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An Empirical Approach to Separation of Powers Research in the EU:

Introducing the SepaRope Judiciary Dataset

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Summary

The idea that public powers should be shared between the legislature, the executive, and the judiciary is foundational in constitutional theory as well as practice. While separation of powers is, as a concept, well established, its meaning is not. This is particularly true in the case of the EU, whose institutional set-up and the allocation of powers does not reflect the traditional trias politica. Against this background, the project Separation of Powers for 21st Century Europe examines how, within the EU, the different branches and levels of government co-determine each other's powers, how they contribute to or hinder democratic will-formation, and how they serve or fail to serve as each other's checks and balances. In this paper, we describe the first results of an empirical analysis of the EU Court of Justice's exercise of public powers in relation to other EU and Member State actors. Our observations not only enrich traditional, doctrinal legal analysis of individual judgments, but also help us identify accountability and legitimacy gaps in the EU constitutional infrastructure, ultimately forming the basis for the construction of empirically-grounded principles for strengthening and maintaining a feasible separation of powers concept in the EU.

1 Context and Purpose

Separation of powers – the idea that public powers should be shared among three branches or governmental functions which at the same time complement and control each other – is a well-established concept in constitutional theory as well as practice. Separation of powers simultaneously *constitutes* public power, by establishing the competence to exercise such powers, and *restrains* it by subjecting the exercise of power by one actor to the control of another.[1] Therefore, separation of powers not only delineates distinct functions of the legislative, executive, and judicial branches, but also establishes the ways in which these functions relate to one another.[2]

Ultimately, the purpose of the doctrine of separation of powers in modern democracies is to ensure that public power is exercised in accordance with the will of the people. Law takes a central position in the realization of this objective, providing both the structures necessary for collective decision-making in a democratic polity and the control mechanisms that limit and permit scrutiny of those decisions. The rule of law ensures that individuals are subjected to public powers only in accordance with the collectively established and recognized rules. The judicial practice of interpreting, applying, and reviewing legal acts must, against this

[1] Möllers, *The Three Branches. A Comparative Model of Separation of Powers,* Oxford University Press 2013, p. 10.

[2] Eckes, Leino-Sandberg, and Wallerman Ghavanini, 'Conceptual Framework for the Project Separation of Powers for 21st Century Europe', *Amsterdam Centre for European Law and Governance Research,* Paper No. 2021-01.

background, be understood not only as a mechanism of control vis-à-vis the executive and the legislative branch, but also as part of the ongoing process of determining and giving expression to the highest guiding principle of democratic power: *the will of the people.*

However, while the concept of separation of powers is widely recognized, its exact meaning and functionality are not. This is particularly true in the context of the EU, whose institutional set-up, and the allocation of powers do not reflect the traditional trias politica.[3] The borders between the executive and the legislative are more fluid, the Parliament is comparatively weak while the Court of Justice of the European Union (CJEU) is exceptionally strong, and the electorate remains ominously passive in the face of institutions perceived as remote and unaccountable.[4]

With this in mind, the comparative and empirical NORFACE-funded project *Separation of Powers for 21st Century Europe* examines how, within the EU, the different branches of government at different governance levels co-determine each other's powers, how they contribute to or hinder democratic will-formation, and how they serve or fail to serve as each other's checks and balances.[5] The project seeks to, first, explore how public power is exercised and controlled in the context of polyarchic institution-building and multilevel policy-making. The results of this exploration will, in the later stages of the project, provide the empirical basis for, second, a normative evaluation of the separation of powers in the EU and, third, the constructive development of principles that can govern the exercise of public power in the EU. This paper and the dataset described in it contribute to the aforementioned empirical objective by exploring the CJEU's legal decision-making and reasoning, specifically regarding its participation in will-formation and exercise of control of other actors at Union and Member State level.[6]

We have selected three policy areas – the European Monetary Union (EMU), migration, and EU international trade – as being of particular interest for exploring issues of separation of powers within the EU. These three fields have all been exceptionally controversial, engaging public debate and arousing criticism against the foundations of the exercise of political and legal power in the EU. In the cases of EMU and migration, controversies have resulted in particular from external developments leading to highly-politicized crises – the financial crisis of 2008 and the so-called refugee reception crisis of 2015, respectively – whereas in trade, the

[3] Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', 28 *Common Market Law Review* 1991, pp. 11–35.

[4] Hobolt and Tilley, *Blaming Europe? Responsibility without Accountability in the European Union,* Oxford University Press 2014 (OUP, 2014).

[5] https://www.norface.net/project/separope/; www.separope.eu.

[6] The authors are all current or former members of the SepaRope Gothenburg research team.

debate has been inspired by a number of international agreements negotiated and entered into by the Union, in particular the controversial Transatlantic Trade and Investment Partnership (TTIP) and various treaties including mechanisms of Investor-State Dispute Settlement (ISDS). The Union response to these events has exposed weaknesses in collective will-formation and a lack of adequate accountability and control, making these three fields illustrative of the separation of powers-related challenges facing the EU.

The purpose of this paper is threefold. First, it introduces the empirical research methods employed in developing the SepaRope Judiciary Dataset and discusses their reliability. Second, it briefly describes the results of the empirical analysis, thus providing a condensed view of the CJEU's exercise of public powers in three controversial policy fields. Third, it identifies possible future scholarly uses for this data and its future applicability, within the *SepaRope* project and beyond.

2 The SepaRope Judiciary Dataset

For the purposes of gaining a systematic overview of *how public power is exercised and controlled* by the centralized EU judiciary, we have conducted an empirical analysis of the CJEU's judgments and decisions in the three policy fields mentioned above, keeping in mind accountability, control, and autonomy vis-à-vis the other branches. The judgments and decisions were selected for the purpose of explaining how judicial decision-making affects and is affected by other branches of government; particularly the legislature but also the executive branch insofar as it engages in regulatory activities as opposed to implementation.

Largely, the cases analyzed give rise to legal issues concerning *interpretation*, *contested validity,* or *Member State infringements*. By tracing these three types of issues, this study has endeavored to track the CJEU's methods of adjudication, including the scope and intensity of its review of the EU's other institutions. This is expected to capture the extent of and ways in which the CJEU empowers, checks, or restrains the legislative and executive branches both vertically and horizontally, and how it uses its adjudication channels to communicate with the EU's institutions and Member States.

The empirical research methods are designed especially for judicial decision-making, as will be detailed in the forthcoming sections. The purpose of the coding process was to trace and characterize instances of interaction with other institutions at the EU and Member State levels. Interactions particularly refer to contributions to law-making, including amending or changing legislative or executive acts, and various ways of exercising judicial control such as examination of validity challenges and infringement proceedings.

3 Case Selection

The dataset includes actions for judicial review against EU legislative and executive acts brought by Member States and EU institutions or, exceptionally, other actors under Article 263 of the Treaty on the Functioning of the European Union (TFEU), as well as infringement proceedings brought against the Member States under Articles 258 and 259 TFEU. It also contains cases referred to the CJEU by Member State courts under the preliminary reference procedure (Article 267 TFEU); these give rise indirectly to both validity issues concerning EU legal acts and infringements of EU law by the Member States. Finally, the dataset also includes actions for opinions under Article 218(11) TFEU and claims for non-contractual liability against the EU brought under Article 340 TFEU.

All selected cases belong to one of the selected policy fields EMU, trade, and migration. The judgments included in the dataset were initially identified through subject-matter searches in the CJEU's Curia database.[7] Temporally, the dataset was limited to cases decided between 1 January 2010 and 31 December 2020; this time period was chosen to ensure, on the one hand, a sample of large enough size to permit the identification of patterns in the cases, and on the other hand to avoid the dataset going too far back in time, which could endanger its relevance.

For EMU, the search initially covered all judgments and orders delivered by either the CJEU or the General Court within the selected period that had been categorized in the database as belonging to the subject area "Economic and Monetary Policy" (all subcategories). Subsequently, all cases whose keywords included "Prudential Supervision of Credit Institutions" were excluded, as these were presumed to concern banking supervision making them less important from a separation of powers perspective. Furthermore, all purely procedural orders were excluded from the dataset.[8]

For migration, the search included all judgments delivered within the selected period that had been categorized in the database as belonging to the subject area 'Area of Freedom, Security and Justice' and one of the subcategories 'Immigration Policy', 'Border Checks', and 'Asylum Policy'. Orders were not included in the case selection for this field, nor were judgments delivered by the General Court. The reason for this was that we expect the most significant cases in this field to arise either through the preliminary reference procedure or to be brought by a privileged applicant with direct access to the CJEU[9] (unlike in the field of EMU, where

[7] www.curia.europa.eu.

[8] As signified by suffixes DEP or OST to the case number.

[9] I.e. Member States and EU institutions; Article 263 TFEU.

many cases are brought by individuals against the ECB or other EU institutions and therefore heard by the General Court).

Lastly, for trade, no suitable categories were available in the Curia database that allowed us to easily identify the relevant cases. This is particularly the case as there is no designated "trade" label, and relevant issues concerning the EU's external treaty-making competences are dealt with under several different subject-matter headings. Instead, we relied on a combination of keywords and limited the search to the subject-matters considered most likely to have been used in relevant cases.[10] Alongside orders and judgments, the search included opinions of the CJEU, and review decisions made under the CJEU's Article 256(2) competence. The selection yielded by this search method was subsequently reviewed by trade experts within the research team to confirm that the selection appeared relevant.[11]

Within all three policy fields, certain documents yielded from the searches described above were excluded from the case selection during the coding process, due to one of three reasons: 1) the judgment did not concern any of the three policy fields, although this had initially been indicated by the keyword search, 2) the judgment had been removed from the CJEU's register and was therefore unavailable to the coders, or 3) the case was declared inadmissible in its entirety. In the migration and trade datasets, cases excluded on the third ground were still included in the dataset but coded only on the independent variables, whereas in the EMU field these cases were entirely excluded from the dataset. Most documents included in the dataset were available in English, and all remaining ones in at least one of two other languages within the competence of the research team (French and Swedish).

The case selection process described above provided us with material consisting of a total of 220 CJEU judgments, orders, and opinions. Within these, we identified 420 individual *legal issues,* or individualizable legal problems, which make up the main unit of analysis. The point of departure for issue division was the bullet points in the operative part of the judgment

[10] The alternative keywords employed were: article 218*, Article 4(2) TEU, institutional balance, choice of legal basis, autonomy of EU law, division of powers, implementing powers, Article 291*, and conferral. Additionally, we excluded cases that contained any of the following key words: competition, JHA, 2009/941/EC, dumping, and anti-dumping. The search was conducted within the following subject-matter headings: "solidarity clause", "Quotas – Third countries", "international agreements", "humanitarian aid", "Food aid", "European Free Trade Association (EFTA)", "European Development Fund (EDF)", "economic, financial and technical cooperation with third countries", "Diplomatic relations", "Development cooperation", "Common foreign and security policy", "World Trade Organisation (WTO)", "General Agreement on Tariffs and Trade (GATT)", "Association Agreement", "Associated African and Malagasy States", "African, Caribbean and Pacific States (ACP)", "Environment", "Closer cooperation", "Provisions governing the institutions", "Transport", and "Principles, objectives and tasks of the Treaties".

[11] Such expert reviews also led us to discard a number of previously tested combinations of keywords and subject-matter labels.

(particularly for preliminary reference cases) and the CJEU's own use of headings or other means of dividing its reasoning into several legal issues (for instance with infringement and validity challenges based on several alternative grounds). Parts of the CJEU's reasoning were attributed to each legal issue and considered in the analysis and coding of that issue, thus enabling a more nuanced analysis of the content of the judgments. Each case in the dataset contains between 1 and 8 distinct issues (including admissibility issues), with an average of 1,9 issues per judgment. Whether a judgment, order, or opinion is divided into several legal issues and, if so, which paragraphs are attributed to each issue, is indicated in the dataset.

