When Judges Risk Precision: Developing Precedent at the Court of Justice of the European Union

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Abstract

Decisions of courts of precedent have implications for policymakers, who need to ensure that their policies are consistent with the rules found in jurisprudence. Existing literature, however, highlights that such rules may 'lock-in' inappropriate policies, presenting courts with a tradeoff. Leaving legal questions undecided, courts can avoid adverse policy effects of their rulings but allow political decisionmakers to pursue policies courts would prefer to keep off the books. I argue that policymakers signalling their preferences to courts inadvertently help judges to resolve this tradeoff. Drawing on original data from preliminary rulings of the Court of Justice of the European Union between 1998 and 2011, I show that judges were less likely to leave legal question unresolved when Member States had revealed divergent preferences to the Court.

1 Introduction

> [W]e know too little to risk the finality of precision ....
>
> *Justice D. Souter*, Associate Justice of the U.S. Supreme Court (quoted in Sunstein 1996, 6)

The decisions of courts at the apex of their judicial hierarchies have implications that reach beyond the individual cases that are being settled. Resolving legal disputes, courts of precedent

establish rules that guide the choices of actors who find themselves in factually similar situations in the future (Hansford and Spriggs 2006). Courts of precedent, such as the U.S. Supreme Court or the Court of Justice of the European Union, assume their arguably most prominent—and controversial—role when their rulings shape the choices of policymakers in government cabinets and legislatures (see Friedman 2002; Staton and Vanberg 2008). When courts of precedent rule on the lawfulness of policy, their decisions deter elected officials from issuing policies inconsistent with these rules in the future (see Stone Sweet 2000; Vanberg 1998; Kelemen and Teo 2014; Schmidt 2018; Fox and Vanberg 2014).

Some scholars warn that courts have thus encroached upon the responsibilities of legislatures and executives, diagnosing a "growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions" (Hirschl 2008, 95, see also Schmidt 2018; Stone Sweet 2000; Tate and Vallinder 1995). These warnings sound all the more concerning in light of scholarship highlighting that judges are often not in a position to craft 'appropriate' rules. Courts navigate a world characterized by uncertainty, lack the expertise to foresee the effects of their decisions on policy and therefore risk "announcing rules that turn out to be inappropriate ex post, and that may be difficult or costly to change" (Fox and Vanberg 2014, 356, see also Sunstein 1996, 1999; Staton and Vanberg 2008).

How do courts of precedent reconcile their mandate to issue instructive interpretations of law with their limited policy expertise? In this article, I introduce a Bayesian formal model and original empirical evidence addressing this question. My analysis centres on a tradeoff characterizing judicial policymaking: By treading carefully and resolving cases without conclusively answering the underlying legal questions, courts can avoid issuing instructions with uncertain, possibly adverse effects on policy, but also allow policymakers in governments and legislatures to pursue acts that courts would like to keep off the books (see Staton and Vanberg 2008; Spriggs 1997).

The formal model investigates how courts navigate this tradeoff. The model shows that policymakers who support the kinds of policies that courts would prefer to keep off the books have stronger incentives to signal their policy preferences to the court. When policymakers signal their preferences, i.e. in briefs submitted during case proceedings, courts gain access to information that allows them to make an informed choice between resolving a legal question or leaving things undecided. The model expects that despite lacking the expertise to foresee the effects of their decisions

on policy, courts are less likely to leave legal questions unresolved when policymakers signal their support for policies clearly at odds with courts' preferences. These insights motivate a statistical analysis of the decisionmaking at the Court of Justice of the European Union in preliminary reference proceedings lodged between 1998 and 2011. Drawing on novel, original data, I show that the Court was more likely to dismiss recommendations by its chief legal advisors to leave legal question unresolved when Member States had signalled resistance against jurisprudence restricting Member States' national autonomy and limiting their policy choices.

This article offers both a theoretical and empirical contribution to existing scholarship. Recent research has taken a stronger interest in understanding how courts develop precedent in a world characterized by uncertainty (see Callander and Clark 2017; Clark 2016; Fox and Vanberg 2014; Clark and Lauderdale 2012). This literature highlights that courts' expectations about policymakers' behaviour and the types of cases judges are likely to hear in the future play a prominent role in judicial decisionmaking. However, a missing piece to the puzzle remains how courts inform their expectations about the future. The article's theoretical model shows that it is policymakers—and in particular those supporting policies at odds with courts' preferences—who play an important role in mitigating courts' uncertainty.

Empirically, the article contributes to the debate on interbranch dynamics between EU Member States and the Court of Justice (Carrubba and Gabel 2015; Blauberger and Martinsen 2020; Schmidt 2018; Larsson and Naurin 2016). Existing scholarship has offered compelling evidence that the Court of Justice is—albeit not universally—receptive to the preferences of Member States (see Carrubba et al. 2008; Larsson and Naurin 2016; Garrett et al. 1998; Ovádek 2021). The narrative presented here is consistent with claims that the Court takes Member States' preferences into account when writing its judgments, and at least occasionally cedes to national governments' pressure. Yet, the evidence shows that the CJEU is unwilling to leave legal questions unresolved when national policymakers' signalled preferences diverge from the Court's position.

The article proceeds as follows. The next section reviews the existing literature and discusses key assumptions that feed into the formal model. The following section then introduces the formal model's primitives and derives its key empirical implications. An empirical application of the theoretical model fielding observational data from the Court of Justice's decisions in preliminary references proceedings follows. The final section discusses key findings of the empirical analysis and

offers concluding remarks.

2 Judicial policymaking in a world of uncertainty

Literature of the legal academy and judicial politics highlights that precedent developed by higher courts coordinates the actions of other actors, including lower courts, policymakers as well as their future selves (see Hadfield and Weingast 2012; Hansford and Spriggs 2006; Bueno de Mesquita and Stephenson 2002; Callander and Clark 2017; Derlén and Lindholm 2015). Resolving cases, courts of precedent establish rules that translate the facts of a particular case into distinct—typically binary—outcomes, indicating for instance whether a policy is deemed constitutional or not given the burdens it places on individuals' fundamental liberties (see Fox and Vanberg 2014, 358, for similar applications see Lax 2007; Cameron et al. 2000; Clark and Carrubba 2012). Crucially, a rule defined in a single case may be relevant for future disputes, as courts draw on existing precedent to resolve future, factually similar cases (see Hansford and Spriggs 2006; Clark 2016).

Where rules define which policies are considered acceptable and which ones are not, non-compliant behavior becomes easier to spot and hence punished (see Kelemen and Teo 2014). Precedent set by courts thus may put pressure on policymakers to amend existing policies and stay clear from policy options that appear at odds with jurisprudence to avoid conflict with courts (Stone Sweet 2000). Put simply, the rules defined by courts can remove otherwise feasible policy options from the agenda of policymakers (see Schmidt 2018, 246).

While some scholars note that courts of precedent thus "may lock in certain policies, while precluding other policy options" (Blauberger and Schmidt 2017, 910), others highlight that "judges run the risk of 'locking-in' an inappropriate policy that does not achieve its desired purpose and may even produce a worse outcome" (Staton and Vanberg 2008, 506). This strand of scholarship argues that the work of courts is complicated by their limited policy expertise and uncertainty about the effects of their decisions on actual policy outcomes (Staton and Vanberg 2008; Sunstein 1996, 1999). Once a rule has been established, it is often costly to change it, as courts try to stay clear from overruling precedent all too quickly and frequently (see Spriggs and Hansford 2001; Hansford and Spriggs 2006; Callander and Clark 2017). Courts are thus well-advised to avoid "steps that might be confounded by unanticipated circumstances" (Sunstein 2006, 1903).

Existing scholarship notes that leaving as much as possible undecided is a strategy for courts to mitigate their lack of policy expertise and uncertainty about the future (see Sunstein 2006). However, Staton and Vanberg (2008) argue that leaving legal questions undecided harbours a difficult tradeoff for courts. Judgments that leave legal questions unresolved provide policymakers with discretion to pursue policies that courts otherwise would have preferred to keep off the books. Staton and Vanberg (2008, 506) cite the example of the U.S. Supreme Court's decision in *Brown* v. *Board of Education*, which required judges to determine "which specific policies will achieve [racial desegregation of schools] and with which side effects", a challenge that ultimately led the Court to shy away from specifying precise rules for policies that would be consistent with the decision. In light of the ambiguity of the Court's decision in *Brown*, public schools in parts of the United States were not desegregated in a meaningful way even long after the Court's decision was published (Staton and Vanberg 2008, 504, see also Rosenberg 1991).

2.1 Weighing risks and informing choices

I expect judges to be aware of this tradeoff and to weigh the risks of establishing precedent 'locking-in' inappropriate policies against the likelihood of policymakers pursuing 'unlawful' policies if courts leave things undecided. Existing literature suggests that courts of precedent write their judgments based on expectations about the cases they will hear in the future (see Clark 2016; Callander and Clark 2017). Judges, however, are uncertain about the types of cases that will land in their dockets. While Staton and Vanberg's (2008) model assumes that judges have perfect information about the preferences of policymakers, courts are likely to be unsure whether future plans for policy in the drawers of policymakers (or even some existing policies) are at odds with their preferred legal rules before a case concerning these policies actually arrives on their desk. The question thus remains how courts inform their choice to leave a legal question undecided.

In the formal model introduced below, I draw on a strand of literature, which highlights that policymakers have incentives to signal their preferences to courts in the hopes of eliciting more favourable judgments (see Hall and Ura 2015; Segal et al. 2011; Carrubba et al. 2008; Carrubba and Zorn 2010; Larsson and Naurin 2016). Both courts and policymakers know that the former lack the 'power of the purse and sword' and cannot enforce compliance with their own judgments or prevent overrides of their decisions (Vanberg 2005; Carrubba and Zorn 2010; Larsson and Naurin

2016; Larsson 2020). Courts' reliance on policymakers for the effective implementation of their decisions tilts the balance of power between the judiciary and the political branches, and existing work has offered evidence suggesting that courts are (at least occasionally) prepared to concede to external pressure from policymakers (see Segal et al. 2011; Hall and Ura 2015; Harvey and Friedman 2006; Carrubba et al. 2008; Carrubba and Zorn 2010; Whittington 2003). Evading compliance with court judgments may be politically costly and override attempts may ultimately fail (Vanberg 2001; Clark 2010; Larsson 2020), hence policymakers have incentives to signal their preferences to courts (e.g. in briefs submitted during case proceedings) *before* legal constraints on their policy choices are established in the first place.

