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National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure

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Abstract

The paper analyses the growth of references for preliminary rulings of the European Court of Justice as the equilibrium outcome of the optimising behaviour of litigants, who demand preliminary rulings, national courts, which are the gatekeepers of the process, and the European Court of Justice, which supplies the rulings. The observed pattern is attributed to economic and political factors, including intra-EC trade, the absence of a service charge in using the preliminary references system, the terms by which private litigants access the national courts, and the empowerment of national judges against their own national authorities brought about by the mechanism.

JEL classification: D72; D78; K33; K41

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1. Introduction

Legal integration in the European Community, the process of establishing a binding supranational legal system across the member states, has been the result of interactions

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between three sets of decision-makers, namely, litigants, national courts, and the European Court of Justice (ECJ). The evolution of Community law represents an extraordinary transformation of international treaties into a system of supranational constitutional governance within which the member states have surrendered a substantial part of their sovereignty. What factors explain this historically unprecedented development? What accounts for the success of the European Court of Justice in imposing this new legal order? Why have national courts accepted and enforced the rulings of the European Court of Justice as the "law of the land" often against opposition by the governments of the member states? What factors, if any, limit the ability of the ECJ to determine public policy in practice?

A fast-growing interdisciplinary literature has developed seeking to answer these questions. Legal scholarship typically focuses on the constitutional doctrine developed by the ECJ. It examines the relationship between members states and EC institutions and the effect of ECJ jurisprudence on the national legal orders, see Weiler (1999) and Tridimas (1999). Political science focuses on judicial behaviour and the relationship between the ECJ and national policy makers. Two opposing views have dominated this line of research. Intergovernmentalism emphasises the pre-eminent role of member states in the integration process. Broadly speaking, it views the ECJ as lacking the autonomy to act against the interests of its creators, particularly, those of the most powerful member states (Garrett, 1992, 1995; Garrett & Weingast, 1993; Keohane & Hoffmann, 1991; Moravcsik, 1991, 1993, 1995[2]). On the contrary, neofunctionalism (or supranationalism) considers, arguably more persuasively, that the ECJ represents the interests of a developing transnational polity and has significant autonomous power which can be used to pursue a pro-integration agenda and rule against powerful national interests (Burley & Mattli, 1993; Stone Sweet & Sandholtz, 1997; Stone Sweet & Brunell, 1998a, 1998b). Perspectives of rational behaviour have been hugely influential on both sides of this debate. Research has focused on the conflicting interests of the main players in the political-legal game, maximisation of benefits and choice under constraints.[3]

Few contributions, however, have come from the public choice tradition, even though the application of the principles of optimising behaviour and equilibrium on political outcomes can offer many useful insights into this line of inquiry.[4] The aim of this paper is to provide a systematic public choice perspective of the preliminary reference procedure. For this purpose, the process of legal integration is analysed as the equilibrium outcome of demand and supply factors originating from the interactions between private litigants, national courts, and the European Court of Justice, while each decision maker is modelled as pursuing its own interests subject to the relevant sets of constraints. We examine the effects of the following economic and political factors: the level of economic activity affected by EC legislation, the cost incurred by private litigants in accessing and using the national legal system, the preferences of national courts and their ability to act upon those preferences,

[2] Note, however, that the latter paper concedes that the ECJ may enjoy more autonomy than other writings in the intergovernmental tradition are prepared to accept.

[3] For recent more synthetic accounts and critical reviews using the calculus of political benefits and costs see amongst others Mattli and Slaughter (1995, 1998), Alter (1996, 1998, 2000), Garrett, Keleman, and Schulz (1998) and Tsebelis and Garrett (2001).

[4] Vaubel (1994), who offers a short public choice account of the ECJ, is a partial exemption.

and the ability of the ECJ to act as an independent agent. After describing the functions of the European Court of Justice, Section 2 records the evolution of the preliminary reference system into a mechanism of legal integration. Section 3 applies the framework of rational choice to examine systematically the role of the private litigants, the national courts, and the ECJ in forming the demand and supply for supranational legal adjudication. Section 4 employs spatial theory to investigate the range of discretionary powers of the ECJ upon the request of a national court for a ruling, a topic left unexplored by the existing literature. Section 5 contains concluding observations.

2. The functions of the ECJ and the growth of preliminary rulings

The Treaty of Rome did not provide for the establishment of a Supreme Court similar, for example, to that of the United States, which would be competent to hear appeals against decisions of national courts. This is hardly surprising since the Community was not born as a federation but rather as a sui generis supranational entity with an open-ended integrative potential. The authors of the Treaty, however, considered it imperative that there should be some mechanism to ensure the uniform application of Community law throughout the Member States. This is not only necessary to secure the rule of law and promote equal treatment among citizens but also makes good economic sense. Uniform interpretation of law reduces distortions of competition and promotes economic efficiency.[5]

Such unifying jurisdiction is given to the ECJ by Article 234 of the EC [previously 177]. This article enables the ECJ, on the request of national courts, to provide rulings on the interpretation and validity of Community law. Article 234(2) states that, where a question of Community law is raised before a national court or tribunal, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to provide a ruling. Article 234(3) provides that, where a question of Community law is raised before a national court against whose decision there is no judicial remedy, that court must bring the matter before the ECJ. Thus, Article 234 draws a distinction between lower national courts, which have a discretion to make a reference, and national courts of final instance, which are under an obligation to refer.[6]

Article 234 is the most important procedural rule of the Treaty. It facilitates dialogue between the national courts and the ECJ and provides the meeting point between Community

[5] This is illustrated by the following example given by Mancini and Keeling (1991). Suppose that there was no unifying jurisdiction having the final say on the interpretation of Community law. It might then be that the German courts decided that Article 141 [ex. 119] EC, which prohibits discrimination on pay on grounds of sex, had direct effect and gave rise to rights for citizens but the courts of all other Member States decided that it did not. That would lead not only to unequal treatment of Community nationals but also put German employers in a unique competitive disadvantage.

[6] For an analysis of the preliminary reference procedure, see Hartley (1998), Craig and De Burca (2002), Slaughter et al. (1998) and Tridimas (2003). Note that apart from Article 234 EC, Article 68 EC provides for a special preliminary reference procedure in relation to Title IV of Part Three of the Treaty concerning visas, asylum and immigration, which is concerned to courts of final instance. Also, Article 35(1) TEU provides for a somewhat different procedure in relation to matters falling within the Third Pillar (Police and Judicial Co-operation in Criminal Matters). These procedures are beyond the scope of this paper.

and national law. It can be said that it serves three inter-related functions. First, it ensures the uniform interpretation of Community law. Secondly, by entrusting to the ECJ the power to rule on the validity of Community acts where such validity is in dispute in national proceedings, it ensures the unity of the Community legal order and the coherence of the system of judicial remedies established by the Treaty.[7] Thirdly, it facilitates access to justice: it makes it clear that Community law is to be applied not only by the ECJ but also by national courts, thus enabling citizens to enforce their Community rights in the national jurisdictions.

