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# A Political Bellwether?

The European Commission's Interaction with the Court  
of Justice of the European Union under the Preliminary  
Ruling Procedure

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## Abstract

Recent quantitative research has shown a sizable impact of the European Commission's written observations on the preliminary rulings of the Court of Justice of the European Union. In explaining the high success rate of the Commission, scholars have referred to an old assumption according to which the Court uses the Commission as a 'political bellwether' to determine how far Member States may be pushed towards enhanced legal integration in any given case.

The present study assesses the validity of the assumption that the Commission acts according to such logic in these proceedings. Interviews with central actors in the Commission reveal internal processes and considerations made when determining the Commission's position in three 'most likely' cases.

Rather than a political bellwether, the empirical findings suggest that the Commission is better characterized as an activist that seeks to contribute to the development of EU law in line with its own policy preferences or legal analysis irrespective of whether such preferences are politically acceptable to Member States. Scholars seeking to understand the Commission's success rate under the preliminary ruling procedure should thus consider alternative explanations to the Commission's success. In this regard, theories stressing the Commission's expertise, resources and judicial strategy of being a 'repeat player' appear to be particularly relevant.

**Keywords:** Article 267 TFEU, Preliminary Ruling Procedure, European Court of Justice, European integration, European Commission, judicial politics, separation of powers, EU migration policy

## Abbreviations

CJEU	Court of Justice of the European Union
EC	European Commission
ECJ	European Court of Justice
EU	European Union
PPU	Procédure Préjudicielle d'urgence
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

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# 1. Introduction

## 1.1. Problem description

Recent quantitative research on the preliminary rulings of the Court of Justice of the European Union has shown a sizable impact of the European Commission's position on the direction of the judgements of the Court.<sup>1</sup> Scholars find the high success rate of the Commission puzzling as their statistical models control for the position of the Advocate-General, who investigates and evaluates the legal issues in the case and presents an independent opinion before the Court. The fact that the Commission's impact holds although one controls for the position of the Advocate-General, seen as a 'proxy for the legal merits'<sup>2</sup>, make these scholars conclude that the Commission has an impact on the Court's rulings that cannot merely be explained by similar interpretations of the legal question at stake.

As an alternative explanation to this puzzling finding, scholars have referred to an old assumption according to which the Court, in striving to advance legal integration, uses the Commission as a 'political bellwether'<sup>3</sup> to determine how far the governments of Member States may be pushed towards legal integration in a given case. According to Burley & Mattli (1993), the Commission's position is thus to be seen as an indication of how far Member States can be pushed towards the Commission's vision of maximum integration without risking that they react

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<sup>1</sup> Carrubba, Clifford J., Matthew, Gabel & Charles, Hankla. (2008). 'Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice', *American Political Science Review* 102(4): 435-52, and (2012) 'Understanding the Role of the European Court of Justice in European Integration', *American Political Science Review* 106(01): 214-23, Stone Sweet, Alec. (2010), 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews in EU Governance*. 5(2): 1-50.

<sup>2</sup> Carrubba, Gable & Hankla (2012:221)

<sup>3</sup> The term 'bellwether' is commonly used to describe something that is used as a sign of what will happen in the future (Oxford Advanced American Dictionary). In politics, the term is used to describe a geographical region where political tendencies are likely to match those in a wider area, e.g. the result of the election in that region is likely to predict the result in the latter. One classic example is the American state Missouri, which produced the same outcome as the national results in the presidential elections 96.2% of the time for the century between 1904 and 2004, only missing 1956.

with legislative override<sup>4</sup> and/or non-compliance with the ruling; actions that would go against the Court's objective of ensuring a uniform interpretation and application of EU law and put the legitimacy of the Court at risk:

Court watchers have long understood that the ECJ uses the EC Commission as a political bellwether. In any given case, the ECJ looks to the Commission's position as an indicator of political acceptability to the member states of a particular result or a line of reasoning.<sup>5</sup>

Implicitly, Burley & Mattli's argumentation suggests that an assessment of political acceptability among Member States determines the position of the Commission. Interestingly, up to today no one has presented empirical data to support this assumption. Additionally, it is not even known to what extent the Commission even considers Member States' preferences in these proceedings.

As the Commission is the only EU institution having the right to initiate new EU law<sup>6</sup> and in view of the high hurdles that any legislative action in the EU needs to overcome (due to consensus or supra-majoritarian decision rules, multiple veto players and heterogeneous preferences within the relevant treaty- and law-making institutions), one may question if the Commission is concerned about Member States' preferences.

In light of these considerations and the very absence of empirical data, the question of how the Commission uses the opportunity to submit a written observation to the Court under the preliminary ruling procedure comes across as an issue that merits empirical investigation.

In agreement with Marshall & Rossman's criteria for qualitative research (2011), such an enquiry is not only relevant for the intra-academic community but also motivated by a more general need to enhance our understanding of these processes.<sup>7</sup> As the judgments of the Court

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<sup>4</sup> In accordance with the definition used by Carrubba, Gable & Hankla (2012), an override is here defined as occurring when a court's ruling is modified in subsequent legislation or treaty revisions.

<sup>5</sup> Burley, Anne-Marie, & Walter, Mattli. (1993:71). 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization* 47(1)

<sup>6</sup> In almost all cases of secondary legislation the Commission has a monopoly for proposing a new law. In some aspects of justice and interior affairs, the Commission shares this right with one quarter of the Member States (Article 61 I Treaty of Lisbon).

<sup>7</sup> Compare with Marshall, Catherine & Rossman, Gretchen B. (2011:91). *'Designing Qualitative Research'* (5<sup>th</sup> ed.),

have authoritative effect in all Member States and as history shows that the rulings often have significant policy implications, ultimately it regards issues of legitimacy of the EU legal system as a whole.

## 1.2. Aim and questions for research

The aim of the present study is to assess the validity of the political bellwether assumption, thereby enhancing understanding of the relationship between the Commission and the Court under the preliminary ruling procedure.

At first sight, it may seem logical to focus such an inquiry on the *outcome* of the interaction between the two institutions: the written observations that the Commission submits to the Court. To do so is however easier said than done; its written observations are not published.

Scholars have however managed to gain access to systematic collections of Reports for the Hearing: documents that reveal statements made in the written observations that are referred to during the oral hearing in a given case.<sup>8</sup> Scholars at the Centre for European Research at the University of Gothenburg (CERGU) recently created a data collection of such reports covering 1562 cases during the time period 1997-2008.<sup>9</sup>

Yet, even if one would gain access to the written observations submitted by Member States and the Commission in a given case and identify a correlation between the positions therein, such a correlation would only encompass the positions of Member States that submitted a written observation in a given case. Such an analysis would thus not reveal the preferences and possible influence of Member States that did not submit a written observation. In addition, an analysis of such documents would not allow drawing the conclusion that the former (Member States' preferences) determined the latter (the position of the Commission). Arguably, Member States'

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Sage, Los Angeles

<sup>8</sup> Carrubba, Gabel & Hankla (2008)

<sup>9</sup> Naurin, Daniel, Cramér, Per, Lyons, Sara, Moberg, Andreas & Östlund, Allison. (2013). 'Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008: Data report' CERGU's Working Paper Series 2013:1

preferences may only influence the Commission if the Commission is *aware* of such preferences and *considers* them at the point in time when its written observation is determined.

Consequently, it makes more sense to focus the limited resources at hand for the present study on investigating the process of determining the Commission's position and the practical experience of civil servants at the Commission. Stein (1981) interestingly noted that although preliminary rulings often have significant policy implications, the political decision-makers view these processes as "technical" and lawyers are thus 'given a more or less free hand to speak for the Commission, the Council and national governments'.<sup>10</sup>

To validate the political bellwether assumption, this study thus argues that there should be awareness for the threat of legislative override and/or non-compliance in the Commission that plays a determinant role in the process of determining its positions. If such awareness cannot be detected one may question the assumption, as it is difficult to see why the Court would interpret the Commission's position as an indicator of political acceptability if that is not an adequate description of the Commission's interaction. In terms of theoretical implications, such findings would imply that the strands of neofunctional scholars advocating this assumption would have to revisit their arguments.

A suitable way to assess whether or not this is the case is to consider internal procedures and the experience of civil servants involved in these processes.<sup>11</sup> A threat of legislative override and/or non-compliance among Member States that is not recognized by central actors in the Commission is arguably not a threat that would feed the Commission's position.

In line with the aim of the present study, the questions for research are thus as follows:

What does the experience of central actors in the Commission reveal:

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<sup>10</sup> Stein, Eric. (1981:3). 'Lawyers, Judges, and the Making of a Transnational Constitution.' *American Journal of International Law* 75(1): 1-27

<sup>11</sup> To make a more comprehensive test of the argument, it would make sense to also investigate the experience and perceptions of the judges at the Court. Given limited resources, that is unfortunately beyond the scope of the present study.



- a) *Meaning*: Are written observations best characterized as contributions to a process of developing EU law *or* as indicators of political acceptability among Member States?
- b) *Process*: Is the process of determining the Commission's position best characterized as one driven mainly by legal *or* political considerations?

The following chapter lays the foundations for the empirical investigation that will follow to answer these questions. More specifically, the following chapter defines relevant concepts, situates the study in the research field in the area of European studies and explains the relevance of the questions for research.

