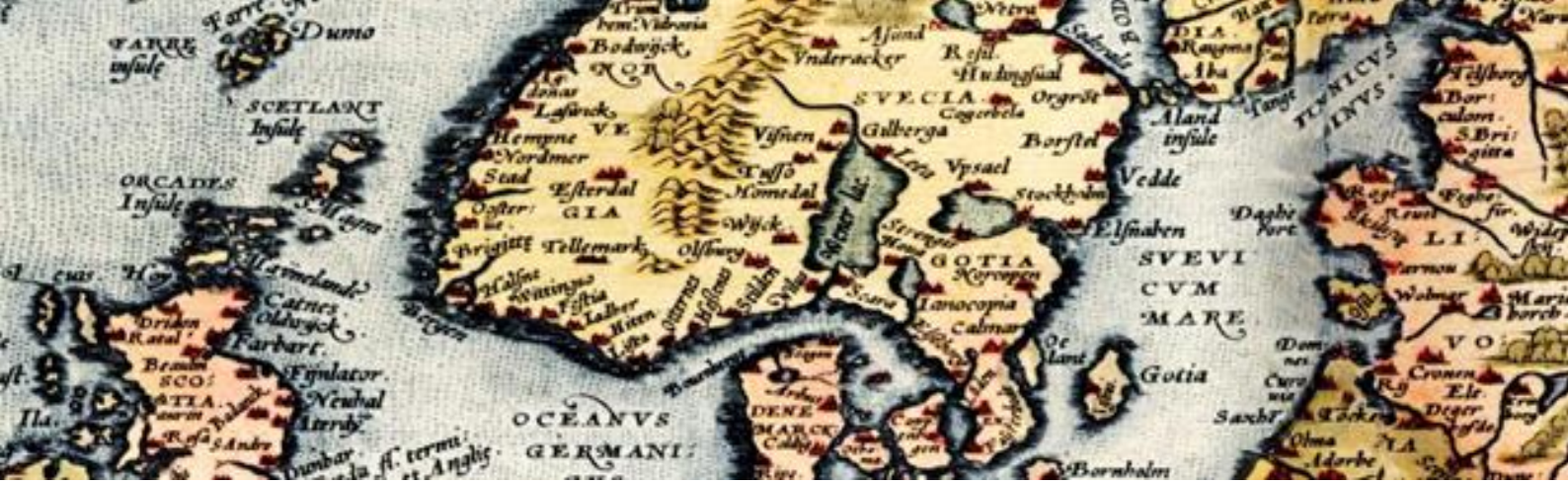

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Data report

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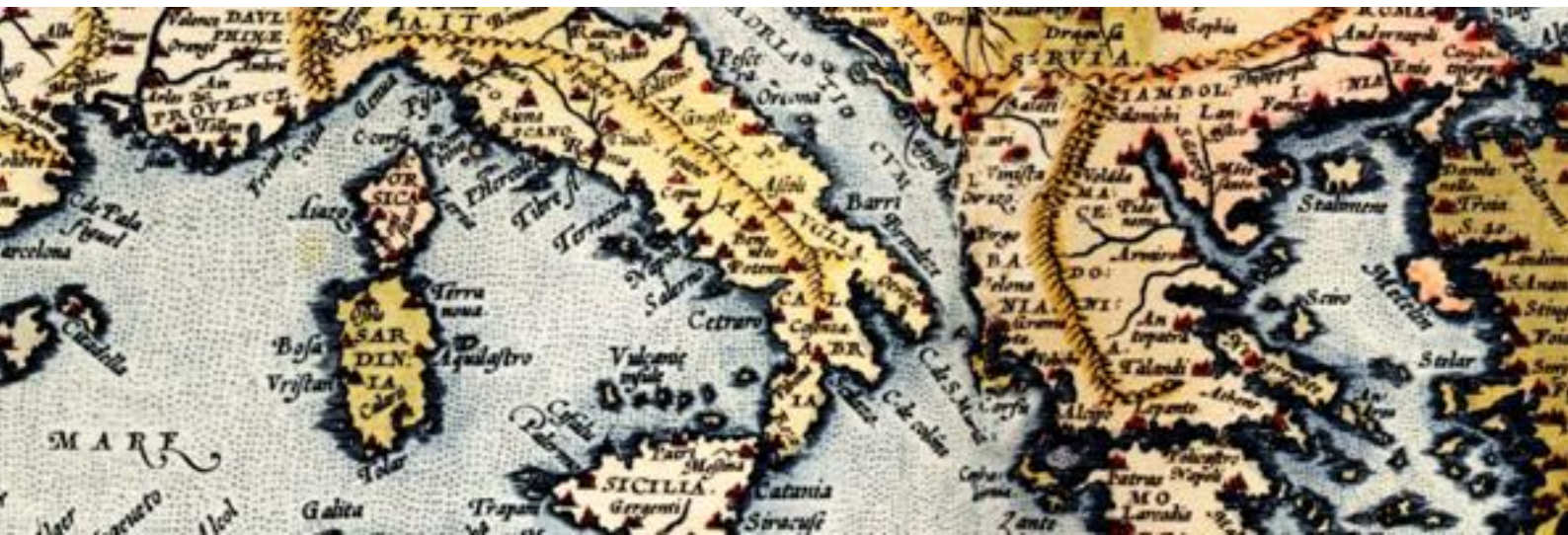

Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008: Data report

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Background

This report describes the data collection that has been made at the Centre for European Research at the University of Gothenburg (CERGU) on the basis of the research project *The European Court of Justice as a political actor and arena: Analyzing member states' observations under the preliminary reference procedure*. The project has been financed by Riksbankens Jubileumsfond, and led by Daniel Naurin and Per Cramér at CERGU.[1]

The overall purpose of the project is to contribute to a better understanding of the interactions between the legal and political institutions of the European Union, and in particular the Court of Justice of the EU (CJEU) and the EU member states' governments. We have a multidisciplinary approach, combining theory and methods from legal and political science. A specific rationale behind the project was the unique opportunity we had to access archival material documenting the "observations" (written positions and arguments) submitted by the Member States' governments in the preliminary reference procedure. The systematic coding of these observations in combination with other related material – including qualitative interpretations of the legal issues involved and the positions taken on these issues by the central actors – constitute the core of the data base.

The report proceeds as follows. First we will describe the document material that has been used for the coding, specify the unit of analysis and make a few comments about the organization of the coding work. Thereafter we describe and comment on the reliability test that has been conducted. We also compare our data to that collected by Carrubba, Gabel and Hankla, which so far is the most similar project to ours.[2] Finally, we describe the variables included in the data,

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[1] We would like to acknowledge our gratitude first and foremost to Anna Falk at the Swedish Foreign Ministry for invaluable support concerning access to documents at the Swedish Foreign Ministry. We would also like to thank Gitte Stadler of the Info and Press Service of the CJEU and Anne-Andreev Winterfeldt of the Swedish Foreign Ministry for support and documentation, Felix Boman, Kajsa Pettersson, Niklas Martinsson, Antonia Häller and Erika Strandén for contributing to the coding, and Fabian Lidman and Stellan Östlund for contributing with customized computer software.

[2] 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* 102:04, and (2012) "Understanding the Role of the European Court of Justice in European Integration." *American Political Science Review* 106(01):214-23

some descriptive statistics, and the results of the reliability test for each variable in the data.

Scope and documentation

The project focuses on the interaction between member states' governments and the CJEU under the preliminary rulings procedure (Article 267 of the Treaty on the Functioning of the European Union). Under this procedure the CJEU responds to questions concerning the interpretation of EU law posed by national courts in the member states. The CJEU does not adjudicate between the parties in the case, but guides the national court in the understanding and construction of EU law. Often this implies deciding whether there is a conflict between EU law and national laws, regulations and practices in the case at hand. Due to the principle of supremacy of EU law over national law (which was established by the CJEU in a preliminary ruling case[3]) the judgments of the CJEU in most cases, imply deciding whether national autonomy will be restricted or not.

A specific individual court decision does not always have large material or doctrinal effects, but the aggregate impact of the incremental expansion of EU law has been described as a remarkable example of judicialization of politics in Europe.[4] A common view is that the CJEU has used the preliminary rulings procedure, along with its own developed tools of supremacy and direct effect, to promote the legal integration of Europe.[5] A much-debated question following from this is to what extent the member states of the EU - the supposed masters of the Treaties - are in agreement with and/or in control of this process of legal integration.