Given that Article 234 puts the ECJ in a weaker position than a supreme court in a federation, it is perhaps ironic that the preliminary reference procedure has proved to be the main procedural route through which the process of the constitutionalisation of the Community has taken place. In a number of leading preliminary reference rulings, the ECJ has had the opportunity to establish the principles of primacy,[8] direct effect[9] and state liability in damages[10] and to lay down the fundamentals of the internal market. In practice, legal integration became possible upon establishing the doctrines of direct effect and supremacy of EC law, proclaimed and refined by the ECJ in the 1960s and the 1970s. Direct effect signals the capacity of Community law to grant enforceable rights to individuals directly, i.e. without the need to be implemented by national law. Primacy or supremacy means that, in case of conflict, Community law takes precedence over national law. The Court itself has referred to those principles as the "essential characteristics" of the Community legal order.[11] Combining the mechanism of preliminary references with the doctrines of primacy and direct effect enables individuals and companies to assert Community rights in national courts. Thus, individuals may use Community law both as a "shield", i.e. to defend themselves from action by the national authorities which infringes Community rights, and as a "sword", i.e. to challenge national measures on grounds of incompatibility with Community laws. Consequently, the preliminary reference procedure provides an opportunity for individuals and, indeed, national courts to question governmental action. The ability of a national government to control which cases are sent to the ECJ is thus undermined. Areas of policy that were thought to be under the exclusive remit of the Member States can now be considered, and indeed influenced, by the ECJ, bringing about a distinct loss of national sovereignty. In this manner, the system of preliminary ruling has been transformed into a mechanism of enforcing EC law and implementing legal integration. The preliminary reference system has led, in effect, to transfer of powers at three levels, namely, (a) from the governments of the Member States to the institutions of the Community; (b) from the executive and the legislature to the judiciary, and (c) from higher national courts to lower national courts.

[7] National courts do not have the power to declare a Community act invalid: see Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-ost [1987] ECR 4199. The ECJ may annul Community acts but does not have jurisdiction to rule on the validity of the founding Treaties from which the ECJ itself derives its powers.

[8] Case 6/64 Costa v. ENEL [1964] ECR 585; Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125; Case 106/77 Simmenthal [1978] ECR 629; Case C-213/89 Factortame [1990] ECR I-2433.

[9] Case 26/62 Van Gend en Loos [1963] ECR 1.

[10] Joined Cases C-6 and C-9/90 Francovich and others [1991] ECR I-5357.

[11] Opinion 1/91 Draft Agreement relating to the creation of the European Economic Area [1991] ECR I-6079, para 21.

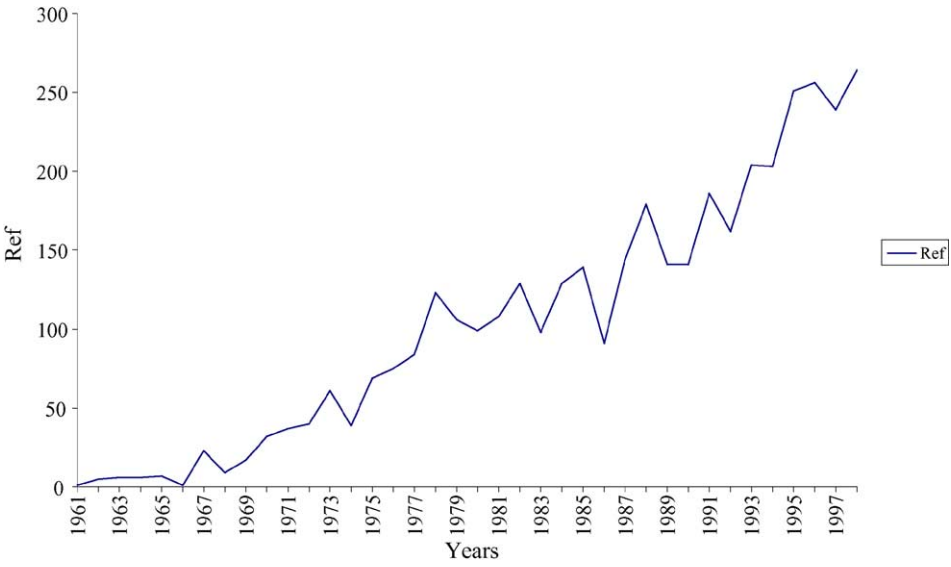

Fig. 1. The growth of references for preliminary rulings.

Where a national court makes a reference to the ECJ, the order for reference is circulated to all Member States, the Commission, and any other Community institutions affected, who may submit written and oral observations to the ECJ. The ruling delivered by the ECJ is binding on the national court but it is upon the latter to apply it on facts of the case. "What is important in the procedure, indeed crucial, is the fact that it is the national court which renders the final judgment" (Weiler, 1994, p. 515). Also, although the judgment does not form binding precedent in the way understood in the Anglo-Saxon legal systems, it has normative value in that it settles a point of interpretation or validity. A national court before which the same point of Community law arises in the future may follow the Court's ruling or make another reference to the ECJ but it may not ignore the ruling.

Fig. 1 presents the growth pattern of references for preliminary rulings (RPR) brought in the ECJ during the period 1961–1998.[12] Although fluctuating somewhat from year to year, the annual average growth rate has been an impressive 16.3%. Fig. 2 charts the share of preliminary references in the total number of cases brought before the ECJ. This share has increased enormously from below 4% in 1961 to more than 64% in 1998. Notably, in order to lighten the ECJ's workload, the Court of First Instance (CFI) was set up in 1989 with jurisdiction to hear certain direct actions. The rationale behind the establishment of the CFI was to set up a court which would be better placed to hear complicated cases in technical

[12] The data have been taken from the paper of Turner and Munoz (1999/2000). Precise data about the annual number of cases brought to and deliberated by the ECJ are not always easy to obtain. Two reasons account for this. First, some cases do not proceed to full judgement, but are disposed by "order". Second, groups of similar cases are often joined together and a single ruling is delivered. Such practices explain why there is a difference between the number of "gross" and "net" cases brought before the ECJ. In drawing the graphs in Figs. 1 and 2 below, two-year averages have been used in order to smooth year to year fluctuations.

