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National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?

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ABSTRACT

This article sheds new light on the role of national courts in the preliminary ruling procedure and European integration by examining: (1) whether national courts allow the Court of Justice of the European Union (CJEU) to decide politically sensitive cases and (2) whether national courts frame the cases by expressing support for an integration-friendly interpretation of EU law or by voicing an opinion in defence of the challenged national law. This study shows that the single most common court behaviour is to support legal integration by referring politically sensitive cases and expressing support for EU law. However, by examining the two choices together, this article also uncovers previously untheorised patterns of behaviour. These findings show that the national courts' behaviour is not limited to either supporting or resisting integration. Instead, it is suggested that national courts may regularly contribute to striking a balance between EU integration and member state autonomy.

KEYWORDS European legal integration; national courts; the preliminary ruling procedure; Court of Justice of the European Union (CJEU); opinions; judicial politics

It is undisputed that the involvement of national courts in the preliminary ruling procedure (Article 267 Treaty on the Functioning of the European Union [TFEU]) has been crucial for the ability of the Court of Justice of the European Union (CJEU) to promote legal integration (Weiler 1994; Alter 1996; Mattli and Slaughter 1998; Davies 2012; Witte *et al.* 2016). However, there is scholarly disagreement regarding how national courts are expected to behave in the EU legal system (Garrett 1995; Mattli and Slaughter 1995; Golub 1996; Alter 2001; Wind *et al.* 2009; Conant 2013; Dyevre 2013; Pollack 2013). According to the logic of *judicial empowerment*, national courts will support EU legal integration since the

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integration process expands their judicial powers (Burley and Mattli 1993; Weiler 1994; Mattli and Slaughter 1998). In contrast, the opposing view, i.e., the logic of *sustained resistance* (Pollack 2013: 1273), proposes that national courts will resist further integration since they want to defend domestic legal coherence and member state sovereignty (Golub 1996; Dehousse 1998; Wind *et al.* 2009).

This article contributes to this discussion on the role of national courts in EU legal integration by exploring what *choices* national courts make in the preliminary ruling procedure. Previous research has mainly focused on how many cases the courts refer to the CJEU (Golub 1996; Sweet and Brunell 1998; Wind *et al.* 2009; Hornuf and Voigt 2015; Kelemen and Pavone 2016; Dyevre *et al.* 2019). However, referral rates are not the only factors that matter for EU legal integration (Alter 2001; Conant 2002; Wind 2010; Conant 2013). For instance, a large number of referred cases does not signify that the CJEU is given extensive opportunities to shape EU legal development if the bulk of those cases is confined to a limited area of EU law (Alter 2000: 501). What instead merits attention are which types of legal cases the CJEU is allowed to decide (Alter 2001; Wind 2010; Hübner 2018) and how these cases are framed by national courts (Nyikos 2006; Rosas 2007; Conant 2013; Leijon and Karlsson 2013; Leijon 2018). These aspects of national court behaviour have important implications for the scope and pace of EU legal integration, and they will be referred to as the national courts' two *key choices* in the preliminary ruling procedure: (1) whether national courts are willing to supply the CJEU with politically sensitive cases in which national policies are at stake and (2) whether national courts frame the cases by expressing support for an integration-friendly interpretation of the EU law or whether they instead voice an opinion in defence of the challenged national policy.

What key choices the national courts make in the preliminary ruling procedure has not yet been systematically studied. Aiming to fill this gap in the literature, this article explores the national courts' decisions between 1992 and 2012. This study contributes to the literature on EU legal integration by providing an account of the observed behavioural patterns of national courts and how these patterns are to be theoretically understood. By examining the combination of the courts' choices, this article uncovers two previously untheorised national court behaviours that refine our understanding of the role of national courts. These two behavioural patterns show that the courts' actions are not limited to either supporting or resisting EU legal integration, as suggested in the scholarly debate. Instead, it is argued that national courts may also be able to strike a fair balance between EU legal integration and member state sovereignty.

The remainder of this article is organised as follows. The first section presents previous research related to the role of the national courts.

The second section develops theoretical expectations regarding the national courts' two key choices in relation to EU legal integration. The third section describes the materials and methods. The fourth section presents the empirical findings. The final section discusses the implications of the findings with regard to the debate on the role of courts in EU legal integration.

The role of national courts in EU legal integration

Two main positions regarding national court behaviour in EU legal integration can be identified in the scholarly debate. First, the logic of judicial empowerment claims that national courts will support further legal integration because it gives them new powers, such as the right to exercise *de facto* judicial review in the preliminary ruling procedure. In its responses to the requests of national courts for preliminary rulings, the CJEU often notes the incompatibility between national policies and the supreme EU law. The CJEU's interpretations of EU law are binding, but it is the job of national courts to independently apply the interpretation to the case at hand. In practice, therefore, national courts take part in reviewing whether a piece of national legislation is compatible with EU law. By being able to review legislation, the courts increase their powers vis-à-vis the other branches of government (Weiler 1991; Burley and Mattli 1993; Weiler 1994) and ensure that their rulings have an impact on public policy (Baum 1997; Alter 2001: 45–46). Refining this argument of judicial empowerment, Alter (2001) suggests that due to inter-court competition, it is predominantly lower national courts that stand to gain new powers from sending questions to the final authority of EU law, i.e., the CJEU. Using answers from the CJEU, the lower courts are able to deliver rulings that will have to be accepted by the highest domestic courts.