The preliminary rulings procedure allows the member states to submit observations to the CJEU, i.e. statements containing positions and arguments in favor of their preferred interpretation of the legal rules that the questions posed

[3] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585

[4] Stein, Eric (1981) "Lawyers, Judges, and the Making of a Transnational Constitution." *The American Journal of International Law* 75(1): 1–27, Weiler, J. H. H. (1991) "The Transformation of Europe." *The Yale Law Journal* 100(8): 2403–83.

[5] Burley, Anne-Marie, and Walter Mattli (1993) "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47(1): 41–76, Alter, Karen J. (1998) "Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice." *International Organization* 52(01): 121–47.

to the CJEU concern. These observations may be interpreted as revealed preferences on legal integration and therefore constitute highly valuable data for studying judicial politics. However, the observations are not publically available from the CJEU. The Court treats them as member state "property", and refers researchers to request the documentation from the 27 member states themselves. Any such attempt on a larger scale is unlikely to be successful.
Historically, another option for collecting data on member state observations on a more systematic basis was to refer to the *Reports for the Hearing* prepared by the Judge-Rapporteur. These reports were made when the procedure in the case included a hearing of oral argument, which normally has been the case (although decreasingly so in the last years as will be seen below). About three weeks before the hearing at the Court, the Report for the Hearing was sent out to the parties and other participants in the proceedings. For preliminary ruling cases, these reports comprised a description of the legal and factual background to the case, a note of the questions referred by the national court and the answers proposed in the written observations lodged by the parties before the national court, as well as any interested party in the meaning of article 23 of the Statute of the Court of Justice such as the member states and the Commission. According to the Court's own procedural notes concerning these reports the arguments put forward in support of the proposed answers were normally not recorded. However, our experience after having coded almost 1600 of these reports is that not only positions but also coherent arguments may be derived from these documents.
If any of the interested parties were unhappy with the summary of their position in the Report for the Hearing they could inform the Registrar at the Court before the hearing and "suggest such amendments as they consider appropriate".[6] In the end, however, the Report for the Hearing is a report presented by the Judge-Rapporteur to the other Members of the Court, and it is for him or her to decide whether it need be amended.
The Reports for the Hearing thus contained crucial information on the member states positions and arguments before the Court. It is therefore unfortunate from a transparency point of view that the Court first, in 1994, limited the access to

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

these reports, and then in 2012 stopped producing them altogether. The reason for this, according to the Court, is lack of resources and a steady increase in the number of cases that it needs to deal with.[7] It means that since November 2012, when the new Rules of Procedure for the CJEU took effect, there is no longer any way of gaining access to the member states' observations from the Court.

Until 1993, the Reports for the Hearing were translated into English and published in the European Court Reports (ECR). Carrubba, Gabel and Hankla make use of these reports in their data collection. From 1994 onwards however, the Reports for the Hearing were no longer translated and published. They were still available from the CJEU in single cases upon request, but only in the language of the case (i.e. the language of the member state of the submitting national Court).

Luckily, we were able to find another source where the Reports for the Hearing were systematically archived also after 1993, and most of them in a language that our research team could handle (French, English, Swedish and Danish). This was the archive of the Swedish Foreign Ministry, where the Reports for the Hearing that have been prepared since Sweden became a member of the EU in January 1995 are stored. We were allowed to make use of the archives under confidentiality conditions, implying that we could use the documents for the sake of preparing the database, although we were not allowed to publish or spread the documents themselves.

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

We used the EU's official search engine for the jurisprudence of the CJEU – *InfoCuria* – to identify the cases. In total we requested access to the Reports for

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

the Hearing for 1896 preliminary reference cases. 1593 of these (84 per cent) were eventually received and coded.[8] The most common reason for missing reports was the simple fact that no reports existed since no oral hearing had been held.[9] These account for 241 cases (13 per cent). Table 1 shows that the number of cases where no oral hearing was held increased substantially after the Court's adjustments of its working procedures in the event of the Eastern enlargement of the EU in 2004.

Does the fact that we are missing observations from about 20 per cent of the cases in the last years covered by the study produce a biased data set for these years? Whether a data set is biased depends on the research question. For many analyses it should be acceptable to work with the cases that were considered most important by the parties. Pursuant to Article 44a of the Rules of Procedure of the CJEU, oral proceedings may be replaced by written procedure upon suggestion by the Judge-Rapporteur and upon approval by the Advocate-General, as long as neither party submits that he wishes to be heard. Although there is no guarantee that salient cases are not settled by written procedure we find it likely that the parties will prefer to state their cases also orally when more is at stake. There were also two other sources of missing reports, as seen in Table 1. In a few cases no Report for the Hearing was drawn up because the case was processed according to the urgent preliminary ruling procedure. This procedure was introduced by Council Decision 2008/79 of December 20, 2007 and is applicable as of 1 March 2008 under Art. 104b of the Rules of Procedure of the CJEU. Seven such cases were found in 2008. Furthermore, Reports for the Hearing from 52 cases (2.7 per cent) remain uncoded because we received them in a language for which we did not have coding expertise. We have no clear explanation as to why the majority of archived Reports for the Hearing at the Swedish Foreign Ministry were in French or English, whereas some were in the language of the

[8] A handful of these were requested directly from the CJEU, while the rest came from the SFM.

[9] We derived the information that there was no oral hearing on these cases from the Court's Judgment or the Opinion of the Advocate-General in the relevant cases. Sometimes these included an explicit confirmation of this fact. In other cases it could be understood from the fact that there was no reference to any hearing or oral observations.

proceedings (most of these are in German). Appendix 1 detail which cases are missing from the data set, and for what reason.

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

Year	Total no requested	Total no coded	No oral hearing	Urgent procedure	Language	Other
1997	152	134	3	0	15	0
1998	150	139	4	0	7	0
1999	152	145	2	0	5	0
2000	141	134	6	0	1	0
2001	145	142	1	0	1	1
2002	137	126	2	0	8	1
2003	140	115	23	0	2	0
2004	169	127	41	0	1	0
2005	168	131	35	0	2	0
2006	156	111	44	0	1	0
2007	177	143	29	0	5	0
2008	208	146	51	7	4	0
Sum	**1896**	**1593**	**241**	**7**	**52**	**2**

The Reports for the Hearing have been the core documents in the coding, in particular for the identification of the member states' observations. In addition to that the coders also used the *Judgments* delivered by the CJEU and the *Opinions of the Advocate-Generals,* which are available on the website of the CJEU. These later documents not only contain the positions of the AG and the final decision by the CJEU, but also relevant background information and legal analysis of the cases, which were useful for the coders when defining the legal issues and the positions of the actors involved. In those few cases where member state observations were only given orally at the hearing we used the judgment of the CJEU and the opinion of the AG to derive information on the content. For

some of the other variables in the dataset other sources were used, including Eurlex and other websites.

Coding and units of analysis

The coding required considerable capabilities in legal analysis. For this reason we recruited graduates and advanced-level students of the Law School of the University of Gothenburg. Although several assistants came and went over the period of three years that the coding was carried out (2009-2012) the bulk of the work was done by two graduates, Sara Lyons and Allison Östlund. For some of the variables, such as nationality of judges and Advocates-General, and legal acts relevant for the case, the data and coding has been automatically extracted from the web using web data extraction programs.

The main units of analysis in the coding are not the 1593 preliminary ruling cases, but the 3845 *questions* submitted by the national courts to the CJEU. On average, each case contained 2,4 questions that the national Court asked the CJEU to answer. It should be noted that the number of *real* questions posed cannot be automatically inferred from the number of questions listed by the national court. Sometimes one (numbered) question from the national court may in practice contain two legal questions, while sometimes two (numbered) questions are overlapping and may be merged into one. Whether or not the coder has made such splitting and merging of the original questions is indicated in the dataset. Table 2 shows the number of questions coded for each year.

