute Settlement. *World Politics* 58 (3):446–477.

- Caldeira, Gregory A. and John R. Wright. 1990. Amici Curiae before the Supreme Court: Who Participates, When, and How Much? *The Journal of Politics* 52 (3):782–806.
- Cameron, Adrian Colin and Pravin K. Trivedi. 2013. *Regression analysis of count data*. Cambridge: Cambridge University Press.
- Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2008. Judicial Behavior under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review* 102 (4):435–452.
- Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2012. Understanding the Role of the European Court of Justice in European Integration. *American Political Science Review* 106 (1):214–223.
- Carrubba, Clifford J. and Matthew Gabel. 2014. *International courts and the performance of international agreements: A general theory with evidence from the European Union*. New York, NY: Cambridge University Press.
- Carrubba, Clifford J. and Lacey Murrah. 2005. Legal Integration and Use of the Preliminary Ruling Process in the European Union. *International Organization* 59 (2):399–418.
- Christiansen, Thomas and Christine Reh. 2009. *Constitutionalizing the European Union*. Basingstoke: Palgrave Macmillan.
- Clark, Tom S., Jeffrey R. Lax, and Douglas Rice. 2015. Measuring the Political Salience of Supreme Court Cases. *Journal of Law and Courts* 3 (1):37–65.
- Collins, Paul M. 2007. Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs. *Political Research Quarterly* 60 (1):55–70.
- Collins, Paul M. 2008. *Friends of the Supreme Court*. Oxford: Oxford University Press.
- Collins, Paul M., Pamela C. Corley, and Jesse Hamner. 2015. The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content. *Law & Society Review* 49 (4):917–944.
- Collins, Paul M. and Lisa A. Solowiej. 2007. Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court. *Law & Social Inquiry* 32 (4):955–984.
- Collins, Todd A. and Christopher A. Cooper. 2016. The Case Salience Index, Public Opinion, and Decision Making on the U.S. Supreme Court. *Justice System Journal* online first (<http://dx.doi.org/10.1080/0098261X.2015.1130105>):1–14.
- Comparato, Scott A. 2003. *Amici Curiae and Strategic Behavior in State Supreme Courts*: Praeger.

- Conant, Lisa. 2007. Review Article: The Politics of Legal Integration. *JCMS: Journal of Common Market Studies* 45 (Annual Review):45–66.
- Cook, Beverly B. 1993. Measuring the Significance of U.S. Supreme Court Decisions. *The Journal of Politics* 55 (4):1127–1139.
- Cross, Frank. 2009. Judicial Independence. In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington, 557–575. Oxford, New York: Oxford University Press.
- Davies, Gareth. 2016. The European Union Legislature as an Agent of the European Court of Justice. *JCMS: Journal of Common Market Studies* online first (<http://dx.doi.org/10.1111/jcms.12353>):1–16.
- Derlén, Mattias and Johan Lindholm. 2015. Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions. *German Law Journal* 16 (5):1073–1098.
- Encyclopædia Britannica. 2016. *Amicus curiae*. Available from <<http://www.britannica.com/topic/amicus-curiae>>. Accessed 10 February 2016.
- Ennis, Bruce J. 1983. Effective amicus briefs. *Catholic University Law Review* 33:603–609.
- Epstein, Lee and Jeffrey A. Segal. 2000. Measuring Issue Salience. *American Journal of Political Science* 44 (1):66.
- European Union. 2012. Rules of Procedure of the Court of Justice. *Official Journal of the European Union* 55 (L 265).
- Franchino. 2007. *The Powers of the Union: Delegation in the EU*. Cambridge, New York et al.: Cambridge University Press.
- Fritz, Vera. 2015. The First Member State Rebellion?: The European Court of Justice and the Negotiations of the ‘Luxembourg Protocol’ of 1971. *European Law Journal* 21 (5):680–699.
- Garrett, Geoffrey. 1992. International Cooperation and Institutional Choice: The European Community's Internal Market. *International Organization* 46 (2):533–560.
- Garrett, Geoffrey. 1995. The politics of legal integration in the European Union. *International Organization* 49 (1):171–181.
- Garrett, Geoffrey and Barry Weingast. 1993. Ideas, Interests and Institutions: Constructing the EC's Internal Market. In *Ideas and foreign policy: Beliefs, institutions, and*

