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Modelling Judicial Dialogue in the European Community: The Quantitative Basis of Preliminary References to the ECJ

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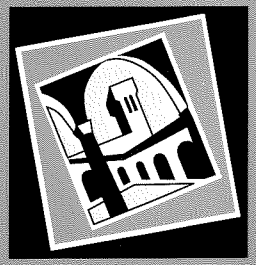

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Abstract*

While it has traditionally been viewed as the mechanism for constructing a remarkable supranational legal order, as well as the primary indication of judicial support for European integration, the intensity of "dialogue" established by preliminary references from national courts to the European Court of Justice varies considerably and unexpectedly amongst member states. By focusing attention on what generates litigation involving EC law, the model presented here identifies transnational economic interaction and transnational movement of people as factors which account almost entirely for cross-national variation in reference rates. These findings are contrasted with the inability of other factors to account for variation, including population size, implementation of EC law, reception of supremacy and direct effect, judicial empowerment, legal education, and various aspects of national legal culture.

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Masked by a shroud of complex legal rhetoric and shielded by claims of judicial impartiality, the European Court of Justice (ECJ) has shaped the trajectory of European integration through its rulings on preliminary references (Burley and Mattli 1993, Weiler 1991, Rasmussen 1986). That is, of course, when it has had references to rule upon. That the ECJ can not compel, but rather relies on Member States to produce these references establishes something of a dialogue between national and transnational judicial institutions. From the Court's perspective, the sources and patterns of preliminary references are fairly irrelevant--the frequency of dialogue rather than the distribution of lines amongst the actors determines the amount of raw material available to shape the integration process.[1] From an analytical perspective, however, the fact that the judicial dialogue between the ECJ and the respective Member States varies considerably in its intensity raises important questions about the process and politics of legal integration.

This article attempts to identify a dominant variable which accounts for such variation. The analysis indicates that quantifiable economic factors explain nearly all the variation in national reference rates, a finding which challenges traditional arguments that references depend on non-quantifiable factors such as legal formalism, judicial empowerment, legal culture and the idiosyncrasies of individual judges. Furthermore, variance amongst national reference rates implies that integration is, or has the potential to be driven more by some states than others. The role of frequent French and German preliminary references in shaping early ECJ jurisprudence in accordance with

[1] As Rasmussen notes, the sheer volume of references provides "the Court's sole means of influence and control" (Rasmussen 1986:255). However, the distribution of references might concern the ECJ if national courts in certain Member States refused to apply its previous preliminary rulings. The binding force of an ECJ preliminary ruling, on the court which referred the case as well as on all other national courts throughout the Community, has been a matter of some controversy. Article 5 of the treaty obliges national courts to rule in accordance with ECJ case law, but a certain measure of uncertainty and latitude emerges from the Court's rulings in this matter. See Bebr 1981b, Shaw 1993:146-7.

the national legal systems of these two states has been noted, in contrast to British courts which forfeited their ability to exercise influence on Community law by foregoing references (Dagtoglou 1978). A model of judicial dialogue which accounts for variation in reference rates therefore has significant predictive as well as explanatory value.

After a brief review of how the existing literature deals with the question of reference rates, I present a preliminary model of judicial dialogue and establish criteria for selecting and evaluating independent variables. This is followed by an analysis of six quantitative variables which might explain cross-national variation in reference rates. Based on the quantitative findings, additional hypotheses and areas of future research are then identified.[2]

Why do reference rates vary?

The starting point for the analysis is a central empirical conundrum of EC legal integration: why do reference rates for Member States vary so considerably, with national courts in Germany and some small states producing so many, and those in the UK and the south so few?

[2] The dataset is available from the author.

Figure 1 The Dependent Variable: Average Preliminary Reference Rates

Country	Average References/yr
Belgium	13.7
Denmark	2.3
France	21.1
Germany	36.2
Ireland	1.3
Italy	15.4
Netherlands	16.9
UK	8.1
Spain	4.6
Portugal	1.2
Greece	2.3

Note: Measuring the total number of references from each state would introduce a bias against Ireland, Denmark, the UK, Spain, Portugal and Greece. The average number of references per year avoids this problem by controlling for different lengths of Community membership.

Remarkably little has been written on this subject, either by political scientists or EC lawyers. Rather, efforts have been focused on a separate aspect of judicial dialogue--explaining why and at what point national courts embraced doctrines of supremacy and direct effect. In particular, each of the prevailing models of judicial interaction between national courts and the ECJ--legalism and neo-functionalism--recognises the importance of 177 references as a defining element in the judicial dialogue, but neither offers an explicit explanation for cross-national variation in the intensity of this dialogue and the resulting variation in the patterns of references (Weiler 1991, Burley and Mattli 1993, Golub 1996). Recent efforts to develop a theory of inter-court competition also fail to address cross-national variance in reference rates, focusing instead on why we see references from lower but not higher courts (Alter 1995).

However, the assumptions embedded in the legalist and neo-functionalist models generate several testable hypotheses about why reference rates vary (Golub 1996:363-365). One possibility drawn from legal formalism is that the total number of references, as well as any cross-national variation in reference rates, to a large extent is dictated by the receptiveness of national judges to the "inherent logic" of ECJ's arguments (Weiler 1991, Mancini 1989). If correct, the rate of 177 references would be higher in states where judges were swayed by the legal persuasiveness of ECJ rulings regarding the need to refer, in particular *Da Costa*, *CILFIT* and *Foto-Frost*.[3] Low reference rates would reflect instances where these rulings were deemed less persuasive by national judges.