Table 2. Number of questions in the dataset

Year	Number of Questions
1997	263
1998	312
1999	386
2000	288
2001	337
2002	271
2003	269
2004	363
2005	298
2006	270
2007	399
2008	389
	3845

Reliability

An inter-coder reliability test was carried out for the qualitatively coded variables in the data set. The test is based on a randomly selected sample of 50 cases including 91 questions from national courts. The coders then recoded cases previously coded by others, without first taking part of the original coding.[10] The two codings were then compared, and notes were made on whether there was any disagreement between the two. Three types of disagreement were distinguished: 1) Non-agreement because of wrong coding by coder 1 (according to coder 2, who performed the reliability coding), 2) Non-agreement because of wrong coding by coder 2 (according to coder 2), 3) Non-agreement because the coding decision was ambiguous and different reasonable

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

interpretations were possible. The codings that were found wrong were subsequently corrected in the original database.

The results of the test are described for each variable in connection to the outline of the variables and codes below in this report, and the full details of the test is available at www.cergu.gu.se. Generally, the reliability is sufficiently high even for the variables based on more complicated analysis of legal argumentation. The agreement rate ranges between 83 per cent up to 100 per cent, which is well in line with established rules of thumb.[11]

One variable stands out in terms of non-agreement, however, and therefore deserves some extra attention here. *Spec_pos_*noX (specified position number 1,2,3 etc) defines and lists the different positions (i.e. answers to the question put by the national court) taken by all the actors involved as identified by the coders. For 59 per cent of the questions the exact same positions are listed, while for the rest at least one position differs. The reason for this relatively high non-agreement is that the coders needed to decide how nuanced they should be when distinguishing between different answers, and it was difficult to make general guidelines for that decision. More than half of the non-agreement on *spec_pos_*noX stemmed from cases where one coder had listed one more position than the other coder, i.e. coder 2 had identified the same positions as coder 1 plus an additional one. Often the additional position was a further specification of an already existing position found also by coder 1, such as "yes" and "yes, if/but…".

For example, in Case C-146/2005, question number 2, the question (legal issue) posed by the national court for the parties to answer was the following: *Does the answer to the* [previous] *question depend on whether the taxable person initially knowingly concealed the fact that an intra-Community supply had occurred?* The two coders identified two positions each among the submissions. Coder 1 noted "Yes" and "No, but it is an important factor", while coder 2 noted "Yes, if there is a risk of loss in tax revenues" and "No". The reliability test indicated strong non-agreement here (four different positions), while the difference in reality is

[11] See, for example, Lombard, Matthew, Jennifer Snyder-Duch and Cheryl Campanella Bracken (2002) "Content Analysis in Mass Communication: Assessment and Reporting of Intercoder Reliability" in *Human Communication Research*, Vol 28, No 4, pp. 587-604

nuanced and the positions are the same at a more aggregate level (”yes” and ”no”).

It is important to note that the non-agreement between the coders on this variable does not come from sloppy coding, but from different judgments on where to draw the line between positions that may be considered separate and positions that are in practice the same even though they contain some nuanced specifications.

These caveats should be kept in mind when using this variable. The list of positions should be interpreted as one reasonable categorization of the positions taken, but other reasonable categorizations may also exist depending on how specific one wants to be in distinguishing between different positions. How this variable should be handled in practice depends on the specific research question, as always. If one wants to have a more aggregate measure of position-similarity *pos_x_type* – which classifies the specified positions at *spec_pos*_noX into positions implying more or less European legal integration (where “yes” and “yes, if/but” would normally fall in the same category) - could be used instead.

A few notes on how our data compares with Carrubba, Gabel and Hankla

In some respects, our data and research design is similar to Carrubba, Gabel and Hankla’s (CGH). In particular, CGH also used large-n data on member states’ observations to analyze the impact of governments on the Court’s decisions. The data analyzed in their APSR article concerns cases from 1987 to 1997, while the larger data set includes cases from 1960-1999.[12] The study of CGH was innovative and thought provoking, although their research design, choice of models and interpretations of findings have been criticized.[13] We will not repeat or review that debate here. Apart from the fact that our data concerns a more recent period (1997-2008), and therefore may tell us more about the judicial politics of a deeper and wider EU, it also has some other advantages to the data collected by CGH.

[12] http://polisci.emory.edu/home/people/carrubba_CJEUd/index.html

[13] Stone Sweet, Alec, and Thomas Brunell (2012) “The European Court of Justice, State Noncompliance, and the Politics of Override.” *American Political Science Review* 106(01): 204–13.

As dependent variable for their APSR article CGH had coded whether the CJEU favors the position of the plaintiff in the case before the national court, or not. This is a fairly crude measure as disagreement with the plaintiff may be based on rather different positions. If the Plaintiff's position is "yes" on the question raised by the legal issue there may be two or three different "no, but…", as described above in the discussion of variable *spec_pos_*noX. Our coding of the positioning is more nuanced in this respect and should therefore give a better measure of actually existing alignments.

Furthermore, CGH were not able to code all member states' observations after 1993. As described before the member states observations are not published by the CJEU, but up until 1993 it published the reporting judges' summaries of Member States observations in the European Court Reports. For the years 1994 to 1997, therefore, CGH had to use the references to the member states observations in the CJEU judgments themselves (and the opinions of the Advocates-General) for their coding.[14] However, the Court does not refer to all observations in its Judgment, but picks and chooses as it deems suitable. The result is a biased sample of observations for the last years of the data set. Unfortunately, the bias also speaks in favor of CGH's main finding concerning member states' influence over the CJEU, since it is most likely that the court chooses to refer to those observations which are in alignment with their own position.

To investigate further the significance of this bias we compared the coding of observations in CGH's data set on 60 questions that were filed in 1995, with the Reports for the Hearing from the Swedish Foreign Ministry.[15] On these questions we were able to derive 155 observations from the Reports for the Hearing, while CGH had only coded 97, i.e. only 62 per cent of the actually submitted observations. It is clear that the CGH data misses a large portion of the observations filed after 1993, and that the data therefore should be used with caution for that period. However, we have no reason to believe that a similar bias

[14] Unfortunately, they do not make this explicit in their article, but it was confirmed in an email communication with the authors on 1 June 2010.

[15] As explained before, our data set does not include the years 1995-1996 since we ran out of resources before these years were coded. However, we did receive the Reports for the Hearing also for these years.

exists before 1994 when CGH were able to make use of the Reports for the Hearing published in the European Court Reports. The details of our comparison are set out in appendix 3.

Apart from the reliability issues we believe that our coding of the content of the positions in terms of their impact on legal integration (*pos_x_type*) also gives us a more theoretically relevant variable for many analyses. Whether the Court's judgment is in line with the position of the plaintiff is not of any substantive interest, but is used as a yardstick by CGH for measuring whether the actors are in agreement or not. Whether the member states, the Commission and the Court argues for more or less Europe, however, is at the core of many theoretical debates. We can therefore test hypotheses about the direction of member states' influence on EU legal integration.

Variables included in the dataset

This section describes the variables that are included in the dataset and makes notes on the coding process. It also includes the codes used and the results of the reliability test. In practice, this is a thicker version of the codebook used by the coders. Some of the variables have been coded qualitatively, while others have been automatically downloaded from different websites with the help of web data extraction tools.

The variables are categorized by the following headings:

1. Identification of cases and questions
2. Submitting Court
3. Parties
4. Community law
5. Doctrine
6. Court of Justice
7. Legal issue and positioning
8. Voting rule

1. Identification of case and questions

Var 1 name: *id*
Codes: 1-3845
Comment: Individual identification number given to all units of analysis, i.e. the questions submitted by the national court in the case.

Var 2 name: *deliv_date*
Codes: Date when the judgment was delivered by the CJEU
Comment: The data has been automatically downloaded from the CJEU website using customized software.

Var 3 name: *case*
Codes: The unique identifier of the official case number, as given by the Court.
Comment: All case numbers have the structure "C-XXX/Year". Here we have only noted the unique identifier, i.e. for case C345/07 we note 345. When cases have been joined only the first case number is noted. This is also the case that subsequently has been coded. The data has been automatically downloaded from the CJEU website using customized software.

