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Working Paper

**Characteristics of Precedent:  
European Court of Justice Case Law in Three Dimensions**

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**Abstract:** The case law of the Court of Justice of the European Union (CJEU) is one of the most important sources of European Union law. However, the role of case law as a source of law in EU law is not uniform. By empirically studying how the Court uses its own case law as a source of law, we explore the correlation between the characteristics of a CJEU case (type of actions, actors involved, and area of law) and, on the other hand, the judgments “embeddedness” in previous case law and value as a precedent in subsequent cases. Using this approach, we test, confirm, and debunk existing scholarship concerning the role of CJEU case law as a source of EU law.

## 1 INTRODUCTION

From the moment of its inception the European Union (EU) has included a court entrusted to ensure that law is respected in the interpretation and application of the Treaties and of the legislative acts.<sup>1</sup> That the Court of Justice of the European Union (CJEU) was to play an important role in settling disputes was clear, but few anticipated how instrumental the Court would become in the development of EU law.<sup>2</sup>

No one can dispute that the judgments of the Court of Justice of the European Union (CJEU) constitutes an important source of European Union law. When it renders a judgment, the CJEU settles the case at hand but also sets a precedent for how subsequent cases are to be settled.<sup>3</sup> Collectively these precedents constitute case law, sometimes even “settled” or “established” case law, that can serve as a legal basis for settling subsequent cases, sometimes extensively or even exclusively.<sup>4</sup> This is for example the case with the principle of state liability for which the Court openly refers to its judgment in *Francovich* as the source of law.<sup>5</sup>

While it is clear that case law, law established through judgments, constitutes one of the primary sources of European Union law, there are many questions about CJEU case law to which legal science does not know or disagrees about the answer. This study explores *when* and *why* CJEU case law is an important source of law.<sup>6</sup> As explained more fully below, this is done by answering two at least partially distinguishable questions: (i) when does the Court cite case law (*persuasive power*) and (ii) which judgments become strong precedents (*precedential power*)? The study answers these questions by empirically testing claims previously made by about the role of CJEU case law as a source of EU law.

This study contributes to existing research by empirically and systematically testing case law’s role as a source of law. By focusing on the role of case law as a source of law in practice

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<sup>1</sup> Article 31 of the Treaty establishing the European Coal and Steel Community (“La Cour assure le respect du droit dans l’interprétation et l’application du présent Traité et des règlements d’exécution.”), now Article 19 of the Treaty on European Union (TEU).

<sup>2</sup> See, e.g., Karen J. Alter, “Who are the ‘Masters of the Treaty’?: European Governments and the European Court of Justice”, *International Organization* vol. 52(1) p. 121 (1998); J.H.H. Weiler, “The Transformation of Europe”, *Yale Law Journal* vol. 100(8) p. 2403 (1991); Paul Craig & Gráinne de Búrca, *EU Law* (5th ed., Oxford University Press, Oxford 2011), p. 63–66.

<sup>3</sup> John J. Barceló, “Precedent in European Community Law”, in *Interpreting Precedent* p. 407 (D. Neil McCormick et al eds., Ashgate, Farnham 1997), at p. 417. Barceló notes that the Court never explicitly refers to its previous judgments as “precedents”. *Ibid.* However, the Court has acknowledged that the General Court’s judgments can “constitute a precedent for future cases”. Case C-197/09 RX-II, *M v EMEA* [2009] ECR I-12033, para. 62; Case C-334/12 RX-II, *Jaramillo et al. v EIB*, judgment of July 12 2013, nyr, para. 50.

<sup>4</sup> See, e.g., Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-8041, paras. 36, 39, 53, and 58.

<sup>5</sup> See, e.g., Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT et al.*, judgment of January 15 2014, nyr, para. 50 (“a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357”).

<sup>6</sup> In a forthcoming article, Mattias Derlén & Johan Lindholm, “Peek-a-bo, It’s a Case Law System” (forthcoming 2015), we explore the question of how CJEU case law is an important source of law.

and under particular circumstances we circumvent the sometimes-paralyzing discussion about the nature of precedent in CJEU law on a system-wide level on a scale somewhere between binding and persuasive.<sup>7</sup>

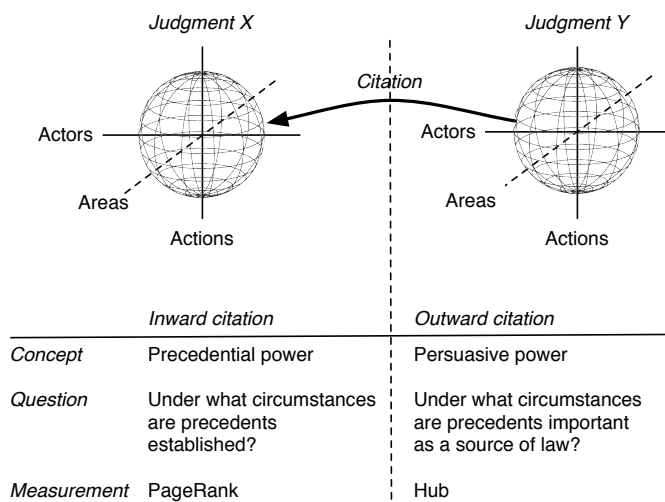
## 2 CASE LAW FROM A NETWORK PERSPECTIVE

### 2.1 INTRODUCTION: TOMORROW'S YESTERDAY

The common and deceptively simple practice of a court citing a previous judgment contains surprisingly much information. It must first be noted that a citation from one judgment to another affects both the cited judgment and the citing judgment.<sup>8</sup> As elegantly explained by Schauer:<sup>9</sup>

*An argument from precedent seems at first to look backward. The traditional perspective on precedent, both inside and outside of law, has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday.*

Thus, two different types of information can be drawn from a single citation: the outward citation from the citing judgment can reveal information about when precedents are important as a source of law and at the same time the inward citation to the cited judgment gives us information regarding the relative importance of different precedents as



**Figure 1. One Citation, Two Questions**

sources of law. As explained more fully below, this study exploits this information using two

<sup>7</sup> See Barceló (1997), pp. 415–416 (providing an overview of existing scholarship on this topic). See also A.G. Toth, "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects", Yearbook of European Law vol. 4 p. 1 (1984).

<sup>8</sup> See also *infra* Illustration 1. One Citation, Two Questions.

<sup>9</sup> Frederick Schauer, "Precedent", Stanford Law Review vol. 39 p. 571, at pp. 572–573.

network centrality measures, Hub Score and PageRank, and examines how they are related to three characteristics of citing and cited judgments: *actions* (type of procedure), *areas* (subject matter), and *actors* (parties).

