

# Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union

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## *Abstract*

*The ability of courts to generate political change has long been debated in national, comparative and international politics. In the examination of the interaction between judicial and legislative politics, scholars have disagreed on the degree of judicial power and the ability of politics to override unwanted jurisprudence. In this debate, the Court of Justice of the European Union (CJEU) has become famous for its central and occasionally controversial role in European integration. This paper examines to what extent and under which conditions judicial decisions influence European Union (EU) social policy outputs. A taxonomy of judicial influence is constructed, and expectations of institutional and political conditions on judicial influence are presented. The analysis draws on an extensive novel dataset and examines judicial influence on EU social policies over time, i.e., between 1958 and 2014, as well as for case studies of working time regulations and patients' rights. The findings demonstrate that both the codification and overriding of judicial decisions are unlikely in the contemporary EU-28 of fragmented politics. However, modification and non-adoption constitute other political responses to attenuate unwelcome jurisprudence and constrain the legislative effect of judicial decisions.*

The ability of courts to generate political change has long been debated in studies of national, comparative and international politics (McCann, 1994; Stone Sweet, 2000; Conant, 2002;

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Rosenberg, 2008; Carrubba et. al, 2012; Carrubba & Gabel 2015; Pollack 2003; 2013). Are courts powerful generators of political change? Can politics override unwanted judicial decisions? What might condition courts' ability to produce broader change? The interaction between judicial and legislative politics has been examined in studies of American, comparative and European Union (EU) politics, alternating between a 'dynamic' and a 'constrained' court view. A growing body of literature presents a dynamic-court view, according to which a judicialization of politics has occurred in which courts have become increasingly powerful political actors in many contemporary democracies (e.g., Stone Sweet, 2000; Cichowski, 2007; Kelemen, 2013; Alter, 2014). A global trend toward constitutional supremacy has placed constitutional courts in the position of powerful institutions of modern democracies. Parliamentary sovereignty and majoritarian rule are no longer the constitutive principles of democratic politics (Stone Sweet 2000). According to this view, courts are key drivers of change; and in practice, politics is unable to override unwanted jurisprudence. Conversely, the constrained-court view deems the judiciary's broader effect to be limited and conditioned by a large set of factors. Thus, courts cannot be independent movers in establishing change (Conant, 2002; Rosenberg, 2008). Law depends on politics to execute its decisions. Politics can overturn court rulings if rulings counteract political preferences and courts, and judges are well aware of the threat of override, causing them to consider politics when ruling (Fisher, 1988; Miller, 2009; Hirschl, 2009).

In both views, the interaction between courts and legislators influences the broader effect of judicial decisions, be they interactions between the US Supreme Court and the Congress (Miller, 2009), the German Federal Constitutional Court and the Bundestag (Vanberg, 2005) or the CJEU and its member states in the Council (Stone Sweet and Brunell, 2012; Carrubba et. al, 2012; Carrubba & Gabel, 2015).

One court that has become famous for its political power is the Court of Justice of the European Union. This supranational court has become known as the constitutional court of the European Union and a 'master of integration', transforming Europe through its jurisprudence, sometimes against the will of the EU member states (Weiler, 1991; Burley and Mattli, 1993; Alter, 1998; Pollack, 2003; Höpner and Schäfer, 2012; Stone Sweet and Brunell, 2012; Cichowski, 2007; Wind, 2009). Compared with other national or international courts, the European Court is generally regarded as an unusually influential court in its interaction with legislative politics whereas EU politics is reported as too fragmented to respond to and correct the Court (Kelemen 2006; Stone

Sweet and Brunell 2012). As in comparative studies of judicial empowerment, the key notion is one of increased judicial involvement in policy-making (Woods and Hilbink 2009, 745). However, what do we actually know about the legislative effects of jurisprudence, and how can we study it? Lawyers, historians and political scientists alike have requested further examination of the dynamics and effects of the relation between law and politics to take us beyond simple causal notions in which law triumphs politics (Armstrong 1998; Wincott 2001; De Burca 2005; Wasserfallen 2010; Rasmussen 2013).

As with other constitutional courts, CJEU decisions may produce broader policy changes in two manners: a) through judicial decisions implemented at the national level, establishing changes in national laws and in administrative practices and court interpretations or b) through judicial decisions leading to changes in EU legislation, in which the EU legislators adopt or correct a new court-generated status quo by means of legislative acts. Here, litigation may push for legislation, or legislative acts may constrain the effect of jurisprudence. Thus far, scholars have mainly examined national-level effects of CJEU decisions, i.e., on national court decisions and national politics, disagreeing on the actual impact of court decisions (Conant, 2002; 2006; Hatzopoulos and Hervey, 2013; Blauberger, 2014). Research on how jurisprudence affects and is responded to by EU legislation remains scarce.<sup>2</sup> The causal link between litigation and legislation is merely assumed. This paper addresses this research gap, examining *to what extent and under which conditions CJEU decisions influence EU social policy outputs, i.e., EU secondary legislation*.<sup>3</sup> This paper thus addresses the ex-post legislative responses or constraints to jurisprudence, i.e., reactions after a judicial decision has been rendered (Ginsburg, 2014, pp. 490-494).

Influence constitutes a fundamental variable in the study of decision-making (March, 1955, p. 432). Influence is closely related to power and is generally understood as “an actor’s ability to shape a decision in line with her preferences or, in other words, ‘a causal relation between the preferences of an actor regarding an outcome and the outcome itself’” (Dür, 2008, p. 561).

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<sup>2</sup> The works of Alter and Meunier as well as Conant are seminal exceptions here, examining the political processes and outputs that followed innovative judicial decisions. Alter and Meunier examined mutual recognition and the development of the Single European Act (Alter & Meunier-Aitsahalia, 1994). Conant’s work on ‘Justice Contained’ analyzed four cases of law-politics interaction involving the liberalization of telecommunications, electricity and social security policy, investigating legislative responses to judicial activism (Conant, 2002).

<sup>3</sup> Social policy is defined according to the broad spectrum of welfare policies, including labor market policies, healthcare, gender equality and welfare distribution policies.

However, the study of influence must capture more than the attainment of specific preferences. Influence studies should also be able to capture how and why and the extent to which certain ideas, norms, principles or rule interpretations influence policy outputs, thus producing change. For the research purpose of this paper, a ‘law attainment’ approach<sup>4</sup> has been developed as a method with which to study judicial influence. The ‘law attainment’ approach compares the interpretation of rules and principles as stated in judicial decisions with the final policy output as adopted by EU legislators. If judicial interpretations of rules and norms are realized in final policy outputs, judicial influence has been exercised. The ‘law attainment’ approach cannot, however, open the ‘black box’ between judicial decisions and legislative outputs (Klüver 2011, p. 8). For this reason, this paper traces the political processes by which influence is exercised in the cases of working time and patients’ rights in cross border healthcare, investigating the conditions under which CJEU decisions influence EU policy outputs.

Judicial influence on EU policy outputs occurs when the established regulatory status quo ( $SQ_{reg}^1$ ) is challenged by a new court-generated status quo ( $SQ_{Court}$ ), which is then codified into or altered by EU legislation ( $SQ_{reg}^2$ ). In more general terms, this occurs when a court exercises judicial review on the basis of the constitution or a statute, which is then responded to by a legislative amendment. When  $SQ_{reg}^2$  equals  $SQ_{Court}$ , full codification and thus maximum judicial influence have occurred. Politicians, however, must approve such codification. I expect that such approval depends on a) the legal clarity of judicial decisions themselves, b) how the Commission proposes to respond to the case law of the Court, and c) on institutional rules and the positions of the EU legislators, i.e., the European Council and the European Parliament.

Certainly, an examination of CJEU rulings’ influence on EU legislative outputs does not capture the entire magnitude of court-driven change; however, I argue that investigating the specific link between the judiciary and subsequent legislation is of particular importance. First, if the principles and interpretations of the Court are adopted into legislation, they become generally enforceable, i.e., they change from being applicable on an individual case-by-case basis to having general implications (Wasserfallen, 2010). A political codification of Court decisions thus increases legal certainty. Second, analyzing the dynamics between judicial and legislative politics is of great

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<sup>4</sup> The study of interest organizations’ influence on policy outputs has developed a preference attainment approach to examine and measure lobbying influence (Dür, 2008; Klüver, 2011). This paper draws on the basic idea of the preference attainment approach but examines the attainment of rules and principles as generated by the Court instead of preferences.

importance because doing so explores the ability of politicians to respond to law and thus establish the course of integration.

Below, I first present why EU social policy has been chosen with which to examine the relation between legal and political integration. Next, the scholarly debate on judicial-legislative interactions is presented. Against this backdrop, I develop a taxonomy of different types of political responses that may condition the extent of judicial influence. The type of political response is expected to depend on legal clarity, the position of the Commission, institutional rules and political positions. The analyses of judicial influence on EU social policy output from 1958-2014 and for two case studies follow. The paper concludes with the empirical and theoretical implications of the findings.

