

WHICH COURTS MATTER MOST? MEASURING IMPORTANCE IN THE EU PRELIMINARY REFERENCE SYSTEM

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In this article we contribute to a recent strand of literature that revisits the role of hierarchically different national courts in the process of European integration. While the received view emphasizes the dominance of lower courts in the preliminary reference procedure, more recent work documents the rise of peak courts as key interlocutors of the Court of Justice of the European Union (CJEU). Our contribution adds a hitherto underexplored variable to the existing research by focusing not only on how many references national courts send to Luxembourg but also what importance the CJEU attributes to each individual case. We find that peak court references are generally treated as more important than questions submitted by non-peak courts. Consequently, peak courts have bolstered their position vis-à-vis the CJEU in the process of legal integration. We base our findings on the most comprehensive preliminary rulings dataset to date (n = 10,609) that includes all cases received and decided by the Court between 1961 up to and including 2018.

Keywords: CJEU, preliminary references, national courts, quantity vs. quality, court formation

I. INTRODUCTION

In this article, we grapple with the question of whether the Court of Justice of the European Union (CJEU or the Court) treats cases submitted by courts

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at different levels of the domestic hierarchy in a systematically different way. In order to answer our question, we propose two opposing hypotheses drawn from the literature on the role of national courts in the preliminary ruling procedure. The hierarchy hypothesis suggests that the CJEU values references from national peak courts the most as a consequence of their standing at the apex of national judiciaries. The divide-and-conquer hypothesis, on the other hand, proposes that the Court prefers to bolster its relationship with lower courts in an effort to circumvent the gatekeeping power of national peak courts.

To test these two opposing hypotheses, we constructed a dataset of 10,609 preliminary references that encompasses all cases received and decided by the CJEU between 1961 and 2018.¹ We classify the importance of references based on whether the Court rendered a decision by means of the Grand Chamber, in a five or three judge chamber with an Advocate General opinion, in a five or three judge chamber without an Advocate General opinion, or by a reasoned order. This measure leverages the discretionary power of the Court in deciding how to respond to a reference. The CJEU has over time developed several instruments which enable it to prioritize cases it considers more important than others. For example, the Court can rule on a preliminary reference with an order rather than a judgment if it determines that the question is manifestly inadmissible or already answered in its previous case law. The Court can also decide that a written Advocate General opinion is not necessary. Most importantly, it can assign a case to the Grand Chamber which is typically reserved for cases of the highest importance. This stratification of preliminary references constitutes a major innovation compared to existing quantitative studies on Article 267 TFEU which are liable to create oversimplified images of referral activity.

This article proceeds as follows. Section II surveys key literature on national courts' incentives for participating in the preliminary ruling procedure and situates the mechanism in the broader judicial landscape in Europe. Section III introduces theoretical reasons behind our two hypotheses on why the CJEU may treat cases stemming from different levels of the national judicial

¹ 1961 marks the year of the first preliminary question ever submitted to the CJEU (*Gerechthof 's-Gravenhage* Case 13/61 *Bosch* [1962]). 2018 is the last full year before writing the present article.

hierarchy distinctly. Section IV describes our measurement strategy and introduces the dataset. Section V presents the main analysis and results before concluding in Section VI.

II. NATIONAL COURTS' PARTICIPATION IN THE REFERRAL SYSTEM

Over the course of just a few decades, the CJEU managed to constitutionalize what was initially an international treaty and contribute to creating a veritable European legal order.² Commentators attest to the importance of the preliminary ruling procedure in that process when they refer to it as a 'proven and effective motor of integration',³ 'critical to the CJEU's influence',⁴ and 'the jewel in the crown of the CJEU's jurisprudence'.⁵

The quantitative evolution of the CJEU's caseload confirms the learned intuitions of these scholars. The graph in Figure 1 depicts the CJEU's case law for the period 1953-2018 by splitting it up according to the type of procedure. Referrals evidently make up the largest share of the Court's caseload.⁶ Its share has, moreover, increased throughout the years, leaving infringement procedures and annulments lagging behind, in particular in the last decade. The attention devoted to the preliminary ruling procedure by legal scholars and political scientists therefore has substantial empirical justification.⁷

² Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law* 1; Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403.

³ Catherine Barnard and Eleanor Sharpston, 'The Changing Face of Article 177 References' (1997) 34 *Common Market Law Review* 1113, 1169.

⁴ Clifford J Carrubba and Lacey Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59 *International Organization* 399, 399.

⁵ Paul Craig, *EU Administrative Law* (3rd ed, University Press 2018) 828.

⁶ The data have been collected in the context of the EUTHORITY project, see <https://euthority.eu/data>.

⁷ Nonetheless, we should not lose sight of the fact that national courts across the EU deal with millions of cases each year. In only a few of these cases do courts feel inclined to ask advice from Luxembourg. In that respect, preliminary references are an extremely rare event.

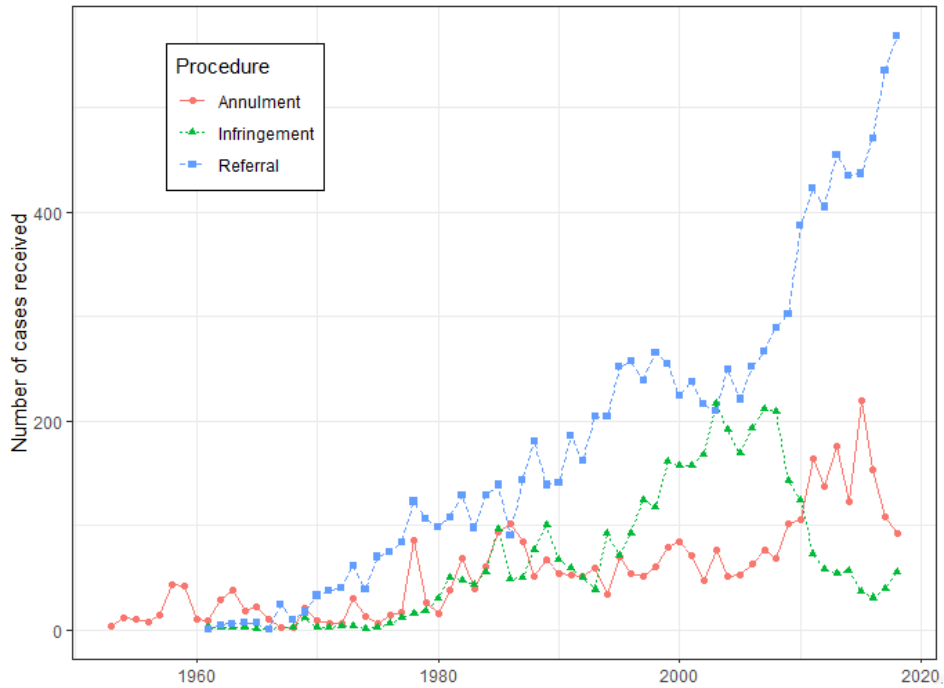


Figure 1: Number of cases received by the CJEU according to the type of procedure, 1953-2018

When the CJEU ruled on its first preliminary reference in 1963, however, few expected that the mechanism would become indispensable for the legal, political and economic integration of Europe.⁸ After all, the mechanism has an in-built dependence on the participation of other actors, notably private litigants and national courts.⁹ The necessary reliance on other actors has both advantages and disadvantages for the CJEU. The advantages of jurisprudential development through preliminary rulings for the Court are obvious. By shifting focus from participation of Member States' governments to subnational actors such as litigants, lawyers and courts, the Court decreases its reliance on the capricious willingness of Member States to use and implement EU law.¹⁰ The immediate interests of litigants and lawyers

⁸ Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 *International Journal of Constitutional Law* 136, 146.

⁹ Stein (n 2).

¹⁰ Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41, 58.

who operate across borders align more strongly with those of the Court.¹¹ Interaction with these actors has strategic value for the CJEU.

Even though cooperation is far from an unequivocal success story,¹² participation by national courts has formed a crucial element in the reference procedure and, as a result, has helped cement the EU legal order. Weiler even considers national courts the 'most consequential interlocutors' of the CJEU.¹³ Their participation, however, is less self-evident than the willingness of litigators to engage with the Court. Accepting doctrines such as supremacy and judicial review bring about structural changes to a national judicial organization that have, over time, become deeply entrenched in their respective legal systems.¹⁴ To take the example of the UK, the introduction of EU law fundamentally altered the judicial hierarchy and its relationship with other branches of government.¹⁵

Early work in the 1990s that tried to make sense of national court participation emphasized the role of lower courts in the preliminary reference procedure. According to Weiler and Alter, it was the desire of lower court judges to empower themselves vis-à-vis other branches of the government¹⁶ or vis-à-vis higher courts in the national judicial hierarchy¹⁷ that

¹¹ Alec Stone Sweet and Thomas L Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95'(1998) 5 *Journal of European Public Policy* 66; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Arthur Deyevre and Nicolas Lampach, 'The Origins of Regional Integration: Untangling the Effect of Trade on Judicial Cooperation'(2018) 56 *International Review of Law and Economics* 122.

