

The European Court of Justice as a political actor and arena: Analyzing member states' observations under the preliminary reference procedure¹

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On December 18th 2007 the European Court of Justice (ECJ) delivered its much awaited judgement in the Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetarförbundet and Others*. In brief, the circumstances in the case were the following: Swedish trade unions had taken action against a Latvian construction company, Laval, over the working conditions for Latvian workers refurbishing a school in the town of Vaxholm. Laval refused to sign a collective agreement, and a blockade of the work place was initiated by the Swedish trade unions as a consequence. Laval maintained that the blockade was illegal with reference to Community Law and that Swedish authorities consequently were under a duty to stop the action. In the following court procedure the Swedish Labour Court referred the case to the ECJ for a preliminary ruling.

It was clear that the Laval case would give rise to fundamental questions under

EC law: Can Community Law restrict, or prohibit trade unions in one member state to take industrial action concerning posted workers? Can the application of collective agreements in a host member state be restricted under Community Law? Moreover, the principal question of balancing fundamental interests—the right of free movement of services and the fundamental right of industrial action—were at the centre of the dispute.

The case arose enormous political debate in both Sweden and Latvia as well as in several other Member States. In the preliminary reference procedure Member States have a right to submit written observations before the Court. In the Laval case Sweden, Latvia and 15 other EU and EFTA states made use of this opportunity. For Latvia and other new Member States the Swedish government's defence of the union blockade amounted to no less than a betrayal of the promise of full membership, and an attempt from the old Member States to prevent competition from the new members. In the Swedish debate, on the other hand, the basic labour market model was said to be at stake. The Swedish government (both before and after the shift from a left-wing to a right-wing government in 2006) was active in trying to build support for its case, defending the Swedish model. In informal contacts with other Member States and the European Commission Sweden encouraged them to submit observations to the Court and to argue along the Swedish line (Bergvall 2007:50f). When the judgement came, broadly supporting the Latvian case, the Swedish Left Party claimed that this would be the end of the 'Swedish model' and urged that Sweden immediately must exit the European Union. High positioned members of the Social Democratic Party argued that Sweden should re-

1 This text is a shortened version (ca 50%) of the original application.

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frain from ratifying the Lisbon Treaty until the issue of how to make the Swedish labour market model compatible with the Laval judgement had been “solved” (Johansson & Bernhardsson, 2008).

The case of Laval demonstrates at least three important points. First, it shows the immense political significance of the seemingly technical-legal decisions taken by the European Court of Justice. It is clear that *EU policy* is being made not only in Brussels and Strasbourg, but also in Luxembourg.

Secondly, the strong public reactions to the Laval decision and the intense coalition-building and lobbying of the Court by Member State governments defending different sides in the case demonstrate that the Court is not only a political actor but also a political arena. Thus, it is equally clear that *EU politics* is being played out in Luxembourg.

Third, the Laval case also indicates that the time for “silent revolutions”—which is a term sometimes used for describing the Court’s successful “constitutionalisation” of the EC Treaty in the 1960s—is over (Weiler 1991). The political actors of Europe are more aware of the significance of the Court today, and prepared to “guard the guardians”. Judicial independence does not imply that the Court is free from political and social constraints.

The project that we propose will study the ECJ both as an actor and as an arena. Although there is quite a literature on to what extent the Court has been an important strategic political actor—an “engine of European integration”, in Pollack’s terms (Pollack 2003)—we propose a new research design to analyze this phenomenon empirically. The Court as an arena, on the other hand, has been much neglected in previous research. As a consequence, we know little about how this im-

portant forum for European politics works.

Constitutionalisation and the politics of making observations before the Court

The constitutionalisation of the EC Treaty and the role of the ECJ in establishing a supranational legal order has been the focus of much research and debate (See, for instance, Stein 1981, Rasmussen 1986, Mancini 1989, Curtin 1990, Weiler 1991, Burley & Mattli 1993, Garrett 1995, Mattli & Slaughter 1998, Carrubba 2003).

