AEL 2021/03
Academy of European Law

WORKING PAPER

The Court of Justice in the Archives Project
Analysis of the *Foglia* case (244/80)

Diego Ginés Martín

European University Institute

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ISSN 1831-4066

Published in June 2021 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Abstract

The *Foglia* cases are key to understanding the relationship between the ECJ and national courts in Article 267 TFEU proceedings, as they were the first cases in which the Court clearly stated that it would decide on its own jurisdiction. In particular, it ruled that it would only be competent to answer preliminary references if these derived from 'genuine disputes'. This working paper derives from the project 'The Court of Justice in the Archives' which, by analysing a selection of key ECJ cases, seeks to illustrate how and why the archives of the Court, opened in 2015 in the Historical Archives of the European Union (HAEU), can be relevant for scholars of various disciplines. Building on the *dossier de procédure* of *Foglia II*, this paper aims at investigating the added value that this source can provide to the current narratives about the case. After an analysis of the *Foglia* saga and its reception in the literature (section 2), this paper goes on to discuss the *dossier* of *Foglia II*. In section 3, the quantitative and qualitative analysis of the documents found in the *dossier* is followed by some reflections on the added value that these can add to the traditional understandings of the case. In light of the documents found, this paper contends that the final judgment undermined the magnitude of the arguments evidencing the existence of genuine litigation at the domestic level. Secondly, the information found points at the influence of the French government upon the judgment, as it was already suggested in the early literature.

Keywords

Court of Justice; *dossier de procédure*; *Foglia II*; Article 267 TFEU; genuine disputes; jurisdictional control.

Acknowledgements

This report is written in the context of the 'Court of Justice in the Archives' project, organised by the Academy of European Law (AEL) and the Historical Archives of the European Union (HAEU). I would like to thank the project directors, Marise Cremona, Claire Kilpatrick, Dieter Schlenker, and Joanne Scott, as well as all the participants of the workshop held at the HAEU on 20 and 21 February 2020 for the exchange of insightful ideas that contributed to the developing of the paper. Particular gratitude is owed to Fernanda Nicola, for her extensive and very helpful comments on a prior version of this paper, and to Jeffrey Miller, for proofreading earlier versions of the manuscript.

Executive summary

A. Insights into legal issues and arguments.

The *dossier* adds substantially (or so I have argued) to the existing debates on the case, primarily by giving insight into the legal arguments of the referring judge, the parties, the Member States involved and the Commission. Whereas their overall legal stance on the issue was clear from the outset, the most remarkable findings of the *dossier* concern the arguments that were left unsaid in the final version of the judgment. The exhaustiveness of the legal arguments of the referring judge, as well as that of the lawyers of both parties, illustrate that the case was as much about demonstrating the existence of a genuine dispute between the two parties in this specific case as about the competences of the Court under Article 177 TEC (now 267 TFEU), contrary to what the judgment suggests.

B. Insights into procedures and institutions.

Access to procedural documents has been largely irrelevant in the case of *Foglia II.* The exception to this is the request of the First Advocate General (AG) Reischl to AG Warner for him to become the Advocate General to the case. Ultimately, due to AG Warner's retirement, AG Slynn served as Advocate General, producing an opinion opposed to that of AG Warner in *Foglia I*. Interestingly, it was not followed by the Court.

C. Insights into actors.

As stated above, the *dossier* does not provide relevant information concerning the actors involved in the case or their overall position in the judgment beyond what is searchable through other means. Accessing their submissions in full, however, permits us to infer their influence on the judgment. In particular, the influence of the observations of the French government upon the reasoning of the Court becomes clearer through an analysis of the *dossier*.

D. The dossier as a document (compared to the judgment): length, contents, redaction

287 out of a total of 352 pages of the *dossier* are now publicly available. It contains 103 documents, of which 94 are procedure-related documents, three correspond to previously available materials, and six to the submission of the referring judge and the observations made by the parties, the Member States and the Commission. It is on the latter documents that this report is based.

E. Key paragraph

'21. The reply to the first question must accordingly be that whilst, according to the intended role of Article 177 [267 TFEU], an assessment of the need to obtain an answer to the questions of interpretation raised, regard being had to the circumstances of fact and of law involved in the main action, is a matter for the national court it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court'.

Table of contents

List of tables and figures

1. Introduction

The case of *Foglia v Novello* (*Foglia II*)[1] stands as a key case on the relationship between domestic courts and the European Court of Justice (ECJ). Highly criticised and long regarded as a 'jurisprudential iceberg'[2], some authors have asserted that it has been overruled by subsequent jurisprudence.[3]

If landmark cases of EU law are commonly defined by reference to a short principle, the most frequent words used in the literature to refer to the *Foglia* saga are *genuine dispute*.[4] In short, the Court undertook an interpretation of Article 177 EEC Treaty (now 267 TFEU) according to which the Court is not bound to give a ruling whenever it considers that a ruling would not be used to solve a genuine dispute before the domestic court, but rather to resolve a constructed or artificial one. This inevitably means that the Court can evaluate the substance of the litigation at the national level in order to determine if it needs to answer the preliminary questions that come before it. Even if, as analysed below, the notion of *genuine dispute* has not aged well, the Court also made a more subtle and far-reaching claim: that despite the division of competences of Article 267, the Court is the ultimate decision-maker with regard to its own jurisdiction.[5]

