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CORE ANALYSIS

# Law and orders: the orders of the European Court of Justice as a window in the judicial process and institutional transformations

Urška Šadl[1]*, Lucía López Zurita[2], Stein Arne Brekke[1] and Daniel Naurin[3]

[1]European University Institute, Fiesole, Tuscany, Italy, [2]University of Copenhagen, Faculty of Law, Copenhagen, Denmark and [3]ARENA, Oslo and University of Gothenburg, Oslo, Norway
*Corresponding author. E-mail: urska.sadl@eui.eu

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**Abstract**
Orders are judicial decisions designed to shore up fair and timely resolution of disputes. As written, detailed, and factual documents, they are reliable markers of procedural steps and a unique source of information about the inner working of an institution. This article examines all published orders of the European Court of Justice, drawing lessons from their use. The analysis demonstrates that the pursuit of efficiency and uniform application blurs the lines between the administration and judging. First, it centralises the institution, expanding the duties of the Registry and amplifying the role of the Cabinet of the President of the Court. Second, it bureaucratises the interpretation and the uniform application of European Union law. These processes are common in judicial institutions with no power over their dockets. But the particular European response, authored by the Court, also suggests its reluctance to forfeit the interpretive monopoly.

**Keywords:** orders of the European Court of Justice; judicial decision-making; legal empirical analysis; institutional transformations; bureaucratisation

## 1. Introduction

> Administration of law without forms is doubtless as impracticable and undesirable as administration of justice without law. (R. Pound)[1]

If procedures are the engine room of a vessel, which is the judicial system, orders are an essential part of the mechanical equipment. Their function is to steer the machinery of justice fairly and efficiently. In a well-functioning system, the engines hum silently. In the European Union judicial system, the rumble from the national courts, and the troubling institutional reforms,[2] signal malfunction, calling for a maintenance check or repair.[3]

[1]R Pound, 'A Practical Program of Procedural Reform' 22 (1910) Green Bag 438, 78.

[2]The latest example is the German Constitutional Reaction to the Court's judgements in Weiss, eg 'Symposium: The PSPP Judgment of the Bundesverfassungsgericht' 19 (2021) *International Journal of Constitutional Law*. On the inter-institutional tensions see FT <https://www.ft.com/content/b3979694-b42b-38b4-b1a7-dddbdb2c1878> accessed 1 May 2022.

[3]The best example is the heated debate about the reform of the General Court due to unacceptable litigation delays and unmanageable backlog. See for instance E Guinchard and M-P Granger (eds), *The New EU Judiciary : An Analysis of Current Judicial Reforms* (Kluwer Law International 2018); A Alemanno and L Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' 54 (2017) Common Market Law Review 129.

This article uses the orders of the European Court of Justice (the Court) to zoom into the engine room of the European Union's judicial system. It proposes the first comprehensive taxonomy of orders, mapping over 5,000 documents. The taxonomy crosses the distance between the purely practical matters and the academic debates about adjudication, unpacking the hidden layers of the Court's working methods.

Orders are an unusual object of legal analysis, which explains why they have remained an untapped legal resource.[4] The Court's Rules of Procedure (RoP), the main legal source regulating orders, is formally an implementing act and rarely a matter of scholarly interest.[5] The RoP contain exhaustive – but not at all hard and fast – rules on the handling of cases. They appear prosaic, doctrinally uninteresting, and possibly odd to the outsiders and academics who have never argued a case in Luxembourg. The day-to-day administration of the RoP is the bread-and-butter of legal practitioners, inside baseball between legal counsel, government agents, avocats, barristers, the Court's staff, and its members. Detailed procedural instructions are not easily accessible.[6] The Internal Guidelines with comprehensive information about case management are not a public document.[7] Therefore, in the absence of a Common Code of Procedure, the RoP constitute the nervous system of European procedural law, operationalising fundamental principles, procedural guarantees, due process, and daily logistics.

At the outset, the analysis distinguishes between the orders on the merits of the dispute and procedural orders, based on their nature, substance, and institutional aspects.[8] The former include decisions that reply to preliminary questions of the referring courts, or dismiss appeals against the judgements of the General Court as unfounded. They are typically reasoned. Examples of the latter are a decision to grant legal aid, request additional documents, or dispense with a hearing. Procedural orders can be strictly procedural or procedural administrative. Strictly procedural orders ensure the correct application of procedural rights during the procedure (the right to intervene, submit written pleadings, evidence, or testimonials), and affect the substance of disputes only indirectly – by imposing a form on the substance of the dispute. Frequently, they are issued by the sitting judges. Administrative procedural orders principally relate to case-management, like the orders to reopen or stay the oral proceedings.[9] Even if the exact boundaries remain unclear,[10] the tasks are distinct and indispensable.[11] Finally, administrative orders typically involve the Court's Registry/central administration, such as the order to remove a case from the Registry.

Orders are inseparable from procedural economy, and as such naturally affect the length of the proceedings. The taxonomy considers this fact by distinguishing between the orders, which shorten

[4]For a few exceptions see: R Barents, *Remedies and Procedures before the EU Courts* (Kluwer Law International 2016); JA Usher, *European Court Practice* (Sweet & Maxwell 1983); A Dashwood and A Johnston, *The Future of the Judicial System of the European Union* (Hart 2001); KPE Lasok, *Lasok's European Court Practice and Procedure* (3rd edition, Bloomsbury Professional 2017).

[5]The exception might be the heated discussion on the reform of the General Court, which was reported in the press. See for instance the discussion of the doubling of judges in D Robinson, 'The Multiplying Judges of the ECJ' Financial Times (17 April 2015) <https://www.ft.com/content/4ce57462-8656-3fd3-973e-01b33c15dc6b> accessed 1 May 2022.

[6]The authors have the permission of the Court to use the Internal Guidelines in the analysis.

[7]Court of Justice, *'Guide pratique relative au traitement des affaires portées devant la Cour de Justice'* (Internal Guidelines 2019) (henceforth 'Guide Pratique').

[8]This is the most common distinction in procedural law, including European Union law. For the distinction procedure/substance, see generally LB Solum, 'Procedural Justice' 78 (2004) Southern California Law Review 143; Specifically on EU law see Barents, *Remedies and Procedures before the EU Courts* (n 4); Lasok, *Lasok's European Court Practice and Procedure* (n 4); K Lenaerts, 'Form and Substance in the Preliminary Reference Procedure' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration* (M Nijhoff 1994) 355–380.

[9]Lasok (n 4) 1126. A recent account of 'administrative work' at the Court in N Vogiatzis, 'The Administrative Functions of the Court of Justice of the European Union' 47 (2022) European Law Review 222.

[10]Ibid., 223–4.

[11]For example, and discussing the American case, see J Resnik, 'Managerial Judges' 96 (1982) Harvard Law Review 374; ML Schwartz, 'The Other Things That Courts Do' 28 (1980) UCLA Law Review 438.

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the proceedings and increase procedural economy (contributing to the efficient handling of cases), and orders, which extend the length of the proceedings (adding procedural steps). Finally, the taxonomy accounts for the implications of orders on deliberation – orders can either expand or reduce the deliberation phase. Orders with limited or no effect on the deliberation and the duration of the proceedings are deliberation neutral and classified accordingly.

To paint an accurate picture of the Court's practice, the article relies on the automated parsing of the texts of orders published from 1954 to 2020 and accompanying information (the so-called metadata).[12] Automation is necessary given the amount, the legal diversity of orders (42 different orders), and the Court's practice of referring to all documents indiscriminately as orders.[13] Finally, the RoP are detailed but adaptable to the case's complexity. Mapping is key to the understanding of the procedural practice.[14]

The analysis reveals the blurring of lines between administration and judging. This is reflected in a growing use of procedural administrative orders and orders on the merits, which delegate judicial tasks to the administrative support units manned by national legal experts. The coordination of the latter is in the hands of the Cabinet of the President of the Court, who is also involved in the decision-making process and the final decision on the merits. The trends coincide with manifold amendments of the RoP, intended to reduce procedural delays and tame the flood of preliminary references (that is, the quest for efficiency).

One should not demonise efficient distribution and division of tasks, especially when resources are scarce, the dockets are swelling, and procedural delays paralyse the judicial system. Moreover, there are good normative and pragmatic reasons for leaving case management to the Court, allowing it to respond to the challenges of its time swiftly and autonomously. Democratic legislators do not (nor should they) systematically meddle in the business of courts.

The examination of procedural reforms and proposed solutions to solve the problem of backlog, however, suggests that the Court has not been at the mercy of the dockets, nor a helpless bystander in the processes of institutional transformation. It actively co-designed and initiated reforms, prioritising effectiveness, imposing demands on its interlocutors – particularly on the referring courts – and guarding its interpretive monopoly. The Court consciously opted for limited deliberation and participation, insisting on delivering timely justice on its own terms – by entrenching its status and custody over European Union law.

These conclusions can contextualise the debates on the reasoning of the Court and its relationship with the referring national courts, inform the discussion about the effects of institutional expansion and enlargement, and provide a factual basis for policy proposals addressing overwhelmed judicial institutions and procedural delays.

The argument develops in five sections. Section 2 situates the orders of the Court in debates about the European justice system and adjudication, and introduces the Court's RoP. Section 3 draws on these debates when presenting a taxonomy of orders. Section 4 surveys the Court's use of orders, identifying broader patterns and trends. Section 5 teases out the rationale, which motivates the use of orders, and two implications for the institution and the judicial process: centralisation and bureaucratisation. Section 6 summarises the argument and concludes.

[12]The documents were collected from the Court's official portal Curia. J Fjelstul and others, 'The CJEU Database Platform: Decisions and Decision-Makers', forthcoming (on file with the authors) <https://dataverse.harvard.edu/citation?persistentId=doi:10.7910/DVN/HURMWM>.

[13]Rules of Procedure of the Court of Justice, Official Journal L 265, 29.9.2012. A table with all orders is added to Section 3 (Table 1). The consolidated version of the RoP is available on the Court's website: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf> accessed 1 May 2022. Unless otherwise indicated, all references to RoP are to this version.

[14]See E Adler and V Pouliot (eds), *International Practices* (Cambridge University Press 2011); N Stappert, 'Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts' 12 (2020) International Theory 33.

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## 2. Efficient form and uniform law: The values of the European judicial process

On the one hand, orders might strike one as obscure legal sources of limited doctrinal significance. They are official documents, tersely accounting for minutiae and decisive procedural turns. The overly factual and technical RoP, which provide the immediate legal basis and the framework for orders, are the domain of insiders. On the other hand, the same features that make orders appear mundane – their factuality and detail – make them the most reliable markers of the judicial process. From this perspective, orders become an ideal ground for examining the gap between the stated principles and aspirations of a legal order (like a complete system of judicial protection).

### *A. The subtle constraints and liberties of the Court in a mature system of judicial protection*[15]

The Court's contribution to the making of the European Union legal system is undoubtedly significant:[16] The Court carved out the fundamental principles from the silent Treaty Articles, and carried the integration process forward when the political forces were pulling it apart.[17] Literature has examined the factors underwriting the story of effective supranational adjudication.[18] The present analysis complements the existing literature by prying open the procedural forms of the Court's decision-making process, and the ways in which these forms restrain or facilitate the pursuit of the values of the European legal system.[19]

The Treaties impose few explicit constraints on the Court regarding procedural form.[20] Institutionally, the Court has the autonomy to self-organise and self-manage its working process. With porous boundaries, limited input, and scant control of other institutions, including the European legislator, it is free to adopt and apply the rules. The situation is not particular to the Court but common to judicial institutions in democratic societies. The distinctiveness of the European administration of justice is the asymmetry between the substance and the form, that is, the legal nature of procedural rules and the process for their amendment.

