

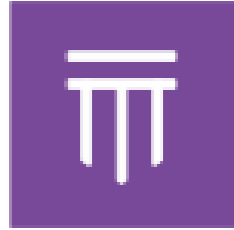
Brno, 29 September 2021

—
ECJ



JUSTIN
Judicial Studies Institute
Masaryk University

| Katarína Šipulová



Principle of conferral: TEU

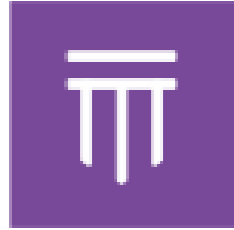
Article 4

- 1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.*

...

Article 5

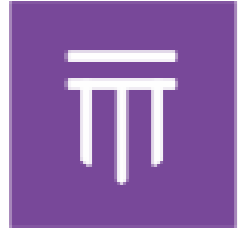
- 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
- 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*
- 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ...*
- 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*



ECJ's role

- *Review of all European law measures*
- *Review of the acts of member states*

- Infringement proceedings (**enforcing** the law)
- Actions for annulment (**annulling EU** legal acts)
- Actions for failure to act (**ensuring** the EU takes action)
- Preliminary rulings (**interpreting** the law)
- Actions for damages (**sanctioning EU institutions**)



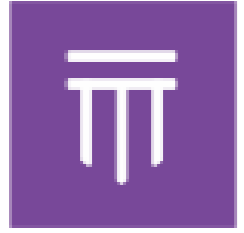
Infringement

Article 258 TFEU

- If the **Commission** considers that **a Member State** has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
- If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter **may bring the matter before the Court of Justice** of the European Union.

Article 259 TFEU

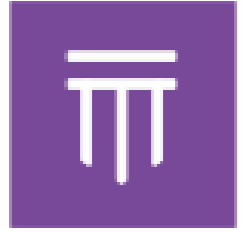
- **A Member State** which considers that **another Member State** has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.
- Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the **Commission**.
- The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
- If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.



Infringement

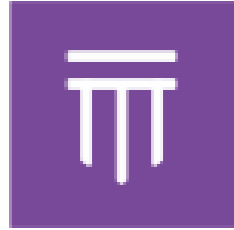
Article 260 TFEU

1. If the **Court of Justice of the European Union** finds that a **Member State** has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
2. If the **Commission** considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
 - If the Court finds that the Member State concerned has not complied with its judgment it may impose a **lump sum or penalty payment** on it.
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures **transposing a directive** adopted under a legislative procedure, it may, when it deems appropriate, **specify the amount of the lump sum or penalty payment to be paid by the Member State** concerned which it considers appropriate in the circumstances.
 - If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned **not exceeding the amount specified by the Commission**. The payment obligation shall take effect on the date set by the Court in its judgment.



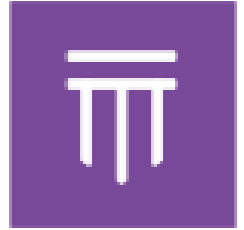
Infringement

- Most famous cases?



Infringement

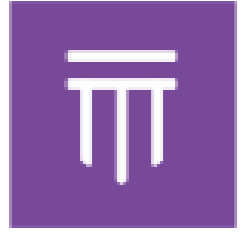
- Most famous cases?
- Article 258 (initiated by the Commission)
 - Poland & Hungary: violation of LGBTQI rights
 - Commission v Poland (C-791/19)
- Article 259 (initiated by the Member State)
 - Hungary v Slovak Republic (C-364/10)
 - Spain v United Kingdom (C-145/04)
 - Dutch Tweede Kamer resolution?
 - Commission v Poland (C-791/19) intervention of 5 member states
- Sanctions?



Annulment

Article 263 TFEU

- *The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.*
- *It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*
- *Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*
- *The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*



Annulment

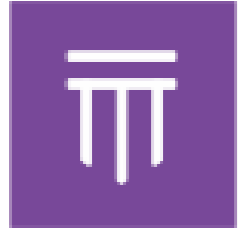
Article 264 TFEU

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

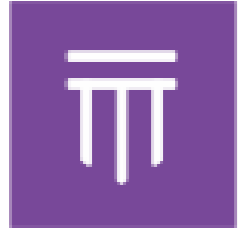
Article 266 TFEU

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.



Annulment

- i.e. Review of legality of
 - Legislative acts
 - Acts of Council, European Commission and ECB
 - Acts of European Parliament and European Council intended to produce legal effects vis-à-vis 3rd parties
- Applicants
 - Privileged (MS, EP, Council, Commission)
 - Semi-privileged (Court of Auditors, Committee of Regions)
 - Non-privileged (individuals)
- Grounds
 - Lack of competence
 - Infringement of procedural requirement (C-138/79 SA Roquette Frères v Council and C-139/79 Maizena GmbH v Council)
 - Infringement of Treaties or Charter
 - Infringement or RoL related to the application of Treaties
 - Misuse of powers
- Famous cases?



Action for Failure to Act

- *Article 265 TFEU*

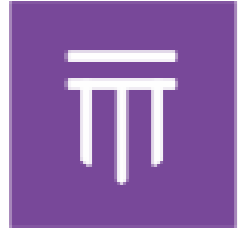
*Should the **European Parliament, the European Council, the Council, the Commission or the European Central Bank**, in infringement of the Treaties, fail to act, the **Member States and the other institutions of the Union** may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.*

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

...

Article 266 TFEU

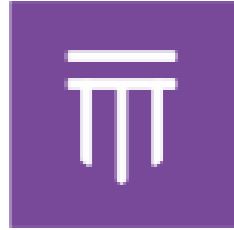
The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.



Preliminary Ruling Procedure

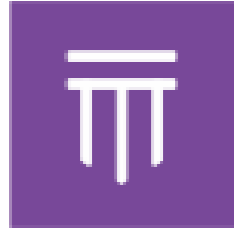
Article 267

- The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
 - (a) the interpretation of the Treaties;
 - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
- Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
- Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is **no judicial remedy** under national law, that court or tribunal **shall bring the matter before the Court**.
- If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the **minimum of delay**.