However, not everyone is convinced by the empowerment claim. The argument of the second position in the debate, i.e., the logic of sustained resistance, is that national courts have incentives to avoid further EU legal integration. First, the preliminary ruling procedure challenges domestic judiciaries' control over policy outcomes (Golub 1996: 381). By allowing the CJEU to issue binding responses to questions of EU law that have arisen in domestic legal cases suggests that national courts are handing over part of their decision-making powers to the EU court. Second, EU legal integration may undermine legal certainty and the coherence of the domestic legal system (Dehousse 1998; Maher 1998; Alter 2001: 48). According to Dehousse, 'European law is often a source of disruption. It injects into the national legal system rules which are alien to its traditions and which may affect its deeper structure, thereby threatening its

coherence' (Dehousse 1998: 173). A third factor that may lead national courts to resist EU legal integration is pressure from member state governments. Previous research has shown that governments have issued statements instructing national courts to be restrictive with regard to using the preliminary ruling procedure (Wind *et al.* 2009).

The national courts' key choices

Previous attempts to resolve the debate on the role of national courts have mainly focused on referral rates. The conventional view holds that courts that frequently request preliminary rulings are supportive of legal integration since referrals provide the CJEU with opportunities to influence legal development. In contrast, courts aiming to prevent any impact of EU law on the national legal order avoid making referrals (for an overview, see, e.g., Conant 2007: 54). Extending beyond referral rates, a few studies provide insights into the number and types of EU law cases that national courts do not refer to the CJEU (Chalmers 2000; Hübner 2018). Another important aspect of the courts' behaviour concerns what types of cases they refer to the CJEU. The fact that national courts have some discretion[1] regarding whether to request a preliminary ruling raises the following important questions: Do national courts mainly refer cases of minor political importance to the CJEU? Alternatively, do national courts regularly refer politically sensitive cases regarding conflicts between national policies and EU law (Bebr 1983: 456–457; Alter 2000: 501)?

National courts are primarily experts on domestic law, and it is not surprising that they ask the CJEU questions about the technicalities of EU law. However, what is considered controversial, at least from the perspective of member state governments, is that national courts may also refer cases that have a *high degree of political sensitivity* to the CJEU. These types of cases concern the potential removal of national policies that have been claimed incompatible with the supreme EU law. By referring such politically sensitive cases to the CJEU, national courts provide the supranational court with opportunities to exercise judicial review over national laws (Alter 2001: 36). This practice of judicial review aims to improve legal harmonisation among member states. However, having national courts refer politically sensitive cases to the CJEU significantly narrows domestic control over public policy. According to Blauberger, EU member states generally want to avoid the kind of rulings from the CJEU that the referral of a politically sensitive case may result in. For example, rulings that force a member state government to give up its current policy and initiate legislative reform or involve different types of financial risks, such as state liability for the infringement of EU law (Blauberger 2014:

461–462). Similarly, Alter suggests that member states typically wish to evade CJEU decisions that 'could upset public policies or create a significant material impact (be it political or financial)' (Alter 1998: 130).

Thus, the national courts' first important choice concerns whether they request preliminary rulings in cases with a high degree of political sensitivity. Concerning the debate on the role of courts in EU legal integration, a national court can be said to contribute to promoting integration if the court, when confronted with a case with a high degree of political sensitivity, decides to refer it to the CJEU. Conversely, if a national court seldom refers the politically sensitive cases with which it is confronted and instead sends cases with a low degree of political sensitivity, the CJEU has fewer opportunities to enforce EU legal norms. The national court's action thereby impedes legal integration. From the perspective of EU legal integration, it is important to know the extent to which national courts, on an aggregated level, refer different types of cases to the CJEU and the types of opinions that accompany these cases.

The second key choice of national courts concerns how they decide to frame the cases they send to the CJEU. When drafting a request for a preliminary ruling, national courts can choose to include a written statement expressing how they believe EU law should be interpreted and how the case at hand should be resolved.[2] These opinions are part of the national courts' dialogue with the CJEU regarding legal issues (Slaughter 1994: 101; Jacobs 2003: 548; Rosas 2007: 126). The opinions have been described by Nyikos (2006: 530) as 'rhetorical weapons' that national courts use to influence the CJEU's understanding of the legal questions that have been raised in the case. By expressing opinions, national courts can show the CJEU which interpretations of EU law are acceptable in their member state's political context.

