

# **Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis**

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## **Abstract**

The preliminary reference procedure has been crucial in the legal integration of the Europe Union. The procedure allows the European Court of Justice (ECJ) to involve national courts in the application and enforcement of European law. In this paper we analyze why the ECJ receives more requests for a preliminary reference from some member states than from others. While this is not a new question, only a few systematic comparative tests have been presented to date, and these display important theoretical and methodological shortcomings. Theoretically, previous studies underestimate or neglect two intuitively plausible factors: country size and litigation rates. We argue that courts in bigger and highly judicialized countries send more references to Luxembourg. Methodologically, the quantitative design of existing comparative studies give a first indication of possible causal relationships, but several of the cases remain not well explained. We argue that country comparison is improved by analyzing necessary and sufficient conditions that highlight the particular combination of factors for each case. We apply a mixed quantitative and qualitative comparative analysis and test existing and new explanations for variation in the number of preliminary references from the fifteen old EU member states in the period from 1995 to 2006.

## 1. Preliminary references: the puzzle

The significance of the preliminary reference procedure in transforming national courts into European courts, and more generally, in the legal integration of Europe, can hardly be overestimated.<sup>1</sup> Most of the landmark judgments by the European Court of Justice (ECJ), situated in Luxembourg, were handed after a national court requested the Luxembourg judges, pending a national case, to give a judgment on the interpretation of European law in a preliminary ruling.<sup>2</sup> The preliminary reference procedure provides that domestic courts in EU member states can, and in some cases must, refer questions on the interpretation or the validity of European law to the ECJ in Luxembourg.<sup>3</sup> The division of labor between the national courts and the ECJ is such that the national court establishes the facts and applies the law to those facts, while the ECJ restricts itself to interpreting European law or to ruling on the validity of secondary European law. It 'is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States'.<sup>4</sup>

The preliminary reference procedure thus provides an avenue for direct inter-court communication between national courts and the European Court of Justice. Article 234 of the EC Treaty, which defines the preliminary reference procedure, allows for 'the clock to be stopped': it gives the national courts the possibility to seek help from the ECJ in the interpretation and construction of EU law and it gives the ECJ the opportunity to intervene while the case is still pending before a national court. This interconnection between international and national courts is unique and is

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<sup>1</sup> See Weiler 1995; Alter 1998, 2000, 2009; Claes 2006.

<sup>2</sup> See Case 26/62 *Van Gend en Loos* [1962] ECR 1; Case 6/64 *Costa v. ENEL* [1964] ECR 585.

<sup>3</sup> The general provision providing for preliminary references is Art. 234 EC Treaty. The special procedure for preliminary references in Title IV of the EC Treaty is laid down in Art. 68 EC and restricts references to courts deciding in final instance. In the context of the third pillar, Art. 35 EU provides for a special preliminary reference procedure. In contrast to Art. 234 EC and Art. 68 EC the ECJ has jurisdiction only in so far as the member state has accepted it in a declaration, specifying whether it opts for a system where all courts can make references or only courts against whose decision there is no appeal. Seventeen member states have accepted jurisdiction of the ECJ under Art. 35 EU, three have denied it (Denmark, Ireland and the UK) and seven member states have made no declaration at all. The data are available on the ECJ's website, see <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigreur/art35.pdf>.

<sup>4</sup> Information Note on references from national courts for a preliminary ruling, 2005, 1.

fundamentally different than appeals procedures that exist in other international organizations, such as the Council of Europe, where the European Court of Human Rights cannot directly interfere in a case: a case can only be brought before it once all local remedies have been exhausted and the domestic highest court has decided a case.

The system depends on the cooperation of the national courts and their willingness to refer. Parties do not have a right to a reference: it is ultimately for the court to decide. There are two kinds of references: questions of interpretation of European law, and questions concerning the validity of secondary European law. Any court or tribunal *may* refer a question to the Court on the interpretation of a rule of European law if it considers it necessary to do so in order to resolve a dispute brought before it. However, courts or tribunals against whose decisions there is no judicial remedy under national law *must*, as a rule, refer such a question to the Court, unless the Court has already ruled on the point (known as ‘acte éclairé’), or unless the correct interpretation of the rule of Community law is obvious and would be the same for any court across the EU and for each of the language versions of the relevant provision (known as ‘acte clair’). When it comes to questions of *validity*, all national courts *must* refer a question to the Court when they have doubts about the validity of a European act, stating the reasons for which they consider that the Community act may be invalid. For reasons of uniformity, national courts are precluded from holding European law invalid or inapplicable.

**[Figure 1 around here]**

The preliminary reference procedure is generally hailed as the ‘jewel in the Crown’ of the ECJ jurisdiction.<sup>5</sup> Figure 1 shows the overall increase of the use of the preliminary reference procedure, from around a dozen cases per year on average during the 1960s to more than two hundred cases per year since the early 1990s. It is important, by the way, to notice that these numbers refer to cases where domestic courts actually make use of the preliminary reference procedure, but that this says nothing about the number of cases where courts *could or should have* done so and have not, or about the number of cases decided by these courts which involve issues of European law.

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<sup>5</sup> Craig and de Búrca (2008), 460.

When we look at the use of the preliminary reference procedure across member states, we find a wide variance. Whereas some member states refer only one or two cases annually on average to the ECJ others refer up to a few dozen cases. Figure 2 presents a box-plot of the number of preliminary references per year for the fifteen ‘old’ member states in the period from 1995 to 2006. The figure shows three groups of countries: a ‘top’ group of Germany and Italy with a median above forty references per year; a middle group of Austria, Belgium, France, Netherlands and the UK with a median around twenty; and a rest group of eight countries with a median below ten. The figure also shows that the use of arithmetic averages may give a misleading picture, as in the case of Spain where the 55 references in 1998 are a clear outlier. In Austria we see a steep increase after the first two years of EU membership, up to 57 references in 2001, followed by a strong decrease to maximum 15 references in the last four years.<sup>6</sup>

**[Figure 2 around here]**

What explains this variation? While this is not a new question, only a few systematic comparative tests have been presented to date, and these display important theoretical and methodological shortcomings.<sup>7</sup> Theoretically, previous studies underestimate or neglect two intuitively plausible factors: country size and litigation rates. We argue that courts in bigger and highly judicialized countries send more references to Luxembourg. In section 2 we give an overview of the main explanations that have been brought forward in the literature and also present the two new factors which we believe are better predictors of cross-national reference patterns. We argue that the country comparison is improved by analyzing necessary and sufficient conditions that highlight the particular combination of factors for each case. The empirical part of the paper evaluates existing and new explanations for fifteen EU member states for the period 1995 to 2006. We test these explanations in a mixed-method design, where we first run a multivariate regression analysis for the cross-section data set. This we do to compare our findings with those of previous studies. Subsequently we run a second, more qualitative comparative analysis, where we search for necessary and sufficient factors, or combinations of factors. We conclude the paper with a reflection on the added value

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<sup>6</sup> See Appendix 1 for an overview of the number of references between 1995 and 2006 for the fifteen member states that we analyze in this paper.

<sup>7</sup> See Stone Sweet and Brunell 1998; Carrubba and Murrain 2005.

of a mixed-method design and also with a more general reflection on the use of the preliminary reference procedure.

## **2. Explaining variation**

What explains the cross-country variation in the use of the Article 234 procedure? Why are courts in some states referring more questions to the ECJ than in other states?