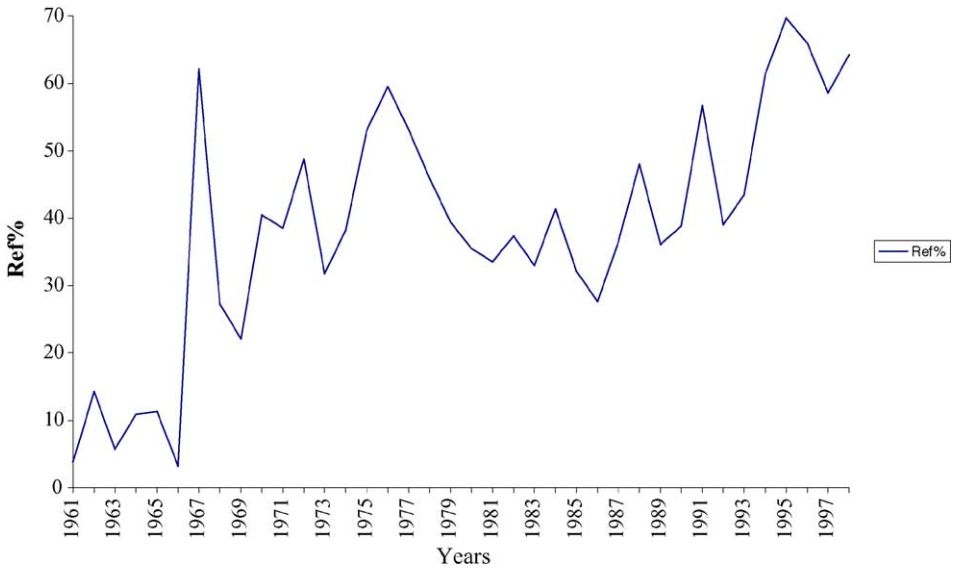

Fig. 2. The percentage share of references for preliminary rulings.

areas of law, such as competition and anti-dumping, thus enabling the ECJ to concentrate in exercising its unifying jurisdiction under the preliminary reference procedure.

The broad trends outlined above mask significant cross country and subject matter variations in the pattern of references, which themselves also vary from sub-period to sub-period. The figures presented in the two panels of Table 1 (taken from Stone Sweet & Brunell, 1999) are quite revealing on this issue. The classification of references by member state (Table 1A), shows that Germany has made the largest number of references per year, almost twice as many as the next country (France), while Ireland and Luxembourg have made the smallest. With regard to subject matter (Table 1B), agriculture and free movements of goods have jointly generated 40% of all cases brought before the ECJ for preliminary rulings.

The ECJ has not kept up with the growth of references. Not only has the number of judgments given by the ECJ increased slower than the number of references made by national courts, but the length of proceedings has also increased. For example, in 1992 the difference between the number of new cases brought and the number of cases decided was 32, a figure which in 1998 climbed to 62. More generally, during the sub-period 1990–1998 (for which comparable statistics have been published), the annual rate of growth of preliminary rulings decided by the ECJ was 7.94%, while the annual growth rate of references for preliminary rulings made was 8.48%. Similarly, in 1998 the average length of proceedings for preliminary rulings was 21.4 months, almost double its size in 1983 when it was 12 months. A systematic explanation of the observed pattern of behaviour must then account for the multitude of the trends recorded, notably, the growth of the total number of references, their composition by state of origin and subject matter, and the growing lag in the response of the ECJ.

Table 1
(A) Average number of references per member state (during the period of membership) and (B) composition of references by legal subject matter, 1958–98

Panel A

Country	Number	Country	Number	Country	Number
Austria	9.75	Germany	31.67	Netherlands	12.35
Belgium	12.26	Greece	3.92	Portugal	2.67
Denmark	3.00	Ireland	1.55	Spain	5.08
Finland	4.00	Italy	13.59	Sweden	5.67
France	16.18	Luxembourg	1.09	UK	10.13

Panel B

Subject matter	Per cent of the total	Subject matter	Per cent of the total
Agriculture	21.42	Establishment	6.14
Free movement of goods	17.68	Social provisions	5.01
Social security	9.43	External	2.31
Taxation	7.31	Free movement of workers	4.29
Competition	6.76	Environment	4.29
Approximation of laws	4.61	Commercial policy	1.59
Transportation	1.63	Other domains	10.26

Source: Stone Sweet and Brunell (1999).

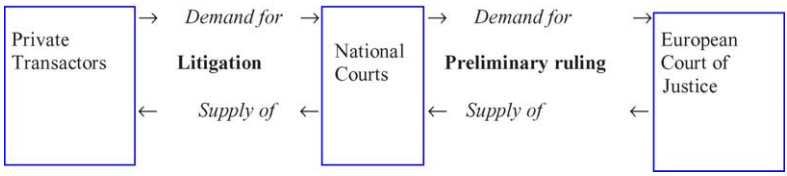

Fig. 3. The process of demand and supply for preliminary rulings.

3. Public choice modelling of the growth of the preliminary rulings

An investigation of the process of legal integration in the light of economic analysis involves enquiries in two areas. First, it calls for an examination of the factors which affect the demand for preliminary rulings as instruments for resolving disputes. Secondly, it requires an analysis of the behaviour of the actors which determine directly or indirectly the supply of rulings, their motives, and the constraints on their behaviour. It will be noted that the preliminary reference procedure differs from the standard market paradigm. It is not a direct interaction between consumers and producers, since demand and supply for rulings are channelled through the intermediation of the national courts. The "market" for rulings therefore can best be understood as involving interaction among three sets of decision makers, namely litigants, national courts, and the ECJ, as shown graphically on Fig. 3.

As the ultimate recipients of the benefits of economic exchanges, and therefore the law which enforces them, private transactors may initiate proceedings, that is, "demand"

judgments from national courts in areas to which EC law may be applicable. The final authority for the interpretation of the law rests with the ECJ, which, as a judicial body, acts independently of the national governments and "supplies" the rulings. In between those groups of decision makers stand the national judges, who act as gatekeepers. Their intervention is crucial because the authority to make a reference is vested with them. That is, demand for a ruling becomes operative not when economic transactors ask for it, but upon the national court requesting a ruling.[13] It is therefore necessary to investigate the objectives and constraints of the three sets of players in using the preliminary reference mechanism.

3.1. Private litigants

Private litigants will resort to litigation and invoke EC law if they expect a net gain, financial or otherwise, from doing so. The net gain depends on the probability of winning the court case and varies positively with the size of the monetary benefit generated when the court awards the litigant the remedy sought (e.g. gaining access to a market, or receiving equal pay).[14] On the other hand, the net gain is negatively related to the price of litigation, that is, the cost of using the preliminary ruling mechanism. These fundamentals suggest that the number of references for preliminary rulings would depend positively on the following factors: the size of economic activity subject to EC legislation, the increase in Community competence and legislation, the expansion of the case law of the ECJ and the increase in awareness of Community law. By contrast, it would depend negatively on the burden of the legal expenses required to pursue a case. These factors will now be examined in turn.

