The Effects of Ideology and Opinion Assignment on European Court of Justice Rulings: Evidence from Anti-Trust and State Aid Cases

Silje Synnøve Lyder Hermansen and Erik Voeten

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Abstract

Can governments influence the ideological direction of the Court of Justice of the European Union (CJEU) through judicial appointments? How does the internal allocation of responsibilities, such as the assignment of reporting judges, affect CJEU decisions? These questions have been difficult to answer given that the CJEU publishes its judgments as a collective. We present a simple model in which a reporting judge is assigned the responsibility to propose a draft judgment to a panel, which can then amend and vote on it. The model yields several observable implications, including that both the ideological preferences of the median and the reporter judge influence Court decisions. We test the implications of the model using state aid annulment cases against EU Commission decisions and anti-trust cases brought either by private litigants or governments in the 1990-2021 period. We find that as the median judge is appointed by a more economically left-wing government, the Court becomes more likely to rule in favor of government intervention in the economy. The ideological preferences of the reporting judge also shape Court decisions. These findings shed new light on both the judicial behavior of the Court and its alleged neoliberal bias.

Introduction

The Court of Justice of the European Union (CJEU) publishes decisions without revealing who dissented from the majority judgment. The absence of information about judicial disagreements complicates scholarly inquiries into key research questions: To what extent do governments influence the ideological direction of the court through the appointment process? Does the internal organization of the court, such as which judge gets assigned to write an inital draft opinion, affect case outcomes?

The absence of data makes these questions difficult to answer on per curiam courts even as they are highly relevant. Governments are each responsible for the appointment of one judge to the Court of Justice (CJ) and two judges to the General Court (GC). Governments have incentives to select judges who reflect their views on issues that commonly appear before the Court and that have domestic political relevance, such as the extent to which governments can intervene in the economy. Moreover, the Court's President assigns responsibility to summarize proceedings and draft an initial opinion to a reporter judge before the Court has even heard the case. If judges vary in their ideological predispositions, then this delegation of authority could affect the Court's case dispositions and judicial reasoning.

We offer a theoretical framework and an empirical research design that allow us to examine these questions in the CJEU context and potentially other per curiam courts. First, we adjust a bargaining model designed to analyze opinion assignment on the U.S. Supreme Court (SCOTUS) (Lax, 2007) to the CJEU's institutional context. The SCOTUS first holds a straw poll vote after which one of the justices in the majority drafts an initial opinion. This leaves the draft opinion writer the opportunity to influence the legal reasoning but not the case disposition (Carrubba, Friedman, et al., 2012). By contrast, the CJEU's President assigns responsibility to summarize proceedings and draft an initial opinion to a reporter judge before the Court has even heard the case. This potentially gives the reporting judge the opportunity to use agenda setting power to shape both legal reasoning and the disposition of

cases. In the model, the reporting judge's only advantage is to offer the first proposal. Other judges can write counter-opinions but they prefer a well-reasoned judgment that deviates modestly from their ideal outcomes over exerting the effort to write an alternative opinion that can beat the initial draft in a majority vote. Even so, judges with alternative preferences who have the time and ability to draft counter-opinions constrain the reporting judge.

We test these hypotheses with on data on 1265 annulment cases filed in the 1990-2021 period where litigants challenge European Commission decisions in two key areas of competition policy: state aid and antitrust. These cases vary in their implications for European integration. State aid cases are about whether a national government should be allowed to intervene in the economy (negative integration) whereas antitrust cases are about whether the Commission should regulate the behavior of private actors (positive integration). Yet, we contend that the more relevant ideological contestation concerns the the degree to which government should be allowed to intervene in the economy, the interventionist position, or should let markets free reign, the neoliberal position. We tap directly into this ideological conflict by coding the policy direction of 1265 rulings, going beyond the common measures where outcomes are indexed on agreement with the Commission (Wijtvliet and Dyevre, 2021), the plaintiff (Zhang, Liu, and Garoupa, 2018; Carrubba, Gabel, and Hankla, 2008) or the national law (Larsson and Naurin, 2016).

We thus argue that substantive ideological preferences over market regulation rather than procedural preferences over European versus national regulation shape judicial behavior. A key conjecture motivating our analysis is that judicial preferences relate to the ideologies of the governments that appointed them. We measure the extent to which governments favor or oppose state intervention in the economy using party manifesto data. We find that panels where the median judge was appointed by economically right-leaning governments were more restrictive toward state aid and less likely to accept EU antitrust enforcement. Furthermore, we find compelling evidence that the ideology of the government that appointed the reporting

judge has an independent effect on case outcomes. Finally, consistent with the model's implications, we find evidence that the influence of the reporting judge is greater when the ideologically distant judges – those with the most incentives to write a counter-opinion – have a higher caseload and thus larger opportunity costs for writing counter-opinions.

These findings contribute to an emerging literature that seeks to open up the black box of CJEU decision making (Malecki, 2012; Frankenreiter, 2017; Wijtvliet and Dyevre, 2021; Cheruvu, 2024; Zhang, Liu, and Garoupa, 2018). We make three broad contributions. First, we demonstrate that the CJEU's output is responsive to changes in government ideology over market intervention. The Court is often accused of having a pro-business bias (Conant, 2002; Conant, 2018; Börzel, 2006) and that it has pushed a neo-liberal conception of the single market beyond what member states would have wanted (Scharpf, 2010b; Höpner and Schäfer, 2012; Schmidt, 2018; McCann, 2014). As Fritz Scharpf put it: "ever since Van Gend & Loos (C-26/62, 05.02.1963), the Court had reinterpreted the commitments of member states to create a common market as subjective rights of individuals and firms against these member states" (Scharpf, 2010a). Our findings suggest that governments can – and have – influenced the direction of the Court's decisions by appointing judges based on their view on state intervention into the economy. This does not mean that governments have perfect control or that they aren't caught in the "join-decision trap" (Scharpf, 1988). Yet, governments are not just bystanders watching helplessly as the Court moves Europe in a neoliberal direction.

Second, we offer evidence that the CJEU's internal organization matters for case outcomes. Legal scholars have mostly analyzed the delegation of responsibility to panels and individual judges from the perspective of enhancing efficiency and the Court's "common purpose" (Krenn, 2022), although others have recognized that it may also affect the consistency of the Court's case law (Fjelstul, 2023). We connect a simple formal model with an empirical research design to show that both the identity of the median and the reporting judge shape case dispositions on state aid cases. This research design potentially opens up further research

into the internal organization of the CJEU and other per curiam courts. For example, future research could explore how the President can shape case outcomes through the appointment of reporting judges.

Third, we adjust the case-space model from the US Supreme Court context to the CJEU context in order to provide a theoretical framework of how the Court's internal assignment of responsibilities to a panel and a reporting judge affects case outcomes. The theoretical framework highlights that while the same ideological divisions exist within the Court as among governments, politics are negotiated differently within the Court (Alter, 2008, pp. 44– 46). For instance, the model illustrates how judges with more experience and expertise may more effectively sway outcomes to their side. While our main contributions are empirical rather than theoretical, the application for the case-space model to the CJEU context has potential implications beyond the observable implications studied in our paper. For example, the model implies that variation in judicial preferences can incentivize judges to write higher quality judicial opinions. The intuition is that a judge who needs to persuade a colleague with different preferences has to put more effort into persuasive legal reasoning than a judge who only has like-minded colleagues. This point matters as the influence of ideology is sometimes thought to undermine legal reasoning. The model thus offers a rationale for high quality judicial reasoning that stems from the need to persuade colleagues rather than compliance constituencies. There is considerable potential for extending the framework to other research questions.

This paper proceeds by reviewing the literature. We then present a simple agenda setter model and its observable implications. The paper next turns to data, methods, and the results. The conclusions return to the broader implications of our findings.

Literature

While the sequence of events might sit oddly with decision making at the SCOTUS, it is a close description of the institutional features of peak courts elsewhere. Both domestic European and international courts tend to delegate the preparation of cases and the initial drafting of the judgment to an individual judge (Cohen, 2014; Kelemen, 2016, p. 39-44, Dunoff and Pollack, 2018). However, there is rarely a preliminary vote on the case's disposition. Instead, the appointment of the reporting judge is done early and in view of the final deliberation (Cohen, 2014). When judges meet to decide on the case, their starting point is the proposal of the reporting judge based on information provided by them. Judges thus decide in a single bargain on both the legal argument and the disposition of the case. While there is a general sense among observers that the reporting judge is frequently in the majority (Kelemen, 2016, p. 42), we have little systematic evidence as to their influence.

This limited attention to internal divisions among judges stands in sharp contrast to the literature on other high courts. Especially in the U.S. context, an extensive literature documents a close correspondence between the ideological predispositions of the U.S. President and the behavior of the judges they appointed (e.g. Epstein and Segal, 2005; Epstein and Knight, 1997; Segal and Cover, 1989; Martin, Quinn, and Epstein, 2004/2005). In the absence of accountability mechanisms, ideological selection becomes the only mechanism for governments to affect how their appointed judges vote. Thus, it should not be surprising that courts with lifetime appointments, such as the U.S. Supreme Court, display clear ideological divisions that map onto the political branch.

Moreover, scholars of especially U.S. courts have shown that the internal organization of courts matters. For instance, many courts have mechanisms that allocate initial responsibility for drafting an opinion to one judge. The cost of writing alternative proposals may mean that the "opinion author" can move court opinions towards her ideal point (Lax and Rader, 2015; Lauderdale and Clark, 2016; Bonneau et al., 2007; Hammond, Bonneau, and

Sheehan, 2005; Lax, 2007; Maltzman, 2000). This question has received much less attention in the study of European courts.

With few exceptions, the literature treats the CJEU as if it acts in unison. If all judges share the same interests, then there is little reason to study how the Court's internal organization shapes outcomes. Theories typically assume that CJEU judges are either non-strategic actors who resolve cases based on their legal merit or that judges collectively act to protect the Court's legitimacy or advance European integration. For example, scholars have argued that the Court's pro-integration tendencies on single market cases have pushed the EU towards more neoliberal policies than the EU's member states would have preferred (Scharpf, 2010b; Höpner and Schäfer, 2012; McCann, 2014; Schmidt, 2018). Yet the Court's power is not unchecked: member state governments can influence the court by threatening legislative override, non-compliance, or other court-curbing measures (Kelemen, 2001; Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Castro-Montero et al., 2018).

By contrast, the literature has mostly ignored governmental influence upstream through the judicial appointment process. If the CJEU can affect policies that governments cannot coordinate on themselves, then EU member states would have strong incentives to appoint judges whose ideology is similar to their own (Weiler 1994, 523–24). Moreover, judges clearly differ in the importance of the portfolio of cases they handle. A recent quantitative assessment of case assignment to reporting judges finds that there is large variation in the number and importance of cases assigned to CJEU judges. Yet, the study does not question whether this affects outcomes; instead concluding that the internal allocation of responsibilities helps to foster "a sense of common purpose" (Krenn, 2022).

We suggest that the relative shortage of attention for these theoretical arguments in the CJEU context has more to do with an absence of data than a lack of relevance. Judges serve six-year renewable terms. There is suggestive evidence that judges are selected and reselected by governments for their economic left-right ideology. In the context of the General

Court, former judges have complained about the impromptu overturn in membership when new governments come to power (Dehousse, 2011, 7-8 and 16-17). Analyzing all potential reappointments to the CJEU in the 1954-2020 period, Hermansen and Naurin (2019) further demonstrate that a new government with different views on state intervention in the economy is more likely to replace the incumbent when their mandate expires. Ideological selection is low-cost. On full-representation courts, there is no coordination problem that prevents governments from selecting ideological allies (Voeten, 2007). In the EU, each member state nominates an equal number of judges and their final appointment in the Council is a mere formality (Dunoff and Pollack, 2017). To lower the cost of screening, governments will often approach candidates for international judgeships through their own party networks (Voeten, 2007). Most countries will also have multiple candidates that have the requisite education and experience to become CJEU judges. Since the Lisbon Treaty, a merit selection committee advises governments on candidates' qualifications. However, each government retains the prerogative to deselect incumbent judges and nominate new ones; one judge to the CJ and two judges to the GC.

Once in office, judges escape political accountability. To protect their independence, the CJEU never reveals individual votes (Dunoff and Pollack, 2017). Both the formal and informal organization of the Court are also geared to shield judges from double binds (Hermansen, 2020). Although their terms may be renewed, there are few indications that judges pander to their future appointers (Cheruvu, 2024). Hidden in numbers, CJEU judges, therefore, have fewer career incentives to moderate their decisions than if their votes had been revealed (Stiansen, 2022; Voeten, 2008). Thus, governments are relatively free to appoint judges that reflect their ideologies and judges are relatively unconstrained in allowing their own viewpoints to shape case outcomes.