## 2.2 OUTWARD CITATIONS, PERSUASIVE POWER, AND HUB SCORE

Starting with outward citations, we depart from the position “that ‘case law’ plays a major justificatory role”<sup>10</sup> and, consequently, that a primary reason for the Court to cite a precedent is to add to the legitimacy of the citing judgment. Consequently, the relative “embeddedness” of a judgment in existing case law is a reflection of its *persuasive power* and, by extension, the Court’s strategic decisions.<sup>11</sup>

The question of the binding force of judgments is a complex one in most legal orders,<sup>12</sup> and EU law is no exception. No court operates in a vacuum and all courts must legitimize its decisions to external actors,<sup>13</sup> but this is perhaps particularly true for the Court of Justice. The CJEU is frequently asked to settle issues of far-reaching political repercussions,<sup>14</sup> and must thus carefully consider how the institutions of the European Union and the government of the Member States will receive its decisions. The CJEU must also legitimize its judgments to the national courts. This is particularly obvious in cases brought as preliminary rulings where it is ultimately up to the referring national court to settle the individual dispute.<sup>15</sup> However, the need to convince national courts also goes beyond this. As explained by Davies, “most EU law is applied by national courts” and “[t]he direct influence of the Court within national legal systems largely depends on the extent to which it influences these national judgments.”<sup>16</sup> Without discounting the importance of other factors, such as clear, consistent, and well-based reasoning, we can reasonably assume that one (actual or perceived) effective way of increasing a judgment’s persuasive power is to embed it in previous case law, citing many previous judgments or important previous judgments.<sup>17</sup>

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<sup>10</sup> John J. Barceló, “Precedent in European Community Law”, in *Interpreting Precedent* p. 407 (D. Neil McCormick et al eds., Ashgate, Farnham 1997), at p. 417.

<sup>11</sup> Cf. Yonathan Lupu & James H. Fowler, “Strategic Citations to Precedent on the U.S. Supreme Court”, *Journal of Legal Studies* vol. 42 p. 151 (2013).

<sup>12</sup> See, e.g., Aleksander Peczenik, “The Binding Force of Precedent”, in *Interpreting Precedent* p. 461 (D. Neil McCormick et al. eds., Ashgate, Dorchester 1997).

<sup>13</sup> Lupu & Voeten (2011), p. 417, and sources cited. The extreme counter-position would be that a judgment’s authority exclusively follows from the position of the rendering court.

<sup>14</sup> See Takis Tridimas, “The Court of Justice and Judicial Activism”, *European Law Review* 1996 vol. 21(3) p. 199, at p. 203.

<sup>15</sup> Notwithstanding the fact that the CJEU expects national courts to either follow its findings or request a preliminary ruling. See Case 28-30/60, *Da Costa v. Nederlandse Belastingadministratie* [1963] ECR 31.

<sup>16</sup> Gareth Davies, “Activism relocated. The self-restraint of the European Court of Justice in its national context”, *Journal of European Public Policy* vol. 19(1) p. 76 (2012), at p. 76.

<sup>17</sup> Cf. Lawrence M. Friedman et al., “State Supreme Courts: A Century Of Style And Citation”, *Stanford Law Review* vol. 33 p. 773 (1981), at p. 794; Thomas G. Hansford & James F. Spriggs II, *The Politics of Precedent* (Princeton University Press, Princeton 2008), pp. 16–23; Marc Jacob, *Precedent and Case-*

Following several previous studies of case law<sup>18</sup> we use *Hub Score* as a measurement of persuasive power. A judgment's Hub Score, which is one attribute assigned to each case using Kleinberg's HITS algorithm, reflects not only the number of cited judgments but also the relative importance of the cited judgments.<sup>19</sup> Instead of treating all cited cases equally, the HITS algorithm assigns greater importance when an important case is cited.<sup>20</sup> Thus, a judgment with a high Hub Score is a judgment that cites many important judgments.<sup>21</sup>

### 2.3 INWARD CITATION, PERSUASIVE POWER, AND PAGERANK

The information that can be inferred from the inward citation is different from the outward citation. When the CJEU renders a judgment it does not merely apply the law to the facts of the case before it, it also, at the same time, contributes to legal development. We argue that citations made to a judgment reflect its *precedential power*, its relative strength as a reason for reaching a similar conclusion in subsequent cases.<sup>22</sup> A judgment that is cited by more judgments or by more important judgments has more precedential power than other judgments.

In this study we use a slightly modified version of the original *PageRank* algorithm, which serves as the basis for how Google ranks webpages, as a measurement of precedential power. Very simplified, PageRank allows a "Random Walker" to explore the structure of the network by randomly following citations and occasionally teleporting to a random link in the network.<sup>23</sup> PageRank, which is expressed as a percentage value, represents the relative probability that the Random Walker will find itself in a certain place and represents, as applied to a case law network, a judgment's popularity.<sup>24</sup> We believe that PageRank constitutes the most accurate measurement of precedential value as it distributes importance based on relative

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based Reasoning in the European Court of Justice (Cambridge University Press, Cambridge 2014), p. 100.

<sup>18</sup> See, e.g., James H. Fowler et al, "Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court", *Political Analysis* vol. 15 p. 324 (2007).

<sup>19</sup> Jon M. Kleinberg, "Authoritative Sources in a Hyperlinked Environment", *Journal of the ACM* vol. 46 p. 604 (1999).

<sup>20</sup> In the HITS algorithm, "importance" is measured as Authority score and calculated on the basis of the judgments citing it. A good Authority is a node pointed to by many good Hubs and a good Hub is a node that points to many good Authorities.

<sup>21</sup> In a network of case law, authorities and hubs can be translated as influential judgments and judgments that are well founded in law. See Fowler et al (2007), p. 331.

<sup>22</sup> William M. Landes & Richard A. Posner, "Legal Precedent: A Theoretical and Empirical Analysis", *The Journal of Law and Economics* vol. 19 p. 249 (1979), at p. 250.

<sup>23</sup> The chance of a teleport, in the algorithm expressed as the damping factor ( $d$ ), affects how far back in a chain of citations the Random Walker will travel. Because of the comparatively limited size of the CJEU's case law network, we use a factor of 0.5 (compare with the original where  $d=0.85$ ).

<sup>24</sup> See Sergey Brin & Lawrence Page, "The anatomy of a large-scale hypertextual Web search engine", *Computer Networks & ISDN Systems* vol. 30 p. 107 (1998); Lawrence Page et al., "The PageRank Citation Ranking: Bringing Order to the Web" (January 29, 1998), available at <http://ilpubs.stanford.edu:8090/422/1/1999-66.pdf> (February 28, 2012).

importance, neither giving equal weight to all citations nor giving all weight to the oldest decisions.<sup>25</sup>

#### 2.4 CJEU JUDGMENTS IN THREE DIMENSIONS

It is generally accepted that the role of CJEU case law as a source of law differs depending on the characteristics of the particular case.<sup>26</sup> We have previously demonstrated that the legal importance of individual judgments differs greatly depending on what one means by “important”<sup>27</sup> and in a forthcoming publication show that both outward and inward outwards citations follow the same power-law distribution found in legal systems that rely heavily on case law.<sup>28</sup>

While it is thus quite clear that CJEU judgments vary in persuasive power and precedential power, it is less clear to what such differences are attributed. Existing scholarship contains numerous claims about the varying importance of CJEU case law as a source of law, but few of these claims have been empirically supported or tested.<sup>29</sup> This study tests to what extent differences in a judgment’s persuasive and precedential power follow the characteristics of the citing or cited judgment respectively.

In so doing, we consider three characteristics of each case: (i) the type of action under which the case was brought, including the outcome for actions that have a binary winner-loser outcome (*actions*), (ii) what area of law the case concerns (*areas*), and (iii) which actors were involved in the case (*actors*). These three characteristics are not the only characteristics of a case, but we believe that they are the ones most likely to affect the persuasive and precedential power of the judgment. This is supported by the aforementioned scholarship that, as more fully described below, has made claims about the impact of these characteristics for the importance of CJEU case law as a source of law.

