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Priority 7 – Citizens and Governance in the Knowledge-based Society

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Summary

The NEWGOV Legal Task Force has compiled and made available, for free and open use, three data bases on litigating EU law under the Treaty of Rome. The data sets, and their respective codebooks, are on-line at the website of the Robert Schuman Centre, the European University Institute. In this note, we provide a summary of these data, and briefly discuss various purposes for which they might be used.

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I. The Data

With the help of staff at the European Court of Justice in Luxembourg, we collected basic information on every case filed at the Court pursuant to Articles 226, 230, and 234 of the Rome Treaty through (at least) 2006. For the purposes of this paper, we will use the word “case” to refer to each infringement proceeding (Art. 226), application for annulment (Art. 230), and preliminary reference (Art. 234) lodged with the Court.

I.1 Article 226

Under Art. 226,¹ the Commission may initiate “infringement proceedings” – also called “enforcement actions” – against a Member State for non-compliance with EC law, including the failure to comply with directly-effective EU law, and the failure to transpose, correctly apply, or to implement directives. Once an action is initiated, rounds of negotiation with the defendant Member State ensue and, if these fail, the Commission may refer the matter to the Court for decision. The Commission is under no obligation to bring proceedings; its discretion under Article 226 is absolute. The Treaty of European Union (1993) added a new provision (to Art. 228) enabling the ECJ to fine Member States for failure to comply with an enforcement ruling.²

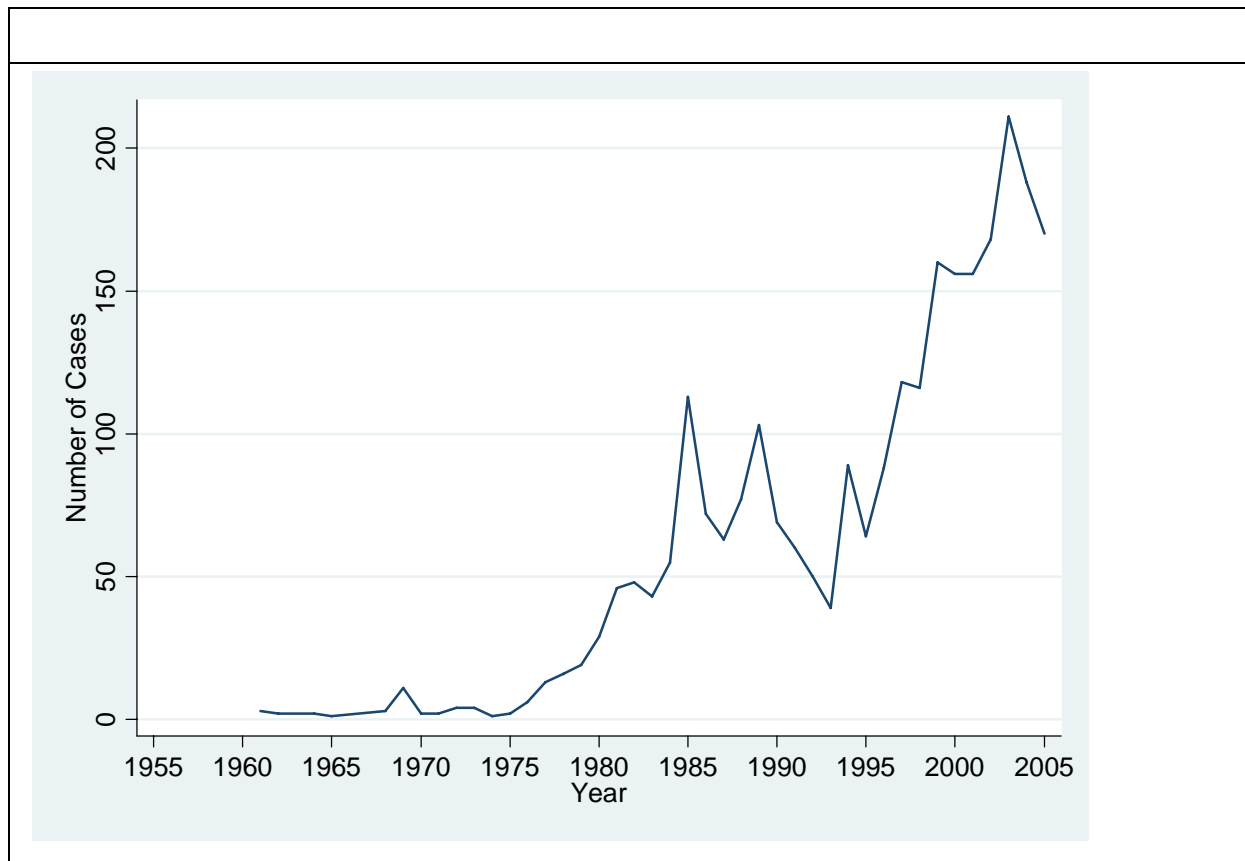
The data set comprises information on the first 2,647 infringement proceedings brought, through 2006. In these actions, the European Commission raised 5,002 separate claims alleging that Member States were in violation of one or more provisions of EC law. For each case, we collected the following information: the name of the defendant Member State; the year and case number given to the action by the Court; the status of the case at the time we coded the data (withdrawn, pending, disposed of by a judgment); the date of the Court’s decision where a judgment on the merits was reached; the substantive area(s) of EC law in which the Member State is alleged by the Commission to be in violation. Figure 1 plots the annual number of infringement proceedings, from the first enforcement action (1961) through 2005. Since the late-1990s, the Court has received between 150 and 200 Article 226 actions annually.

