Lawmaking Cooperation?

Explaining Referral Failure in Federated Judicial Systems

M.M. Manriquez[†]

[†]ARENA Centre for European Studies
Department of Political Science
University of Oslo

ECPR General Conference 2024,
University College Dublin, 12th August 2024

Agenda

Puzzle

Theory

Data & Measurement

Research Design

Results

Conclusion

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.
3. Application : Influence of national courts in ECJ's rulemaking

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.
3. Application : Influence of national courts in ECJ's rulemaking
4. Measurement: Set ratio citations & Caselaw Density

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.
3. Application : Influence of national courts in ECJ's rulemaking
4. Measurement: Set ratio citations & Caselaw Density
5. Data: 2008-2023 Referral Applications Citations and Text (N=4513)

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.
3. Application : Influence of national courts in ECJ's rulemaking
4. Measurement: Set ratio citations & Caselaw Density
5. Data: 2008-2023 Referral Applications Citations and Text (N=4513)
6. Estimation: Empirical Implications via OLS and Non-Parametric *ElasticNet*

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.
3. Application : Influence of national courts in ECJ's rulemaking
4. Measurement: Set ratio citations & Caselaw Density
5. Data: 2008-2023 Referral Applications Citations and Text (N=4513)
6. Estimation: Empirical Implications via OLS and Non-Parametric *ElasticNet*
7. Results: Descriptive for now..

TL:DR

1. Puzzle: Does the ECJ learn from lower courts when constructing legal rules?
2. Theory: Three Models of Inter-Court rulemaking cooperation.
3. Application : Influence of national courts in ECJ's rulemaking
4. Measurement: Set ratio citations & Caselaw Density
5. Data: 2008-2023 Referral Applications Citations and Text (N=4513)
6. Estimation: Empirical Implications via OLS and Non-Parametric *ElasticNet*
7. Results: Descriptive for now..
8. Conclusion: Some thoughts...

Table of Contents

Puzzle

Theory

Data & Measurement

Research Design

Results

Conclusion

Setting the puzzle

1. Empirical Studies about the preliminary reference procedure argue that he dialogue between ECJ and MS State Courts is mainly unidirectional where the ECJ comes up with its own legal reasoning Šadl and Wallerman 2019; Ghavanini 2022; Pérez 2014; van Gestel and de Poorter 2019

You might ask: *why would the Court care about national courts perception?*

Setting the puzzle

1. 'the main allies' of the Court as it relies on them for getting preliminary referrals and subsequently enforcing the judgments linked to those referrals. Weiler 1991; Alter 1996; Slaughter et al. 1998

Setting the puzzle

1. 'the main allies' of the Court as it relies on them for getting preliminary referrals and subsequently enforcing the judgments linked to those referrals. Weiler 1991; Alter 1996; Slaughter et al. 1998
2. relies, on national courts for the enforcement of its caselaw in cases that do not did not required a referral Davies 2012

Research Question

When and to what extent do national courts fail to contribute to the making of legal rules in the European Union?

Table of Contents

Puzzle

Theory

Data & Measurement

Research Design

Results

Conclusion

Theoretical Models of Judicial rulemaking

Pooled Learning: fact finding and law discovery

1. US studies on the Supreme Court uses signals from lower courts to reign in a legal issue an enforce its doctrinal preferences (Cameron et al. 2000)
2. SCOTUS tolerates conflict between lower courts by issuing more narrowly tailored opinions building precedent until the issue percolates (Tom S. Clark and Kastellec 2013; Tom S Clark 2016)
3. US judicial system this division of labor has been described where U.S. District Courts specialize in fact finding.(Kornhauser 1994–1995)

Information flow and APEX preference for legal rules (self ascribed importance)

Theoretical Models of Judicial rulemaking

Optimal strategy: managing the judiciary

1. US studies on hierarchy highlight Appellate Courts tradeoff between creating more precise rules versus less precise ones as a function for controlling case outcomes.(Tom S Clark 2016)
2. Tradeoff between rules and standards creation by higher courts is affected by ideological conflict across the levels of the judicial hierarchy (Lax 2012.)
3. internal court orgnization moderates ability SCOTUS preferred doctrine carried out by its subordinates in the judicial hierarchy (Kastellec 2007).

Managing the judicial hierarchy where judges balance their preferences for legal rules with their personal relatio

Theoretical Models of Judicial rulemaking

Constrained Flexibility: sensitive to political context

1. Domestic courts adapt their decisions to the political context that face (Staton and Vanberg 2008)
2. ECJ decisions making are influenced by their Member States. (Carrubba et al. 2012; Larsson and Naurin 2016)

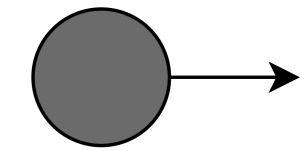
Threats of political override set the importance of political constrains and ideology when adjudicating cases

Rulemaking through Preliminary References

Information Flow For Making Legal Rule

Step 1:

