Authority Transfer and Politicised Member State Litigation before the Court of Justice of the EU

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ABSTRACT

European integration is increasingly politicised. Contributing to a new strand of research that examines how EU institutions and Member State governments respond to this trend, this article focuses on the judicial arena. We explore whether authority transfers to the EU have provoked legal mobilisation by Member States before the Court of Justice of the EU, and we analyse the salience and polarisation of this litigation over time. Based on original data on interventions in all direct actions with government parties from 1954 to 2022, we find intensifying but differentiated judicial politicisation. Member States increasingly mobilise against European legislation, implementation, and enforcement. While challenges to legislation grew more salient but not more polarised over time, litigation against implementation decisions became more controversial but remained obscure. We argue that these varying trends mirror differential changes in the authority of EU institutions to enact, implement and enforce binding rules.

Keywords: European Union, Politicisation, Court of Justice of the EU, Litigation

INTRODUCTION

This paper explores the politicisation of the European Union (EU) in litigation before the Court of Justice of the EU (CJEU). Politicisation is understood as manifesting in growing mobilisation, salience, and polarisation of EU decisions against the backdrop of authority transfers to the EU (de Wilde et al., 2016, p. 4; Hutter & Kriesi, 2019, p. 999; Zürn, 2014, p. 50). While most politicisation research examines domestic actors and arenas, an emerging strand explores how actors at the EU level respond to societal politicisation (Bressanelli et al., 2020). Contributing to this line of work, we ask if and how Member State governments engage in politicisation before the CJEU. Has the intensification of European integration engendered more legal mobilisation against exercises of EU authority? Has government litigation become more salient and polarised among the EU governments? Focussing on Member States' litigation activity in direct actions, these questions address a gap in research on European legal mobilisation, which mostly deals with private actors and domestic courts in preliminary references (Conant et al., 2018; Pavone, 2022; Weiler, 1991).

We argue that Member State litigation is increasingly politicised as a result of the EU's growing authority to make, implement, and enforce binding rules, and by the extent to which EU institutions assert this authority in practice. Using actions for annulment, Member States increasingly mobilise against the adoption of European legislative rules and implementation decisions. Moreover, by analysing government interventions, we show that litigation against EU legislation grew more salient but not more polarised, while litigation against EU-level implementation became more controversial but remained obscure. Politicisation also permeates enforcement litigation. The Commission's increasingly confident enforcement of EU law led to more salient infringement proceedings with growing intergovernmental cohesion. This, in turn, likely contributed to the Commission's recent turn to forbearance (Kelemen & Pavone, 2023).

In the following, we first explain our unit of analysis, CJEU proceedings with government parties. Connecting literature on politicisation and judicial politics, we then develop theoretical expectations about the politicisation patterns in different judicial procedures. After describing our data and methods, we assess the empirical trajectory of judicial politicisation across the domains of EU-level rule-making, implementation, and enforcement, and we compare it with the extent of authority the EU wields in each domain. We close with a discussion of limitations and implications.

MEMBER STATE LITIGATION

Our dependent variable is politicisation in Member State litigation. Member State litigation refers to CJEU proceedings that involve Member States as applicants or de-

fendants. We examine all actions for failure to fulfil obligations and all government-submitted actions for annulment. These procedures are responsible for 93 percent of all Member State litigation (Appendix A). Actions for failure to fulfil obligations are the judicial stage of the infringement procedure by which the Commission enforces EU law. They allow the Commission[1] to ask the CJEU to determine that a Member State has failed to comply, and to impose a penalty. The annulment procedure allows Member States to challenge the legality of an EU legal act. Actions for annulment can be subdivided into annulments of legislative rules and annulments of implementation decisions. These annulments concern different types of issues and actor constellations, suggesting different patterns of politicisation, as explained later on. By including legislative and implementation annulments as well as infringement proceedings, our sample covers the main dimensions of political authority, namely the making, the implementation, and the monitoring and enforcement of binding rules (see de Wilde & Zürn, 2012, p. 142).

In annulment actions Member States are the applicants, whereas in infringement proceedings they are defendants.[2] Next to becoming a party, a Member State can also join a proceeding as *amicus curiae* by submitting a written intervention. Interventions provide the CJEU with relevant legal and factual information, and informally they also signal how the penning Member State likes the Court to rule (Dederke & Naurin, 2018). According to the Rules of Procedure of the Court of Justice, interventions must explicitly support either one or the other party "in whole or in part" (Art. 129 (1)). When the Court publishes a ruling, it indicates which interveners, if any, support which party, revealing information on the number of interveners and their positions. We use this data to assess the degree and direction of judicial politicisation.

We distinguish between politicisation *by* and *of* Member State litigation. Politicisation is commonly seen as comprised of mobilisation, salience, and polarisation (de Wilde et al., 2016, p. 4; Grande & Hutter, 2016a; Hutter & Kriesi, 2019, p. 999; Zürn, 2014, p. 50; Zürn et al., 2012). Mobilisation, also called "actor expansion" (Grande & Hutter, 2016a, pp. 8–9), refers to the degree to which further actors and arenas become involved in a conflict (see also Schattschneider, 1957). Salience or "awareness" (Zürn et al., 2012, p. 71) refers to how visible a conflict is, and polarisation refers to how much the actors diverge in their positions. We are interested in the extent to which Member States use EU litigation as a tool to challenge EU authority (politicisation *by* litigation) and in the extent to which litigation itself becomes politicised (politicisation *of* litigation). Politicisation *by* litigation captures how strongly Member States legally mobilise against exercises of EU authority, thus expanding the conflict

[1] Governments shy from open confrontation (Blauberger & Kelemen, 2017, pp. 331–332), so they have only filed seven infringement cases.

[2] But see footnote 1

to new actors and arenas. The higher the rate at which cases are brought in a given period, the stronger the mobilisation. Politicisation *of* litigation captures how salient and polarised individual proceedings are, as governments show greater concern for, and express diverging preferences over ongoing litigation. The more governments intervene, the more salient is the proceeding; and the more they intervene on opposing sides, the more polarised it is.

POLITICISATION AND EU AUTHORITY

Beyond describing patterns in the politicisation of and by Member State litigation, we also seek to explain them. We argue that politicisation in Member State litigation is driven by the expansion of EU authority, our independent variable. EU politics used to be characterised by a "permissive consensus" (Lindberg & Scheingold, 1970, Chapter 8) when citizens paid scant attention to the goings-on in Brussels – less Luxembourg – and afforded supranational and domestic elites considerable discretion (Hooghe & Marks, 2009). The CJEU contributed to this depoliticisation by promoting "integration through law" (Cappelletti et al., 1986), cloaked in legal reasoning and technical language (Blauberger & Martinsen, 2020; Burley & Mattli, 1993; Stein, 1981). Yet since the late 1990s, EU decisions more often entered the realm of mass politics and became more salient and contested among a more diverse crowd of actors (de Wilde & Zürn, 2012; Hooghe & Marks, 2009, p. 21).

European integration is politicised when the EU's growing authority knocks up against persisting legitimacy constraints (Grande & Kriesi, 2016, p. 279; Hooghe et al., 2019; Zürn et al., 2012, p. 70), especially in areas with overt distributive implications or close to sovereign statehood (Genschel & Jachtenfuchs, 2016, p. 49). Broader sections of the society then assign political responsibility to the EU and address it with demands. Politicisation is neither linear nor uniform, since a host of variables facilitate and moderate it across countries and issues, and because contestation tends to occur alongside major integration steps, including in the EU's early history (de Wilde et al., 2016; Hutter et al., 2016; Kriesi, 2016). Generally speaking, however, the "opportunities to politicise European issues became increasingly common" (Grande & Kriesi, 2016, p. 279), and politicisation therefore "intensified considerably over the past decades" (de Wilde et al., 2016, p. 5).