To summarize, as long as there is a realistic chance that a court would opt for a precedent that limits their policy choices, policymakers have an incentive to make their voices heard. Policymakers signalling their preferences then reveal information on the gap between the court and policymakers' preferences and may inadvertently steer the court away from leaving a legal question unresolved. The formal model introduced below elaborates on this argument in detail.

2.2 Model primitives

The formal model of imperfect information involves three players: Nature (N), a court of precedent (C) hearing a legal question with implications for policy, and a policymaker (L), who must decide whether to communicate its position on the legal question to the court. The court is asked to rule on the legal question but at least occasionally lacks the expertise to foresee the effects of its decision on policy. By settling the legal question nonetheless, the court may set a precedent with adverse effects. Leaving the legal question unresolved, however, the court foregoes an opportunity to shape the behaviour of policymakers. Both the court and policymaker choose their actions in the face of imperfect information. While the policymaker has imperfect information on the court's policy expertise, the court has imperfect information on the policymaker's type (more on this below).

The model's sequence of play displayed in Figure 1 starts with two independent moves by Nature, first drawing a state of the world, ω, and then drawing the policymaker's type, θ. The model distinguishes between two states, $\omega = A$ drawn with probability p, and $\omega = \overline{A}$ drawn with probability $1 - p$. Whenever Nature draws $\omega = A$, the court lacks relevant expertise and risks locking-in inappropriare policies when settling the legal question itself. Otherwise, given $\omega = \overline{A}$ the

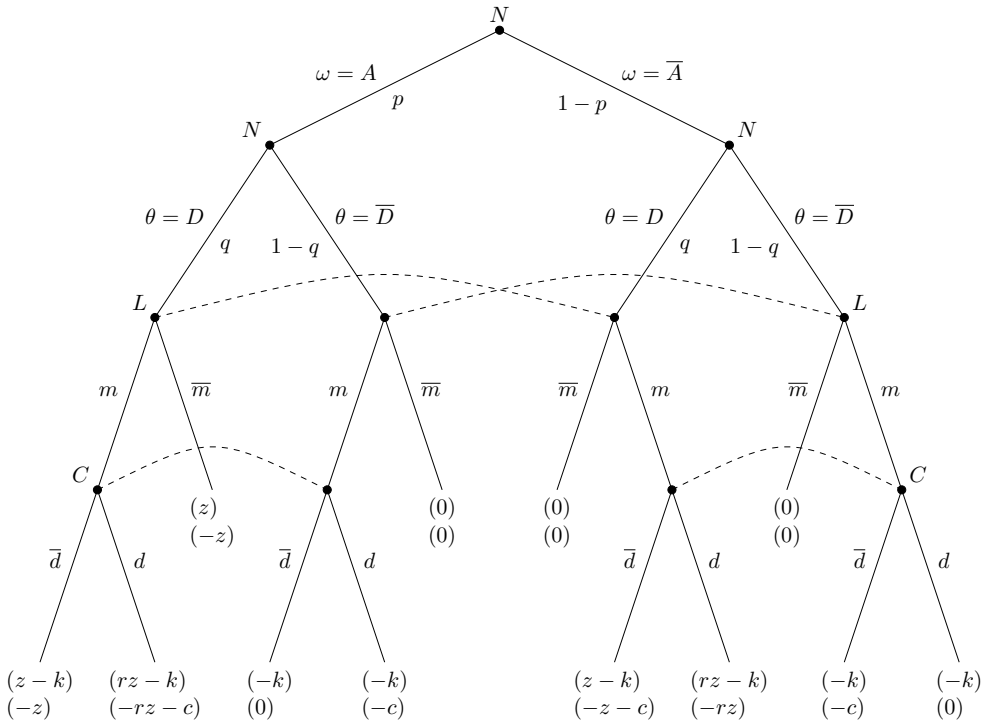

Figure 1: Sequence of play. Payoffs for the policymaker (L) are listed first, payoffs for the court (C) are listed second. Dashed lines indicate players' information sets.

court has sufficient expertise to answer the legal question. While the court observes Nature's first draw, the policymaker does not, with her prior beliefs about the state of the world characterized by $Pr(\omega = A) = p$.

Nature then draws the policymaker's type, $\theta = D$ with probability q, and $\theta = \overline{D}$ with probability $1 - q$. The policymaker's type determines whether or not her position on the legal question diverges from the court's position. Both the court and policymaker know that any rules the former establishes when answering a legal question can have consequences for policies. We can think of rules as mappings into policies that can be placed in a uni-dimensional space $\mathbb{R}$. Without loss of generality, let the court's preferred rule be set at 0, and set the policymaker's preferred rule at z. Hence, the parameter $|z|$ captures the gap between the policymaker and the court's preferred rule.[1] Given $\theta = D$, the court and policymaker's preferences diverge. Otherwise, given $\theta = \overline{D}$, the court and policymaker share the same position (i.e. $z = 0$). While the policymaker knows her own type, the court has only imperfect information whether or not the policymaker's preferences diverge from its own preferences, with its beliefs about the policymaker's type characterized by $Pr(\theta = D) = q$.

[1] To save on notation but without loss of generality, I assume throughout the following that z is non-negative.

To summarize, while the Court has private information about its policy expertise, $\omega \in \{A, \overline{A}\}$, the policymaker has private information about its type, $\theta \in \{D, \overline{D}\}$. Following Nature's draws, the policymaker decides whether to signal its position on the legal question to the court, $g \in \{m, \overline{m}\}$, with m indicating that she reveals her preference, and $\overline{m}$ indicating otherwise. The game ends should the policymaker choose not to reveal her preference, with the court then leaving the question unresolved when $\omega = A$ and submitting its preferred rule when $\omega = \overline{A}$. Should the policymaker signal her preference, the court chooses from two options, $f \in \{d, \overline{d}\}$, with $\overline{d}$ indicating that it leaves the question unresolved, and d indicating that it settles the question. Following the court's choice, the game ends and payoffs are allocated.

2.3 Payoffs

The court pays a cost c whenever its decision mismatches the state of the world, either choosing to resolve the question when it lacks relevant expertise, $\theta = A$, or leaving things undecided when it has no reason to do so, $\theta = \overline{A}$.[2] Turning to the policymaker, signalling her preferences comes at a (possibly small) cost k, as a brief or submission to the court needs to be prepared, binding the policymaker's resources.[3] Yet, by signalling her preferences, the policymaker can induce the court to opt for a more favourable rule closer to the policymaker's preference. The policymaker thus can secure an outcome that is preferable over an outcome had she not signalled her position.

The model does not assume that a signalling policymaker always succeeds in pressuring a court to offer concessions. Instead, whenever the policymaker signals her preference and the court subsequently decides to settle the legal question herself, a lottery determines their payoffs. The policymaker receives a payoff z with probability r (i.e. with probability r she succeeds in eliciting a concession matching her preferred rule) and a payoff of 0 with probability $1-r$. Similarly, the court receives a payoff of $-z$ with probability r (i.e. reflecting the cost it pays for offering a concession to a divergent policymaker) and a payoff of 0 with probability $1 - r$.

The lottery simplifies the tension between policymakers and courts, and the actors' strategic mo-

[2]There are several interpretations for the cost the court pays whenever it chooses to delegate despite having no reason to do so. One interpretation may be that the court then can expect to hear future cases, which bind time and resources, which it could have avoided had it set a precedent that resolved similar future cases as well. Another interpretation may be that this cost is reputational, as a court of precedent is generally expected to develop case law and precedent when it has sufficient information to do so.

[3]We can safely assume that these costs are small. Nonetheless, engaging in a case, learning the case facts and preparing a brief is surely more costly for the policymaker than simply not engaging with the case.

tives highlighted in existing literature (see Staton and Vanberg 2008; Carrubba and Zorn 2010; Clark 2010). Yet, it captures the basic tenets of this tension while keeping the model tractable. Divergent policymakers generally have an incentive to signal their preferences to secure more favourable outcomes, and courts have incentives to give in to external pressure once in a while. The probability $r \in (0,1)$ reflects the power (im-)balance between the court and policymakers, tipping in favour of policymakers as r increases.

Based on these primitives, a strategy for the lawmaker is a mapping from her type and prior beliefs about the state of the world into a decision to signal her preferences, $g : \theta \times (0,1) \rightarrow \{m, \overline{m}\}$. A strategy for the court is a mapping from the state of the world and its prior beliefs about the policymaker's type into a decision whether or not to delegate, $f : \omega \times (0,1) \rightarrow \{d, \overline{d}\}$.

2.4 Analysis

The model supports four pure strategy perfect Bayesian equilibria (PBE). In the following, I state equilibrium existence conditions for each of these PBE and then discuss their empirical implications in turn. The proofs for the model's PBEs are discussed in Section A of the online appendix. I begin my analysis with a separating PBE in which the policymaker with divergent preferences signals these preferences to the court, while the non-divergent policymaker chooses not to signal. The court then can perfectly update its prior belief about the policymaker's type and chooses to resolve the legal question despite lacking policy expertise whenever the following conditions hold.

Proposition 1. Given $z \geq \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE (*Separating 1*) exists in which the policymaker signals if her type is divergent $\theta = D$ and does not signal if $\theta = \overline{D}$, while the court settles the legal question upon observing the policymaker's signal, regardless of its policy expertise.

Consider the two thresholds concerning the preference gap between the policymaker and the court, $z^* \equiv \frac{c}{1-r}$, and another concerning the policymaker's beliefs about the court's policy expertise, $p^* \equiv \frac{rz-k}{z}$. The separating equilibrium introduced above holds for wider preference gaps, $z \geq z^*$, and when the policymaker has little reason to believe that the court lacks policy expertise, $p \leq p^*$, which are further discussed below. Next, I show that a second separating equilibrium exists when z falls below the threshold z^*, however the court now leaves the question unresolved when it lacks policy expertise despite the policymaker signalling a preference gap.