Another contested issue concerns the nature of the ideological conflict that matters in both politics and the judiciary. The main thrust of scholarly debate about CJEU policy making has focused on the distribution of competences between the supranational Court and member states. The Court formally placed itself at the top of the European judicial hierarchy by establishing the doctrines of supremacy and direct effect starting in the 1960s. Scholars within the neofunctionalist tradition have argued that private actors with vested economic interests in trans-border trade have further pushed the pro-integration tendencies of the Court (Stone Sweet and Brunell, 1998; Sandholtz and Stone Sweet, 1998).

Yet, in EU politics, the socioeconomic left-right division has historically been dominant (Gabel and Hix, 2002; Hix, Noury, and Roland, 2006) even if it has more recently been challenged by conflict over cultural authoritarianism (Hooghe and Marks, 2018). Economic left-right conflict, especially over the extent to which the state can intervene in markets, has also been central to many cases that come before the Court, especially on competition policy, state aid, and other single market issues. As Fritz Scharpf put it: "integration through law was able to move forward without political interference through the seemingly inexorable evolution of judicial doctrines protecting and extending the Treaty-based rights of private individuals and firms." (Scharpf, 2010a).

We argue that governments are likely to select judges based on their views over the central issues that the Court adjudicates, which have historically been single market cases. Thus, we expect that government positions over the role of the state in the economy rather than pro- or anti integration shapes judicial behavior. There is some evidence that this may be so. Hermansen and Naurin demonstrate that the turnover in judges maps neatly on to governments' economic left-right preferences but not their views on European integration (Hermansen and Naurin, 2019). The President of the Court furthermore displays sensitivity to the same preferences in his allocation decisions (Hermansen, 2020). Wijtvliet and Dyevre (2021) asked competition law experts to rate the ideology of General Court judges and find that variation in the score of the median panel judge towards market intervention significantly predicts the outcome in competition and state aid cases (Wijtvliet and Dyevre, 2021). We

thus similarly assume that the core dimension of contestation that matters to governments and judges is ideological differences over state intervention into the single market.

The Reporting Judge as an Agenda Setter

The median voter theory posits that when collective bodies make decisions under majority rule and voter preferences are aligned along a single dimension, the voter with the median preferences will be pivotal (Black et al., 1958). Especially U.S. Supreme Court scholars have adapted this theory to argue that the "median justice" is the key determinant for the ideological direction of a court (e.g. Epstein and Knight, 1997; Martin, Quinn, and Epstein, 2004/2005). The CJEU formally makes decisions through majority voting even if in practice there are norms towards achieving consensus. Still, the shadow of a majority vote looms over the decision making process. Thus, the preferences of the median justice should be central in the process of reaching consensus. The implication in our empirical context is that a panel with a median judge further to the right would need a stronger legal case for allowing state aid than a panel where the median judge is further to the left. By contrast, if the median judge is more left leaning then the panel would be willing to accept instances of state aid that fit less comfortably within the legal exceptions created by EU law.

Scholars have long pointed out that voting rules are not the only institutions that shape collective decision making. For example, institutions often have rules that allocate responsibility to draft proposals to individuals or small committees. These "agenda setters" may be able to move outcomes towards their ideal points (e.g. Romer and Rosenthal, 1978; Romer and Rosenthal, 1979). Scholars of judicial decision making have developed this insight in the context of the U.S. Supreme Court (Lax and Rader, 2015; Lauderdale and Clark, 2016; Bonneau et al., 2007; Hammond, Bonneau, and Sheehan, 2005; Lax, 2007; Maltzman, 2000) but there has been relatively little attention to this on the CJEU.

We adapt a bargaining model over opinion formation in the USSC (Lax, 2007) to the CJEU context. There are important institutional differences between the two courts that matter for strategic judicial behavior. On the Supreme Court, the justices first hold a preliminary "straw" vote on the disposition of a case. If the Chief Justice is in the majority, he assigns the responsibility to draft a majority opinion to one of the other judges or himself. If the Chief Justice is in the minority, then the task to assign a draft opinion writer falls upon the most senior justice in the majority. The justices can then write counter-opinions before a final vote is held.

By contrast, on the CJEU, the Court's president assigns a reporting judge when the case is received, and will not not take the responsability herself.¹ The president is typically not a voting judge on the panel, although she may have strategic reasons for preferring some reporting judges over others. We set aside this issue for future research.

The reporting judge plays a larger role than simply drafting an initial opinion. The reporting judge summarizes the written submissions from the parties. In the CJ, this summary is discussed at the Court's general meeting, which then decides to assign the case to a panel of 3, 5 or 15 judges, including the reporting judge.² The GC rarely uses the general meeting and moves directly to panel deliberations. The panel then holds an oral hearing (if deemed necessary), and the reporting judge drafts an initial opinion. To foster discussion during the deliberations, each judge is then asked to present their views and can at this point table alternative proposals. Finally, decisions are made by majority vote if no consensus can be reached.

The designation of a reporting judge at the very beginning of a case before any straw poll means that there is no guarantee that the judge responsible for writing the initial opinion will be in the majority concerning the disposition of the case. This arguably implies that

¹In the GC, this is typically on the advice of the Chamber president

²In rare important cases the whole Court hears a case. In these instances, the President will also serve as the reporting judge.

the identity of the reporter judge is potentially more important than the majority opinion writer on the SCOTUS. A draft opinion could not just influence legal reasoning but also whether an instance of state aid is adjudged to meet EU law standards. It is plausible that the other judges may accept a draft opinion that deviates from their ideal preferences over incurring the cost of writing the judgment themselves.

The framework for the formal analysis is the case space model, which recognizes the differences between legislatures and courts (Lax, 2007; Lax and Rader, 2015). Legislatures can introduce laws that overturn a policy status quo. By contrast, courts use and develop legal rules that resolve cases. In our example, the Court must decide whether a Commission decision about state aid should be annulled. In the process of resolving cases, Courts also develop the general legal rules that govern what types of state aid meets EU law standards and what types of state aid do not fit EU law.

We assume that judges have preferences about what the ideal legal rules should be. More specifically, we conjecture that judges appointed by more economically left-wing governments prefer legal rules that are more lenient towards state aid and more favorable towards active antitrust enforcement than judges who are appointed by more economically right wing governments. Importantly, we do not assume that judges have case-specific preferences, such as that judges favor the side of a case supported by most by member governments (Carrubba, 2009; Larsson and Naurin, 2016). This type of strategic judicial behavior has been the traditional focus of CJEU studies. We control for government submissions in our empirics. Our theoretical focus is instead on ideological disagreements: some judges take a broader view of what types of state interventions EU law allows than other judges, and these judicial preferences follow from the preferences of the governments that appointed the judges. This focus also helps us zoom in on the potential importance of reporting judges for shaping the direction of CJEU jurisprudence.

The case space model assumes that judgments vary in their clarity, persuasiveness, or, more

generally, quality. Legal rules are inherently noisy. The CJEU's jurisprudence is implemented by the EU Commission, national courts, and national policy makers who may interpret or implement rules in ways that are slightly different than intended by the judgment's authors. The more care judges put in drafting a judgement, the lower this randomness (Lax, 2007). Yet, writing high quality rules also takes effort. In the CJEU context the reporting judge must exercise some of this effort. The question then is under what conditions it is worthwhile for the other judges to exert effort if they dislike the policy implications of the initial draft opinion. This determines the room a reporting judge has to influence the direction of the Court's jurisprudence.

Below we introduce some formal notation, using the example of state aid cases.³ Consider a case x drawn from a one-dimensional policy space X, where larger values of x reflect a case with stronger legal facts for allowing an instance of state aid. A legal rule r defines a cut-point \bar{r} such that the court rejects state aid when $x > \bar{r}$ and accepts state aid otherwise. So, the larger the value for \bar{r} the more economically right wing the court will be and the more instances of state aid will be rejected. The legal rule is a random variable with mean p and variance (1-q) where $p \in X$ and $q \in [0,1]$. A draft opinion o consists of both a target cut-point p for the rule and quality q. The expected utility for each judge i is a function of how far the expected cut-point departs from the judge's preferred cut-point j_i and (if the judge is the opinion writer) the cost of writing a judgment at a given quality level:

$$EU_i(o) = -((j_i - p)^2 + 1 - q) - I_i(c_i(1+q))$$

The first part of this expected utility function captures how far the policy implications of a legal ruling deviate from the judge's ideal point. The second part captures the cost of writing an opinion of a given quality q. I_i is an indicator that equals 1 if the judge authors an opinion and 0 otherwise. The cost of producing quality judgments (c_i) varies among

³The notation sticks closely to (Lax, 2007)

judges. Judges with more expertise or experience may find it easier to write high quality judgments. It can also reflect that the opportunity costs for judges with lower caseloads to invest in high quality judgments may be lower.⁴ The cost c_i thus reflect the marginal cost for judge i of producing additional quality. In addition, it may be reasonable to assume that the respondent judge suffers costs from producing an initial draft opinion that is below a minimal threshold. As long as this threshold is reasonably low, this only affects outcomes in cases where the respondent judge lacks sufficient motivation to put effort into writing judgments. Since we cannot empirically identify those cases we relegate a discussion of this issue to the appendix.

The model has two adjustments from the one analyzed in Lax (2007), which in practice make the model simpler. First, while that article was a purely theoretical analysis, the role of the model here is to derive testable observable implications. We thus omit parameters that play no role in our empirical analysis: case specific and individual salience of cases as well as the legal difficulty of cases. This does not affect the underlying logic of the model or the equilibrium analysis for the parameters we care about.⁵

The second difference, highlighted earlier, is that the institutional set up in the CJEU differs from the US Supreme Court. There is no initial conference vote and then assignment of an opinion by the senior member of the winning coalition. Instead we analyze three stages of the bargaining process:

- 1. The rapport eur R drafts an initial opinion o_R with policy p_R and quality q_R
- 2. The left-wing judge L and the median judge M decide whether to draft alternative opinions
- 3. The judges decide by majority vote among alternative opinions

 $^{^4}$ The model assumes that the cost can never be 0 .

⁵The salience and case characteristics reduce to one parameter for each judge t_i and case t in the formal analysis in (Lax, 2007) so there is no real difference in the equilibrium analysis.

Without loss of generality, we discuss the case where R has an ideal point to the right of M and we normalize M's ideal point to 0. This means that j_R reflects the distance between the ideal points of M and R and j_L the distance between M and L's ideal point. The game can be solved through backward induction. The proof that M is decisive in the voting stage is straightforward and identical to Lax (2007). In the second stage, judges must first evaluate what their best winning counteroffer (BWC) is and whether it is indeed in their interest to put in the effort to write that counteroffer. In the first stage, R chooses her preferred opinion that satisfies the constraints that both other judges decide that it is not in their interest to write a counter-opinion.

In equilibrium⁶ R proposes the best offer that the panel supports in a majority vote. Assuming that such an offer exists, it has policy position

$$p_R = \frac{j_R}{c_R} + (1 - \frac{1}{c_R}) \frac{j_L}{c_L}$$

and quality:

$$q_R = (\frac{j_R}{c_R} - \frac{j_L}{(c_R * c_L)})^2 - 1$$

There are several interesting features of this proposal. First, the degree to which the rapporteur can shift legal rules towards her ideal point relative to the median is increasing in the distance from the median judge's ideal point (j_R) . This implies that there exist cases $x \in [j_m : j_r]$ whose disposition would be different under the median voter model than in the agenda setting model. That is: the preferences of the reporter and median judge should matter on close cases where there are credible legal arguments for either allowing or prohibiting state aid. Arguably, litigants have few reasons to bring cases that do not fit this profile in the annulment context. The implication is that a reporter judge can change outcomes by sheer virtue of being obliged to draft the first proposal.

 $^{^6}$ Like (Lax, 2007) , we focus on an interior solution, meaning that we exclude corner cases with perfect or 0 quality.

Second, the ability of R to move a rule away from the median is decreasing in the ratio between how far the left-wing judge is from the median j_L and the cost for the left-wing judge to produce high quality opinions $(c_L)^{.7}$ This captures the insight that the left-wing judge's incentives to write a winning counter-opinion increase as her policy dissatisfaction with an opinion to the right of the median increases and the cost for writing a counter-opinion are lower. R can prevent such a counter-opinion by writing a draft that is closer to M's ideal point. The ability of R to move policy is also decreasing in her own cost for investing in high quality judgments (c_R) . Lower cost make it easier to write a high quality opinion that is more attractive for M, which makes it more difficult for another judge to write a winning counter-opinion.

