

Finding Law: Organized Interests and the Confinement of Executive Primacy[†]

Mauricio Mandujano Manriquez[‡]
m.m.manriquez@arena.uio.no

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Abstract

Filing written briefs before apex courts is a key channel through which federal executives, subnational governments, and private actors shape legal rules. Existing theory predicts that federal executives should dominate rulemaking because their legal offices are the preeminent repeat player for rules—yet no quantitative study has tested this claim. Using newly available full-text observations submitted to the European Court of Justice between 2022 and 2025, I measure whose proposal is semantically closest to the Court’s operative part. Contrary to expectations, the Commission is closer to the Court’s rule than member states only in slightly more than half of cases, while private actors are closest in over one-third; each additional member state brief reduces the Commission’s advantage. These findings show that repeat-player status does not guarantee interpretive primacy, leaving executive influence over rulemaking competitively constrained.

Keywords: Amici curiae; opinion content; sentence embeddings;
European Court of Justice; EU Commission

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[‡]ARENA Centre for European Studies, University of Oslo, Norway.

INTRODUCTION

POLITICAL SCIENTISTS STUDYING the judicialization of politics have long sought to explain how political power gets reflected in the opinions written by apex courts ([Hirschl 2008](#); [Staton and Vanberg 2008](#)). Much of this power operates directly before a ruling is ever written, as interested actors submit *amici curiae* briefs to press courts toward a particular reading of *what the law is* ([Caldeira and Wright 1988](#); [Spriggs and Wahlbeck 1997](#)). To uncover such influence, scholars have engineered theoretically useful outcome variables that capture specific dimensions of politics, such as the granting of *certiorari*, pro- and anti-federalization, win-lose against national governments, and the density of caselaw citations ([Larsson et al. 2017](#); [Hermansen et al. 2025](#); [Cheruvu 2025](#); [Lupu and Voeten 2012](#); [Black and Owens 2012d, 2011](#)). Despite the merits of these approaches they have failed to capture the substantive meaning of legal rules encoded in the judgment texts.

Measuring legal rules is essential because rulemaking is the primary function of apex courts ([Hansford and Spriggs 2006](#); [Spriggs and Hansford 2001](#); [Hansford et al. 2013](#)). Legal rules provide actors with the information needed to anticipate the consequences of their actions. Through their judgments, apex courts provide authoritative interpretations of legal provisions, clarifying what those provisions mean, what conduct they allow and what they prohibit. Such interpretations outlive the cases and often the courts that produce them. For executives, influencing these interpretations is critical to protecting policy goals, because apex courts can constrain, alter, or undermine their preferred readings that advance their agendas ([Hofmann 2013](#); [Black and Owens 2012c](#); [Vauchez 2015](#)). In doing so, government lawyers draw on both institutional legal expertise and ‘political embeddedness’—their position as insiders—to communicate reliable information and credible signals about government preferences through legal briefs ([Leino-Sandberg 2021a](#); [Wohlfarth 2009](#)).

Nonetheless, *amici curiae* briefs submissions are not limited to executive actors but must compete in the same information space with litigants and other third party submissions.¹ This multi-actor contest is particularly pronounced in the European

¹In this paper I use *amici curiae* briefs and observations interchangeably; the latter is the term used in EU law for such submissions.

Union judicial system, where the European Court of Justice (ECJ) regularly receives written briefs from the member states and private litigants (Cichowski 2004; Carrubba et al. 2008). Recent studies demonstrate, on the one hand, that member states' briefs influence the citation behavior and the treatment of previous precedent by the Court (Mandujano Manriquez 2025; Larsson et al. 2017; Lindholm et al. 2025). On the other hand, private litigants are more successful than companies, particularly when lodging individuals' rights claims suggesting the Court's preference towards less resourceful actors (Hermansen et al. 2025). Jointly, this suggest that the Court is responsive to multiple stakeholder classes, but *whose legal interpretation matters most to the Court?*

This article inquires under what conditions do private actors and subnational governments displace the executive as the main source of court rulemaking. Existing theory posits the Commission as primary co-architect of legal rules due to its role as 'guardian of the Treaties', its shared integrationist milieu with the Court, and the positionality of the legal service—legal expertise and repeat player advantage (Hofmann 2013; Pavone 2022; Stone Sweet and Brunell 2012). Yet, there are two settings where they should not dominate. First, when member states submit their written observations they provide alternative legal visions that are more likely to deviate from the Commission's own reading, thus, making it more likely that the Court sides with an interpretation from a member state. This should be more pronounced in primary-law cases as they are more "constitutional," and member states have stronger incentives and dedicate more resources to contest the Commission's reading.

Second, the Court therefore favors individuals' rights claims to build its legitimacy as a protector of the weak and cultivate support networks among legal practitioners (Hermansen et al. 2025). This suggest that in cases dealing with individual rights the Court should be less likely to side with the Commission's reading. Altogether these form the basis for the theoretical expectations of this paper.

Empirically, I draw on newly available full-text observations that were submitted to the ECJ between 2022 and 2025 under the preliminary reference procedure. First, leveraging this text data, I use BERT embeddings to calculate the semantic distance—capturing similarity in meaning rather than wording—between the rule enacted in the Court's operative part and those proposed by the different actor classes: the

Commission, member state governments, and private parties. Second, I employ a novel difference-in-distance estimator to quantify the magnitude and the relative position of who is closer to the ECJ between the Commission and the two other actors' classes.² Last, this delta difference estimator is used for all statistical modeling to estimate theorized effects.

