

Raising the Bar: The Development of Docket Control on the Court of Justice

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Abstract We examine the emergence and evolution of docket control mechanisms in the preliminary ruling procedure. Using both legal and statistical analysis, we show that reasoned orders have increased dramatically since the mid-1990s, with courts in Italy and Central and Eastern member states being the most frequent targets. We argue that the trajectory of the European Court of Justice's docket policy is an indirect manifestation of its ascendant position as Europe's judicial powerhouse. Facing a rising caseload, the Court has sought to optimise the allocation of its resources by applying stricter admissibility criteria and by prioritising references raising novel legal issues. For domestic courts, this evolution means that references must satisfy higher standards of quality and originality, although the application of these standards is itself influenced by the size of the Court's backlog at the time of submission.

Keywords docket control; European Court of Justice (ECJ); preliminary references; reasoned orders.

Legal Texts/Norms Article 92, 94, 99, 104(3) of the Rules of Procedure; Article 258, 259, 263, 267 TFEU.

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I. Introduction

While justice might seem to require that everyone should have her case heard, no judicial body has infinite resources. A new court may initially face a small caseload. At this stage, its judges and supporting staff may even welcome new litigants. Yet, unless judicial resources grow in tandem with the court's workload, there is inevitably a point at which the judges' expanding caseload starts having an impact on how the court processes legal disputes. The duration of proceedings may lengthen and a large backlog may soon begin to form. This may prompt talks of a "docket crisis"¹ or that the "court is the victim of its own success"². A docket crisis can be addressed in various ways, some more radical than others. A court may start by attempting to manage its existing resources better and reallocate them so that cases are dealt with more quickly and in larger numbers. This will often mean spreading resources – *ie* the court's time along with its intellectual and administrative firepower – over more cases with the result that fewer resources are expended on each. Alternatively, the court may choose to allocate different amounts of resources to different groups of cases depending on criteria such as apparent complexity, the nature of the governmental act being challenged, the broader implications of the issue raised, and so on. Another way of saving resources is to dispose of cases by summary judgements. While sparing judges the pain of having to write a full opinion, summary judgements can also save the time and efforts in bargaining and negotiation which is sometimes required to have a panel agree on an *opinio decidendi*. A more radical avenue to tackle a caseload crisis is to grant judges some discretion over case selection. A discretionary docket – as opposed to a mandatory docket – permits judges to decide which disputes are really worthy of the court's precious resources.

These institutional choices have important implications, both for the court and for litigants. From the vantage point of the court, choosing what caseload management strategy to adopt involves a delicate trade-off at the level of principles. Individual justice requires that everyone is entitled to her "day in court". But a court's constitutional function, where it has one, demands that it focuses on disputes raising new questions. Justice requires celerity – justice delayed is justice denied. But speedier case disposition may come at the expense of quality – poorly justified decisions or even erroneous ones. As regards litigants, the case management approach adopted will affect how much attention, if any, their case gets from the judges. A mandatory docket means the litigants will decide what cases are heard. But a discretionary one means that the judges' own appraisal of what cases are important or sufficiently meritorious will ultimately decide who has a day in court.

¹ *Hjalte Rasmussen*, Docket Control Mechanisms, the EC Court and the Preliminary References Procedure, in Henry G. Schermers (ed), Article 177 EEC: Experiences and Problems (1987) 83; *Anthony Arnall*, Case Note on the Telemarsicabruzzo Case, Common Market Law Review 2 (1994) 377 (377 et seq); *idem*, Judicial Architecture or Judicial Folly? The Challenge Facing the European Union, European Law Review 24 (1999) 516; *Sarah E. Strasser*, Evolution & Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References, Jean Monnet Working Paper (Jean Monnet Chair 1995); *Takis Tridimas*, Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, Common Market Law Review 40 (2003) 9; Paul Craig/Gráinne de Búrca (eds), The Evolution of EU Law² (2011) 373, 387 et seqq.

² *Morten Broberg/Niels Fenger*, Preliminary References to the European Court of Justice (2014) 5.

In this essay, we examine the case selection practices of the European Court of Justice (ECJ) with regard to preliminary references. On the face of things, it would seem that case management in the context of the preliminary ruling procedure raises an even knottier problem. Indeed, the right to submit references to the ECJ belongs not to litigants but to domestic judges. Because cooperation with domestic judges has been and remains so important for the ECJ,³ we might expect that the Luxembourg Court would be reluctant to tighten admissibility criteria or to practice greater selectivity, for fear it might antagonise its most important domestic interlocutors. However, as we shall see, a systematic examination of the Court's practice reveals a dramatic evolution. In early years and up until the mid-1990s, the Court seemed keen to encourage domestic judges to submit references and applied lax admissibility criteria. Orders and removals were rare. But, around the turn of the millennium, when the duration of preliminary ruling proceedings reached new heights, these became much more frequent. The Court started to dismiss an increasing number of preliminary references as "manifestly inadmissible" or as pertaining to "settled issue". "Prompted" withdrawals – cases withdrawn at the request of the Court – also became an additional docket control mechanism. Their frequency has continued to rise substantively in recent years. At the same time, the Court has tightened its Rules of Procedure to reflect its changed practice. While the residual discretion that admissibility doctrines and Rules of Procedure afford the Court is limited, we show that there is a systematic, statistical relationship between the proportion of references ending in an order and the number of cases waiting on the ECJ's docket. References from Italian and Central and Eastern European courts account for a disproportionate share of the ECJ's summary judgments, which sheds light on what the European Court now expects from referring judges in terms of both quality and originality. To summarize the evolution of the Court's docket policy, we liken the Court to an academic journal. In the early years, the Court's editorial and review policy were generous and lax, reflecting the low number of submissions. But as the Court attracted more references and gradually morphed into the judicial superpower that now sits at the apex of the EU legal system, it also became more demanding towards submitters. Rather than reflecting a constitutional reorientation, the evolution of the Court's admissibility practices seems guided by efficiency considerations in the context of the Court's core law-finding and law creation functions.

Before entering into the substance of our argument, a word about methodology. In addition to applying traditional legal analysis to the careful parsing of the relevant legal texts and doctrines, our study also relies on hard data. The reason why we use quantitative data is that we believe that it is impossible to understand a court's docket management practices – be it the ECJ's – by only looking at doctrines and rules of procedure. Here we take inspiration from American legal realists, who insisted that legal scholars should try to uncover the "real rules" followed by judges and not restrict

³ *Alec Stone Sweet*, *The Judicial Construction of Europe* (2004); *idem*, *Governing with Judges: Constitutional Politics in Europe* (2000); *Jan Komárek*, "In the Court(s) We Trust?" On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure, *European Law Review* 32 (2007) 467; *Joseph H. H. Weiler*, *The Transformation of Europe* 100 (1991) 2403; *Hannes Rösler*, *The Right to Refer to the European Court of Justice – Should It Be Limited to the Courts of Last Instance?*, in Kai Purnhagen/Peter Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (2014) 835.

their attention to the “paper rules”.⁴ This does not mean that the paper rules – the doctrines, treaty provisions and rules of procedures – do not matter – we have no doubt that they do. But, as legal realists argued, the paper rules are usually – as is the case, we believe, with the ECJ’s docket management practices – only a poor approximation of the real rules. The set of considerations taken into account by judges in reaching decisions is often richer and more complex than what the language of the paper rules suggests.⁵ When it is so, data and quantitative analysis become useful tools to uncover patterns which in turn may reveal aspects of a court’s practices that traditional doctrinal analysis would be unable to capture. These important insights from the legal realist movement motivate the methodological approach adopted in the present Essay. We do not argue that either doctrinal or quantitative analysis is superior to the other, but we combine the two methods to cast a wider light on the evolution of the ECJ’s practices. We believe that the combination of the two methods helps us paint a more accurate picture of the Court’s practices. As for our data, it consists primarily of all preliminary references decided by the European Court of Justice over the period 1961–2017. For each reference the following information was compiled – either manually or using computer-aided web scraping methods – from the EUR-Lex website:⁶ case number; filing date of the reference; country of origin; submitting court; date of ECJ decision; type of decision (judgment, order, removal); number of words; and, for reasoned orders, the justification furnished by the ECJ (no jurisdiction, manifestly inadmissible, settled issue).

This Essay is structured as follows. Section Two documents the evolution of the ECJ’s caseload and its impact on the duration of the preliminary ruling proceedings. Section Three discusses possible strategies to address a workload crisis. Section Four elaborates on the strategy adopted to address the ever-growing workload of the Court, namely the disposition of reference by reasoned order. We discuss what reasoned orders are and provide examples of cases in which the Court resorted to this form of case disposition. We then turn to the discussion on how reasoned orders are used by the Court as a type of resource management mechanism. Section Five then seeks to characterise the strategy and selection criteria adopted by the Court. We examine how the Court’s Rules of Procedure have changed and become stricter over time. Section Six looks in more detail at the justification adduced by the Court dispose of references by reasoned order. While discussing cross-national divergence in the incidence of reasoned orders, we examine how the odds that a case will be terminated by a reasoned order relate to the size of the Court’s backlog. We conclude with some thoughts on the implications of our findings for judges and litigants.