The “mask and shield” of the law, according to the neo-functional position in this debate, had protected the ECJ from Member State interference and enabled the Court to make rulings which at least some of the governments would not have intended (Burley & Mattli 1993). Intergovernmentalists, on the other hand, pointed at the weak enforcement mechanisms of the Court and concluded that the Court would not be able to rule against the desires of powerful Member States (Garret 1995).

One way of conceptualizing the relationship between the ECJ and the most important political actors of the European polity—the Member State governments—is principle-agent theory. In this theoretical language the ECJ is an Agent created by the Member States to perform certain tasks, in particular helping them to make credible commitments and to reduce transaction costs by enforcing the incomplete contracts inherent in the treaties. Delegating power is risky however, as a certain amount of discretion on behalf of the Agent is impossible to avoid, and Agents may have preferences which differ

from the Principle's. According to Pollack the ECJ "enjoys a remarkable amount of discretion in comparison not only with the Commission but also with national constitutional courts" (Pollack 2003:155). The ECJ (in collaboration with their "consociational" partners the national courts) has made full use of this discretion. In particular the preliminary reference procedure laid down in Article 234 (ex 177) EC has been the main vehicle with which the constitutionalisation process has been driven. It was through the preliminary reference system that the doctrines of direct effect and supremacy of EU law were established, and individual rights legally enforceable in national courts were created. It is well known that the Member State principles often have been unpleasantly surprised of the creativity of their judicial agent in driving European integration forward.

However, the Member States are not bound to passively await the Court's decisions. In the preliminary reference system there is a possibility for governments and EC institutions to submit written observations before the Court, arguing their opinions. According to Chalmers national governments may have an influence over the Court's decisions, especially "in those rare circumstances where there appear to be consensus among the governments as to the approach to be taken" (Chalmers 1997:172). One of the most reknown cases is probably C-91/92 *Faccini Dori*, where six out of seven Member States, as well as the Commission, argued against making provisions in Directives capable of having horizontal direct effect, the Court following their position. However, "in the ordinary run of things, individual governments seem to have limited influence" (Ibid). Oddly enough neither lawyers nor political scientists have analyzed

this potential source of representative democratic participation in this decision-making process in any systematic way.

Research questions, data and design

How do governments use the opportunity to influence the Court's decisions by submitting written observations in procedures on preliminary rulings under article 234 EC? How does the Court react to such observations? How can the mode of interaction between the Court, the governments and the EC institutions (in particular the Commission) be characterized? These are the basic research questions dealt with in this project. Apart from studying the dynamics between the Member States, the Commission and the Court *as an actor* we will also analyze which conflict dimensions structure the ECJ as a *political arena*, drawing on and connecting to the broader literature on conflict dimensions in the EU (See, for example, Marks & Steenbergen 2004, Hix, Noury & Roland 2006, Naurin & Lindahl 2008). The latter literature concerns the 'normalisation' of the European Union as a political system. Is EU politics structured by conflict dimensions familiar from national politics, such as the left-right dimension, or is it (still) mainly an intergovernmental arena where state sovereignty and national interests dominate interactions?

The time-series data

Empirically, we will use both quantitative and qualitative data. A major part of the project will be to build up a data base on *all* written observations before the ECJ from 1961, when the first preliminary reference was filed, up till today. As the full content of such observations are not

made public by the Court we will first use summaries of the observations noted in the Judge-Rapporteurs' preliminary reports. These reports were translated and published in the European Court Reports up till 1994. Thereafter, however, the reports are no longer published and remain available only on request – and in small numbers – on the language of the case (i.e. the language of the national court which made the reference to the ECJ). The only way to analyse a large number of written observations after 1994 through the Court's public records is to derive them from the opinions of the General Advocates and the Court's judgments (which is the method used by Carrubba, Gabel & Hankla for the year 1997). However, references to written observations in these documents are not systematic and will lead to a biased data set.