Another qualitative factor underpinning variation in reference rates has also been suggested by neofunctionalists, who attribute Article 177 judicial dialogue to the lure of professional self-interests--"heady" psychological factors and judicial empowerment which create unidirectional incentives driving national judges to provide the ECJ with preliminary references (Weiler 1994, Burley and Mattli 1993). Rasmussen, for example, attributes the growth of references during the period 1967-83 to an ECJ publicity campaign which fostered these feelings by bringing national judges to Luxembourg and alerting them to the benefits of judicial cooperation (Rasmussen 1986:246-7). Unfortunately, comparative studies of how these factors affect reference rates in each Member State have not been performed. Furthermore, important

[3] Cases 28-30/62 [1963] ECR 31, 283/81 [1982] ECR 3415 and 314/85 [1987] ECR 4199. These rulings establish guidelines for national judges on the obligation to refer. Da Costa introduced an exception to the obligation of courts of last resort to refer under Article 177(3)--when the Court has already ruled on a question which was "materially identical". While appearing to expand this doctrine, CILFIT actually narrowed the grounds upon which national courts can refuse to refer by constructing the exception so narrowly "that it would rarely, if ever, be satisfied" (Mancini and Keeling 1991:3). See Rasmussen 1984. The ECJ held in Foto-Frost that even lower national courts must refer where the legal validity of Community acts is in question.

disincentives have been identified which make it unlikely that judicial self-interest or empowerment are the underlying determinants of reference rates (Golub 1996, Rawlings 1993).[4]

While the argument is never made explicitly, the scholarship devoted to supremacy and direct effect might also contain potential explanations for variation. Theoretically, application of direct effect and supremacy could lead to more preliminary references as EC law becomes an available remedy in national courts. Alternatively, early acceptance of supremacy and direct effect might remove many of the ambiguities surrounding the application of EC law and its relationship with pre-existing national norms, leading to a paucity of references. However, the timing of when national courts embraced doctrines of supremacy and direct effect apparently bears no relation to reference rates: the UK and Italy each embraced direct effect at an early stage (Mattli and Slaughter 1996), but this was not associated with large or equivalent numbers of references from these states. Similarly, France and Britain both accepted direct effect and supremacy at a later stage with landmark decisions in the Conseil d'Etat and House of Lords, but exhibited dramatically different patterns of references from one another--France's reference rate was exceeded only by Germany while the UK remained a noticeable laggard. Nor did Italy and the Netherlands accept these doctrines at the same time, as their equivalent reference rates might suggest. Thus we do not find that reception of supremacy and direct effect leads either to an increase or a paucity in the number of references--national reference rates are apparently unrelated to the early application of these doctrines.

[4] This view of the judicial dialogue requires substantial rethinking, as it overestimates the expected number of references by ignoring important disincentives, particularly the ability of individual judges to pursue specific policy outcomes by withholding references. Similarly, in some cases we might see fewer references because the heady business of engaging in judicial dialogue with the ECJ might be tempered by an attachment to sovereignty and a general aversion to the integration process on the part of national judges.

Outside of the two leading theoretical models designed specifically to explain EC legal integration, differences in national legal culture are also obvious candidates for explaining reference rates. While the diversity of scholarship on legal culture tends to reveal the "catch-all quality" of the term, comparative legal analysis has highlighted important national variation in the supply and demand for law, as well as the structure and operation of legal institutions (Nelken 1995). Attention to such variations--including, for example, levels of national litigiousness, the size of national judiciaries and their caseloads, traditions of judicial review, dualist and monist doctrines, and the national diversity in the legal training of advocates--might reasonably be expected to explain a substantial amount about Article 177 reference rates. However, although patchy and incomplete, available data suggests that these factors do not account for cross-national variation in the frequency of references.

In their study of national courts and the ECJ, Weiler and Dehousse offer the following conclusion: "Could the high number [of references] for some Member States relate to generally more litigious societies? This seems unlikely given the relative similarity between a group of Member States" (Weiler and Dehousse 1992:14). Indeed, based on Figure 1, if it were a key factor in variation, proponents of this variable would need to demonstrate a remarkable aversion to legal proceedings in Ireland, Denmark, the UK and Mediterranean states, much higher but similar levels of litigiousness in Italy, the Netherlands and Belgium, and an unusual affinity for legal confrontation in Germany. For Germany the argument might be made, but the Netherlands has "the lowest litigation frequencies on the European continent" (Blankenburg 1994:789). The Netherlands also has perhaps the lowest number of advocates in Europe, as well as one of the smallest judiciaries (Blankenburg 1994:793), factors which have not prevented it from having a remarkably high reference rate.

Scholars of legal culture might also highlight national differences in the structure of legal education, and how these differences condition the supply of and demand for preliminary references. Lawyers in some states may not encourage references because they have little knowledge of or experience with European law, their legal education having consisted almost entirely of national law (Brown and Kennedy 1994:275, Goode 1993:11). Despite the appeal of this argument, very little research has been done on comparative legal education, and what does exist suggests that this variable enjoys minimal explanatory power. Evidence must be provided, for example, that lawyers in Belgium and the Netherlands are somehow immersed in EC legal studies, those in Britain severely deprived, and that education requirements differ significantly amongst France, Germany and Italy. Furthermore, given their similar reference rates, the proportion of education devoted to EC law would have to be roughly equivalent in Italy and the Netherlands. In fact, the persistent lack of British references does not reflect a lack of EC legal education (Brown and Kennedy 1994:275-6, Goode 1993:13). More importantly, legal requirements in all Member States are dominated by courses in national law, which makes it difficult to explain cross-national variation in reference rates. Even amongst the original states, "the basic diet is national law" (Lonbay 1992:81) and insufficient attention is paid to EC legal requirements, which form a small component of international law or are grafted interstitially on to other traditional courses (Brown and Kennedy 1994:275, Lonbay 1992:84-93, de Groot 1992). Germany is a particularly clear example of this phenomenon (de Groot 1992:20-22) yet it has the highest reference rate.