⁴ *Karl N. Llewellyn*, A Realistic Jurisprudence – the next Step, *Colum. L. Rev.* 30 (1930) 431; *Frederick Schauer*, Legal Realism Untamed, *Tex. L. Rev.* 91 (2012) 749; *Matthew C. Stephenson*, Legal Realism for Economists, *Journal of Economic Perspectives* 2 (2009) 191; *Brian Leiter*, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, *Texas Law Review* 1997, 267.

⁵ *Stephenson* (Fn 4).

⁶ <www.eur-lex.europa.eu> (05.08.2019).

II. The ECJ's Growing Workload

Numbers help get a sense of the challenge that has confronted the ECJ. Figure 1 illustrates the growth of the ECJ's overall caseload from 1953 to 2018. The chart breaks down the figures by procedure: annulments (ANNUL), infringements (INFR), preliminary references (PREL) and staff cases (STAFF).⁷ Note that the data excludes cases handled by the General Court and the Civil Service Tribunal.

Figure 1 shows that the number of preliminary references has increased manifold since the 1960s. The increase has been continuous and consistent over time, in contrast to annulment and infringement cases (the latter have experienced a remarkable decline since the mid-2000s). Preliminary references represent the bulk of the ECJ's caseload, which do not come as a surprise to those who closely watch the Court. What has been less widely noticed is the rise in orders and removals, which started in the 1990s for preliminary references and somewhat earlier for annulment cases. These are direct manifestations of the Court's changed docket policy.

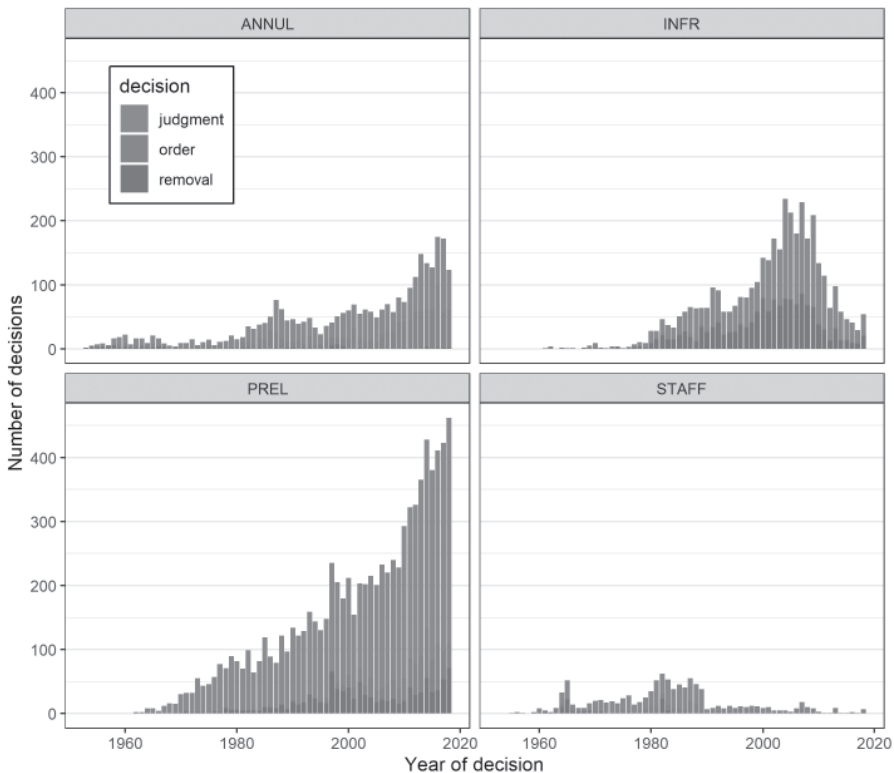


Fig. 1. Type of decision by procedure, 1953–2018. ANNUL = annulment procedure (Article 263 TFEU); INFR = infringement procedure (Article 258 and 259 TFEU); PREL = preliminary ruling procedure (Article 267 TFEU)

⁷ Staff cases are only included to the extent that they ended up on the Court of Justice's docket.

While the ECJ's funding and staff have been upgraded at several junctures over the years,⁸ the expanding caseload has clearly impacted the duration of proceedings. Figure 2 shows that the average duration of preliminary reference proceedings⁹ began to rise in the late 1970s and increased steadily to reach a peak of more than 700 days in 2003. After that, it fell rapidly to about 460 days by the 2010s, which is roughly where it was in the early 1990s. The diminution observed after 2003 may have had several causes. Eastern enlargement, by increasing the number of ECJ judges, may have played a part. As has a simultaneous slowdown in the growth rate of preliminary references (which lasted until referral rates picked up speed again after 2010), which may have further amplified the effect of expanded judicial personnel. Yet the more frequent use of orders may have helped to reduce the backlog of cases too, as we shall see in more detail below.

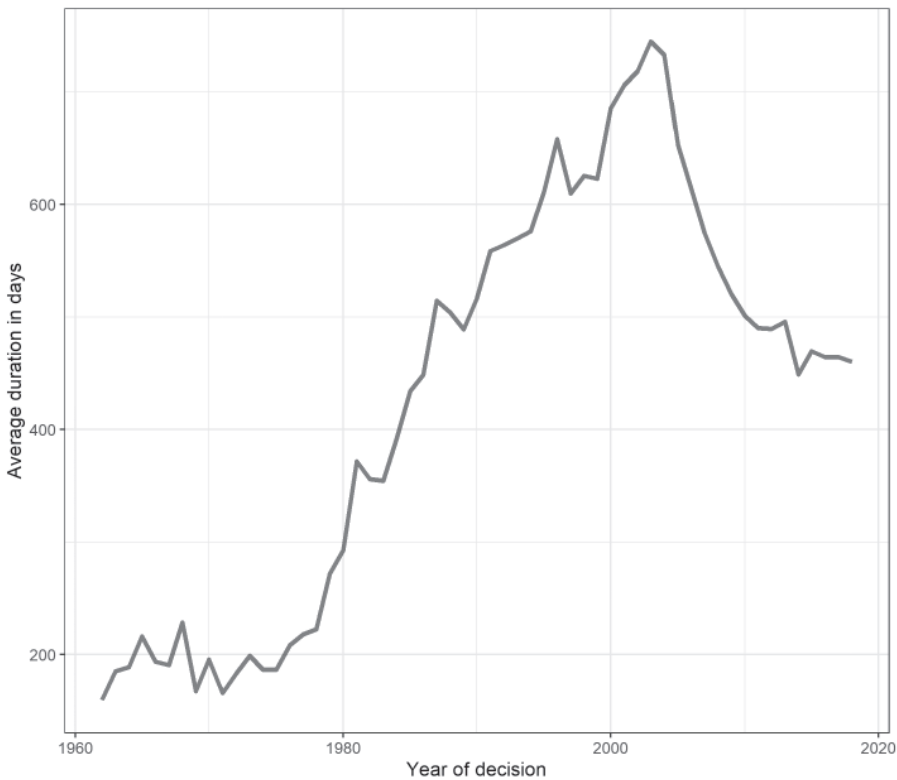


Fig. 2. Average duration of Article 267 proceedings in days, 1963–2018

⁸ See Court of Justice of the European Union, Annual reports on judicial activity, <https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels> (22.04.2021).

⁹ Duration is calculated from the day the reference is filed to the day the ECJ's decision (judgment, order or removal) is rendered.

III. Docket Control Mechanisms

Save for the measures that enlarge judicial resources – such as extra staff – or merely reallocate them to exploit a slack in productivity, the possible avenues to tackle a docket crisis involve either reducing the amount of attention expended on individual cases or keeping some cases off the court’s docket entirely. The most radical solution is to grant judges full discretion over case selection. As legal comparativists know, this solution is embodied in the *certiorari* system governing access to the United States Supreme Court since 1925 (and extended in 1988 to cover the Court’s entire jurisdiction). Its effect can be momentous. While the US Supreme Court receives around 8000 petitions for a *writ of certiorari* every year, it only grants the precious *cert* in only about 1 % of cases. With a ratio of less than nine cases per judge per year, US Supreme Court Justices are not exactly overworked.¹⁰ A discretionary docket allows judges to concentrate on issues that *they* deem important – even when the litigants might think otherwise. To put it differently, discretionary docket affords judges *negative* agenda control. Judges can decide whether a given legal issue should be addressed and whether it is the right time or the right case to do so.

Introducing such a system in the EU court system would almost certainly require a treaty revision. However, standing doctrines can be manipulated to achieve, if not the same result, at least some degree of docket control. The ECJ’s standing doctrines with regard to Article 263 TFEU have largely kept private litigants out of annulment cases.¹¹ Had the Court set out less restrictive conditions for this class of “unprivileged” claimants, annulment cases might well outnumber preliminary references. The fact that the Court generously granted standing to the European Parliament in inter-institutional disputes¹² shows that the rules can be tweaked when the Court so wants. The language of *locus standi* doctrines and/or admissibility criteria formally enshrined in legislation or in rules of procedure can make a court’s access rules functionally close to a discretionary docket.