The observable implications of the quality of a legal opinion are harder to evaluate empirically. There are some measures of the legal clarity, precision, or thoroughness of legal judgments in the broader judicial behavior literature (e.g. Black et al., 2016; Lupu and Voeten, 2012). We are not aware of applications to the ECJ and developing such measures is beyond the scope of this paper. Yet, it is plausible for researchers to develop such measures and so it is worthwhile briefly discussing the model's implications.

Most notably, the model implies that the reporter judge has to invest more effort to write a high quality judgment if she wishes to move the rule further away from the median judge and as j_L is further from the median. Thus, variation in policy preferences may induce incentives for better judgments. The intuition is twofold. First, if one needs to convince a judge (or a reviewer) with different preferences, one needs to invest more time and effort in making an argument clear and persuasive. The median judge needs more convincing as p_R becomes larger. Second, as noted above, L has more incentives to invest in a quality counter-opinion the more her preferences deviate from M. This incentivizes R to invest

⁷This assumes that L has greater incentives than M to write a counter-opinion. This may not be true if M has relatively large cost advantages over L that supersede L's policy incentives to write a counter-opinion. In that scenario, c_M becomes a critical parameter

more in the quality of her initial draft. The somewhat counter intuitive implication is that some ideological disagreement may well improve the quality of court judgments. Or to put it differently: a homogeneous panel might produce lower quality judgments because judges lack the incentives to make an effort to persuade each other. Similarly, a centrist rapporteur will need to invest less in an opinion's legal quality in order to forestall a counter-opinion.

This rationale differs subtly from theories that assume that the Court invests in quality legal reasoning because it (as a collective) wants to persuade skeptical political actors (Cheruvu and Krehbiel, 2022; Larsson and Naurin, 2016). Those models typically assume that judges care about the legitimacy of the Court. Instead, in this model the desire for quality stems from the assumption that judges care about the policy implications of judgments. It may well be possible to combine insights from these approaches in future research.

The model could also be extended to incorporate other relevant features of strategic judicial decision-making on the CJEU. For example, we could analyze a dynamic variant where judges care about their reputations for high quality opinions or the strategic assignments of rapporteur tasks by the Court's President. These factors could be incorporated by the framework but we set these issues aside for future research.

Hypotheses

The core testable implication is that the probability that the court supports state aid is declining in the difference between rapporteur and median judge preferences: j_r . In the model, the median judge orientation is fixed to zero. Yet, the median judge remains the pivotal voter. So, we should also expect that as the median judge is more to the right, more cases of state aid should be approved.

Note that the theory primarily is about legal rules rather than cases. We presume that most of the time, litigants would not incur the costs of filing a case if there was not at least some potential disagreement about whether a case falls above or below a threshold rule

for state aid exceptions. Thus, as explained in the theory section, there should be cases of state aid that the median judge would accept but that a right-wing rapporteur would find in violation of EU rules. We thus test the following two hypotheses:

Hypothesis 1 The probability of ruling in favor of economic intervention increases as the median panel judge is appointed by a more economic left-wing government

Hypothesis 2 The probability of ruling in favor of economic intervention decreases as the reporter judge is more towards the right of the median panel judge

An additional observable implication is that the most ideologically distant judge can counteract the influence of the reporter judge but only if that judge has low cost of writing a high quality counter-opinion that the median judge would accept. While we cannot directly observe judge level variation in the ability to write high quality opinions, we assume that the opportunity cost for non-reporter judges to write a counter-opinion are higher when they have a higher caseload. We can thus test the following hypothesis:

Hypothesis 3 The effect of the distance between reporter and median panel judge is larger as the ideologically distant judge has a larger case load

Research design

To test our argument, we examine instances where private and public actors contest the Commission's application of the EU's common competition policies. Our data includes 1385 annulment cases brought between 1990 and 2021 that that resulted in judgments by either the General Court (68%) or the Court of Justice (32%). Overall, the sample represents

⁸Note that the implication from the model is slightly more complex and conditional on other parameter values. For example, the cost for the rapporteur also matter. However because we assume that the rapporteur pays a cost for not exerting minimum effort and because rapporteurs may well be selected strategically for their ability to write high quality opinions, we should see less observable differences in rapporteur quality

approximately 7% of the Court's judgments. In the following, we explain our case selection and present our data and research design.

Commission decisions on state aid and anti-trust issues

We focus on two core policy areas specified in the EU treaties: antitrust regulation (101-106 TFEU) and state aid (107-108 TFEU). Both areas target market failures that prevent Paretoefficient outcomes, as predicted by neoclassical economic theory. In contrast to newer EU policy areas, such as environmental and consumer protection, these policies are not explicitly redistributive. Instead, they aim to limit anticompetitive practices that restrict free trade and prevent regulatory competition (Hix and Høyland, 2022, p. 210-17).

Our focus is thus on litigation questioning the role of government in the economy, a defining ideological divide in European politics (Lindqvist and Dornschneider-Elkink, 2024). Economically left-wing parties tend to support a more active government role, while right-wing parties generally advocate a laissez-faire approach to market regulation and government intervention. This ideological divide intersects with debates over the appropriate level of governance – national or European. However, support for European integration is often intertwined with EU-level economic policies (Hix and Høyland, 2024). The EU has traditionally proven effective in tearing down barriers to trade, but – due to high decision making hurdles in the political branch – has been slow to propose EU level alternatives (Scharpf, 1998). Rather than viewing European integration as a separate political cleavage, Hix and Høyland (2024) suggest that support for integration is transactional and depends on the left-right content of EU policy output, as parties' orientations toward the EU vary over time and across issues.

To rule out the possibility that judges are motivated by the distribution of competences rather than political intervention in the economy, we analyze two policy areas with differing degrees of EU interference in national policies. The EU's *state aid* policy exemplifies neg-

ative economic integration, as it restricts governments from supporting industries except in limited circumstances related to public interest, provided that such aid does not excessively undermine free competition. The Commission's application of EU rules in this area necessarily pertains to national governments' intervention in the economy. A negative decision therefore restricts both national sovereignty and specific economic interventions.

By contrast, the EU's antitrust regulation is an instance of positive economic integration, establishing a common set of rules for all economic undertakings within the European market. The area includes the prohibition against agreements among companies or trade associations that may reduce competition (such as price-fixing, mergers and abuse of dominant position). Most of the Commission's antitrust decisions target private actors' market behavior rather than national policies. In many instances, the alternative to the Commission's regulation is less market intervention.

Our coding scheme for case outcomes indicates whether a decision permits more economic intervention, irrespective of the government level—national or European—responsible for the intervention.⁹ To identify the relevant judgments, we searched for all cases filed from 1990 to 2021 labeled as "competition", "state aid", "concerted practices", "dominant position" or "concentration" in their subject matter or in the Eur-Lex caselaw directory.

Litigants and Procedures

We focus on cases brought under the annulment procedure (Article 263 TFEU) because it targets decisions made by EU institutions and is triggered by a range of actors with different interests. The procedure allows other EU institutions, governments and private actors — if their interests have been affected — to ask the Court to declare void decisions that run

⁹There is one notable exception to this situation. In contrast to US antitrust regulation, EU policies also encompass public undertakings. In these instances, EU rules risk circumscribing national governments ability to intervene in the market through their ownership. For the purposes of this paper, we have left out all cases involving public undertakings. In the current sample, this amounts to 16 cases.

counter to the superior rules of the Union's legal order. For the purposes of this paper, we exclude all appeals against penalties imposed by the Commission since they revolve around the consequences rather than the existence of such a violation.¹⁰

Although the Court's decisions relating to state aid have direct implications for governmental policies, the procedure is dominated by companies with a proven (economic) interest in the Commission's decision (73% in state aid; 91% in antitrust). In fact, in more than half the cases (68%) the government whose policy is in question *did not* submit an observation to defend their position.

Considering first-instance litigation, we see that companies file cases both in support and opposition to economic intervention. Some 51% of the cases were initiated *in defense* of economic intervention. Among these, some 66% of the applicants were businesses, while only only 12% came at the instigation of a government. The vast majority of the applications seeking to *limit* economic intervention are also brought by businesses (83%). Governments do not generally initiate litigation against the state aid granted in other states. Instead, they occasionally support the private applicant's claim (5%).

Outcome variable and model choice: Court support for economic intervention

Our outcome variable, Support for economic intervention, flags Court decisions that grant in favor of litigants whose claims would open for more government intervention in the economy. For each case, we identify the direction of the applicant's claims with respect to either state aid or antitrust regulation, then the direction of the Court's decision (Brekke et al., 2023). In some instances (14%), the Court's position is mixed – some claims are granted, while others are not. In our multivariate analysis, we therefore model the Court's decision to allow economic intervention as a success (1), partial success (0.5) or failure (0) out of one trial. In

¹⁰This is only relevant for litigation relating to EU's antitrust policy.

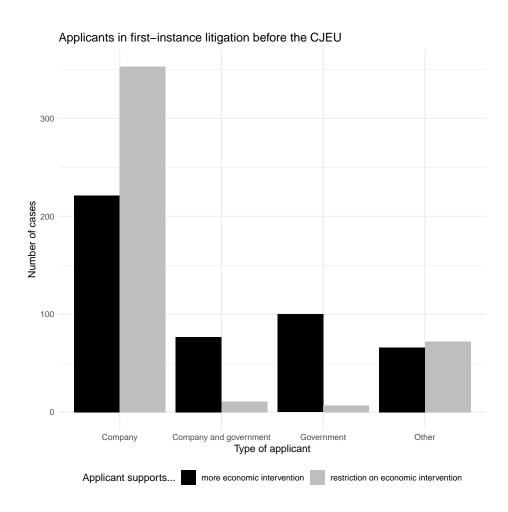


Figure 1: The type of applicants and the direction of their claims in first-instance litigation against the Commission.

other words, we use a simple binomial logistic regression.

In state aid cases, most frequently, the litigation is initiated after aid has been given by a member state ("old aid"), but the Commission has decided it runs counter to EU policies, or when a government's application for permission to grant aid ("new aid") has been declined. The same holds for antitrust litigation where most cases are filed by companies or trade associations whose plans for mergers or past concerted practices are struck down by the Commission. However, litigation is also initiated by businesses that consider their competitors enjoy an unfair advantage, but where the Commission has either authorized a behavior or declined to consider its legality. Taken together, the two courts ruled in favor of economic intervention in 48% of the cases, 53% of which are decided against the stated wish of the Commission.

Table 1: Descriptive statistics

Statistic	N	Mean	St. Dev.	Min	Pctl(25)	Median	Pctl(75)	Max
Court rules in favor of economic intervention	1,248	0.48	0.46	0.00	0.00	0.50	1.00	1.00
Median judges' preferences	1,247	0.07	0.18	-0.80	-0.03	0.09	0.18	0.75
Reporting judges' preferences	1,248	0.08	0.41	-1.44	-0.11	0.09	0.26	1.27
Difference (rapporteur - median)	1,247	0.004	0.38	-2.05	-0.14	0.00	0.13	1.34
Difference (rapporteur - median) (when different)	925	0.005	0.45	-2.05	-0.25	0.02	0.22	1.34
Case-load of distant panelists (avg.)	840	5.00	2.59	0.67	3.00	4.67	6.60	14.67
Case-load of proximate panelists (avg.)	847	4.98	2.54	0.00	3.00	4.67	6.67	13.33
Other governments supporting economic intervention	1,248	0.13	0.48	0	0	0	0	6
Other governments opposing economic intervention	1,248	0.05	0.30	0	0	0	0	5
Supported by affected government	1,248	0.34	0.47	0	0	0	1	1
Council supports economic intervention	1,248	0.02	0.14	0	0	0	0	1
Council opposes economic intervention	1,248	0.005	0.07	0	0	0	0	1

Explanatory Variables

Judges' preferences

Our measure of judges' political preferences taps into their appointing government's leftright position on economic policies. To do so, we rely on information from the national parties' electoral manifestos. Specifically, we draw on data from the Manifestos project to place all parties in the same policy space by calculating factor scores from 12 variables relating to the state's role in the economy (Gabel and Huber, 2000; Lehmann et al., 2023). These variables include favorable mentions of the free market, supply-side oriented economic policies (such as subsidies), market regulation, economic planning, support for free trade, Keynesian demand-side policies, economic growth, government control, nationalization and economic orthodoxy. The resulting variable is an average among the parties in the appointing government weighted by their size in the national parliament (see the Appendix).

All judgments are prepared by a reporting judge, but rendered by a panel of judges by simple majority. For each case, we thus identify the *Median panelist's preferences* as well as the *Reporting judges' preferences*. To arrive at the reporting judge's influence relative to the median, our analysis reports the *Difference (rapporteur - median)* between the two decision makers. Following our theorization, we'd expect that as a judge's appointing government moves to the right (higher values), the likelihood that the Court rules in favor of economic intervention decreases.