Fortunately, however, the Swedish Foreign Ministry has compiled its own archive of preliminary references – including all written observations – since the Swedish EU membership in 1995. Our contacts with the responsible staff at the Ministry indicates that we will be able to access this material (on-site) for research purposes, provided that the positions of the submitters will not be traceable (Ref. Anna Falk, Kansliråd, Ministry of Foreign Affairs, Stockholm). This will give us a unique opportunity to analyze previously non-accessible primary data and to complete the time-series up till today.

The coding of the ECR (up till 1994) and Foreign Ministry (from 1995) material will include who is submitting written observations, on which side in the dispute, and on which types of issues. We will look at the content of the written observations as well as the outcome (the Court's judgment). The precise coding scheme will be developed in conjunction with the

data and tested in a pilot round of coding (one year for both the ECR and the Foreign Ministry material). The basic unit of analysis will be questions referred by the national courts, rather than cases, since one case often includes several questions.

Example of questions addressed in the quantitative part

The coded material will give us a rich time-series data set which will subsequently be analyzed statistically (frequencies, regression analysis, time-series analysis, multi-dimensional scaling). Concrete research questions for the quantitative part of the study will include:

1. Do observations affect (or correlate with) the Court's decisions? (Analysis based on the number of observations (relative to the size of the EU membership at the time), the positioning and types of argumentation used in the written observations, on the one hand, and the positioning and argumentation of the Court in its judgment, on the other hand.)
2. Does the effect depend on the types of issues involved? (Based on the same data as (1) + categorization of the issues)
3. Are some submitters more successful in influencing the Court than others? Are successful observations related to the status and/or the arguments of the submitter? (Same data as (1) + submitter)
4. Are written observations mainly aimed at moderating the influence of European law over national law, and in which case are they most often successful? (Analysis based on the same data as (1) + categorization of the legal issues involved and the degree of potential integrative effects.)
5. Are there any recurrent patterns in the alliances of the submitters (both

Member States and EC institutions). Can such patterns be given any substantial interpretation (such as left-right, pro-anti-integration, judicial tradition or other geographical patterns)? (Analysis based on submitter + data characterizing the submitter. For the party ideologies of the member state governments, for example, we will primarily use the party manifesto data collected by Budge et. al., which is available from 1945 (Budge 2001, 2006).)

6. How can the decision to submit (or refrain from submitting) a written observation be explained? (Analysis based on submitter and submitter characteristics)

These are just examples of the types of questions that we will be able to address. Furthermore, the time-series data created also gives us the opportunity to study how the use of written observations to influence the Court has developed over time and what effects of the recurrent deepening and widening of the EU that are discernible. As always when it comes to measuring “influence” and “success” causality is difficult (if not impossible) to confirm. Patterns of correlations will be controlled for omitted variables as far as possible, and cautiously interpreted when drawing conclusions. Nevertheless, findings indicating that observations are – or are not – correlated with the judgments of the Court will be highly interesting regardless of whether explicit causality can be proved.

The qualitative interview data

In addition to the statistical analyses we will conduct interviews with representatives of Member State governments and the European Commission who are responsible for submitting written observations at the Court. An important research

question for the project is whether written observations are best characterized as signals of discontent and threats of future non-compliance and/or legislative override, as assumed for instance by Carrubba, Gabel and Hankla (2007), or whether they are better interpreted as contributions to a deliberative process with the purpose of developing EU law. The statistical analysis of different types of arguments, and the importance of size/power for being “convincing”, will contribute to answering this question. Nevertheless, qualitative evidence is also needed to clarify the purpose and meaning of written observations. The interviews will also clarify the process behind the decision to submit written observations and identify the key actors involved within Member State governments. Is this, for example, a process driven mainly by legal expertise and legal concerns, or is it dominated by political party and/or national interests?

We will make face-to-face interviews with a broad sample of Member State representatives. The government officials who are acting as agents before the Court meet informally several times per year. One way of saving travel costs which we will take advantage of is to be present at the location of some of these meetings and conduct several interviews at this occasion. We expect to make approximately 15-20 interviews.

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