Before going to the existing explanations we make three preliminary remarks about the question why national judges would refer a question to Luxemburg, or why not. First, a judge making a reference may have different purposes in mind. She may simply inquire about the correct interpretation of a provision of European law or question its validity; she may even second-guess the ECJ's previous case law, or ask the ECJ for further clarifications. References can be made in various types of procedures: between an individual and a public authority (mainly in administrative law cases, and also criminal cases), between public authorities among themselves or between private parties (civil cases). European law may be invoked as a sword or as a shield.

Second, even though the preliminary reference procedure can be seen as a decentralized compliance mechanism, to the extent that the procedure leads to the enforcement of European law and the sanctioning of incorrect application of European law by national authorities, a referring judge may not necessarily aim to achieve compliance.<sup>8</sup> Domestic courts use this form of judicial dialogue to solve questions of interpretation and these questions may not necessarily be related to enforcing European law vis-à-vis states. Low reference rates, for example in Scandinavian countries such as Denmark, Finland and Sweden, may imply that courts do not need the assistance of the ECJ to interpret EU law. This is not necessarily a sign of non-compliance or defiance. On the contrary, it is more and more agreed that national courts should assume responsibility as European courts: in a mature system, not all interpretation issues should be dealt with by the ECJ. Vice versa, high reference rates do not necessarily prove high compliance rates, nor does it prove that the courts perform their duties as European judges well. Frequent

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<sup>8</sup> Tallberg 2003, pp. 620-623; Stone Sweet and Brunell 1998, pp. 67.

referencing may, on the contrary, mean that the national courts do not take full responsibility and refer any question of European law, even those which they may (and should) answer themselves. What counts is that the right questions are asked, at the right time, with the right purpose in mind. This may be illustrated by the Italian case where only 42% of all questions referred to Luxembourg ended in a judgment by the ECJ. This is well below the average 61% for all EU members in the period 1961-2006.<sup>9</sup>

In addition, what matters is what the courts do with the judgment of the ECJ on a reference, and whether they duly take it into account when handing the final decision in the case, in other words the ‘application’ of EU law to the facts of the case. It is difficult to get the complete picture of compliance by national courts with the ECJ judgments on preliminary references. As explained above, the ECJ only rules on the interpretation of EU law, while it remains the task of the national courts to solve the dispute before them. The ECJ invites the national courts making a reference to be informed on the action taken upon its ruling in the national proceedings and, where appropriate, a copy of the national court's final decision.<sup>10</sup>

Thirdly, the backlog and case overload in turn put the quality of the judicial work at risk, as well as the consistency of the ECJ’s case law. As a consequence, national courts may well have good reasons not to make a reference, in cases where they could (or

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<sup>9</sup> See Stone Sweet and Brunell 2007. From the 777 Italian cases in this database 11 were ended by a Court order and deemed inadmissible, while 180 cases were removed from the register, which usually happens when the Court’s registry advises that questions have been answered already in other cases.

<sup>10</sup> The Association of Councils of State and Supreme Administrative Jurisdictions began in 2003 to publish these decisions in two databases, one on the basis of data collected by the participating national courts (Jurifast) and one on the basis of information supplied by the ECJ (dec.nat.). The latter is a reference database, providing the dates of decisions, the courts which took them, details of their publication (if applicable), reviews and reports pertaining to them, and so forth. However, the database does not provide direct access to the documents themselves, which will have to be sought or obtained elsewhere. See [http://curia.europa.eu/en/coopju/apercu\\_reflets/lang/index.htm](http://curia.europa.eu/en/coopju/apercu_reflets/lang/index.htm). Jurifast does contain summaries of decisions. The special feature of this system is that members enter full details of the decision on the site, together with a brief description of the subject and any references to the provisions of Community law concerned. They then submit a summary of the decision in either French or English, with a link to the full text of the decision in the original language.

must!) do so.<sup>11</sup> This does not always have to do with insurgence on the part of those courts or bad faith. In some cases, courts and the parties before them prefer closure of the case over the certainty that an issue of European law is correctly decided.<sup>12</sup> Domestic courts may also have had a bad experience with a previous reference, where the ECJ's answer was not very helpful. A hesitation to send a reference to Luxembourg may also have to do with built-up experience and confidence in applying European law. In a mature decentralized judicial system, not all cases involving a European law element should end up at the ECJ, and the national courts can take responsibility to perform their function as European courts. This does, however, require knowledge and expertise in European law, sensitivity to the characteristics of European law and the manner in which it has been developed by the ECJ, and the ability to take on a European perspective reaching beyond the national legal order. In other words, neither the 'compliance' of national courts with their European mandate, nor the compliance of states with EU law more generally, should be measured solely against the number of preliminary references being made. Acting as a European court equally requires the responsibility to answer some questions on their own, without requesting the assistance of the ECJ for each and every problem of interpretation.<sup>13</sup> Indeed, the fact that the ECJ has the final say on the interpretation of EU law, does not imply that national courts should not have any role in the interpretation and construction of EU law.

Now that we have clarified more specifically the use of the preliminary procedure *in general*, the question remains what explains variation in the use of this procedure *between countries*. The puzzle discussed in this paper is far from new. Yet the comparative literature presents a mixed picture with sometimes contrasting arguments and contrasting findings (see Table 1). We group these different kinds of explanations in two sets of hypotheses: a group of institutionalist hypotheses that focuses on the

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<sup>11</sup> A distinction must be made here between lower courts, and those whose decision there is no judicial remedy available. While the former *may* make a reference, the latter *must* request a preliminary ruling if a provision of European law is unclear and is necessary to solve the case before them. There are exceptions, though, generally referred to as the *Cilfit* criteria: where the interpretation is clear beyond all doubts, or where the correct interpretation transpires from previous case law, these courts too are absolved from their duty to refer a question to the ECJ.

<sup>12</sup> Nyikos 2007.

<sup>13</sup> See the famous plea for restraint of the part of national courts (and the ECJ) by Advocate general Jacobs in Case C-338/95 *Wiener* [1997] ECR I-6495, also known as the pyjamas case.



domestic legal framework (legal doctrine and judicial review) and a group of functionalist explanations focuses on societal factors (importance of intra-EU trade and support for integration).

**[Table 1 around here]**

Some scholars have pointed particularly to the importance of whether a country has a monist or dualist legal culture and also at whether judicial review is accepted or not.<sup>14</sup> The traditional *legal doctrine hypothesis* states that more references will be made from monist countries than from dualist countries.<sup>15</sup> Under this hypothesis courts in monist countries, where there is a less strict separation between the domestic and the international legal order, and where it is not uncommon for courts to make use of non-national sources of law, find it easier to also accept the interference of a European court in a domestic case. Thus, it is not a coincidence that thirteen out of the first fifteen references made, came from Dutch courts. Of the six original member states, the Netherlands' legal order was most monist, and the power of the courts to apply international treaties and set aside conflicting national legislation had been incorporated in the Constitution in 1953. It has been demonstrated that the Dutch courts had not made use of the power to set aside domestic primary law for violation of international treaty provisions prior to Van Gend en Loos. In fact, the Dutch courts were probably pleased with the assistance from an international court in deciding whether a particular provision was one that could actually be applied.<sup>16</sup> Vice versa, so the explanation goes, courts in dualist states will prefer not to engage in a dialogue with a non-national courts, since they are not prepared to apply European law anyway. Thus, the Italian government intervening in *Costa v ENEL* argued that the ECJ should hold the preliminary reference inadmissible, since the judgment could not be of avail to the Italian judge, who in any case had to give effect to the Italian law, whether consistent with Community law or not.<sup>17</sup>

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<sup>14</sup> Alter 1996; Mattli and Slaughter 1998.