Overall, there were substantial variation in the constellations of preferences on the Court. In the period, some 89% of the judges – 153 members – served as a reporting judge facing 119 different median panelists, making for some 496 unique judge-median pairs. Table 1 reports the descriptive statistics.

Our measure translates the assumption that judges have moderate preferences. Thus, although the national parties' preferences are calculated as factor scores – and therefore tend to range between -2 (left) and 2 (right) – the judges are generally appointed by a coalition of governmental parties, such that their estimated preferences are substantially more moderate than what the electoral competition among parties would indicate. In our data, the median panelist was slightly right of center, with most preferences in the range of -0.03 to 0.18 (1st to 3rd quartile). The variation among the reporting judges is naturally larger (-0.11 to 0.26), but their political differences remain moderate.

¹¹More precisely, factor scores yield variables with mean 0 and standard deviation 1

We have argued that the Court's reliance on case delegations induces a policy drift proportional to the preference distance between the reporting judge and the median on the panel. While the variation in this distance is higher than for any of the two judges taken separately, it is masked by the large number of cases in which the median panelist takes the role of reporting judge. The CJEU relies on three panel sizes to reach it's decisions: small (three judges), medium (five) and large (grand chamber, 9-15 judges). Most cases in the General Court are heard in smaller panels of three judges (64%). In the data, some 26% of the decisions are reached in panels where the reporting judge constitutes the median panelist. By contrast, the interquartile range in the reporting judge-median difference when these roles are held by different judges is 0.48; roughly twice as high as the range between the median judges on different panels (0.21). In other words, although the interquartile range in parties' policy space is high compared to the Court (1.35), the potential for policy drift within the Court due to these delegations is also not trivial.

Figure 2 illustrates the bivariate relationship between the Court's decision and the preferences of the reporting judge's appointing governments. The dots represent the average direction of Court decisions for reporting judges appointed by governments with similar preferences, while their size is scaled to the number of cases they have reported on. The graphic makes clear that when cases are prepared by judges appointed by right-wing governments, the share of decisions accepting more economic intervention is lower. Yet, this does not test the model's implications about the median and the reporting judge. In the multivariate analysis, we parse out the effects of the median panelist and control for other factors that may confound the relationship.

Judges' workload

Judges divide their time between preparing cases as reporting judges and assisting in decision making as panelists. We have theorized that the likelihood that the reporting judges'

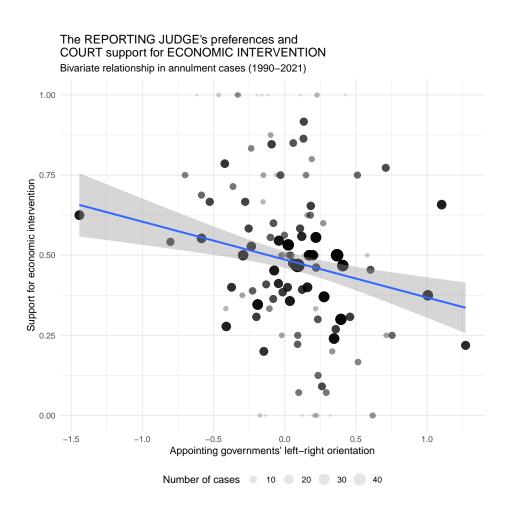


Figure 2: Bivariate graphic. Share of pro-economic intervention outcomes are reported as grouped averages among reporting judges with similar preferences in the scatterplot.

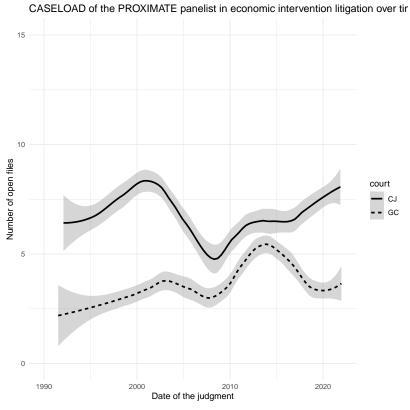
proposal is challenged hinges on the costs and incentives of doing so for the other panelists.

In particular, we expect that as the political distance between two judges increases, their willingness to expend effort to amend the reporting judge's proposal increases. However, the panelists' time is also limited. As their workload increases, the cost of monitoring their peers increases and we may expect that the influence of the reporting judge grows. We therefore test the intuition that the influence of the reporting judge is moderated by the *caseload of the distant panelists*. Specifically, the variable counts the number of open cases for which the ideologically distant panelists are assigned to report on. To identify the "distant panelists", we first place the reporting judge to the left or to the right of the median, then calculate the mean caseload of the judges on the far side of this reference point. We cannot know judges' full case load before all judgments are rendered. The variable is therefore limited to economic intervention cases decided before 2022.

We verify the intuition again in a placebo test where we measure the *Caseload of the* proximate panelists. Specifically, we tap into the number of open cases among the judges on the same side of the median (including the median) as the reporting judge. This time, we expect a substantially smaller effect.

Figure 3 illustrates how the caseload of the proximate and the distant panelists has changed over time and across the two courts. The number of cases filed with the Court has increased substantially over the years. The judges allegedly celebrated their first reference for a preliminary ruling in 1961 with champagne. By contrast, today, more than a thousand cases are filed per year. Notwithstanding this increase, the actual workload for each judge has varied substantially.

On the one hand, the Court has received more resources to address its growing caseload. The number of judges has increased following the EU's successive enlargements, but also as a result of two major institutional reforms. The General Court (GC) was established in 1989 at a moment where decisions were delayed due to the Court's high case load and



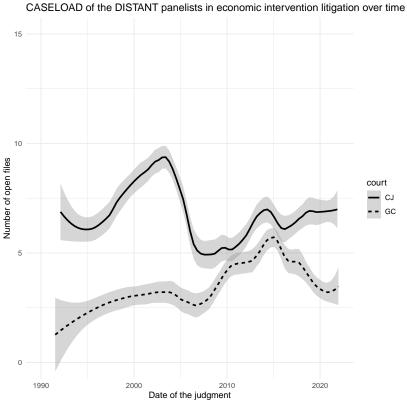


Figure 3: The caseload for individual judges (acting as reporting judge) varies over time and institutions. The figure illustrates the average number of open cases in the median and the distant panelists' portfolio as judge rapporteur, respectively.

after pressure from business interests. The reform delegated the facts-heavy direct actions to a lower-level court, having the dual effect of giving private litigants a specialized venue to contest EU-level decisions, but also a new right to appeal decisions to the Court of Justice (CJ) (Avril 2022). A second major reform came in 2015 when member states agreed to double the size of the GC (Dehousse 2011). Both reforms have had the effect of alleviating individual judges' case load.

On the other hand, the CJEU itself has adjusted its case management to save resources by assigning fewer judges to each case and restricting their use of oral hearings and a separate opinion by the advocate general (an advisor to the Court). While these reforms have had the effect of reducing the case-processing times (Fjelstul, Gabel, and Carrubba 2023), the chamber system – and in particular the reliance on smaller panels – would also induce higher variability in the median judge, and consequently in the case outcomes (Fjelstul 2023).

By comparison, we argue that – while the median judge has the decisive vote – the reporting judge also influences outcomes. As we have seen, the variation in the reporting judge's preferences is substantially higher than the between-panel variation in median voters. The reporting judge's ability to shift the disposition of the case is nevertheless moderated by peer monitoring.

Control Variables

An alternative strategic model of CJEU decision making highlights that the Court is responsive to the governments that submit their views to the Court and the EU institutions that can override their decisions (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016). Our analysis therefore includes an indicator for whether the *Council supports economic intervention*, since this means that member states have coordinated on a policy and can credibly coordinate again to override the Court's case law. For the same reason, the analysis also includes the number of governments who intervene in the case (on both sides).

We code both support from the affected government and from third-party governments, although these intervened in just 13% of cases

Results

Table 2: Court support for economic intervention: The effect of the appointing government's policy preferences for the reporting and the median judge's (results from a binomial logistic regression).

		Dependent variable: Court support for economic intervention				
	state aid	competition	all			
	(1)	(2)	(3)			
State aid policy (ref. competition)			-0.798*** (0.158)			
Fines are contested		1.421*** (0.205)	1.400*** (0.196)			
Other governments supporting economic intervention	0.302** (0.144)	0.888** (0.360)	0.459*** (0.130)			
Other governments opposing economic intervention	-0.023 (0.260)	-1.694^{***} (0.492)	-0.642^{***} (0.246)			
Council supports economic intervention	1.839** (0.717)	$0.145 \\ (0.627)$	1.008** (0.471)			
Supported by affected government	0.727*** (0.157)	0.884 (1.001)	0.709*** (0.154)			
Median judges' preferences (H1)	-1.321^{***} (0.437)	-1.180** (0.528)	-1.192*** (0.333)			
Difference (rapporteur - median) (H2)	-0.670^{***} (0.217)	-0.856^{***} (0.245)	-0.735^{***} (0.161)			
Constant	-0.836*** (0.118)	$0.005 \\ (0.123)$	-0.021 (0.113)			
Observations Log Likelihood Akaike Inf. Crit.	791 -485.562 985.124	582 -380.552 777.105	1,373 -874.618 1,767.236			
Note:	0001121	*p<0.1; **p<0.0				

Table 2 and Figure 4 present the main results. They largely support our expectations that judges' preferences – as defined by their appointing government – shape outcomes. The two first models report the effect of the median and reporter judges' preferences in each policy area separately (models 1 and 2), while the third model tests our two hypotheses by pooling the data (model 3). Two things are apparent. First, as either the median panelist or the reporting judge move to the right, the probability that the Court rules in favor of economic intervention decreases. Second, the level of government at which the economic intervention is decided – national (state aid) or European (competition) – does not affect our results.

The size of the effects are non-trivial. Panels reach their final decision by a majority vote. We therefore formulated an expectation that the pivotal judge would be the median panelist (H_1) . If we consider the typical (interquartile) difference between two panels, we see that the likelihood that the Court rules in favor of economic intervention is 20% lower in the panel where the median judge is right-wing compared to the panel with a more left-wing median. This difference increases to 81% when we consider the two most extreme panels in the data.

We also hypothesized that the panel may be willing to accept the reporting judge's initiative rather than exerting additional effort themselves (H_2) . The results indicate that the reporting judge has a substantial and independent effect on outcomes. A typical median-rapporteur distance when the two roles are held by different judges results in a 30% change in the Court's probability of supporting economic intervention. In instances where the differences in preferences are high on the panel, ideological competition may lead the reporting judge to sufficiently invest in the quality of the draft judgment to sway their peers. If we consider the two most extreme rapporteur-median constellations in the data, the effect is 92%.

We then move to probe the joint effect of ideological competition and the cost of alternative proposals on the reporting judge's influence (H_3) . Results are reported in Table 3 and illustrated in Figure 5. They also align with our expectations. The first model shows that the influence of the reporting judge increases as the ideologically distant panelists' workload grows, while the second model identifies a minimal effect for the more proximate panelists. If we consider – as before – a typical rapporteur-median difference (the interquartile range), we see that the effect of the reporting judge's preferences is minor (11%) when the distant panelists' workload is low (2 open cases, the 10^{th} percentile). This effect increases to 52% when their workload is high (8.4 open cases, the 90^{th} percentile).

Our control variables behave as expected. Judges are overall less likely to rule in favor of economic intervention when the case involves transfer of resources in the form of state aid than for anti-trust policies. This aligns with our intuition that neoliberals also allow for a

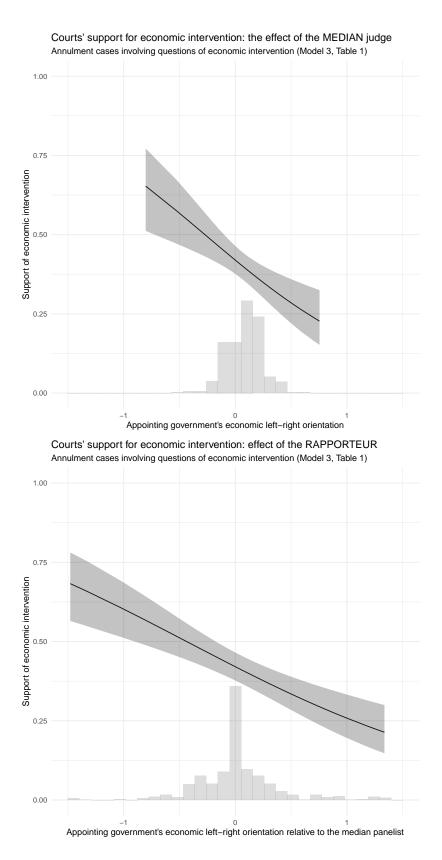


Figure 4: The likelihood of a court outcome in favor of government/EU intervention in the economy decreases as the judges moves to the right.