4 Analysis and Coding

The research was conducted through hand-coding judgments and decisions based on a codebook consisting of preset variables and outcomes. Textual and legal analysis was applied to sort and analyze legal argumentation and justification, as explained below and in the full codebook (Appendix 2 to this paper). The codebook describes which variables were used, as well as how their respective values were defined. The codebook was developed in stages:

In an initial pilot stage, a first set of variables was tested on a sub-selection of judgments. During this process, the codebook was modified insofar that variables were added and removed, for purposes of clarity and time constraints. In addition, clarifications were added to variables and values to document each step of the coding process and improve replicability. Both rules of thumb and exceptions to such rules were described to assist the coders moving forward.

In the second coding stage, according to the modified codebook, the same cases were coded again together with the remaining samples. To maintain consistency, few changes were then made to the codebook. A few variables were nonetheless removed at this time, and clarifications reflecting consistent practices were made in the codebook.

In the third stage, the dataset was tested for internal and external reliability. The internal (inter-coder) reliability test is described in section 6 below. The external reliability (i.e., recoding by a researcher not previously involved in the coding) test was carried out mainly to ensure that the codebook transparently and unequivocally reflected what had actually been done. Repeated deviations in coding outcomes were thus addressed by improving the pedagogy of the codebook. These modifications were not made to change the definition of variables and values; merely to better explain the coding practice ex post. The codebook in Appendix 2 represents a consolidated version of the codebook following this third stage.

5 Variables and Overview of the Findings

5.1 Overview of the Codebook

Most variables have been coded manually, while a few variables have been automatically collected from the judgments with the help of web scraping tools. The variables are designed to capture both quantitative and qualitative data connected to the aims of the research project. The same variables are used across all policy fields, apart from variable 18b, which captures field-specific principles and thus differs among the three fields.

The variables are categorized according to the following headings:

1. *Issue identification and other preliminaries* are introductory labels (I-V) specifying case-number, division into legal issues paired with judgment sections, basic categorization of issue type, as well as name of coder.
2. A first set of *independent variables* (1–10): legal field, type of procedure, involved actors and institutions, and basic admissibility.
3. A first category of dependent variables concerning *will-formation and control mechanisms* (11–17) includes legal basis and formal competence for reviewed act, competence findings of the CJEU, intensity of review, deference, and implications for the reviewed actors' autonomy.
4. The next group of dependent variables (18–22) is *judicial law-making*, tracing how the CJEU grounds its findings, e.g. its choices of legal sources, interpretation styles, and measure of expansionism or restraint.
5. A final group of dependent variables (24–25) seeks to capture *separation of powers-related issues,* identifying a "winner" for each litigation issue, but also tracing references to principles specifically related to the separation of powers. The principles were chiefly identified beforehand and not during the coding process, even though minor adjustments were gradually made (see Appendix 2; variable 25 a).

5.2 About the Dataset

Of the 420 legal issues in the dataset, 282 pertain to the migration policy area, 59 to EMU, and 79 to trade. An even larger majority of the issues – 313 issues or 75 percent of the dataset – were raised to the court by way of the preliminary reference procedure; after this procedure, the direct action under Article 263 TFEU was most common at 91 issues or 22 percent, whereas the other procedures included were only used in a handful of cases. This implies that, when viewed as a whole, the practices typical of migration law and/or the preliminary reference

procedure, if different from the other policy fields, will dominate the dataset. Separate analysis and comparisons will therefore be necessary when analyzing the data and drawing conclusions on this basis.

As noted above, the legal issues are not only individually described in the dataset but also categorized as issues of either interpretation, compatibility of Member State action with EU law, validity of EU legal acts, or admissibility. Interpretation was the most common category, making up 40 percent of the dataset (165 issues), followed by compatibility (108 issues or 26 percent) and validity (88 issues or 21 percent). The prevalence of preliminary reference cases in the dataset likely explains the large number of interpretation issues. Also, most of the compatibility issues will stem from this procedure, rather than from the infringement procedure. While the CJEU is not, strictly speaking, competent to assess the compatibility of national legal acts with Union law in that procedure, we know from previous research that preliminary questions raising these kinds of issues are common in practice.[12]

Geographically, cases emanate from almost all Member States (exceptions being Croatia, Estonia, Lithuania, and Malta). The CJEU consisted, on average, of 8,4 judges, with panels of 5 judges being the most common (deciding 225 or 54 percent of the legal issues) followed by panels of 13 and 15 judges (83 and 60 issues corresponding to 20 and 14 percent, respectively). Three cases in the dataset were decided by the full fourt.[13]

5.3 Will-formation and Control

For the purposes of collective will-formation at the EU level and judicial oversight of executive and legislative actions, legal issues concerning the validity of EU legal acts – whether brought directly under Article 263 TFEU (or, exceptionally, 218(11) TFEU) proceedings or indirectly by way of a reference for a preliminary ruling – are of particular interest. We therefore dedicated two variables specifically to validity issues in order to better understand the CJEU's review in this regard. Variable 11 indicates whether a Union legal act was challenged for having been adopted without a proper legal basis in the Treaties and the CJEU's assessment of that claim, and Variable 12 indicates the same for the question of the competence of the adopting institution(s). We found that 28 legal issues concerned a claim that the challenged measure had been adopted either without a valid legal basis or on the wrong legal basis and that 24 concerned a claim that the adopting actors lacked competence to adopt the contested act; this

[12] Van Gestel and de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECH and Supreme Administrative Courts,* Cambridge University Press 2019; Wallerman Ghavanini*, Mostly Harmless: The Role of the Referring Court in the Preliminary Reference Procedure* (forthcoming).

[13] Opinion 2/15 on the EU-Singapore Free Trade Agreement (EU:C:2017:376); Opinion 1/17 on the CETA (EU:C:2019:341); and Case C-370/12 *Thomas Pringle* v. *Government of Ireland* (EU:C:2012:756).

represents 32 and 27 percent of the validity issues, respectively. The majority of these were from the field of trade, which also accounted for 65 percent of the validity issues in the entire dataset. The migration dataset, on the other hand, contained only six validity issues, and only one case of challenges on each of the bases covered by Variables 11 and 12. More often than not, such challenges were not successful; 28 percent of the challenges concerning legal basis were upheld, whereas the corresponding figure for the challenges based on the competence of the adopting actor was 42 percent.

Looking more broadly at instances of alleged misuse of public power by executive and legislative actors at both Union and Member State levels, we recorded whether the CJEU's rulings implied that a public actor had either overstepped their powers according to EU law or failed to fulfill their EU law duties. This question arose for 168 of the legal issues in the dataset. For 112 of them (67 percent), the CJEU found no misuse of public powers. Within the remaining third of these issues, where the CJEU found that another actor had committed a fault, it held on 41 legal issues (24 percent of the issues where the question came up, or 10 percent of the entire dataset) that the misuse was one of overreach, whereas the CJEU found in only 15 legal issues (representing 4 percent of the entire dataset) that the actor in question had failed to live up to its duties.

In a similar vein, we coded whether each CJEU ruling entailed the striking down of a legal act, be it executive or legislative, on the EU or Member State level. In many cases this would be a consequence of having found a breach of EU law under one of the preceding variables, but this variable (number 14 in the codebook) is more inclusive in that it coded all review of legal acts, including indirect review of national legal acts in the preliminary reference procedure, regardless of whether a specific actor was explicitly held responsible for an error. The CJEU engaged in such review on 323 of the legal issues in the dataset. Of these, the CJEU wholly or partially struck down the measure reviewed on 148 issues (46 percent of the cases where the question arose, or 35 percent of the whole dataset).

Finally, we examined the judicial review carried out. Half of the time (54 percent), the review was direct, meaning that the CJEU clearly stated that it was engaged in comparing a national or secondary legal act with higher-ranking EU law in order to assess the former's compatibility with the latter. For the other 46 percent of the legal issues giving rise to judicial review, the scrutiny of a legal measure was done only indirectly. This was most often the result of a preliminary ruling making it clear that the interpretation of EU law was requested in order for the referring court to assess whether national law had to be set aside as incompatible with EU law, but where the CJEU's lack of competence to interpret national law prevented it from explicitly pronouncing on the compatibility question. Direct review was far more common in the fields of EMU and trade, accounting for 90 and 94 percent of the issues respectively, and

relatively rarer in the migration field, where it accounted for only 36 percent. This is most likely a consequence of the dominance of the preliminary reference procedure in the latter field.

We furthermore measured the intensity of direct judicial review on a three-grade scale from merely procedural review over limited substantive review to strict substantive review.[14] We found that the CJEU is more often light-handed in its review, with 55 instances (32 percent) of procedural review only, 111 instances (64 percent) of limited substantive review, and only 8 instances (5 percent) of strict substantive review. Finally, we coded whether the CJEU defers final judgments on the issue to another actor. We found deference on only 68 legal issues (18 percent); almost all belonging to the migration field, meaning that in trade and EMU the CJEU almost exclusively determines the legal issues brought before it conclusively. Examining the instances of deference more closely, we found that deference was minimal on 31 of the legal issues (46 percent), partial on 36 issues (53 percent) and full only in one case.

5.4 Outcome and Justification

As for the CJEU's legal reasoning, we coded the general principles and international sources of law relied upon by the CJEU (references to EU legal acts and case law will be accessed through the CJEU Database[15]). These will aid us in our legal interpretation of the cases. We also counted the CJEU's references to the preambles of legal acts and to the precise wording, including comparisons of language versions of a legal act, intending these to be potential proxies for a more restrained approach by the CJEU. We found that, on average, the CJEU refers to these between once and twice per judgment (1,2 times for preambles and 1,8 times for wording). We also attempted to code expansionism or restraint of the CJEU directly in Variable 22, where we made an assessment on a five-grade scale categorizing the reasoning on the legal issue as very restrained, somewhat restrained, neither restrained nor expansive, somewhat expansive, or very expansive. The results on this variable necessarily depend on the judgment of the coder, and as will be discussed in section 6.3 below the inter-coder reliability was not as satisfactory here as for the other variables. As an average assessment, we found the CJEU to be neither restrained nor expansive, with the middle position chosen for 525 legal issues (66 percent). 44 legal issues (12 percent) were categorized as somewhat

[14] Drawing on Widdershoven, 'The European Court of Justice and the Standard of Judicial Review', in de Poorter et al. (eds), *Judicial Review of Administrative Discretion in the Administrative State*, Springer 2019.

[15] Brekke, Fjelstul, Naurin, and Hermansen, 'The CJEU Database Platform: Decisions and Decision-Makers', 2022 (unpublished version, 0.0) in Lindholm, Naurin, Šadl, Wallerman Ghavanini, Brekke, Fjelstul, Hermansen, Larsson, Moberg, Näsström, Ovadek, Pavone, and Schroeder, *The Court of Justice of the EU Database*, IUROPA, www.iuropa.pol.gu.se.

restrained, whereas 82 (22 percent) were categorized as somewhat expansive; the extremes of the scale were barely used.

We also coded a "winner" for each legal issue. Generally, applicants and defendants were successful in equal measure (148 legal issues were coded as won by applicants, compared to 139 for defendants; on 48 legal issues we could not determine a winner). Cross-referenced with party identities, however, this shows that individuals were often successful, being coded as the winning party on 116 legal issues (40 percent of the issues where a successful party was identified). Furthermore, the successful actor was more often part of the executive than the legislative branch (135 legal issues for the executive compared to 36 for the legislative), and more often a national than an EU-level actor (119 legal issues were coded as won by Member State actors, compared to 52 for Union actors).[16]

Lastly, we counted references in the dataset to 14 principles identified as being of specific interest for separation of powers matters.[17] Generally, these were only rarely relied upon by the CJEU. The most commonly-mentioned principles were those of proportionality and the duty to provide reasons, referred to on average once and thrice, respectively, in every ten judgments.

6 Reliability of the Dataset

The legal analysis incorporated in the coding work was carried out by a team of highly skilled law and political science graduates, recruited for their specialization in EU law or policy and with prior experience of legal or academic professional work. They carried out the coding in continuous dialogue with other members of the research team. The accuracy of their analysis is reflected in the excellent overall reliability results, described in the forthcoming sections.