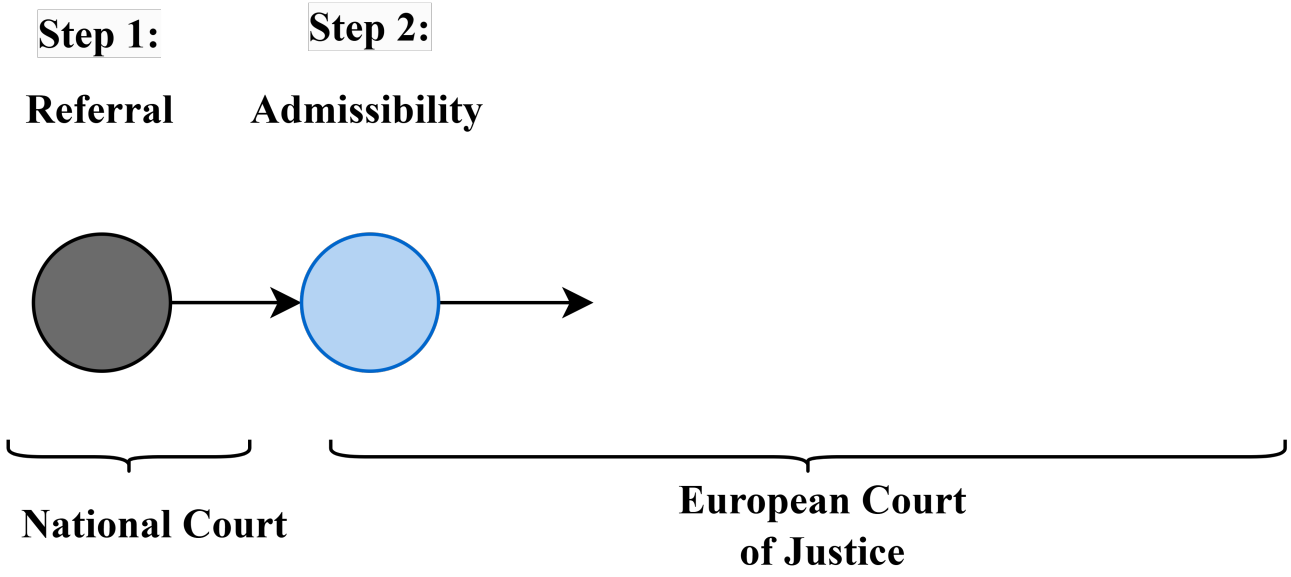
Referral



National Court

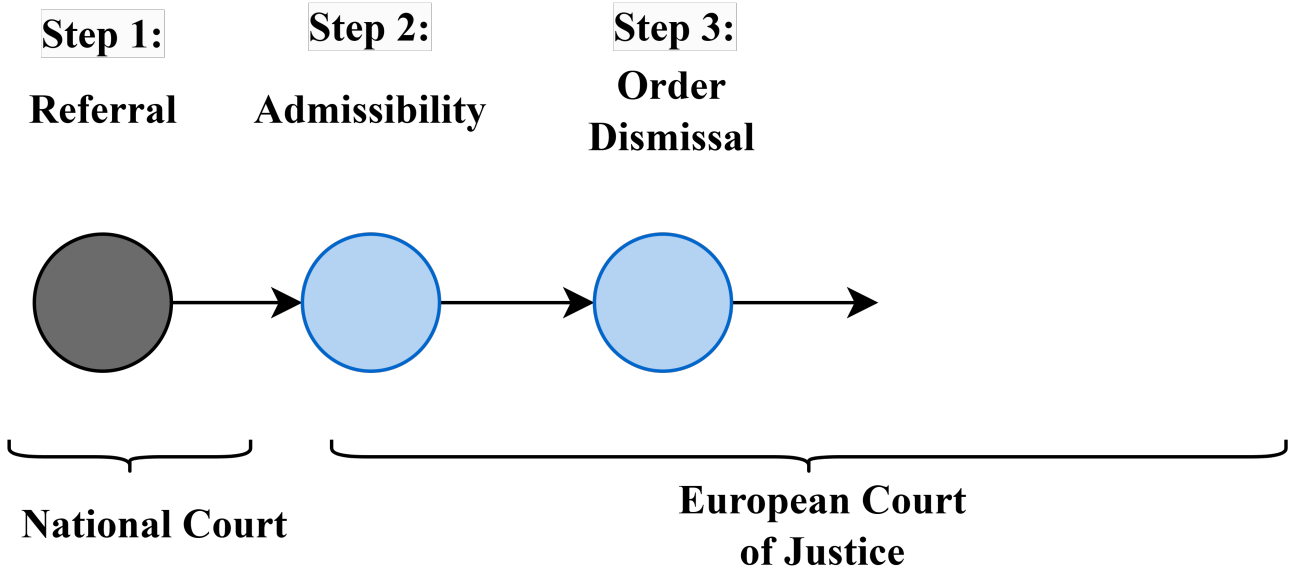
Rulemaking through Preliminary References

Information Flow For Making Legal Rule



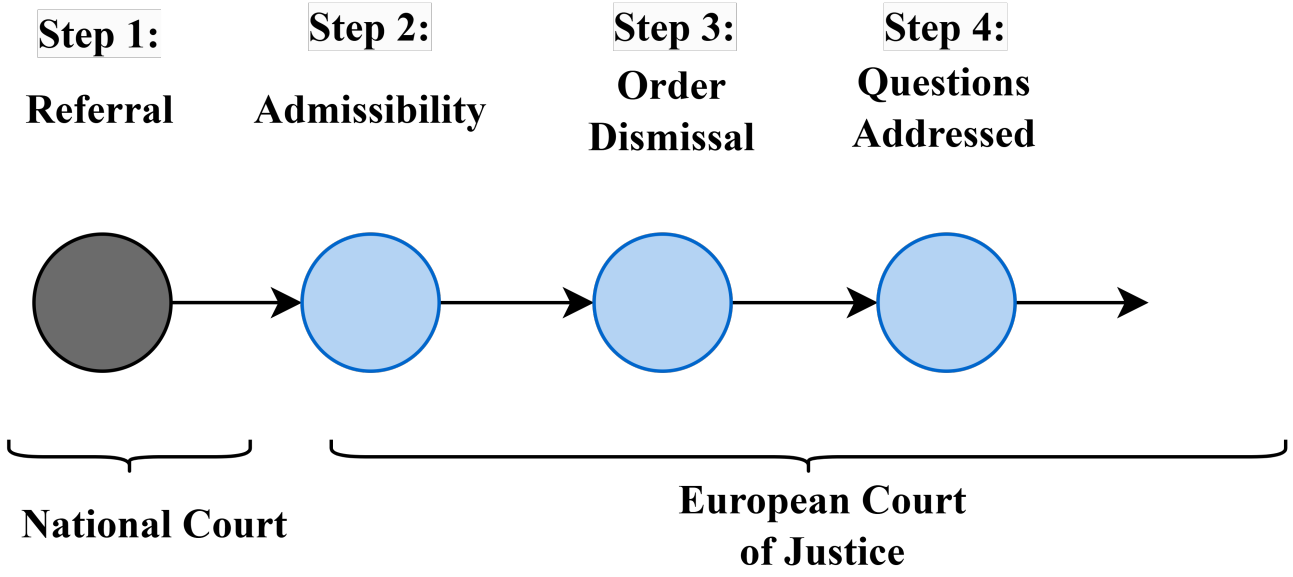
Rulemaking through Preliminary References