Table 3: Court support for economic intervention: The effect of the reporting judge conditional on other panelists (results from a binomial logistic regression).

	Depende	ent variable:
	Court support for Distant panelist	economic intervention Proximate panelist
State aid policy (ref. competition)	-0.918*** (0.171)	-0.917*** (0.170)
Fines are contested	1.490*** (0.211)	1.489*** (0.209)
Other governments supporting economic intervention	0.473*** (0.142)	0.475*** (0.141)
Other governments opposing economic intervention	-0.538** (0.265)	$-0.509** \\ (0.258)$
Council supports economic intervention	1.327** (0.538)	1.299** (0.535)
Supported by affected government	0.793*** (0.167)	0.789*** (0.166)
Median judges' preferences	-1.271^{***} (0.366)	-1.190^{***} (0.364)
Difference (rapporteur - median)	$0.166 \\ (0.348)$	-0.346 (0.347)
Caseload of distant panelists	-0.004 (0.020)	
Difference (rapporteur - median) $*$ Caseload of distant panelist	-0.201*** (0.070)	
Caseload of proximate panelist		-0.016 (0.020)
Difference (rapporteur - median) * Caseload of proximate panelist		-0.086 (0.067)
Constant	-0.037 (0.130)	$0.009 \\ (0.133)$
Observations Log Likelihood Akaike Inf. Crit.	1,235 -768.071 1,558.142	1,235 -770.466 $1,562.933$

Note: *p<0.1; **p<0.05; ***p<0.01

Effect of the REPORTING JUDGE as a function of the IDEOLOGICALLY DISTANT panelists' WORKLOAD

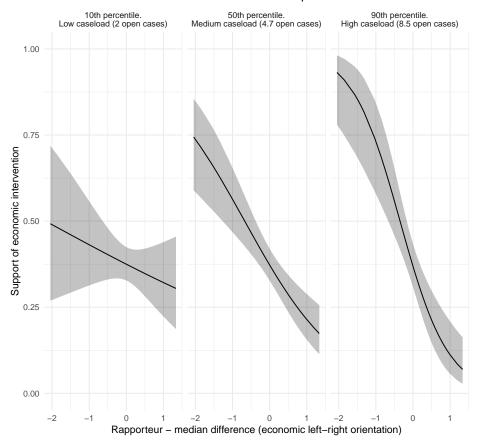


Figure 5: The effect of the reporting judge is moderated by the distant panelists' workload.

range of market-correcting policies, but remain reticent to the notion of economic transfers from the state.

The Court displays sensitivity to signals from the political branch much in the same way as described in earlier literature. While neo-functionalists worried that the Court has restricted governments' ability to interfere in the economy against their will, we find little support for this statement in this study. To the contrary, the Court seems particularly sensitive to signals that favor economic intervention. In the instances where the affected government files in support for their own economic policy, the Court is more than 2 times as likely to rule in favor of economic intervention. This also holds for third-party government submissions. Each submission in support of economic intervention increases the probability of a pro-intervention ruling by 57%. Lastly, we also see that in the few instances where the Council submitted in support of state aid, the Court was 2 times more likely to yield, aligning with the expectation that a coordinated response from the legislator during the Court's proceedings is a credible signal of potential override. This effect is entirely driven by state aid cases, however.

Robustness

Our results are robust to a range of alternative model specifications (see the Appendix). We have demonstrated that – although voting is secret – we can nevertheless trace case outcomes to the influence of individual pivotal judges. Career-oriented judges may thus face countervailing incentives if cases are decided against their home governments' preferences. While we argue that judges act on their sincere preferences, it may also be that they strategically adjust their positions to their current government. To make sure our results are not driven by the subset of instances where the judges' appointing governments are still in office, we re-estimate a model where we control for judges' positions as defined by their current government. We find no indication that judges act strategically in this respect (see the Appendix). In other words: the appointing government's preferences shape judicial behavior rather than

the current government in the judge's home country.

We may also ask whether our effect is under-estimated due to the introduction of an additional merit selection stage in the recruitment of judges in 2010. While the procedure aims to ensure candidate judges' integrity and competence, some commentators have speculated that the effect of ideological selection would dampen in the aftermath of the reform (Pérez, 2015).

The Lisbon Treaty introduced for the first time an EU-level advisory merit selection committee tasked with assessing the qualifications of the member states' nominees. The committee – popularly labelled the "255 Panel" – is staffed by seven former national and EU judges, six of which are nominated by the President of the CJEU. The panel has certainly proven pro-active. As of 2022, it had rejected 29 new candidates, leading some observers to claim it has gone further than its delegated authority intended (von Bogdandy and Krenn, 2015)[pp 173-74]. The reform has led some member states to rethink their national guidelines for judicial recruitment (Dumbrovsky, Petkova, and Van der Sluis, 2014), and there is evidence that judges have changed their behavior to align with the Panel's performance criteria (Cheruvu, Fjelstul, et al., 2022). However, the Panel itself has expressively defined its mandate as non-political. Even if it's mandate would allow for such evaluations, it has avoided any assessment based on socio-demographic criteria, instead focusing on judges' integrity as well as legal and linguistic competences (Seventh activity report, 2022, p. 12).

There is no reason to believe the Panel has infringed upon the ideological selection of judges. Each government is free to deselect the incumbent judge at the end of their mandate without any justification given. The merit selection panel also only considers the nominees that governments put forth. As long as governments can identify new candidates that simultaneously align with governments' preferences and possess the the required competences, the selection process will move on. A commonly expressed concern is the difficulty that some member states have experienced in recruiting qualified judges. However, as long as the seat

is not filled by a new appointee, the incumbent judge remains in place. In other words, we have no theoretical reason to believe the Panel has weakened the connection between judges' personal preferences and those of the initially appointing government.

There is also no empirical indication that the screening has infringed upon governments' ideological selection of judges. In their study of judicial reappointments to the CJEU, Hermansen and Naurin (2019) find no evidence for an alteration in the effect of economic left-right ideology on governments' decisions following the introduction of the Panel. In the Appendix, we probe the question further. We identify the reporting judges that entered the Court after the reform and re-estimate our main model with a separate effect for screened judges. The correlation between the reporting judge's appointing government and case outcomes has – if anything – been stronger for judges appointed in the decade following the reform compared to judges appointing earlier.

Conclusion

We have argued that, like on other high courts, governments select CJEU judges that share their ideological predispositions on issues that are most relevant to the Court: preferences over the degree to which European states should be allowed to intervene in the economy. We then develop a theoretical model that takes seriously the internal organization of the Court, especially the role of the reporter judge. The model predicts that both the preferences of a median judge on a panel and the reporter judge affect both judicial reasoning and the disposition of cases. We present empirical evidence for these propositions using data on 768 annulment cases regarding state aids.

This paper furthers a developing research agenda that seeks to understand how internal divisions on the Court can affect outcomes and how these divisions are related to government ideologies. The theory provides a basic framework that can be developed further to

derive insights about the role of expertise, the salience of issues, the role of the President, the importance of panel selection, collegial norms, and other issues related to the internal processes at the Court. The model already develops some insights that could be tested with additional data, such as that reporter judges with more expertise and experience might be better able to move outcomes towards their ideal points.

The empirics can also be extended. Annulment cases on state aids have the advantage that outcomes can relatively easily be coded as either favoring more or less European government intervention into the single market. We expect that our findings should extend to other single market issues, such as competition policy cases. We do not necessarily believe that these findings should extend to issues that are uncorrelated with the economic left-right dimension.

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Appendix

Variable description

Case selection

Competition law is central to in the European Union economic integration, and encompasses elements of both negative and positive economic integration. For the purposes of this study, we focus on two policy areas that exemplify both types of integration.

• EU regulation of **state aid** is an example in point of European negative integration, whereby the EU Treaties ban governments from treating favorably specific economic actors with the exception of a few instances of public interest (107 TFEU). The treaty also vests the Commission with monitoring states' compliance with the European legislation (108 TFEU).

To identify the relevant judgments, we searched for all cases filed in the 1990-2021 period labelled as "state aid" either in their subject matter or classified as such in Eur-LEX' caselaw directory.

• EU antitrust policy is an example of positive integration whereby the EU regulates the economy. Specifically, we focus on the ban on "agreements, decisions and concerted practices" (101 TFEU) and the Commission's role in monitoring market actors' compliance with the regulation (102 TFEU). Article 101 TFEU prohibits formal agreements between undertakings, but also decisions by associations of undertakings (trade associations), and concerted practices that may affect trade between EU member states. The ban targets formal and informal agreements that aim to or has the effect of preventing, restricting, or distorting competition (such as price fixing and mergers leading to a

dominant position) within the internal market. However, the article also opens for exceptions where such behavior contributes to improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefits.

To identify the relevant judgments, we searched for all cases filed in the 1995-2020 period labelled as "concerted practices" in their subject matter or classified as such in Eur-LEX case law directory.

To arrive at our final selection, we retain all cases filed under the EU's annulment procedure (263 TFEU), while removing cases that also involve an appeal against penalties. The primary focus of the latter cases is the size of the fines imposed by the Commission rather than questions of law.

Variables

Several of the variables in the analysis are compound measures. The following section describes how variables are defined.

The outcome variable: Court's support for government intervention in the economy

To code the policy direction of the Court's decision, we begin by identifying the actor (applicant/defendant) whose argument would lead to more state intervention in the economy. We then draw on the Court's own classification of outcomes to determine the direction of the Court's final decision.

• intervention_support indicates the Court's support for more state/EU intervention in the economy. To identify the *interventionist court outcome*, we consider the direction

of the applicants' claims and the reported outcome of the case. The applicant's claims can either be granted (1), unfounded (0) or result in a mixed outcome (i.e. parts of the claims are granted, while other parts are unfounded). This leads to an outcome variable with three values: non-interventionist (0), interventionist (1) or mixed (0.5).

- outcome_granted indicates if the Court concludes partially or entirely in favor of the applicant's claims.
- outcome_unfounded indicates if the Court concludes partially or entirely in *disfavor* of the applicant's claims.
- intervention_beneficiary indicates which side ("applicant"/"defendant") of the litigation argues in favor of more latitude in government/EU intervention in the economy. In state aid cases, we identify which actor (applicant/defendant) is accused of either receiving or giving state aid or in the event that a party brings the Commission to court for non-action which party argues for a less strict application of the state aid ban. This variable allows us to identify the "interventionist" party in the case. In competition cases, we identify which actor (applicant/defendant) is accused of distorting the market or in the event that a competitor accuses the Commission for non-action which party's argument would result in a more interventionist outcome. This variable allows us to identify the "interventionist" party in the case.

Judges' political orientation

The judges' political orientation is approximated by the left-right preferences on economic matters of the government that initially appointed them. Government preferences are calculated from cabinet members' manifestos. The measure is calculated in three steps. i) Cabinet parties are identified at the date of each judge's first appointment to the Court and linked to the ParlGov cabinet data. ii) Cabinet parties are then linked to their party manifesto at

the last legislative election (Marpor/Manifesto project). Their economic left-right position is then calculated on the entire Marpor corpus using the vanilla method on the following variables: "per401", "per402", "per403", "per404", "per405", "per406", "per407", "per409", "per410," per412", "per413", "per414". iii) Cabinet position is then calculated as a weighted average of each cabinet's party's number of seats in Parliament. iv) The cabinet position is linked to the judge's on the Court.

- All political positions relaed to governments posititions on free_economy are thus calculated from the factor scores using the following indicators from Marpor:
 - "per401" Free Market Economy. Favourable mentions of the free market and free market capitalism as an economic model. May include favourable references to: Laissez-faire economy; Superiority of individual enterprise over state and control systems; Private property rights; Personal enterprise and initiative; Need for unhampered individual enterprises.
 - "per402" Incentives: Positive. Favourable mentions of supply side oriented economic policies (assistance to businesses rather than consumers). May include: Financial and other incentives such as subsidies, tax breaks etc.; Wage and tax policies to induce enterprise; Encouragement to start enterprises.
 - "per403" Market Regulation. Support for policies designed to create a fair and open economic market. May include: Calls for increased consumer protection; Increasing economic competition by preventing monopolies and other actions disrupting the functioning of the market; Defence of small businesses against disruptive powers of big businesses; Social market economy.
 - "per404" Economic Planning. Favourable mentions of long-standing economic planning by the government. May be: Policy plans, strategies, policy patterns etc.; Of a consultative or indicative nature.