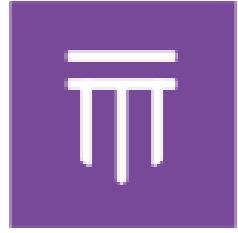
HR in the enlargement process

- *Matthews v Doego case*
- *‘Article 237 of the EEC Treaty must be interpreted as meaning that, in addition to the requirements which it lays down for the application and agreement, it permits the accession of a State to the European Economic Community only if that State is a European State; and its constitution guarantees, on the one hand the existence and continuance of a pluralistic democracy and, on the other hand, effective protection of human rights.’*
- *The Draft Treaty establishing the European Union 1984 (Spinnelli)*
- *1989 EP resolution Declaration of Fundamental Rights and Freedoms – one of EC tasks is to contribute to the propagation of democracy based on respect of FR*
- *Democratic reunification of Europe*



Copenhagen Criteria

- Definition of fundamental values and political conditions of membership
- Take over the definition of democratic character imposed by A237 EEC Treaty
 - To minimize the risk of backsliding
 - Democracy
 - Rule of law
 - Functioning of market economy
- 1998: transformed into Council Regulation EC No 622/98
- The very same year, democratic principles in Preamble and Article F TEU = new Grundnorm
- Amsterdam: transfer of Copenhagen criteria into Article 7
- And membership criteria: Article 49



ECJ and European Integration

- Conventional prototype of courts
 - Independent courts
 - Decide cases on the basis of preexisting rules
 - Adversary procedure, dichotomous ruling (i.e. winners x losers)
 - who are the parties?
- Appeal
- Triadic resolution of conflicts

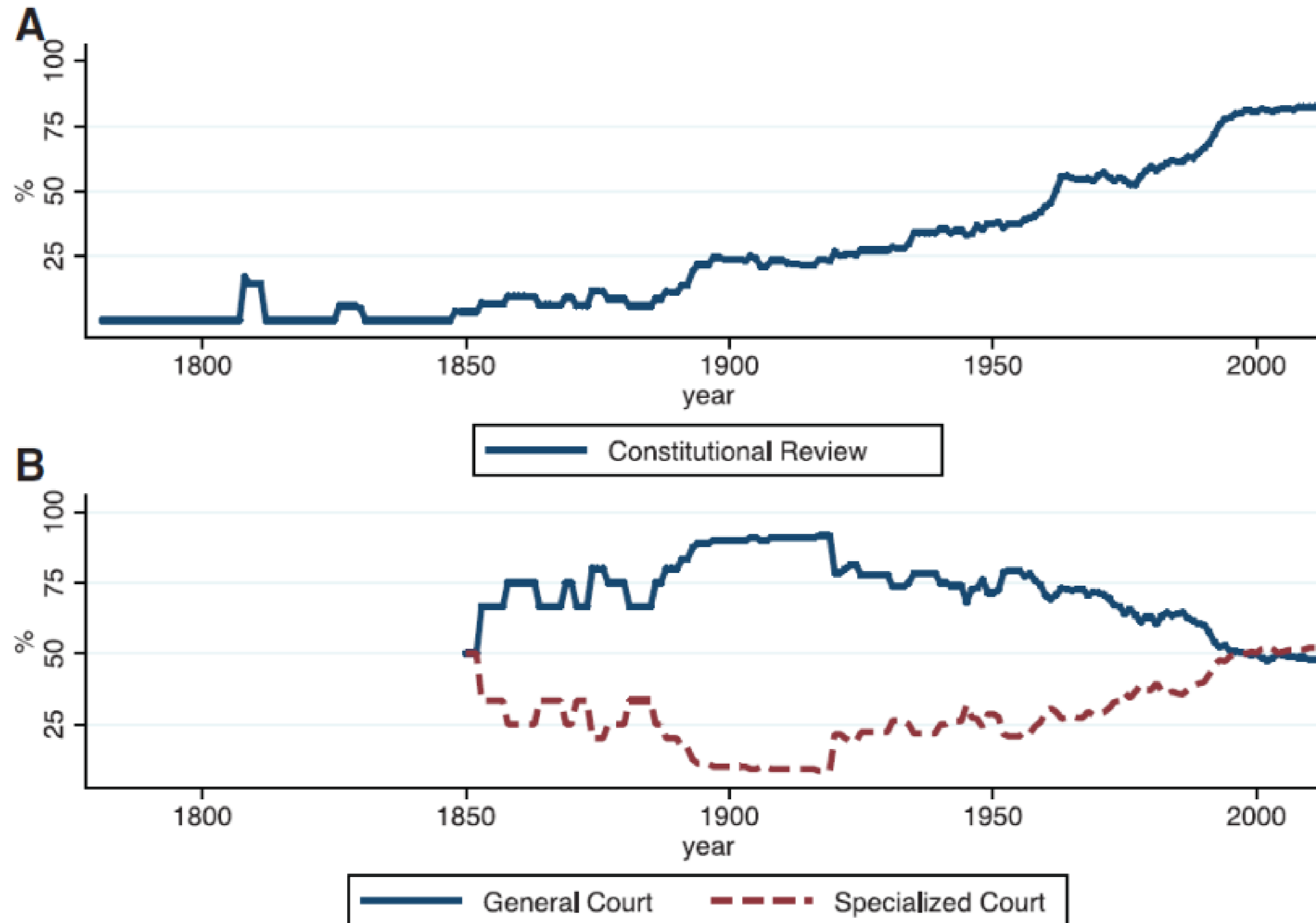
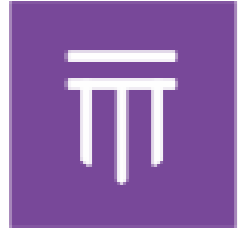
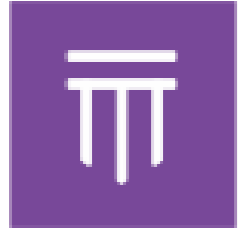


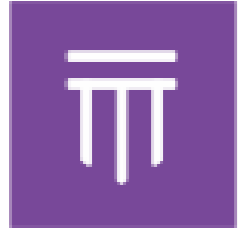
Figure 1. (A and B) The Spread of Constitutional Review. Note: Because there are so few cases of judicial review adoption prior to 1850, Panel B only starts in 1850, so that we do not show strong fluctuations that do not represent actual trends.



Why are states willing to have independent judicial review?

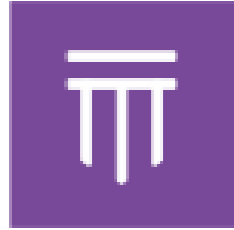
Theories

- Ideational
- Strategic
- Diffusion of norms



Questions about courts

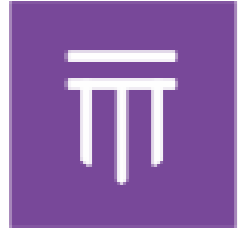
- What influences their position in a political system?
- What influences courts in their decisions?
- What influences judges in their decisions?



Questions about courts

- **Strategic approach** ([Epstein – Knight](#))
- **Behavioral approach** ([Gillman](#))

Gibson: “Judge’s decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.”