In contrast, if national courts do not express opinions, there is a greater risk that the CJEU will deliver a ruling that contravenes national legal and political traditions.[3] According to Scharpf (2009: 186-187), the CJEU lacks knowledge about the legal particularities of each member state, leading it to frequently make decisions that threaten the coherence of national policies. In the worst-case scenario, the rulings of the CJEU may have a disruptive effect on the national legal system, effectively contributing to its disintegration (Dehousse 1998: 173; Alter 2001: 48). However, national courts that lack resources may refrain from including opinions in the request for preliminary rulings since formulating opinions is a time-consuming task (Nyikos 2006). Alternatively, national courts may not always have an opinion regarding the legal issue they refer to the CJEU.

The CJEU is expected to sometimes take the courts' opinions into account when deciding the outcome of a case because it wants to ensure

that national courts continue to request preliminary rulings (Nyikos 2006). National courts have been known to challenge the CJEU's interpretations when they disapprove of them. The CJEU is therefore well aware of the need to cater to the views of national courts to uphold EU legal integration (Alter 2001: 61–62). Although the effects of opinions on the CJEU's final rulings have not yet been systematically examined, anecdotal evidence indicates that the CJEU has considered the views of national courts in its judgements (Alter 2001: 61–62; Nyikos 2006: 527; Rosas 2007: 126).

Previous research has identified opinions in approximately 40% of the requests for preliminary rulings (Nyikos 2006), and a study investigating Swedish court behaviour shows that the courts primarily express support for either national policies or EU law (Leijon and Karlsson 2013). National courts that express support for EU law, i.e., stating that they consider a national policy to be incompatible with EU law, are considered to act in a way that supports further legal integration. By expressing such opinions national courts signal to the CJEU that an expansion of the EU legal scope is accepted. Although the CJEU is believed to favour legal integration, it may still be rational for national courts to express opinions supporting EU law since the member state government, which is assumed to seldom prefer an expansion of EU law, is also allowed to express its view on the legal issue. Previous research shows that such member state observations have a certain influence on the CJEU's rulings (Larsson and Naurin 2016). In contrast, national courts that express support for national policies are considered to be resisting EU legal integration. For example, national courts may argue that while a national policy restricts free movement, it should be deemed compatible with EU law since it aims to protect public health (Davies 2012).

Combining cases and opinions: four behavioural patterns

Despite being acknowledged as highly important decisions directly related to the CJEU's ability to foster EU legal integration, the national courts' two key choices have not yet been considered together. Drawing upon previous research and relating the courts' choices to the debate between judicial empowerment and sustained resistance, this article elaborates on the combination of choices that one could expect national courts to make. Based on the judicial empowerment logic, national courts are believed to support EU legal integration by referring cases with a high degree of political sensitivity and expressing opinions in support of EU law (Table 1: Integration supported). In contrast, if the courts behave according to the sustained resistance logic, we could expect them to

Table 1. The national courts' combined behavioural patterns.

	Opinions supporting EU law	Opinions supporting national law
Cases with a high degree of political sensitivity	1: Integration supported	2
Cases with a low degree of political sensitivity	3	4: Sustained resistance

defend national sovereignty by referring cases with a low degree of political sensitivity, and expressing opinions in support of national law (Table 1: Sustained resistance). However, as Table 1 shows, there are four – not two – possible combinations of the national courts' key choices. How can the two new behavioural patterns be understood?

This article proposes that the two undefined behavioural patterns are best understood from the viewpoint that national courts are placed at the intersection between two political systems and that this position exposes the courts to demands from both the EU and the member state. This viewpoint suggests that the two combinations of choices, i.e., (2) and (3), are the domestic courts' methods of balancing these conflicting demands. The demands from the EU level consist of the rules regulating the preliminary ruling procedure that call on national courts to send cases in which the interpretation of EU law is unclear to the CJEU regardless of the cases' degree of political sensitivity. Although national courts have some discretion regarding the referral of cases, preliminary rulings are sometimes required[4] and failure to abide by the treaty article may result in infringement proceedings against the member state (e.g., case C-224/01. *Köbler v Austria*. ECR 2003 I-10239).[5]

However, following the EU rules and allowing the CJEU to decide cases with a high degree of political sensitivity can be met with opposition by the member state. The CJEU has been known to frequently overturn national policies against the wishes of member state governments (Volcansek 1992; Martinsen 2005, 2011). Member states are assumed to be opposed to having politically sensitive questions removed from political decision making and handed over to the CJEU (Blauberger 2014: 460; Grimm 2015). This opposition is the demand that national courts face at the domestic level. Therefore, national courts may feel the need to be cautious with regard to what types of cases they send to the CJEU.