- "per405" Corporatism/Mixed Economy. Favourable mentions of cooperation of government, employers, and trade unions simultaneously. The collaboration of employers and employee organisations in overall economic planning supervised by the state. Note: This category was not used for Austria up to 1979, for New Zealand up to 1981, and for Sweden up to 1988.
- "per406" Protectionism: Positive Favourable mentions of extending or maintaining the protection of internal markets (by the manifesto or other countries). Measures may include: Tariffs; Quota restrictions; Export subsidies.
- "per407" Protectionism: Negative. Support for the concept of free trade and open markets. Call for abolishing all means of market protection (in the manifesto or any other country).
- "per409" Keynesian Demand Management. Favourable mentions of demand side oriented economic policies (assistance to consumers rather than businesses). Particularly includes increase private demand through: Increasing public demand; Increasing social expenditures. May also include: Stabilization in the face of depression; Government stimulus plans in the face of economic crises.
- "per410" Economic Growth: Positive. The paradigm of economic growth. Includes: General need to encourage or facilitate greater production; Need for the government to take measures to aid economic growth.
- "per412" Controlled Economy. Support for direct government control of economy.
 May include, for instance: Control over prices; Introduction of minimum wages.
- "per413" Nationalisation Favourable mentions of government ownership of industries, either partial or complete; calls for keeping nationalised industries in state hand or nationalizing currently private industries. May also include favourable mentions of government ownership of land.
- "per414" Economic Orthodoxy. Need for economically healthy government pol-

icy making. May include calls for: Reduction of budget deficits; Retrenchment in crisis; Thrift and savings in the face of economic hardship; Support for traditional economic institutions such as stock market and banking system; Support for strong currency.

- free_economy reports the political orientation of the reporting judge on the case.
- free_economy_median reports the political orientation of the median judge on the panel to which the case is assigned.
- free_economy_diff reports the difference in political orientation between the median panelist and the rapporteur on the case (free_economy-free_economy_median). In the analysis, the variable reflects the additional influence of the reporting judge once the shared preferences with the median panelist is accounted for.

Political support structure

The models control for various government interventions in the case.

- gvt_supp lists the number of external governments (i.e. that have not themselves provided state aid in the case) filing in support of state aid, either as litigant or an intervener.
- gvt_not_support lists the number of external governments that file against state aid.
- origin_support indicates if the government that provided/intends to provide state aid files in support for state aid; either as a litigant or as an intervener. The variable only covers state aid cases, since the Court's decision will affect a specific governments' policies. In competition cases, where EU regulations apply to businesses rather than governments, it is coded as 0.

• fines indicates if the case involves claims relating to fines that the Commission has imposed. Litigants in competition cases may ask for a reduction or annulment of the fines that the Commission has imposed on them. While we only retain litigations where fines are not the primary focus, the parties may still ask for a reduction. In state aid cases, there are no fines involved and the variable is coded as 0.

Judges' ability to monitor the rapporteur

Judges time constraints are measured in different ways, based on the Court's case load and staff.

- n_reports_far_side lists the average case load of the panelists whose preferences are on the far side of the median compared to the reporting judge. It is calculated in four steps. i) For each case, we identify the judges on the panel. ii) We then draw on a list of all judgments rendered by the Court to identify their reporting judge. iii) For each of the panelists, we count the number of open cases (cases that have been filed, but not concluded) at the time of the decision that will be concluded in the following year. iiii) We identify the panelists that are on the far side of the median compared to the reporting judge and calculate their mean number of open cases. For example, in a panel of three judges we might have: the reporting judge to the left, the median in the center and the right-wing judge "on the far side". This variable reports the latter's load of active cases. In all cases where the reporting judge is the median on the panel, the variable is coded as zero.
- n_reports_this_side lists the average active case load of the panelists whose preferences are on the same side of the median as the reporting judge, including the median panelist. It is defined in the same way as the preceding variable.

Alternative models

Here, we consider the robustness of our results to other model specifications. We begin by testing whether the results are present in different subsets of the data. In particular, we verify if they hold for decision making in both courts and whether they are robust to the EU-level reform in how judges are selected. We then move on to consider their robustness to alternative explanations.

Do the results hold in subsets of the data?

Do the results hold for both courts? In the main text, we report pooled results from both the upper-level Court of Justice and the lower-level General Court. Here, we consider whether the results hold in either of the courts separately.

Are the results from the main model representative for both courts? The results reported in Table 4 show that both the direction and the size of the effect of preferences are similar in both samples. However, they are less precisely estimated in the Court of Justice for which the sample size is also smaller.

Is the effect of the rapporteur's influence moderated by the resources of the other panelists? We have argued that the effect of the reporting judge hinges on the relative cost for other panelists to write competing proposals. This depends on the resources of the Court – its caseload, and the measures it uses to address it – as well as on whether the other panelists have incentives to propose alternative solutions to the reporting judge's proposal.

Chamber size As the number of judges on the panel increases, the probability that another judge will find the cost of proposing an alternative solution to the rapporteur's proposal increases. We might therefore expect that the effect of the rapporteur is higher in smaller

Table 4: Court support for economic intervention: The effect of the reporting and the median judge's policy preferences estimated separately for the two courts (results from a binomial logistic regression).

		$Dependent\ variable:$		
	Court support for economic intervention			
	Both GC ($_{\rm CJ}$	
	(1)	(2)	(3)	
State aid policy (ref. antitrust)	-0.795***	-0.678***	-1.063***	
	(0.158)	(0.181)	(0.335)	
Fines are contested	1.399***	1.261***	1.449***	
	(0.196)	(0.242)	(0.352)	
Supported by affected government	0.705***	0.810***	0.505*	
	(0.154)	(0.185)	(0.297)	
Other governments supporting economic intervention	0.458***	0.628***	0.283	
	(0.130)	(0.188)	(0.188)	
Other governments opposing economic intervention	-0.638***	-0.860**	-0.365	
0	(0.246)	(0.338)	(0.338)	
Council supports economic intervention	1.008**	1.296*	1.010	
	(0.471)	(0.728)	(0.663)	
Council does not supports economic intervention	-0.405	-0.288	-10.922	
	(0.984)	(1.005)	(535.411)	
Median judges' preferences	-1.202***	-1.220***	-1.705**	
	(0.334)	(0.422)	(0.684)	
Difference (rapporteur - median)	-0.734***	-0.436**	-1.369***	
,	(0.161)	(0.189)	(0.334)	
Constant	-0.020	-0.128	0.355	
	(0.113)	(0.130)	(0.250)	
Observations	1,373	930	443	
Log Likelihood	-874.438	-596.102	-269.803	
Akaike Inf. Crit.	1,768.877	1,212.205	559.607	

Note:

*p<0.1; **p<0.05; ***p<0.01

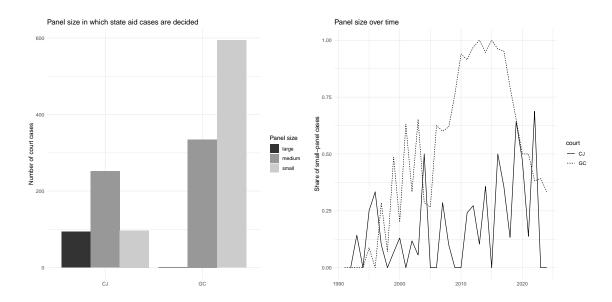


Figure 6: The typical panel size varies systematically between the two courts and has varied over time with the Court's workload. The number of cases decided without oral hearing and/or an advocate general opinion has also increased over time in both courts.

panels. In Table 5 we estimate separate effects for the rapporteur's additional ideological influence according to the panel size (small/medium/large). Here, we see that the effect is indeed more pronounced in smaller panels of three judges.

As Figure 6 makes clear, the panel size varies systematically between the two courts. Most of the cases are decided in smaller panels of three judges ("small") in the General Court, while the Court of Justice relies more often on medium-sized panels of five judges ("medium"). The upper-level court also decide a substantial number of cases in the grand chamber ("large"). We therefore also check the intuition in separate models of the two courts (models 3 and 4). This seems to hold. The effect of the rapporteur's ideology is consistently lower when the number of panelists is high.

Here, we can also see that the effect of the rapporteur is in principle also substantial in the Court of Justice. However, the Court's proceedings more often involve a larger number of judges to hold the rapporteur in check.

The workload of politically distant panelists Table 6 reports the change in the relative effect

Table 5: Court support for economic intervention: The effect of the reporting and the median judge's policy preferences estimated separately for the two courts (results from a binomial logistic regression).

		Dependent variable:		
	Court support for economic intervention			
	Main model	Both courts	GC	$_{\rm CJ}$
	(1)	(2)	(3)	(4)
State aid policy (ref. antitrust)	-0.795^{***} (0.158)	-0.797^{***} (0.159)	-0.685^{***} (0.182)	-1.074^{***} (0.338)
Fines are contested	1.399*** (0.196)	1.414*** (0.197)	1.282*** (0.245)	1.432*** (0.353)
Supported by affected government	0.705*** (0.154)	0.703*** (0.154)	0.810*** (0.185)	$0.489 \\ (0.300)$
Other governments supporting economic intervention	0.458*** (0.130)	0.491*** (0.133)	0.628*** (0.188)	$0.308 \\ (0.192)$
Other governments opposing economic intervention	-0.638^{***} (0.246)	-0.702^{***} (0.257)	-0.866** (0.338)	-0.401 (0.350)
Council supports economic intervention	1.008** (0.471)	1.166** (0.488)	1.320* (0.729)	1.088 (0.692)
Council does not supports economic intervention	-0.405 (0.984)	-0.351 (0.997)	-0.292 (1.006)	-10.524 (535.412)
Median judges' preferences	-1.202*** (0.334)	-1.168*** (0.335)	-1.224*** (0.422)	-1.729** (0.697)
Difference (rapporteur - median)	-0.734*** (0.161)			
Difference (rapporteur - median) * Large panel		-1.961*** (0.610)	-177.987 $(7,193.943)$	-1.771^{***} (0.631)
Difference (rapporteur - median) * Medum panel		-0.500** (0.219)	-0.262 (0.269)	$-0.935^{**} (0.414)$
Difference (rapporteur - median) * Small panel		-0.798^{***} (0.245)	-0.593** (0.261)	-2.318** (0.910)
Constant	-0.020 (0.113)	-0.021 (0.114)	-0.126 (0.130)	0.378 (0.251)
Observations Log Likelihood Akaike Inf. Crit.	1,373 -874.438 1,768.877	1,373 -871.949 1,767.898	930 -595.003 1,214.006	$ 443 \\ -267.970 \\ 559.941 $

Note: *p<0.1; **p<0.05; ***p<0.01

Table 6: Court support for economic intervention: The effect of the reporting judge conditional on other panelists (results from a binomial logistic regression).

	D	ependent variable	e:
	Court suppo Both courts	rt for economic GC	intervention CJ
State aid policy (ref. antitrust)	-0.919***	-0.713***	-1.451***
	(0.171)	(0.195)	(0.371)
Fines are contested	1.490***	1.343***	1.491***
	(0.211)	(0.260)	(0.372)
Supported by affected government	0.794***	0.840***	0.780**
	(0.167)	(0.201)	(0.336)
Other governments supporting economic intervention	0.474***	0.752***	0.201
ovince governments supporting economic intervention	(0.142)	(0.228)	(0.193)
Other governments opposing economic intervention	-0.539**	-0.653*	-0.266
* 0	(0.266)	(0.366)	(0.396)
Council supports economic intervention	1.327**	1.275*	1.681**
country supports decinating intervention	(0.538)	(0.747)	(0.813)
Council does not supports economic intervention	0.070	0.303	-11.679
	(1.047)	(1.079)	(882.744)
Median judges' preferences	-1.270***	-1.279***	-1.817**
inculai juages presentes	(0.367)	(0.461)	(0.738)
Difference (rapporteur - median)	0.166	0.250	-0.831
Emerence (tapportear meanan)	(0.348)	(0.402)	(1.237)
Caseload of distant panelists	-0.004	-0.043	0.027
customa of distant panelists	(0.020)	(0.032)	(0.034)
Difference (rapporteur - median) * Caseload of DISTANT panelist	-0.201***	-0.194*	-0.084
Difference (rapported medium) Caserbad of District panels	(0.070)	(0.101)	(0.177)
Constant	-0.037	-0.092	0.275
Constant	(0.130)	(0.153)	(0.303)
Observations	1,235	818	417
Log Likelihood	-768.086	-517.228	-238.985
Akaike Inf. Crit.	1,560.173	1,058.456	501.97

Note: *p<0.1; **p<0.05; ***p<0.01

Table 7: Court support for economic intervention: The effect of the reporting judge conditional on other panelists (results from a binomial logistic regression).