## 2. Theoretical framework

### 2.1. The preliminary ruling procedure and the development of European integration

The preliminary ruling procedure<sup>12</sup> was established with the Treaty of Rome. In the Court's own words, the procedure is a fundamental mechanism of EU law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the EU.<sup>13</sup>

Under the preliminary ruling procedure, the Court replies to questions from national courts or tribunals in the Member States on how to interpret EU law. The Court does not adjudicate between the parties in the case but guides the national court or tribunal on how to understand EU law. In concrete terms, the question is often one about whether there is a conflict between EU law and national law or practice. Due to the principle of supremacy of EU law over national law,

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<sup>12</sup> Article 267 Treaty on the Functioning of the European Union (TFEU). The full text of the Article is displayed in Annex 2 of the present study.

<sup>13</sup> Court of Justice of the European Union: Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01)

the judgments of the Court often imply deciding on whether or not to restrict national autonomy. In interpreting EU law, the Court may end up creating new legal rules that did not exist before. Additionally and as Craig and Búrca (2011) note, in practice the rulings of the Court are often so closely addressed to the case at hand that the referring court will have little discretion.<sup>14</sup>

The Court's findings bind not only the referring court but also all of the Member States. This is why, by virtue of Article 23 of the Statute of the Court of Justice, all Member States, as well as the parties to the main proceedings, Member States and, under certain conditions, other actors,<sup>15</sup> are entitled to submit written and/or oral observations to the Court concerning issues raised by a reference for a preliminary ruling.<sup>16</sup>

There is wide academic agreement that the Court has played a fundamental role in the development of European integration by establishing a supranational legal order in the EU via the preliminary ruling procedure. Among the most famous doctrines established by the Court through this procedure are the principles of *direct effect* and *supremacy* that transformed the preliminary ruling procedure into one that allows individuals to challenge national law with the help of EU law. In fact, the principle of direct effect implies that individuals can invoke EU law as the basis for legal claims in national courts. The principle of supremacy implies that if national law and EU law are incompatible, EU law trumps national law.

Interestingly, scholars disagree on how to understand this development and the two grand theories of European integration, *neofunctionalism* and *intergovernmentalism*, offer different explanations to this end. According to the neofunctional perspective, launched by Haas in 1958, the development is best understood as a result of the independence of supranational actors such as the Court and the Commission.<sup>17</sup> Prominent European integration scholars such as Weiler

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<sup>14</sup> Craig, Paul & de Búrca, Gráinne. (2011:474). *'EU Law. Text, Cases, and Materials'*, Oxford, New York, Oxford University Press (5<sup>th</sup> ed.)

<sup>15</sup> Article 23, Protocol no 3, Statute of the Court of Justice of the European Union (C 83/210)

<sup>16</sup> Lenaerts, Koen. (2010). 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice', *International and Comparative Law Quarterly*, 59(2): 255-301

<sup>17</sup> Sandholtz, Wayne, & Stone-Sweet, Alec. (1998). *'European integration and supranational governance'*, Oxford University Press

(1999) have attributed the transformation of the EU from an international legal order into a more constitutional one to the actions of the Court.<sup>18</sup> According to the intergovernmentalist perspective (Garrett 1992, Garrett & Weingast 1993) this development is better understood as a process where Member States influence and limit the scope of manoeuvre of the Court.<sup>19</sup>

With respect to legal integration, the main divide between the two perspectives is the issue of the extent to which the Court acted independent of Member States, more specifically the extent to which Member States influence the rulings of the Court through threats of override and non-compliance.

In addressing this issue, scholars from both sides have had to consider the fact that the Court has produced a number of controversial rulings that pushed for legal integration despite opposition from Member States.<sup>20</sup> Arguably, the practical relevance of these perspectives is best determined by empirical analysis.

Similar to the neofunctional perspective, the challenge of explaining the development of European legal integration has also been addressed from a separation of powers approach, according to which the Court is seen as engaging in judicial politics.<sup>21</sup> According to this model, the checks that Member States posit on the Court constitute the limits of the Court's ability to engage in such judicial politics.

The ultimate threat Member States can pose to a Court that 'goes too fast' in enhancing legal integration (practising Court activism) is to review the powers of the Court, in Pollack's word a 'nuclear' option<sup>22</sup> that so far has not been used. As this would require treaty change (hence,

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<sup>18</sup> Weiler, Joseph. (1999). 'The Constitution of Europe: Do the New Clothes have an Emperor? and other Essays on European Integration' Cambridge: Cambridge University Press; Burley and Mattli (1993)

<sup>19</sup> Garrett, Geoffrey R. 1992. 'International Cooperation and Institutional Choice: The European Community's Internal Market', *International Organization* 46(2): 533-60, Garrett, Geoffrey, and Weingast, Barry R. 1993. 'Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', in Goldstein, Judith, and Keohane, Robert O. (eds) *Ideas and foreign policy*: Cambridge: Cambridge University Press.

<sup>20</sup> Stein (1981), Weiler (1999), Burley & Mattli (1993)

<sup>21</sup> Naurin & Larsson (2013)

<sup>22</sup> Pollack, Mark. (1997:118-119). 'Delegation, Agency, and Agenda-Setting in the European Community', *International Organization*, 51(1), 99-134.

unanimous agreement among Member States), the threat is commonly not interpreted as an efficient one.<sup>23</sup> Member States may however resort to other, less complicated 'methods of revenge' by adopting more detailed and precise law to regain national sovereignty on a given issue.<sup>24</sup>

A fundamental premise of the separation of powers model is that the Court is *aware* of the preferences of key actors in the legislative process, thereby succeeding in avoiding rulings that would lead to legislative override or non-compliance. In reality, doing so comes across as an information challenge as the Court, in order to make an informed decision, would need to know the preferences not only of the Commission but also of at least a qualified majority of Member States. And as only cases with a high political salience trigger a large number of written observations from Member States, where would the Court get such information?

## 2.2. The political bellwether assumption

In 1993, Burley & Mattli argued that the Court is concerned with the preferences of Member States, yet there was no evidence that the Court attempts to track their preferences.<sup>25</sup> In relation to this, Burley & Mattli launched the idea of characterizing the Commission as a political bellwether, arguing that *in any case*, the Court looks at the Commission's position as an indicator of political acceptability among Member States.<sup>26</sup> In a similar spirit, Helfer & Slaughter (1997) have argued that the boundaries of the Court are set by the political institutions of the Community, first and foremost by Member States:

If the Court pushes teleological interpretation of the treaty - a mode of interpretation biased toward achieving the ever closer union described in the Treaty's preamble - too far too fast, the member states can act to curtail its jurisdiction or urge their national courts to disregard its judgments. They might also seek to shift the composition of the Court...(...). The Court has thus

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<sup>23</sup> Pollack (1997:121), Alter (2009), Stone Sweet (2010:9-11)

<sup>24</sup> Stone Sweet (2010:14)

<sup>25</sup> Burley & Mattli (1993:51)

<sup>26</sup> Burley & Mattli (1993:71)

used the Commission of the Community, the executive political branch of the Community, as a political bellwether, watching its position on major cases as a sign of what the political traffic will bear.<sup>27</sup>

Implicitly, this line of reasoning suggests that the Commission acts according to this logic, as it is difficult to see why the Court otherwise would use the Commission as a political bellwether. Interestingly, neither Burley & Mattli nor Helfer & Slaughter provide empirical data to support the assumption that the Commission acts according to this logic.

It is visible to anyone witnessing the oral hearings at the Court that the Commission's position sometimes clearly go against that of those Member States intervening. Consequently, it may be assumed that the advocates of the political bellwether assumption do not see the Commission's position as politically acceptable only to the specific Member States that intervene in a given case but to all Member States or at least to a qualitative majority of these.

Both Burley & Mattli and Helfer & Slaughter refer to Stein's study, which indeed demonstrates that out of 11 landmark cases, the Court only diverged from the Commission's proposal in two cases. Interestingly, Stein does not explicitly argue that the Commission's position is determined by political acceptability among Member States but merely hypothesizes that the Commission was motivated by considerations with a national flavour:

... the Commission's lawyers... (...) may have been motivated as much by national constitutional practices as by their political judgments against pressing the legal integration process too far. The spurt of criticism following the ruling in the Defrenne case may be viewed as a justification of the Commission's sensitivity.<sup>28</sup>

It thus seems as if it has simply been assumed that the Commission would act according to this logic. Interestingly, several scholars have picked up this line of reasoning. In her PhD dissertation, Kilroy (1999) argues that the Commission is sensitive to the preferences of Member States and that the Commission's effect on the Court's decisions is partly attributable to

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<sup>27</sup> Helfer & Slaughter (1997:315)

<sup>28</sup> Stein (1981:26)

the effect of Member States on the Commission.<sup>29</sup>

Even more recently, the argument that the Court would use the Commission as a political bellwether has gained new interest as intergovernmentalist scholars have engaged in quantitative research on the relationship between written observations submitted by Member States and the Court's rulings. Carrubba, Gabel and Hankla (2008) analysed Member States' and the Commission's written observations during three years (1989, 1993, 1997) and detected an aggregate impact not only of Member States' preferences but also of the Commission's written observations on the Court's rulings.<sup>30</sup>

Carrubba, Gabel & Hankla (2008, 2012) have had to defend their findings in a fierce exchange with the neofunctional scholars Stone, Sweet & Brunell (2012, 2013) who reject their conclusions and argue that the Commission and neofunctional theory dominate as predictors of Court rulings.<sup>31</sup>

While they disagree on the impact of Member States' written observations on the Court's ruling, they interestingly share the assessment that there is a sizable and puzzling impact of the Commission on the Court.<sup>32</sup> This aspect has also been confirmed in a recent preliminary analysis of the data collection of preliminary rulings put together by scholars at the Centre for European Research at the University of Gothenburg, which demonstrates a strong correlation between the rulings and the signals that the Court receives from Member States.<sup>33</sup> Partly in line with Stone, Sweet & Brunell, Larsson & Naurin (2013) find that the Commission's 'voice' tends to weigh heavier than that of the Member States. In light of these findings, the enquiry of the present study comes across as both relevant and timely.

