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Preliminary References — Analyzing the Determinants that Made the ECJ the Powerful Court it Is

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Preliminary References — Analyzing the Determinants that Made the ECJ the Powerful Court it Is[3]

Abstract:

The European Court of Justice (ECJ) is a very powerful court compared to other international courts and even national courts of last resort. Observers almost unanimously agree that it is the preliminary references procedure that made the ECJ the powerful court it is today. In this paper, we analyze the determinants that lead national courts to use the procedure. We add to previous studies by constructing a comprehensive panel dataset (1982– 2008), including more potentially relevant explanatory variables and by testing for the robustness of previous results. In addition to confirming the relevance of variables previously found significant, we identify a number of other determinants, including the relevance of agriculture to a country, length of EU membership, corporate tax rate, familiarity with EU law, and tenure of democracy.

Keywords: European Court of Justice, Economic Analysis of Court Behavior, Preliminary Reference Procedure.

JEL classification: H77, K33

L&E classification: 9800

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Preliminary References — Analyzing the Determinants that Made the
ECJ the Powerful Court it Is

> *In a sense, the Court created the present-day*
> *Community; it declared the Treaty of Rome to be not*
> *just a treaty but a constitutional instrument that obliged*
> *individual citizens and national government officials to*
> *abide by those provisions that were enforceable*
> *through their normal judicial processes.*
> *Shapiro (1992, 123)*

1. Introduction

The European Court of Justice (ECJ) is evaluated by many observers as an extremely powerful court. For example, Nugent (1999, 277f.) writes: "In exercising their responsibilities the Courts, and especially the ECJ, sometimes not only interpret law but also make it. Of course judges everywhere help to shape the law, but this is especially so in the EU where the Courts have much more manoeuvrability available to them than is customary within states."

On its path to power, the court's preliminary reference procedure played an important role, both quantitatively and qualitatively. Today, a majority of all cases brought to the ECJ draw on this procedure. Many of the ECJ's decisions that resulted in far-reaching implicit constitutional change were based on the preliminary reference procedure: these include *Van Gend en Loos* (1963), in which the ECJ proclaimed that European Legislation takes "direct effect" in the EU member states without the necessity of national parliaments passing corresponding laws; *Costa v. Enel* (1964), in which the ECJ decided that European law takes precedence in the case of conflict between it and national legislation; and *Francovich* (1991), in which the ECJ established that member states were responsible for damages attributable to their failure to enact (or incorrect enactment of) legislation mandated by EU directives. All three of these examples involve procedural issues, but the court has also used the preliminary reference procedure to strengthen or extend EU policy. *Barber* (1990), in which the ECJ ruled that occupational pensions are part of an employee's pay and must therefore comply with the Treaty article stipulating equal pay for women and men, is one prominent

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example of how the court extended EU policy competence with regard to social security entitlements.

Tridimas and Tridimas (2004, 128) write: "The preliminary reference system has led, in effect, to transfer of powers at three levels, namely (a) from the governments of the Member States to the institutions of the Community; (b) from the executive and the legislature to the judiciary, and (c) from higher national courts to lower national courts."

More than a decade ago, Stone Sweet and Brunell (SSB) (1998a, 73) stated that the wide variance in the use of the preliminary reference procedure between different member states is "the most important puzzle confronting scholars working in this area." This variance can easily be grasped by looking at Table 1, which indicates the frequency with which the courts from different member states call on the ECJ to issue preliminary rulings. To ensure comparability, the numbers in the table have been normalized for population size.

TABLE 1 AROUND HERE

Why is it that judges in Belgium call on the ECJ almost 10 times as often as judges in Portugal? Why have judges in Luxembourg recently completely stopped calling on the ECJ? SSB (1998a, b) suggest some answers. Since the publication of their work, other scholars have added their efforts to solving this puzzle by proposing and testing additional conjectures.

Our contribution follows and extends Carrubba and Murrah (CM) (2005). We follow them in testing a number of well-known conjectures within a unified frame. We extend their work by (1) formulating some well-known hypotheses in a more precise manner, (2) introducing more appropriate proxies for some well-known hypotheses, (3) adding some new hypotheses, and (4) applying more appropriate estimation techniques.

We confirm the relevance of variables previously found significant and identify a number of other determinants. Among these are the relevance of agriculture (larger agricultural shares are negatively correlated with preliminary references), familiarity with EU law, and at what stage of the

legislative process national courts have the power to review legislation for its constitutionality; these are all positively correlated with the number of preliminary references from a given country.

The paper is structured as follows: Section 2 briefly describes the preliminary references procedure. Section 3 summarizes extant literature. In the theoretical Section 4, a number of conjectures on the likely determinants that cause nation-state judges to refer a case to the ECJ are developed. Section 5 describes our estimation approach as well as the data. In Section 6, our findings are described and interpreted. Section 7 concludes.

2. The Preliminary References Procedure—A Primer

National courts may, and in some cases must, ask the ECJ for a preliminary ruling involving interpretation and validity of Community Acts. The preliminary rulings procedure is described in Art. 267 TFEU (formerly Art. 234 TEC, and, prior to that, Art. 177). National courts can turn to the ECJ for a preliminary ruling on interpretation of EU law. More precisely, Art. 267 grants all courts that are not courts of last resort the option of turning to the ECJ, whereas courts of last resort are required to ask the ECJ if EU legislation is decisive for the judgment of the court. This means that lower courts have *de jure* discretion, whereas last-instance courts have *de facto* discretion, deriving from their evaluation of the potential decisiveness of EU law for a specific case.[4]

No national court has the authority to rule on the incompatibility of secondary EU legislation with primary EU legislation. The ECJ thus has a monopoly on interpreting European law. However, the ECJ will not rule on a concrete case, but only interpret primary as well as secondary legislation in a general fashion. In court, a private litigant who believes that application of EU legislation would further her interests can suggest that the court make use of the preliminary rulings procedure but cannot force the court to do so. National courts are thus important gate-keepers

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[4] As many supreme courts believe their competence is curbed by activities of the ECJ, they appear to have little interest in forcing other last instance courts to use the preliminary reference procedure.

in the use of the procedure. If the national court does ask for a preliminary ruling, it is bound by that ruling. The effect of preliminary rulings seems to be the setting of precedent for a potentially large number of similar cases, making the procedure of huge importance in effecting implicit constitutional change.[5]

Note that (i) the ECJ can provide preliminary rulings even in cases where the national court has phrased the question in an inappropriate or inadmissible way and (ii) the ECJ can rule on issues even if the same have not been specifically mentioned by the court asking for a preliminary reference. Also of note is that (iii) the court has established a number of strict guidelines that force national courts to request rulings, although it also must be kept in mind that the ECJ has repeatedly turned down requests for preliminary rulings.