	D	ependent variable	e:
	Court suppo Both courts	rt for economic GC	intervention CJ
State aid policy (ref. antitrust)	-0.918*** (0.170)	-0.702*** (0.194)	-1.458*** (0.371)
Fines are contested	1.489*** (0.209)	1.282*** (0.260)	1.507*** (0.373)
Supported by affected government	0.790*** (0.167)	0.796*** (0.200)	0.809** (0.335)
Other governments supporting economic intervention	0.475*** (0.142)	0.751*** (0.229)	0.243 (0.196)
Other governments opposing economic intervention	-0.510** (0.258)	-0.686* (0.364)	-0.241 (0.394)
Council supports economic intervention	1.299** (0.535)	1.233* (0.744)	1.781** (0.821)
Council does not supports economic intervention	0.117 (1.041)	0.246 (1.073)	-11.438 (882.744)
Median judges' preferences	-1.188*** (0.365)	-1.066** (0.460)	$-1.706** \\ (0.734)$
Difference (rapporteur - median)	-0.346 (0.347)	$-0.970** \\ (0.427)$	-0.216 (1.332)
Caseload of proximate panelists	-0.016 (0.020)	-0.018 (0.031)	-0.013 (0.035)
Difference (rapporteur - median) $*$ Caseload of PROXIMATE panelist	-0.086 (0.067)	0.156 (0.110)	-0.171 (0.188)
Constant	0.009 (0.133)	-0.125 (0.159)	$0.471 \\ (0.311)$
Observations Log Likelihood Akaike Inf. Crit.	1,235 -770.490 1,564.981	818 -514.951 1,053.901	417 -238.464 500.928

Note: *p<0.1; **p<0.05; ***p<0.01

of the rapporteur as the *distant* panelist's workload increases in each court, while Table 7 reports the effect of the rapporteur as the *proximate* judges' workload increases. While the distance in preferences increases the incentives for other panelists to propose alternative solutions to the rapporteur's draft, their case-load defines the opportunity cost that they would incur.

Did the screening of new judges by a merit selection committee change the effect of judges' appointing government preferences? We may also ask whether our effect is under-estimated due to the introduction of an additional merit selection stage in the recruitment of judges in 2010. While the procedure aims to ensure candidate judges' integrity and competence, we could also speculate that the effect of governments' preferences on judges' attitudes was dampended in the aftermath of the reform. Here, we seek to rule out this possibility.

The Lisbon Treaty introduced for the first time an EU-level advisory merit selection committee tasked with assessing the qualifications of the member states' nominees. The committee – popularly labelled the "255 Panel" – is staffed by seven former national and EU judges, six of which are nominated by the President of the CJEU. The Panel began its work in 2010. In the wake of the introduction of the Panel, some commentators expressed a hope that merit selection would sever judges' political ties to their governments (Perez 2015). The panel has certainly proven pro-active. As of 2022, it had rejected 29 new candidates, leading some observers to claim it has gone further than its delegated authority intended (von Bogdandy 2015, 173-74). However, the Panel itself has expressively defined its mandate as non-political, instead focusing on judges' integrity as well as legal and linguistic competences (Seventh activity report, 2022, p. 12).

While the Panel advises on the suitability of governments' nominees, each government has retained control over the nomination process. As long at their nominee possesses the

competences required for the job, governments are therefore free to select judges that align with their preferences. This also holds for the replacement of incumbent judges. Judges sit on six-year renewable terms at the end of which all governments are free to deselect the incumbent judge without interference from the merit selection committee. A commonly expressed concern with respect to EU judicial nominations is the difficulty that some member states have experienced in recruiting qualified judges. However, as long as the seat is not filled by a new appointee, the incumbent judge may remain in place. In other words, we have no theoretical reason to believe the Panel has weakened the connection between judges' personal preferences and those of the initially appointing government.

There is also no empirical indication that the screening has infringed upon governments' ideological selection of judges. In their study of judicial appointments to the CJEU, Hermansen and Naurin (2019) find no evidence for an alteration in the effect of economic left-right ideology on governments' decisions following the introduction of the Panel. Here, we probe the question further.

To verify whether the screening of judges has weakened the link between their appointing governments's preferences and the Court's output, we separate out the reporting judges that were appointed for the first time after 2010. If merit selection weakens governments ideological selection, then we would expect the correlation between the reporting judges and court outcomes to be weaker for those appointed after 2010. Some 67 of the reporting judges in our sample were appointed for the first time after the reform – and have therefore passed the Panel's initial screening (12 to the CJ and 55 to the GC).

In Figure 7 we plot the appointing governments' preferences of the non-screened (left pane) and screened (right pane) reporting judges against the case outcomes they have prepared. As we can see from the figure, the variation in government preferences is lower in the 2010-2020 period compared to the 1990-2010 period, but the slope of the bivariate regression remains similar.

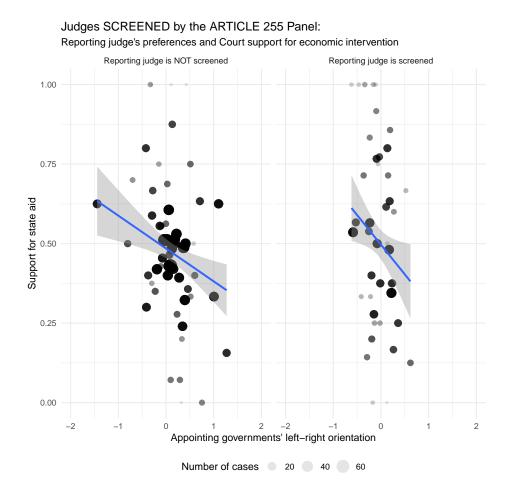


Figure 7: The correlation between reporting judges' appointing government preferences and Court outcomes in state aid cases did not change after the introduction of merit selection.

Table 8: Court support for economic intervention: Controlling for the SCREENING of judges for the 255 PANEL (results from a binomial logistic regression).

	Deper	ident variable:
	Court support for economic interver	
	Both	GC
	(1)	(2)
State aid policy (ref. antitrust)	-0.795***	-0.805***
	(0.158)	(0.160)
Fines are contested	1.399***	1.390***
	(0.196)	(0.197)
Supported by affected government	0.705***	0.706***
	(0.154)	(0.155)
Other governments supporting economic intervention	0.458***	0.456***
oviner governments supporting economic invertention	(0.130)	(0.131)
Other governments opposing economic intervention	-0.638***	-0.643***
Other governments opposing economic intervention	(0.246)	(0.247)
	1.000**	0.000**
Council supports economic intervention	1.008** (0.471)	0.990** (0.473)
	(0.471)	(0.473)
Council does not support economic intervention	-0.405	-0.470
	(0.984)	(0.985)
Median SCREENED by the 255 Panel		0.034
		(0.176)
Median judges' appointing government preferences	-1.202***	-1.101**
7	(0.334)	(0.435)
Difference (rapporteur - median) in appointing government preferences	-0.734***	-0.652***
Emercine (rapporteur - median) in appointing government preferences	(0.161)	(0.172)
D		0.054
Rapporteur SCREENED by the 255 Panel		0.054 (0.181)
		, ,
Median judges' appointing government preferences * SCREENED by the 255 Panel		-0.138 (0.704)
		(0.704)
Difference (rapporteur - median) in preferences * SCREENED by the 255 Panel		-0.645
		(0.479)
Constant	-0.020	-0.057
	(0.113)	(0.123)
Observations	1 272	1 270
Log Likelihood	1,373 -874.438	1,372 -872.035
Akaike Inf. Crit.	1,768.877	1,772.071

Note:

In the second model in Table 8 we similarly rely on an interaction effect to estimate separate effects for screened and non-screened median panelists and reporting judges. We find no substantial change in the effect of the median panelist's preferences on outcomes. Furthermore, instead of finding a weakening of the effect of the reporting judge's preferences, the effect has been stronger in the last decade compared to earlier.

Alternative explanations and potential confounders

We argue that the outcome of court cases are influenced by the preferences and position of a set of key actors: the median voter, the agenda setter and potential ideological competitors. Alternative explanations for our results may be that judges act strategically: They may adjust their behavior to their future reappointing governments out of career concerns or to the European Commission's position.

Are judges in fact strategically adapting to their current government? An alternative explanation for our results would be that judges strategically adjust their decisions to the preferences of their current government (that may decide on their reappointment) rather than to decide sincerely. To rule out this possibility, we fit a series of models that also include control variables that capture the reporting and the median judges' current governments' preferences.

As is clear from the results reported in Table 9, we find no indications that the effect of government preferences are driven by judges' strategic adjustments in either of the two courts. Neither the median panelist – as defined by the panelists' current governments – nor the reporting judge's current government's preferences have a predictive effect on the case disposition. The results align with our argument that governments influence the Court's output through their selection of like-minded judges as well as through their submissions during the proceedings, but not through the threat of deselection.

Table 9: Court support for economic intervention: Controlling for judges' CURRENT GOV-ERNMENT preferences (results from a binomial logistic regression).

		ependent variabl	le:	
		Court support for economic intervention		
	Both	GC	CJ	
	(1)	(2)	(3)	
State aid policy (ref. antitrust)	-0.792*** (0.164)	-0.657^{***} (0.188)	-1.146^{***} (0.354)	
Fines are contested	1.348*** (0.202)	1.287*** (0.248)	1.248*** (0.371)	
Supported by affected government	0.699*** (0.159)	0.826*** (0.191)	0.444 (0.311)	
Other governments supporting economic intervention	0.570*** (0.145)	0.743*** (0.208)	0.297 (0.211)	
Other governments opposing economic intervention	-0.781^{***} (0.271)	-0.917^{***} (0.352)	-0.426 (0.367)	
Council supports economic intervention	0.811 (0.548)	1.155 (0.740)	0.296 (0.872)	
Council does not supports economic intervention	-0.434 (1.181)	-0.392 (1.188)		
Median judges' APPOINTING government preferences	-1.209*** (0.353)	-1.327*** (0.450)	-1.707** (0.722)	
$ \label{eq:continuous} \mbox{Difference (rapporteur - median) in APPOINTING government preferences } $	-0.690*** (0.173)	-0.392^* (0.201)	-1.523*** (0.386)	
Median judges' CURRENT government preferences	0.156 (0.349)	0.327 (0.404)	-0.124 (0.727)	
Difference (rapporteur - median) in CURRENT government preferences $% \left(1\right) =\left(1\right) \left(1\right) $	-0.086 (0.212)	-0.126 (0.268)	-0.014 (0.363)	
Constant	-0.010 (0.119)	-0.154 (0.136)	0.512* (0.270)	
Observations Log Likelihood Akaike Inf. Crit.	1,275 -814.465 1,652.929	876 -561.487 1,146.973	399 -243.101 508.202	

Note:

*p<0.1; **p<0.05; ***p<0.01

Is the variation in ideology in fact driven by national factors? To what extent are the estimated effects of judges' preferences driven by national factors rather than — as we have theorized — within-national differences in their appointing governments' policy preferences? Several national-level factors may influence governments' choice of judge — and through that choice — the outcome of the cases they handle without being explicitly informed by the economic left-right dimension defining domestic party competition.

On the one hand, the results we find could be driven by between-national variation in judges' preferences. There are several potential reasons for this.

First, the preferences that inform governments' selection of judges may follow the varieties of capitalism in the EU. Students of European integration sometimes argue that governments' (and by extension their appointed judges') preferences over European policies are determined by national economic factors. In particular, scholars have argued that EU economic policies hit member states differently depending on national social and economic conditions. Various national governments might therefore adopt similar policy position depending on how which variety of capitalism the member state adheres to (Höpner and Schäfer 2010).

Second, judges have different national legal backgrounds and may therefore have varying propensity to favor public actors when performing administrative review. Zhang, Liu, and Garoupa (2018) demonstrate, for example, that reporting judges educated in a French legal culture, tend to show higher deference to the Commission's initial decision.

On the other hand, it may also be that the effect of judges' preferences varies across member states. That is, it may be that our estimate of judges' preferences drawing on their appointing government is a poor description of their true preferences, and that this inaccuracy follows national differences in appointment procedures or availability of qualified candidates across Europe. For example, it may be that smaller countries have fewer lawyers that would qualify for the position as judge at the CJEU and that the government therefore relaxes their emphasis on ideology in their recruitment. Some member states also include a

Table 10: Court support for economic intervention: Controlling for the rapporteur's NATIONALITY (results from a binomial logistic regression).

