

That's an Order! How the Quest for Efficiency Is Transforming Judicial Cooperation in Europe

STEIN ARNE BREKKE,¹  DANIEL NAURIN,²  URŠKA ŠADL^{1,3}  and LUCÍA LÓPEZ-ZURITA³ 

¹Department of Law, European University Institute, Florence, Italy ²ARENA Centre for European Studies, University of Oslo, Oslo, Norway ³iCourts - Centre of Excellence for International Courts, University of Copenhagen, Copenhagen, Denmark

Abstract

Effective procedural arrangements allow courts to reconcile conflicting demands of timely justice and sound legal argument. In the context of the European Union, conflict between these demands emerged most acutely in the face of paralyzing delays in the preliminary reference procedure. It was partly solved by Article 99 of the Rules of Procedure. The provision allowed the European Court of Justice to dispose of repetitive and legally undemanding cases with a reasoned order in lieu of a judgment. This article analyses all published orders of the European Court of Justice to examine the use and the implications of Article 99 of the Rules of Procedure. It is the first article to do so. We find that the Court resorts to orders to save time and to halt repeated questions from the courts of a single Member State.

Keywords: Court of Justice of the EU; Judicial Cooperation; Judicial Behaviour; Adjudication; Dispute Resolution

Introduction

The benefits of timely justice and rigorous judicial argument are impossible to overstate and hard to reconcile. In a well-functioning legal system, courts are expected to deliver both. To the extent that persuasively reasoned judgments deplete resources, it generates a performance trade off. The task to optimize both values falls on institutional design and procedural rules.

In the struggle against an overpowering backlog and procedural delays, the European Court of Justice (the Court) has amended its Rules of Procedure (RoP) at least 14 times in 30 years. Among the best-known amendments were increased delegation of cases to smaller chambers, fewer oral hearings, and a lesser involvement of the Advocates General. All were designed to increase procedural efficiency and reduce delays.

In this article, we focus on a less discussed procedural innovation, inserted in the RoP to countermand growing delays in the preliminary reference procedure (Article 267 TFEU). In 1991, Article 104(3) (now 99) of the RoP introduced the possibility to decide cases that raised no new questions with reasoned orders in lieu of judgments. The intention was to free the Court from legally uninteresting questions, allowing it to focus on more important and pressing legal issues. In the early 2000s, the delays in the preliminary reference procedure reached a peak, with proceedings of more than 700 days on average (Dyevre *et al.*, 2021, p. 566).

Article 99 RoP reasoned orders are legally unique. Their structure, which draws on established precedent to arrive at binding (and authoritative) interpretations of European law, is akin to judgments. Their simplified procedure is typical of orders. Because of these

characteristics of Article 99 RoP orders, and to distinguish them from other types of Court orders, we have labelled these adjudicating orders.¹

Article 99 RoP specifies that the Court can decide by an adjudicating order when preliminary questions are identical to previous questions; if the reply clearly follows from the existing case law; or the answer permits no reasonable doubt. The requirements appear straightforward, implying that the Court should decide by an order in clear cases. But opinions on the latter diverge, and the Court's criteria are ambiguous (Broberg and Fenger, 2014). This creates the opportunity for strategic use of adjudicating orders, as a means of docket control or simply to dispose of excessive workload (leisure reasons) (Galetta, 2014). The practice of orders reflects the Court's value choices and strategies in balancing procedural efficiency with rigorous legal argument.

Ample literature on judicial behaviour suggests that courts seek legitimization from their constituencies (Burley and Mattli, 1993; Garoupa and Ginsburg, 2008, 2011; Baum, 2009), and develop strategies to cope with conflicting demands (Dothan, 2014). Perceptions matter: as long as courts enjoy legitimacy, their rulings have real effect (Helfer and Slaughter, 1997). Historically, the effectiveness of European Union law hinged on national courts, submitting references to Luxembourg and dutifully implementing the Court's interpretations, even when they proved controversial. The benefits were mutual: cooperation with the Court offered national courts a 'heady' taste of power, according to some observers (Alter, 2009; Weiler 1999; for a contrary narrative, see Pavone, 2022).

The use of adjudicating orders will transform this relationship. Recent literature highlights that adjudicating orders are an embarrassment for national judges, indicating that they have not done 'their homework' (Leijon and Glavina, 2022), although one study indicates that national courts are not necessarily deterred from submitting new references after having been rebutted once (Dyevre *et al.*, 2022). The relaxation of procedural safeguards will also lead to less informed rulings, and not hearing the parties raises questions about the adequacy of judicial protection (Tridimas, 2003; Broberg, 2008). It is thus reasonable to expect that the Court would use adjudicating orders sparingly.

Given the high stakes, it is surprising that adjudicating orders have not received a more comprehensive treatment. Most legal scholars have analysed the judgments of the Court, focusing on the principle of procedural autonomy or the related principles of effectiveness and equivalence in the interpretation of European Union law (Kakouris, 1997; Delicostopoulos, 2003; Becker, 2007; Bobek, 2011; Wallerman, 2016; Eliantonio and Muir, 2019). Political scientists, by contrast, have shown limited interest in the ins and outs of procedural arrangements and implementing acts.

This article examines the frequency and the rationale of adjudicating orders to fill this gap in the literature. It draws on a unique dataset of all (around 500) published adjudicating orders and the CJEU Database Platform (Brekke *et al.*, Forthcoming), including all corresponding judgments issued in the preliminary reference procedure.

It does so in two parts. First, it presents a descriptive overview of the Court's use of adjudicating orders. It shows a limited use of adjudicating orders from 1991 to 2000, and a substantive increase after the 2000 amendment to the RoP. It also shows that adjudicating orders tend to significantly shorten processing time.

¹The Court uses its own label, Article 99 RoP orders.