3. Brief Survey of the Literature

In the introduction to this paper, we mentioned that judges in Belgium call on the ECJ approximately 10 times as often as do judges in Portugal. This section briefly surveys the conjectures offered to explain the wide variance. SSB set the stage for papers empirically assessing this question with two very similar articles (1998a, b). They argue that transnational activity is facilitated by a common legal framework. Private-law subjects engaged in important transnational activity would demand such a common legal framework. They conclude that judges in countries host to firms with above average transnational activity should also draw on the preliminary reference procedure more frequently than others.

Many details of these early studies can be — and are — criticized. SSB do not, for example, normalize their trade data for the size of the country. They find a very high correlation between EU trade and the average number of preliminary references and interpret this high correlation as causality running from trade to the number of preliminary references.

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[5] We define constitutional change as "implicit" if the meaning of the constitution (in the case of the European Union, the Treaties) is changed but the wording remains the same. Explicit constitutional change occurs when a constitution's wording is changed. The mechanisms behind implicit constitutional change are analyzed in more detail in Voigt (1999).

Pitarakis and Tridimas (2003) take issue with both the data and their interpretation. They find that preliminary references (Granger-)cause EU trade, but not vice versa. Further, judges do not enjoy agency in the SSB papers: high trade volumes might, indeed, lead to the demand for unified law but, ex ante, it is by no means certain that judges in different member states will satisfy that demand in a uniform way by calling on the ECJ for preliminary rulings. Tridimas and Tridimas (2004) offer a public choice approach to explain the preliminary reference procedure.

The original SSB papers contain two conjectures that are not even tested anymore as, according to SSB, "it is obvious that [they] have no systematic effect that is measurable by our data" (1998a, 73). These are (1) the way in which national legal systems incorporate international law into the domestic system: that is, are the two systems of law interpreted as one single system ("monism") or as two distinct ones ("dualism")? and (2) the effect of whether judges have the power of judicial review. Both hypotheses are taken up below.[6]

Carrubba and Murrah's work (2005) is an important step forward in identifying the determinants of nation-state judges using the preliminary reference procedure. CM use a negative binomial panel model with fixed effects and draw on the EU 15 from 1970 to 1998. In addition to the one conjecture tested by SSB, they test the two not tested by SSB, and additionally explore whether public support of European integration is conducive to the use of preliminary references (it is), and whether political awareness of the public is conducive (it also is). Concerning the two conjectures not tested by SBB, CM find only limited empirical evidence in their favor. The CM paper is more comprehensive than those by SSB, but we intend to make even further improvements by formulating some conjectures more precisely, proposing several more appropriate proxies, and adding a few new conjectures.

Vink et al. (2009) is to date the most recent and comprehensive attempt to identify reasons for the large variation in calling on the preliminary reference procedure. It is based on the EU 15 and yearly observations between 1995 and 2006 and relies on two different estimation

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[6] These conjectures were first introduced by Alter (1996) and Mattli and Slaughter (1998).

techniques: the first is a simple pooled OLS regression model; the second draws on Boolean analysis of necessary and sufficient conditions.[7] They improve on SSB by measuring intra-EU trade as a ratio to GDP. This ensures that trade is not simply a measure of size but of transnational activity. They further introduce two new variables: population size and litigation rates. In their OLS estimates, intra-EU trade (as a ratio to GDP) is not statistically significant in explaining variation in the use of preliminary references, casting doubt on the early SSB results.

4. Determinants of Preliminary Rulings

The literature briefly surveyed in Section 3 contains a number of potentially relevant determinants of requests for preliminary rulings. In this section, we add some new ones. Special emphasis will be on country characteristics that explain the use of the procedure. We propose to distinguish between three broad categories: (1) the economic dimension, (2) the structure of the judiciary, and (3) socioeconomic factors.

(1) Economic Dimension

First, we cannot exclude that requesting preliminary references is simply a function of being a large economy. It is a matter of statistical probability that the larger the economy, the more frequently disputes arise. From a theoretical perspective, population size and total GDP are both convincing predictors. Since the two variables are highly correlated, however, the model would suffer severe multicollinearity if both were included. In general, total GDP is a somewhat better predictor for the number of preliminary references and we thus use it in the following specifications. To approximate the degree of economic connectedness, we use the share of intra-EU trade over GDP. Normalizing for GDP ensures that it is not only the size of the country as such but the degree of its economic integration into the EU that matters.

The size of the economy and the degree of economic integration into the EU might not be the only dimensions indicating a high relevance of EU legislation. Individuals and firms operating in areas disadvantaged by

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7   It is unfortunate that Vink et al. (2009) rely on a different time period than CM (2005) as differences in their results could be due to the different period chosen.

national rules are more likely to have their rights enforced on the European level. Figure 1 shows that at present the single most important legal domain for preliminary references is tax law, followed by environmental and consumer issues. These subject areas were involved in more than one-fourth of all proceedings in 2009. To test for the effect of tax legislation, we rely on statutory corporate tax rates as well as the insurance and financial services activity in the economy. The latter variable is normalized over commercial service exports, as disputes arising out of transnational activities are most likely to matter for preliminary rulings.[8]

Furthermore, different sectors could rely on EU legislation to different degrees. SSB's analysis (1998) shows that until the 1990s it was agriculture, which attracted more than one-fifth of the preliminary references. We therefore use the structure of the economy (agriculture and industry as share of total GDP) as additional explanatory variables. If being a predominantly agricultural, industrial, or finance-driven economy creates a high demand for preliminary references, the variables outlined above should so indicate.

FIGURE 1 AROUND HERE

(2) Judicial Structure

The conjecture that judges from monist legal orders request preliminary references more frequently than those from dualist systems was first made by Alter (1996) and Mattli and Slaughter (1998). Monist legal orders are those in which both domestic and international law are perceived as forming a single legal order. Dualist orders are those in which the two kinds of legislation are assumed to coexist independently of each other.[9]

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[8]   A well-known case is *Manninen* (2004), in which the ECJ held that any tax imputation system that only imputes corporate taxes on dividends from locally resident companies violates the EU Treaty.