Because cross-national variance in reference rates may reflect a combination of these domestic legal factors and other variables which is far too numerous and complex to model, the challenge is clearly to identify which factors best account for national differences. The model presented below seeks

to do just this. If it can be shown that a single factor identified in the model accounts for a substantial amount of the variation, it becomes unnecessary to look further for explanations drawn from legal culture or the two traditional models of EC legal integration.

The model

The model presented here is designed to test two essential features of the reference process, the actual number of references (the dependent variable), and the potential demand for adjudication involving EC law (the independent variable). Obviously issues of EC law must first arise in national litigation before they are sent to the ECJ. As national judges are brought into more frequent contact with EC law through demand for litigation, the number of references should increase accordingly. Demand for litigation involving EC law is generated only when a treaty provision or a piece of secondary legislation might play an important part in a national court case. Therefore I examine several quantifiable independent variables which could generate cases involving issues of EC law, and thereby serve as the causal mechanism for cross-national variation in reference rates.

In so doing, the model collapses the necessary chain of events which leads to a preliminary reference. It ignores the very complex, perhaps essential, relationship between issues arising and issues referred, and models instead the connection between factors which might generate a high number of issues arising and the actual number of references made. While judges play an essential role in facilitating references, they are treated here effectively as an intervening factor, a conduit through which a limited number of references could conceivably pass depending on the underlying demand. Of course a more thorough model could take account of the fact that not everything is referred, and that the "referral propensities" of national judges vary amongst states and

over time (Golub 1995). The implications of omitting judicial discretion as a crucial intervening variable should be reflected in the model's ability (or inability) to account for actual reference rates.

The "perfect" independent variable, if it were to exist, would capture the preliminary reference rates of Member States in the equation Y = mX. For example, if the number of lawyers X strongly determines the number of 177 references Y, then we would find the same reference/lawyer ratio (Y/X) in all states--doubling lawyers would double references, tripling lawyers would triple references etc. In this case the R-squared value which measures the relationship between the dependent and independent variables would be exactly 1.0, as shown in Figure 2.

Figure 2 The Perfect Independent Variable

	Independent variable	Total 177 references
Germany	8x	8y
Italy	7x	7y
UK	6x	6y
France	5x	5y
Netherlands	4x	4y
Belgium	3x	3y
Denmark	2x	2y
Ireland	x	y

Regression R-squared Value = 1.0

While never reaching a level of perfection, variables which generate the highest R-squared values suggest the highest causal relationship with 177 reference rates. Identification of the factors which drive reference rates allows us to answer some of the central questions offered above: for example, why do small states produce so many references, Britain so few, and why does the German reference rate exceed those of Italy and France? As the explanatory power of the model's variables increases, the need to consider judicial discretion, legal

culture, neo-functionalism and legal formalism as determinants of reference rates decreases accordingly.

Selection of variables

Six independent variables have been selected for their potentially dominant effect on 177 reference rates: population size, economic openness, intra-EC trade value, intra-EC agricultural trade value, number of EU non-nationals in a host state, and EC law implementation rates as measured by the number of Article 169 warning letters issued against a Member State. This section outlines the analytical reasons behind selection of each variable, while the following section assesses their explanatory power through the use of bivariate regression. The analysis is intentionally restricted to bivariate regression, as several of the independent variables exhibit extremely high collinearity, making estimates from multiple regression extremely unstable and therefore unreliable.[5] A distinction is also made between original and newer Member States in order to identify whether different variables apply more strongly in the UK, Ireland, Denmark and southern Europe.

The analysis then introduces the concept of judicial learning in order to further explore the strength of each independent variable. The theoretical justification here is that a transition period should occur after accession to the Community, during which time familiarity with EC law by lawyers, litigants and judges increases (Golub 1996). Until such diffusion of experience took place reference rates would be artificially low, unrelated to the quantitative factors which determined reference rates in other Member States.

[5] In other words, several of the independent variables are closely associated, with increases in one corresponding to increases in the other. This precludes discerning the independent effect of each variable through the use of multiple regression.

After a number of years, the rates from new Member States should converge with those of the original Member States, in accordance with shared underlying factors, reflected in higher R-squared values. Decreasing regression values could signal either the relevance of other quantitative variables, or the importance of qualitative factors and other pathologies suggested by both neofunctionalists and previous studies of judicial discretion (Burley and Mattli 1993, Golub 1995, 1996). In order to test for judicial learning and reveal the actual predictive power of each variable, the assessment therefore factors in a timelag for Denmark, Ireland, the UK, Greece, Spain and Portugal by omitting data for their initial years of membership and then recalculating the regressions.

