Ideology and Agenda Setting on the Court of Justice of European Union: Evidence from Anti-Trust and State Aid Cases

Silje Synnøve Lyder Hermansen and Erik Voeten

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Abstract

Can governments influence the ideological direction of the Court of Justice of the European Union (CJEU) through judicial appointments? How does the internal allocation of responsibilities, such as the assignment of reporting judges, affect CJEU decisions? These questions have been difficult to answer given that the CJEU publishes its judgments as a collective. We present a simple model in which a reporting judge proposes a draft judgment to a panel, which can then amend and vote on it. The model yields several observable implications, including that both the ideological preferences of the median and the reporting judge influence Court decisions and that the agenda setting power of the reporting judge increases when other judges face higher costs for drafting alternative opinions. We test the implications of the model using annulment cases against EU Commission decisions relating to competition policy brought either by private litigants or governments in the 1990-2021 period. We find that as the median and the reporting judge are appointed by more economically left-wing governments, the Court increasingly rules in favor of government intervention in the economy.

Introduction

Studies of strategic judicial behavior on the U.S. Supreme Court (SCOTUS) often focus on pivotal individual judges, such as the median judge, the majority opinion writer, and the president. By contrast, studies of *per curiam* courts, such as the The Court of Justice of the European Union (CJEU), usually analyze courts as unitary actors even if these courts often designate significant responsibilities to individual judges. Yet, we know little about if and how such delegation of authority affects case dispositions and judicial reasoning?

We offer a theoretical framework and an empirical research design that allow us to examine these questions in the CJEU context. To do so, we adapt a bargaining model designed to analyze SCOTUS (Lax and Cameron, 2007) to the CJEU's institutional context. The main difference is that the SCOTUS president assigns a draft opinion writer after knowing which judges are in the majority whereas the CJEU's President assigns a reporting judge before the Court has even heard the case. This potentially gives the reporting judge the opportunity to use agenda setting power to shape both legal reasoning and the disposition of cases. In the model, the reporting judge's only advantage is to offer the first proposal. Other judges may prefer a well-reasoned judgment that deviates from their ideal outcomes over exerting the effort to write an alternative opinion that can beat the initial draft in a majority vote. In equilibrium, both the preferences of the reporter and the median judge affect case dispositions. Moreover, the influence of the reporting judge increases as the other judges face higher opportunity cost for writing alternative opinions, for example because of higher caseloads.

We test the observable implications of the model with data on annulment cases (1990-2021) where litigants challenge European Commission decisions in two key areas of competition policy: state aid and antitrust. State aid cases are about whether a national government should be allowed to intervene in the economy (negative integration) whereas antitrust cases are about whether the Commission should regulate the behavior of private actors (positive integration). Yet, the more relevant ideological contestation concerns the the degree to which government should be allowed to intervene in the economy, the interventionist position, or should let markets free reign, the neoliberal position. We tap directly into this ideological conflict by coding the policy direction of 1265 rulings, going beyond the common measures where outcomes are indexed on agreement with the Commission (Wijtvliet and Dyevre, 2021), the plaintiff (Zhang et al., 2018; Carrubba, Gabel, and Hankla, 2008) or the national law (Larsson and Naurin, 2016).

We measure the extent to which governments favor or oppose state intervention in the economy using party manifesto data. We find that panels where the median judge was appointed by economically right-leaning governments were more restrictive toward state aid and less likely to accept EU antitrust enforcement. Furthermore, we find compelling evidence that the ideology of the government that appointed the reporting judge has an independent effect on case outcomes. Finally, consistent with the model's implications, we find evidence that the influence of the reporting judge is greater when the ideologically distant judges – those with the most incentives to write a counter-opinion – have a higher caseload and thus larger opportunity costs for investing in such activities.

These findings contribute to an emerging literature that seeks to open the black box of CJEU decision making (Malecki, 2012; Frankenreiter, 2017; Wijtvliet and Dyevre, 2021; Cheruvu, 2024; Zhang et al., 2018). We make three broad contributions. First, we demonstrate that the CJEU's output is responsive to changes in government ideology over market intervention. The Court is often accused of having a pro-business bias (**Borzel2006**; Conant, 2002; Conant, 2018) and that it has pushed a neo-liberal conception of the single market beyond what member states would have wanted (**Hopner2012**; **McCann2014**; Scharpf, 2010b; Schmidt, 2018). As Fritz Scharpf put it: "ever since Van Gend & Loos (C-26/62, 05.02.1963), the Court had reinterpreted the commitments of member states to create a common market as subjective rights of individuals and firms against these member states"

(Scharpf, 2010a). Our findings suggest that governments can – and have – influenced the direction of the Court's decisions by appointing judges based on their view on state intervention into the economy. This does not mean that governments have perfect control or that they aren't caught in the "join-decision trap" (Scharpf, 1988). Yet, governments are not just bystanders watching helplessly as the Court moves Europe in a neoliberal direction. Moreover, our analysis highlights that substantive ideological preferences over market regulation rather than procedural preferences over European versus national regulation shape CJEU decisions.

Second, we provide evidence that the CJEU's internal organization matters for case outcomes. Legal scholars have analyzed the delegation of responsibility to panels and individual judges from the perspective of enhancing efficiency and the Court's "common purpose" (Krenn, 2022), although others have recognized that it may also decrease the consistency of the Court's case law (Fjelstul, 2023). We connect a simple formal model with an empirical research design to show that both the identity of the median and the reporting judge shape case dispositions. This research design potentially opens up further studies into the internal organization of per curiam courts. For example, most European and international courts delegate the preparation of cases and the initial drafting of judgments to an individual judge (**Cohen2014**; **Kelemen2016**, Dunoff and Pollack, 2018) and they rarely hold preliminary votes on the case's disposition before the appointment of a reporting judge (**Cohen2014**). This suggests that our theory and findings might generalize to other courts.

Third, while our main contributions are empirical rather than theoretical, the application for the case-space model to the CJEU context has potential implications beyond the observable implications studied here. For example, the model implies that variation in judicial preferences can incentivize judges to write higher quality judicial opinions. The intuition is that a judge who needs to persuade a colleague with different preferences has to put more effort into persuasive legal reasoning than a judge who only has like-minded colleagues. This point matters as the influence of ideology is sometimes thought to undermine legal reasoning. The model thus offers a rationale for high quality judicial reasoning that stems from the need to persuade colleagues rather than compliance constituencies. There is considerable potential for extending the framework to other research questions.

This paper proceeds by reviewing the literature. We then present a simple agenda setter model and its observable implications. The paper next turns to data, methods, and the results. The conclusions return to the broader implications of our findings.

Literature

With few exceptions, the literature treats the CJEU as if it acts in unison. If all judges share the same interests, then there is little reason to study how the Court's internal organization shapes outcomes. Theories typically assume that CJEU judges are either non-strategic actors who resolve cases based on their legal merit or that judges collectively act strategically to protect the Court's legitimacy or advance European integration. For example, scholars have argued that the Court's pro-integration tendencies on single market cases have pushed the EU towards more neoliberal policies than the EU's member states would have preferred (**Hopner2012**; **McCann2014**; Scharpf, 2010b; Schmidt, 2018). Yet the Court's power is not unchecked: member state governments can influence the court by threatening legislative override, non-compliance, or other court-curbing measures (Kelemen, 2001; Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Castro-Montero et al., 2018). Yet, the literature has mostly ignored governmental influence through the judicial appointment process.