Regardless of the impact that this ruling may have had on the evolution of EU law, *Foglia* is a puzzling case in several respects. Firstly, the Court broke free from its previous jurisprudence (which had been extremely liberal concerning the admissibility of preliminary references) and embraced the concept of *genuine dispute*, which was abstract in nature, alien to the laws of most Member States,[6] and not followed by the Court's subsequent jurisprudence. Moreover, the Court was faced with what appeared to be genuine litigation at the domestic level. Lastly, in ruling that it lacked jurisdiction, the Court went against the observations of the Commission and the Opinion of the Advocate General.

It is because of this that, by analysing the *dossier de procédure* of the case, archival research can provide very valuable information concerning the arguments of the parties and their impact on the final judgment, as well as regarding the influences that different actors may have exerted upon the Court's reasoning.

This report aims at investigating the added value that the *dossier* can provide to the current narratives about the case. In doing so, the report will focus on the substance of the submission for a preliminary reference by the national judge, as well as the observations of the Commission, the French Government, Foglia, Novello and the Danish government. These are the documents of the *dossier* which, I will be argue below, provide the most valuable insights into the case.

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[1] Case C-244/80 *Foglia v Novello*, ECLI:EU:C:1981:302. The case is commonly referred to as *Foglia II*, due to the existence of a prior case deriving from the very same judicial issue at the domestic level (*Foglia I)*, in which the Court of Justice already stated that it lacked jurisdiction on the questions submitted to it on the basis that there was no genuine dispute between the parties.

[2] Gerhard Bebr, 'The Possible Implications of Foglia v. Novello II' (1982) 19 Common Market Law Review 421, 441.

[3] Alina Kaczorowska, *European Union Law* (Fourth edition, Routledge, Taylor & Francis Group, 2016) 406.

[4] See, among others: Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 164; Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International BV 2001) 247; Kaczorowska (n 3) 405.

[5] Paul P Craig and Gráinne De Búrca, *EU Law : Text, Cases, and Materials* (Sixth edition, Oxford University Press 2015) 488.

[6] Schermers and Waelbroeck (n 4) 248.

Section 2 provides an overview of the facts leading to the submission of the questions to the Court, the parties' submissions (as reported by the judge-rapporteur in the final judgment), the AG opinion, and the final judgment, all of which were publicly available documents prior to the release of the *dossier*. It also includes an analysis of the legacy of *Foglia II* and its reception in the literature.

Section 3 analyses the *dossier* of the case. I first provide an overview of the documents found therein, analysing the number and types of documents available. Secondly, I analyse the arguments of the abovementioned actors in light of the publicly available material analysed in section 2. These are followed by some reflections on the value that access to these documents adds to the traditional understandings of the case.

2. Overview of the case in light of publicly available information and existing literature

2.1 The facts

2.1.1 Foglia I

The case of *Foglia II* was built on a previous case before the Court of Justice *(Foglia I*) which derived from the same domestic proceedings.[7] The facts giving rise to *Foglia I* unfolded as follows:

On February 1979, Mrs Novello, an Italian national, requested certain cases of Italian liqueur-wine from Mr Foglia, an Italian wine merchant, to be delivered to a person residing in France. In doing so, both parties entered into a contract in which Mrs Novello stated that she would not be liable for various charges, including a specific agreement that restricted Novello's liability 'to those taxes authorised by the Community provisions in force guaranteeing the free movement of goods'.[8] Since Mr Foglia did not directly conduct the dispatch of goods, he had recourse to Danzas S.p.A, a specialised transportation company. Similarly, the contract concluded between Mr Foglia and Danzas S.p.A included the same provision restricting Foglia's liability and making it a condition for the carriage of goods. Mr Foglia paid the bill for the dispatch of goods to Danzas, including a tax on the importation of the wine to France, and later requested that Mrs Novello reimburse him. Mrs Novello however maintained that the bill included a duty which had been unlawfully paid at the frontier and she refused payment, relying on the aforementioned stipulation in the contract. Foglia then sued Novello before the Pretore di Bra (domestic judge) in order to obtain a reimbursement of the expenses. The Pretore however found that the answer to be given to the dispute (concerning the liability to reimburse the expenses and whether to include the joinder of Danzas S.p.A in the proceedings) depended on the compatibility of French legislation with Community law, and thus submitted five questions to the Court of Justice concerning the compatibility of French taxes with Articles 95 (now 110 TFEU) and 92 (now 107 TFEU) of the EEC Treaty. The issue at stake was whether the French tax, which applied to 'sweet wines having a naturally high alcoholic content with or without a designation of origin', was contrary to the prohibition of direct or indirect discrimination in the taxation of products from other Member States, given that the tax was

[7] Case C-104/79 *Foglia v Novello,* ECLI:EU:C:1980:73.