<sup>15</sup> Carrubba and Murrah 2005, p. 404.

<sup>16</sup> Claes and De Witte 1998.

<sup>17</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

The argument could however also go in the opposite direction: courts in monist countries would rather be less inclined to make references, since they already are experienced in interpreting and applying non-national law and do not need assistance. It must be remembered that national courts (and especially the lower ones) are not precluded from interpreting European law themselves. Vice versa, courts in dualist states which never apply international treaty provisions directly and are suddenly obliged to do so under their European mandate, may be more inclined to seek help from the ECJ since they have no experience with the interpretation and application of law beyond the state. This may be termed a *reversed legal doctrine hypothesis*: monist states on average should make fewer references than dualist states.<sup>18</sup>

The *judicial review hypothesis* states that countries that already have a form of judicial review within their national system are more likely to accept the consequences of judicial review inherent in the preliminary reference procedure. The argument runs as follows: For a court to accept to make a reference, it must also accept the power to declare national law which appears –after the preliminary ruling- to be inconsistent with European law null and void, or at least, to set it aside. It must, in other words, act as a review court. This is most problematic when the origin of the inconsistency is to be found in primary legislation, because in all member states, judicial review of primary legislation is either endowed to a specialized (constitutional) court, or it is prohibited. The judicial review hypothesis claims that in countries without a form of judicial review, the courts will make less references, and courts familiar with judicial review will send more questions, since the preliminary reference procedure and the power to review inconsistent national law that go with it, are considered a natural extension of preexisting powers.

Yet, in this case also, there may be alternative expectations: courts in member states without a tradition of judicial review, but willing to assume the mandate to review powers in the light of European law, may make references in order to join forces with an international court, which may give them confidence to conduct such novel review. This may be termed the *reversed judicial review hypothesis*.

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<sup>18</sup> See Carrubba and Murrah 2005, p. 405, who focus on litigant behavior in support of this hypothesis.

The main problem with the judicial review hypothesis, formulated either way, is that it does not sufficiently distinguish between the specific courts and their role in the domestic systems. Carrubba and Murrah rightfully point at the need to distinguish between abstract and concrete judicial review.<sup>19</sup> Abstract judicial review relates to the review of laws ‘in abstracto’, so not in the context of a concrete case or controversy.<sup>20</sup> Abstract review, if it exists at all, is exercised only by constitutional courts (in Austria, Germany, Greece and Italy), a constitutional council (France) or Supreme Court (Ireland). Concrete review takes place in the context of litigation and a specific case and can be exercised both by constitutional courts and by higher and lower ordinary courts.

Carrubba and Murrah hypothesize two effects: 1) *states with only abstract judicial review make less references* than those without abstract review; 2) *states with concrete judicial review make more references* than those without concrete review.<sup>21</sup> We have problems with both hypotheses. The problem of the first hypothesis is that there is in fact only one EU15 country –France– that has *only* abstract review and no concrete review of the constitutionality of legislation. This is clearly not enough basis for a more general hypothesis. All other countries with abstract review also have some form of concrete review. Moreover, given that the preliminary reference procedure always revolves around specific cases we do not see why having a tradition of abstract review or not would have an effect on the likelihood of sending references to Luxembourg.

With regard to the second hypothesis, on concrete review, we think it is useful to distinguish further between countries where concrete judicial review is exercised by constitutional courts, countries where this is done by ordinary courts (including the Supreme Court in Ireland), and countries where concrete judicial review does not exist. From a point of view of judicial empowerment, the preliminary reference procedure clearly offers the strongest incentive to judges in countries which fall in the latter category and we would therefore hypothesize that judges in states with no concrete review make relatively many references. However, from the same judicial empowerment perspective we would expect the preliminary reference procedure to offer

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<sup>19</sup> Carrubba and Murrah 2005, p. 403-404.

<sup>20</sup> See Carrubba and Murrah 2005, p. 404. In contrast with their definition, abstract judicial can take place not just before (a priori), but also after (a posteriori) a law has been implemented.

<sup>21</sup> Carrubba and Murrah 2005, p. 404.

a greater incentive to judges in countries where concrete judicial review is the prerogative of constitutional courts than to those in states with concrete review by ordinary courts. Constitutional courts may also serve as a catalyst for ordinary courts (particularly highest courts) to use the preliminary reference procedure when they are expected to. In Germany, for instance, the Constitutional Court has proved unwilling to make references itself, but it also considers that an unmotivated refusal to make a reference by 'ordinary' highest German courts infringes the constitution.

Stone Sweet and Brunell dismiss these institutionalist explanations –without a systematic test: '(...) it is obvious that distinctions between monist and dualist systems, and between those systems which permit or forbid judicial review, have no systematic effect that is measurable by our data.'<sup>22</sup> Carrubba and Murrah rightly point out there is no reason why one would not test for these explanations, given that there are longstanding theoretical arguments supporting these institutionalist explanations (even if they may be hypothesized to work in different directions, as in the case of legal doctrine).<sup>23</sup> In contrast with their initial expectations, and most of the literature, however, Carrubba and Murrah find that for the two institutionalist explanations the assumed relationship is negative rather than positive: both monism and abstract judicial review overall lead to less, rather than more references.<sup>24</sup> We come back to these findings in the empirical part of our paper.

Moving on to functionalist explanations, Stone Sweet and Brunell (p. 95) argue on the basis of their transaction-based theory of integration that the importance of *intra-European trade* for a country best predicts the number of preliminary references by courts in that country. They find statistical support for their hypothesis and conclude that 'the evidence strongly suggests that the European legal order has been constructed as a self-sustaining, self-organizing system.'<sup>25</sup> Carrubba and Murrah corroborate the hypothesis that member states with higher levels of transnational economic activity are

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<sup>22</sup> Stone Sweet and Brunell, p. 1998: 73.

<sup>23</sup> Carrubba and Murrah 2005, p. 416.

<sup>24</sup> Carrubba and Murrah 2005, p. 411.

<sup>25</sup> Stone Sweet and Brunell 1998, p. 95.

more likely to make preliminary references to the ECJ.<sup>26</sup> Although we agree that the involvement of private litigants has been crucial for the success of the preliminary reference procedure, we suggest two more intuitive factors: *population size* and *litigation rates*. First, bigger member states will make more references than small member states simply because there are more court cases as such and also more courts and judges than can refer questions. Second, some states are more litigious than others, due to legal culture, the availability of systems of alternative dispute resolution, or legal aid, which is why we propose the introduction of a relative factor: the number of litigious cases per capita.<sup>27</sup> In order to capture transnational activity we introduce a third variable which measures the ratio of intra-EU trade to GDP. Although population size is included as a control variable by Stone Sweet and Brunell,<sup>28</sup> the litigation hypothesis has not yet been tested in previous studies. In the remainder of this paper we test these various hypotheses.