This stands in sharp contrast to the literature on other high courts. Especially in the U.S. context, an extensive literature documents a close correspondence between the ideological predispositions of the U.S. President and the behavior of the judges they appointed

(**Segal1989**; **Martin2004**; e.g. Epstein and Segal, 2005; Epstein and Knight, 1997). Moreover, scholars of especially U.S. courts have shown that the internal organization of courts matters. For instance, many courts have mechanisms that allocate initial responsibility for drafting an opinion to one judge. The cost of writing alternative proposals may mean that the "opinion author" can move court opinions towards her ideal point (**Lauderdale2016**; **Hammond2005**; **Maltzman2000**; Lax and Rader, 2015; Bonneau et al., 2007; Lax and Cameron, 2007). This question has received much less attention in the study of European courts.

We suggest that the relative shortage of attention for these theoretical arguments in the CJEU context has more to do with an absence of data than a lack of relevance. Judges serve six-year renewable terms. There is suggestive evidence that judges are selected and reselected by governments for their economic left-right ideology. In the context of the General Court (GC), former judges have complained about the impromptu overturn in membership when new governments come to power (Dehousse, 2011, 7-8 and 16-17). Analyzing all potential reappointments to the CJEU in the 1954-2020 period, Hermansen and Naurin (2025) further demonstrate that a new government with different views on state intervention in the economy is more likely to replace the incumbent when their mandate expires. Ideological selection is low-cost. On full-representation courts, there is no coordination problem that prevents governments from selecting ideological allies (Voeten, 2007). In the EU, each member state nominates an equal number of judges and their final appointment in the Council is a mere formality (Dunoff and Pollack, 2017). Since the Lisbon Treaty, a merit selection committee advises governments on candidates' qualifications. However, each government retains the prerogative to deselect incumbent judges and nominate new ones; one judge to the CJ and two judges to the GC.

Once in office, judges escape political accountability. To protect their independence, the CJEU never reveals individual votes (Dunoff and Pollack, 2017). Both the formal and informal organization of the Court are also geared to shield judges from double binds (Hermansen, 2020). Although their terms may be renewed, there are few indications that judges pander to their future appointers (Cheruvu, 2024). Thus, governments are relatively free to appoint judges that reflect their ideologies and judges are relatively unconstrained in allowing their own viewpoints to shape case outcomes.

Another contested issue concerns the nature of the ideological conflict in both politics and the judiciary. One thrust of scholarship has focused on the distribution of competences between the supranational Court and member states. The Court formally placed itself at the top of the European judicial hierarchy by establishing the doctrines of supremacy and direct effect starting in the 1960s. Scholars within the neofunctionalist tradition have argued that private actors with vested economic interests in trans-border trade have further pushed the pro-integration tendencies of the Court (Stone Sweet and Brunell, 1998; Sandholtz and Stone Sweet, 1998).

Yet, in EU politics, the socioeconomic left-right division has historically been dominant (Gabel and Hix, 2002; Hix, Noury, and Roland, 2006). Economic left-right conflict, especially over the extent to which the state can intervene in markets, has also been central to many cases that come before the Court, especially on competition policy, state aid, and other single market issues. As Fritz Scharpf put it: "integration through law was able to move forward without political interference through the seemingly inexorable evolution of judicial doctrines protecting and extending the Treaty-based rights of private individuals and firms." (Scharpf, 2010a) .

We argue that governments are likely to select judges based on their views over the central issues that the Court adjudicates, which have historically been single market cases. Thus, we expect that government positions over the role of the state in the economy rather than pro- or anti integration shapes judicial behavior. There is some evidence that this may be so. Hermansen and Naurin demonstrate that the turnover in judges maps neatly on to governments' economic left-right preferences but not their views on European integration (Hermansen and Naurin, 2025). The President of the Court furthermore displays sensitivity to the same preferences in his allocation decisions (Hermansen, 2020). Wijtvliet and Dyevre (2021) asked competition law experts to rate the ideology of General Court judges and find that variation in the score of the median panel judge towards market intervention significantly predicts the outcome in competition and state aid cases (Wijtvliet and Dyevre, 2021). We thus similarly assume that the core dimension of contestation that matters to governments and judges is ideological differences over state intervention into the single market.

The Reporting Judge as an Agenda Setter

The median voter theorem posits that when collective bodies make decisions under majority rule and voter preferences are aligned along a single dimension, then the voter with the median ideal point will be pivotal (Black et al., 1958; Epstein and Knight, 1997). The CJEU formally makes decisions through majority voting even if in practice there are norms towards achieving consensus. Still, the shadow of a majority vote looms over the decision making process, which theoretically makes the median judge's preferences pivotal. The observable implication in our empirical context is that a panel with a median judge appointed by a more left-leaving government should be willing to accept more instances of state aid than a panel with a median judge appointed by a more right-leaning government.

In addition, we posit that the reporting judge's authority to draft an initial opinion allows her to move outcomes towards her preferred direction. Similar arguments have been made about the opinion writer in the SCOTUS context (**Lauderdale2016**; **Hammond2005**; **Maltzman2000**; Lax and Rader, 2015; Bonneau et al., 2007; Lax and Cameron, 2007) but there are some noteworthy institutional differences. On SCOTUS, the justices first hold a preliminary "straw" vote on the disposition of a case. If the Chief Justice is in the majority, he assigns the responsibility to draft a majority opinion to one of the other judges or himself. If the Chief Justice is in the minority, then the task to assign a draft opinion writer falls upon the most senior justice in the majority. The justices can then write counter-opinions before a final vote is held.

By contrast, the CJEU's president assigns a reporting judge when the case is received.[1] The president is typically not a voting judge on the panel. The Court's president may well be strategic in appointing reporting judges, which we set aside as an issue for future research. The reporting judge summarizes the written submissions from the parties. In the CJ, the Court's general meeting discusses this summary and then decides to assign the case to a panel of 3, 5 or 15 judges, including the reporting judge.[2] The GC rarely uses the general meeting and moves directly to panel deliberations. The panel then holds an oral hearing (if necessary), and the reporting judge drafts an initial opinion. Each judge is then asked to present their views and can table alternative proposals. Finally, decisions are made by majority vote if no consensus can be reached.

If writing persuasive legal opinions is costly, then judges may prefer a draft opinion that deviates somewhat from their ideal preferences over incurring the cost of writing an alternative judgment. Unlike in the U.S. Supreme Court, there is no guarantee that the judge responsible for writing the initial opinion will be in the majority concerning the disposition of the case. This implies that the reporting judge may influence not just influence legal reasoning but also the disposition of a case, such as whether an instance of state aid is adjudged to meet EU law standards.