Population size: Larger populations generally produce more courts, more businesses, more litigation, more possibility of encountering issues of EC law, and therefore more references. EC lawyers have suggested that, after some initial difficulties, every Member State began to make frequent use of Article 177 (Bebr 1981a:543, Volcansek 1986:261), so that over time 177 reference rates might be nothing more than a function of population size. This would explain why Germany, the largest state, has the highest rate of references, while the smallest states Portugal and Ireland have the lowest. Below, average national population size is regressed against average reference rates for the years 1972-94.[6]

Openness of the economy: Another possibility is that references are highly associated with identifiable economic factors which give rise to litigation involving EC law, and which vary across states. As a starting point one such factor would be the density of intra-EC transnational economic interaction. This would include the number of firms involved in cross-border trade, and also

6 Data is drawn from *European Economy*.

the frequency of trade. Firms operating transnationally necessarily encounter foreign legal regulations which place restrictions on their business activities. This creates a demand for litigation in national courts and for references to the ECJ in order to receive guidance on treaty provisions and secondary community law, both of which are designed to remove such restrictions.

Large corporations doing business throughout Europe have strong incentives to support completion of the common market, and have consistently pursued this goal through litigation in which the ECJ was encouraged to assess the validity of national measures through frequent preliminary rulings (Mattli and Slaughter 1996, Plötner 1995, Claes and De Witte 1995). While a large proportion of the preliminary references made during the period 1988-93 dealt with trade related issues such as commercial policy, company law, free movement of goods, taxation and competition (Brown and Kennedy 1994:416-17), the national distribution of these cases has yet to be accounted for. One goal of this article is thus to identify specific aspects of national trade which determine patterns of cross-national variation in reference rates, for the entire period 1972-1994.

One indication of intra-EC economic interaction could be the openness of the economy for each Member State, traditionally measured by the percentage of GDP derived from trade. Courts in states which derive a high proportion of their GDP from intra-EC trade would be expected to face greater pressure for application of EC law from importers and exporters, which in turn would produce relatively more references. As Mattli and Slaughter point out, "it is no coincidence that ten out of the first thirteen references to the ECJ came from Dutch courts," as small states have particularly open economies (Mattli and Slaughter 1996:8). The analysis presented below utilises the overall openness

of national economies, but also differentiates between exports and imports for the period 1972-94.[7]

Intra-EC trade: A crude proxy for the density of economic interactions could be the actual value of intra-EC trade for each state: the sum of intra-EC imports plus intra-EC exports. This reflects the number of cross-border shipments and the number of firms operating at a transnational level, and might account for the absolute number of references. Small states have high rates of cross-border trade, which might account for their disproportionate number of references. As with economic openness, the analysis differentiates between intra-EC exports and imports for 1972-94 in order to identify the potentially dominant factor driving reference rates.[8]

We would expect states with large intra-EC trade to have large numbers of instances where firms encounter foreign practices which could violate EC law, such as cases involving EC law on competition and undertakings (Articles 85-90), monopolies (Article 37), customs duties (Articles 12-17), state aids (Articles 92-94), dumping (Article 91), taxation of goods (Articles 95-99), free movement of goods (Article 9, Articles 30-36) etc. These encounters should produce demand for litigation in national courts regarding questions of interpretation, and therefore references to the ECJ. For states with low rates of intra-EC trade, firms face potential restrictions on their business activity mostly as matters of national law. Without transnational trade effects, there is less prospect of encountering the treaty or secondary legislation, and thus less demand for references to the ECJ.

[7] Data compiled from *European Economy* .

[8] Data from *European Economy*. Not considered in this paper is the possibility that extra-EC trade flows might also influence reference rates, if EC laws on external tariffs and customs were involved. More refined versions of the model could include this variable.

Agricultural trade: Intra-EC agricultural trade is a specific form of transnational economic interaction, and is calculated separately from (not subsumed by) general intra-EC trade. States with large intra-EC agricultural trade should encounter more conflicts between national rules and EC law (Articles 38-47) and thus demand greater numbers of references. Almost a fifth of the preliminary references made during 1988-93 dealt with agriculture (Brown and Kennedy 1994:416-17), making this a potentially fundamental determinant of national reference rates. Unfortunately a lack of data allows analysis of a thirteen year time series 1980-92, as opposed to 23 years for general trade.[9]

Foreign population: Besides trade flows, the number of EU non-national residents in a state (e.g--Germans living in France, Italians living in Belgium) might exercise a strong influence over patterns of preliminary references. Rather than transnational economic interaction, transnational movement of people inevitably generates conflicts between national laws, and between national and EC law, each of which requires ECJ resolution. High numbers of EU non-nationals would be associated with frequent instances of EC law, and thus frequent references, in national litigation dealing with free movement of people (Article 48), social security for migrants (Article 51), establishment (Articles 52-58), freedom to provide services (Articles 59-66), and equal treatment (Article 7), areas which saw substantial numbers of references during 1988-93 (Brown and Kennedy 1994:416-17). 177 cases would originate in the host country, rather than the country of emigration. References could deal directly with interpretation of the treaty itself, as in the case of free movement, or with the validity and interpretation of secondary legislation, as in the case of social security for migrant workers (Brown and Kennedy 1994:197). We would

[9] Data from *UN Commodity Trade Statistics* and *Eurostat*.

therefore expect high numbers of EU non-national residents to translate into a high reference rate. Unfortunately a significant amount of data is missing for this variable, which limits the time period under consideration. Available data from 1980-93 is used in the regression analysis.[10]