¹ Art. 226 EC:

“If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”

² The relevant provision states: “If the Court of Justice finds that the Member State concerned has not complied with its judgement, it may impose a lump sum or penalty payment on it.”

Figure 1: Infringement Proceedings under Article 226, per Year

Source: Alec Stone Sweet and Thomas L. Brunell, *Data Set on Infringement Proceedings in EC Law*, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2006).

Table 1 charts Article 226 activity by policy domain: the subject matters of enforcement actions aggregated into the thirteen most important meta-domains in EU law.³ The Commission only began to use enforcement actions aggressively in the late-1970s, in the service of its own legislative and market-building agendas. The Table can be read as an indicator of how the Commission’s priorities have changed over time, as a record of implementation failures on the part of the Member States, and with reference to the complex politics of implementation that take place in the EU.

³ For an explanation of “meta-domains,” see the Codebooks for the data sets.

Table 1: Distribution of Infringement Proceedings by Legal Domain and Period (Art. 226)

<i>Subject Matter**</i>		1958-05*	58-75	76-80	81-85	86-90	91-95	96-00	01-05
Agriculture	% n	16.5 826	21.4 9	18.9 28	14.8 89	19.9 159	29.3 179	17.6 210	9.5 152
Free Movement of Goods		11.1 557	33.3 14	21.6 32	24.8 149	17.2 138	11.5 70	4.6 55	6.2 99
Social Security		0.7 35	0.0 0	1.4 2	0.3 2	1.7 14	0.2 1	0.8 9	0.4 7
Taxation		5.3 267	21.4 9	8.1 12	7.6 46	7.5 60	5.2 32	5.2 62	2.9 46
Competition		3.4 169	7.1 3	5.4 8	5.1 31	3.0 24	2.5 15	2.7 32	3.5 56
Approximation of Laws		18.2 910	4.8 2	23.6 35	16.9 102	17.7 142	23.0 140	20.1 240	15.5 249
Transportation		3.6 178	0.0 0	2.0 3	2.0 12	2.6 21	1.6 10	4.9 58	4.6 74
Establishment		17.5 876	0.0 0	0.7 1	14.5 87	11.6 93	11.3 69	20.7 247	23.6 379
Social Provisions		2.7 133	0.0 0	0.0 0	2.5 15	1.4 11	1.3 8	3.3 39	3.7 60
External		0.5 23	2.4 1	0.0 0	0.5 3	0.4 3	1.1 7	0.3 4	0.3 5
Free Movement of Workers and Persons		2.1 106	2.4 1	1.4 2	1.2 7	2.1 17	2.6 16	1.7 20	2.7 43
Environment		10.6 530	0.0 0	4.7 7	4.8 29	7.0 56	6.4 39	12.6 150	15.5 249
Commercial Policy		0.1 7	0.0 0	0.0 0	0.0 0	0.1 1	0.7 4	0.0 0	0.1 2
Other Domains		4.8 382	7.1 3	2.6 18	4.0 30	7.6 62	1.7 20	3.5 67	8.6 182
Total Proceedings by Domain		4,999	42	148	602	801	610	1,193	1,603
% of Total Proceedings by Domain		100***	0.8	3.0	12.0	16.0	12.2	23.9	32.1

Note: the data reported are based on filing dates of infringement proceedings (not dates of decision), through 2005. Proceedings can be filed in more than one issue area for the same case, and the table counts each of these domains. Percentages are rounded.