### 3. Method & Data

In this paper we apply a mixed design of both quantitative and qualitative comparative methods to explain the variation in the use of the preliminary reference procedure by domestic courts. While the combination of quantitative analysis and case study analysis is seen fairly frequently in Europeanization studies,<sup>29</sup> the combination with comparative methods such as Boolean or fuzzy-set analysis is rare.<sup>30</sup> The limited use of these comparative methods is surprising given that they are developed for small to medium-size datasets and seem well-suited for Europeanization studies.<sup>31</sup>

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<sup>26</sup> Carrubba and Murrah 2005, p. 411. They also find that public *support for integration* and general *political awareness* among the population are significant predictors for a high number of references. In the latter case we are not convinced that there is a causal relation between the frequency of discussing political matters and the frequency of referrals to the ECJ and we exclude this factor from our analysis.

<sup>27</sup> See Alter 2000: 509.

<sup>28</sup> Stone Sweet and Brunell 1998. They find no significant effect of population size.

<sup>29</sup> See Börzel et al 2008; Mastenbroek 2007.

<sup>30</sup> See Kaeding 2007 for an exception.

<sup>31</sup> See Haverland 2007, p. 69.

As a first step, we analyze the hypotheses by structuring our data as a cross-section data. We aim to capture the relative effect each of the predictor variables has on the degree to which preliminary references are issued. For this purpose we run an ordinary least square multivariate regression analysis and report the standardized coefficients.<sup>32</sup>

We follow up on this quantitative analysis with a Boolean analysis of necessary and sufficient conditions, based on the comparative method developed by Ragin.<sup>33</sup> Our aim here is to look for specific configurations of variables (or ‘conditions’ as they are termed by Ragin) that explain why some countries refer relatively many questions to the Court in Luxembourg, and others relatively few. What is important is that this comparative method is explicitly non-probabilistic, which means that rather than searching for variables that ‘independently’ explain a part of the variation on the dependent variable, Boolean analysis aims to detect necessary and sufficient conditions (or combinations of conditions) that lead to the presence or absence of the outcome. The example of monism may suffice. Carrubba and Murrah find that monism has a negative and significant effect on the dependent variable and conclude that ‘disputes over the applicability of EU law arise more frequently in dualist systems than in monist systems.’<sup>34</sup> However, when we look at the different countries in their study and their legal doctrine, we see that there are monist countries with relatively many preliminary references (Belgium, France and the Netherlands) and also dualist countries with relatively few references (Ireland and the Scandinavian countries). In other words: how strong is the empirical basis for the reversed legal doctrine hypothesis? By showing under which conditions statistical predictors ‘work’ and also under which conditions statistically insignificant variables actually may become relevant for explaining one or more cases, we use Boolean analysis to refine the outcome of our time series analysis.

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<sup>32</sup> However, the Durbin Watson statistics of this analysis indicate that there may be serial autocorrelation. To cross-check the validity of the standard errors, t and F values and the confidence intervals we ran a Prais-Winsten AR(1) regression to correct for serial autocorrelation. In this analysis we also find the same variables to be statistically significant as in the OLS analysis.

<sup>33</sup> See Ragin 1987; Rihoux and Ragin 2008.

<sup>34</sup> Carrubba and Murrah 2005, p. 412.

A word on the data. In both analyses we use data for the fifteen countries that were member of the EU from 1995 to 2006.<sup>35</sup> For reasons of comparability we focus on the period from 1995 to 2006, where we have data for all fifteen countries over the twelve year period.<sup>36</sup> We exclude the ten states that joined the EU in 2004 because courts in only a few of these countries have referred only a few questions to the ECJ. This is generally in line with older members where domestic courts also needed a few years to adapt. Our dependent variable is the number of references per year per member state. These numbers are published at the CURIA website in the annual reports on the judicial activity of the Court of Justice.<sup>37</sup> For the multivariate analysis we use absolute numbers per year, for the qualitative comparative analysis we use the median number of references per year per member states over the period 1995-2006 (see Table 2).<sup>38</sup>

For population size we use Eurostat data on resident population per country per year.<sup>39</sup> Although we prefer population size as a proxy for country size over GDP for theoretical reasons, as populous countries have more potential litigants and thus more opportunities to refer cases to the ECJ (all other things being equal), it should be noted that statistically this choice is relatively unimportant given the high correlation between population size and GDP.

For litigation rates we make use of data from a recent study on European judicial systems by the European Commission for the Efficiency of Justice, of the Council of

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<sup>35</sup> Carrubba and Murrah use a dataset that has data up to mid-1998. An updated version of this dataset is available via the Legal Task Force at the NEWGOV website. See Stone Sweet and Brunell 2007.

<sup>36</sup> Carrubba and Murrah analyze the same fifteen countries, but their analysis covers the period from 1970 to 1998. This means that they only have data for the first four membership years of Austria, Sweden and Finland, who acceded to the EU in 1995. Stone Sweet and Brunell exclude these three countries.

<sup>37</sup> Data refer to preliminary references based on Article 177 of the EC Treaty (now Article 234 EC), Article 35 (1) EU, Article 41 ECSC, Article 150 EA, 1971 Protocol.

<sup>38</sup> We reflected on using relative numbers in order to correct the dependent variable for population size, for example by calculating the number of references per 100.000 inhabitants, the disadvantage of that approach is that it greatly inflates the numbers for small countries, particularly Luxembourg. Instead we use population size as an independent variable in the time series analysis and as causal condition in the qualitative comparative analysis.

<sup>39</sup> Source for population: Eurostat database: Population and Social Conditions.

Europe. Figures refer to the number of first instance civil and administrative litigious incoming cases, per 100.000 inhabitants in 2004.<sup>40</sup>

For intra-EU trade Stone Sweet and Brunell, as well as Carruba and Murrah, calculate the total volume of both import from and export to EU countries.<sup>41</sup> One important problem with this measure is that intra-EU trade correlates highly with both GDP and population size, which means, theoretically, that the measure for intra-EU trade as used by Stone Sweet and Brunell, as well as by Carruba and Murrah, should be seen as a proxy for country size. Statistically, this means that it is very difficult to maintain that intra-EU trade ‘widely outperforms’ rival variables GDP and population.<sup>42</sup> Intra-EU trade, GDP and population explain almost equally strong the variance in numbers of preliminary references. To solve this problem we introduce, next to population size, a new measure for the *relative* importance of European trade, which we calculate as the ratio of intra-EU trade divided by GDP.<sup>43</sup>

For the institutional variables we include one dummy variable for legal doctrine, which takes the value one if a state has a monist tradition and zero for a dualist tradition, and three dummy variables for the presence of different forms of judicial review.<sup>44</sup> For legal doctrine, we score countries as monist (MONI) when a clear doctrinal acceptance of the applicability and primacy of international treaty provisions over national law enforceable in courts. According to our scores seven out of fifteen countries have a tradition of monism (see Table 2).

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<sup>40</sup> CEPEJ 2006, p. 89. See also CEPEJ 2008, p. 132 for an overview of data from a 2006 survey. Unfortunately these more recent data only refer to litigious civil cases and cannot be compared to the 2004 data, which also include data from administrative proceedings.

<sup>41</sup> Source for intra-EU trade: Eurostat Statistical Books: External and intra-European Union trade Statistical yearbook.

<sup>42</sup> Stone Sweet and Brunell 1998, p. 75.

<sup>43</sup> Source for GDP: World Development Indicators. In contrast with CM we do not include GDP per capita in the analysis.

<sup>44</sup> Carruba and Murrah do not include the raw scores for these institutional variables in their paper. This means that it is not possible to check their scores with ours and hence to know whether our results may differ with theirs due to different scoring.