[8] ibid 747.

based on objective criteria, but seemingly favoured French wines and disproportionally affected its foreign competitors.[9]

The Court however declined to exercise jurisdiction on the basis that there was no genuine dispute in the case, but rather an artificially constructed one. In the Court's view, both parties had the same interest concerning the outcome of the dispute, namely to obtain a ruling on the invalidity of French legislation so that neither Mr Foglia nor Mrs Novello would be liable for the taxes in question. Article 177 of the EEC Treaty (267 TFEU) was meant to provide the correct interpretation of Community law for domestic judges to be able to solve genuine disputes,[10] but, in the words of the Court, '[a] situation in which the Court was obliged (…) to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty'.[11]

2.1.2 The facts after Foglia I and the preliminary questions

Despite the reluctance of the Court to give a ruling in *Foglia I*, the Pretore again stayed the domestic proceedings between Mr Foglia and Mrs Novello, providing further clarifications on Italian procedural law in order to persuade the Court about the need to obtain a ruling, and asking the Court of Justice to provide further clarifications on its preliminary ruling in *Foglia I*. In its submission, the Pretore noted that, in Italian procedural law, it is common that 'the defendant [Mrs Novello], in contesting the claim of a plaintiff for a ruling against him, proceeds not only to request the dismissal of the plaintiff's claim but also submits a claim, which is to a certain degree independent, for a declaratory ruling'.[12] Thus, in the view of the national judge, what is labelled by the Court as an 'artificial dispute', is in reality a very specific type of dispute which is characteristic of Italian law. Building on this, the Pretore submitted five questions to the Court on Justice, this time inquiring not only about the compatibility of French legislation with Community law, but also about the division of powers between the Court of Justice and domestic courts concerning preliminary references, the power of domestic courts to interpret Community law themselves, the situation of Community countries whose legislation is questioned before the tribunals of another Member State, and the degree of protection of the rights of individuals when disputes are among private persons.[13]

2.2 Submissions by institutions, Member States and parties

The report of the judge-rapporteur, which was already publicly available as part of the judgment, provides a summary of the parties' submissions. These are briefly summarised below, but it is in section 3 that I conduct an in-depth analysis of the raw submissions of the parties (as found in the *dossier*), in order to compare them with the material available in the judgment.

From the summary of the judge-rapporteur, it can be observed that Mr Foglia, Mrs Novello, and the Commission agreed on the admissibility of the preliminary reference (and on the incompatibility of the French tax with Community legislation), but for different reasons. The

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[9] ibid 747.

[10] It must be noted that the text of Article 177 of the EEC Treaty did not include any reference as to the need for a dispute between the parties, but simply mentioned that the domestic judge 'may' or 'shall' (depending on whether or not it is a judge of last instance) submit the preliminary reference when it 'considers that a decision on the question is necessary to enable it to give judgment'.

[11] ibid para 11.

[12] Case C-244/80 *Foglia v Novello* (n 1) 3050.

[13] ibid 3049.

plaintiff and the defence criticised the new course of jurisprudence followed by the Court in *Foglia I* as invasive of domestic courts' competences under Article 177. Moreover, Mr Foglia aimed to show the existence of a genuine dispute in the main action. Similarly, the Commission seemed convinced by the arguments of the Pretore and argued that the explanations provided by the domestic judge on Italian procedural law clearly showed the presence of a conflict of interests and, if known by the Court, would have surely led to a different ruling in *Foglia I*. In addition, the lack of jurisdiction of the Court would undermine the unity and uniformity of Community law. The French government, on the other hand, argued that the question regarding the jurisdiction of the Court had already been resolved by the Court in *Foglia I* and that there was no new matter justifying its re-examination. The national Court was, indeed, the competent party to determine whether a preliminary reference should be made, but this was subject to exceptions and only meaningful in those cases in which there was a genuine dispute. The French government also argued that summoning a foreign State before a national court was likely to infringe its right of defence and that, in any case, it would breach international law on State immunity. Lastly, the Danish government also argued that the Court of Justice had exclusive jurisdiction in deciding which questions to answer, particularly in those cases in which the domestic judge was ruling on the validity of the laws of another Member State.

2.3 AG opinion

Unlike in *Foglia I*, where AG Warner casted doubts on the admissibility of the reference[14] (in a context in which not even the French government had questioned the jurisdiction of the Court), in *Foglia II* AG Slynn seemed persuaded by the arguments of the parties, the Commission and, most notably, by the fuller explanation given by the Pretore on the procedural aspects of the domestic case. Thus, although the Advocate General stressed that it was open to the Court to consider whether the new evidence was sufficient to enable the Court to decide that it had jurisdiction to deal with the questions,[15] he seemed prone to answering the preliminary questions given the fact that the Pretore had amplified the material available for the Court's consideration.[16] The AG acknowledged that the Court of Justice could deny its jurisdiction where domestic courts fail to consider the correct test for the purposes of Article 177 in a clear abuse of the procedure, but also recognised that the Court had been given a fuller explanation on the existence of a dispute and argued as follows:

> It does not, in my view, matter for this purpose that the parties adopt the same position on the point of Community law. The crucial matter is not whether the parties are agreed: it is whether the judge considers that the question has to be determined for the purposes of giving judgment.[17]

He thus made a clear distinction between the existence of domestic litigation (genuine or otherwise) and the question of interpretation at the Community level, where the confluence or divergence of views over the correct interpretation of the Community provision at stake is irrelevant from the perspective of the Court's jurisdiction. This reasoning, though ignored by the Court in its judgment, was also key for the parties to make the case that the domestic proceedings were not built upon artificially constructed litigation.