Source: Alec Stone Sweet and Thomas L. Brunell. *Data Set on Infringement Proceedings in EC Law*, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

I.2 Article 230

Under Article 230,⁴ any “natural or legal person” may apply to the Court for judicial review of a Community act that “is of direct and individual concern” to that person. Under this provision, individuals or corporate entities (groups and companies) seek to annul, as unlawful, EC legal measures that affect them adversely. The Court has interpreted the phrase “direct and individual concern” as laying down relatively restrictive “standing requirements” (the criteria that must be met by a plaintiff in order for a case to be adjudicated). The consequence has been that litigating under Article 230 in the public interest (e.g., by NGOs and interest groups) has proved difficult or impossible. In jurisprudence dating from 1963,⁵ the Court has insisted that the applicant be the direct target of the measure, or part of a closed class of persons targeted; the applicant may not merely represent a negatively affected, diffuse interest. Despite intense criticism,⁶ the Court has declined to depart fundamentally from this position.⁷

Our Article 230 data set contains the first 5,143 applications for annulment filed with the European Court of Justice, through 2006. Taken together, applicants invoked 11,973 separate claims involving one or more provisions of EC law.⁸ Comprehensive data on Article 230 activity have never been collected previously.⁹ Figure 2 depicts the number of applications lodged since 1954 (the figure includes pre-1958 applications under the Treaty establishing the European Coal and Steel Community). The annual number of applications reached more than 100 per year in the 1980s, topped 300 in the 1990s, and climbed above 400 per year in 2005.

⁴ Article 230:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

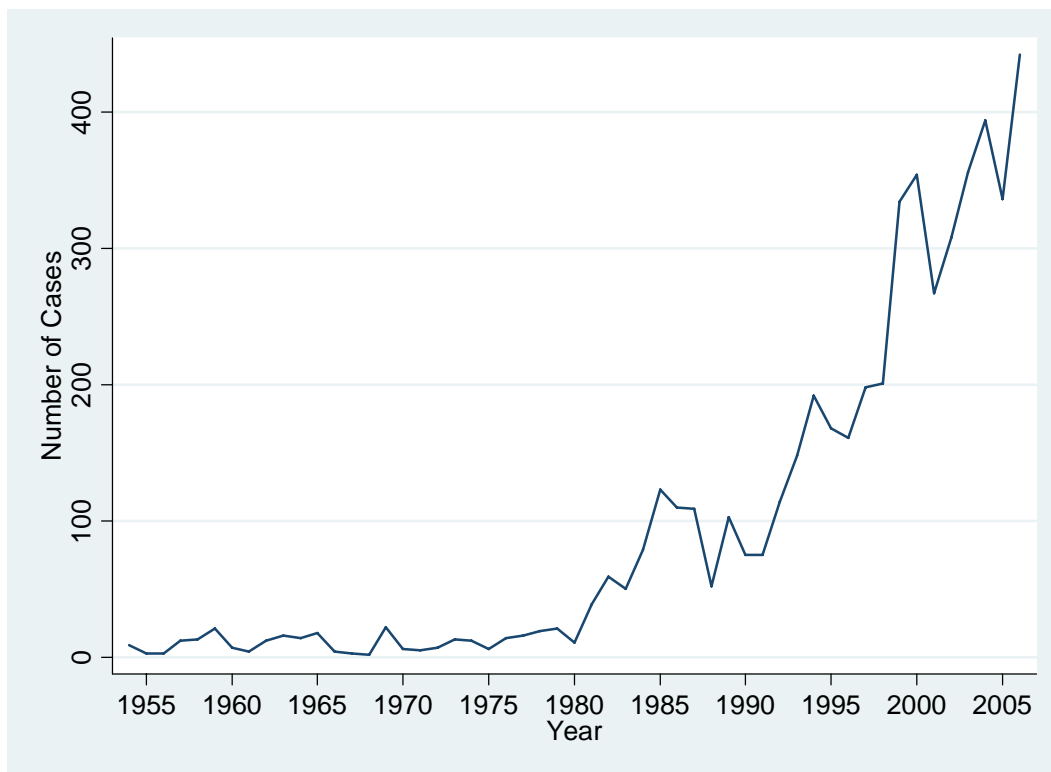
⁵ Case 25/62 *Plaumann v. Commission* [1963] ECR 95.