Societal politicisation "is taken up by national representatives and translated again at the EU level" (Saurugger, 2016, p. 936) into salient and polarised decision-making. Hooghe and Marks expected politicisation to exert "pressure on the level and scope of integration" (2009, p. 21). This "bottom up pressure" (Bressanelli et al., 2020, p. 338) affects several dimensions of EU authority. *Rule-making* in the EU Council has become more contentious at least since Lisbon, with more frequent negative

votes (Pircher & Farjam, 2021, p. 480; Plechanovová, 2011); EU-level *implementation* is increasingly delegated to agencies and "de novo bodies" (Bickerton et al., 2015) instead of the Commission, and lately also the *enforcement* of EU policy contends with increasing Member State opposition (Kelemen & Pavone, 2023). At the heart of most inter-institutional litigation lies the distribution of authority between the Commission, the EP, and the EU Council (Hartlapp, 2018). In line with these findings, authority transfer should also go hand in hand with governments legally mobilising against the exercise of EU authority, and with such litigation becoming more salient and partly more polarised. We leave it to future research to explore the role of societal politicisation as transmission mechanism, and focus in the remainder on the congruence between authority transfer and politicised litigation.

Our independent variable, EU authority, refers to the right of EU institutions to formulate, implement, and enforce binding rules (see de Wilde & Zürn, 2012, p. 142). Across all these dimensions, the EU has in the course of its history accumulated authority by covering ever more policy areas and territory. From humble beginnings as a customs union, the EU has matured into an Economic and Monetary Union and a "regulatory state" (Majone, 1997) with growing redistributive capacities (Caporaso et al., 2015; Schoeller & Weismann, forthcoming) and the ability to regulate "core state powers" that traditionally were national prerogatives (Genschel & Jachtenfuchs, 2016). Throughout seven enlargements, the EU spread from six to 28 countries, greatly increasing its heterogeneity and potential for conflict, until the unprecedented politicisation episode of "Brexit" culminated in the first withdrawal (Donoghue & Kuisma, 2022). Each Treaty reform moreover pooled additional rule-making authority in the EU Council by subjecting more areas to qualified majority voting (QMV), and delegated more rule-making authority to the Commission and the European Parliament (EP) as agenda-setter and, respectively, veto-player (Börzel, 2005).

Indirectly, the spread of QMV also augmented EU-level implementation authority by making it "much easier for the Commission to create coalitions among Member States for legislation that would free its hands at the implementation stage" (Bergström et al., 2007). While originally the Commission was responsible mainly for implementing Treaty provisions in competition law and agriculture, the Single Market and the parallel rise of the regulatory state increased the scope of its implementation authority (Blom-Hansen, 2011). Also the EU's enforcement authority increased, first by the Treaty reforms of Maastricht and Lisbon that included and then extended the possibility to impose sanctions on non-compliant Member States (Falkner, 2018), and second by the Commission's more and more confident use of its enforcement powers until the mid-2000s (Kelemen & Pavone, 2023).

POLITICISATION BY AND OF MEMBER STATE LITIGATION: EXPECTATIONS

Does the bottom-up pressure of societal politicisation extend to Member States' litigation behaviour? As the EU's authority grows, do governments mobilise more often against its decisions before the CJEU, and do these proceedings become more salient and polarised? With respect to politicisation *by* litigation, we expect the rate at which governments submit annulment actions against EU-level rule-making and implementation to increase. We moreover expect governments to litigate predominantly against rule-making under QMV because rule-making authority is pooled under QMV but not under unanimity. Most implementation decisions, by contrast, are adopted unilaterally by the Commission. While we expect litigation against EU-level implementation to increase as more implementing authority is delegated to the Commission, we also expect litigation to track how the Commission exercises its authority (see Bauer & Hartlapp, 2010, p. 209).

Turning to the politicisation *of* litigation, a similar logic applies to the salience of ongoing proceedings. *As EU authority grows, annulment and enforcement litigation become more relevant, and more Member States should take an interest. As for polarisation, by contrast, we expect it to increase only in litigation against EU-level rule-making and implementation, but to decrease in enforcement litigation*. The reason is that in enforcement litigation, the predominant issue is the extent to which EU law penetrates domestic legal orders. Based on the assumption that Member States protect their autonomy, *we expect that enforcement disputes largely pit governments against the Commission* (see e.g. Garrett, 1995; Kelemen & Pavone, 2023), *whereas annulment disputes more often pit governments against each other* due to their diverging economic and policy interests (Bauer & Hartlapp, 2010). Accordingly, *we further expect the positions that interveners take in rule-making litigation to correspond to how they voted on the contested act in the EU Council.* Since negative votes more frequently occurred in the post-Lisbon period, characterised by multiple crises and the accession of thirteen new Member States (Pircher & Farjam, 2021, p. 480; Plechanovová, 2011), *we expect rule-making litigation to become polarised* as well. Similarly, greater heterogeneity due to enlargement, and the multiplication of policy areas with delegated implementation authority *should lead to more polarised legal implementation disputes*.

Concerning enforcement litigation, the only formal change in the Commission's authority has been the possibility to seek a second ruling – after the CJEU determines a national breach of EU law – that authorises a penalty. This second procedure was introduced in the Maastricht Treaty and expedited in the Treaty of Lisbon (Falkner, 2018). Assuming that Member States, protecting their regulatory autonomy, try to limit the authority of the Commission to the minimum laid down in the Treaties, *we expect to find salient but uncontroversial cases where the Commission applies a broad*

interpretation of its enforcement powers. The Commission made increasing use of its authority to enforce EU law by bringing ever more infringement actions until the early 2000s, but then adopted a course of forbearance with much-reduced litigation (Kelemen & Pavone, 2023). Like with implementation decisions, we expect the salience and polarisation of enforcement litigation to track this change. *As Member States become aware of the Commission's growing pugnacity, they should intervene more often.* By the same token, *we expect enforcement litigation to become less rather than more polarised* because of Member States' shared concern for regulatory autonomy.

EMPIRICAL STRATEGY

We examine the plausibility of our expectations using original empirical data on all interventions in all main proceedings with Member State parties decided between 1954 until 2022 and procedural information from the Iuropa project (Brekke et al., 2023a).[3] To collect the intervener data, we identified all proceedings with Member State parties and scraped the corresponding judgements from the EU's main legal repository, EUR-Lex. Rulings unavailable on EUR-Lex were manually added from the CJEU's official archive InfoCuria. Each judgement includes a section that lists the parties along with the corresponding interveners in a semi-standardised format, which allowed us to programmatically extract the number of interveners supporting each party in each proceeding. We manually verified the resulting information.

Our dependent variables are the extent of legal mobilisation and the salience and polarisation of each proceeding. We measure legal mobilisation by the number of cases lodged in each year, salience by the number of interventions in each proceeding, and polarisation by the share of proceedings in which the interveners support different parties, as well as by a polarisation score. In the procedures of interest, each proceeding has two parties, and interveners must support either one or the other. Accordingly, the polarisation is lowest when all interventions accrue to one party, and highest when the interventions are evenly split between the parties, that is, when each party's share of interventions is 50 percent. The polarisation score is the standardised absolute difference between this maximum and the applicant's actual share of interventions, bound by 0 (no polarisation) and 100 (maximal polarisation).

Our independent variable is the extent of authority exercised by the EU. For rulemaking authority, we mainly consider whether the legislative acts that were disputed in annulment proceedings have been adopted under QMV and whether litigation happened around major Treaty reforms. For implementation authority, we consider the substantive scope of the Commission's formal implementation powers and trends in

[3] For litigation activity, we only include proceedings lodged until 2020 to account for the publication lag. On average, it takes 1.8 years (standard deviation 0.9) for a case to be decided.

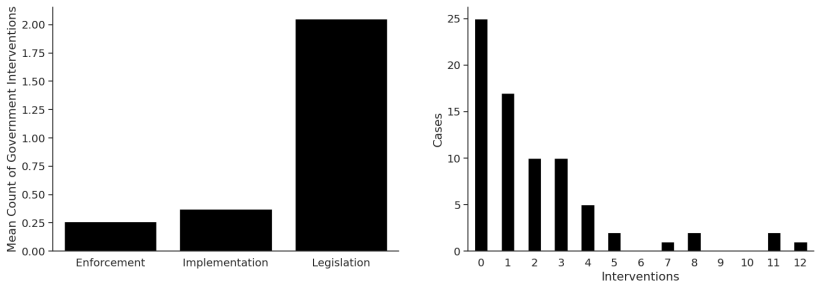
the Commission's actual application of this authority, drawing on specialised literature and qualitative information. We also examine how much new Member States contributed to legal mobilisation in both kinds of annulment proceedings. For enforcement litigation, finally, we consider the rare extensions of the Commission's relevant formal powers, and we examine to what extent the Guardian of the Treaty put its enforcement authority to practical use.