This article argues that combination (2) in Table 1 is to be understood as the behavioural pattern *compatibility defended*. This combination enables national courts to address the demands stemming from both the EU and the member state. By even allowing the CJEU to decide unclear EU law cases that have a high degree of political sensitivity, the national court satisfies the wishes of the EU level. At the same time, the court adheres

to the concerns of the member state government by including opinions defending the compatibility of national practices with EU law in the referrals.

If a national court aims to avoid further EU legal integration, it is taking a risk when referring politically sensitive cases to the CJEU. However, if successful in influencing the CJEU's final ruling by expressing an opinion in support of national policy, the court can contribute to setting precedents that limit the reach of EU law not only in the case at hand but also in related cases. The alternative, i.e., avoiding referring politically sensitive cases, is not always a viable option for a court that wishes to safeguard member state policy and to balance conflicting demands. Courts from other member states may refer cases related to the same sensitive issue but instead express opinions in support of EU law. If the CJEU decides to overturn the national policy in question, its decision applies to all member states (Jacobs 2003: 549). Hence, avoiding the preliminary ruling procedure does not guarantee that member state autonomy is preserved. Applying the terminology proposed by Rytter and Wind (2011: 488), the behavioural pattern compatibility defended suggests that national courts attempt to be active co-producers of EU legal norms rather than passive consumers.

The other previously unexplored combination (3) in Table 1, i.e., *access contained*, may also be understood as a response to different demands from the EU and national political levels. The national court accommodates the EU-level demand by including opinions in the requests for preliminary rulings that support EU law. The court can point out that the further expansion of EU law is indeed acceptable in the case referred. The member state government is not expected to object to this behaviour since the case referred to the CJEU has a low degree of political sensitivity. Therefore, the referral is unlikely to result in the overturning of any sensitive member state policy.

However, it should be kept in mind that access contained may lead to dissatisfaction at the EU level. The ability of the CJEU to expand the reach of EU law is in part circumscribed if national courts do not give the EU court access to cases with a high degree of political sensitivity. National courts that only exhibit the behavioural pattern access contained participate in a dialogue with the CJEU and are co-producers of EU law but only within the sphere of cases with a low degree of political sensitivity.

The four combinations in Table 1, namely, integration supported, sustained resistance, compatibility defended, and access contained, are stylised patterns of behaviour. Answering the question of how common each pattern is will provide essential information about the role of national courts in EU legal integration.

Materials and methods

To provide a first systematic study of the types of cases national courts refer to the CJEU and types of opinions they express in these referrals, this study uses an original dataset[6] consisting of a simple random sample of 470 cases[7] drawn from all CJEU's judgments on requests for preliminary rulings (5,590 cases) from the years 1992 to 2012.[8] The units of analysis in the dataset are the legal cases for which national courts have requested preliminary rulings.

Information regarding the national courts' two key choices was obtained by reading the two types of official CJEU documents that belong to each case. The first document is the ruling from the CJEU, i.e., the *Judgement of the Court,* which includes a description of the legal issue, the questions and any statements made by the national court. The second document, i.e., *Opinion of the Advocate General,* follows a similar outline but discusses the legal questions in greater detail. Both documents have been frequently used in previous research investigating national court behaviour (Sweet and Brunell 1998; Nyikos 2006; Carrubba *et al.* 2008; Carrubba and Gabel 2015).

The advantage of using this dataset is that it includes information regarding both of the national courts' key choices. Hence, for the first time it is possible to empirically examine the combinations of the two choices. However, a disadvantage is that the dataset does not include information regarding the share of politically sensitive cases that the national courts chose to not refer to the CJEU. This means that we cannot determine whether national courts attempt to limit EU legal integration by keeping most politically sensitive cases to themselves. However, this lack of data regarding non-referrals is not a major concern for this study since its focus is on the combinations of cases and opinions, and opinions only occur in the requests for preliminary rulings. To provide the descriptive statistics necessary for assessing the national courts' aggregated choices, the data were analysed using statistical software.

The variable 'type of case' has the value of 1 if the case has a high degree of political sensitivity and 0 if the case has a low degree of political sensitivity. A case with a high degree of political sensitivity is operationalised as *a case in which the legal dispute concerns a conflict between national policies and EU law*. Here, 'national policies' include laws, government decrees and other rules and regulations issued by national authorities. Whether a case concerns a conflict between national policies and EU law is measured by a close reading of the description of the legal dispute in the documents *Judgement of the Court* and *Opinion of the Advocate General*. For example, in case C-203/08[9], the CJEU is asked whether a national law on games of chance is compatible with Article 49

EC (which requires the abolition of all restrictions on the freedom to provide services). This legal issue clearly concerns a conflict between EU law and national law, and therefore, the case is coded as having a high degree of political sensitivity.

If the case does not concern a conflict of laws but rather revolves around conflicting interpretations of EU law, it is coded as having a low degree of political sensitivity. This category of cases can be illustrated by case C-276/94[10] in which the CJEU is asked to interpret the EU rules concerning the inspection of fishing vessels, specifically whether boarding boats must fly an inspection pennant.