⁶ See the Opinion of Advocate General Jacobs, Case C-50/2000 P, *Union de Pequenos Agricultores v. Council*, [2002] ECR I-6681.

⁷ See Case C-50/2000 P, *Union de Pequenos Agricultores v. Council*, [2002] ECR I-6677, and Case C-263/02 P *Commission v Jègo-Quèrè* [2004] CMLR 12.

⁸ See the discussion of legal domains in the Codebook, on-line at this site.

⁹ They deserve to be analysed in light of scholarship on the evolution of EU administrative law, a growing field. See Paul Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006).

Figure 2: Actions for Annulment under Article 230, per Year

Source: Alec Stone Sweet and Thomas L. Brunell, *Data Set on Actions under Article 230, 1954-2006*. Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

I.3 Article 234

Article 234¹⁰ establishes a procedure that connects the ECJ and the national courts. National judges make references to the European Court in order to obtain a formal interpretation of European law – of the Treaty, secondary legislation, human rights, and so on – when that law is material to the resolution of a case at bar. The ECJ’s interpretation, called a “preliminary ruling,” is then applied by the judge of reference to resolve the case. The provision was designed to help national judiciaries avoid conflicts of interpretation, thereby promoting the consistent application of EC law within national legal orders. With the consolidation of the

¹⁰ Article 234

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

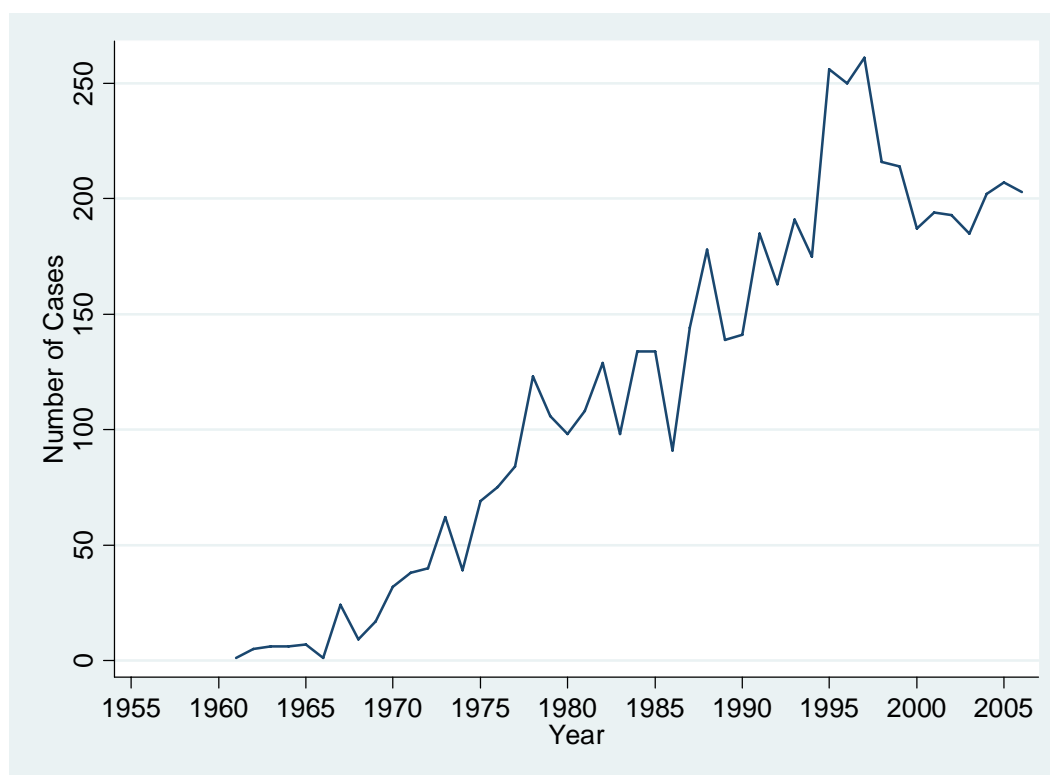
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Court’s doctrines of “direct effect”¹¹ and “supremacy,”¹² Article 234 became the basis of a decentralized system of enforcing European law, at the behest of private parties before the national courts.¹³

Our data set on Article 234 contains the first 5,425 preliminary references filed, through 2006, references that invoke 8,638 claims involving one or more provisions of EC law. For each case, we collected the following information: the national origin of the court of reference; the year and case number given to the reference by the Court; the status of the reference at the time we coded the data (withdrawn, pending, disposed of by a judgment, etc.); the date of the Court’s decision where a judgment on the merits was reached; the substantive area(s) of EC law invoked by the referring court in the reference. Figure 3 plots the annual number of references, from the first enforcement action (1961), through 2005. Today, the system is chronically overloaded. National courts now send more than 200 references each year.