[9]   Monist orders need a way to deal with potential conflicts between domestic and international law. Hence, there are actually two kinds of monism: one in which

In monist orders, so the argument goes, judges are more accustomed to relying on international law in arriving at their decisions than are judges in dualist systems. Hence, they also should be more likely to demand a preliminary ruling from the ECJ. However, according to CM (2005), exactly the opposite could be the case: because judges in monist orders have more experience in interpreting international law, and thus perceive themselves as experts in this area, they are less likely to draw on the expertise of the judges in Luxemburg.

Every textbook on international law puts great emphasis on the monist/dualist distinction. In practice, however, sorting countries into one of the two traditions is difficult. Both CM and Vink et al. (2009) use a dummy variable for monism. The partial correlation between the two is $r = 0.73$, with Austria and Belgium coded differently. Voigt (2010a) contains a number of variables proxying for monism. Here, we use a more refined measure that codes as 1 countries in which international law has supremacy over domestic constitutional law in case of a conflict between the two, as 0.5 those countries in which international law has supremacy over ordinary domestic law, and as 0 those countries in which domestic constitutional law trumps international law.[10]

The conjecture that the presence of judicial review (JR) could have an impact on the propensity of judges to ask for preliminary references was also first introduced by Alter (1996) and Mattli and Slaughter (1998). The conjecture was made more specific by CM, who hypothesized that judges in countries with concrete JR would display a higher propensity to ask for preliminary references than would judges in countries without JR. The latter, however, are expected to be more likely to ask for preliminary references than judges in countries with only abstract JR.

Concrete JR is the power to declare legislation unconstitutional based on a concrete case; abstract JR is the power to declare legislation

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international law enjoys precedence over national law and one in which domestic law enjoys precedence over international law. After the ECJ's *Van Gend en Loos* decision, however, this distinction is superfluous within the EU.

[10] The partial correlation between this more refined measure and the Vink et al. (2009) variable is $r = 0.65$. The partial correlation with the CM (2005) monism variable is $r = 0.39$.

unconstitutional even in the absence of a concrete case challenging the law. Unfortunately, CM attribute the difference between concrete and abstract JR to the temporal dimension, claiming that concrete JR only comes into play after a law has been implemented, whereas abstract JR is available before the law's implementation (2005, 404). Their conjecture is based on the rationale that courts accustomed to declaring laws unconstitutional only before their implementation ("abstract" in their words) are not only unfamiliar with ex post JR but that such ex post review would also be contrary to their legal tradition.

Given the highly unusual characterization of concrete versus abstract JR offered by CM, we propose to test two different dimensions of JR. The first is the temporal dimension, and we distinguish four cases, namely, the constitutionality of legislation can be reviewed (1) before promulgation, (2) after promulgation, (3) both before and after, and (4) neither before nor after. Frequently, two systems of judicial review are distinguished: (1) the American and the (2) European (see, e.g., Harutyunyan and Mavcic 1996). This distinction involves whether the system provides for a special court with competence to review the constitutionality of legislation. In the United States, every court has the power to review the constitutionality of legislation. In Austria, a special constitutional court with the exclusive power of JR was founded in 1920 subsequent to the new Austrian constitution of the same year. After World War II, constitutional courts became widespread in Europe, hence the name. It is often conjectured that the preliminary reference procedure grants lower court judges the power to bypass the domestic top-level judges and hence change the balance of power within the judiciary (Tridimas and Tridimas 2004). Under the American system of JR, lower courts have relatively more power than under the Austrian or European system, implying that judges under the latter two systems have greater incentive to request preliminary references than those working under and American-style system.

The wide ranging effects of legal origin have played a prominent role in economics over the last decade (for a summary, see La Porta et al. 2008). In the context of this paper, it seems reasonable to assume that the differences between civil and common law might lead to differences in

the behavior of judges: the function of a judge in common-law countries is more than to be the "*bouche de la loi*" as is the case in civil-law countries. In common-law countries, judges are expected to help develop the law. We thus conjecture that, on average, judges in common-law countries have a more developed self-consciousness and are loath to ask others for an opinion. The hypothesis is that judges in common-law countries will request preliminary references less often than judges in civil-law countries. The problem with this hypothesis, of course, is that only three EU member states (the United Kingdom, Ireland, and Malta) are common-law countries.

Asking the ECJ for a preliminary ruling on a specific case presupposes that the judge knows that such a request is possible, if not exactly how to go about making it. Thus, one possible determinant of the frequency with which preliminary rulings are requested could be familiarity with European law. Ideally, we would use data for all relevant legal actors who have received training in EU law, but, at least to our knowledge, no such database exists. As a proxy, we have the number of students who have graduated from the College of Europe in Bruges, which offers a variety of degrees in European studies. We expect to see a positive correlation between the number of nationals who have a law degree from Bruges and the number of preliminary references requested. Again, exactly the opposite correlation cannot be excluded ex ante: that is, due to their intensive training in European issues, judges with such education might be more confident in deciding issues involving EU law on their own.[11]

Vink et al. (2009) suspect that a substantial judicial backlog reduces the propensity for asking a preliminary reference. The argument is that judges value the judiciary's reputation as a branch of government that "gets results." If a court is already experiencing a substantial backlog, asking for preliminary references will just make things worse and judges will, therefore, refrain from such requests. This could be particularly true if judges have an incentive to make quick decisions. Nevertheless, there are a number of counter arguments to "judicial backlog" theory. First, the

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[11]   Alternatively, we could have counted the number of law firms with first-rate competence in European law, but that would have been a much more subjective measure.

judiciary's reputation is a collective good produced by all judges and an individual judge has limited incentive to contribute to the production of that public good. In other words, the behavior of an individual judge is unlikely to be influenced by such concerns. Further, the number of cases potentially appropriate for the preliminary reference procedure is miniscule compared to the entire caseload and thus the effect of asking for one preliminary reference on the overall backlog will also be miniscule. Further, sending a case to Luxemburg could be an attractive way of buying time: that is, if the case is in Luxemburg, it cannot possibly be the local judge's fault that it has not yet been decided.

Judges who have many cases to adjudicate upon have more possibilities to refer cases to the ECJ than those with a low caseload. In that sense, a high number of cases is a necessary precondition to using the preliminary reference procedure. Following Vink et al. (2009), the corresponding hypothesis is tested here with the number of first-instance civil and administrative incoming cases per 100,000 inhabitants in 2008.