¹⁰ Some scholars have argued that US Supreme Court justices deliberately keep the Court’s caseload low to free up time for non-judicial activities such as delivering commencement speeches, writing best-selling autobiographies or appearing on television, see *Lee Epstein/William M. Landes/Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013) 37.

¹¹ The strict interpretation of the *locus standi* requirements given by the ECJ has been subjected to a widespread criticism by legal scholars. See, for example, *Paul Craig, Standing, Rights, and the Structure of Legal Argument*, *European Public Law* 4 (2003) 493; *Adam Cygan, Protecting the Interests of Civil Society in Community Decision – Making – the Limits of Article 230 EC*, *ICLQ* 4 (2003) 995; *Stefan Enchelmaier, No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice’s Jurisprudence on Art. 230(4) EC*, *Yearbook of European Law* 1 (2005) 173. See also *Haakon Roer-Eide/Mariolina Eliantonio, The Meaning of Regulatory Act Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions?*, *German Law Journal* 9 (2013) 1851; *Jason Haynes, Revisiting the Locus Standi of Private Applicants in Judicial Review Proceedings under CARICOM and EU Law: A Comparative Perspective*, *Commonwealth Law Bulletin* 1 (2015) 59–81; *Michał Krajewski, The Many-Faced Court: The Value of Participation in Annulment Proceedings*, *European Constitutional Law Review* 2 (2019) 220.

¹² ECJ 22.05.1990 Case C-70/88 (European Parliament/Council of the European Communities) ECLI:EU:C:1990:217.

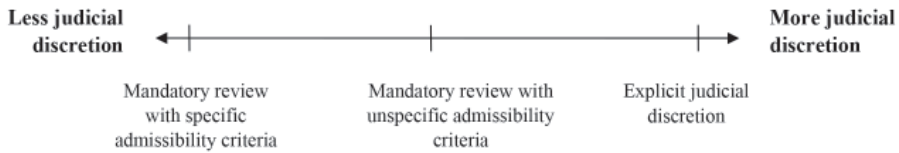


Fig. 3. Docket control schemes and discretion over case selection

As illustrated in Fig. 3, *locus standi* doctrines and admissibility criteria employing unspecific, vague terms like “individually concerned”, “ill-founded” or “serious” afford judges a good deal of discretion even within what formally remains a mandatory docket. Arraying access rules on a continuum from zero to full discretion, such a scheme falls somewhere between US-style *certiorari* and a system of mandatory review with specific admissibility leaving little or no room to pick and choose.¹³

Worried that the excessive duration of proceedings might discourage national courts to request a preliminary ruling, some scholars have advocated the introduction of a filter system at ECJ level that would operate along similar lines.¹⁴ Other proposals to address the ECJ’s case management challenge, though, did not entail giving the Court greater discretion over case selection. Restricting the right to refer to courts of the last instance,¹⁵ with or without exceptions,¹⁶ would certainly bring down the number of references – though perhaps not as much as one might think.¹⁷ In any case, it would not affect the Court’s power over case selection. The same goes for transferring the Court of Justice’s jurisdiction to the General Court,¹⁸ or the establishment of regional courts to add to the existing judicial architecture of the EU.¹⁹ Ditto for the measure that would encourage or oblige national courts to suggest the answer to be given to the submitted questions.²⁰ Likewise, further broadening and relaxing the *CILFIT* criteria would increase the discretion of referring national courts but not that of the ECJ.²¹

¹³ Supreme and constitutional courts in many countries of Latin America, for example, have a mandatory docket, which requires them to hear (nearly) all the cases that reaches them, resulting in huge backlogs. See Tom S. Clark/Aaron B. Strauss, The Implications of High Court Docket Control for Resource Allocation and Legal Efficiency, *Journal of Theoretical Politics* 2 (2010) 247.

¹⁴ Catherine Barnard/Eleanor Sharpston, The Changing Face of Article 177 References, *Common Market Law Review* 5 (1997) 1113; Hjalte Rasmussen, Remediating the Crumbling EC Judicial System, *Common Market Law Review* 5 (2000) 1071; Strasser (Fn 1); Tom Kennedy, First Steps towards a European Certiorari, *European Law Review* 18 (1993) 121.

¹⁵ Rasmussen (Fn 14) 1104; Rösler (Fn 3); Broberg/Fenger (Fn 2) at 31.

¹⁶ Rasmussen (Fn 14) 1104; Rösler (Fn 3); Broberg/Fenger (Fn 2) 31.

¹⁷ As a group, last instance courts have become the most frequent users of the preliminary ruling procedure, see Arthur Dyevre/Monika Glavina/Angelina Atanasova, Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System, *Journal of European Public Policy* 6 (2020) 912.

¹⁸ Rasmussen (Fn 14) 1098; Francis G. Jacobs, Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice, *European Law Review* 29 (2004) 823; Broberg/Fenger (Fn 2) 26; Tridimas (Fn 1) 21.

¹⁹ Jean Paul Jacqué/Joseph H. H. Weiler, On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference, *Common Market Law Review* 2 (1990) 185.

²⁰ Broberg/Fenger (Fn 2) 30.

²¹ Strasser (Fn 1); Rasmussen (Fn 14).

These proposals have not been embraced by the Court, nor by treaty-makers. One reason, presumably, is that they do not square well with what the Court and EU legislators believe its function should be in the context of the preliminary ruling system. The criteria used in the ECJ's Rules of Procedure – which we shall examine in greater detail in the next section – provide the Luxembourg Court with only a modicum of discretion over the selection of references. “Manifestly inadmissible” and “no reasonable doubt” are not as indeterminate as “individually concerned”, “serious” or even “ill-founded”. This underscores an important aspect of case selection in the context of the preliminary ruling procedure. First, the preliminary ruling mechanism is the only formal channel of interaction between the ECJ and domestic judicial bodies. It has played a central role in giving EU law real legal bite within domestic legal systems. Yet, it bears reminding that references are not submitted by litigants but by *judges*. So, inasmuch as the ECJ needs domestic judges not only to bring fresh references but also to implement its preliminary rulings, it should be wary of rejecting submissions in a way that irritate or antagonize its domestic interlocutors. As the US Supreme Court illustrates, greater discretion over case selection is correlated with greater unpredictability. Litigants and lower courts experience the *certiorari* procedure as a lottery.²² This is probably not the perception the ECJ would like to create among referring courts. Unpredictability and uncertainty could spark frustration and foment resentment among domestic judges.²³ Nor should we expect the Court to embrace a system excluding entire categories from the preliminary ruling system. Though the danger always exists that we infer too much from a single case, *Cartesio*²⁴ implies that the ECJ still sees value in giving lower courts access to the preliminary ruling mechanism.²⁵ Prior to *Cartesio*, the practice was that a reference would be removed from the Court's register if the reference was reversed by an appellate court.²⁶ But in its *Cartesio* judgment, delivered in 2008, the ECJ held that a lower court cannot be deprived of its right to refer, even when a superior court rules that a reference is not necessary.²⁷ In other words, excluding lower courts is not a price the ECJ sees worth paying for a more manageable caseload.

Even when limited, docket control can serve a plurality of goals. In the case of a generalist referral court such as the ECJ, resources saved by disposing of questions by summary judgment or formal dismissal can be re-channelled towards important issues of law-finding and law-creation. Docket control may be used to focus on “constitutional” questions, deemed of fundamental, systemic importance to the legal sys-

²² Laurie L. Levenson, *Cases of the Century*, Loy. LAL Rev. 33 (1999) 585 (601).

²³ Although the early practice of dismissing the preferences by the ECJ has been criticised by some scholars. The criticism has not been directed towards the principle of the reasoned order, but rather about the fact that the case-law of the ECJ is inconsistent and fails to give national courts sufficient guidelines. *Barnard/Sharpston* (Fn 14); *David O'Keefe*, *Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility*, European Law Review 23 (1998) 509; *Robert Lane*, *Article 234: A Few Rough Edges Still*, in Mark Hoskins/William Robinson (eds), *A True European: Essays for Judge David Edward* (2004) 327.

²⁴ ECJ 16.12.2008 Case C-210/06 (*Cartesio*) ECLI:EU:C:2008:723.

²⁵ *Tridimas* (Fn 1) 14.

²⁶ For the analysis and the impact of the *Cartesio* case, see *Hugo Storey*, *Preliminary References to the Court of Justice of the European Union (CJEU)* (2010) 33 et seq.

²⁷ Case C-210/06 (*Cartesio*), para 93.

tem. Alternatively, it can serve to make the court's business easier to conduct by disciplining referring courts and setting quality standards that references must meet in order to have a chance of receiving full consideration. As we shall see, the ECJ appears to pursue all these objectives, although, we argue, with greater emphasis on quality.