All findings made in this article are made on the basis of a dataset including all 5,579 judgments rendered by the CJEU between 1992 and 2011. However, when we calculate Hub Score and PageRank for those judgments, we do so on the basis of all 9,125 judgments and 38,278 citations made by the CJEU between 1954 and 2011.<sup>30</sup> Using that information, we

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<sup>25</sup> Mattias Derlén et al., “Coherence Out of Chaos: Mapping European Union Law by Running Randomly Through the Maze of CJEU Case Law”, *Europarättslig Tidskrift* vol. 16 nr. 3 p. 517 (2013), at pp. 520–524.

<sup>26</sup> See, e.g., Foster (2011), pp. 76–77.

<sup>27</sup> Mattias Derlén & Johan Lindholm, “Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments”, *European Law Journal* (forthcoming 2014).

<sup>28</sup> Derlén & Lindholm (2015).

<sup>29</sup> But see Marc Jacob, *Precedent and Case-based Reasoning in the European Court of Justice* (Cambridge University Press, Cambridge 2014) (conducts a limited empirical study).

<sup>30</sup> Unlike in a study assessing individual cases, see, e.g., Derlén & Lindholm (2014), the exclusion of individual cases is unlikely to distort the mean score for groups of cases. We believe that that the sampled

calculate descriptive statistics for groups of cases that share a value for one of the aforementioned characteristics actions, area, and actor.<sup>31</sup> This provides a relative measurement for how the precedential and persuasive power of a judgment varies depending on the characteristics of the underlying case.<sup>32</sup> We then, finally, analyze to what extent those measurements conform to existing legal theory.

Table 1. Descriptive Statistics

	<i>N</i>	<i>Mean</i>	<i>Sd</i>	<i>Min</i>	<i>Max</i>
Hub Score	5,572	.000131	.000172	0	.003697
PageRank	5,572	.000103	.000167	0	.003267
Outdegree	5,572	6.1	6.6	0	44
Indegree	5,572	4.5	5.8	0	134

### 3 ACTIONS

The Treaty on the Functioning of the European Union provides an exhaustive list of actions that may be brought before the CJEU, who may bring such actions, and who may be the subject of such actions. A most obvious distinction is between *direct actions* where the Court has jurisdiction to finally settle disputes brought against EU institutions and the Member States, and, on the other hand, *preliminary rulings* where the Court answers questions posed by national courts and tribunals concerning the interpretation of the Treaties and the validity and interpretation of secondary acts.<sup>33</sup>

The dominant view in existing literature is that there are important differences between the aforementioned procedures, primarily in the sense that the Court’s development of EU law has primarily been done through preliminary rulings.<sup>34</sup> For example, Craig describes it as both the basis and the “procedural vehicle” for the development of some of EU law’s most fundamental concepts.<sup>35</sup> Jacob tells us that most CJEU “landmark cases” are preliminary rulings.<sup>36</sup> Along the

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used (61%) gives a fair and representative picture of modern CJEU case law and fear that including even older judgments would produce an outdated image.

<sup>31</sup> For example that the case was brought as a preliminary ruling (action), by the Commission (actor), or concerned the free movement of goods (area).

<sup>32</sup> Using R, we calculate for each category mean score, standard deviation, and a p-value using Welch Two Sample t-test.

<sup>33</sup> Article 267 TFEU.

<sup>34</sup> See, e.g., Alter (1998), pp. 126–129. See also *ibid.* p. 122 (“A significant part of the “transformation” of the EU legal system has been explained by legal scholars who have shown how the Court turned the “preliminary ruling system” of the EU from a mechanism to allow individuals to challenge EC law in national courts into a mechanism to allow individuals to challenge national law in national court.”); Alec Stone Sweet & Thomas L. Brunell, “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community”, *American Political Science Review* vol. 92(1) p. 63 (1998), at pp. 65–66.

<sup>35</sup> Paul Craig, “The Jurisdiction of the Community Courts Reconsidered”, in *The European Court of Justice* p. 177 (Gráinne de Búrca & J.H.H. Weiler eds., Oxford University Press, Oxford 2001), at pp. 182–183.



same lines, Schepel & Blankenburg concludes that the Court “has refrained from turning [judicial review] into a vehicle of general constitutional review [and] has instead opted for the preliminary reference procedure to chant the mantras of Community law.”<sup>37</sup>

We find that the role of case law as a source of law varies significantly between categories of actions and that precedential and persuasive powers follow largely the same pattern. 24% of all CJEU cases and 70% of all direct actions consist of successful infringement proceedings in which case law has comparatively low importance as a source of law and among which few important precedents can be found. Instead, it is in preliminary rulings, which make up 57% of all CJEU decisions, that the Court uses case law as a source of law and that important precedents can be found.

These findings are consistent with and confirm the above claims previously made by scholars regarding the particularly strong role of case law as a source of law in preliminary rulings. Among the CJEU’s most important judgments during the period<sup>38</sup> two out of three, including the top four, are preliminary rulings.<sup>39</sup> While such a top list includes direct actions and even successful infringement proceedings, a closer examination reveals that those decisions are largely cited on procedural points as matter of routine.<sup>40</sup>

That case law is a less important source of law in direct actions is, to some extent, a corollary of the conclusion that it is a particularly important source in preliminary rulings. However, there is a noticeable discrepancy between unfounded infringement proceedings and other direct actions that gives a more nuanced image into the role of CJEU case law and the Court itself. While the Court inhabits an important position establishing precedents at the apex of Europe’s judiciary, our data suggest that about a quarter of its workload consist of, more or less as a matter of routine, finding in favor of the Commission and against the Member State infringement proceedings in cases that are neither legally complex nor particularly important for the development of EU law.

Of particular interest in this regard are unfounded direct actions. Only about 18% of all direct actions are unsuccessful but those judgments have on average significantly higher

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<sup>36</sup> Jacob (2014), p. 19 (and cited sources). Regarding what constitutes an important decision, see Dérén & Lindholm (2014).

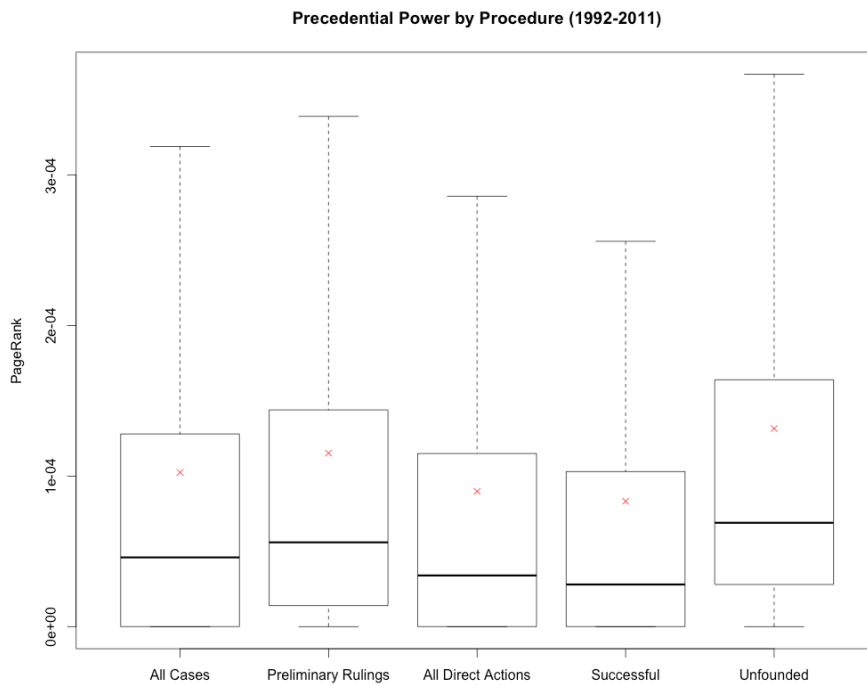
<sup>37</sup> Harm Schepel & Erhard Blankenburg, “Mobilizing the European Court of Justice”, in *The European Court of Justice* p. 9 (Gráinne de Búrca & J.H.H. Weiler eds., Oxford University Press, Oxford 2001), at pp. 41–42.