Figure 3: Preliminary References under Article 234, by Year



Source: Alec Stone Sweet and Thomas L. Brunell, *Data Set on Preliminary References in EC Law*, European University Institute (San Domenico di Fiesole, Italy, 2007).

Table 2 charts the evolution of Article 234 activity by policy domain. During the 1970s, when levels of references first took off, the majority of all questions raised fell in just two

¹¹ Where the doctrine of direct effect holds, EC norms confer – directly upon individuals - legal rights that public authorities must respect, and which can be pleaded in the national courts.

¹² The doctrine of supremacy lays down the rule that, in *any* conflict between an EC legal rule and a rule of national law, the former must be given primacy.

¹³ On the impact of Article 234 on European integration and EU policymaking, see Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); Rachel Cichowski.

domains: agriculture and the free movement of goods. Over the past decade, the overall importance of these two areas has been reduced by more than half. In the meantime, we see an important diffusion of reference activity to other domains, such as establishment, taxation, and approximation of law. In the 1990s nearly one-in-twelve references concerned social provisions, the vast majority concerning sex discrimination law; references in that domain have declined thereafter.

Table 2: Distribution of Preliminary References by Legal Domain and Period (Art. 234)

<i>Subject Matter</i>		<u>1958-05*</u>	<u>58-75</u>	<u>76-80</u>	<u>81-85</u>	<u>86-90</u>	<u>91-95</u>	<u>96-00</u>	<u>01-05</u>
Agriculture	%	16.6	33.3	35.8	25.8	21.2	13.0	9.8	9.3
	n	1324	166	251	194	173	155	187	198
Free Movement of Goods		18.7	20.8	20.4	21.5	22.2	16.6	17.7	17.2
		1490	104	143	162	181	198	337	365
Social Security		6.7	14.6	10.3	8.4	9.1	9.6	4.9	2.3
		538	73	72	63	74	114	93	49
Taxation		9.5	5.6	4.7	5.6	8.0	8.6	11.8	12.5
		759	28	33	42	65	103	224	264
Competition		5.8	7.2	3.8	4.5	5.8	9.1	5.8	4.7
		462	36	27	34	47	108	110	100
Approximation of Laws		6.1	1.0	1.9	4.9	3.8	5.2	7.9	8.8
		485	5	13	37	31	62	151	186
Transportation		1.4	1.0	1.4	1.3	1.5	2.8	1.0	.9
		109	5	10	10	12	33	19	20
Establishment		12.0	2.4	3.1	3.3	6.6	8.0	16.3	20.9
		961	12	22	25	54	95	310	443
Social Provisions		4.4	.4	1.1	3.7	4.2	8.6	5.6	3.4
		354	2	8	28	34	103	107	72
External		2.3	2.4	2.4	3.1	1.1	2.1	2.5	2.2
		180	12	17	23	9	25	47	47
Free Movement of Workers and Persons		4.2	3.2	2.0	4.1	5.0	3.3	5.2	4.3
		333	16	14	31	41	39	100	92
Environment		1.5	0.0	0.4	1.6	.9	2.4	1.9	1.6
		120	0	3	12	7	29	36	33
Commercial Policy		1.3	0.8	1.4	1.5	1.8	2.4	0.7	0.9
		100	4	10	11	15	28	13	19
Other Domains		14.5	7.2	11.3	10.8	8.9	8.3	9.0	10.9
		1155	36	79	81	73	99	172	232
Total Claims		7,987	499	702	753	816	1,191	1,906	2,120
% of Total Claims by Period		100**	6.2	8.8	9.4	10.2	14.9	23.9	26.5

Note: the data reported are based on the filing dates of each preliminary reference (not the date of decision), through 2005. Joined references from the same court on the same date are excluded. References can be filed in more than one issue area for the same case, and the table counts each of these domains. Percentages are rounded.