Var 4 name: *year*
Codes: The year the case was received by the CJEU
Comment: Corresponds to the year of the case number. The data has been automatically downloaded from the CJEU website using customized software

Var 5 name: *add_quest* (additional question)
Codes:

0 = same number of questions as *numbered* by the submitting court

1 = additional question(s) has/have been added by the coder

Comment: This variable marks when more questions (in quantity, not content) have been coded than the literal number of questions posed by the national court. Oftentimes, there have been several explicit questions under one single heading (i.e. with one common number). In such cases, these have often been divided into the contained sub-questions. The first question has been coded (0)

whereas the subsequent questions, which originally lacked unique numbers in the reference, have here been marked (1). This applies also to cases where the submitting court has divided one single question into e.g. sub-questions 1A, 1B etc. Then, question 1A has been marked (0) whereas the subsequent questions have been coded as "additional questions" (1).

Reliability for *add_quest*:

Number of questions coded in reliability test	91
Sum of wrong codings	4
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,04

Var 6 name: *merged_quest*

Codes:

0 = same number of questions as *numbered* by the submitting court

1 = two or more questions from the national court merged into one

Comment: This variable has been marked (1) if two or more of the submitted questions (originally listed e.g. 1 and 2 etc.) have been merged. This has for example been the case when the reference for a preliminary ruling has contained several sequential or overlapping questions; if so, superfluous questions have been left out or merged. When two or more of the original questions have been merged *or* if sequential questions have been excluded, the remaining question(s) have been coded (1). Notably, this dos not apply to cases where several sub-questions have been merged, to the extent that they had the same original numbers in the referral by the submitting court (see above).

Oftentimes, it has been possible to take guidance in the composition of questions found in the CJEU's ruling; for example when the CJEU has merged several questions for the purpose of clarity. The CJEU's subdivision of questions has thus been adhered to when this has been thought to facilitate the coding/analysis process. For example, in cases where the CJEU, the Advocate-General and the

interested parties and/or intervenients have merged the same question(s), it would have been difficult for the coders to find individual answers to the unique sub-questions. In such cases, the coders will in most instances instead have merged them. Even if the coders did not follow the CJEU:s enumeration squarely in all instances, it was sometimes unnecessary to code the original (submitted) questions in their original order, for example when the two separate original questions wore worded in the following way: ”Is the national legislation precluded by Article 5 of the Directive?” and ”Is the national legislation precluded by Article 7 of the Directive?”. In such cases, it has been possible to compose a merged question with the same substantive content: ”Is the national legislation at hand precluded by Article 5 and/or Article 7 of the Directive?”. By subsequently adjusting the various response alternatives to the new and merged question, the coding becomes more lucid, whilst still maintaining the key legal issue and, more importantly, the autonomy/integration dimension (Less/More Europe). Please refer to section 13.”Positioning; position type” concerning whether coding has been carried out in coherence or discord with with the original numbering.
Consequently, in cases where the coders have merged a set of *sub-questions* but maintained the original numbering, neither the variable *add.quest* nor *merged_quest* have been marked.

Reliability for *merge_quest*:

Number of questions coded in reliability test	91
Sum of wrong codings	8
Sum of ambiguous codings	3
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,12

2. Submitting Court

Var 7 name: *subm_ms* (Member state of Submitting Court)

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.

Reliability for *subm_ms*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

Var 8 name: *subm_co* (Submitting Court type)

Codes:

0 = Lower Court

1 = Supreme Court

99 = Uncertain

Comment: This variable specifies whether the submitting court constitutes last judicial instance or a lower instance. To the extent that this information cannot be extracted from the factual background information of the Ruling, the Opinion of the Advocate-General or the Report for the Hearing, the information was sought on Wikipedia, using the key words “supreme court” and “list of national supreme courts.” In the rare cases where this information was not found at this source, we have been able to find this information on the relevant member state’s homepage or its dedicated Wikipedia page, in the latter case under the section on the judiciary. Ultimately, in the worst scenario, it has been possible to rely on Google Translate in order to translate the name of the court instance – its translation oftentimes giving an indication of its jurisdiction. For example, local and regional references in the Court title indicate lower courts, whereas names including “Bundes-“, “Supremo” or “Cassation” indicate last instances/Supreme courts. Constitutional courts are highly underrepresented; however, to the

extent that they have been encountered they have been coded as Supreme courts. Similarly, the highest ordinary court instances have also been coded as Supreme courts, since they are usually the last *de facto* instance (i.e. the last generally available one).

Examples of such situations are the *Corte Constituzionale dell Repubblica Italiana* and the *Corte Suprema di Cassazione,* which have both been coded as last instances since the former is the ultimate (extraordinary) instance whereas the latter is the last "ordinary" court instance. Moreover, in Germany, the Constitutional Court *Bundesverfassungsgericht* as well as several "ordinary" last instances, e.g. *Bundesgerichtshof*, *Bundesfinanfzhof* and the *Bundesverwaltungsgericht,* have all been coded as last instances. Another example is Spain where the Constitutional Court is named *Tribunal Constitucional de España* whereas the last "ordinary" court instance is the *Tribunal Supremo.*

Reliability for *subm_co*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	2
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,02

3. Parties

Var 9 name: *plaint* (Plaintiff)

Codes:

0 = Private

1 = Public

99 = Uncertain

Comment: This variable specifies the type of applicant/defendant in the national proceedings. We have coded party type at first instance, in other words relying on the facts underlying the national proceedings and not on the label attributed

to the parties by the CJEU. The CJEU's choice of designation can sometimes be confusing in cases where e.g. the case concerns appellate proceedings in the submitting court. In such cases, the CJEU has sometimes chosen to refer to the appealing party as "applicant" despite that the latter was defendant in the initial national proceedings. We have consistently used the standing in the original national proceedings as starting point.

Usually, this information is to be found in the section "The dispute in the main proceedings" in the CJEU's Ruling or in the Advocate-General's opinion. In exceptional cases, where this information was not to be found there, we have looked in the Report for the Hearing. Sometimes we have ultimately had to Google the party and/or the relevant proceedings in order to obtain this information.

The parties have been identified as either private of public entities, and in exceptional cases, when we have not been able to categorize them as such using the available documentation and the Internet, we have entered a code representing "uncertain" (99). In the majority of cases, the applicant party has been a private entity (legal or physical person).

When examining the coding, one must be aware that we have consistently coded the applicant party as "public party" in criminal proceedings, assuming that the proceedings have been initiated by some sort of prosecutor/prosecuting authority even in cases where no authority was a formal party in the original national proceedings. In criminal proceedings, the public party usually did not submit any observations. By contrast, where the criminal proceedings were initiated through lawsuit or other private legal action, this has been evident from the background information, and the applicant party has therefore been coded as private.

Reliability for *plaint*:

Number of questions coded in reliability test	91
Sum of wrong codings	5
Sum of ambiguous codings	3

Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,09

Var 10 name: *def* (Defendant)

Codes:

0 = Private

1 = Public

99 = Uncertain

Comment: Here we have coded the type of defendant in the main proceedings. We have coded party type at first instance, in other words relying on the facts underlying the national proceedings and not on the label attributed to the parties by the CJEU. Usually, this information is to be found in the section "The dispute in the main proceedings" in the CJEU's Ruling or in the Advocate-General's opinion. In exceptional cases, where this information was not to be found there, we have sought this information in the Report for the Hearing. When we have not been able to categorize them as private or public entities using the available documentation and the Internet, we have entered a code representing "uncertain".

A few remarks must be made relating to the distinction between national government bodies and other public authorities (including national/federal). In the event that a public authority has party standing, we have maintained a clear distinction vis-à-vis national government representatives (who usually leaves observations in the capacity of being a member state (article 23 Statute of the Court of Justice) instead of intervening in support of a party to the dispute (article 40 Statute of the Court of Justice). In exceptional cases where a Minister, Ministry or other governmental body has party standing, we have not been able to maintain such a distinction. In such cases, the relevant government has often submitted its views, without specifying whether doing so on behalf of the state party or on behalf of the "interests" of its member state. We have solved this the following way: if, say, the Minister (party to the proceedings) makes submissions *and* the same government has made separate observations, then we have coded them separately (even when their observations coincide in substance). If, on the

other hand, the government has only made one set of observations, we have coded these as party (e.g. defendant) positions *as well as* member state positions. It has thus been assumed that the government and e.g. the Minister party have the same intersts in the proceedings before the CJEU, unless the opposite has been explicitly stated.