<sup>38</sup> Measured as the top 10% by PageRank.

<sup>39</sup> Case C-415/93, *URBSFA v. Bosman* [1995] ECR I-5040; Case C-379/98, *PreussenElektra AG v. Schleswag AG* [2001] ECR I-2159; Case C-279/93, *Finanzamt Köln-Altstadt v. Schumacker* [1995] ECR I-249; Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4186.

<sup>40</sup> See, e.g., the Court’s oft-cited decisions in Case C-103/00, *Commission v. Greece* [2002] ECR I-1147, Case C-168/03, *Commission v. Spain* [2004] ECR I-8227 and Case C-23/05, *Commission v. Luxembourg* [2005] ECR I-9535, which the Court routinely cites in infringement proceedings (many of which are summary publications) on the point that it will not consider any changes made subsequent to the period laid down in the Commission’s reasoned opinion.

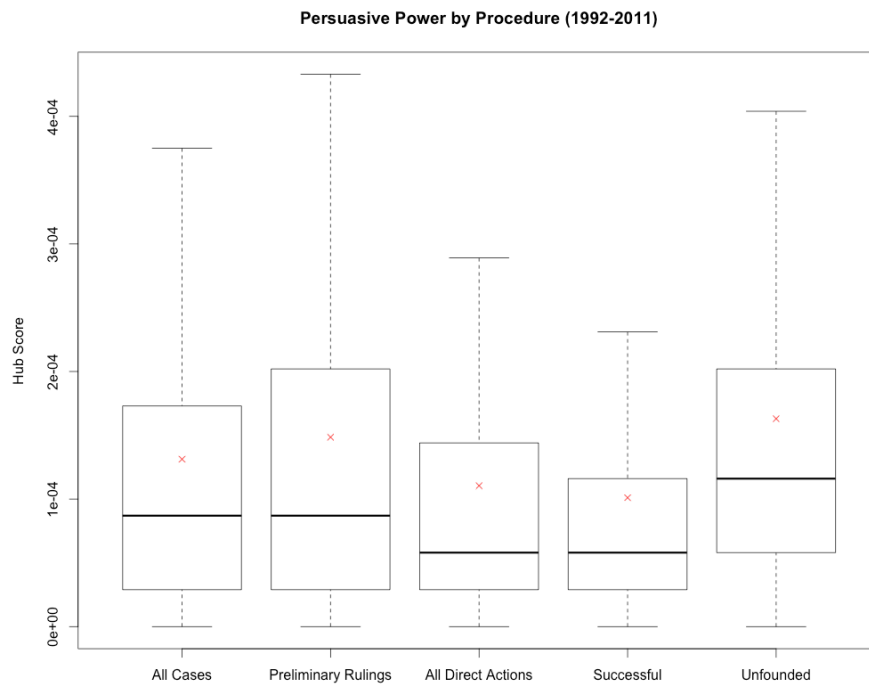
persuasive and precedential power than successful direct actions and even preliminary rulings.<sup>41</sup> While not immediately obvious, this finding makes sense. The Commission wins in more than four out five infringement proceedings and in most cases it is quite clear that the Member States have failed to meet their obligations, for example by failing to implement a directive in time. The most likely explanation for this finding is that while most infringement proceedings are rather uncomplicated and that the ones that the Court finds to be unfounded are more complicated cases whose outcome requires additional justification.<sup>42</sup>



**Figure 2. Precedential Power by Procedure (1992–2011)**

<sup>41</sup> The overall importance of unfounded direct actions, which make up less than 6% of all cases, in the CJEU’s case law is however not as strong as preliminary rulings.

<sup>42</sup> Another possible and combinable explanation for this finding is that the Court is more concerned with its internal standing vis-à-vis the other EU institutions and thus more careful to legitimize its findings when it goes against the Commission than against a Member State. However, our findings regarding actors suggest that this is not the case. See further *infra* Part 5.



**Figure 3. Persuasive Power by Procedure (1992–2011)**

#### 4 AREAS

The case law of the Court of Justice concerns different areas of law. The fact that EU law “cannot be divided into the traditional branches of law found in a national legal system”<sup>43</sup> does not mean that it is impossible or without merit to consider the role of case law as a source of law in different areas of law, only that “areas of law” has a different meaning. Indeed, the prevailing (albeit vague) opinion among scholars appears to be that the role of case law as a source of law varies between different areas of law. For example, Foster argues, regarding what we refer to as precedential power, that “leading cases in Community law, such as *Van Gend en Loos* and *Costa v ENEL*, have acquired a higher and more authoritative status than other cases – dealing, for example, with an interpretation of one of the common customs tariff classifications or some other mundane item of EU secondary legislation.”<sup>44</sup> Another example is Davies who explains that the judicial activism-criticism has primarily concerned four areas of EU law “of great social and legal importance” where “the central legal concepts are imprecise ones”: free movement, non-discrimination law, the rules pertaining to the interpretation of directives, and the law on damages for breach of EU law.<sup>45</sup> The prevailing view seems to be that CJEU case

<sup>43</sup> Barceló (1997), p. 419.

<sup>44</sup> Foster (2011), pp. 76–77.

<sup>45</sup> Davies (2012), pp. 79–80.

law is of particular importance in areas of law that are (i) important for achieving an internal market, (ii) (politically) sensitive to the Member States, and (iii) and predominantly governed by Treaty provisions rather than legislative acts<sup>46</sup>. This conforms with the view of the role of case law more generally. Lupu & Voeten has demonstrated that the European Court of Human Rights (ECtHR) will to a greater extent use past case law to justify its judgments when it concerns politically sensitive issues.<sup>47</sup> Similarly, Landes & Posner argue that case law is an important source “of the specific rules of law” in legal systems where legislative bodies only provide “general norms of conduct”.<sup>48</sup>

For the purpose of exploring the validity of these claims we use the subject matters assigned by the Court. The Court designates between one and eleven, on average between two and three, subject matters to each judgment.<sup>49</sup> It should be noted that these designations are somewhat rough and primarily include policy areas, thereby excluding from separate consideration a large number of issues, for example constitutional and procedural issues. A total of 136 unique subject matters occur in the data set. Many of these subject matters are, however, wholly or almost wholly ( $\geq 97\%$ ) included in another subject matter and will therefore be excluded from consideration.<sup>50</sup> There are also a number of subject matters that only occur in a limited number of judgments and from which it is therefore difficult to draw reliable conclusions.<sup>51</sup> It was concluded above that there are significant differences between types of actions with regard to the role of case law as a source of law. For this reason, the examination includes separate consideration of preliminary rulings (PR) and direct actions (DA) respectively.<sup>52</sup> Several conclusions can be drawn from the data.