### **On case selection**

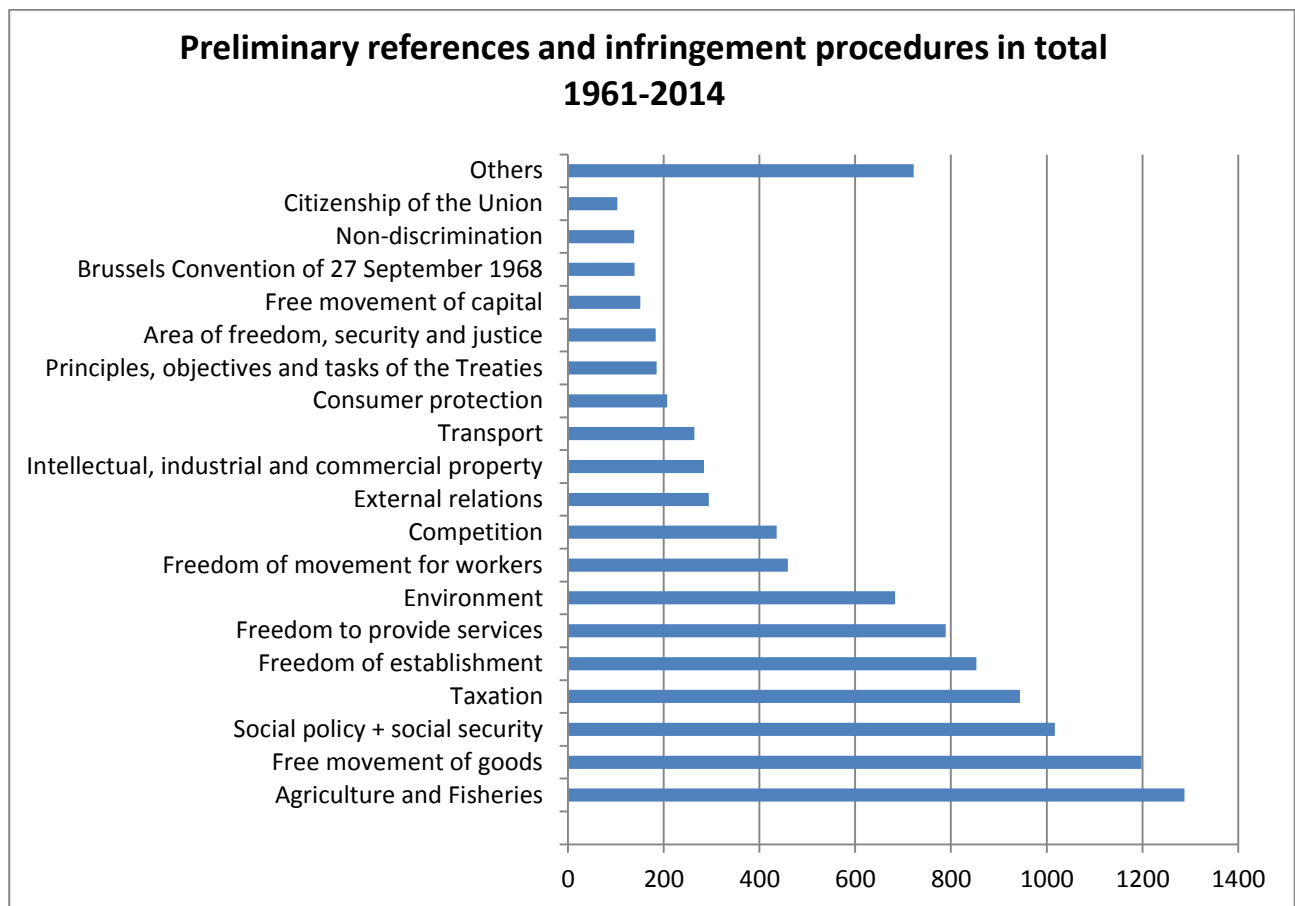
The case study has been deemed the appropriate method for the research question's type of social enquiry because case studies allow us to examine the details of the dynamics and conditioning factors of judicial decisions as potential causes of institutional change, i.e., of EU policy outputs (Gerring, 2004, pp. 348-349). The case study method may uncover new territory in the complex and dynamic relation between law and politics that large-n quantitative studies overlook. For this purpose, EU social policy has been selected for examination. I argue that EU social policy constitutes a strong test case (George and Bennett, 2005, pp. 120-123) for uncovering a potential causal link and the mechanisms between legal and political integration because the policy fulfills two criteria. First, legal integration has occurred largely in the policy area. Second, when legal integration occurs, we should assume politicians will engage. As for the first criterion, 1017 EU social policy cases were decided by the CJEU from 1961-2014 from a total of 7547 cases, rendering social policy the area with the third-most Court cases within EU jurisdiction.<sup>5</sup> Only

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<sup>5</sup> The data on CJEU case law have been compiled using the Court of Justice of the European Union's database, curia.europa.eu. All judicial decisions between 1/1/1958 and 1/7/2014 have been compiled for cases ruled according to Articles 258 and 267 of the Treaty on the Functioning of the European Union (TFEU). Article TFEU 258 lays down the infringement procedure according to which the European Commission can take a member state to the Court for non-compliance with EU law. Article 267 constitutes the preliminary reference procedure in which national courts can send preliminary references to the CJEU to obtain its interpretations of EU law (Stone Sweet and Brunell, 2012, p. 206). The rulings have been sorted according to the CJEU's categories of substantive matters. The category of 'Approximation of laws' is not inserted in figure 1 because that category does not represent a policy area as such. The categories of 'social provisions' and 'social security' have been merged into one category in the figure.

agriculture and fisheries and the free movement of goods have had more cases before the CJEU than social provisions and social security.

**Figure 1: Case law across policy areas, 1961-2014**



We thus have reasons to assume that legal integration may propel political integration in the social policy area, challenging politicians to respond to and change the established regulatory status quo. Concerning the second criterion, we assume that judicial interpretations of social legislation matter to politicians. EU social policy constitutes a policy field in which much is at stake, and politicians disagree on the way forward (Ferrera, 2005). EU social policy is an area likely to create divergent political positions because of ideological controversies as well as the increased socio-economic heterogeneity of an EU comprising 28 member states (Höpner and Schäfer, 2012, pp. 436-438). EU social policy often intersects with the internal market and thus divides political

actors along key conflict lines: market freedom versus social rights, de-regulation versus social (re)-regulation, EU competencies versus subsidiarity, and open labor markets versus protection of national welfare states. Judicial decisions are interpreted along such conflict lines, not in a political vacuum. In other instances of legal integration, politicians may be neutral or indifferent because the integration will not challenge what are regarded as important political ideas or institutions. However, a certain degree of conflict or ideological controversy is required to fruitfully examine the relation between law and politics.<sup>6</sup>

This paper will analyze judicial influence over time, from when the first proposal was presented by the European Commission in 1958 to July 2014. In addition, two case studies will be conducted to examine variations in judicial influence and political responses: EU regulation of working time and patients' rights in cross-border healthcare.<sup>7</sup> These two cases were selected because they were negotiated within the constitutional framework of the latest EU Treaty, i.e., the Lisbon Treaty, and after the grand enlargement of 2004. This enables us to revisit our empirical and theoretical knowledge based on evidence collected in the most recent institutional and socio-economic settings. The two cases are characterized by a high degree of legal certainty; in these cases the Court, over a considerable period, established judicial precedent. According to our first expectation, presented below, judicial decisions should thus be appropriate for political adoption because the Court has been clear and consistent.

### **Dynamic or constrained courts? Proposing a taxonomy of judicial influence**

Research on the judicialization of politics has grown considerably in national, comparative and international political studies. One string of research argues that courts are increasingly powerful in policy-making, enjoying considerable independence from legislative correction (Stone Sweet, 2000;

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<sup>6</sup> For similar arguments discussing where the relation between law and politics can most fruitfully be examined, see Rosenberg, 2008, p. 4 and Garrett et al., 1998, p. 151. In many other areas of EU law, we should expect similar degrees of political contestation, such as in environmental, justice and home affairs, taxation, financial regulation, education, and agriculture.

<sup>7</sup> For the case studies, data have been collected using document studies and a large set of semi-structured interviews with key respondents. Seventy-seven interviews were conducted with key actors including council representatives; commission civil servants; national civil servants; members of the European Parliament (MEP), i.e., rapporteurs, shadow rapporteurs and ordinary members; European Parliament policy advisors; representatives of national and European social partners; and representatives of national parliaments. The interviews were conducted between February 2009 and December 2013 to uncover policy processes as they unfolded.

Woods & Hilbink, 2009; Alter, 2014). In this view, courts are above politics, insulated from the correction of partisan politics. Legal interpretations can be important drivers of change, and politics lacks the capacity to override unwanted jurisprudence (Stone Sweet and Brunell 2012). Societal actors, including lawyers, are key to pushing for a judicial decision to have further implications by taking new cases to court or fighting for the general applicability of their cases on the streets. In this manner, parliaments and legislation may no longer have the final word, as they had in the times of parliamentary sovereignty (Harlow and Rawlings, 1992, p. 322). The opposing string of research questions the ability of courts to create change. International courts' effectiveness depends whether court rulings are consistent with the preferences of governments (Carrubba and Gabel, 2015, p. 191 ff.). A court ruling against such preferences will be ineffectual. Domestic courts face similar problems of effectiveness (Vanberg, 2005; Miller, 2009). Domestic courts lack executive means and therefore depend on political actors to implement their rulings (Staton and Moore, 2011, pp. 560-561). Although acting from atop the legal hierarchy, the effect of the US Supreme Court is actually limited. The Court depends on social, administrative and political responses to its rulings for the rulings to have an effect that extends beyond the individual lawsuit (Rosenberg, 2008). In the relation between court and congress, the latter remains powerful, able to override or quell unwanted judicial rulings (Fisher, 1988; Miller, 2009).