Second, the article analyses the Court's use of adjudicating orders, focusing on the decision to issue an order rather than a judgment. It finds support for a legitimacy–efficiency trade-off in the Court's handling of preliminary references: high workload and sudden influx of cases increase the likelihood of adjudicating orders. Further, the analysis finds support for the Court's use of adjudicating orders as authoritative signals of limited interest in issues without a broader, pan-European dimension (Micklitz, 2005). The Court is more likely to issue adjudicating orders in response to repeated references from the same Member State questioning the same legal provisions, but not when the repeated references originate from different Member States. This indicates that adjudicating orders add a vertical dimension to the preliminary reference procedure: the Court communicates disinterest in further questions about a specific national context directly to the national court.² Finally, it finds that the Court strategically assigns the cases in which adjudicating orders are likely to chambers of three judges with low workload. This implies that the Court efficiently identifies these cases already when they are lodged at the registry, prior to assigning them to the chambers, and distribute them so as to improve its records in terms of processing time. Together, the findings lead to the conclusion that adjudicating orders help the Court manage the performance trade-off while having transformative effects on judicial cooperation.

The argument develops in four sections. Section I contextualizes adjudicating orders and highlights their hybrid nature. Section II presents the hypotheses, the research design, and the results. Section III discusses the findings. The final section draws conclusions.

I. Legitimate Legal Authority and Efficient Adjudication

Legitimacy is commonly perceived as the main ingredient of effective adjudication. To ensure compliance and produce effects in practice, courts must back up the external appearance of independent, law-abiding and apolitical dispute resolution bodies with the so-called 'internal' or legal legitimacy of their decisions. They must strive for well-reasoned and persuasive judgments, grounded in statute and precedent, and for coherent and consistent jurisprudence (Bengoetxea, 1992; Alexy, 2010; MacCormick, 2010). Additionally, their integrity is closely tied to the ability to deliver efficient adjudication. The old maxim, *justice delayed is justice denied*, is no anachronism in today's world. The right to have the case heard in reasonable time is fundamental to fair trial. It is instrumental to the public perception of a functioning legal order. Moreover, timely justice is the flip side of legal certainty – a fundamental value of every democratic legal system.

The following subsections place adjudicating orders in the context of orders and judgments issued by the Court (1), unpack them as a seemingly ideal compromise between legal quality and efficiency struck in a long process of legislative fine-tuning (2), and illustrate the Court's pursuit of efficiency (3).

²Komárek (2007) stresses that the preliminary reference procedure is not entirely horizontal. Even in limited numbers, orders modify the terms of judicial cooperation and individual protection.

Orders of the European Court of Justice: Legal Framework and Characteristics

Judicial procedures of international courts are a matter of institutional design, usually fashioned in a two-stage process. They involve prolonged diplomatic negotiations, the signing of a Treaty or a Statute of the court, and subsequent ratification by national legislative bodies. By contrast, the daily judicial business of international courts is often obscure, and regulated by implementing acts, far from democratic oversight and hidden from the public eye. This needs little explaining. As a matter of principle, the prerogative to self-govern and organize the procedures autonomously in 'local codes' shields courts from political influence, and enhances their independence (Pound, 1917). Pragmatically, procedural rules and institutional arrangements must be flexible and adapt quickly to the demands of practice, and, therefore, they should be tailored to the needs of individual institutions. Local codes often elaborate the more technical and organizational aspects of procedures, and legal instruments, which formalize them.

In the European context, the RoP are such local code, implementing broad Treaty articles and the Statute of the Court. They are designed mostly for the judges and the Advocates General, the legal secretaries, translators, supporting staff, the parties, and legal counsel. Painstakingly detailed, they are the primary legal document regulating 42 different types of orders (Sadl *et al.*, 2020).

While frequent since the 1950s and central to all procedures, orders are elusive legal sources; diverse, multi-functional and amoebic. The Court issues many different orders in every case. One document labelled as order can include several decisions (orders). The amendments of the RoP have subsequently introduced new types of procedures and a plethora of accompanying orders.

Overall, most orders are administrative, and create a paper trail, such as orders to join cases and resend a case to a larger formation. A number of orders primarily regulate the Court's procedure, meaning that they define the rights of the parties without ruling on the substance, for example orders that bar the continuation of proceedings, allow intervention, or declare an action inadmissible. Those orders are procedural. A handful of orders decides directly on the legal substance of the case, like whether an appeal is manifestly unfounded. Because those orders typically terminate proceedings with legal consequences for the parties, they also have to state reasons: they are thus substantive reasoned orders.

Adjudicating Orders: A Silver Bullet

Adjudicating orders are as peculiar as they are consequential. To recall, the Court can issue them in the preliminary reference procedure (Article 267 TFEU) to reply to the national courts when: (1) the question referred is identical to a question on which the Court has already ruled; (2) the reply to the question referred may be clearly deduced from existing case law; or (3) the answer to the question referred admits of no reasonable doubt.

Adjudicating orders are a hybrid between judgments and orders. Content-wise, they are like judgments, delivering binding and authoritative interpretations of European Union law. Justification of outcomes and reliance on past cases guarantees the continuity and coherence of European law. Procedure-wise, they are orders, issued in a process with

fewer demands and guarantees. As we will show, this directly translates into shorter processing time and indirectly into a reduced backlog. Adjudicating orders thus seem to strike an impossible balance between efficiency and legal quality.

This was not always the case. Quite the contrary, the current arrangement results from decades of fine-tuning. Adjudicating orders were introduced in a restricted format in 1991: the Court could issue an adjudicating order only if the question was *identical* to an already answered question. The Court had to inform the referring court, consider all submitted observations, and hear the Advocate General.³ These constraints might explain the scarcity of adjudicating orders and why the number of pending references was ‘the most pressing issue’ by the late 1990s (Dashwood and Johnston, 2001).

In response, the amendments to the RoP in 2000 extended adjudicating orders to cases where the answer to the question could be clearly deduced from the existing case law (clear case) or where the question admitted no reasonable doubt (beyond doubt). Subsequent amendments relaxed the requirement to inform the national court and the parties, except for cases beyond doubt, in 2005. The amendments in 2012 removed that obligation as well. The Advocate General must still be heard.

Figures 1 and 2 illustrate the mixed effects of amendments to the RoP. Figure 1 shows that while the amendments in 1991 did not trigger major changes, the amendments in 2000 substantially increased the relative frequency of adjudicating orders. Within a year after the reform, the Court was deciding 7 per cent of all preliminary references with adjudicating order. The reforms of 2005 and 2012 did not increase their frequency.