First, we find empirical support that the importance of CJEU case law as a source of law varies significantly between different subject matters. For example, the mean precedential power of a judgment in a preliminary case is more than three times greater if it concerns *Dominant position* than *Agriculture*. While hardly surprising, it is valuable to empirically establish that there are indeed significant differences between different areas of law, most fundamentally to avoid treating all case law as a source of law the same in all areas of law.

Second, consistent with our findings regarding actions, the greatest precedential and persuasive power of case law can be found among cases brought as preliminary rulings. For

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<sup>46</sup> Cf. Jacob (2014), pp. 16–18.

<sup>47</sup> Yonatan Lupu & Erik Voeten, “Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights”, *British Journal of Political Science* vol. 42(2) p. 413 (2011).

<sup>48</sup> Landes & Posner (1979), p. 249.

<sup>49</sup> The average number of subject matters has remained more or less constant since 1971.

<sup>50</sup> For example, thirty-four subject matters always occur together with the subject matter *Agriculture*, including *Beef & Veal*, *Cereals*, *Dry Fodder*, *Flax & Hemp*, *Milk Product*, *Sugar*, and *Wine*. We find no plausible reason why there would be a legal difference between these categories of agricultural products.

<sup>51</sup> The lowest being *Safety at Work and Elsewhere* which is only a subject matter in two judgments. We have excluded subject matters never raised in more than fifty cases ( $n < 50$ ) for reasons of constituting a too limited sample.

<sup>52</sup> See *infra* Table 2. Mean Scores by Subject Matter (1992-2011).

example, among the nine individual subject matters with a statistically significant mean Hub Score higher than .000200, only one, *State aids*, is a direct action.<sup>53</sup>

Third, consistent with existing scholarship, case law's greatest use as a source of law is in preliminary rulings cases concerning subject matters that concern the internal market: competition law and fundamental freedoms. Cases concerning those subject matters, and almost exclusively those cases, have statistically significant higher than average mean values for Hub Score and PageRank. Similarly, when they are grouped together in *All competition law* and *All fundamental freedoms* it is clear that judgments concerning these subject matters have high precedential and persuasive power. With regard to direct actions, the same is true for cases concerning *All competition law* and *State aids*.<sup>54</sup>

Fourth, more careful examination reveals that between cases concerning the internal market, some important distinctions can be made. The five types of cases with the highest scores are, with some small variations between precedential and persuasive power, cases concerning *Dominant position (PR)*, *State aids (DA)*, *Free movement of capital (PR)*, *Dominant position (PR)* and *State aids (PR)*. That case law is a more important source of law in the field of competition law than in the field of fundamental freedoms is an interesting observation considering existing legal theory as reported above. That such a difference might exist in cases brought as direct actions was more expected, but that competition law cases, with a not insignificant margin, also dominates fundamental freedom cases brought as preliminary rulings is a surprise. It can be noted though that *All fundamental freedoms (PR)* does edge out, albeit barely, *All competition law (DA)*.

It may also, at first sight, appear surprising that *Free movement of capital* is the one occupies such a prominent role may at first appear surprising. While the free movement of capital for a long time was much less prominent than the other fundamental freedoms, it has gradually increased in importance since the beginning of the 1990's, largely through the case law of the CJEU. As observed by Flynn, "[t]he volume of case law relating to the free movement of capital has exploded over the past five years [and] the Court's case law has brought the capital rules in five years to the positions held by the other freedoms after almost thirty years."<sup>55</sup> It is thus natural that it would be a prominent area of case law during the period examined here. Central cases concerning free movement of capital includes *Manninen*<sup>56</sup> and *Verkooijen*<sup>57</sup> that according to our data are the overall twentieth and twenty-third most important CJEU decisions (by PageRank) respectively between 1992 and 2011.

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<sup>53</sup> If we include the aggregate categories *All competition law* and *All fundamental freedoms*, it is two out of twelve.

<sup>54</sup> Regarding direct actions concerning fundamental freedoms, the means found are not of statistical significance and close to the overall average for direct actions.

<sup>55</sup> Leo Flynn, "Coming of Age: The Free Movement of Capital Case Law 1993–2002", *Common Market Law Review* vol. 39 (4) p. 773 (2002), at p. 804.

<sup>56</sup> Case C-319/02, *Manninen* [2004] ECR I-7477.

<sup>57</sup> Case C-35/98, *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4071.

Fifth, excluding competition law and fundamental freedoms, there is primarily one subject matter that stands out in a positive regard: cases brought under preliminary rulings concerning *Principles, objectives and tasks of the Treaties*. In this group we find many of the Court's central judgments concerning legal principles and constitutional matters, including such famous cases as *Brasserie du Pecheur*<sup>58</sup>, *Inter-Environnement Wallonie*<sup>59</sup>, *Martinez Sala*<sup>60</sup>, *Mangold*<sup>61</sup>, and *Schmidberger*<sup>62</sup>. Thus, it should come as no great surprise that this is an area where case law plays an important role as a source of law in the sense that judgments in cases concerning this subject matter on average contain references to many important prior decisions (high Hub Score) and are cited by many important judgments (high PageRank). The same is, however, not equally true for cases concerning this subject matter when they are brought under direct actions.

Sixth and finally, this approach also allows us to identify subject matters where case law is less important as a source of law. Our findings reveal that case law is of comparatively little importance as a source of law (low Hub Score) in cases concerning *Provisions governing the institutions (DA)*, *Agriculture (PR)*, *Customs union (PR)*, *Approximation of laws (PR)*, and *Brussels Convention (PR)*. Similarly, we find that precedents are relatively rarely found (low PageRank) in cases concerning *Provisions governing the institutions (DA)*, *Agriculture (PR)*, *Customs union (PR)*, *Brussels Convention (PR)*, *Social security for migrant workers (PR)*.<sup>63</sup>

These lists, which in many ways are similar, may at first appear surprising, but we find primarily two reasonable explanations for our findings. First, concerning *Agriculture* there appears strongly connected to the degree by which those cases concern the interpretation of legislative EU acts. CJEU judgments in preliminary rulings cases contain on average 2.03 references to Directives and Regulations. However, a judgment in a preliminary rulings case where at least one subject matter is *Agriculture* refers on average to 2.97 legislative acts.<sup>64</sup> A similar pattern is noticeable in direct actions, albeit not as accentuated.<sup>65</sup> Second, the negative correlation in direct actions can largely be explained by the same phenomenon observed above regarding the relevance of actions: many of the cases handled by the CJEU are relatively simple infringement proceedings where the Court finds that a Member State has violated Union law without needing to cite previous case law in support of this conclusion.<sup>66</sup> Of all direct actions

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<sup>58</sup> Joined Cases C-46/93 & 48/93, *Brasserie du Pecheur SA v. Germany & The Queen v. Secretary of State for Transport, ex parte Factortame Ltd et al.* [1996] ECR I-1029.