A subtler limit to the Court's procedural freedom and autonomy is the requirement of uniformity, a practical necessity of a supranational legal system. Formal rules (like the RoP) can support and assure uniformity by giving the Court an *interpretive monopoly* (like the exclusive jurisdiction in the preliminary reference procedure in Article 267 TFEU)[21] and a *broad jurisdiction* in appeals. In practice, however, uniformity hinges on (1) the goodwill of national courts to submit preliminary references and adhere to the answers and (2) the compliance of Member State governments with the rulings rendered in infringement proceedings.[22]

[15]K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' 44 (2007) Common Market Law Reports 1625; K Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy European Union Law Issue: Essay' 36 (2013) Fordham International Law Journal 1302; M Krajewski, 'The Many-Faced Court: The Value of Participation in Annulment Proceedings' 15 (2019) European Constitutional Law Review 220.

[16]K Alter, *Establishing the Supremacy of European Law : The Making of an International Rule of Law in Europe* (Oxford University Press 2001); SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018); H Rasmussen, *On Law and Policy in the European Court of Justice : A Comparative Study in Judicial Policymaking* (M Nijhoff 1986).

[17]FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' 8 (2010) Socio-Economic Review 211.

[18]K Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009); LR Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107 (1997) Yale Law Journal 119.

[19]LL Zurita, *The Survival of the Fitted? Individual Protection in the European Court of Justice's Preliminary Ruling Procedure* (European University Institute 2021).

[20]D Edward, 'How the Court of Justice Works' 20 (1995) European Law Review 539; S O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart 2002).

[21]Article 256(1) Treaty on the Functioning of the European Union (TFEU) would in principle allow the General Court to hear preliminary references, but it has never been developed in the Statute of the Court, as the Article itself requires for it to be operative.

[22]J Komárek, 'In the Court(s) We Trust? On The Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' 32 (2007) European Law Review 467.

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The Court has won the loyalty of national courts and secured compliance with its rulings.[23] On the flip side, the trust of national courts progressively translated into a stream of preliminary references. The symbiotic relationship with the Commission and the exclusive jurisdiction in appeals further added to the backlog. As the system matured and evolved, the potential risks of incoherence grew. This is again a common development in judicial institutions with no power to select cases.[24]

The Court's working process first became a topic of public debate when procedural delays reached the limits of tolerable (it took over two years for the Court to reply to preliminary references), threatening to erode the Court's legitimacy and authority.[25] Given the pile of pending cases on open display, no one questioned the nature and the gravity of the problem. The Court and the judges had recurrently acknowledged and expressed concerns over their workload and the length of the proceedings in extra-judicial writings, Annual Reports, and explanatory notes accompanying formal proposals for the amendments of the RoP. Scholars concluded that the Court had fallen victim to its own success.[26] A comprehensive reform, featuring legislative intervention to increase the output and reduce delays, seemed inevitable.[27]

The proposed solutions had a mature legal order in mind,[28] meriting a flexible rapport with the national courts, and a constructive judicial dialogue on topics of broad European relevance.[29] The reforms assumed that national judges had had enough time to internalise the new legal order and the terms of its interpretation and application. The Court contributed to this impression with the *CILFIT* criteria, outlining the duty of the highest national courts to submit preliminary references.[30] Among other adjustments, the RoP introduced the orders on the merits (Section 3) to reply

[23]JHH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' 26 (1994) Comparative Political Studies 510; Alter (n 18); Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' 3 (1997) European Law Journal 165; G De Búrca and JHH Weiler, *The European Court of Justice* (Oxford University Press, 2001).

[24]The problem of backlog at the ECtHR is particularly telling. MR Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' 9 (2018) Journal of International Dispute Settlement 199; L Wildhaber, 'Rethinking the European Court of Human Rights' in J Christoffersen and MR Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011).

[25]A Arnull, 'Refurbishing the Judicial Architecture of the European Community' 43 (1994) International & Comparative Law Quarterly 296.

[26]European justice is 'malade de son succès' in R Mehdi, *L'avenir de La Justice Communautaire : Enjeux et Perspectives* (Documentation française 1999); See also H Rasmussen, 'Remedying the Crumbling EC Judicial System' 37 (2000) Common Market Law Review 1071; A recent, more nuanced view in H de Waele, 'Re-Appraising Success and Failure in the Life of the European Court of Justice' 23 (2021) Cambridge Yearbook of European Legal Studies 54.

[27]Scholars have chimed in with new or criticised the adopted solutions. To cite only a few, see Rasmussen, 'Remedying the Crumbling EC Judicial System' (n 26); JHH Weiler and JP Jacqué, 'On the Road to European Union-A New Judicial Architecture: An Agenda for the Intergovernmental Conference' 27 (1990) Common Market Law Review 185–207; A Alemanno and O Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' 51 (2014) Common Market Law Review 97; Guinchard and Granger (n 3).

[28]Jacobs argued that the maturity of the EU legal order should mean that courts should 'consider their reasons to refer' and proposed a green light system that would reset the preliminary reference procedure. See G de Búrca, 'The Mutual Judicial Influence of National Courts and the European Court of Justice through the Preliminary Rulings Mechanism: Evidence from the United Kingdom' in E Fisher, J King and A Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 107–126. A more detailed discussion of the green light system in J Bajwa, 'Grow Up!: Rethinking the Preliminary Reference Procedure from the Perspective of Maturity' 6 (2020) LSE Law Review 65.

[29]The same position was maintained recently, also in relation to the maturing of the EU legal order, by AG Bobek in his Opinion in CIM (Case C-561/19, *Consorzio Italian Management*, ECLI:EU:C:2021:291), particularly at paragraph 127: 'Finally, maturation of a judicial system also implies a maturing of its constituent parts. Today, national courts are much more familiar with EU law in general and with the preliminary rulings procedure in particular.'

[30]T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' 40 (2003) Common Market Law Review 9, 12; a much more critical look on CILFIT in P Allott, 'Preliminary Rulings – Another Infant Disease' 25 (2000) European Law Review 538; H Rasmussen, 'The European Court's Acte Clair Strategy in CILFIT' 9 (1984) European Law Review 475.

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to repetitive preliminary references. Even if the solutions sought to balance the quality of deliberation with the quantity of the Court's output, their main aim was to increase the latter without surrendering too much of the former.

Scholars occasionally wondered whether the reforms struck the right balance, highlighting their undesirable side effects: decreased deliberation and poorer quality of legal reasoning.[31] Both negatively affect the persuasiveness and the acceptability of the Court's pronouncements (legitimacy),[32] already aggravated by the opaqueness of its decision-making process.[33]

Finally, the institutional side-effects of a mature and overburdened justice system include the transformation of the office of the President of the Court, the bureaucratisation of the Court and the rising status of administrative (non-judicial) staff and secretariats.[34] The Registry, for instance, becomes central.[35] Coordination typically streamlines the process and increases the output while securing the continuity of the practice. Even if its effect on the law is elusive and unpredictable, it is certainly thinkable (and troubling) that the streamlining of the form in the RoP streamlines (impoverishes) argumentation.[36]

### B. The RoP as a moving target

The main legal framework of orders are the RoP operationalising broad Treaty requirements[37] of judicial protection and remedies.[38] The Treaty and the Statute have not changed the organisation of procedures significantly since 1959. Major changes include the Treaty of Amsterdam (1999), which gave the Court the right to propose amendments to the RoP, and the Treaty of Nice (2003), which additionally simplified this process. Under the current legal regime, the Council approves the Court's proposals with a qualified majority. The Treaty of Lisbon added Article 255 TFEU, establishing an expert panel to assess the suitability of the candidates to the Court. The Statute introduced the office of the Vice President and reformed the Grand Chamber in 2012.[39]

The current RoP from 2012 are organised in eight Titles,[40] further divided in Chapters. The Titles lay out the internal organisation of the Court and successive procedural stages. Individual rules apply to all procedures, like the rights and obligations of agents, advisers, and lawyers. Other Titles govern only procedures with direct actions or the review of decisions of the General Court. The 2012 RoP include (for the first time) a separate Title for the preliminary reference procedure.[41]

[31]For all, see Rasmussen, 'Remedying the Crumbling EC Judicial System' (n 26).

[32]The legal reasoning of the Court (and its shortcomings) are a recurrent topic. For a comprehensive view, see Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012); Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013).

[33]Alemanno and Stefan (n 27).

[34]M Cohen, 'Judges or Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 58–80.

[35]Not unique to the Court see Ibid; CD Creamer and Z Godzimirska, 'Trust in the Court: The Role of the Registry of the European Court of Human Rights' 30 (2019) European Journal of International Law 665.

[36]K McAuliffe, 'Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union' 24 (2011) International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique 97; L Azoulai, 'La Fabrication de La Jurisprudence Communautaire' in P Mbongo and A Vauchez (eds), *Dans la fabrique du droit européen : scènes, acteurs et publics de la Cour de justice des communautés européennes* (Bruylant 2009) 153–169.

[37]Protocol (no 3) on the Statute of the Court of Justice of The European Union.

[38]KPE Lasok, *Lasok's The European Court of Justice: Practice and Procedure* (Butterworths: Butterworth Legal Publishers 1984).

[39]The amendment in 2012, initiated by the Court, introduced the office of the Vice President and reformed the Grand Chamber. The Court also proposed to increase the number of judges of the General Court to solve the problem of lengthy delays. The latter decision was postponed at the time.

[40]The RoP were amended in 2019.

[41]G Koutsoukou, 'The Court of Justice's New Statute and Rules of Procedure' in E Guinchard and M-P Granger (eds), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Kluwer Law International BV 2018) 308–324.

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The Chapters of the Titles detail the handling of narrower procedural or organisational matters, like the appointment of the members of the Court (judges and Advocates General), the allocation of costs, the assignment of cases, or legal aid. The provisions on orders are scattered across several Titles and Chapters and should be interpreted in that narrower legal framework. Similarly, as the Articles of the RoP, some Orders apply to all procedures, like the President's order to stay the proceedings. Others are relevant to specific procedures, like the order to declare an appeal against the decision of the General Court manifestly unfounded.

As a formally binding source of law, the RoP are an implementing act. In practice they assume the role of a procedural code or legislation, regulating the procedures, the rights of the parties and imposing time limits. Just like other implementing acts, the RoP regulate the judicial calendar and the means of official communication, but skip details on case processing. Those are relegated to the (unpublished) Internal Guidelines. The rules on case assignment and the composition of Chambers are not included in the RoP.

As mentioned earlier, the Court can propose amendments to the RoP, subject only to the Council's approval by qualified majority. In most Member States, amendments of procedural codes require parliamentary intervention and debate. The contrast is stark. The Treaty allows the Court to de facto mend any issue it considers troubling: the growing caseload, inefficiency, or repetitive questions.

The Court has made effective use of the so-called right of legislative initiative in a positive sense – to introduce amendments – and in a negative sense – to resist reforms. It has always resisted alternatives that could have reduced its control or status.