6.1 Testing Inter-Coder Reliability

An inter-coder reliability test was conducted for almost all variables in the dataset. The only exceptions were identification variables of lesser importance, such as identity of the coder which will necessarily differ between coders, and string variables where replicability cannot be

[16] It should be noted though that Member States were parties in approximately twice as many legal issues as were Union actors. This said, the descriptions here are not intended to portray predicted success, only frequencies.

[17] These principles were: proportionality, institutional balance, subsidiarity, conferred powers, sincere cooperation, harmonization/coordination, sovereignty, separation of powers, rule of law, good administration, duty to state reasons, effective judicial protection, primacy, and transparency.

expected; e.g. Variable II that briefly explains the legal issue(s) of the case and therefore is not expected to be identically portrayed by coders.

As EMU was the first of the three policy fields to be coded, each of the EMU cases available in English was coded in its entirety by two separate coders to ensure a consistent application and interpretation of the codebook. This also provided an opportunity to discern and address any misunderstandings or ambiguities related to the codebook at an early stage of the coding. Subsequently, all non-agreements in the EMU cases were corrected in the original dataset, as some clarifications and adjustments of the codebook had been made following the test. In total, 38 EMU issues, or a share of 66 percent of the EMU dataset, were included in the reliability testing. The annexed reliability results for EMU reflect the outcome of this original round of reliability testing.

For the fields of migration and trade, the reliability test was based on a random selection of cases consisting of a total of 18 and 10 issues respectively. Due to the difference in the number of issues stemming from each case, this corresponded to a share of 12,5 percent of the trade issue population and 6,4 percent of the migration issue population. Furthermore, the share of trade issues included in the reliability test was larger than that of migration issues, in order to ensure that the share of issues for each policy field consists of a minimum of 10 issues, deemed sufficient to identify patterns from the reliability test results within the issues for each policy field. The total reliability test thus consists of 66 issues from the three fields.

Each issue included in the reliability test was independently coded by two separate coders. The two sets of coding were then compared in order to identify any non-agreement between the two. Whether or not the codings were consistent with each other was noted as a binary value of either 0 (non-agreement) or 1 (agreement). Accordingly, the results of the reliability test take on a value between 0 percent (no agreement) and 100 percent (perfect agreement).

It is important to note that when variables take on a wide range of values or multilayered values they can show non-agreement in the reliability test, even when the codings might in fact be relatively similar. For example, Variable 22, which captures the number of paragraphs in which the wording of EU legislation is discussed, takes on a wide range of values. Thus, if two codings have captured e.g., values 11 and 12 respectively for the wording variable, the reliability test will also show non-agreement for quite similar, albeit not identical, codings, as well.

Further, multilayered variables such as Variables 13a, 16a and 17a, which all capture how actors are affected by various aspects of the CJEU's rulings, provide many alternative coding values. The variables classify actors according to three dimensions, e.g., FR-01-EX captures a French executive actor that is part of the central government, while FR-02-EX captures a French executive actor at the national level, but not part of the central government. If two

codings differ as in this example, the variable will show non-agreement in the test although two of the value's three components are actually in agreement, whereas the third one might be in a grey zone insofar as it lacks an unambiguously "correct" solution. These observations should be kept in mind when examining the results of the test, as the range in values of a variable may coincide with the level of inter-coder agreement.

6.2 General Reliability Results

The results of the reliability test are synthesized in the present section, combining all three policy fields. Then, in section 4.3, we focus on variables or categories of variables that stand out in terms of their rate of agreement. The full details of the test and each individual variable, grouped by policy field, are found in Appendix 1.

The mean rate of agreement for all variables in all three policy fields is 95,6 percent.[18] Separating the three fields, the mean agreement rate ranges from 95,2 percent in migration to 95,8 percent in trade, with EMU in between at 95,7 percent. This represents very similar overall reliability results for the three policy fields, as well as displaying a high overall percentage of agreement, above 95 percent, for the total dataset as well as each individual policy field.

Particularly high agreement rates are found for variables related to category 1 (issue identification and other preliminaries) as well as category 2 (independent variables related to the parties and procedure of the cases). The majority of variables in these categories display 100 percent agreement; e.g., Variables 5, 6 and 8, describing the referring court, the number of participating CJEU judges, and the names of the parties to the case. Furthermore, no variable in the dataset has an agreement rate below 80 percent. Results from the first two categories thus show a sufficient level of reliability in accordance with established standards.[19]

Categories 3, 4 and 5 contain variables based on more advanced analysis of the legal argumentation in the judgments of the CJEU, as well as quantitative variables counting references in the judgments, e.g., to sources of international law or legal principles. The overall reliability results for categories 3, 4 and 5 show an agreement rate ranging between 80 and 100 percent for almost all variables. However, two variables in category 4 stand out in terms of their non-agreement rate, displaying an overall agreement rate below 80 percent: Variables

[18] The mean rate of agreement is calculated giving equivalent weight to the three legal fields. While this method partly compensates for the differences in the total share size tested for each field, it does not perfectly reflect the balance of the complete dataset. Yet, since the mean agreement was in any event extremely similar between fields, a non-weighed mean would likewise remain right above 95 percent. For more information on the reliability test, see Appendix 1.

[19] See, for example, Lombard, Snyder-Duch, and Campanella Bracken, 'Content Analysis in Mass Communication: Assessment and Reporting of Intercoder Reliability', 28 *Human Communication Research* 2002, pp. 587–604.

21 and 22. Representing the only two variables in the dataset to display a lower agreement rate, these variables will be given additional attention below.

6.3 Variables 21 and 22

Variable 21 seeks to measure how many times the CJEU refers to the wording of an EU law provision by explicitly discussing the choice or meaning of specific words in the legislation. This variable displays an overall agreement rate of 70,5 percent. As the variable can, in theory, assume an unlimited range of values, it allows for more alternative coding options compared with most other variables in the dataset. The agreement rate is thus likely to stem from the margin for coder discretion in the coding of the variable, as it proved difficult to provide general guidelines for this decision that would be applicable across variations in the wording of the CJEU's reasoning.

Still, the reliability test shows that the majority of issues with non-agreement only differ by one value, e.g., one coder coding 4 references while the other coded 5. Furthermore, no single issue in the test displays a difference above 3 value points between the two sets of coding. This indicates that although the room for coder judgment in this variable results in a somewhat lower level of exact agreement, the values coded only differ by 3 value points at the most. As the variable still serves a purpose for the aims of the research project, for instance as an indicator of judicial restraint, it is retained in the dataset but should be used keeping these caveats in mind, i.e., as an indicative and relative measure of how often the CJEU discusses the choice or meaning of an EU law provision’s wording.

Somewhat lower agreement is found in Variable 22, which measures whether the ruling of the CJEU is an example of judicial expansionism or restraint. As observed above, this variable takes on five positions: very restrained (0), somewhat restrained (1), neither restrained nor expansive (2), somewhat expansive (3) and very expansive (4). Although the variable is explicitly worded as relying on coder judgment calls, the agreement rate amounts to 61,8 percent.

In all issues with non-agreement between coders, one value had been coded as neither expansionism nor restraint (2), and the other value as either somewhat restrained (1) or somewhat expansive (3). Thus, all issues with non-agreement differed by only one value, and the coded values were never found on opposite sides of the neutral value (2). This indicates that coders have made different judgments on where to draw the line between neither an expansive nor restrained finding (2) on the one hand, and a somewhat restrained (1) or somewhat expansive (3) ruling on the other. It could also indicate that when an issue shows

neither very clear signs of judicial restraint nor of expansionism, coders have relied on coding (2) as a safe option.

Based on these results, Variable 22 should mainly be considered an indicative guide to identify cases relevant for further analysis. This is in accordance with the original aim of the variable, namely as a starting point for embarking on qualitative analysis of judgments that stand out (i.e., V = 0 or 4, keeping in mind that the disagreement was isolated to V = 1–2 and 2–3). This original purpose also represents a reason for retaining Variable 22 in the dataset, keeping in mind that remaining disagreement in this instance by no means represents contradictory findings and that the 61,8 percent agreement is still relatively high considering the scaling method and anticipated coder discretion.

Finally, we want to underscore that these two variables have been included in our mean inter-coder reliability results and have thus affected the mean agreement for all fields and variables, which nevertheless still remains high (95,6 percent).

7 Outlook

This research project is justified by a need to include systematic, detailed, and empirically-grounded research into the allocation and exercise of public power within the EU, in general, and the Union judiciary, in particular. This paper introduced the SepaRope Judiciary Dataset as a first step in addressing this lacuna. Our paper has detailed the case selection, the principles of analysis, and the outcome of reliability testing for that dataset, and has described the overall observations resulting from it.

Focusing on the three policy fields of trade, migration, and EMU has allowed the coverage of pivotal areas based on an updated and comprehensive set of cases. Although some delimitations have been made in order to focus on the issues most conducive to analysis of separation of powers, the cases selected within at least the fields of migration and EMU arguably represent the totality of the relevant populations from the last decade. While the fact that international trade issues tend to span a number of legal subdisciplines renders the corresponding claim for that policy field more tenuous, we are confident that the dataset includes a sufficient range of cases and that the majority of the relevant cases are captured by the selected search route. Our dataset supplements other ongoing and prior empirical studies of CJEU jurisprudence and will be made available through the Iuropa Network website upon its finalization.[20]

[20] Lindholm, Naurin, Šadl, Wallerman Ghavanini, Brekke, Fjelstul, Hermansen, Larsson, Moberg, Näsström, Ovadek, Pavone, and Schroeder, *The Court of Justice of the EU Database*, IUROPA, www.iuropa.pol.gu.se. Earlier endeavours include Carrubba, Gabel, and Hankla, 'Judicial Behavior under Political Constraints', 102 *American*

The high level of inter-coder reliability throughout the dataset is testament to its quality and suitability to form the basis of continued research regarding how the institutional balance within the EU plays out before the CJEU and how that court fulfills its judicial function. It has already transpired that the analysis encompassed by the dataset was expansive and elaborate. In order to ascertain that the accumulated data would be of sufficient quality to be retained and used according to plan, the coding process involved multiple rounds and controls paired with progressive documentation and coordination. The present report ensures that this transparency is not lost over time. In anticipation of people who wish to use or criticize our data, we have included the full codebook as Appendix 2 of this paper. The dataset will remain available to the research community, not only for examination but also for independent use.[21]

The present paper has also briefly provided a first descriptive overview of our observations of the dataset. While these observations require deeper analysis and interpretation before conclusions can be drawn as regards the separation of powers in the EU and the CJEU's contribution to it, they have already provided new knowledge about the number and kinds of issues brought before the CJEU within the fields of migration, trade, and EMU. In the continuation of our research within the *SepaRope* project, we foresee the following three uses for the information gained from the dataset.

First, the dataset can form the basis for analysis into the mechanisms of judicial control of legislative and executive initiatives within the three specific policy areas. This line of research could provide a new and deeper understanding of the institutional relations forming each field, and indicate the need for reform in order to safeguard collective will-formation and the rights of the individuals concerned. Second, the dataset provides systemic information capable of enriching and contextualizing the legal analysis of individual rulings, thus also contributing new insights to traditional, doctrinal legal scholarship by informing us as to the prevalence of certain practices and highlighting the truly seminal rulings. Third, the analysis of 420 legal issues specifically related to separation of powers can help us identify overall accountability and legitimacy gaps in the CJEU's practice and the EU constitutional infrastructure. On this basis

Political Science Review 2008, pp. 435–452; Naurin and Cramér, 'The European Court of Justice as a political actor and arena: Analyzing member states' observations under the preliminary reference procedure', 111 *Statsvetenskaplig Tidskrift* 2009, pp. 80–85; Derlén and Lindholm, 'Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments', 20 *European Law Journal* 2014, pp. 667–687; Panagis, Šadl & Tarissan, 'Giving every case its (legal) due: The contribution of citation networks and text similarity techniques to legal studies of European Union law', *Legal Knowledge and Information Systems - JURIX 2017: The 30th Annual Conference.* IMIA and IOS Press, pp. 59-68; *Mostly Harmless: The Role of the Referring Court in the Preliminary Reference Procedure* (forthcoming).