In order to ensure that the time trends in the number of annulment proceedings and interventions do not simply track the EU's territorial expansion or the proliferation of litigation opportunities with the growing *acquis*, we control for the number of Member States in each year and for the yearly output of legislative rules and implementation decisions, using the EUMS dataset (Fjelstul, 2021) and data collected from EUR-Lex using eurlex 0.4.8 for R (Ovádek, 2021). Annulment actions can only be filed within a short time frame of two months following the adoption of the contested act, according to Article 263 (6) TFEU.

Our distinction between legislative rule-making, implementation, and enforcement decisions is based firstly on the procedure. All actions for failure to fulfil obligations were categorised as enforcement decisions. Second, we considered actions for annulment in which the Commission or an EU agency was on the defending side as litigation against an implementation decision. We considered actions for annulment in which the Council (with or without the EP) was a defendant as litigation against legislative rule-making, unless the disputed act was adopted on the basis of secondary law. While most implementation decisions are taken by the Commission, the Council may, exceptionally, likewise be entrusted with implementation. This option is enshrined in Article 291 (2) TFEU for implementing acts, but it existed also before the Lisbon Treaty.

POLITICISATION ACROSS PROCEDURES

Our data consists of 3329 unique proceedings decided between 1954 and 2022, including 135 appeals that we dropped so as not to confound the analysis. We also dropped four annulment proceedings that attacked an administrative and a legislative act at the same time, and six cases in which a Member State launched enforcement litigation under Article 259 TFEU. Of the 3184 remaining cases, 2395 are enforcement cases, 714 are annulment actions against implementation, and 75 are annulment actions against legislation. Although enforcement litigation has strongly declined, as discussed later, across the whole time period it is responsible for the bulk of Member State litigation. Few instances of EU legislative rule-making are brought before the Court, but these cases are naturally most salient with 2.05 interventions on average. By contrast, litigation against enforcement and implementation decisions attracts just 0.26 and, respectively, 0.37 interventions on average (see Panel 1, left).



Panel 1: Left: Mean count of government interventions for different kinds of Member State litigation. Right: Distribution of government interventions in legislation annulments. Source: Procedural data from Iuropa (Brekke et al., 2023a, 2023b), intervention data compiled from Eurlex and Curiae.

The distribution of government interventions is moreover heavily skewed towards zero. There are up to twelve interventions in enforcement cases and in annulment cases against implementation, but most of these proceedings (88 and 80 percent, respectively) see no intervention at all. By contrast, Member States intervene in two thirds of all annulment cases against legislative rule-making, and the Commission routinely intervenes as well. The right-hand figure in Panel 1 shows how government interventions are distributed across these latter proceedings. The different salience of the various procedures is consistent with the unequal sizes of the groups that are affected by the contested decisions. Legislation applies to all Member States, whereas most infringement proceedings and implementation decisions only have ramifications for the parties to the dispute.

How controversial are the different kinds of proceedings among the intervening governments? Table 1 compares the share of interventions supporting the applicant, polarisation scores, and the percentage of disputed cases across procedures. The possible range of polarisation is from zero to hundred, and a proceeding is disputed when at least one intervener supports a different party than the other(s). Both measures are only defined for cases with two or more interventions. Overall, the degree of controversy in Member State litigation looks moderate. Just above one in six enforcement cases, close to two in six implementation cases, and just under three in six legislative rule-making cases are disputed. On polarisation, both types of annulment litigation are closer, accentuating their difference from enforcement litigation.

Moreover, although governments do not often intervene in enforcement cases, they strongly tend to support each other when they do, consistent with the idea that Member States defend their regulatory autonomy against supranational intrusions. By contrast, interventions in rule-making and implementation litigation are distributed more evenly between the parties, suggesting that economic and ideological issues, where Member States have more heterogeneous interests, structure the conflict rather

than regulatory autonomy *per se*. This supports the finding by Bauer and Hartlapp (2010) that many judicial implementation disputes concern issues related to domestic and EU-level subsidies with immediate redistributive consequences for the litigants. We discuss examples later on. Substantive policy interests seem even more relevant for litigation about legislative rule-making, where almost half of all proceedings are disputed and polarisation is highest. Yet in contrast to implementation litigation, the majority of interveners here supports the defendant EU Council (and EP), seeking to uphold the contested legislation. Arguably, the difference in applicant support is owed to the fact that most legislation reaching the CJEU in annulment proceedings has been adopted by a qualified majority of Member States, which resurfaces in litigation. Most implementation decisions, by contrast, are adopted unilaterally by the Commission. We return to this interpretation below.

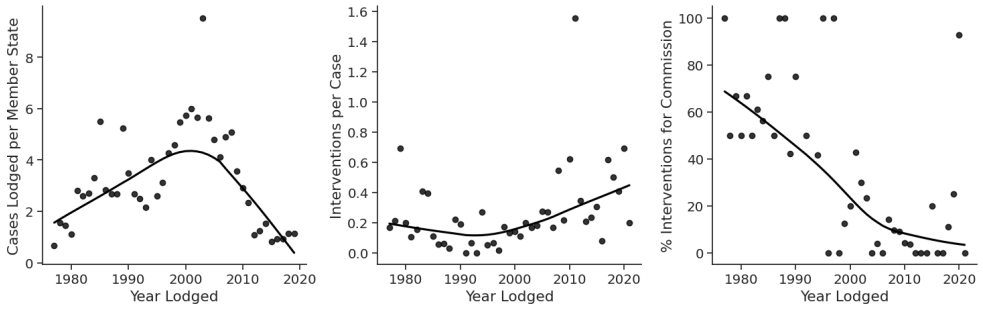
Procedure Type	Cases with > 0 Interveners	Cases with > 1 Interveners	Percent Disputed	Mean (St. D.) Polarization	Mean (St. D.) Applicant Share
Enforcement	294	121	17.36	10.92 (27.28)	19.50 (37.92)
Implementation	142	62	30.65	21.67 (35.64)	64.33 (44.95)
Rule-Making	50	33	45.45	27.62 (36.45)	40.78 (43.35)

Table 1: Government Intervener Polarisation and Alignment by Procedure. Source: Own compilation from Eurlex and Curiae. Polarisation ranges from 0 to 100; see "Empirical Strategy" for details. Interveners refers to government interveners. Applicant share is based on proceedings with at least one, percent disputed and polarisation are based on proceedings with at least two government interveners.

ENFORCEMENT LITIGATION: GROWING SALIENCE AND INTERGOVERNMENTAL COHESION

In enforcement litigation, the hallmarks of politicisation are perhaps clearest. As observed before (Falkner, 2018; Hofmann, 2018; Kelemen & Pavone, 2023), the Commission dramatically reduced the number of infringement proceedings after the turn of the century. At the height of its litigation activity, the Commission brought 143 cases to Court in the single year of 2003, 9.5 cases per member state (see Panel 2, left). In the ten years from 1997 to 2006, the Commission filed 54.6 infringement cases per state (964 in total), yet in the decade from 2010 to 2020, this number has shrunk to a mere 14.5 cases (400 in total). Behind this stark decline in enforcement litigation lies politicisation, manifesting in more salient lawsuits that are strongly polarised between the Commission and the Member States while intergovernmental polarisation has plummeted.