- political change*, edited by Judith Goldstein and Robert O. Keohane, 173–206. Ithaca: Cornell University Press.
- Gleason, Shane A. and Colin Provost. 2016. Representing the States Before the U.S. Supreme Court: State Amicus Brief Participation, the Policy-making Environment, and the Fourth Amendment. *Publius: The Journal of Federalism* 46 (2):248–273.
- Goertz, Gary and James Mahoney. 2012. Causes-of-effects and effects-of-causes. In *A tale of two cultures: Qualitative and quantitative research in the social sciences*, edited by Gary Goertz and James Mahoney, 41–63. Princeton, N.J: Princeton University Press.
- Golub, Jonathan. 1996. The politics of judicial discretion: Rethinking the interaction between national courts and the European court of justice. *West European Politics* 19 (2):360–385.
- Granger, Marie-Pierre. 2006. States as successful litigants before the European Court of Justice: Lessons from the 'Repeat players' of European litigation. *Croatian Yearbook of European Law and Policy* 2 (2):27–49.
- Granger, Marie-Pierre F. 2004. When governments go to Luxembourg...: the influence of governments on the Court of Justice. *European Law Review* 29 (1):3–31.
- Gujarati, Damodar N. and Dawn C. Porter. 2009. *Basic econometrics*. Boston: McGraw-Hill Irwin.
- Hansford, T. G. 2004. Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case. *Political Research Quarterly* 57 (2):219–230.
- Hirschl, Ran. 2008. The Judicialization of Mega-Politics and the Rise of Political Courts. *Annual Review of Political Science* 11 (1):93–118.
- Hirschl, Ran. 2009. The Judicialization of Politics. In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington, 119–141. Oxford, New York: Oxford University Press.
- Hix, Simon and Bjørn Kåre Høyland. 2011. *The political system of the European Union*. Basingstoke: Palgrave Macmillan.
- Hönnige, Christoph. 2010. Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts. *European Political Science* 10 (3):346–358.
- Höpner, Martin and Armin Schäfer. 2010. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe. *West European Politics* 33 (2):344–368.

- Hornuf, Lars and Stefan Voigt. 2015. Analyzing preliminary references as the powerbase of the European Court of Justice. *European Journal of Law and Economics* 39 (2):287–311.
- Hübner, Denise C. 2015. The content of EU directives and their judicial enforcement through member state courts in the EU fifteen. Dissertation. Dublin: University of Dublin.
- Hübner, Denise C. 2016. The 'National Decisions' database (Dec.Nat): Introducing a database on national courts interactions with European Law. *European Union Politics* 17 (2):324–339.
- Hume, Robert J. 2006. The Use of Rhetorical Sources by the U.S. Supreme Court. *Law & Society Review* 40 (4):817–844.
- Kearney, Joseph D. and Thomas W. Merrill. 2000. The Influence of Amicus Curiae Briefs on the Supreme Court. *University of Pennsylvania Law Review* 148 (3):743–855.
- Kelemen, R. Daniel. 2012. The political foundations of judicial independence in the European Union. *Journal of European Public Policy* 19 (1):43–58.
- Kelemen, R. Daniel. 2013. Judicialisation, Democracy and European Integration. *Representation* 49 (3):295–308.
- Kelemen, R. Daniel and Susanne K. Schmidt. 2012. Introduction – the European Court of Justice and legal integration: perpetual momentum? *Journal of European Public Policy* 19 (1):1–7.
- King, Gary and Margaret E. Roberts. 2015. How Robust Standard Errors Expose Methodological Problems They Do Not Fix, and What to Do About It. *Political Analysis* 23 (2):159–179.
- Krislov, Samuel. 1963. The Amicus Curiae Brief: From Friendship to Advocacy. *The Yale Law Journal* 72 (4):694.
- Larsson, Olof, Daniel Naurin, Mattias Derlén, and Johan Lindholm. 2016. Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union. *Comparative Political Studies* Online first (<http://dx.doi.org/10.1177/0010414016639709>):1–29.
- Larsson, Olof and Daniel Naurin. 2016. Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU. *International Organization* 70 (2):377–408.