The results indicate that executive primacy in judicial rulemaking is not automatic. In preliminary rulings, the Commission is not uniquely positioned to shape the Court's legal interpretations: member states perform comparably, and private actors align most closely with the Court in over a third of cases, although less often in cases concerning individual rights. This pattern contrasts with infringement proceedings, where the binary structure of adjudication means that a Commission victory effectively secures adoption of its preferred interpretation, and where the Commission wins more than 90 percent of cases (Kelemen and Pavone 2022; Stone Sweet and Brunell 2012). Yet the Commission has increasingly de-prioritized infringement actions while promoting decentralized private enforcement (Hofmann 2026). In a context of declining infringement litigation (Kelemen and Pavone 2022), the Commission's interpretative authority is weaker and more dispersed across the actors participating in preliminary rulings.

The remainder of this article proceeds as follows. First, I develop the theoretical argument and derive expectations concerning the influence of member states and private actors. Second, I describe the data and research design, including the semantic-distance measures used to compare actors' legal proposals with the Court's rules. Third, I present the empirical results. Finally, I discuss what these findings reveal about executive influence, competing sources of legal authority, and judicial rulemaking in the European Union.

JUDICIAL LAW CREATION IN THE EUROPEAN UNION

Tucked away in the Duchy of Luxembourg, the European Court of Justice is vested with the duty and exclusive authority of interpreting EU law (Stein 1981).³ As made

²Full details in Appendix D.

³Jointly, Article 19(1) TEU and Article 267 TFEU establish the Court's sole interpretative authority over the entire body of EU law.

clear by the Court’s own caselaw, in principle, it has broad discretion to articulate its preferred exegesis to the hundreds of questions that influx into its docket every year.⁴ Yet, social scientists have disputed this view by documenting numerous instances of influence exerted by the Commission Legal Service (Vauchez 2015; Leino-Sandberg 2021a). Rasmussen (2014), for example, convincingly shows how in *Van Gend en Loos* (1963), the Commission’s very own legal service encouraged the Court to articulate the principle of *direct effect* —a cornerstone of the EU legal order— rather than it emerging in a vacuum. In the US, the legal service has as a counterpart the Office of the Solicitor General, which scholars have long established its influence throughout the U.S. Supreme Court decision-making process in granting *certiorari*, opinion writing, and case holdings (Black and Owens 2011, 2012a; Bailey et al. 2005; Black and Owens 2012d; Wohlfarth 2009). Such accounts suggest that, despite formal autonomy, apex courts are responsive to external legal arguments advanced by key institutional actors.

Drawing on the American judicial politics literature, I contend that an apex court’s effectiveness depends primarily on its capacity to acquire, interpret, and apply information (Black and Owens 2012b; Spriggs and Wahlbeck 1997; Caldeira and Wright 1988). By effectiveness, I mean the ability to make rules that are complied with by the subjects. Specifically, *amici curia* briefs reduce the information problem faced by apex courts and help judges anticipate the impact of their opinions (Spriggs and Wahlbeck 1997, pp.365). Faced with limited resources, judges and their clerks are better able to locate their preferences within the space of potential “like cases” when trusted briefs present real-world policy outcomes alongside the proper legal scaffolding (Winston 1974). Thus amici briefs are one of the most direct ways of shaping judicial rulemaking at the ECJ.

In the EU legal system three actor classes appear before the ECJ seeking to influence its rulemaking: the executive, the member states, and private parties.

Within the confines of Berlaymont, the Commission employs an elite group of about 150 lawyers tasked with representing the positions of the executive branch before the Court (Leino-Sandberg 2021a). As members of the Commission’s Legal Service, they benefit from three forms of leverage —institutional reputation, tech-

⁴See Case C-294/83, *Les Verts v European Parliament*, ECLI:EU:C:1986:153, para. 23; Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, paras. 15–16.

nical specialization, and repeat-player advantage— all operating under the guise of impartiality and public service. This is what [Pavone \(2024\)](#) calls the ‘politics of positionality’ (pp.472). First, the legal service has provided the Commission with key arguments to legitimize legal enforcement of the treaties to great success ([Vauchez 2015](#), pp.24). A testament to this is how in direct actions the Commission wins more than 90 percent of cases it lodges ([Kelemen and Pavone 2022](#); [Stone Sweet and Brunell 2012](#)).⁵ Second, the Commission’s legal service has institutional expertise accumulated over-time and across specialized DGs ([Hofmann 2013](#)). Internally, the legal service works collegially and where opinions are discussed ‘to ensure historical and horizontal consistency’; this internal vetting process grants them institutional doctrinal authority ([Leino-Sandberg 2021b](#), pp.60-61; [Hofmann 2013](#), pp.78). Third, the legal service is the ‘ultimate repeat player’ as it submits its observations in almost every single case referred to the court ([Hofmann 2013](#); [Leino-Sandberg 2021a](#)). Even for non-institutionally linked lawyers, [Hermansen et al. \(2025\)](#) shows how experience significantly affect the likelihood of winning.⁶ This makes the Commission the pre-eminent “player for rules”, rather than focusing on case dispositions ([Galanter 1974](#)). The foregoing arguments crystallize into my baseline theoretical expectation:

Expectation 1 (E1) The Court’s legal rule is closer to the European Commission proposal than to any EU member state or private litigant.

Yet, the European executive is not the only actor that shapes the ECJ judgments. On the one hand, each of the twenty-seven member states has its own legal counsel, whom deploy their legal expertise to protect their national interests before the ECJ ([Lindholm et al. 2025](#)).⁷ In turn, member states’ legal briefs convey a risk of credible override and potential non-compliance—since it is the member states who must comply with these rulings ([Carrubba et al. 2008](#); [Larsson and Naurin 2016](#)). Recent evidence on case disposition supports this picture: as shown by [Cheruvu \(2025\)](#), when a judge receives an *amicus* brief from their appointing member state, the judge’s panel

⁵Albeit narrowly, this success has already been proven in [Cichowski \(1998\)](#) study of environmental law, where the Commission has a 97 success rate of having their observations upheld.