Finally, we add a fine-grained proxy of people's sentiments toward the judiciary or, more precisely, their sentiments toward the ECJ. In principle, it is possible that citizens have a very favorable attitude toward Europe but are highly skeptical of the ECJ. Since 1999, the Eurobarometer has asked how much trust citizens have in judicial decisions by both the ECJ and the highest national courts. We use the difference between the two as an additional explanatory variable. Our conjecture is that the larger the citizens' net difference in favor of the ECJ, the higher the propensity for judges in that country to request preliminary references, implying that domestic courts may be using the citizens' high regard for the ECJ to bolster their own reputation. Alternatively, however, judges of courts in countries where the citizens regard the ECJ highly may "feel jealous" of that trust and react by not asking for preliminary references.

(3) Socioeconomic Factors

Brussels can be considered the capital of Europe. Member states geographically very distant from Brussels might be very "distant" from its legal institutions too, and hence draw on the preliminary references procedure less frequently than judges located in countries geographically closer to Brussels. We take this possibility into account by controlling for the distance between Brussels and the respective nation's capital.

It is argued that national sentiment toward European integration could act as an additional determinant of requests for preliminary references (CM 2005). The judiciary's legitimacy, unlike other branches of government, does not rely on either the purse or the sword and at the end of the day, national judiciaries depend for their survival on the support of the citizens. Judges will thus be highly cognizant that their actions can either increase or decrease their legitimacy. It follows that if public opinion is very critical of European integration, judges will be less likely to call for preliminary references from the ECJ. CM (2005) draw on Eurobarometer surveys to determine public opinion. They use the number of citizens who are supportive of European integration minus the number who are rather critical as their proxy for the legitimacy of European institutions.[12]

SSB (1998a, 75) bemoan the fact that they cannot control for the number of internationally active interest groups, believing that such groups could have an interest in a stable legal framework at the European level and thus could exert some pressure on courts to request preliminary references. A variable measuring the number of such groups is now available (Paxton 2002) and we use it here.

Societies differ in the degree to which their members accept hierarchies (Putnam 1993, LLSV 1997, Hofstede 1997), and religious affiliation seems to be one important determinant of this variation. Purportedly, Catholics (and the Orthodox) are more accepting of hierarchies than are Protestants. In the context of preliminary references, this would mean that judges from more egalitarian countries are less likely to call on

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[12] We use the average of the spring and autumn wave of the Eurobarometer question QA6: "Generally speaking, do you think that your country's membership of the European Union is …? A good thing/A bad thing."

Luxemburg than are judges from predominantly Catholic countries. We test this conjecture by looking at the percentage of Catholics and Protestants in a society.

Finally, we take into consideration whether the country is unitary or federal. Compared to unitary countries, federal countries are characterized by a more autonomous lower level of government. The state-level court structure is also often more autonomous in federal countries. Assuming that judges at the state level can increase their influence vis-à-vis judges at the federal level and are interested in doing so, we would expect to see more requests for preliminary references originating from federal countries.

5. Estimation Approach and Data

The seminal article by SSB (1998) relies on a standard OLS regression model to explain the number of preliminary references per year and member state. While the small sample properties of this estimator are well known, it is *per se* not a suitable estimator for dealing with the count data properties of the dependent variable (see Figure 2 for the distribution of the data). It is perhaps for this reason that CM (2005) apply a fixed-effects negative binomial panel estimator (FENB). Besides the theoretical underpinnings for doing so, the model fits their data quite well. However, the fit of the model is only one — and arguably a subordinated — criterion in deciding whether the FENB is an appropriate panel estimator.

The FENB applied in CM (2005) dates back to Hausman et al. (1984) and is not without its critics. Allison and Waterman (2002) as well as Guimarães (2008) show that this panel estimator in fact may not condition out the fixed effects. As a solution, Allison and Waterman investigate a variety of alternative estimators. Guimarães (2008) develops a score test indicating whether the fixed effects are in fact conditioned out in the FENB. Instead of adopting one of these fixes, Vink et al. (2009) prefer a dual research strategy using both quantitative and qualitative methods. Their quantitative analysis relies, again, on the standard ordinary least squares regression model. We do not think that

ignoring the count data property of preliminary rulings is an appropriate solution and that a count data model should be estimated, especially in light of recent developments in the econometric literature.

In a first step, we specify different models for each of the theoretical concepts outlined above. This is done because some potential explanatory variables are highly correlated and thus should not be included in a single specification. Furthermore, estimating independent models helps identify relevant drivers of preliminary rulings with regard to different theoretical concepts. We specify pooled and fixed-effects panel data models. The coefficients of the pooled models are very likely to suffer from various types of endogeneity (e.g., omitted variable bias) and therefore will deviate (sometimes considerably) from the coefficients of the panel data models. As the FENB should by definition consider time-invariant country characteristics, some of the country-specific variables that are significant in the pooled models will lose their relevance in the panel specifications. We do not specify a random-effects model, as EU member states cannot be considered a random sample. In a second step, we consider the most promising variables from the panel regressions as well as factors found to be relevant in the previous literature and run a horse-race specification.

To counter the econometric concerns discussed by Allison and Waterman (2002) as well as by Guimarães (2008), we estimate the FENB and the Poisson fixed-effects estimator as a robustness check.[13] More importantly, however, we implement the score test developed by Guimarães (2008) to check whether the time-invariant country fixed effects have been successfully removed. In the following regressions, we report incidence rate ratios as they can easily be interpreted as a multiplicative effect or semi-elasticity. Therefore, all estimates below 1 should be interpreted as a negative relationship, while estimates greater than 1 reveal a positive effect.

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[13]   The Poisson estimator relies on the more restrictive assumption that the variance must equal the mean. If this condition is met, the model might do a better job of canceling out the country-fixed effects.

We consider the EU 27 member states over the period from 1982 to 2008. Because for the new member states some variables have become available only recently (e.g., the Eurobarometer survey), our panel dataset is unbalanced. However, we know that the reason behind the different data availability is the fall of the Iron Curtain and the consequent EU membership of some CEE states. To account for this fact, we include a dummy variable for the 12 new member states, which captures the effect of late EU entry and the unbalanced panel.

The empirical analysis in the next section relies on multiple data sources; some established measures previously used in the literature, some new ones not applied in the present context, and some hand-collected variables never used before. Appendix 1 provides an extensive overview of the coding and sources of the variables.

6 Results

We test the robustness of our results in a number of ways. First, we estimate different models for each of the three theoretical concepts outlined above. Second, we test for their explanatory power by running a horserace among the variables that were identified as relevant predictors. Finally, we check for the robustness of our findings by applying two different estimation techniques (negative binomial and Poisson).