AG Slynn thus proceeded to answer all the questions posed by the Pretore. In doing so he found, in accordance with the view of Foglia, Novelo, and the Commission, that the French tax under scrutiny was indeed contrary to Article 95 EEC (110 TFEU).

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[14] Case C-104/79 *Foglia v Novello*, Opinion of the Advocate General, ECLI:EU:C:1980:22 764–765.

[15] Case C-244/80 *Foglia v Novello*, Opinion of the Advocate General, ECLI:EU:C:1981:175 3069.

[16] ibid 3072.

[17] ibid 3071.

2.4 The judgment: key aspects and general reflections

In *Foglia II*, the Court of Justice, again sitting as a full Court (in which eight out of nine judges were the same as in *Foglia I*), declined once more its jurisdiction to rule on the compatibility of the French tax with Community laws on the free movement of goods. Although the outcome concerning the interpretation of Article 95 was effectively the same, the ruling in *Foglia II* was far more complex than its precedent, and it stood out as highly controversial due to the fact that it decided to rule against not only the observations submitted by the Commission and the Opinion of the AG, but also against mainstream academic commentary.

Unlike in *Foglia I*, the Court decided to provide answers to three of the five questions posed by the Pretore.

Concerning the first question, on the division of competences between domestic courts and the Court of Justice in Article 177 proceedings, the Court established that, whereas it was for the national court to assess the need to obtain an answer to questions of interpretation of Community law, and whereas the Court must place as much reliance as possible on the assessment of the domestic court, 'it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court'.[18] In particular, it was not the duty of the Court to deliver advisory opinions on general or hypothetical questions, or to reply to questions artificially arranged by the parties to induce the Court to give judgement.

When asked about the need to order the joinder in the proceedings of the authorities of the Member State whose legislation is being questioned before the tribunals of another Member State prior to submitting a reference for a preliminary ruling, the Court answered that this did not depend on Community law, but on the procedural law of the Member State whose laws were questioned and on the relevant principles of international law.

Regarding the fourth question, on the rights of individuals receiving a lesser degree of protection in the case of proceedings between private persons, the Court answered that, even though 'all individuals whose rights are infringed by measures adopted by a Member State which are contrary to Community law must have the opportunity to seek the protection of a court',[19] the Court of Justice had to take special care to ensure that preliminary references were not initiated in breach of Article 177 in those proceedings between private individuals where the legislation of a Member State was questioned before the tribunals of another Member State. In other words, the Court would take a closer look at the genuineness of the dispute precisely because the parties were questioning the validity of a French tax before Italian courts.

Finally, the Court left two questions unanswered. In the case of the second question, which raised the issue of which law (Community or domestic) should the domestic court interpret in the case of a lack of jurisdiction of the Court of Justice, the Court merely stated that '[h]aving regard to the foregoing it is unnecessary to reply to the second question'.[20] Concerning the last question submitted by the Pretore, the Court denied its jurisdiction to rule on the main issue of the dispute, the compatibility of the French tax on liqueur wines with Article 95 of the EEC Treaty. It did so by referring to its reasoning in *Foglia I* and arguing that the circumstances referred to by the Pretore did not shed light on new facts justifying a fresh appraisal of its jurisdiction by the Court.

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[18] ibid para 21.

[19] ibid para 26.

[20] ibid para 35.

2.5 General reflections on the case

It must be highlighted that the dispute at the domestic level concerned the payment of a tax of 148,300 Italian Lire (less than €80). As occurred in *Costa v ENEL,* the amount at stake did not correspond to the impact of the case on EU law. Along these lines, Vauchez argues that, in *Costa v ENEL:* 'far from being a rather irrational dispute over a contested 1,925 Italian lire bill issued by the Italian electricity company ENEL led by uncontrolled, litigious if not foolish, lawyers (as many of the accounts seem to indicate nowadays), their undertaking was grounded in a consistently activist conception of a European rule of law'.[21] Similarly, Pollack distinguishes between 'opportunistic' uses of EU law in which lawyers simply seek to find a particular legal remedy for their client, and activist litigation, in which the litigants and their lawyers seek to push forward the progress of European integration.[22]

The case of *Foglia v Novello* seems to fit the latter category. The Pretore was not a court of last instance and hence was not compelled to submit the questions for a preliminary ruling to the Court of Justice. Yet, faced with a case concerning a small amount of money, and having obtained a judgment in which the Court of Justice had already denied its jurisdiction, the Pretore declined to decide the case before it and referred the case again to the Court of Justice. He took this path even though, as the *dossier* shows, Mr Foglia had argued that the Court of Justice had implicitly recognised the legality of the French tax in *Foglia I* and therefore suggested that Mrs Novello should have paid it. Throughout the *dossier*, the Pretore's knowledge of Community law, as well as his engagement with the legal consequences of *Foglia I* for Community law, are truly remarkable.