According to Kelemen and Pavone (2023, p. 801), the Commission adopted a deliberate strategy of forbearance in response to eroding governmental support, "as a Eu-



Panel 2: Left: Number of action for failure to fulfil obligations by the Commission, plotted against the year the case was lodged, divided by the number of EU members in that year, allowing for the exact accession date. Middle: Number of interventions submitted per action in each year, divided by the number of cases in that year. Right: Percentage of interventions supporting the Commission, plotted against the year the cases were lodged. Note how the outliers make the trend appear less dramatic. Source: Procedural data from Iuropa (Brekke et al., 2023a, 2023b), accession data from EUMS (Fjelstul, 2021), intervention data compiled from Eurlex and Curiae.

rosceptic backlash intensified across member states". The Barroso presidency therefore centralised control over the enforcement process at the expense of the politically independent legal service (ibid., p. 790). The Commission, by contrast, claims its new approach is owed to efficiency. By settling minor infractions out of Court, under managerial procedures like the EU Pilot, it could focus legal action on the most egregious cases of non-compliance (European Commission, 2017a, 2017b; see also Falkner, 2018, pp. 773–774). Our data casts doubt on the Commission's presentation and confirms the hypothesis that it responded to political pressure.

This can be seen first in the yearly number of government interventions per infringement case, which starts to increase sharply before the number of proceedings declines (see Panel 2, middle)). Up until the mid-90s, interventions actually waned, but as the Commission became litigious, they started to grow. In the ten years around the peak of enforcement litigation from 1997 to 2006, Member States on average submitted 0.18 interventions per case, and 10 percent of all cases included at least one intervention. Compared to the period from 2011 to 2020, the number of interventions per case more than tripled to 0.59, and the share of cases with interventions more than doubled to 21 percent.[4] As enforcement became more rigorous, Member States paid stronger attention to infringement proceedings, but they also remained vigilant under forbearance. In line with the Commission's argument, the fact that interventions still continue to increase could mean that Member States simply focus their resources on fewer proceedings, but this would not explain why interventions

[4]The yearly caseload increases as more countries (potential litigants) join the EU. By presenting the number of interventions per case, we thus also adjust for the growing EU membership.

already proliferated before the launch of the EU pilot and while the Commission was ramping up litigation.

The alternative hypothesis, that enforcement litigation has become politicised, is bolstered by the greater polarisation between the Commission and EU governments that we observe in the disposition of the interventions. Not only did the Member States submit *more* interventions when the Commission became overly litigious, they also submitted *more adverse* interventions, signalling discontent and closing the ranks. From 1968, when the first enforcement case was litigated, through 2000, almost half (11) of all infringement proceedings with more than one intervention (24) included submissions supporting different parties. From 2001 through 2021, just over every tenth such proceeding was contentious in this sense (10 out of 97). Between both periods, the intergovernmental polarisation scores shrunk from 44 to 18 percent, indicating closer alignment between the Member States. Finally, support for the Commission also went off a cliff (Panel 2, right). Before 2001, 41 percent of all interventions supported the Commission. Since 2001, this share has dropped to 9 percent. Save for a few outliers, such as the recent rule of law cases,[5] Member States nowadays rarely ever intervene in favour of the Commission. They intervene more often, and almost always in support of each other.

Exploring individual cases, we also find governments intervening in support of each other where they can expect to be targeted with similar enforcement actions in the future or where the Commission files infringement proceedings against multiple Member States over similar legal arrangements (see also Schmidt, 2018, pp. 100–106). Such a "bundled" enforcement action featured in relation to national regulations concerning the profession of notaries that the Commission viewed as incompatible with the freedom of establishment.[6] Member States also intervene in concert to oppose more structural extensions of the Commission's enforcement authority. A recent example involved ten governments opposing the Commission's attempt to directly set the amount for lump sum or penalty payments. This option was introduced by the Lisbon Treaty, and the Commission tested how far it could push its unclear boundaries.[7]

[5] CJEU, C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97; CJEU, C-156/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98; CJEU, C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596; CJEU, C-204/21, *Commission v. Poland*, ECLI:EU:C:2023:442.

[6] CJEU, C-47/08, *Commission v. Belgium*, ECLI:EU:C:2011:334; CJEU, C-50/08, *Commission v. France,* ECLI:EU:C:2011:335; CJEU, C-51/08, *Commission v. Luxembourg*, ECLI:EU:C:2011:336; CJEU, C-53/08, *Commission v. Austria*, ECLI:EU:C:2011:338; CJEU, C-54/08, *Commission v. Germany*, ECLI:EU:C:2011:339; CJEU, C-61/08, *Commission v. Greece*, ECLI:EU:C:2011:340; CJEU, C-54/08, *Commission v. Germany*, ECLI:EU:C:2011:339; CJEU, C-52/08, *Commission v. Portugal*, ECLI:EU:C:2011:337.

[7] CJEU, C-543/17, *Commission v. Belgium*, ECLI:EU:C:2019:573.

LITIGATION ABOUT RULE-MAKING: MORE FREQUENT AND SALIENT BUT NOT MORE POLARISED

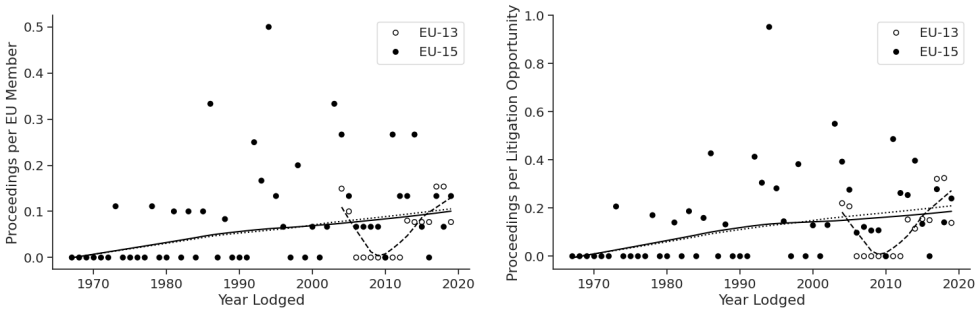
Next to enforcement, politicisation also shows up in litigation against legislative rule-making. First, rule-making authority is politicised *by* litigation. We observe a steady rise in annulment actions against legislative acts that is driven by the pooling and delegation of authority as new policy areas were subjected to QMV and parliamentary co-decision, and by its growing territorial scope as new states joined the EU. As for politicisation *of* litigation, we find that proceedings have become more salient, with more governments intervening over time. However, aside from the principled opposition of some eurosceptic governments, we do not find higher levels of polarisation between interveners, indicating that the expansion of QMV rather than growing heterogeneity shapes the litigation behaviour.

Before 1987, when the Single European Act (SEA) entered into force, legal challenges to secondary law were rare. Between the first annulment of secondary law in 1973 and 1985, the CJEU received an annulment action less often than every second year on average, amounting to 0.04 cases per Member State and year. Yet the caseload grew strongly after the SEA had brought several policy areas under QMV, notably the Single Market. Averaged over the years 1986 through 2020, the yearly arrival of new proceedings morethan doubed to 0.1 cases per Member State (close to 2 cases overall). Although the Treaty of Rome already provided for QMV in some policy areas, the informal Luxembourg compromise in practice gave each Member State a veto (Bulmer et al., 2020, pp. 128–129), so governments did not have to resort to litigation to block rule-making. Rather than ordinary legislative matters, the first legal challenges therefore concerned transitional arrangements after EU accession[8] or autonomous decisions of the EP on the location of its seat and meetings.[9] Litigation activity first spiked in 1986 after the Member States had signed the SEA (see Panel 3), and continued to grow until the Eastern enlargements in the 2000s. Although the Luxembourg compromise was never formally revoked, the SEA "relaxed attitudes […] on voting" (Hayes-Renshaw & Wallace, 2006, p. 270), so that already before its ratification, "some ninety-three decisions are reported as having been taken in the Council by QMV" (ibid., p. 276). Following this change, the UK brought annulments against two agricultural directives that it had voted against (see Meng, 1990, p. 822), arguing they should have been adopted under Single Market powers, which at the time still required unanimity.[10] The use of QMV in new policy areas sparked litigation also in relation to other areas of EU law, such as the adoption of a vocational training pro-

[8] CJEU, Case 151/73, *Ireland v Council*, ECLI:EU:C:1974.