Implementation failure: The demand for ECJ involvement in national litigation might also depend on how governments have implemented EC law. States with poor implementation create situations where lawyers can easily question the conformity of national measures with EC secondary legislation. Identifying implementation failure for EC law presents a number of definitional problems, but is measured here by the number of Article 169 warning letters issues against a state. We would expect a high number of warning letters to correspond with a high number of references. I introduce this variable in order to capture 177 references dealing primarily with secondary legislation (conformity of national implementing measures, or lack thereof, with EC law), although warning letters are also issued for direct violations of treaty provisions (e.g. Article 30). Data for this variable is available only for 1978-94.[11]

Results

Reference rates were regressed against the independent variables, Figure 3 reports the R-squared values. Calculations were made based on reference rates of the original Member States (except Luxembourg) (n=5), the original states plus Denmark, Ireland and the UK (n=8), and all states after the accession of Greece, Spain and Portugal (n=11).

10 Data from *OECD Trends in International Migration* and *Eurostat*.
11 Taken from *Annual Reports of the Commission to the European Parliament on the Application and Monitoring of EC Law*.

Figure 3: Article 177 Reference Rate Bivariate Regression Results

	N=11	N=8	N=5
Trade			
intra-EC imports	0.83226	0.83106	0.92525
	(6.68)	(5.433)	(6.094)
intra-EC exports	0.93785	0.9415	0.99842
	(11.65)	(9.827)	(43.576)
total intra-EC trade	0.89818	0.90056	0.98493
	(8.91)	(7.372)	(14.003)
import openness	0.06626	0.10692	0.25838
	(-.7991)	(-.8475)	(-1.022)
export openness	0.00111	0.05741	0.21801
	(-.100)	(-.6045)	(-.9145)
total openness	0.01988	0.07976	0.23946
	(-.427)	(-.721)	(-.972)
Agriculture			
intra-EC agriculture imports	0.81341	0.75398	0.74779
	(6.264)	(4.288)	(2.982)
intra-EC agriculture exports	0.48379	0.34164	0.01795
	(2.904)	(1.765)	(.234)
total intra-EC agriculture trade	0.82074	0.78141	0.52563
	(6.419)	(4.631)	(1.823)
Implementation	0.00398	0.13914	0.10878
	(-.190)	(.985)	(-.605)
EU Foreign Residents	0.68772	0.61143	0.65702
	(4.452)	(3.073)	(2.397)
National Population	0.43453	0.41643	0.39166
	(2.63)	(2.069)	(1.39)

Note: T-statistics in parentheses

The regression values are consistent with the hypothesis that preliminary reference rates are determined by quantifiable domestic factors. Intra-EC trade, particularly exports, exhibits a remarkably strong relationship with reference rates in all eleven Member States (R-squared=.93785). This striking relationship is shown in Figure 4--an increase of 2.8 billion ECU in intra-EC exports is associated with one additional preliminary reference. A second variable, agricultural trade, also shows a strong relationship with references, but only in the case of imports (R-squared=.81341). Contrary to expectations, agricultural exports are only weakly related to reference rates. Although not as strong as that with trade, the relationship between references and the number of EU foreign residents appears significant, consistent with the model's

predictions.[12] An equally important finding is that two of the potentially influential variables--implementation of EC law and overall economic openness--appear to play no role at all in determining cross-national variation in reference rates (R-squared values=.00398 and .01988 respectively).

12 In assessing the role of these variables, the collinearity caveat must be taken into consideration. Although not exhibiting quite as strong a relationship, the picture would be similar if plotting references against imports, agricultural imports or EU foreign residents. While this makes it impossible to determine whether agricultural imports, with the second highest R-squared value, exhibit a strong relationship with references independent of overall national trade levels, the scatter plot (not included here) casts doubt on the explanatory power of this variable. Unlike the case of exports, where deviation from an almost perfect linear relationship depended on the peculiarities of only three states, agricultural imports appear weakly related to references in almost all states--only four of the eleven states fall near the best-fit line.