Approximately 5% of the cases in the sample were coded as having a high degree of political sensitivity despite the lack of an explicit conflict of laws. This includes cases in which the conflicting interpretations concern the sensitive national policy areas migration or the extension of social rights (Wind 2010: 1053; Martinsen 2011: 948). An example is case C-200/02[11] in which the legal dispute concerns a national agency's refusal to grant a long-term residence permit to an applicant based on its interpretation of EU law (mainly Directive 90/364/EEC). While not threatening a specific national policy, the CJEU's interpretation of the EU directive in this type of case may have repercussions for core national features and competencies over which the member states wish to maintain control. These types of cases thereby challenge the status quo in the member state.

Inter-coder reliability tests were performed on one fifth of the material, and the results showed a high degree of inter-coder agreement; in approximately 90% of the cases, there was agreement between the classification of the author and another researcher. It is worth emphasising that the inquiry centres on the types of consequences a preliminary ruling *may* have on the member state, not the actual political effects of the CJEU's rulings.

The variable 'type of opinion' is coded as 1 if the opinions support national law and 0 if the opinions support EU law. A case is coded as including an opinion supporting national law if the national court expresses support for national laws, regulations, practices, or decisions made by national agencies. For example, 'According to the national court, the national provision is not contrary to Article X in the Treaty'. In contrast, an opinion supporting EU law is defined as any instance in which the national courts side with EU legal acts, practices, regulations and decisions or takes a stand against decisions made by national authorities. Identifying an opinion expressed by the national court in the documents (*Judgment of the Court* and *Opinion of the Advocate General*) is a fairly straightforward task because such opinions are referred to as being

expressed by the national court in question. The coding procedure consists of a careful reading of the documents and the use of the search function (to find specific terms[12]) in the document to ensure that no opinions are omitted.

One minor caveat is worth noting in relation to the data. According to Nyikos (2006), it might be problematic to analyse opinions in cases referred to the CJEU after 1995. A potential problem is that a section in the document *Judgement of the Court*, which previously contained national court opinions, has been rearranged. The claim is that even though national court opinions can be found in other parts of the document, they might be incomplete (Nyikos 2006: 538). The accuracy of this statement has been evaluated in a study of 30 cases referred from Swedish courts to the CJEU between 1995 and 2009. That study found that when comparing the original document from the Swedish courts (which includes the original statements of the national court) with the documents *Judgement of the Court* and *Opinion of the Advocate General,* no opinions were missing in the EU documents (Leijon and Karlsson 2013).[13] Hence, there is no empirical support for the claim that going beyond 1995 would in any serious way affect the reliability of the results.

Empirical analysis

When examining the choices of national courts one by one, the findings first show that the majority (54.5%, i.e., 256) of the referred cases have a high degree of political sensitivity. While we do not know whether this is a low or high share compared to the number of politically sensitive cases that national courts *did not* refer, this finding suggests that the CJEU is at least not starved of sensitive references. Second, the study finds that national courts express opinions in 182 (39%) of the requests for preliminary rulings. The most common decision is to frame the requests for preliminary rulings in a way that shows the CJEU that an expansion of EU law is acceptable: national courts express support for EU law in 118 (64.8%) of the cases with opinions. Conversely, the national courts express support for national law in only 64 (35.2%) of the cases in which opinions were included.

Recalling the inter-court competition hypothesis, we could expect to find that lower national courts make choices that support integration, while courts of final instance display resistance. A comparison of the two groups of courts[14] shows that there is no significant difference in the types of cases referred. However, as Figure 1 shows, lower courts are more likely than courts of final instance to express opinions supporting EU law, and conversely, courts of final instance express support for national law to a greater extent than lower courts.[15]

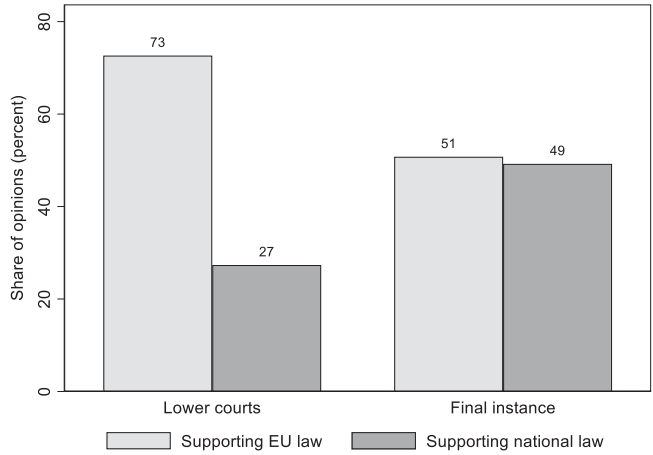

Figure 1. The share of opinions across court levels. Number of observations: Lower courts = 117, Final instance = 65.