To illustrate, at the time of the establishment of the Court of First Instance (now the General Court) in 1989,[42] the Court immediately proposed an amendment to the RoP to declare an appeal manifestly well founded[43] and unfounded.[44] In 2019, the RoP introduced orders to process the appeals against the judgements of the General Court concerning the decisions of selected independent boards of appeal (BoA).[45,46] The Court can issue those orders *unless* the appeal 'raises an issue that is significant with respect to the unity, consistency or development of Union law' (Article 170 bis RoP), that is, by default.[47] So far, the Court considered that only one of 126 appeals raised a significant legal issue.[48]

The Court's resistance to reforms can be illustrated by its reactions to the proposals, debated especially in the period leading to the 2004 enlargement.[49] Those included a filtering mechanism for preliminary references, a possibility to limit the references to a handful of national courts, and

[42]T Millett, 'The New European Court of First Instance' 38 (1989) The International and Comparative Law Quarterly 811; Some literature suggests that it has been successful in increasing efficiency TY-C Yeung, M Ovádek, and N Lampach, 'Time Efficiency as a Measure of Court Performance: Evidence from the Court of Justice of the European Union' 53 (2022) European Journal of Law and Economics 209.

[43]Used only three times Cases C-58/19 P, *Mykola Yanovych Azarov v Council of the European Union*, ECLI:EU:C:2019:890, C-663/20 P, *SRB v Hypo Vorarlberg Bank*, ECLI:EU:C:2022:162, and C-664/20 P, *SRB v Portigon and Commission*, ECLI:EU:C:2022:161.

[44]Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 7 June 1989, Official Journal L 241/1.

[45]The relevant Boards of Appeals are established in Article 58a Statute of the Court: The European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency. It is unclear why only decisions of those BoA were included.

[46]Article 170 bis RoP.

[47]Article 58a Statute.

[48]Case C-382/21P, *EUIPO v The KaiKai Company Jaeger Wichmann*, ECLI:EU:C:2021:1050. The data is provided by the Court in Court of Justice of the European Union, 'Report Provided for under Article 3(1) of Regulation 2015/2422' (2020) 40 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/en_2018-01-12_08-43-52_183.pdf> accessed 1 May 2022. Analysis in M Krajewski, *The Relative Authority of Judicial and Extra-Judicial Review: The EU Courts, the Boards of Appeal, the Ombudsman* (Hart Publishing 2021).

[49]An overview in A Dashwood and AC Johnston, *The Future of the Judicial System of the European Union* (Hart 2001); Rasmussen, 'Remedying the Crumbling EC Judicial System' (n 26).

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the option of shared responsibility and competence for preliminary rulings between the Court and the (then) Court of First Instance.[50] The Court strongly opposed the establishment of a filtering mechanism in the Report on Judicial Reform,[51] citing its possible detrimental impact on the relationship with national courts, and the adverse consequences for the uniformity of European Union law. The Working Party agreed,[52] echoing those arguments. All major changes were rejected. Oddly, the Court and the Working Party were not at all concerned with the effects of marginal procedural modifications on judicial cooperation and uniformity.

## 3. A taxonomy of orders

Orders are a unique window in the judicial process, an ideal to explore the long-term implications of the Court's choices, notably efficiency. Efficiency is a value, propelled by workload and sustained by external pressure. A comprehensive classification is the initial step to articulate the subtle trade-offs underlying its pursuit.

Most existing accounts of orders follow the characteristics of orders in the RoP,[53] or analyse only selected types of orders in a narrower context, such as orders on the merits issued in reply to the preliminary questions in the preliminary reference procedure.[54]

This Section proposes the first comprehensive taxonomy of orders of the Court of Justice or any other international court.[55] First, it systematically maps the orders of the Court, identifying 42 legally distinct orders. Then, it describes each order with a reference to the RoP and its formal characteristics (like the signatory), adding analytical categories with information about the nature and the implications.

The mapping criteria are based on the reading of the RoP, numerous decisions containing orders, and scholarly literature on judicial protection and procedural law.[56] They indicate the division of labor in the institution, the decision-making power, the time spent to issue orders, and the degree to which the Court operationalises (rationalises) its workflow. The taxonomy incorporates aspects that are often discussed, and arguably of considerable concern to the Court, like procedural economy, judicial dialogue, or the uniform application of European Union law.

In this sense, the taxonomy approximates the debates about the price of efficiency, especially decreased deliberation, and reduced quality of legal reasoning. Following recent literature, which highlights the rising influence of the President of the Court, the taxonomy also considers the signatory of the order as specified in the RoP, and the probable implication of the use of each order on the division of labor within the institution (centralisation or the balance of power).[57]

Table 1 provides an overview of orders following these criteria. The first two columns from the left indicate the name of the order and the legal basis as specified in the RoP. The third column from the left shows the initial distinction based on the nature of the order: order on the merits or a

[50]See for instance Rasmussen, 'Remedying the Crumbling EC Judicial System' (n 26); Weiler and Jacqué, (n 27); Komárek (n 22); Dashwood and Johnston (n 49).

[51]Ibid.

[52]Report of the Working Party in Ibid. Rasmussen writes that the Report of the Court is a 'non-paper' in Rasmussen 'Remedying the Crumbling EC Judicial System' (n 26) 1086.

[53]Barents (n 4).

[54]M Broberg, 'Acte Clair Revisited. Adapting the Acte Clair Criteria to the Demands of the Times' 45 (2008) *Common Market Law Review* 1383; M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (Second edition, Oxford University Press 2014).

[55]For other classifications see Barents (n 4); Lasok (n 4).

[56]Ibid.; Barents, *Remedies and Procedures before the EU Courts* (n 4); HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union.* (6th edition, Kluwer Law International 2001).

[57]SSL Hermansen, 'Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union' 27 (2020) Journal of European Public Policy 1127; C Krenn, 'Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success' 19 (2018) German Law Journal 2007; J Frankenreiter, 'Informal Judicial Hierarchies: Case Assignment and Chamber Composition at the European Court of Justice'. <https://papers.ssrn.com/abstract=2778807> accessed 1 May 2022.

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procedural order. Following the analysis of the RoP, Table 1 records the formal characteristics of orders, including the signatory of the order (according to the RoP and in practice), and the motivation. Additionally, Table 1 provides information related to the implications of the order on the length of the procedure, the centralisation of the decision-making process, and deliberation. Finally, it indicates the scope of application of each order (whether general or specific to a particular procedure), and the stage of the procedure in which the Court can issue it. The purpose of the representation of orders in the table format is to offer the most detailed, factual, and comprehensive overview of orders.

### A. Primary distinction: Process and substance in the orders of the court

The main distinction of the taxonomy of orders relates to their nature: While procedural orders are concerned with the processing of cases (the form), orders on the merits of the dispute effectively decide the case (the legal substance).

Procedural orders provide a form in which the Court reaches the decision on the merits of the legal claim (petitum) and settles the dispute. They are diverse, ranging from factual administrative decisions (orders setting the date of the hearing) to decisions that govern (operationalise) procedural rights of the parties, like the right to be heard (the decision to reopen the oral part of the proceedings). Orders on the merits, by contrast, rule on the subject of the dispute (petitum). The distinction is reminiscent of the traditional form against substance divide. However, the analysis does not enter the debate but simply assumes that procedures are 'a form in which legal solutions to the substantive problems should be cast'.[58]

In this sense, procedural orders and orders on the merits fulfil complementary functions, and are as such not entirely separate categories. The line between form and substance is porous but visible. Procedural orders, like an order declaring that the preliminary reference is inadmissible, indirectly affect the rights and duties of the parties in the main proceedings. An order that the Court does not have the jurisdiction to rule on the claim, a procedural question par excellence, is frequently based on the substantive legal assessment of the case (it has a substantive component). By analogy, an order to reopen the oral proceedings or appoint an expert witness is not only a matter of procedure for the litigants. Experts' testimonies can bear significantly on the decision whether the claim is justified, and hence on the outcome of the case. The Court's decision to reopen the oral phase of the procedure can increase the quality of deliberation and swing the final judgement. Nonetheless, the immediate decision to reopen the oral proceedings is mainly procedural. Even if the division appears formalistic, it is useful for analytical purposes and the inquiry into the institutional dynamics. There, the questions who decides, how fast, and who is involved, are central. What the Court decides, and what strategies the litigants pursue, is important in other contexts.[59]

The following Sections provide detailed descriptions, examples, and illustrations of the *problématique* (and the realities) captured by the taxonomy.

#### Strictly procedural orders and procedural administrative orders

Procedural orders, concerned with case management, are manifold and diverse. Some are communications and instructions (deciding when the oral hearing will take place), others are procedural decisions affecting the procedural rights of the parties and guaranteeing fair procedures (orders, which deny intervention or omit a hearing, deciding on the admissibility of the question or granting interim relief). Given the diversity, procedural orders can be further divided into procedural administrative orders and strictly procedural orders for the purposes of the inquiry.

[58]D Kennedy, 'Form and Substance in Private Law Adjudication' 89 (1976) Harvard Law Review 1685, 1685.

[59]An inquiry into the litigation strategies and the protection of procedural rights would have led to a different classification and to different criteria for the classification. The interpretation of the findings considers these issues in their broader decision-making context, such as the internal guidelines, and thus moderates the rigidity of the categories.

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**Table 1.** An overview of orders, regulated in the RoP (adopted in 2012). The first column from the left indicates the name of the order from the RoP. The second column indicates the Article of the RoP (legal basis of the order). The third column indicates the function of the order: order on the merits, procedural administrative order or a strictly procedural order. Columns under the heading formal characteristics display the formal characteristics of orders. The column Signatory indicates the authority that signs the order according to the RoP, and the column Signatory (practice) indicates who signs the orders in practice. The blank spaces are left whenever there were not enough documents indicating the signatory in practice. The column Motivation indicates whether the order must be reasoned according to the RoP (yes/no). The four subsequent columns indicate the implications of the order. The column length of procedures shows whether an order shortens the procedures, usually by relaxing the procedural constraints, or extends it (shorter/longer procedure). The next column indicates whether an order increases or decreases deliberation. It approximates, albeit imperfectly, the quality of the decision-making process, and the decision. The column President Participation indicates whether the President or the administrative units under her supervision (the Registry or the Research and Documentation Unit) participate in the decision to issue the order. The column Centralisation indicates whether the order centralises the decision-making (either decreases or increases centralisation). Orders that do not have a strong effect on the decision-making – whose effect is almost neutral regarding deliberation, increased productivity or centralisation – are marked with 'na'. Finally, the final three columns provide general information about the order. The column Application (scope) indicates whether the order applies to all procedures or only to direct actions/preliminary references/appeal proceedings. The column next to it indicates the stage in the proceedings in which the Court can issue an order. The final column indicates the year in which the provision regulating each type of order was added to the RoP

| Name and legal basis (RoP) | | Nature | Formal characteristics | | | Implications | | | | Other characteristics (RoP) | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Order (name) | Legal basis | Nature | Signatory (RoP) | Signatory (practice) | Motivation | Length of proceedings | Deliberation | President participation | Centralization | Application (scope) | Stage in procedure | Introduced in RoP |
| 1 Manifestly unfounded appeal | 181 RoP | order on the merits | Court | Chamber | yes | shorter | decrease | yes | na | direct action (appeal) | after AG | 1989 |
| 2 Reply to preliminary questions | 99 RoP | order on the merits | Court | Court / Chamber | yes | shorter | decrease | yes | increase | preliminary reference | after AG | 1991 |
| 3 Dismissal of appeal / General Court decision on BoA (58a St) | 170b RoP | order on the merits | Special chamber | Special Chamber | yes | shorter | decrease | yes | na | direct action | after AG and JR | 2019 |
| 4 Manifestly well-founded appeal | 182 RoP | order on the merits | Court | Court | yes | shorter | decrease | yes | na | direct action (appeal) | after AG | 2012 |
| 5 Deferment of determination | 56 RoP | procedural administrative | President | President | no | longer | na | yes | increase | general | any stage | 1959 |
| 6 Stay of proceedings / general provision | 55 RoP | procedural administrative | President | Court / Chamber | no | longer | na | yes | increase | general | after AG | 1991 |
| 7 Stay of proceedings until decision of General Court | 54(3) Stat + 55 RoP | procedural administrative | Court | Court / Chamber | no | longer | increase | no | na | general | any stage | 1991 |
| 8 Suspension | 53(4) Stat | procedural administrative | unspecified | Chamber | no | longer | na | no | na | direct action | any stage | |
| 9 Discontinuance (radiation) | 148 RoP | procedural administrative | President | President Chamber | no | shorter | decrease | yes | na | direct action | end | 1959 |
| 10 Radiation | 100 RoP | procedural administrative | unspecified | President / President Chamber | no | shorter | decrease | yes | increase | preliminary reference | any stage | |