⁶More broadly, this effect of prior experience is also found across jurisdictions. See [McGuire 1995](#) and [Galanter 1974](#).

⁷[Owens and Wohlfarth \(2014\)](#) have empirically shown an analogous influence in the U.S. federal setting where State governments’ briefs too influence the U.S. Supreme Court.

is more likely to rule in favor of that member state's position.

Moreover, legal briefs are not merely political threats but also plausible legal alternatives that the Court might find more appealing—particularly in cases concerning primary law (Lindholm et al. 2025; Mandujano Manriquez 2025). Primary law is broadly analogous to constitutional law in the US, whereas secondary law is more akin to statutory law (See Segal 1997; Eskridge 1991).⁸ Because primary law cases concern the constitutional foundations of the EU legal order, member states have stronger incentives and commit greater resources to contest the Commission's interpretation. Their observations should therefore provide particularly consequential legal alternatives to the Commission's position. This reasoning leads to my second theoretical expectation:

Expectation 2 (E2) The probability that the Court's legal rule is closer to the European Commission's proposal decreases as the number of member state observations increases, this effect is stronger in cases concerning primary law.

On the other hand, private actors have historically been drivers of European integration despite formal opposition of some member states (Stone Sweet 2000, pp.162; Cichowski 2004, pp.171). As shown by Cichowski (2004), faced with little protection under domestic law, women experiencing discrimination utilized general EU gender equality laws to bring claims where the ECJ expanded the meaning and scope of EU social provisions for the sake of EU interests and greater clarity. Moreover, recent studies have shown how the Court favors individuals' rights claims to build legitimacy as a protector of the weak and cultivate support networks among legal practitioners and citizens (Hermansen et al. 2025). Taken together, these dynamics highlight how the incentives of private litigants and the Court align, allowing individual claims to shape legal rules. Last, I formalize my third theoretical expectation as follows:

Expectation 3 (E3) The probability that the Court's legal rule is closer to the European Commission proposal decreases when the case deals with individual rights.

⁸Primary law comprises the EU treaties, whereas secondary law consists mainly of regulations and directives adopted under them.

Table 1: Theorized effects on the likelihood of the Commission being closer to the ECJ’s legal rules

Actor	Influence Mechanism	Expected Effect
<i>European Commission</i>	<ul style="list-style-type: none"> • Positionality – repeat player advantage, political embeddedness, and technical specialization. • Shared supranationalist interests and identity. 	x
<i>EU member states</i>	<ul style="list-style-type: none"> • EU member state briefs provide legal alternatives with override and systemic non-compliance threats. • Heighten when case deals with primary law as more resources are committed. 	– – –
<i>Private parties</i>	<ul style="list-style-type: none"> • ECJ bolsters legitimacy by siding with individual litigants. 	–

Note : x denotes the baseline expectation whereby the Commission’s proposed legal rule is closer to the ECJ’s legal rule than the member states and private actors respectively.

RESEARCH DESIGN

Data & Measurement

To evaluate my theoretical expectations, I assembled an original dataset of all preliminary references adjudicated between 2022 and 2025, comprising operative judgment texts, case attributes, and written observations submitted to the ECJ.⁹ The dataset makes it possible to study a question that existing research has largely been unable to answer systematically: whose legal interpretation is reflected in the rules ultimately articulated by the Court? Rather than examining only whether an actor wins or loses, the data allows me to compare the substantive legal rules proposed by the Commission, member states, and private parties with those established by the ECJ.

Under REGULATION (EU, Euratom) 2024/2019, which entered into force on 1 September 2024, written observations from the Commission, member states, and case parties became systematically accessible to the public for the first time.¹⁰ This development made it possible to assemble the first systematic dataset for examining how competing actors shape judicial rulemaking through their written observations. The dataset contains 320 cases, encompassing 1,025 written observations and 2,246 rule proposals advanced by the Commission, member states, and private actors, alongside

⁹For more details see appendices **B** and **C**.

¹⁰Previously, such observations were only accessible through the archives in Florence on a 30-year rolling window or limited FOI requests.

320 ECJ judgments comprising 520 operative rules.

Leveraging this rich text data, I measured the semantic distance between the rules proposed by the observing parties and the rule ultimately articulated in the Court’s operative part. Semantic distance captures the similarity between two rules in meaning, rather than merely in wording. This matters because legal actors often express the same rule in somewhat different words, and conversely, use nearly identical wording with only a couple of changes to mean the opposite. By focusing on meaning rather than wording, semantic distance treats paraphrases and synonyms as “close” while distinguishing subtly altered but substantively opposed formulations — something neither bag-of-words (BoW) models, which count word occurrences without regard to meaning, nor Word2Vec embeddings, which capture word-level similarity but not full-sentence semantics, can do.

Computationally, I used the **Sentence-CamemBERT-Large** embedding model, which was developed for French language and represents each sentence as a numerical embedding in a 1024-dimensional space (Martin et al. 2019; Reimers and Gurevych 2019). Once these distances were calculated for each actor pair, I devised a difference-in-distance estimator to quantify both the magnitude of the difference and which actor was closer to the ECJ’s rule: the Commission or the other two actor classes (see equation 1). Substantively, this delta (Δ) indicates which actor class is closer to the Court’s rule and by how much. These deltas are the key outcome variables for the descriptive analysis.