Apart from supporting the argument of inter-court competition, this finding also speaks to the claim made by Pavone and Kelemen (2019) that the highest national courts are seeking to reassert control over EU legal development. The results presented in Figure 1 provide additional insights into *how* the highest courts reassert their influence, that is, in a way that is more sensitive to national concerns compared to the behaviour of lower courts. However, the highest courts still support EU law in half of all their opinions, suggesting that at least the courts of final instance that participate in the preliminary ruling procedure are not as skeptical towards EU legal integration as one might expect.

To fully understand the behaviour of national courts in the preliminary ruling procedure, it is necessary to analyse the two key choices together. This approach will shed light on the theoretical controversy regarding the role of courts: To what extent are national courts exhibiting behavioural patterns that either support EU legal integration or that protect member state policies? Table 2[16] shows the distribution of the 182 cases that include opinions across the four possible behavioural patterns.

By viewing the courts' choices together (Table 2), it becomes clear that the single most common behaviour among national courts is integration supported. In 42% of the cases, national courts provide the CJEU with opportunities and encouragement to expand the reach of EU law by referring cases with a high degree of political sensitivity along with opinions supporting EU law. The least common behaviour is sustained resistance. This combination of cases with low political sensitivity and opinions defending national policies makes up 14% of the cases.

Table 2. Results: the national courts' combined behavioural patterns.

	Opinions supporting EU law	Opinions supporting national law
Cases with a high degree of political sensitivity	**Integration supported** 42.1% (77)	**Compatibility defended** 21.3% (39)
Cases with a low degree of political sensitivity	**Access contained** 22.4% (41)	**Sustained resistance** 14.2%(25)

Note: Number of observations: 182 (cases with opinions supporting either national law or EU law), total number of observation in each cell within parentheses.

However, it is striking that 44% of the cases do not correspond to the expectations derived from either the sustained resistance approach or the judicial empowerment approach. The first of the two previously unexplored behavioural patterns, *compatibility defended*, is reflected in 21% of the cases investigated. An example of such a case is C-324/99,[17] which concerned the legality of a national decree. Thus, the legal dispute concerns a conflict between a national law and an EU law, making it politically sensitive. In the request for a preliminary ruling, the national court included the following opinion:

> The Bundesverwaltungsgericht [the national court] considers that the prohibition on exporting hazardous waste for disposal imposed by the contested decree must be considered to be an imperative requirement of environmental protection, within the meaning of the Court's case-law. It concludes that the prohibition is not contrary to Article 28 EC (now Article 34 TFEU).[18]

As this passage shows, the national court claims that the national decree (the prohibition) is in fact *not* contrary to EU law, which is interpreted as an expression of support for the contested national policy. The second of the two new behavioural patterns is *access contained*, which accounts for 22% of the cases analysed. An example of this type of case is C-430/08,[19] which concerned whether the customs authorities in the United Kingdom had correctly interpreted the Community Customs Code when they imposed a customs debt on a company. Since the case concerns conflicting interpretations of EU law it is considered to have a low degree of political sensitivity. The national court expressed support for the company's interpretation of the EU law against the decision made by the domestic customs authorities as follows:

> The national court is of the view that Article 203 of the Customs Code does not give rise to a customs debt in the case in the main proceedings. In that regard, it is of the view that the behaviour of the customs authorities contributed, during the relevant time period, to the use of an incorrect code.[20]

This article argues that these two previously undefined combinations of cases and opinions are responses by national courts to different

demands from EU institutions and member states and that they may contribute to striking a balance between member state autonomy and European integration.

Concluding discussion

What is the role of national courts in EU legal integration? The following two opposing expectations were derived from the literature: courts support legal integration by referring cases with a high degree of political sensitivity to the CJEU and expressing opinions in favour of EU law (i.e., judicial empowerment) or defend national sovereignty by referring cases with a low degree of political sensitivity and expressing opinions supporting national policies (i.e., sustained resistance). This first systematic analysis of the key decisions of national courts in the preliminary ruling procedure shows that the single most common court behaviour corresponds to the expectations derived from the judicial empowerment perspective. However, the picture changes when examining the combination of the courts' decisions. The analysis reveals that in nearly half of all cases that carry opinions, national courts do not behave as predicted by either judicial empowerment or sustained resistance. This article argues that the two new behavioural patterns that emerge, i.e., *compatibility defended* and *access contained*, could be understood as attempts by the national courts to strike a balance between member state autonomy and European integration.