¹² Lisa J Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002).

¹³ Joseph HH Weiler, 'A Quiet Revolution: "The European Court of Justice and Its Interlocutors"' (1994) 26 *Comparative Political Studies* 510, 518.

¹⁴ Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 *Living Reviews in European Governance* 29.

¹⁵ Damian Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom', *West European Politics* 23, no. 4 (October 2000) 173.

¹⁶ Weiler (n 13).

¹⁷ Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne Marie Slaughter, Alec Stone Sweet, Joseph Weiler (eds), *The European courts and national courts - Doctrine and Jurisprudence* (Hart Publishing 1998).

drove the number of referrals across the EU. In doing so, lower national courts – so the reasoning goes – contributed greatly to the legal, political and economic integration of Europe.

In the same decade, Stone Sweet and Brunell took issue with the suggested centrality of lower courts by pointing out that over a longer period of time appellate courts referred much more prominently. In contrast to lower courts, these judicial bodies play a different role in domestic litigation that involves more legal interpretation and conflicts of law. Accordingly, it should not come as a surprise that appellate courts are an important interlocutor of the CJEU.¹⁸ Contemporary scholarship stresses the importance of peak courts as well. Research of Dyevre and co-authors indicates that lower courts may have submitted many references in the early years of integration but that peak courts became numerically more active by the turn of the century.¹⁹ As recent work of Pavone and Kelemen shows, peak courts started slowly but managed to reassert their position in their respective legal systems by taking the lead in the development and use of EU law.²⁰ It is hard to pinpoint exactly what share of non-peak courts use Article 267 TFEU because we miss longitudinal data on the number of courts in Member States. Nevertheless, it is safe to assume that the number of non-peak courts in a country is much larger than the number of peak courts, which provides us with a relevant intuition.

The comparatively decreasing number of non-peak court judges in the reference practice suggests that, proportionally speaking, judges in the highest echelons of national legal systems have become the most important CJEU interlocutor while non-peak courts have mostly played out their role in the preliminary ruling proceedings. Such reasoning, however, is based solely on a quantitative analysis in which each observation of a reference is treated equally, creating a narrative that solely depends on the supply of cases

¹⁸ Stone Sweet and Brunell (n 11) 90.

¹⁹ Arthur Dyevre, Monika Glavina and Angelina Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' [2019] *Journal of European Public Policy* 1 (published online 16 Jun 2019).

²⁰ Tommaso Pavone and R Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' [2019] *European Law Journal* 1.

by national courts. Hence, the approach fails to account for the possibility that the CJEU, despite the growing involvement of peak courts, treats references coming from non-peak courts in a qualitatively different way.²¹

The bare fact that peak courts are more active in the preliminary reference procedure provides little insight into the way in which the CJEU deals with cases it receives. In order to shed light on that side of the equation, we construct two hypotheses derived from a theoretical investigation of how the CJEU treats cases stemming from either peak or non-peak courts. The hierarchy hypothesis stresses that the Court attaches greater importance to cases coming from peak courts. The divide-and-conquer hypothesis, inversely, lays out a rationale for why the CJEU would actually bequeath non-peak court cases with a treatment that positively emphasizes their importance. Both hypotheses stand in contrast to the null-hypothesis that the Court does not treat peak courts and non-peak courts differently. We discuss the two theoretical expectations in the next section.

III. THEORETICAL EXPECTATIONS CONCERNING CASE IMPORTANCE

For a number of reasons, the CJEU may prefer assigning a different measure of importance to either peak or non-peak court references. Before we discuss these, we introduce a potential strategic mechanism that may help explain the behaviour of the CJEU regardless of the hypothesis at stake. That being said, we acknowledge that the two hypotheses presented below do not exhaust the range of possible explanations of CJEU decision-making behaviour. Potential differences in treatment may also depend on subject area or legal or policy pertinence of cases. Nevertheless, we focus on those theoretical explanations which were most prominently discussed in the literature on judicial behaviour and preliminary references, namely the role of strategic decision-making and judicial hierarchy.

²¹ By quality we refer to the element of importance of preliminary reference, not to the "legal quality" of the question submitted. Although such quality may affect CJEU reception, we do not see the theoretical grounds for its potential influence. Also due to measurement constraints, "legal quality" for now remains beyond the scope of existing research on Article 267 TFEU.

1. *Importance as a Strategic Device*

A central theoretical assumption in the empirical literature on judicial behaviour proposes that judges choose specific goals and subsequently strategize with those goals in mind. Depending on the context and situation, judges can have widely divergent goals. Consequently, researchers modelling judicial behaviour have to decide for themselves what goal-oriented behaviour drives judicial decision-making under specific circumstances.²² These may include furthering the workings of the democratic legal system by making sense of the incoherent system of rules created by the legislature,²³ creating good law and good policy marked by legal accuracy and legal clarity,²⁴ or solely creating good law.²⁵ Most commonly, though, application of this so-called strategic model assumes that judges pursue legal policy goals, which loosely translates to decision-making based on an ideological attitude.²⁶ Although the centrality of policy preferences has long dominated the American literature on judicial decision-making, this somewhat myopic emphasis has come under increasing attack in favour of including a wider set of potential judicial motivations.²⁷

²² Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998) 11–12.

²³ John Ferejohn and Barry Weingast, 'Limitation of Statutes: Strategic Statutory Interpretation'(1991) 80 *Georgetown Law Journal* 565, 571, 574.

²⁴ Ferejohn and Weingast (n 23); Lawrence Baum, *The Puzzle of Judicial Behavior* (University of Michigan Press 1997) 21, 25.

²⁵ Pablo T Spiller and Emerson H Tiller, 'Invitations to Override: Congressional Reversals of Supreme Court Decisions' (1996) 16 *International Review of Law and Economics* 503.

²⁶ Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998) 10. Important works include Jeffrey Allan Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); Lee Epstein, William M Landes and Richard A Posner, *The Behavior of Federal Judges. A Theoretical and Empirical Study of Rational Choice* (Harvard University Press 2013).

²⁷ Charles M Cameron and Lewis A Kornhauser, 'Rational Choice Attitudinalism?', *European Journal of Law and Economics* (September 7 2015) 1–20. Even proponents of the ideological analysis of judicial behaviour plead guilty to this charge. As Epstein and Knight apologetically explain: 'theoretically, yes, strategic and, more generally, rational choice accounts of judicial behavior can accommodate different or even multiple motivations. But in practice we adopted the conventional (political science) party line and argued that maximizing policy is

Following the development of this empirical literature, we entertain the possibility that CJEU judges use court formation and procedural instruments as strategic devices, though not ones informed by ideological preferences. Court formation is an inherent element of a resource-constrained environment like that of the CJEU, which necessitates treating references differently. The Court may partly use its discretion for strategic reasons to bolster its relationship with either national peak courts or non-peak courts. It can do so by rewarding a reference with a review by a court formation that signals the importance of the legal issue at stake and conveys a sign of respect. Conversely, the Court can signal its lack of interest by deciding a case by a reasoned order. The CJEU may want to act in this fashion to induce specific interlocutors into participation (and vice versa) in a project of the Court's choosing. The mechanism itself is merely a strategic way of attaining a goal and does not in and of itself specify the substance of that project. As we will see, we can propose radically different answers to that substantive question under each hypothesis.

2. The Hierarchy Hypothesis: Attaching Greater Importance to Peak Courts' References

Our first hypothesis expects that peak court references are more likely to receive case review associated with a higher importance score. We have several theoretical arguments to support this hypothesis, all of which revolve around the position of these courts at the top of the judicial hierarchy.

First, the CJEU may have strategic reasons to bolster its relationship with national peak courts because of their position atop the judicial hierarchy. As highest courts, these courts generally enjoy the most legal authority within their respective national systems. By attaching its jurisprudential developments to cases from courts that hold most legal sway over other,

of paramount, even exclusive, concern. We were wrong. Data and research developed by scholars (mostly from other disciplines) have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges. The evidence is now so strong that it poses a serious challenge to the extremely (un)realist(ic) conception of judicial behavior that has dominated the study of law and legal institutions for generations'. Lee Epstein and Jack Knight, 'Reconsidering Judicial Preferences', *Annual Review of Political Science* 16, no. 1 (May 10, 2013) 12–13.

lower national courts, the CJEU can increase the visibility of its own case law, lend greater authority to it and positively nudge the likelihood of its acceptance. With this goal in mind, the Court can reinforce its partnership with peak courts by rewarding their references with case handling expressive of high importance.

Second, possibly higher importance score for peak court references may also in part be affected by case difficulty. These courts generally deal with the most indeterminate cases. If such cases involve the application of EU law, the reasoning goes, then the ambiguity aspect pertaining to EU law logically also needs review by the highest type of EU court. Elements of the team model of judicial behaviour and the case selection hypothesis underwrite this intuition.