IV. Reasoned Orders as Docket Control Mechanism

We contend that “reply by reasoned order” has been the principal mechanism used by the ECJ to tackle its docket management challenge. A reasoned order is, basically, a simplified decision.²⁸ In practice, it means that the reference at issue is disposed of by a chamber of three judges without either an oral or written procedure.²⁹ As we shall see, reasoned orders are used to dismiss preliminary references asking questions falling out of the ECJ's jurisdiction, questions to which the Court has already provided an answer in a previous ruling or questions that are, for other reasons, manifestly inadmissible. Reasoned orders tend to be significantly shorter than judgments. The average reasoned order has 2.779 words, the average judgment 4.669. Moreover, reasoned orders are frequently much shorter. The Court's first reasoned order, in *Henri Godard v Garantie Mutuelle des Fonctionnaires* was a mere 269 words in length. After repeating the preliminary question submitted by the *Tribunal d'Instance Hayange*, the Court tersely stated that:

“[I]t appears from the file and from the wording of the question submitted as well as the statement of the reasons on which it is based that it in no way concerns either the interpretation of the EEC Treaty or the validity or interpretation of an act of an institution of the Community. The Court therefore clearly has no jurisdiction to reply to the question thus raised.”³⁰

Similarly, terse wordings are common in decisions where references are disposed by a reasoned order invoking a lack of jurisdiction.³¹ Somewhat longer are the orders invoking the manifest inadmissibility of the reference. In such cases, the Court starts by reminding the referring courts of the requirements for a well-drafted reference. In Case C-116/00 – one of the early illustrations of that type of order – the ECJ wrote the following:

“The Court has consistently held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [...] The Court has also stressed that it is important for the national court to state the precise rea-

²⁸ It is sometimes referred to as a procedure for “simple cases”, see *Elspeth Berry/Matthew J. Homewood/Barbara Bogusz*, *Complete EU Law: Text, Cases, and Materials* (2019).

²⁹ See the speech of the Advocate General *Niilo Jääskinen*, *Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape*, King's College 15 February 2013, <<https://www.kcl.ac.uk/law/research/centres/european/Kings-College-Jaaskinen.pdf>> (13.03.2020).

³⁰ ECJ 27.06.1979 Case C-105/79 (Godard) ECLI:EU:C:1979:168.

³¹ See for early examples ECJ 27.06.1979 Case C-68/80 (Hayange) ECLI:EU:C:1980:76; 18.06.1980 Case C-138/80 (Borker) ECLI:EU:C:1980:162; 09.11.1983 Case C-80/83 (Habourdin International SA) ECLI:EU:C:1983:321; 28.03.1984 Case C-56/84 (Von Gallera) ECLI:EU:C:1984:136; 05.03.1986 Case C-318/85 (Regina Greis Unterweger) ECLI:EU:C:1986:106. More recent orders “no jurisdiction” are rarely longer than 500 words. See ECJ 05.11.2014 Case C-254/14 (VG Vodoopskrba) ECLI:EU:C:2014:2354.

sons which caused it to question itself as to the interpretation of Community law and to consider that it was necessary to refer questions to the Court for a preliminary ruling. [...] It is clear, however, that the order for reference does not contain sufficient information to satisfy those requirements. [...] In the light of the above considerations it must be held [...] that the question referred to the Court is manifestly inadmissible.”³²

The most loquacious orders are those where “settled issue” forms the main *ratio decidendi*. However, this is in large part because these orders take the pain to point out the rulings and relevant passages where the referring court is told to look for the answer to its question.³³ For example, in Case C-259/02, the referring court is told that the answer to its question “may be clearly deduced from paragraphs 35 to 39 of *Ansul*, cited above, in which the Court set out the following conclusions: [...]”³⁴ Lists and excerpts of previous rulings do much to lengthen this category of orders, which, for the rest, contain little in the way of new or original determinations.

Reasoned orders are not only shorter. They are also less likely to be translated into the 24 EU official languages, as is normally required of CJEU judgments. The first order issued by the Court can be found in six linguistic versions: Danish, German, English, French, Italian and Dutch.³⁵ But it is not infrequent for more recent ones to be available only in French and in the language of the parties.³⁶ Reasoned orders further allow the Court to dispense with an Advocate General opinion. All these features allow the Court to cut corners and save time and resources.

That reasoned orders have been used to address the Court’s growing docket is not, in itself, a particularly original claim. It has been acknowledged by members of the Court³⁷ and is also widely recognised by Court watchers.³⁸ In its performance review of case management at the Court, the Court of Auditors, too, described reasoned orders as speeding up case disposition.³⁹ In the next two Sections, we chart their deployment over time and how they affected the Court’s docket policy.

³² In ECJ 28.06.2000 Case C-116/00 (*Laguillaumie*) ECLI:EU:C:2000:350, paras 14–17, para 26.

³³ See, for example, ECJ 12.07.2001 Case C-102/00 (*Welthgrove BV*) ECLI:EU:C:2001:416; 07.07.1998 Joined Cases C-405–408/96 (*Béton Express and Others*) ECLI:EU:C:1998:337; 04.03.2002 Case C-175/00 (*Verwayen-Boelen*) ECLI:EU:C:2002:133.

³⁴ ECJ 27.01.2004 Case C-259/02 (*La Mer Technology*) ECLI:EU:C:2004:50, para 19.

³⁵ ECJ 27.06.1979 Case C-105/79 (*Godard*) ECLI:EU:C:1979:168.

³⁶ See, for example, ECJ 12.10.2016 Case C-511/15 (*Horžić*) ECLI:EU:C:2016:787; 05.12.2014 Case C-254/14 (*VG Vodoopskrbna*) ECLI:EU:C:2014:235; 17.10.2018 Case C-353/18 (*Beny Alex*) ECLI:EU:C:2018:82; 03.07.2018 Case C-340/18 (*EK and Others*) ECLI:EU:C:2018:577; 30.01.2019 Case C-335/18 (*AK* (Bulgarian confiscation of an undeclared sum leaving the EU)) ECLI:EU:C:2019:92; 01.06.2018 Case C-196/18 (*Soares de Sousa*) ECLI:EU:C:2018:435; 06.09.2018 Case C-184/18 (*Patrício Teixeira*) ECLI:EU:C:2018:694; 06.09.2018 Case C-90/18 (*HBOR*) ECLI:EU:C:2018:685; 12.07.2018 Case C-707/17 (*Pinzaru and Cirstinoiu*) ECLI:EU:C:2018:574; 24.01.2019 Case C-510/17 (*ML*) ECLI:EU:C:2019:128; 26.01.2018 Case C-490/17 (*Passenger Rights*) ECLI:EU:C:2018:71.

³⁷ See *eg* the submissions of Advocate General *Sharpston* before the European Union Committee of the House of Lords, 29 March 2011, <<https://publications.parliament.uk/pa/ld201011/ldselect/ldcom/128/12802.htm>> (13.03.2020).

³⁸ *Berry/Homewood/Bogusz* (Fn 28) 300.

³⁹ Performance Review of Case Management at the Court of Justice of the European Union, Special Report No 14/2017, <<https://op.europa.eu/webpub/eca/special-reports/court-of-justice-14-2017/en/>> (13.03.2020.)

V. The Evolution of Admissibility Criteria

The evolution of a supranational court's approach to case selection typically follows a trajectory that can be compared to that of a new academic journal. As with a new periodical, the new judicial body will initially be eager to attract submissions. Just like a journal without submissions has no *raison d'être*, a court without cases to decide is socially and legally irrelevant. So as long as the number of submissions remains small, the court will want to avoid discouraging potential submitters. Hence, in this early stage, the court's acceptance criteria will usually be lax. As the court becomes more established and more prestigious, however, it will attract more and more submissions, as happened with the ECJ.

As it climbs academic rankings, a journal typically becomes more selective. Priority is given to more polished submissions or submissions making a greater or more original contribution. The ECJ, we argue, has behaved similarly to an academic journal. In keeping with this analogy, it applied a broad definition of what was to be considered "a court or a tribunal of a Member State" for the purpose of Article 267 TFEU.⁴⁰ The Court accepted references from courts such as the Benelux Court (although it is not a national court),⁴¹ arbitration boards (eg Danish Industrial Arbitration Board),⁴² administrative authorities (eg Greek Competition Commission, British National Insurance Commissioner),⁴³ and private bodies (eg Dutch General Practitioners Registration Committee).⁴⁴ The same philosophy informed the requirements applying to the formulation of the submitted questions.⁴⁵ The Court refrained from assessing the relevance of the questions referred for the legal dispute that gave rise to the request for a preliminary ruling.⁴⁶ Nor was the ECJ very strict when it came to the need for the reference to specify the facts of the case or applicable domestic rules and doctrines.⁴⁷ The Court was even willing to re-formulate imprecise questions to ensure they could serve as a basis for a preliminary ruling.⁴⁸ Rising referral rates then led the Court to change tack.

⁴⁰ *Broberg/Fenger* (Fn 2) 5. For the definition of what constitutes "a court or a tribunal of a Member State" see ECJ 06.10.1981 Case C-246/80 (Brokemeulen) ECLI:EU:C:1981:218, Advocate General Reichl Opinion. See also: ECJ 30.06.1966 Case C-61/65 (Vaassen-Göbbels) ECLI:EU:C:1966:39; 17.09.1997 Case C-54/96 (Dorsch Consult) [1997] ECR I-4961; 14.06.2007 Case C-246/05 (Häup) ECLI:EU:C:2007:340; 18.10.2007 Case C-195/06 (KommAustria v ORF) ECLI:EU:C:2007:613.

⁴¹ ECJ 12.02.2004 Case C-265/00 (Campina Melkunie) ECLI:EU:C:2004:87.