[21] For the time being, the dataset is kept on file with the authors and available upon request to anna.ghavanini@law.gu.se.

it can ultimately ground the construction of new or adapted, empirically-based principles for strengthening and maintaining a feasible separation of powers concept in the EU.

Beyond these possible avenues for continued research, it is our hope that members of the scholarly community will find further uses for the data. We are pleased to be able to contribute a new dataset to the emerging field of legal empirical studies and look forward to continuing to develop it in dialogue with our colleagues within and beyond our own research team.

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Appendix 1. Reliability Report

All fields equally weighted (see fn 19 above), all variables: Mean reliability = 95,58%

Variable	Reliability
Case no	100,00%
I. Issue ID	100,00%
II. Legal issue	N/A
III. Paragraphs	91,58%
IV. Issue type	95,52%
V. Coder ID	N/A
1 Field	100,00%
2 Subfield	95,52%
3 Procedure	98,25%
4 MS concerned	100,00%
5 Referring court	100,00%
6 a) CJEU/GC	100,00%
6 b) Appeal case	100,00%
6 c) No of judges	100,00%
7 Advocate General	100,00%
8 Applicant	100,00%
8 a) Applicant ID	100,00%
9 Defendant	100,00%
9 a) Defendant ID	97,27%
10 a) Intervenients	97,27%
10 b) Intervenients ID	86,12%
Admissibility check	100,00%
11 Legal basis	95,61%
11 a) Basis measure	94,91%
11 b) Correct legal basis	99,12%
12 Legislative comp.	86,49%
12 a) Actual actor	88,25%
12 b) Right actor	95,79%
12 c) Alleged right actor	85,61%
13 EU Law violation	81,07%
13 a) Actor	80,19%
13 b) Provision	81,07%
14 Strike down/uphold	97,37%
14 a) Explicit/implicit	88,99%
14 b) Nature measure	92,18%
14 c) Legal basis review	95,52%
15 Review (intensity)	80,47%
16 Autonomy	93,67%
16 a) Actor	83,02%
17 Deference	98,25%
17 a) Actor deferred to	94,54%
17 b Deference type	96,39%
18 a)-c)	N/A
20 Recitals	89,45%
21 Wording	70,49%
22 Expansionism	61,83%
23 Winner	93,67%
24 Parties intervenients	N/A
25 Proportionality	94,91%
25 a) Actor prop.	88,58%
25 b) Impact prop.	89,65%
25 Inst. balance	100,00%
25 a) Actor balance	100,00%
25 b) Impact balance	99,12%
25 Subsidiarity	100,00%
25 a) Actor subsid.	100,00
25 b) Impact subsid.	100,00%
25 Conferral principle	100,00%
25 a) Actor conferral	100,00%
25 b) Impact conferral	96,49%
25 Sincere cooperation	98,15%
25 a) Actor sincere	97,27%
25 b) Impact sincere	97,27%
25 Harmonization	98,15%
25 a) Actor harm.	98,15%
25 b) Impact harm.	98,15%
25 Sovereignty	100,00%
25 a) Actor sovereign.	100,00%

25 b) Impact sovereign.	100,00%
25 Separation powers	100,00%
25 a) Actor powers	100,00%
25 b) Impact powers	99,12%
25 Principle rule of law	99,12%
25 a) Actor rule of law	99,12%
25 b) Impact rule of law	99,12%

25 Good administration	100,00%
25 a) Actor good adm.	96,39%
25 b) Impact good adm.	95,52%
25 Duty provide reasons	94,91%
25 a) Actor reasons	92,18%
25 b) Impact reasons	93,06%
25 Judicial protection	97,27%

25 a) Actor EJP	98,15%
25 b) Impact EJP	98,15%
25 Primacy of EU law	100,00%
25 a) Actor primacy	100,00%
25 b) Impact primacy	100,00%
25 Transparency	100,00%
25 a) Actor transp.	100,00%
26 b) Impact transp.	100,00%

All EMU variables: Mean reliability = 95,71%

Variable	**Reliability**
Case no	100,00%
I. Issue ID	100,00%
II. Legal issue	N/A
III. Paragraphs	94,74%
IV. Issue type	92,11%
V. Coder ID	N/A
1 Field	100,00%
2 Subfield	92,11%
3 Procedure	94,74%
4 MS concerned	100,00%
5 Referring court	100,00%
6 a) CJEU/GC	100,00%
6 b) Appeal case	100,00%
6 c) No of judges	100,00%
7 Advocate General	100,00%

8 Applicant	100,00%
8 a) Applicant ID	100,00%
9 Defendant	100,00%
9 a) Defendant ID	97,37%
10 a) Intervenients	97,37%
10 b) Intervenients ID	89,47%
11 Legal basis	86,84%
11 a) Basis measure	94,74%
11 b) Correct legal basis	97,37%
12 Legislative comp.	89,47%
12 a) Actual actor	94,74%
12 b) Right actor	97,37%
12 c) Alleged right actor	86,84%
13 EU Law violation	92,11%

13 a) Actor	89,47%
13 b) Provision	92,11%
14 Strike down/uphold	92,11%
14 a) Explicit/implicit	94,74 %
14 b) Nature measure	92,11%
14 c) Legal basis review	92,11%
15 Review (intensity)	94,74%
16 Autonomy	86,84%
16 a) Actor	86,84%
17 Deference	94,74%
17 a) Actor deferred to	94,74%
17 b Deference type	94,74%
18 a)-c)	N/A

18 b) Equal treatment	94,74%
18 b) Open market	100,00%
18 b) Independence	97,37%
18 b) Home Member State	100,00%
20 Recitals	89,47%
21 Wording	73,68%
22 Expansionism	71,05%
23 Winner	92,11%
24 Parties intervenients	N/A
25 Proportionality	94,74%
25 a) Actor prop.	86,84%
25 b) Impact prop.	78,95%
25 Inst. balance	100,00%
25 a) Actor balance	100,00%
25 b) Impact balance	97,37%
25 Subsidiarity	100,00%
25 a) Actor subsid.	100,00%
25 b) Impact subsid.	100,00%
25 Conferral principle	100,00%

25 a) Actor conferral	100,00%
25 b) Impact conferral	89,47%
25 Sincere cooperation	100,00%
25 a) Actor sincere	97,37%
25 b) Impact sincere	97,37%
25 Harmonization	100,00%
25 a) Actor harm.	100,00%
25 b) Impact harm.	100,00%
25 Sovereignty	100,00%
25 a) Actor sovereign.	100,00%
25 b) Impact sovereign.	100,00%
25 Separation powers	100,00%
25 a) Actor powers	100,00%
25 b) Impact powers	97,37%
25 Principle rule of law	97,37%
25 a) Actor rule of law	97,37%
25 b) Impact rule of law	97,37%

25 Good administration	100,00%
25 a) Actor good adm.	94,74%
25 b) Impact good adm.	92,11%
25 Duty provide reasons	94,74%
25 a) Actor reasons	92,11%
25 b) Impact reasons	94,74%
25 Judicial protection	97,37%
25 a) Actor EJP	100,00%
25 b) Impact EJP	100,00%
25 Primacy of EU law	100,00%
25 a) Actor primacy	100,00%
25 b) Impact primacy	100,00%
25 Principle transparency	100,00%
25 a) Actor transparency	100,00%
25 b) Impact transparency	100,00%

All migration variables: Mean reliability = 95,19%

Variable	**Reliability**
Case no	100,00%
I. Issue ID	100,00%
II. Legal issue	N/A

III. Paragraphs	100,00%
IV. Issue type	94,44%
V. Coder ID	N/A
1 Field	100,00%

2 Subfield	94,44%
3 Procedure	100,00%
4 MS concerned	100,00%
5 Referring court	100,00%

6 a) CJEU/GC	100,00%
6 b) Appeal case	100,00%
6 c) No of judges	100,00%
7 Advocate General	100,00%
8 Applicant	100,00%
8 a) Applicant ID	100,00%
9 Defendant	100,00%
9 a) Defendant ID	94,44%
10 a) Intervenients	94,44%
10 b) Intervenients ID	88,89%
Admissibility check	100,00%
11 Legal basis	100,00%
11 a) Basis measure	100,00%
11 b) Correct legal basis	100,00%
12 Legislative competence	100,00%
12 a) Actual actor	100,00%
12 b) Right actor	100,00%
12 c) Alleged right actor	100,00%
13 EU Law violation	61,11%
13 a) Actor	61,11%
13b Provision	61,11%
14 Strike down/uphold	100,00%
14 a) Explicit/implicit	72,22%
14 b) Nature measure	94,44%

14 c) Legal basis review	94,44%
15 Review (intensity)	66,67%
16 Autonomy	94,44%
16 a) Actor	72,22%
17 Deference	100,00%
17 a) Actor deferred to	88,89%
17 b) Deference type	94,44%
18 a) and 18 c)	N/A
18 b) First entry	100,00%
18 b) Solidarity	100,00%
18 b) Upholding dignity	100,00%
18 b) Legal certainty	94,44%
18 b) Non-discrimination	94,44%
18 b) Best interests child	100,00%
18 b) Vulnerability	100,00%
18 b) Right to be heard	100,00%
18 b) Effectiveness	100,00%
18 b) Safe third country	100,00%
18 b) Non-refoulement	100,00%
20 Recitals	88,89%
21 Wording	77,78%
22 Expansionism	44,44%
23 Winner	88,89%

24 Parties intervenients	N/A
25 Proportionality	100,00%
25 a) Actor prop.	88,89%
25 b) Impact prop.	100,00%
25 Inst. balance	100,00%
25 a) Actor balance	100,00%
25 b) Impact balance	100,00%
25 Subsidiarity	100,00%
25 a) Actor subsid.	100,00%
25 b) Impact subsid.	100,00%
25 Conferral principle	100,00%
25 a) Actor conferral	100,00%
25 b) Impact conferral	100,00%
25 Sincere cooperation	94,44%
25 a) Actor sincere	94,44%
25 b) Impact sincere	94,44%
25 Harmonization	94,44%
25 a) Actor harm.	94,44%
25 b) Impact harm.	94,44%
25 Sovereignty	100,00%
25 a) Actor sovereign.	100,00%
25 b) Impact sovereign.	100,00%
25 Separation powers	100,00%

25 a) Actor powers	100,00%
25 b) Impact powers	100,00%
25 Principle rule of law	100,00%
25 a) Actor rule of law	100,00%
25 b) Impact rule of law	100,00%
25 Good administration	100,00%

25 a) Actor good adm.	94,44%
25 b) Impact good adm.	94,44%
25 Duty provide reasons	100,00%
25 a) Actor reasons	94,44%
25 b) Impact reasons	94,44%
25 Judicial protection	94,44%
25 a) Actor EJP	94,44%

25 b) Impact EJP	94,44%
25 Primacy of EU law	100,00%
25 a) Actor primacy	100,00%
25 b) Impact primacy	100,00%
25 Transparency	100,00%
25 a) Actor transp.	100,00%
25 b) Impact transp.	100,00%

All trade variables: Mean reliability = 95,85%

Variable	**Reliability**
Case no	100,00%
I. Issue ID	100,00%
II. Legal issue	N/A
III. Paragraphs	80,00%
IV. Issue type	100,00%
V. Coder ID	N/A
1 Field	100,00%
2 Subfield	100,00%
3 Procedure	100,00%
4 MS concerned	100,00%
5 Referring court	100,00%
6 a) CJEU/GC	100,00%
6 b) Appeal case	100,00%
6 c) No of judges	100,00%
7 Advocate General	100,00%
8 Applicant	100,00%

8 a) Applicant ID	100,00%
9 Defendant	100,00%
9 a) Defendant ID	100,00%
10 a) Intervenients	80,00%
10 b) Intervenients ID	80,00%
Admissibility check	100,00%
11 Legal basis	100,00%
11 a) Basis measure	90,00%
11 b) Correct legal basis	100,00%
12 Legislative competence	70,00%
12 a) Actual actor	70,00%
12 b) Right actor	90,00%
12 c) Alleged right actor	70,00%
13 EU Law violation	90,00%
13 a) Actor	90,00%