For judicial review, we distinguish between abstract judicial review (ABJUDREV) and two kinds of concrete judicial review. For concrete judicial review we differentiate between countries where this power is exercised by constitutional courts exclusively (CONJUDREV1), as in Germany, and countries where this is done by ordinary courts (CONJUDREV2), as in Scandinavian countries where we find a decentralized system of constitutional review. In all countries except France, Netherlands and UK, either constitutional courts or ordinary courts have concrete review powers, in other words the power to review the constitutionality of legislation in force in the context of a concrete case brought before them. However, even in the Netherlands and France where in principle courts do not have the power to annul primary legislation that violates constitutional law, they do have such powers in the light of international law based on their monist traditions. In the UK courts have a limited right of judicial review based on the Human Rights Act.<sup>45</sup>

**[Table 2 around here]**

We measure net support for European integration, similar to Carrubba and Murrah, as the difference between the percentages of people that see EU membership as a ‘good thing’ and a ‘bad thing’ for their country.<sup>46</sup> Note that in occasional years, for Sweden and the UK, these calculations produce negative numbers when there are more people who see EU membership as a bad thing than there are people who see membership as a good thing. For many countries the numbers fluctuate significantly and the range between low and high numbers can be quite large (>20), as in the case of Belgium where we see a decline of net support from 62 in 1995 to 24 in 1997, and a subsequent ‘recovery’ to 67 in 2004.

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<sup>45</sup> This cannot lead to the courts declaring such law null and void or setting it aside: the higher courts can issue a declaration of incompatibility. Such declaration has no direct impact on the continuing validity of the law, but triggers a power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights.

<sup>46</sup> Source for net support: Standard Eurobarometers 43 (1995) – 66 (2006), Fall Surveys. See Carruba and Murrah 2005, p. 407.

#### 4. Analysis

As outlined in the previous section we start with a quantitative analysis of a modified set of hypotheses derived from previous studies. Table 3 presents the results of cross-sectional data with OLS regressions. This analysis we run for a model with four functionalist and three institutionalist variables. The results of the model show that of the predictor variables two of the functionalist variables have the strongest impact: population size and litigation rates. Both these variables are statistically significant and the standardized coefficient is positive. This means the larger the population of a country the more likely this country will have a high number of preliminary references. Also, a large incidence of litigation rates tends to correlate with a high number of preliminary references. The functionalist variable 'support for EU integration' is also statistically significant, and has a positive effect. The other functionalist variable, intra-EU trade to GDP ratios, is not statistically significant.

Of the institutionalist variables, statistically significant are the following two institutional variables: abstract judicial review and legal doctrine (monism). In line with the findings of Carrubba and Murrah, both coefficients are negative. This means that the presence of these institutional variables tend to lead to fewer preliminary references. When looking at the fit of the overall model we see that around sixty six percent of variance between countries in terms of the number of annual preliminary references is explained by the independent variables.<sup>47</sup>

**[Table 3 around here]**

Although the previous analysis is certainly useful, particularly in terms of determining the relative explanatory power of individual variables, it, however, may not give us the full picture. Perhaps the causal relationships of the phenomenon we are studying may not neatly adhere to a linear logic that regression analysis is geared to. For example, even though both population size and litigation rates clearly have strong explanatory

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<sup>47</sup> We also ran the model with lagged independent variables and did not find a significant improvement of the overall fit of the model. This perhaps may be due to the fact that there is not a lot of variation of the variables across time. The institutionalist measurements are invariant across time and the changes in the functionalist variables across the years are marginal (for instance population size or EU trade).

power *in general*, neither all big countries (think of Spain) nor all countries with high litigation rates (think of Portugal) have high reference rates. Also, monism may *in general* have a negative effect, but we know that there are also monist countries with many references (Belgium, France, the Netherlands) and dualist countries with few references (Ireland and the Scandinavian countries). What we need to do, after analyzing the relative strength of the different variables, is to specify the conditions under which these explanatory factors work. We do this, as explained above, on the basis of a Boolean analysis where all explanatory conditions as well as the outcome are dichotomized based on the threshold levels included in Table 2 (the four institutionalist conditions are already dichotomized). These thresholds are generally set around the median value, and thus dividing our population in half, but sometimes a ‘natural gap’ in the data may also lead us to place the threshold in such a way that the population is split well below or above the median value (we use the Thresholdsetter function in the Tosmana program to detect these natural gaps in the data).

On the basis of this dichotomized data matrix the software constructs truth tables where each line represents a logically possible combination of conditions. This means that a truth table with only two conditions will have four rows ( $2^2$ ), with three conditions eight rows ( $2^3$ ), etc. As our dataset consists of fifteen countries, and to avoid many empty truth table rows (combinations which are not represented by one or more empirical instances), we only use models with a maximum of four conditions, or sixteen logical combinations. In this paper we make two truth tables: one of the four functionalist variables and one of the four institutionalist variables. Note that these two analyses, in contrast with the time series analysis, cannot be used to test the relative explanatory strength of a model. Rather, these two qualitative comparative analyses are used to see how countries group within these two sets of causal conditions and how the different conditions may be logically ‘minimized’ to explain an outcome. By definition each of the truth tables will have at least one empty row, given that there are sixteen rows and only fifteen cases, and moreover some rows will be covered by more than one country. These empty rows are called ‘logical remainders’ and are represented by a white field in

the truth table Visualizers. For reasons of space we only show the minimal formulae which result from minimization with inclusion of logical remainders.<sup>48</sup>

**[Figure 4 around here]**

Figure 4 visualizes the truth table for a model with four causal conditions: support for integration, intra-EU trade ratio to GDP, litigation rates and population size. It shows that twelve of the sixteen logical combinations are represented by one or two countries and that there are five logical remainders. The horizontal rectangle in the centre represents countries with high litigation rates and the vertical rectangle represents large countries. The different marking (0 or 1) of each cell refers to the outcome: the darker cells are countries with low reference rates (e.g. DK, FI, SE, etc.) and the lighter ones are combinations with high references rates (e.g. DE, IT, etc.).

When minimizing the truth table for the four functionalist conditions the software produces the so-called minimal formulae stated above. Not surprising, the combination of high *litigation rates* with large *population size* (LITIGAT{1}\*POP{1}) leads to a high number of references. What is more interesting is that we can now specify under which conditions countries that do not have both high litigation rates and a large population may still make many references. In other words, how can we explain the outcome for Austria and Belgium (small country but high litigation rates) and France and UK (large countries but low litigation rates)? The minimization shows that *support for integration* is crucial in combination with population and countries with a large population make relatively many references if there is relatively little support for the integration process. High *intra-EU trade ratio* is important in combination with high litigation rates.

Figure 5 visualizes the truth table for a model with the four institutionalist conditions: monism, abstract judicial review, concrete judicial by constitutional courts, and concrete judicial review by ordinary courts. The four empty cells in the centre of the Figure indicate that there are no countries with concrete judicial review by both constitutional

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<sup>48</sup> When including logical remainders the software assumes an outcome for truth table rows which are not represented by empirical instances (see Rihoux and De Meur 2008 for a textbook explanation).

courts and ordinary courts (which results from the judicial hierarchy in systems with constitutional courts). In fact, seven out of sixteen logical combinations do not exist within the group of the old fifteen member states.<sup>49</sup>

Minimization for the 1 outcome shows that all (three) countries where concrete judicial review permitted by neither constitutional courts nor ordinary courts have relatively high reference numbers (FR, NL, UK). Concrete review for constitutional courts in combination with dualist legal systems (AT, DE, IT) also leads to relatively high reference numbers.