The team model presupposes that all judges in the national judicial hierarchy share the same objective, which is maximizing the number of "correct" judicial outcomes.²⁸ In achieving this objective, judicial hierarchy has several advantages over a flat system of laterally related courts. First, it allows for the allocation of workload and resources across different tiers of courts to achieve an efficient division of labour.²⁹ Second, hierarchy creates an impetus for specialisation. For instance, trial courts have at their disposal little time and resources to spend on individual cases. Hence, their range of duties involve mostly fact-finding and swift dispute resolution.³⁰ Higher courts, by contrast, enjoy a lighter caseload while having access to more resources. If peak courts have more resources and fewer cases than non-peak courts, then they face fewer constraints to participate in the preliminary reference

²⁸ Charles M Cameron and Lewis A Kornhauser, 'Appeals Mechanism, Litigant Selection, and the Structure of Judicial Hierarchies' in James R Rogers, Roy B Flemming and Jon R Bond (eds), *Institutional Games and the U.S. Supreme Court* (University of Virginia Press 2006) 178.

²⁹ Lewis A Kornhauser, 'Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System Symposium on Positive Political Theory and Law' (1995-1994) 68 *Southern California Law Review* 1605-30.

³⁰ Francisco Ramos Romeu, 'Law and Politics in the Application of EC Law: Spanish Courts and the CJEU 1986-2000' (2006) *Common Market Law Review* 43 395-421.

procedure.³¹ Hence, they should be more likely to refer cases the CJEU deems important.

The increase in both time and resources also create fertile ground for a focus on law-finding and law-creation.³² The preoccupation with legal development by peak courts generates a system of precedence and doctrinal categories that help guide lower courts in conflict resolution.³³ Likewise, preliminary questions only address points of law, which relates more closely to the creative aspect of judging present in peak court decision-making.³⁴ It therefore stands to reason that peak courts are more likely to handle law-making cases with an EU dimension that require a CJEU court formation expressive of exactly this legal aspect.

That peak courts focus strongly on the creative aspect of decision-making may not only depend on resource management but also on the type of cases that most likely make its way to their dockets. The Priest-Klein effect is a selection hypothesis that suggests that the decision to litigate depends on rational expectations of parties about the likely outcome of a case. Such prediction is possible because legal rules are generally clear.³⁵ Especially cases

³¹ Dyevre, Glavina and Atanasova (n 19) 9.

³² Lewis A Kornhauser, 'Judicial Organization & Administration' in Boudewijn Bouckaert and Gerrit de Geest (eds) *Encyclopedia of Law and Economics* (Edward Elgar, 2000) 27–43; Romeu (n 30).

³³ Kornhauser, 'Adjudication by a Resource-Constrained Team' (n 29); Francisco Ramos Romeu, 'Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior' (2002) 2 *Global Jurist Frontiers* 1; Romeu (n 30); Arthur Dyevre, Angelina Atanasova and Monika Glavina (n 19).

³⁴ Dyevre, Glavina and Atanasova (n 19) 8.

³⁵ This insight has a long pedigree in legal scholarship. Even American legal realists were acutely aware of it. As Max Radin explained, "the law" as a generalization of legal judgments is always incomplete since it is always concerned with a specific question not yet decided, as well as thousands already decided. The prognosis of that decision involves an estimate in advance of the factors that will determine the future judgment. In spite of the possible variety and number of these factors, the advance estimate is so highly probable in a number of cases that the statement of the law can be made with a fair degree of certainty and precision, and no decision will be required to test its accuracy since most men will regard the decision as a foregone conclusion. Decisions will consequently be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact

with a win-rate of 50 per cent for both plaintiff and appellant make it attractive to try one's luck in court. Divergent prior estimates merely lead to settlement outside of court, or so the hypothesis suggests. The clarity of the legal solution merely dissuades litigants from going to court.³⁶

In many cases, first instance court judges can reach a decision with a fair degree of certainty and precision. Plenty of litigants accept these decisions as final. Unsuccessful litigants who appeal court rulings generally have a clear understanding of the facts of the case and wield the ability to spot legal inaccuracies in decisions of trial judges.³⁷ These are likely 'marginal cases, in which prognosis is difficult and uncertain.'³⁸ Such difficulty and uncertainty is equally present when the legal rules at stake are indeterminate. Marginal cases refer more colloquially to 'hard cases'. These are the subset of legal conflicts that manage to capture the imagination and attention of legal scholarship.³⁹ Appellate cases are, however, exceedingly rare.⁴⁰ Therefore, the number of cases that make their way through the judicial hierarchy declines at each litigation stage while the share of indeterminate cases increases.⁴¹ Hence, the dockets of peak courts tend to be overrepresented with difficult and indeterminate cases. These require judgement under incomplete legal guidance and necessarily contain a creative element, whether the legal norms at stake are national or European.

that makes the entire body of legal judgments seem less stable than it really is'. Max Radin, 'In Defense of an Unsystematic Science of Law' (1942) 51 *The Yale Law Journal* 1271.

³⁶ Richard L Revesz, 'A Defense of Empirical Legal Scholarship'(2002) 69 *University of Chicago Law Review* 169, 172–173.

³⁷ Jonathan P Kastellec, 'The Judicial Hierarchy: A Review Essay' [2016] *Oxford Research Encyclopedia of Politics* 6.

³⁸ Radin (n 35) 1271.

³⁹ Max Radin, 'Scientific Method and the Law' (1931) 19 *California Law Review* 164, 170.

⁴⁰ Frederick Schauer, 'Judging in a Corner of the Law' (1987) 61 *Southern California Law Review* 1717.

⁴¹ Arthur Dyevre, 'Outline of a Legal Realistic Approach to Legal Integration' in Ulla B Neergaard and Ruth Nielsen (eds), *European legal method: towards a new legal realism* (DJØF Publishing 2013) 59.

As the team model suggests, national peak courts have more time and resources to draft a preliminary question than non-peak courts. Moreover, they are more often faced with cases that address difficult and indeterminate legal norms, which the case selection hypothesis merely confirms. Statistically speaking, such conflicts are more likely to involve questions pertinent to the interpretation of EU law as well. Indeed, the preliminary ruling procedure itself inherently focuses on those situations in which the law is unclear and requires uniform interpretation across the legal systems of the Member States by the CJEU. Such questions most likely crop up in cases that make their way to peak courts, which, in comparison to lower courts, already have more time and resources available to think carefully about law making.⁴²

3. The Divide-and-Conquer Hypothesis: Attaching Greater Importance to Lower Courts' References

National courts have been characterized as 'the motors of European integration.'⁴³ As Alter explains, these courts have many incentives to participate in the preliminary ruling procedure. Her inter-court competition hypothesis likens courts to bureaucratic organizations that pursue their own interests. Legal integration, however, incentivizes peak courts and non-peak courts differently. For example, the EU provides lower courts with an additional argumentative repository that allows them to circumvent peak court jurisprudence. By incorporating an EU dimension into their decision-making, these courts can shield themselves from possible legal criticism when they disregard national jurisprudence. However, the reference to EU law is not necessarily a constant. Lower courts may just as easily alternate it with acquiescence in national peak court case law if the outcome aligns more closely with their preferences.⁴⁴

This side of Alter's theory mostly focuses on the choice architecture of lower court decision-making and cannot explain why the CJEU would like to collaborate with them. Weiler called EU integration a simple narrative of judicial empowerment that gave national courts sufficient incentives to cooperate with the CJEU in a mutually advantageous European endeavour

⁴² Dyevre, Glavina and Atanasova (n 19).

⁴³ Alter (n 17); Weiler (n 2).

⁴⁴ Alter (n 17) 241–246.

that has led political scientists to coin the phrase 'reciprocal empowerment.'⁴⁵ The preliminary reference procedure gives national courts and especially those in the lowest echelons the power of judicial review. As a potentially intrusive form of judicial decision-making, this particular power was, for a long time, the sole prerogative of a handful of peak courts. EU law and its supremacy vis-à-vis national legislation thus distributed the possibility of judicial policy-making throughout the judicial hierarchy. The increase in power proved difficult to resist. On an institutional level, the power of the judicial branch vis-à-vis other branches of government changed as well, adding to the overall empowerment.⁴⁶

The advantages for domestic non-peak courts seem clear. The collaborative element present in the reference mechanism provides national courts as well as the CJEU valuable shelter from potential political backlash. Non-peak courts can refer to the existence of a legal duty to refer questions relevant to the uniform interpretation and validity of EU law to the Court. Judges in Luxemburg for their part never directly resolve the case itself but merely render a ruling on the interpretation of the relevant European law. Peak courts are less likely to participate enthusiastically in this dynamic. The advent of EU law namely poses a threat to their hierarchical position as ultimate interpreters of legal norms in the national system. In order for the CJEU to achieve its goal of increasing its power and the acceptance of its case law, it may thus favour circumventing the control of peak courts and remain working closely with lower courts.⁴⁷ The aligned interests between both actors may explain why the CJEU prefers collaborating with domestic non-peak courts.