13 b) Provision	90,00%
14 Strike down/uphold	100,00%
14 a) Explicit/implicit	100,00%
14 b) Nature measure	90,00%
14 c) Legal basis review	100,00%
15 Review (intensity)	80,00%
16 Autonomy	100,00%
16 a) Actor	90,00%
17 Deference	100,00%
17 a) Actor deferred to	100,00%
17 b) Deference type	100,00%
18 a) and 18 c)	N/A
18 b) Autonomy	90,00%
18 b) Equal treatment	100,00%

18 b) Effectiveness	100,00%
18 b) Mutual trust	100,00%
18 b) Good faith	100,00%
18 b) Pacta sunt servanda	100,00%
18 b) International representation	100,00%
18 b) Exclusive jurisdiction	100,00%
20 Recitals	90,00%
21 Wording	60,00%
22 Expansionism	70,00%
23 Winner	100,00%
24 Parties intervenients	N/A
25 Proportionality	90,00%
25 a) Actor prop.	90,00%
25 b) Impact prop.	90,00%
25 Inst. balance	100,00%
25 a) Actor balance	100,00%
25 b) Impact balance	100,00%
25 Subsidiarity	100,00%
25 a) Actor subsid.	100,00%

25 b) Impact subsid.	100,00%
25 Conferral principle	100,00%
25 a) Actor conferral	100,00%
25 b) Impact conferral	100,00%
25 Sincere cooperation	100,00%
25 a) Actor sincere	100,00%
25 b) Impact sincere	100,00%
25 Harmonization	100,00%
25 a) Actor harm.	100,00%
25 b) Impact harm.	100,00%
25 Sovereignty	100,00%
25 a) Actor sovereign.	100,00%
25 b) Impact sovereign.	100,00%
25 Separation powers	100,00%
25 a) Actor powers	100,00%
25 b) Impact powers	100,00%
25 Principle rule of law	100,00%

25 a) Actor rule of law	100,00%
25 b) Impact rule of law	100,00%
25 Good administration	100,00%
25 a) Actor good adm.	100,00%
25 b) Impact good adm.	100,00%
25 Duty provide reasons	90,00%
25 a) Actor reasons	90,00%
25 b) Impact reasons	90,00%
25 Judicial protection	100,00%
25 a) Actor EJP	100,00%
25 b) Impact EJP	100,00%
25 Primacy of EU law	100,00%
25 a) Actor primacy	100,00%
25 b) Impact primacy	100,00%
25 Transparency	100,00%
25 a) Actor transp.	100,00%
26 b) Impact transp.	100,00%

Appendix 2. Consolidated Codebook for Work Package IV of SepaRope

ISSUE IDENTIFICATION and other preliminaries

I. **Unique issue identifier (column B)** should be constructed using CELEX case number and order of the operative part bullet points, e.g., 62004CJ0224-1.

II. **The legal issue (column C)** is defined with the bullet points in the operative part of the judgment as a point of departure. Questions reformulated by the CJEU are not feasible as not all cases will be preliminary references.

- Admissibility should be coded as a separate legal issue(s) if the Court decides on the question of admissibility, even if it is not included in the operative part of the judgment. If admissibility does not have its own heading (but is only mentioned very shortly), do not code as a separate legal issue.
- Cost decisions are not, as a rule, legal issues. Bullet points can be separated or combined if the coder finds this warranted on the basis of a legal analysis of what should be considered one issue.

If the Court clearly divides its reasoning into several legal issues, code these as separate legal issues following the separation by the Court. If the Court rules on an issue very briefly (e.g., in case 370/12, essentially in only one paragraph), this issue can be combined with the previous/following issue if those two issues are similar in substance and of the same issue classification, as long as this does not complicate the coding of the issue. In uncertain cases, separate as few legal issues as possible, as a rule of thumb. This should also be reflected in Variable III regarding which paragraphs are covered by each issue. Parts of the reasoning are to be attributed to each issue and in the analysis.

This is a string (text) variable where coders briefly describe the legal issue. It is recommended that the text in the operative part is used as a starting point for the issue description, but coders might need to add some information to help make it understandable without referring to the judgment; this is in particular the case for direct actions and appeals from the General Court, where the operative part will often be very brief. If relevant, try to indicate the most relevant legal provision(s) for the issue, but be selective. Make sure that any provision referred to is clearly identifiable but avoid excessive formalism.

III. Indicate which **paragraphs** of the Court's reasoning concern each legal issue (whether or not there is one or several legal issues, paragraphs are indicated). If, exceptionally, some paragraphs are excluded from the Court's reasoning and create a gap, you should use intervals. Note that these can only be excluded from the analysis when and only when the Court explicitly identifies the "Observations submitted/Arguments of the parties" under a clear headline. If, exceptionally, an admissibility issue consists of the Court's reasoning on the question of admissibility under several different headlines in the judgment, use intervals to capture all

paragraphs regarding the issue of admissibility. Add preliminary observations with the legal issue under that heading (or the legal issue that it connects/fits with best).

IV. Issues should be **qualified (column D)** as interpretation of EU law (1), compatibility of national law with EU law (2), validity of EU law (3), admissibility (4), or other (5).

The legal issue should be classified with reference to the operative part of the judgment.

- **Interpretation** indicates that the issue is framed as a problem of the interpretation of EU law. A typical formulation would be: "[EU law] must be interpreted as meaning". A subcategory of the interpretation issues is those dealing with whether a provision has direct effect.
- **Compatibility** indicates that the issue is framed as one of the compatibility between EU and national law. Compatibility refers to compatibility only of national law with EU law whereas compatibility of EU law with EU law should be coded as interpretation or validity. A typical formulation would be: "EU law precludes the application of…". Note that this is formally a subcategory of interpretation, as the ECJ does not have the competence to interpret national law. An issue should be coded as compatibility even where, formally, the ECJ declares a hypothetical Member State provision incompatible with EU law. In case of overlap with interpretation, compatibility takes precedence.
- **Validity** is used for challenges to the validity of EU law, including both direct (art 263 TFEU) and indirect (art 267 TFEU).
- **Admissibility** is coded when the Court decides on the question of admissibility, when the issue of admissibility is under its own heading. If the jurisdiction of the Court is discussed under its own heading, this is also coded as admissibility. Admissibility issues should only be coded until variable 10x (see admissibility of the case below). **Admissibility issues are not to be coded when the entire case is dismissed as manifestly inadmissible, without or with only a few paragraphs of reasoning by the CJEU.** As variable 10x was not introduced during the coding of EMU cases, admissibility issues in these cases have been coded in full. Further, more cases have been excluded due to a change in the method (variable 10x was introduced only for migration and trade) and following the development of the codebook. After the method was changed, admissibility issues were no longer coded from column 10x and onwards to the right. However, in EMU, more cases were in their entirety excluded due to the above underscored instruction on manifest admissibility, which was perhaps originally formulated, or subsequently interpreted, as excluding all cases that were ruled inadmissible in full, and not only those found manifestly inadmissible in full.

*Example of how to code this variable: In C-233/18, the operative part is phrased in the language of **interpretation**: "Article 20(4) and (5) of Directive 2013/33/EU […] must be interpreted as meaning that a Member State cannot […] provide for a sanction consisting in the withdrawal, …". While the interpretation does entail a prohibition on the Member States to impose certain sanctions, the operative part offers only an abstract interpretation of the Directive that does not in any way indicate whether or not a Member State has taken an action that is (or is not)*

contrary to it and does not refer even to a hypothetical national provision. The issue is therefore to be coded as 1 (interpretation), even though a closer reading of the judgment as a whole betrays that there is indeed a national provision that does appear to be incompatible with the Directive as interpreted by the ECJ.

V. CODER ID: Each coder should indicate their identity for every issue (coder's initials).

INDEPENDENT VARIABLES

1) Legal field

Predefined as either migration (1), EMU (2) or trade (3).

2) Subfield

Within migration (code 1 on variable 1), choose one of the following subfields:

- Asylum (1), including asylum procedures, definition and scope of protection, and reception conditions;
- Legal migration (2), including family reunification, workers, students (most cases will concern family reunion);
- Border controls/irregular migration (3), including pre-entry control, control on territories, expulsions, detentions, return agreements.

Within EMU (code 2 on variable 1), choose one of the following subfields:

- Single Resolution Mechanism (1), including resolution procedure, decisions of the Single Resolution Board, the Single Resolution Fund;
- European Stability Mechanism (2), including Eurogroup statements concerning stability support programs for the restructuring of the banking sector
- Banking supervision (3), including penalties imposed by the ECB, decisions of the European Banking Authority;
- Article 128 TFEU (4), including all aspects concerning the Euro;
- other (5), including budgetary surveillance, emergency liquidity assistance.

Within trade (code 3 on variable 1), choose one of the following subfields:

- Multilateral trade system (1), including WTO agreements (e.g. GATT, GATS, TRIPs);
- Preferential Trade and Investment Agreements (2), including bilateral (e.g. CETA, Vietnam Free Trade Agreement and the Investment Protection Agreement) and regional agreements (MERCOSUR), the scope of Article 207 TFEU (this is often related to questions over the division of competences), the compatibility of an international agreement with the EU Treaties (this is often the case in Article 218(11) TFEU actions. Also include in this subfield General issues of treaty-making, including institutional questions over the negotiation and conclusion of international agreements where the agreement does not fall within the Common Commercial Policy (this could concern the division of powers, the

legal basis for the Council Decision regarding the signing or conclusion of an international agreement);
    - For a while, value 2 was separated into 2 (Pref Trade Inv Agr) vs 3 (General issues of treaty-making) but they are now merged consistently throughout the Trade dataset.
- Acts adopted in the implementation of international agreements (4), including Article 218(9) TFEU, decisions adopted in treaty bodies;
- Sanctions (5);
- Other unilateral action (6), including regulations and internal regulation adopted under Article 207 TFEU such as the investment screening regulation.

3) Type of procedure

Indicate the procedure followed in the case as follows:

1: Article 258 or 259 TFEU
2: Article 263 TFEU
3: Article 267 TFEU
4: Article 218(11) TFEU
5: Article 340 TFEU

When procedures 2 and 5 are both followed in the same issue, then procedure 2 takes precedence.

4) Member State(s) directly concerned

For infringement procedures, code the defendant Member State (MS) (also in the case of Article 259 procedures). For Art 263 challenges it will be the applicant Member State, if the applicant is a Member State; otherwise, code "no Member State directly concerned" (99). For preliminary references, put in the Member State from which the reference originates. In other cases, code "no Member State directly concerned" (99). If there is more than one MS, write them all down once and separate each one with a semicolon. There is however no need to separate them according to the different identified legal issues.

AT: Austria
BE: Belgium
BG: Bulgaria
CY: Cyprus
CZ: Czech Republic
DE: Germany
DK: Denmark
EE: Estonia
ES: Spain
FI: Finland
FR: France
GR: Greece
HR: Croatia
HU: Hungary
IE: Ireland
IT: Italy
LT: Lithuania
LU: Luxemburg
LV: Latvia
MT: Malta
NL: Netherlands
PL: Poland (value=PO also means PL)
PT: Portugal
RO: Romania
SE: Sweden
SI: Slovenia
SK: Slovakia
UK: United Kingdom
99: No Member State directly concerned

5) Referring court

In preliminary reference cases, insert the referring court's court ID as available in Ghavanini et al, 'National Courts in the CJEU Preliminary Reference Procedure'.[22] For other types of procedures, code 99.

6) CJEU composition

a) Indicate whether the judgment is delivered by the General Court (0) of the CJEU (1)
b) Indicate whether the case has been appealed from the GC to the CoJ (No: 0, Yes: 1)
c) Indicate the number of CJEU judges participating in the judgment.

7) Advocate General

String variable. Insert name of the AG, or 99 if no AG was appointed.

8) Applicant

Name: Copy in the name of the applicant.