(*Continued*)

**Table 1.** (*Continued*)

| Name and legal basis (RoP) | | Nature | Formal characteristics | | | Implications | | | | Other characteristics (RoP) | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Order (name) | Legal basis | Nature | Signatory (RoP) | Signatory (practice) | Motivation | Length of proceedings | Deliberation | President participation | Centralization | Application (scope) | Stage in procedure | Introduced in RoP |
| 11 Rectification | 154 RoP | procedural administrative | Court | Chamber | no | na | na | no | na | direct action | after decision | 1959 |
| 12 Renvoi to GC/Court | 54(2) Stat | procedural administrative | Court | Chamber | no | longer | increase | no | na | general provision | any stage | |
| 13 Resend to bigger formation | 60(3) RoP | procedural administrative | Court | Chamber | no | longer | increase | no | na | general | any stage | 2003 |
| 14 Joinder of cases | 54 RoP | procedural administrative | President / Court | President | no | shorter | na | yes | increase | general | written/oral | 1959 |
| 15 Disjoinder of cases | 54 RoP | procedural administrative | President/ Court | President | no | longer | na | yes | na | general | written/oral | 1959 |
| 16 Intervention in preliminary reference | 131 RoP | strictly procedural | President | | no | longer | increase | yes | increase | preliminary reference | after AG and JR | 1959 |
| 17 Reopening oral proceedings | 83 RoP | strictly procedural | Court | Chamber | no | longer | increase | no | na | general | any stage | 1959 |
| 18 Intervention / witnesses / testimony | 66 RoP | strictly procedural | Court | Chamber | yes | longer | increase | no | na | general | any stage | 1959 |
| 19 Measures of inquiry | 64 RoP | strictly procedural | Court | Court | no | longer | increase | no | na | general | after AG | 1959 |
| 20 Expert report | 70 RoP | strictly procedural | Court | | no | longer | increase | no | na | general | any stage | 1959 |
| 21 Request for documents | 62 RoP | strictly procedural | Judge Rapport-eur | Chamber | no | longer | increase | no | na | general | any stage | 2000 |
| 22 Invitation to the parties to reply in writing | 61 RoP | strictly procedural | Court | Court | no | shorter | increase | no | na | general | any stage | 2012 |
| 23 Expedited preliminary ruling procedure | 105(1) RoP | strictly procedural | President | President | no | shorter | decrease | yes | increase | preliminary reference | before written | 2000 |
| 24 Expedited procedure | 133 seq RoP | strictly procedural | President | President | no | shorter | decrease | yes | increase | direct action | before written and after hearing AG JR | 2000 |
| 25 Urgent preliminary ruling procedure | 108(1) | strictly procedural | Designated Chamber | Chamber | no | shorter | decrease | yes | na | preliminary reference | before written | 2008 |
| 26 Exclusion of agent, adviser or lawyer | 46(2) RoP | strictly procedural | Court | | yes | na | decrease | no | na | general | any stage | 1959 |
| 27 Admissibility application for revision | 159 RoP | strictly procedural | Court | Court / Chamber | no | longer | increase | no | na | direct action | after AG | 1959 |

(*Continued*)

**Table 1.** (*Continued*)

| Name and legal basis (RoP) | | Nature | Formal characteristics | | | Implications | | | | Other characteristics (RoP) | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Order (name) | Legal basis | Nature | Signatory (RoP) | Signatory (practice) | Motivation | Length of proceedings | Deliberation | President participation | Centralization | Application (scope) | Stage in procedure | Introduced in RoP |
| 28 Inadmissibility | 53(2) RoP | strictly procedural | Court | President / Chamber | yes | shorter | decrease | yes | increase | general | after AG | 1959 |
| 29 Case does not proceed to judgment | 149 RoP | strictly procedural | Court | | yes | shorter | decrease | no | na | direct action | any stage | 1959 |
| 30 Inadmissibility of application for revision | 159 a RoP | strictly procedural | Court | Court / Chamber | yes | shorter | decrease | no | na | direct action | after AG and JR | 2020 |
| 31 Stay of execution | 157(4) | strictly procedural | Court | | no | longer | increase | no | na | direct action | end | 1959 |
| 32 Interlocutory order | 160(7) RoP | strictly procedural | President | President / Vice President | no | longer | na | yes | increase | direct action | any stage | 1959 |
| 33 Absolute bar of proceeding | 150 RoP | strictly procedural | Court | | yes | shorter | decrease | no | na | direct action | any stage | 1959 |
| 34 No need to adjudicate | No provision | strictly procedural | unknow | Chamber | no | shorter | decrease | yes | na | general | admissibility | |
| 35 Interim measures (decision) | 162-163 RoP | strictly procedural | President | Vice President / President Chamber | yes | longer | na | yes | increase | direct action | any stage | 1959 |
| 36 Legal aid direct actions | 187 RoP | strictly procedural | Chamber | Chamber | no | na | increase | no | na | direct action | any stage | 1959 |
| 37 Decision in costs disputes | 145 RoP | strictly procedural | Chamber of Rapporteur | Chamber | no | na | na | no | na | direct action | end (after AG) | 1959 |
| 38 Allocation of costs | 137-138 RoP | strictly procedural | Court | Chamber | no | na | na | no | na | direct action | end | 1959 |
| 39 Allocation of costs / appeals | 184 RoP | strictly procedural | Court | Court | no | na | na | no | na | direct action (appeal) | end | 1959 |
| 40 Costs discontinuance/withdrawal | 141 RoP | strictly procedural | unspecified | Chamber | no | na | na | no | na | direct action | end | 1959 |
| 41 Legal aid preliminary rulings | 116 RoP | strictly procedural | Chamber | Chamber | no (unless denied) | na | increase | no | na | preliminary reference | any stage | 1974 |
| 42 Article 111(3) EEA agreement | 204(5) | strictly procedural | Court | | yes | na | increase | no | na | procedure art. 111 EEA | after AG | 1995 |

Procedural administrative orders are orders by which the Court manages the case, like the order to delete the case from the Registry (radiation).[60] Importantly, these orders frequently involve the Court's Registry.[61] For instance, in Case C-731/19, a Spanish court submitted a preliminary reference on certain aspects of the Court's decision in *Zaizoune*.[62] The Court received the reference of the Spanish court in October 2019. In October 2020, while Case C-731/19 was pending, the Court clarified its decision in *Zaizoune* in Case C-568/19.[63] Pursuant to the latter, the Registry of the Court contacted the Spanish Court to inquire whether it still wished to maintain the preliminary questions. The national court swiftly withdrew the reference, and the President of the Court swiftly ordered that the case be erased from the Registry.

Strictly procedural orders *primarily* delimit procedural rights of the parties (to submit written pleadings, evidence, or testimonials), including interim measures and, ultimately, the decision to not hear the case (admissibility/jurisdiction). They are tangential to the substance of the dispute (they can effectively put an end to it), providing a procedural framework rather than allocating substantive rights and duties or redrawing the limits of European Union's competences. To illustrate, in Case C-213/19, the Commission lodged an action against the United Kingdom for failing to fulfill its obligations in relation to textiles and footwear imports from China. Several Member States expressed their interest to intervene in the proceedings in support of the United Kingdom. The United Kingdom supported those requests, but also asked for the confidential treatment of data on individuals because 'the mention of their names could affect their legitimate commercial interests, whereas disclosure of those names would not be of any benefit to the interveners.'[64] The President of the Court issued an order granting the intervention *and* the request for the confidential treatment of information. Withholding information probably affected the content of interventions, and hence the oral hearing and deliberations. It would be, however, mistaken to believe that the decision to allow the intervention and the confidential treatment of information was substantive/on the merits.

### Orders on the merits of the case

Orders on the merits of the case bear directly on the legal claim.[65] They effectively settle disputes, allocate rights and duties, confirm the existing judicial allocation of rights and duties (in appeals), and authoritatively determine the questions of validity and interpretation of European Union law. Some orders on the merits are judgements bar their name. The difference between an order and a judgement is at times unclear. For instance, decisions in which the Court rules that it lacks jurisdiction or that the question is inadmissible could be judgements, but they are often orders pursuant to Article 53(2) of the Statute. To illustrate, in Case C-92/16, a Spanish reference on consumer protection, the Court ruled in the case with an order after soliciting a written Opinion of the AG and convening an oral hearing with seven interveners.[66]

Orders on the merits of the case are typically reasoned. They can be further divided into orders on the merits of appeals and orders on the correct interpretation and validity of European Union law in the preliminary reference procedure. The distinction is pertinent because of the diverse institutional and procedural implications of those orders.

The first type of orders on the merits of the case are Article 99 RoP orders. The Court can issue them in reply to the preliminary questions of the national court where those are identical to earlier

[60]Lasok (n 4) 1126. It should be considered that orders do not mark all procedural steps, and that it remains unclear when procedural decisions should be adopted in the form of an order.

[61]Ibid., 1125.

[62]Case C-38/14, *Zaizoune*, ECLI:EU:C:2015:260.

[63]Case C-568/19, *Subdelegación del Gobierno en Toledo (Conséquences de l'arrêt Zaizoune)*, EU:C:2020:807.

[64]Case C-213/19, *Commission v United Kingdom*, ECLI:EU:C:2022:167.

[65]Litis actio/Litis contestation/petitum/matter of the case.

[66]Case C-92/16, *Bankia*, ECLI:EU:C:2019:560.

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questions on which the Court has already ruled, where the reply may be deduced from the existing case law or where the answer is beyond reasonable doubt.[67] For example, in Case C-134/21, a Belgian Court inquired about the possibility of transfer measures against an applicant in the context of Dublin III Regulation. The Court decided to apply Article 99 RoP and replied by a reasoned order as the case 'raised no reasonable doubt'. It was the second order in the case, as the Chamber already issued a procedural order rejecting the application for an urgent procedure.

The second type of orders on the merits are Article 181, Article 182 and Article 170 bis RoP orders, which allow the Court to declare an appeal, either against a decision of the General Court or of selected Boards of Appeals, manifestly unfounded, inadmissible, manifestly well-founded, or lacking significant legal interest. Examples are plentiful, owing to the Court's frequent use of these orders (see Section 4). Just from January to April 2022, the Court rejected four appeals against decisions of the European Union Intellectual Property Office based on Article 170 bis.[68] The reason was the same in all of them: 'the appellant's request is not capable of establishing that the appeal raises issues that are significant with respect to the unity, consistency or development of EU law.'[69]

Orders on the merits of the case affect the inter-institutional dynamics, altering the arrangement of authority over European Union law and the status of actors who participate in the judicial system. Potentially, they create tensions within the Court, between parts of the institution (that is, in relation to the General Court), and in the broader community of courts (that is, in relation to the national courts).