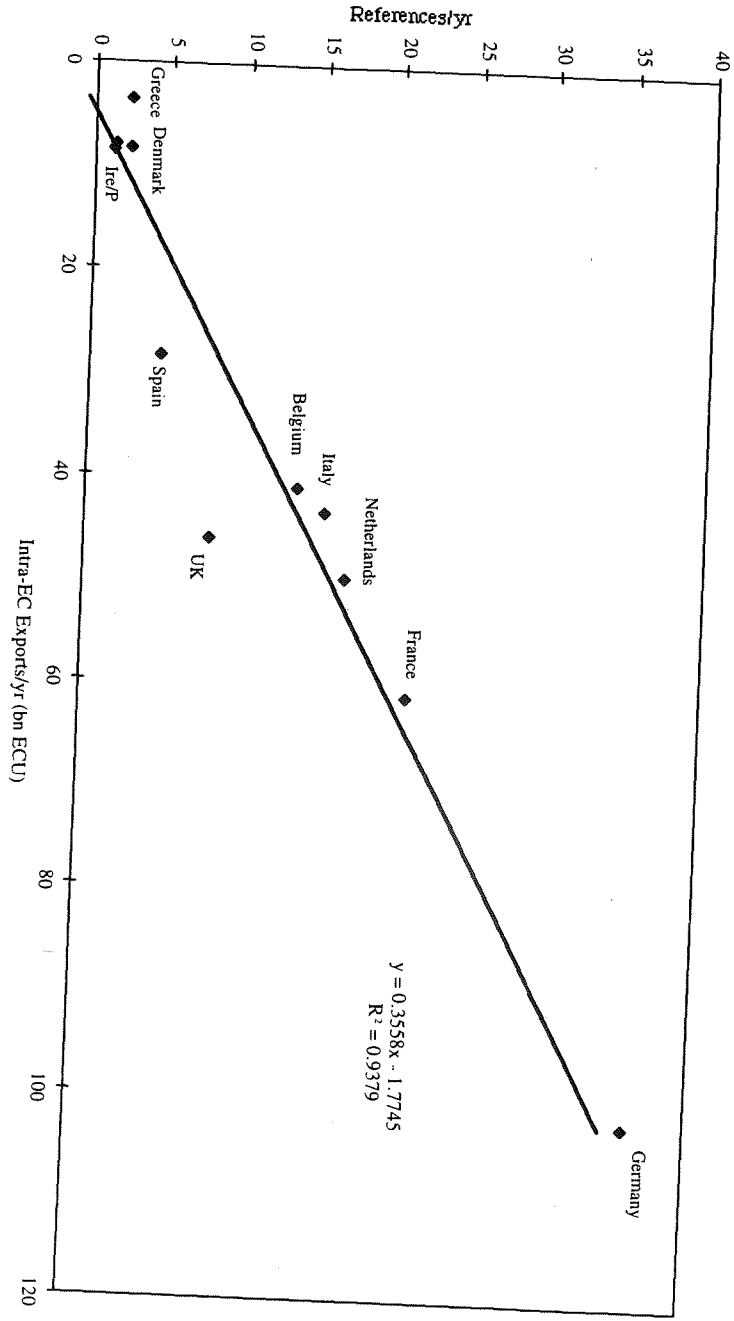

Figure 4: References v. Exports in Eleven EC States 1972-1994

Reducing the sample size reveals that exports exert an even more dominant influence on reference rates in the original Member States. Removal of the newer states leaves the original states falling almost exactly along the best-fit line, the R-squared value rising to .998 (n=5) as indicated in Figure 3. The analysis also identifies the UK, Spain and Greece as outlier states where a weaker relationship exists between exports and references. Spain and the UK produce fewer references than expected given their level of intra-EC exports (falling below the best-fit line), while Greece produces a disproportionately high number of references (falling well above the line). This could indicate the role of other quantitative factors not considered here, but equally supports the conclusion that in these states judicial discretion, psychological qualitative factors, legal culture and other variables play an important role in determining the use of Article 177, with disincentives significantly depressing the British reference rate (Golub 1995, 1996).[13]

Introducing the concept of judicial learning also helps identify causal factors underpinning cross-national variation in reference rates. Over time, as new states adjust to EC law and experience learning, R-squared values should increase for the relevant independent variables and outliers should move closer and closer to the best-fit line. Alternatively, the R-squared value could fall precipitously if trade played no role in determining reference rates in the newer states. Figure 5 reports the regression analysis after factoring in a time lag. Regressions were performed on limited periods of data: 1983-94 for Ireland, Denmark and the UK, 1986-94 for Spain and Portugal, 1986-94 for Greece. The full 1972-94 time period was used for original Member States.

[13] It should be noted that any conclusions drawn about the behaviour of the smallest states should be treated with caution given the inherent problems of working with small numbers--the references/exports ratios for these states are highly sensitive to tiny changes in the actual number of references, a few additional cases could alter the results dramatically.

Figure 5: 177 Reference Bivariate Regression Results Including Time Lag

Independent Variable	After learning n=11	Before n=11	After learning n=8	Before n=8
Trade				
intra-EC imports	.71827	0.83226	.6824	0.83106
	(4.79)	(6.68)	(3.5902)	(5.433)
intra-EC exports	.88961	0.93785	.87648	0.9415
	(8.516)	(11.65)	(6.5249)	(9.827)
total intra-EC trade	.81953	0.89818	.7939	0.90056
	(6.393)	(8.91)	(4.807)	(7.372)
import openness	.1114	0.06626	.1353	0.10692
	(-1.062)	(-.7991)	(-.969)	(-.8475)
export openness	.01779	0.00111	.1291	0.05741
	(-.40377)	(-.100)	(-.9431)	(-.6045)
total openness	.05272	0.01988	.13358	0.07976
	(-.7077)	(-.427)	(-.9618)	(-.721)
Agriculture				
intra-EC agriculture imports	.8581	0.81341	.8178	0.75398
	(7.378)	(6.264)	(5.1898)	(4.288)
intra-EC agriculture exports	.45199	0.48379	.3133	0.34164
	(2.7245)	(2.904)	(1.655)	(1.765)
total intra-EC agriculture trade	.8287	0.82074	.7955	0.78141
	(6.599)	(6.419)	(4.831)	(4.631)
Implementation	.1522	0.00398	.0283	0.13914
	(-1.271)	(-.190)	(.4182)	(.985)
EU Foreign Residents	.7420	0.68772	.6789	0.61143
	(5.0879)	(4.452)	(3.562)	(3.073)
National Population	.5134	0.43453	.4944	0.41643
	(3.082)	(2.63)	(2.422)	(2.069)

Note: T-statistics in parentheses

Clearly exports exhibit a strong relationship with reference rates even after a transition period, as R-squared remains very high for the case of n=11. Nevertheless, there is a slight weakening from the nearly perfect .998 we saw for the original states. This could indicate the importance of alternative quantitative factors or the role of qualitative factors and other variables in a few states. Figure 6 reveals which states have undergone an adjustment during the transition period, whereby their reference rates approach an expected value based on trade, or continue to exert downward pressure on the R-squared value.