Reliability for *def*:

Number of questions coded in reliability test	91
Sum of wrong codings	6
Sum of ambiguous codings	7
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,14

4. Community Law

Var 11 name: *act_conc* (Acts Concerned)
Codes: This variable denotes what specific legislation the case (not the specific legal issue) concerns.
Comment: This data was downloaded from Eurlex automatically for each case in the dataset, using the program deixto (www.deixto.com). Under the "Case affecting" heading Eurlex lists the acts and documents the CJEU interprets, declares invalid, and so on. For example, in the *Laval* case (Case C-341/05), the CJEU first dealt with the interpretation of the Posting of Workers Directive (31996L0071), and subsequently related this discussion to article 49 (11997E049) of the treaty . The Variable act_conc here lists the PWD-directive and article 49.
This variabel should be used with some caution. The categorization done at Eurlex is ex post and based on what acts the CJEU discussed and in what manner it did so, and not on what acts where discussed in the questions from the referring national court or in submitted observations. In the question from the referring court in the *Laval*-case both the freedom to provide services and the

prohibition of any discrimination on the grounds of nationality were mentioned, and in reference to this the CJEU discusses articles 12, 49 and 50 EC. However, only article 49 is listed by Eurlex. Article 49 is the article of central concern to the case, as it states that restrictions on the freedom to provide services shall be prohibited and this freedom was the core of the case. Article 50 simply defines the term "services". One reason for the exclusion of article 50 from "case affecting" might be that the CJEU never contests any previous interpretation of this definition. However, it is a perhaps more surprising that Eurlex does not list Article 12 EC under case affecting as the first paragraph of the grounds of the judgment states that "This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 49 EC…". Article 12 concerns discrimination based on nationality.

Act_conc is thus not to be interpreted as those acts that were brought forward for discussion or interpretation by any of the parties, or the CJEU itself, but rather as a list of the most central acts the CJEU ended up interpreting in its own decision, based on an ex post-analysis of the case.

Furthermore, Eurlex sometimes does not list anything at all under case affecting. This seems to be the case in particular when the referring court asks more abstract and general questions such as "does community law mean that…", without specifying any specific acts which the question concerns.

Most cases are however less complex than Laval, and simply concern the interpretation of one or two acts, such as a regulation or a directive. These are simply listed by Eurlex under "case_affecting" as one would expect.

Reliability for *act_conc*: We have not performed any specific reliability test of this variabel, but it should be unproblematic since it is automatic.

Var 12 name: *legbas* (Legal Basis)

Codes: This variable denotes the legal basis of the acts listed in *act_conc* (above).

Comment: The information is taken from the act's Eurlex entry. We have used the data from "An API for European Union Legislation" (http://api.epdb.eu/)

developed by Buhl & Rasmussen (www.buhlrasmussen.eu), which contains all the Eurlex information for EU legal acts, to derive the information.

Reliability for *legbas*: We have not performed any specific reliability test of this variabel, but it should be unproblematic since it is automatic.

Var 13 name: *legact* (Legal Act)

Codes:

1 = Treaty

2 = Other Primary Law

3 = Regulation

4 = Directive

5 = Decisions, case-law and other legal acts

6 = Non-EU legal act

13 = Both 1 and 3 as given above

14 = Both 1 and 4 as given above

134 = Both 1, 3 and 4 as given above, etc

Comment: For this variable a qualitative judgment is made of the type of legal act that the *legal issue* concerns. For example, Accession Treaties have been coded as 2 (other primary law) and the Brussels Convention has been coded as 6 (Non-EU legal act).

Reliability for *legact*:

Number of questions coded in reliability test	91
Sum of wrong codings	9
Sum of ambiguous codings	3
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,13

Var 14 name: *harm* (Harmonization)

Codes:

0 = Legality

1 = Interpretation

99 = Uncertain

Comment: This variable specifies whether the particular question relates to the interpretation or legality/validity of EU law.

Reliability for *harm*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

Var 15 name: *dero* (Derogation)

Codes:

0 = No

1 = Yes

99 = Uncertain

Comment: This variable indicates whether the specific question posed by the national court relates to the freedom of movement and to grounds for justifying restrictions on these freedoms. We have coded this variable restrictively (i.e. only marked (1) on very clear cases) which has resulted in a clear majority of questions being coded (0). In order to justify coding (1), the submitting court must have explicitly referred to both the relevant freedom of movement *and* the justification of derogations (or, at minimum, referred to the relevant Treaty provisions governing the freedom and, if applicable, the derogation rule) in the questions referred to the CJEU.

Reliability for *dero*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0

Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

Var 16 name: *direct* (Direct effect)

Codes:

0 = No

1 = Yes

99 = Uncertain

Comment: This variable specifies whether or not the referred question relates to the principle of direct effect. Unlike the "derogation"-variable, this variable has not been given a restrictive construction based on the original wording of the question referred by the national court. In order to code (1) here the court need not explicitly refer to the principle of direct effect; instead, it suffices that the national court has asked whether a particular provision of EU law can be invoked by an individual before a national court. Even cases where the referred question concerns a national court's competence or obligation to apply a particular provision *ex officio* have been included in the coding of this variable. In other words, focus has been on the direct applicability *and* the direct effect in a given context. Similarly to how we handled the *derogation* variable (above) the coders have consistently required that the *referred question* at some level include the aspect of direct effect in order to code (1), whereas it was not sufficient that the Ruling, the Opinion or the submitted observations have raised it.

Reliability for *direct*:

Number of questions coded in reliability test	91
Sum of wrong codings	1
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,01

Var 17 name: *adm* (Admissibility)

Codes:

0 = No claim that the question was inadmissible was stated

1 = One or more claims that the question was inadmissible were stated

99 = Uncertain

Comment: Here we have marked (1) if a party, an intervenient, the CJEU or the Advocate-General has claimed that the referred question is inadmissible.

Reliability for *adm*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

5. Doctrine

The following five variables indicate whether the case at hand has been treated in legal doctrine, defined as being mentioned in the textbook *EU Law: Text, Cases and Materials,* 5th Edition, by Craig and de Búrca, Oxford University Press. Both the fourth (2008) and the fifth (2011) editions have been used. If a case is mentioned in the book the coder makes a qualitative judgment of whether it may be categorised as a question concerning one ore more of the following: direct effect, supremacy, state liability, loyal cooperation and non-discrimination.

Var 18 name: *doc_direct (*Direct Effect)

Codes:

0 = No

1 = Yes

99 = Uncertain

Reliability for *doc_direct*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	3
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,03

Var 19 name: *doc_suprem (*Supremacy)

Codes:

0 = No

1 = Yes

99 = Uncertain

Reliability for *doc_suprem*:

Number of questions coded in reliability test	91
Sum of wrong codings	1
Sum of ambiguous codings	4
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,05

Var 20 name: *doc_liab (*State Liability)

Codes:

0 = No

1 = Yes

99 = Uncertain

Reliability for *doc_liab*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous	0

codings/number of questions coded)	

Var 21 name: *doc_loyal (*State Liability)

Codes:

0 = No

1 = Yes

99 = Uncertain

Reliability for *doc_loyal*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	5
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,05

Var 22 name: *doc_nondis (*Non-discrimination)

Codes:

0 = No

1 = Yes

99 = Uncertain

Reliability for *doc_nondis*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	3
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,03

6. Court of Justice

Var 23 name: *court (*Court formation)

Codes: Number of Judges deciding on the case (3-15)

Reliability for *court*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

Var 24-50 name: *judge_be, judge_dk, judge_de,* etc *(*Member state of judges)

Codes:

0 = No

1 = Yes

Comment: These variables note which Member States the judges serving on the bench in the case represent (Belgian, Danish, German etc). They were automatically downloaded from the InfoCuria homepage using custom-made software.

Reliability for *judge_be – judge_ro*:

Number of questions coded in reliability test * 27	2457
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

Var 49 name: *ag* (Nationality of Advocate-General)

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.