## B. Formal characteristics of orders

### Signatory of the order

The signatory refers to the authority in the Court that issues the order. The criterion is formal, referring to the RoP. Table 1 shows that the RoP are flexible: Orders are not necessarily issued by the signatory indicated in the Rules. According to the RoP, some orders are a formal prerogative of the Cabinet of the President. Only she can decide to join cases,[70] postpone the decision in the case to a later date,[71] grant an injunction,[72] or process the reference for a preliminary ruling in an expedited procedure. In practice, the President frequently delegates her prerogatives to the Vice President of the Court or the Chambers. The Vice President often decides on injunctions and the Presidents of the Chamber sign orders to remove the case from the Registry. Similarly, the RoP can refer to the Court without further specification. The examples include orders in important technical matters like the allocation of costs,[73] the decision to grant legal aid,[74] or the order to request additional documents.[75] The tasks most often fall on the Chambers of five and three sitting judges because they process most cases, and thus issue most orders.

### Motivation

The RoP specify when the Court must motivate an order.[76] Thus, it is useful to distinguish between reasoned (motivated) and non-reasoned (non-motivated) orders. Reasoned orders can

[67]Article 99 RoP.

[68]Orders in Cases C-730/21 P, *Collibra*, ECLI:EU:C:2022:208; C-679/21 P, *Sony*, ECLI:EU:C:2022:109; C-678/21P, *Sony*, ECLI:EU:C:2022:141; and C-599/21, *Quinan*, ECLI:EU:C:2022:32.

[69]Case 679/21, *Sony*, but essentially repeated in the other three cases.

[70]Article 52 RoP.

[71]Article 56 RoP.

[72]Articles 131, 162–163 RoP.

[73]Articles 138–139 RoP.

[74]Article 116 RoP for the preliminary reference procedure, and 184 RoP for direct actions.

[75]Article 62 RoP.

[76]Barents (n 4) 1127.

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declare an appeal manifestly well-founded or unfounded,[77] bar the continuation of the proceedings,[78] exclude legal counsel,[79] allow interventions or the hearing of witnesses[80] and declare an action inadmissible.[81] According to the RoP, the Court must state reasons in 12 out of 42 instances (sixth column from the left in Table 1). Somewhat counterintuitively, reasoned orders often decrease deliberation and shorten the proceedings (the four columns under the heading 'implications' in Table 1). The Court can issue them either in direct actions or preliminary reference procedures. Many orders can be issued at almost any stage of the proceedings (like the order that the case will not proceed to judgement). Most often, the RoP specify that the Court can issue a reasoned order only after the consultation/hearing of the Advocate General (column 'stage' in the procedure in Table 1).

### C. Implications of orders

The raison d'être of orders is to bootstrap and/or shorten procedures without compromising their fairness or frustrating the rights of the parties.[82] Three criteria, the length of proceedings, the impact on deliberation and the effect on centralisation, directly address this trade-off.

The length of proceedings indicates whether and how the order affects the length of the procedure. For instance, an order of the President to process the preliminary reference in the urgent procedure shortens the proceedings. Similarly, an order deciding to join cases increases efficiency by treating two cases as one (solving two disputes in one procedure). Not all orders that increase efficiency have the same implications for the rights of the parties and, potentially, for the substance of the case. Additional criteria are necessary to measure this effect.

The impact of an order on deliberation refers to the effect of that order on the participation of different actors in the decision-making process. Orders to dispense with the opinion of the Advocate General or the oral proceedings decrease deliberation and participation. Orders on the merits in the preliminary reference procedure effectively exclude most actors, including the Advocate General, from the decision-making.[83]

Finally, centralisation is often associated with cost-cutting and efficiency.[84] The criterion refers to the effect of the order on the concentration of the decision-making in one or more units of the Court, meaning the Cabinet of the President and the units under her supervision. For instance, an order of the President to reply to a preliminary reference by a reasoned order shortens the proceedings delegating the 'judgement' to the administrative units and the Cabinet of the President. It partially excludes the members of the Court from deliberation on the merits of the case.

## 4. A map and the territory of orders

This Section explains the mapping process (the empirical analysis) of orders and outlines the patterns of their use. The quantitative analysis is based on the taxonomy developed in Section 3. It shows that the Court most commonly uses orders that shorten the proceedings. Those orders also condense the deliberation phase in preliminary reference procedures, appeals, and direct actions, limiting the participation of the members of the Court (Judges and Advocates General), the parties and other actors (like the referring courts). Moreover, the Court has been more frequently resorting to procedural orders and orders on the merits, which involve the

[77]Articles 181–182 RoP.
[78]Article 150 RoP.
[79]Article 46(2) RoP.
[80]Article 66 RoP.
[81]Article 53(2) RoP.
[82]This is the most frequent justification of the Court in its proposals for amending the RoP.
[83]This is however not easy to confirm because the drafting of the Internal Guidelines on this point is obscure.
[84]Frankenreiter (n 57).

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Cabinet of the President of the Court, and the Registry and the Research and Documentation Unit (DRD).

### A. The mapping process

The mapping of the Court's practice proceeds on the basis of an automated search. This means that an algorithm parses the documents containing orders, searching for references to the Articles of the RoP,[85] common expressions associated with different types of orders in the operative part (the Court's decision) and the keywords corresponding to the individual provisions of the RoP.

By way of illustration, the automated search can identify an order that declares an action inadmissible in three ways. First, it identifies a reference to an article of the RoP or the legal basis of the order. In the example, the Court will almost certainly refer to Article 53(2) RoP. Second, the search locates the operative part of the decision, which typically repeats the relevant text of the same Article. In this example, it will locate the phase that '*the Court has no jurisdiction to hear the case* or that *the request for the preliminary reference is manifestly inadmissible*.'[86] Third, the algorithm searches for the keywords in the document that identify the order, in this case the *admissibility of preliminary reference*. The keywords are, as mentioned, attached to the document and available on the website of the Court.

Combining these three approaches, the automated search accurately classifies nine out of ten orders, irrespective of possible occasional discrepancies between the documents. Further, the method is impervious to the Court's inconsistent use of terminology, a problem often cited in the literature.[87] The classification is also resilient to the amendments of the RoP (like the renumbering of Articles). Finally, by parsing the texts, it is possible to identify multiple orders in a single document. Some documents contain two decisions, where the second decision typically allocates costs. Thus, the method captures the number of orders rather than only the number of published documents. A caveat of the approach (as well as all other approaches relying on the analysis of legal texts) is that the Court might still issue orders without publishing them. Those orders would fall outside the scope of the analysis.

### B. Orders by type and policy area

The Court's use of orders varies greatly across time and policy areas. The most frequent orders are the orders allocating the costs in direct actions and appeals. The second most frequent orders are radiation orders, which remove the case from the Registry, typically after the referring court has withdrawn the preliminary reference. Referring courts can do so either on their own motion or when prompted by the Registry of the Court. The Registry normally addresses a communication to the referring court, inquiring whether a past decision on a similar case (usually attached to the communication) could be helpful in solving the referred question, in which case the reference is moot.[88] In the past decade, the use of radiation orders in the preliminary reference procedure has increased tenfold.[89] The third most commonly used orders are orders declaring an appeal manifestly unfounded or an action inadmissible.

The policy areas with most orders depend on the type of procedure. In direct actions, the Court most often uses orders in disputes related to agriculture and fisheries, transport, environment, and competition, followed by free movement (of services, goods, and establishment). In preliminary reference procedures, the orders in cases dealing with free movement are most common, followed

[85]This information is available on the official website (EUR-lex and Curia) as the information about the document, provided by the Court (the so-called metadata).

[86]Case C-484/16, *Criminal proceedings against Antonio Semeraro*, ECLI:EU:C:2016:952.

[87]Barents (n 4).

[88]A recent example in Case C-627/20, *Deutsche Lufthansa v. OP*, ECLI:EU:C:2021:579.

[89]It is unclear whether this is due to the more frequent communication by the Registry or to other reasons.

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by fundamental rights, consumer protection, the area of freedom, security, and justice, and social policy.

Finally, the use of individual orders differs over time. The number of orders deciding on the right of interested parties to intervene in the proceedings peaked at 79 orders in 2011. Until the eighties, those orders were highly uncommon.

## C. Patterns of use

### Process and substance

The primary distinction between process and substance serves as a starting point from which to draw a map of orders and explore their territory. The use of procedural orders and orders on the merits of the case is illustrated in Figure 1. Noteworthy developments, which merit further investigation, are a sharp increase of strictly procedural orders (along with an extended period of their frequent use between 2003 and 2012), a considerable rise of procedural administrative orders after 2000, and a steady rise of orders on the merits after 2005.

Strictly procedural orders, such as interlocutory orders or orders allowing interventions, balance the procedural economy with the rights of the parties. These orders multiply when procedures grow more complex, and when cases draw the interest of the national governments and require increased awareness of the procedural steps to secure the legitimacy of the judicial process. Strictly procedural orders, such as orders to process the case in an urgent procedure, give priority to procedural economy – their main aim is to decide the case (reply to the preliminary references) without delay. To achieve a timely outcome, they minimise the input of the litigants and the interested parties, curtail procedural steps, and de facto allocate the management of the procedure to the Cabinet of the President of the Court. These specificities are important when interpreting the patterns.

Procedural administrative orders are orders to join cases, stay the proceedings, defer the decision in the case, resend the case to a larger formation, suspend the decision, or erase a preliminary reference from the Registry. They are issued by the Registry and based on the reports drafted by the administrative services under the supervision of the President of the Court.[90]

Procedural administrative orders bureaucratise institutional practices, explicitly articulating and transforming them into mandatory procedural steps. Even when valid rules and regulations do not prescribe the steps, the internal rules impose them as vital for record-keeping or case tracking. Usually, they do so by introducing further written internal instructions for the processing of cases through the system. Their growing use has implications for the deliberation phase – especially for the participation of the members of the Institution. As indicated in Table 1, procedural administrative orders do not require the intervention/consultation of the Advocate General, compared to the orders on the merits (rows 1 to 5 in Table 1) and strictly procedural orders, which directly affect the (procedural) rights of the parties. It could be argued that the rise of procedural administrative orders after 2000 signals a turn to a greater bureaucratisation and dwindling participation and deliberation.

The orders on the merits are discussed separately in the fourth subsection.

### Length of proceedings

Figure 2 below illustrates the Court's frequent use of orders, which shorten the proceedings (area with slanted stripes). The development is particularly evident in the past two decades when their share has stabilised at a rather overwhelming 75–85 percent.

The development is noteworthy given that the RoP balance the orders shortening the procedures (like orders to join cases) with orders prolonging them (like the request for documents).

[90]Court of Justice, *Guide Pratique*, paras 2–18.