⁴² ECJ 17.10.1989 Case C-109/88 (Handels- og Kontorfunktionærernes Forbund) ECLI:EU:C:1989:383.

⁴³ ECJ 31.05.2005 Case C-53/03 (Syfait) ECLI:EU:C:2005:333; 28.06.1978 Case C-1/78 (Kenny) ECLI:EU:C:1978:140.

⁴⁴ ECJ 06.10.1981 Case C-246/80 (Brokemeulen) ECLI:EU:C:1981:218.

⁴⁵ *Broberg/Fenger* (Fn 2) 5.

⁴⁶ ECJ 30.06.1966 Case C-61/65 (Vaassen-Göbbels) ECLI:EU:C:1966:39.

⁴⁷ *Broberg/Fenger* (Fn 2) 297 et seq.

⁴⁸ Cases where the Court reformulated the questions referred include, for example, ECJ 15.05.2003 Case C-160/01 (Mau) ECLI:EU:C:2003:280; 29.05.1997 Case C-329/95 (VAG Sverige AB) ECLI:EU:C:1997:256; 15.05.1997 C-250/95 (Futura Participation) ECLI:EU:C:1997:239; 07.09.2006 Case C-470/04 (N) ECLI:EU:C:2006:525; 11.03.1981 Case C-69/80 (Worringham and Humphreys v Lloyds Bank) ECLI:EU:C:1981:63.

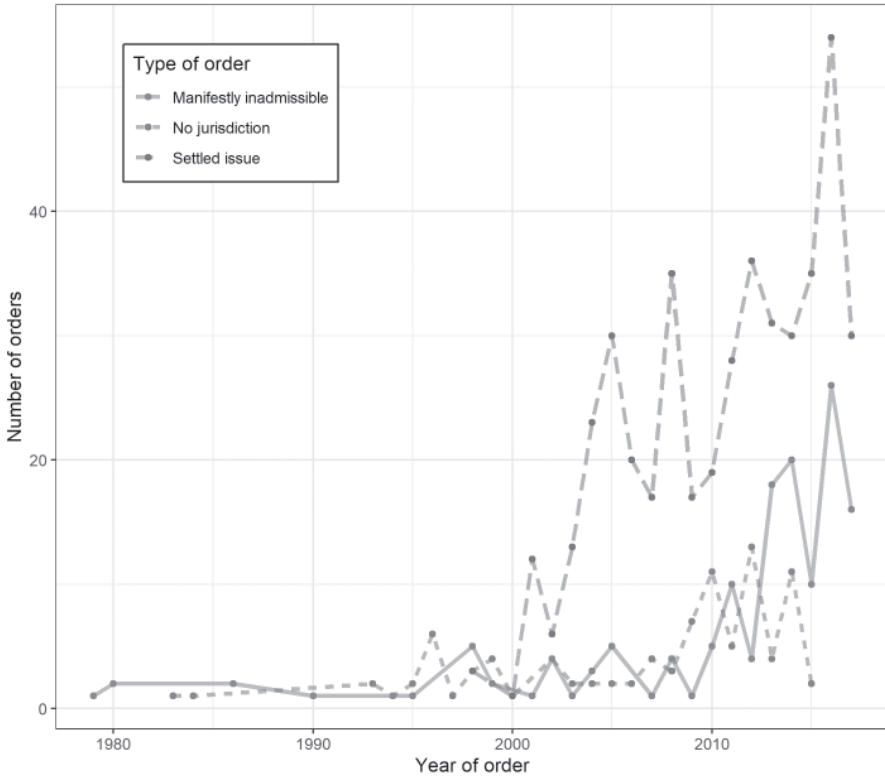


Fig. 4. Dismissed references according to the type of order, 1961–2017

The Rules of Procedure adopted in 1959 did not mention the possibility of disposing of references by a reasoned order, although one provision stipulated that the Court “at any time of its own motion” could “consider whether there exists any absolute bar to proceeding with a case”.⁴⁹ This provision was amended in 1979 to allow the Court to declare an “application” inadmissible by “reasoned order” when it is “clear that the Court has no jurisdiction to take cognizance of an application”. This was the first mention of “reasoned order” in the Rules of Procedure. The rare instances (only eight) in which the Court, prior to the 1990s, rejected a request for a preliminary ruling invoked this provision.⁵⁰ Interestingly, the first case in which the Court used an order to dismiss a reference on the grounds that it fell outside of its jurisdiction predates the 1979 amendment by a couple of months.⁵¹ The Rules of Procedure were amended again in 1991. Article

⁴⁹ Rules of Procedure of the Court of Justice of the European Communities OJ 18, 21.03.1959, Article 92.

⁵⁰ ECJ 27.06.1978 Case 105/79 (Godard) ECLI:EU:C:1979:168; 12.03.1980 Case C-68/80 (Hayange Sonacotra v Ahmed Belaid) ECLI:EU:C:1980:76; 18.06.1980 Case C-138/80 (Borker) ECLI:EU:C:1980:162; 09.11.1983 Case C-80/83 (Habourdin International SA) ECLI:EU:C:1983:321; 28.03.1985 Case C-56/84 (Von Gallera) ECLI:EU:C:1984:136; 05.03.1986 Case C-69/85 (Wünsche v Germany) ECLI:EU:C:1986:104; 05.03.1986 Case C-318/85 (Regina Greis Unterweger) ECLI:EU:C:1986:106; 26.01.1990 Case C-286/88 (Faciola) ECLI:EU:C:1990:33.

⁵¹ See ECJ 27.06.1979 Case 105/79 (Godard) ECLI:EU:C:1979:168.

92 added the possibility to discard “an action” by reasoned order when the action is “manifestly inadmissible”, a ground which it had already invoked on four occasions. A new Article 104(3) added the possibility to resort to a reasoned order when the question referred to the Court is “manifestly identical to a question on which the Court has already ruled”. The use of reasoned orders started picking up a few years later, as can be seen in Fig. 4. The absence of jurisdiction and manifest inadmissibility were the two most frequent grounds for resorting to this form of case disposition. After the turn of the millennium, however, “settled issue” became a more frequent ground.

Besides revisions of the Rules of Procedure, the 1990s saw the publication of a non-binding practical guide to the preliminary ruling system for national judges, *Guidance on References by National Courts for Preliminary Rulings*, first published in 1997. Apart from summarising the Court’s case law, the guide outlined a set of recommendations for submitting courts:⁵² a request for a preliminary ruling should include a statement of the essential facts of the case, indicate what reasons prompted the reference, and – if appropriate – a summary of the arguments of the parties to the case.⁵³ The guide also recommended that any document – including the text of domestic laws – necessary for an accurate understanding of the case be enclosed with the reference.⁵⁴

When new Rules of Procedure were enacted in 2012, the Court expressly referred to the necessity “[i]n order to maintain the Court’s capacity, in the face of an ever-increasing caseload, to dispose within a reasonable period of time of the cases brought before it” to extend the opportunities for the Court to rule by reasoned order.⁵⁵ Codifying the Court’s practice, Article 99 of the Rules of Procedure specified that references could be disposed of by reasoned order not only when the question was identical to a previous reference but also when “where the reply to such a question may be clearly deduced from existing case-law” or “where the answer to the question referred for a preliminary ruling admits of no reasonable doubt”. Article 94 of the same Rules of Procedure codified requirements regarding relevance, contextual information and clarity that the Court had articulated in its case-law⁵⁶ and in the *Guidance on References by National Courts for Preliminary Rulings*. References are thus required to include (a) a summary of the subject-matter and the relevant facts of the dispute before the referring court; (b) the text of the national provisions applicable to the case and the

⁵² *Court of Justice*, Court of Justice of the European Communities Note for Guidance on References by National Courts for Preliminary Rulings, *Common Market Law Review* 5 (1997) 1 et seq.

⁵³ (Fn 53) n 6.

⁵⁴ (Fn 53) n 6.

⁵⁵ Preamble (6), Rules of Procedure of the Court of Justice OJ L 265, 29.09.2012.

⁵⁶ Already in 1961, the ECJ held that a request for a preliminary ruling must be sufficiently specific in order to be of use for the referring national court, see ECJ 06.04.1962 Case C-13/61 (Bosch) ECLI:EU:C:1962:11. Other examples of the ECJ’s case law on the formulation of the preliminary question are ECJ 06.05.1971 Case C-1/71 (Cadillon) ECLI:EU:C:1971:47; 16.07.1992 Case C-343/90 (Lourenco Dias) ECLI:EU:C:1992:327; 09.08.1994 Case C-378/93 (La Pyramide) ECLI:EU:C:1994:316; 01.04.1982 Joined Cases C-141/81–143/81 (Holdijk) ECLI:EU:C:1982:122; 25.06.1996 Case C-101/96 (Italia Testa) ECLI:EU:C:1996:250; 10.03.1981 Joined Cases 36/80 and 71/80 (Irish Creamery) ECLI:EU:C:1981:62.

relevant national case law; and (c) a statement of the reasons motivated the domestic to request a preliminary ruling.⁵⁷

Removals also became more frequent in the 1990s (see Fig. 1). In terms of decision type, removals outnumber reasoned orders. Removals may occur at the Court's own initiative – which was always in the powers of the Court. But the ECJ may also prompt the referring tribunal to withdraw its reference. Since 2005 the ECJ reports this subset of removals. Figure 6 indicates that the number of such prompted withdrawals has experienced a steep increase. This, we believe, is another manifestation of the Court's stricter approach to case selection.