We start with the economic dimension (Table 2). Consistent with the descriptive statistics, we find that "size matters" and that new member states make fewer requests to the ECJ for preliminary rulings. The impact of total GDP appears negligible, though, since a US$ 1 billion increase in productive activity causes a less than 0.1 percent increase in requests for preliminary rulings. In stark contrast, being a new member state reduces the number of preliminary rulings by more than two-thirds. Both results can be considered as inherent features of the country and therefore lose statistical significance if country fixed effects are included. Except for the pooled Poisson model, we find no support for the economic connectedness hypothesis (*Intra-EU trade/GDP*), which is in line with the results of CM (2005).

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Next, we consider the relevance of the financial sector. We find a very robust and highly significant effect of corporate taxation on Art. 267 TFEU activities. The effect is weaker in the panel regressions, with a 10-percentage point increase in the statutory corporate tax rate increasing the number of preliminary rulings by 11–14 percent. Individuals and firms disadvantaged by national tax legislation (and hence having more to gain from enforcement of their rights) turn to the ECJ more frequently than their peers not so disadvantaged. The variable on insurance and financial service activities over trade exports is not significant in the panel regressions (2) and (4). A likely explanation for this finding is that the popularity of financial centers does not vary much over time and the effect is taken out by the country fixed effects.

Finally, we find a negative, very robust, and significant result for the share of agriculture in the economy. This outcome is probably due to the fact that many disputes concerning agriculture were referred to the ECJ before the 1980s (see the descriptive results of SSB). As Figure 1 reveals, currently, it is mostly taxation issues that are subject to ECJ rulings, which is impressively borne out by the data. The industry share variable produces somewhat mixed findings, as only the Poisson panel data model yields a significant result.

TABLE 2 AROUND HERE

In a second step, we investigate the impact of judicial structure on the number of preliminary references issued by a particular country (Table 3). As many of the institutional factors are time invariant, we do not estimate a panel data model in this step.

Again, we find recent EU membership to have a robust and statistically significant effect on preliminary rulings, with stronger coefficients than in the economic specifications. The variables on monism (*monism*) and the stage of the legislative process at which bills can be reviewed for constitutionality (*chalstag*) are both insignificant at conventional statistical levels. The dummy variable indicating an "Austrian" system of judicial review is highly significant in all specifications. We include legal origin as a (categorical) control variable but abstain from interpreting a

causal effect for single dummy variables, as confounding variables are likely to be a problem, particularly in light of our small sample.

The number of law students at Bruges, which proxies for the familiarity of judges with the preliminary reference procedure, performs very well in all specifications. One more law student at Bruges increases the number of preliminary references by 9.2–12.6 percent. Moreover, while it may be the case that it is a general interest in Europe that drives students to study at Bruges, we find lagged variables (up to seven years) to be statistically significant. For a lag of five years, one more law student raises preliminary references by 7.3–8.4 percent. Neither the number of incoming cases nor the number of high courts has a significant effect on Art. 267 TFEU activity.

Finally, we find that the more popular the ECJ in comparison to national courts, the fewer preliminary references are requested from the ECJ. We speculate that national judges may fear a (further) loss in reputation or support from society and hence refer cases less frequently to the ECJ.

TABLE 3 AROUND HERE

Table 4 provides further evidence that a European legal education is particularly beneficial to the use of Art. 267 TFEU. Evidently, it is not the general number of students studying in a European environment that drives preliminary references to the ECJ, since we no longer find significant results for the lagged variables. For the panel regressions (2) and (6), the students variable is still significant but with a much smaller coefficient, which indicates that the general number of students at Bruges can be considered a proxy variable measuring support for European integration. The Eurobarometer variable on people's sentiments toward European integration has a positive effect and is significant in most of the specifications as well.

We confirm CM's (2005) result that political discussion in society plays a significant role. The number of international (non-) governmental organizations is highly significant in all pooled regressions but loses significance in the negative binomial panel model. This could indicate

that courts in countries with a high degree of lobbyism demand more preliminary references from the ECJ.

Finally, we consider four time-invariant variables. The distance to Brussels has a significant impact in the panel regressions (2) and (4). The age of democracy variable is positive and statistically significant throughout almost all specifications, implying that courts in countries with a longer history of uninterrupted democracy are more likely to ask for preliminary references. In the panel regressions, we find a very strong and positive effect for Protestantism, which is highly significant in all specifications. On the other hand, there is a somewhat weaker and barely significant result for Catholicism. Therefore, our conjecture that judges in countries comprised of citizens with a more hierarchically structured mindset would demand more preliminary references than judges in countries where the citizens has a more horizontal outlook on the world is refuted by the data. Federalism shows a strong and significant effect, which is, however, not borne out by the panel data models.

TABLE 4 AROUND HERE

We now include the most promising variables derived from our independent models in a horse-race specification. As in the previous models, we start with two structural indicators. Once more, we find that "size matters," with total GDP having a positive and significant impact in all but the Poisson fixed-effects specification. Being a new member state has a negative effect in the pooled regressions, but is not statistically significant in the FENB model, which is due to the fact that the fixed effects already capture this country-specific characteristic.

In a next step, we consider the two variables found to be significant in the economic panel specifications (Table 2). Corporate taxation is significant only in the pooled models now. However, agriculture share continues to be significant in all models, with a larger agricultural share reducing the number of requests for preliminary references sent to the ECJ. We consider this as strong evidence for the structure of the economy having a significant impact on the frequency with which preliminary references are requested.

With regard to judicial structure, we have not yet specified any panel models because most of these variables are time invariant. We include the number of law students in the horserace, since it is the only variable with a time dimension. Monism was found a relevant predictor in the previous literature and is thus considered here as well. The monism variable is now significant in the pooled regressions but remains insignificant in the panel models. The law student proxy is again robust and highly significant throughout all specifications. In unreported regressions, we tested for the two measures of judicial review. The dummy variable indicating an "Austrian" system of judicial review (which was highly significant in Table 3) is insignificant in the horse-race specification. By contrast, the *chalstag* variable is statistically significant in Equations (2) to (4). The variable is highly correlated with the new EU member state dummy, however. To avoid severe multicollinearity, we restrict the horse-race model to the more parsimonious specification reported in Table 5.