Gaining the power of judicial review may seem sufficiently incentivizing for lower courts to participate in the preliminary ruling procedure without worrying too much about the importance the Court assigns to a case. However, the 1990s saw the increasing *de jure* acceptance of European integration.⁴⁸ As Alter herself expected, lower court reference activity may

⁴⁵ Burley and Mattli (n 10) 64.

⁴⁶ Weiler (n 2) 2426.

⁴⁷ Alter (n 17) 241–246.

⁴⁸ David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 1998) 388.

eventually lead peak courts to accept the supremacy of EU law and the corresponding guidance of the CJEU. As more and more non-peak courts accept CJEU supremacy and as the number of legal subfields that EU law touches accrues, continued obstruction against the expansion of EU law by peak courts becomes increasingly futile, she predicts.⁴⁹ As the work of Pavone and Kelemen shows, this theoretical possibility seems to pass empirical muster.⁵⁰ The seemingly inevitable acceptance of supremacy by peak courts has a potential trade-off, however. In accepting the importance of EU law, peak courts have the additional incentive to minimize the number of references by lower courts.⁵¹ If these courts manage to become the main interlocutor of the CJEU in the preliminary reference procedure, then they effectively gain a monopoly on litigant access to the Court. As the main gatekeepers of EU law litigation, peak courts *de facto* increase their power vis-à-vis the judges in Luxembourg.

There are additional reasons for the CJEU to resist peak courts from monopolizing participation in the preliminary ruling procedure. First, the existence of a monopoly could be a reason for EU sceptical Member State governments to pack peak courts with judges not so keen on EU integration. Second, many litigants never make it to the top of the judicial hierarchy, whether this is due to financial constraints or lack of procedural stamina.⁵² To prevent this from happening, the CJEU may want to keep non-peak courts in the reference game by means of positive reinforcement through a reward system based on case disposition. It signals to lower courts that despite the centrality of peak courts they too are of fundamental importance for European legal integration.

⁴⁹ Alter (n 17) 343.

⁵⁰ Pavone and Kelemen (n 20).

⁵¹ Pavone has highlighted the constraining effect of strong hierarchy on EU law use by lower courts in a case study of the French administrative law system. See Tommaso Pavone, 'The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe' (Princeton University Forthcoming).

⁵² Pavone and Kelemen (n 20) 21; Lisa Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries' in Maria Green Cowles, James Caporaso and Thomas Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001) 109.

IV. DATA AND METHODOLOGY

For a variety of theoretical reasons, we now have two different expectations regarding the way in which the CJEU attributes importance to preliminary references coming from peak courts or non-peak courts. We therefore turn our attention to how we measure case law importance and which data we use for this purpose.

I. Measuring Importance

Attributing a "true" measure of importance to preliminary references is difficult. We therefore simplify matters and follow the observable behaviour of the CJEU itself. Court formation and case handling options are relevant in this respect. Five and three judge chambers are the standard by which the CJEU operates.⁵³ The Court deviates from this standard if the difficulty, importance or particular circumstances require it to assign the case to the Grand Chamber that usually consists of fifteen or thirteen judges.⁵⁴ Regardless of the material circumstances, Member States may make a request to the similar effect. The Court may decide to refer a case it deems of exceptional importance to the Full Court, which consists of at least 17 judges.⁵⁵ Additionally, the Statute of the Court of Justice state that the CJEU can decide to conclude a case without a submission from the Advocate General, 'where it considers that the case raises no new point of law'.⁵⁶ All these deviations from the standard indicate that these are relatively more important cases than three and five judge-chamber cases from the point of view of the Court.

The Rules of Procedure of the Court are rather vague as far as the conditions for the assignment of cases to the Grand Chamber are concerned. Nevertheless, most authors seem to agree that case assignment relates to case importance. To begin with, a division of labour between CJEU judges makes

⁵³ Statute of the Court of Justice of the European Union (1-5-2019) 1, Art 16(1).

⁵⁴ Ibid Art 16(2).

⁵⁵ Ibid Art 16(5), Art 17(4).

⁵⁶ Ibid Art 20(5).

it exceedingly efficient to dispose of the day-to-day business of the Court.⁵⁷ Considering that the Court consists of 28 judges, one from every EU Member State, it stands to reason that small chambers adjudicate the bulk of cases and leave only the most contentious issues to the Grand Chamber. Although Bobek expresses his scepticism about the degree to which court formation indicates importance, he does suggest that the Grand Chamber consists of 'more senior members of the Court.'⁵⁸ In a similar vein, Aleksander Kornezov interprets the involvement of the Grand Chamber as a measure of legal salience since it decides the more difficult and important cases.⁵⁹ This sentiment is more widely shared as an inclination that cases lacking simple resolve rarely if ever end up in smaller chambers.⁶⁰ In the same vein, both Kornezov⁶¹ and Galetta⁶² consider a request for an opinion of an Advocate General as a proxy for case importance. Signals to the contrary are possible as well. A refusal by the Court to answer a question and, instead, produce a reasoned order indicates a lack of importance. Such cases are either manifestly inadmissible, fall outside the scope of EU law or their resolution can be readily deduced from the existing body of case law.⁶³ As such, scholars

⁵⁷ Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45 *Common Market Law Review* 1611, 1637.

⁵⁸ Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"?' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1157841 20.

⁵⁹ 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* (Bloomsbury Publishing, 2015) 247–248.

⁶⁰ Krzysztof Lasinski-Sulecki and Wojciech Morawski, 'Late Publication of EC Law in Languages of New Member States and Its Effects: Obligations on Individuals Following the Court's Judgment in Skoma-Lux' (2008) 45 *Common Market Law Review* 705, 714.

⁶¹ Kornezov (n 59) 247.

⁶² Diana-Urania Galetta, 'European Court of Justice and preliminary reference procedure today: national judges, please behave!' in Ulrich Becker and Jürgen Schwarze (eds), *Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag* (1. Aufl, Nomos 2014).

⁶³ The Court of Justice of the EU, Consolidated Version of the Rules of Procedure of the Court of Justice (2012) Art 99.

generally consider such cases of little importance to the jurisprudence of the CJEU.⁶⁴

Of course, procedural choices relating to case disposition are not necessarily a perfect proxy. The Court may decide to send a case to a smaller chamber not because of a lack of importance but merely for reasons of resource management.⁶⁵ Although possible, its influence should be fairly limited when analysing the entire jurisprudence of the Court. Its implication would merely be that in a perfect world a subset of cases with a definitive quality would always be sent to the Grand Chamber. Since resources are limited, however, the cut-off point merely fluctuates from year to year but still provides relevant information. Importance is a matter of degree and its determination happens in relations to other cases, not to an absolute standard that dictates forum choice. The advantage of adopting the case disposition choice by the Court is that it duplicates this relative order of importance. Regardless of possible fluctuations throughout the years, we may safely assume that the average case decided by the Grand Chamber is of relatively higher importance than the garden-variety case handled by a three-judge chamber.

We understand procedural decisions of the CJEU about case handling as indicative of how much the Court values the reference in legal terms. We thus explicitly measure case importance *from the perspective of the CJEU*. Although the importance attached to a case by the referring national court might correlate with our indicator, we restrict ourselves to measuring case importance as a function of CJEU decisions. Based on these assumptions, we develop a new ordinal measure for the importance of a preliminary reference consisting of four categories. In order of importance, we attribute different scores to decisions rendered by 1) the Grand Chamber; 2) three or five judge chambers that include an Advocate General opinion; 3) three or five judge chambers; and 4) reasoned orders. The Grand Chamber traditionally rules on the most important and difficult questions. Because Full Court decisions are extremely rare, we merge them with Grand Chamber cases. Advocate General opinions are mandatory in the former category of cases. In other

⁶⁴ Michal Bobek, 'Talking Now? Preliminary Rulings in and from the New Member States' (2014) 21 *Maastricht Journal of European and Comparative Law* 782, 786; Kornezov (n 59) 245–246; Galetta (n 62) 3.

⁶⁵ Bobek (n 64) 786.

court formations they merely give their opinion if the case raises new questions of law. We therefore use the Advocate General opinion as a criterion to distinguish between the perceived importance of cases handled by smaller chambers.

Finally, we entertain the possibility that importance could also be measured in another manner. It is intuitively possible that the CJEU signals importance by resolving cases from some courts faster than from others. In relation to our main hypothesis this would mean that cases referred by peak courts are resolved quicker than cases coming from non-peak courts. Nonetheless, because the thrust of existing scholarship emphasizes case disposition rather than celerity as a signal of case importance, our interest in the latter is more exploratory.