We illustrate these points using a case space model adapted from (Lax and Cameron, 2007). The case space framework recognizes the differences between courts and legislatures (Lax and Rader, 2015). Legislatures can introduce laws that overturn a policy status quo.

[1] In the GC, this is typically on the advice of the Chamber president

[2] In rare important cases the whole Court hears a case. In these instances, the President will also serve as the reporting judge.

By contrast, courts use and develop legal rules that resolve cases. In our example, the Court must decide whether a Commission decision about state aid should be annulled. In the process of resolving cases, Courts also develop the general legal rules that govern what types of state aid meets EU law standards and what types of state aid do not fit EU law.

We assume that judges have uni-dimensional preferences about what the ideal legal rules should be. More specifically, we conjecture that judges appointed by more economically left-wing governments prefer legal rules that are more lenient towards state aid and more favorable towards active antitrust enforcement than judges who are appointed by more economically right wing governments. This deviates from most of the strategic CJEU literature, which assumes that judges respond to case characteristics, such as how many member governments support a side in the case (Carrubba, 2009; Larsson and Naurin, 2016). We acknowledge that such strategic behavior may occur and we control for government submissions in the empirical analysis. Yet, our theoretical focus is on ideological disagreements. This allows us to examine judges rather than the court as a strategic actor and thus to understand the potential importance of reporting judges for shaping the direction of CJEU jurisprudence.

The case space model assumes that judgments vary in their clarity, persuasiveness, or, more generally, quality. Legal rules are inherently noisy. The CJEU's jurisprudence is implemented by the EU Commission, national courts, and national policy makers who may interpret or implement rules in ways that are slightly different than intended by the judgment's authors. The more care judges put in drafting a judgment, the lower this randomness (Lax and Cameron, 2007). Yet, writing high quality rules also takes effort. In the CJEU context the reporting judge must exercise some of this effort. The question then is under what conditions is it worthwhile for the other judges to also exert effort and propose an alternative opinion.

Consider a case x drawn from a one-dimensional policy space X, where larger values of x

reflect a case with stronger legal facts for allowing an instance of state aid.[3] A legal rule r defines a cut-point $\overline{r}$ such that the court rejects state aid when $x > \overline{r}$ and accepts state aid otherwise. So, the larger the value for $\overline{r}$ the more instances of state aid will be rejected. The legal rule is a random variable with mean p and variance $(1-q)$ where $p \in X$ and $q \in [0,1]$. A draft opinion o_i written by judge i consists of both a target cut-point p_i for the rule and quality q_i.

Without loss of generality, we discuss the case where respondent judge R has an ideal point to the right of the median judge M and we normalize M's ideal point j_M to 0 and judge L's ideal point $j_L < 0$. The game has the following three stages:

1. *Drafting stage*: The rapporteur R drafts an initial opinion o_R with policy p_R and quality q_R
2. *Amendment stage*: Judges L and M decide whether to draft alternative opinions
3. *Voting stage:* The judges decide by majority vote among alternative opinions

The expected utility for each judge i is a function of how far the expected cut-point departs from the judge's preferred cut-point and, if the judge is the opinion writer, the marginal cost c_i of writing judgments of higher quality:

$$EU_i(o) = -((j_i - p)^2 + 1 - q) - I_i(c_i(1+q))$$

In this equation, I_i is an indicator that equals 1 if the judge authors an opinion and 0 otherwise. The cost c_i reflect the marginal cost for judge i of producing additional quality. Judges with more expertise or experience may find it easier to write high quality judgments. Moreover, judges with higher caseloads face greater opportunity costs for investing in writing

[3]The notation sticks closely to Lax and Cameron (2007).

high quality judgments.[4]

Unlike for judges L and M, producing an opinion is not optional for R. We assume that R suffers some cost if she writes an opinion below a minimum quality threshold $q_R < q_{MIN}$. For simplicity, and because this issue is not central to our analysis, we assume that the professional penalties for writing an opinion $q_R < q_{min}$ are equal to $-c_R(1+q_R)$. This assures that R does not have incentives to write draft opinions below the minimal quality level. The main implication of this modeling assumption is that it rules out corner solutions where R writes an initial opinion at $q_R = 0$, which essentially skirts the judge's professional obligation and leaves the drafting task to the other judges. The assumption extends the range of parameter values for which the interior solution on which we focus holds. A full consideration of professional incentives to write high quality opinions would require a dynamic model and explicit consideration of strategic appointments of respondent judges. We see this as a fruitful future extension of the model.

The game can be solved through backward induction. In the appendix we demonstrate that an interior equilibrium exists under a range of parameter values where R proposes o_R with with policy $p_R > 0$ that is not amended in stage 2 and that the panel supports in a majority vote. In this equilibrium:[5]

$$p_R = \frac{j_R}{c_R} + (1 - \frac{1}{c_R})\frac{j_L}{c_L}$$

and quality:

$$q_R = (\frac{j_R}{c_R} - \frac{j_L}{(c_R * c_L)})^2 - 1$$

There are several interesting features of this equilibrium. First, the degree to which the

[4]The model assumes that the cost can never be 0. In contrast to Lax and Cameron (2007), we do not vary the (relative) salience of cases.

[5]This equilibrium presumes that judge L has stronger incentives to write a counteropinion than judge M because she has stronger policy motives for doing so. This may not hold if M can write a proposal at considerably lower cost than L.

rapporteur can shift legal rules towards her ideal point relative to the median is increasing in the distance from the median judge's ideal point (j_R). This implies that there exist cases $x \in [j_m : j_r]$ whose disposition would be different under the median voter model than in the agenda setting model. That is: the preferences of the reporter and median judge should matter on close cases where there are credible legal arguments for either allowing or prohibiting state aid. Arguably, litigants have few reasons to bring cases that do not fit this profile in the annulment context. The implication is that a reporting judge can change outcomes some of the time by sheer virtue of being obliged to draft the first proposal.

Second, the ability of R to move a rule away from the median is decreasing in the ratio between how far the left-wing judge is from the median j_L and the cost for the left-wing judge to produce high quality opinions (c_L).[6] This captures the insight that the left-wing judge's incentives to write a winning counter-opinion increase as her policy dissatisfaction with an opinion to the right of the median increases and the cost for writing a counter-opinion are lower. R can prevent such a counter-opinion by writing a draft that is closer to M's ideal point. The ability of R to move policy is also decreasing in her own cost for investing in high quality judgments (c_R). Lower cost make it easier to write a high quality opinion that is more attractive for M, which makes it more difficult for another judge to write a winning counter-opinion.