CM (2005) and, to a lesser extent, Vink et al. (2009) found support for European integration and the frequency of political discussion to be relevant socioeconomic variables. We therefore consider them in our horse-race model. Neither variable is significant in the specifications at hand, except for political discussion in the Poisson fixed-effects model. For the two time-invariant variables that were consistently significant in our previous socioeconomic specifications, we find the age of the constitution to have a significant impact on Art. 267 TFEU activity. Protestantism is significant in the FENB panel regression model as well.

TABLE 5 AROUND HERE

Finally, we implement the score test developed by Guimarães (2008) to check whether the FENB model successfully conditions for the country fixed effects. The test indicates that there is a specific functional relation between the fixed effects and the individual overdispersion parameter. Since we cannot reject this null hypothesis, the test indicates that the country fixed effects are indeed canceled out.

7 Conclusions and Outlook

Legal scholars are in apparent agreement that the ECJ's preliminary reference procedure is one of the most important — if not *the* most important — factors in making that court the powerful entity it is today. Understanding why there is such variance in its use is of paramount interest because the preliminary reference procedure has been and no doubt will continue to be an important instrument of European integration.

We contribute to this understanding by adding a number of new, and now empirically tested, conjectures and by applying a more adequate econometric approach (testing whether country fixed effects have indeed been removed in the FENB model). We find that the relative size of the agricultural sector has a strong negative effect on the number of preliminary references, whereas familiarity with EU law, the litigiousness of societies, and a judicial system providing for judicial review at every level of court have a positive effect.

Furthermore, by using a novel measure for legal education regarding European issues, we find that an international legal training has a decisive effect on Art. 267 TFEU activities. Finally, we have also shown that the drivers of preliminary references are not a given and may change over time. While in the early decades of the ECJ the share of agriculture in the economy had a positive effect on preliminary rulings, taxation matters most today. Future research should therefore keep track of these developments.

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Appendix 1: List of Variables

AGRICULTURE:
The agricultural value added as a share of GDP; source: World Development Indicators (WDI).

CATHOLIC:
Percentage of a country's population professing the Catholic religion in 1980 (younger states are counted based on their average from 1990 to 1995); sources: PT and BMVW.

CHALSTAG:
The stage of the legislative process at which a bill can be reviewed for constitutionality: (1) pre-promulgation, (2) post-promulgation, (3) either pre or post, (0) no time explicitly specified; source: Elkins et al. (2009) Comparative Constitutions Project.

CORPORATE TAX RATE:
Tax rate for the basic central government statutory (flat or top marginal) corporate income tax (including surtax if applicable); source: OECD tax database and KPMG Corporate and Indirect Tax Rate Surveys.

DEMOCRATIC AGE:
Age of democracy defined as (2000 – AGE)/200, with values varying between 0 and 1, where AGE is the first year of democratic rule in a country that continues uninterrupted until the end of the sample, given that the country was also an independent nation during the entire period; does not count foreign occupation during World War II as an interruption of democracy; sources: PT and BMVW.

DISTANCE TO BRUSSELS:
The distance between Brussels and the capital of a country in kilometers; source: Centre d'Etudes Prospectives et d'Informations Internationales (CEPII).

GDP:
Total GDP at current prices in USD billion; sources: International Monetary Fund (IMF) World Economic Outlook (WEO).

HIGH COURTS:
The number of high courts; source: Voigt (2010b).

IGO:
The number of international governmental organizations working within a country; source: Paxton (2002).

INCOMING CASES:
The number of incoming first-instance cases per 100.000 inhabitants in 2008; source: European Commission for the Efficiency of Justice (CEPEJ 2010).

INDUSTRY:
The industry value added as a share of GDP; source: WDI.

INGO:
The number of international NGOs working within a country; source: Paxton (2002).

INSURANCE AND FINANCIAL SERVICES:
Insurance and financial service activity as a percentage of commercial service exports; source: WDI.

INTRA-EU TRADE:
Sum of intra-EU exports plus intra-EU imports measured as a share of GDP; sources: CM (2005), Eurostat Yearbooks, and WEO.

JUDICAL REVIEW:
Equals 1 if the country has an "Austrian" system of judicial review; 0 otherwise.

LAW STUDENTS:
The number of law students graduating from the College of Europe by nationality; source: College of Europe.

LEGAL ORIGIN:
The legal origin of each jurisdiction: (1) common law, (2) French, (3) German, or (4) Scandinavian; source: Zweigert and Kötz (1998).

MONISM:
Coded 0 if domestic constitutional law has supremacy over international law, 0.5 if international law has supremacy over ordinary domestic law, and 1 if international law has supremacy over domestic constitutional law; source: Voigt (2010a).

NEW EU MEMBER (CEE):
Equals 1 if the country is one of the 12 Central and Eastern European nations that joined the EU in either May 2004 or January 2007; 0 otherwise.

POLITICAL DISCUSSION:
The population's average response from two surveys in a given year; answers to the question "When you get together with friends, would you say you discuss political matters frequently, occasionally, or never?" are coded as follows: (0) never, (1) occasionally, and (2) frequently; higher values thus indicate greater involvement in political discussion; source: Eurobarometer Surveys.

PROTESTANTISM:
Percentage of a country's population professing the Protestant religion in 1980 (younger states are counted based on their average from 1990 to 1995); sources: PT and BMVW.

STUDENTS:
The number of students graduating from the College of Europe by nationality; source: College of Europe.

SUPPORT ECJ:
The population's average response from two surveys in a given year; we calculate the percentage of respondents in a country and year that "trust" the ECJ and subtract from that the percentage that "trust" the national legal system; source: Eurobarometer Surveys.

SUPPORT FOR EUROPEAN INTEGRATION:
The population's average response from two surveys in a given year; we calculate the percentage of respondents in a country and year that consider EU membership a "good thing" and subtract from it the percentage of respondents that consider it a "bad thing"; source: Eurobarometer Surveys.

Table 1: Preliminary rulings normalized for population size in the year 2009

Country	preliminary references	population size in mill. inhabitants	preliminary references per mill. inhabitants
Belgium	35	10.7	3.3
Malta	1	0.4	2.4
Austria	15	8.3	1.8
Latvia	4	2.3	1.8
Estonia	2	1.3	1.5
Netherlands	24	16.4	1.5
Cyprus	1	0.9	1.2
Bulgaria	8	7.6	1.0
Hungary	10	10.0	1.0
Slovenia	2	2.0	1.0
Greece	11	11.2	1.0
Lithuania	3	3.4	0.9
Germany	59	82.1	0.7
Denmark	3	5.5	0.5
Sweden	5	9.2	0.5
Italy	29	59.8	0.5
Czech Republic	5	10.4	0.5
United Kingdom	28	61.4	0.5
France	28	62.3	0.4
Finland	2	5.3	0.4
Portugal	3	10.6	0.3
Poland	10	38.1	0.3
Spain	11	45.6	0.2
Slovak Republic	1	5.4	0.2
Romania	1	21.5	0.0
Ireland	0	4.4	0.0
Luxembourg	0	0.5	0.0
Average EU 27	11.1	18.4	0.9
Average CEE	4.6	10.2	0.8
Average EU 15	17.0	26.3	1.0

Source: Curia, IMF.