Information Flow For Making Legal Rule

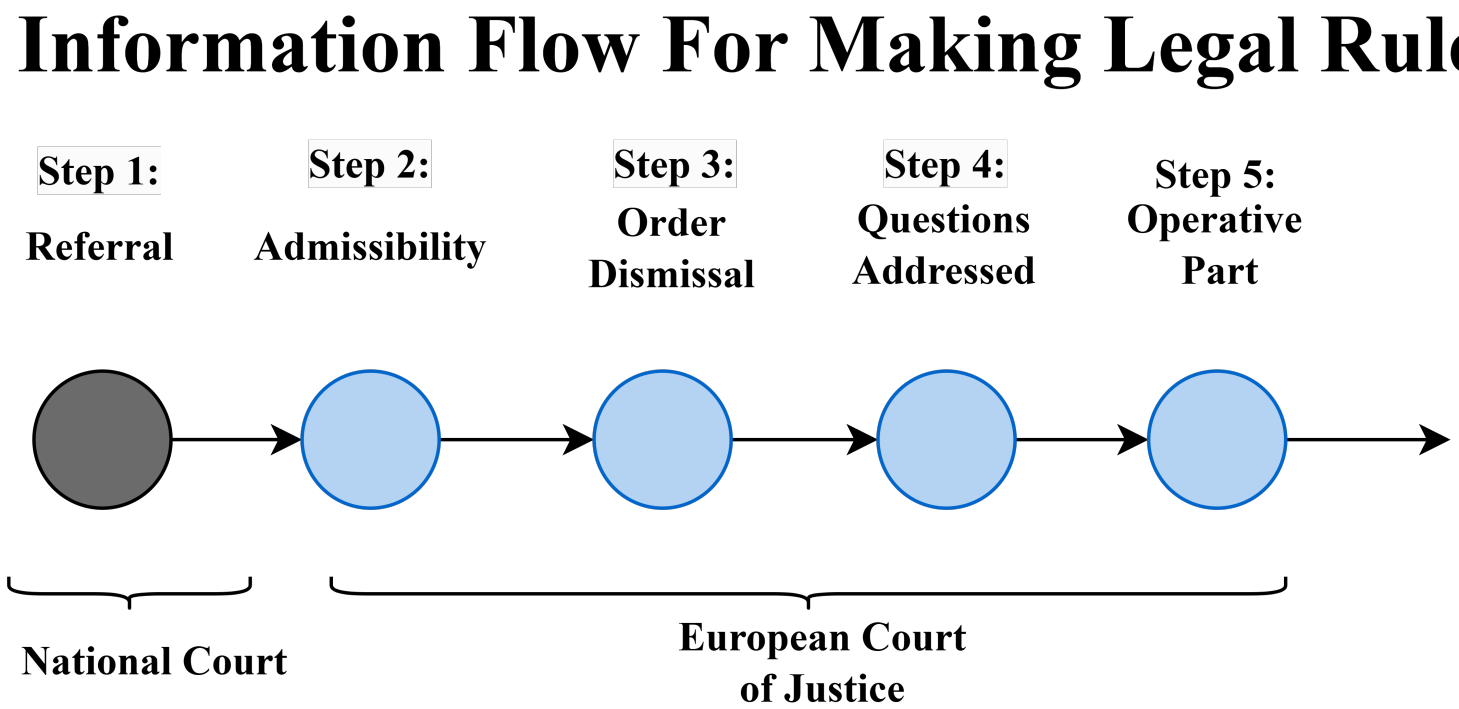


Rulemaking through Preliminary References

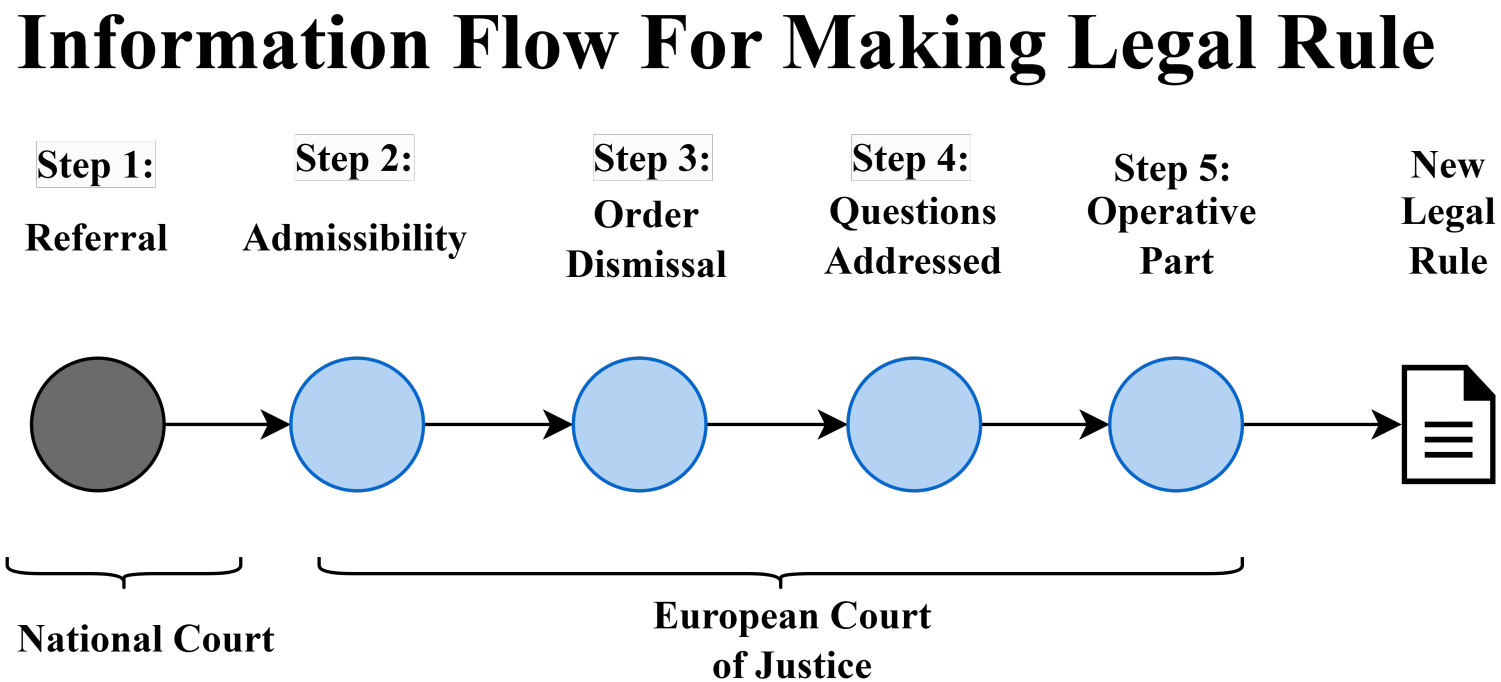
Information Flow For Making Legal Rule



Rulemaking through Preliminary References



Rulemaking through Preliminary References



Example using *ASJP* (C-64/16)

1 **Step 1:** Referral Supremo Tribunal Administrativo

Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal) lodged on 5 February 2016 — Associação Sindical dos Juízes Portugueses v Tribunal de Contas

(Case C-64/16)

Language of the case: Portuguese

Referring court

Supremo Tribunal Administrativo

Parties to the main proceedings

Applicant: Associação Sindical dos Juízes Portugueses

Defendant: Tribunal de Contas

Question referred

In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by EU rules, must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the Charter of Fundamental Rights of the European Union [1] and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law No 75/2014 of 12 September?

---

[1] OJ 2000 C 364, p. 1.

Example using *ASJP* (C-64/16)

2 **Step 2:** ECJ Determines Admissibility

Consideration of the question referred

Admissibility

The European Commission contends that the referring court has not set out, in its order, the reasons for choosing the provisions of EU law which it seeks to have interpreted.

In that regard, it should be borne in mind that it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers that a reply to its questions concerning the interpretation of certain provisions of EU law is necessary to enable it to give judgment (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 47 and the case-law cited).

In the present case, the order for reference contains sufficient information to enable the Court to understand the reasons why the referring court seeks an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter for the needs of the main proceedings.

The Portuguese Government, for its part, contends that the request for a preliminary ruling is inadmissible, on the ground that on 1 October 2016 Law No 159-A/2015 totally abolished the salary reduction which from 1 October 2014 had affected persons performing duties in the public sector. It argues, therefore, that any claim that there was an alleged infringement of the principle of judicial independence on account of that salary reduction has become devoid of purpose.

In that regard, it should be noted that the Court may refuse to rule on a question referred by a national court in particular where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose or where the problem is hypothetical (see, in particular, judgment of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraph 36 and the case-law cited).

In the present case, as the Advocate General observed in point 32 of his Opinion, the dispute before the referring court in the main proceedings concerns the annulment of the administrative measures under which the remuneration of members of the Tribunal de Contas (Court of Auditors) was reduced and the reinstatement of the sums withheld pursuant to Law No 75/2014.

It is apparent from the file submitted to the Court that the amounts withheld from the remuneration of the persons concerned during the period from October 2014 to October 2016 have not been repaid to them. Consequently, since the main proceedings have not become devoid of purpose, that plea of inadmissibility must be rejected.

It follows from the foregoing that the request for a preliminary ruling is admissible.

Example using *ASJP* (C-64/16)

3 **Step 3:** ECJ (Might) Determines Dismissal with an Order

Substance

By its question, the referring court seeks, in essence, to ascertain whether the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of a Member State's judiciary.

Example using *ASJP* (C-64/16)

4 **Step 4:** ECJ Assesses Questions via Judgement

Operative part of the judgment

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors, Portugal).

---

[1] OJ C 156, 2.5.2016.