The observable implications of the quality of a legal opinion are interesting even if they are harder to evaluate empirically. Most notably, the model implies that the reporting judge has to invest more effort to write a high quality judgment if she wishes to move the rule further away from the median judge and as j_L is further from the median. Thus, variation in policy preferences may induce incentives for better judgments. The intuition is twofold. First, if one needs to convince a judge (or a reviewer) with different preferences, one needs

[6]This assumes that L has greater incentives than M to write a counter-opinion. This may not be true if M has relatively large cost advantages over L that supersede L's policy incentives to write a counter-opinion. In that scenario, c_M becomes a critical parameter

to invest more time and effort in making an argument clear and persuasive. The median judge needs more convincing as p_R becomes larger. Second, as noted above, L has more incentives to invest in a quality counter-opinion the more her preferences deviate from M. This incentivizes R to invest more in the quality of her initial draft. The somewhat counter intuitive implication is that some ideological disagreement may well improve the quality of court judgments. Or to put it differently: a homogeneous panel might produce lower quality judgments because judges lack the incentives to make an effort to persuade each other. Similarly, a centrist rapporteur will need to invest less in an opinion's legal quality in order to forestall a counter-opinion.

This rationale differs subtly from theories that assume that the Court invests in quality legal reasoning because it (as a collective) wants to persuade skeptical political actors (**Cheruvu2022**; Larsson and Naurin, 2016). Those models typically assume that judges care about the legitimacy of the Court. Instead, in this model the desire for quality stems from the assumption that judges care about the policy implications of judgments. It may well be possible to combine insights from these approaches in future research. There are some measures of the legal clarity, precision, or thoroughness of legal judgments in the broader judicial behavior literature (e.g. Black et al., 2016; Lupu and Voeten, 2012). We are not aware of applications to the ECJ and developing such measures is beyond the scope of this paper so we set this aside for future research.

Hypotheses

The core testable implication is that the probability that the court supports state aid is declining in the difference between rapporteur and median judge preferences: j_r. In the model, the median judge orientation is fixed to zero. Yet, the median judge remains the pivotal voter. So, we should also expect that as the median judge is more to the right, more cases of state aid should be approved. We thus test the following two hypotheses:

Hypothesis 1 *The probability of ruling in favor of economic intervention increases as the median panel judge is appointed by a more economic left-wing government*

Hypothesis 2 *The probability of ruling in favor of economic intervention decreases as the reporting judge is more towards the right of the median panel judge*

An additional observable implication is that the most ideologically distant judge can counteract the influence of the reporting judge but only if that judge has low cost of writing a high quality counter-opinion that the median judge would accept.[7] While we cannot directly observe judge level variation in the ability to write high quality opinions, we assume that the opportunity cost for non-reporting judges to write a counter-opinion are higher when they have a higher caseload. We can thus test the following hypothesis:

Hypothesis 3 *The effect of the distance between reporter and median panel judge is larger as the ideologically distant judge has a larger case load*

Research design

To test our hypotheses, we examine instances where private and public actors contest the Commission's application of the EU's common competition policies. Our data includes 1385 annulment cases brought between 1990 and 2021 that resulted in judgments by either the General Court (68%) or the Court of Justice (32%). The GC hears annulment requests in the first instance, while the CJ hears appeals. Overall, the sample represents approximately 7% of the Court's judgments.

[7] Note that the implication from the model is slightly more complex and conditional on other parameter values. For example, the cost for the rapporteur also matter. However because we assume that the rapporteur pays a cost for not exerting minimum effort and because rapporteurs may well be selected strategically for their ability to write high quality opinions, we should see less observable differences in rapporteur quality

Commission decisions on state aid and anti-trust issues

We focus on two core policy areas: antitrust regulation (101-106 TFEU) and state aid (107-108 TFEU). In contrast to newer EU policy areas, such as environmental and consumer protection, these policies are not explicitly redistributive. Instead, they aim to limit government interventions that constitute anti-competitive practices (Hix and Høyland, 2022, p. 210-17). Our focus is thus on litigation questioning the *role of government in the economy*, a defining ideological divide in European politics (**Lindqvist2024**).

To rule out the possibility that judges are motivated by the distribution of competences rather than political intervention in the economy, we analyze two policy areas with differing degrees of EU interference in national policies. The EU's *state aid* policy exemplifies negative economic integration, as it restricts governments from supporting industries except in limited circumstances related to public interest, provided that such aid does not excessively undermine free competition. The Commission's application of EU rules in this area necessarily pertains to national governments' intervention in the economy. A negative decision therefore restricts both national sovereignty and specific economic interventions.

By contrast, the EU's *antitrust* regulation is an instance of positive economic integration, establishing a common set of rules for all economic undertakings within the European market. The area includes the prohibition against agreements among companies or trade associations that may reduce competition (such as price-fixing, mergers and abuse of dominant position). Most of the Commission's antitrust decisions target private actors' market behavior rather than national policies. In many instances, the alternative to the Commission's regulation is less market intervention.

Our coding scheme for case outcomes indicates whether a decision permits more economic intervention, irrespective of the government level—national or European— isresponsible for the intervention.[8] To identify the relevant judgments, we searched for all cases filed from 1990

[8] There is one notable exception to this situation. In contrast to US antitrust regulation, EU policies

to 2021 labeled as "competition", "state aid", "concerted practices", "dominant position" or "concentration" in their subject matter or in the Eur-Lex caselaw directory.

Litigants and Procedures

We focus on cases brought under the annulment procedure (Article 263 TFEU) because it targets decisions made by EU institutions and is triggered by a range of actors with different interests. The procedure allows other EU institutions, governments and private actors – if their interests have been affected – to ask the Court to declare void Commission decisions that run counter to the superior rules of the Union's legal order. For the purposes of this paper, we exclude all appeals against penalties imposed by the Commission since they revolve around the consequences rather than the existence of a violation.[9]

Businesses are the most common litigants (73% in state aid; 91% in antitrust) even if the cases are ultimately about government policies. About half of the cases were initiated in defense of economic intervention. Among these, two-thirds of the applicants were businesses, while only only 12% came at the instigation of a government. However, the vast majority of the applications seeking to limit economic intervention are also brought by businesses (83%).

Outcome variable and model choice: Court support for economic intervention

Our outcome variable, *Support for economic intervention*, flags Court decisions in favor of litigants whose claims are in support of government intervention in the economy. For each case, we identify the direction of the applicant's claims with respect to either state aid or antitrust regulation, then the direction of the Court's decision (Brekke et al., 2023). In

also encompass public undertakings. In these instances, EU rules risk circumscribing national governments ability to intervene in the market through their ownership. For the purposes of this paper, we have left out all cases involving public undertakings. In the current sample, this amounts to 16 cases.

[9] This is only relevant for litigation relating to EU's antitrust policy.