Source: *Alec Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law*, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

As with Table 1, the variation reported may also be of explanatory interest, as measures of either independent or dependent variables, depending on the nature of the research project.

II. Using the Data Sets

The EU's legal system has been a crucial determinant of the course of European integration since the early 1960s.¹⁴ Further, the Court, through its case law, routinely generates policy outcomes, or otherwise influences how the EU's legislative organs make law.¹⁵ We hope that the data sets will stimulate more systematic research, by both lawyers and social scientists, on the legal system and its impact.

Most basically, a researcher interested in the development of a specific policy domain – environmental regulation, for example – could use the data sets as a comprehensive list of cases in that (or any) area. She could then use the list to explore, qualitatively but systematically, the extent of the role litigating has played in producing the kinds of outcomes in which she is interested (or the role of policymaking on litigating).

Researchers could also use these data as the basis for building new data sets. They can enter any new information collected into additional columns grafted onto that part of the data base they are using. Thus, for environmental rulings, one might collect data on outcomes (e.g., who wins and loses), citation of prior ECJ judgments, *ex post* implementation, and so on.

For the scholar interested in testing causal propositions about how the legal system operates, the data may be downloaded into a statistical program where it can be easily manipulated (e.g., for econometric and other quantitative analyses).¹⁶ Tables 1 and 2 contain the domain data included in the data sets on Articles 226 and 234, respectively. These data could be conceived as laying out the dependent variable of a research project: what explains variation in activity across times and policy domains? The data could also be conceived as the independent variable, if the project were to be defined in other ways.

Some intriguing research questions inhere in the data themselves. Figures 4, 5, 6 were generated from the data sets, depicting variation along one or more dimensions. Seeking to explain variation is one (classic) type of research agenda: the data defines the dependent variable. Like Tables 1 and 2, Figures 4, 5, and 6 may be useful as heuristic devices. How the data are organized may suggest puzzles to which we may choose to respond, or force us to question our received ideas or theories.

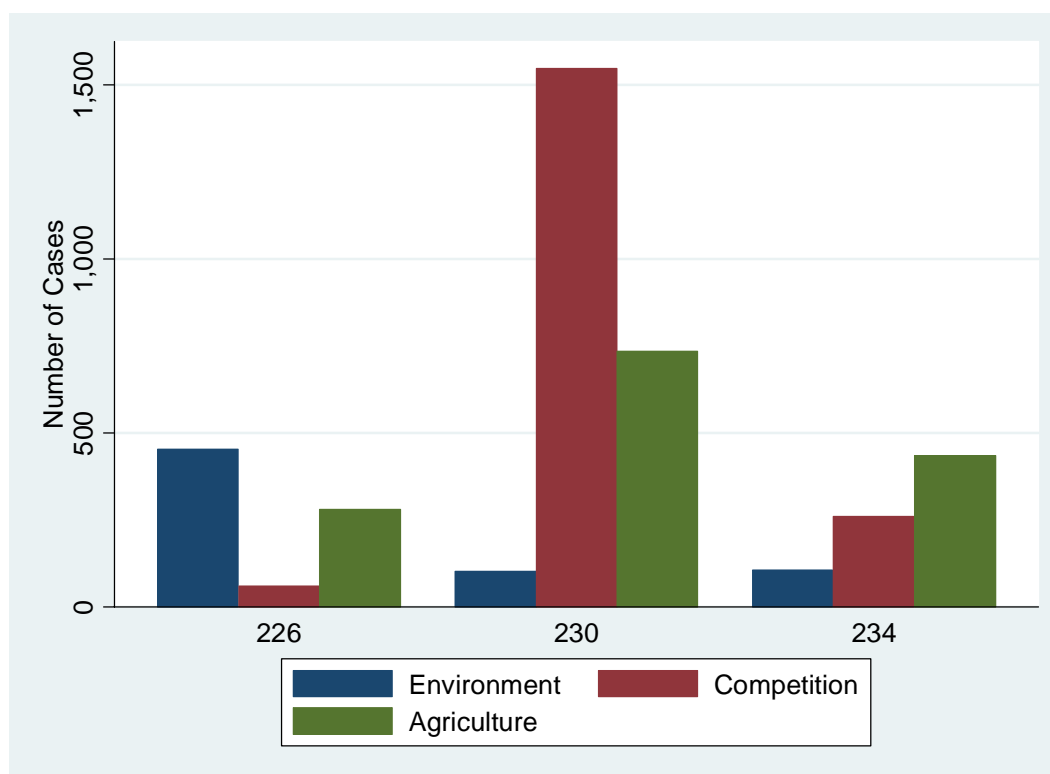
¹⁴ Joseph H.H. Weiler, "The Transformation of Europe," 100 *Yale Law Journal* (1991) 2403; Neil Fligstein and Alec Stone Sweet, "Constructing Markets and Politics: An Institutional Account of European Integration," 107 *American Journal of Sociology* (2002) 1206.