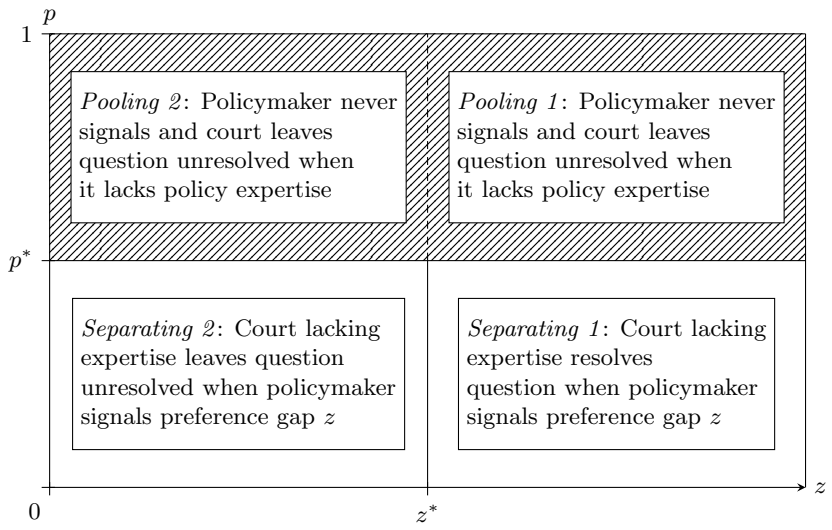

Figure 2: Equilibrium predictions. On the vertical axis, z denotes the preference gap between the court and the policymaker. On the horizontal axis, p denotes the policymaker's prior beliefs that the court lacks policy expertise. The thresholds are defined as $z^* \equiv \frac{c}{1-r}$ and $p^* \equiv \frac{rz-k}{z}$. The equilibria *Pooling 1* and *Pooling 2* differ in the court's off-the-equilibrium path strategies not shown here, see discussion in the online appendix.

Proposition 2. Given $z < \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE (*Separating 2*) exists in which the policymaker signals if her type is divergent $\theta = D$ and does not signal if $\theta = \overline{D}$, while the court observing the policymaker's signal leaves the legal question unresolved if it lacks policy expertise and resolves the question otherwise.

Finally, I identify two pooling equilibria in which the policymaker never signals her preferences to the court, which is therefore unable to update its prior beliefs about the policymaker's type. The two pooling equilibria differ only in the off-the-equilibrium path behaviour of the court (i.e. how the court would have reacted if the policymaker had signalled her preferences).

Proposition 3. Given $p > \frac{rz-k}{z}$, two pooling PBE exist in which neither type of policymaker signals, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise. Given $z \geq \frac{c}{1-r}$, off-the-equilibrium path a court lacking policy expertise would resolve a legal question upon observing the policymaker's signal (*Pooling 1*). Given $z < \frac{c}{1-r}$, off-the-equilibrium path a court lacking policy expertise would leave a legal question unresolved upon observing the policymaker's signal (*Pooling 2*).

Figure 2 summarizes the four equilibria discussed above. Figure 2 shows that above the threshold $p^* \equiv \frac{rz-k}{z}$ no policymaker invests the effort to signal her preference to the court. As long

as policymakers have sufficient reason to believe that a court will not settle a legal question (i.e. $p > p^*$), they are better off not investing the effort to communicate their preferences. Once their prior beliefs about the court's policy expertise fall below the threshold p^*, policymakers expect the court to settle the legal question and therefore signal their preferences to try to get a more favourable answer. The parameters determining where this threshold lies, $p^* \equiv \frac{rz-k}{z}$, are intuitive. First, note that p^* decreases as the costs of preparing a brief k increase. As the time and resources policymakers have to bind to signal their preferences to the court increase, the region covered by the two pooling equilibria in Figure 2 expands, indicating that ceteris paribus we should see fewer policymakers signalling their preferences.

In contrast, note that the threshold p^* increases with r, the probability that the court actually concedes to policymakers' pressure and offers a more favourable rule when settling the legal question. Intuitively, ceteris paribus, when policymakers can expect that their signalling of preferences will push the court to offer concessions, they have stronger incentives to invest effort into signalling. Further, the threshold p^* increases with the preference gap between policymakers and the court, z. If policymakers expect that their policy preferences diverge substantially from the court, they will invest efforts to signal these preferences even if their prior beliefs that the court lacks policy expertise and would leave a legal question unresolved are relatively high. Put simply, those policymakers who have a lot to lose should a court opt for a rule that constrains their policy choices are also the ones who have stronger incentives to signal their preferences to the court. This expectation is summarized in the following observation.

Observation 1. As policymakers' preferences for policy diverge further from the preferences held by a court, policymakers face stronger incentives to signal these preferences to a court.

Now consider the scenarios in which policymakers with divergent preferences choose to signal their preferences to the court, the bottom two quadrants of Figure 2. In scenarios captured by the bottom-left quadrant, the signalled preference gaps between policymakers and the court are relatively small, falling below the threshold $z^* \equiv \frac{c}{1-r}$. Here, the model expects that a court lacking policy expertise will leave the legal question unresolved to avoid setting a precedent with unintended, adverse consequences. Given the signalled preference gap is small, leaving a policymaker with somewhat divergent preferences room to manoeuvre is preferable over the risk of 'locking-in'

inappropriate policies. The incentives of a court lacking policy expertise, however, change when the signalled preference gap is wider, falling above the threshold z^*. In these scenarios, captured by the bottom-right quadrant of Figure 2, the court considers the costs of providing discretion to policymakers with clearly divergent preferences higher than the costs that may arise from setting an inappropriate precedent. This expectation is summarized in the following observation.

Observation 2. When policymakers signal wider preference gaps, courts lacking policy expertise should be less likely to leave legal questions unresolved.

The parameters that determine where the threshold determining the court's actions falls, $z^* \equiv \frac{c}{1-r}$, are again intuitive. The threshold increases with c, the costs the court faces from locking-in inappropriate policies. As these costs increase, the space covered by the bottom-left quadrant in Figure 2 increases to the right, and the court will leave legal question unresolved even if policymakers signal wider preference gaps. The same holds for the parameter r. As the balance of power between the court and policymakers tilts in favour of the latter (i.e. as the term $1 - r$ decreases), a court lacking policy expertise will leave legal questions unresolved even when policymakers signal wider preference gaps.

To summarize the gist of the formal model and the insights from its analysis, courts of precedent may not always have all the expertise required to settle a legal question without risking adverse consequences and face incentives to leave things undecided. Leaving the answer to legal questions in the hands of other actors, however, also opens up the possibility that policymakers may continue to implement policies courts would otherwise like to see off the books. The model shows that we should be more likely to observe courts settling legal questions themselves when policymakers signal wider preference gaps, and that policymakers with more extreme policy preferences relative to a court should generally be more likely to signal these preferences. In other words, policymakers inadvertently reveal information that allows a court to make a more informed choice between settling a legal question itself or leaving things undecided. In the following, I turn to the decisionmaking of the Court of Justice of the European Union in preliminary reference proceedings for an empirical application of these claims.

3 Empirical application

The CJEU serves as the European Union's "central dispute settlement mechanism" (Carrubba and Gabel 2015, 61), and is tasked with clarifying the implications of European law through the preliminary reference procedure (Craig and de Búrca 2020, 496). Answering preliminary references from national courts the CJEU routinely clarifies whether individual Member States had met their obligations under European law, and its interpretations are relevant for policymakers in capitals throughout the Union (Blauberger and Schmidt 2017). Recent research, however, has highlighted that the CJEU occasionally opts not to answer the referred questions (see Tridimas 2011; Zglinski 2018; Davies 2012). By leaving a legal question unresolved and 'handing responsibilities back' to national courts (Zglinski 2018), the CJEU skips an opportunity to write an interpretation that shapes the behaviour of policymakers across Member States—unlike jurisprudence of the CJEU, national courts' reasoning does not carry weight beyond the borders of their Member States.

Typically, when leaving legal questions unresolved, the CJEU acts on the advice of its Advocate Generals, the Court's chief legal advisors. To illustrate, in *Case C-478/07 Budějovický Budvar National Corporation v Rudolf Ammersin GmbH*, which involved a dispute between a Czech beer brewery and an Austrian beverage distributor, the Advocate General recommended leaving it for national courts to decide which instrument is appropriate to determine if a brand name serves as an indication of provenance—and the CJEU followed this recommendation. In the following, I discuss how I leverage information on whether the Advocate General had recommended leaving a legal question unresolved and for national courts to determine for the empirical application of the formal model's comparative statics.

3.1 Empirical strategy

For each question referred by national courts to the CJEU between 1998 and 2011, the data indicates whether or not the CJEU found that the answer to a referred question is *For the national court to determine* (i.e. the outcome variable), with 1 indicating that the CJEU found that the answer to a question is to be determined by the referring national court, and 0 indicating otherwise. The data shows that for the 4,520 questions the CJEU considered in preliminary references between 1998 and 2011, the Court left the question unresolved in 272 instances, roughly six percent of all

questions. In other words, the CJEU rarely misses an opportunity to settle legal questions itself.

This pattern may not surprise as it is the premise of the preliminary reference proceeding that the CJEU itself clarifies EU law in response to these questions. The rarity of this event also makes the CJEU's decisions in preliminary reference proceedings a suitable empirical target for the comparative statics of the formal model's equilibria discussed above, as it is likely that policymakers in Member States have generally little reason to expect the CJEU to leave things undecided.

I require a proxy indicating whether judges a priori (i.e. irrespective of Member States' preferences) thought that a legal question should be left unresolved and hence which 'state of the world' the CJEU is navigating. Lacking access to documentation of judges' internal deliberations, the next best alternatives are the opinions issued by the Court's Advocate General in the course of case proceedings. The Advocate General (throughout the following, AG) is an officer who "is generally considered a legal expert, writes thorough legal analyses of the legal questions in each case, and provides a published advisory opinion to the [CJEU]" (Carrubba and Gabel 2015, 88). Hence, the AG's opinion serves as an indicator which questions should be left unresolved based on an expert legal analysis, distinguishing between the formal model's two 'states of the world'. I have access to data indicating whether or not the AG assigned to a case advised the CJEU to let the referring national court decide the answer to a legal question before the Court. The variable *AG recommendation* is binary, with 1 indicating that the AG recommended leaving the question unresolved and 0 indicating otherwise.