Figure 2 analyses the efficiency gains of adjudicating orders compared to judgments. It shows the time spent on adjudicating orders compared to the procedure time of the judgments they cite. The measurement of adjudication time and the subsequent efficiency gains rely on two assumptions, based on Article 99 RoP: First, that cited judgments are the main reference for adjudicating orders, as they are legally similar, and second, that orders should closely resemble the cited judgments. Citations are thus a good indicator of which case law the Court treats as ‘settled’ and the comparison allows to control for case complexity. The results indicate a sizable efficiency gain of the reform of 2005: almost overnight, the Court issued several adjudicating orders, reducing the adjudication time *vis-a-vis* the comparable judgments, in some instances by more than 500 days. This trend of substantially shorter procedure times (often over a year shorter than those of cited judgments, and between 200 and 300 days on average) continued, though relative efficiency gains appear less significant after 2012. Procedure times are measured relative to yearly averages for judgments of the Court to avoid the findings from being driven by a change in efficiency over time.⁴

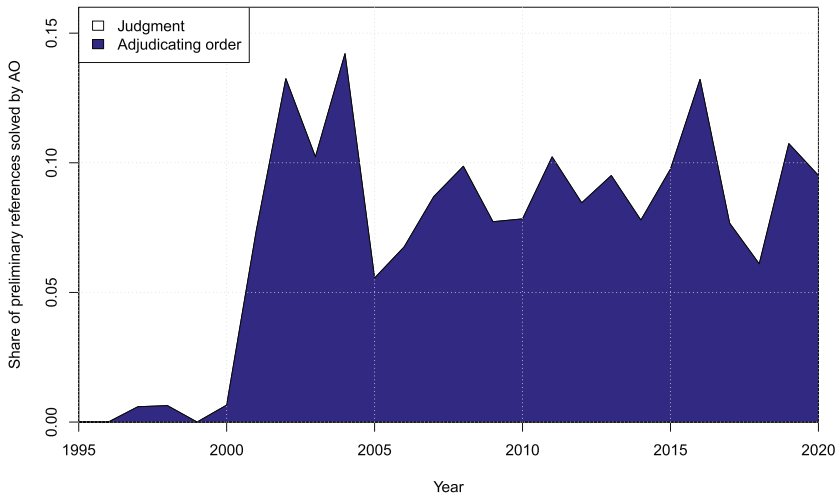
A Winding Road to Efficient Procedures

While the effects of individual amendments to the RoP varied, all pursued the same objective: To reduce delays and quickly dispose of repetitive and legally uninteresting cases.

³Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 16 May 2000 (Court of Justice of the European Union, 2000, p. 43).

⁴According to the Court’s yearly reports, the average time of a preliminary procedure was 21.6 months in 2000. In 2005 it decreased to 20.4 months. In 2010 and 2015, the average was 16.1 and 15.3 months. Finally, the average time increased slightly to 15.5 months in 2019

Figure 1: The Share of Preliminary References Answered by an Adjudicating Order [Colour figure can be viewed at wileyonlinelibrary.com]



Note: The figure illustrates the relative frequency of adjudicating orders during a time period of absolute growth in the number of preliminary rulings. Note that the Y axis only spans from 0 to 16 per cent.

This follows from the Court's explanatory notes to the proposed procedural amendments, the reports of the Working Party, the formal addresses of the President of the Court and from the Court's Annual Reports, all lamenting backlog and delays.

On a closer reading, the Court seemed to attribute delays to a combination of repetitive legally inconsequential questions and multilingualism. The explanatory note to the proposed amendments in 2005 stressed that the obligation to hear the parties and the referring judge served 'no useful purpose' and delayed 'the decision by a month and a half'. The note to the 2012 amendments pointed out that the 'opportunity to submit any written observations' was often synonymous with a 'significant increase in the workload'. Moreover, the legally mandatory translation of new observations would cause 'a delay of several months'.

President Skouris announced that:

'The referring judge should also be prepared to receive more rapid but simplified answers. As a consequence of the development of the case-law, the Court will most probably be in a position to respond more often to certain requests for a preliminary ruling by way of a simple order [...], referring to previous judgements or relevant case-law' (Skouris, 2006).

Although the backlog problem was clearly and unequivocally structural, the Court resisted re-structuring. The proposals, debated in the late 1990s, prior to the Eastern enlargement, included a filtering mechanism for preliminary references, a possibility to limit the references to a handful of national courts, and the option of shared jurisdiction with the (then) Court of First Instance (Weiler and Jacqu e, 1990; Rasmussen, 2000).

Figure 2: The Time Efficiency Gains of Adjudicating Orders Compared to Judgments [Colour figure can be viewed at wileyonlinelibrary.com]



Note: The procedure time of adjudicating orders compared to the procedure time of the judgments they cite (number of days). Each data point represents an order. A value of 100 on the Y axis indicates that the procedure time of the given order was 100 days shorter than the average procedure time of the judgments it cited. In case of negative values, the Court spent more time issuing the adjudicating orders than it spent on the judgments it was citing. Symbols indicate chamber size. Vertical lines indicate changes in the RoP, horizontal lines mark time in years.

The Court expressed its preferences in the Report on Judicial Reform (1999) (Dashwood and Johnston, 2001). Therein, it opposed the establishment of a filtering mechanism, citing the possible detrimental impact on the relationship with the national courts. The Working Party subsequently rejected all major structural changes for the same reason.

By the time the Treaty of Nice came into force, the Court's backlog had doubled within a decade, amounting to 350 pending references in January 2003. Reasonably expecting the paralyzing effect of the accession of ten new Member States, the Court again, but this time internally and largely anonymously, reconsidered the preliminary reference procedure. The reform effectively implemented the Court's demands expressed in 1999 (Court of Justice of the European Union, 2001; Bobek, 2008): a simplified procedure, and the expansion of Article 99 RoP in the face of a 'structural increase in the number of pending cases'.⁵

The Council approved the proposed amendments in 2005. It might not be a coincidence that the Court acknowledged a structural problem of the preliminary reference mechanism soon after all structural reforms were discussed and democratically rejected (following the Court's objections). The timing of the reform is important. The Treaty of Nice made amendments of the RoP less cumbersome (and faster). It also strengthened

⁵See Report at Chapter 2, Section 2 iii).

the Court's position by replacing the unanimity rule for approval by the Council, requiring only a qualified majority.