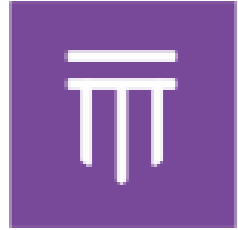


Critique of courts

- Bickel: non-majoritarian difficulty
- Bork: juristocracy
- Hirschl: judicialization of politics

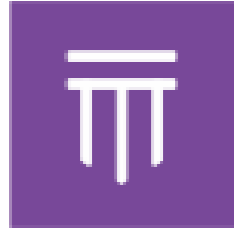
- Dahl: [Decision-making in a democracy](#)
- Ely: protection of minorities
- Checks and balances

- Dworkin: rights as trumps



EU Law

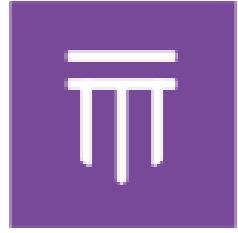
- Primary
 - Treaties (IL)
- Secondary
 - Directives
 - Regulations
 - Decisions
 - Opinions
- Tertiary
 - Recommendations, soft law



Court of Justice of the European Union

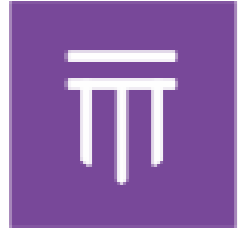
- Court of Justice
- General Court (Court of First Instance, CFI 1988)
- Civil Service Tribunal (2004, 2016 -> GC)

- Why not Supreme Court, High Court, etc.?



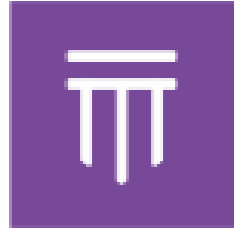
Court of Justice - 2019





Court of Justice - 2019



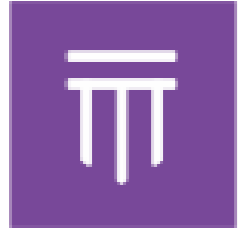


Court of Justice of the European Union

- [Eric Stein \(1981 AJIL\)](#)

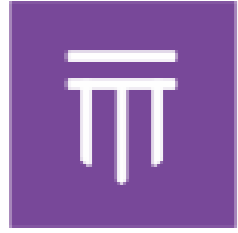
“Tucked away in the fairyland Duchy of Luxemburg and blessed until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.”





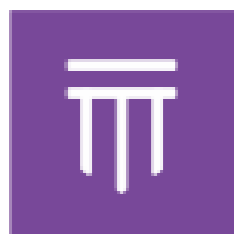
Composition CoJ

- Luxembourg
 - 27 judges
 - 11 advocate generals
 - Registrar
-
- Grand chamber
 - Chamber of 3
 - Chamber of 5
 - Full sitting

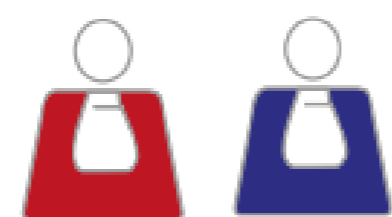


Core principles

- Direct effect
- (su)premacy
- State liability
- Fundamental rights



CJEU Annual Report 2020



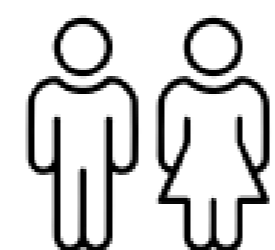
81
Judges



11
Advocates
General

from the

27
Member States



2 235
officials and
other staff



61% 39%
1 359 women
876 men



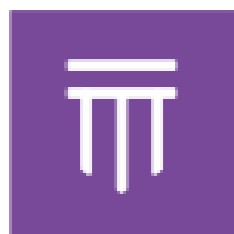
BUDGET
437
Million euros

The number of women in management positions within the Court is above the average for European institutions.

Women hold:

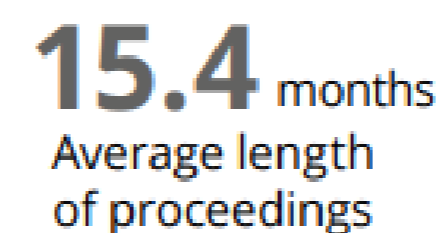
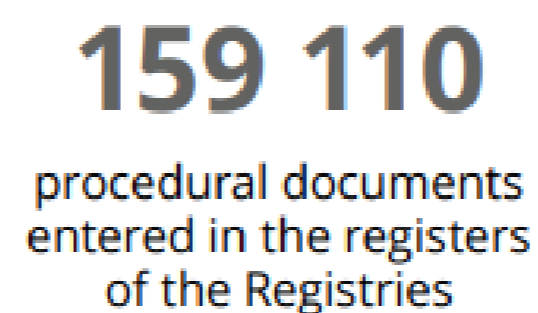
54% of administrator posts

41% of middle and senior management posts

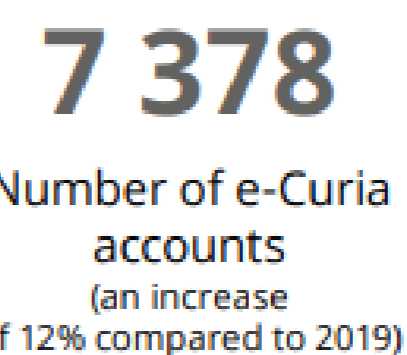


CJEU Annual Report 2020

The judicial year (all courts combined)



Percentage of
procedural documents
lodged via e-Curia



e-Curia is an application of the Court of Justice of the European Union enabling the representatives of the parties in cases brought before the Court of Justice and the General Court and national courts, in the context of requests for a preliminary ruling of the Court of Justice, to send and receive procedural documents to and from the Registries purely by electronic means.

[Watch the video on YouTube](#)





CJEU

As a multilingual judicial institution, the Court must be able to deal with a case irrespective of the official language of the European Union in which it has been brought. It then ensures that its case-law is disseminated in all those languages.



24
potential languages
of the case

552
possible language
combinations



601
lawyer-linguists
to translate written
documents

1 145 000
Workload
(number of pages to be translated)

1 170 000
Pages produced
by the legal translation service

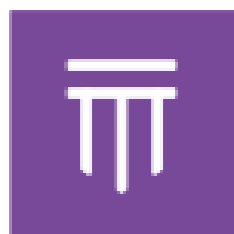
480 000
pages
Economy measures adopted
by the Courts to reduce translation requirements