<sup>59</sup> Case C-129/96, *Inter-Environnement Wallonie ASBL v. Région Wallonne* [1997] ECR I-7411.

<sup>60</sup> Case C-85/96, *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

<sup>61</sup> Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981.

<sup>62</sup> Case C-112/00, *Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659.

<sup>63</sup> Although there are other subject matters with lower mean Hub Score and PageRank, we cannot confirm that those numbers are statistically significant.

<sup>64</sup> The second to highest average is *Customs union* with 2.25 references.

<sup>65</sup> *Agriculture* has the highest average number of cited legislative acts of all subject matters in direct actions, 3.30 compared to an average of 2.10, but an average number of cited judgments that is only slightly below the average, 4.59 compared to an average of 5.03.

<sup>66</sup> See *supra* Part 3.

concerning *Approximation of laws* 89% are such successful infringement proceedings.

Table 2. Mean Scores by Subject Matter (1992–2011)

Type	N	<i>Preliminary Rulings</i>		N	<i>Direct Actions</i>	
		Hub Score	PageRank		Hub Score	PageRank
All cases	3,164	.000148	.000115	1,727	.000110	.000090
All Competition law	127	.000272*** (.000409)	.000217** (.000370)	117	.000214*** (.000214)	.000172*** (.000194)
<i>Concerted practices</i>	13	.000216 (.000167)	.000177 (.000167)	9	.000129 (.000191)	.000103 (.000198)
<i>Dominant position</i>	49	.000312* (.000524)	.000263* (.000478)	8	.000202 (.000243)	.000191 (.000278)
<i>State aids</i>	71	.000262** (.000333)	.000203* (.000297)	100	.000222*** (.000214)	.000176*** (.000187)
All fundamental freedoms	830	.000224*** (.000274)	.000182*** (.000261)	432	.000117 (.000142)	.000091 (.000142)
<i>Free movement of capital</i>	83	.000289*** (.000254)	.000239*** (.000251)	34	.000153 (.000152)	.000111 (.000136)
<i>Free movement of services</i>	334	.000203*** (.000237)	.000160*** (.000214)	229	.000110 (.000143)	.000088 (.000156)
<i>Free movement of workers</i>	216	.000229*** (.000325)	.000180** (.000306)	95	.000128 (.000150)	.000108 (.000183)
<i>Quantitative restrictions</i>	188	.000231*** (.000276)	.000189*** (.000265)	75	.000138 (.000117)	.000114 (.000120)
<i>Right of establishment</i>	346	.000200*** (.000253)	.000165*** (.000242)	273	.000106 (.000141)	.000081 (.000129)
Agriculture	427	.000101*** (.000131)	.000078*** (.000133)	253	.000113 (.000134)	.000089 (.000134)
Approximation of laws	553	.000133** (.000166)	.000107 (.000167)	403	.000096 (.000135)	.000085 (.000148)
Brussels convention	76	.000137* (.000086)	.000089** (.000066)	0	---	---
Consumer protection	113	.000114 (.000164)	.000084* (.000161)	38	.000094 (.000111)	.000066 (.000096)
Customs union	293	.000113*** (.000116)	.000086*** (.000108)	19	.000116 (.000096)	.000079 (.000075)
Environment	123	.000135 (.000169)	.000117 (.000182)	365	.000097 (.000141)	.000089 (.000176)
External relations	149	.000141 (.000144)	.000104 (.000129)	78	.000133 (.000167)	.000103 (.000173)
Financial provisions	19	.000117 (.000112)	.000087 (.000104)	40	.000132 (.000137)	.000094 (.000117)
Industrial and commercial property	164	.000128 (.000150)	.000108 (.000161)	23	.000121 (.000110)	.000105 (.000104)
Principles, objectives and tasks of the Treaties	127	.000229*** (.000233)	.000181** (.000224)	45	.000134 (.000149)	.000100 (.000145)
Provisions governing the institutions	34	.000221 (.000238)	.000169 (.000209)	52	.000084** (.000065)	.000057** (.000065)
Social provisions	301	.000141 (.000138)	.000103 (.000124)	73	.000130 (.000204)	.000122 (.000252)
Social security for migrant workers	208	.000133 (.000138)	.000096* (.000129)	19	.000091 (.000083)	.000071 (.000102)
Taxation	496	.000168* (.000178)	.000135* (.000182)	114	.000123 (.000117)	.000095 (.000109)
Transport	86	.000137 (.000180)	.000111 (.000177)	92	.000088 (.000131)	.000072 (.000140)

Note: \* p < .05, \*\* p < .01, \*\*\* p < .001. Standard deviation in parenthesis.

## 5 ACTORS

As explained above, we expect that the role of CJEU case law as a source of law differ depending on the actors involved and this extends, in particular, to the persuasive power of a particular case. We would expect that the effort that the Court will spend on embedding one of its judgment's in existing case law to differ depending on how many and which actors are involved in the particular case. For example, we expect that the Court would rely more heavily on case law in cases involving common law jurisdictions compared to civil law jurisdictions considering the traditionally increased importance of case law as a source of law in those jurisdictions.<sup>67</sup>

We also expect that the Court has a greater need to legitimize its judgment in highly sensitive or controversial cases and that this will to those judgments being more heavily embedded in existing case law. Not all cases that the Court settles are politically charged, and many are outright uncontroversial, but in some cases the Court acts as a "referee" settling disputes between the Member States and the EU institutions. Jacob argues that the multiplicity and diversity of legal and political influences within the EU legal order adds to the importance of CJEU precedent in the EU legal order.<sup>68</sup> Based on these considerations, we expect a positive correlation between the number of actors involved in a case and the extent to which the judgment is embedded in case law.

One actor that we should not forget is the Court itself. While the Court is one single institution, its composition differs between cases. Whereas roughly smaller chambers decide four out five cases, the remaining fifth are singled out to be adjudicated by the Full Court (before 2004) and the Grand Chamber (after 2004).<sup>69</sup> We expect to find and do find that cases that are singled out for such preferential treatment distinguish themselves when it comes to the use of case law as a source of law. Judgments in such cases make up half of the top 10% strongest precedents<sup>70</sup> with a mean PageRank that is almost double the average (.000195).<sup>71</sup> Similarly, these judgments are almost twice as heavily embedded in existing case law as the average judgment with a mean Hub Score of .000226.<sup>72</sup> It is thus fair to say that much of the development of CJEU case law, both in terms of precedential and persuasive power, comes through these cases. However, it must also be noted that not all such cases turn out to be important and that there are, as explained elsewhere in this paper, other factors that even more

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<sup>67</sup> Cf. Lupu & Voeten (2011), p. 421.

<sup>68</sup> Jacob (2014), pp. 18–19.

<sup>69</sup> Until the European Union's enlargement in 2004 the Full Court would decide certain, presumably more important cases, collectively whereas other, presumably less important cases would be heard by smaller chambers. During the time period examined in this study, the Full Court consisted of between twelve and fifteen members. After the enlargement, the Court almost never sits as a full court, instead relinquishing its roll to the Grand Chamber, a composition comprising a minimum of thirteen judges.

<sup>70</sup> Making them overrepresented by 2.5 times.