These findings have important implications for the discussion regarding the tension between European integration and member state sovereignty in the EU political system. We know that the CJEU favours extensions of EU legal competences, whereas the member states wish to remain in control over national policies (Alter 2001; Blauberger 2014). Moreover, Grimm (2015) and Scharpf (2009) argue that the CJEU is unable to uphold a fair balance between EU legal integration and member state autonomy. There are several examples of CJEU decisions that have undermined member states' financial and social policies and resulted in negative reactions from the member states (Scharpf 2009: 191–192). According to Scharpf (2009: 198–199), 'the politically unsupported extension of judge-made European law in areas of high political salience within member state polities is undermining the legitimacy bases of the multilevel European polity'. The EU political project thus faces an important challenge: resolving the conflict between politically legitimate national concerns and equally legitimate constraints that countries must accept as members of the EU. On the one hand, it is impossible to avoid the fact that the functioning of the EU and the internal market depend on the

CJEU upholding EU law. On the other hand, there is a risk that member states will openly declare noncompliance when the CJEU decides to overturn salient national policies because these policies conflict with EU law (Scharpf 2009: 189, 200).

The behaviour of national courts must be evaluated in light of this challenge. If national courts only engaged in the pro-integration behaviour that has been envisaged by the judicial empowerment perspective, they would exacerbate the tension between member state sovereignty and European integration. The same would be true if the courts only exhibited behaviour characterised by sustained resistance. In the first situation, the CJEU would be given extensive possibilities to widen the scope of EU law and accelerate the pace of integration at the expense of core member state policies. The member states would have a difficult time justifying the decisions of the CJEU to their citizens, and in the worst-case scenario, this situation could lead to a legitimacy crisis for the EU. In the other situation, the CJEU would have restricted access to the national legal orders, and its ability to uphold common legal standards would be limited. In the worst-case scenario, such unlimited member state autonomy could make it impossible for the EU to maintain its internal market.

This study finds that neither of these worst-case scenarios reflects reality. National courts are not keeping the gate to the domestic legal sphere firmly shut to effectively shield domestic policies from EU legal intrusions. Conversely, they are not providing the CJEU with an open invitation to expand the scope of legal integration. Instead, the aggregated behaviour of national courts in the preliminary ruling procedure covers all four combinations of choices, suggesting that the actions of the courts regularly contributes to striking a balance between the interests of the member states and the interests of the EU. Thus, this study has substantially revised our understanding of national court behaviour by showing that an important aspect of the role of national courts in the EU legal system is to alleviate some inherent tension between, on the one hand, legitimate national concerns and, on the other hand, the EU legal obligations that member states must accept for the EU to function efficiently.

However, research concerning the types of decisions that national courts make in the preliminary ruling procedure is still rather limited, and the national courts' two key choices are but one aspect of their role in EU legal integration. To not refer any cases to the CJEU is arguably still the most efficient way for a national court to avoid further legal integration. Therefore, information regarding the share of politically sensitive cases that national courts never refer to the CJEU could shed further light on whether national courts support integration, defend

national autonomy or balance conflicting demands. It is also possible that the behavioural patterns of national courts may vary between and within member states (e.g., Pavone and Kelemen 2019). Another aspect that falls beyond the scope of this study is the behaviour of individual courts and judges. For instance, whether national courts' exhibit the behavioural pattern 'integration supported' because they intentionally strive to support EU integration remains an open question. The complexity of the legal dispute and the need for the interpretation of the CJEU (Hübner 2018) as well as considerations regarding the substantive content of the legal case are other factors that may guide the decisions of judges. Future research should therefore deploy more resources to explore variations in court behaviour, national judges' reasons for acting in accordance with any of the four behavioural patterns and the normative implications of the national courts' choices in the preliminary ruling procedure.

Notes

1. According to Article 267 TFEU, lower national courts may, and courts of final instance shall, refer questions regarding the interpretation of EU law to the CJEU. However, courts of final instance are not required to refer a case if the interpretation of EU law is 'obvious'; see Case 283/81. *CILFIT*. ECR 1982-03415. In contrast, lower national courts are obliged to refer when the validity of EU law is at stake; see Case 314/85. *Foto-Frost*. ECR 1987-04199.
2. 'Information Note on References from National Courts for a Preliminary Ruling', *Official Journal of the European Union*, 2005/C 143/1, paragraph 23.
3. This claim is made under the assumption that the court has decided to refer the case and is considering whether to include an opinion. Arguably, the most efficient way for a national court to protect national policies is to not send the case to the CJEU (Ramos 2002: 33).
4. See note 1.
5. In 2004, the Commission sent a reasoned opinion to the Swedish government arguing that Swedish courts were too restrictive in their application of the preliminary ruling procedure (Rosas 2007: 125-126).
6. Leijon, Karin (2020). Data from: *National court choices in the preliminary ruling procedure* [Dataset]. Figshare Data Repository.
7. The official database of European Union Law, EUR-LEX (http://eur-lex.europa.eu), makes it possible to identify the number of requests for preliminary rulings that have been decided by the CJEU each year. Each request (case) has a unique number; for example, C-12/99 is case number 12 from the year 1999. Based on this information regarding the population of cases, a simple random sample was generated using statistical software. Courts from 23 of 27 member states are represented in the dataset. See the Appendix.
8. The time period was chosen with the purpose of investigating national court behaviour in the EU over the last 20 years. In the year the study was initiated, data were only available up to 2012, which made this year the natural end point of the data collection.