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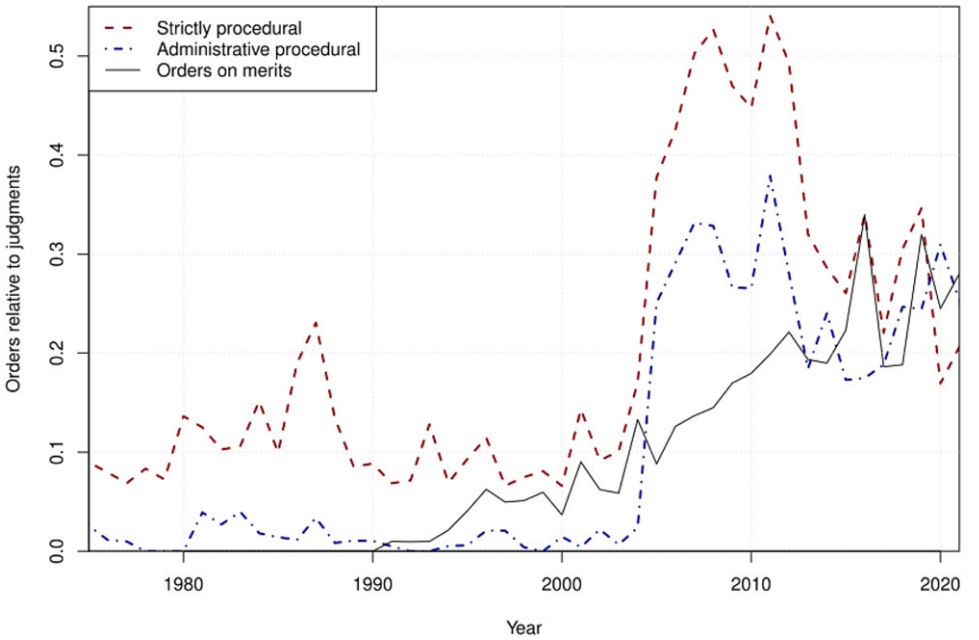


**Figure 1.** Orders on the merits and procedural orders (strictly procedural and procedural administrative) from 1975 to 2022, relative to the number or judgements.[91] A single published document can contain several orders, for instance an order deciding the appeal and an order deciding on the costs. This further implies that the three lines do not add up to the numbers of documents published, but display the total number of orders, which fit within these categories. The full drawn line shows a clear upward trend in the use of orders on the merits since the first orders of this type in the early 1990s. The use of both types of procedural orders (dotted lines) increased substantially around 2005, but has since stabilised.

As shown in Table 1 (seventh column from the left), the RoP include 15 types of the former and 14 types of the latter. The effect is unclear for the remaining 12 orders. It is, however, most reasonable to assume that it is not significant, as they do not omit, simplify, or add procedural steps. The Cabinet of the President participates in nearly all orders shortening the procedures (as illustrated in Table 1).

From Table 1 it transpires that the orders shortening the procedure also limit participation and involve fewer members of the Court in the decision-making process. Almost 96 percent of the orders, which reduce the length of the proceedings, also decrease deliberation. In other words, orders decrease the length of proceedings by decreasing deliberation and centralising the decision-making (Table 1, fourth column from the right). Thus, Figure 2 also demonstrates the decrease of deliberation and the increase of centralization.

### *Centralisation/orders of the President*

Orders of the President are a facet of centralisation – a process of institutional transformation evidenced in Figures 1 and 2 above as the use of orders shortening the procedure, the use of orders on the merits and procedural administrative orders. Figure 3 shows that the number of orders, signed by or involving the President of the Court in direct actions, grew exponentially around 2003, and that the growing trend was reversed after 2011 (bar a spike in 2018 – 2019). The trend

[91]Using the absolute numbers would mean that any increase would only reflect an increase in the caseload, and would not provide an accurate representation of the developments in the use of orders.

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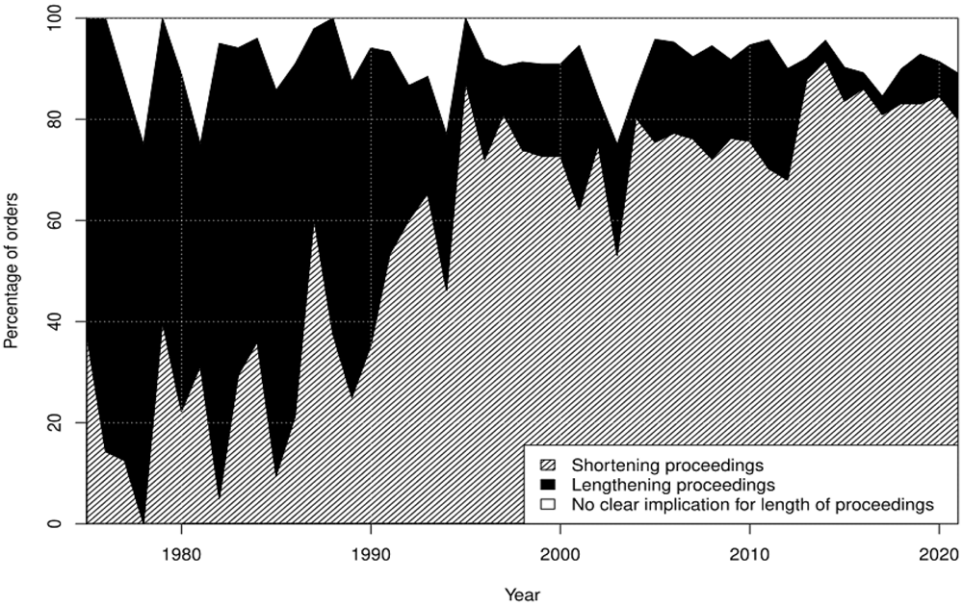


**Figure 2.** The share of orders by their effect on the length of procedures from 1975. Until 1975, the Court issued and published only a few orders. The figure shows a clear increase in the orders shortening the procedures (slanted gray area), particularly from the mid-nineties. Orders, which lengthen (prolong) the procedure have been less common since the late nineties (black area). The figure shows that these orders surged between 2004 and 1012, decreasing since. The white area indicates the orders without a clear effect on the duration of the proceedings.

in appeals displays a steady growth since 2000. In preliminary reference procedures, the orders of the President increased sharply after 2000 and 2008, tripling since 2011.

Content wise, in the preliminary reference procedures most orders are radiation/removal from the Registry orders, reflecting a more active role of the Registry in communicating with the national courts, as well as the orders of the President exercising emergency powers. Regarding direct actions, most orders are applications for interventions related to the disputes concerning the environment.

The upward trend partly coincides with the amendments to the RoP in 2000 and 2008, which introduced the so-called emergency powers.[92] According to Articles 105 and 107 RoP, the President can issue orders to process the case in an expedited (accelerated) or urgent procedure.[93] Expedited procedures shorten the written part of the procedure by limiting the number of participants who can submit written pleadings or omits written pleadings altogether. Urgent procedures, used to deal with the reference in the area of freedom, security, and justice, can dispense with both if merited by the circumstances of the case – meaning urgency. They were introduced when asylum cases, often requiring swift handling, began to crowd out pressing references in other policy fields. To ensure equal treatment of cases, the RoP separated the two procedures and introduced a greater discretion/more procedural flexibility into the urgent procedure.

On the one hand, scholars have argued that the President's power to assign cases to reporting judges – and the possibility to use this power strategically – has positive implications for the Court's relationship with Member States' governments and compliance rates.[94] Reporting judges,

[92]By contrast, no amendments introduced orders that would have a de-centralising effect or diminish the role of the central administration, especially the Registry.

[93]Proposals for Amendments to the Rules of Procedure of the Court of Justice, Register of the Council of the European Union 9803/99, 12 July 1999.

[94]Krenn (n 57).

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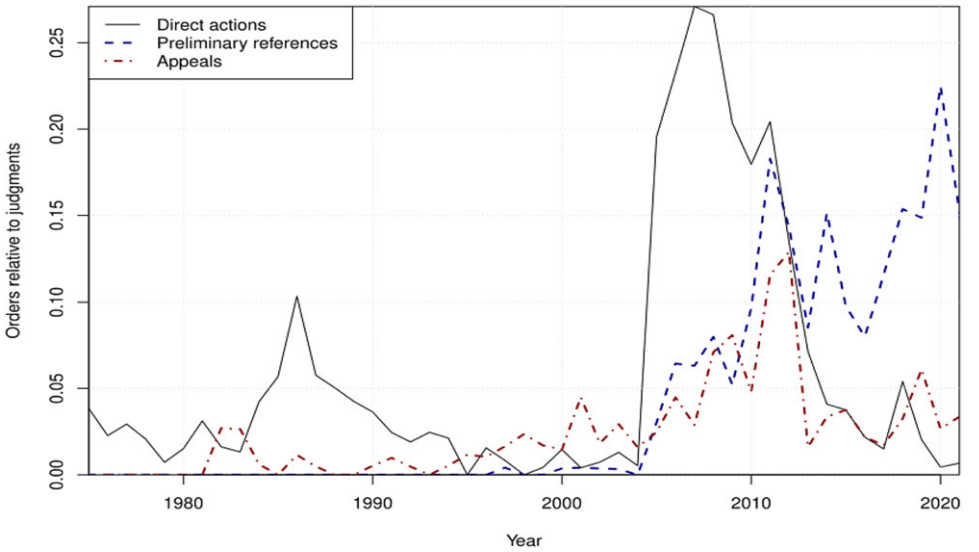


**Figure 3.** Orders signed by the President of the Court or involving the President´s Cabinet or any other service under her direct supervision by type of action (dashed line: preliminary references, straight line: direct actions, dash-and-dots line: appeals). A majority of orders of the President of the Court or involving her in the decision-making are administrative orders, others are substantive.

who are perceived as neutral by the litigants (including national governments), can increase the legitimacy of the process and the acceptability of the ruling. On the other hand, the practice leads to specialisation and disproportionate influence of individual judges on the deliberation in the Chambers.[95] The problem is obvious especially in the context of non-permanent Chambers, which persist despite the Court's non-hierarchical organisation compared to other higher national courts.[96] In this context, the allocation of cases by the President of the Court can result in institutional asymmetries, increasing her power to influence legal developments.

### *Orders on the merits*

Figure 4 demonstrates the use orders on the merits. These are orders to dismiss an appeal against the decision of the General Court as manifestly unfounded, orders to dismiss an appeal against the decision of the General Court deciding on the decision of the Board of Appeals (Article 170 bis RoP), and orders issued in reply to preliminary references. While the use of all has expanded, the growth has been greatest for the latter two. The use of these orders increases centralisation, involving the administrative units of the Court, particularly the Cabinet of the President, the DRD, and the Registry. Figure 4 thus suggests a growing centralisation and a greater role of the Cabinet of the President in the decision-making process.

The patterns of use, illustrated above, coincide with procedural reforms. In 2000, the RoP introduced the option to reply to a preliminary reference with a reasoned order '*where the answer to such a question may be clearly deduced from existing case-law and where the answer to the question admits of no reasonable doubt.*'[97] The use of orders on the merits surged. In 2005, a second

[95]Hermansen (n 57).
[96]Frankenreiter (n 57).
[97]Amendments to the Rules of Procedure of the Court of Justice of 16 May 2000, Official Journal L 122/43.