II. Empirical Analysis of the Use of Orders

According to the RoP, the Court can issue an adjudicating order if it considers that the answer to a referred question is obvious. Many judgments issued by chambers of three judges, however, deal with such cases that raise no new legal questions. At the same time, some adjudicating orders are carefully reasoned and referenced. In other words, the provisions of the RoP do not adequately explain the practice, calling for further analysis.

We test three possible, and overlapping, explanations for why the Court will issue an adjudicating order instead of a judgment: (1) the workload of the chamber to which the case is assigned, (2) the existence of abundant relevant case law, and (3) top down communication with national courts. The analysis is based on all judgments issued by chambers of three or five judges from May 2000 (the date of the reform to the RoP) to December 2020.

There are two central findings of the analysis. First, the Court uses adjudicating orders to communicate its reluctance to consider similar future references from the same source; second, the Court assigns cases likely to be solved by adjudicating orders to chambers with low case loads, presumably to ensure quick processing.

The Effect of Workload on the Likelihood of Adjudicating Orders

The most comprehensive empirical treatment of the CJEU's use of orders so far is that by Dyeve *et al.* (2021). See also Dyeve *et al.*, (2022). They argue that the Court has become more restricted over time – as the supply of references has grown – in terms of which questions they afford with a judgment, and that orders have increasingly been used as 'a type of resource management mechanism' (Dyeve *et al.*, 2021, p. 564). They also demonstrate a systematic statistical relationship between the proportion of preliminary references ending in an order and the number of cases waiting on the Court's docket.

However, Dyeve *et al.* do not develop the mechanism by which backlog and orders are connected. We suggest that two different types of mechanisms may be behind this correlation. The first relates to the leisure component of the labour market model of judicial behaviour (Epstein *et al.*, 2013. For an application to the CJEU see Glavina, 2020, p. 37f). Judges, like other employees, value a sensible workload that supports a reasonable work-life balance. Since adjudicating by means of a reasoned order typically requires less time than writing a judgment, judges with limited resources, who feel overburdened, may choose to use orders rather than judgments in the interest of time.

The second mechanism that may generate a correlation between the Court's backlog and an increased use of adjudicating orders may be derived from a strategic model of judicial behaviour (Ferejohn and Weingast, 1992, Epstein and Knight, 1998. For applications to the CJEU see for example Carrubba and Gabel, 2015, Larsson and Naurin, 2016). From a strategic perspective, judicial decisions may partly be explained by judges' anticipation of reactions from other branches of government, or from society at large. In this context, backlog and subsequent delays in processing time risk weakening the legitimacy of the CJEU in the eyes of important external interlocutors, which may affect its ability to

act as an effective and authoritative adjudicator. Thus, adjudicating orders may be used partly to improve the Court's record in terms of processing time.

These mechanisms cannot be differentiated empirically only by estimating the correlation between workload and the Court's choice of judgment or order. However, by leveraging the Court's division of labour into chambers, our research design goes further in distinguishing the two.

The Court organizes its work by assigning its 27 members to chambers of three or five judges. Most cases are decided in those smaller compositions. When a judge is the reporting judge in a case, that case is added to the workload of 'her' chamber. Thus, analysing workload at the chamber level gets us closer to individual judges' workload, in accordance with the labour market model. Based on this model, we would expect a higher workload of a chamber to increase the likelihood of the Court issuing an adjudicating order, to decrease the time pressure.

H_{1A}: High chamber workload increases the likelihood of an adjudicating order, as the chamber seeks to minimize the time spent on cases.

Based on the strategic model, on the other hand, there is reason to expect the opposite empirical pattern in chambers of three judges (but not in chambers of five). The reason is that that Court's leadership has incentives to allocate cases to chambers in a way that maximizes the reduction in processing times. As soon as the case is lodged, the Court's supporting units identify legally undemanding cases that could merit an adjudicating order (candidate cases). The President of the Court receives the notification before assigning the case to a reporting judge and her chamber. If the Court seeks a quick decision, the President might assign the case to a chamber with a smaller backlog. In that case, a large chamber backlog would decrease the likelihood of receiving candidate cases from the President and thus fewer adjudicating order. Such strategic assignment on behalf of the President is only likely to involve chambers of three judges, since larger chambers handle the legally more challenging cases.

H_{1B}: In chambers of three judges – but not in chambers of five – high chamber workload decreases the likelihood of an adjudicating order, as the candidate cases for adjudicating orders are assigned to chambers with low backlogs to minimize processing time.

Hypotheses 1A and 1B would be counteracting in chambers of three. However, it is reasonable to assume that a chamber of five would rarely receive clear candidates to be solved with adjudicating orders. Hypothesis 1B is therefore only valid for three judges chambers, making five-judge chambers an appropriate testing ground for Hypothesis 1A. By comparing empirical results for both chamber sizes we can test both hypotheses.

The Effect of Repetitive Questions on the Likelihood of Adjudicating Orders

If the Court recently responded to numerous questions about a specific legal instrument (repetitive questions), new questions concerning that instrument are more likely to be identical to a question on which the Court has already ruled.

Repetitive questions are therefore expected to increase the likelihood of an adjudicating order.

H₂: The likelihood of an adjudicating order increases when the referred question concerns a provision that has been the subject of a large number of preliminary references in the last five year period.

While judgments and adjudicating orders reply to preliminary references, the referring judges perceive them differently. The national judges arguably interpret adjudicating orders as signals that the questions did not merit an answer and should not have been referred (Leijon and Glavina, 2022). Adjudicating orders might therefore serve as a means of top-down communication. They communicate directly and vertically only to a national court and a national context, rather than speaking horizontally to courts and other legal actors. We hypothesize that such communication is likely when the Court receives repeated referrals on the same legal instruments *from the same Member State* over a limited period of time. In such circumstances, the Court may want to send a clear authoritative signal that it is not interested in intervening in a local dispute with few cross-border implications.

H₃: The likelihood of an adjudicating order increases further when the referred question concerns a provision that has been the subject of a large number of preliminary references from courts of the same Member State in the last five-year period.