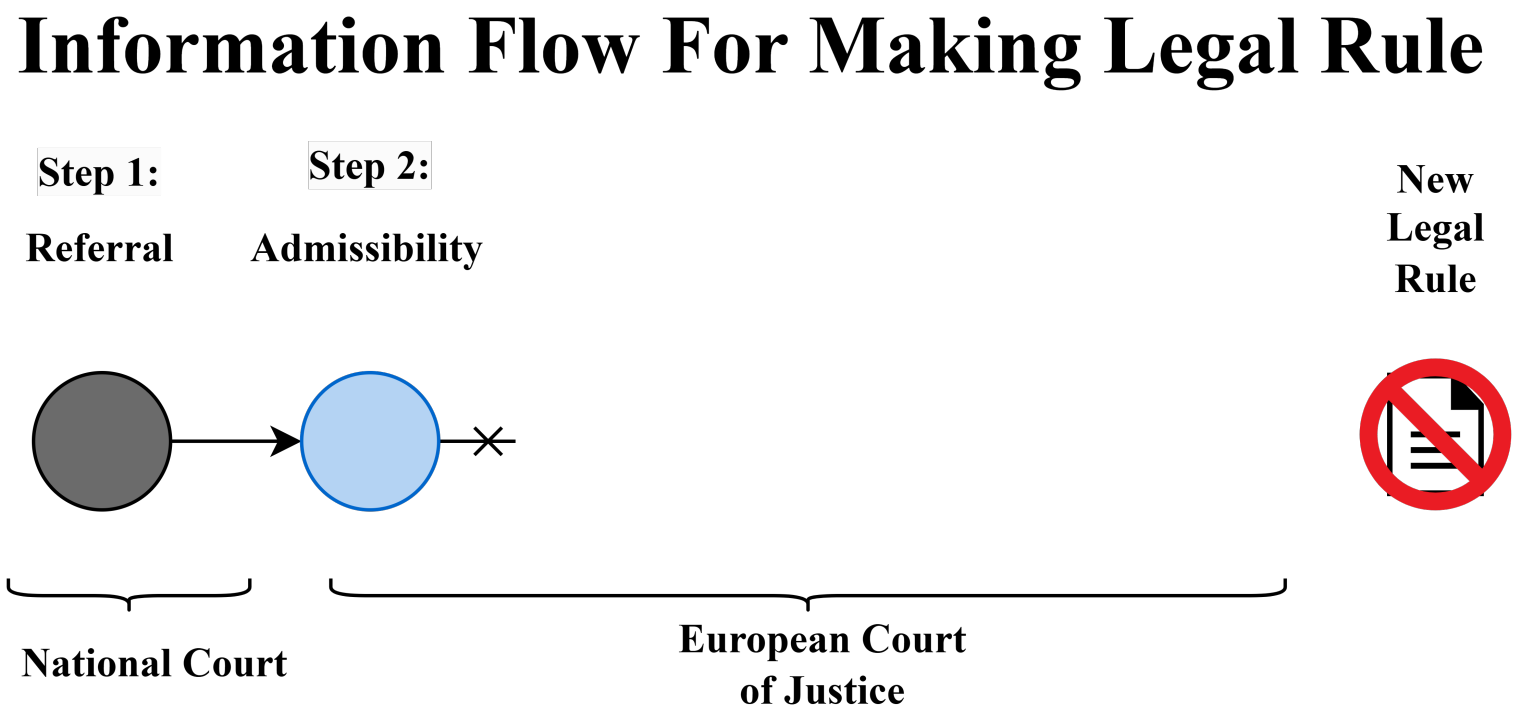
Example using *ASJP* (C-64/16)

Sequence of Steps 1-4

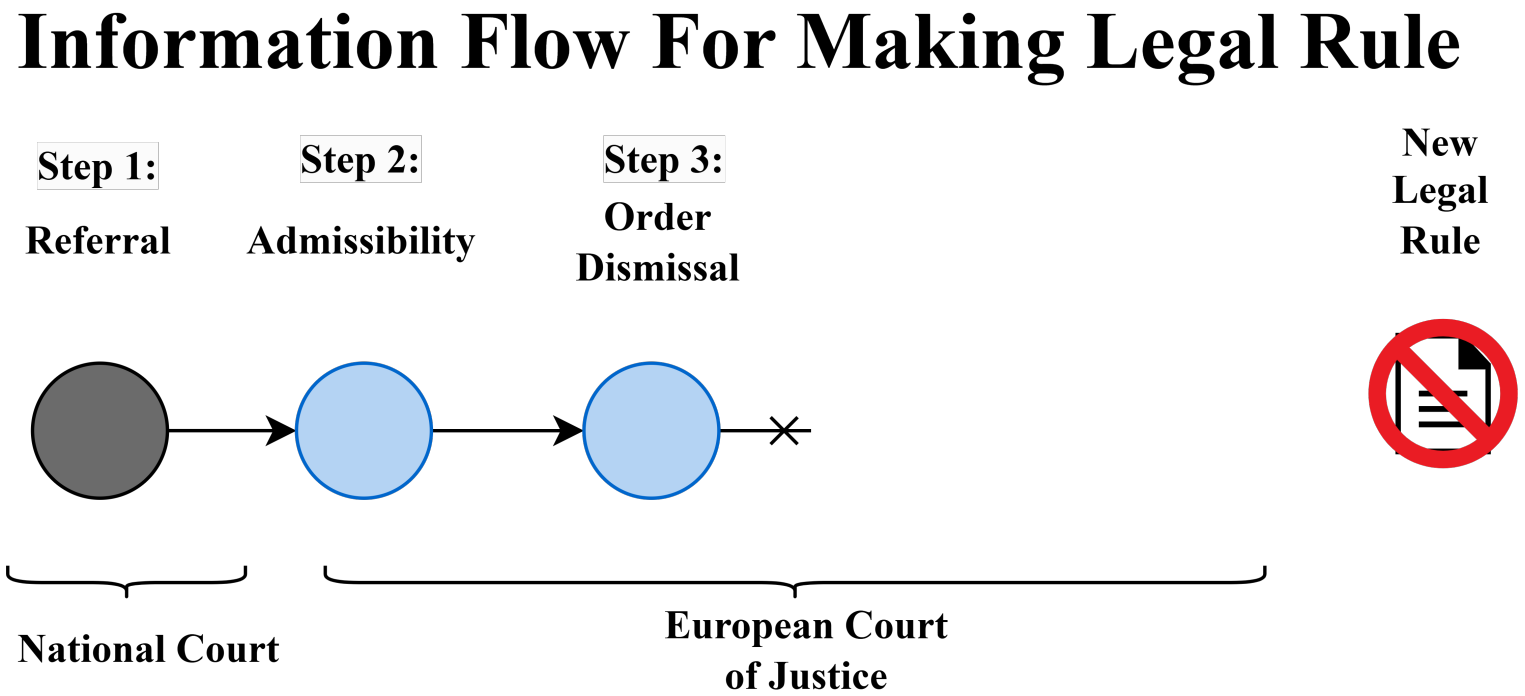
Create a dyadic unit of analysis that pairs each Order for Reference to its Judgement.

Referral:Judgement	Referred Question	Admissibility	Order-Dismissal	In-Judgment	OJ Answer
C-64/16	In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by EU rules, must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the . . .	It follows from the foregoing that the request for a preliminary ruling is admissible.	None	By its question, the referring court seeks, in essence, to ascertain whether the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction. . .	The second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary reduction measures, such as those at issue in the main proceedings. . .