Also studies on the effects of the CJEU on European integration have alternated between two different camps. A dynamic-court view of European integration proposes a broadly neo-functional logic of integration whereby case law produces political integration (Burley and Mattli, 1993; Mattli and Slaughter, 1995; Stone Sweet and Brunell, 1998; Stone Sweet and Brunell, 2012). Neo-functional scholars have presented the integration dynamic using a stage model suggesting a 'virtuous circle' with causal links between different phases as follows: 1) Interaction or contracting between social actors creates a social demand for third-party dispute resolution. 2) Dispute resolutions will push for legislation. 3) This push for legislation in turn will stimulate more contracting and interaction as well as more dispute resolution and legislation (Stone Sweet and Brunell, 1998; Stone Sweet, 2000, pp. 194-203; 2010; Cichowski, 2007, p. 21). The causal link between dispute resolution and legislation is the essence of how legal decisions influence policy outputs. According to Stone Sweet, 'judicialization of politics' has obtained a foothold in the European Union (Stone Sweet, 2010, p. 7). Political decision-making has become judicialized, meaning that non-judicial actors are guided by court-developed rules (Stone Sweet and Brunell, 1998; Stone Sweet, 2000). Judicialization creates a new type of legislative politics wherein



legislators ‘routinely take decisions that they would not have taken in the absence of review, and governing majorities anticipate likely decisions of the court and constrain their behavior accordingly’ (Stone Sweet, 2000, p. 202). The fragmented nature of politics has enhanced judicial power and rendered it increasingly unlikely that unwanted judicialization can be overturned (Chichowski, 2006, p. 12; Kelemen, 2006, p. 105; Stone Sweet and Brunell, 2012). Instead, the dynamic-court view posits that the most likely type of political response to judicial lawmaking will be *codification*, implying that a new court-generated status quo will be incorporated into legislation as part of a self-sustaining dynamic.

EU regional integration interpreted from the constrained-court perspective assigns far less significance to the role of courts as movers in the making of broader change. Power remains within the control of member states, and judicial decisions have zero or only a modest effect on policy when they contradict political preferences. It is argued that EU member states control the CJEU and that the Court does not have the autonomy to rule against the more-powerful states but must bend to their interests (Garrett, 1992, p. 537, p. 552). Member states that disagree with a judicial decision can respond in one of two ways: collectively at the European level and/or individually back home. They can work for a collective override of the decision either by means of treaty revision or through secondary legislation (Carrubba et al., 2008, p. 438; 2012); or they can decide not to comply with the case law, i.e., not implement the case law at the national level (Conant, 2002). Politicians will respond by legislative *override* if a new court-generated status quo runs counter to political preferences. A new regulatory status quo overturning the Court will be adopted by politicians.

Scholars have recently revived these juxtaposed interpretations of the relation between legal and political integration. In the latest heated debate on the political power of the CJEU, proponents of neo-functionalism have asserted neo-functionalism’s triumph, arguing that neo-functionalism has won ‘by a landslide’ over intergovernmentalism, claiming that there are no important examples of politicians overriding the Court in the history of European integration (Stone Sweet and Brunell, 2012, pp. 204-205). However, the fact that it is increasingly difficult for politicians to override CJEU case law does not prove that political codification occurs or that politicians cannot shape judicial influence.

Lawyers, political scientists and historians have pointed to the conditioned nature of judicial influence, arguing that the Court’s role in substantive policy-making is often overstated

(Armstrong, 1998; Wincott, 2001, p. 192; Rasmussen, 2013). The Court is one actor among many in the EU policy process, and the Court's influence is 'conditional and contingent' (Wincott, 2001, pp. 180-181). The Court's influence depends on how a larger set of forces may align to overcome member states' resistance. In addition, how the Commission makes legislative use of case law can be decisive (Wincott, 2001, p. 189). This suggests that the Commission's strategic use of a ruling is central to the ruling's broader effect. The Commission here becomes a key player in pushing forward a case or cluster of cases to produce a more general change (Schmidt, 2000).

Thus, to reach more measured conclusions regarding judicial influence, we should enhance our understanding of legal/political interactions beyond producing either legislative codification or override. Moreover, we should improve our analytical ability to connect the dots between judicial decisions and policy output (Carrubba and Gabel, 2015, p. 215). First, the Commission must bring a Court decision into the political process. Second, the Council and the European Parliament must accept, but can also alter or refuse, the manner in which the Commission proposes to respond to the case law of the Court. Thus, two other types of responses should be added as potentially conditioning judicial influences on policy output. Politicians may respond to a new status quo generated by the Court by adopting secondary legislation that *modifies* the principles or reasoning generated by the Court, aiming to contain the effect of those rulings. A modification implies that parts of the Court's reasoning are incorporated into subsequent EU decision-making; simultaneously, however, political response limits the scope of judicial influence. *Modification* implies that acceptance of the Court-generated principle is only partial. Court interpretations are 'ruled in', but not fully 'overridden' or 'codified'. A modification can allow for certain deviation from the Court generated principles, insert more scope for national discretion and control. Politicians may also respond by *non-adoption*, in which legislators disagree on how to respond to jurisprudence and no sufficient majority can be established to codify, modify or override judicial decisions. Non-adoption constitutes legislative gridlock, producing a stalemate among the legislators in which no legislation is adopted (Binder 1999). Non-adoption implies a political deadlock, resulting in a non-decision. Legal uncertainty arises in the wake of a non-adoption.

To be able to capture 'the variable reach of law' in EU policy output, I have constructed a taxonomy of judicial influence.<sup>8</sup> The taxonomy of judicial influence establishes four

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<sup>8</sup> Lisa Conant's work on the implementation of CJEU case law operates with a typology comprising six types of national responses that explain the 'variable reach of the law' (Conant, 2002, p. 15 ff.).

types of political responses, leading to four different implications for and degrees of judicial influence, as established in Table 1 below. The different political responses will be traced in the empirical analysis below.

**Table 1: A taxonomy of judicial influence on policy output**

| <b>Type of political response</b> | <b>Judicial influence on policy output</b>   |
|-----------------------------------|--|
| <b>Codification</b>               | SQ <sub>Court</sub> is incorporated into policy outputs. Strongest type of judicial influence on policy outputs.   |
| <b>Modification</b>               | SQ <sub>Court</sub> is ruled by policy outputs, and the scope of judicial influence is reduced. Weaker form of judicial influence on policy outputs.   |
| <b>Non-adoption</b>               | No political agreement on how to respond to SQ <sub>Court</sub> is adopted. A stalemate is created because a sufficient majority is not established on how to respond to jurisprudence. Legal uncertainty and sub-optimality result. |
| <b>Override</b>                   | SQ <sub>Court</sub> is overturned by EU decision-making. No judicial influence on policy outputs.  |

### **Conditions of judicial influence**

The taxonomy supports analysis of variations in judicial influence caused by different types of political responses. However, in general, we should most likely not expect politicians to respond to CJEU decisions. When judicial decisions only introduce minor or non-controversial change, we should expect politics to comply with jurisprudence without discussion. However, when legal integration challenges or changes the established institutional order, we should expect politicians to engage. In general, the likelihood of political response depends on the institutional and socio-economic implications of judicial decisions.

Beyond such overall observations, three additional factors are expected to condition judicial influence on policy outputs. First, as previously hypothesized by Garrett and Kelemen, legal clarity is likely to affect interactions between law and politics (Garrett et. al., 1998, p. 158; Kelemen, 2001, p. 625). When a CJEU law precedent has had time to mature and has developed consistently in one direction, legal clarity of jurisprudence increases. Legal and political disagreements regarding the requirements of established case law should thus decrease. *Thus, the first expectation is that when legal clarity is high, judicial decisions will be codified into EU policy outputs.*

Second, we expect the position of the Commission to be decisive regarding judicial influence (Schmidt, 2000; Pollack, 2003). The Commission is the gatekeeper for jurisprudence to be introduced into the political process. The Commission is thus the agenda-setter in proposing an appropriate response to legal interpretations. By bringing in the voice of the judiciary, the Commission may acquire a particularly strong position from which to steer decision-making in a specific direction, capitalizing on the legitimacy of the Court (Alter & Meunier-Aitsahalia, 1994, p. 542). The Commission's institutional position on how to bring case law forward can be strategic. For example, the Commission's position can serve a particular integrative purpose or be role-based, i.e., serving as guardian of the Treaty. In a law-based system such as the EU, the Commission should have a particularly strong position to steer negotiations when the Commission justifies a proposal based on the 'voice of law' as stated by the Court. *The second expectation is thus that judicial decisions will be adopted into policy outputs as the Commission proposes.*

However, the European Parliament and the Council may not merely adopt how the Commission proposes to respond to the Court but also may develop their own positions within the institutional rules governing collective decision-making. *Institutional rules* lay down thresholds with which politicians may correct or adopt jurisprudence. If the CJEU interprets primary law, i.e., treaties of the European Union, such interpretations can only be overturned by a unanimous decision of all member states in an intergovernmental conference, which must subsequently be ratified at the national level. The likelihood of EU politicians overturning Court decisions increases when we turn to the Court's interpretation of secondary legislation. Judicial decisions interpreting a regulation or a directive can be rewritten by a statute, which must usually be decided by qualified majority voting in the Council and by a majority in the European Parliament. In this institutional setting, the likelihood of legislative override depends on 1) the number of veto points and 2) the

ability of political actors to act in a sufficiently unified manner to mobilize such a veto point (Pollack, 2003). As the European Parliament increasingly acts as a co-legislator, a legislative overturn of the Court's ruling is confronted with three veto points: 1) the Commission must first propose overriding judicial decision-making, 2) the Council must adopt a common position overturning the Court's decisions, and 3) the European Parliament must adopt such an overturn. As noted by Pollack, the voting rules of the European Union raise the institutional thresholds even higher (Pollack, 2003, pp. 170-171). Qualified majority voting in the Council requires a supermajority of more than two-thirds of the Council votes. In addition, the European Parliament can either approve the Commission's proposal and the common position of the Council by a simple majority or reject the Council's common position by an absolute majority. In sum, EU thresholds to correct an unwanted CJEU decision by means of secondary legislation are lower than the thresholds of primary law but nevertheless "higher than the thresholds for constitutional amendment in most democratic states". Additionally, the thresholds exceed those of "the proverbial home of judicial activism, the United States" (Pollack, 2003, p. 171).