My analysis in the following proceeds in two steps. First, I consider the effect of the number of briefs (in EU jargon referred to as observations) Member States had submitted during case proceedings on the CJEU's decision to follow the AG's advice. In the second step of the analysis, I then take a closer look at effects of the positions Member States communicate to the Court. The formal model suggests that the CJEU should be less likely to leave a legal question unresolved when submitted observations had signalled a wider preference gap between Member States and the Court. The data allows me to capture Member States' positions on the legal question before the Court with respect to its implications for Member States' national autonomy (see Larsson and Naurin 2016, 2019; Ovádek 2021). For each submitted Member State observation on each legal question before the Court, the data indicates whether the submitting national government preferred fewer restrictions to national autonomy, more restrictions to national autonomy, or whether the

government's position was ambivalent and could not clearly be categorized as either of the two preceding types of positions.

Ideally, I would then compare these communicated preferences to the CJEU's position on the legal question to see whether the Court is less likely to leave a question unresolved when Member States' observations revealed a preference gap. However, as for previous analyses of the CJEU's strategic decisionmaking (see Carrubba et al. 2008; Larsson and Naurin 2016), I lack information on the Court's 'true' preferences, which may not be reflected in its observable decision—the CJEU may strategically offer concessions to Member States. While previous studies relied on the position communicated by the AG as an independent legal advisor to proxy the CJEU's sincere preferences, this strategy is not an option here. Research assistants had been instructed to code that the AG's position could not be categorized as either in favour or against further restrictions to national autonomy whenever the AG recommended to leave a question unresolved.

While I am unable to directly measure a preference gap between Member States and the CJEU, existing research has highlighted that—unlike Member States—the Court consistently prefers advancing European integration over the preservation of Member States' national autonomy (see Ovádek 2021; Larsson and Naurin 2016; Martinsen 2015). Therefore, we should be more likely to observe preference gaps between Member States and the Court when the former argue (even only in part) against further restrictions to their national autonomy, than when they voice positions favouring such restrictions. The variable *MS opposing restrictions* counts the number of Member States voicing opposition to further restrictions to their national autonomy, while the variables *MS favouring restrictions* and *MS ambivalent* count the number of Member States supporting such restrictions or issuing observations with ambivalent positions.

Regressing the outcome variable *For the national court to determine* on interactions between the AG's recommendation to leave the legal question question unresolved and the explanatory variables discussed above allows me to compare how different types of positions voiced by Member States reflect in the CJEU's choice to follow the AG's advice and leave legal questions unresolved.

3.2 Estimation and control variables

Given the event I am interested in, the CJEU's decision to let a national court determine the answer to a legal question, is relatively rare, I am estimating Rare Events Logistic Regression

Models, relying on the **Zelig** package for the programming environment R, correcting for the bias that occurs when observed events on the outcome variable are rare (see King and Zeng 2001). The units of analysis are the 4,520 legal questions considered by the CJEU in preliminary references lodged between 1998 and 2011. I have reason to believe that potential outcomes for legal questions with higher values on the key explanatory variables systematically differ from legal questions with no or few submitted Member State observations.

It is possible that the CJEU's decisionmaking differs between highly politicized questions that concern a Member State's derogation from the principles of free of movement of goods, persons, services and capital on the one hand, and other types of legal questions on the other, with Member States more likely to make their voices heard on question concerning derogation. Therefore, I control for a binary variable *Derogation*, with 1 indicating that the referred question concerns whether a derogation from the principles of free movement is justified, and 0 indicating otherwise. Similarly, given the CJEU may be more likely to leave questions for national courts to decide in certain policy areas but not others, while Member States may be more likely to submit observations in some policy areas, I include fixed-effects the areas of national law a legal question concerns.[4]

The data also shows that the AG is not the only actor issuing recommendations to leave a legal question unresolved. Such recommendations may also be voiced by the European Commission as well as Member States themselves. It is likely that the AG and Commission's recommendations to leave a legal question unresolved are correlated, while the CJEU may be more likely to follow such advice when it comes from both actors. Further, for legal questions with several Member States submitting observations, it is more likely that we find observations recommending to leave the legal question unresolved, which may be systematically linked to the CJEU's decisionmaking. I therefore control for the variables *Commission recommendation* (a binary variable, with 1 indicating the Commission recommends leaving the question unresolved and 0 otherwise), and the variable *Member States recommendation* (indicating the number of Member States recommending to leave the legal question unresolved). Finally, it is plausible to assume that the CJEU's choice to leave a legal question unresolved and Member States incentives to signal their positions is linked to

[4]I include dummy variables for the following national areas of law in my statistical models: agriculture, environment, health care, intellectual property, labour law, migration, social policies, tax and technology. I also include dummy variable indicating whether the legal question exclusively concerns EU law. Note that a legal question may concern up to two national areas of law.

	Model 1	Model 2	Model 3	Model 4
Number of observations	0.03	0.00	0.04	−0.04
	(0.03)	(0.03)	(0.04)	(0.05)
AG recommendation		3.57	3.96	3.54
		(0.16)	(0.26)	(0.33)
Number of observations × AG recommendation			−0.14	−0.28
			(0.07)	(0.10)
Commission recommendation				2.56
				(0.20)
Member States recommendation				0.72
				(0.14)
Derogation				0.50
				(0.26)
Number of previous interpretations				0.00
				(0.08)
AIC	2059.26	1627.80	1626.20	1390.52
BIC	2072.09	1647.05	1651.86	1505.35
Log Likelihood	−1027.63	−810.90	−809.10	−677.26
Deviance	2055.26	1621.80	1618.20	1354.52
Num. obs.	4,520	4,520	4,520	4,358

Table 1: Rare events logistic regression coefficients with standard errors reported in parentheses. Model 4 includes fixed-effect controls for national areas of law (not shown here).

the extent of already existing precedent on the legal question heard by the Court. To control for the CJEU's previous decisionmaking, I include the variable *Number of previous interpretations* obtained from replication data provided by Hermansen (2020), which counts how often the CJEU had already considered the piece of EU law addressed by the legal question in its previous decisions.

3.3 Results

I begin my empirical analysis by regressing the outcome variable *For the national court to determine* on the variable *Number of observations* (Model 1). Table 1 shows that there is no distinguishable effect of the number of observations submitted by Member States on the CJEU's decision to leave the question unresolved. In Model 2, I add the variable *AG recommendation* showing that, as expected, the CJEU is more likely to leave a legal question unresolved whenever the AG recommends doing so, while the variable *Number of observations* continues to have no discernible effect.

This however changes once we include an interaction of the two variables in Model 3. While

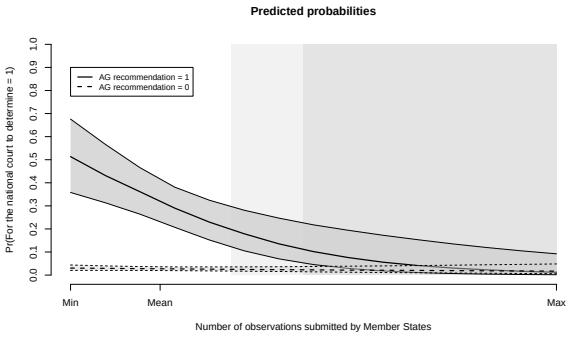

Figure 3: Predicted probabilities across the range of *Number of observations*. Light-grey shaded areas indicate values one SD above the variable's mean, dark-grey shaded areas indicate values more than two SD above the mean.

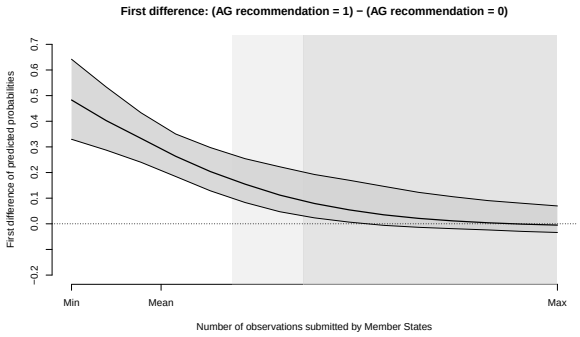

Figure 4: First difference of predicted probabilities across the range of *Number of observations*. Light-grey (dark-grey) shaded areas indicate values one (more than two) SD above the variable's mean.

the main effect for the variable *Number of observations* remains close to zero, the coefficient for the interaction effect is negative and distinguishable. Whenever the AG recommends leaving a legal question unresolved, each additional observation submitted by Member States decreases the probability that the CJEU follows the AG's advice. This effect remains robust after introducing the control variables in Model 4 (complete results are presented in Table C.1 in the online appendix). To offer a substantive interpretation of the observed effect, I calculate predicted probabilities based on on 1,000 simulations from coefficients of Model 4, manipulating values on the main explanatory variables of interest (*Number of observations* and *AG recommendation*) while holding all other variables constant at their appropriate measures of central tendency. Figures 3 and 4 plot the predicted probabilities and first difference for the scenarios *AG recommendation* = 0 and *AG recommendation* = 1 across the range of the variable *Number of observations*. We can see that while the CJEU tends to follow the AG's advice in roughly half of the cases when no Member State signalled its position, the probability of the Court heeding such advice drops significantly as the number of observations received from Member States increases.