This thesis can be further supported if one looks at the lawyers who worked on the case. Mr Foglia was defended by Emilio Cappelli, who was a lawyer before the Court of Justice in at least eight cases and who had just defended Simmenthal S.p.A in the landmark case of *Simmenthal*.[23] Mrs Novello was represented by Prof. Giovanni Motzo, a member of the Italian Parliament and academic specialised in Community Law, who immediately submitted an unconstitutionality appeal at the domestic level after *Foglia I*.

In their observations, both the defendant and the plaintiff showed their concern that the ruling of the Court in *Foglia I* invaded the competences of the domestic judicial authority and negatively affected the mutual confidence shared by the courts as well as the unity and uniformity of EU law, as argued by the Commission, in what the parties believed to be an example of European disintegration. This is particularly striking in the case of Mr Foglia, to whom the legality or illegality of the French tax would have been irrelevant from an individual perspective. Indeed, despite the denial of jurisdiction by the Court of Justice in *Foglia I*, Mr Foglia decided to maintain the view that the French tax was contrary to Community law, running the risk that the ECJ might interpret, again, that the common position of both parties

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[21] Antoine Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' (2010) 16 European Law Journal 1, 17–18.

[22] Mark A Pollack, 'Learning from EU Law Stories: The European Court and Its Interlocutors Revisited' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2751739 583.

[23] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA,* ECLI:EU:C:1978:49. Other cases in which Emilio Cappelli litigated before the ECJ are: Case C-133/93 *Crispoltoni and Others v Fattoria Autonoma Tabacchi and Others*, ECLI:EU:C:1994:364; Case C-179/84 *Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro*, ECLI:EU:C:1985:306; Case C-368/89 *Crispoltoni v Fattoria Autonoma Tabacchi di Città di Castello*, ECLI:EU:C:1991:307; Joined Cases C-161/90 and C-162/90 *Petruzzi and Longo v AIPO and Others*, ECLI:EU:C:1991:383; Case C-88/91 *Federconsorzi v AIMA*, ECLI:EU:C:1992:276; Case C-64/93 *Donatab v Commission*, ECLI:EU:C:1993:266; Joined cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others v Fattoria Autonoma Tabacchi and Others,* ECLI:EU:C:1994:364.

concerning the interpretation of Community Law was a sign of an artificial dispute. This is what ultimately occurred.

2.6 The legacy of Foglia II: what is the case known for in the literature?

This section analyses the reception of the *Foglia* saga in the literature, as well as the impact that the case has subsequently had on EU law, bearing in mind that, as Poiares Maduro and Azoulai put it, 'the importance of a case is determined as much by the judgment as it is by the follow-up to that judgment in the broader political, social and legal communities'.[24]

As anticipated above, the judgment of the Court of Justice in *Foglia II* was heavily and almost unanimously criticised in the literature[25] for two main reasons. Firstly because, by appraising the substance of the domestic litigation, it was said to trespass on the powers of the national judge and undermine the separation of competences between domestic courts and the Court of Justice, which is intrinsic to the preliminary reference procedure.[26] Secondly, the concept of 'genuine dispute' was highly controversial, due to its abstract nature and the fact that it was an unknown concept at the national level, where judges had to decide all cases brought before them.[27] Moreover, most of the academic commentary agreed that, even if the standard of 'genuine dispute' was to be accepted as a reasonable threshold for the Court of Justice to accept its jurisdiction, in this specific case the Pretore di Bra faced what looked like a genuine dispute.[28] When the Court had previously declined jurisdiction, it had done so in cases where 'the lack of jurisdiction was so manifest that the Court practically needed not to engage in any review to arrive at such a conclusion'.[29] The case of *Foglia v Novello,* conversely, 'demonstrates the dangers of using such power in a case that is less than clear'.[30] Thus, even if there were disagreements as to whether or not the existence of a 'genuine dispute' was an adequate standard of application of Article 177 (267 TFEU), there was a widespread consensus that the principle had been overstretched in *Foglia*.

Academic critiques were followed by erratic ECJ jurisprudence, which has led some authors to wonder the extent to which the condition that there must be a genuine dispute between the parties still exists.[31] The *Foglia* judgments have been described as 'isolated',[32] or even a

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[24] Miguel Poiares Maduro and others, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Bloomsbury Publishing Plc 2010) xiii.

[25] In this line, read, among others: Ami Barav, 'Preliminary Censorship? The Judgment of the European Court in Foglia v Novello' (1980) European Law Review; Bebr (n 2); Trevor C Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union* (Oxford University Press 2014) 301; D Anderson, 'The Admissibility of Preliminary References' (1994) 14 Yearbook of European Law 179, 194–195.

[26] Schermers and Waelbroeck (n 4) 248.