- Lemos, Margaret H. and Kevin M. Quinn. 2015. Litigating State Interests: Attorneys General as Amici. *New York University Law Review* 90:1229–1268.
- Long, J. Scott and Jeremy Freese. 2014. Regression models for categorical dependent variables using Stata. College Station Tex.: Stata Press.
- Lupu, Yonatan and James H. Fowler. 2013. Strategic Citations to Precedent on the U.S. Supreme Court. *The Journal of Legal Studies* 42 (1):151–186.
- Lupu, Yonatan and Erik Voeten. 2012. Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights. *British Journal of Political Science* 42 (02):413–439.
- Martinsen, Dorte Sindbjerg. 2015a. *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union*. Oxford: Oxford University Press.
- Martinsen, Dorte Sindbjerg. 2015b. Judicial Influence on Policy Outputs?: The Political Constraints of Legal Integration in the European Union. *Comparative Political Studies* 48 (12):1622–1660.
- McCann, Michael. 2009. Litigation and Legal Mobilization. In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington, 522–540. Oxford, New York: Oxford University Press.
- Merriam-Webster. 2016. *Attorney General*. Available from <<http://www.merriam-webster.com/dictionary/attorney%20general>>. Accessed 4 March 2016.
- Mortelmans, K. J. M. 1979. Observations in the Cases governed by Article 177 of the EEC Treaty: Procedure and Practice. *Common Market Law Review* 16 (4):557–590.
- Naurin, Daniel and Per Cramér. 2009. The European Court of Justice as a Political Actor and Arena: Analyzing Member States' Observations under the Preliminary Reference Procedure. *Statsvetenskaplig tidskrift* 111 (1):80–85.
- Cramér, Per; Larsson, Olof; Moberg, Andreas; Naurin, Daniel (2016): See you in Luxembourg? EU Governments' observations under the preliminary reference procedure. Stockholm: Swedish Institute for European Policy Studies (SIEPS); Svenska institutet för europapolitiska studier. Available online at http://www.sieps.se/sites/default/files/2016_5_rapp_eng.pdf.
- Naurin, Daniel, Per Cramér, Olof Larsson, Sara Lyons, Andreas Moberg, and Allison Östlund. 2013. Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008:

- Data report. *CERGU's Working Paper Series* 2013(1). Gothenburg: Centre for European Research (CERGU), University of Gothenburg.
- o'Connor, Karen and Lee Epstein. 1983. Court rules and workload: A case study of rules governing amicus curiae participation. *Justice System Journal* 8 (1):35–45.
- Pollack, Mark A. 2003. *The engines of European integration: Delegation, agency, and agenda setting in the EU*. Oxford, New York: Oxford University Press.
- Pollack, Mark A. 2013. The New EU Legal History: What's New, What's Missing? *The American University international law review* 28:1257–1310.
- Provost, Colin. 2011. When to Befriend the Court?: Examining State Amici Curiae Participation Before the U.S. Supreme Court. *State Politics & Policy Quarterly* 11 (1):4–27.
- Scharpf, Fritz W. 2012. Perpetual momentum: directed and unconstrained? *Journal of European Public Policy* 19 (1):127–139.
- Schmidt, Susanne K. 2014. Judicial Europeanisation: The Case of Zambrano in Ireland. *West European Politics* 37 (4):769–785.
- Shapiro, Martin. 2009. Law and Politics: The Problem of Boundaries. In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington, 767–774. Oxford, New York: Oxford University Press.
- Songer, Donald R. and Reginald S. Sheehan. 1993. Interest Group Success in the Courts: Amicus Participation in the Supreme Court. *Political Research Quarterly* 46 (2):339–354.
- Spaeth, Harold J. 2009. Reflections about Judicial Politics. In *The Oxford Handbook of Law and Politics*, edited by Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington, 752–766. Oxford, New York: Oxford University Press.
- Spriggs, James F. and Paul J. Wahlbeck. 1997. Amicus Curiae and the Role of Information at the Supreme Court. *Political Research Quarterly* 50 (2):365–386.
- Stone Sweet, Alec. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press.
- Stone Sweet, Alec and Thomas Brunell. 1998. Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. *American Political Science Review* 92 (1):63–81.