As alternative explanations, scholars have stressed common visions among the judges at the

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<sup>29</sup> Kilroy, Bernadette Anne. (1999:14). 'Integration Through Law: ECJ and Governments in the EU', Ph.D. dissertation, UCLA. Kilroy's analysis is based on 293 randomly selected cases in the area of free movement of good and social policy from 1958-1994.

<sup>30</sup> Carrubba, Gabel & Hankla (2008)

<sup>31</sup> Stone Sweet & Brunell (2012:212, 2013)

<sup>32</sup> Stone Sweet (2004), Carrubba, Gable & Hankla (2008)

<sup>33</sup> Naurin & Larsson (2013)

Court and referred to a process of socialisation in the early years of European integration, including the establishment of 'Euro-law' associations in the 1950s and 1960s that promoted a unified view of the objectives of European cooperation.<sup>34</sup> As Hofmann notes, while probably bearing relevance in explaining the early years of European integration, it is not certain whether those factors are still relevant in understanding the Court's behaviour today.<sup>35</sup>

Alternatively, scholars have proposed that the Commission's impact on Court rulings is simply due to a congruity of preferences (for more integration) between the two institutions or that it is a result of the Commission's judicial strategy of being "the prototypical repeat player on the European legal stage"<sup>36</sup>.

Carrubba, Gabel and Hankla (2012) rule out the possibility that the impact of the Commission on the direction of the Court's rulings simply reflects the legal merits on the specific legal question at stake. In their view, the political bellwether assumption could be a relevant explanation as well as the hypothesis that the Court (simply) agrees with or is responsive to a Commission pro-integrationist agenda, and it is important to find out more:

Given the sizable impact of commission observations on rulings, identifying the appropriate interpretation is important to our understanding of ECJ decision making.<sup>37</sup>

It is beyond the scope of the present study to assess all explanations to the Commission's success under the preliminary ruling procedure. Yet and importantly, if the political bellwether assumption cannot be validated, this implies an elimination of one competing explanation.

To sum up, it seems that it has simply been assumed that the Commission acts as a political bellwether in front of the Court and there is a clear lack of empirical data to support this argument. Against this background, it appears relevant to conduct an empirical enquiry to determine whether the political bellwether logic is indeed one that characterizes the

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<sup>34</sup> Alter (2009:66)

<sup>35</sup> Compare with Hofmann, Andreas. (2013). *Strategies of the Repeat Player. The European Commission between Courtroom and Legislature*, PhD thesis, Universität zu Köln

<sup>36</sup> Hofmann (2012:9)

<sup>37</sup> Carrubba, Gable & Hankla (2012:222)

Commission's interaction with the Court. If not the case, both intergovernmental and neofunctional scholars might have to revisit their arguments and direct their efforts on assessing alternative explanations to understand the Commission's high success rate under the preliminary ruling procedure.

Such findings would however not rule out the argument that the Court is sensitive to the threats of legislative override and/or non-compliance among Member States, as suggested by recent quantitative research.<sup>38</sup> It could simply be that the Court considers Member States' preferences directly (as expressed during the proceedings) without using the Commission as a proxy for political acceptability. To some extent, such findings would strengthen the intergovernmentalist perspective as it proposes that the Court is even more sensitive to Member States' preferences than the neofunctional scholars advocating the political bellwether assumption have assumed.

### 2.3. The argument for considering the experience of central actors in the European Commission

As outlined in the introductory chapter, to demonstrate the validity of the political bellwether assumption, there should be awareness for the threat of legislative override and/or non-compliance in the Commission that plays a determinant role in the process of determining its positions under the preliminary ruling procedure. A threat of legislative override and/or non-compliance among Member States that is not recognized by central actors in the Commission is arguably not a threat that would feed the Commission's assessment.

As also outlined in the introductory chapter, a premise of the present study is that a mere analysis of the Commission's written observations is not enough to understand the dynamic of the Commission's interaction with the Court. On the contrary, to understand whether Member States influence the Commission's position it is necessary to consider the experience of actors involved in these processes: the civil servants of the Commission.

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<sup>38</sup> Larsson & Naurin (2013)



By investigating the process and purpose of written observations submitted by the Commission to the Court, the present study responds to a call from scholars such as Conant (2007) to cross the so-called disciplinary divide between legal scholars and social scientists dealing with the legal integration of the EU.<sup>39</sup> Even more recently, Hofmann (2013) has stressed the importance of exploring the relationship of preliminary references as options for the Commission to influence policy-making.<sup>40</sup>

The present study addresses the lack of empirical research to support assumptions regarding the Commission's interaction with the Court under the preliminary ruling procedure. Notably, previous research has failed to consider internal processes and the experience of actors involved in determining the position of the Commission. Consequently, the present study has a potential of contributing to the on-going academic debate on how to understand the role of the Court and the preliminary ruling procedure in European integration: a key issue in the field of European Studies.<sup>41</sup>

In addition, while previous research has focused on the early years of European legal integration and on landmark constitutional preliminary rulings, the present study allows exploring what these dynamics are like in a more recent context.

The lack of such empirical research is however not surprising, given the lack of public information on the internal processes of the Commission. On its homepage, the Legal Service only provides a very general description of its mission, casting itself as an expert lending its legal expertise to the Court:

Representing the Commission as guardian of the Treaties, the Legal Service routinely intervenes as *amicus curiae* (friend of the court – similar to an expert witness giving a court the benefit of his advice) in preliminary ruling cases.<sup>42</sup>

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<sup>39</sup> Compare with Conant (2007:46)

<sup>40</sup> Hofmann (2013:246)

<sup>41</sup> For an overview of the latest arguments put forward in this debate, see Carrubba, Gable & Hankla (2012) and Stone (2010).

<sup>42</sup> Homepage of the Legal Service of the European Commission  
[http://ec.europa.eu/dgs/legal\\_service/agent\\_en.htm](http://ec.europa.eu/dgs/legal_service/agent_en.htm) (accessed on 8 May 2014)

Hence, the information available to the public does not allow for grasping the dynamics of these processes.

Previous academic literature on this topic only amounts to anecdotal elements that address the issue at a very general level. An interview with a member of the Legal Service of the European Commission allowed Hofmann to conclude that that the competent Directorate-General takes the lead and that the Legal Service acts at gatekeeper when the written observation (here below called opinion) is determined:

This opinion is usually drafted at a low level by the responsible official assigned to the case, in some cases in consultation with the respective Head of Unit. The political level within the Commission (Cabinets and Commissioners) is not formally involved in this process. The opinion is returned to the Legal Service, who exclusively handles all interaction with the Court. While this process mostly involves little friction, it is the Legal Service who has the final say on legal interpretations, being able to override DG opinions. This is particularly relevant in politically sensitive cases, bearing in mind that the Legal Service is formally under the leadership of the Commission president.<sup>43</sup>

From this, one may deduct that political considerations could feed the Commission's assessment at a very early stage as the policy Directorate-General makes the first draft. On the other hand, the College of Commissioners is not formally involved in this process, meaning that there is no (automatic) political steering that way. What is lacking from the above account, yet crucial to determine the relevance of the political bellwether assumption, is information about circumstances that are taken into account by those involved in these processes. In addition, it would be relevant to understand how the actors involved in determining the Commission's position see their role and the objective with the written observations.

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<sup>43</sup> Hofmann (2013:78)

## 3. Methodological approach

### 3.1. A case study

In addition to shedding light on the general meaning and process of determining the Commission's observations to the Court under the preliminary ruling procedure, it was deemed relevant to also assess considerations made in specific cases.

Consequently and given the complexity of the topic, the need to understand the purpose and meaning of internal processes and the limited resources at hand, a case study approach was deemed appropriate. In Yin's words (2009) the case study approach allows illuminating complex phenomena in a real-time context within the limited scope in terms of resources that a study of this dimension offers, and allows making an in-depth investigation of relationships on which there is limited knowledge.<sup>44</sup>

In policy-areas where enhanced legal integration at EU level is relatively uncontroversial, there is not really a reason to assume that the Commission would act as a political bellwether. Accordingly, it made sense to invest the limited resources at hand on determining whether the argument holds in cases that can be characterized as favourable, here understood as cases *where the issue(s) that the Court was asked to address had potential integrative effects* (i.e. implied constraining the sovereignty of the Member States) *and where Member States opposed such effects* (logic: the stronger the opposition from the Member States, the higher the risk for legislative override and/or non-compliance and thus the higher the incentive for the Commission to act as a political bellwether). Arguably, if the hypothesis cannot be validated in such cases, it is not likely that it would be validated in other (less favourable) cases either.