70
interpreters for hearings
and meetings

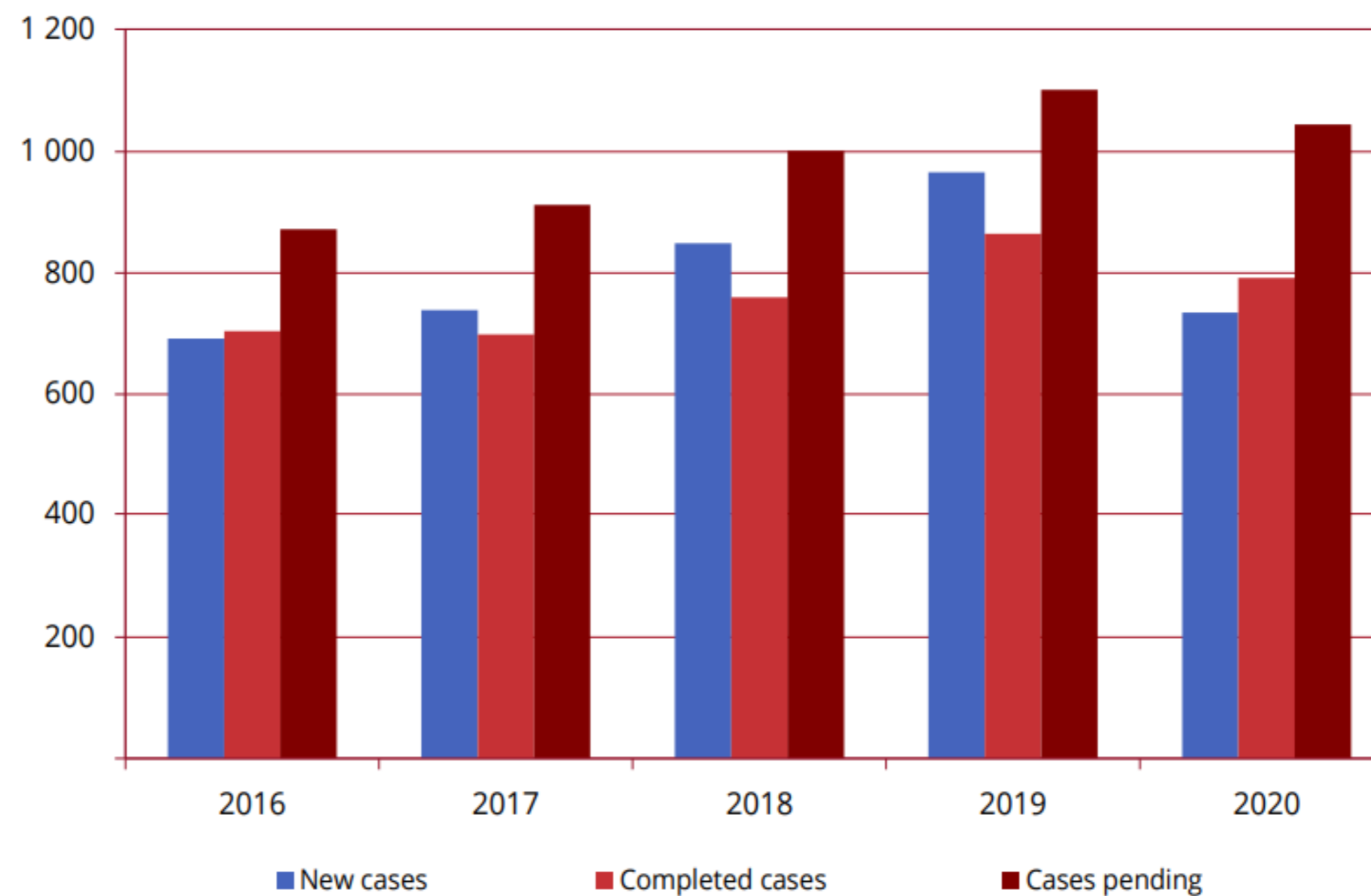
445
hearings and meetings with
simultaneous interpretation

At the Court, translations are produced in accordance with mandatory language arrangements covering all combinations of the 24 official languages of the European Union. The documents to be translated are all highly technical legal texts. That is why the Court's language service employs only **lawyer-linguists** who have completed their education in law and who have a thorough knowledge of at least two languages other than their mother tongue.

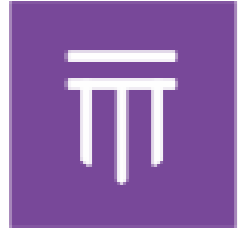




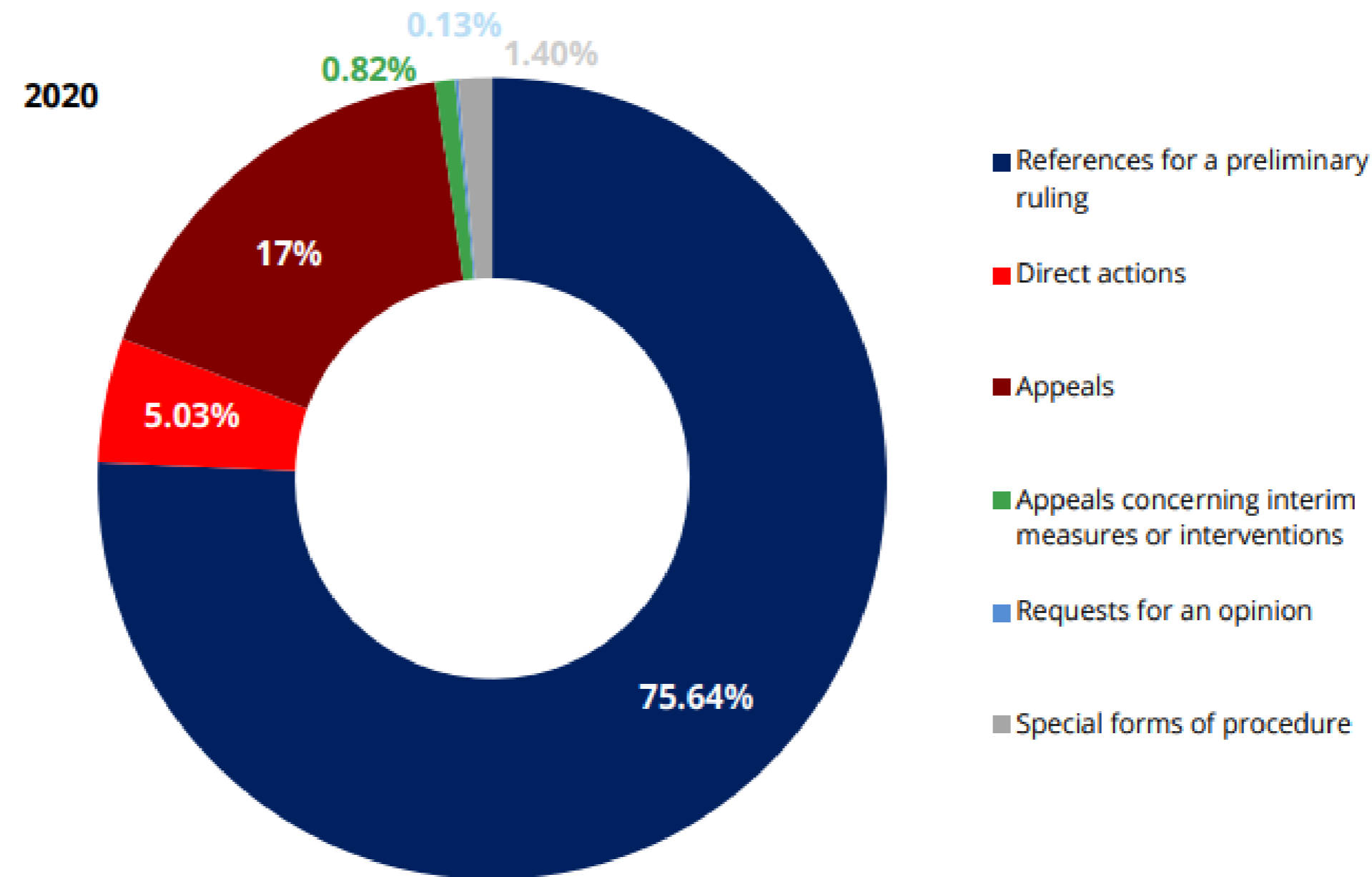
I. General activity of the Court of Justice – New cases, completed cases, cases pending (2016-2020)