Because of the considerable institutional barriers, the judicial discretion of the CJEU is high, and, at first, this appears to confirm the neo-functional version of the 'judicialization of politics', wherein politicians tend to codify what the Court has previously stated. However, for such codification to occur, the same institutional thresholds shape the Court's influence on EU legislation. The same three veto points and the same voting rules apply for CJEU decisions to be codified into secondary legislation as follows: 1) The Commission must present a proposal aimed at codifying the case law of the Court. 2) The Council must adopt such a codification and mobilize a qualified majority among the member states. 3) The European Parliament must adopt the codification of the judicial decision by making its plenary majority. Institutional rules thus do not favor codification for override. Both outputs face extremely high thresholds. Codification may be a more likely output if judicial decisions are unimportant to politicians or non-controversial. However, when litigation matters to politicians and positions for or against the litigation diverge, codification faces identical barriers as override faces. In such situations, modification becomes the more likely political response.

For judicial decisions to be adopted into political decisions, they must be supported by a sufficient winning coalition in the Council and the European Parliament. If political actors have divergent positions, a blocking minority in the Council or a simple majority in the European

Parliament can block the adoption of the case law of the Court. The institutional and socio-economic conditions of the EU-28 differ markedly from past instances of European integration. In the current setting of increased socio-economic heterogeneity and new veto players, diverging positions for and against the case law of the Court are likely to arise, rendering both codification and override less likely. Political controversy in response to legal integration may occur in a two-dimensional space (Marks & Steenbergen, 2002). A *left-right dimension* of, for example, social rights versus liberal free movement principles and a *more integration versus less integration dimension*, i.e., European regulation versus subsidiarity, may occur. The positions of political contestation may change over time, i.e., between  $T_1$  and  $T_2$ . *The third expectation therefore is that institutional rules and political positions of an EU-28 render codification and override of judicial decisions less likely.*

### **Court influence on EU social policy over time**

The following analysis draws on an extensive novel dataset and conducts a ‘law attainment’ approach to compare the rules and principles generated by judicial decisions with the extent to which these rules and principles are adopted into final policy outputs. Three analytical steps have been undertaken to examine judicial influence over time, examining 1) whether Commission proposals refer to the case law of the Court, 2) whether the Commission proposes principles or provisions to adopt the case law of the Court, and 3) the extent to which the Council and the European Parliament adopt the case law of the Court as proposed by the Commission.

All new regulations, directives, and subsequent amendments adopted between January 1, 1958 and July 1, 2014 have been compiled.<sup>9</sup> Where they were possible to trace, rejected policy proposals were also included in the compilation. Prior to July 2014, EU legislators adopted 125 binding acts in social and health policies. All original Commission proposals were collected and

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<sup>9</sup> Data compiled by means of EUR-Lex advanced search. Search code: (Directory\_code = 1530+ OR 0520+ ) AND (Form = regulation NOT proposal OR directive NOT proposal). Minor amendments, applications and extensions have been screened from this sample. I largely apply the same method as Treib et al. (2011), who distinguished between 1) new directives and regulation and 2) amendments, applications and extensions (Treib et al., 2011). In the present compilation, major amendments of regulations and directives are also included because they may address responses to CJEU case law. Similar to Treib et al., the dataset is not restricted to legislation in force. Note that I included the proposal for a service directive as a proposal but not as an adopted legislative act because social provisions were largely deleted from the adopted directive.

coded for their reference to the jurisprudence of the Court.<sup>10</sup> The proposals were coded for whether the Commission referred to the case law of the CJEU in its justifications of a proposal, i.e., in the explanatory memoranda and recitals of a proposal. The coding was binary: no = 0, yes = 1.<sup>11</sup> The coding was performed manually; three researchers examined all proposals in turn to ensure inter-coder reliability. Unlike studies of ‘preference attainment’, we chose not to rely on quantitative text analysis programs such as ‘wordfish’<sup>12</sup> or similar computer programs to distinguish when a proposal *referred* to the Court and when it *justified* or *reasoned* a policy change on the basis of jurisprudence. Forty policy proposals referred to the Court’s jurisprudence.

### *The Court as justification*

As the second analytical step, the 40 proposals referring to the Court were examined to determine whether reference to the Court was justifying or reasoning specific provisions or principles in the proposal. In 22 of the 40 proposals, the Commission used such a reference as justification for provisions or principles, often referring to specific case law of the Court (see Annex 1, column on reference to specific case law). These 22 proposals were further analyzed according to the classification of the taxonomy. As a first step, the response of the Commission was examined, i.e., whether the Commission proposed to codify, modify or override the new status quo established by the court (see Annex 1, column on Commission response). The taxonomy’s category of ‘non-adoption’ was irrelevant in relation to the Commission’s proposals.

In 17 of the 22 proposals, the Commission proposed *codifying* the case law of the Court, demonstrating that the Commission often, but not always, proposes codifying the case law when referring to previous jurisprudence. Three proposals were aimed at *modifying* the case law and two at *overriding* the Court ruling.

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<sup>10</sup> The early Commission proposals were difficult to acquire because these proposals are not online and were not in the hands of relevant ministries or information offices. However, with the help of the ‘Historical Archives of the Commission’, we managed to collect the early original proposals, allowing us to work with the full sample of 125 proposals.

<sup>11</sup> The coding of CJEU was (0 = No; 1 = Yes). The following search words were used as proxies for reference to the case law: ‘Court of Justice’, ‘European Court of Justice’, ‘case law’, ‘jurisprudence’, ‘judgments’, ‘the Court’, ‘ECJ’, and ‘CJEU’ as well as reference to specific judgments. In those proposals, only available in French, the following words were used as proxies: ‘La cour de justice’, ‘la cour’, ‘jurisprudence’.

<sup>12</sup> As an example of the use of ‘wordfish’ to measure influence, see Klüver, 2011.

In the proposal for a Posted Workers Directive COM (91) 230, the Commission attempted to modify the implications of the *Rush Portuguesa* case,<sup>13</sup> determining that the case had extended social protection to such a degree that it would hinder the free movement of services. The Commission also suggested modification of the case law of the Court in a proposal for a Patients' Rights Directive COM (2008) 414. In COM (88) 27, the Commission proposed modifying the implications of the *Pinna* case<sup>14</sup> by delineating which French family benefits could be exported and which could not. Finally, in the proposal COM (85) 396, the Commission proposed overriding the case law of the Court that had extended which social benefits migrant workers could export across borders (Conant 2002, 192-194) as it did in the proposal COM (2004) 607 on the revision of the Working Time Directive.

This substantiates the Commission's important role as gatekeeper. Only those judicial decisions that the Commission wants to bring into the political process find their way there. The Commission constitutes the first threshold for Court influence on policy outputs. The findings demonstrate that the Commission often, but not always, sides with the Court's interpretations and thus sometimes proposes to modify or even override the new status quo generated by the Court. This finding notes that the Commission has its own position on whether jurisprudence serves the course of integration.

### *Political responses*

The third step of the analysis is analyzing the European Parliament and the Council's responses to the case law as proposed by the Commission. European legislators constitute subsequent thresholds for judicial influence. To analyze their political responses, the adopted binding act was compared to the Commission's proposal on the specific provisions or principles addressing the case law of the Court. The responses were classified in accordance with the taxonomy developed earlier. In concrete terms, they were classified in terms of whether the political institutions codify, modify, override or do not adopt the Commission's proposal on how to respond to the case law of the Court (see Annex 1, last column on political response).

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<sup>13</sup> Case C-113/89, *Rush Portuguesa*, 27 March 1990.

<sup>14</sup> Case 41/84 *Pinna* [1986] ECR 17.



Of the 22 proposals, 13 binding acts ended up codifying, 5 modifying, and 1 overriding the influence of judicial decisions on EU legislation; 3 were not adopted. The examination of judicial influence over time thus demonstrates that the EU legislators are capable of ruling in the case law of the Court and shaping judicial influence. Override is rare but became the policy output back in 1992. Modification and non-adoption are more likely outputs. Modification implies that the new court-generated status quo is partially taken into account; however, its implications are limited by politics. Modification can be quite close to override. Non-adoption indicates that no sufficient majority could establish a common position on how to respond to the case law of the Court. This stalemate situation implies legal uncertainty in which  $SQ_{\text{Court}}$  is contested but not overridden, modified or codified.

However, 13 binding acts codified the case law of the Court. Does this not confirm a judicialization of politics as repeated by the dynamic-court view? The willingness to codify likely depends on the political implications of jurisprudence. Recent research on EU decision-making concludes that the duration of a decision-making process critically depends on ideological congruency, i.e., the degree of political contention within and between the legislative bodies (Klüver and Sagarzazu, 2013). Decision-making speed can thus be used as a proxy for the political importance and conflicts generated by a proposal to codify the case law of the Court. Decision-making time suggests that the majority of cases codifying the case law of the Court were largely politically non-controversial or even technical, as, for example, in the many amendments of regulation 1408/71. Adopting codification in which the EU legislators agreed with the Commission took an average of 1 year and 3 months (469 days), suggesting much less conflict than when responding by override, modification or non-adoption. The proposals that ended in override, modification or non-adoption or in which the Commission and the legislators disagreed lasted, on average, 3 years and 1 month (1149 days) (see column on duration of policy process, Annex 1). Codification thus tends to occur when legal integration is less controversial from a political point of view.

Examination over time indicates that the extent of judicial influence varies. EU legislators do not simply respond to legal integration by codification. Additionally, modification, override and non-adoption are responses to be considered. Furthermore, the European Parliament (EP) and the Council do not simply follow the Commission's proposals on how to respond to the case law of the Court, thus disconfirming the second expectation as formulated above. In the case

studies below, I examine the judicial-legislative interactions in the EU-28 with two case studies in which  $SQ_{\text{Court}}$  was characterized by a high degree of legal clarity: working time and patients' rights in cross-border healthcare. I also further analyze whether and how the roles of the Commission, institutional rules and political positions can explain variation in judicial influence.