¹⁵ Stone Sweet, *The Judicial Construction of Europe*, op cit.

¹⁶ Examples of quantitative analyses based on earlier editions of these data sets include: Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization, and Governance* (Cambridge: Cambridge University Press, 2007); Stacy A. Nyikos, "The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment," 4 *European Union Politics* (2003) 397; Alec Stone Sweet and Thomas Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," 92 *American Political Science Review* (1998) 63. See also Jean-Yves Pitarkis and George Tridimas, "Joint Dynamics of Legal and Economic Integration in the European Union," 16 *European Journal of Law and Economics* (2003) 357.

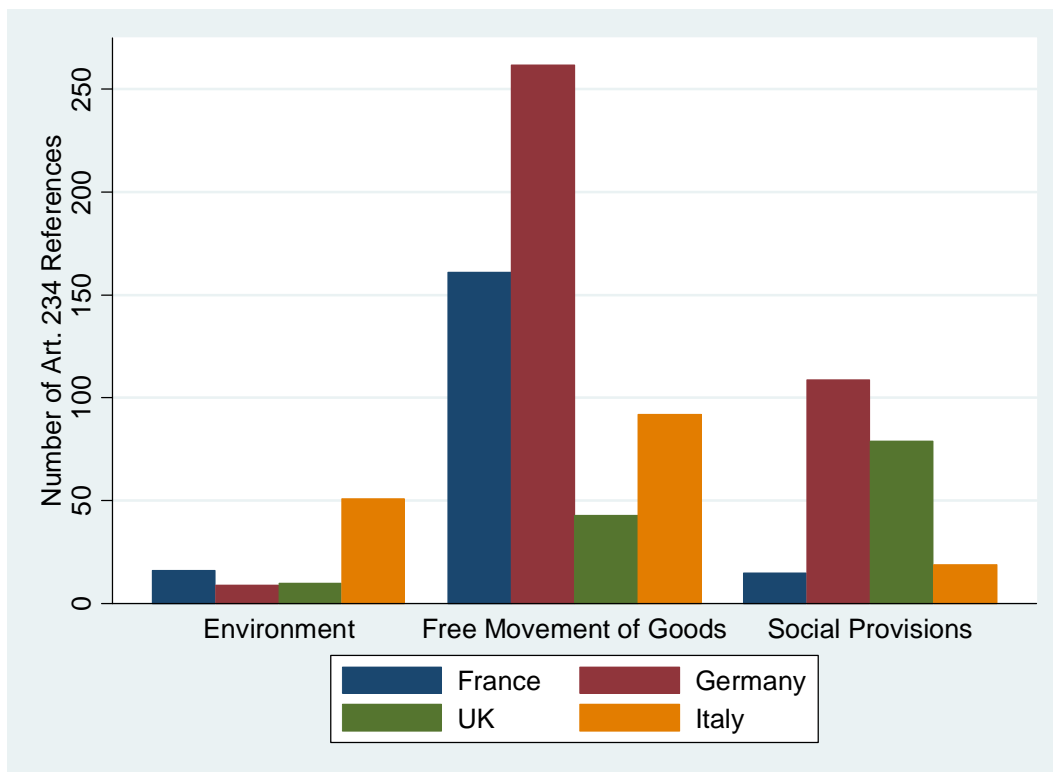
Figure 4 reports the total number of cases, brought under Articles 226, 230 and 234, in three policy domains, between 1990 and 2006, during the 1990-2006 period. The order of these domains, ranked in terms of cases lodged with the Court for each type of activity, varies. It is clear that each of these three systems functions differently, for different purposes, in response to different social demands. However obvious, the point has not been seriously explored. Nor have scholars paid much attention to how these systems interact with one another, across domains.