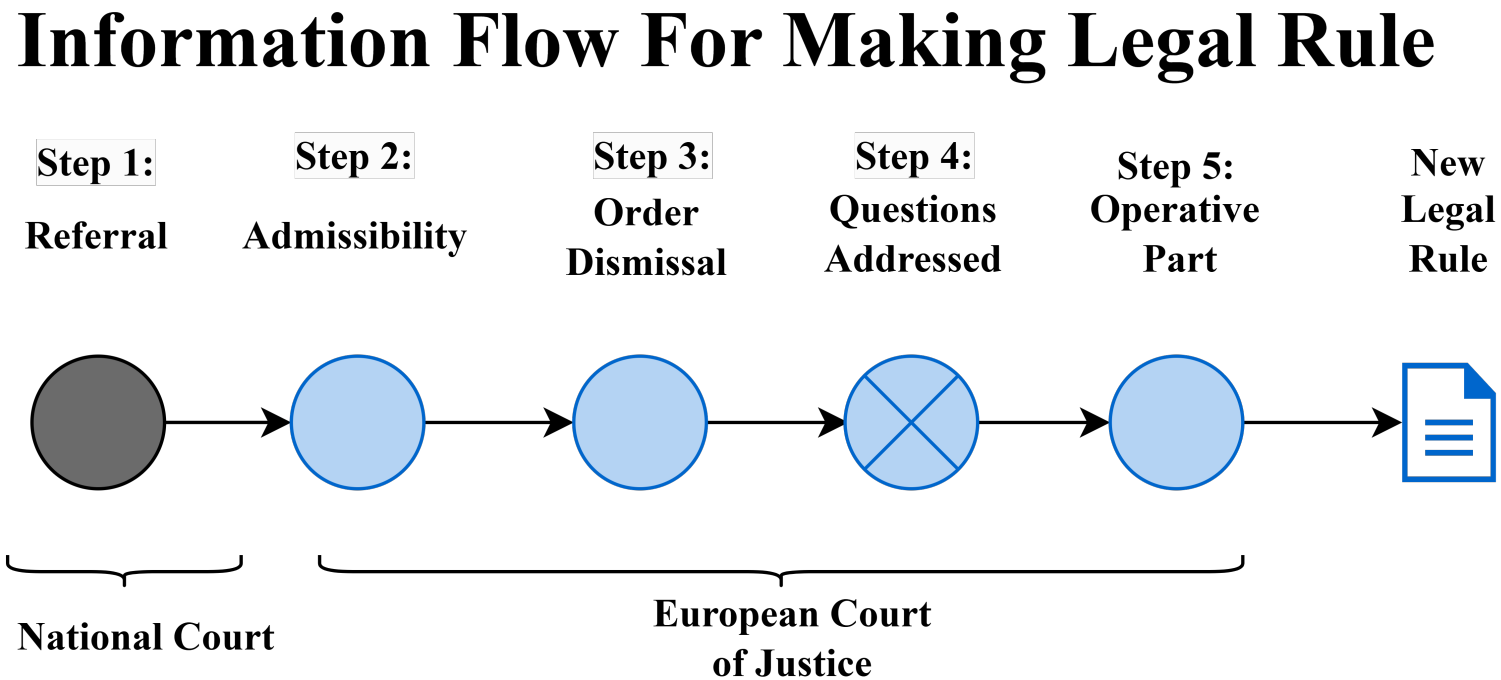
Measuring Referral Failure as Reversals on rulemaking



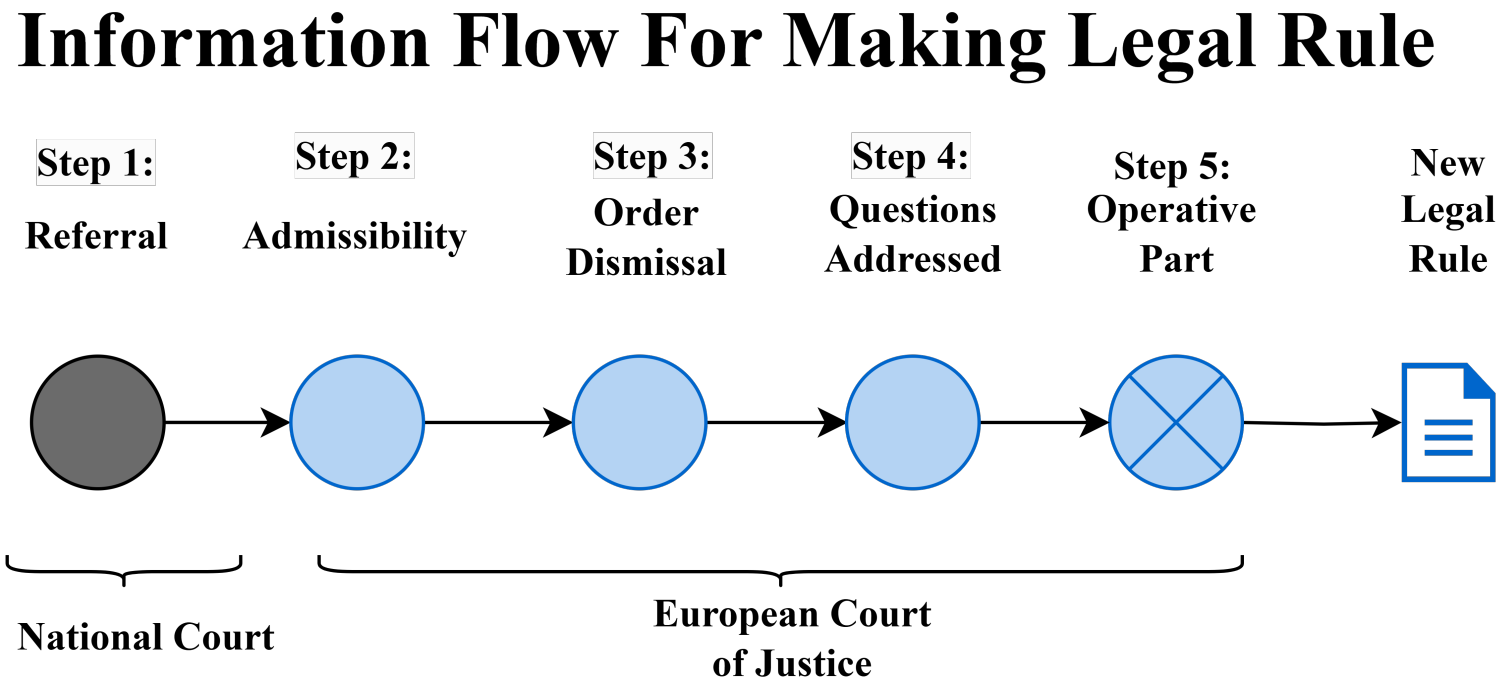
Measuring Referral Failure as Reversals on rulemaking



Measuring Referral Failure as Reversals on rulemaking



Measuring Referral Failure as Reversals on rulemaking



Qualitative Validation

Pathway II: Dismissed with order (Case C-92/16 *Bankia SA*, 2021) Spanish reference on unfair terms in mortgage contracts, by an adjudicating order.(Brekke et al. 2023)

Qualitative Validation

Pathway III: Changes via reformulation (Case C-219/15, *Schmitt*, 2024

Quote: "By its second and third questions, which it is appropriate to answer first and together".