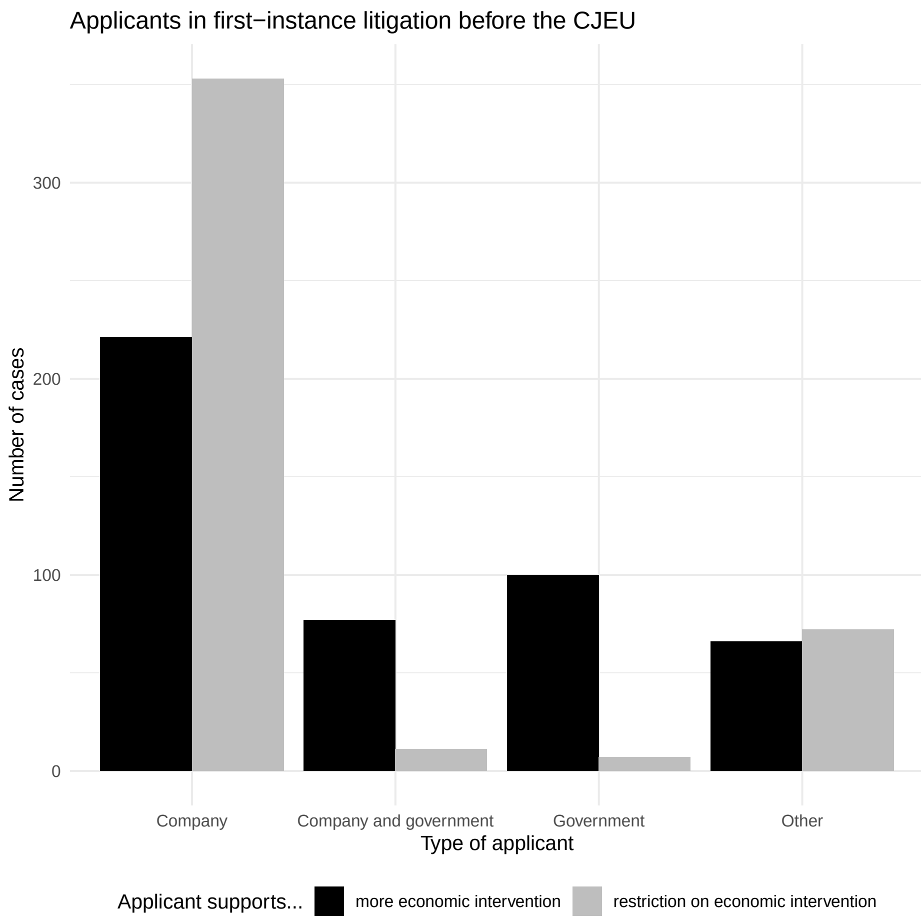


Figure 1: The type of applicants and the direction of their claims in first-instance litigation against the Commission.

some instances (14%), the Court's position is mixed – some claims are granted, while others are not. Our multivariate analysis therefore models the Court's decision to allow economic intervention as a success (1), partial success (0.5) or failure (0).

In state aid cases, most frequently, the litigation is initiated after aid has been given by a member state ("old aid"), but the Commission has decided it runs counter to EU policies, or when a government's application for permission to grant aid ("new aid") has been declined. The same holds for antitrust litigation where most cases are filed by companies or trade associations whose plans for mergers or past concerted practices are struck down by the Commission. However, litigation is also initiated by businesses that consider their competitors enjoy an unfair advantage, but where the Commission has either authorized a behavior or declined to consider its legality. Taken together, the two courts ruled in favor of economic intervention in 48% of the cases, 53% of which are decided against the stated wish of the Commission.

Table 1: Descriptive statistics

Statistic	N	Mean	St. Dev.	Min	Pctl(25)	Median	Pctl(75)	Max
Court rules in favor of economic intervention	1,248	0.48	0.46	0.00	0.00	0.50	1.00	1.00
Median judges' preferences	1,247	0.07	0.18	−0.80	−0.03	0.09	0.18	0.75
Reporting judges' preferences	1,248	0.08	0.41	−1.44	−0.11	0.09	0.26	1.27
Difference (rapporteur - median)	1,247	0.004	0.38	−2.05	−0.14	0.00	0.13	1.34
Difference (rapporteur - median) (when different)	925	0.005	0.45	−2.05	−0.25	0.02	0.22	1.34
Case-load of distant panelists (avg.)	840	5.00	2.59	0.67	3.00	4.67	6.60	14.67
Case-load of proximate panelists (avg.)	847	4.98	2.54	0.00	3.00	4.67	6.67	13.33
Other governments supporting economic intervention	1,248	0.13	0.48	0	0	0	0	6
Other governments opposing economic intervention	1,248	0.05	0.30	0	0	0	0	5
Supported by affected government	1,248	0.34	0.47	0	0	0	1	1
Council supports economic intervention	1,248	0.02	0.14	0	0	0	0	1
Council opposes economic intervention	1,248	0.005	0.07	0	0	0	0	1

Explanatory Variables

Judges' preferences

To measure appointing governments left-right positions on economic policies, we use the Manifestos project to place all parties in the same policy space by calculating factor scores from 12 variables relating to the state's role in the economy (**Lehmann2023**; Gabel and Huber, 2000). These variables include favorable mentions of the free market, supply-side oriented economic policies (such as subsidies), market regulation, economic planning, support for free trade, Keynesian demand-side policies, economic growth, government control, nationalization and economic orthodoxy. The resulting variable is an average among the parties in the judges' appointing government weighted by their size in the national parliament (see the Appendix).

In our data, the median panelist was slightly right of center, with most preferences in the range of -0.03 to 0.18 (1st to 3rd quartile). The variation among the reporting judges is naturally larger (-0.11 to 0.26). 89% of the judges – 153 members – served as a reporting judge facing 119 different median panelists, making for 496 unique judge-median pairs. The CJEU relies on three panel sizes: small (three judges), medium (five) and large (grand chamber, 9-15 judges). Most cases in the General Court are heard in smaller panels of three judges (64%). About one quarter of the decisions are reached in panels where the reporting judge is also the median panelist. Table 1 reports the descriptive statistics.

Figure 2 illustrates the bivariate relationship between the Court's decision and the preferences of the reporting judge's appointing governments. The dots represent the average direction of Court decisions for reporting judges appointed by governments with similar preferences, while their size is scaled to the number of cases they have reported on. The graphic makes clear that when cases are prepared by judges appointed by right-wing governments, the share of decisions accepting more economic intervention is lower. Yet, this does not test the model's implications about the median and the reporting judge. In the multivariate analysis, we parse out the effects of the median panelist and control for other factors that may confound the relationship.