As the present study seeks to trace internal processes (on which there is little public information available) and considerations that do not necessarily exist in a written format there was a need for oral information from the actors involved in these processes. In view of this it was deemed

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<sup>44</sup> Compare with Yin (2009:17)

necessary to study cases that were fairly recent, to enhance the chance of reaching actors who can inform about such processes and considerations.

One policy-area where to look for suitable cases is migration and asylum policy. The right to determine who enters one's national territory is close to the concept of national sovereignty and legal migration continues to be an area of mixed competence where Member States retain the right to determine volumes of admission of third-country nationals to their territory to seek work.<sup>45</sup> Among migration and asylum scholars, this has traditionally been referred to as a restrictive policy area with Member States engaging in cooperation at EU level to control the numbers of migrants and asylum seekers. Scholars have explained the increasing cooperation on these issues with Member States seeking to 'venue-shop', that by moving these matters to the EU venue they can circumvent liberal pressures and obstacles faced at the domestic level.<sup>46</sup>

The entry into force of the Lisbon Treaty in 2009 implied important changes to the institutional framework for cooperation on these issues, notably with the introduction of Qualified Majority Voting. Acosta & Geddes (2013) describe how Member States are now encountering constraints linked to the preliminary rulings of the Court due to the strengthened role of the EU institutions in this area.<sup>47</sup> With the rise of anti-immigrant sentiments and political parties in most Member States, cooperation at EU level has not become easier. The Court thus finds itself acting in a policy-area that is highly sensitive for Member States.

In sum, given the high political salience and the unwillingness of Member States to let go of their national competencies in controlling immigration and asylum flows, asylum and migration policy was deemed a suitable policy-area to test the political bellwether assumption. It was also a favourable policy-area from a practical point of view as my familiarity with the relevant Directorate-General gained through my own work experience at the Commission allowed me to

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<sup>45</sup> Article 79(5) TFEU

<sup>46</sup> For an introduction to the development of the literature on the 'venue-shopping' theory, see Kaunert, Christian & Léonard, Sarah. (2012). 'The development of the EU asylum policy: venue-shopping in perspective', *Journal of European Public Policy*, 19:9, 1396-1413

<sup>47</sup> Acosta & Geddes (2013:191)

identify relevant interviewees and convince them to share their experience: a key challenge for anyone engaging in carrying out elite interviews.

Among the various legal instruments in this policy-area, three were selected.<sup>48</sup> The rest of this chapter outlines why this is the case and describes the three preliminary rulings that were deemed suitable to test the political bellwether assumption.

### 3.1.1 Family Reunification

The Family Reunification Directive<sup>49</sup> was adopted by the Council of the European Union in 2003 and lays down minimum conditions under which third-country nationals in a Member State are allowed to bring their family members over to that Member State.<sup>50</sup> During the negotiations of the Directive, Member States were keen on not creating obligations to amend national law. Interestingly, some scholars even argue that the very reason why Member States such as France, Germany and the Netherlands agreed to the Directive was that they pursued and obtained maintenance of status quo.<sup>51</sup> As many other Directives in sensitive areas of cooperation such as migration policy, the final agreed product contained few binding articles that confined Member States only to a limited extent.<sup>52</sup>

Family Reunification is a policy-area that has been increasingly politicized in recent years with several Member States introducing restrictive policies. An important number of Member States including Austria, Belgium, Denmark, Germany, France, the Netherlands, Sweden and the United

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<sup>48</sup> For an overview of legal instruments in the area of immigration, see the [homepage of DG Home Affairs](#).

<sup>49</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251 of 3.10.2003

<sup>50</sup> The United Kingdom, Ireland and Denmark did not opt in and are thus not bound by the Directive.

<sup>51</sup> Block, Laura & Bonjour, Saskia. (2013:213). 'Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands', *European Journal of Migration and Law* 15: 203-224

<sup>52</sup> Roos, Christof, & Zaun, Natascha. (2013:10). 'Normative Regimes in the Regulation of Asylum and Immigration: International Conventions – Attitudes – EU Integration'. EUSA Paper. European Union Studies Association; Klaassen, Mark & Søndergaard, Johanne. 2012:44. 'How the Dutch response to the Commission's Green Paper on Family Reunification compares to the reactions of other member states. The Netherlands as the black sheep of the family?', A&MR 2012 Nr. 08

Kingdom have sharpened income and age requirements, reinforced controls on sham marriages or introduced integration conditions at entry for family migrants.<sup>53</sup>

In its evaluation report adopted in October 2008, the Commission argued that the low-level binding character of the Directive had left Member States with (too) much discretion and that in some Member States the results had even been lowering the standards when applying 'may' provisions of the Directive on certain requirements for the exercise of the right to family reunification in a too broad or excessive way.

As of today, the Commission has not opened up for a recast of the Directive. The Commission did however recently publish guidelines in which it sets out its views on how the Directive should be interpreted.<sup>54</sup> The fact that the Commission has not opened up for a renegotiation of the Directive is commonly explained as a fear that a re-negotiation would result in a restriction of the rights conferred in the Directive with Member States re-gaining national sovereignty on these provisions.<sup>55</sup>

In light of this information, which demonstrates the high political sensitivity during the adoption of the Directive and the preliminary ruling as such, the Family Reunification Directive comes across as a piece of legislation that is under threat of legislative override and one where the political bellwether logic is well placed to fit in.

Scholars have argued that it was difficult to predict which attitude the Court would adopt in this new and politically sensitive policy field.<sup>56</sup>

Case C-155/11 PPU Mohammad Imran v Minister van Buitenlandse Zaken (hereinafter referred to as the *Imran* case) comes across as particularly suitable for the purposes of the present study.<sup>57</sup> In the *Imran* case, a national court in the Netherlands asked the Court whether a

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<sup>53</sup> Block & Bonjour (2013:203)

<sup>54</sup> COM(2014) 210 final

<sup>55</sup> Roos & Zaun (2013:10)

<sup>56</sup> Bonjour, Saskia & Vink, Maarten. (2013:401). 'When Europeanization backfires: The normalization of European migration politics', *Acta Politica* 48: 389–407

<sup>57</sup> To date, there is only one other preliminary ruling regarding this case: Case C- 578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken*.

Member State could refuse entry and residence to a family member on the sole ground that the family member has not passed a civil integration examination. Eventually, the Court never answered the question as the Dutch ministry in the meantime decided to grant a residence permit, only few days after the Commission had submitted its written observation on the case.<sup>58</sup> In accordance with established case law, the Court consequently deemed a ruling unnecessary.<sup>59</sup> Somer (2012) explains that following the judgment in a previous case regarding the same Directive, the *Chakroun* case, the Dutch government adopted a position paper in which it called for a tightening of EU migration legislation.<sup>60</sup>

The *Imran* case is thus considered to be one where Member States were relatively united in opposing further legal integration (the number of Member States who submitted an observation to the Court is not known but the negotiations proceeding the Directive clearly show the high political sensitiveness of cooperation on this topic). The *Imran* case regarded the interpretation of the Family Reunification Directive in the Netherlands but would have had implications for recently introduced legislation also in Austria, Germany and France.<sup>61</sup> In addition, the *Imran* case took place in a context characterized by a changing national political landscape that sought to restrict rights conferred to third-country nationals in the Directive:

The CJEU had three months to produce a ruling which would directly affect the legislations of four important Member States (Netherlands, Germany, Austria and France) which had, in the last few years, developed a clear strategy in their political and legislative discourse on limiting family reunification as a way of entrance for TCNs. In France, for example, President Sarkozy made a distinction between immigration that was 'choisie' (chosen) such as highskilled workers, and not 'subie' (endured) such as, in his view, family migration.

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<sup>58</sup> Acosta Arcarazo, D. & Geddes, A. (2013:190). 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy', *Journal of Common Market Studies*, 51: 179–193.

<sup>59</sup> See, for instance, Case C-225/02 García Blanco [2005] ECR I-523, paragraph 28, quoted in Acosta & Geddes (2013)

<sup>60</sup> Somer, Marie de. (2012:16). 'Enhanced competences for the European Court of Justice: "Re-shuffling" the dynamics of EU migration policy-making?' *Migration Studies Unit Working Papers*, No. 2012/01

<sup>61</sup> Bonjour (2010); Groenendijk, Koen. (2011). 'Pre-departure integration strategies in the European Union: Integration or immigration policy?', *European Journal of Migration and Law* 13(1): 1–30

Integration measures were the final barrier (in a long list of obstacles including raising fees or increasing the spouses' age) in the campaign to limit family migration.<sup>62</sup>

It should be noted that the Imran case was a PPU case ('procédure préjudicielle d'urgence'), thus governed by a specific procedure according to which only the government of the Member State of the national court is allowed to lodge a written observation (and not, as under the normal preliminary ruling procedure, all Member States). However, in both procedures, all Member States have the opportunity to raise their voice in the oral hearing. Yet, the Imran case can be seen as a case where the Commission, if acting in line with the political bellwether argument, should have been particularly prone to act as a political bellwether, as the Court's 'information gap' is stronger than under the normal preliminary ruling procedure.