### **Battles for working time; fixed positions and non-adoption**

EU working time regulation has long been a contested area of EU social policy. With the adoption of the Single European Act in 1987, health and safety at work were introduced for the first time in the treaty by article 118A, which established that measures could be adopted by qualified majority voting. In 1990, the Commission proposed a Working Time Directive based on Article 118A of the Treaty. However, the United Kingdom opposed the choice of legal basis, arguing that working time was not a health and safety matter, but an employment issue. For this reason, the appropriate treaty basis, the United Kingdom argued, was either Article 100 or Article 235, both of which require unanimity.

The UK protest against the legal basis was not accepted, and after three years of negotiations, the Council adopted the Working Time Directive (Directive 93/104/EC of 23 November 1993). Thus, a regulatory status quo was established ( $SQ_{\text{reg}}^1$ ). The directive establishes a maximum 48-hour work week within a reference period of four months, minimum daily and weekly rest periods, and a minimum of 4 weeks paid leave per year. At that time, working time was defined as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties', and rest periods were defined as 'any period which is not working time'.<sup>15</sup> However, to satisfy the United Kingdom, the member states won several opt-outs from core parts of the directive during negotiations.

In 2000, the CJEU produced its first judgment that seriously disturbed the established status quo on the definition of working time ( $SQ_{\text{Court}}$ ). The preliminary reference was sent to the European Court by the Spanish Trade Union of Doctors in Public Service (SiMAP); this reference questioned whether on-call time for doctors was to count as working time.<sup>16</sup> The CJEU ruled that

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<sup>15</sup> Art. 2 (1) and (2) of the directive.

<sup>16</sup> Case C-303/98 *Sindicato de Medicos de Asistencia Publica (SiMAP)* [2000] ECR I-7963.

doctors were not excluded from the directive although Article 2 (2) of the framework directive allows for the exemption of public service activities that maintain public order and security. Furthermore, the Court ruled that on-call time spent at a healthcare institution constituted working time within the meaning of the directive. The Jaeger<sup>17</sup> case followed in 2003. In the Jaeger case, a higher German labor court asked the CJEU if time spent on-call, but inactively, counted as working time although the doctor may sleep during that time. The CJEU's conclusions were largely a restatement of the SiMAP ruling, that on-call time in which the doctor must be physically present at the hospital is working time within the meaning of the directive, regardless of whether he or she can rest. Jaeger irrevocably clarified that the inclusion of on-call time as working time applied generally and not specifically to the Spanish system. Legal clarity had been established.

### *Political responses*

Despite the legal certainty of jurisprudence, many countries flouted the CJEU conclusions and did not implement them (*Financial Times*, 2 December 2005). The wide discrepancy between  $SQ_{reg}$ <sup>1</sup> and  $SQ_{Court}$  demanded a political response. In September 2004, the Commission announced its official proposal for amending the Working Time Directive (COM (2004) 607). Although the aim of the proposal was to respond to the case law of the Court, the case law was only mentioned once (COM (2004) 607, p. 2). In the case of working time, the Commission took a strategic position, foreseeing that the majority of member states were against the codifying jurisprudence. In fact, the Commission proposed overriding the case law of the Court, introducing a fundamental breach with established case law by distinguishing between 'on-call time' and 'inactive on-call time'. 'Inactive on-call time' should not be regarded as working time. Furthermore, the proposal maintained the opt-out possibility of the 48-hour working week, among other features. In sum, whereas the new court generated a status quo and the  $SQ_{Court}$  had strengthened social rights, the 2004 proposal introduced a considerable setback.

The Council of Ministers welcomed the distinction between 'inactive on-call time' and 'on-call time', claiming that the distinction would introduce legal certainty. The clear priority of the Council was to override the course of legal integration (Interview, Commission, 3 March 2012). However, the member states experienced internal disagreement regarding the question of opt-out.

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<sup>17</sup> Case C-151/02 *Jaeger* [2003] ECR I-8389.

France and Sweden were the most active advocates of ending the opt-out possibility whereas Poland supported the United Kingdom on maintaining the right to exemption (*Financial Times*, 2 December 2005). Furthermore, a deep conflict arose with the European Parliament. From the first reading of the proposal, the Parliament took a firm stand against the Commission's proposal, strongly opposing the opt-out and finding that the Commission's position meant an unacceptable overturn of the Court's case law:

"However, the solution being sought by the Commission is not the best one. We cannot lightly alter the *acquis communautaire* and legislate against the case law of the Court of Justice, which has been repeatedly and supremely well-argued and established that on-call duty is working time. It is essential that the European institutions respect the inviolability of the acts that they have adopted and which affect the legal situation of legal persons ..." (EP report A6-0105/2005, p. 19).

The Council, however, took the common position that it needed to avoid the 'negative effects' of the case law (Council press release PRES/2007/284). The purpose of negotiations was stated as the following:

"...to avoid any consequences of the European Court of Justice's case law, in particular rulings in the *SiMAP* and *Jaeger* cases, which held that on-call duty performed by health professionals and other workers, when they are required to be physically present at their places of work, must be regarded as working time" (Council press release, PRES/2006/298).

Throughout the negotiations, the EP firmly supported scrapping the opt-out (*Financial Times*, 16 December 2008). Inter-institutional negotiations were taken all the way up to the third reading; however, the EP and the Council did not manage to establish an agreement because of the opt-out. Positions remained fixed. Concerning the case law of the Court, the EP gradually developed a more dynamic position. During its second reading, the EP thus accepted that the 'inactive part of on-call time working time' could be calculated in a special way to comply with the maximum weekly 48-hour work week.<sup>18</sup> The inactive part of on-call working time continued to be defined as working time but could be calculated differently (Interviews, European Parliament, 29 March 2012; social partners 28 January 2013). In this manner, the EP took a considerable step toward meeting the Council and the Commission, opening up the possibility of a modification of legal integration. However, the EP was not willing to accept the opt-out; thus, its general position remained fixed.

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<sup>18</sup> See the amendments proposed by the EP in the second reading on art. 2a; P6 TA(2008)0615.

The interminable political negotiations failed, and despite five years of dialog, bargains and concessions, no solution was identified to the ‘case law problem’. Against this background, the Commission invited its social partners to take over. In November 2011, the European social partners declared their willingness to negotiate in accordance with the social consultation procedure established in Articles 154 and 155 of the TFEU. For Business Europe, the main purpose of the negotiations was to override the case law and maintain the opt-out (Interviews, social partners, 14 February 2012, 14 August 2012; 1 November 2012; 4 July 2013).

“(There) wouldn’t have been any need to negotiate anything if there hadn’t been this ruling, because the ruling created the practical problem. [...] we negotiate because there is a problem in real life. And this problem was provoked by the Court. And that’s why the purpose was to change the directive” (Interview, social partners, 4 July 2013).

The European Trade Union Confederation (ETUC) insisted on negotiating the opt-out (Interviews, social partners, March 30, 2012; August 14, 2012) on behalf of employees. The employees argued along identical lines as the European Parliament, viewing the opt-out that ‘spread like ripples in a pond’ as the main obstacle to the EU working-time regulation (Interview, social partners, 1 November 2012). In addition, the ETUC wanted the case law of the Court to be codified (Interviews, social partners, March 30, 2012; June 13, 2013). However, despite long negotiations and some common interests in revitalizing the ‘European corporatist community’ (Falkner, 1998), negotiations failed in late December 2012 (Interview, social partner, January 28, 2013). Whereas Business Europe wanted to override the case law of the Court, the ETUC wanted to codify it. The social partners’ positions remained fixed during negotiations. Thus, both an overriding and a codification of the changed status quo established by the Court were blocked by politics.

### *Judicial influence on the EU working time regulation*

It could be argued that because the case law of the Court had not been modified or overridden, the rulings constitute the regulatory status quo and thus the individual lawsuits generated change. However, few member states comply with the judicial decisions (Interviews, social partners, November 1, 2012; January 28, 2013; June 13, 2013; July 4, 2013). The legal integration exerted has ‘established rules nobody follows’ (Interview, social partners, 1 November 2012). It is also

expected that more member states will request the opt-out in the future to avoid the implications of the case law of the Court (Interviews, social partners, 1 November, 2012; 28 January, 2013; 4 July, 2013). The inability to override or modify the case law of the Court has not resulted in judicialized working time regulation.