2. Data

To test the two hypotheses discussed in the previous sections, we created a preliminary ruling dataset that includes judgments, orders and Advocate General opinions delivered between 1963 up to and including 2018. For each of the 10 609 observations in the dataset we code referral year, case duration, referring court, country of referring court, type of decision (judgment or order), joined case or not, Advocate General involvement and Grand Chamber involvement. Table 1 summarizes the variables in our dataset.

Variable	Type	Explanation
Year of submission	Continuous	Specifies the year within the range 1961-2018
Case duration	Continuous	Specifies the number of days from reference submission to CJEU ruling
Referring court	Nominal	Specifies the name of the referring court
Referring peak court	Binary	Specifies whether the referring court is a peak or non-peak court

Country of origin	Nominal	Specifies the Member State of the referring court
Type of CJEU decision	Binary	Specifies whether the reference ended in a judgment or an order
Joined case	Binary	Specifies whether the case was joined or not
Advocate General opinion	Binary	Specifies whether the Advocate General wrote an opinion or not
Grand Chamber	Binary	Specifies whether the Grand Chamber decided the case or not

Table 1: Summary of Main Variables in the Dataset

In some instances, the coding of "peak court" raises questions. If a court of appeal, such as the Court of Appeal for England and Wales, occupies a very important place in the judicial hierarchy and its decisions are rarely appealed further, should it really be coded as "non-peak"? We follow a conservative coding scheme according to which only courts whose decisions can virtually never be appealed are coded as "peak" courts. Only courts standing truly at the top of a domestic judicial hierarchy are therefore coded as peak courts (thus only the Supreme Court in the UK). Other coding schemes are thinkable, but all would at some point hit the barrier of imperfect commensurability of different legal systems in Europe. A court of appeal in one country might in practice have a very different role than its counterpart in name in another. Ultimately, the proof of whether different delineations matter for our analysis are in the empirical pudding. Because our approach to peak courts is if anything under-inclusive, the results below can be interpreted as the minimum effect for the hypothesized relationship.⁶⁶

⁶⁶ We have tried coding more courts – such as the Court of Appeal (EWCA) and the High Court of Justice (EWHC) – as peak courts and our results were not significantly affected.

V. ANALYSIS AND RESULTS

We begin by presenting an overview of referral trends in the EU, conditional on our variables of interest. Figure 2 shows the proportion of peak court references in the total number of questions submitted in each Member State. Overall, there is considerable variation between countries, which may reflect differences in the hierarchization of Member States' judiciaries. The stark differences between peak and non-peak court reference activity in the UK exemplifies this aspect of the preliminary ruling procedure best. Formally, only the UK Supreme Court and the Scottish Court of Session qualify as peak courts. These two courts are not frequent users of the referral mechanism. The High Court of Justice and Court of Appeal for England and Wales, on the other hand, are not peak courts but nevertheless occupy an important position in the judicial hierarchy and refer many questions to Luxembourg. Perhaps more than in any other country, these two courts approximate closely the role of apex courts, which might go some way towards explaining the particularly lopsided division of total UK referrals.

Trends in most countries evolve over time, sometimes reverting the distribution of referral activity between peak and non-peak courts. In France, non-peak courts engaged with the CJEU first before peak courts increasingly asserted themselves as the primary interlocutor in preliminary ruling proceedings. Germany is by far the most active country in the procedure with a total of 2,488 cases sent to Luxembourg over a period of 60 years. Its share of references by peak and non-peak courts is also remarkably stable.

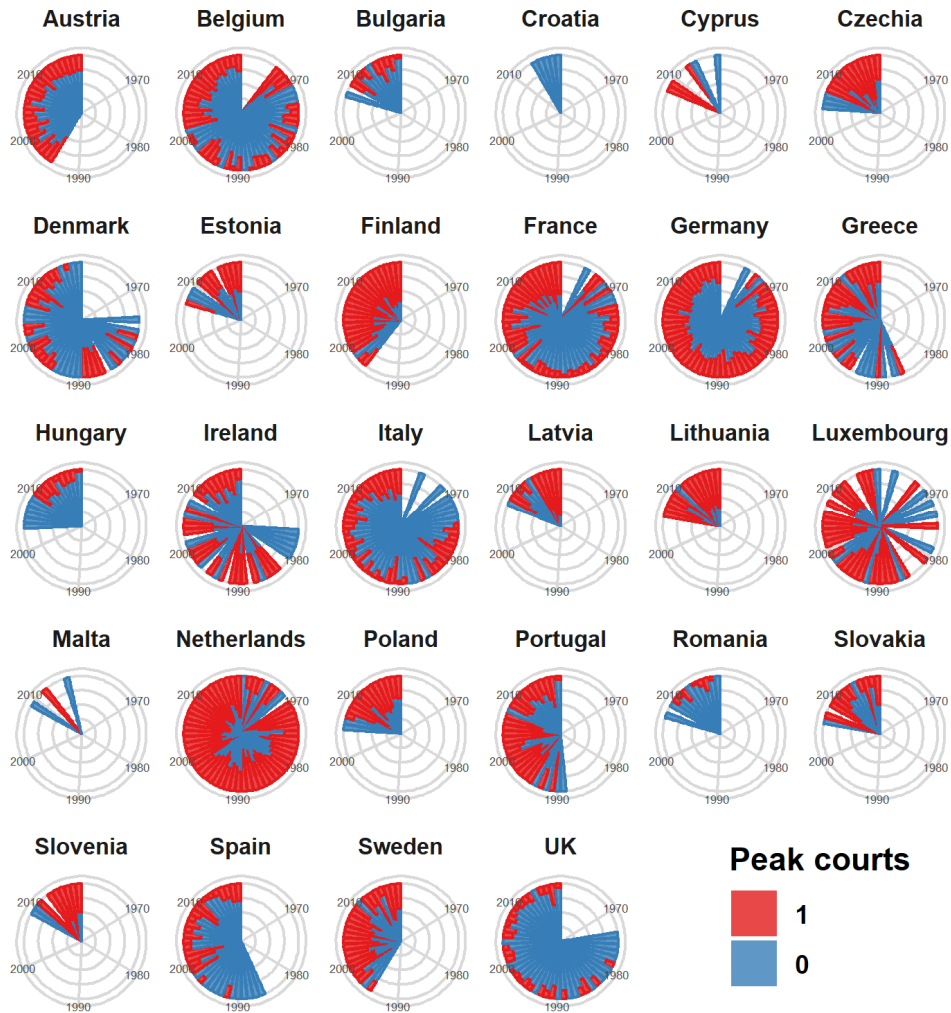


Figure 2: Proportion of peak court references by country (1 = yes, it is a peak court; 0 = no, it is not a peak court). Passage of time is captured clockwise in each circle.

Figure 3 shows the total number of cases submitted by peak and non-peak national courts to the CJEU during the entire history of European integration. We can observe that non-peak courts – that is first instance and appellate courts – have always referred more questions than peak courts.⁶⁷

⁶⁷ At the time of writing we only had complete data for 2017 but a preliminary look at 2018 data revealed that the gap in reference activity of peak and non-peak courts has grown.