So far, I have considered the number of observations submitted by Member States, without taking the content of these observations into account. Figure 5 plots coefficient point estimates and 95 percent confidence intervals for Model 5, where I include interactions between *AG recommendation* and *MS opposing restrictions*, *MS favouring restrictions* and *MS ambivalent*, respectively (complete results are presented in Table C.1 in the online appendix). Figure 5 shows that while

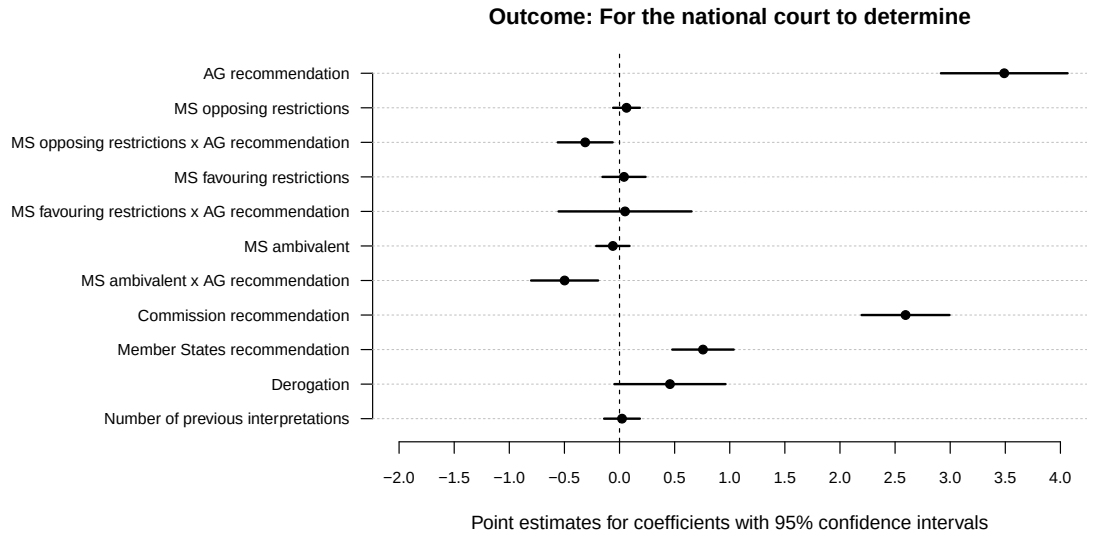

Figure 5: Rare events logistic regression coefficient estimates from Model 5. Model 5 includes fixed-effect controls for national area of law (not shown here).

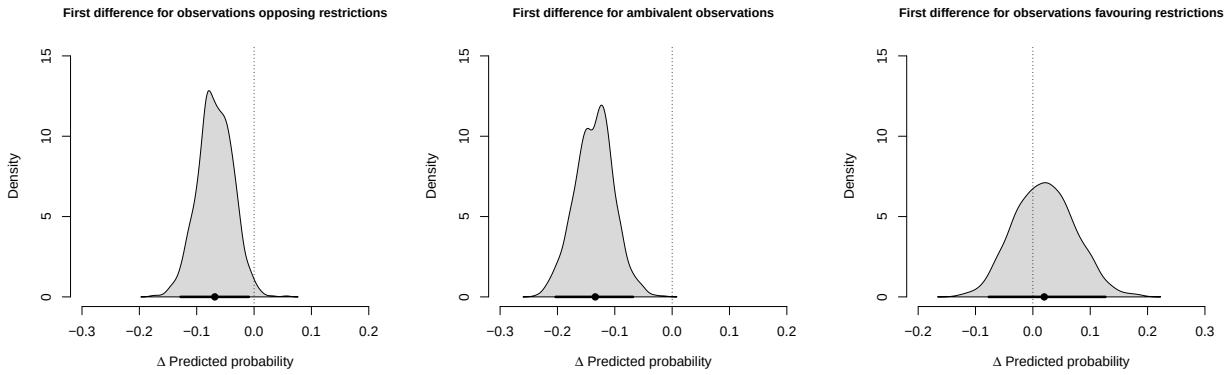

Figure 6: Distribution of the first differences in average marginal predicted probabilities for the variables *MS opposing restrictions*, *MS ambivalent* and *MS favouring restrictions*, given *AG recommendation* = 1. Point estimates and 95% intervals indicate first difference between mean values on the three variables and values one standard deviation above the respective means.

the coefficient for the interaction between *AG recommendation* and *MS favouring restrictions* is effectively zero, the interaction effects for *AG recommendation* and *MS opposing restrictions* as well as *AG recommendation* and *MS ambivalent* are negative and distinguishable from zero. There is evidence that the pattern observed in Model 4 is at least in part driven by Member State observations arguing against restrictions to national autonomy—and therefore Member State positions that are more likely to diverge from the CJEU's true preferences.

Figure 6 provides a substantive interpretation of the observed interactions effects for the vari-

ables *MS opposing restrictions*, *MS ambivalent* and *MS favouring restrictions*. The plotted point estimates and their 95% confidence intervals show the effect of a one standard deviation increase from the mean of the respective variables on the predicted probability of the Court leaving the question unresolved given $AG\ recommendation = 1$. We can see that given an increase of standard deviation above the mean of *MS opposing restrictions*, the CJEU is roughly 7 percentage points less likely to follow the AG's advice and leave the legal question unresolved (and roughly 13 percentage points less likely for a standard deviation increase on the variable *MS ambivalent* while no such effect is observable for the variable *MS favouring restrictions*).

To summarize, the evidence presented here suggests that despite receiving advice from the AG to allow a referring national court to determine the answer to a legal question, the likelihood that the CJEU follows this advice decreases as additional Member States signal their interest in the legal question before the Court. Further, it appears that Member State observations opposing further restrictions to national autonomy through the Court's jurisprudence at least in part drive this relationship. This evidence is consistent with the key empirical implication of the formal model introduced above. We should expect to see policymakers in Member States make their voices heard when they anticipate (and oppose) further restrictions to their national autonomy and hence their policy choices (see Schmidt 2018). In signalling their preferences, however, policymakers also help the CJEU to identify preference gaps and push the Court to issue answers to legal questions that shape the choices of policymakers, even when the Advocate General advised against doing so.

4 Conclusion

The decisions of courts can have significant consequences for the choices of policymakers and remove otherwise feasible options from the latter's agenda (see Schmidt 2018). However, existing literature highlights that courts do not always have the necessary expertise to foresee the effects of their jurisprudence on policy, and courts run the risk of establishing rules "that turn out to be inappropriate ex post" (Fox and Vanberg 2014, 356, see also Staton and Vanberg 2008; Sunstein 1999). Staton and Vanberg (2008) highlight that courts then face a tradeoff. Courts may leave legal questions undecided to avoid 'locking-in' inappropriate policies, yet consequently need to accept that policymakers may stick to policies they would otherwise prefer to keep off the books.

In this article, I explored how courts navigate the dilemma of their limited policy expertise in a world characterized by uncertainty. I developed a formal model showing that policymakers have incentives to signal their preferences to courts whenever they expect that rules defined by courts may constrain their preferred policy options. Signalling their preferences, policymakers inadvertently help courts to spot preference gaps—and push the court to resolve legal questions despite its lack of policy expertise when these gaps are particularly wide. The narrative presented here ties in with two strands of research in judicial politics that appear otherwise irreconcilable. On the one hand, scholars have argued that courts strategically respond to threats of override and non-compliance with their decisions by accommodating to the views and preferences of policymakers in their rulings (see for example Carrubba et al. 2008; Carrubba and Zorn 2010; Vanberg 2005). On the other hand, others have disputed accounts of courts' strategic deference to policymakers and argued that courts gradually expand the set of rules that shape and constrain the choices of political decisionmakers (see Stone Sweet and Brunell 2012; Stone Sweet 2000; Hirschl 2008).

Considering these two camps of scholarship, the theoretical model's main takeaway appears to fit neatly with the latter. Faced with the prospect of policymakers pursuing acts that the court would consider unacceptable, we should expect judges to prioritize limiting policymakers' discretion through their jurisprudence over concerns over their limited policy expertise. However, consistent with expectations of strategically deferential judges, the model expects that the court at least occasionally accommodates to policymakers' preferences in its jurisprudence—and it is the prospect of judges' strategic accommodation that pushes policymakers to signal their divergent preferences to the court in the first place.

The empirical application presented in this article offers evidence consistent with some of the formal models key empirical implications and offers a new perspective on the role of Member State observations in the CJEU's decisionmaking that complements existing research (see Carrubba and Gabel 2015; Larsson and Naurin 2016; Larsson et al. 2017). Communicating their positions on legal questions, Member State governments' observations provide the CJEU with information it would otherwise have no access to. The evidence presented here implies that judges at the CJEU carefully consider the effects of their decisions on the policymaking in Member States, and that the information national governments provide in their observations helps the Court to weigh the costs and benefits of the different options available to them—including the likely costs of leaving

a legal question unresolved. I find that the CJEU is less likely to follow recommendations by its chief legal advisor, the Advocate General, to leave legal questions unresolved when Member State governments signalled that they oppose further restrictions on their national autonomy.

To summarize, we should generally expect courts concerned about their lack of policy expertise to stay clear from developing rules that 'lock-in' certain policies and preclude others (Sunstein 1996, 1999). However, the main takeaway from the theoretical model and its empirical application presented in this article qualifies this expectation. Ultimately, there are limits to courts' willingness to let concerns about their lacking policy expertise drive their choice which legal questions to resolve and which ones not. Where a court expects that political actors favour policies that fall far from what it would consider acceptable, leaving a legal question with implications for these policies unresolved becomes an unattractive option—and concerns about leaving policymakers with discretion to pursue unlawful policies thus trump courts' concerns about their limited policy expertise.

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A Supplementary Material: Formal proofs

The game described in the main manuscript supports four pure strategy perfect Bayesian equilibria (PBE): Two separating equilibria, in which the court is able to perfectly update its prior beliefs about the policymaker's type based on the latter's actions; and two pooling equilibria, in which both types of policymakers play the same strategy and the court is unable to update its prior beliefs. In the following proofs, I consider each of the four strategy profiles and beliefs for the court and policymaker in turn and derive the conditions under which they can be part of a PBE.

A.1 Separating PBE 1

Consider a scenario in which the following strategies and beliefs constitute a separating PBE: The policymaker always signals, $g = m$, if it has a divergent type, $\theta = D$, and never signals, $g = \overline{m}$, if $\theta = \overline{D}$. Upon observing the policymaker signalling, the court always resolves the legal question, $f = d$, irrespective of its policy expertise. If the court does not lack policy expertise it likewise always resolves the legal question. Given these strategies, the application of Bayes' rule suggests that the court's posterior beliefs upon observing the policymaker's signal are given by $Pr(\theta = D|m) = 1$ and $Pr(\theta = \overline{D}|m) = 0$.

Despite lacking policy expertise, $\omega = A$, the court has no incentive to deviate from its strategy of resolving the legal question after the policymaker's signal as long as $-rz - c \geq -z$. Solving for z yields the inequality $z \geq \frac{c}{1-r}$. Whenever z falls above the threshold $z^* \equiv \frac{c}{1-r}$, a court lacking policy expertise has no incentive to deviate from its strategy of settling the legal question. Whenever the court does not lack policy expertise, $\omega = \overline{A}$, resolving the legal question strictly dominates leaving the question undecided.