3.1.1. The growth in the size of economic activity subject to EC legislation

One may reasonably expect that as the size of economic activity covered by any given EC legislation increases so does recourse to the formal procedure of the law to resolve disputes. In a series of seminal contributions, Stone Sweet and Brunell (1998a, 1998b) argued along this line attributing the growth of preliminary references to demand by private litigants, and offered empirical tests in support of their model. The essence of their argument is the following. Like any contractual relationship, transnational exchanges generate demand for dispute resolution. National laws were not designed to resolve disputes arising from transnational transactions. This void is filled by Community legislation. National courts recognise the relevance of Community law in facilitating transnational economic activity and accept the competence of the ECJ in interpreting the law. Hence, as the volume of economic transactions among the EC countries grows, conflicts between national law and EC law

[13] Notably, the ECJ itself vehemently safeguards the independence of the national courts vis-à-vis the parties to the dispute. Thus, it is for the national court to decide whether to make a reference, what questions to refer, and at what stage in the proceedings to make the reference. A national court may make a reference on its own motion, i.e. even if none of the parties to the proceedings wishes to do so. See, e.g. Case 126/80 Salonia [1981] ECR 1563; Case 166/73 Rheinmuhlen [1974] ECR 33, 146/73 [1974] ECR 139; Case 14/86 Pretore di Salo v. Persons Unknown [1989] 1 CMLR 71: In practice, however, the parties will usually play a significant role by presenting argument as to whether a reference should or should not be made.

[14] Note that the benefits from some legal disputes may not be easily expressed in financial terms in which case assigning monetary values to the gains becomes problematic.

will increase and the demand for a system of dispute resolution to cover the transnational exchanges will do likewise. Based on regression analysis, which uses the size of intra-EC trade at current prices as the explanatory variable and the number of references for preliminary rulings as the dependent variable, Stone Sweet and Brunell obtain statistical support for the posited relationship. Moreover, their hypothesis accounts for the cross-country and cross-subject variation in references. Since the level of intra-EC economic activity varies across different member states, the number of references for preliminary rulings will differ from state to state, being higher for those characterised by larger volumes of intra-EC-trade. Similarly, since various sectors of economic activity are characterised by diverse levels of intra-EC trade, the number of references for preliminary rulings will also vary across sectors of activity.[15]

3.1.2. The increase in Community competence and legislation

Successive Treaty amendments have expanded the competence of the Community bringing more and more areas of regulation within the scope of Community law (e.g. environmental protection). In parallel, the volume of Community legislation has increased considerably. These developments have in turn led to a substantial growth in demand for rulings.

3.1.3. The expansion of the case law of the ECJ

The case law of the Court is in itself an indirect source of demand. The emergence of new sets of facts requires the constant refinement and elaboration of legal principles. In some cases, a Court ruling may pronounce on the application of an existing principle in a new area which subsequently gives rise to a host of references on similar points.[16] This is exacerbated by the fact that the ECJ tends to interpret Community legislation as being directly effective, namely as giving rise to rights which individuals may enforce before national courts.[17] Direct effect facilitates reliance on Community rights before national courts and further contributes to the growth of litigation.

3.1.4. The burden of legal expenses

Fees for legal services will depend on the terms of access to the domestic courts, such as, for example, the formal procedures involved, the length of proceedings, the level of the national court before which the litigation is conducted, etc. Those expenses vary from country to country and subject matter to subject matter. The deterring influence of costs might suggest that private litigants who have access to the required financial resources, like wealthy corporations, or richly endowed interest groups, or those fortunate enough to qualify for legal aid from the state, will be privileged in making use of the preliminary reference mechanism.[18]

[15] Note, however, that not all references for preliminary rulings relate directly to intra-EU trade. A substantial and growing proportion of references are made in disputes which have no direct inter-state element.

[16] See, e.g. the recent case law on the application of the four freedoms on direct taxation, which until recently was perceived as a bastion of national sovereignty.

[17] See, for example, Case C-443/98 Unilever Italia SpA v. Central Food SpA, 26 September 2000.

[18] Similar perspectives are also found in the paper of Mattli and Slaughter (1998), which examines the role of individual litigants and the strategies that they may follow before the ECJ, and the paper of Alter (2000) which discusses the factors that influence private domestic litigants to resort to the EC legal machinery.

3.1.5. The increase in awareness of Community law

The days when Community law was perceived as a specialised, and somewhat marginal, field of legal practice have long gone. Nowadays, legal advisors and, increasingly, citizens themselves are aware of the Community law dimension of their claims and keen to exploit EC rules to their advantage. A new European legal culture is emerging where the influence of Community law on national laws becomes pervasive. Also, a new generation of judges is gradually emerging at the national level, who perceive Community not as a challenge to the entrenched methodology of national law but as an integral part of the national legal system. In this context, Community rights are perceived as part of the national legal heritage and making a reference to the ECJ seems a natural option.

Demand, however, is only part of the explanation of legal integration.[19] As careful examination of the process described in Fig. 3 will reveal, linking the set of explanatory variables of the growth of preliminary rulings only with the volume of economic activity is unnecessarily restrictive. In effect, that would be equivalent to subscribing to an "organic" view of the process, where growth in economic activity is almost inevitably followed by growth in applications for preliminary rulings. This account is incomplete because it ignores the influence of "judicial politics". Judicial politics relate to the behaviour of the actors engaged in the supply of the legal order, notably, the national courts and the ECJ, their motives and opportunities in applying EC law.

3.2. The national courts

As stated above, the preliminary reference mechanism grants to national courts the authority to make a reference and ascribes to them the role of gatekeepers. It is important to emphasise that, in making a decision whether to refer, the national courts intervene not as mechanical conduits but as eclectic agents. Lower national courts, from which the overwhelming majority of references originates, enjoy discretion whether to make a reference. Also, even courts of last instance which are in principle under an obligation to refer, in fact enjoy some discretion since there are certain exceptions from this obligation.[20] In short, the co-operation of national courts is a sine qua non for the success of the preliminary reference procedure and, consequently, the very development of the Community legal order. Legal integration and the implementation of ECJ jurisprudence has relied on the willingness of national courts to refer cases to the Court.

According to the public choice theory, when interpreting the law courts like other organs of government are assumed to have their own set of preferences over policy outcomes.