Mapping Testable Empirical Implications

1. E1 $= f(\theta_m) \times h$ when h flags for a high court.
2. E2 $= f(\theta_m) \times a$ when a Judge rapporteur nationality matches referring court.
3. E3 $= f(\theta_m) \times o$ When o flags for when the member state submits its observations to a referral application sent from one of their domestic courts.

Mapping Testable Empirical Implications

Pooled Learning: fact finding and law discovery

EI-1↑ Degree of rulemaking cooperation will increase when referral comes from a high court as it servers as importance and quality flag.

EI-2 ↓ Degree of rulemaking cooperation will increase when *judge rappeteur* and referring court coming from the same member state increases contextual information

EI-3 – None

Mapping Testable Empirical Implications

Optimal strategy: managing the judiciary

EI-1↑ Degree of rulemaking cooperation will increase but less when there a large number of referring member states.

EI-2 ↓ Degree of rulemaking cooperation decrease when *judge rapporteur* and referring court coming from the same member state as it must balance both arenas.

EI-3 ↓ Degree of rulemaking cooperation will decrease when the referral application comes from a high court and their respective government submits observations.

Mapping Testable Empirical Implications

Constrained Flexibility: sensitive to political context

EI-1– None.

EI-2↓ Degree of rulemaking cooperation decrease increase when *judge rappeteur* and referring court coming from the same member state as it lets judge rappreteur agenda setting.

EI-3↓ Degree of rulemaking cooperation will decrease when the referral application comes from a high court and their respective government submits observations.

Table of Contents

Puzzle

Theory

Data & Measurement

Research Design

Results

Conclusion

Two Caveats...

...or three.

- Hard to extract preliminary references from judgement texts. IUROPA on a fine tuned NER model that might help with this task.

Two Caveats...

...or three.

I Hard to extract preliminary references from judgement texts. IUROPA on a fine tuned NER model that might help with this task.

II Re-assess results aggregating in a per question agreement basis.

Two Caveats...

...or three.

I Hard to extract preliminary references from judgement texts. IUROPA on a fine tuned NER model that might help with this task.

II Re-assess results aggregating in a per question agreement basis.

III Results presented here are missing 205 missing citation and text data.

Dataset Construction

1. Data from 2008 to 2023 (N=4513) Referral Judgement Dyads[1]
2. Number of Referral-Judgment dyads.
3. Missingness:

Variable	**Missing**
Referral Applications Text	13($<1\%$)
Referral Applications Citations	205(5%)
ECJ Judgement Citations	470(11%)
ECJ Judgement Text 2504	(56%)

[1] For final version I N....

Degree of Judicial Cooperation

$$\texttt{set ratio citations agreement()} = \begin{cases} \frac{X_q - (X_q - Y_q)}{X_q} & \text{If} X \setminus Y = 0 \\ \frac{X_q^- (X_q - Y_q)}{X_n + Y_n} & \text{If} X \setminus Y > 0 \end{cases}$$

1. Let X_q be the set of all national court citations at question q.

Degree of Judicial Cooperation

$$\texttt{set ratio citations agreement()} = \begin{cases} \frac{X_q - (X_q - Y_q)}{X_q} & \text{If} X \setminus Y = 0 \\ \frac{X_q^- (X_q - Y_q)}{X_n + Y_n} & \text{If} X \setminus Y > 0 \end{cases}$$

1. Let X_q be the set of all national court citations at question q.
2. Let X_n be the set number of citations by the national court.

Degree of Judicial Cooperation

$$\texttt{set ratio citations agreement()} = \begin{cases} \frac{X_q - (X_q - Y_q)}{X_q} & \text{If} X \setminus Y = 0 \\ \frac{X_q^- (X_q - Y_q)}{X_n + Y_n} & \text{If} X \setminus Y > 0 \end{cases}$$

1. Let X_q be the set of all national court citations at question q.
2. Let X_n be the set number of citations by the national court.
3. Let Y_q be the set of all ECJ citations at question q.

Degree of Judicial Cooperation

$$\texttt{set ratio citations agreement()} = \begin{cases} \frac{X_q - (X_q - Y_q)}{X_q} & \text{If} X \setminus Y = 0 \\ \frac{X_q^- (X_q - Y_q)}{X_n + Y_n} & \text{If} X \setminus Y > 0 \end{cases}$$

1. Let X_q be the set of all national court citations at question q.
2. Let X_n be the set number of citations by the national court.
3. Let Y_q be the set of all ECJ citations at question q.
4. Let Y_n be the set number of citations by the ECJ.

Mean Caselex Density

2

$$\texttt{mean caselex density()}_i = \sum_{i=1}^{i} \sum_{1 \in x_i^p}^{p} \frac{X^p}{|X^p|}$$

1. Let X be the entire dataset.

[2] caselex= caselaw legal density

Mean Caselex Density

2

$$\texttt{mean caselex density()}_i = \sum_{i=1}^{i} \sum_{1 \in x_i^p}^{p} \frac{X^p}{|X^p|}$$

1. Let X be the entire dataset.
2. Let X_i^p be dataset with all referral-judgement dyads j all possible policy areas p.

[2] caselex= caselaw legal density

Mean Caselex Density

2

$$\texttt{mean caselex density()}_i = \sum_{i=1}^{i} \sum_{1 \in x_i^p}^{p} \frac{X^p}{|X^p|}$$

1. Let X be the entire dataset.
2. Let X_i^p be dataset with all referral-judgement dyads j all possible policy areas p.
3. Let $|X^p|$ be the cardinality or the number of elements (columns) in X^p.

[2] caselex= caselaw legal density

Table of Contents

Puzzle

Theory

Data & Measurement

Research Design

Results

Conclusion

- Assess the four empirical implications presented on before on degree of inter-court rulemaking cooperation with *OLS*.
- Compare them to a *ElasticNet* Non-parametric feature selection model.(*ElasticNetCV* 2024)

Estimation Strategy

$$y_i^j = \beta\theta_m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of judicial cooperation for referral-judgement dyad i in case j.

[3] Following Abadie et al. 2023 advice.

Estimation Strategy

$$y_i^j = \beta\theta_m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of judicial cooperation for referral-judgement dyad i in case j.
2. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).

[3] Following Abadie et al. 2023 advice.

Estimation Strategy

$$y_i^j = \beta\theta_m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of judicial cooperation for referral-judgement dyad i in case j.
2. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).
3. Let θ_m be the predicted variables when indexing for model m.

[3] Following Abadie et al. 2023 advice.

Estimation Strategy

$$y_i^j = \beta\theta_m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of judicial cooperation for referral-judgement dyad i in case j.
2. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).
3. Let θ_m be the predicted variables when indexing for model m.
4. Let ε_i^c is a robust error term clustered at the referring member state court c.[3]

[3] Following Abadie et al. 2023 advice.

Estimation Strategy

$$y_i^j = \beta\theta_m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of judicial cooperation for referral-judgement dyad i in case j.
2. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).
3. Let θ_m be the predicted variables when indexing for model m.
4. Let ε_i^c is a robust error term clustered at the referring member state court c.[3]
5. Let β be the vector of coefficients for model m

[3] Following Abadie et al. 2023 advice.

Conditional Effects Estimation

$$y_i^j = (\beta\theta_m) \times \beta_1 C^e + \lambda_i^p + \varepsilon_i^c$$

Same as above plus...