### 3.1.2 Return

The second legal instrument of interest is the Return Directive<sup>63</sup> (2008/115/EC), which sets out common EU rules for the return and removal, the use of coercive measures, detention and re-entry of third-country nationals.<sup>64</sup> The negotiations of the Directive proved difficult and Member States watered down several of the guarantees that the Commission's initial proposal had included, a fact that reveals the high political salience of the Directive and the reluctance of Member States to let go of national sovereignty in this policy-area.

Among the various preliminary rulings regarding the Return Directive, Case C-61/11 PPU El Dridi Hassen El Dridi alias Soufi Karim (hereinafter referred to as the *El Dridi* case) comes across as a 'most likely' case, given the high political salience of the Directive in general and the legal provision at stake in the preliminary ruling as such.

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<sup>62</sup> Acosta & Geddes (2013)

<sup>63</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348 of 24.12.2008

<sup>64</sup> All EU Member States except the UK and Ireland are bound by the Directive; the associated Schengen States (Switzerland, Norway and Iceland) are also bound by the Directive.



The issue at stake was salient not only for the Member State directly concerned in the case at hand (Italy) but also for others, notably the Netherlands and France. During the years preceding the case, Italy, which is a key migrant destination country in the EU, experienced ‘an intense politicization of migration (in particular irregular migration) with a growth in populist and xenophobic discourse led by Lega Nord, a party that was in government 2001-06 and 2008-11’.<sup>65</sup> When the Berlusconi government (which included Lega Nord) took office in May 2008, it was too late for it to influence the negotiations of the Directive (adopted in December 2008) but it could and did determine its implementation. With Roberto Maroni of the Lega Nord as interior minister, the party’s call for tougher measures on immigration and security were soon put into practice. Only a few days after the new government took office, a legislative proposal was adopted that included a range of new restrictive measures. Acosta & Geddes (2013) state that the Italian government was surprisingly open about its intention to circumvent the Return Directive.

The *El Dridi* case regarded an Algerian national who entered Italy clandestinely and never obtained a valid residence permit. After having been requested to leave the country and not doing so, he was sentenced to one year’s imprisonment. He appealed and the national court referred the question to the European Court of Justice asking whether a system whereby a third-country national could be imprisoned in a case of non-compliance with a removal order was in line with the Return Directive, in particular Articles 15 and 16 on detention.<sup>66</sup>

Despite opposition from several Member States, the Court went ahead and in its ruling on 28 April 2011 it ruled that the Directive precludes national rules imposing a prison term on an illegally staying third-country national who does not comply with an order to leave the national territory. The Court however also ruled that “a penalty such as that provided for by the Italian legislation is liable to jeopardise the attainment of the objective of introducing an effective policy

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<sup>65</sup> Acosta & Geddes (2013:179)

<sup>66</sup> For a more detailed summary of the case, see Acosta & Geddes (2013:185)

for removal and repatriation in keeping with fundamental rights".<sup>67</sup>

Acosta & Geddes (2013) describe how the Italian Ministry of Interior (Roberto Maroni) reacted with ire and stated that the judgment was a problem not only for Italy but also for the rest of Europe:

[I]f it is made more difficult to expel irregular migrants this is not only a problem for Italy, but also for the rest of Europe' (La Repubblica, 2011)<sup>68</sup>

This issue was also politicized in the Netherlands, 'where the July 2010 'support agreement' of the populist anti-immigration Partij voor de Vrijheid (PVV) for the Christian Democrat CDA and liberal-conservative VVD coalition government had included a proposal to consider irregular stay in the Netherlands to be a criminal offence for which prison was foreseen'.<sup>69</sup> The issue of detention of irregular migrants was also a sensitive issue in France.

Same as the Imran case, the El Dridi case was a PPU case, meaning that the Court's 'information gap' is stronger than under the normal preliminary ruling procedure.

### 3.1.3 Asylum

The Dublin II Regulation<sup>70</sup> sets out the criteria and mechanisms for determining the Member State responsible for examining asylum applications lodged in the EU.<sup>71</sup> The Member States where the applicant makes his first application is the one where the application is to be assessed

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<sup>67</sup> Judgment of the Court of Justice of the European Union in case C-61/11 PPU El Dridi on 28 April 2011, Court of Justice of the European Union, Press Release No 40/11 Luxembourg, 28 April 2011 Judgment in Case C-61/11 PPU Hassen El Dridi alias Soufi Karim

<sup>68</sup> Quoted in Acosta & Geddes (2013:186)

<sup>69</sup> Groenendijk, Koen. (2010) 'Proposals for Revision of EU Migration Law and International Law in the September 2010 Dutch Coalition Agreement'

<sup>70</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50 of 25.2.2003

<sup>71</sup> Kaunert & Leonard (2012)

and if the applicant goes to another Member State the latter must transfer the asylum seeker to the Member State responsible.

The Regulation was enacted in 2003 following lengthy negotiations and political deadlock for years. One of the main and most famous principles of the Dublin II Regulation is that the Member State, in which the asylum-seeker first enters, is the one responsible for processing the application. Given the uneven distribution of Member States where asylum applications are lodged (at the time when the judgment was issued, Greece was the point of entry in the EU of 90% of illegal immigrants) means that there is a very disproportionate burden being borne by this Member State compared to other Members States, thus explaining the high political salience of the Regulation.

Case C-411/10 *N.S. and Others* (hereinafter referred to as the *N.S.* case) on the 'Dublin II' Regulation (EC) No 343/2003) (judgment in December 2011) comes across as a 'most likely' case given the high political salience of the Directive in general and the legal provision at stake in the preliminary ruling as such. More specifically, the case regarded the issue of whether an Afghan national who claimed asylum in the United Kingdom after travelling through other EU Member States including Greece could be sent back to Greece despite serious concerns regarding the conditions of fundamental rights of asylum-seekers in that country. No less than 13 Member States submitted a written observation to the Court (Ireland, the United Kingdom, Belgium, the Czech Republic, Germany, Greece, France, Italy, the Netherlands, Austria, Poland, Slovenia and Finland), which points to the high political salience of the issue at stake. The Swiss Confederation, the United Nations High Commissioner for Refugees, Amnesty International and the AIRE Centre also intervened.

Despite opposition from several of these Member States, in its judgment on 21 December 2011, the Court went ahead and significantly limited the discretion of sovereignty of Member States. More specifically, the Court ruled that the Charter of Fundamental Rights precluded the transfer of asylum-seekers from other Member States to Greece pursuant to the 'Dublin II Regulation' even where the criteria in that Regulation designated Greece as the Member State responsible

for considering the application. The Court motivated its judgment with the breaches of human rights which asylum-seekers were likely to face in Greece.<sup>72</sup>

### 3.2. Data collection and analysis

To answer the questions for research, five semi-structured interviews with civil servants at the European Commission were carried out in Brussels. Interviews were deemed necessary to obtain detailed information about the process, meaning and considerations made during the process of determining the Commission's position in the selected cases.<sup>73</sup> Interviews allow for open-ended questions and allow the respondents to talk freely. In Tansey's words (2007), as a researcher it is thus possible to gather rich details about thoughts and attitudes on the issues at stake, something that is highly useful to answer the questions for research of the present study.<sup>74</sup> The possibility of conducting a survey was not considered a preferable alternative as such an approach would not have allowed making an in-depth assessment of the experiences and perceptions of the actors involved. In addition, it was deemed unlikely that they would have agreed to put such considerations into writing.

The interviewees were selected according to their centrality, here understood as the degree to which they played a central role in the process of determining the Commission's position in the selected cases (the more central, the better). The selected interviewees were all familiar with at least one of the three selected cases. To enable a comprehensive understanding of the Commission's interaction, both civil servants from the relevant Directorate-General and the Legal Service were interviewed. All of the selected interviewees agreed to participate.

In accordance with the recommendation by Lilleker (2003) to increase the willingness among potential interviewees to participate, they received information about the research project, why

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<sup>72</sup> Summary of important judgments on the homepage of the Legal Service of the European Commission [http://ec.europa.eu/dgs/legal\\_service/arrets/listepartheme\\_en.htm#jha](http://ec.europa.eu/dgs/legal_service/arrets/listepartheme_en.htm#jha) (accessed on 18 May 2014)

<sup>73</sup> To enhance the reliability of the results, interview guides with typical questions that were used are annexed to the present study.

<sup>74</sup> Tansey, Oisín. (2007:766). 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling' *Political Science and Politics*, Vol. 40, No. 4, pp. 765-772

they were asked to participate and what kind of questions they would be asked.<sup>75</sup> As the first interviewees refused to be recorded on tape and to avoid a situation where the interviewees would feel uncomfortable it was deemed preferable not to record the following interviews on tape either. Although not ideal (not least from a reliability point of view), this was deemed an acceptable approach as notes were taken during the interviews and a first processing of the data took place straight away after each interview while the impressions from the interview were still fresh. Additionally, the questions and answers were quite straightforward.