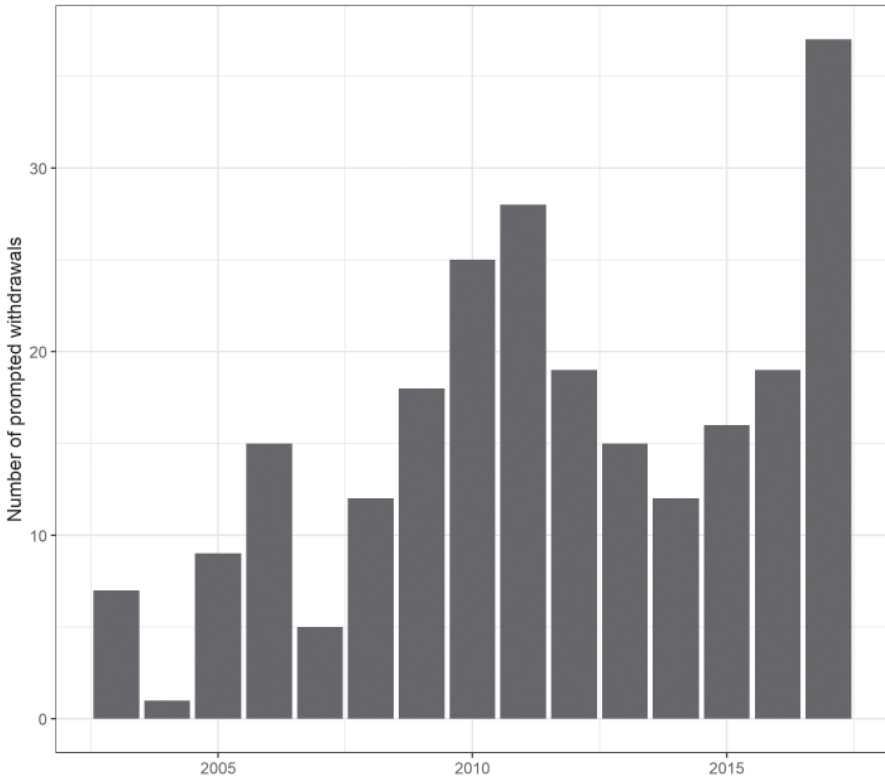


Fig. 6. Number of “prompted” withdrawals over time, 1961–2017

An account of the evolution of the ECJ's practices would be incomplete without mentioning its judgment in *Foglia*, which the Court delivered in December 1981. Aside from holding that a preliminary reference could challenge the law of another member state, the Court determined that it had no jurisdiction to rule over artificial disputes which the parties deliberately created to obtain a judicial ruling.⁵⁸ At the time, *Foglia*

⁵⁷ The Court of Justice of the EU, Consolidated Version of the Rules of Procedure of the Court of Justice, 25 September 2012.

⁵⁸ ECJ 11.03.1980 Case C-104/79 (*Foglia v Novello*) ECLI:EU:C:1980:73.

came as a surprise to scholars and has attracted a lot of attention.⁵⁹ However, its importance in the evolution of the Court's practice may be overstated. While the Court has occasionally invoked *Foglia* to refuse to review questions challenging the law of another member state,⁶⁰ the hypothetical case doctrine outlined in *Foglia* seems to have found few applications. Moreover, the *Mangold* ruling, which arose from an artificial dispute,⁶¹ suggests that the ECJ is willing to disregard the doctrine when it suits its agenda.⁶²

VI. Quality and Originality

If reasoned orders have enabled the Court to save resources, how have these resources been used? Borrowing, again, the metaphor of the academic periodical, our argument is that the Court has focused on quality and originality. The emphasis on originality is reflected in the high proportion of orders adducing settled case law as the main justificatory reason for refusing to review the merits of the question. These orders signal both what the ECJ does not want – questions that ask it to repeat what it has already said – and what it wants – new questions addressing points on which the law must be clarified or questions that would allow the court to establish new doctrines.⁶³ “Manifestly inadmissible”, which is the second most frequent ground for a reasoned order, ties more directly into the question of quality.⁶⁴ The ECJ wants well-written references, which clearly state the relevant facts and legal rules. References that provide this information make the Court's job easier. Those that do not face a higher probability of rejection.

⁵⁹ *Barnard/Sharpston* (Fn 14) 1121.

⁶⁰ See ECJ 21.01.2003 Case C-318/00 (*Bacardi-Martini v Newcastle United FC*) ECLI:EU:C:2003:41.

⁶¹ *Josephine Steiner/Lorna Woods/Philippa Watson*, Steiner & Woods EU Law (2012) 225; *Antoine Masson/Mary J. Shariff*, Legal Strategies: How Corporations Use Law to Improve Performance (2009) n 20.

⁶² ECJ 22.11.2005 Case C-144/04 (*Mangold*) ECLI:EU:C:2005:709.

⁶³ To be sure, some of these orders may reflect the fact that more issues have become settled as a consequence of the expansion and differentiation of the Court's case law. However, the remit of EU treaties and legislation has also expanded over time and we believe that the ECJ would have been reluctant to handle domestic references in this way in the early phase of legal integration.

⁶⁴ *Alexander Kornezov*, When David Teaches EU Law to Goliath: A Generational Upheaval in the Making, in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015) 264; *Diana-Urania Galetta*, European Court of Justice and Preliminary Reference Procedure Today: National Judges, Please Behave!, SSRN Scholarly Paper (2014); *Michal Bobek*, Talking Now?: Preliminary Rulings in and from the New Member States, *Maastricht Journal of European and Comparative Law* 4 (2014) 782 (786).

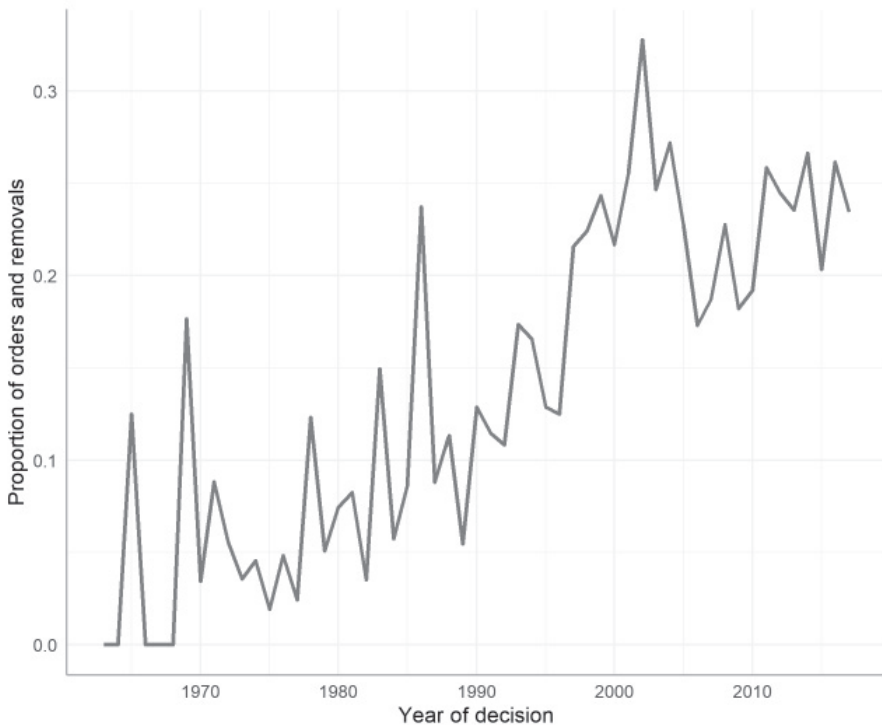


Fig. 7. Evolution of the proportion of references disposed of by reasoned order (as a fraction of all references), 1961–2017

Figure 7 confirms that the proportion of references disposed of by way of either a reasoned order or a removal has gone up considerably. Yet, a look at the national origin of the references that ended in a reasoned order uncovers substantive national disparities. Figure 8 shows the absolute number of reasoned orders for all 28 member states broken down by type of order. If we consider the relatively high number of references they submit, Dutch and UK courts seem to do a good job at meeting the ECJ’s admissibility requirements. Few of their references are rejected. On the rare occasions when they are, it is mostly because the question is a settled issue or, exceptionally, when it is outside the ECJ’s jurisdiction. By contrast, references from Italian courts seem more susceptible to reasoned orders. Italian judges are especially likely to see their references dismissed as “manifestly inadmissible”. So too are Belgian, Romanian and Hungarian courts. If we look not at the absolute number of orders (Fig. 8) but at the proportion of national references (Fig. 9), we clearly see that courts in eastern (Romania, Croatia, Hungary, Bulgaria) and southern (Italy, Spain, Cyprus, Greece) member states lead the league table of the courts that most consistently fail to do their homeworks before sending their references. While other factors may be at play, these figures are broadly consistent with perceived disparities in the quality of references across national legal systems.⁶⁵ The high share of Italian references result-