- In procedures initiated by a direct application to the Court (whether the GC or the CoJ), this is the party initiating the procedure in the first instance.
- In preliminary references, it is the party referred to by the Court as the applicant/claimant/appellant in the main procedure/proceeding or, if the Court does not refer to anybody under that label or a similar, the party listed first at the beginning of the judgment.
- In appeal or cross-appeal cases, it is the applicant in the first instance (i.e., the parties' roles before the GC). In cross-appeal cases, make a comment that it is a cross-appeal case. If this approach results in an actor (of an otherwise not captured classification) being overlooked, i.e., if the parties in the appeals differ, team coders have discussed the case between them and in some instances included several applicant names.
- In combined cases, when the party composition and classification differ between the cases that have been joined, and when it is possible to attribute an issue to only one of the joined cases, applicant and defendant should be coded at issue level.
- In opinion procedures pursuant to Article 218(11) TFEU, code the party that requested the opinion as the applicant and, unless there is an opposing party, code the defendant as 99.
- In UK ex parte proceedings, the queen is not coded as a party.
- Where there are many co-applicants, list all that will receive different classifications using the system set out under a) (i.e., if ten private citizens appear alongside a corporation, list the corporation and one of the citizens, but no need to list all citizens).

[22] Ghavanini, Pavone, Naurin, and Šadl, 'National Courts in the CJEU Preliminary Reference Procedure', (unpublished version, 0.0) in Lindholm, Naurin, Šadl, Wallerman Ghavanini, Brekke, Fjelstul, Hermansen, Larsson, Moberg, Näsström, Ovadek, Pavone, Schroeder, *The Court of Justice of the EU Database*, IUROPA, URL: http://iuropa.pol.gu.se/

- However, if there is more than one actor with the same classification, add "and other(s)". Example in case C-41/15: "Gerard Dowling and others; Scotchstone Capital Fund Limited".
- If only one party is listed as such in party name of judgment, then only one party is coded. If it is criminal proceedings and only one individual party is listed as party in umbrella, then code indicted/prosecuted/convicted party as defendant, and there will be no applicant in the case (thus coded 99).

8a) Applicant classification: Insert an identifier in the format XX-YY-ZZ, where:

- XX indicates the Member State code (see variable 4), with these additions: EU (EU), International (INT), individual (IND). INT is used for non-EU supranational organizations (e.g., the WTO, the ILO, the UN, etc.) and TC is used for third country parties.
- YY indicates type of actor as follows: 01: Central government (for EU this includes only the Commission, the Council, the European Council, and the Parliament as well as the EU as a legal person; for Member States it includes the Member State as a legal person, the Member State government, the Member State head of state, any individual member of a Member State government, and the national parliament); 02: Central authority (EU institutions not included in 01 and Member State central/federal authorities); 03: Regional authority or otherwise "emanation of the state" in accordance with the CJEU's *Foster v. British Gas* jurisprudence (mutatis mutandis for EU level); 04: NGO; 05: Private legal person; 06: Natural person, citizen of an EU Member State; 07: Natural person, third country national. 08: Natural person, unknown/unspecified nationality.
- ZZ indicates the branch of government the actor belongs to: Executive (EX), legislative (LE), judicial (JU), informal (INF), none (NO). This designation is decided by institution, *not* on a case-by-case basis; e.g., the Commission should always be considered an executive actor, even if in the individual case it has carried out legislative tasks.

  The code "informal" (INF) captures actors that are not officially an EU institution, but which in practice operate as one, e.g., the Eurogroup. In order to describe the type of actor (YY) for informal actors, use the same code as the institution that it can be considered equivalent or most similar to (for the Eurogroup, code it as you code the Council), with the addition of the code INF instead of the code for the branch of government of that institution (i.e., the nature of the legal measure).

Example of classifications: In Case 26/62 van Gend & Loos v. Netherlands Inland Revenue Administration, the applicant would be designated IND-05-NO, whereas the defendant would be designated NL-02-EX.

<u>Recurring or specific actors and the appropriate classification:</u>

EMU (typical recurring actors and classifications)

- Eurogroup: EU-01-INF
- Central banks: (MS code)-02-EX, e.g. Deutsche Bundesbank: DE-02-EX
- Other banks: IND-05-NO
- Companies/businesses: IND-05-NO

Migration (specific actors where a choice was made for that actor, not a general rule for a type of actor)

- UNHCR: INT-04-NO
- International Protection Appeals Tribunal (Ireland): IE-02-EX

General (mostly general rules/clarifications but a few exceptional attributions/labels)

- Attorney General of Ireland: IE-02-EX
- Bundesregierung: DE-01-EX
- Bundestag: DE-01-LE
- Bundesland, e.g. Land Baden-Württemberg: DE-03-EX
- Vertreter des Bunderinteresses beim Bundesverwaltungsgericht: DE-02-EX
- Ministries, ministers, or state secretaries: [MS]-01-EX
- National research institutes, statistical institutes, etc.: [MS]-02-NO (code 03 if regional)
- Public Prosecutors: [MS]-02-EX
- Marshal of the Sejm (Poland): PL-01-LE
- Ombudsman: [MS]-02-NO
- NGO's (local and national): IND-04-NO
- Representatives of the Governments of the Member States: MS-01-EX
- Préfet (e.g. Préfet du Val-de-Marne): FR-03-EX

9) Defendant

Copy in the name of the defendant. The defendant is defined as the party opposing the applicant as defined above.

- *In preliminary references, if there is only one party (usually in criminal proceedings), code that party as a defendant (unless it is clearly identified as applicant/claimant by the Court). Code 99 for the other party.*

a) Defendant classification: See variable 8a).

10) Intervenients

a) Indicate the number of intervenients submitting observations in the case (i.e., the intervenients listed in the introduction to the judgment).

- *Do not include any of the parties to the main procedure.*
- *All intervenients submitting observations must be included even if the Court writes down a specific and limited list under the headline "Intervenients."*
- *When a ministry, minister, or a state secretary is a party to the proceedings (ex: Minister for Foreign Affairs, Netherlands), and the government (ex: the Netherlands Government) is listed under the actors who submitted observation, code the government as interveners. However, if a Member State is named as party to the case (e.g., xxx v. Republic of Ireland), without further precision as to organ/representative, and the government of that Member State figures as intervenient in the list of intervenients, do not double code the government as an intervenient.*

b) Indicate the identity of the intervenients using the classifications set out in variable 8a). Separate intervenients with a semicolon. If two or more

intervenients receive the same classification, only list that classification once. If there are no intervenients, code 99 here.

10x) Admissibility of the case

Introduce a column after variable 10 in order to code if the case is inadmissible (0) or admissible (1).

If the case is inadmissible:

- Code 0 and stop the coding for this case (i.e., only variable 1 to 10 are coded for inadmissible cases). In the following variables code a full stop ('.').
- In the comment section write down the main reason why the case was declared inadmissible by the Court

If the case is admissible:

- Code 1 and stop the coding for the admissibility issue. There is no need to write the arguments motivating the Court's decision on that matter. In the following variables code a full stop ('.').
- Continue the coding of the other issues (interpretation, validity, compatibility).

If the case is declared partially (in)admissible, this has been coded (1) for admissible, in part.

This variable should be coded starting with migration cases, no need to change the EMU cases already coded. Inadmissible cases are listed and marked in our selection case when manifestly inadmissible. For admissibility issues already coded (i.e. in cases declared admissible after discussion), we coded all the variables, including variables after V10.

DEPENDENT VARIABLES REGARDING WILL FORMATION & CONTROL MECHANISMS

While variable 11 merely captures whether an EU measure is based on the correct article of the Treaties, variable 12 examines whether or not a measure is decided by the correct actor(s) (e.g., whether another institution should have been involved in the decision-making process, or if one should not have been involved). Any other procedural considerations should be coded in variable 14. Variable 13 focuses on the measure's content (substantive review).

As a rule, abstract/hypothetical future measures are not to be coded. However, as an exception, in a Court Opinion, where the Court clearly strikes down a future measure or agreement, or on the contrary, upholds it, it can be coded in respective variables 11-14.

11) Legal basis

This variable is only coded on issues that concern the validity of an EU legal measure (code 3 on variable IV) if the (correct or incorrect) **Treaty basis** of the legal measure is discussed. If the issue is not a validity issue (i.e., any other code than 3 on variable IV), code 99, and if validity was challenged on other grounds than the (in)correct legal basis, code 98. EU legal measures are acts of legislation on the EU level as well as decisions made by executive authorities on the EU

national level, except judgments and decisions by the GC. Code whether the challenged measure was found to have been made on a correct (1) or incorrect (0) **Treaty basis**.

a) Identify the legal basis upon which the measure was taken, using the CELEX number. If the main variable was coded 98 or 99, code 99 here.
b) If 0, identify the correct legal basis as indicated by the Court. If the Court did not identify what is the correct legal basis, code 97. If the main variable was coded 1, 98 or 99, code 99 here.

This variable captures only whether a legal measure is carried out on the correct or incorrect Treaty basis, for example whether the Council should have adopted a decision on the legal basis of Article 48 TFEU or Article 79(2) TFEU. It does not, however, capture whether an actor failed to fulfill the requirements of that Treaty basis; this is instead captured by variable 13 (substantive) or 14 (procedural and substantive).

12) Legislative competence review

This variable is only coded on issues that concern the validity of an EU legal measure (code 3 on variable IV) if the Court discusses whether or not it was the correct actor that decided on a legal measure. If the issue is not a validity issue (i.e., any other code than 3 on variable IV), code 99, and if validity was challenged on other grounds than lack of competence, code 98. EU legal measures are acts of legislation on the EU level as well as decisions taken by executive authorities on the EU national level, except judgments and decisions by the GC. Code whether the actor(s) deciding the challenged measure were fully competent (1) or not fully competent (0).

a) Identify the actor(s) taking the challenged act using the system set out in variable 8a), with the addition of the generic code "MS" when Member States in general have taken the challenged act. If the main variable was coded 98 or 99, code 99 here.
b) If 0, identify the actor(s) who should have acted/been involved in the legislative procedure, if any party is clearly overlooked, using the system set out in variable 8a), with the addition of the generic code "MS" when Member States in general are concerned. If 0, but the Court does not specify any other actor who should have been involved, code 97. If the main variable was coded 1, 98 or 99, code 99 here.
c) If 1, identify the actor(s) that according to the unsuccessful challenge should have acted/been involved in the legislative procedure (according to the applicant), using the system set out in variable 8a), with the addition of the generic code "MS" when Member States in general are concerned. If the challenge did not identify an actor who should have been involved, code 97. If the main variable was coded 0, 98 or 99, code 99 here.

13) EU law violation

Whether the Court's ruling directly or indirectly implies that a public actor (other than the General Court) has overstepped their powers according to EU law (1) or failed to fulfill their EU law duties (2) or neither (0). This variable focuses on the violation of a provision in substance, i.e., on the misdeeds of actors who are

competent to adopt a legal measure but who have abused their power and, in doing so, have been/are accused of having violated EU provisions. When coding this variable, do not take into account competence as this is captured by variable 12). Procedural issues are excluded from analysis – focus on content (substance). Code 0 when the question is discussed, but the Court does not find an actor to have overstepped or failed to fulfill their EU law duties. If this question is not relevant in the case, code 99 here, and also on a) and b).

All EU law violations, apart from procedural considerations, committed by a public actor on the EU or Member State level should be taken into account. The coding should however only take into account the actions at issue in the legal issue; if a legal issue concerns the actions of a private actor, or only concerns the abstract interpretation of a provision, no violation should be coded even though the ruling may, by extension, indicate that a public actor may at some point have acted contrary to EU law.

- *'1' should be used when the actor in question has acted wrongfully in an expansive fashion (i.e., done too much, acted when it should not have) (e.g., criminalizing too many behaviors, placing a person in detention even though the conditions for detention are not met)*
- *'2' should be used where when an actor has acted wrongfully in a restrictive way (i.e., done too little, did not act when it should have).*

In direct actions under Arts 258, 259 or 263 TFEU that reach the CoJ on appeal, do not take into account any wrongs that the GC may have committed.

a) If 1, 2 or 0, identify the actor using the system set out in variable 8a) with the addition of the generic code "MS" for Member States in general but where reasoning does not apply to a specific state. Otherwise, code 99.
b) If 0, 1 or 2, identify the provision the assessment of the Court was based on using the CELEX number if available. Otherwise, code 99. If the assessment is based on a principle, mention the principle.