All of the interviews but one were carried out in English (one was carried out in French). All interviews but one were carried out face-to-face. They typically lasted for 1 hour.

Well aware of the benefits of triangulation in improving the validity of research findings in case study research,<sup>76</sup> the present study had to rely on one kind of empirical data (the interviews). The reason for this was, as already explained in the introduction, that the information sought could only be obtained from the interviewees themselves. To the extent possible, their statements were however also verified by screening the observations sent from the Directorate-General to the Legal Service in two of the three cases. It was however not possible to verify their statements via so-called Report from the Hearing as the Court ceased to produce such reports in 2012.<sup>77</sup>

In line with Steinar Kvale's reasoning on qualitative interviews (2006) and contrary to how the analytical stage of a thesis is often described, it was conceived of as a process that started not after, but already *during* the interview. Notably, an important task during the interviews was to concentrate and interpret what the interviewee said (notably lines of reasoning that are vague or unclear) and 'send it back' to the interviewee for verification. At least in theory, such an approach would allow to end up in a situation where there is only one possible (common) interpretation of what the interviewee is saying.<sup>78</sup>

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<sup>75</sup> Lilleker (2003:209)

<sup>76</sup> Compare with Yin, Robert. (2009). *'Case Study Research. Design and Methods.'* Thousand Oaks: SAGE (4<sup>th</sup> ed.)

<sup>77</sup> Naurin et al (2013:5)

<sup>78</sup> Compare with Kvale (2006:171)

The following step of analysis was to lay the puzzle of what the process is like and what considerations the central actors made in the specific cases with regard to the preferences of Member States. The analysis included an attempt to consider interactional details such as the interviewers' talk (interaction with the interviewee) as this may affect the production of content.<sup>79</sup>

As the interviews were not recorded on tape it was not possible to re-process the interviews in their entirety but only the notes that had been taken. The information obtained in each interview was reconsidered in light of the other interviews until the stage where such processing no longer revealed new relevant elements to the analysis.

### 3.3. Ethical considerations

The approach on how to deal with the interviewees was guided by the four basic ethical principles recommended by the Swedish Research Council for the purpose of humanistic and social scientific research.<sup>80</sup> The interviewees were informed about the *purpose* of the study, participation was subject to their *agreement*, they were offered an appropriate degree of *confidentiality* and their answers were used for *scientific purposes only*.

Yet, revealing information about the Commission's work that the Commission does not communicate about itself turned out to be a delicate exercise from an ethical point of view. In Marshall & Rossman's words, interviews may be characterized as "encounters dependent on trust"<sup>81</sup> and already during the first interview it became obvious that the interviewee was willing to share their knowledge and experience in a surprisingly open way. The high degree of trust that I experienced felt somewhat problematic, as it would have been easier if I could have assumed that they would not share any information that could harm them or the Commission if

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<sup>79</sup> For examples of how the interaction between the interviewer and the interviewee may affect the content, see Rapley (2001:306)

<sup>80</sup> Vetenskapsrådet (2007) "Forskningsetiska principer inom humanistisk-samhällsvetenskaplig forskning" (in Swedish)

<sup>81</sup> Marshall & Rossman (2011)

published. From a reliability point of view it was however not a bad thing – it strengthened my perception that they were actually sharing their true considerations and reflections.

The issue of confidentiality also called for reflection and was a major issue when designing the study as a whole as two possible and alternative strategies emerged:

- a) To offer as much and where possible full confidentiality to increase the likeliness that one would obtain a rich material and insights that the interviewees would not have otherwise revealed;
- b) To aim for an analysis of a specific case, an option under which confidentiality is problematic from a research point of view (as the inability to publish the sources of information might raise issues regarding transparency and scrutiny) and would thus only be sacrificed to the extent needed.

Eventually I decided to go for the second option, as it seemed important to assess the validity of the political bellwether assumption in explaining the outcome in real cases. Yet, I respected the request of the interviewees not to display their names in the final product. Given the limited number of civil servants who are actively involved in the preparation of a written observation, I however also had to determine whether to also avoid displaying the names of the cases studied to offer full confidentiality. In practice, their colleagues could otherwise identify interviewees. Not displaying the name of the cases studied would however have undermined the credibility of the study as a whole.

Albeit important, these ethical challenges did not discourage from using the proposed methodology. It was considered satisfactory to address them with continuous reflection throughout the research process, by showing openness during the interaction with the interviewees and by reminding them of my role as researcher.

### 3.4. Credibility

The issue of whether the interviewees would agree to reveal considerations that determined the Commission's position was a source of much reflection. The interviews may be characterized as elite interviews and the interviewees thus probably skilled in choosing an (as perceived by them) appropriate narrative, which puts demands on the interviewer in assessing the credibility of the information provided. For instance, one could imagine that interviewees would be hesitant to reveal political considerations as this could harm the Commission's reputation (or, at least, its ambition to portray itself) as an expert witness giving the Court the benefit of its advice in legal matters.

Although in agreement with rational choice theorists who question whether it is possible to reach the 'hearts and souls' of policy-makers, it was considered that this challenge could be addressed by demonstrating preparedness during the interviews, engaging in critical assessments to ensure that the interviewees' line of reasoning is fully developed and reflecting on possible motives of depicting a process in a certain way.

Knowing that the Commission's internal processes are sensitive matters, it could not be taken for granted that the interviewees would agree to reveal considerations that are not publicly available. It was however not considered likely that the interviewees would give misleading or even false information. Rather, if they would not have wished to reveal 'the full version', they could easily have provided short or general answers to the questions asked or even refused to comment on the more delicate questions.

To a varying degree, all interviewees were hesitant to talk about their knowledge of considerations made in specific cases. One interviewee did at first refuse to comment on considerations made in a given case. At the end of the interview, when confronted with the assumption that the Commission considers Member States' preferences, the interviewee however came back to the issue and denied that such considerations took place.

The frank attitude, with which some of the interviewees elaborated on their views and experience (as shall be shown in the following chapter cannot but be taken as likely to be true



considerations.

### 3.5. Limitations

Although the cases of the present study were strategically selected and represent ‘most likely’ cases in a ‘most likely’ policy area, none of them constitute a constitutional landmark case in the sense defined by Stein (1981). Consequently, it is not possible to exclude a relevance of the political bellwether assumption in explaining the historical development of European legal integration through the landmark constitutional cases that resulted in the quasi-constitutional legal order of today. Put differently, the findings will not allow determining whether the Commission did consider Member States’ preferences in the historical cases that radically changed the EU legal order.

In addition, as only three cases are examined, it is not possible to generalize the results in a quantitative sense. It could be that the way these dossiers are dealt with has varied over time. In addition, the case study approach does not allow fleshing out (systematic) trends or insights into the gradual development of the case law of the EU legal system.

Also, it cannot be excluded that additional interviews would have revealed further new elements relevant to assess the political bellwether assumption. Yet, there are no particular reasons to presume that the views of the five selected interviewees would differ from that of other civil servants in the Commission.

## 4. Results

### 4.1. Meaning

#### ***a) Are written observations best characterized as contributions to a process of developing EU law or as indicators of political acceptability among Member States?***

The interviewees were all asked about the objective of the Commission's written observations and none considered that these should reflect political acceptability among Member States. On the contrary, when confronted with this assumption they argued that Member States' preferences were irrelevant in this regard. In explaining the objective of the Commission's interventions, all interviewees stressed the role of the Commission as guardian of the treaties. Two also referred to the role of the Commission in promoting the general interest of the Union.

The replies from the interviewees show that they rather conceived of the Commission's intervention as a way to contribute to developing EU law. On this, two interviewees described the preliminary ruling procedure as a way to obtain a policy outcome that could not be obtained during negotiations with Member States on the legislation in question. When asked to clarify this reasoning, one civil servant in the Directorate-General was unexpectedly frank on this point:

In a way, you could see the preliminary ruling procedure as way to obtain what could not be obtained during the negotiations of the Directive.... a request for a preliminary ruling is a bit like a gift from heaven when it arrives.<sup>82</sup>

The above quote reveals a rationale according to which the civil servant even welcomes the opportunity to go against the preferences of Member States. Similarly, another interviewee described the preliminary ruling procedure as a way to contribute to putting an end to questionable conditions regarding the treatment of third-country nationals that are sanctioned by Member States and referred to a specific case as being useful in this regard:

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<sup>82</sup> EC official 2 (Directorate-General)

It was a well-selected case [by the national court,] that allowed us to move forward in the direction we wanted to go.<sup>83</sup>

One interviewee however refused to see preliminary rulings as a tool for policy development, arguing that it was not for the Commission to use the procedure in such a way if it meant sacrificing legal quality. When confronted with the idea that the Commission could use the preliminary ruling procedure to pursue its policy preferences, this interviewee reacted strongly, arguing that his/her role was to make the best possible legal analysis of the given case:

... when drafting the proposal to the Legal Service, it is about intellectual honesty, my honesty as a civil servant is at stake, what I think as a lawyer. I sometimes start off thinking that I will propose A, but then I assess all facts and elements and reach conclusion B.<sup>84</sup>

According to this interviewee, if the outcome of such an analysis coincided with the policy preferences of the Commission, this was nothing but a lucky coincidence.