⁶⁵ *Galetta* (Fn 64); *Michal Bobek*, Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice, *Common Market Law Review* 6 (2008) 1611; *Bobek* (Fn 64); *Kornezov* (Fn 64).

ing in reasoned orders may partly stem from the above-average proportion of submissions originating in lower courts in this country – references from higher courts are generally less likely to result in a reasoned order.⁶⁶ Italian first instance courts are very active participants in the preliminary ruling system. But the fact that they typically have less resources (whether legal assistants, research units, library, access to databases, etc) and expertise than courts higher in the hierarchy⁶⁷ may adversely impact the quality of their references. With inadequate staff support or simply unawareness of the ECJ's admissibility criteria, many Italian judges seem to devote too little time and effort to reference writing. As a result, their references are insufficiently researched or poorly drafted, prompting the ECJ to reject them.⁶⁸

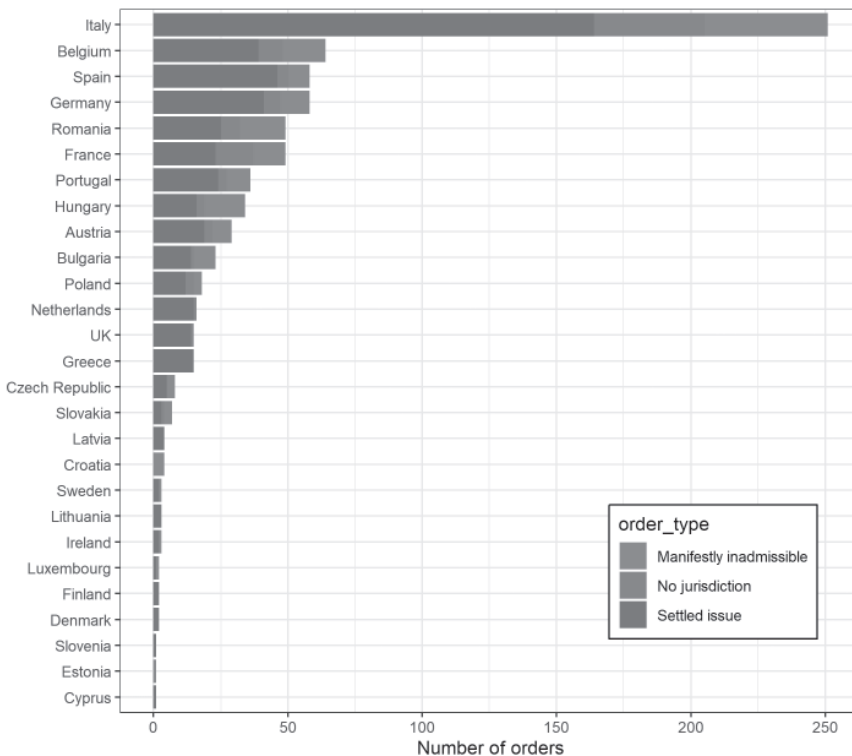


Fig. 8. Absolute numbers of reasoned orders by EU member state, 1961–2017

Similar problems appear to plague courts in Central and Eastern European (CEE) member states. Following the 2004 enlargement, scholars expressed concerns over

⁶⁶ *Michal Ovádek/Wessel Wijtvliet/Monika Glavina*, Who Matters Most? Measuring Importance in the EU Preliminary Reference System, *European Journal of Legal Studies* 1 (2020) 121.

⁶⁷ *Dyevre/Glavina/ Atanasova* (Fn 17); *Monika Glavina*, To Refer or Not to Refer, That Is the (Preliminary) Question, *Croatian Yearbook of European Law and Policy* 16 (2020) 25; *eadem*, Judicial Hierarchy in the Preliminary Ruling Procedure: Exploring the Relationship Between the First and Second Instance Courts, *European Papers – A Journal on Law and Integration* 2 (2020) 799.

⁶⁸ *Galetta* (Fn 64).

the ability of CEE judges' capacity to apply EU law "properly".⁶⁹ This concern mainly arose from the new member states' communist past. Within less than two decades, CEE countries faced two waves of transformation of their legal systems. The first coincided with the end of communist rule and accession to the Council of Europe, bringing them under the jurisdiction of the ECtHR. Less than 15 years later, accession to the European Union required them to implement the entire *acquis communautaire*. The magnitude of the required adjustment presented lawyers and judges in the region with a considerable challenge.⁷⁰ Another possible explanation points to the lack of experience with the domestic application of international law in CEE countries. With the possible exception of Poland, international law had largely failed to penetrate domestic legal systems.⁷¹ As a result, ordinary courts in CEE countries had very little experience with the application of international law upon their countries' accession to the EU. The problem has less to do with defiance of European legal order or distrust of the ECJ than with poor legal knowledge and the enduring influence of textualist modes of thinking inherited from the communist era.⁷² The incomplete translation is another problem that further complicates communication between the ECJ and its judicial interlocutors in CEE countries. Translation of EU legislation faced significant delays, which made the task of CEE judges considerably harder.⁷³ Not that the problem has disappeared. More than a decade after the accession of CEE countries, a quick search of the Curia database reveals that most pre-2004 ECJ judgments do not have translations in all the languages officially spoken in the region.⁷⁴ The inability to do read ECJ decisions in their native tongue may, thus, be one reason why CEE courts fail to do their homeworks prior to submitting their references. It could explain the high incidence of Romanian, Hungarian, Bulgarian and Polish references dismissed as "settled issue" (see Fig. 8).

That judges face challenges and difficulties with navigating the preliminary ruling procedure has been further documented by recent research drawing on data from qualitative interviews with domestic judges. Interviewed judges describe the process of

⁶⁹ Zdenek Kühn, *The Application of European Law in the New Member States: Several (Early) Predictions*, German Law Journal 3 (2005) 1; Marek Sajjan, *Central and Eastern European Constitutional Courts Facing New Challenges: Ten Years of Experience*, in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015) 375; Jan Zobeč/Jernej Letnar Čerňič, *The Remains of the Authoritarian Mentality within the Slovene Judiciary*, in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015) 125; Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015).

⁷⁰ Attila Harmathy, *Codification in a Period of Transition*, UC Davis L. Rev. 31 (1997) 783; Pavel Holländer, *The Judge Today: A Barrier to a Postmodern Deconstruction or an Industrial Factory for Decision-Making*, in Priban Jiří ea (eds), *Systems of Justice in Transition. Central European Experiences since 1989* (2003) 77; Kühn (Fn 69).

⁷¹ Kühn (Fn 69).

⁷² Kühn (Fn 69); Péter Cserne, *Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case?*, in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (2015) 23. Bobek too warned on the negative impact of textualism on the proper application of EU law. See Bobek (Fn 69).

⁷³ Michal Bobek, *A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe*, Croatian Yearbook of European Law & Policy 2 (2006) 285.

⁷⁴ Source: Curia, <<https://curia.europa.eu/>> (22.04.2021).

preparing a request for a preliminary ruling as effortful and time-consuming.⁷⁵ That higher court judges have an advantage over their colleagues at the lower echelons of the judicial pyramid when it comes to the resources that can be devoted to reference drafting is a sentiment which some judges also appear to share. Commenting on the high referral activity of the Slovenian Supreme Court, a Slovenian lower court judge observes: “Not only [do] the [judges of the Supreme Court] have more time, but they also have something else and these are law clerks. [...] These are people who can be tasked with investigating the legal situation and the steps to ask the preliminary questions, and attending the attached administrative requirements.”⁷⁶

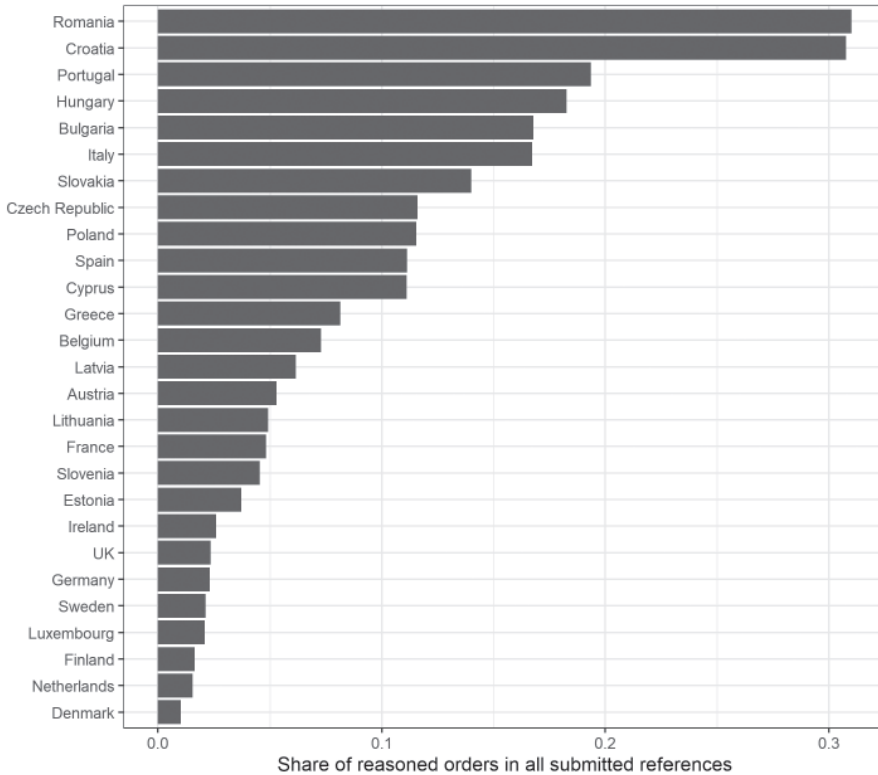


Fig. 9. Percentage of formal dismissals across EU member states, 1961–2017

⁷⁵ A German judge, for example, admitted “No. I would not do it. [...] It is too much effort.” See *Tobias Nowak/Fabian Amtenbrink/Marc Hertogh/Mark Wissink*, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (2011); *Urszula Jaremba*, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes* (2012); *Glavina* (Fn 67); *eadem*, *Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia*, in Clara Rauegger/Anna Wallerman (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law. EU Law in the Member States 4* (2019) 191.