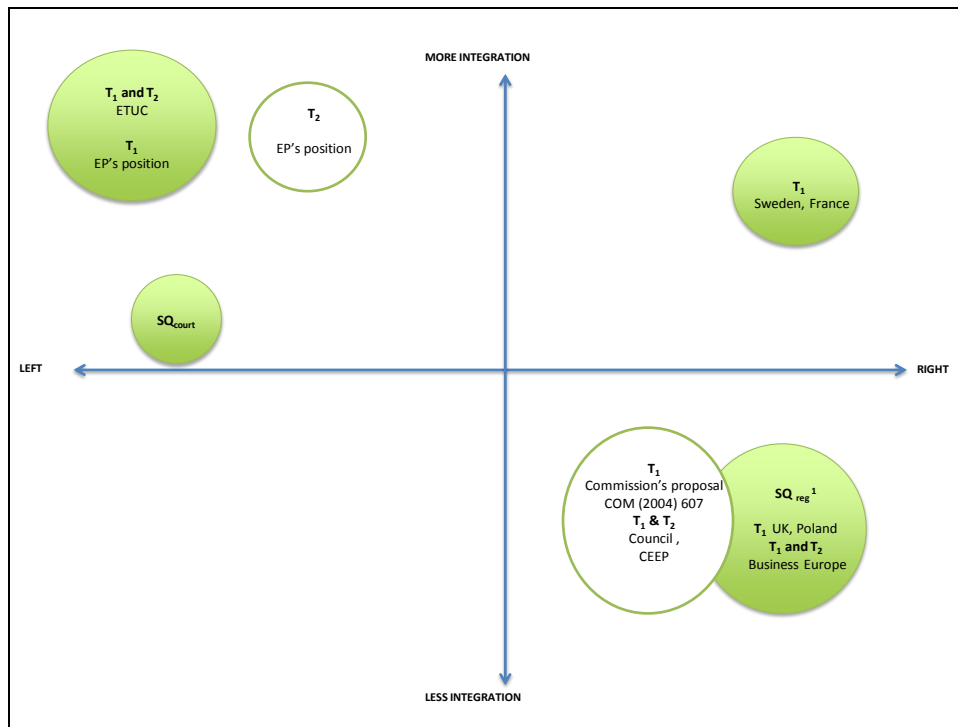
The envisioned reform of the Working Time Directive demonstrates intense battles between law and politics in the EU. Although judicial decisions had established legal clarity,  $SQ_{\text{Court}}$  became highly contested. The Commission and political actors interpreted and used the case law of the Court differently, and this diverse reading of ‘the state of legal affairs’ conditioned their interaction. Ultimately, the different interpretations and use of case law in combination with different positions on the opt-out blocked a political compromise and created an uncertain regulatory situation.

The original regulatory status quo  $SQ_{\text{reg}}^1$  was challenged by  $SQ_{\text{Court}}$ . The discrepancy between political and legal integration demanded a political response. The Commission took a firm position against the course of legal integration and proposed to override the case law of the Court. A sufficient majority of member states supported the Commission’s proposal and also wanted to overturn the  $SQ_{\text{Court}}$ . A common position was observed in the Council to override jurisprudence. However, the Commission had not foreseen the unified position of the European Parliament, which wanted to codify the case law of the Court and thus strengthen social rights. After long inter-institutional interaction, the EP was ready to modify its position on how to calculate on-call time. A compromise was within reach. However, fixed positions for or against maintaining the opt-out ultimately ended negotiations between the Council and the European Parliament. Disagreements on the opt-out and whether to override or codify the case law of the Court were even more entrenched among the social partners. Negotiations failed here too – and no agreement was adopted.

Thus, political contestation occurred in two different dimensions (Marks & Steenbergen, 2002). Political positions diverged for or against the case law of the Court according to a left-right conflict (*left* = strengthened social rights by calculating on-call time as part of the EU working time definition compared with *right* = on-call time as not part of the EU working time definition). Furthermore, positions diverged on a more-integration compared with a less-integration dimension (*more integration* = ending the opt-out possibility versus *less integration* = maintaining the opt-out possibility). Despite lengthy and intense negotiations, positions remained fixed concerning the opt-out, resulting in non-adoption. The different positions on a two-dimensional

space and between two points in time  $T_1$  (initial position) and  $T_2$  (final position) can be visualized in figure 2 below.

**Figure 2: Political response to the definition of working time.**



**Patient rights in cross-border healthcare: Modifying the case law of the Court**

European integration of healthcare has been greatly disputed. The regulatory status quo ( $SQ_{reg}^1$ ) long consisted of a treaty specifying that the delivery and organization of healthcare are the responsibility of the member states.<sup>19</sup> Additionally, regulation 1408/71 on the coordination of social security for migrant workers<sup>20</sup> states that planned healthcare treatment can only be sought in other

<sup>19</sup> See article 168 (7) of the Lisbon Treaty.

<sup>20</sup> Now Regulation 883/2004.

member states and reimbursed in the home state if it has been authorized beforehand by the competent national authority.  $SQ_{reg}^1$  was thus one of considerable national control, with nearly no free movement for planned health care services or patients. However, the original regulation reimbursed the full expenses of cross border care for those authorized to go abroad, thus ensuring equality between patients able to afford eventual extra costs and those unable to afford such care. The high degree of national control established by the regulatory status quo was challenged by a line of CJEU case law specifying that healthcare is not exempted from single market principles.

In 1998, the Decker and Kohll cases<sup>21</sup> established that healthcare is a service covered by the meaning of the treaty. In the subsequent Geraets-Smits and Peerbooms case,<sup>22</sup> the Court clarified that internal market principles also apply to hospital care. In the ensuing case of Müller-Fauré and Van Riet,<sup>23</sup> the CJEU distinguished between hospital care and non-hospital care. Under certain conditions, hospital care may require prior authorization. For non-hospital care, however, prior authorization was deemed an unjustified barrier to the free circulation of services. The Court changed the status quo by severely constricting the national ability to control cross-border healthcare ( $SQ_{Court}$ ). A high degree of legal certainty was developed through a line of case law unfolding from 1998-2007 (Martinsen, 2009).

### *Political responses*

The Commission's first attempt to respond to the case law of the Court came with its proposal for a Service Directive that proposed that healthcare would be part of the Directive (COM (2004) 2). Thus, in the Commission's Service Directive proposal, Article 23 sought to codify the case law of the Court. However, the health ministers refused to have their policy area regulated as part of a general directive on services and placed under the aegis of the Directorate General (DG) for the Internal Market (Szyszczak, 2011, pp. 116-117). Thus, the Commission's first attempt to codify judicial decisions was rejected.

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<sup>21</sup> In the cases C-120/95 *Decker* [1998] ECR I-01831 and C-158/96 *Kohll* [1998] ECR I-01931.

<sup>22</sup> Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-05473.

<sup>23</sup> Case C-385/99 *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen and Van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-04509.



In December 2007, the Commission made its second attempt to present a proposal, this time primarily drafted by the DG for health, i.e., SANCO. SANCO announced that the proposal would be presented on December 19, 2007. However, when the day of the presentation arrived, the Commission decided to withdraw the proposal (EU Observer, 19 December 2007). Various cabinets intervened against the proposal just before its presentation, expressing concerns regarding its effects on national health systems (EU Observer 2008, February 7, 2008; Interview, Commission, February 2009). Additionally, key members of the European Parliament's Socialists and Democrats (S&D) group urged the Commission to withdraw the proposal, arguing that it would have considerable negative consequences for national healthcare systems (Politiken, 11 January, 2008; Politiken, 19 January, 2008; Interview, European Parliament, February 2009). Against this background, the second attempt to respond to the case law of the Court was withdrawn.

On July 2, 2008, the Commission finally presented its proposal of a Patients' Rights Directive (COM (2008) 414). One core objective of the proposal was to have as many of the Court's interpretations adopted into legislative text as possible. Reference to the case law of the Court was a main element of the proposal; the Court was mentioned 37 times in the explanatory memoranda and recitals. The Commission developed the reasoning of its proposal with recurring references to judicial decisions. Judicial decisions thus justified the Treaty basis as internal market Article 95 (now TFEU article 114) and Articles 7 and 8 concerning prior authorization. The scope and limits of prior authorization constituted the most controversial portion of the proposal.

Learning from experience, the Commission this time suggested some modification of judicial decisions, departing from the clear-cut distinction between non-hospital care and hospital care as presented in Article 23 of the original Service Directive proposal. The Commission proposed that non-hospital care should circulate freely but extended the justified use of prior authorization to include not only hospital care but also highly specialized and cost-intensive healthcare.<sup>24</sup> The latter should be included on a specific list, established and regularly updated by the Commission.<sup>25</sup> In this manner, the Commission would control the scope of what could be classified as non-hospital but nonetheless highly specialized and cost-intensive healthcare. In terms of equality, the proposal stated that patients must pay before service delivery and would be reimbursed only up to the cost of a similar treatment in their home country. Patients unable to pay

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<sup>24</sup> Article 7 and 8.1.(a) and (b) of COM (2008) 414.

<sup>25</sup> Article 8.2 of COM (2008) 414; Interview, Commission, February 17, 2009.

eventual extra costs or pay before service delivery would not be able to utilize EU cross-border healthcare.

Despite the Commission's attempt to take previous political responses into account, negotiations became tense and contentious. Parliament faced disagreements both within and across the political groups (Interviews, European Parliament, June and November 2009). The S&D group in the Parliament was divided internally on various issues, particularly on the fundamental question of the correct legal basis for the directive, equality and the issue of prior authorization. The European Peoples Party (EPP) and the Liberals (ALDE), however, supported the Commission's proposal. ALDE, however, wanted to strengthen patients' rights to some degree by establishing a European ombudsman for patients. The EPP held the rapporteurship for the dossier, and the case law of the Court constituted a strong argument for why political action was necessary (Interviews, European Parliament, February 18, June 10, November 16, 2009). The argument was that if politicians were unable to respond, the Court would continue to define the course of integration (Rapporteur John Bowis' Report A6-0233/2009, p. 77).