When asked about the Commission's judicial strategy of submitting written observations to the Court in all preliminary rulings, one interviewee argued that such an approach was necessary to live up to the obligation conferred to the Commission as guardian of the treaties.<sup>85</sup> The same interviewee interestingly also described this strategy as an issue of enhancing credibility in front of the Court to remain influent over time. The alternative strategy according to which the Commission would 'pick and choose' cases in which to intervene (as Member States do) would risk making the Commission come across as political in the eyes of the Court.<sup>86</sup>

The interviewees in the Legal Service both stressed the importance for the Commission in being consistent in its legal interpretations horizontally (across policy-areas) and over time. On this, the same interviewee also hypothesized that Member States that used a more consistent

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<sup>83</sup> EC official 3 (Directorate-General)

<sup>84</sup> EC official 5 (Directorate-General)

<sup>85</sup> EC official 1 (Legal Service)

<sup>86</sup> EC official 1 (Legal Service)

approach and that sent the same lawyers repeatedly were more influential in the Court over time as such an approach allowed the lawyers to build up useful experience.<sup>87</sup>

When asked about awareness of Member States' preferences, all interviewees to varying degree said that they were aware of Member States' preferences, although unwilling to elaborate on this topic in more detail. One interviewee explained that Member States' written observations to the Court were considered insofar as they brought about new legal or factual elements to the case. Yet, the same interviewee stressed that the written observations were not relevant for the Commission *per se* and in any case not as indicators of political acceptability.

## 4.2. Process

### ***b) 'Is the process of determining the Commission's position best characterized as one driven by legal or political considerations?'***

The information provided by the interviewees suggests that the process is twofold in the sense that both the policy Directorate-General and the Legal Service are involved. The Directorate-General sends written observations to the Legal Service who then drafts the written observation to the Court. This was referred to as a suitable *modus operandi* as the Directorate-General is the service that knows the content and background of the issue at stake. When asked about the role of the Directorate-Generals in the process of deciding on the Commission's position, the reflections of the member of the Legal Service suggested the process in the Directorate-Generals is policy-driven:

They are the policy Directorate-Generals. They know the policies, how the policy field has developed over time, how it has been implemented so far, the political context, etc. They are thus best placed to propose the Commission's position.<sup>88</sup>

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<sup>87</sup> EC official 1 (Legal Service)

<sup>88</sup> EC official 1 (Legal Service)

The length, content and structure of the Directorate-Generals' written observations to the Legal Service vary. According to one interviewee, the proposals made by the Directorate-General typically contains a description of what the Commission sought to achieve with the legal provision at stake in the first place (when proposing the legislation) and what the negotiations on the provision were like. To supply the Legal Service with more detailed information on this, the Directorate-General sometimes annexes minutes from the discussions in the Council.<sup>89</sup> The interviewees described the content of the Directorate-Generals' written observations as the 'history of the file'<sup>90</sup> or as a comprehensive background analysis<sup>91</sup>.

Given that the Legal Service is in charge of drafting the written observation and ultimately deciding upon the Commission's position, its considerations and interests determine the outcome of this process. The members of the Legal Service both described the Legal Service as being at the service of the Directorate-Generals; yet they said that their legal interpretation determines the process. This view may be exemplified with the account of one of the interviewees:

You could say that we are their [the Directorate-General's] lawyers. We try to accommodate them but must of course ensure that we don't jeopardize the overall credibility of the Commission in front of the Court. We need to consistent to be influential. We need to ensure an overall high legal quality and consistence with the Treaty. That is our concern at the Legal Service.<sup>92</sup>

Both members of the Legal Service stressed the need to ensure a high probability that the Commission's proposal will be taken on board by the Court. According to one interviewee in the Legal Service, the typical reason for disagreement (or at least diverging views) between the two services was the willingness to take the risk of 'loosing' in front of the Court (in the sense that the Commission's proposal is not taken on board by the Court). It appears that the Legal Service (as compared to the Directorate-Generals) is more concerned about winning, while the

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<sup>89</sup> EC official 5 (Directorate-General)

<sup>90</sup> EC official 4 (Legal Service)

<sup>91</sup> EC official 5 (Directorate-General)

<sup>92</sup> EC official 1 (Legal Service)

Directorate-Generals are more willing to take the risk of “loosing” in front of the Court if the potential gains in terms of policy outcome are high enough in a given case. One interviewee had the impression that the members of the Legal Service varied in their willingness to take such risks.<sup>93</sup> The account of one interviewee however revealed that there are hesitations to take a too high risk as the Court’s judgments may have a constraining effect on the Commission:

Will we really be better off if we push for an even more rights enhancing line and the Court does not follow? Arguably not, then we risk ending up in a situation where we have less protection for these groups of people than before. Maybe it is better to have our views in our own communications and guidelines... and not put them at risk.<sup>94</sup>

One interviewee in the Directorate-General also explained that the Legal Service plays the role of reconciling different interests between different Directorate-Generals and that in this sense the Legal Service limits the prospect for political considerations to determine the Commission’s position.

The interviewees in the Legal Services both argued that if any political considerations were made during the course of determining the Commission’s position, such considerations took place within the Directorate-General and the Legal Service was not necessarily aware of these:

It might well be that Directorate-Generals take political opposition among Member States into account when proposing how to act in front of the Court. I don’t see anything strange in that, I don’t see the drama. History shows that the political context changes, national governments change, even the Commission changes. This is a natural development. Society changes as a whole. So, you never really know what the future will bring anyways.<sup>95</sup>

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<sup>93</sup> EC official 3 (Directorate-General)

<sup>94</sup> EC official 3 (Directorate-General)

<sup>95</sup> EC official 1 (Legal Service)

### 4.3. Specific cases

The interviewees were also asked about considerations made in the three specific cases: the *Imran* case (case C-155/11 PPU *Imran*), the *El Dridi* case (C-61/11 PPU) and the *N.S.* case (case C-411/10).

Although to a varying degree willing to elaborate on considerations made in specific cases, the accounts of the interviewees were straightforward and left no doubts regarding their lines of reasoning as regards Member States' preferences.

The interviewees were asked to validate the selected cases as 'most likely' cases in the respective policy area and agreed that these could be seen this way compared to other cases. To a varying degree, they confirmed that the Commission was aware of the preferences of Member States at the point in time when the Commission's written observation to the Court was determined ('such information slips in through different ways'<sup>96</sup>, 'well, I read the news'<sup>97</sup>, 'as you know, we work in Brussels'<sup>98</sup>). They all however strongly opposed the idea that such preferences would have fed the Commission's assessment. When asked whether the written observations to the Legal Service contained any such assessments (regarding the risks for legislative override and/or non-compliance and/or an assessment on how far Member States could be pushed towards enhanced legal integration), they denied that it would have been the case. A screening of the written observations sent by the Directorate-General to the Legal Service in the *El Dridi* case and the *Imran* case confirm these claims.<sup>99</sup>

Some interviewees explicitly stated that considering Member States' preferences was never an option as it would be contrary to the Commission's duties under the Treaty (as guardian of EU law).<sup>100</sup> Similarly, none of the interviewees saw that risks for legislative override or non-compliance among Member States were relevant for the Commission under this procedure as

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<sup>96</sup> EC official 2 (Directorate-General)

<sup>97</sup> EC official 1 (Legal Service)

<sup>98</sup> EC official 5 (Legal Service)

<sup>99</sup> See written observations of DG Home Affairs to the Legal Service of the European Commission in case C-155/11 *Imran* (sent to the Legal Service on 27 April 2011) and case C-61/11 PPU *El Dridi*

<sup>100</sup> EC official 2 (Directorate-General)

the Commission has monopoly on proposing new EU law. On this, one interviewee simply replied:

So what? We have the right of initiative.<sup>101</sup>

On the risk for non-compliance, one interviewee states that this was indeed a possible consequence of a controversial ruling. According to the experience of this interviewee, Member States sometimes find ways to circumvent the Court's rulings by adjusting their legislations in a way that these complied with the ruling while still not changing the way things were implemented in practice.<sup>102</sup> This did not however have any implications for the Commission's assessment. When asked why Member States' preferences were not taken into account in a given case despite the risk of non-compliance or legislative override, the interviewee simply replied:

Well no, because our assessment is based on a different analysis. We simply considered that the Member States were wrong.<sup>103</sup>

The same interviewee questioned the question as a whole:

Why would anyone in the Court think that the Commission adjusts its position according to an assessment of Member States? At least in my policy-area [asylum], it is obvious that the Commission does not always agree with Member States.<sup>104</sup>

The interviewees all shared the consideration that the assessment of whether or not the Court would be likely to take a given proposal on board was the major factor limiting the Commission's scope of manoeuvre in the sense that the Commission would not propose something that was not likely to 'fly' in the Court.

To sum up, the interviewees all opposed the idea that the Commission would consider Member States' preferences to identify a politically acceptable position. They refused such reasoning on

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<sup>101</sup> EC official 2 (Directorate-General)

<sup>102</sup> EC official 2 (Directorate-General)

<sup>103</sup> EC official 5 (Directorate-General)

<sup>104</sup> EC official 5 (Directorate-General)



several grounds, notably that it was not considered *relevant* ('why should we?'<sup>105</sup> 'our job is to guard the EU law'<sup>106</sup>) or *legitimate* ('would be contrary to our role as guardians of the treaty'<sup>107</sup>).