[19] Note that the factors listed as determinants of demand also account for the accession of new member states. Entry of a new member state increases the volume of economic transactions and may give rise to new conflicts of EC law with domestic legislation precipitating an increase in references.

[20] A national court of last instance need not make a reference in the following cases: (a) When it considers that a decision of the ECJ is not necessary to enable it to give judgment; (b) when the ECJ has already ruled on the point of Community law in question; (c) when the issue is "acte clair", i.e. the correct application of Community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved; see Case 283/81 CILFIT v Ministry of Health [1982] ECR 3415. The last exception, in particular, leaves considerable margin of appreciation to the national courts.

Judicial preferences may, but do not need to be, substantive; they reflect neither calculations of private benefit (like profit maximising firms), nor electoral considerations (like vote maximising politicians). Rather, as legal scholars would argue, judicial preferences are based on notions of justice and the rule of law. Crucially, the preferences of lower national courts regarding policy outcomes may differ from those of higher national courts and/or the national political authorities, leading them to seek opportunities for pursuing their own most preferred policies. The utility of the court is higher, the closer is the actual policy implemented to its most preferred (ideal) policy point. Courts will therefore use their judgments to pursue policies which maximise their utility subject to the relevant restrictions, which constrain their freedom of action. A court suffers a twofold loss in utility when its judgment is reversed by a higher national authority (appellate, or supreme court, or the legislature as the case may be). First, because a less preferred policy is pursued in practice (that is, one which serves less well the court's notion of justice). Second, because the failure to uphold a judgment may affect adversely the professional reputation of judges and even, perhaps, jeopardise their future career prospects. National courts will refer to the ECJ and consequently apply its ruling when the expected net utility gains (benefits minus costs) from doing so exceed the utility gains from not referring.

Reference to the ECJ brings two complementary benefits. The first comes from the involvement of the court in decision making, while the second relates to the benefits from having its decision accepted.[21] The reference for preliminary ruling confers to the national courts the right to influence public policy; this is described as "judicial empowerment". That is, "Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation" (Weiler, 1991, p. 2426). This is a privilege that they hardly enjoyed in the domestic domain. If the judgment of the ECJ leads to a policy outcome closer to that preferred by the national court that makes the reference, the national court will exercise its judicial power and stamp its authority. Viewed in terms of the distribution of power of decision making, the empowerment that reference to the ECJ confers is analogous to extending the right to determine policy to a wider group of concerned players than before. These players can now challenge the dominant position of other branches of government and implement policies closer to their own ideal points.

The second benefit arises from the protection that a judgment based on the ECJ ruling enjoys against reversal. A lower national court runs the risk of having its ruling overturned by a higher national court. Similarly, a judgment of a higher court, which runs counter to the wishes of the government, may be overridden by new legislation. However, in view of the considerable difficulties that national authorities encounter in reversing the decision of the ECJ, the use of the preliminary reference system offers national courts a strategy to minimise the risk of having their decisions reversed. Thus, by referring to the ECJ, national courts can put in practice their most preferred policies without the risk of reversal.

The use of the reference mechanism is not costless, since the delivery of a preliminary ruling by the ECJ requires resources, including the time, effort and materials used by the

[21] Accounts of the motives and opportunities of the national courts to use the preliminary reference mechanism and the interactions between national courts and the ECJ can be found in Burley and Mattli (1993), Mattli and Slaughter (1998), Weiler (1994), Alter (1996, 1998) and Golub (1996).

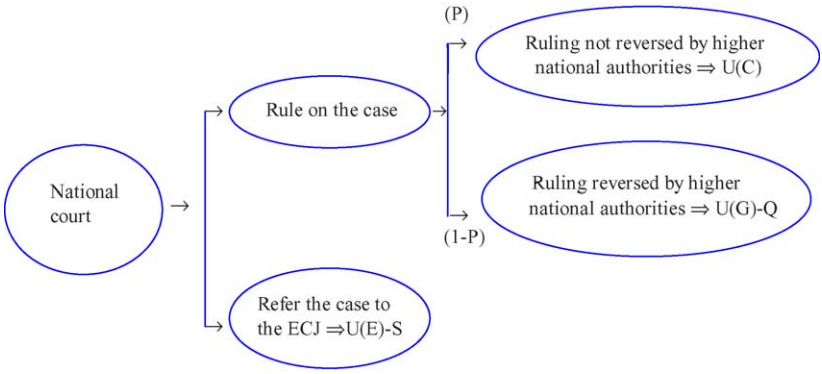

Fig. 4. The structure of the decision of national courts.

ECJ judges and other officials, whose quantity and intensity may vary from case to case. However, national courts do not bear the resource cost of using the preliminary reference system, since they do not pay the relevant price to the ECJ. Effectively, as far as national courts are concerned, the use of the mechanism is not constrained by the resources needed to operate it. Hence, the number of applications for preliminary reference is boosted not only by the volumes of relevant economic activity, but also by the absence of the price constraint that national courts would have to pay when sending a request to the ECJ. But when the consumers of a service face a zero price,[22] demand will exceed supply. Excess demand is manifested in practice by a very rapid increase in the number of applications for preliminary references without a commensurate increase in the number of cases decided. When use of the price mechanism is ruled out to eliminate excess demand other methods of allocation of resources emerge to fill the void. One such familiar response is queuing, or equivalently, a waiting list, which in the present case of excess demand for preliminary rulings takes the form of an increasing backlog of pending cases and a lengthening of the time period it takes to decide a case. As already detailed in the previous section, both these theoretical predictions are corroborated in the picture that the ECJ itself paints about its increasing workload.

The structure of the decision of the national court whether to refer or not to refer to the ECJ is shown in Fig. 4. Let *C*, *G* and *E* denote the policy levels most preferred by the national court, the higher national authority and the ECJ, respectively, and let *P* denote the probability that the judgment of the national court will not be overturned by the higher national authorities. P increases as the difference between *C* and *G* decreases and also depends on other institutional factors. For example, according to Cooter and Ginsburg (1996), the probability of non-reversal will be increasing on the degree of constitutional division of powers (effectively, the number of vetoes that legislation has to overcome) and the number of parties and degree of party discipline in the ruling coalition. Assuming a risk

[22] In practice, even though the national court does not pay a pecuniary price for applying for a preliminary ruling, the effective price is above zero since the opportunity cost of the national judges making the application is positive.

neutral national court, the expected utility from not referring is written as $P \times U(C) + (1 - P) \times [U(G) - Q]$, where Q represents the additional loss suffered by the court when its judgment is overturned (reflecting the disutility of adverse reputation and career prospects). On the other hand, if the court refers the case to the ECJ its utility is $U(E) - S$, where S is the price-for-service that the national court will have to pay towards covering the resource cost of the mechanism. Obviously, the smaller the size of S the larger the benefits from referring. The national court will refer to the ECJ when the expected utility from referring the case is greater than the expected utility from ruling on the case and not referring, that is, if $U(E) - S > P \times U(C) + (1 - P) \times [U(G) - Q]$.