To provide a more intuitive understanding, consider Case C-615/23, *Dyrektor Krajowej Informacji Skarbowej* (Public Transport Services).¹¹ At issue in this case is whether payments made by a local authority to a public transport operator, to compensate for operating losses, should be treated as subject to VAT. In its observations, the Commission argued that the subsidy directly lowers the price paid by passengers and should therefore be treated as part of the price, and thus subject to VAT. The Hungarian government —the closest among all government observers— argued, by contrast, that the subsidy should not be included in the VAT base. In its operative part, the ECJ’s legal rule aligned most closely with Hungary’s position, holding that such subsidies are not included in the VAT base, albeit with a different formulation

¹¹Case C-615/23, *Dyrektor Krajowej Informacji Skarbowej*, 8 May 2025, ECLI:EU:C:2025:329.

and several divergent aspects of factual description. This combination of substantial agreement and textual divergence is reflected in the relatively small, but non-zero, semantic distance between the Hungarian government and the ECJ ($\delta = 0.109$; Figure 1 bottom), compared with the much larger distance between the Commission and the ECJ ($\delta = 0.651$; Figure 1 top).

Figure 1: Measuring semantic distance between the ECJ, the Commission and Hungary. When delta reaches zero it means that the meaning encoded in both paragraphs is the exact same $\delta \rightarrow 0$

ECJ		EC	
OJC_2023_0615_00_PAR001		OBS_2023_0615_00_01_PAR001	
Article 73 of Council Directive 2006/112/EC of 28 November 2006, on the common system of value added tax must be interpreted as meaning that: a lump-sum compensation paid by a local authority to an company providing public transport services, and intended to cover the losses incurred in the provision of those services, is not included in that company's taxable amount.	—	Article 73 of the VAT Directive must be interpreted as meaning that, in circumstances such as those in the main proceedings, where a local authority organizing a transport service pays compensation to the carrier for the provision of that service, that compensation must be regarded as a subsidy directly linked to the price paid by a third party for that transaction and, consequently, must be included in the taxable amount.	$\delta = 0.651$
[−0.2318, −0.4224, ..., 0.0370, 0.2130]		[0.1069, −0.3634, ..., 0.1272, 0.3557]	
ECJ		HUN	
OJC_2023_0615_00_PAR001		OBS_2023_0615_00_04_PAR001	
Article 73 of Council Directive 2006/112/EC of 28 November 2006, on the common system of value added tax must be interpreted as meaning that: a lump-sum compensation paid by a local authority to an company providing public transport services, and intended to cover the losses incurred in the provision of those services, is not included in that company's taxable amount.	—	Article 73 of Directive 2006/112 must be interpreted as meaning that compensation paid by a local authority to a separate entity (an operator) for the provision of public transport services is not included in the taxable amount referred to in that provision.	$\delta = 0.109$
[−0.2318, −0.4224, ..., 0.0370, 0.2130]		[0.0077, −0.3365, ..., 0.0197, 0.4035]	

Note: The examples above were originally written in French and have been self-translated into English for illustrative purposes. However, all materials used in the analysis were retained in their original French.

$$\Delta = d(A, B) - d(A, C) \quad (1)$$

Equation 1 formalizes this logic as a difference-in-distance estimator. In the present example, A denotes the embedding of the ECJ's rule; B denotes the embedding of the Commission's proposal; and C denotes the embedding of the closest comparator proposal—in this case, Hungary's proposal. The term $d(A, B)$ corresponds

to the large ECJ–Commission distance ($\delta = 0.651$), while $d(A, C)$ corresponds to the small ECJ–Hungary distance ($\delta = 0.109$). Their difference is

$$\Delta = d(A, B) - d(A, C) = 0.651 - 0.109 = 0.542.$$

Because $\Delta > 0$, the closest member state (Hungary) is nearer to the Court’s rule than the Commission, and the magnitude $|\Delta| = 0.542$ quantifies how much closer. More generally, a negative Δ indicates that the Commission is closer to the Court than the comparator actor class, whereas a positive Δ indicates that the comparator (member states or private actors) is closer, with $|\Delta|$ measuring the size of that gap.

For statistical modeling, I further map Δ into a binary indicator using Equation 2, where $f(\Delta) = 1$ indicates that the Commission is closer to the Court than the comparator actor class, and $f(\Delta) = 0$ indicates the opposite. In addition to its sign, the magnitude of Δ contains information about the clarity of the comparative classification. I use this magnitude to construct *signal-strength weights*, so that cases in which the two proposals are nearly equidistant from the Court receive less influence than cases displaying a clearer distance separation. This weighting choice does not assume that legal language is randomly generated or that the weights constitute objectively estimated measurement variances. Instead, it reflects the substantive claim that a larger distance contrast provides a clearer basis for identifying which actor’s proposed rule is closer to the Court’s rule.

$$f(\Delta) = \begin{cases} 1 & \text{if } \Delta < 0 \\ 0 & \text{if } \Delta > 0 \end{cases} \quad (2)$$

Besides these novel measurements, I also included a set of case-level descriptors capturing the structure of the underlying judicial process. For the Commission–member state comparison, these cover the number of member state amicus briefs, their substantive role (override or information), and the average similarity between all member state submissions and the Court’s operative rule. For the Commission–private actor comparison, they include whether the case concerns individual rights, the number of private actor amicus briefs, and the average similarity between all private actor submissions and the Court’s operative rule.