[9] CJEU, Case 230/81, *Luxembourg v European Parliament*, ECLI:EU:C:1983:32; CJEU, Case 108/83, *Luxemburg v European Parliament*, ECLI:EU:C:1984:156.

[10] CJEU, C-84/94, *United Kingdom v Council*, ECLI:EU:C:1996:431, although the Court annulled one



Panel 3: Number of annulment action against legislative EU acts, stratified by new (EU-13, open circles) and old Member States (EU-15, filled circles), and plotted against the year in which the case was lodged, divided by the number of members in that year and group (left) or by the litigation opportunities and multiplied by one thousand (right), allowing for the exact accession date. A litigation opportunity is defined as the product of the number of members in a given year and group and the legislative acts adopted in that year. The lines represent locally estimated scatterplot regression functions for the new (dashed), old (dotted), and all (solid) Member States, calculated with regplot from Seaborn 0.13.2 for Python (Waskom, 2021). Source: Procedural data from Iuropa (Brekke et al., 2023a, 2023b), accession data from EUMS (Fjelstul, 2021), number of administrative acts from EUR-Lex, collected using eurlex 0.4.8 for R (Ovádek, 2021). Classification of legal acts: see "Empirical Strategy".

gramme[11] or, following the entry into force of the Treaty of Maastricht, the Working-Time Directive.[12] In both contexts, the UK argued that legislation should have been adopted on the basis of the EU's residual competence, nowadays Article 352 TFEU, a provision that would have required unanimity in the Council. The Court, however, rejected this argument.

Another sign that the pooling of rule-making authority drives litigation is the fact that almost no proceeding concerns secondary law adopted under unanimity rule. Nothing legally prevents governments from pursuing the judicial annulment of an act they supported in the Council,[13] but they rarely have political incentives to do so.[14] Yet as QMV became more widespread, the share of contested acts increased, and more cases ended up before the CJEU. Congruent with this reasoning, the alignment of litigants sharply mirrors political majorities, with the applicants and their supporting interveners voting against the legally disputed act, and the interveners on the Council's and, if applicable, the EP's side in its favour. The VoteWatch dataset (Hix et al., 2022), contains information about Member States' individual votes on the legislative acts at

provision of this legal act, without however challenging the choice of legal basis for the legal act as such.

[11] CJEU, Case 56/88, *United Kingdom v Council*, ECLI:EU:C:1989:224

[12] CJEU, C-84/94, *United Kingdom v Council*, ECLI:EU:C:1996:431

[13] CJEU, Case 166/78, *Italy v. Council*, ECLI:EU:C:1979:195, para. 6.

[14] Such situations can result from inconsistent positions at the domestic level, from changes in government, or as an attempt to avoid blame for unpopular decisions (Adam et al., 2015).

issue in 15 of our 75 annulment proceedings.[15] Of the sixteen applicants in these cases, 12 voted against the act, two did not participate in the vote under the enhanced cooperation procedure,[16] one abstained while submitting a critical statement to the record,[17] and one voted in favour[18]. Voting and interventions are only slightly less congruent. Seven out of the eleven interveners on the applicants' side in this sample voted against the act, three voted in favour, and one abstained. Conversely, all of the 96 interveners that supported the defendant and did not opt out from legislation voted in favour of the act.

The enlargements of the EU by thirteen new Member States between 2004 and 2007 somewhat affected litigation activity too. After 2004, the yearly flow of cases from the old Member States began to plateau. The EU-13 at first showed restraint, except for two early Polish submissions on accession conditions[19] and on the recognition of qualifications[20]. Only recently have the EU-13 become quite litigious. In the most recent three year average, the new Member States in fact lodged more cases than the EU-15/14, as shown by the dashed and dotted lines in Panel 3. Poland alone is responsible for eight of the thirteen cases from the new Member States, followed by Hungary with three cases. With the free movement of services, climate and environmental policy, asylum, and the rule of law,[21] many of these proceedings concern issues that were prominent in the enlargement debates and reflect the growing socio-economic and political heterogeneity in the EU. Overall, the EU-13 seem to repeat the same trajectory that the EU-15 followed before them, only faster.

Annulment litigation about secondary law has continuously become more salient (see Panel 4, left). As more decisions were taken by QMV and as the national positions became more heterogeneous, Member States intervened in ongoing proceedings more often. Before the turn of the century, Member States made on average 1.2 submissions per case, and 52 percent of the cases had no intervention; from 2000 through 2021, they made 2.6 submissions on average, and only 23 percent of the cases lacked an intervention. The earliest example of a salient case concerned the famous 1993

[15] These acts were adopted between 2011 and 2020. The Council does not disclose all votes, and there is no systematic documentation before 2009.

[16] CJEU, Case C-274/11, *Spain and Italy v Council*, ECLI:EU:C:2013:240.

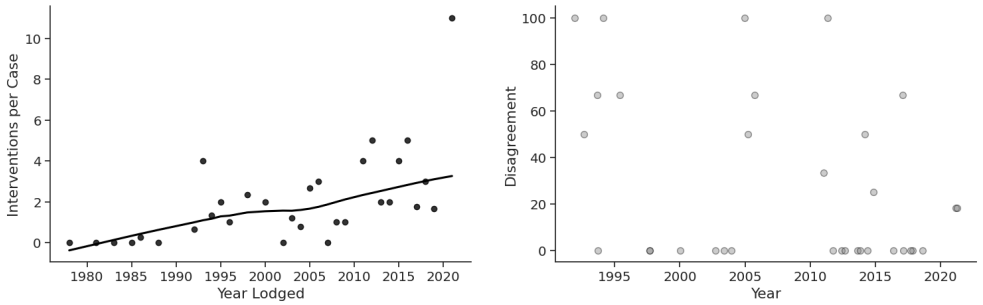
[17] CJEU, Case C-270/12, *United Kingdom v Parliament and Council*, ECLI:EU:C:2014:18.

[18] CJEU, Case C-121/14, *United Kingdom v Parliament and Council*, ECLI:EU:C:2015:749.

[19] CEU, Case C-273/04, *Poland v Council*, ECLI:EU:C:2007:622.

[20] CJEU, Case C-460/05, *Poland v Parliament and Council*, ECLI:EU:C:2007:447.

[21] On the Posted Workers Directive, CJEU, C-620/18, *Hungary v Parliament and Council*, ECLI:EU:C:2020:1001; On the Greenhouse gas emission trading scheme: CJEU, C-5/16, Poland v Parliament and Council, ECLI:EU:C:2018:483; on the refugee relocation mechanism: CJEU, C-643/15 and C-647/15, Slovak Republic and Hungary v Council, ECLI:EU:C:2017:631; on the Conditionality Regulation: CJEU, C-156/21, Hungary v Parliament and Council, ECLI:EU:C:2022:97; CJEU, C-156/21, Poland v Parliament and Council, ECLI:EU:C:2022:98.



Panel 4: Left: Number of interventions submitted per annulment action against a legislative act in each year, divided by the number of cases in that year. The line represents a locally estimated scatterplot regression function calculated with regplot from Seaborn 0.13.2 (Waskom, 2021). Note how the most recent outlier makes the trend appear less dramatic. Right: Level of disagreement among the interventions for each case with two or more interveners (see "Empirical Strategy" for details). Cases submitted in the same year are plotted as overlapping circles. Source: Compilation of data from Iuropa (Brekke et al., 2023a, 2023b), Eurlex, and Curiae.

Banana controversy (Alter & Meunier, 2006, p. 367) with nine interventions neatly following the voting coalition.[22] The most salient disputes, however, are of recent origin and were often launched by EU-13 states, among them two actions against the Conditionality Regulation. The regulation broke new ground in the EU's response to the rule of law crisis and saw no less than eleven government interventions. While the two applicants, Poland and Hungary, each supported the other's application, the remaining interveners supported the defendant EU Council and EP.[23] The high number of interventions in support of the measure suggests that Member States defend politically-brokered compromises also in court.