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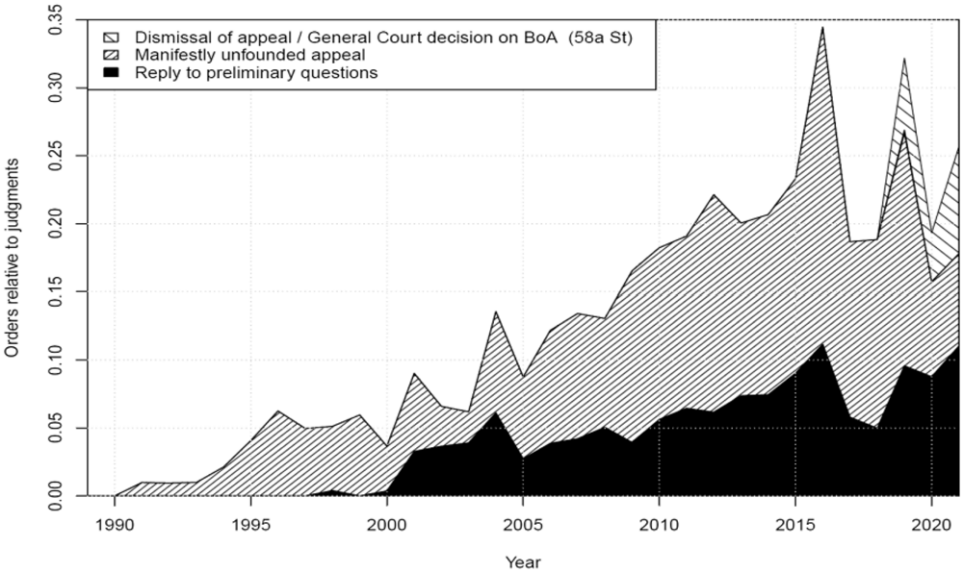


**Figure 4.** Orders on the merits over time: orders on the merits in the preliminary reference procedure (Article 99 RoP), orders to declare an appeal manifestly unfounded (181 RoP) or to dismiss appeals against the General Court's rulings on the decision of the Boards of Appeals (Article 170 bis RoP). The use of all orders on merits has increased, but mostly for orders declaring an appeal manifestly unfounded, and orders of Article 170 bis. Not visible on the figure are orders declaring appeals manifestly well-founded (Article 182 RoP): the first such order was published in 2019 (Case C-58/19 P), and two related orders were published on the same date in early 2022 (C-663/20 P and C-664/20 P).

amendment to the RoP relaxed those procedural requirements,[98] except in cases where the answer admitted no reasonable doubt. The reform in 2010 eliminated the last procedural constraints. The use of those orders rose in both instances, as illustrated in Figure 4.

By comparison, the amendments of the RoP, which introduced new procedures or orders, but maintained the requirements of participation and deliberation, did not trigger an increase of those procedures or orders. This suggests that efficiency motivates the practice. The RoP in 1991, for instance, stipulated a possibility to issue an order '[*w*]*here a question referred to the Court for a preliminary ruling was manifestly identical to a question on which the Court has already ruled*'.[99] The Court had to inform the referring court, consider all submitted observations, and consult the written Opinion of the Advocate General.[100] The constraints were not trivial, which might explain why the Court rarely used them, and why by the end of the 1990s the number of pending references became 'the most pressing issue'.[101]

Finally, the upward trend for Article 170 bis orders is related to the amendments to the RoP in 2019, which introduced the possibility to issue orders in the appeals against the judgements of the

[98]Amendments to the Rules of Procedure of the Court of Justice of 4 August 2005, Official Journal L 203/19. There was no longer an obligation to inform the national court or the parties, but the Advocate General still needed to be heard. President Skouris remarked in 2006 (a year after the reform) that the changes responded to 'a now well-established practice of responding to certain requests by way of a simple order'. V Skouris, 'Self-Conception, Challenges and Perspectives of the EU Courts' in I Pernice, J Kokott and C Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Baden-Baden Nomos 2006) 21.

[99]Article 104(3) of the RoP.

[100]Amendments to the Rules of Procedure of the Court of Justice of 4 July 1991, Official Journal L 176/01.

[101]See The Court's Paper and The Working Party Report in Dashwood and Johnston (n 49).

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General Court concerning the decisions of selected independent Boards of Appeal (BoA).[102,103] The Court will issue such orders by default, that is, *unless* the appeal 'raises an issue that is significant with respect to the unity, consistency or development of Union law' (Article 170 bis RoP).[104] Since the provision was added to the RoP in 2019, the Court has issued 125 orders rejecting the requests to proceed with the appeal, and only one order in which the appeal was allowed to proceed (interestingly, the only case so far in which an EU body, the European Union Intellectual Property Office (EUIPO), was the appellant and not the defendant).[105] Figure 4 illustrates this development.

## 5. The blurred lines between judging and administration: causes and consequences

This Section explains that the use of orders reflects the Court's strife for productivity and the desire to oversee the application of rules. To be clear, there are convincing reasons to insist on both. Greater productivity delivers timely justice, outwardly legitimising the institution. Control can secure and promote the uniform application of European Union law and the protection of individual rights.[106] Both are indispensable for the institution seeking to manage an efficient justice system and maintain exclusive interpretive authority under the Treaty (Article 267 TFEU).

Greater productivity, timely justice, uniform application, and exclusive interpretation, however, seem difficult to pursue together, clashing with competing and equally desirable and legitimating attributes of the judicial process: the quality of the legal argument, a constructive judicial dialogue, fair procedures, the right to be heard. . . . There is little reason to question the purity of the Court's stated motive to deliver timely justice of excellent quality in a cordial spirit of cooperation with national courts.[107] Inasmuch as those call for broad participation, extensive deliberation, incalculable logistics and organisation, they undermine procedural economy. Inasmuch as a shared responsibility for the development of law potentially enables the Court to focus on a handful of most legally interesting matters of general importance, it also challenges its interpretive monopoly and uniform interpretation.

The use of orders offers valuable insight into how the Court reconciles the conflicting demands. No other procedural instrument is so intimately linked to procedural economy and yet so often missing from the discussion. The history of procedural reforms and the Internal Guidelines of the Court exposes the peculiarity/uniqueness of the European approach. Together, they show that the Court delegates judicial tasks to the Cabinet of the President and the administrative support units. This has far-reaching normative and institutional implications in the context where the President has – compared to other international courts – the exclusive right to allocate cases to the reporting judges or allocate judges in Chambers as she sees fit, potentially pre-empting case outcomes.[108]

In the current institutional context, delegation leads to the centralisation of the institution and the bureaucratisation of judging. Orders, issues in reply to preliminary references or solving appeals, illustrate and support this conclusion.

[102]The relevant Boards of Appeals are established in Article 58a Statute of the Court: The European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency. It is unclear why only decisions of those BoAs were included.

[103]Article 170 bis RoP.

[104]Article 58a Statute.

[105]Order in Case C-382/21P, *EUIPO v The KaiKai Company Jaeger Wichmann*, ECLI:EU:C:2021:1050.

[106]See the Opinion of AG Bobek in Case C-561/19, *Consorzio Italian Management*, ECLI:EU:C:2021:291.

[107]Skouris (n 97).

[108]Hermansen (n 57); Krenn (n 57).

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### A. Motivation: Full oversight without delay

The Court's ambition to preserve its interpretive monopoly and full control transpires through each reorganisation of the preliminary reference procedure, leaving national courts aside, and otherwise limiting participation. The gradual implementation of practices attests to the changing priorities and the power of the Court to formalise them in the RoP.

The amendments (Figure 4) have altered the division of labor. Speaking on the future of the European Union's Justice System in 2006, President Skouris noted that the referring judge would have to submit 'better drafted references' demonstrating that 'his knowledge and awareness in terms of European law have increased.'[109] The national judge, however, would not acquire a more important role in the interpretation of European Union law. The intention of the 2005 reform was decisively not to make the national courts 'better placed to give informed decisions on a growing number of questions of Community law',[110] but to reduce delays, which the Court seemed to attribute to a combination of legally uninteresting questions and multilingualism.[111] Post reforms, national judges were no longer aware of the possibility of an order until receiving one.

The weeding of preliminary references can efficiently tackle the bottlenecks caused by unwarranted litigation. The practice sits uncomfortably with the demanding *CILFIT* criteria.[112] The analogy might seem odd, but less so when one thinks of the practice of orders in terms of broad control over interpretation and uniform application, and an *inverted acte clair*.[113] To recall, *CILFIT* concerned the question whether the national courts of last instance had to refer questions of interpretation under Article 267 TFEU even if the correct interpretation (and application) of Community law was 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.[114] The Court established a high threshold that few courts of last instance met in practice. The criteria that the national court had to be convinced that the matter was 'equally obvious' to other national courts and to the Court was particularly demanding and hypothetical. By comparison, the Court never established corresponding criteria for the application of Article 99 RoP.[115]

The standard of 'no scope for reasonable doubt' sounds similar, except that a*cte clair* leaves the decision of legal relevance to the referring courts, and Article 99 RoP negates the soundness of their judgement. The double standard signals distrust in the ability and responsibility of national courts. The arrangement, probably justified occasionally, functions more like – in the vernacular of apps and tablets – parental controls. Experts understand that it invites detached cooperation at best.

Orders on the merits in the preliminary reference procedure might not drastically affect the Court's relation with the national courts, but they disrupt the participation of the parties to the proceedings. The Court seems aware but not excessively concerned. In the explanatory note to the proposal for amendment of the RoP in 2005, which sought to relax the criteria to reply to a preliminary refer,ence by an order, the Court argued that the obligation to hear the parties and the referring judge had no useful purpose and merely held up the decision by a month and a half.[116]

[109]Skouris (n 97). A similar approach to the new attitude of national courts in Jacobs, as quoted in de Búrca (n 28).

[110]Working Party Report in Dashwood and Johnston (n 49) 168.

[111]Ibid.

[112]Rasmussen, 'The European Court's Acte Clair Strategy in CILFIT' (n 30).

[113]The Court has not specifically addressed this issue in its judgements. However, AG Tizziano in his Opinion in Case C-99/00, *Lyckesdog*, specifically rejected this idea, arguing that 'the prerequisites and purposes' of both provisions 'are, and must be, completely different.'

[114]Case C-77/83, *CILFIT*, ECLI:EU:C:1984:91.

[115]Broberg (n 54) 1383.

[116]Draft amendments to Articles 37, 44a, 76, 104 and 120 of the Rules of Procedure of the Court of Justice of the European Communities, Register of the Council of the European Union 10461/04, 11 June 2004.

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The observations, the Court explained, 'd[id] no more than repeat the arguments previously put forward by the party in question during the written procedure'.

The amendments in 2011 responded to the same justification and showed equally little interest in ensuring the participation of the parties. In its explanatory note, the Court repeated that the parties' opportunity to submit written observations on the Court's intention to rule by reasoned order in cases in which the reference 'offered no reasonable doubt' was 'often synonymous with a significant increase in the workload of one or other party'. The litigants and other participants in the procedure tended to reproduce the content of their earlier written observations, requiring translation. The latter caused a delay of several months, prompting the Court 'to choose to rule by way of a judgement delivered without a hearing and without an Opinion, instead of by order'.[117] The fourth modification of the RoP in 2012 entirely removed the obligation to hear (or notify) the parties and inform the referring court of its intention.[118]

Second, those appealing the decision of the General Court pursuant to Article 170 bis RoP must satisfy a further condition and demonstrate the 'significance of the issue raised by the appeal with respect to the unity, consistency or development of EU law'.[119] The Court can dismiss appeals, which do not meet the threshold, with an order, and focus on questions that it considers novel and relevant (interesting). The aim of the provision was to discourage certain type of appeals,[120] and reduce their number overall.[121] The frequency of those orders shows that the Court accepts a negligible number of appeals (Figure 4). The option is a reminder of who has the final word more than a remedy – to request the legality review of administrative decisions. Given that the Court declares almost all appeals unfounded, an appeal to an extended Grand Chamber or the Plenary of the General Court might present a more efficient solution.