14) Strike down/uphold

Whether the judgment directly or indirectly strikes down (1) or upholds (2) a legal measure. A legal measure is any act of legislation on the national or EU level as well as decisions made by executive authorities on the EU or national level. Judgments and decisions by the GC are *not* included. In general, national judgements are also excluded unless, exceptionally, it is the "original" legal measure, meaning the measure which initiated the case in the first place. If no legal measure is even indirectly reviewed, or if the case concerns a future/hypothetical legal measure, code 0 and then 99 on a)–c). If the Court only partly upholds/strikes down, a legal measure, code 97. This variable can overlap with variables 11-13.

When there is a judicial measure, try to go back one step and think about the nature of the measure and which actor is behind that measure (especially when the court is applying national legislation and the measure could be classified as an administrative act, rather than a judicial measure). (See, e.g., C-41/15, Direction Order of High Court is to be classified as an executive measure).

a. If 1 or 2, indicate whether the review was explicit (1) or implicit (0).

- A review will be considered explicit where the CJEU acknowledges that it is indeed assessing the compatibility of a legal measure with an EU legal provision. This will by definition be the case for Article 263 challenges and preliminary references concerning validity, and also in many Member State infringement cases.
- The review carried out in preliminary references concerning compatibility will most often be implicit as the ECJ does not technically have the competence to assess the compatibility of national provisions with EU law, but on occasions where the Court engages particularly with the national provision (thus arguably going too far in relation to its Art 267 competence), the review can exceptionally be considered explicit.
- Regarding preliminary references, the review will be considered explicit only if the CJEU refers to it directly and analyzes the national legal measure closely and concretely. On the contrary, the review should be considered implicit if the Court only provides broad guidance for the national court to apply.

  Example of an explicit review in a preliminary reference concerning compatibility, C-41/15, Dowling and Others:

  '50 However, as is clear from paragraphs 44 to 48 of this judgment, the Direction Order is not a measure taken by a governing body of a public limited liability company as part of its normal operation, but is an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a company, which failure, in the opinion of the referring court, would threaten the financial stability of the European Union...'

b. If 1 or 2, identify the kind of measure reviewed in the format XX-ZZ, where XX identifies the author of the measure (EU or one of the Member States, should be specified by country code which member state in that case) and ZZ indicates whether the measure was of legislative, executive, judicial, or informal nature, using the abbreviations described in variable 8a), with the addition of the generic code "MS" when Member States in general are concerned, rather than any specific Member State.

As a main rule, where the question and ruling concerns whether national legislation is compatible with EU law, think of that **legislation** as the relevant act and the **national legislature** as the relevant actor (This occurs typically when the executive and judicial acts adopted at the MS level are compatible with national law, but the conflict is between the national legislation and EU law, and the conflict between MS judgments or executive acts are merely consequences of the original incompatibility of the national legislation). Only where you find that national law is actually not at issue – e.g., because another national actor has used discretion or filled a legislative lacuna – should you look beyond the national legislation (and code the executive act adopted by national authorities for instance). Another exception would be when the EU legal act is directly applicable, and the question therefore is whether a national executive action is compatible with the EU legal act.

c. If 1 or 2, identify the legal basis for the review carried out in CELEX format.

This variable does not refer to the legal basis granting competence to the Court to conduct the review, but rather the legal basis used for the adoption of the contested legal measure. This legal basis will most often be an EU legal provision but may also be an EU general principle or a provision of an international treaty acceded to by the EU.

- If the legal basis does not have a CELEX number (e.g. Rules of Procedure of the SRB), code the title of the provision/principle, e.g. title or "Art X Rules of Procedure".
- Typically, the Court will itself identify the superior norm that the reviewed legal act is deemed contrary to. Otherwise, the coder should use the norm that appears to have been decisive.
- Unless it is absolutely necessary to mention several legal bases, try to narrow it down to one main legal basis.
    - If there is more than one legal basis, separate each with a semicolon.
    - If the legal basis consists of numerous articles from the same secondary law, merely code the legislation's CELEX number.
    - However, if the legal basis is several Treaty articles, mention all of them. When possible, refer to the legal basis mentioned by the Court in the operative part.

Example case C-62/14: A preliminary reference concerning the interpretation and application of EU law, whether ECB has the competence to adopt a decision, which it published in a press release that it will adopt. While the review of the decision will be implicit (as the measure is not yet adopted), the decision that is assessed is to be coded as EU-EX (because the decision will be of executive nature when it is adopted). As the decision has not yet been adopted, the issue should be coded under "1"(interpretation).

15) Intensity of judicial review

This variable refers to the judicial review captured by variable 14) and is used only where that review is direct. If variable 14) or 14a) has been coded 0, this variable should be coded 99.

Judicial review is coded on a three-level scale: procedural review only (0); limited substantive review (semi-substantive or semi-procedural review) (1); strict substantive review (2).[23]

- **Procedural review only (0)** means that the Court does not question the substantive policy choices (as regards legislation) or the fact-finding and exercise of discretion (as regards executive acts), but merely checks that the correct procedures have been observed in the adoption of the act. This might

23 This system is lightly based on Widdershoven, 'The European Court of Justice and the Standard of Judicial Review', in de Poorter, Ballin and Lavrijssen (eds), *Judicial Review of Administrative Discretion in the Administrative State,* Springer 2019.

include the thoroughness of fact-finding, but as noted above not the fact-finding itself; for instance, if the Court rules that a decision-making authority ought to have heard more experts or gathered more evidence prior to making its decision, this still counts as procedural review and should be coded 0 (whereas if it also/instead states that the evidence should have led it to come to another conclusion, this would be limited or strict substantive review).

- **Limited substantive review (1)** entails 'the absence of a manifest error of the substance of the decision and the appraisal of the relevant facts'.[24] In particular, in a limited substantive review, the Court is likely to examine the reasons provided in support of the challenged act in order to establish whether they fulfil basic requirements of adequacy (I.e., are intelligible and relevant to the decision to be taken) and whether the 'factual and legal elements on which the decisions has (sic) been based were indeed present'.
- **Strict substantive review (2)** finally means that the Court substitutes the assessment of the decision-making authority for its own. Typical examples of this would be when the Court rejects the decision-making authority's conclusions on a matter of fact (or, if it is a national authority, on a matter of national law), or when the Court decides that a decision, while available to the decision-making authority as a matter of discretion, is nevertheless inappropriate and should be reversed, or when the Court makes a new proportionality assessment.

If the Court conducts more than one type of review (e.g., procedural review AND strict substantive review), code for the more far-reaching alternative (in my example 2, for strict substantive review).

16) Whether the judgment restricts an executive or legislative actor's autonomy.

Values of variable 16) result rather automatically variable 13 and 14 (except possibly on interpretation issues). The answer to whether there is restriction functions as a baseline for which actors to code. The real gain of this variable lies in that it identifies a broader range of actors that are affected and the "real effects" of the judgment, as this variable allows for a freer identification of actors than variables 13 and 14.

Autonomy is understood as the actor's room for manoeuvre, i.e., its possibility to choose between different alternative actions. Possible codes are yes (1), no (0), unclear (97), and not applicable (99). Code 0 when the question is discussed, an actor is not restricted. 97 should be used where the coder is not certain whether the outcome will have effects for an executive or legislative actor's autonomy. Code 99 where this question is not discussed or relevant (for instance on admissibility issues). Whether autonomy is affected should be determined in comparison with what the actor is *competent* to do, irrespective of whether it was likely to make use of that competence.

- *Exceptionally, it is possible to consider national judicial actors in this variable, if the national court is acting alone, and is using wide discretion in its action.*
- *Exceptionally, it is possible to consider informal actors in this variable (e.g., Eurogroup), if the measure of that actor is reviewed by the Court, who finds that*

[24] Id. at 59.

it should actually be considered an executive or legislative act. However, if the Court does not review the measure of an informal actor, and instead merely dismisses the case, code 99 as the measure has not actually been reviewed.

Admissibility issues: code 99

Compatibility issues:

- *If the Court finds the national measure compatible with EU Law: code 0*
- *If the Court finds the national measure incompatible with EU Law: code 1. On variable 16a, code the author or actor of the national measure. Code 97 if the effects of this decision are unclear.*

Validity issues:

- *If the Court dismisses the case (i.e., if the legal measure is found to be valid): code 0*
- *If the EU legal measure is found to be incompatible with another EU law provision: Code 1 if the legal measure affects an actor's autonomy. On 16a, code the actor or author of the EU measure. Code 99 or 97 if the legal measure reviewed does not affect any actor's autonomy or if its effects are unclear.*

Interpretation:

- *Try to look at the Court's reasoning and see if its interpretation adds a criterion if an actor in particular will be more restricted in its actions than before. In this case, code 1. If an actor's autonomy is discussed but its room for maneuver is not affected by the interpretation of the Court, code 0. If autonomy is not applicable or if its effects are unclear code 99 or 97.*

a) If 1 or 0, indicate the actor whose autonomy is affected using the system set out in variable 8a) with the addition of the generic code "MS" when Member States in general (i.e., not one specific Member State) are affected. If no actor is affected, code 99.

17) Deference

Whether the Court defers final judgment on the issue to another actor (not including the General Court). Codes are deference (1) and no deference (0).

Deference should be coded where the Court's ruling does not conclusively deal with the legal issue but leaves some aspects of it to be determined by another actor. An explicit indication of deference by the Court is needed. This will most often be indicated in the operative part by phrases such as "which it is for the referring court to determine" or by indicating that an actor has a "margin of discretion/appreciation". If the Court invites the legislature to modify a legal act instead of declaring it invalid, this can be considered deference depending on the wording and degree of specificity of that invitation. Sometimes, however, deference will also be expressed in the reasoning. The coder will then decide whether the deference affects the outcome of the case despite not being included in the operative part. The mere fact that cases referred for a preliminary reference are always finally decided by the national court is not per se an indication of deference.

a) If 1, indicate the actor to whom the Court defers using the system set out in variable 8a) with the addition of the generic code "MS" when the Court defers final judgment to Member States or national courts in general (i.e., not one specific Member State or national court). If 0, code 99.
b) If 1, indicate the type of **deference** on the scale from minimal (0), partial (1), or full (2); otherwise, code 99.

- **Minimal deference** is characterized by the Court in principle deciding the legal issue but deferring to another actor for (seemingly) mainly formal reasons or on a point of very little importance for the issue at stake, for instance a mere technicality. An example would be where the Court acknowledges that a proportionality assessment is for the referring court to carry out, but nevertheless provides detailed "guidance" for that assessment to the extent that only one result seems possible.
- **Partial deference** implies that the Court decides the issue in the abstract and gives some pointers to the final decision-maker, but where these pointers are not so detailed as to extinguish all discretion on the part of the actor deferred to.
- **Full deference** should be coded where the Court decides that the issue hinges upon a matter outside of its competence and does not provide any guidance as to how the matter should be handled, e.g., where it decides that the outcome depends upon a proportionality assessment and does not provide any guidance as to how that assessment should be performed.

DEPENDENT VARIABLES REGARDING JUDICIAL LAW-MAKING

18) The legal sources relied upon by the Court

This variable is designated as a proxy for judicial expansionism, on the assumption that references to general principles and case law generally indicate expansionism whereas references to black-letter law indicate judicial restraint. Therefore, not only the individual sources but the frequency with which they are cited should be coded.

a) References to EU legal acts and CJEU case law. *These are already available and need not be hand-coded.*

b) References to general principles. Only the principles indicated on the policy-specific lists (appendix) and in the formulations indicated there should be coded. For each principle cited by the Court, indicate in how many paragraphs the principle is cited. Insert a specific column for each principle.

c) References to international sources of law.