In contrast to litigation activity and salience, the level of polarisation in annulments against EU rule-making did not increase much. As explained earlier, virtually all contested acts are adopted by QMV, and the distribution of interventions mirrors the political alignment in the Council when the acts were adopted. As a result, most interventions support the defendant (Table 1). In 18 of the 33 relevant proceedings with two or more government interventions, shown in the right-hand figure of Panel 4, all interveners supported the same party. The remaining 15 disputed proceedings clustered in the early 1990s after the introduction of QMV, and in the post-enlargement decades, with a period of calm between. In the most recent decade, we again see more undisputed proceedings. Yet the share of contested cases is the same before and after 2004 (45 percent), and the polarisation increased only slightly from 41 to 54 percent. Given the increasing heterogeneity among Member States since the

[22] CJEU, C-280/93, *Germany v Council*, ECLI:EU:C:1994:367.

[23] CJEU, C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97; CJEU, C-156/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

Eastern enlargements, we did expect more, but also lasting disagreement since 2004. The reason for the rather stable degree of polarisation could be institutional. Since Treaty reforms and enlargements barely changed the size of the majority needed to pass legislation (Aken, 2012, p. 21) they did not affect the average share of interventions in favour of each party.

Some policy areas are more prone to polarised litigation than others. Specifically, this holds true for recent litigation in migration law (Bornemann, 2020, p. 551). An example of this is the Visegrád states' opposition to supranational efforts of refugee relocation (Varju et al., 2024). In the initial annulment case, the legality of the respective Council decisions was challenged by Slovakia and Hungary, supported by Poland, facing off a large group of seven old member states and the Commission advocating in favour of the decision. In the follow-up infringement cases brought by the Commission against the Czech Republic, Hungary and Poland, all defendant governments intervened in support of each other in their respective proceedings.[24]

All this supports the expectation that EU legislation is more frequently politicised *by* litigation as rule-making authority was pooled and in parallel with the EU's territorial expansion. As for politicisation *of* litigation, the results are mixed, since we observe more salient proceedings, but no continuous increase in polarisation. Of those cases that were particularly controversial, however, many were submitted by eurosceptic governments, for example in the case of Poland's and Hungary's opposition to migration policy reform and rule of law safeguards.

LITIGATION ABOUT IMPLEMENTATION: MORE FREQUENT AND POLARISED, BUT STILL OBSCURE

Finally, we also find judicial politicisation concerning the implementation of EU law. Starting with politicisation *by* litigation, we observe steadily increasing annulment actions until the early 2000s, followed by a slight decline in terms of cases per Member State and a plateau in cases per litigation opportunity (Panel 5). Both rise and decline coincide with enlargement as well as changes in European implementation authority concerning agriculture and state aid, which are responsible for three out of four cases. Concerning enlargement, we first note the burst of cases in 1985 that was largely due to a row over fishing quotas in the run-up to the Portuguese and Spanish accessions.[25]

[24] CJEU, C-715/17, C-718/17, C719/17, *Commission v. Poland, Hungary and Czech Republic*, ECLI:EU:C:2020:257.

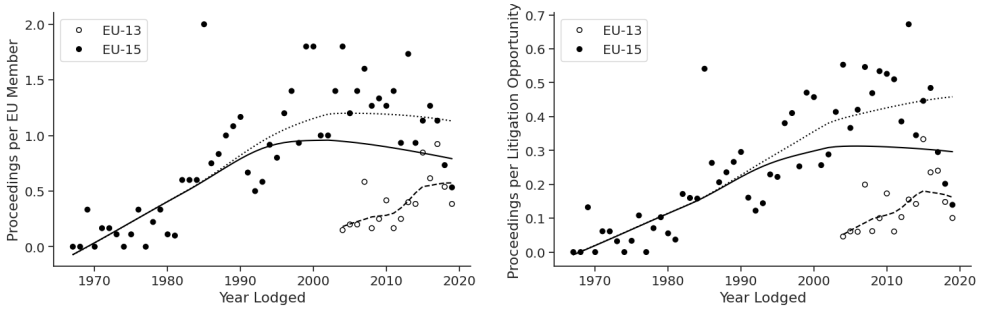
[25] ECJ, Case 326/85, *Netherlands v. Commission*, ECLI:EU:C:1987:547; Case 332/85, *Germany v. Commission*, ECLI:EU:C:1987:549; Case 336/85, *France v. Commission*, ECLI:EU:C:1987:550; Case 346/85, *United Kingdom v. Commission*, ECLI:EU:C:1987:551; Case 348/85, *Denmark v. Commission*, ECLI:EU:C:1987:552.

Moreover, the Eastern enlargement contributed to the plateau in the number of cases since 2004 due to their initial reluctance to mobilise before the CJEU, probably a short-lived effect.

Based on data similar to ours, Bauer and Hartlapp (2010, p. 208) argue that the "increase in the late 1980s and 1990s seems to reflect the power transfer related to the Common Market Programme as established by the Single European Act" as well as "the delegation of further competences under the Maastricht Treaty". Indeed, as with secondary law annulments, we see litigation spike around major Treaty reforms, in particular the SEA, which not only brought the EU's Single Market but also its Common Agricultural Policy (CAP) under QMV (Daugbjerg, 1999, p. 421).

Agriculture and fisheries account for 53 percent of all annulment litigation against administrative acts. Although major changes to CAP only happened in 1992 with the MacSharry reform (Snyder, 2014, pp. 486–487), the move to QMV might have freed the Commission's hand in implementation earlier. Apart from the spike in 1985, CAP litigation increased quite steadily until the late 1990s (Appendix B). The subsequent decline was arguably caused by decentralisation. Responding to long-standing oversupply and budgetary problems, the Agenda 2000 and Fischler reforms in 1999 and 2003 decoupled agricultural aid from output by substituting direct payments for price support. With this came a devolution of implementation authority, as member states were allowed to distribute EU subsidies between their farmers "as they saw fit" and could "modulate" payments between different CAP pillars (Bulmer et al., 2020, p. 404).

The second most common subject is state aid, accounting for 21 percent of all litigation against administrative decisions. In contrast to CAP, state aid control is driven by "negative integration" (Scharpf, 1996), the direct application of Treaty provisions to remove market barriers independently of Council assent. Art. 107 TFEU prevents Member States from disbursing subsidies that distort competition, and under Art. 108 TFEU the Commission can authorise exceptions from this rule and investigate suspect cases. These instruments have existed since 1957, so the Commission always enjoyed "substantial freedom of manoeuvre" (Cini, 2001, p. 197), and the move to QMV made little difference. Although state aid became "a Commission priority" (Cini, 2001, p. 196) in the 1980s, with a first rise in annulment actions, legislation was adopted only in 1998, not least because the vague Treaty clauses afforded the Commission, holding the monopoly of initiative, more flexibility (Blauberger, 2009, p. 732). Helped along by the CJEU (Smith, 1998, pp. 66–69), the Commission exercised its authority with increasing resolve. The definition of state aid was broadened to encompass creative evasions, information requirements were extended, Member States were obligated to recover illegally granted aid, and a compliance constituency emerged that bolstered the Commission's capacity (Aydin, 2014, pp. 144–146; Blauberger, 2009, p. 721; Smith, 1998, pp. 62–63). Investigations therefore multiplied (Appendix C;

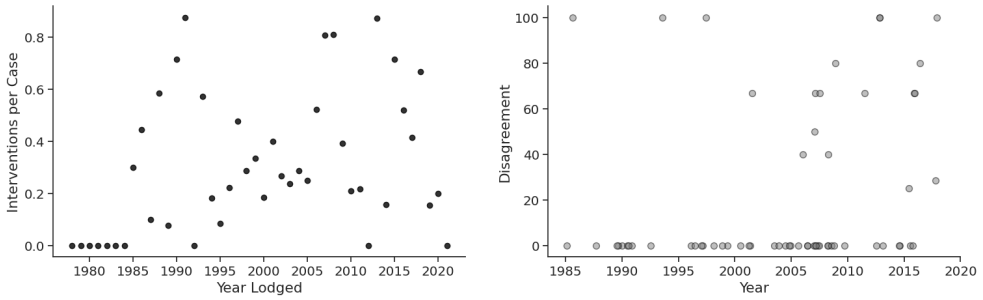


Panel 5: Number of annulment action against administrative acts, stratified by new (EU-13, open circles) and old Member States (EU-15, filled circles), and plotted against the year in which the case was lodged, divided by the number of members in that year and group (left) or by the litigation opportunities and multiplied by one thousand (right), allowing for the exact accession date. A litigation opportunity is defined as the product of the number of members in a given year and group and the legislative acts adopted in that year. The lines represent locally estimated scatterplot regression functions for the new (dashed), old (dotted), and all (solid) Member States, calculated with regplot from Seaborn 0.13.2 for Python (Waskom, 2021). Source: Procedural data from Iuropa (Brekke et al., 2023a), accession data from EUMS (Fjelstul, 2021), number of administrative acts from EUR-Lex, collected using eurlex 0.4.8 for R (Ovádek, 2021). Classification of legal acts: see "Empirical Strategy".