Now consider the policymaker' choice. The policymaker's choice to signal is strictly dominated by not signalling whenever her type is $\theta = \overline{D}$. Whenever the policymaker has a divergent type, $\theta = D$, she has no incentive to deviate from her strategy of signalling if $p(rz-k)+(1-p)(rz-k) \geq pz$. Solving for p yields the inequality $p \leq \frac{rz-k}{z}$. As long as the divergent policymaker's prior beliefs about the court's policy expertise fall below the threshold $p^* \equiv \frac{rz-k}{z}$, signalling is her best response.

Given $z \geq \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE exists in which the policymaker signals if her type is divergent $\theta = D$ and does not signal otherwise, while the court settles the legal question

upon observing the policymaker's signal, regardless of its policy expertise.

A.2 Separating PBE 2

Now consider a scenario in which the following strategies and beliefs constitute a second separating PBE: As in the equilibrium discussed above, the policymaker always signals, $g = m$, if it has a divergent type, $\theta = D$, and never signals, $g = \overline{m}$, if $\theta = \overline{D}$. Now, however, the court leaves the legal question unresolved upon observing the policymaker signalling when it lack policy expertise, $\omega = A$, while it resolves the question when $\omega = \overline{A}$. In light of the policymaker's strategy profile and upon applying Bayes' rule, the court's posterior beliefs are given by $Pr(\theta = D|m) = 1$ and $Pr(\theta = \overline{D}|m) = 0$.

Upon observing the policymaker signalling, the court's best response is to resolve the legal question, $f = d$, whenever $\omega = \overline{A}$, but to leave the question unresolved when it lacks policy expertise, $\omega = A$, and when $z < \frac{c}{1-r}$ (providing the threshold $z^* \equiv \frac{c}{1-r}$). As long as the preference gap z falls below the threshold z^*, a court lacking policy expertise has no incentive to deviate from its strategy of leaving the legal question unresolved.

Now consider the policymaker' choice. As above, the policymaker's choice to signal is strictly dominated by not signalling whenever her type is $\theta = \overline{D}$. Whenever the policymaker has a divergent type, $\theta = D$, she has no incentive to deviate from her strategy of signalling if $p(rz-k)+(1-p)(rz-k) \geq pz$. Solving for p yields the inequality $p \leq \frac{rz-k}{z}$. As long as the divergent policymaker's prior beliefs about the court's policy expertise fall below the threshold $p^* \equiv \frac{rz-k}{z}$, signalling is her best response.

Given $z < \frac{c}{1-r}$ and $p \leq \frac{rz-k}{z}$, a separating PBE exists in which the policymaker signals if her type is divergent $\theta = D$ and does not signal otherwise, while the court always leaves the legal question unresolved if it lacks policy expertise and resolves the question otherwise.

A.3 Pooling PBE 1

Next, I show that the following strategies and beliefs support a pooling equilibrium: The policymaker never signals regardless of her type, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise. Applying Bayes' rule Bayes' rule given

the policymaker's strategy profile, the court is unable to update its prior beliefs, hence its posterior beliefs are given by $Pr(\theta = D|m) = q$ and $Pr(\theta = \overline{D}|m) = 1 - q$.

Given the policymaker never signals, I need to determine the court's out-of-equilibrium beliefs. Here, I follow the intuitive criterion by Cho and Kreps (1987), which places zero probability on the type of policymaker which could not gain any benefit from deviating from its strategy of not signalling. It is easy to see that given the non-divergent policymaker's choice to signal is strictly dominated by not signalling (hence, she cannot gain any benefit from deviating), the court places zero probability on the non-divergent policymaker off the equilibrium path. Hence, off the equilibrium path (i.e. the policymaker signals), the best response of a court lacking policy expertise is to resolve the legal question when $z \geq \frac{c}{1-r}$, i.e. when $z \geq z^*$. The divergent policymaker has no incentive to deviate from her strategy of not signalling if $p(rz - k) + (1 - p)(rz - k) < pz$, yielding the inequality $p > \frac{rz-k}{z}$. As indicated above, the non-divergent policymaker never has an incentive to deviate from not signalling.

Given $z \geq \frac{c}{1-r}$ and $p > \frac{rz-k}{z}$, a pooling PBE exists in which neither type of policymaker signals, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise.

A.4 Pooling PBE 2

Finally, I show that the following strategies and beliefs support a pooling equilibrium: As before the policymaker never signals regardless of her type, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise. Given the policymaker never signals, the court is again unable to update its prior beliefs, hence its posterior beliefs are given by $Pr(\theta = D|m) = q$ and $Pr(\theta = \overline{D}|m) = 1 - q$.

Given the policymaker never signals, the court's out-of-equilibrium beliefs are determined applying the intuitive criterion hence the court places zero probability on the non-divergent policymaker off-the-equilibrium path. Observing the policymaker signalling off-the-equilibrium path, the best response of a court lacking policy expertise is to leave the question unresolved when $z < \frac{c}{1-r}$, i.e. when $z < z^*$. The divergent policymaker has no incentive to deviate from her strategy of not signalling if $p(rz - k) + (1 - p)(rz - k) < pz$, yielding the inequality $p > \frac{rz-k}{z}$. As indicated above, the non-divergent policymaker never has an incentive to deviate from not signalling.

Given $z < \frac{c}{1-r}$ and $p > \frac{rz-k}{z}$, a pooling PBE exists in which neither type of policymaker signals, while the court leaves the legal question undecided when it lacks policy expertise and resolves the question otherwise.■QED

B Supplementary Material: Coding protocols

The data for the empirical analysis presented in Section 3 was collected as part of a multi-annual research environment project, aiming to establish a comprehensive database on the characteristics of the cases heard by the Court of Justice of the European Union (CJEU). The project employed several trained hand-coders with academic or professional backgrounds in European law. In the following, I present the coding instructions the hand-coders had received from the project leads for key variables in the analysis and discuss the reliability of their coding.

For each case involving a preliminary reference from a national court to the CJEU covered in the article's empirical analysis (i.e. preliminary references lodged between 1998 and 2011), hand-coders had access to the full judgment text and more importantly written reports of the hearings the CJEU had held for each case. These documents cover not only the Court's eventual decision in the case, but also detail the positions various other actors, including the Advocate General, the European Commission and Member State governments, had taken on the referred legal questions. Based on the information found in these documents coders were asked to identify how the different actors answered the referred legal questions. While coders could freely choose how to describe positions, they were instructed to keep position descriptions short and state affirmative or negating positions (e.g. coders were instructed that often the alternatives "Yes" and "No" would suffice to capture positions on a legal question).

Once a position description was formulated, coders were asked to list the actors that held this particular position, allowing for multiple actors to hold the same position (e.g. the CJEU, the Advocate General and Germany could all answer "Yes" to a particular legal question, while the Commission and the Netherlands could answer "No"). Further, coders were then instructed to categorize a position in terms of its effect on the legislative and/or executive autonomy (hereafter "autonomy") of the Member State from which the case before the CJEU originated (i.e. the country where the referring national court resides), the variable *pos_auto*. The variable *pos_auto* has the

following five categories:

- 0 = If this position would be the judgment, the autonomy of the Member State would not be more restricted than before.
- 1 = If this position would be the judgment, the autonomy of the Member State would be more restricted than before.
- 97 = The position cannot be easily categorized as 0 or 1, e.g. because it implies that autonomy would be restricted in one aspect and not restricted in another aspect.
- 98 = The position cannot be easily categorized as 0 or 1, because the position (if it would be the judgment) would not affect the autonomy of the Member State.
- 99 = The effect on autonomy is uncertain, because information on the position is missing or is incomprehensible.

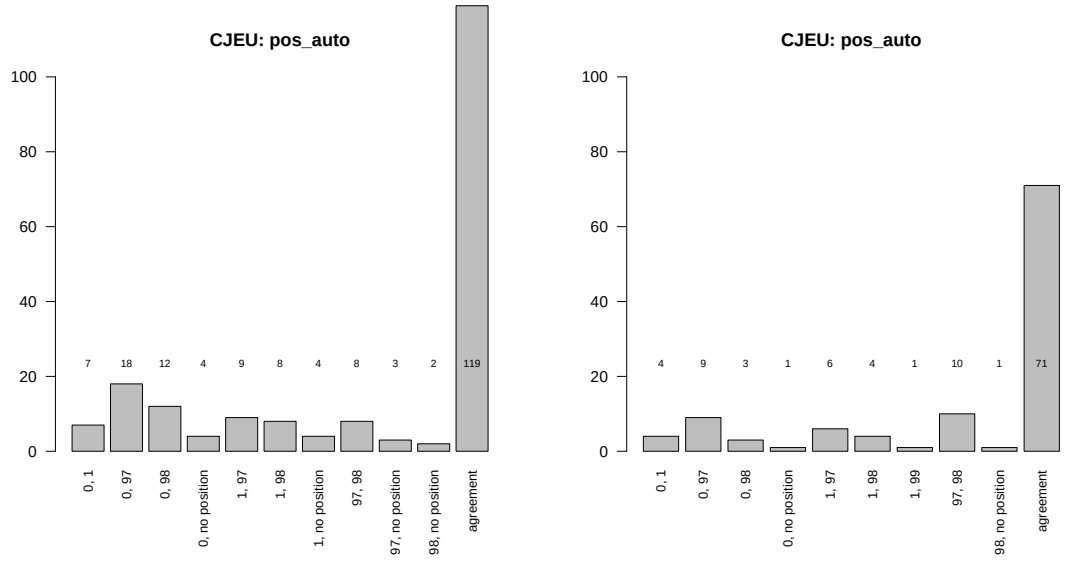
In addition, hand-coders were instructed to record whether an actor's position held that the legal question is for the referring national court to determine, with 1 indicating that the actor (e.g. the Advocate General or the European Commission) held that position and 0 indicating that the actor did not hold that decision.

Based on the coding, I was able to identify the positions the CJEU, the Advocate General and the European Commission held on the legal questions the Court considered in its preliminary rulings, and also count the number of Member States which held the various positions.