Table 2: Economic dimension

	Negative Binomial		Poisson	
	Pooled	Fixed Effects	Pooled	Fixed Effects
	(1)	(2)	(3)	(4)
Total GDP / 10³	1.000 ***	1.000	1.000 ***	1.000
	(0.000)	(0.202)	(0.000)	(0.114)
New EU member (CEE)	0.340 ***	1.688	0.217 **	
	(0.000)	(0.719)	(0.000)	
*Intra EU trade / GDP * 10²*	1.002	1.003	1.002 ***	1.000
	(0.214)	(0.162)	(0.030)	(0.770)
Corporate Tax	1.045 ***	1.014 **	1.030 ***	1.011 ***
	(0.000)	(0.018)	(0.000)	(0.001)
*Fin. & Insur. / Exports * 10²*	0.969 ***	1.005	0.978 ***	1.002
	(0.000)	(0.434)	(0.000)	(0.681)
*Argriculture / GDP * 10²*	0.766 ***	0.771 ***	0.827 ***	0.842 ***
	(0.000)	(0.000)	(0.000)	(0.000)
*Industry / GDP * 10²*	0.985	1.005	1.000	0.982 **
	(0.156)	(0.712)	(0.986)	(0.046)
Observations	331	331	331	331
Standard Errors	robust	-	robust	-
Log likelihood	-1089.61	-890.78	-1629.64	-1123.96
Wald chi square	480.36 ***	73.35 ***	818.52 ***	140.75 ***

This table reports the results from negative binomial and Poisson regressions. The dependent variable is the number of preliminary references. ***, **, * indicate statistical significance at the 1%, 5%, and 10% level, respectively. We report incidence rate ratios as they can easily be interpreted as a multiplicative effect or semi-elasticity. All estimates below 1 should be interpreted as a negative relationship, while estimates greater than 1 reveal a positive effect. Appendix I provides detail on sources and variables definitions.

Table 3: Judicial structure

	NB	Poisson	NB	Poisson	NB	Poisson
	(1)	(2)	(3)	(4)	(5)	(6)
Total GDP / 10^3	1.000	1.000	1.000 **	1.000	1.001 ***	1.001 ***
	(0.217)	(0.283)	(0.012)	(0.458)	(0.000)	(0.000)
New EU member (CEE)	0.108 ***	0.034 **	0.141 ***	0.075 ***	0.196 ***	0.192 ***
	(0.000)	(0.015)	(0.000)	(0.000)	(0.000)	(0.000)
Monism	0.538	0.228	0.814	0.351 **	3.418 **	1.546
	(0.372)	(0.193)	(0.711)	(0.115)	(0.027)	(0.382)
Judical Review	2.296 ***	1.979 ***	1.838 ***	1.802 ***	1.563 **	1.563 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.043)	(0.046)
Chalstag	1.366	2.450	1.189	1.737	1.235	1.313 *
	(0.147)	(0.179)	(0.383)	(0.111)	(0.203)	(0.090)
Legal Origin	0.848	0.785 *	0.832	0.792 *	1.616 **	1.371
	(0.256)	(0.099)	(0.203)	(0.092)	(0.016)	(0.112)
Law Students	1.187 ***	1.144 ***			1.136 ***	1.104 ***
	(0.000)	(0.000)			(0.000)	(0.000)
Law Students (5 Year Lag)			1.197 ***	1.133 ***		
			(0.000)	(0.000)		
Incoming Cases / 10^2	0.997	1.030	0.993	1.016	1.004	1.014
	(0.859)	(0.439)	(0.630)	(0.450)	(0.770)	(0.331)
Number of High Courts	0.872	0.707	0.873	0.938	0.836	0.968
	(0.568)	(0.429)	(0.530)	(0.822)	(0.362)	(0.858)
Support ECJ - Nat. Court					0.972 **	0.972 **
(Average 1999-2007)					(0.025)	(0.041)
Observations	224	224	219	219	219	219
Standard Errors	robust	robust	robust	robust	robust	robust
Log pseudolikelihood	-736.80	-1172.71	-720.14	-1152.30	-711.84	-1075.13
Wald chi square	320.18 ***	374.97 ***	329.80 ***	343.50 ***	391.36 ***	518.80 ***

This table reports the results from negative binomial and Poisson regressions. The dependent variable is the number of preliminary references. ***, **, * indicate statistical significance at the 1%, 5%, and 10% level, respectively. We report incidence rate ratios as they can easily be interpreted as a multiplicative effect or semi-elasticity. All estimates below 1 should be interpreted as a negative relationship, while estimates greater than 1 reveal a positive effect. Appendix I provides detail on sources and variables definitions.