Aydin, 2014, p. 145), and so did the actions for annulment in their wake, peaking with at least[26] 11 state aid cases in the year 2000 (Appendix B).

Struggling with the growing work-load (Blauberger, 2009, p. 732; Smith, 1998), the Commission began to develop guidelines for permissible aid through soft-law and, starting with the Enabling Regulation 994/1998 and the Procedural Regulation 659/1999, also by way of hard legislation (Cini, 2001, p. 202). The Procedural Regulation codified the notion that Member States may not grant aid without approval and must recover illegal aid (Blauberger, 2009, p. 721). Under the Enabling Regulation, the Commission can exempt entire aid categories from prior approval via block exemptions (Blauberger, 2009, p. 732). Both lowered the incentives to litigate by enhancing legal certainty. By deploying block exemptions, the Commission moreover returned the authority to implement state aid for a growing number of goals to the Member States. From 2001 onwards, the categories exempted rose dramatically, to the effect that, in 2022, 84 percent of all new state aid measures fell under a block exemption or a sectoral exemption for agriculture and fishery (European Commission, 2024, p. 89). In addition, the Commission also granted the Member States considerable autonomy to adopt state aid following the 2009 Eurozone crisis and the 2020 Covid-19 pandemic under so-called "temporary frameworks" (Di Carlo et al., 2024). These changes are reflected in much fewer investigations and negative decisions since around the year 2000 (Appendix C). As the Commission exercised authority with greater restraint,

[26]Topic keywords are only available for judgements published on Eur-Lex (94.4 percent of our sample).



Panel 6: Left: Number of interventions submitted per annulment action against administrative acts in each year, divided by the number of cases in that year. Right: Level of disagreement among the interventions for each case with two or more interveners (see "Empirical Strategy" for details). Cases submitted in the same year are plotted as overlapping circles. Source: Compilation of data from Iuropa (Brekke et al., 2023a, 2023b), Eurlex, and Curiae.

litigation concerning state-aid began to decline accordingly. By contrast, the flow of annulment cases unrelated to CAP or state aid remained virtually constant – further evidence that politicisation by litigation is related to authority transfers specific to these areas (Appendix B).

Turning to politicisation *of* litigation, actions against EU-level implementation did not become more salient, unlike the other proceeding types (Panel 6, left). We expected salience to stay low because EU-level implementation remains concerned with rather technical questions. This is borne out in the aggregate analysis above. Still, on some occasions, technicalities have economic relevance or may be salient to voters, as in Austria's legal battle against Commission decisions authorising state aid for nuclear energy. The annulment proceedings in *Hinkley Point C* saw strong support for the defendant, with seven "nuclear-friendly" countries intervening in support of a state aid measure for a British nuclear power station, and in the proceedings about the Hungarian plant *PAKS II*, the Commission was supported by six Member States.[27]

While litigation concerning EU-level implementation remained obscure, it did become more polarised. The inflection point occurred around the turn of the century (Panel 6, right). Between 1954, when the first case was lodged, and the end of 2000, only three out of the 20 cases with two or more interveners have been disputed (18 percent), yet the polarisation score in these three cases was extreme (see the upper-left corner in Panel 6, right), so that across the 20 cases, polarisation no less stood at 45 percent. Between 2001 and 2021, 16 out of 42 cases with two or more interveners were disputed (37 percent), while the polarisation score increased sharply to 86 percent. Only six of the 19 disputed cases in the entire period concerned CAP or

[27] Regarding Hinkley Point C in the UK, CJEU, T-356/15, *Austria v. Commission*, ECLI:EU:C:2018:439 and, upon appeal, CJEU, C-594/18 P, *Austria v. Commission*, ECLI:EU:C:2020:742; regarding PAKS II in Hungary, CJEU, T-101/18, *Austria v. Commission*, ECLI:EU:T:2022:728.

state aid, despite these issues representing 74 percent of all implementation litigation. This suggests that the increase in polarisation results from an expansion of European implementation authority in new policy areas. State aid "pits the Commission directly against the member states" (Cini, 2001, p. 198),[28] and CAP is dominated by sectoral policy communities where governmental interests are likewise homogeneous (Daugbjerg, 1999). By contrast, we find among the more polarised cases issues related to language,[29] transparency,[30] energy,[31] climate,[32] as well as environmental,[33] consumer,[34] and financial regulation,[35] where policy preferences are more diverse. Despite the growing number of polarised cases, however, they remain exceptions.

In summary, politicisation *by* litigation against EU-level implementation has intensified until the mid-2000s, followed by a gradual decline. Mirroring our findings about enforcement, this trend may result from a less assertive exercise of implementation authority. In terms of politicisation *of* litigation, annulments against implementation decisions show no tendency towards salience, but they have become more polarised since the early 2000s, as implementation authority spread to new policy-areas.

CONCLUSION

In parallel with the authority transfer to European institutions, the EU has seen a remarkable growth of societal politicisation, putting Member States under bottom up pressure to scrutinise and contest EU-level rule-making, implementation, and enforcement. Focussing on proceedings that involve governments as parties, we examined whether this pressure led to more politicised litigation. As integration intensified, the Member States increasingly politicised the exercise of EU authority *by* litigation in front of the CJEU, launching ever more annulment actions against EU-level legislation and implementation decisions, whereas the rate at which the Commission brings infringement proceedings before the Court strongly declined.

[28] There are also zero-sum constellations, in which, say, France files an annulment in favour of a French firm, and the Netherlands intervenes for a Dutch competitor (Adam et al., 2020, Chapter 6), but these cases rarely involve more than one intervener.

[29] CJEU, T-510/13, *Italy v. Commission*, ECLI:EU:T:2015:1001.

[30] CJEU, T-59/09; *Germany v. Commission*, ECLI:EU:T:2012:75; CJEU, C-506/08 P, *Sweden v. MyTravel Group plc and Commission*, ECLI:EU:C:2011:496.

[31] CJEU, T-883/16, *Poland v. Commission*, ECLI:EU:T:2019:567

[32] CJEU, T-183/07, *Poland v. Commission*, ECLI:EU:T:2009:350; CJEU, T-263/07, *Estonia v. Commission*, ECLI:EU:T:2009:351; CJEU, T-369/07, *Latvia v. Commission*, ECLI:EU:T:2011:103.

[33] CJEU, T-699/17, *Poland v. Commission*, ECLI:EU:T:2021:44.

[34] CJEU, C-14/06, *Denmark and European Parliament v. Commission*, ECLI:EU:C:2008:176.

[35] CJEU, T-496/11, *United Kingdom v. ECB*, ECLI:EU:T:2015:133.

We observed a parallel increase in the politicisation *of* Member State litigation, with more frequent and more diverging interventions, indicating growing salience and polarisation. These trends are not uniform. Both enforcement litigation and annulment proceedings against legislative rule-making have become much more salient, reflecting the accumulation of legislative authority and the more rigorous deployment of enforcement authority. Although the Commission has likewise assumed more implementation authority, the corresponding litigation has not become more salient. The reason is its narrow application and technical nature, characteristics that remained constant.

As expected, how governments align depends on the main issue that structures the conflict in each procedure. In infringement proceedings, Member States united against the Commission's increasingly hard-nosed enforcement due to their shared preference for regulatory autonomy. As a result, the intergovernmental polarisation decreased, and instead we find more polarisation between the Commission on the one hand and the Member States on the other. This has not always been the case. In earlier times, governments were almost as likely to support than to oppose the Commission in infringement cases. The concerted opposition will presumably exacerbate forbearance.