Reliability checks for the coding were carried out in two rounds. First, between July and September 2020, three coders completed the coding for 100 preliminary rulings, which had been referred to the CJEU in 2010. Subsets of these 100 preliminary rulings were randomly assigned to pairs of coders.[5] After coders had completed their work for the first round, a workshop was organised with coders, addressing differences in coding that were identified in the first round of reliability checks. Between October and December 2020, coders then completed the coding for an additional 50 preliminary rulings lodged with the CJEU in 2010, with subsets of these cases again randomly assigned to pairs of coders.[6]

[5] In the first round, Coder 1 and Coder 2 each coded 33 identical preliminary rulings, Coder 1 and Coder 3 each coded 33 identical preliminary rulings, and Coder 2 and Coder 3 each coded 34 identical preliminary rulings.

[6] In the second round, Coder 1 and Coder 2 each coded 16 identical preliminary rulings, Coder 1 and Coder 3 each



(a) First round of reliability checks ($N = 194$) (b) Second round of reliability checks ($N = 110$)

Figure B.1: Overview over agreement and disagreement types in coding decisions in the first and second round of reliability checks.

B.1 Positions on national autonomy

To evaluate the reliability of the coding for the variable *pos_auto*, three metrics were calculated: ε_{wrong}, indicating the share of "wrong" coding choices (i.e. Coder 1 categorized a position as not further restricting national autonomy, "0", whereas Coder 2 categorized the same position as further restricting national autonomy, "1"); $\varepsilon_{ambiguous}$ indicating the share of "ambiguous" coding choices (i.e. any other types of disagreement, for instance coders disagreed between assigning the codes "0" and "97"); and γ_{pos_auto}, indicating the share of coding choices where coders agreed.

Figures B.1a and B.1b plot the frequency distributions of the types of disagreements and the frequency of matching coding decisions ("agreement") between coders for coding decisions for the variable *pos_auto* for the position of the CJEU. In both rounds of the reliability checks coders agreed in most of their coding choices. Further, coders rarely fundamentally disagreed on their coding choices, indicated by the relatively low frequencies for the disagreement "0, 1". However, the figures also show that "ambiguous" disagreements (e.g. "0, 97" and "1, 97") between coders were somewhat common in both rounds of the reliability checks.

Figures B.1a and B.1b also show that coders occasionally disagree when assigning the codes

coded 17 identical preliminary rulings, and Coder 2 and Coder 3 each coded 16 identical preliminary rulings.

pos_auto	ε_{wrong}	$\varepsilon_{ambiguous}$	γ_{pos_auto}
First round			
All actors	**0.03 (42 of 1261)**	**0.27 (345 of 1261)**	**0.70 (874 of 1261)**
CJEU	0.04 (7 of 181)	0.26 (47 of 181)	0.70 (127 of 181)
Commission	0.05 (9 of 172)	0.30 (51 of 172)	0.65 (112 of 172)
Advocate General	0.04 (5 of 133)	0.29 (39 of 133)	0.67 (89 of 133)
Plaintiff	0.02 (3 of 142)	0.29 (41 of 142)	0.69 (98 of 142)
Defendant	0.05 (3 of 56)	0.27 (15 of 56)	0.68 (38 of 56)
Germany	0.04 (3 of 86)	0.27 (23 of 86)	0.69 (60 of 86)
France	0.00 (0 of 24)	0.21 (5 of 24)	0.79 (19 of 24)
Second round			
All actors	**0.04 (31 of 723)**	**0.21 (149 of 723)**	**0.75 (543 of 723)**
CJEU	0.04 (4 of 107)	0.21 (22 of 107)	0.75 (81 of 107)
Commission	0.02 (2 of 93)	0.23 (21 of 93)	0.75 (70 of 93)
Advocate General	0.03 (3 of 90)	0.19 (17 of 90)	0.78 (70 of 90)
Plaintiff	0.08 (6 of 76)	0.18 (14 of 76)	0.74 (56 of 76)
Defendant	0.03 (1 of 35)	0.23 (8 of 35)	0.74 (26 of 35)
Germany	0.02 (1 of 55)	0.18 (10 of 55)	0.80 (44 of 55)
France	0.04 (1 of 23)	0.26 (6 of 23)	0.70 (16 of 23)

Table B.1: Intercoder reliability for the position-level variable *pos_auto*, shown for all coded positions and for a selection of actors where the number of positions coded is > 20.

"97" and "98", with both categories indicating that the position cannot be easily categorized as 0 or 1, albeit for different reasons. Therefore, the codes "97" and "98" were collapsed into a single category, which indicates that no clear implication in terms of member state autonomy could be drawn from the position (i.e. not counting "97, 98" as a disagreement among coders).

Table B.1 displays results for the three metrics, ε_{wrong}, $\varepsilon_{ambiguous}$ and γ_{pos_auto}, across all actors and for selected individual actors, respectively (here results for actors with more than 20 coded positions are displayed). Two patterns emerge from Table B.1. First, coders rarely fundamentally disagree over the coding of the variable *pos_auto* (i.e. wrong decisions are very rare across all actors). Second, the reliability of the coding improved after the first round of reliability checks in light of the additional training coders received. Table B.1 shows that after the second round of reliability checks, coders agreed in 75 percent of their coding decisions.

natcourtdet	*Include missing observations*	*Exclude missing observations*
First round		
All actors	**0.95 (1371 of 1442)**	**0.90 (385 of 427)**
CJEU	0.94 (186 of 198)	0.88 (54 of 61)
Commission	0.93 (182 of 195)	0.83 (52 of 63)
Advocate General	0.91 (131 of 144)	0.88 (37 of 46)
Plaintiff	0.99 (158 of 160)	0.99 (39 of 40)
Defendant	0.94 (62 of 66)	0.94 (17 of 18)
Germany	0.94 (100 of 106)	0.94 (29 of 31)
France	0.93 (25 of 27)	0.89 (8 of 9)
Second round		
All actors	**0.96 (782 of 812)**	**0.95 (210 of 222)**
CJEU	0.92 (103 of 112)	0.87 (33 of 38)
Commission	0.94 (95 of 101)	0.94 (32 of 34)
Advocate General	0.97 (95 of 98)	0.96 (26 of 27)
Plaintiff	0.99 (89 of 90)	1.00 (29 of 29)
Defendant	0.95 (39 of 41)	0.92 (11 of 12)
Germany	0.95 (61 of 64)	1.00 (13 of 13)
France	1.00 (26 of 26)	1.00 (5 of 5)

Table B.2: Intercoder reliability for the position-level variable *natcourtdet*, shown for all coded positions and for a selection of actors where the number of positions coded is > 20.

B.2 For the national court to determine

Turning to the variable *natcourtdet*, inspection of the data shows that in more than half of all coded positions in both the first and second round, coders did not assign any category for the variable *natcourtdet*, instead leaving the placeholder for the variable empty. Conversations with coders revealed that rather than always representing missing values, coders often chose not to enter a value for the variable *natcourtdet* when the position did not state that the answer to the issue is for the national court to determine (i.e. leaving the placeholder blank rather than assigning the category "0"). This implies that for some observations of the variable *natcourtdet*, blank placeholders should often be replaced with the category "0", although it is not clear which ones should be replaced.

To nonetheless assess the reliability for of the coding for the variable, two separate analyses are presented. In the first analysis, instances where one coder assigned the category "1" while the other coder left the placeholder for the variable blank is counted as disagreement between the coders. However, instances where one coder assigned the category "0" while the other coder left

the placeholder blank, as well as instances in which both coders left the placeholder blank, are not counted as disagreement. Effectively, instances where coders did not assign any category for the variable *natcourtdet* are then counted as if they had assigned the category "0" (i.e. the position does not state that the answer to the legal issue is to be determined by the national court). The second analysis then focuses exclusively on comparing coding choices where both coders in a coder pair actually assigned a category, "0" or "1".

Table B.2 shows the share of coding decisions where coder pairs agreed on the same category for *natcourtdet* for the first and second round of reliability checks for both types of analyses. The table shows that coders almost always agreed on the chosen category in both rounds of reliability checks and irrespective of whether missing values are treated equivalently to the category "0" or not.

C Supplementary Material: Additional results

In this section, I present additional results supplementing the evidence presented in Section 3 of the main manuscript. I begin by plotting descriptive statistics for the key explanatory variables *MS opposing restrictions*, *MS favouring restrictions* and *MS ambivalent* (i.e. the number of Member States opposing or favouring further restrictions on their national autonomy, and the number of Member States holding ambivalent positions). Figure C.1 plots the variables' frequency distributions by the two categories of the variable *AG recommendation*, indicating whether the Advocate General recommended leaving the legal question for the referring national court to determine.

Figure C.1 shows that distributions for all three variables are skewed to the right, and legal questions that received more than three Member State observations arguing either in favour or against further restrictions or communicating ambivalent positions are relatively rare. Further, Figure C.1 shows that the CJEU generally receives fewer observations arguing in favour of further restrictions to national autonomy. This pattern is consistent with the claim that Member States are less likely to push for additional restrictions on their national autonomy in the course of European integration than the Court of Justice or the European Commission. However, it also raises concerns that the results for the variable *MS favouring restrictions* and its interaction with *AG recommendation* discussed for Model 5 in Section 3 of the main manuscript may partially be