## 5. Analysis

The empirical findings reveal logics that are rather different from those put forward by previous research.

Notably, the empirical findings suggest that the Commission's written observations to the Court of Justice of the European Union are better characterized as contributions to a process of developing EU law than as indicators of political acceptability among Member States. In fact, none of the interviewees considered that political acceptability among Member States would be a relevant aspect for the Commission when determining its position under this procedure. On the contrary: they strongly opposed the idea that this would be the case.

Their accounts of the purpose and meaning of the Commission's written observations show that they see them as contributions to the development of EU law. Interestingly, the interviews revealed two different viewpoints in this regard: one seeing the written observations as a way for the Commission to pursue its policy interests and the other stressing the objective of supplying the Court with the best possible legal analysis. It appears from the interviews that the views of individual civil servants in the Directorate-Generals may influence and even determine the task of striking the balance between these two visions.

The internal procedures do allow political considerations to feed the Commission's position but only to the extent that they do not jeopardize the overall credibility of the Commission as a provider of legal expertise in the eyes of the Court. In this regard, the Legal Service acts as a

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<sup>105</sup> EC official 5 (Directorate-General)

<sup>106</sup> EC official 2 (Directorate-General)

<sup>107</sup> EC official 3 (Directorate-General)

gatekeeper to ensure an overall high legal quality and horizontal consistency in the legal interpretations.

These findings suggest that the Commission, rather than a political bellwether, is better described as a (political) activist that seeks to contribute to the development of EU law in line with its policy preferences or legal analysis irrespective of whether such an assessment is politically acceptable to Member States.

Importantly, it seems that the limits to such activism are not set by Member States' preferences but by expectations regarding whether a given position is convincing enough to be taken on board by the Court. Given the interest of the Legal Service in maintaining and enhancing the Commission's influence horizontally (across policy-areas) and over time, this service is more likely to sacrifice potential gains in terms of policy outcome in a given case than the Directorate-General.

Interestingly, it seems that the willingness to take such risks varies in the Legal Service and that the degree of risk-taking is determined by the views of its individual members. Hesitations to taking such risks however also exist in the Directorate-Generals as they see a risk that the Court's judgments may restrict their possibility to promote their policy preferences in the future. As an alternative to Burley & Mattli's (1993) reasoning (according to which the Court follows the 'political' lead of the Commission), it might be more adequate to think of the Commission following the Court in the sense that the Commission determines its position in accordance with expectations on whether a given proposal is likely to be taken on board by the Court.

In light of the empirical findings, it is difficult to see how the political bellwether assumption fits into recent quantitative literature such as the analysis of Carrubba, Gabel and Hankla (2012) that seeks to explain the high success rate of the Commission under the preliminary ruling procedure.

For neofunctional scholars, these findings imply that they should revisit their argumentation in explaining the sizable impact of the Commission on the Court and on why the Court is so keen to follow the lead of the Commission.

For the intergovernmental scholars Carrubba, Gabel and Hankla, the empirical findings have slightly different implications. Notably, the findings have implications for their theoretical model, where the position of the Advocate-General serves as a proxy for the legal merits of a case. If the Commission's position in some cases represents the Commission's best legal interpretation (as the empirical findings of the present study suggest), this implies that Carrubba, Gabel and Hankla have two variables measuring the same phenomena: the legal merits of the case. In addition, if the Commission in some cases intervenes as a policy activist, it is not really clear what role the Commission variable should have in their theoretical model discussing the influence of Member States.

As discussed in the theoretical framework, the empirical findings do however not rule out the possibility that the Court is receptive to threats of legislative override and/or non-compliance by Member States. It could simply be the case that the Court considers these directly and not, as the political bellwether assumption presumes, by using the Commission as a proxy for political acceptability.

As regards alternative explanations to the high success rate of the Commission, it could be that the Court simply is responsive to the pro-integrationist agenda of the Commission, or that the Commission's success may be explained by its expertise, resources, perceived neutrality as well as the judicial strategy as a 'repeat player' in front of the Court under the preliminary ruling procedure (as compared to Member States, who only intervene on a case by case basis) and/or the lack of resources at the Court, which forces the Court to rely on the Commission's legal expertise. These were all factors put forward by the interviewees when asked to offer their view on why the Court often follows the Commission.

## 6. Conclusion

### 6.1. The European Commission: A political bellwether?

The aim of the present study was to assess the validity of the assumption that the Commission acts as a political bellwether when interacting with the Court of Justice of the European Union under the preliminary ruling procedure. Thereby, and on a more general level, the present study sought to contribute to a better understanding of the relationship between these two institutions under this procedure.

As a first remark, it can be concluded that the exercise of carrying out interviews with central actors at the European Commission proved useful to this end. The interviews revealed a notable discrepancy between the reasoning made by neofunctional scholars and the practical experience of central actors involved in these processes.

Secondly, it may be concluded that the Commission's written observations to the Court in the three selected cases are better characterized as contributions to a process of developing EU law than as indicators of political acceptability among Member States. On this, the findings are clear. In fact, the interviews did not reveal any signs that Member States' preferences played a role in determining the Commission's position in these cases. Rather than a political bellwether, it thus appears that the Commission is better described as an activist that seeks to contribute to the development of EU law in line with its policy preferences or legal analysis, irrespective of whether such a line is acceptable to Member States. Interestingly, it seems that the limits to such activism are not set by the preferences of Member States but by expectations on whether or not a given position will be taken on board by the Court.

A few remarks on the policy implications of these conclusions can also be made. As history shows that preliminary rulings often have significant policy implications and as they have authoritative effect in all Member States, Member States might usefully dedicate more resources to monitor and influence them. Some Member States seem to have reached the same conclusion as they have established mechanisms and dedicated resources to supervise preliminary rulings

and control national courts' references to the Court. Yet, one may wonder whether Member States are still to fully realise what William Wallace (1982) called 'the gradual draining away of their lifeblood to Brussels'.<sup>108</sup>

For Member States that are hesitant to this on-going legal integration, the empirical findings may come as bad news, as it seems that the Commission is rather unreceptive to their threats of legislative override and/or non-compliance. Yet, the present study does not reveal whether (and if so, to what extent) Member States actively seek to influence the Commission's position. It cannot be excluded that such efforts could prove successful in this regard. Given the high success rate of the Commission in preliminary rulings, such a strategy may be worth trying.

## 6.2. Avenues for further research

By demonstrating that central actors in the European Commission did not consider Member States' preferences when determining the Commission's written observation to the Court in three 'most likely' preliminary rulings, the present study has ruled out one prominent assumption regarding how to understand the Commission's sizable impact on the Court's rulings under the preliminary ruling procedure. In terms of further research, it seems highly relevant to carry out further empirical research to assess alternative explanations to the Commission's high success rate.

Although probably challenging from a practical point of view, an exploration of the experience of central actors at the Court could constitute a fruitful path in this regard.

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<sup>108</sup> Wallace, William (1982:64-65). 'Europe as a Confederation: the Community and the Nation-State', *Journal of Common Market Studies*, 21: 57-68.

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# Appendices

## Appendix 1: Interview guide

### **Process**

1. How would you describe the Commission's interaction with the Court of Justice under the preliminary ruling procedure?
  - The role of your service in the process of issuing a written observation as compared to the role of other services involved in this process?
  - Based on your experience, what is the most common reason for disagreement between the Directorate-Generals and the Legal Service? Could you please elaborate?

### **Meaning**

2. In your view/based on your experience, why does the Commission submit written observations to the Court?
  - Purpose (goal)?

### **Specific cases**

3. References for a preliminary ruling can be more or less controversial. I am thinking of the degree to which the rulings could lead to more legal integration and the degree to which Member States oppose more legal integration in such cases.
4. At the point in time when the Commission's position in case X was determined, were you aware of the preferences of Member States?
  - If yes, did this awareness feed the assessment of your service? Could you please elaborate?

- Although this was a sensitive issue to Member States, the Commission did not hesitate to propose to enhance legal integration. Could you help me understand why?
- Did you see a risk that Member States might not comply with the judgment of the Court? (Why, why not?)
- Did you see a risk that Member States might call for amendments of the Directive to re-gain national sovereignty on these issues? (Why, why not?)
- *If yes:* Did this awareness feed your work with the written observation? If so, how? If not, why? (Could you please elaborate?)
- Some would argue that if the Court's judgment goes against Member States' preferences, they might react by not complying with the judgment or by calling for legislative change at EU level to 'take back power to the national level'. Has this ever been a concern of yours in your work with written observations to the Court?

### **Concluding questions**

5. Based on your experience, does the Commission consider the preferences of Member States when deciding on its position in a preliminary ruling?
  - If so, in what sense and under what circumstances?
  - Why/why not?
6. One last question: In your opinion, should the Commission consider the preferences of Member States in its written observations to the Court?
  - If so, in what sense and under what circumstances?
  - Why/why not?

These were all of my questions. Is there anything that you would like to add?

## Appendix 2: Article 267 TFEU

### Article 267

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.