- Stone Sweet, Alec and Thomas Brunell. 2012. The European Court of Justice, State Noncompliance, and the Politics of Override. *American Political Science Review* 106 (1):204–213.
- Stone Sweet, Alec and Thomas L. Brunell. 2013. Trustee Courts and the Judicialization of International Regimes. *Journal of Law and Courts* 1 (1):61–88.
- Thomson, Robert, Javier Arregui, Dirk Leuffen, Rory Costello, James Cross, Robin Hertz, and Thomas Jensen. 2012. A new dataset on decision-making in the European Union before and after the 2004 and 2007 enlargements (DEUII). *Journal of European Public Policy* 19 (4):604–622.
- Thomson, Robert and Frans N. Stokman. 2006. Research design: measuring actors', saliences and capabilities. In *The European Union decides*, edited by Robert Thomson, Frans N. Stokman, Christopher H. Achen and Thomas König, 25–53. Cambridge: Cambridge University Press.
- Thomson, Robert. 2006. Comparison of expert judgements with each other and with information from Council documentation. In *The European Union decides*, edited by Robert Thomson, Frans N. Stokman, Christopher H. Achen and Thomas König, 329–347. Cambridge: Cambridge University Press.
- Thomson, Robert. 2011. *Resolving Controversy in the European Union: Legislative Decision-Making before and after Enlargement*. Cambridge: Cambridge University Press.
- Tridimas, George and Takis Tridimas. 2004. National courts and the European Court of Justice: A public choice analysis of the preliminary reference procedure. *International Review of Law and Economics* 24 (2):125–145.
- van Stralen, Floris. 2015. The Member States and the Court of Justice. Why do Member States participate in preliminary reference proceedings? Master Thesis. Gothenburg: University of Gothenburg.
- Vachez, Antoine. 2012. Keeping the dream alive: The European Court of Justice and the transnational fabric of integrationist jurisprudence. *European Political Science Review* 4 (1):51–71.
- Vining, Richard L. and Teena Wilhelm. 2011. Measuring Case Salience in State Courts of Last Resort. *Political Research Quarterly* 64 (3):559–572.
- Waltenburg, Eric N. and Bill Swinford. 1999. *Litigating Federalism: The States Before the U.S. Supreme Court*. Westport, London: Greenwood Publishing Group.

- Warntjen, Andreas. 2012. Measuring salience in EU legislative politics. *European Union Politics* 13 (1):168–182.
- Wasserfallen, Fabio. 2010. The judiciary as legislator?: How the European Court of Justice shapes policy-making in the European Union. *Journal of European Public Policy* 17 (8):1128–1146.
- Weiler, Joseph H. H. 1991. The Transformation of Europe. *The Yale Law Journal* 100 (8):2403–2483.
- Wincott, Daniel. 1995. The role of law or the rule of the Court of Justice? An ‘institutional’ account of judicial politics in the European Community. *Journal of European Public Policy* 2 (4):583–602.
- Wind, M., D. S. Martinsen, and G. P. Rotger. 2009. The Uneven Legal Push for Europe: Questioning Variation when National Courts go to Europe. *European Union Politics* 10 (1):63–88.
- Wind, Marlene. 2010. The Nordics, the EU and the Reluctance Towards Supranational Judicial Review. *JCMS: Journal of Common Market Studies* 48 (4):1039–1063.
- Zemans, Frances Kahn. 1982. Framework for Analysis of Legal Mobilization: A Decision-Making Model. *American Bar Foundation Research Journal* 1982:989.
- Zuber, Katie, Udi Sommer, and Jonathan Parent. 2015. Setting the Agenda of the United States Supreme Court?: Organized Interests and the Decision to File an Amicus Curiae Brief at Cert. *Justice System Journal* 36 (2):119–137.