Figure 4: Cases Brought to the ECJ under Arts. 226, 230, and 234 (1990-2006)



Source: Alec Stone Sweet and Thomas L. Brunell. *Data Set on Preliminary References in EC Law*, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

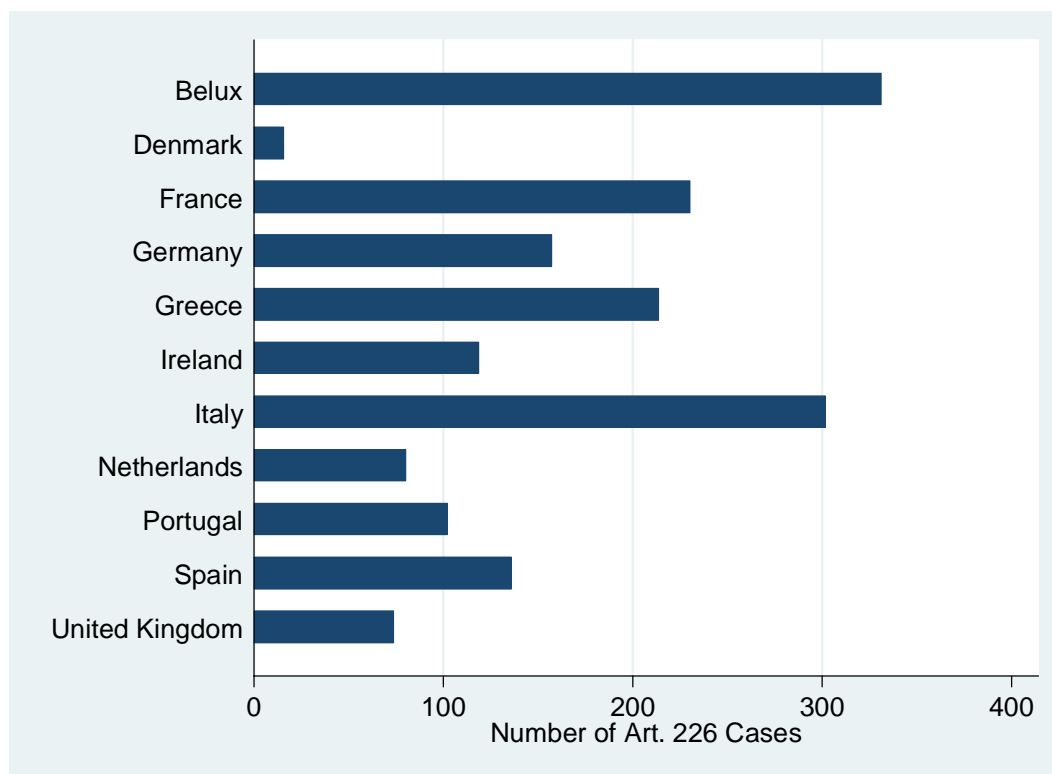
Figure 5 charts the number of Article 234 preliminary reference generated by four Member States, in three different domains, 1980 through 2006. Notice that Italian Courts send more references than their counterparts in the environment domain; German judges dominate free movement of goods reference activity; and the UK produces a high percentage of references in social provisions (sex equality). What is clear is that cross-national variation in reference activity is not due to factors that operate at the national level. It makes no sense, for example, to argue that Germans produce more references because they are more litigious, or that French judges don't like to send references for some cultural reason (after all, they send references routinely in the free movement domain). It is likely that logics working at the domain level, as structured by specific aspects of court systems, are far more important.

Figure 5: Preliminary References to the ECJ under Art. 234 (1980-2006)

Source: Alec Stone Sweet and Thomas L. Brunell, *Data Set on Preliminary References in EC Law*, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).

Finally, figure 6 plots the number of infringement proceedings brought by the Commission against the EC-12 (1990-2006). It would not be a simple matter to explain this variation but, in attempting to explain it, we would learn a great deal about how the Commission, the Member States, and the Court engage one another in an arena that, by its nature, blends law and politics in complex ways.¹⁷

¹⁷ As far as we are aware, Tanja Boerzel's project on the politics of compliance is the most systematic. New papers are forthcoming, but see also Tanja Börzel, "Guarding the Treaty: The Compliance Strategies of the European Commission," 6 *The State of the European Union: Law, Politics, and Society* (2003) 197; Tanja A. Börzel, Tobias Hofmann, and Diane Panke, "Who's Afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance," ECPR Joint Sessions, Granada, April 14-19, 2005 (paper on file with the authors).

Figure 6: Infringement Proceedings Brought under Art. 226 (1990-2006)

Source: Alec Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 2007).