Methodology

The hypotheses are tested by fitting two generalized linear models (GLM) estimating the probability of an adjudicating order (1) rather than a judgment (0) with a binomial distribution on the dependent variable. The first model estimates the probability of adjudicating orders in chambers of three judges (409 orders total), the second in chambers of five (83 orders total).

The analysis considers preliminary reference cases decided by chambers of three and five judges from the amendment of the RoP in May 2000 until December 2020. The final analysis includes over one thousand decisions by three-judges chambers, and over 3,000 decisions by five-judge chambers. The analysis relies on the CJEU Database Platform (Brekke *et al.*, Forthcoming), which is a part of the IUROPA project.⁶ Adjudicating orders are identified by analysing three different aspects of the orders of the Court: references to the relevant articles in the RoP, the use of specific keywords in the official metadata supplied by the Court, and text analysis of the operative part of the order. In addition, we use automated text analysis of the Court's decisions to identify references made in the questions referred from the national court.

⁶ www.iuropa.pol.gu.se

Independent Variables

This section presents the independent variables. All are standardized to have a mean of 0 and a standard deviation of 1, making their estimated effects comparable across variables.

The workload of chambers, which serves to test Hypotheses 1A and 1B, is observed through two different values and their interaction. The variables provide a flexible measurement of chamber workload, observing absolute workload as well as its absolute and relative increase.

The first variable, *workload*, counts the number of pending cases at the time the case is lodged. This is calculated as the number of cases assigned to a chamber that are lodged, but still pending a judgment, at the given point in time. Cases not leading to judgments are omitted.

The second variable observes the increase in the number of cases pending in a chamber over a one-year period (*workload_increase*). This is calculated by observing the workload of a chamber and subtracting the workload observed 365 days earlier. A value of 20 thus indicates that the workload of the chamber has increased by 20 cases in one year.

Last, an interaction variable between the workload of the chamber and the increase of the workload (*workload:workload_increase*) observes the effect of a relative increase of the workload. An equal absolute increase in the workload (for example from 10 to 20 cases (*workload_increase* = 10) and from 50 to 60 cases) might have different implications at different levels of absolute workload. The interaction effect allows for the effect of the increase of workload to be mediated by the absolute workload, and for alternative dynamics from relative increases.

As stated by Hypothesis 2, the Court will more likely respond with an adjudicating order to repetitive questions regarding a specific legal instrument (a directive, a regulation, or a treaty article). This is captured by the variable *repetition*, which counts the number of preliminary references concerning the same legal instrument over five years. If the question referred contains multiple provisions, the average score for all these legal instruments is calculated.

To test Hypothesis 3, which predicts an authoritative top-down communication between the Court and the national court, we have constructed the variable *repetition_nat*. This variable captures repetitive references from courts of the same Member State. It is similar to *repetition*, except that it only observes references from courts of the same Member State. By observing the Court's response to these questions, it provides insight into the nature of the communication between the Court and the national court: any effect not related to the specific Member State is captured by the *repetition* variable.

Control Variables

Policy areas correspond to the 'subject matter' assigned by the Court to each case and stored as metadata on the Court's official web portal, Curia (curia.europa.eu). The ten policy areas with the largest share of adjudicating orders are controlled for with fixed effects: freedom of establishment, consumer protection, freedom to provide services, fundamental rights, transport, free movement of capital, approximation of laws, social policy, taxation and environment.

An increase of cases in a specific policy area may increase the number of adjudicating orders, even if these references do not concern the same provisions. There are two potential mechanisms, which may lead to that result. First, an increased influx of cases in a policy area could be due to an external shock rather than an unresolved question of European Union law. For example, the 2008 financial crisis led to numerous references from a handful of Member States relating to abusive clauses in consumer mortgage loans. Second, one could expect a degree of specialization in the Court (Hermansen, 2020). Specialization means that a sudden increase of cases in the relevant policy area could overwhelm the specialized members of the Court, motivating the use of adjudicating orders to avoid delays. The inclusion of the policy area-specific influx of cases thereby improves the reliability of the estimated effect of repetitive referrals. Similar to the *repetition* variables, the *caseload* variable measures the increase in the influx of cases within a policy area over a five-year period. In cases where a judgment refers to several policy areas, the average between them is calculated.

Time trends are controlled for using year fixed effects, which ensures that correlating time trends do not drive the effects estimated by the model.

Findings

The following subsections summarize the findings of the analysis. Table 1 presents the findings for chambers of three judges. Table 2 presents the findings for the chambers of five judges.

The empirical analysis reveals differences in the use of adjudicating orders between chambers of three and five judges. A high chamber workload (*workload*) implies a decreased likelihood of adjudicating orders in chambers of three, while a relative increase over time (*workload_increase*) increases the likelihood of adjudicating orders in both chambers. The relative increase of workload (*workload:workload_increase*) has no observed effect in either model. Repetitive references from different Member States have no significant effect in either chambers of three or five judges, while repetitive references from the same Member State have a positive effect on the likelihood of adjudicating orders for both chamber compositions.

Table 1: Adjudicating Orders in Chambers of Three Judges

	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
(Intercept)	-17.395	313.715	-0.055	0.956
repetition	0.069	0.099	0.701	0.483
repetition_nat	0.267	0.080	3.323	0.001***
workload	-1.353	0.237	-5.713	0.000***
workload_increase	0.777	0.134	5.781	0.000***
caseload	0.511	0.118	4.342	0.000***
workload:workload_increase	-0.124	0.114	-1.081	0.280

Note: Estimated likelihood of the Court answering a preliminary reference by adjudicating order in chambers of three judges. * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

Table 2: Adjudicating Orders in Chambers of Five Judges

	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
(Intercept)	-17.703	1065.536	-0.017	0.987
repetition	-0.060	0.197	-0.304	0.761
repetition_nat	0.383	0.167	2.292	0.022*
workload	-0.114	0.322	-0.354	0.724*
workload_increase	0.571	0.216	2.637	0.008**
caseload	0.460	0.213	2.161	0.031*
workload:workload_increase	-0.281	0.213	-1.317	0.188

Note: Estimated likelihood of the Court answering a preliminary reference by adjudicating order in chambers of five judges. * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

Interpretation of the Results

The analysis finds no clear support for Hypothesis 1A: the Court does not issue more adjudicating orders under increased pressure due to high workload in the chamber. Three-judge chambers with a high workload will be significantly *less* likely to issue adjudicating orders, while there is no such pattern in chambers of five. This supports Hypothesis 1B, which states that the Court assigns candidate cases to chambers of three judges with smaller backlogs, thereby speeding up the procedure at low efficiency cost.