[27] *Ibid.*

[28] Hartley (n 25) 301.

[29] Bebr (n 2) 439. See, for example the case of Mattheus (Case C-93/78 *Mattheus v Doego*, ECLI:EU:C:1978:206), where the parties had entered an agreement which they had the right to terminate if 'the accession of Portugal to the EEC remained impracticable', this having to be determined compulsorily by the Court of Justice. In this case, the Court noted that there was an agreement between private parties trying to compel a national court to submit a specific question before the Court. However, the Court did not deny its jurisdiction due to this (given that the domestic court had not presented this issue), but because the legal conditions of the accession of Portugal to the Community were defined in the treaties and its feasibility depended upon many contextual features which, for obvious reasons, could not be defined judicially in advance.

[30] Anderson (n 25) 194.

[31] Kaczorowska (n 3) 405.

[32] Schermers and Waelbroeck (n 4) 248.

'jurisprudential iceberg'.[33] These assertions are based on a number of subsequent cases by the ECJ in which the Court consistently rejected arguments that there was no genuine dispute, even in cases where the litigation was arguably less genuine than in *Foglia*.[34] The ECJ has also accepted references in cases in which a domestic judge submitted questions concerning the validity of the laws of another Member State.[35]

As a result, *Foglia v Novello* is considered an isolated judgment which is not only inconsistent with its very liberal preceding jurisprudence, but also with successive judgments. Yet, despite being known because of the 'genuine dispute' rule, the legacy of the judgment goes well beyond it. As Craig and de Búrca rightly point, *Foglia* is also 'about the primacy of control over the Article 267 procedure and the nature of the judicial hierarchy, involving EU and national courts (…) Foglia reshaped that conception. The ECJ was not simply to be a passive receptor, forced to adjudicate on whatever was placed before it'.[36] Indeed, the Court asserts in *Foglia* that it 'must be in a position to make any assessment (…) to check, as all courts must, whether it has jurisdiction'.[37] Thus, *Foglia,* understood broadly, is not simply about genuine disputes, but about jurisdictional control more generally. The standard of 'genuine disputes' was simply one manifestation (and arguably not a very fortunate one) of such jurisdictional control.

While this wider principle lay dormant for some time, the Court began to use it again in the 1990s.[38] The standard formulation of the principle, as now used by the Court, is based on three grounds on which a reference can be declared inadmissible. These were summarised by the ECJ in *Filipiak v Dyrektor Izby* as follows:

> [T]he Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 Foglia [1981]) (…) The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[39]

Yet *Foglia II* is still a perplexing judgment. Even though it has had a visible legacy on EU law, there are various questions that the Court left unanswered. Why did the Court switch from

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[33] Bebr (n 2) 441.

[34] See, among others: Case C-412/93 *Leclerc-Siplec,* ECLI:EU:C:1995:26; Case C-144/04 *Mangold v Helm*, ECLI:EU:C:2005:709; Case C-140/79 *Chemial v DAF*, ECLI:EU:C:1981:1 ; Case C-46/80 *Vinal v Orbat*, ECLI:EU:C:1981:4.

[35] For example, in the case C-150/88 *Parfümerie-Fabrik 4711 v Provide*, ECLI:EU:C:1989:594, posterior to *Foglia,* the Italian government asked for the inadmissibility of the reference based on both: 1) the lack of a genuine dispute and; 2) 'that they [the parties] are intended to permit a court in one Member State to determine whether the rules of another Member State are compatible with Community law' (para. 11). However, the Court made clear that 'the Court may provide the criteria for the interpretation of Community law (…) when it is to be determined whether the provisions of a Member State other than that of the court requesting the ruling are compatible with Community law' (para. 12).

[36] Craig and De Búrca (n 5) 488.

[37] Case C-244/80 *Foglia v Novello* (n 1) para 19.

[38] Craig and De Búrca (n 5) 490. In *Dias*, ruled in 1992, the Court recalled that, under *Foglia,* it is essential for the national court to explain why a response to the questions is necessary to enable it to give judgment. It is based on this that it noted that 'If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment' (*C*ase C-343/90 *Dias,* ECLI:EU:C:1992:327 para 20).

[39] Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu,* EU:C:2009:719 paras 41-42.

an extremely liberal approach[40] concerning the admissibility of preliminary references to a very restrictive one, and then shift again to a more liberal one after *Foglia*? And, more importantly: why did it adopt the need for a 'genuine dispute' as the standard for its jurisdiction, particularly in a case in which, *prima facie*, there was indeed a genuine dispute? Whereas the literature has traditionally associated *Foglia* with the will of the Court to emphasise its powers within Article 267 proceedings to the detriment of national courts, some also pointed to the role of the French government in the ruling. As Hartley notes, 'it seems likely that the real reasons for the decision in *Foglia v Novello* was one of policy: it did not wish to offend France by allowing the lawfulness of its taxes to be challenged by such roundabout means'.[41]

By looking at the *dossier*, I aim to untangle, at least partly, the reasons leading to such an enigmatic ruling, as well as to understand the role played by actors other than the Court itself. The *dossier*, in other words, opens up a space for research that looks at the case, not for what it may have become after decades (as illustrated above) but as a resource that provides a deeper understanding of what the case was about at the time and gives further insights into the micro-history of the case dynamics.[42] It is by taking a close look at the arguments of the parties, Member States and Community institutions that some of these questions can begin to be answered.