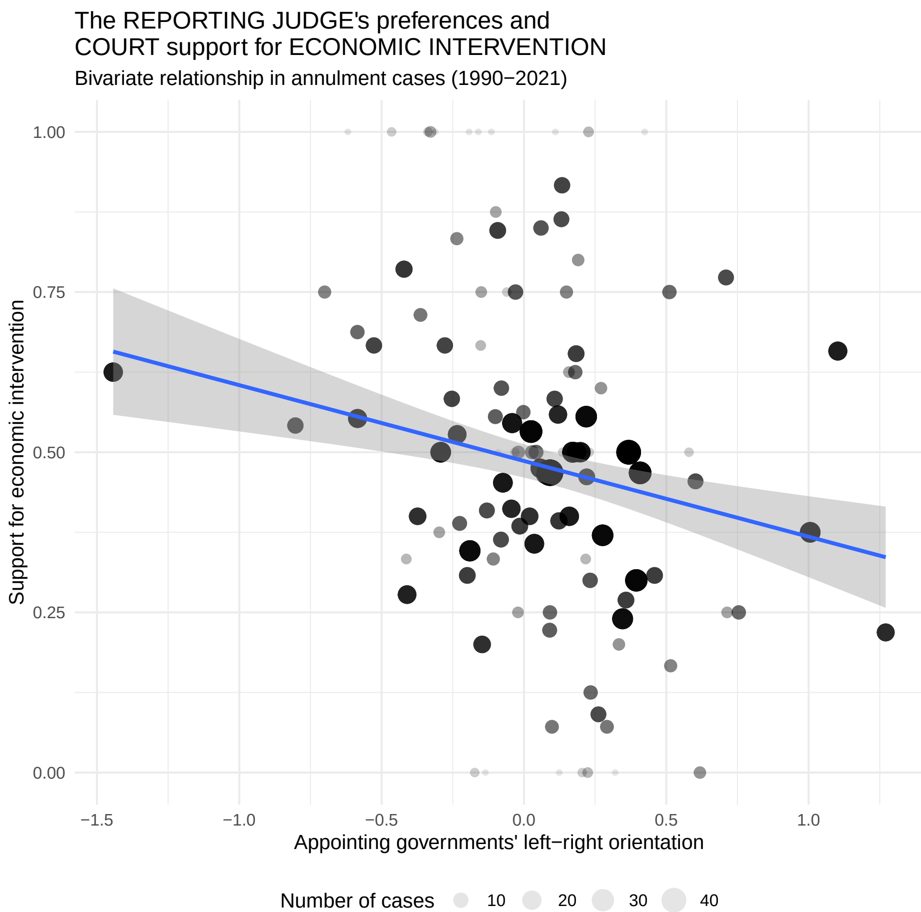


Figure 2: Bivariate graphic. Share of pro-economic intervention outcomes are reported as grouped averages among reporting judges with similar preferences in the scatterplot.

Judges' workload

We hypothesized that the influence of the reporting judge is moderated by the *caseload of the distant panelists*. We measure this by counting the number of open cases for which the ideologically distant panelists are assigned to report on. To identify the "distant panelists", we first place the reporting judge to the left or to the right of the median, then calculate the mean caseload of the judges on the far side of this reference point.[10] We also compute the *Caseload of the proximate panelists* using the same method. Given the lower incentive for proximate panelists to challenge the rapporteur's proposal, we expect a substantially smaller effect of proximate panelist caseload in our analyses.

The actual workload varies across judges but it has also varied substantially over time and across the two courts. The General Court was established in 1989 (when our study starts) due to the CJ's high case load and after pressure from business interests (Avril, 2022). The number of judges has also increased following the EU's successive enlargements, as well as in 2015 when member states agreed to double the size of the GC (Dehousse, 2011). The CJEU itself has also saved resources by assigning fewer judges to each panel. These reforms have had the effect of reducing the case-processing times (Fjelstul, Gabel, and Carrubba, 2023). Yet, the chamber system – and in particular the reliance on smaller panels – has also induced higher variability in the median judge, and consequently in the case outcomes (Fjelstul, 2023).

Control Variables

An alternative strategic model of CJEU decision making highlights that the Court is responsive to the governments that submit their views to the Court and the EU institutions that can override their decisions (Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin,

[10]Since we cannot know judges' full case load before all judgments are rendered, the variable is limited to cases decided before 2022.

2016). Our analysis therefore includes an indicator for whether the *Council supports economic intervention*, since this means that member states have coordinated on a policy and can credibly coordinate again to override the Court's case law. For the same reason, the analysis also includes the number of governments who intervene in the case (on both sides). We code both support from the affected government and from third-party governments, although these intervened in just 13% of cases.

Results

Table 2: Court support for economic intervention: The effect of the appointing government's policy preferences for the reporting and the median judge's (results from a binomial logistic regression).

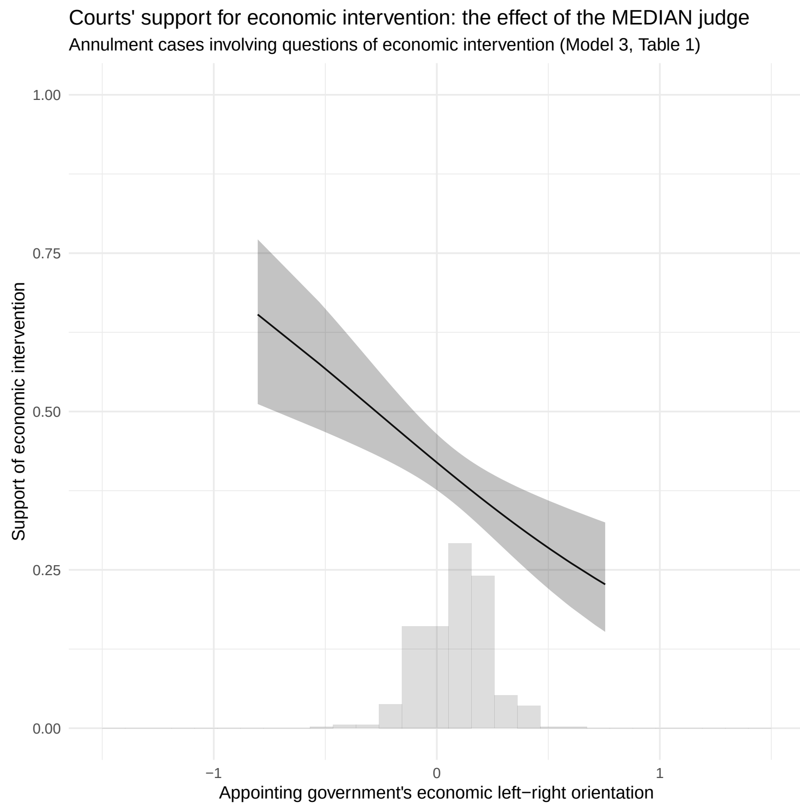
	Dependent variable:		
	Court support for economic intervention		
	state aid	competition	all
	(1)	(2)	(3)
State aid policy (ref. competition)			-0.798^{***}
			(0.158)
Fines are contested		1.421^{***}	1.400^{***}
		(0.205)	(0.196)
Other governments supporting economic intervention	0.302^{**}	0.888^{**}	0.459^{***}
	(0.144)	(0.360)	(0.130)
Other governments opposing economic intervention	-0.023	-1.694^{***}	-0.642^{***}
	(0.260)	(0.492)	(0.246)
Council supports economic intervention	1.839^{**}	0.145	1.008^{**}
	(0.717)	(0.627)	(0.471)
Supported by affected government	0.727^{***}	0.884	0.709^{***}
	(0.157)	(1.001)	(0.154)
Median judges' preferences (H1)	-1.321^{***}	-1.180^{**}	-1.192^{***}
	(0.437)	(0.528)	(0.333)
Difference (rapporteur - median) (H2)	-0.670^{***}	-0.856^{***}	-0.735^{***}
	(0.217)	(0.245)	(0.161)
Constant	-0.836^{***}	0.005	-0.021
	(0.118)	(0.123)	(0.113)
Observations	791	582	1,373
Log Likelihood	-485.562	-380.552	-874.618
Akaike Inf. Crit.	985.124	777.105	1,767.236
Note:			*p<0.1; **p<0.05; ***p<0.01

Table 2 and Figure 3 present the main results. They largely support our expectations that judges' preferences – as defined by their appointing government – shape outcomes. The table first reports the effect of the median and reporting judges' preferences in each policy area separately (models 1 and 2), while the third model tests our two hypotheses by pooling the data (model 3). Two things are apparent. First, as either the median panelist or the reporting judge move to the right, the probability that the Court rules in favor of economic intervention decreases. Second, the level of government at which the economic intervention is decided – national (state aid) or European (competition) – does not affect our results.