Table 4: Socioeconomic factors

|	Negative Binomial		Negative Binomial		Poisson	
	Pooled	Fixed Effects	Pooled	Fixed Effects	Pooled	Fixed Effects
	(1)	(2)	(3)	(4)	(5)	(6)
Total GDP / 10^3	1.000	1.001 ***	1.000	1.001	1.000	1.000
	(0.865)	(0.001)	(0.635)	(0.001)	(0.986)	(0.267)
Students College of Europe	1.002	1.003 **			1.003	1.009 **
	(0.861)	(0.611)			(0.726)	(0.013)
Students College of Europe (5 Year Lag)			0.995	1.003		
			(0.629)	(0.611)		
Support for Intergartion	1.013 ***	1.003	1.012 ***	1.003	1.012 ***	1.004 **
	(0.000)	(0.203)	(0.000)	(0.203)	(0.000)	(0.014)
Political Discussion	4.747 ***	3.196 **	4.614 ***	3.196 **	9.156 ***	5.194 ***
	(0.001)	(0.021)	(0.001)	(0.021)	(0.000)	(0.000)
Int. Gov. Oranizations	1.051 ***	1.005	1.051 ***	1.005	1.042 ***	1.009 *
	(0.000)	(0.552)	(0.000)	(0.552)	(0.000)	(0.094)
Int. Non-Gov. Oranizations / 10^2	1.076 ***	1.016	1.080 ***	1.016 *	1.066 ***	1.021 ***
	(0.000)	(0.057)	(0.000)	(0.057)	(0.000)	(0.000)
Distance to Brussels / 10^2	0.997	1.136 ***	0.996	1.136 **	1.021	
	(0.857)	(0.017)	(0.725)	(0.017)	(0.218)	
Democratic Age	0.995 **	0.962 ***	0.996 *	0.962 ***	0.993 ***	
	(0.041)	(0.000)	(0.100)	(0.000)	(0.001)	
Catholic	0.999	1.014 *	0.999	1.014 *	1.003	
	(0.729)	(0.096)	(0.772)	(0.096)	(0.221)	
Protestant	0.981 ***	1.047 ***	0.980 ***	1.047 ***	0.983 ***	
	(0.000)	(0.003)	(0.000)	(0.003)	(0.000)	
Federalism	3.882 ***	0.590	3.666 ***	0.590	3.257 ***	
	(0.000)	(0.334)	(0.000)	(0.334)	(0.000)	
Standard errors	robust	-	robust	-	robust	-
Observations	254	254	254	254	254	254
Log pseudolikelihood	-781.85	-645.12	-781.70	-647.63	-1084.90	-829.36
Wald chi square	538.79 ***	108.28 ***	556.09 ***	102.86 ***	586.08 ***	133.36 ***

This table reports the results from negative binomial and Poisson regressions. The dependent variable is the number of preliminary references. ***, **, * indicate statistical significance at the 1%, 5%, and 10% level, respectively. We report incidence rate ratios as they can easily be interpreted as a multiplicative effect or semi-elasticity. All estimates below 1 should be interpreted as a negative relationship, while estimates greater than 1 reveal a positive effect. Appendix I provides detail on sources and variables definitions.

Table 5: Horserace

	Negative Binomial		Poisson	
	Pooled	Fixed Effects	Pooled	Fixed Effects
	(1)	(2)	(3)	(4)
Total GDP / 10³	1.329 ***	1.149 **	1.196 **	1.040
	(0.001)	(0.036)	(0.044)	(0.361)
New EU member (CEE)	0.237 ***	2.705	0.187 ***	
	(0.000)	(0.424)	(0.000)	
Corporate Tax	1.031 ***	1.002	1.023 ***	1.001
	(0.000)	(0.740)	(0.000)	(0.778)
*Argriculture / GDP * 10²*	0.782 ***	0.879 ***	0.801 ***	0.866 ***
	(0.000)	(0.001)	(0.000)	(0.000)
Monism	1.906 ***	1.851	1.378 *	
	(0.002)	(0.585)	(0.073)	
Law Students	1.077 ***	1.027 ***	1.067 ***	1.027 ***
	(0.000)	(0.009)	(0.000)	(0.000)
Support for Intergartion	0.997	1.003	1.000	1.002
	(0.354)	(0.193)	(0.900)	(0.177)
Political Discussion	1.508	1.788	1.940 *	3.370 ***
	(0.481)	(0.109)	(0.100)	(0.000)
Democratic Age	1.006 ***	0.986 ***	1.005 ***	
	(0.000)	(0.007)	(0.000)	
Protestant	1.006	1.038 ***	1.001	
	(0.120)	(0.010)	(0.640)	
Observations	289	289	289	289
Standard Errors	robust	-	robust	-
Log likelihood	-966.53	-786.84	671.51	180.54
Wald chi square	451.01 ***	115.05 ***	-1338.556 ***	-994.4634 ***

This table reports the results from negative binomial and Poisson regressions. The dependent variable is the number of preliminary references. ***, **, * indicate statistical significance at the 1%, 5%, and 10% level, respectively. We report incidence rate ratios as they can easily be interpreted as a multiplicative effect or semi-elasticity. All estimates below 1 should be interpreted as a negative relationship, while estimates greater than 1 reveal a positive effect. Appendix I provides detail on sources and variables definitions.

Figure 1: Preliminary rulings by legal domain in the year 2009
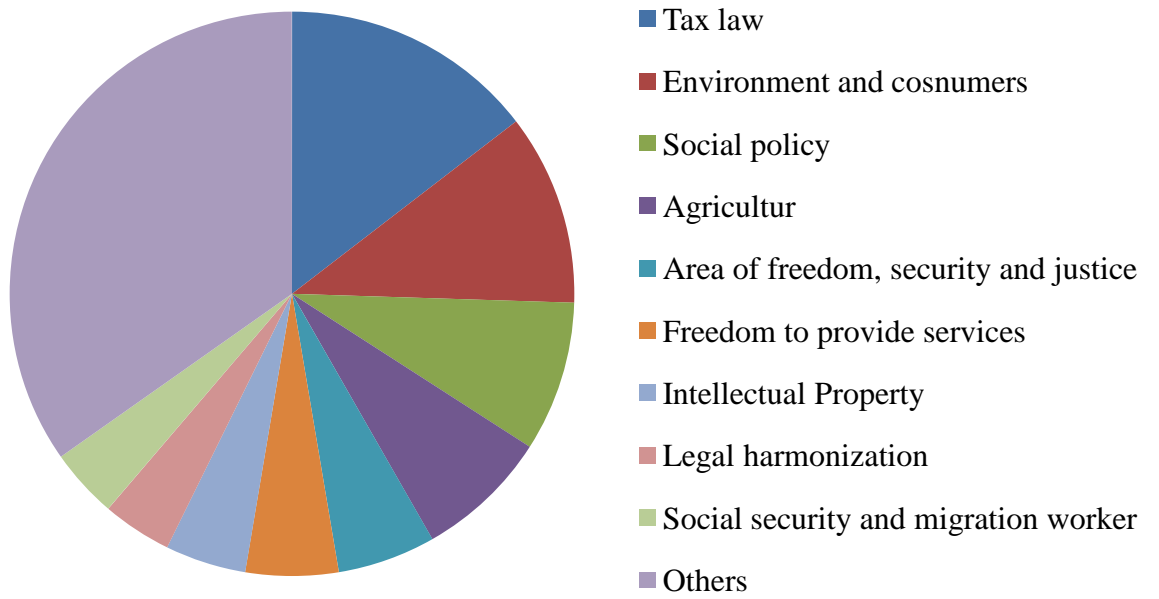
Source: Curia.

Figure 2: Frequency of preliminary rulings (per year and member state)