The political negotiations on the dossier lasted approximately 2.5 years and appeared complicated from the beginning. As noted by former health Commissioner Androulla Vassillou, only two or three member states were in favor when the Commission first presented the proposal (2980th meeting, Press Conference, 1 December 2009). During the initial 1.5 years of negotiations, the Council appeared divided between a) those wanting to codify the case law of the Court, holding the position that prior authorization should be the exception rather than the rule, and b) those wanting to override the judicial decisions, opposing the dossier as a whole (Interviews, Council, December 8, December 9, December 14, 2009, June 2010). A majority of member states gradually came to agree on the need for political regulation to delineate what the Court had initiated (Interviews, *ibid*). A majority developed around the position that member states needed to take over the legislative process from the Commission, i.e., depart from its proposal, ensure stronger national control and use the opportunity to "contain the court's perceived excesses" (Hatzopoulos and Hervey, 2013, p. 2). In December 2009, the Swedish presidency presented a compromise proposal; however, a blocking minority led by Spain and further comprising Poland, Romania, Portugal, Greece, Ireland, Hungary, Slovakia, Slovenia and Lithuania rejected the compromise. Spain took over the presidency in 2010. Thus, the leader of the blocking minority now chaired the negotiations. The Spanish president decided to present a minor amendment to the Swedish text, apparently

solving the Southern problem of resident pensioners from other member states requesting healthcare in their member state of origin (Interviews, Council, December 9, 2009, July 7, 2010). The amendment was accepted, and the Council established a compromise. However, the Council did not act in consensus. Poland, Portugal, Romania and Austria voted no, and Slovakia abstained from voting. Additionally, the European Parliament was able to establish a compromise between the three major groups, allowing for more national control of cross-border healthcare and proposing to strengthen rights for patients with rare diseases as well as stipulating that patients should not pay up front for treatment in an effort to improve equality. These two EP proposals were, however, not accepted by the Council, and a final compromise was established, largely mirroring the Council's common position of extended national control. By March 2011, both legislatures had adopted the directive. Although positions diverged within and between institutions from the outset, they were dynamic and changed as interaction unfolded.

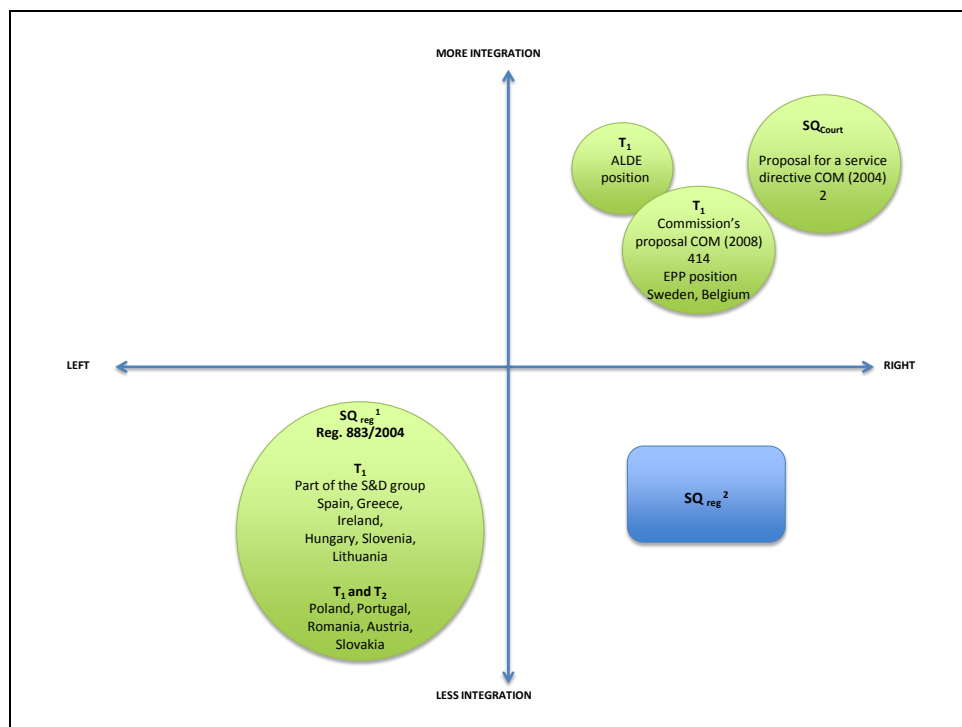
#### *Judicial influence on the EU patients' rights directive*

Despite the legal clarity of precedents, judicial decisions were not codified into the final EU policy output, nor was the Commission-proposed response to the case law approved by EU legislators. The adopted text differed from the Commission's proposal in several respects (SQ<sub>reg</sub><sup>2</sup>). A dual legal basis had been reached. The internal market legal base, Article 114 TFEU, constituted the main legal basis; however, Article 168 TFEU (on public health) had been added to address the concerns of members of the European parliament from the S&D group. The other significant compromise was that the prior authorization was also accepted for special and cost-intensive care. In this area, the Council and the European Parliament extended the modification of the case law considerably beyond what had been suggested by the Commission. Instead of leaving it to the Commission to decide which types of healthcare should be defined as specialized and cost-intensive, the final text established that this issue should be decided by the member states. This compromise became the most important modification of the case law of the Court, paving the way for political compromise by allowing more national control.

Political positions formed in response to the case law of the Court. Because it was not possible to override the Court, most actors came to agree on the need to rule in the Court by means of a modification, allowing for more national control by prior authorization than was originally

suggested. Political contention occurred in two dimensions. In one dimension, positions diverged on a left vs. right dimension (*left* = equality in patients’ rights to cross-border care vs. *right* = patients as consumers benefiting from liberalized national healthcare systems). In the other dimension, the two sides diverged on a more integration vs. less integration dimension (*more integration* = free movement, i.e., limited use of prior authorization, versus *less integration* = maintaining prior authorization and thus national control). Figure 3 presents the different positions formed in response to the case law of the Court and on a two-dimensional space between T<sub>1</sub> and T<sub>2</sub>.

**Figure 3: Modifying free movement of healthcare**



In the late phase of this legal-political game, it is important to note that the CJEU has brought its case law in line with the legislative position expressed in the Directive and during political negotiations. In more recent cases,<sup>26</sup> the Court has taken a ‘tempered’ approach, giving member states considerable discretion both in defining their health policies and in exerting national control

<sup>26</sup> See for example C-211/08 *Commission v Spain* [2010] ECR I-5267, case C-512/08 *Commission v France* [2010] ECR I-8857, C-490/09 *Commission v Luxembourg* [2011] ECR I-249.

over what can be consumed abroad (Hatzopoulos and Hervey, 2013). The CJEU had not needed to do so, given that its previous rulings were based on primary law, thus, in *stricto sensu*, only changeable by means of a treaty amendment. Therefore, the adaptive behavior of the Court is even more notable.

## **Conclusion**

Studies of judicial-legislative interactions in the EU tend to rely on a progressive narrative of judicial impact, creating an image of ‘politics under law’ (Armstrong, 1998, p. 163; Conant, 2002, p. 15; Rasmussen, 2013, p. 1195). A plausible yet unexplored causal link between legal and political integration has been key to the dynamic-court view of how the CJEU may advance political change. The taxonomy developed in this paper presents a broader spectrum of political responses to judicial dynamics than previous theoretical discussions have relied on.<sup>27</sup> The taxonomy thus opens up discussion of the more subtle interactions between law and politics than the somewhat juxtaposed understanding of political responses as either codification or override. Because empirical evidence on override has seldom been collected, theoretical interpretations of rather unrestrained Court power have recently claimed superiority (Stone Sweet and Brunell, 2012). However, the findings of this paper show that the inability to override does not imply legislative approval of judicial decisions.

The findings, however, do not disconfirm that judicial decisions can influence EU policy outputs. Important institutional change can certainly be set in motion because of a new Court-generated status quo, which will then limit the policy options available to politicians. But this may again provoke political counter responses (Alter & Meunier-Aitsahalia, 1994). The findings of this paper demonstrate how politics can restrain judicial influence. EU legislators do not simply follow the course of legal integration – even in cases such as working time and patients’ rights, in which jurisprudence has had time to mature and develop consistently. Legislators did not follow the course of legal integration even in cases in which the Commission proposed codifying jurisprudence, as was shown in the analysis over time. Instead, the institutional rules and diverging political positions of EU-28 render both codification and override of judicial decisions less likely.

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<sup>27</sup> With Lisa Conant’s work as the seminal exception.

Two additional types of political responses conditioning judicial influence have been added to our understanding of the judiciary-legislative relation: modification and non-adoption. To constrain the Court by *modification* is an important political response in the continuous attempt to maintain national control and decide on the balance between social rights and free market, between more integration and subsidiarity. In addition, *non-adoption* occurred as a political response. Such political gridlock leaves a considerable discrepancy between the political and the Court-generated status quo, creating a state of legal uncertainty. Law-abiding member states may follow  $SQ_{\text{Court}}$  whereas less law-observant countries are likely to defy Court rulings. Thus, a considerable degree of differentiation on what is considered the binding rules is likely to result. Such a state of legal uncertainty may push the Commission to present a new policy proposal modifying judicial decisions, as occurred with the patients' rights directive and that can be anticipated in a future proposal on working time.

The first two expectations of what may influence judicial influence were not confirmed. *First*, legal clarity does not ensure political approval. This analysis has demonstrated that the state of Union law is in fact politically disputed. Political actors have different understandings of the case law of the Court. What is accepted as legal certainty depends on political interests, perceptions and interpretations. Legal integration is political, creating controversies and conflicts. In addition, the Court may adapt to a legislative modification and change legal reasoning. As shown in the analysis of patients' rights, the CJEU can be responsive to political reactions. Here, the CJEU has recently tempered its line of reasoning. Although it could have ignored the legislative modification because  $SQ_{\text{Court}}$  was based on primary law, the CJEU has in fact "backtracked from its former 'revolutionary' stance" (Hatzopoulos and Hervey, 2013, p. 2).

*Second*, the Commission does not always side with the Court. It is selective as to which of the 1,017 Court cases it brings into the process and sometimes proposes modifying or even overriding the case law of the Court. Although it is an important gatekeeper, the Commission does not sit firmly in the driver's seat as an authority or strategic actor. The responses of the European Parliament and the Council may differ starkly from the Commission. Rather than strategic behavior, the adaptive behavior of the Commission appears to be important; after two defeats, the Commission's willingness to change its position rendered it possible to adopt a much modified patients' rights directive.

Instead, consistent with the *third* expectation, institutional rules and political positions condition judicial influence on policy outputs. Institutional thresholds to political responses render both codification and override less likely in an EU-28 of socio-economic heterogeneity and divergent interests. If divergent political positions remain fixed, there is no room for compromise, and the stalemate situation of non-adoption results in cases such as the working time issue. Such non-decisions have severe consequences for legal certainty and the state of Union law. However, interaction may bring the divergent positions of the legislators into a common position, creating room for compromise and modification of judicial influence.