The size of the effects are non-trivial. Panels reach their final decision by a majority vote. We therefore formulated an expectation that the pivotal judge would be the median panelist (H_1). If we consider the typical (interquartile) difference between two panels, the likelihood that the Court rules in favor of economic intervention is 20% lower in the panel where the median judge is right-wing compared to the panel with a more left-wing median. This difference increases to 81% when we consider the two most extreme panels in the data.

We also hypothesized that the panel may be willing to accept the reporting judge's initiative rather than exerting additional effort themselves (H_2). The results indicate that the reporting judge has a substantial and independent effect on outcomes. A typical median-rapporteur distance when the two roles are held by different judges results in a 30% change in the Court's probability of supporting economic intervention. In instances where the differences in preferences are high on the panel, ideological competition may lead the reporting judge to sufficiently invest in the quality of the draft judgment to sway their peers. If we consider the two most extreme rapporteur-median constellations in the data, the effect is 92%.

We then move to probe the joint effect of ideological competition and the cost of alternative proposals on the reporting judge's influence (H_3). Results are reported in Table 3 and illustrated in Figure 4. They also align with our expectations. The first model shows that the influence of the reporting judge increases as the ideologically distant panelists' workload grows, while the second model identifies a minimal effect for the more proximate panelists. If we consider – as before – a typical rapporteur-median difference (the interquartile range), we see that the effect of the reporting judge's preferences is minor (11%) when the distant panelists' workload is low (2 open cases, the 10^{th} percentile). This effect increases to 52%



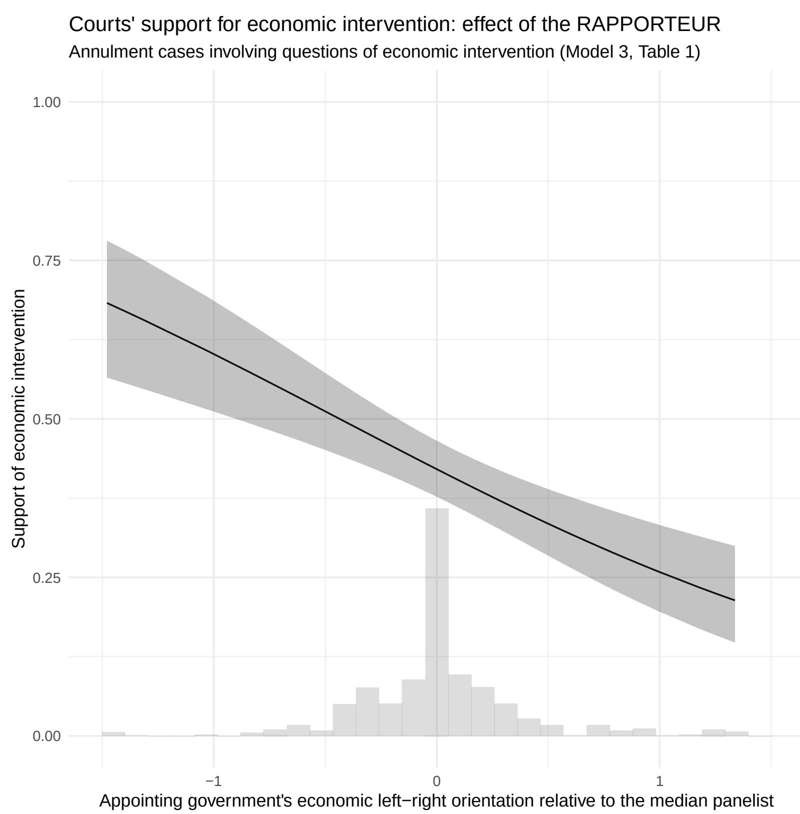


Figure 3: The likelihood of a court outcome in favor of government/EU intervention in the economy decreases as the judges moves to the right.

when their workload is high (8.4 open cases, the 90^{th} percentile).

Table 3: Court support for economic intervention: The effect of the reporting judge conditional on other panelists (results from a binomial logistic regression).

	Dependent variable:	
	Court support for economic intervention	
	Distant panelist	Proximate panelist
State aid policy (ref. competition)	-0.918^{***}	-0.917^{***}
	(0.171)	(0.170)
Fines are contested	1.490^{***}	1.489^{***}
	(0.211)	(0.209)
Other governments supporting economic intervention	0.473^{***}	0.475^{***}
	(0.142)	(0.141)
Other governments opposing economic intervention	-0.538^{**}	-0.509^{**}
	(0.265)	(0.258)
Council supports economic intervention	1.327^{**}	1.299^{**}
	(0.538)	(0.535)
Supported by affected government	0.793^{***}	0.789^{***}
	(0.167)	(0.166)
Median judges' preferences	-1.271^{***}	-1.190^{***}
	(0.366)	(0.364)
Difference (rapporteur - median)	0.166	−0.346
	(0.348)	(0.347)
Caseload of distant panelists	−0.004	
	(0.020)	
Difference (rapporteur - median) * Caseload of distant panelist	-0.201^{***}	
	(0.070)	
Caseload of proximate panelist		−0.016
		(0.020)
Difference (rapporteur - median) * Caseload of proximate panelist		−0.086
		(0.067)
Constant	−0.037	0.009
	(0.130)	(0.133)
Observations	1,235	1,235
Log Likelihood	−768.071	−770.466
Akaike Inf. Crit.	1,558.142	1,562.933
Note:		*p<0.1; **p<0.05; ***p<0.01

Our control variables behave as expected. Judges are overall less likely to rule in favor of economic intervention when the case involves transfer of resources in the form of state aid than for anti-trust policies. This aligns with our intuition that neoliberals also allow for a range of market-correcting policies, but remain reticent to the notion of economic transfers from the state.