Reliability for *ag*:

Number of questions coded in reliability test	91
Sum of wrong codings	0
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0

Var 52 name: *spec_quest (*Specific question)

Codes:

0 = No

1 = Yes

Comment: Here we have indicated whether the CJEU has posed specific questions to any of the member states. References to such posed questions are usually only made through one brief sentence/phrase, are not to be consistently found in a particular section of the Ruling; and are sometimes solely made in the Ruling *or* in the Opinion of the Advocate-General. In other words, even a meticulous coder may sometimes miss identifying such particular questions.

Reliability for *spec_quest*:

Number of questions coded	91
Sum of wrong codings	5
Sum of ambiguous codings	0
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,05

7. Legal issue and positioning

Var 53 name: *legal_iss* (Legal issue)

Codes: Brief description of the question submitted by the National Court
Comment: Here the question posed by the national court is indicated. Usually, the original wording of the question is very lengthy and complicated, in which case it has been shortened or summarized by the coder in order to make it more legible. We have attempted, to the greatest possible extent, to phrase questions in a binary manner, i.e. in terms so that they can be answered "yes" or "no". This has sometimes led to the forfeit of certain nuances. For example, the question "May the national authority impose such restrictions, or must it refrain from doing so and consequently follow those imposed by the Directive?" can be re-phrased the following way: "May the national authority impose such restrictions?" This was done in order to facilitate the coding and the coders' own understanding of the legal issue, in preparation of coding the various response alternatives under *spec_pos_noX* (below).
When questions have previously been merged (see above, *merg.quest*), it should be added this will have one of two consequences for the present variable: either the new, merged questions will be stated as they have been composed by the coder, or the discarded questions will not be included at all, due to their lack of relevance to the coding of the key legal issue.

Reliability for *legal_iss*:

Number of questions coded	91
Sum of wrong codings	1
Sum of ambiguous codings	6
Non-agreement share (sum of wrong and ambiguous codings/number of questions coded)	0,08

Var 54-59 name: *spec_pos_no1, spec_pos_no2, etc* (Specified position)

Codes: Brief description of all the existing answers given to the question (as formulated in *legal_iss*), for example "Yes", "No", "Yes, but…".

Comment: The different answers (positions) by parties and intervenients are primarily obtained from the Reports for the Hearing. In addition, we were able to make use of both the judgments and the opinions of the Advocates-General in cases where the Reports did not state the responses in a sufficiently clear or detailed manner. Moreover, we were able to find oral submissions (which, for obvious reasons, are never included in the Reports for the Hearing) in the judgments and the opinions of the Advocate-General.

The reliability of *Spec_pos*_noX was discussed earlier in this report. The table here shows in more detail the result of the reliability test.

Number of diverging positions noted between the two coders	Number of questions	Percent	Cumulative percent
0	54	59,34	59,34
1	21	23,08	82,42
2	10	10,99	93,41
3	2	2,20	95,60
4	3	3,30	98,90
5	0	0	98,90
6	1	1,10	100
Total	91	100	

In about 40 per cent of the questions there was a difference in one or more positions noted by the two coders. As already noted above the reason for this relatively high non-agreement is that the coders needed to decide how nuanced they should be when distinguishing between different answers, and making general guidelines for that decision proved to be difficult. Often the additional position was a further specification of an already existing position found also by coder 1, such as “yes” and “yes, if/but…”. The list of positions given by *spec_pos*_noX should be interpreted as one reasonable categorization of the

positions taken, although other reasonable categorizations may also exist depending on the degree of specificity when distinguishing between different positions. How this variable should be handled in practice depends on the specific research question.

Var 60-65 name: *pos_1_type, pos_2_type*, etc (Position type)

Codes:

0 = The answer to the question implies that EU law does not restrict the autonomy of the member states in the case at hand

1 = No clear implication in terms of member state autonomy can be drawn from the answer to the question

2 = The answer to the question implies that EU law restricts the autonomy of the member states in the case at hand

Comment: This variable categorizes the different positions/answers to the submitted questions as given by *spec_pos_*noX, in terms of their effect on national autonomy. In *Pos_1_type,* we categorize the position previously noted as *spec_pos_no1*. *Pos_2_type* categorizes position no. 2 etc.

For example, in the case C-294/97 *Eurowings Luftverkehr* the national court submitted the following question to the CJEU: ”Does Article 59 of the Treaty preclude national legislation on trade tax such as that at issue in the main action?”. Position no. 1, “Yes”, implies recognition of the EU:s competence in relationship to the member states in this case and is therefore coded (2). The position ”No” implies the opposite, and is therefore coded (0).

Sometimes the implication of the position in terms of national autonomy is less clear. This may be the case if the questions referred by the national court do not incorporate any dimension of autonomy/integration, EU vs. member state competence or the supremacy of EU law over national law. For example, the questions may relate to an entirely harmonized area of EU law. In the case C-379/02 *Imexpo Trading* the national court posed the following question: ”Must Annex I to Regulation 2658/87 be construed as meaning that chairmats such as those at issue in the main proceedings, were to be classified, over the period

from 15 July 1997 to 20 March 2000, under tariff subheading 3918 10 90 in Chapter 39 or under tariff subheading 9403 70 90 in Chapter 94?".
Position no. 1 reads "tariff subheading 3918 10 90 in Chapter 39" and position no. 2 reads "tariff subheading 9403 70 90 in Chapter 94". Both these positions are coded (1) since no clear implication in terms of national autonomy is to be found. However, response no. 3, stating "Neither, and in addition, it is for the national court to determine the correct subheading" has been coded (0) since it advocates a margin of discretion at the national level.

Reliability of *pos_x_type*. The non-agreement share for all positions compared in the reliability test (i.e. excluding positions which only one coder had identified) is 0,17 (se table below). Ambiguos codings here refer to case where one coder had noted 0 or 2, while the other coder had noted 1 (i.e. no clear implication). For only three positions (2 per cent) did one coder note 0 while the second noted 2. This shows that the coders have "played safe" in the sense that in difficult situations they have tended to note 1.

	Pos_1_ type	*Pos_2_ type*	*Pos_3_ type*	*Pos_4_ type*	*Pos_5_ type*	Sum
Number of positions compared	91	71	9	1	1	173
Sum of wrong codings	2	1				3
Sum of ambiguous codings	13	10	4			27
Non-agreement share (sum of wrong and ambiguous codings/number of						0,17

positions compared)						

Var 66-103 name: *pos_cjeu, pos_com, pos_ag, pos_be, pos_de* etc (Party's position)
Codes:

1 = Party's position equivalent to *spec_pos_no1*

2 = Party's position equivalent to *spec_pos_no2*

3 = Party's position equivalent to *spec_pos_no3*

4 = Party's position equivalent to *spec_pos_no4*

5 = Party's position equivalent to *spec_pos_no5*

6 = Party's position equivalent to *spec_pos_no6*

7 = No position because of preconditions given by previous questions

8 = No position because Party argued inadmissible on *adm*

11 = Party's position equivalent to *spec_pos_no1* and the position was only given orally at the hearing.

12 = Party's position equivalent to *spec_pos_no2* and the position was only given orally at the hearing.

etc…

99 = Position uncertain

Comment: Code 7 has been used, for example, in cases where the legal issue has been the following; "if Question 1 is answered in the negative; is such national legislation precluded by the Regulation?". If a party has responded "Yes" to question 1 and then simply not given a response to question 2 one can assume that the non-response to question 2 was a result of the condition set by question 1.

If a party has only submitted a response orally, the position is supplemented with (1) before the indication of position. For example, if the response is "Yes" at *spec_pos_no1* and the answer is "No" at *spec_pos_no2,* and a particular party has answered "Yes" orally, this position is coded (11). In rare cases, a party has ended up changing position at the point of its oral submission vis-à-vis its prior

written submission. If the position proposed in the oral proceedings does not correspond to that contained in the written submission, we have chosen only to code the oral submission, given that it was presented at a later date.

Case C-293/2006 may be used as an example of how the coding of the positions was carried out. One of the issues raised by the national (German) court in this case was the following:

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

In more simple terms the German national court is asking the CJEU whether the German tax authorities can treat this particular tax issue in this particular way, or whether they are precluded from doing so by EU law. Only two distinct positions were noted in the documented responses from the different parties and actors involved – "yes" and "no" (which therefore constituted *spec_pos_no1* and *spec_pos_no2*). Since the question was negatively formulated ("Is it contrary to…?") "yes" implies code (2) on *pos_type* and "no" means code (0) in this case. "No" was argued by the German and Dutch governments, which had submitted observations summarized in the Report for the hearing (noted at *pos_de* and *pos_nl*). The Commission and the Advocate-General, on the other hand, argued for "yes" (*pos_*com and *pos_ag*). The Court in its judgment decided for "yes" (*pos_CJEU)*.