3. The dossier

3.1 The composition of the dossier

The *Foglia dossier* is comprised of the following types of documents:

1. Submission of the Preliminary Reference
2. Submissions of the Parties, Member States and Institutions
3. Procedure-related documents
4. Report of the Oral hearing by the judge-rapporteur
5. AG Opinion
6. Final Judgment
7. Redacted material

[40] For example, in *Costa*, the Court itself noted that it could correct and extract the adequate questions from improperly framed references. It also affirmed that the clear separation of functions between the Court and domestic Courts did not allow it to investigate the facts of the case or to criticise the grounds or purpose of the request (Case 6/64 Costa, ECLI:EU:C:1964:66 593). In *Rewe-Zentrale*, where the Court making the reference acknowledged that the questions were not relevant to the litigation, the questions were answered by the Court as it could become a test case for similar cases (See Case C-37/70, *Rewe-Zentrale v Hauptzollamt Emmerich* [1971] EU:C:1971:15).

[41] Hartley (n 25) 301.

[42] Antoine Vauchez, 'EU Law Classics in the Making Methodological Notes on Grands Arrêts at the European Court of Justice' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2752364 22.

Table 1: Categorisation of *dossier* by document type

Category of Document	**Number of documents (103 available in *dossier*)**	**% of number of documents**	**Number of pages (352 in total/ 287 in *dossier*)**	**% of the *dossier***	**% of the original file**
Submission of the Preliminary Reference	1	1%	21	7.3%	6%
Observations by parties, MSs and Institutions	5	4.8%	68	23.7%	19.3%
Procedure-related documents	94	91.2%	95	33.1%	27%
Report of the Oral hearing	1	1%	21	7.3%	6%
Opinion of the AG	1	1%	36	12.5%	10.2%
Final Judgment	1	1%	40	14%	11.3%
Redacted Material			65		18.5%

3.1.1 Submission of the Preliminary Reference

The Submission of the Preliminary Reference by the Pretore di Bra consists of 21 pages (7.3% of the original *dossier*) which were not previously available to the public and offer valuable insights into the legal reasoning of the domestic judge pertaining to the need to obtain a preliminary ruling.

3.1.2 Observations of the parties, Member States and institutions

The *dossier* contains another five documents that were not publicly available, in which the parties, Member States and the Commission submitted their observations and presented their legal arguments before the Court. In total, these documents run 68 pages, amounting to 19.3% of the total of the *dossier*. The documents included are: 1) The observations of the Commission (seven pages); 2) the observations of the French government (20 pages, 10 of them in French and 10 of them corresponding to the Italian translation); 3) the observations of Mr Foglia (21 pages); 4) the observations of Mrs Novello (10 pages) and; 5) the observations of the Danish government (10 pages, five of them in Danish and five corresponding to the Italian translation).

The order of the submission found in the *dossier*, which corresponds with the chronological order of the submissions, does not correspond with the order reported by the judge-rapporteur, which is as follows: 1) Commission; 2) Foglia; 3) Novello; 4) French Government; 5) Danish government.

3.1.3 Procedure-related documents

The largest part of the *dossier* is made up of procedural documents, both in terms of number (94 out of 103 available) and length (around one third of the available *dossier*). The large number of documents, however, can be explained due to the fact that most of these are communications from the Registrar of the Court in which identical documents are translated and sent to the different parties, Institutions and Member States. In these communications the Registrar of the Court: let the parties know about their right to submit observations; attached the different observations to all the parties involved; notified the date of the hearing; attached the report of the hearing; and attached the AG's opinion and the final judgment, among others.

There are other procedural documents, including:

- Appointment of the judge-rapporteur by the President of the Court.
- Premier Avocat Général's nomination of the AG for the case.
- Letter by the German government communicating that it would no longer participate in the proceedings.
- Designation of its legal representatives by the Commission and the French government.

These documents do not generally provide any substantial insights into the case. However, it must be highlighted that through the *dossier* it is possible to know that AG Warner, who served as Advocate General in *Foglia I* (where he suggested that the Court deny its jurisdiction), was offered the position as AG again in *Foglia II* by the First Advocate General G. Reischl.[43] Given that AG Warner left the Court in 1981 after eight years in office, it was eventually AG Slynn who served as Advocate General in *Foglia II*. This arguably had consequences for the outcome of the Opinion, as AG Slynn seemed convinced that the Court had jurisdiction to answer the questions posed by the Pretore, even if the Court did not follow his advice in the end.

3.1.4 Material that was publicly available prior to the publication of the dossier

The *dossier* also contains the report of the judge-rapporteur Lord Mackenzie Stuart (21 pages), the Opinion of the Advocate General (36 pages, 18 of which correspond to the Italian translation), and the Final Judgment (40 pages), all of which were already publicly available. Together, they amount to 97 pages, 33.8% of the available *dossier*.