3.3. The European Court of Justice

The ECJ makes the judgment on the case referred and supplies the ruling to the national court.[23] Following the rational choice theory and in analogy to national courts, the ECJ is assumed to have its own policy preferences, which reflect the "deeply internalised" notions of justice held by judges. It is also assumed to dislike to see its rulings overturned by the political-legislative authorities, and crucially, being rejected by the national courts, whose co-operation, as stated above, is vital to the construction of the European edifice. To say that the ECJ has preferences over policies is not to deny its independence from partisan or national interests, or the interests of other branches of the EU, nor to disregard the formality of legal reasoning. It is, however, to recognise that its rulings have a significant effect on policy outcomes. Through the process of interpreting the law, the ECJ shares policy making with the other organs of the EU. In contrast to the political institutions, however, it has no agenda setting power, that is, it cannot initiate policy but can only rule on those cases brought before it. As a result, its principal contribution has been characterised as negative integration, that is, its rulings have served to remove and dismantle various national restrictions to the fundamental freedoms of movement. Its role in positive integration, that is, in constructing supranational rules of conduct in lieu of national legislation, although important has been less pronounced.

Transforming the preliminary ruling system into a mechanism for the enforcement of EC law has conferred considerable autonomy to the ECJ and freed it from being subservient to the national governments that set it up. Specifically, offering individuals and companies the possibility of challenging national law increases the ability of the ECJ to pursue its most preferred policies, while it simultaneously decreases its dependence on the governments of the member states and the Commission to raise infringement cases.

But what explains the autonomy that the ECJ enjoys in practice to pursue its own policy objectives? Borrowing from the economic theory of the principal–agent relation the ECJ is seen as an institution (agent) to which sovereign states (principals) have delegated authority to interpret the law and thus facilitate transnational co-operation between the member states.[24] However, given the powers granted to accomplish its functions, the insti-

[23] It should be borne in mind that treating the ECJ, which is a collective body, as a single decision maker is a simplification made for the purpose of the present study.

[24] Beneficial transnantional co-operation is plagued by transaction costs, which comprise all those costs that a decision maker bears in order to ensure that the actual outcome of a transaction is the same as the expected

tution may take a life of its own and serve its own interests by pursuing its most preferred policies rather than those of the principals. In practice this takes the form of advancing pro-integration policies that would not have been favoured by some of the member state governments.

The agency losses can be limited by introducing various control mechanisms which define ex ante the nature and range of the activities of the agent and monitor, reward or punish ex post its behaviour. However, since the control procedures are costly to operate in terms of resources to be invested and speed of decision making, monitoring in practice can never be perfect, implying that the agent may still enjoy considerable discretion in its decision taking. The sanctions available to minimise the agency losses include budgetary cuts, dismissal of personnel, non-compliance with the decisions of the agency, introduction of new legislation to overturn a decision of the agency and even a change of the charter of the agency. There are severe limits to the effectiveness of all those types of sanctions in relation to the ECJ. Biting budgetary cuts may undermine its ability to carry out its assigned role of adjudication. The judges are appointed for (renewable) terms of six years. National governments cannot dismiss serving judges; nor can they single out non grata judges, since the judgment of the Court is collegiate and no dissenting views are published.[25] Non-compliance by government of a member state singles out the member state as an uncooperative player, while in addition, it pits the government of the member state against the domestic courts which apply the ECJ rulings. Introducing new legislation to reverse Court rulings is not an easy option. There are few practical examples of passing fresh legislation with the purpose of overturning an ECJ ruling. Effectively, the ECJ rules on constitutional matters, that is, the compatibility of national law with the EC treaty, and no secondary legislation can reverse its provisions. Changing the constitutional provision or changing the role and the functions of the Court requires treaty revision, which renders it as an extremely costly option since it can only be accomplished after calling an intergovernmental conference, securing agreement by unanimity and ratification by each member state. The latter implies that the threat of revising the Court's mandate may lack credibility and diminish its value as a sanction. It then follows that the ECJ is in a position to exercise autonomous influence on European public policy by delivering rulings which are closer to its own preferences rather than those of the member states (principals).

Needless to say, the discretionary power of the ECJ is not without limits. Two constraints are noted, in particular. On the one hand, it must enjoy enough support in the legislative bodies, so that attempts to repeal its decision by the other political organs of the EU can be blocked. On the other hand, its interpretation of the law must have the support of the national court that asked for the ruling. The former issue has been analysed using the spatial model of public choice theory. However, no analogous treatment of the latter using the same tool of analysis is found in the literature. The next section aims to fill this gap.

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outcome, and include the costs of collecting information, monitoring and sanctioning the behaviour of other parts to an exchange. See Garrett and Weingast (1993), Pollack (1997) and Doleys (2000) for detailed accounts of the autonomy of the ECJ and other supranational EC institutions using the agency theory.

[25] This is consistent with the presumption that judges spread responsibility for a verdict equally amongst themselves, thus strengthening the validity of the ruling and minimising the opportunity for contesting the decision reached.

4. A spatial model of the preliminary ruling system

This section uses the spatial model of public choice theory to illustrate how the preliminary ruling mechanism has empowered the national courts and the ECJ to deliver judgments that would not have been possible in the absence of the mechanism.[26] In so doing it also shows the range of discretionary power of the ECJ, that is, the set of policy outcomes that it can sanction without its rulings being overturned by new legislation.