In annulments of EU legislation and implementation decisions, policy interests play a more important role than autonomy as such. We argued that the Commission's push into areas outside the realms of agriculture and competition policy is responsible for more polarised implementation disputes. Yet contrary to our expectations, annulment proceedings against EU legislation did not become more polarised, despite the use of QMV and more contested voting in the enlarged EU. One possible explanation is that controversial proposals will often be rejected by the Council, and acts adopted by narrow margins – like the Posted Workers Directive and the Refugee Relocation Mechanism – remain infrequent.

Governments increasingly use interventions to defend political compromises. This may be a response to the politicisation *of* litigation. Member States have an interest in the CJEU upholding the legality of EU legal acts in Court that they supported in the Council, opposing annulment challenges filed by other governments. Moreover, Member States increasingly view interventions as an expedient avenue for engaging with the Court. This is particularly visible in relation to governmental litigation activity post accession. EU-13 Member States initially did not file many annulment cases, but gradually became more active, eventually overtaking the EU-14/15.

Our findings are consistent with recent work on the repercussions of domestic politicisation in the decision-making of the political EU institutions. We showed that similar dynamics are at play in the judicial arena. These results suggest areas for further inquiry. First, direct actions are in some sense "most likely cases" for politicisation, so it remains an open question whether our results extend to preliminary refer-

ences. Preliminary rulings may also raise issues of EU authority, but they often do so in a circumspect manner, and since Member States are not directly involved as parties, they are less adversarial. Second, our discussion lends urgency to the question if and how national litigation units coordinate their interventions as "networks of national agents" (Granger, 2013, p. 68), strategically shaping the evolution of EU law. Finally, while our analysis confirms the "authority transfer hypothesis" (Zürn, 2016; see also Zürn et al., 2012), given the "intermittent" (Grande & Hutter, 2016b, p. 34) and "differentiated" (de Wilde et al., 2016) nature of politicisation, future research could examine the societal transmission mechanism between authority transfer and the politicisation of EU-level litigation.

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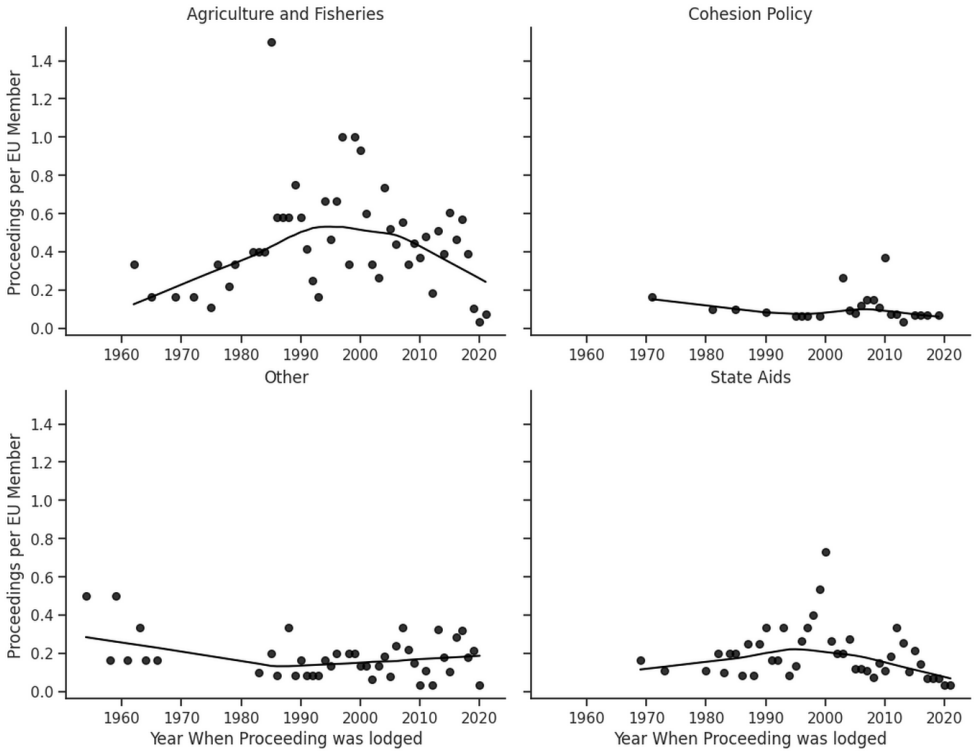
APPENDIX

Appendix A: Procedures with Member State Parties, 1957–2022

Procedure	Count	Percentage
Action for failure to fulfill obligations	2410	69.69
Action for annulment	805	23.28
Appeal	135	3.9
Reference for a preliminary ruling	92	2.66
Action for failure to act	4	0.12
Action for damages	4	0.12
Arbitration clause	3	0.09
Staff case	2	0.06
Application for interim measures	1	0.03
Application to intervene	1	0.03
Application for measures of inquiry	1	0.03

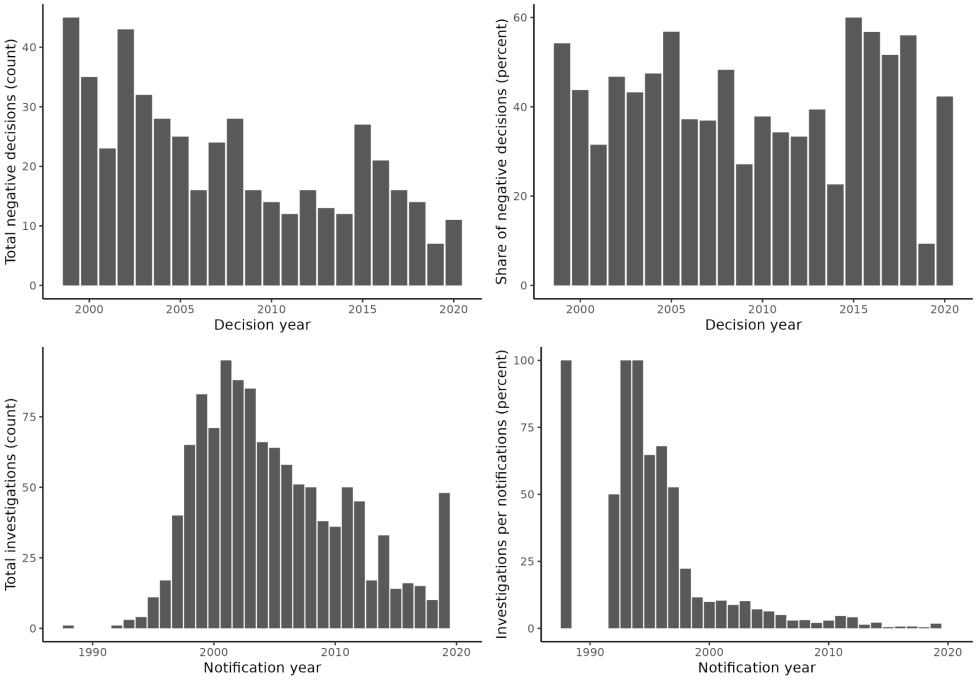
Note: One case may occasionally involve multiple procedures. Source: Calculations based on Iuropa version 1.0 (Brekke et al., 2023a).

Appendix B: Member State Litigation against Administrative EU Acts by Subject Area



Note: Number of annulment action against administrative acts by main subject area, divided by the number of EU member states in a given year. The proceedings only include judgements published on Eur-Lex (94.4 percent of our sample). The lines represent locally estimated scatterplot regression functions, calculated with regplot from Seaborn 0.13.2 for Python (Waskom, 2021). Source: Procedural data from Iuropa (Brekke et al., 2023), accession data from EUMS (Fjelstul, 2021a).

Appendix C: State Aid Investigations and Decisions by the European Commission



Note: Total number of negative state aid decisions and share of negative decisions by year; total state aid investigations and investigations per notified state aid measure per notification year. Source: Calculated from EUSA (Fjelstul, 2021b).