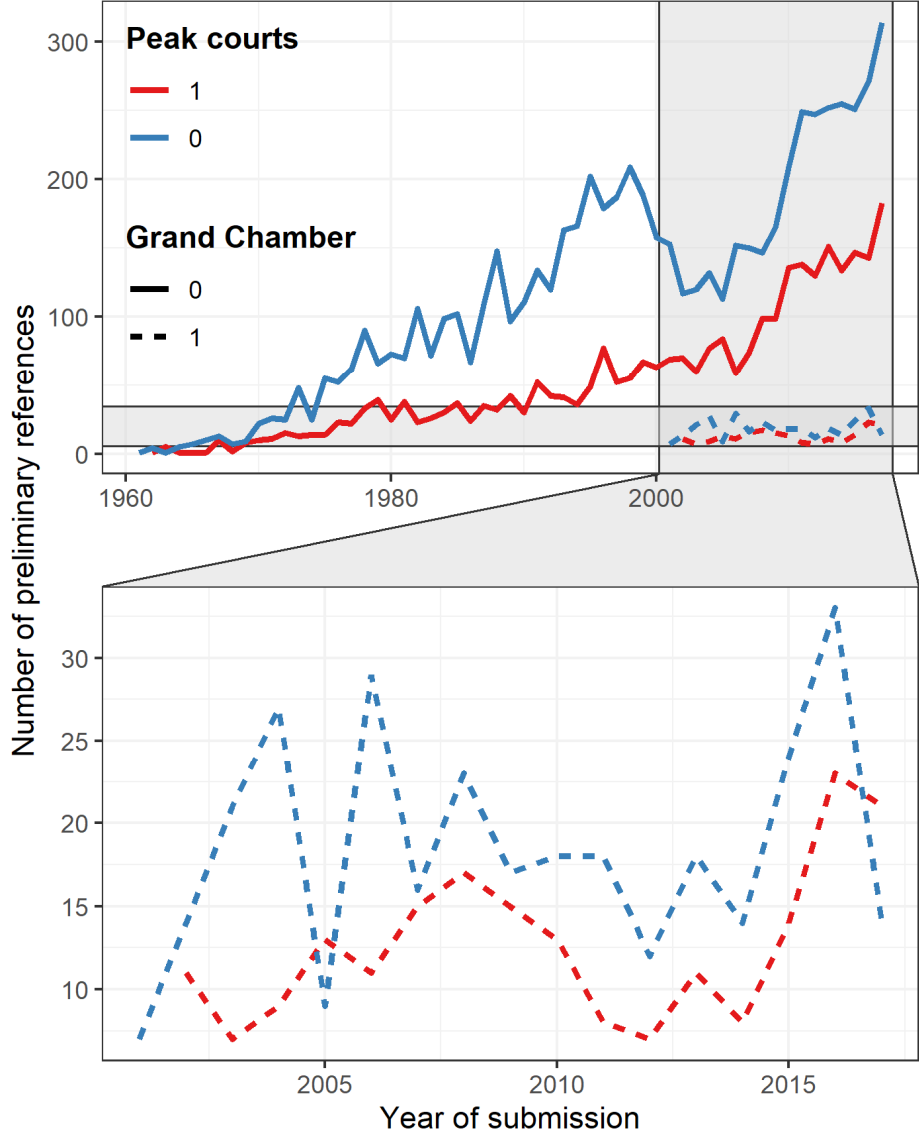


Figure 3. Overall number of preliminary references submitted by (non-)peak courts and those decided by the CJEU's Grand Chamber (1961-2017). Note the drop at the end is due to references submitted but not yet decided by the CJEU.

However, the picture becomes more mixed once we introduce the element of Grand Chamber decision-making. Although the total number of non-peak court referrals decided by the Grand Chamber is higher than that of peak courts, Grand Chamber cases constitute a higher proportion of peak court questions. Peak courts' references go before the Grand Chamber on average

in 10 per cent of their cases, while for non-peak court this proportion is 7.8 per cent. These findings are robust regardless of whether we separate joined cases or not.⁶⁸

In the next step, we expand our analysis to encompass the full measure of case importance as described above. Figure 4 shows the proportion of preliminary references according to our scale, differentiating the patterns of peak courts from non-peak courts. The larger share of Grand Chamber judgments among peak court questions seems part of a broader trend in EU law litigation. In comparison to their counterparts in the lower rungs of the national judicial hierarchy, peak courts are less likely to receive a reasoned order. Additionally, they are more likely to receive Advocate General involvement.

Our main measure of importance relies on variation in procedural disposition of cases and as such increases in its power to differentiate with regard to importance from 2004. Prior to 2004, the Grand Chamber did not exist and the workload of the CJEU was relatively low. Increase in workload, however, forces the CJEU to economize on the amount of attention it pays to individual references. Especially the dramatically falling numbers of cases in which the Advocate General writes an opinion illustrate this effect well; as resources grow scarcer, the relative importance of this instrument increases. Nonetheless, even in earlier periods of European integration we can observe that the lower two levels of our measure (orders and no Advocate General opinion) were applied proportionally more often to references from non-peak courts.

⁶⁸ In Figure 3, each case is counted individually regardless of whether it was later joined in a judgment or not. The ratio of peak to non-peak and Grand Chamber to other does not change even if we discount the effect of joined cases.

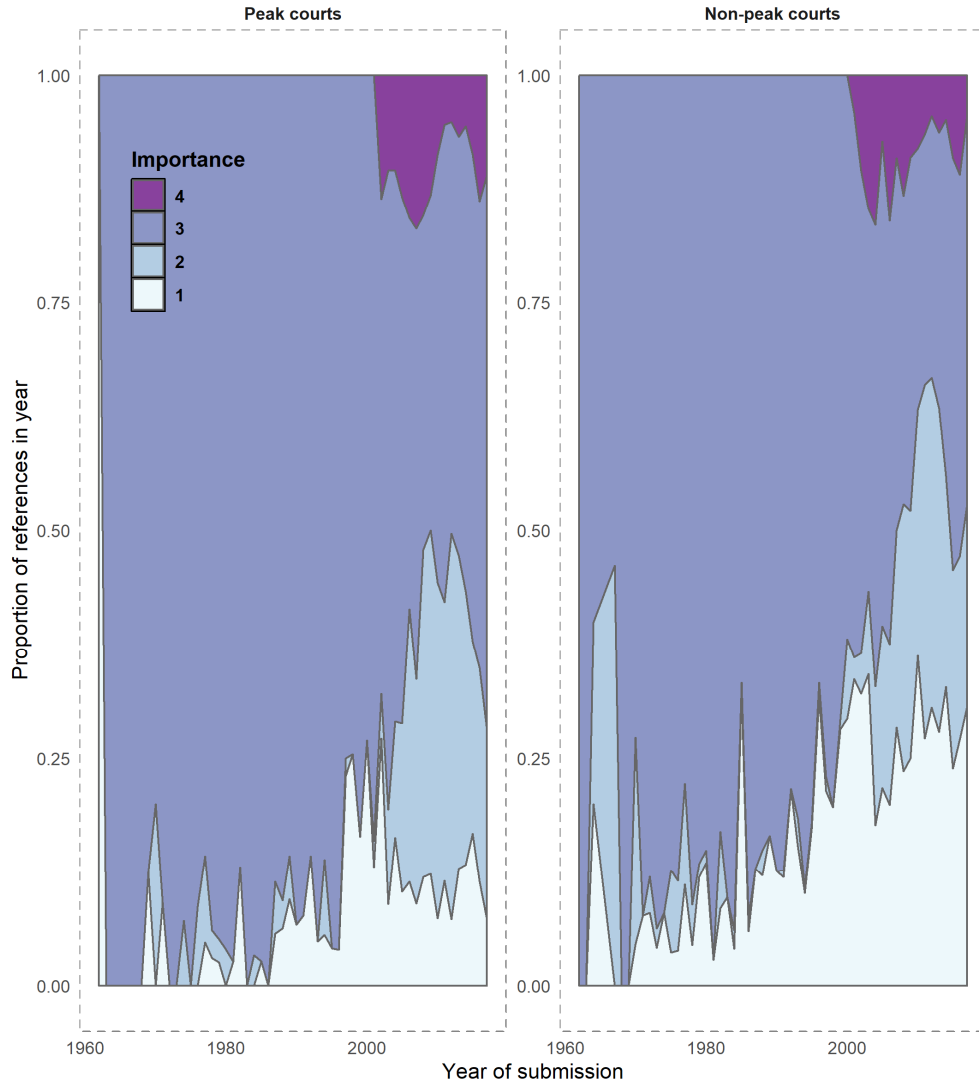


Figure 4: Proportion of preliminary references according to the importance attached to them by the CJEU. 1 = cases decided by an order; 2 = Chamber judgments without AG opinion; 3 = Chamber judgments with AG opinion; 4 = Grand Chamber judgments (includes AG opinion). The proportion is expressed as an interval between 0 and 1, which is the same as 0 per cent and 100 per cent.

Finally, having observed seemingly systematic differences between treatment of peak and non-peak courts,⁶⁹ we are interested in knowing whether these

⁶⁹ The mean importance on the four-level scale is 2.45 for non-peak courts and 2.67 for peak courts (with unresolved cases dropped).

can be considered statistically significant. If there is in fact no significant difference between the two groups of courts, the results of an ordinal logit regression should indicate that whether a national court is a peak court has no significant impact on the level of importance attributed to a case by the CJEU. As a matter of exploration, we also test whether there is a significant difference in terms of case duration, which would indicate that the CJEU gives priority treatment to peak court references.

	<i>Dependent variable:</i>					
	Importance			Duration		
	<i>Ordered logistic</i>			<i>OLS</i>		
	(1)	(2)	(3)	(4)	(5)	(6)
Peak court	0.460 ^{***}	0.382 ^{***}	0.508 ^{***}	-0.929	7.439	2.320
	(0.043)	(0.046)	(0.047)	(5.721)	(5.920)	(5.106)
FE Country	X	✓	✓	X	✓	✓
FE Year	X	X	✓	X	X	✓
Constant				543.278 ^{***}	628.680 ^{***}	262.965
				(3.325)	(12.392)	(204.239)
Observations	10,328	10,328	10,328	8,274	8,274	8,274
AIC	21,754	21,191	20,641	114,595	114,271	111,559

Note: * p<0.1; ** p<0.05; *** p<0.01;

Table 2: Ordered logit model of peak court effect on degree of CJEU importance and ordinary least squares regression estimating the impact of the same on length of proceedings. "FE" stands for fixed effects, "AIC" for Akaike Information Criterion. We include country and year fixed effects in order to isolate the effect of the variable of interest (peak court). Lower AIC implies better model fit.