	2016	2017	2018	2019	2020
New cases	692	739	849	966	735
Completed cases	704	699	760	865	792
Cases pending	872	912	1 001	1 102	1 045



II. New cases – Nature of proceedings (2016-2020)



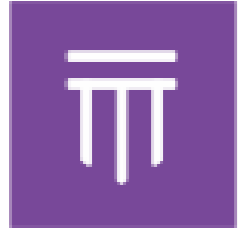
	2016	2017	2018	2019	2020
References for a preliminary ruling	470	533	568	641	556
Direct actions	35	46	63	41	37
Appeals	168	141	193	256	125
Appeals concerning interim measures or interventions	7	6	6	10	6
Requests for an opinion		1		1	1
Special forms of procedure ¹	12	12	19	17	10
Total	692	739	849	966	735
Applications for interim measures	3	3	6	6	3



CJEU

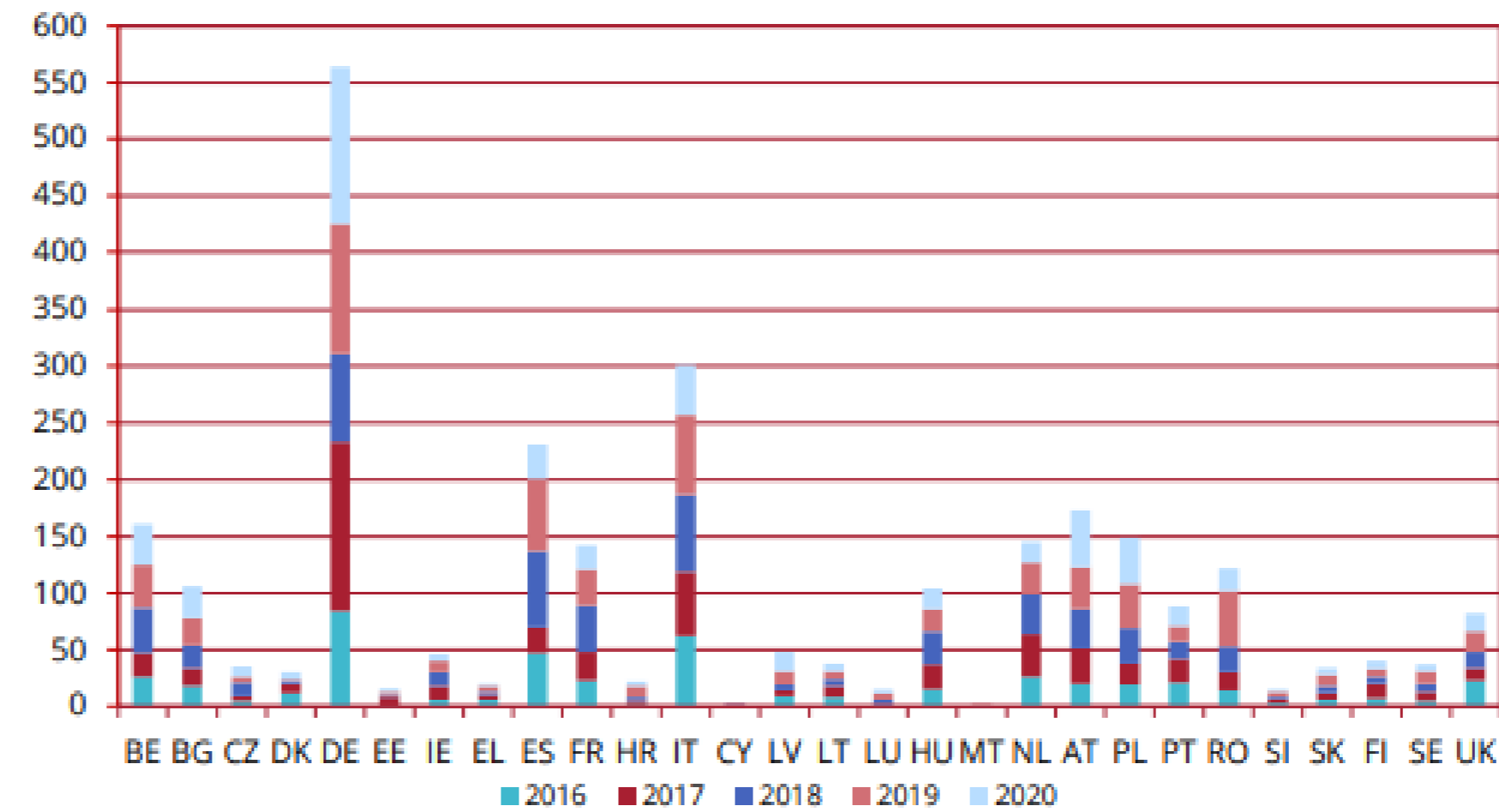
III. New cases – Subject matter of the action (2016-2020)

	2016	2017	2018	2019	2020
Access to documents	6	1	10	5	1
Accession of new States		1			
Agriculture	27	14	26	24	15
Approximation of laws	34	41	53	30	35
Arbitration clause		5	2	3	1
Area of freedom, security and justice	76	98	82	107	95
Citizenship of the Union	7	8	6	8	11
Commercial policy	20	8	5	10	8
Common fisheries policy	3	1	1	1	2
Common foreign and security policy	7	6	7	19	1
Company law	7	1	2	3	1
Competition	35	8	25	42	16
Consumer protection	23	36	41	72	37
Customs union and Common Customs Tariff	13	14	13	18	19
Economic and monetary policy	1	7	3	11	12
Economic, social and territorial cohesion		2	1	1	2
Education, vocational training, youth and sport		2			
Employment					1
Energy	3	2	12	6	7
Environment	30	40	50	47	23
External action by the European Union	4	3	4	4	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	3	6	6	8	7
Free movement of capital	4	12	9	6	9
Free movement of goods	3	6	4	8	5
Freedom of establishment	16	8	7	8	22
Freedom of movement for persons	28	16	19	40	14
Freedom to provide services	15	18	37	12	11
Industrial policy	3	6	4	7	1
Intellectual and industrial property	66	73	92	74	51
Judicial cooperation in civil matters					1
Law governing the institutions	22	26	34	38	27
Principles of EU law	11	12	29	33	29
Public health	1	1	4	6	4
Public procurement	19	23	28	27	13
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	2	1	3	
Research and technological development and space	3	3	1		
Social policy	33	43	46	41	32
Social security for migrant workers	10	7	14	2	6
State aid	39	21	26	59	17
Taxation	70	55	71	73	65
Transport	32	83	39	54	99
TFEU	676	719	814	910	704
Safety control			1		
Protection of the general public			1	1	
Euratom Treaty			2	1	
Principles of EU law			1	1	
EU Treaty			1	1	
Law governing the institutions			2		
Privileges and immunities	2		2	3	2
Procedure	13	12	12	16	10
Staff Regulations	1	8	16	35	19
Others	16	20	32	54	31
OVERALL TOTAL	692	739	849	966	735