Reliability of *pos_party*. The reliability test included 658 positions identified by the two coders, of which 89 per cent were the same.

Number of positions compared	658

Sum of wrong codings	28
Sum of ambiguous codings	47
Non-agreement share (sum of wrong and ambiguous codings/number of positions compared)	0,11

8. Voting rule

Variable 104 name: *qmv*. Codes: 0-1
Variable105 name: *unanimity.* Codes: 0-1
Variable 106 name: *mixed*. Codes: 0-1

Comment: Based on the information listed under "Legal basis" we have coded the voting rule required in the Council of the EU in order to change the acts listed under "Concerned acts", at the time of the judgment of the CJEU. If an article listed under "Legal basis", such as article 113 EC, specifies QMV as the voting rule, the variable *qmv* equals (1), otherwise (0). If an article listed under "Legal basis", such as article 13 EC, included by the treaty of Amsterdam, specifies unanimity as required for decisions based on this article, the variable *unanimity* equals (1), otherwise (0). Cases which concern acts that may be taken either under unanimity or qmv can thus have (1) for both variables.
We also have a third voting rule-variable, *mixed*, which is coded (1) when one of the acts under "Legal basis" specifies an article in which both QMV and unanimity are specified to be used, but under different circumstances. This is for example the case for Article 139 EC, where it is said that "the Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall act unanimously."
We have corrected for changes over time, i.e. when some articles have been modified by subsequent treaties, changing the voting rule from unanimity to QMV.

Reliability of the voting rule variables: We have not performed any specific reliability test of the voting rules variables.

Appendix 1. Cases not included in the dataset

The following cases are not included in the dataset because no oral hearing was held, which means that no Report for the Hearing was produced:

2008	C-446/08	C-44/06
C-13/08	C-449/08	C-45/06
C-14/08	C-462/08	C-56/06
C-16/08	C-470/08	C-63/06
C-18/08	C-473/08	C-73/06
C-19/08	C-541/08	C-97/06
C-33/08	C-568/08	C-98/06
C-40/08	C-586/08	C-142/06
C-75/08	C-147/08	C-174/06
C-88/08		C-182/06
C-124/08	**2007**	C-183/06
C-126/08	C-1/07	C-192/06
C-132/08	C-19/07	C-229/06
C-133/08	C-33/07	C-246/06
C-134/08	C-55/07	C-256/06
C-137/08	C-68/07	C-260/06
C-139/08	C-78/07	C-263/06
C-161/08	C-82/07	C-271/06
C-170/08	C-105/07	C-281/06
C-205/08	C-173/07	C-300/06
C-242/08	C-281/07	C-328/06
C-254/08	C-291/07	C-349/06
C-264/08	C-297/07	C-352/06
C-285/08	C-298/07	C-355/06
C-292/08	C-304/07	C-368/06
C-302/08	C-313/07	C-371/06
C-303/08	C-321/07	C-400/06
C-305/08	C-337/07	C-435/06
C-314/08	C-350/07	C-437/06
C-323/08	C-377/07	C-446/06
C-344/08	C-396/07	C-449/06
C-352/08	C-426/07	C-450/06
C-302/08	C-453/07	C-451/06
C-303/08	C-471/07	C-458/06
C-305/08	C-486/07	C-460/06
C-314/08	C-491/07	C-463/06
C-323/08	C-537/07	C-464/06
C-344/08	C-544/07	C-486/06
C-352/08	C-549/07	C-499/06
C-376/08	C-221/07	C-507/06
C-377/08		C-526/06
C-381/08	**2006**	C-532/06
C-384/08	C-2/06	C-534/06

2005	C-258/04	**2001**
C-5/05	C-265/04	C-462/01
C-10/05	C-288/04	
C-13/05	C-293/04	**2000**
C-14/05	C-303/04	C-9/00
C-15/05	C-304/04	C-99/00
C-34/05	C-311/04	C-131/00
C-81/05	C-345/04	C-189/00
C-83/05	C-346/04	C-257/00
C-103/05	C-366/04	C-384/00
C-111/05	C-379/04	
C-114/05	C-415/04	**1999**
C-120/05	C-421/04	C-508/99
C-138/05	C-430/04	C-379/99
C-154/05	C-441/04	
C-157/05	C-453/04	**1998**
C-166/05	C-465/04	C-273/98
C-168/05	C-470/04	C-302/98
C-174/05	C-473/04	C-407/98
C-213/05	C-493/04	C-414/98
C-239/05	C-494/04	
C-241/05	C-502/04	**1997**
C-275/05	C-509/04	C-86/97
C-286/05	C-514/04	C-211/97
C-289/05		C-259/97
C-316/05	**2003**	
C-335/05	C-26/03	
C-346/05	C-60/03	
C-375/05	C-68/03	
C-383/05	C-171/03	
C-401/05	C-193/03	
C-446/05	C-195/03	
C-455/05	C-235/03	
C-2/05	C-265/03	
C-3/05	C-272/03	
C-59/05	C-300/03	
	C-330/03	
2004	C-356/03	
C-1/04	C-373/03	
C-3/04	C-383/03	
C-9/04	C-403/03	
C-15/04	C-435/03	
C-28/04	C-461/03	
C-43/04	C-462/03	
C-71/04	C-495/03	
C-73/04	C-520/03	
C-101/04	C-522/03	
C-109/04	C-536/03	
C-125/04	C-542/03	
C-126/04		
C-128/04	**2002**	
C-142/04	C-196/02	
C-201/04	C-467/02	
C-246/04		
C-249/04		

The following cases are missing from the dataset because the urgent procedure was used, which means that no Report for the Hearing was produced:

2008	C-195/08
C-66/08	C-388/08
C-123/08	C-296/08
C-127/08	C-261/08

The following cases are missing from the dataset because the Reports for the Hearing were received in a language in which we did not have coding competence:

2008	**2002**	C-220/98 In German
C-64/08 In German	C-77/02 In German	C-322/98 In German
C-78/08 In Italian	C-91/02 In German	C-415/98 In German
C-371/08 In German	C-90/02 In German	C-465/98 In German
C-436/08 In German	C-100/02 In German	
	C-102/02 In German	**1997**
2007	C-112/02 In German	C-36/97 In German
C-42/07 In Portuguese	C-230/02 In German	C-39/97 In German
C-309/07 In German	C-277/02 In German	C-76/97 In German
C-484/07 In Dutch		C-103/97 In German
C-485/07 In Dutch	**2001**	C-111/97 In German
C-316/07 In German	C-314/01 In German	C-127/97 In German
		C-147/97 In German
2006	**2000**	C-210/97 In German
C-409/06 In German	C-121/00 In German	C-255/97 In German
		C-258/97 In German
2005	**1999**	C-290/97 In German
C-27/05 In German	C-479/99 In German	C-328/97 In German
C-376/05 In German	C-380/99 In German	C-342/97 In German
	C-288/99 In German	C-350/97 In German
2004	C-73/99 In German	C-435/97 In German
C-445/04 In German	C-2/99 In German	
2003	**1998**	
C-25/03 In German	C- 65/98 In German	
C-398/03 In Finnish	C-104/98 In German	
	C-208/98 In German	

Furthermore, one case - Case C-267/02 - is missing because it was removed from the CJEU register by order of the President of the CJEU, OJ C 219 of 14/09/2002.