1. Let $C^e = od$ be set of scope conditions used to test the three main empirical implications e.

Conditional Effects Estimation

$$y_i^j = (\beta\theta_m) \times \beta_1 C^e + \lambda_i^p + \varepsilon_i^c$$

Same as above plus...

1. Let $C^e = od$ be set of scope conditions used to test the three main empirical implications e.
2. Where o flags for when the member state submits its observations to a referral application sent from one of their domestic courts.

Conditional Effects Estimation

$$y_i^j = (\beta\theta_m) \times \beta_1 C^e + \lambda_i^p + \varepsilon_i^c$$

Same as above plus...

1. Let $C^e = od$ be set of scope conditions used to test the three main empirical implications e.
2. Where o flags for when the member state submits its observations to a referral application sent from one of their domestic courts.
3. h whether referral comes from a high court.

Conditional Effects Estimation

$$y_i^j = (\beta\theta_m) \times \beta_1 C^e + \lambda_i^p + \varepsilon_i^c$$

Same as above plus...

1. Let $C^e = od$ be set of scope conditions used to test the three main empirical implications e.
2. Where o flags for when the member state submits its observations to a referral application sent from one of their domestic courts.
3. h whether referral comes from a high court.
4. a flags when the judge rapporteur comes from the referring member state.

Conditional Effects Estimation

$$y_i^j = (\beta\theta_m) \times \beta_1 C^e + \lambda_i^p + \varepsilon_i^c$$

Same as above plus...

1. Let $C^e = od$ be set of scope conditions used to test the three main empirical implications e.
2. Where o flags for when the member state submits its observations to a referral application sent from one of their domestic courts.
3. h whether referral comes from a high court.
4. a flags when the judge rapporteur comes from the referring member state.
5. And β_1 the marginal conditional effect under conditioning implication e.