Table 2: Causal Models – Variables Statistics

	<i>n</i>	<i>mean</i>	<i>std</i>	<i>range</i>
Commission closer than member states	354	0.469	0.500	[0, 1]
Delta difference (ECJ – EC) – (ECJ – MS)	354	-0.018	0.129	[-0.56, 0.56]
Primary law	354	0.410	0.492	[0, 1]
Number of member states <i>amici briefs</i>	354	1.782	1.202	[1, 11]
MS <i>amici briefs</i> (override)	354	1.006	1.149	[0, 5]
MS <i>amici briefs</i> (information)	354	0.777	1.301	[0, 11]
Average MS–EC similarity	354	0.717	0.141	[0.14, 0.99]
Commission closer than private actors	350	0.357	0.480	[0, 1]
Delta difference (ECJ – EC) – (ECJ – PT)	350	-0.063	0.165	[-0.87, 0.44]
Individual rights	350	0.363	0.482	[0, 1]
Number of private actors <i>amici briefs</i>	350	1.517	0.845	[1, 7]
Average PT–EC similarity	350	0.675	0.168	[0.06, 0.97]

n is different for private actors and member states, because cases might have observing member states but no private actors and *vice versa*.

Estimation

To further probe my theoretical expectations I specify two weighted logistic regression models in line with a modern graphical causal inference logic (Ahmed and Cheng 2020; Pearl 2009, 2015).¹² Specifically, these models assess whether the European Commission retains primacy in shaping EU legal rules relative to member states and private actors respectively. For both models, the dependent variable is whether the Commission is closer to the ECJ’s operative rule (when true $y = 1$ else $y = 0$).

On the one hand, I want to know whether the European Commission is losing its primacy in shaping of EU legal rules *vis-à-vis* the member states. As shown in Equation 3, y is the probability that the Commission is closer to the ECJ’s operative rule rather than any of the proposals of the member states. η is the number of member state briefs submitted when case deals with primary law ; κ is the number of member state briefs submitted when case does not deal with primary law $\beta\mathbf{X}$ are information related controls from all other member state proposals.

$$\mathbb{P}(y_i = 1) = \eta + \kappa + \beta\mathbf{X} + \varepsilon_i^c \quad \text{with weights } \omega_i \quad (3)$$

On the other hand, the other part of the puzzle is whether private actors are displacing the Commission as key provider of legal rules; particularly in cases concerning

¹²Full causal identification details provided in Appendix E

individual rights. This is specified in Equation 4. Where y is the probability that the Commission is closer to the ECJ’s operative rule rather than any of the proposals of the private actors; τ_i is whether the case deals with individual rights or not; $\beta\mathbf{X}$ are information related controls from all other private actors proposals and their count.

$$P(y_i = 1) = \tau_i + \beta\mathbf{X} + \varepsilon_i \quad \text{with weights } \omega_i \quad (4)$$

For both models, ω_i denotes *signal-strength weights* constructed from the distance contrast $|\Delta_i|$. The absolute value of Δ_i measures how clearly the embedding representation separates the two competing actor–Court distances: values close to zero indicate that the proposals are nearly equidistant from the Court’s rule, whereas larger values indicate a clearer comparative signal. The sign of Δ_i , by contrast, determines the binary outcome. I therefore give greater weight to observations with a larger distance contrast because they provide a clearer basis for classifying which actor’s proposal is closer. These are not inverse-variance or sampling-probability weights; rather, they define a signal-weighted estimand in which cases with clearer semantic separation contribute more to estimation than cases in which the two proposals are nearly indistinguishable in the embedding space. ε_i^c standard errors are clustered by case to allow for correlation among rules within the same preliminary ruling (Abadie et al. 2023).

Limitations

Before reporting any results, three limitations warrant discussion. First, in some cases member states file a petition to prevent the release of their written observations to the public. This means that member state influence could be underestimated; however, this is more of an exception than a rule.¹³ Second, actors may be anticipating the Court’s ruling rather than actually influencing it. Yet the preliminary ruling procedure grants the ECJ broad discretion to adopt any interpretation, making pure anticipation an unlikely full explanation for the observed patterns. Third, the sample is confined to 2022–2025, the first period for which written observations became systematically accessible under REGULATION (EU, Euratom) 2024/2019. This lim-

¹³Case-level details on missing observations by actor are in Appendix B, Table B.2 .

its the analysis of historical change and prevents direct assessment of whether the observed patterns characterize earlier periods of ECJ rulemaking. Nevertheless, the mechanisms examined in this article—including the Commission’s legal expertise and repeat-player advantage, as well as member states’ ability to offer competing legal interpretations—are not necessarily specific to this period. Whether the findings generalize to earlier periods remains an important question for future research.