While the absolute number of pending cases in a chamber does not increase the likelihood of adjudicating orders, an increase in chamber backlog (*workload_increase*) does in both smaller and larger chambers. This may indicate that, in accordance with the labour market model, a sudden increase of cases (rather than a high absolute level) triggers judges to dispose of the extra workload. An alternative possible explanation is that a large influx of similar cases would be assigned to the same chamber to ensure efficient and consistent case management, increasing both the chamber workload and the likelihood of adjudicating orders. An example is the seventh chamber of the Court, which issued 13 near-identical adjudicating orders on the same day in 2016. All were lodged between 2014 and 2016, and all concerned gambling cases in Italy.⁷ This indicates that, in accordance with the strategic assignment mechanism, adjudicating orders may be used to decrease the overall processing time of the Court, rather than to manage backlog in individual chambers.

Hypothesis 2 is weakened, as we observe no statistically significant relationship between the number of repetitive questions over the preceding five years (*repetition*) and the likelihood of adjudicating orders. Although new points of law would be expected to arise less commonly when the Court already repeatedly ruled on a certain legal provision (that is, when there is abundant case law on a given matter), adjudicating orders seem unrelated to the number of previous rulings concerning the same legal provision.

Instead, the findings support Hypothesis 3: repeated questions are strongly associated with an increased likelihood of adjudicating orders only when these questions stem from

⁷Cases C-542/15, *Manzo*, ECLI:EU:C:2016:730; C-438/15, *Durante*, ECLI:EU:C:2016:728; C-8/16, *Tonachella*, ECLI:EU:C:2016:244; C-504/15, *Conti*, ECLI:EU:C:2016:243; C-65/15, *Santoro*, ECLI:EU:C:2016:242; C-534/14, *Gaiti and Others*, ECLI:EU:C:2016:241; C-474/14, *Pontillo*, ECLI:EU:C:2016:240; C-467/14, *Baldo*, ECLI:EU:C:2016:239; C-462/14, *Barlucci*, ECLI:EU:C:2016:238; C-437/14, *Seminario*, ECLI:EU:C:2016:237; C-436/14, *Cazzorla*, ECLI:EU:C:2016:236; C-435/14, *Barletta*, ECLI:EU:C:2016:235; C-434/14, *Mignone*, ECLI:EU:C:2016:234; C-433/14, *Rosa*, ECLI:EU:C:2016:233; C-210/14, *Tomassi*, ECLI:EU:C:2016:245.

the courts of the same Member State (*repetition_nat*). This can be interpreted as the Court's reluctance to intervene in a national dispute with little relevance to the rest of the EU: the Court is more likely to reply with an adjudicating order if Spanish courts refer repetitive questions. The Court is however not more likely to reply by adjudicating order to the repetitive questions referred by courts from *several* Member States.

III. Discussion: Docket over Dialogue

The empirical findings indicate that concerns about processing time is an important factor driving the use of adjudicating orders. By contrast, legal similarity does not appear to explain fully the Court's use of adjudicating orders; similar questions from the same Member State irk the Court. We acknowledge that the former might be due to an imprecise operationalization of similarity as used in our analysis. However, this section proposes an alternative and in our view more convincing explanation, namely that adjudicating orders are a tool for vertical interaction with national courts.

Judicial cooperation in Europe might not live up to the fairy tale of dialogue. Still, the Court seems to be aware of its importance (van Gestel and de Poorter, 2019). Openly renouncing the idea(l) would damage the Court's legitimacy and effective adjudication. Moreover, the argument from dialogue has proved beneficial historically. When the conflict between dialogue and efficiency emerged in clearest terms during the late 1990s, the Court opted for efficiency but used dialogue to resist structural reforms.

The Explanatory notes to the amendments and the Reports of the Working party evidence the Court's prioritization of procedural economy and its quest for simpler and faster procedures. Our analysis of the use of adjudicating orders over time, however, attests to a varied effect of efficiency-driven reforms. From 1991 to 2000, the Court issued only one adjudicating order. If procedural demands were the main inhibiting factor, the simplifications introduced in 2005 should have reversed the trend. However, as Figure 1 shows, this was not the case. The same is true regarding a minor, yet legally significant amendment in 2012.

The strong Member State specific effect (*repetition_nat*) and the absent effect of the general measure (*repetition*) of legal similarity supports two interpretations. The first is methodological: the questions about the same legal provisions originating from different Member States may simply not be that similar. The second interpretation is substantive: the Court uses adjudicating orders to discontinue a conversation – a dialogue – with national courts.

The second alternative is convincing, because courts across Member States should harbour similar legal doubts at least occasionally. However, our findings indicate no connection between cross-national repetition and the use of adjudicating orders. Legal similarity is not decisive. Instead, top-down communication partly explains the use of adjudicating orders, as indicated by two pieces of anecdotal evidence from Spain.

First, the use of adjudicating orders following bouts of litigation over specific legal provisions of European law is conspicuous. The societally divisive Spanish litigation in the area of consumer protection is a case in point. After the 2008 collapse of the financial sector, citizens defaulting on their mortgage payments were being evicted from their homes *en masse* (Domurath *et al.*, 2014). This spurred a protracted litigation over the fairness of the contract terms in mortgage loans, concluded between individual consumers

(private parties) and banks. Spanish judges took sides, jamming the Court with a series of preliminary references about the correct interpretation of Council Directive 93/13/ECC *on unfair terms in consumer contracts* (Mayoral and Pérez, 2018). Once the Court provided a consumer-friendly interpretation of the provision, it increasingly resorted to adjudicating orders. Repetitive references from Romania, Bulgaria and Slovakia concerning the same provisions of the same Directive followed a near-identical pattern. With adjudicating orders, the Court cut all conversations short.