<sup>71</sup> Ranked by PageRank.

<sup>72</sup> Judgments made by the Grand Chamber (i.e. after 2004) cite on average 10.59 previous judgments. That can be compared to an average of 6.10 citations for all judgments between 1992 and 2011.



strongly predicates precedential or persuasive power.

Table 3. Mean Scores for Direct Actions by Actor (1992–2011)

	<i>All direct actions</i>			<i>Excl. successful infringement proceedings</i>		
	<i>N</i>	<i>Hub Score</i>	<i>PageRank</i>	<i>N</i>	<i>Hub Score</i>	<i>PageRank</i>
All cases	1,720	.000110	.000089	515	.000141	.000110
By applicant						
<i>Person</i>	99	.000132 (.000149)	.000099 (.000140)	99	.000132 (.000149)	.000099 (.000140)
<i>Commission</i>	1,354	.000102 (.000139)	.000085 (.000154)	149	.000141 (.000193)	.000117 (.000206)
<i>Council</i>	2	.000044 (.000021)	.000014 (.000020)	2	.000044* (.000021)	.000014* (.000020)
<i>European Parliament</i>	32	.000122 (.000074)	.000101 (.000079)	32	.000122 (.000074)	.000101 (.000079)
<i>Official</i>	1	.000029#	.000000#	1	.000029#	.000000#
<i>All MS</i>	254	.000149*** (.000171)	.000114* (.000160)	254	.000149 (.000171)	.000114 (.000160)
By defendant						
<i>Person</i>	18	.000156 (.000165)	.000110 (.000149)	18	.000156 (.000165)	.000110 (.000149)
<i>Commission</i>	252	.000139** (.000159)	.000105 (.000140)	252	.000139 (.000159)	.000105 (.000140)
<i>Council</i>	136	.000145** (.000158)	.000115 (.000165)	136	.000145 (.000118)	.000115 (.000165)
<i>European Parliament</i>	24	.000118 (.000123)	.000076 (.000120)	24	.000118 (.000123)	.000076 (.000120)
<i>Official</i>	2	.000794 (.000837)	.000719 (.000840)	2	.000794 (.000837)	.000719 (.000840)
<i>All Institutions</i>	381	.000143*** (.000171)	.000110** (.000161)	414	.000143 (.000171)	.000110 (.000161)
<i>All MS</i>	1,310	.000100* (.000134)	.000084 (.000150)	113	.000134	.000111 (.000193)

Note: \* p < .05, \*\* p < .01, \*\*\* p < .001. Standard deviation in parenthesis. # Insufficient number of observation for t-test.

The actors involved in a case differ greatly between direct actions and preliminary rulings. Starting with direct actions, we know that a large bulk of all direct actions successful infringement proceedings brought by the Commission against a Member State and that case law is of relatively limited importance in those cases.<sup>73</sup> As a consequence, if considering all direct actions, it appears as if it the Commission being the applicant or a Member State being the defendant reduces both the precedential and persuasive power of a judgment below the mean. This is confirmed by the significant increase in mean for Hub Score and PageRank

<sup>73</sup> See *supra* Part 3.

when we exclude successful infringement proceedings from consideration.<sup>74</sup> There are, however, only a few actors that significantly deviate from the mean. The Court will reliably to a greater extent use case law (high Hub Score) in direct actions brought by Member States or against a EU institution and judgments in such cases are more likely to become important precedents (high PageRank).

In preliminary rulings there are no formal defendants and applicants. Instead we can use the originating Member State, i.e. which Member State's courts and tribunals referred the case to the CJEU, as a factor for distinguishing between different preliminary rulings. As explained above, we expect some differences in the use of case law as a source of law depending on the legal tradition of the referring Member State based on the theory that governments and courts of common law jurisdictions, such as Ireland and the United Kingdom, are, in accord with their domestic legal tradition, more likely to find a judgments persuasive if it is embedded in existing case law. Although citing case law may also add to the persuasiveness of a judgment in the eyes of governments and courts of civil law jurisdictions, such as France, we expect it to be less persuasive and for the CJEU to act accordingly. If this theory is true, we expect to find that judgments in preliminary rulings originating from common law countries have a higher Hub Score than those originating from civil law countries.

Only in a few instances are the found means statistically significant, and those that are statistically significant provide a mixed message. The raw number of citations made by the CJEU in preliminary rulings (*Outdegree*<sup>75</sup>) does not support the theory. While the CJEU cites a much lower than average number of prior judgments when responding to German courts, it cites a greater than average number of judgments when relying to preliminary rulings made by Austrian courts. However, if we consider the relative importance of the cases cited, we find that that the mean Hub Score of preliminary rulings originating in British courts quite significantly exceeds the overall mean. The same is also true for the precedential power of preliminary rulings originating in the United Kingdom.<sup>76</sup>

We are hesitant about drawing any clear conclusions from our data, neither in a positive nor negative direction, regarding whether the Court takes national legal tradition into account when drafting its replies to preliminary rulings. While it is clear that preliminary rulings originating in British courts distinguish themselves in the case law of the CJEU, both with regard to the use of case law (persuasive power) and their importance as a source in subsequent cases (precedential power), this may be attributable to other factors than the referring courts legal tradition.

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<sup>74</sup> However, the difference in mean scores between different applicants and defendants in such cases are not statistically significant.

<sup>75</sup> A judgment's *Outdegree* is equal to the number of judgments it cites. A judgment's *Indegree* is equal to the number of judgments that cites it.

<sup>76</sup> See *infra* Table 4. Mean Scores for Preliminary Rulings by Originating Member State (1992–2011).

Table 4. Mean Scores for Preliminary Rulings by Originating Member State (1992–2011)

	<i>N</i>	<i>Persuasive power</i>		<i>Precedential Power</i>	
		<i>Hub Score</i>	<i>Outdegree</i>	<i>PageRank</i>	<i>Indegree</i>
All cases	3,164	.000148	6.6	.000115	5.0
Austria	222	.000149 (.000150)	7.7*** (6.1)	.000110 (.000135)	5.0 (5.5)
Belgium	282	.000146 (.000273)	5.8*** (5.5)	.000104 (.000236)	4.8 (9.9)
Denmark	84	.000158 (.000165)	6.5 (5.0)	.000120 (.000154)	5.5 (5.8)
Finland	55	.000161 (.000193)	6.9 (5.1)	.000118 (.000183)	5.5 (7.5)
France	226	.000142 (.000167)	5.9 (5.1)	.000112 (.000167)	4.7 (6.1)
Germany	833	.000137 (.000177)	5.7*** (5.6)	.000108 (.000175)	4.7 (6.6)
Greece	70	.000165 (.000189)	7.6 (7.2)	.000117 (.000187)	5.2 (7.0)
Ireland	24	.000183 (.000174)	7.0 (8.6)	.000138 (.000160)	6.3 (6.9)
Italy	318	.000158 (.000184)	7.3 (6.2)	.000125 (.000184)	5.4 (6.8)
Luxembourg	37	.000173 (.000225)	6.9 (5.2)	.000162 (.000240)	6.4 (8.8)
Netherlands	347	.000158 (.000172)	6.5 (5.7)	.000128 (.000172)	5.5 (6.7)
Portugal	53	.000153 (.000142)	5.5 (4.6)	.000105 (.000113)	4.8 (5.3)
Spain	117	.000154 (.000204)	6.9 (5.7)	.000125 (.000192)	5.3 (7.3)
Sweden	75	.000142 (.000141)	7.5 (7.5)	.000106 (.000118)	4.8 (5.1)
United Kingdom	320	.000182*** (.000214)	7.4 (7.2)	.000145*** (.000198)	6.3*** (8.0)

Note: \*  $p < .05$ , \*\*  $p < .01$ , \*\*\*  $p < .001$ . Standard deviation in parenthesis. Due to limited sample, only EU-15 reported.