The results of the ordered logit model reported in Table 2 confirm that the difference between peak courts and non-peak courts is statistically significant. The odds ratio⁷⁰ of a preliminary reference assuming greater importance (moving up to a higher importance score on the scale of 1-4) is 1.58 times greater in the baseline model when the referring court is a peak court than in other cases.⁷¹ The effect is still present when we include country and year fixed effects, which strengthens our confidence in the robustness of the results. Additionally, we do not find evidence that the CJEU would take less time to adjudicate references from peak courts in comparison to non-peak courts.⁷² We were not wedded to this alternative measurement instrument due to a lack of theoretical justification but include the results for exploratory purposes. We can conclude that the data show greater support for the hierarchy hypothesis, meaning that the CJEU values peak court references on average more than those of non-peak courts and that importance is manifested through a procedural rather than a temporal channel.⁷³ Given the trends we observe and the strengthening of CJEU-peak court cooperation,⁷⁴ we speculate that the relative importance of peak courts' references is only going to increase in the coming years.

⁷⁰ We get the odds ratio from the model output by exponentiating $e^{0.460} = 1.58$.

⁷¹ In other words, the two groups (peak and non-peak) are significantly different from each other in terms of CJEU importance. Running a Welch two sample t-test explicitly rejects the null hypothesis that peak and non-peak courts are treated the same: $t = 12.271$, $df = 7170$, $p\text{-value} < 2.2e-16$.

⁷² If the Court was more expedient to signal importance to peak courts, we would expect a negative coefficient for the peak court variable, because the dependent variable is measured as the number of days between submission and decision (so a higher value means more delay). The coefficients are not statistically significant, however, and they are also sensitive to including country and year fixed effects which might indicate omitted variable bias. It would be possible to envisage a more precise model that would additionally control for variation in case facts and legal difficulty. However, no reliable indicators of these variables are available at present.

⁷³ These results corroborate the finding of Pavone and Kelemen, based on a more limited dataset, that courts higher up the judicial hierarchy are less likely to have their case answered by an order, including declared inadmissible (Pavone and Kelemen (n 20) 19–20).

⁷⁴ The CJEU section of the 2019 Draft General Budget of the European Union describes the creation of the 'Judicial Network of the European Union', which comprises the constitutional and supreme courts of the Member States and is

As a secondary point of interest, we look at how our measure of importance feeds into country and court variation. Interestingly, Ireland has the largest share of Grand Chamber judgments among its references. As we can deduce from Figure 5, countries that account for the biggest chunk of reference activity like Germany, the UK and the Netherlands in general also receive higher importance scores than countries that send fewer references like Italy and Portugal. Contrary to its Eurosceptic reputation, UK courts account for a large number of Grand Chamber references and overall cases of high importance. Figure 5 also illustrates that references are a marginal phenomenon in "new" Member States. Not only do their courts refer fewer questions, the case handling also indicates that the CJEU assigns lower importance to these cases.

coordinated by the CJEU. The network is operational since January 2018 and it 'seeks to reinforce the cooperation between the Court and the national courts by means of a multilingual platform which will enable them to share, in a perfectly secure environment, a range of information and documents intended to promote mutual knowledge of the case law of the European Union and that of the Member States, and the deepening of the dialogue between the Court of Justice and the national courts in the context of requests for a preliminary ruling.'

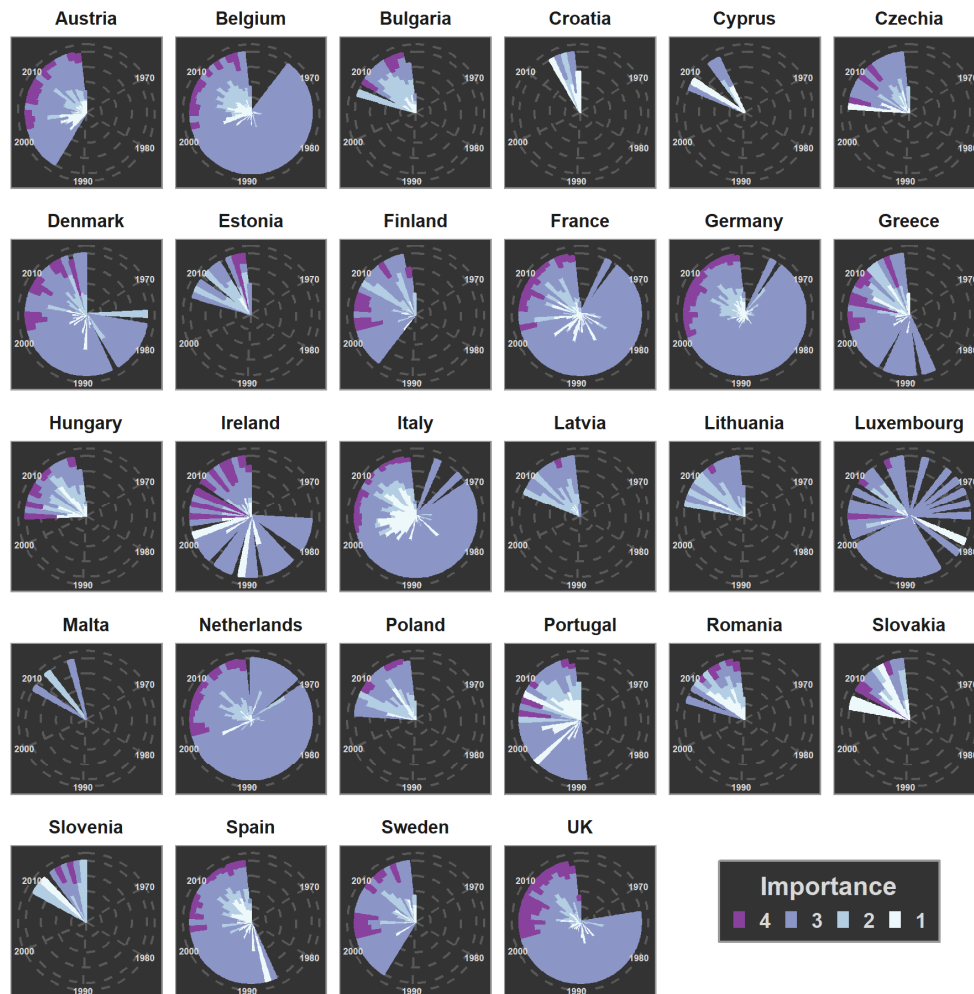


Figure 5: Country comparison in terms of CJEU case importance. Bars represent proportions of each country's referrals in a given year. For years with no coloured bars there were no references sent from that country. The different starting points therefore also reflect different accession moments (first references).

Finally, we are interested in the performance of individual courts in order to obtain an even more granular view of CJEU attention allocation. When we weight preliminary references by our measure and order national courts accordingly, we can isolate national courts that in aggregate contribute the most important cases. Figure 6 shows the results. Eight of the ten highest-ranking courts are peak courts and this court type also makes up the top three. We observe considerable disparities among the two non-peak courts

on this list as well. The High Court of Justice (England and Wales) is a key domestic judicial player by virtue of the specific constellation of the national legal system and it refers more cases decided by the Grand Chamber than any other court in the EU.⁷⁵ Yet, references from the other non-peak court in our top ten, the German Finanzgericht Hamburg, barely ever make it before the most important CJEU court composition.

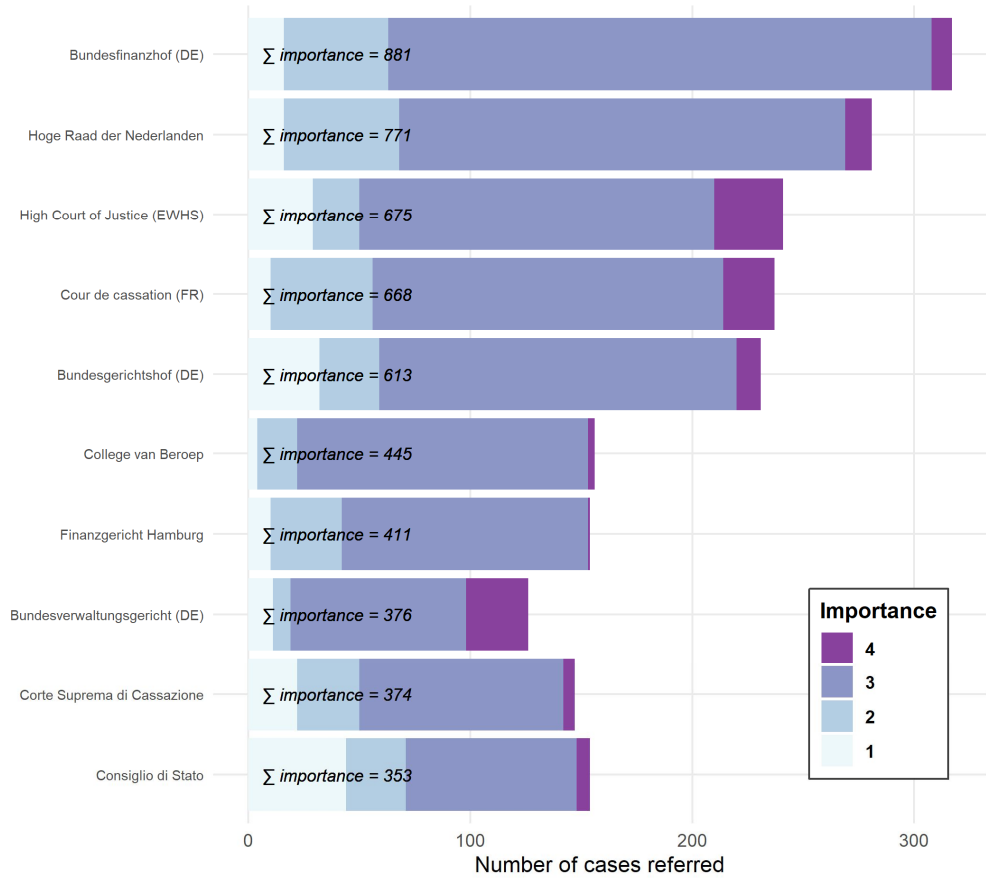


Figure 6: Top ten court comparison in terms of CJEU case importance between 1961-2018. The national courts are ordered by weighted count, calculated as $n_i * importance_i$ where importance is measured on the ordinal 1-4 scale.