**[Figure 5 around here]**

When we minimize for the 0 outcome and as already indicated by all countries which fall in one of the cells of the vertical rectangle in the center of Figure 4, it appears that all (five) countries that have concrete judicial review by ordinary courts have low reference rates.<sup>50</sup> In other words, the presence of concrete judicial review by ordinary courts is a *sufficient* condition for a relatively low number of references.<sup>51</sup>

## 5. Conclusion

What explains the use of the preliminary reference procedure? In this paper we tested a number of explanations, derived from the literature, and found that first of the institutionalist variables abstract judicial review and legal doctrine (monism) matter. Additionally, the functionalist variables, size, litigation rates and support for European integration matter. While others have pointed at the importance of intra-European trade we argue that this explanation has been operationalized in such a way that it becomes a proxy for country size and big states simply refer more questions than small states. We

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<sup>49</sup> One logical combination {1,1,1,0} produces a contradictory outcome (C) because Spain and Portugal are countries with relatively low reference rates, but Belgium has relatively number of references.

<sup>50</sup> The minimal formulae for the 0 and 1 outcomes differ because of empty truth table rows.

<sup>51</sup> The software also produces a minimal solution to cover Luxembourg, but because that minimization uses a logical remainder that was already used for the minimization of the 1 outcome {0010}, this solution is left aside here. On contradictory simplifying assumptions, see Rihoux and De Meur (2008).

also found that high litigation rates, as a proxy for strong judicialization, are a significant predictor for high reference numbers. Having said that, these explanations cannot be seen as sufficient conditions for many references: there are big countries (Spain) and countries with high litigation rates (Portugal) that refer well below the median European number and there are small countries (Austria and Belgium) and countries with relatively low litigation rates (France, UK) that refer above the median. In order to explain these ‘outliers’ we show that it is useful to look beyond a linear regression model and to think in terms of configurations of factors. We found that population size only explains either in combination with high litigation rates or in combination with low net support for the integration process, and that high litigation rates only explain in combination with large population or in combination with high intra-EU trade to GDP ratios.

We also looked at institutional variables related to legal doctrine and judicial review. We found that countries without any form of concrete judicial review, and dualist countries with concrete review by constitutional courts, relatively often refer questions to the Court in Luxembourg. All countries with concrete judicial review by ordinary courts have relatively low numbers of preliminary references.

Of course, we acknowledge that other factors may also impact on the number of cases referred or not. One could think of the level of knowledge of European law, of practicing lawyers and advocates, and of judges, or the type of support the judges have with regard to research and documentation, and access to relevant materials. In some countries more than others, judges work under time pressure and have to meet targets, which they cannot meet if they ‘lose time’ making a reference.<sup>52</sup> Although clearly more difficult to operationalize for a systematic comparative study, these factors may also influence the number and type of questions referred, as well as their their quality.

Finally, having these findings in mind, what are the prospects of the preliminary reference procedure in the near future? Ultimately, it is for the courts themselves to decide whether or not they make a reference and the success of the procedure thus depends on the willingness of the courts to make the reference, and on their compliance

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<sup>52</sup> See European Parliament 2007, for the results of a survey among more than 2300 national judges.

with the ECJ judgments. In the past, the ECJ has always encouraged the national courts to make references, and has been extremely lenient in admitting them. The more references, the better, the message seemed to be. The Court has made it a policy not to review the opportunity of a reference. Today, many will agree that the preliminary reference procedure is in crisis: too many references are made and it takes too long for the ECJ to give judgment (on average 22 months). The ECJ's answer may also not be helpful to the national court making the reference: judgments are sometimes very cryptic and difficult to interpret and there may be a difficulty for the national court to translate the European outcome of the reference and to fit it into national law. The system has come under pressure for many reasons: the extension of European law into ever wider fields, the complexity and sometimes poor quality of European legislation, increased awareness of and expertise in European law on the part of counsel and national courts. It may be expected that reference rates will increase further as a consequence of enlargement, and legal uncertainty following Treaty amendment.

It seems fair to predict that the preliminary reference procedure will come under greater strain than it has over the past decades. The enlargement, the expansion of EU law to ever wider fields, and the impending extension by the Lisbon Treaty of the ordinary preliminary reference procedure, for example to Title IV EC on asylum, visas, and migration, will lead to more questions being referred. It is with good reason that the debate on the future of the European judicial system focuses on the preliminary references procedure and without adjustment the system may well collapse. Many solutions have been suggested, some of which already possible for by the current treaties: the transfer of certain categories of questions to the CFI, for instance, or a green light procedure,<sup>53</sup> procedural reform of the ECJ to enhance capacity, or a more restrictive jurisprudential approach of the ECJ curtailing the volume of preliminary rulings.<sup>54</sup> Some authors have gone further and have suggested limiting the competence to make references to only the highest courts within member states.<sup>55</sup>

Many of these proposals focus on the European Courts in Luxembourg. It has also been suggested, that the national courts should take their responsibility, and only make those

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<sup>53</sup> See Jacob 2004.

<sup>54</sup> See Lenaerts 2006.

<sup>55</sup> See Komarek 2006.

references that are relevant for the Union as a whole. Self-restraint on the part of the national courts themselves could decrease the number of references and such restraint could be encouraged by the ECJ in its case law and a more restrictive version of the Notice for national courts. Yet, this is probably not the right time for such a measure: the courts in the new member states are still in the process of adapting to the procedure, and if Lisbon enters into force, both the ECJ and the national courts will enter a new era, where EU law enters in new fields, raising new questions for judicial settlement, such as in fields of fundamental rights, criminal law, and asylum. A clear balance will have to be struck between the need for a sufficient level of uniformity, efficiency of the courts, protection of European rights of individuals, enforcement of European law and state compliance, and an efficient European judicial system.

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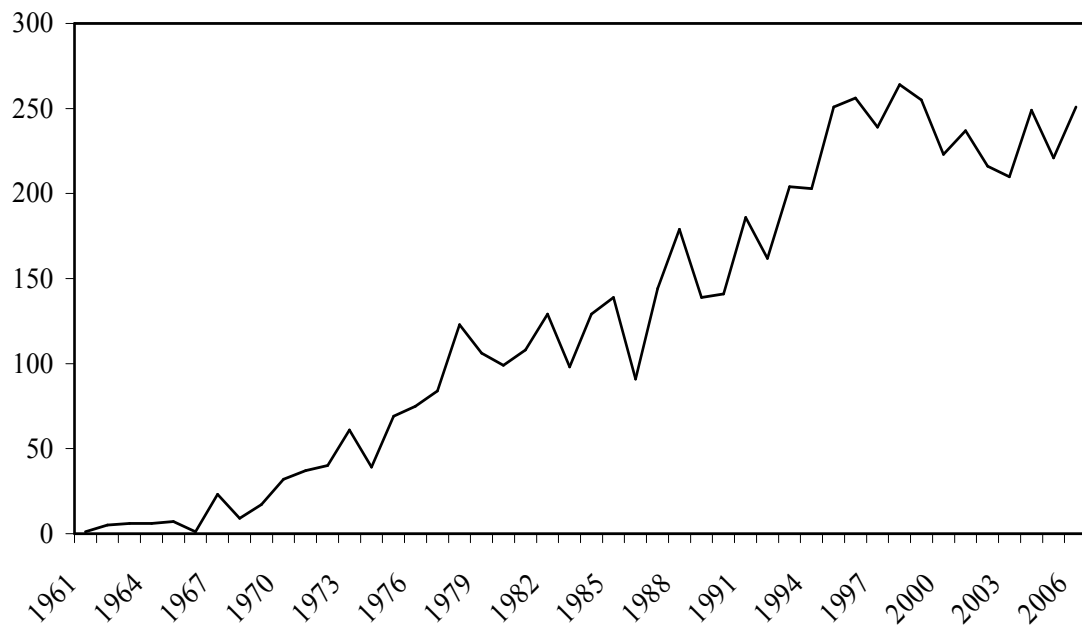
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**Appendix 1. Preliminary references, by EU-15 member state per year, 1995 - 2006**