In cases brought as preliminary rulings, “the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.”<sup>77</sup> Those allowed make extensive use of the opportunity to provide such observations and few preliminary rulings are without observations. However, the number of observations submitted differs distinctly between cases.<sup>78</sup> Whereas the Court will in most cases only receive one or two observations, it will in some cases receive more than ten observations. Thus, the Member States’ and EU institutions’ decisions to submit or not submit

<sup>77</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union, Article 23, para. 2.

<sup>78</sup> See *infra* Figure 4. Observations by Member States (1992–2011).

observations in a preliminary ruling constitute a quantifiable measurement of their involvement in the case.

The most active observant, by far, is the Commission. In the 3,164 preliminary rulings included in our data, the Commission submitted an observation in all but fifty-four cases, and the Commission was an observant in all but five cases where observations were submitted.<sup>79</sup> Consequently, it is difficult for the purpose of this study to draw any conclusions from the Commission's observations. Since other institutions besides the Commission more rarely submit observations, the distinctive factor is observations made by Member States.

Member States being involved in a case by offering observations is related to the persuasive power of the final judgment. If at least one Member State submits an observation, the resulting judgment will have a slightly higher Hub Score. This tendency increases with the number of Member States that submit observations: the more observant Member States in a case, the more embedded the judgment will be in existing case law.<sup>80</sup>

While there is a clear connection between the number of observations submitted in a case and the embeddedness of the final judgment, it is more difficult to determine the cause. As stated above, we depart from the assumption that the Court uses citations of existing case law strategically to legitimize its judgment. Although Member States differ somewhat in their practice of submitting observations, a high degree of submitted observations could indicate that the case is important or controversial<sup>81</sup> and, in turn, that the Court would have a greater need to legitimize its judgment. If accepted, our findings about the embeddedness of such judgments support the underlying assumption.

However, we cannot dismiss the alternative explanation that involvement and embeddedness are both affected by a third factor. If the legal issue(s) concerned in the particular case are particularly important or complicated, without necessarily being controversial, it may reasonably cause both a higher degree of involvement in the case and embeddedness of the judgment as institutions and Member States are more likely to get involved in cases that concern important legal issues. From this perspective, involvement can be viewed as a "market" assessment of the legal or political importance of the issues to be settled by the Court in a particular case.

The precedential power of a judgment is similarly positively correlated to the number of observations submitted. Judgments in preliminary rulings where many observations were submitted are likely to be cited in both more subsequent decisions and by more important decisions than other judgments in preliminary rulings.

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<sup>79</sup> As a result, data for Commission observations and any observation mirror each other.

<sup>80</sup> See *infra* Figure 2. Observations by Member States (1992–2011).

<sup>81</sup> See Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, Oxford 2014), pp. 357–358.

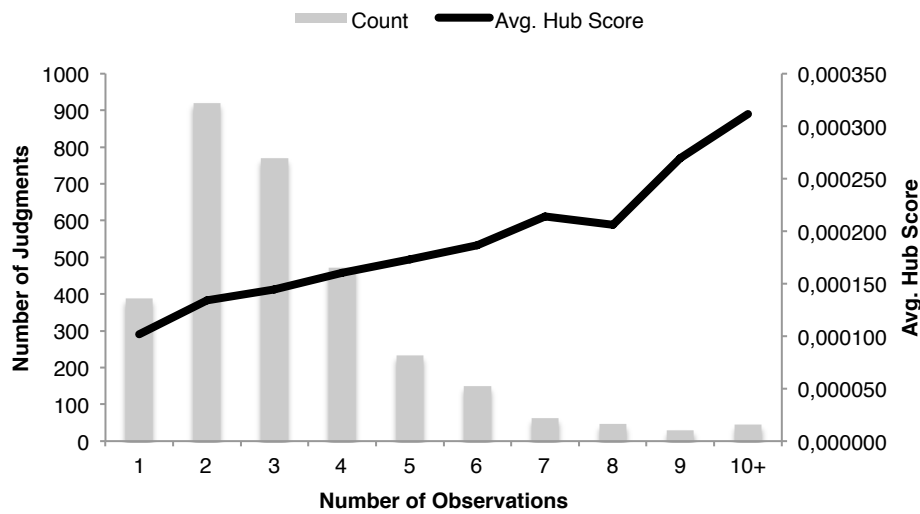


Figure 4. Observations Submitted (1992–2011)

## 6 SUMMARY AND CONCLUSIONS

It follows from our findings above that there are no clear, black-and-white answers to the role of case law as a source of law, but we have made some significant advancements in our understanding in the issue. We believe that six conclusions can be drawn from our findings.

First, the CJEU case law as a source of law should not be treated as a single mass. The Court fulfills many functions within the European Union, ranging from “infringement confirmer” to “constitutional referee”. In all three dimension of case law considered, we find that these different roles are reflected in persuasive and precedential power of its judgments.

Second, of all the case characteristics studied here, the great majority has no or limited impact on the persuasive or precedential power of the judgment. This does not contradict the first conclusion or that case law generally is an important source in EU law. However, there are only a limited number of the factors that reliable affect a judgment’s persuasive or precedential power in a negative or positive direction.

Third, the Court’s use of its own case law as a source of law is particularly limited in successful infringement proceedings. These cases also make up a large amount of all cases adjudicated by the Court.

Fourth, case law’s role as a source of law is particularly greatest in preliminary rulings, particularly those concerning fundamental freedoms or competition law (“Treaty-based market rules”). This confirms, consistent with previous scholarship, that case law is particularly important as a source law in those areas.

Fifth, that the Court to a noticeable extent shifts its behaviour depending on originating Member State and the number of observations supports the theory that the Court is acting

strategically, particularly to maximize its persuasive power over the Member States and its the national courts when most needed. This provides us with some basis for making a prognosis about which decisions will become important. Based on the factors observed above, we predict that within the next eight years<sup>82</sup> the CJEU will cite its recent decision *S & G* in several important cases.<sup>83</sup>

Sixth and finally, we can observe that PageRank and Hub Score are consistently correlated: cases who have a low or high score for one tend to similarly have a low or high score for the other. This is consistent with a legal system based on case law where law, at least in certain areas, are judgments based on judgments. Indeed, “[t]oday is not only yesterday’s tomorrow; it is also tomorrow’s yesterday.”<sup>84</sup>

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<sup>82</sup> See Derlén & Lindholm (2015).

<sup>83</sup> Case C-457/12, *S & G v. Minister voor Immigratie, Integratie en Asiel*, decided of March 12, 2014, not yet reported. At the time of writing this, the Court has never cited the judgment.

<sup>84</sup> See *supra* Part 2.1.