⁷⁶ Translation adapted from *Glavina* (Fn 75) 205 et seqq.

Some scholars warned that reasoned orders might have an adverse effect on the willingness of national judges to participate in the preliminary ruling system,⁷⁷ notably in new member states where courts have no experience with EU law.⁷⁸ This “fear of rejection” was further echoed in a European Parliament’s report on the role of the national judge in the European judicial system.⁷⁹ In qualitative interviews, national judges speak of the fear to see their ignorance of EU law exposed by the Court of Justice.⁸⁰

As discussed above, the conditions governing the disposition of references by way of reasoned orders do not turn the ECJ’s docket into a discretionary docket. “Manifestly inadmissible”, “clearly deduced” and “reasonable doubt” do not give the Luxembourg Court’s judges the power to freely pick and choose references and dismiss the rest by reasoned orders. On the judicial discretion continuum (Fig. 3), the Court’s case selection scheme is definitely closer to a strict mandatory docket than to a US-style discretionary one. But even so, admissibility criteria are still sufficiently vague to allow the Court to take into account the current level of available judicial resources. There are shades of “manifestly”, “clearly” and “reasonable” that leave some wiggle room for interpretation. This modicum of discretion affords the Court the possibility to take into account resource management considerations. Figure 10 shows that there is a strong, positive association between the probability that a reference will be disposed of by a reasoned order and the overall number of cases – all procedures included – on the Court’s docket. In other words, a referring court is more likely to face an order when there are more cases awaiting resolution. Our back-of-the-envelope calculation suggests that the effect is appreciable. An increase in the Court’s backlog from 0 to 1.000 increases the probability of a case being ruled by order by 26 %. From a statistical perspective, this effect is strongly significant – in other words, the association is very unlikely to be the result of pure chance.⁸¹ What is more, the curve in Fig. 10 shows that the marginal probability that a reference results in a reasoned order increases as the size of the backlog goes up: adding one case to the Court’s backlog has a stronger effect on the proportion of orders when the Court already has 800 pending cases than when it has only 200. Similar patterns of relationship between dismissals and backlogs have been found in other legal contexts.⁸²

⁷⁷ Maarten Vink/Monica Claes/Christine Arnold, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis* (2009).

⁷⁸ Bobek (Fn 65) 1620.

⁷⁹ European Parliament, *The Role of the National Judge in the European Judicial System*, 6 April 2008, <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2008-0224&language=EN>> (18.11.2019).

⁸⁰ Glavina (Fn 75) 205 et seq.

⁸¹ The effect is robust to different specifications, such as controlling for cases which are joined or removed from the docket.

⁸² Richard A. Posner, *How Judges Think* (2008); Epstein/Landes/Posner (Fn 10); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, *American Law and Economics Review* 1 (2004) 1; Stephen J. Choi/Mitu Gulati/Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, *Journal of Law, Economics, and Organization* 3 (2012) 518.

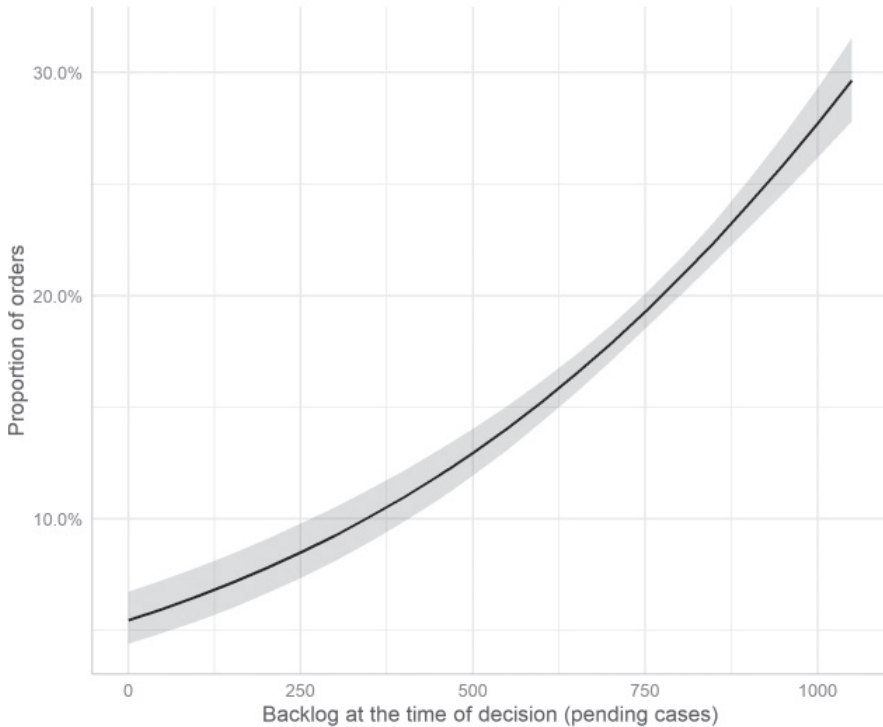


Fig. 10. Relationship between backlog and the probability that a reference will result in a reasoned order⁸³
 Note: grey band represents 95 % confidence margin.

This finding constitutes perhaps the best illustration of the distinction between the paper rules and the real rules discussed in the introduction. The paper rules – whether it is the Court’s doctrines, its Rules of Procedure or the Treaties – do not make mention of the number of cases on the Court’s docket as an admissibility requirement. However, our quantitative analysis reveals that it is a practice that obeys a robust pattern of regularity. While this does not mean that the paper rules do not matter, it clearly shows that they do not capture all aspects of the Court’s docket management policy. The real rules – in the sense used by American legal realists⁸⁴ – that govern the admissibility of references and the recourse to reasoned orders are more complex and reflect considerations that the official rules do not make fully explicit.

⁸³ The plot is generated by regressing the log-odds of the ECJ issuing an order (as opposed to a judgment) on the number of cases pending before it at the time the decision is issued. Subsequently, the exponentiated estimated coefficients are used to predict the probability of an order given any level of backlog. Here we look at backlog values of 0 to 1.100 pending cases, because this is historically the approximate range of pending cases at various points time at the Court, but we could predict the probability of an order at higher values as well. We model the overall relationship using the logistic function, so the overall curve has a sigmoidal shape until it reaches 100 % probability. This means the probability of orders would keep rising sharply beyond the currently realistic range of backlog values.

⁸⁴ *Llewellyn* (Fn 4).

VII. Conclusion

In this Essay, we examined the emergence and evolution of the ECJ's docket control policy with respect to Article 267 TFEU. To paint a comprehensive and accurate picture of the Court's practices, we applied methodology blending doctrinal and quantitative analysis. We suggested that the evolution of the docket control policy of the ECJ can be likened to the evolution of an academic journal. Like a new journal seeking to boost submissions, the ECJ, as a new and relatively unknown judicial player, was eager to boost the number of referrals. But EU law and the Court have come a long way. The mutually reinforcing effects of greater institutional prominence and increasing referral activity have turned the ECJ into the judicial equivalent of a top academic journal with high impact factor. Yet the rising inflow of submissions, which has resulted in longer proceedings and an accumulating backlog, has put a strain on the Court's resources. As have courts elsewhere, the ECJ has responded to this challenge by tightening access, although without embracing a US *certiorari*-style approach to case selection.

The consequence for domestic courts is that it has become harder to get published in the ECJ journal – at least, if by publication, we mean a full ECJ judgment. The ECJ expects higher quality and true originality. Some courts, notably in central and southern member states, have found it harder to adapt to these more demanding standards. Yet the admissibility criteria codified in the Court's Rules of Procedure are not applied mechanically. Among other things, their application seems to be influenced by the size of the ECJ's docket at the time of submission. As well as for the national judges who contemplate a request for a preliminary ruling, these findings are important for litigants who often play a key role in persuading courts to submit references. While our analysis suggests that looking at the Rules of Procedure is essential to understand the ECJ's priorities and expectations, it also shows why it might be insufficient and why it is also useful to understand admissibility from a quantitative case management perspective.

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