	AT	BE	DE	DK	EL	ES	FI	FR	IE	IT	LU	NL	PT	SE	UK
1995	2	14	51	8	10	10	0	43	3	58	2	19	5	6	20
1996	6	30	66	4	4	6	3	24	0	70	2	10	6	4	21
1997	35	19	46	7	2	9	6	10	1	50	3	24	2	7	18
1998	16	12	49	7	5	55	2	16	3	39	2	21	7	6	24
1999	56	13	49	3	3	4	4	17	2	43	4	23	7	5	22
2000	31	15	47	3	3	5	5	12	2	50	0	12	8	4	26
2001	57	10	53	5	4	4	3	15	1	40	2	14	4	4	21
2002	31	18	59	8	7	3	7	8	0	37	4	12	3	5	14
2003	15	18	43	3	4	8	4	9	2	45	4	28	1	4	22
2004	12	24	50	4	18	8	4	21	1	48	1	28	1	5	22
2005	15	21	51	4	11	10	4	17	2	18	2	36	2	11	12
2006	12	17	77	3	14	17	5	24	1	34	1	20	3	2	10

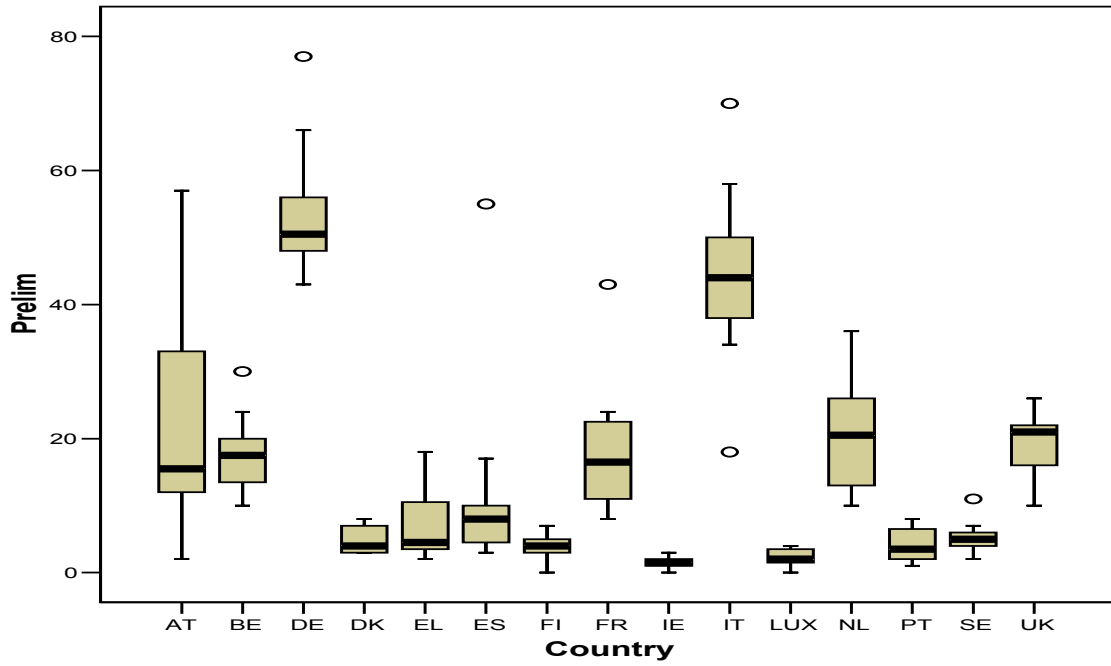
Source: CURIA Annual Reports

**Figure 1. Annual number of preliminary references in EU (1961-2006)**



Source: CURIA

**Figure 2. Annual number of preliminary references in EU15  
(1995-2006)**



Source: CURIA

**Table 1. Overview literature on explaining variance in preliminary references**

<b>Factors</b>	<b>Authors</b>	<b>Expectation</b>	<b>Finding</b>
<i>institutionalist</i>			
Monism	MS / A* SSB CM	Positive correlation No correlation Positive/negative correlation	No test No test Negative correlation
Judicial review	MS / A* SSB CM	Positive correlation No correlation Positive correlation	No test No test Negative correlation
- concrete	CM	Positive correlation	No correlation
- abstract	CM	Negative correlation	Negative correlation
<i>functionalist</i>			
Intra-EU trade	SSB CM	Positive correlation Positive correlation	Positive correlation Positive correlation
Diffuse support	MS SSB CM	Positive correlation No expectation Positive correlation	No test No correlation Positive correlation
Political awareness	CM	Positive correlation	Positive correlation
Population	SSB	No expectation	No correlation
Litigation	A**	Positive correlation	No test
GDP	SSB	No expectation	Positive correlation
GDP / capita	CM	No expectation	No correlation
Trade / GDP	CM	No expectation	No correlation

Literature: Alter 1996 (A\*); Alter 2000 (A\*\*); Carrubba and Murrah 2005 (CM); Mattli and Slaughter 1998 (MS); Stone Sweet and Brunell 1998 (SSB).

**Table 2. Data matrix**

	SUPINT	EUTRADGDP	LITIGAT	POP	GDPCAP	MONI	ABJUDREV	CONJUDREV1	CONJUDREV2	PRELIM
AT	18	0.55	9970	8.1	26,392	0	1	1	0	15.5
BE	45	1.17	6653	10.3	24,900	1	1	1	0	17.5
DK	38	0.33	2347	5.3	32,783	0	0	0	1	4
DE	38	0.46	3738	82.2	25,317	0	1	1	0	50.5
EL	52	0.22	1525	10.9	13,667	1	1	0	1	4.5
ES	55	0.34	1926	41.1	16,367	1	1	1	0	8
FI	19	0.40	181	5.2	25,508	0	0	0	1	4
FR	34	0.31	2862	61.1	23,992	1	1	0	0	16.5
IE	72	0.94	3228	3.9	28,150	0	1	0	1	1.5
IT	51	0.32	6159	57.4	20,992	0	1	1	0	44
LU	73	0.95	948	0.4	50,925	1	0	1	0	2
NL	64	0.81	5542	16.0	26,467	1	0	0	0	20.5
PT	48	0.49	5966	10.3	11,908	1	1	1	0	3.5
SE	6	0.44	482	8.9	28,525	0	0	0	1	5
UK	8	0.34	3011	59.1	24,758	0	0	0	0	21
TH	40	0.5	3500	15	24,000					10

SUPINT = net support for integration (average 1995-2006)

EUTRADGDP = intra-EU trade ratio to GDP (average 1995-2006)

LITIGAT = civil and administrative litigious cases (first instance), per 100,000 inhabitants (2004)

POP = population, in million inhabitants (average 1995-2006)

MONI = monism

ABJUDREV = abstract judicial review (by constitutional courts)