CJEU

New cases – References for a preliminary ruling by Member State (2016-2020)



	2016	2017	2018	2019	2020	Total
Belgium	26	21	40	38	36	161
Bulgaria	18	16	20	24	28	106
Czech Republic	5	4	12	5	9	35
Denmark	12	8	3	1	6	30
Germany	84	149	78	114	139	564
Estonia	1	7	2	3	3	16
Ireland	6	12	12	10	5	45
Greece	6	4	3	5	2	20
Spain	47	23	67	64	30	231
France	23	25	41	32	21	142
Croatia	2	3	3	10	4	22
Italy	62	57	68	70	44	301
Cyprus			1	1		2
Latvia	9	5	5	12	17	48
Lithuania	8	10	6	7	7	38
Luxembourg	1	1	4	6	3	15
Hungary	15	22	29	20	18	104
Malta	1			1		2
Netherlands	26	38	35	28	18	145
Austria	20	31	35	37	50	173
Poland	19	19	31	39	41	149
Portugal	21	21	15	14	17	88
Romania	14	16	23	49	20	122
Slovenia	3	3	2	5	2	15
Slovakia	6	6	6	10	6	34
Finland	7	13	6	7	7	40
Sweden	5	8	7	11	6	37
United Kingdom	23	11	14	18	17	83
Total	470	533	568	641	556	2 768

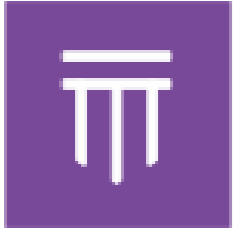
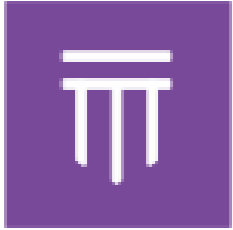
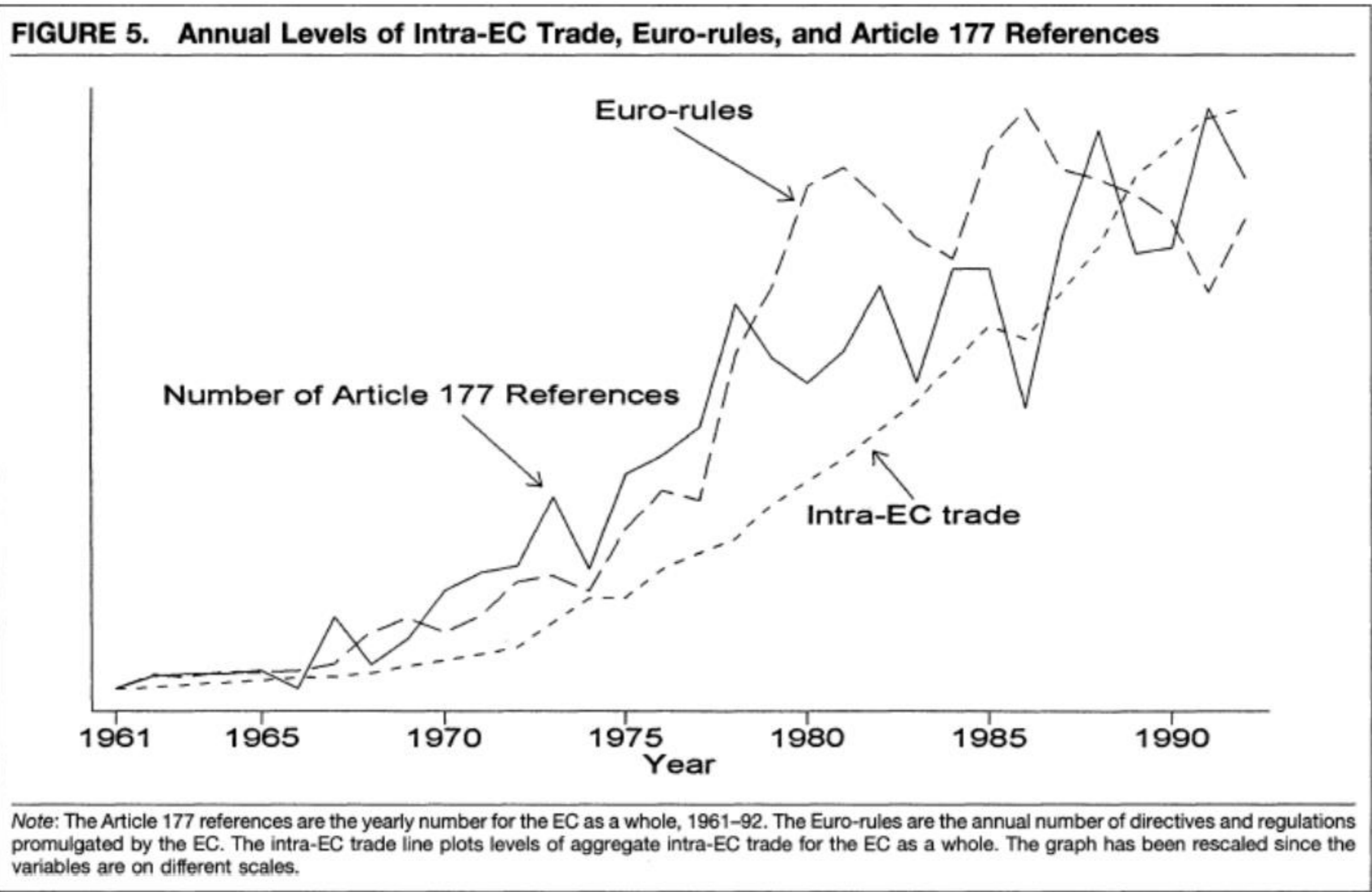


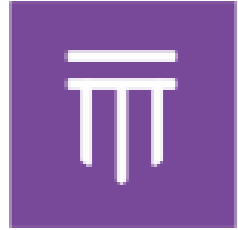
TABLE 1. *Average number of preliminary references by county and decade*