Second, the analysis of individual cases further corroborates the interpretation that firm top down communication partly explains the use of adjudicating orders. For instance, the Court decided the *Bankia* case,⁸ yet another Spanish reference on unfair terms in mortgage contracts, by an adjudicating order. The reference followed a long line of similar references. Strikingly, the Court issued an adjudicating order after conducting a fully-fledged procedure. It held the hearing in the presence of the parties and their representatives, the Spanish government, the governments of another three Member States, and the European Commission. The Advocate General delivered a written Opinion (Opinion of Advocate General Szpunar in case C-92/16). According to the RoP, however, the Court could have issued an adjudicating order without written submissions, hearings, written opinions, and without consulting the parties or the national court. The adjudicating order was just that: an order to refrain from questioning the case law on unfair contract terms.

The Court maintains the narrative of dialogue, opting for adjudicating orders as a subtler mechanism, which promotes efficiency at a lower legitimacy costs. The practice transforms the preliminary reference procedure from an instrument of interpretation of European Union law through the conversation with national courts into an instrument of authoritative withdrawal from local disputes.

Conclusions

The article unpacked adjudicating orders as legally unique and practically versatile instruments. The analysis highlighted hidden trade-offs behind procedural mechanisms underpinning effective adjudication and legitimate authority.

According to Article 99 RoP, the Court can issue an adjudicating order when preliminary questions raise no new points of law, closely resemble previously answered questions, or where the answers clearly follow from the established case law. In practice, our analysis has shown that the Court issues adjudicating orders partly to save time and avoid a reputation for delaying justice that may be detrimental to its legitimacy and effectiveness. Moreover, their use increases significantly when courts from the same Member State submit repetitive preliminary questions. Nevertheless, the ratio between orders and judgments remains relatively low (one order for every ten judgments) and stable.

These findings, which follow from the examination of the RoP and supporting legal sources as well as empirical analysis of all adjudicating orders and comparable judgments, indicate that the Court at times uses adjudicating orders strategically. On the one hand, adjudicating orders may serve as tools of docket control and authoritative deterrence. On the other hand, their use is limited in scope, implying that the Court is wary of legitimacy and broad support. It reaches for adjudicating orders to terminate prolonged,

⁸Case C-92/16, *Bankia SA v Henry-Rodolfo Rengifo Jiménez and Sheyla-Jeanneth Felix Caiza*, ECLI:EU:2019:560

divisive, geographically limited, as well as legally narrow and uninteresting discussions cluttering the docket. Thereby, it can deliver good law in good time, focusing on legally more demanding and weighty litigation.

Criticizing the Court for trying to curb the activism of national judges or refusing to fuel their national reformist agendas would seem unfair. It would be equally difficult to object to its lack of enthusiasm to engage in highly polarized national disputes. Finally, there are good reasons to insist on the broader relevance of preliminary questions if European law is to be a common project.

These reasons notwithstanding, adjudicating orders also signal disinterest and avoidance of difficult but necessary conversations about pressing societal problems in Europe. The Spanish consumer saga highlights this most unfortunate aspect (Micklitz, 2013). Alas, the responsibility for uniform interpretation and protection of individual rights does not neatly stop at the border of national political or socio-economic strife.

Finally, the Court can tailor procedural rules governing adjudicating orders to its needs. Minimal legislative involvement and democratic oversight into the process of legal reform make adjudicating orders an invisible but powerful tool structuring the content of European Union law. The community of courts might not endorse the terms of a new legal order.

Correspondence:

Daniel Naurin, University of Oslo - ARENA Centre for European Studies.
email: daniel.naurin@jus.uio.no

References

- Alexy, R. (2010) *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Oxford University Press).
- Alter, K.J. (2009) *The European Court's Political Power: Selected Essays* (Oxford: Oxford University Press).
- Baum, L. (2009) *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press).
- Becker, F. (2007) 'Application of Community Law by Member States' Public Authorities: Between Autonomy and Effectiveness'. *Common Market Law Review*, Vol. 44, No. 4, pp. 1035–56. <https://doi.org/10.54648/COLA2007200>
- Bengoetxea, J. (1992) *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Oxford University Press).
- Bobek, M. (2008) 'Learning to Talk: Preliminary Rulings, the Court of the New Member States and the Court of Justice'. *Common Market Law Review*, Vol. 45, No. 6, pp. 1611–43. <https://doi.org/10.54648/COLA2008115>
- Bobek, M. (2011) 'Why There is No Principle of "Procedural Autonomy" of the Member States'. In Micklitz, H. and de Witte, B. (eds) *The European Court of Justice and the Autonomy of the Member States* (Cambridge: Intersentia), pp. 305–24.
- Brekke, S.A., Fjelstul, J., Hermansen, S.S.L. and Naurin, D. (Forthcoming) 'The CJEU Database Platform: Decisions and Decision-Makers'. *Journal of Law and Courts*.
- Broberg, M. (2008) 'Acte Clair Revisited. Adapting the Acte Clair Criteria to the Demands of the Times'. *Common Market Law Review*, Vol. 45, No. 5, pp. 1383–97. <https://doi.org/10.54648/COLA2008095>