Table of Contents

Puzzle

Theory

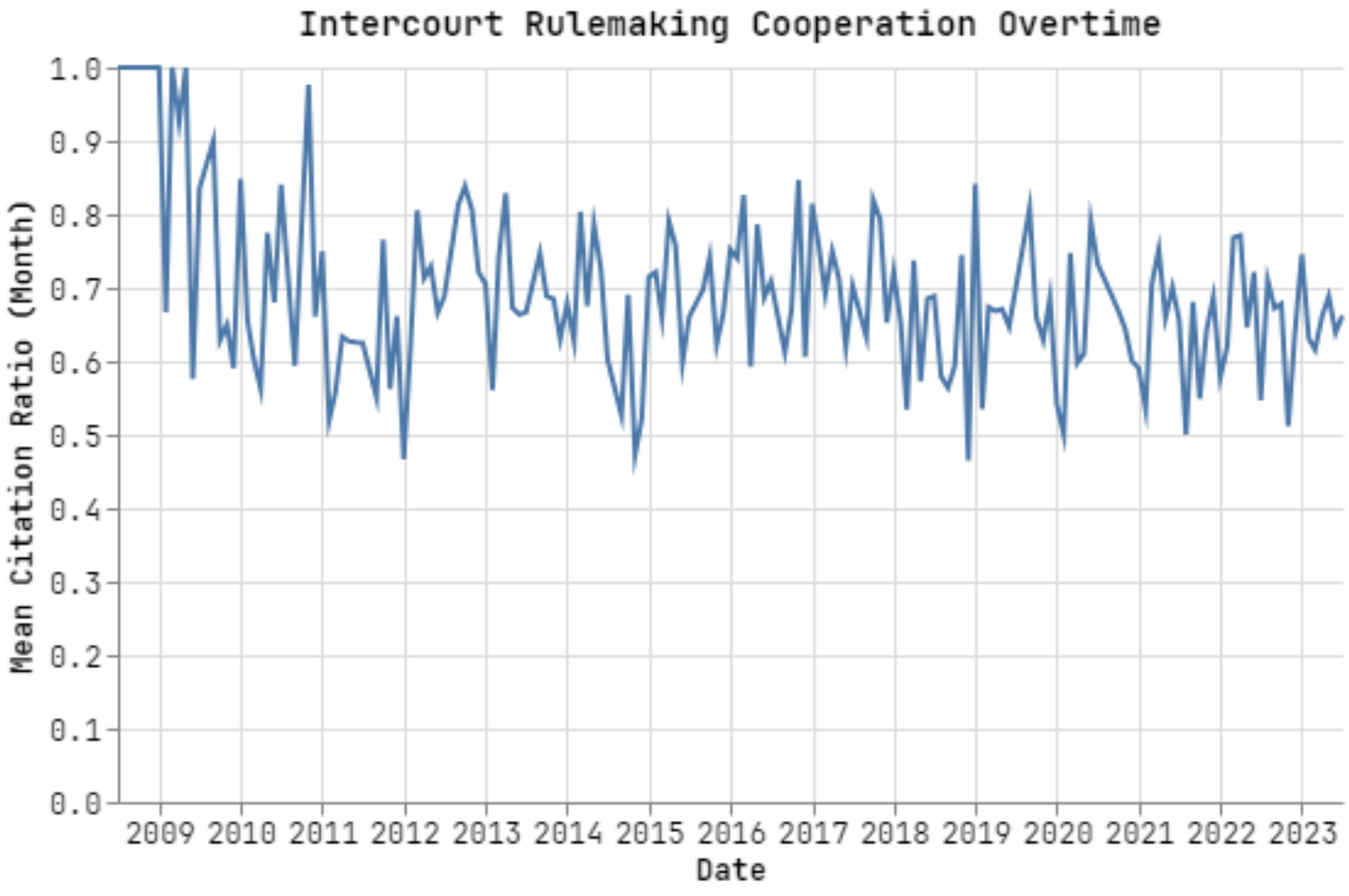
Data & Measurement

Research Design

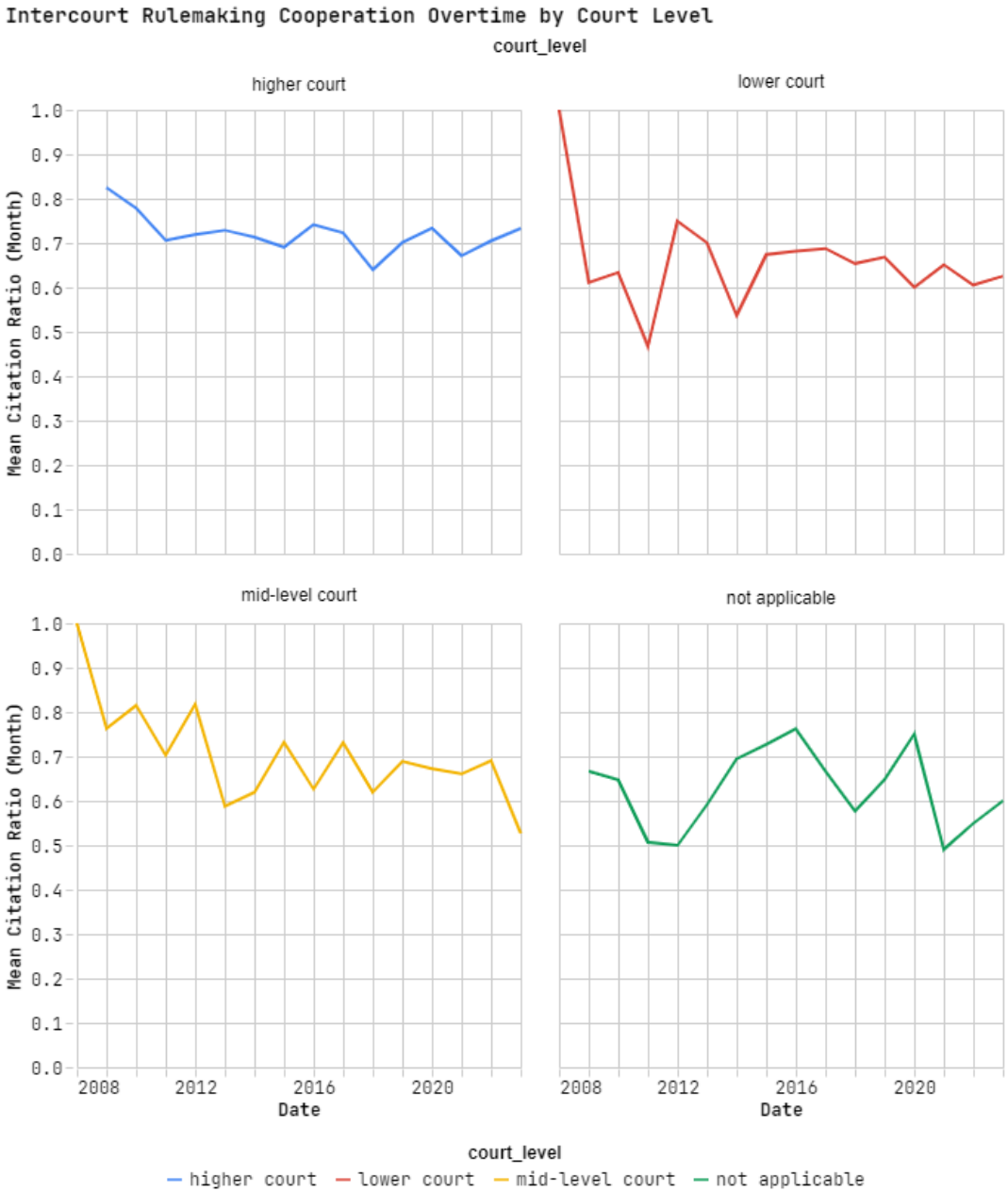
Results

Conclusion

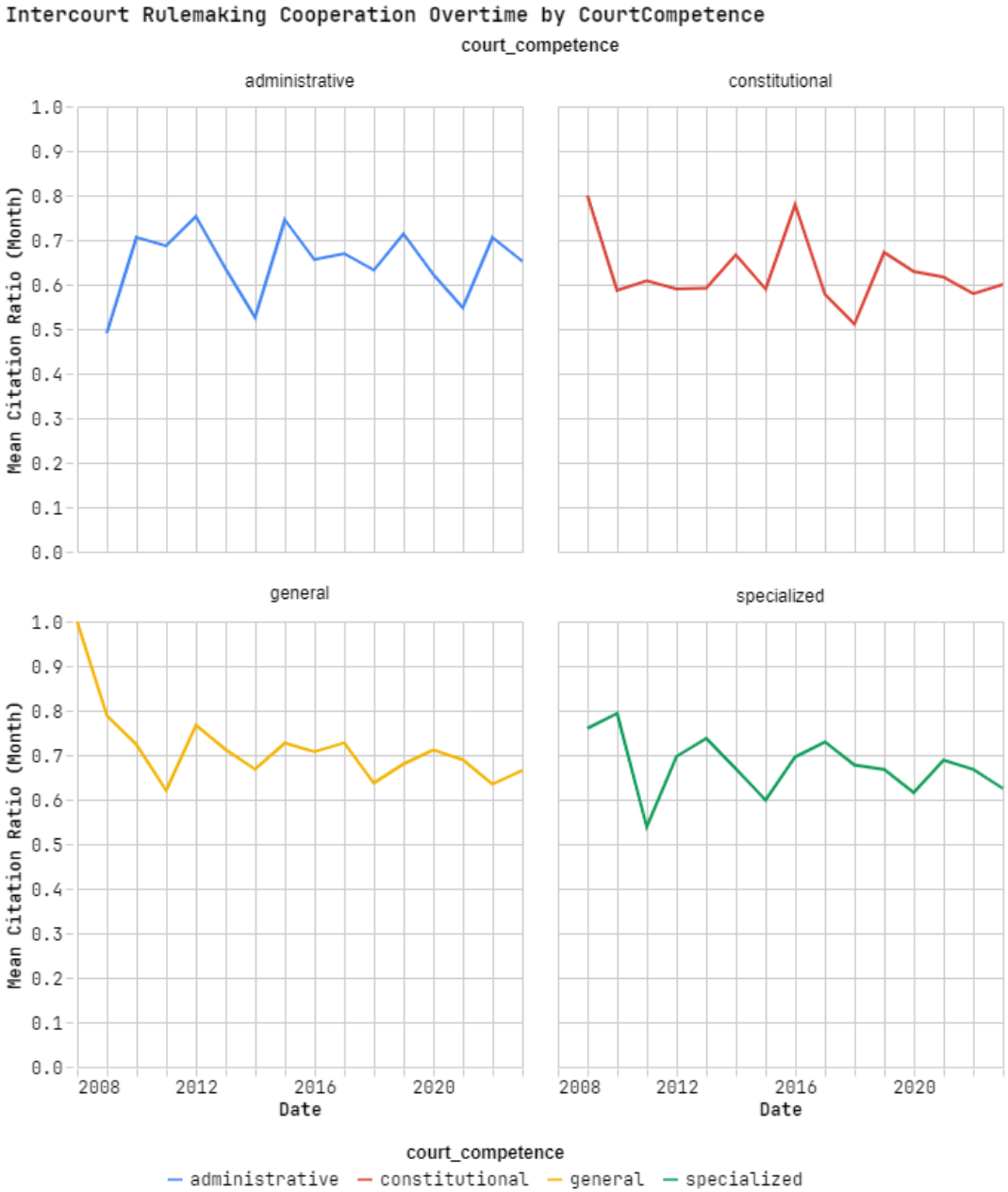
Descriptive I



Descriptive II



Descriptive III



Results Pending...

- Run Statistical models with improved data

Results Pending...

I Run Statistical models with improved data

II Test conditional hypothesis.

Results Pending...

I Run Statistical models with improved data

II Test conditional hypothesis.

III Compare performance *ElasticNet* non parametric feature selected model to existing models.

Table of Contents

Puzzle

Theory

Data & Measurement

Research Design

Results

Conclusion

Some thoughts...

1. **Q1** Any thoughts on the level of granularity should I refine my results for the set citations ratio?

Some thoughts...

1. **Q1** Any thoughts on the level of granularity should I refine my results for the set citations ratio?
2. **Q2** Unit of Measurement vs Unit of Analysis is key. How to make research commensurable?

Some thoughts...

1. **Q1** Any thoughts on the level of granularity should I refine my results for the set citations ratio?
2. **Q2** Unit of Measurement vs Unit of Analysis is key. How to make research commensurable?
3. **Q2** Should I add a single predictor estimate that I should interact to estimate the conditional effects ?

$$y_i^j = \beta_1 \delta_i + \beta \theta_m + C^e + \lambda_i^p + \varepsilon_i^c$$

Feedback Questions

Thank you for your time!!!
Please feel free to ask any questions and comments.

Contact
Email: m.m.manriquez@arena.uio.no