The Court displays sensitivity to signals from the political branch much in the same way as described in earlier literature. While neo-functionalists worried that the Court has restricted governments' ability to interfere in the economy against their will, we find little support for this statement in this study. To the contrary, the Court seems particularly sensitive to

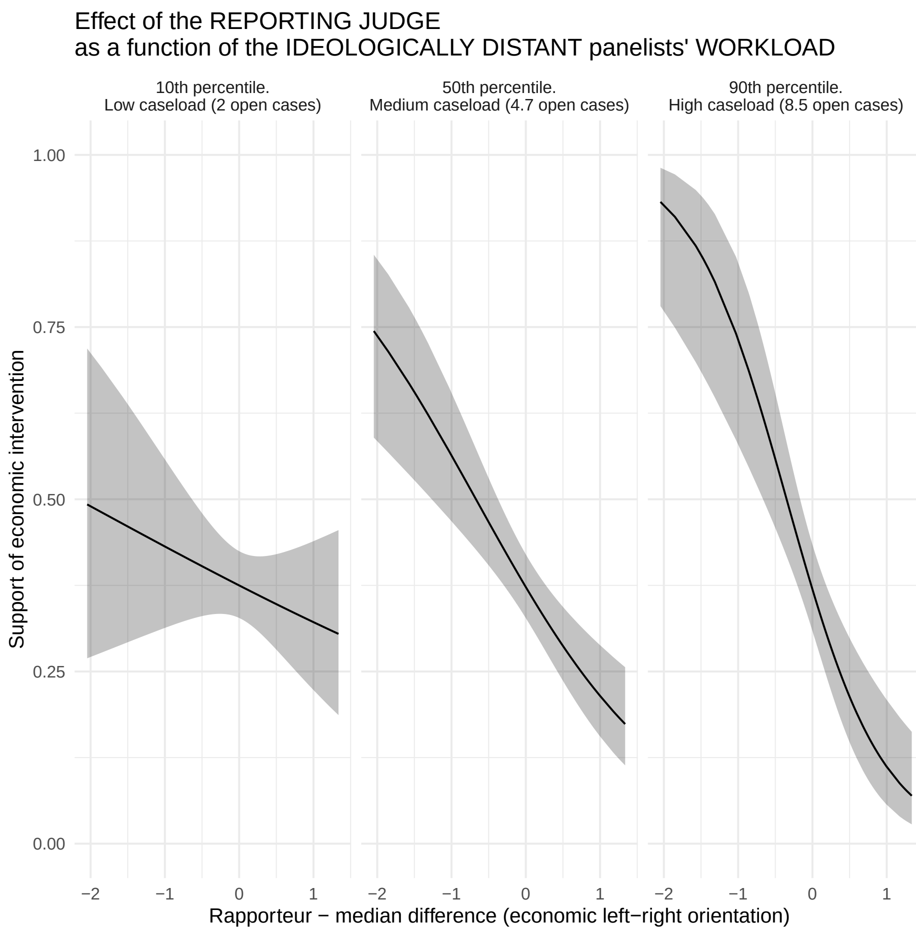


Figure 4: The effect of the reporting judge is moderated by the distant panelists' workload.

signals that favor economic intervention. In the instances where the affected government files in support for their own economic policy, the Court is more than 2 times as likely to rule in favor of economic intervention. This also holds for third-party government submissions. Each submission in support of economic intervention increases the probability of a pro-intervention ruling by 57%. Lastly, we also see that in the few instances where the Council submitted in support of state aid, the Court was 2 times more likely to yield, aligning with the expectation that a coordinated response from the legislator during the Court's proceedings is a credible signal of potential override. This effect is entirely driven by state aid cases, however.

Robustness

The Appendix contains a series of results that show that the results are robust to a range of alternative model specifications and are similar for both courts. To make sure our results are not driven by the subset of instances where the judges' appointing governments are still in office, we re-estimate a model where we control for the preferences of judges' current government. We find no indication that judges' current government's preferences shape their decisions. In other words: judicial behavior is defined by judges' preferences – as defined by who appointed them – rather than strategic adaptations. This test also rules out that the effect is driven by national rather than ideological differences. The Appendix also reports results where we include fixed and random effects for the reporting judge's member state.

Another potential concern is that the findings are confounded by unmodeled time-varying elements. First, the court may be sensitive to economic and political currents which could covary with the overturn in membership. In the Appendix, we show that the results are robust to including year fixed effects. Second, our effect could be affected by the introduction of an additional merit selection stage in the recruitment of judges in 2010. The Lisbon Treaty introduced for the first time an EU-level advisory merit selection committee tasked with assessing the qualifications of the member states' nominees. The "255 Panel" is staffed by former national and EU judges that have not been shy in rejecting new candidates. As of 2022, 28 new candidacies had been retracted following the committee's advice, leading some observers to claim it has gone further than its delegated authority intended (von Bogdandy and Krenn, 2015)[pp 173-74]. The reform has led some member states to rethink their national guidelines for judicial recruitment (Dumbrovsky, Petkova, and Van der Sluis, 2014), and there is evidence that judges have changed their behavior to align with the Panel's productivity criteria (Cheruvu and Krehbiel, 2022). However, the Panel itself has expressively defined its mandate as non-political and focused on judges' integrity as well as legal and linguistic competences (Seventh activity report, 2022, p. 12).

There is no empirical indication that the screening has infringed upon governments' ideological selection of judges. In their study of judicial reappointments, Hermansen and Naurin (2025) find no evidence a change in the effect of economic left-right ideology on governments' decisions following the introduction of the Panel. In the Appendix, we probe the question further. We identify the reporting judges that entered the Court after the reform and re-estimate our main model with a separate effect for screened judges. The correlation between the reporting judge's appointing government and case outcomes has – if anything – been stronger for judges appointed in the decade following the reform compared to judges appointed earlier.

Lastly, we show that coding the policy direction of the Court's decision matters. We do not find any effect of judges' position when we follow previous studies and index on the position of the Commission's initial decision (Wijtvliet and Dyevre, 2021; Zhang et al., 2018).

Conclusion

Like on other high courts, governments select CJEU judges that share their ideological predispositions on issues that are most relevant to the Court: preferences over the degree to which European states should be allowed to intervene in the economy. We develop a theoretical model that takes seriously variation in the ideology of judges and the internal organization of the Court, especially the role of the reporting judge. The model predicts that both the preferences of a median judge on a panel and the reporting judge affect both judicial reasoning and the disposition of cases. Moreover, the model implies that when other judges face high opportunity costs for writing alternative opinions, the influence of the reporting judge becomes more important. We then present empirical evidence for these propositions using data on annulment cases regarding state aids and anti-trust cases. The evidence largely supports the observable implications from the model.

This paper furthers a developing research agenda that seeks to understand how internal divisions on the Court can affect outcomes and how these divisions are related to government ideologies. The theory provides a basic framework that can be developed further to derive insights about the role of expertise, the salience of issues, the role of the President, the importance of panel selection, collegial norms, and other issues related to the internal processes at the Court. The model already develops some insights that could be tested with additional data, such as that reporting judges with more expertise and experience might be better able to move outcomes towards their ideal points.

Yet, there are also several insights that can be extended theoretically and empirically. First, a follow-up study might examine the role of the Court's president more seriously. Since the president plays a large role in selecting reporting judge, it is likely that the assignment process is strategic. The ability to strategically shape Court outcomes through delegation is a promising area for new research.

Second, the model only hints at the importance of professional norms and reputation. A dynamic formal theory might examine the incentives for reporting judges to write high quality judgments and (perhaps) acquire future appointments. This theory could also be tested empirically with the new data that we collected and coded.

Third, the model and research design could be adapted to study other courts than the CJEU. For example, the European Court of Human Rights assigns a great deal of responsibility to a rapporteur at the initial stages, as do many other courts. Our analysis shows that even in the absence of voting data, it is possible to analyze individual strategic behavior on courts.

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