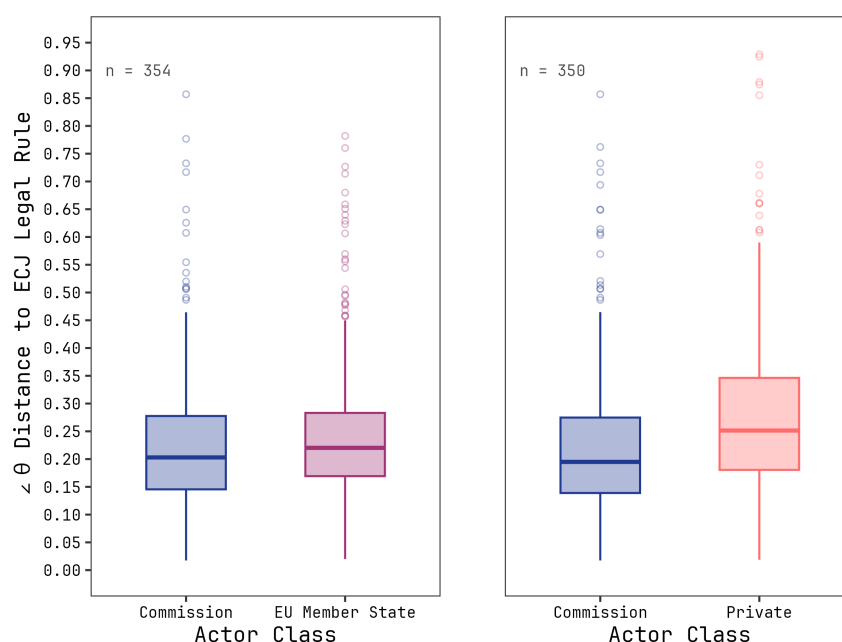
RESULTS

In this section I will first discuss some descriptive findings before moving to the statistical analysis. First, looking at the distance between the Commission, the member states and the private actors proposals relative to the Court’s legal rules two findings stand out (See Figure 2). On the one hand, the median distance between the Commission and the closest member state differs by merely, 0.02 points on a unit interval ($x \in [0, 1]$). Even if the Commission comes out ahead, the difference is not substantively meaningful. Instead, this result suggests that the Commission and the member states make comparable contributions. On the other hand, where the Commission does have supplying edge is over private actors who have a 0.28 median distance compared to the Commission’s 0.20. Seeing jointly, is clear that the Commission’s preferred interpretations are more successful.

Tapping into the mechanisms of why the Commission comes ahead is clearer from reading these written briefs. Often private actors care less about shaping judicial rules, understandably, and frame their briefs around facts and why a given preliminary question applies or do not apply to their factual circumstances. Textually, private parties tend to latch on to the questions, rather than bring about a different reading, and only tell the Court to answer in the *affirmative* or *negative*.¹⁴ Their focus on case dispositions rather than rules is also evident in the structure of their documents. These often do not include a designated section where they explicitly suggest the ECJ’s preferred legal interpretation, unlike the submissions of both the Commission and member state lawyers.

¹⁴See, e.g., “Pour toutes ces raisons, CRRC Sifang et Astra considèrent que la réponse à la première question doit être affirmative” and “Nous estimons qu’il y a lieu de répondre PAR L’AFFIRMATIVE à cette cinquième question...” (original casing)

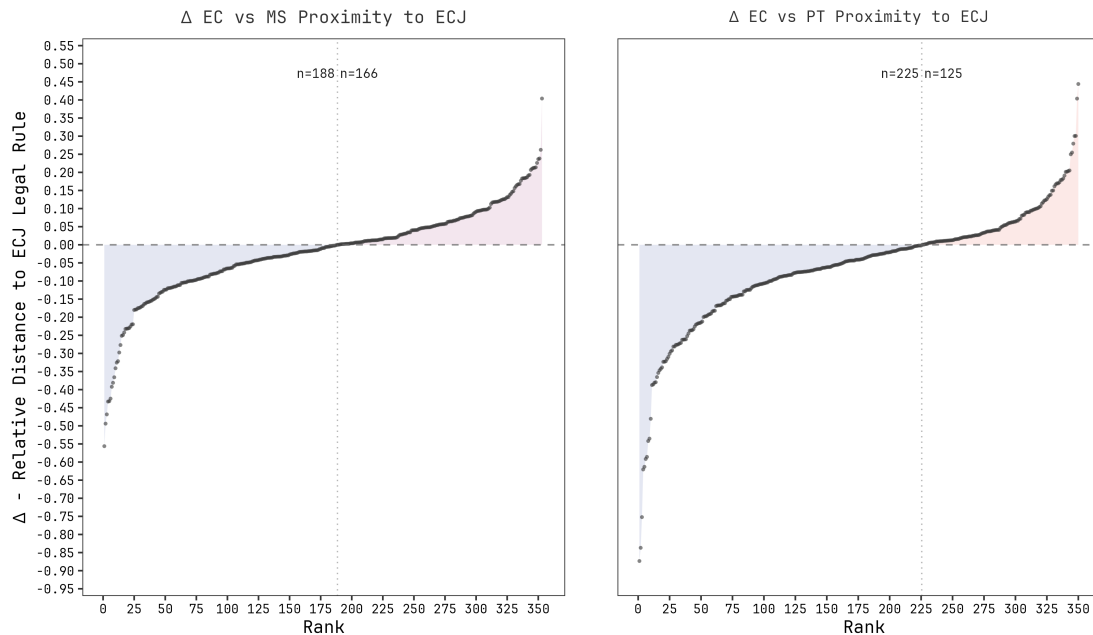
Figure 2: Boxplots of actor-class distance to the ECJ legal rule.



Note: When multiple member states or private actors submit observations in the same case, the median is calculated using the actor whose proposed position is closest to the ECJ's final legal rule, rather than computing a separate distance for each individual actor.