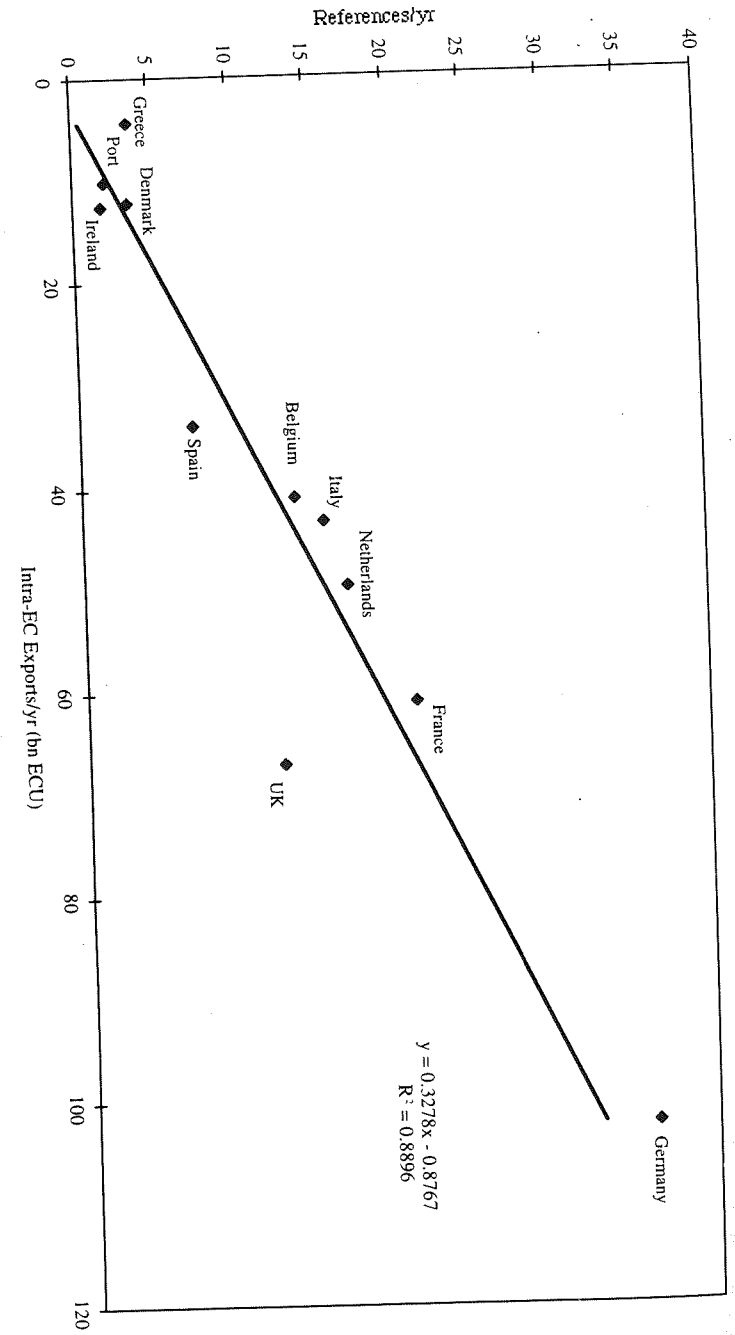

Figure 6: References v. Exports in Eleven EC States After Judicial Learning

The graph provides support for the presence of judicial learning, but only in Spain, where after a four year time lag the relationship between references and exports approximated that found throughout the EC--an additional reference for each 3.0 billion ECU increment in intra-EC exports. The level of references from Greece, on the other hand, remained unusually high instead of decreasing in line with its intra-EC exports, although the small numbers problem must be taken into consideration. Already very close to the best-fit line, Portugal, Ireland and Denmark experienced almost no change during the transition period, suggesting that judicial learning was not necessary to bring their reference rates into accordance with trade factors, but also that membership did not trigger pathologies undermining this relationship. The data also confirm previous characterisations of the UK as a severe laggard when it comes to preliminary references (Golub 1995, 1996). The UK actually moved farther away from the best-fit line, revealing the fact that according to this variable a period of "learning" merely exacerbated Britain's anachronistic position--removing the UK from Figure 6 raises the R-squared value from .8896 to .9731.

Conclusions

A number of conclusions emerge from the previous analysis. As predicted by the model, transnational economic interaction, as well as transnational movement of people constitute the underlying determinants of national reference rates. Quantifiable variables such as intra-EC trade, intra-EC agricultural trade and EU foreign residents explain cross-national variation in patterns of judicial interaction between the ECJ and the Member States. The level of intra-EC exports displays the most remarkable association with references, particularly in the original Member States. It also appears that in some cases accession triggers a process of judicial learning, whereby over time the reference-trade relationship also applies to the newer Member States. Also of great significance, other quantitative factors which might have been

important for determining reference rates, such as population size, the openness of the national economy, and the level of implementation of EC laws can be excluded as insignificant pending further analysis.