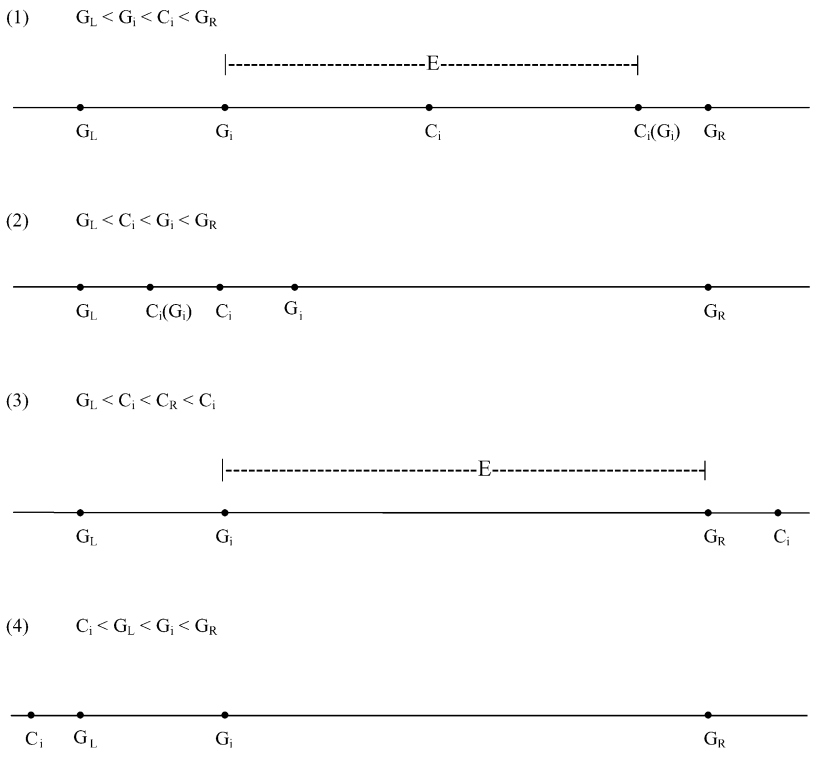
To simplify, and in common with the literature using the spatial model to examine the behaviour of the ECJ, we assume a single dimension policy issue, so that the set of possible policy points is depicted as a straight line and can be ranked from "small" to "large" as one moves from the origin to the right, as shown in Fig. 5. For example, the dimension of choice may be restrictions on tobacco advertisement, constraints on the content of a particular substance in a product, or removal of restrictions on the freedom of movement. It is assumed that all political actors, including courts, have a most preferred or ideal point along that line and that their preferences over different policy points depend only on the Euclidean distance of the policy outcome from that ideal point. That is, given its ideal point a decision maker prefers policy outcomes closer to its ideal point than further away from it and will be indifferent for equi-distant points to the left or the right of the ideal point.

Let G_L and G_R denote the preferences of the governments in favour of the smallest and largest policy values, respectively, whose consent is required to pass EU legislation.[27] Thus, policy points between G_L and G_R are stable equilibria, in the sense that they cannot be overturned by the supranational legislative organs of the EU. Policies represented by points to the left of G_L or the right of G_R will not be enacted for they do not command the required majority. For a given member state at a point in time there is a status quo policy G_i, which embodies the existing national legislation.[28] Assuming that $G_L \leq G_i \leq G_R$, the member state can pursue policy i without fear of intervention from the supranational authorities, since the latter will not be able to muster the required votes to impose a different policy at the supranational level.

[26] For the use of the spatial model in studying the impact of courts in policy making see McNollgast (1990), Ferejohn and Shipan (1990), Gely and Spiller (1990) and Ferejohn and Weingast (1992). The spatial model has also been applied by Cooter and Drexl (1994) and Bednar, Ferejohn, and Garrett (1996) to study the interaction between the governments of the member states and the ECJ under alternative majority voting rules.

[27] When the ECJ is interpreting the founding treaties, the only way for the national governments to reverse its ruling is to revise the treaty by unanimity. Under unanimity G_L is the most preferred point of the government which is farthest left and G_R is the most preferred point of the government which is farthest right in the dimension of choice. When the ECJ is interpreting secondary legislation, its ruling can be overturned by new legislation. Under the co-decision procedure introduced by the Amsterdam Treaty a qualified majority of 5/7 in the Council and simple majority in the European Parliament is required for passing new legislation. Under Qualified Majority G_L corresponds to the 3rd government from the left and G_R corresponds to the 5th government from the left. Denoting by P the policy most preferred by the Parliament (not shown), the range of policy points which when proposed can defeat all other points may be written as $[\min(G_L,P), \min(G_R,P)]$.

[28] Two observations justify this treatment. In the period up to the Maastricht Treaty of 1992 national authorities of member states were often too slow to transpose EC legislation to national law. In the post-Maastricht Treaty period, the freedom of national governments to set policy at the state level was formalised in the subsidiarity principle.



G_i: Status quo policy in member state i
C_i: Ideal point of national court which has to choose whether to refer to the ECJ
G_L: Ideal point of the member state in favour of the smallest policy level
G_R: Ideal point of the member state in favour of the largest policy level
$C_i(G_i)$: The national court is indifferent between G_i and $C(G_i)$, i.e., $G_iC_i = C_iC_i(G_i)$
E: Policy point implemented by the European Court of Justice

Fig. 5. The range of discretionary power of the ECJ.

Assume now that a private litigant challenges the policy measure G_i in the national court on grounds of incompatibility with Community laws. Let $C_i \neq G_i$ be the policy level which accords to the interpretation of the law by the national court reviewing the legislation. Other things being equal, the bigger the distance between G_i and C_i, the larger the utility loss suffered by the national court if G_i is implemented. As the policy moves away from G_i and closer to C_i the national courts prefers the outcome more up to C_i. As policy moves further to the right of C_i, the utility of the court starts falling. Let $C_i(G_i)$ denote the point where the size of the policy measure is at such a large value (and is therefore so far away from the ideal point of the court) that the national court is now indifferent between G_i and $C_i(G_i)$, that is, $C_iG_i = C_iC_i(G_i)$; the national court will prefer G_i to any policy further to the right of $C_i(G_i)$. Hence, the national court prefers any interpretation point inside the interval $G_iC_i(G_i)$ to the status quo G_i.

In a national setting without access to the supranational legal system, the national court has few, if any chances, to see its ideal point implemented, since the higher national authority will reverse it on appeal or by new national legislation. When the national court is given the option to refer the case to the ECJ and apply its ruling, the set of interpretations that can be applied in practice changes dramatically. On the one hand, the ECJ can implement policies anywhere in the interval $G_{\mathrm{L}}G_{\mathrm{R}}$, which denotes the set of politically viable interpretations of the law. On the other hand, the national court would like to implement an interpretation of the law which is inside the interval $G_{\mathrm{i}}C_{\mathrm{i}}(G_{\mathrm{i}})$. The set of overlapping points between those two intervals represents the range of discretion of the ECJ feasible policies; in notation, $G_{\mathrm{L}}G_{\mathrm{R}} \cap G_{\mathrm{i}}C_{\mathrm{i}}(G_{\mathrm{i}})$. Its points show how far can the judgment of the Court depart from the nationally enacted policy without provoking a reversal of its ruling by a new decision simultaneously ensuring the support of the national court.