<i>Country</i>	<i>1970–79</i>	<i>1980–89</i>	<i>1990–98</i>
<i>France</i>	8.6	28.2	22.56
<i>Belgium</i>	7.8	14.7	18.22
<i>Netherlands</i>	10.8	18.5	17.33
<i>Germany</i>	27.5	34.6	47.44
<i>Italy</i>	8.4	12.4	34.11
<i>Luxembourg</i>	0.4	1.7	1.67
<i>Denmark</i>	0.86	2.5	4.89
<i>Ireland</i>	0.86	1.5	1.44
<i>Great Britain</i>	3.0	8.5	16.33
<i>Greece</i>	—	2.33	3.33
<i>Spain</i>	—	1.0	11.78
<i>Portugal</i>	—	0.2	2.78
<i>Finland</i>	—	—	2.5
<i>Sweden</i>	—	—	5.5
<i>Austria</i>	—	—	12.0

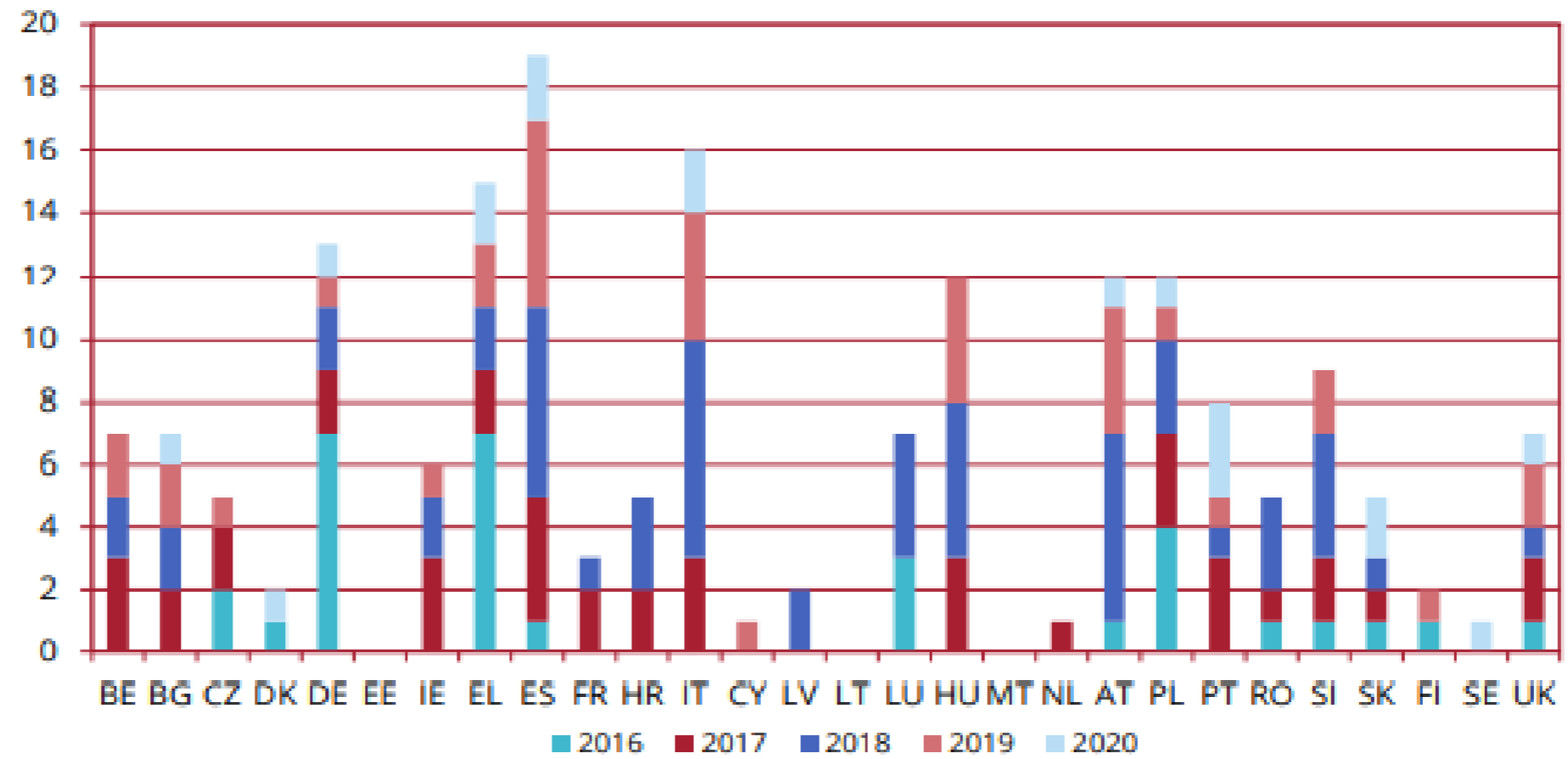


CJEU





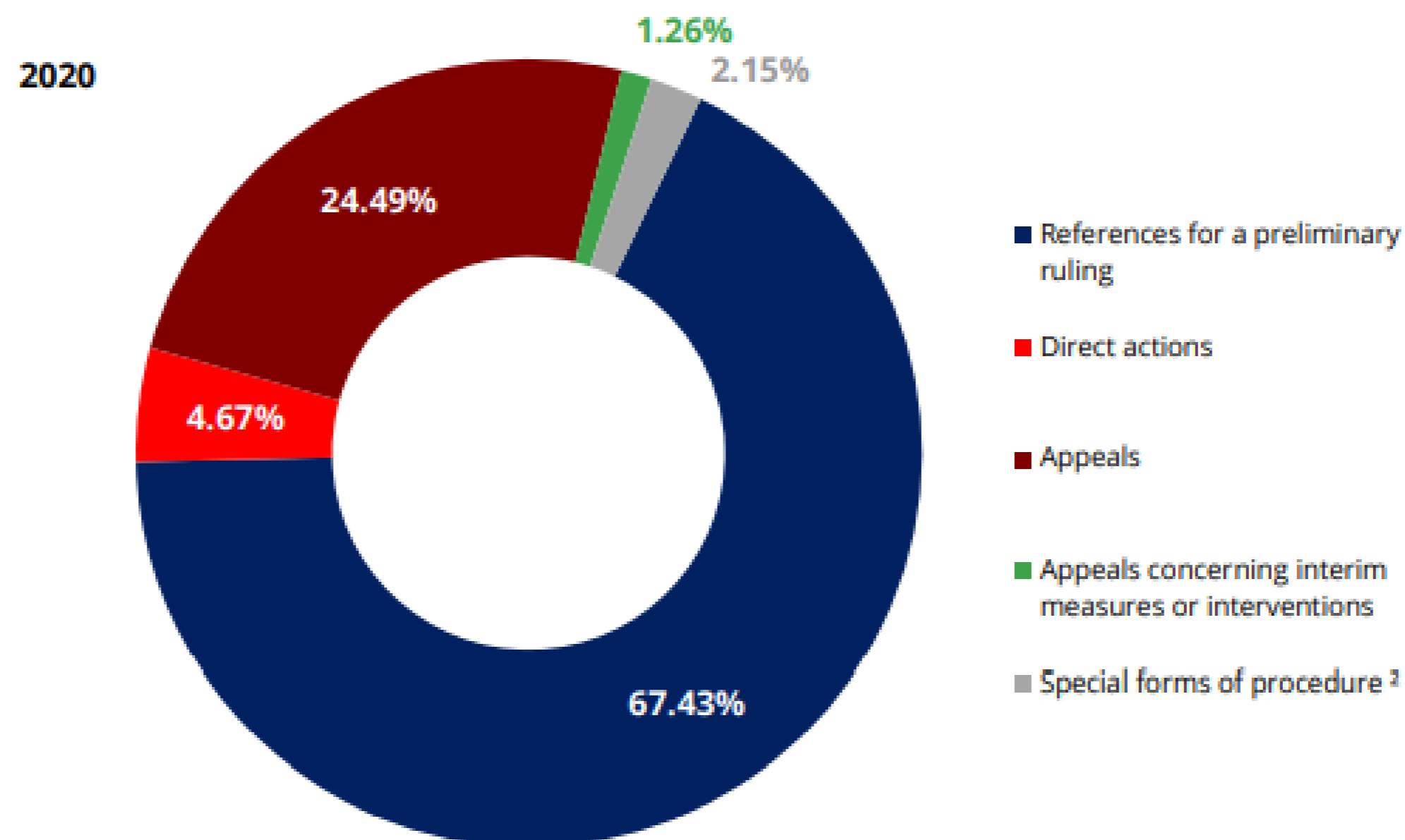
VI. New cases – Actions for failure of a Member State to fulfil its obligations (2016-2020)