These findings leave little room for claims that reference rates are determined even moderately by factors such as "the goodwill of national courts" (Mancini and Keeling 1991:1), national reception of direct effect and supremacy, judicial empowerment, legal formalism, neo-functionalist dynamics between the ECJ and national courts, legal culture, traditions of judicial review, monist v. dualist doctrines, or upon distinct idiosyncrasies of national judiciaries. The high rates found in Belgium and the Netherlands, for instance, appear to depend on trade rather than an unusual willingness of Belgian and Dutch judges to follow the narrow legal guidelines laid out in *CILFIT*. Similarly, the variation between German, French and Italian rates seems to reflect export patterns, not differing intensities amongst national judiciaries of heady enthusiasm for European integration or reverence for members of the ECJ. The German reference rate is the highest in the EC, nearly twice that of France, not because Germany has the most open economy or because of its unique legal culture, but because it produces a vast amount of exports. Most of the smaller Member States follow a similar pattern, exporting little and producing few references.

Intuitively we might have expected a bewildering number of domestic factors to underpin variation. However, the robustness of the results suggests that factors such as legal culture or functionalism operate only at the margin for most states. Significant effects might even be limited to two cases, Greece and UK, where qualitative factors contribute to an unusually high number of references in the former and a particularly low number in the latter. Nevertheless, if for most states patterns of references are strongly associated

with quantifiable factors such as trade, this allows more leverage in identifying and studying anachronisms.

Evidence that quantifiable economic factors dictate patterns of preliminary references places the burden of proof on those who would claim that structural and cultural aspects of comparative legal studies account for variation in national patterns of references. If these factors operate at all, tireless pursuit of their effects might only inject unnecessary complexity into a system that can be adequately modelled by more parsimonious means. While there is no doubt that quantitative factors require a significant amount of testing and refinement before it is possible to decide definitively on their causal relationship with reference rates, it is equally important that claims for the determining influence of qualitative factors generate testable hypotheses which are then subjected to the same rigorous analysis.

Refinement of the model is certainly required. As stated at the outset, it will be necessary to consider the relationship between questions of EC law arising in national courts and the number of references made, a link in the chain of events which was intentionally omitted for this study. While neglect of judicial discretion as a variable might strike some as patently absurd, the near perfect connection between trade and references suggests that judges in fact serve as conduits, their individual discretion playing an insignificant role in determining aggregate national reference rates. In terms of extending the model, or indeed testing the preliminary results presented here, particular attention might be focused on explaining cross-national variation in the distribution of references across policy sectors once we disaggregate overall reference rates.[14] This requires information about the break-down of 177

14 The model also allows predictions about which national courts make references. We would expect that courts which handled issues of transnational trade and treatment of foreign EU nationals would account for the overwhelming majority of total references.

references by policy area, data which is not publicly available. If in fact quantifiable factors dictate reference rates, as the above results suggest, this would give rise to three additional hypotheses about patterns of references:

- We would expect to find a predominance of trade-related references from all Member States. This would still allow for considerable cross-national variation, as trade issues could encompass, among other things, customs and tariff issues, free movement of goods, competition, and dumping, but each state would produce a predictable number of references in the sector when taken as a whole. Given the high collinearity between trade and agricultural trade, it is also possible that reference rates in certain states would show a stronger relationship with the latter than the former, although, unlike overall trade, the data suggests the relevance of agricultural imports, not exports.

- We would expect that the number of EU foreigner residents, which also varies closely with trade, could explain cross-national variation in patterns of references dealing with free movement of persons, equality of treatment, social security, and right of establishment. As with trade, we might see some variation across states amongst these three sub-categories, but the sum of the subcategories would remain predictable based on the predictive power of our independent variable. Disentangling the independent effects of trade, agriculture and foreign residents on reference rates will require additional data in order to overcome collinearity problems and facilitate reliable multiple regression analysis.

- We would expect this cross-national clustering effect around trade issues to contrast sharply with reference rates in sectors unrelated to trade, such as sex discrimination (Article 119), social policy, environmental protection etc. In all of these sectors the pattern of references from each Member State would remain highly unpredictable.

Finally, this study highlights an important conceptual ambiguity surrounding the term "judicial dialogue" as it is currently used in the study of European legal integration. For many, legal integration involves "the acceptance of [ECJ] jurisprudence within national legal systems" (Alter

1995:2), particularly the doctrines of supremacy and direct effect, which requires the cooperation of national courts. This cooperation comes in two distinct forms, each of which have been referred to as dialogue. On one hand, the frequency of preliminary references from national courts has been interpreted as a key indicator of cooperation with the ECJ (Golub 1996:362-363), and thus a critical aspect of judicial dialogue. On the other hand, the term dialogue has been used to describe the process whereby national courts cooperate in European integration by applying supremacy and direct effect themselves, without needing to refer.

The two issues are frequently conflated, but require separate treatment. Focusing on how national courts think and speak about supremacy and direct effect, while important for understanding legal integration, provides insufficient explanations for patterns of preliminary references (Golub 1995, 1996). Focusing on the references themselves, however, offers limited insight into the full implications of EC law, particularly the opportunities it affords to individual litigants when questioning the legality of national policies and governmental practices. In order to combine the work of those who study supremacy and direct effect with those who study preliminary references, scholars should clearly recognise the existence of these two separate aspects of judicial dialogue, the one dealing with the frequency of contact between courts, the other with the content and effects of the judicial conversation. The challenge to a comprehensive model of EC legal integration remains to assess both, but also to find an analytical connection between the two.

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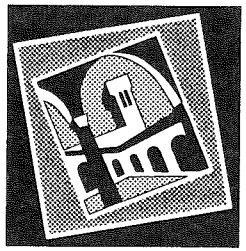

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