To simplify it is assumed that the ECJ prefers "larger" to "smaller" policy levels, so that stylistically its ideal point lies to the right of G_{i} on the dimension of choice.[29] Four configurations of the preferences of national courts and higher national authorities are considered:

(1) $G_{\mathrm{L}} \leq G_{\mathrm{i}} < C_{\mathrm{i}} \leq G_{\mathrm{R}}$: the ideal point of the national court lies to the right of the ideal point of the national authorities and it is no further right than the ideal point of the pivotal member state with preferences farthest to the right. The national court prefers an ECJ interpretation which lies in the interval $G_{\mathrm{i}}C_{\mathrm{i}}(G_{\mathrm{i}})$. If the ECJ ruling lies to the left of G_{i} or to the right of $C_{\mathrm{i}}(G_{\mathrm{i}})$, the national court will have preferred the status quo G_{i} rather than using the preliminary ruling system. Further, points in the interval $G_{\mathrm{i}}C_{\mathrm{i}}(G_{\mathrm{i}})$ will not be repealed by new legislation. Thus, the set $G_{\mathrm{i}}C_{\mathrm{i}}(G_{\mathrm{i}})$ comprises the range of discretionary power of the Court. It represents the range of interpretation of the law which is invulnerable to new legislation and acceptable by the referring national court.

(2) $G_{\mathrm{L}} \leq C_{\mathrm{i}} < G_{\mathrm{i}} \leq G_{\mathrm{R}}$: the ideal point of the national court lies to the left of the ideal point of the national authorities and it is no further left than the ideal point of the pivotal member state with preferences farthest to the left. In this setting, any policy point to the right of G_{i} will make the national court worse off. The optimal action for the national court is therefore not to ask for a preliminary ruling. The ECJ will then have no effective power whatsoever (since it cannot initiate legislation). This finding serves to reiterate the point that, even though the preliminary reference mechanism offers an instrument of empowerment, the instrument will be taken up by the national court only if its preferences regarding policy outcomes differ from those of the higher national authorities and are better served by the ECJ.

(3) $G_{\mathrm{L}} \leq G_{\mathrm{i}} \leq G_{\mathrm{R}} < C_{\mathrm{i}}$: the ideal point of the national court lies to the right of the ideal point of the pivotal member state with preferences farthest to the right. The national court will prefer a policy outcome to the right of the ideal point of its own national authorities G_{i}. The discretionary power of the ECJ is then the interval $G_{\mathrm{i}}G_{\mathrm{R}}$.

[29] This is justified upon assuming that "larger" policy levels correspond to more integration and, stylistically, the ECJ favours more than less integration. In the opposite case, where the ECJ's most preferred policy level lies to the left of G_{i}, the results derived below are reversed (not shown in the figure, but available on request from the authors).

(4) $C_i < G_L \leq G_i \leq G_R$: the ideal point of the national court lies to the left of the ideal point of the pivotal member state with preferences farthest to the left. Similarly to case (2) the optimal course of action for the national court is not to ask for a preliminary ruling.

In sum, the discretionary range of ECJ rulings is as follows

$$\text{For} \quad G_i < C_i \Rightarrow \quad \{G_i, \min[C_i(G_i), G_R]\}$$
$$\text{For} \quad C_i < G_i \Rightarrow \quad 0$$

Note that the above ranges denote the intervals of feasible outcomes, that is, those that the ECJ can implement in practice, without its rulings being overturned. If the policy outcome most preferred by the ECJ lies within the above region, it will be able to apply it in practice. On the contrary, if it lies further to the right of the feasible range, it will not be able to pursue it and will have to contend itself with a policy outcome corresponding to min $[C_i(G_i),G_R]$.

A number of important corollaries follow from the above exposition. First, given the institutional arrangements needed to reverse an ECJ ruling, the ECJ can pursue a more expansive account (up to the upper bound described) of the founding treaties which was not necessarily envisaged by the enacting legislators. Second, in so far as different countries have different preference configurations for different policy fields, where such configurations are captured by points like G_i, C_i, G_L and G_R, the pace of applications for preliminary rulings and consequently the extent of legal integration will differ across the different countries and across the different policy fields.[30]

5. Summary and conclusions

The present study sought to demonstrate how the process of legal integration in Europe, and more specifically, the use of the preliminary system, can be considered as the outcome of optimising behaviour on the part of three groups of decision makers, litigants, the national courts and the European Court of Justice. The three together form a complex of causal relationships that generate demand and supply for interpretation of EC law. Litigants have an economic stake deriving from integration (or lack thereof). They are the primary source of demand for law rulings and their ultimate recipients, rendering the level of economic activity and the financial and legal terms by which they can access the justice systems of their home countries as an important determinant of demand for preliminary rulings. However, such demand becomes effective only when national courts refer to the ECJ, which is the ultimate source of supply. National courts will turn to the ECJ when the expected benefits from referring in terms of ability to implement their own preferred policy outcomes exceed the benefits from not referring. The ability of national courts to influence policy is much weaker in the national context of each member state than in the supranational context of the EC, where national courts implement the authoritative interpretations of the law given by

[30] This result may well explain the cross-country variation in national court acceptance of the doctrines of direct effect and supremacy observed in practice (documented by amongst others, Golub, 1996; Mattli & Slaughter, 1998).

the ECJ. The rulings of national courts can be overturned and altered more easily by higher national authorities than the rulings of the ECJ can be altered by the equivalent authorities of the EC. An additional cause of the buoyancy in the growth of references has been the absence of rationing of demand by price. For the ECJ, the use of the preliminary ruling system offers both a source of cases to deal with as well as an opportunity to exercise an autonomous influence in determining policy outcomes. The ECJ has been delegated with the authority to resolve the problems that result from the unpredicted aspects of transnational co-operation, while it has also been endowed with procedures and mechanisms that minimise the ability of states as principals to meddle with and bias its decisions. The ECJ has therefore room to pursue its own most preferred policies regarding the interpretation of the law, but, within a given institutional framework, its range of discretion is constrained by the position of the policy preferences of national courts and government authorities of the relevant member states.

The application of public choice methodology suggests a more eclectic view than those suggested by both intergovernmentalism, which gives a prominent position to the governments of the member states, and supranationalism, which considers the Court as serving faithfully the interests of a "nascent" supranational society. In terms of the delegation relationship outlined above, intergovernmentalism assumes that principals can always control fully the agents. Supranationalism is largely "apolitical" ignoring the motives and opportunities of the various sets of players to advance their own interests. The eclectic view models both the national courts and the ECJ as decision takers pursuing their own objectives, subject to the relevant institutional constraints, and interacting with other relevant players in the policy making game. Intergovernmentalism and supranationalism would then both appear as polar cases occupying opposite extremes, which would be valid only under restrictive circumstances.

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