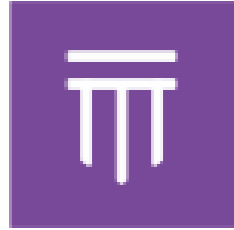
	2016	2017	2018	2019	2020	Total
Belgium		3	2	2		7
Bulgaria		2	2	2	1	7
Czech Republic	2	2		1		5
Denmark	1				1	2
Germany	7	2	2	1	1	13
Estonia						
Ireland		3	2	1		6
Greece	7	2	2	2	2	15
Spain	1	4	6	6	2	19
France		2	1			3
Croatia		2	3			5
Italy		3	7	4	2	16
Cyprus				1		1
Latvia			2			2
Lithuania						
Luxembourg	3		4			7
Hungary		3	5	4		12
Malta						
Netherlands		1				1
Austria	1		6	4	1	12
Poland	4	3	3	1	1	12
Portugal		3	1	1	3	8
Romania	1	1	3			5
Slovenia	1	2	4	2		9
Slovakia	1	1	1		2	5
Finland	1					2
Sweden					1	1
United Kingdom	1	2	1	2	1	7
Total	31	41	57	35	18	182



VII. Completed cases – Nature of proceedings (2016-2020) ¹

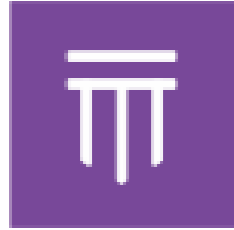


	2016	2017	2018	2019	2020
References for a preliminary ruling	453	447	520	601	534
Direct actions	49	37	60	42	37
Appeals	182	194	155	204	194
Appeals concerning interim measures or interventions	7	4	10	6	10
Requests for an opinion		3		1	
Special forms of procedure ²	13	14	15	11	17
Total	704	699	760	865	792



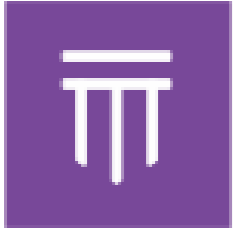
How to Read a Legal Opinion

- [Orin KERR: How to Read a Legal Opinion](#)
- **Caption** Costa v ENEL
- **Case Citation** European Court of Justice, Judgment of 15 July 1964, Cost a / E.N.E.L.
- **Author** The Court: A.M. Donner, President, Ch.L. Hammes and A. Trabucchi, Presidents of Chambers, L. Delvaux and R. Lecourt (rapporteur), judges; Advocate-general: K. Roemer; Registrar: A Van Houtte
- **Facts of the Case**
- **Law of the Case**
- **Separate (Concurring and/or Dissenting Opinions)**



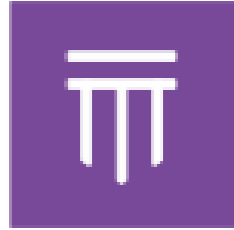
How to Read a Legal Opinion

- Facts
- Legal Arguments by the Parties
- Disposition (the action the court took – affirm, reverse, etc.)
- Reasoning
 - Source of the law
 - Method of reasoning (following statute, precedent, public policy ground, morality)
- Significance of the Opinion
- Final ruling
- Separate Opinion



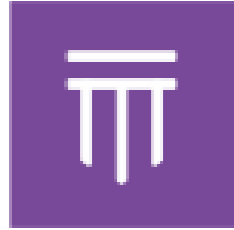
CJEU and domestic courts

- Possibility v obligation
 - Change of the case law
- Validity of EU acts
 - C-293/12 and C-594/12 Digital Rights Ireland
- Interpretation of the EU law by the court of the last instance
- *283/81 CILFIT – CILFIT criteria*
 - there is no obligation if
 - a) the interpretation of EU law has no connection to the result of the dispute
 - b) **acte clair doctrine**
 - c) **acte éclairé doctrine**
 - Herculean judge?
 - What about constitutional courts?



CJEU and domestic courts

- What preliminary rulings are courts referring?
- 1) Do provisions of EU law have direct effect?
 - *Van Gend en Loos*
- 2) How to interpret provisions of EU law?
- 3) Conformity of domestic legislation with EU law



CJEU and domestic courts

- Who refers and why?
 - Judicial attitudes and educational background
 - Patterns of transnational economic exchange
 - Public support for integration
 - Democratic aversion to judicial power
 - Legal culture
 - Economic clusters
 - Institutional differences among domestic courts
 - strategic behavior of lower courts

- “[O]ver the entire life of the Community, appellate courts have been more active than lower courts in referring questions to the European Court. If we consider the fact that there are many more lower than appellate courts, and that lower courts process the vast bulk of national litigation, this discrepancy is all the more striking. Because a core function of appellate judging is to resolve disputes involving legal interpretation and conflict of law, we would expect the appellate courts to be far more involved in the construction of the legal system than Alter imagines them to be.” (Stone Sweet and Brunell 1998: 90)



JUDICIAL STUDIES INSTITUTE

MASARYK UNIVERSITY BRNO

WWW.JUSTIN.LAW.MUNI.CZ