Bundesfinanzhof's domination is due to the sheer number of cases decided with an Advocate General opinion rather than their Grand Chamber

⁷⁵ Brexit is therefore liable to have an indirect impact on CJEU doctrinal development.

worthiness. Nonetheless, it is somewhat surprising that compared to its fellow German Supreme Court (Bundesgerichtshof), far fewer of its cases were disposed of by an order. On this statistic, however, it is the Consiglio di Stato that fares particularly badly with 44 cases answered by a CJEU order. This is a record high for any peak court in the EU. On the contrary, its German counterpart – the Bundesverwaltungsgericht – has such a high proportion of Grand Chamber judgments that it ranks above the Consiglio di Stato in terms of importance despite referring fewer cases in total.

We additionally examine how our proposed metric compares with the prevailing method of plainly counting each preliminary reference as a single observation of equal weight. Table 3 shows that taking into account the weight attached to references by the CJEU can alter the order of "top" national courts. We focus on the post-2003 period during which the CJEU introduced more variation in court formation, notably through introduction of the Grand Chamber. In comparison to the full time-series presented in Figure 5, the Bundesfinanzhof has been less active in the previous 15 years. Although the first two columns are similar, two Italian courts fall outside the top 10 when we account for case importance.

Rank	By unweighted count	By weighted count	By average importance
1	Hoge Raad der Nederlanden [158]	Hoge Raad der Nederlanden [415]	Rechtbank Den Haag [3.17]
2	Cour de cassation (FR) [146]	Cour de cassation (FR) [405]	Bundesverwaltungsgericht (DE) [3.04]
3	Bundesgerichtshof (DE) [141]	Bundesgerichtshof (DE) [361]	Bundesarbeitsgericht (DE) [2.97]
4	Bundesfinanzhof (DE) [112]	Bundesfinanzhof (DE) [293]	High Court (IE) [2.97]
5	Consiglio di Stato [110]	Consiglio di Stato [249]	Østre Landsret (DK) [2.95]
6	High Court of Justice (EWHC) [81]	High Court of Justice (EWHC) [229]	Grondwettelijk Hof (BE) [2.93]

7	Raad van State (NL) [78]	Raad van State (NL) [214]	Supreme Court (UK) [2.90]
8	Tribunale amministrativo regionale di Lazio [77]	Oberster Gerichtshof [209]	Sąd Najwyższy (PL) [2.89]
9	Oberster Gerichtshof [73]	Bundesverwaltungsgericht (DE) [204]	Oberster Gerichtshof [2.86]
10	Corte Suprema di Cassazione [71]	Verwaltungsgerichtshof (AT) [179]	Court of Appeal (EWCA) [2.84]

*Table 3. Most salient national courts by different metrics of preliminary references 2004-2018. In order not to focus extensively on outliers, we exclude courts that have referred fewer than 15 cases (one case a year on average). Unweighted count is simply the total number of references n . Weighted count is calculated as $n_i * importance_i$ where importance is measured on the ordinal 1-4 scale. Average importance is $\frac{1}{n} \sum_i importance_i$.*

Our measure makes the most difference when we look at average importance of cases referred by national courts. Surprisingly, the Rechtbank Den Haag has referred, on average, the most important cases between 2004 and 2018. Upon closer inspection, we can see that its references relate predominantly to the processing of asylum applications and prompted three Grand Chamber judgments.⁷⁶ At the same time, as a first-instance court, the Rechtbank Den Haag is the odd-one out in the broader picture painted by case importance. All other courts are either peak courts or appeal courts with an important standing in the domestic judicial hierarchy, such as the Court of Appeal (England and Wales) and the Østre Landsret in Denmark. Generally, courts from "new" Member States merely seem to play a supporting role in the reference system. Hence, the appearance of the Supreme Court of Poland on the list of courts with the highest average importance offers a rare glimpse behind the former Iron Curtain.

⁷⁶ Joined Cases C-47/17 and C-48/17 *X and X v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2018:900; Case C-331/16 *K. v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2018:296; Case C-163/16 *Christian Louboutin and Christian Louboutin Sas v van Haren Schoenen BV* ECLI:EU:C:2018:423.

VI. CONCLUSION

In a bid to move beyond assessments of the preliminary reference procedure that merely count the number of rulings indiscriminately, this article introduced a new ordinal measure of case importance at the CJEU. Consistent with existing observations in the literature, we exploit variation in case disposition by the Court of Justice. We deploy this measure to investigate whether the Court considers references stemming from national peak courts or non-peak courts as more important. We construct our indicator on the basis of the largest dataset of preliminary references to date (n = 10,609).

To test potential variations in treatment, we formulate two different expectations about CJEU attention division based on the dichotomous position of courts within national judicial hierarchies. The hierarchy hypothesis predicts that the Court allots more importance to references from peak courts because these wield more legal authority in their respective systems, have more time and resources at their disposal or generally handle difficult and indeterminate cases. The divide-and-conquer hypothesis, on the other hand, expects the CJEU to attach more significance to non-peak court cases as a way to stimulate the use of EU law throughout the entire national judicial hierarchy. The Court acts this way to prevent peak courts from becoming the *de facto* gatekeepers of EU law use by monopolizing the preliminary ruling procedure.

Our empirical assessment of CJEU treatment of references suggests that peak courts generally send more important references to Luxembourg. This finding leads us to believe, as others increasingly suggest as well,⁷⁷ that the importance attached to different preliminary references by the CJEU reflects a growing preference for cooperation with peak courts. Because resources of the Court are limited, decreasing attention to non-peak court referrals is merely the flipside of the CJEU's relationship with peak courts growing closer. This is not to say that cases from some non-peak courts cannot receive favourable treatment by the Court, as demonstrated by the *Rechtbank Den Haag* in recent years. Nonetheless, all the trends in the data that we examine

⁷⁷ Dyevre, Glavina and Atanasova (n 19); Pavone and Kelemen (n 20).

in this article corroborate the inclination of the CJEU to deem peak court references as more important.

Despite not being able to definitively identify the mechanism behind the CJEU's peak court preference, our findings are highly relevant. Peak courts not only account for a large number of references but are also more likely than non-peak courts to refer cases that the CJEU deems legally important. Peak courts have thus increasingly managed to establish a central position in the system through which the CJEU dispenses its doctrine. Importantly, the preliminary ruling mechanism depends on such cooperation of national courts. As a result, peak courts may just have bolstered their *de facto* position vis-à-vis the CJEU in the development of EU law.

Our research leaves room for further investigation. First, our measure of importance surpasses the confines of the substantive dimension examined here. Scholars can use it to shed light on other aspects of European law and judicial politics. Second, future research could tease apart how much the different theoretical reasons contribute to explaining why the CJEU favours close cooperation with domestic peak courts over non-peak courts. Considering the relative power increase of these courts vis-à-vis the CJEU, it also remains to be seen how peak courts assert their growing influence on EU law. Moreover, peak courts from "old" Member States generally drive European legal integration. Some courts deviate from this rule. The Rechtbank Den Haag is a first instance court whose cases the CJEU nevertheless deems of the utmost importance. Likewise, the Polish Supreme Court is a peak court from a "new" Member State that finds favourable reception in Luxembourg. These and other exceptions warrant closer inspection through case studies that enable researchers to dig deeper into the particular circumstances of individual domestic courts, such as the ongoing struggle over judicial independence in Poland.⁷⁸ This ties in with our more general conviction that further qualitative investigation is necessary to fully unpack the mechanisms at play in the interaction between the CJEU and its national interlocutors.

⁷⁸ Laurent Pech and Sébastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 *Common Market Law Review* 6 1827–1854.