This includes references to international treaty provisions (including the ECHR) and rulings of international judicial and quasi-judicial bodies. International treaties adopted by the EU are coded as international sources of law, while the Council Regulation (or similar) through which the EU adopts the treaty is considered EU law. Identify the article or ruling cited and the number of paragraphs in which it appears (i.e., not the paragraph numbers, but the number of times the article or ruling is cited) and code the source of law followed by the number of times it is cited, separated by a semicolon. Example: if ECHR article 8 is cited in paragraphs 34 and 67, code: "ECHR article 8; 2").

- When there are multiple sources/articles, create a separate column (e.g., 18c_1, 18c_2).
- When a Treaty is mentioned in its entirety: code one reference to the Treaty in one column.
- When specific articles of a Treaty are mentioned:
  - If they constitute a continuous interval: code one reference to the interval in one column
  - If they are discontinuous, code one reference to each of them in separate columns
  - When both specific articles and the Treaty are mentioned: code them separately in different columns
- When the ESM Treaty is mentioned, do not code which articles the judgment refers to, only code how many times the ESM Treaty is mentioned.
- In migration cases, do not code when the judgment refers to UN Guidelines, do mention them in the comments.
- When the Court refers to the annex or protocol of an international source of law, code it as a reference to the concerned treaty or convention in general. Example: If the Additional Protocol to the EEC-Turkey Agreement is mentioned, code it as a reference to the EEC-Turkey Agreement.
- When a source of international law is mentioned only indirectly, for example if the Court refers to its own case law, do not code this as a reference to that source of international law. Example: If the Court refers to "Opinion 3/15 (Marrakesh Treaty)", do not code the Marrakesh Treaty under variable 18c.

19) This variable was excluded in its entirety at an early stage.

20) Recitals/preamble

Whether and how many times the Court refers to the recitals of the preamble of applicable secondary legislation or to the legislative intent set out in other preparatory works.

Stick only to references to what **the legislator** intended (i.e., not references to an "objective" highlighted by the Court itself). Indicate as a numerical value. Only one reference per paragraph in judgment should be counted, and only references in the CJEU's legal reasoning (i.e., not references in the introductory parts of the ruling). Do not code references to the preparatory works of the Treaties. If the Court refers to two or more recitals in the same sentence or paragraph code only one reference.

21) Wording

Whether and how many times the Court refers to the **wording** of an EU law provision. Only paragraphs where the Court explicitly discusses the choice or meaning of specific words in the legislative texts should be included.

- Paragraphs where the CJEU merely recalls the content of the provision in question (i.e., cites the provision but does not explain, make explicit, or discuss its meaning) should not be considered references to its wording.
- Where the Court has established the literal meaning of a provision, any consequences that flow from that meaning should not themselves be considered references to the wording.
- Only one reference per paragraph in judgment should be counted. Indicate as a numerical value.

Count when the Court clearly mentions that the interpretation is based on the wording of a provision, such as when it states,

- '*it is clear from its (very) wording that Art…*', '*it can be seen from the wording of that Article*', '*the wording of Art… should be understood as', 'In the light of case-law, in order to determine whether an act is capable of having legal effects […] it is necessary to examine its wording and context*'
- or when it mentions a specific word in '…', such as: '*the concept of "larger impact", within the meaning of Article…*'
- or when the Court refers to the various language versions of the provision. For instance, '*The various language versions of the provision in which that concept appears do not enable its meaning to be determined clearly and unequivocally,*'

Example (C-414/18):

82 First, Article 5(1)(a) of that delegated regulation states that that exclusion must be applied to the intragroup liabilities arising from transactions entered into by an institution with an institution which is part of the same group, provided that certain additional conditions are met.

83 It is apparent from the very wording of that provision that it can be applicable only to transactions between two institutions that are part of one and the same group.

84 While Delegated Regulation 2015/63 does not directly define the concept of a 'group', Article 3 of that delegated regulation states that, for the purposes of that regulation, the definitions contained in Directive 2014/59 are to apply.

85 The concept of a 'group' is defined in Article 2(1)(26) of that directive as meaning 'a parent undertaking and its subsidiaries'. The latter two concepts are, in turn, defined in Article 2(1)(5) and (6) of that directive, by reference to Article 4 of Regulation No 575/2013, which itself refers to Articles 1 and 2 of Directive 83/349, provisions which correspond, in essence, to Article 22(1) to (5) of Directive 2013/34.

86 It follows from those definitions that the relationship of parent undertaking and subsidiary presupposes a form of control that involves the parent undertaking holding a majority of voting rights within the subsidiary, a right to appoint or remove some of the directors or senior managers of that subsidiary or alternatively a dominant influence over that subsidiary.

Paragraph 82 should not be counted as a reference, as it merely recalls the content of the provision. This would hold true even if the Court had in para 82 quoted the provision. Paras 83–85 on the other hand are references to the wording, as indicated inter alia by the reference to the "very wording" in para 83 and to the word in question in quotation marks in paras 84–85. Para 86, finally, should not be counted, as the Court here leaves the wording and instead discusses the consequences that follow from the literal interpretation carried out in the previous paras.

22) Expansionism/restraint

Whether the coder judges that the ruling is an example of judicial expansionism or judicial restraint, defined as very restrained (0); somewhat restrained (1); neither restrained nor expansive (2); somewhat expansive (3), very expansive (4).

This would be a judgment call on the part of the coder, and inter-coder reliability is not expected. The variable will be used only to identify cases relevant for further, doctrinal analysis, and the coder should not allow this variable to become time-consuming but rely on overall impression and gut feeling. The outer extremes of the scale should be reserved for cases giving the coder the feelings of "Why do the judges even bother coming to work if they don't intend to do anything?!" and "Wow, this Court is really running wild!", respectively.

To guide her or his judgment, the coder should look at the arguments and legal sources used by the Court to decide on an issue. If the Court is mainly basing its reasoning on the wording of EU law provisions and could use principles which could make a difference but does not, the variable should be coded 0 or 1. If the Court combines the wording with its own case-law, does not develop any new argument or contradicts a previous judgment on the same topic, and does not use principles or any international law, variable 22 can be coded 2.

Conversely, if the Court makes an extensive use of recitals, principles, and international sources of law, trying to go further than the literal meaning of the provisions, variable 22 can be coded 3 or 4.

DEPENDENT VARIABLES REGARDING OTHER SEPARATION-OF-POWERS RELATED ISSUES

23) Winner

Who won the issue? Applicant (1), Defendant (2), Inconclusive (97), Not applicable (99)

Only the parties should be taken into account for this variable, even though other actors may come off as winners. In preliminary reference procedures this will require some interpretation as the Court will not conclude by upholding one of the parties' claims. If it is not possible to conclusively say that one of the parties "won", for instance because the implications of the ruling for the parties cannot be determined or because the ruling entailed that both parties received satisfaction to some extent, code 97. 99 is used for legal issues where no party can be said to

"win", for instance in cases where there is only one party, and for all admissibility issues.

24) This variable was excluded in its entirety from the dataset. References to the parties and intervenients appearing before the Court will instead by captured using an automatic web scraping method.

25) General principles

References to general principles of particular relevance for the separation of powers. Only the principles indicated on the below list of relevant principles and in the formulations indicated there should be coded. Specific columns will be introduced for each principle. This variable only reflects whether (1) or not (0) a principle is cited by the ECJ. If a principle is not mentioned, code (99) on a) and b).

a) For each principle cited, indicate which actor is affected by the principle as applied by the Court using the system set out in variable 8a), with the addition of the generic code "MS" when Member States in general are affected by the principle. If the principle does not appear to affect any actor, code 99. If the principle affects several actors, code all the actors affected, separated by semicolon(s), in the order they appear in the judgment. Example: MS-01-EX; EU-01-EX.

If the Court refers to the EU institutions in general:

- *If the Court mentions the actor affected in the following paragraphs: code this actor*
- *If the actor affected is not mentioned in the following paragraphs: code all the institutions involved in the case*

b) If an actor is identified on a), indicate how that actor is affected: restricted (1), empowered (2), ambiguous (97), neither (98). If no actor is identified, or if the principle applies to the Court or to an individual, or when the Court in its reasoning (i.e., in the paragraphs covered by the legal issue) recalls a principle that a party refers to: code variable 25 = Value 1. Code 99 for 25 a) and b). If the principle affects several actors, code how each actor is affected, separated by semicolon(s), in the order they appear in the judgment. Example: 1;2.

This variable is coded based on the nature of the language in the paragraphs that mention the principle and the affected actor, i.e., if the Court uses a restricting or empowering language. It is not coded based on whether or not the outcome of the judgment will actually restrict or empower the actor.

- **Restricted** means that the Court applies the principle to give less room for maneuver to the actor. Code this if the language of the Court is of a negative nature, e.g., if the Court states that an actor may only or cannot do something as it would be contrary to the principle mentioned, or if the Court tries to induce an actor to act with caution in order for it to comply with the principle mentioned.
- **Empowered** means that the Court uses the principle to give more room for maneuver to an actor (for instance, in comparison to the wording of the regulation). This is coded when the language of the Court is of a positive nature, e.g., if the Court states that an actor may do something in accordance with the principle mentioned.
- **Neither** is coded when the Court applies the principle in a neutral language, or when the Court examines whether an actor complied with the principle

and merely finds that it did, or in other words, that the actor did what it was supposed to do.

Example (C-493/17):

42 Having regard to the principles referred to in paragraphs 31 to 33 of this judgment, those factors establish that the ECB duly stated the reasons for Decision 2015/774.

43 As regards the absence of any subsequent publication of details relating to the black-out period, the Court observes that, since the purpose of such publication would be to show the precise content of the measures adopted by the ESCB rather than the reasons justifying those measures, it cannot be required by virtue of the obligation to state reasons.

44 In view of the foregoing, it must be found that Decision 2015/774 is not vitiated by any defect in the statement of reasons such as to render it invalid.

List of relevant principles for variable 25):

- Proportionality
- Institutional balance
- Subsidiarity
- Principle of conferral/conferred powers

  Code this only when the exact phrasing occurs (most frequently occurs in matters of Union/MS division of powers).
- Principle of sincere cooperation
- Principle of harmonization/coordination
- Sovereignty
- Separation of powers
- Rule of law (different from **a** rule of law: which should not be coded) (in state liability, rule of law is not usually mentioned as a principle)
- Principle of good administration/sound administration
- Duty/obligation to state/provide reasons
- Principle of effective judicial protection
- Principle of primacy of EU law
- Principle of transparency

26) Comments

Comments field for the coder to indicate anything they find interesting or remarkable with the issue. To be used at the coder's discretion.

Appendix 3: Principles for variables 18b) and not 25):

For **migration** cases

- principle of first entry
- principle of solidarity and fair sharing of responsibility
- principle of upholding human dignity
- legal certainty
- principle of non-discrimination/equal treatment/equality (of treatment)
- principle of the best interests of the child
- principle of vulnerability
- right to be heard
- principle of effectiveness

  If the principle of effectiveness is explicitly mentioned by the Court and then referred to in terms such as "the effectiveness of EU law", code this reference as a reference to the principle. However, if the principle was never mentioned verbatim first, do not code any other similar wording.

- Principle/concept of safe third country or principle/concept of safe country of origin.

  Coders have required that the principle appear in itself, by these names or similar. References to EU secondary law provisions are not included if they are only referenced abstractly or by their article number. This rule usually applies to the lists of general principles (depending on how they are formulated in the list), but it is clarified here.

- Principle of non-refoulement.

For **EMU** cases

- Principle of equal treatment (of creditors/equality between all creditors) or principle/prohibition of unequal treatment (of creditors/credit institutions)

  Do not code this when similar phrasing occurs such as: 'this practice leads to unequal treatment of credit institutions.'

- Principle of an open market economy (with free competition)
- Principle of the independence of the ESCB/of the ECB
- Principle of home Member State prudential supervision

For **trade** cases

- principle of autonomy (not including procedural autonomy)
- principle of equal treatment
- principle of effectiveness
- principle of mutual trust

- principle of good faith
- principle of pacta sunt servanda
- principle of unity in international representation
- principle of the exclusive jurisdiction of the Court