These findings have general implications for the study of judicial politics. The findings show that even in EU politics, in which thresholds to constrain jurisprudence are exceedingly high, higher even than in the United States, politicians respond to and can attenuate the extent of judicial influence. The findings show that even in times of fragmented politics, EU decision-making is crucial to the broader effects of judicial decisions. The findings also show that the Court is no independent mover of political change. This substantiates that even in polities where judicialization should be especially strong (Kelemen, 2013, p. 295), legislative politics can condition its effect. In domestic judicial-legislative interactions, we should expect politics to have stronger voice against unwelcome judgments. The findings of this study invite comparative studies of judicialization to look beyond legislative override as the only meaningful counteraction through which politics can respond to law. There are other responses to ‘quell unfavorable judgments’ (Hirschl, 2009, 827; Fisher, 1988, p. 200 ff.). Modification is one such response. Non-adoption as political gridlock is another. To develop a more accurate understanding of judicial power and effect, we must also examine the boundaries of judicialization and see how the continuous interplay between law and politics set the scope and limits of Union integration.

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## Annex 1: Judicial Influence on Policy Outputs over Time (up to 1<sup>st</sup> July 2014)

| Commission Proposal                | Adopted Act   | Lengths of policy process (days) | Number of references to judicial decisions | References to specific cases   | Which provisions         | Commission response | Political response  |
|------------------------------------|---|----------------------------------|--|--|--------------------------|---------------------|---------------------|
| COM (2012) 131 proposed 21/3-2012  | Council directive adopted 13. May 2014. Not numbered yet.<br><b>Enforcement directive on the posting of workers</b>   | 782                              | 36   | C-346/06 (Rüffert); C-319/06 (Commission vs. Luxembourg); C-49/98-71/98 (Finalarte among others) | Art. 9+12                | <b>Codification</b> | <b>Modification</b> |
| COM (2012) 130 proposed 21/3-2012  | Not adopted. Rejected by the national parliaments. Withdrawn by the Commission; 12 September 2012<br><b>Proposal on a regulation on the right to take collective actions (Monti II)</b> | 171                              | 36   | C-438/05 (Viking); C-341/05 (Laval)  | Article 1,2 and 3        | <b>Codification</b> | <b>Non-adoption</b> |
| COM (2008) 414 proposed 2/7-2008   | Directive 2011/24/EU of 9 March 2011 –<br><b>Patient rights</b>   | 981                              | 37   | C-158/96 (Kohll); C-368/98 (Vanbraekel); C-372/04 (Watts); and others                            | Legal basis, article 7+8 | <b>Modification</b> | <b>Modification</b> |
| COM (2009) 410 proposed 30/7-2009  | Council Directive 2010/18/EU of 8 March 2010 –<br><b>Amending parental leave</b>  | 222                              | 3  | C-180/95 (Draehmpaehl); C-271/91 (Marshall)  | art. 2                   | <b>Codification</b> | <b>Codification</b> |
| COM (2004) 830 proposed 23/12-2004 | Regulation (EC) No 629/2006 of 5 April 2006 –<br><b>Amending 1408/71 (coordination social security)</b>   | 469                              | 2  | C-43/99 (Leclere)  | Annex IIa                | <b>Codification</b> | <b>Codification</b> |
| COM (2004) 607 proposed 22/9-2004  | Not adopted. Rejected by the social partners 8 December 2012<br><b>Proposal to amend the working time directive</b>   | 2996                             | 2  | C-303/98 (SiMAP); C-151/02 (Jaeger)  | Article 2a               | <b>Override</b>     | <b>Non-adoption</b> |
| COM (2004) 2 proposed 5/3 2004     | Article on healthcare not adopted. The Commission proposes an amended <b>proposal for a service directive</b> on the 4/4 2006, excluding health<br>COM (2006) 160                       | 759                              | 28   | C-157/99 (Smits and Peerbooms) among others  | Article 23               | <b>Codification</b> | <b>Non-adoption</b> |

|   |   |      |    |  |                |                     |                     |
|---|---|------|----|--|----------------|---------------------|---------------------|
| COM (2003)<br>468 proposed<br>31/7-2003                     | Regulation (EC) No 647/2005 of 13 April 2005 – <b>Amending 1408/71 (later annulled)</b> | 623  | 33 | C-215/99 (Jauch); C-43/99 (Leclere); C-160/96 (Molenaar)   | Annex IIa      | <b>Codification</b> | <b>Codification</b> |
| COM (2003)<br>657 proposed<br>5/11-2003                     | Council Directive 2004/113/EC of 13 December 2004 – <b>Implementing equal treatment</b> | 405  | 3  | C-200/91 (Coloroll); C-43/75 (Defrenne II)   | art. 4         | <b>Codification</b> | <b>Modification</b> |
| COM (2000)<br>334 proposed<br>7/6-2000                      | Directive 2002/73/EC of 23 September 2002 – <b>Amending 76/207 (equal treatment)</b>    | 836  | 34 | 149/77 (Defrenne); C-450/93 (Kalanke); C-222/84 Johnston and others  | Art. 2.2 + 6.1 | <b>Codification</b> | <b>Codification</b> |
| COM (2000)<br>832 proposed<br>15/1-2001                     | Directive 2002/74/EC of 23 September 2002 – <b>Amending 80/987 (insolvency)</b>         | 617  | 20 | C-479/93 (Frankovich); C-117/96 (Mosbaek); C-198/98 (Everson)  | 8a             | <b>Codification</b> | <b>Codification</b> |
| COM (1999)<br>565 proposed<br>25/11-1999                    | Council Directive 2000/78/EC of 27 November 2000 – <b>Framework equal treatment</b>     | 404  | 9  | C-109/88 (Danfoss); C-127/92 (Enderby); C-400/93 (Royal Copenhagen); and others                                  | art. 2b, 6, 9  | <b>Codification</b> | <b>Codification</b> |
| COM (1998)<br>662 - 98/0318 (SYN)<br>proposed<br>24/11-1998 | Directive 2000/34/EC of 22 June 2000 – <b>Amending 93/104 (working time)</b>            | 583  | 1  | Based on C-84/94 UK versus Council   | Art. 5         | <b>Codification</b> | <b>Codification</b> |
| COM (97) 486<br>proposed<br>8/10-1997                       | Council Directive 98/49/EC of 29 June 1998 – <b>Supplementary pension rights</b>        | 265  | 5  | C-279/93 (Finanzamt Köln-Altstadt v Schumacher); C-272/94 (Guiot); and others                                    | Art. 6 and 7   | <b>Codification</b> | <b>Modification</b> |
| COM (97) 378<br>proposed<br>18/7-1997                       | Council Regulation (EC) No 1223/98 of 4 June 1998 – <b>Amending 1408/71</b>             | 322  | 2  | C-251/94 (Eduardo Lafuente Nieto)  | Annex VI, 4b   | <b>Codification</b> | <b>Codification</b> |
| COM (96) 340<br>proposed<br>17/7-1996                       | Council Directive 97/80/EC of 15 December 1997 – <b>Burden of proof</b>                 | 517  | 27 | C-109/88 (Danfoss); C-318/86 (Commission v. France); C-127/92 (Enderby); C-400/93 (Royal Copenhagen); and others | Art. 4         | <b>Codification</b> | <b>Codification</b> |
| COM (91) 230<br>proposed<br>19/6-1991                       | Directive 96/71/EC of 16 December 1996 – <b>Posting of workers</b>                      | 2008 | 6  | C-113/89 (Rush Portuguesa); and others   | Art. 3         | <b>Modification</b> | <b>Codification</b> |
| COM (91) 247<br>proposed<br>12/7-1991                       | Council Regulation (ECC) No 1249/92 of 30 April 1992 – <b>Amending 1408/71</b>          |      |    | 20/85 (Roviello)   | Annex VI       | <b>Codification</b> | <b>Codification</b> |

|  |  |      |   |  |                         |                     |                     |
|--|--|------|---|--|-------------------------|---------------------|---------------------|
|  |  | 294  | 3 |  |                         |                     |                     |
| COM (85) 396<br>proposed 8/8-<br>1985  | Council Regulation<br>(EEC) No 1247/92<br>of 30 April 1992 –<br><b>Amending</b><br><b>1408/71</b>      | 2481 | 3 | Based on 139/82<br>Piscitello; joined<br>cases 379-381/85<br>and 93/86 Giletti<br>et al. | Annex II a,<br>art. 10a | <b>Override</b>     | <b>Overrule</b>     |
| COM (90) 335<br>proposed 3/8-<br>1990  | Council Regulation<br>(EEC) No 2195/91<br>of 25 June 1991 –<br><b>Amending</b><br><b>1408/71</b>       | 337  | 2 | 302/84 (Ten<br>Holder); 58/87<br>(Rebmann)   | Art. 13 (2)<br>f, 45    | <b>Codification</b> | <b>Codification</b> |
| COM (88) 27<br>proposed 5/2-<br>1988   | Council Regulation<br>(EEC) No 3427/89<br>of 30 October<br>1989 -<br><b>Amending</b><br><b>1408/71</b> | 641  | 1 | 41/84 (Pinna)  | Art. 73,<br>annex VI    | <b>Modification</b> | <b>Modification</b> |
| COM (88) 538<br>proposed<br>18/10-1988 | Council Regulation<br>(EEC) No 2332/89<br>of 18 July 1989 –<br><b>Amending</b><br><b>1408/71</b>       | 286  | 1 | 377/85 (Burchell)  | Art. 76, art.<br>79     | <b>Codification</b> | <b>Codification</b> |