Appendix 2. Search criteria for InfoCuria

In order to identify all references for preliminary rulings submitted to the CJEU during the period of 1997-2008, we used the EU:s official search engine for the jurisprudence of the CJEU, *InfoCuria*.[16] The following parameters were used in the search:[17]

- Under the field "Case status", the search was limited to "Cases closed" so as not to include pending cases.
- Under the field "Court", only the Court of Justice was selected as search criteria.
- The search engine allows searches to be limited by year of reference for preliminary ruling. The case numbers of preliminary rulings correspond to the year and date that cases were brought before the CJEU. For example, case C-1/1997 would refer to the first case brought before the CJEU during the year of 1997, sorted by date of receipt. Since this field does not allow multiple variable criteria, the field "Case number" was instead used on a one-year basis. In order to e.g. select all of the references for preliminary rulings received by the CJEU during 1997, the field "Case number" was limited by entering "/97".
- In order not to include other procedures than preliminary rulings, only the two search criteria "Reference for a preliminary ruling" and "Preliminary reference - urgent procedure" were selected under the field "Procedure and result".
- Finally, in order to only include references for preliminary rulings resulting in a judgement (as compared to e.g. orders and other opinions),

[16] http://curia.europa.eu/juris/recherche.jsf?language=en.

[17] The following link provides an example of the search results from the year of 1997: http://curia.europa.eu/juris/documents.jsf?pro=PREJ%252CPREJURG%252C&lgrec=en&nat=&oqp=&lg=&dates=&language=en&jur=C&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=%252F97&td=%3B%3BPUB1%3BNPUB1%3B%3BORDALL&pcs=O&avg=&page=1&mat=or&etat=clot&jge=&for=&cid=22721.

the search field “Documents” was limited to “Documents published in the ECR – Judgements”[18] and “Documents not published in the ECR – Judgements”[19].

Summary of search criteria

Procedure and result = "Reference for a preliminary ruling", "Preliminary reference - urgent procedure" Court = "Court of Justice" Case number = /97 Documents = Documents published in the ECR : Judgments Documents not published in the ECR : Judgments Case status = "Cases closed".

[18] Judgments, orders, Advocates General's Opinions and positions of the Courts of the European Union delivered or made since 17 June 1997 and published or to be published in the *European Court Reports* or the *European Court Reports - Staff Cases (ECR-SC).* http://curia.europa.eu/common/juris/en/aideGlobale.pdf#page=8.

[19] Judgments, orders and decisions (review procedures) delivered or made since 1 May 2004 and not published in the *European Court Reports*. *http://curia.europa.eu/common/juris/en/aideGlobale.pdf#page=8*.

Appendix 3. Comparing the number of observations found in our data with Carrubba, Gabel and Hankla (CGH)[20]

In this short memorandum, we will present the comparative study we have undertaken between our data derived from the Reports for the Hearing and the results presented in CGH's study. It is based on 29 randomly selected preliminary ruling cases from 1995, from which CGH identified 60 questions from the national courts. The point of departure of this comparison is the fact that the CGH team has not had access to the same data as we have.[21] During the examined year, the Reports for the Hearing were not publicly accessible, and therefore not included in their study. The Reports for the Hearing have, however, been available to us, and our hypothesis is that this has affected the number of observations and positions identified by the two research teams. Specifically, we examine the extent to which CGH have omitted positions which we have been able to include.

Our starting point has been the individual questions found in CGH's spreadsheet *Issues and positions*. The questions included by CGH in *Issues and positions*, according to their codebook, correspond to the listed answers in the operative part of each judgment by the CJEU. By contrast, we have based our selection on the questions submitted by national courts to the CJEU. To the extent that CGH has listed fewer questions than we have, therefore, this is not to be interpreted as an omission on their part, and we have not let it affect the results concerning the number of coded questions and positions.

When in a given case we have encountered discrepancies in the number of coded questions between CGH's data and ours, we have compared the substance of their chosen question with one or several questions in ours. In some cases, we have been able to conclude that one of their questions corresponds to a combination of several of ours, and in other cases it has been possible to identify one of our questions that corresponds to theirs. In the first case we have

[20] This memo was prepared by Felix Boman and Allison Östlund, August 2010
[21] CGH's data is accessible at http://polisci.emory.edu/home/people/CGH_CJEUd/index.html

merged our questions into one, and in the second case we have excluded those questions that do not correspond to any of CGH's questions.

This method has made it possible to compare how many observations we have found, and subsequently how many positions we have coded, for each question included by CGH in *Issues and Positions*, with the number of positions coded by CGH in their other spreadsheet *Observations*. A discrepancy in this regard could be explained in terms of availability of documentation. We have also compared how many questions coded by CGH in *Issues and Positions* that have not been covered in the spreadsheet *Observations*. In this step we have disregarded the questions that were included, but where all positions were coded "Not Specified" or "na."

A remark should be made regarding the two different approaches to coding the parties of the dispute. CGH has chosen not to include the position of a member state if that state is also a party in the dispute, whereas we have included all observations. However, in the present study this difference in methodology has been compensated for by consistently excluding all positions of governments that are also parties of the dispute from the comparative data.

Result concerning number of observations

The main finding is that we have been able to code 155 positions in total on the 60 questions identified by CGH in the 29 cases selected, whereas CGH has only found 97, i.e. they have only covered 62% of the positions that we have identified. Furthermore, our comparison shows that out of 60 originally coded questions (in *Issues and positions*) only 40 (67%) had corresponding observations. Consistently, the explanation for the omission is that no observation was identified by CGH. In other words, the majority of the omitted positions can be assigned to questions where no positions were coded at all by CGH.

It should also be noted that in three cases, the CGH study covers more positions than ours. This information has, of course, been integrated in the data below and affected the results accordingly.

Table A3.1. Number of positions coded

	CGH	Naurin and Cramér
Total number of questions	60	Same sample
Number of questions with corresponding positions (excluding plaintiff and defendant)	40	Same sample
Total number of coded positions	97	155

The statistics presented above show unambiguously that we have covered substantially more observations than CGH. Most likely this has nothing to do with the carefulness of the different coder teams, but is rather explained by the fact that we have had a more advantageous source of information (the Reports for the Hearing).

For a selection of cases where positions were not found by CGH, we have reviewed all three sources of information (the Reports for the Hearing, the Judgments and the Opinions of the AG) in an attempt to explain the discrepancy. In the majority of these cases, we found that information on the positions of the observers was available neither in the Opinion of the AG nor in the Judgment. Only in a few cases should the positions have been found also by the CGH team with access only to the latter documents

The reason why in two of the cases CGH included more positions than us was the fact that the listed observations were only given orally at the hearing.[22] In the third case, the positions were excluded because the report was in Italian. This case should not have been included in our statistics in the first place.

Comment on "legal issues"

When performing the comparison above we could not help noting some problems with how the CGH coders formulated the legal issues at hand. The

[22] This finding early in the coding process made us adjust our coding procedure so to include also oral observations as derived from the Judgements and/or the Opinions of the AG.

original questions posed by the Submitting Courts have been re-phrased by CGH's coders according to the following instructions in the codebook; the legal issue(s) of each "bulleted point" in the judgment was to be summarized in one statement, and, where possible, the legal issue was to be "translated (…) into an interpretable statement if necessary." We have found that, in the process of simplifying the questions, the character and contents of the questions have sometimes been substantially changed:

- One legal issue (C-97/95) in *Observations* has been re-worded compared to how it was formulated in *Issues and positions*. According to CGH's codebook legal issues in each spreadsheet should correspond to each other.
- One legal issue (C-64/95) has been formulated incomprehensibly.
- The formulation of three legal issues (C-38/95, C-78/95, C-29/95) indicates that the coder has misunderstood these issues.
- One legal issue (C-74/95) only covers parts of the relevant aspects

Varying quality with respect to the formulation of legal issues makes it more difficult to review or control the validity of the coding. For example, it generated problems for us in the process of finding corresponding questions in our selection, when we could not make a reasonable interpretation of CGH's version of the legal issue. However, in the cases where the legal issues were, according to our judgment, misrepresented, we have found that the coded positions (to the extent that they were covered, see previous section) in many cases were accurate. It means that problems with the coding of legal issues must not have spilled over to the coding of the actors positions.

Sample of cases

The following cases were included in the comparison:

C-27/95	C-74/95	C-58/95
C-66/95	C-80/95	C-43/95
C-70/95	C-1/95	C-53/95
C-28/95	C-24/95	C-44/95
C-97/95	C-77/95	C-29/95
C-64/95	C-78/95	C-65/95
C-100/95	C-85/95	C-72/95
C-38/95	C-88/95	C-34/95
C-42/95	C-84/95	C-59/95

C-15/95	C-3/95	