Court cases and legal texts

- Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963], EUR-Lex document 61962CJ0026.
- Case C-6/64 Flaminio Costa v E.N.E.L. [1964], EUR-Lex document 61964CJ0006.
- Case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (also known as ‘Cassis de Dijon’) [1979], EUR-Lex document 61978CJ0120.
- Case C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (CPAS) [2001], EUR-Lex document 61999CJ0184.

Case C-14/01 Molkerei Wagenfeld Karl Niemann GmbH & Co. KG v Bezirksregierung Hannover [2003], EUR-Lex document 62001CJ0014.

Case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) [2004], EUR-Lex document 62002CJ0456.

Case C-283/03 A. H. Kuipers v Productschap Zuivel [2005], EUR-Lex document 62003CJ0283.

Case C-313/04 Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung [2006], EUR-lex document 62004CJ0313.

Case C-341/05 Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2008], EUR-Lex document 62005CA0341.

Case C-372/06 Asda Stores Ltd v Commissioners of Her Majesty's Revenue and Customs [2007], EUR-Lex document 62006CJ0372.

Case C-403/08 Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen [2011], EUR-Lex document 62008CA0403 (joined cases).

Case C-333/13 Elisabeta Dano, Florin Dano v Jobcenter Leipzig [2014], EUR-Lex document 62013CA0333.

Case C-67/14 Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others [2015], EUR-Lex document 62014CJ0067.

Case C-308/14 Commission v United Kingdom [pending], EUR-Lex document 62014CC0308 (here: Advocate General's Opinion since case is pending).

Council Regulation (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products, EUR-lex document 31999R1255.

Appendix A1: Overview of variables

Table A1: Overview of variables

commonlaw (0;1)	Indicates common law background, i.e. whether a country-case and the respective MS observation concerns a common law country (Ireland, UK) (1) or not (0).
complexity (-1.494 – 3.286)	Stata syntax of the factor analysis for the variable complexity: .factor count_issueareas n_questions, pcf factor(2) .predict complexity .label variable complexity "Complexity"
count_issuearea	Count variable which sums up the number of policy/issue areas which are affected by a PRP. count_issuearea=free_mov_goods + agriculture + free_mov_workers + establishment + services + capital + visas + transport + competition + tax + approximation + econ_policy + mon_policy + inst_econ_mon + customs_coop + transitional + employment + social_provs + social_fund + education + culture + public_health + consumer_prot + trans_network + industry + cohesion + research + environment + overseas + commercial_policy + development + institutional_provs + financial_provs + general_provs. The individual variables are policy dummy variables which indicate if a legal question was attributed to the issue area or not (1-0).
count_legalacts (1-20)	[=number of non-missing string values in the variables ‘concerned_acts1’ to ‘concerned_acts20’]
court_type (0;1)	Type of the submitting national court. “Codes: 0 = Lower Court 1 = Supreme Court 99 = Uncertain”
doctrine_affected (0;1)	Coded one if one of the five doctrines (doc_direct; doc_suprem; doc_liab; doc_loyal; doc_nondis) is affected
gdp (gross domestic product)	Annual gross domestic product recoded in billion US\$, data from OECD database (https://data.oecd.org/gdp/gross-domestic-product-gdp.htm).
internalobs (0;1)	1=internal observation; 0=external observation
MSobservation (0;1)	Issue observation dummies for each MS; indicates whether an actor filed an observation in the respective issue (single unit of observation) or not (1-0)
N_observ (0-27)	Count variable that sums up the number of MSs which filed an observation to the respective court procedure. N_observ=bedum + dk dum + dedum + grdum + esdum + frdum + iedum + itdum + ludum + nldum + atdum + ptdum + fidum + sedum + ukdum + eedum + lvdum + ltdum + pldum + czdum + skdum + hudum + sidum + cydum + mtdum + bgdum + rodum.
n_questions	Number of questions sent to the ECJ by a national EU court in the respective court procedure.
salience_ms (0-100)	Political salience scale ranging from 0 (not salient) to 100 (highly salient) for each MS (Thomson (2011)/ Thomson et al. (2012)).
submMS	Country of the court from which a PRP was submitted to the ECJ. “Codes: 1 Belgium, 2 Denmark, 3 Germany, 4 Greece, 5 Spain, 6 France, 7 Ireland, 8 Italy, 9 Luxembourg, 10 Netherlands, 11 Austria, 12 Portugal, 13 Finland, 14 Sweden, 15 United Kingdom, 16 Estonia, 17 Latvia, 18 Lithuania, 19 Poland, 20 Czech Republic, 21 Slovakia, 22 Hungary, 23 Slovenia, 24 Cyprus, 25 Malta, 26 Bulgaria, 27 Romania.” Recoded into dummies for each country, e.g. submitting court_SE/subm_SE (1=Yes, 0=No).
year_lodged	year when the case was received by the ECJ (2001-2008), recoded to range from 1-8