9. Case C-203/08, 3 June 2010. *Sporting Exchange Ltd v. Minister van Justitie*. ECR 2010 I-04695.
10. Case C-276/94, 18 January 1996. *Criminal proceedings against Finn Ohrt,* ECR 1996 I-00119.
11. Case C-200/02, 19 October 2004. *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*. ECR 2004 I-09925.
12. The search terms include 'according to the national court,' 'in the order of the reference' and the name of the referring court.
13. Reading both the *Judgement of the Court* and *Opinion of the Advocate General* is believed to have further minimised the risk that opinions are omitted. All information pertaining to the question regarding the legal case should be included in these documents. Since the opinions of national courts fall under this category, it is unlikely that any opinions are left out. For an exploration of the dialogue between Swedish high courts and the CJEU, see (Wallerman 2018).
14. The variable 'final instance' is coded as 0 if the referring court is a first instance court or a court of appeal and 1 if the referring court is a court of final instance.
15. For instance, the confidence interval (95% level) for the difference between the two proportions shows that lower courts are 6.4-36.6 percentage points more likely than courts of final instance to express support for EU law.
16. In cases with a high degree of political sensitivity, the share of opinions supporting EU law is 66%, compared to 62% in cases with a low degree of political sensitivity. However, this difference is not statistically significant. Due to the small number of cases with opinions from courts of final instance in the dataset, it is not possible to disaggregate the combined behavioural patterns by court level.
17. Case C-324/99, 13 December 2001. *DaimlerChrysler AG v. Land Baden-Württemberg*. ECR 2001 I-09897.
18. Opinion of Mr. Advocate General Léger, Case C-324/99, 20 September 2001. *DaimlerChrysler AG v. Land Baden-Württemberg*. EU:C:2001:459, paragraph 36.
19. Case C-430/08, 14 January 2010. *Terex Equipment Ltd. v. The Commissioners for Her Majesty's Revenue & Customs*. ECR 2010 I-00321.
20. Judgment of the Court, Case C-430/08, 14 January 2001. *Terex Equipment Ltd. v. The Commissioners for Her Majesty's*. EU:C:2010:15, paragraphs 20-21.

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No potential conflict of interest was reported by the author(s).

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Data availability statement

The data that support the findings of this study are available from the author upon request. Pre-reserved DOI: 10.6084/m9.figshare.11904879.

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Appendix

Number of cases with a high and low degree of political sensitivity (by member states) and the number of opinions (by member state) (Figure A1).

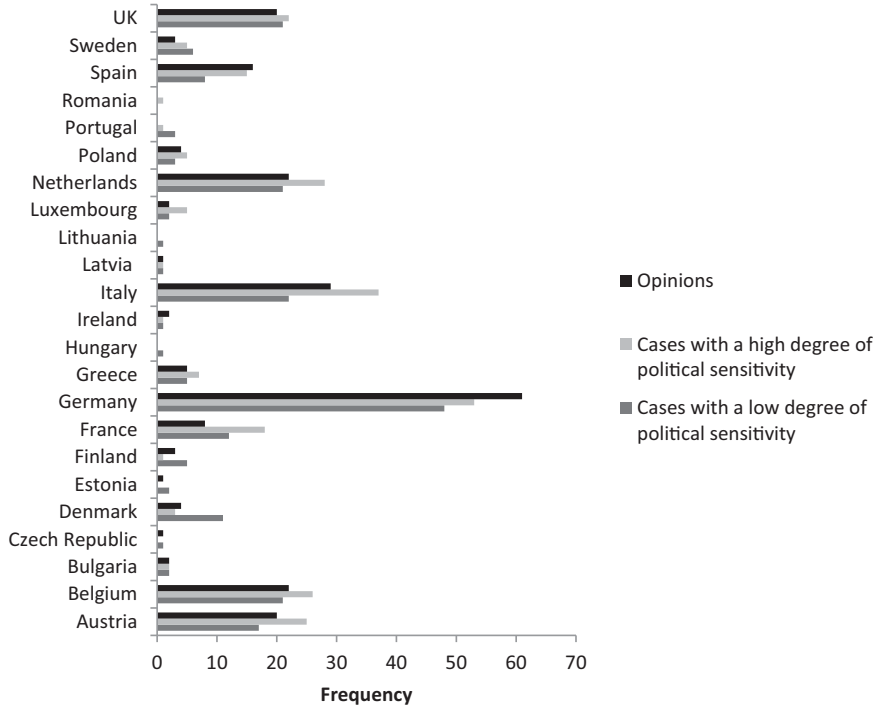

Figure A1. The number of cases with a high respectively a low degree of political sensitivity (by member states) and the number of opinions (by member state). Number of opinions = 182, number of cases with a high degree of political sensitivity = 256. Number of cases with a low degree of political sensitivity = 214.