		Dependent varial	ble:
	Court supp	ort for economic	c intervention
	logistic		$linear \\ mixed-effects$
	(1)	(2)	(3)
State aid policy (ref. antitrust)	-0.781*** (0.158)	-0.772*** (0.166)	-0.176*** (0.032)
Fines are contested	1.404*** (0.196)	1.430*** (0.204)	0.296*** (0.037)
Supported by affected government	0.692*** (0.153)	0.669*** (0.158)	0.154*** (0.031)
Other governments supporting economic intervention	0.466*** (0.130)	0.489*** (0.131)	0.103*** (0.025)
Other governments opposing economic intervention	-0.648*** (0.247)	-0.708*** (0.249)	-0.127*** (0.040)
Council supports economic intervention	1.005** (0.470)	0.808* (0.476)	0.182** (0.084)
Council does not supports economic intervention	-0.317 (0.980)	-0.375 (1.008)	-0.044 (0.177)
Reporting judges' preferences	-0.809*** (0.151)	-0.804*** (0.201)	
Constant	-0.052 (0.111)	0.009 (0.319)	0.484*** (0.025)
Rapporteur nationality Observations Log Likelihood Akaike Inf. Crit. Bayesian Inf. Crit.	none 1,373 -875.104 1,768.207	fixed 1,373 -853.040 1,778.081	random 1,373 -806.616 1,637.232 1,699.929

Note:

*p<0.1; **p<0.05; ***p<0.01

Effect of reporting judges' preferences by nationality Results from a hierarchical linear model with national—level intercepts and slopes Caceh Republic Finland Caceh Republic Finland Resulting R

Figure 8: Varying effects of reporting judges' preferences by their country of origin (illustration of model 3, table 10).

broader set of actors in the recruitment of judges (Dumbrovsky, Petkova, and Van der Sluis 2014) – open calls, merit selection, consensus bargaining in parliamentary bodies etc. – and might therefore end up appointing judges whose preferences do not reflect the governmental parties' preferences over economic policies. If so, we would expect that the effect of the reporting judge's preferences varies across nationalities. We run the risk that the average effect we report in the paper only reflects a small subset of member states.

Following both of these arguments, the results we find could be driven either by betweennational variation in judges' preferences or between-national variation in the accuracy of our estimate of judges' preferences. To rule out these concerns, the models reported in Table 10 probe whether there are indications that our results can be explained by national factors.

Since these arguments concern all our estimates of judges' preferences regardless of the role they have during the Court's deliberations – the reporting judge, median panelist or policy outlier – we cannot reliably rule out between-national variation in our main models using fixed effects on each judge's nationality. Instead, the models reported in Table 10 focus squarely on the effect of the reporting judges' preferences. Model 1 reports a pooled model as a reference point, while model 2 includes fixed effects for the reporting judge's nationality. The similarity in the effect sizes of the reporting judge's preferences in models 1 and 2, indicate that the variation we draw on comes from differences between judges, even when they come from the same member state (but are appointed by different governments).

Model 3 then includes varying intercepts for nationality as well as varying slopes for the reporting judges' preferences. The model requires substantial within-country variation in the data. The number of judges appointed by each member state in our study remains limited. Estimating 28 different effect sizes for the reporting judges' preferences therefore entails substantial uncertainty. To ensure convergence, we therefore estimate a linear rather than a binomial logistic model. The main effects are displayed in Table 10, while the varying slopes are illustrated in Figure ??. As is clear from the figure, we find that the majority of

the national-level estimates of judges' preferences follow the hypothesized direction. The exceptions are Cyprus, Bulgaria, Portugal, Belgium and Hungary. Among these, only Portugal and Belgium are observed with more than three appointing governments, however.

Is the Commission's position confounding the results? The Court and the Commission often favor the same solution. In our data, the Court nevertheless rules against the Commission's submission in 35% of the cases.

There are different theoretical accounts for how the Commission's position relates to the Court's ruling. On the one hand, the neo-functionalists have argued that the Commission and the Court share the same preferences for more European integration and that has lead them to adopt similar positions on the state's role in the economy. On the other hand, rational choice scholars often point to the fact that the Commission and the Court are sensitive to the same political signals (and threats) from the member states. If so, the Commission's position provides an indication of the potential acceptance among member states of the Commission's proposed solution (Burley and Mattli 1993, 71). However, including the Commission's position would then be redundant to our controls for the governments' submissions. According to both of these arguments, the two institutions should therefore hold similar preferences over the Court's outcome, but there is no causal relationship between the two.

Authors have also argued that the Court may have an incentive to align with the Commission to ensure its cooperation (Carrubba, Hankla and Gabel, 2008, p. 442) or that it is a proxy for the legal merits of the case (Carrubba, Hankla and Gabel, 2012, p. 219). It is unclear, however, why the Commission would be better informed than the Court on questions it has not itself brought to the Court

Extant theorization is in other words blurry about the Commission's influence over Court decisions beyond their ability to bring cases with strong legal merits through the infringement

procedure. It is also unclear how the Commission's position would influence the composition of panels (or judges' preferences). We therefore have no reason to suspect that its position confounds our results. Our models consequently do not include controls for the Commission's stance on the merits of state aid. Here, we nevertheless show that our results are not contingent on the Commission's position.

The models in Table 11 probe the effect of the Commission's position towards state aid on the Court's decision making. The second model includes the Commission's position towards state aid as a control. While all variables – including the judges' ideological positions – remain in the same direction, their estimated effect is less precise. This is unsurprising, given how little variation that remains in the data once the Commission's position is accounted for.

Table 11: Court support for economic intervention: Controlling for the COMMISSION's position (results from a binomial logistic regression).

	I	Dependent variab	le:
	Court support for economic intervention		
	(1)	(2)	(3)
policystate aid	-0.193	-0.205	-0.200
	(0.176)	(0.176)	(0.177)
fines	0.791***	0.655***	0.790***
	(0.208)	(0.204)	(0.208)
origin_support	0.413**	0.386**	0.419**
	(0.165)	(0.165)	(0.166)
gvt_supp	0.381***	0.358***	0.378***
	(0.138)	(0.135)	(0.138)
gvt_not_supp_state_aid	-0.600**	-0.618**	-0.595**
	(0.252)	(0.252)	(0.252)
council_supp_state_aid	0.801	0.735	0.801
	(0.493)	(0.487)	(0.493)
council_not_supp_state_aid	-0.339	-0.477	-0.373
	(1.007)	(1.018)	(1.009)
commission_supp_state_aid	1.667***	1.684***	1.663***
	(0.138)	(0.137)	(0.138)
free_economy	-0.682***		
·	(0.160)		
free_economy_median		-0.696**	-0.846**
Ţ.		(0.350)	(0.354)
free_economy_diff			-0.651***
			(0.170)
Constant	-1.059***	-1.026***	-1.043***
	(0.148)	(0.150)	(0.151)
Observations	1,373	1,373	1,373
Log Likelihood	-798.187	-808.053	-798.136
Akaike Inf. Crit.	1,616.375	1,636.106	1,618.273
Note:	*	p<0.1; **p<0.0	05; ***p<0.0

Does coding the policy direction matter for the results? How does our operationalization of the Court's outcome ("pro-state aid") compare to extant studies' measure of pro-litigant/Commission outcomes?

In their studies of state aid and competition judgments in the General Court, both Wijtvjet (2021) and Zhang (2018) seek to link judges' left-right preferences with the Court's decision to grant a win to the applicant (against the Commission). The studies find a weak link between the median panelist and reporting judges' appointing governments' preferences (respectively) and the Court's outcome, but fail to find evidence for the influence of both. In these studies the Commission is assumed to have pro-regulation preferences because of its position as a regulating authority. By contrast, we code outcomes according to its policy direction. How does our model compare to their operationalization?

Table 12: Court support for economic intervention in the General Court: Two alternative operationalizations of the Court's outcome (results from a binomial logistic regression).

	$Dependent\ variable:$		
	Court support for economic intervention	Court supports the applicant	
	(1)	(2)	
policystate aid	-0.678***	-0.394**	
	(0.181)	(0.184)	
fines	1.261***	0.276	
	(0.242)	(0.224)	
origin_support	0.810***	0.491***	
	(0.185)	(0.183)	
gvt_supp	0.628***	0.038	
	(0.188)	(0.140)	
gvt_not_supp_state_aid	-0.860**	0.124	
0	(0.338)	(0.241)	
council_supp_state_aid	1.296*		
••	(0.728)		
council_not_supp_state_aid	-0.288	-0.128	
	(1.005)	(0.514)	
free_economy_median	-1.220***	0.310	
·	(0.422)	(0.426)	
free_economy_diff	-0.436**	0.202	
	(0.189)	(0.188)	
Constant	-0.128	-0.570	
	(0.130)	(0.523)	
Observations	930	930	
Log Likelihood	-596.102	-577.068	
Akaike Inf. Crit.	1,212.205	1,172.137	
Note:		*p<0.1; **p<0.05; ***p<0.01	

Results are reported in Table 12. While the model coefficients have the same direction as

in our study, the effects are weak and imprecise. The results are driven by the structure of the litigation. A small majority of the cases filed with the General Court (48%) are brought by applicants in support of state aid. Overall, the

Are our results driven by time-varying factors? Our study covers 31 years of the Court's recent history. The economic situation in Europe has varied substantially during this period, including the 2008-2012 Eurocrisis as well as the beginning of the Covid-19 pandemic. While the EU initially reacted by imposing austerity in response to the 2008 crisis, it had the opposite reaction to the recent pandemic, temporarily relaxing the Union's strict view on state aid. This may impact our results through three different mechanisms, one of which may confound our results.

Importantly, it may be that the judges react strategically to political signals by ruling in a more interventionist direction during the pandemic, while being less interventionist during the Eurocrisis. That is, economic shocks may lead to a left (or right) turn in electoral support, bringing new governments to power. The political composition among EU governments would then be different from that of the Court (whose overturn in membership is delayed and incremental). This could potentially confound our results.

However, there are also mechanisms that are either consistent with our theorization or even conducive to a more precise estimation of the effect of judges preferences.

First, it may be that the President reacts strategically to political signals. Consistent with our theorization, the President may assign more left-leaning judges to economic cases during the Covid pandemic, while choosing right-leaning judges to reflect the Union's austerity during the Eurocrisis. This would imply that the judges continue to decide cases on their merits following their sincere preferences, however their presence and role in the panel would be impacted by the President's reaction to political signals following economic factors.

Second, also consistent with our theory, we believe that even a subset of the right-leaning

governments' and judges' tolerance for public intervention in the economy is higher in times of crisis. Variations in the economy may therefore help us tease out the differences between the group of right-leaning judges in a pooled model, while a control for time periods would remove this additional information.

Third, also consistent with our theory, it could be that member state governments react to economic imperatives by replacing incumbent judges at the end of their mandate with judges whose views reflect the governments current priorities. This would result in an incremental and delayed change in the political composition of the Court that would in turn change the disposition of cases. Our empirical strategy to link judges to their appointing governments' preferences assumes such overturns exist. We therefore do not want to control away such lagged effects.

Table 13: Court support for economic intervention: Controlling for TIME (results from a binomial logistic regression).

	Dependent variable: Court support for economic intervention		
	(1)	(2)	
State aid policy (ref. antitrust)	-0.795***	-0.776***	
	(0.158)	(0.167)	
Fines are contested	1.399***	1.450***	
	(0.196)	(0.206)	
Supported by affected government	0.705***	0.682***	
	(0.154)	(0.159)	
Other governments supporting economic intervention	0.458***	0.459***	
	(0.130)	(0.133)	
Other governments opposing economic intervention	-0.638***	-0.656***	
0	(0.246)	(0.254)	
Council supports economic intervention	1.008**	1.075**	
	(0.471)	(0.484)	
Council does not supports economic intervention	-0.405	-0.232	
	(0.984)	(0.997)	
Median judges' preferences	-1.202***	-1.134***	
	(0.334)	(0.360)	
Difference (rapporteur - median)	-0.734***	-0.804***	
	(0.161)	(0.168)	
Constant	-0.020	12.755	
	(0.113)	(324.744)	
Year of decision fixed effects	no	yes	
Observations	1,373	1,373	
Log Likelihood	-874.438	-850.189	
Akaike Inf. Crit.	1,768.877	1,786.379	
Note:	*p<0.1; **p<0.05; ***p<0.01		

To assuage concerns that our results are driven by judges' strategic adaptation political

signals following changes in the economy, the second model in Table 13 therefore included yearly fixed effects to leverage purely within-year differences in the Court's rulings. For reference, the first column reports results from our main model that pools the effect across time. As is clear from comparing the direction of the effects as well as the precision of their estimate, there is no indication that our results are driven by time-varying confounders. The results remain similar.