- Broberg, M. and Fenger, N. (2014) *Preliminary References to the European Court of Justice* (2nd edition) (Oxford: Oxford University Press).
- Burley, A.-M. and Mattli, W. (1993) 'Europe Before the Court: A Political Theory of Legal Integration'. *International Organization*, Vol. 47, pp. 41–76. <https://doi.org/10.1017/S0020818300004707>
- Carrubba, C.J. and Gabel, M.J. (2015) *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (Cambridge: Cambridge University Press).
- Court of Justice of the European Union (2001) The Future of the Judicial System of the European Union (Proposals and Reflections). In Dashwood, A. and Johnston, A. (eds). *The Future of the Judicial System of the European Union*. Hart.
- Court of Justice of the European Union (2000) 'Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 16 May 2000'. *Official Journal of the European Union*, L122/43 (May).
- Dashwood, A. and Johnston, A. (2001) *The Future of the Judicial System of the European Union* (Oxford: Hart).
- Delicostopoulos, J.S. (2003) 'Towards European Procedural Primacy in National Legal Systems'. *European Law Journal*, Vol. 9, No. 5, pp. 599–613.
- Domurath, I., Comparato, G. and Micklitz, H. (2014) 'The Over-Indebtedness of European Consumers—A View from Six Countries'. EUI Working Paper Law 2017/10.
- Dothan, S. (2014) *Reputation and Judicial Tactics: A Theory of National and International Courts* (New York: Cambridge University Press). <https://doi.org/10.1017/CBO9781139381260>
- Dyevre, A., Glavina, M. and Ovádek, M. (2021) 'Raising the Bar: The Development of Docket Control on the Court of Justice'. *Austrian Journal of Public Law*, Vol. 76, No. 2, p. 523–48.
- Dyevre, A., Lampach, N. and Glavina, M. (2022) 'Chilling or Learning? The Effect of Negative Feedback on Interjudicial Cooperation in Nonhierarchical Referral Regimes'. *Journal of Law and Courts*, Vol. 10, No. 1, pp. 87–112. <https://doi.org/10.1086/714704>
- Eliantonio, M. and Muir, E. (2019) 'The Principle of Effectiveness: Under Strain?' *Review of European Administrative Law*, Vol. 12, No. 2, pp. 255–65. <https://doi.org/10.7590/187479819X15840066091268>
- Epstein, L. and Knight, J. (1998) *The Choices Justices Make* (London: Sage).
- Epstein, L., Landes, W.M. and Posner, R.A. (2013) *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press).
- Ferejohn, J. and Weingast, B.R. (1992) 'A Positive Theory of Statutory Interpretation'. *International Review of Law and Economics*, Vol. 12, No. 2, pp. 263–79.
- Garoupa, N. and Ginsburg, T. (2011) 'Building Reputation in Constitutional Courts: Political and Judicial Audiences'. *Arizona Journal of International and Comparative Law*, Vol. 28, p. 539.
- Galetta, D.U. (2014) 'European Court of Justice and Preliminary Reference Procedure Today: National Judges, Please Behave!' In Becker, U., Hatje, A., Potacs, M. and Wunderlich, N. (eds) *Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Baden-Baden Nomos).
- Garoupa, N. and Ginsburg, T. (2008) 'Judicial Audiences and Reputation: Perspectives from Comparative Law'. *Columbia Journal of Transnational Law*, Vol. 47, p. 451.
- van Gestel, R. and de Poorter, J. (2019) *In the Court We Trust: Cooperation, Coordination and Collaboration Between the ECJ and Supreme Administrative Courts* (Cambridge University Press).
- Glavina, M. (2020) 'National Judges as European Union Judges? Evidence from Slovenia and Croatia'. Dissertation, KU Leuven. <https://lirias.kuleuven.be/2901341>
- Helfer, L. and Slaughter, A.-M. (1997) 'Toward a Theory of Effective Supranational Adjudication'. *Yale Law Journal*, Vol. 107, November, p. 119.

- Hermansen, S.S.L. (2020) 'Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union'. *Journal of European Public Policy*, Vol. 27, No. 8, pp. 1215–35. <https://doi.org/10.1080/13501763.2020.1714697>
- Kakouris, C.M. (1997) 'Do the Member States Possess Judicial Procedural "Autonomy"'. *Common Market Law Review*, Vol. 34, No. 6, pp. 1389–412.
- Komárek, J. (2007) 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure'. *European Law Review*, Vol. 32, No. 4, pp. 467–91.
- Larsson, O. and Naurin, D. (2016) 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU'. *International Organization*, Vol. 70, No. 2, pp. 377–408.
- Leijon, K. and Glavina, M. (2022) 'Why Passive? Exploring National Judges' Motives for Not Requesting Preliminary Rulings'. *Maastricht Journal of European and Comparative Law*, Vol. 29, No. 2, pp. 263–85.
- MacCormick, N. (2010) *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Reprint. Law, State, and Practical Reason) (Oxford: Oxford University Press).
- Mayoral, J.A. and Pérez, A.T. (2018) 'On Judicial Mobilization: Entrepreneurship for Policy Change at Times of Crisis'. *Journal of European Integration*, Vol. 40, No. 6, pp. 719–36.
- Micklitz, H. (2005) *The Politics of Judicial Co-Operation in the EU Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press). <https://doi.org/10.1017/CBO9780511495021>
- Micklitz, H. (2013) 'Mohamad Aziz – Sympathetic and Activist, but Did the Court Get It Wrong?' Florence, European Constitutional Law Network. http://www.ecln.net/tl_files/ECLN/Florence%202013%202013/Micklitz%20-%20The%20ECJ%20gets%20it%20wrong%20Aziz%20-%20The%20ECJ%20gets%20it%20wrong%20Aziz-30-11-14.pdf
- Pavone, T. (2022) *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press). <https://doi.org/10.1017/9781009076326>
- Pound, R. (1917) 'The Place of Procedure in Modern Law'. *Southwestern Law Review*, Vol. 1, No. 2, pp. 59–79.
- Rasmussen, H. (2000) 'Remedying the Crumbling EC Judicial System'. *Common Market Law Review*, Vol. 37, No. 5, pp. 1071–112.
- Sadl, U., Naurin, D., López-Zurita, L. and Brekke, S.A. (2020) 'That's an Order! The Orders of the CJEU and the Effect of Article 99 RoP on Judicial Cooperation'. iCourts Working Paper Series No. 219. <https://doi.org/10.2139/ssrn.3715514>
- Skouris, V. (2006) 'Self-conception, Challenges and Perspectives of the EU Courts'. In Pernice, I., Kokott, J. and Saunders, C. (eds) *The Future of the European Judicial System in a Comparative Perspective* (Baden-Baden: Nomos).
- Tridimas, T. (2003) 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure'. *Common Market Law Review*, Vol. 40, No. 1, pp. 9–50. <https://doi.org/10.54648/5115417>
- Wallerman, A. (2016) 'Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-imposed Limits on National Procedural Autonomy'. *Common Market Law Review*, Vol. 53, No. 2, pp. 339–60.
- Weiler, J.H.H. and Jacqué, J.P. (1990) 'On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference'. *Common Market Law Review*, Vol. 27, No. 2, pp. 185–207. <https://doi.org/10.54648/COLA1990014>
- Weiler, J.H.H. (1999) *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press).