Source: Dataset and variables are described in and citations taken from Naurin et al. (2013), except for salience_ms, which is adopted from Thomson (2011)/ Thomson et al. (2012), and gdp, which is annual OECD data in billion US\$; partly recoded variables as indicated.

Appendix A2: Internal observations as powerful predictors

Table A2. Bivariate Pearson Chi²-tests. The dependence of MS observations (*msdum*) on the submission of a legal issue by a national court in the respective MS (*submMS*)

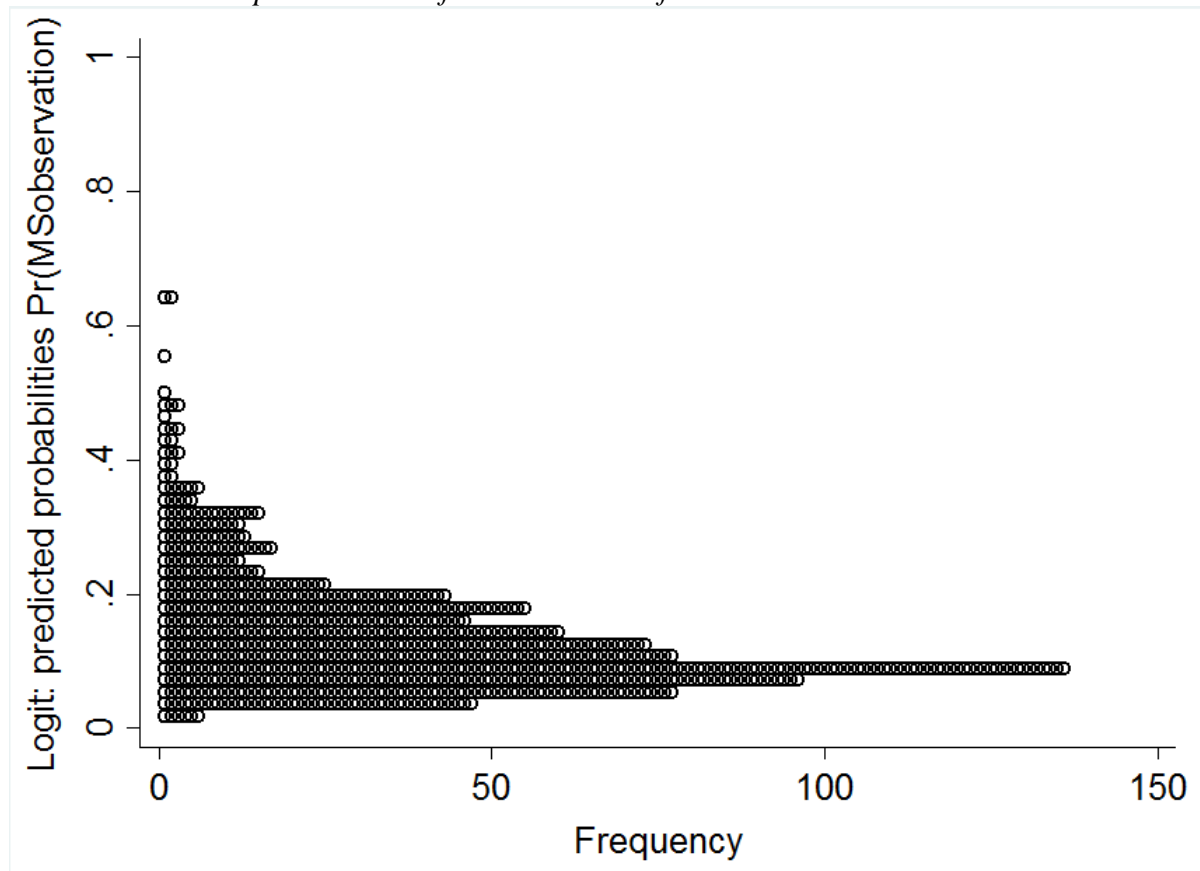
DV: <i>msdum</i>	Pearson Chi-Square (χ^2)	Phi (ϕ)	(Fisher's Exact Test Significance)
IV: <i>submMS</i>			
submBE	819.471***	.462***	
submDK	687.106***	.423***	
submDE	703.772***	.428***	
submGR	404.621***	.324***	
submES	668.437***	.417***	
submFR	551.638***	.379***	
submIE	(65.032***)	.130***	.000
submIT	631.373***	.405***	
submLU	(994.670***)	.509***	.000
submNL	1002.009***	.510***	
submAT	1212.787***	.562***	
submPT	808.918***	.459***	
submFI	1102.046***	.535***	
submSE	582.466***	.389***	
submUK	926.707***	.491***	
submEE	(1546.146***)	.634***	.000
submLV	(332.521***)	.294***	.000
submLT	(120.126***)	.177***	.000
submPL	(206.153***)	.232***	.000
submCZ	(282.768***)	.271***	.000
submSK ²¹	-	-	
submHU	(1209.012***)	.561***	.000
submSI ²⁹	-	-	
submCY	(.018)	-.002	1.000
submMT ²⁹	-	-	
submBG	(2882.248***)	.866***	.000
submRO ²⁹	-	-	