### B. Implications: Centralisation and bureaucratisation

The increase of procedural orders, especially procedural administrative orders, and orders on the merits suggests a parallel increase in the bureaucratisation of the decision-making and the centralisation within the institution. It is related to the involvement of the President's Cabinet and the DRD in the process.

Delegation of judicial work to non-judicial (administrative) support units, particularly the Registry and the DRD, which is composed of national experts, increases judicial productivity, unburdening the Judges and the clerks. The new division of labor increases the influence of the President.[122] The task of the support units is to screen for (un)important legal issues and draft the decisions. The Court's

[117]Ibid., 81.

[118]M-A Gaudissart, 'La refonte du règlement de procédure de la Cour de justice (The Recast of the Rules of Procedure of the Court of Justice)' 48 (2012) Cahiers de droit europeen 603; G Koutsoukou, 'The Court of Justice's New Statute and Rules of Procedure' in Emmanuel Guinchard and Marie-Pierre Granger (eds), *The new EU judiciary: an analysis of current judicial reforms* (Kluwer Law International 2018) 308–324.

[119]Draft amendments to the Rules of Procedure of the Court of Justice, Register of the Council of the European Union 5700/19, 24 January 2019, 5 (emphasis added). The reason for this, according to the explanation of the Court, is that the matter would have been reviewed twice (by the BoA and the General Court) by the time it was appealed before the Court. See for instance order in Case C-74/20, *Hästens Sängar AB v. EUIPO*, ECLI:EU:C:2020:407 at 15: '(. . . ) it should be observed that it is for the appellant to demonstrate that the issues raised by its appeal are significant with respect to the unity, consistency or development of EU law.'

[120]Krajewski, *The Relative Authority of Judicial and Extra-Judicial Review* (n 48).

[121]Literature argues that the Court generally does not welcome appeals. Krajewski, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (n 15); A Zhang, 'The Faceless Court' 38 (2016) University of Pennsylvania Journal of International Law 71.

[122]The growing role of the secretariats has been analysed for other international courts. See for instance F Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019); Creamer and Godzimirska (n 35).

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Internal Guidelines confirm this understanding of the patterns.[123] The following four examples are illustrative.

First, the most obvious example are the emergency powers. The President can decide on its own motion or at the request of the referring court to process the case in an expedited procedure (Article 105 RoP). The President might also ask the designated Chamber to consider whether it is necessary to proceed according to the rules of the urgent preliminary reference procedure (Article 107 RoP). The decision to use the emergency powers is an order, which omits (substantial) procedural steps. The President can request that the parties 'restrict the matters addressed in their written observations to the essential points of law raised by the request for a preliminary ruling' and even prescribe a 'maximum length of those documents' in the urgent procedure. In extreme urgency, the Chamber can decide to omit the written part entirely (Article 111 RoP). Figure 3 showed an increased use of emergency powers since their addition to the RoP.

Second, in appeals involving intellectual property, public procurement, access to documents and staff cases, the DRD (which reports to the President) indicates whether the Court could issue an order pursuant to Article 181 RoP (manifestly unfounded appeal) or whether the appeal should proceed, as it raises a 'significant issue' (Article 170 bis RoP). If the DRD believes that the case meets the criteria for an order, it already *drafts the order* and attaches that draft to the file.[124] In parallel, the Registry (which also reports to the President´s Cabinet)[125] conducts a preliminary analysis of the case to facilitate the assignment to the reporting judge (by the President). This so-called *fiche objet* signals a quick solution.[126] Figure 4 shows that since the introduction of Article 170 bis, the Court solved nearly all appeals with an order.

Third, if the DRD and the Registry indicate a possibility to decide by an order in the general appeals procedure (Article 181 RoP),[127] the Judges will discuss the merits of the appeal in a general meeting only at the explicit request of at least one member of the Court. Otherwise, the Advocate General will draft an Opinion that the reporting Judge will reproduce in her draft.[128] According to Articles 181, 182 and 170 bis RoP, the Court can declare an appeal manifestly unfounded or inadmissible, manifestly well-founded or lacking legal interest, and decide with an order without involving the parties. In the absence of their submissions, the preliminary analysis (*fiche objet*), drafted by the DRD, is the sole reference. Figure 4 shows a steady increase in the use of those orders, particularly after 2010. This is consequential because the members of the Court and the parties have no say in the process. While this applies to the orders issued in preliminary reference procedures and appeals, it is not equally conclusive. The parties can request (at least in theory) a second reference from the national court in the same procedure.[129] Appeals, on the contrary, exclude this option per definition.

Fourth, in the preliminary reference procedures, the President influences the decision to issue an order formally and informally. Formally, the President receives the preliminary analysis of the DRD, highlighting the possibility to reply by an order and a draft of the decision,[130] before assigning the case to the reporting judge. Informally, she might assign the case with the possibility of a reply by an order in mind, gaining influence that exceeds the formal power inherent in the attribution of cases.[131] If in

[123]Court of Justice, *Guide Pratique*, paras 2–18.

[124]Court of Justice, *Guide Pratique*, para 11.

[125]See organigram at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/en.pdf. It also explains why only the President can issue an order to remove the case from the docket through the Registry.

[126]Court of Justice, *Guide Pratique*, para 2.

[127]Krajewski, 'The Many-Faced Court: The Value of Participation in Annulment Proceedings' (n 15) 243.

[128]Court of Justice, *Guide Pratique*, paras 69–72.

[129]See for instance Case C-466/00, *Kaba*, ECLI:EU:C:2003:127, where the applicant managed to get a second reference sent to the Court after a first preliminary ruling (in Case C-356/98, *Kaba*, ECLI:EU:C:2000:200).

[130]Court of Justice, *Guide Pratique*, para 16.

[131]Hermansen (n 57); C Krenn, 'A Sense of Common Purpose: On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice' in MR Madsen, F Nicola and A Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022).

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agreement to reply to the reference with an order, the reporting judge might propose to inquire whether the national court wishes to maintain the reference. The communication is subject to the President's approval.[132] The Court makes a formal decision to reply by an order, based on the preliminary report of the reporting judge,[133] at the general meeting.

## 6. Conclusion

What do the Court's orders reveal about the decision-making routines, the institutional priorities and transformations? So far, these have remained impressionistic owing much to the absolute secrecy of deliberation.[134]

The article replied to this question by systematising 42 types of orders and mapping their use. The analysis reveals a growing use of orders, which increase the Court's output, like orders on the merits in direct actions, preliminary reference procedures, and appeals, or orders deciding to process cases in urgent and accelerated procedures. Institutionally, these orders strengthen the role of the Registry, delegate judicial tasks to the administrative support units, like the DRD, and fortify the position of the President's Cabinet. While the efficient handling of cases reduces delays and disposes of the backlog, it also centralises the decision-making and bureaucratises the institution. In this way, orders contribute to the blurring of lines between judging and administration.

The patterns reflect the Court's strife to remain in control over the European judicial system without buckling under increasing demand. They also imply that the Court is prepared to forego participation and short-circuit deliberation to increase its output. In other words, the Court seeks to demonstrate that it can deliver timely justice and oversee the development of all aspects of European Union law.

The conclusions of the analysis, highlighted below, are primarily relevant to the study of European Union law and institutions. They should resonate with all judicial institutions without direct control over their dockets and the scope of their jurisdiction, but with powerful figures at the helm, substantive institutional autonomy, and a decisive say in the administration of procedures.[135]

Yet, the situation of the Court is unique. The Court designs its procedural framework to an extent unknown to most other high courts, which operate within tighter procedural frameworks adopted and amended by the Legislator. The internal procedural guidelines, common to courts but of diverse character, tend to govern practical and organisational matters.[136] Their content and limited availability, adding on to the closed nature of the decision-making (dissenting opinions, case allocation, and the logic of Chamber composition come to mind) does not show the Court in

[132]Court of Justice, *Guide Pratique*, paras 39–40.

[133]Ibid., para 40.

[134]The discussion about the working of the Court is often limited to personal (albeit insightful) accounts of former of current members of the institution. For some good examples, see Edward (n 20); A Rosas, 'Oral Hearings before the European Court of Justice' 21 (2014) Maastricht Journal of European and Comparative Law 596; S Prechal, 'Communication within the Preliminary Rulings Procedure: Responsibilities of the National Courts' 21 (2014) Maastricht Journal of European and Comparative Law 754; E Sharpston, 'Making the Court of Justice of the European Union More Productive' 21 (2014) Maastricht Journal of European and Comparative Law 763; S O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart 2002).

[135]Literature has examined the growing importance of the secretariats of International Courts. Baetens (n 123); Creamer and Godzimirska (n 35).

[136]For instance, the Spanish Supreme Court publishes its rules for case assignment in the Official Journal every year.

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its most legitimate light. Additionally, the role of the President far exceeds representational duties. Orders shed light on these powers, which she exercises continuously via her Cabinet and the Registry. They tangibly affect the process of judicial decision-making (notably, a decrease in deliberation) and the institution (especially, a progressive centralisation).

The institutional transformations coincide with procedural amendments. Those were often motivated and merited by structural changes and events beyond the Court's control. The 2004 enlargement, the budgetary crisis, and the expansion of competences, complicated by a pile of pointless preliminary references and appeals, called for a responsive organisation with a supple procedural framework, and a decisive managerial approach. Yet, all amendments carried the Court's seal of approval, embraced its priorities, and catered to its ambitions. The Court could impose its diagnosis of the problems and the ensuing greater demands on its interlocutors without sharing the responsibility and the authority over European Union law. The diagnosis often lay in external circumstances – the clumsily drafted or repetitive references, the influx of new cases owing to several rounds of enlargement, financial or immigration crisis, the exponential increase of the membership of the institution, the broadening of its jurisdiction, and the language regime – to mention the most often debated. The Court proposed 14 piecemeal modifications of the RoP tackling those issues, subject only to qualified approval by the Council. At the same time, the Court resisted comprehensive reforms, subject to democratic debate.[137] It consciously opted for a process that it could initiate and administer with minimum transparency and reduced oversight of the Council.

Finally, yet importantly, are these developments consequential and is the *problématique* significant? Timely judgements cater to the interests of litigants and guarantee the stability of the legal system. Informational asymmetry and effective application of rules speak in favor of institutional autonomy and heavy involvement of the Court in procedural reforms. Importantly, the Court must internalise the RoP to apply them effectively, and it knows best how to conduct its proceedings and organise the workflow. Financially, fewer resources and better performance are preferable. These are non-negligible benefits of efficiency driven reforms.

The European Union lacks a general procedural code, and the RoP assume this role. In this context, the RoP should not be crafted behind closed doors, nor practiced according to internal guidelines, inaccessible to outsiders. This is, alas, the case. The Council routinely seconds the Court's perception of reality, its (often-unverifiable) diagnosis of the challenges of the justice system, and a mixed bag of remedies. The practice creates a sense of obscurity around the Court's institutional practices and the management of procedures. Safeguarding the rule of law and order(s), however, calls for constructive engagement with the legislator and the legal actors. It begins with a guided tour of the engine room and a conversation about its maintenance.

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[137]The reform of the Treaties to allow more flexibility to amend the RoP was introduced but in its light(er) version: The power was not given to the Court, but the approval by unanimity at the Council was transformed into a qualified majority.

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