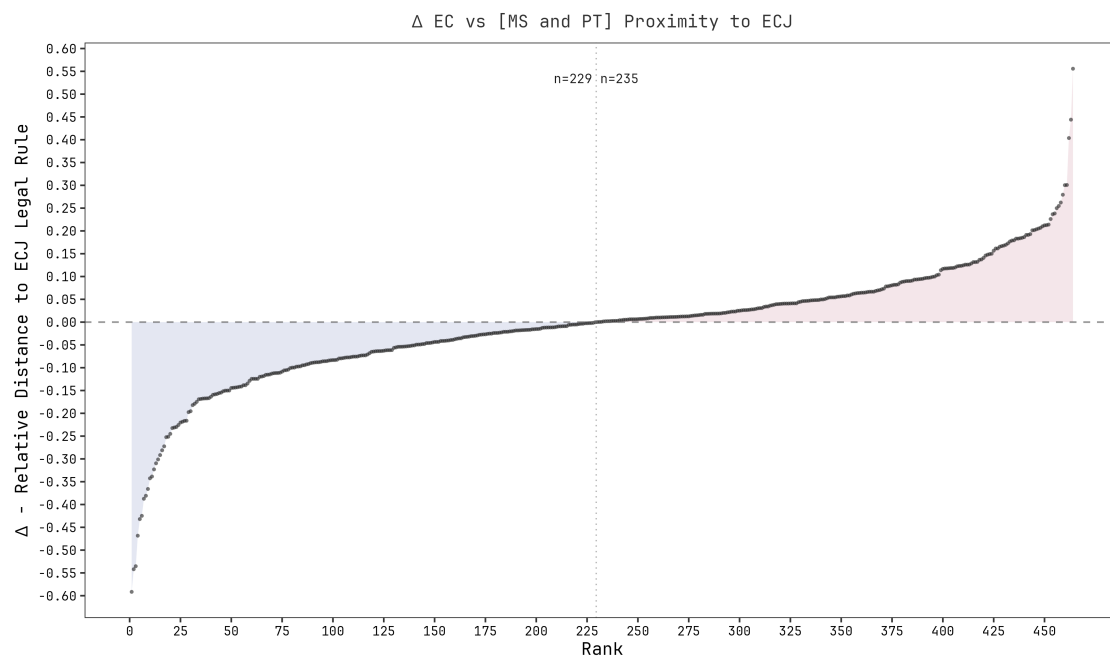
Second, besides pairwise distances to the Court's legal rules, another important descriptive finding emerges from the delta differences, which essentially answers *who is closer to the Court and by how much?* To start, looking at the comparison between the Commission *vis-à-vis* the member states, it's clear that the over 90% litigation success does not translate into interpretative hegemony in recent years (Stone Sweet and Brunell 2012). The prevalence of the Commission being closer than member states is 0.555 (SE = 0.0301), denoting an almost Salomonic share in judicial rulemaking to the member states (95% CI: 0.497–0.614, $p < 0.001$). As shown in the left panel of Figure 3, across 354 rulemaking instances, the ECJ tends to show a clear preference toward either the Commission or a member state, as indicated by the shaded areas, which capture the magnitude of the difference. Counterfactually, if the shaded area were very narrow, this would suggest that the closest member state and the Commission occupy very similar positions, so that the apparent difference would be merely a mathematical artifact. Yet this is not the case.

Figure 3: Distribution of ECJ closeness to Commission *vis-à-vis* member states and private actors respectively



Complementarily, the comparison of the Commission *vis-à-vis* private actors shows a similar but less drastic pattern of faltered influence. The prevalence of the Commission being closer than private actors is 0.689 (SE = 0.0276), meaning almost a third of private actors come ahead (95% CI: 0.634–0.743, $p < 0.001$). This aligns more with traditional accounts of Commission dominance, though not as overwhelmingly as in the infringement procedure. Yet the shaded area in the right panel of Figure 3 denotes that private actors substantively disagree with the Commission’s interpretation; otherwise the shaded area would be narrower (close to zero throughout). So it’s not the case that private actors and the Commission are always in sync or care equally about judicial rulemaking.

Figure 4: Distribution of ECJ closeness to EC *vis-à-vis* member or private actors



Moreover, Figure 4 provides a full picture of how does the Commission fare *vis-à-vis* private actors and the member states simultaneously. Two key takeaways emerge. Jointly, both actor classes overtake the Commission since they are closer to the Court in 235 instances versus the Commission's 229. This also denotes, that the member states and private actors, both contribute to specific cases since originally each actor class was closer in 166 and 125 respectively (See Figure 3). Considering the substantive variation and descriptive findings, I now move to the statistical findings.

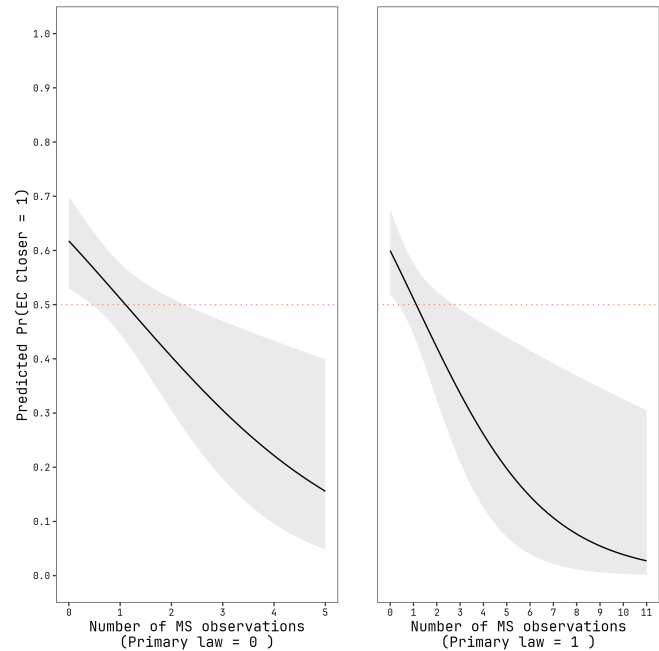
The first puzzle is whether the submission of briefs from member states will decrease the probability that the Commission is closer to the Court due to override, non-compliance and informational effects. Particularly, when the case deals with primary law as these cases tap into the constitutional underpinnings of the member states and are likely to have stronger legal preferences. To this end, Figure 5 shows the marginal effect of member states' briefs when the case deals with primary law and when it does not. In line with the works of Larsson and Naurin (2016) and Carrubba et al. (2008) on risk of override, I find that one additional brief decreases the probability of the Commission being closer by 9 percentage points (95% CI: $-0.140, -0.035$ $p < 0.001$).

Similarly, for primary law cases, when the main mechanism is the provision of

legal alternatives, I find that one additional brief decreases the probability of the Commission being closer by 6 percentage points (95% CI: $-0.102, -0.022$ $p < 0.002$). This results are in line with the view that, legal alternatives matter even when a formal override threat is not present (Mandujano Manriquez 2025; Lindholm et al. 2025).