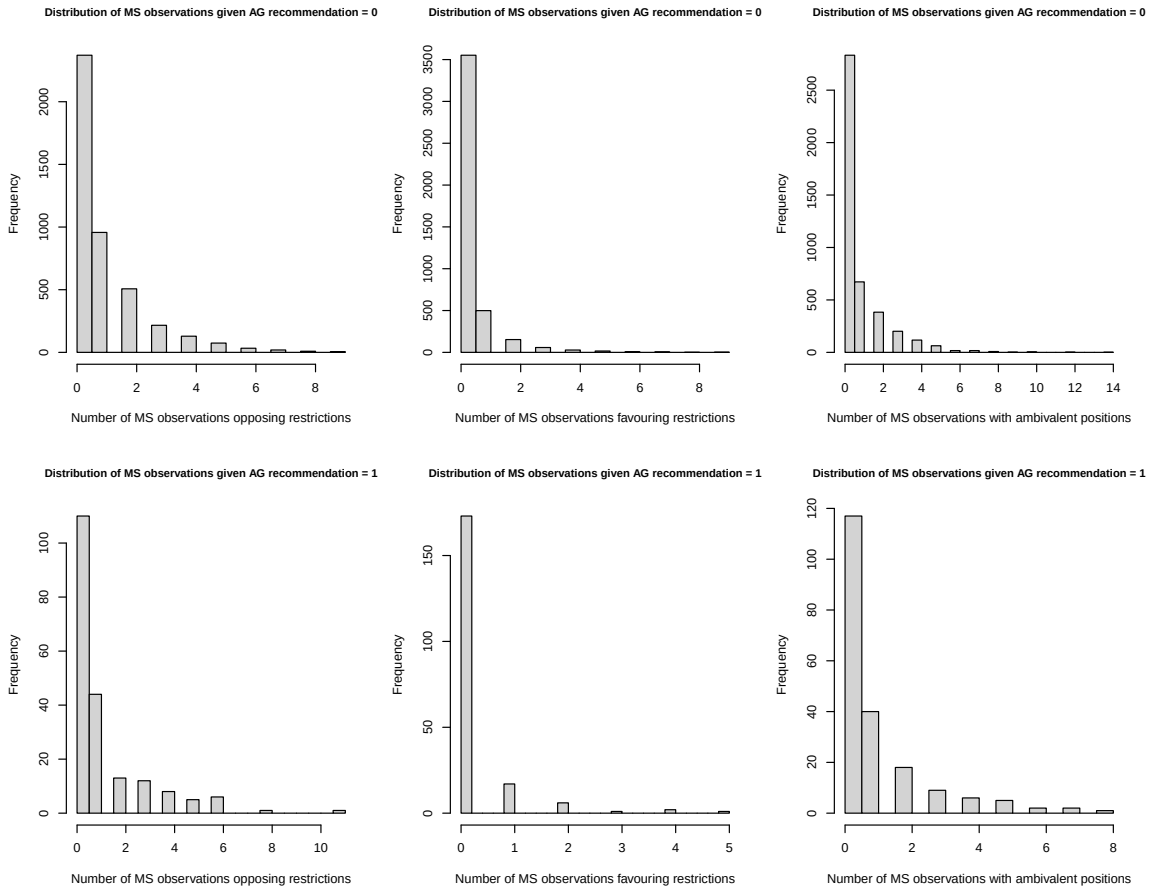


Figure C.1: Frequency distributions of the variables *MS opposing restrictions*, *MS favouring restrictions* and *MS ambivalent*, by the variable *AG recommendation*.

driven by a relatively low number of observations (e.g. there are only 27 instances of Member States arguing in favour of restrictions when the Advocate General recommends leaving the legal question for the national court to determine). Nonetheless, while the relatively small number of observations favouring restrictions can account for the wide confidence intervals of the interaction coefficient between *MS favouring restrictions* and *AG recommendation* in Model 5, the results still show that the coefficient's point estimate is effectively zero, supporting the expectation that observations that are unlikely to conflict with the CJEU's own position do not push the Court to resolve a legal question despite its lacking policy expertise.

	Model 4	Model 5
(Intercept)	−3.52	−3.68
	(0.20)	(0.19)
AG recommendation	3.54	3.49
	(0.33)	(0.29)
Number of observations	−0.04	
	(0.05)	
Number of observations × AG recommendation	−0.28	
	(0.10)	
MS opposing restrictions		0.06
		(0.06)
MS opposing restrictions × AG recommendation		−0.31
		(0.13)
MS favouring restrictions		0.04
		(0.10)
MS favouring restrictions × AG recommendation		0.05
		(0.31)
MS ambivalent		−0.06
		(0.08)
MS ambivalent × AG recommendation		−0.50
		(0.16)
Commission recommendation	2.56	2.60
	(0.20)	(0.20)
Member States recommendation	0.72	0.76
	(0.14)	(0.14)
Derogation	0.50	0.46
	(0.26)	(0.26)
Number of previous interpretations	0.00	0.02
	(0.08)	(0.08)
Agriculture	−0.17	−0.05
	(0.45)	(0.45)
Environment	0.37	0.36
	(0.35)	(0.36)
Healthcare	−0.25	−0.35
	(0.46)	(0.46)
Intellectual property	−0.14	0.05
	(0.36)	(0.36)
Labour laws	0.41	0.43
	(0.27)	(0.27)
Migration	0.31	0.18
	(0.41)	(0.41)
Exclusively EU law	−0.45	−0.33
	(0.26)	(0.26)
Social policies	−0.10	−0.10
	(0.32)	(0.32)

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Table C.1 – continued from previous page

	Model 4	Model 5
Tax laws	0.40	0.36
	(0.24)	(0.24)
Technology	0.09	0.05
	(0.47)	(0.48)
AIC	1390.52	1394.27
BIC	1505.35	1534.62
Log Likelihood	−677.26	−675.13
Deviance	1354.52	1350.27
Num. obs.	4358	4358

Table C.1: Rare events logistic regression coefficients with standard errors reported in parentheses for Model 4 and Model 5 discussed in the main manuscript, including fixed-effect coefficients for national areas of law.

Next, Table C.1 presents the complete results for Models 4 and 5 discussed in the main manuscript, including results for the fixed-effect controls for areas of national law affected by the legal question considered by the CJEU. Table C.1 shows that there are no clearly distinguishable effects in any area of law, albeit some tentative evidence that the Court appears to be more likely to leave legal questions unresolved when they concern Member States' labour laws.

Finally, I turn to present results from several alternative model specifications to supplement the analyses covered in Section 3. I begin by estimating two rare events logistic regression models that consider the effects of weighted counts of Member States' positions on the CJEU's decision to allow the referring national court decide a legal question, following the assumption by Larsson and Naurin (2016) that the voices of politically powerful Member States are more likely to be reflected in the CJEU's decisionmaking. In Model 6, the variable *MS Anti* reflects the counts of Member State observations arguing against further restrictions to their national autonomy but weighs these counts by Member States' voting power in the Council of the European Union (using the normalized Banzhaf voting power index, see Larsson and Naurin 2016, 397). The variable *MS Pro* weighs the counts of Member States arguing in favour of more restrictions in the same way.

	Model 6	Model 7	Model 8	Model 9
(Intercept)	−3.58	−3.59	−3.66	−3.62
	(0.17)	(0.16)	(0.16)	(0.16)
AG recommendation	2.83	2.85	2.98	2.74
	(0.22)	(0.21)	(0.22)	(0.21)
MS Anti	−1.80			
	(1.24)			
MS Anti × AG recommendation	−0.40			
	(2.64)			
MS Pro	1.74			
	(1.82)			
MS Pro × AG recommendation	2.52			
	(8.27)			
MS Net		1.75		
		(1.04)		
MS Net × AG recommendation		0.53		
		(2.54)		
MS Net count			−0.05	
			(0.05)	
MS Net count × AG recommendation			0.20	
			(0.12)	
Disagreement MS				−0.08
				(0.29)
Disagreement MS × AG recommendation				0.97
				(0.77)
Commission recommendation	2.54	2.54	2.57	2.56
	(0.20)	(0.20)	(0.20)	(0.20)
MS recommendation	0.62	0.62	0.62	0.62
	(0.13)	(0.13)	(0.13)	(0.13)
Derogation	0.50	0.51	0.46	0.45
	(0.26)	(0.26)	(0.26)	(0.25)
Number of previous interpretations	0.00	0.00	0.02	0.01
	(0.08)	(0.08)	(0.08)	(0.08)
Agriculture	−0.09	−0.09	−0.09	−0.08
	(0.44)	(0.44)	(0.44)	(0.44)
Environment	0.40	0.40	0.39	0.38
	(0.35)	(0.35)	(0.35)	(0.35)
Healthcare	−0.27	−0.28	−0.29	−0.32
	(0.46)	(0.46)	(0.45)	(0.46)
Intellectual property	−0.19	−0.19	−0.15	−0.13
	(0.36)	(0.36)	(0.36)	(0.36)
Labour laws	0.42	0.42	0.40	0.42
	(0.27)	(0.27)	(0.27)	(0.27)
Migration	0.18	0.18	0.17	0.18
	(0.43)	(0.43)	(0.41)	(0.42)

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Table C.2 – continued from previous page

	Model 6	Model 7	Model 8	Model 9
Exclusively EU law	−0.39	−0.39	−0.36	−0.36
	(0.25)	(0.25)	(0.25)	(0.25)
Social policies	−0.03	−0.03	−0.05	−0.02
	(0.32)	(0.32)	(0.32)	(0.32)
Tax laws	0.45	0.45	0.40	0.43
	(0.24)	(0.24)	(0.24)	(0.24)
Technology	0.12	0.12	0.06	0.02
	(0.46)	(0.46)	(0.47)	(0.47)
AIC	1404.81	1400.95	1402.32	1403.26
BIC	1532.41	1515.79	1517.15	1518.09
Log Likelihood	−682.41	−682.47	−683.16	−683.63
Deviance	1364.81	1364.95	1366.32	1367.26
Num. obs.	4358	4358	4358	4358

Table C.2: Rare events logistic regression coefficients with standard errors reported in parentheses.

Model 7 includes the variable *MS Net*, which captures the net value of these weighted counts, subtracting *MS Anti* from *MS Pro*. Accordingly, negative values on the variable *MS Net* indicate that Member States overall argued against further restrictions to their national autonomy, while positive values indicate that Member States overall argued in favour of such restrictions. For Model 8 the variable *MS Net count* simply subtracts the count of Member States arguing against further restrictions from the count of Member States arguing in favour, without weighting these counts by Member States' voting power in the Council. Model 9 then includes a dummy variable *Disagreement MS* indicating whether at least one observation submitted by Member States argued against further restrictions while another argued in favour (*Disagreement MS* = 1, *Disagreement MS* = 0 otherwise). Across Models 6 to 9, all variables discussed here are interacted with the variable *AG recommendation* to evaluate their effect on the CJEU's decision to leave a legal question unresolved when the AG recommends doing so.

Results for Models 6 to 9 are displayed in Table C.2. We can see that neither the main effects of the variables discussed above nor their interactions with the variable *AG recommendation* are distinguishable from zero. While the evidence presented in the main manuscript suggests that the CJEU is less likely to follow the advice by its Advocate General to leave a legal question unresolved

as additional Member States signal resistance against jurisprudence limiting their national autonomy, there is no evidence suggesting that the Court is more receptive to the views of politically powerful Member States when making this choice. Further, there is no indication that the CJEU considers the overall trend in positions argued by Member States in its decision to leave legal questions unresolved, nor is the Court more or less likely to follow the Advocate General's advice when at least two Member States disagreed on their preferred direction of the Court's jurisprudence.