CONJUDREV1 = concrete judicial review by constitutional courts

CONJUDREV2 = concrete judicial review by ordinary courts

PRELIM = number of preliminary references per year (median 1995-2006)

TH = threshold for Boolean analysis

**Table 3. Predictors of Preliminary References**

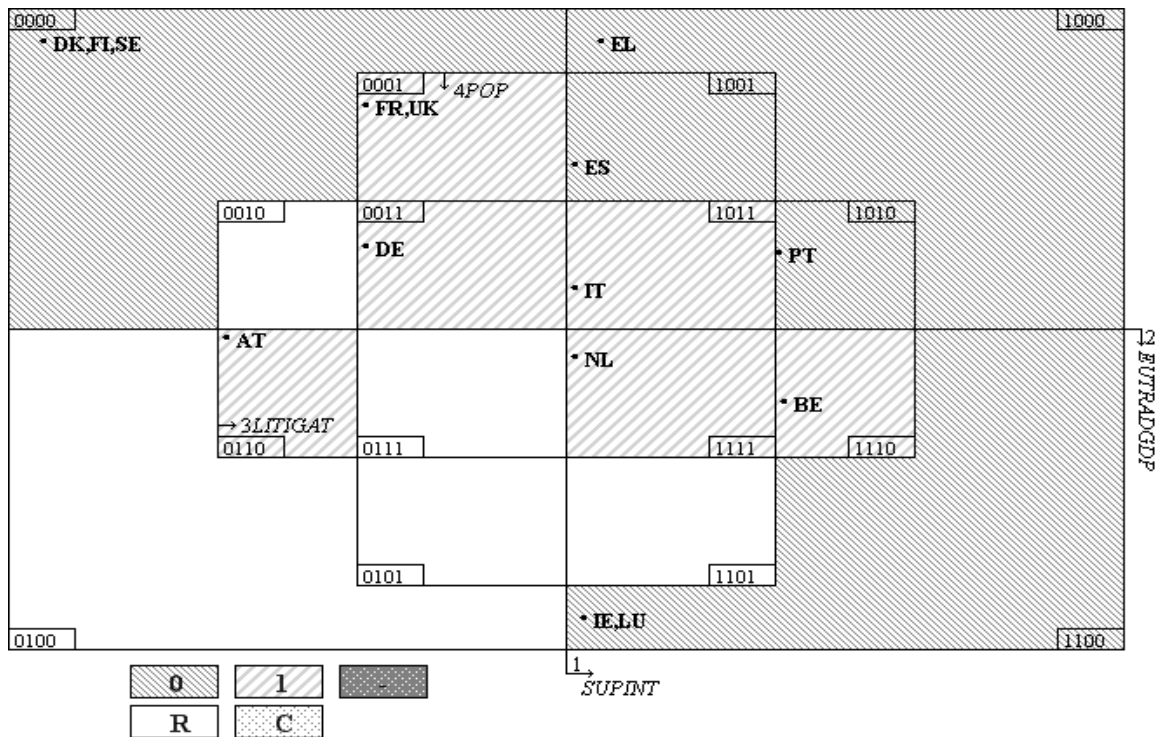
<b>Standardized Coefficients</b> (standard error)	
<i>Population</i>	.609*** (.000)
<i>Litigation Rates</i>	.452*** (.000)
<i>Support for EU</i>	.216*** (.000)
<i>Intra EU Trade</i>	-.098 (3.730)
<i>Monism</i>	-.186*** (1.727)
<i>Abstract Review</i>	-.239*** (2.050)
<i>Concrete Review</i>	.059 (1.939)
<i>Obs.</i>	176
<i>Adjusted R<sup>2</sup></i>	0.659

\* p<.05; \*\* p<.01; \*\*\* p<.001

EUTRADGDP data missing for Luxembourg 1995-1998; values were imputed from 1999.



Figure 4. Truth table Visualizer: functionalist conditions



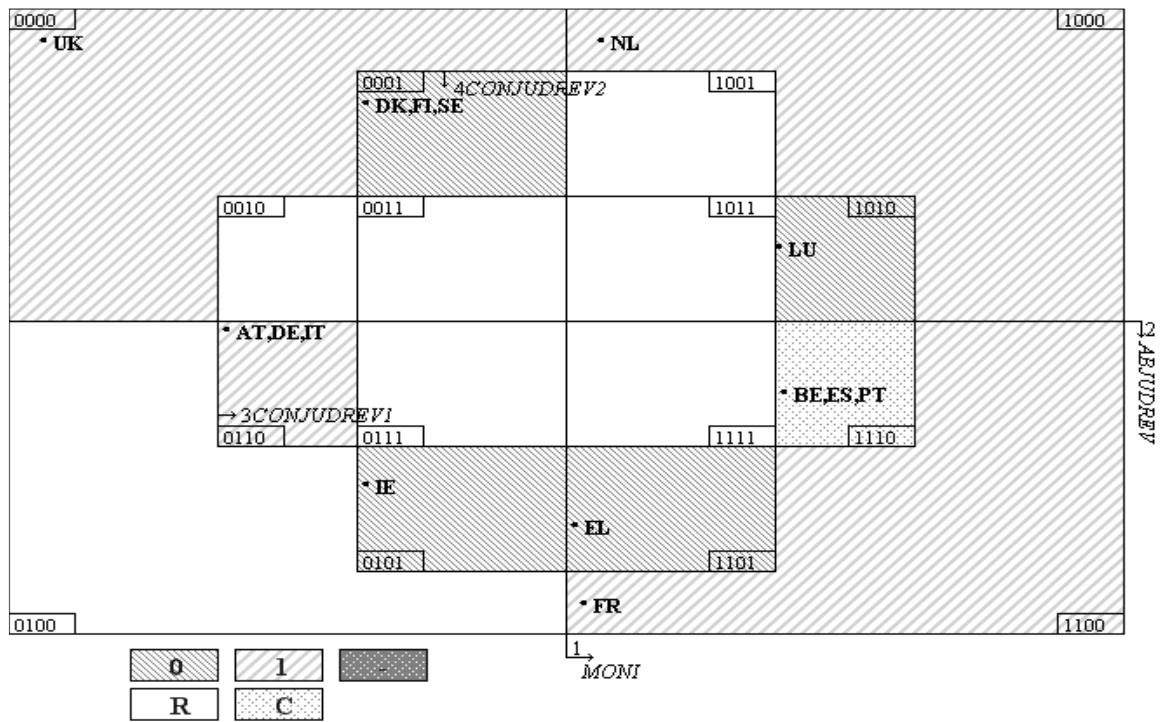
**Minimizing for outcome 1**

SUPINT{0}POP{1} +	EUTRADGDP{1}LITIGAT{1} +	LITIGAT{1}POP{1}
(DE+FR,UK)	(AT+BE+NL)	(DE+IT+NL)

**Minimizing for outcome 0**

SUPINT{1}LITIGAT{0} +	EUTRADGDP{0}POP{0}
(EL+ES+IE,LU)	(DK,FI,SE+EL+PT)

**Figure 5. Truth table Visualizer: institutionalist conditions**



**Minimizing for outcome 1**

$MONI\{0\}CONJUDREV1\{1\} +$	$CONJUDREV1\{0\}CONJUDREV2\{0\}$
$(AT,DE,IT)$	$(FR+NL+UK)$

**Minimizing or outcome 0**

$CONJUDREV2\{1\}$
$(DK,FI,SE+EL+IE)$