Jointly, these results are partly supportive of expectation one *E2*. The probability that the Court’s legal rule is closer to the Commission proposal decreases with the number of member states observations, yet it does not heighten when the case deals with primary law.

Figure 5: Predicted probability of the Commission being closer than member states



Exposure	$\frac{\partial \hat{p}}{\partial x}$	CI 2.5%, 97.5%	$\Pr(> z)$
MS observations (primary law = 0)	-0.088	(-0.140, -0.035)	0.001**
MS observations (primary law = 1)	-0.062	(-0.102, -0.022)	0.002**

Note: Marginal effects on predicted probabilities were robustly estimated using GLM with signal-strength weights based on the delta difference. Confidence intervals and p-values were constructed using cluster-robust standard errors at the case level.

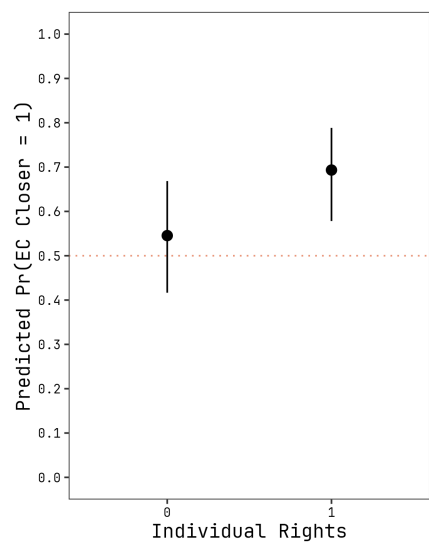
The second puzzle is whether the Court’s “leveling effect” towards individual rights litigants also translates into rulemaking contributions, as a strategy to bolster its legitimacy. In contrast to the findings from Hermansen et al. (2025), concerning case dispositions, I find the opposite effect whereby the Court is less likely to

adopt the proposal from the individual rights claimant. As shown in Figure 6, the probability that the Commission is closer to the ECJ's rule is 0.545 in cases without individual-rights claims (95% CI: 0.417–0.674, $p < 0.001$). In cases with individual-rights claimants, this probability rises significantly to 0.693 (95% CI: 0.587–0.800, $p < 0.001$).

These results disprove *E3*. The probability that the Court's legal rule is closer to the Commission proposal *does not* decrease when the case deals with individual rights; on the contrary, it *increases* by 14.8 percentage points (from 0.545 to 0.693). This reveals a critical distinction: while the ECJ favors individuals' rights claims in dispositions (Hermansen et al. 2025), this favoritism does not extend to rulemaking. As noted earlier, this may be in part because individual rights claimants tend to focus on factual descriptions and case-specific resolutions rather than articulating precise legal rules.¹⁵ Consequently, the Commission's technical expertise in framing substantive legal arguments gives it greater influence over the Court's rulemaking, even in individual rights cases.

¹⁵It's worth reminding the reader that, as shown in Figure 3, private actors and the Commission do differ, as shown by the shaded area; this is not just preference convergence where the Commission is always better at presenting arguments.

Figure 6: Predicted probability of the Commission being closer than private actors



Individual Rights	$E[\hat{P}]$	CI 2.5%, 97.5%	$\Pr(> z)$
0	0.545	(0.417, 0.674)	< 0.001***
1	0.693	(0.587, 0.800)	< 0.001***

Note: Predicted probabilities were robustly estimated using GLM with signal-strength weights based on the delta difference. Confidence intervals and p-values were constructed using cluster-robust standard errors at the case level.

CONCLUSION

This article shows that executive primacy in judicial rulemaking is limited. In preliminary rulings, the European Commission does not retain unique primacy in shaping the European Court of Justice's legal interpretations: member states perform comparably, and private actors are closest to the Court's rule in over a third of cases. The statistical results further show that additional member state observations reduce the probability that the Commission is closest to the Court, while the Commission remains more likely to be closest in cases concerning individual rights. Together, these findings challenge the common wisdom that repeat players possess a general advantage in shaping legal rules ([Galanter 1974](#)). The Commission's expertise and experience matter, but they do not by themselves secure interpretative primacy when other repeat participants regularly provide competing legal interpretations.

These findings also clarify the relationship between enforcement success and influence over legal rules. Existing research shows that the Commission is highly successful in infringement proceedings, where the binary structure of adjudication means that a Commission victory effectively secures adoption of its preferred interpretation. With win rates exceeding 90 percent ([Kelemen and Pavone 2022](#); [Stone Sweet and Brunell 2012](#)), the Commission has considerable enforcement power. Yet this advantage does not translate into equivalent primacy over rulemaking in preliminary rulings, where the Commission, member states, and private actors regularly submit competing legal interpretations. The Commission's increasing de-prioritization of infringement actions and promotion of decentralized private enforcement ([Hofmann 2026](#)) may therefore contribute to a more dispersed structure of interpretative authority. This interpretation remains tentative given the study's temporal scope, but it is consistent with arguments that the Commission has become less central to the production of legal innovations ([Mandujano Manriquez and Pavone 2025](#)).

More broadly, future research should apply this semantic-distance strategy across apex courts to examine when litigation success translates into interpretative primacy. In the United States, for example, the Office of the Solicitor General has long been highly successful when participating as *amicus curiae* ([Collins 2004](#); [Segal 1988](#)). Yet it remains unclear whether the OSG's proposed legal rules are also semantically

closest to the Supreme Court's opinions when competing briefs are present. Comparative research could therefore show whether the relationship between repeat-player advantage, litigation success, and interpretative primacy varies across institutional and legal settings, or reflects a broader feature of apex court politics.

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