* $p < .05$ ** $p < .01$ *** $p < .001$. $N=3845$ (complete dataset Naurin et al. 2013). $df=1$. In some Chi-Square tests expected values lower than 5 occurred due to the fact that in some countries there has been an extremely low number of issues submitted from a national court to the ECJ so far. These countries were not taken into account when reporting the range of the value range of Pearson Chi² (χ^2) and Phi (ϕ) in the text. For those cases, the significance of Fisher's exact test is reported.

²¹ No issues submitted from courts in Slovakia, Slovenia, Malta, Romania in the dataset (i.e. until 2008).

Appendix A3: Plotting predicted probabilities

Plot A3. Predicted probabilities of MSobservation for model 4



Appendix A4: Email communication with ECJ registry

“From: Registry ECJ <ECJ.Registry@curia.europa.eu>

Sent: Friday, 12 February 2016 11:39

To: Julian Dederke

[Email Subject]: When is a procedure attributed to a certain chamber?

“Dear Mr Dederke,

In preliminary reference procedures the request for a preliminary ruling is notified to all the Member States, in their own language, one month after the request has been received at the Court Registry. The Member States then have 2 months, plus 10 days, to lodge written observations should they wish to do so. The written observations are translated into the language of the case and into French (the working language of the Court) and are then notified to all the Member States and other participants in the case, with a request that they inform the Court, within 3 weeks of receipt of that notification, as to whether or not they deem that an oral hearing is necessary.

It is at this stage that the reporting judge will prepare the preliminary report which will go before a General Meeting of the Court. It is at that meeting that the Court decides which chamber will decide the case and whether or not an oral hearing is necessary. After the General Meeting the Registry informs all participants of the decisions taken at that meeting, including which chamber will handle the case.

I hope that this information is of assistance to you,

Yours sincerely,

[...]

ECJ Registry”