3.1.5 Redacted material

There are 65 pages that have been redacted, around one fifth (18.5%) of the original *dossier*. It is not possible to know with exactitude the type of documents which have been removed from the *dossier*, as it is only written '[p]ages - to - are not available for public consultation'.

There are 14 pages removed from page 129 to 142 of the *dossier*, corresponding to the whole phase of Instruction. The last page available before the redacted part is a cover which merely reads 'ISTRUZIONE', whereas the first page after the cut marks the beginning of the Oral proceedings. 51 pages have been removed (from page 195 to 245) between the report of the oral hearing and the Opinion of the Advocate General.

Setting aside the material that was already publicly available, as well as purely procedural documents, I have identified 89 pages which were unpublished and provide substantial insight

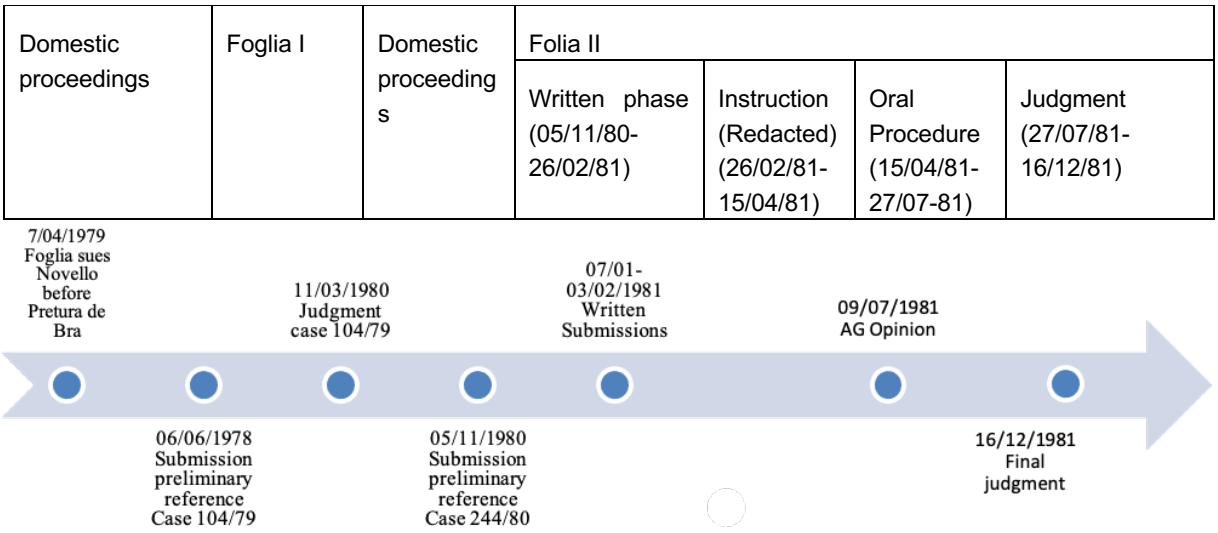
[43] Annex, Doc. 17.

into the case. The removal of 65 pages means that it is likely that a large part of the key material is still not accessible.

3.1.6 Conclusions

As shown in the table above, there are six types of documents now available. In total, the *dossier* contains 109 documents in a total of 287 pages (out of the 352 pages than conformed the original *dossier*). This means that 65 pages (18.5% of the original file) have been removed. Three of the available documents, namely the report of the oral hearing, the Opinion of the Advocate General and the final judgment are all documents which were available to the public prior to the release of the *dossier*. Together they amount to the 33.8% of the available part of the *dossier* and 27.5% of the *dossier* in its entirety. This effectively means that around 50% of the original file (190 pages) is formed by documents which were not available prior to the opening of the *dossier* and which can now be consulted. However, 27% (95 pages) of the original file is comprised of procedure-related documents which, although now available, do not provide *a priori* any relevant information for the study of the case. As a result, there are six documents, which together amount to one fourth (25,3%) of the original *dossier* (89 out of 252 pages) that, despite being summarised in the report by the judge-rapporteur and present in the publicly available judgment, provide new and valuable information concerning the submission of the preliminary reference by the Pretore di Bra, and the arguments of the parties, institutions and countries involved. These documents provide the basis of the present report, which conducts an analysis of the arguments of all the actors involved to see the extent to which these are accurately reflected (or omitted) in the publicly available materials, as well as whether they make their way into the reasoning of the Court.

Figure 1: Procedural timeline of Foglia cases



3.2 The submissions of the actors in light of the available material

As noted above, the *dossier* does not provide particularly relevant information in its procedural documents. Neither does it provide major surprises as to the actors involved in the case or the interests pursued by them, as they correspond to the parties and positions that could be observed in the final judgment.

As a result, the present section will focus on the added value of the arguments submitted by the Pretore di Bra (referring judge), the parties (Foglia and Novello) and the intervening Member States (France and Denmark) as found in the *dossier*, which will then be compared with the official reports.[44] I will analyse the key arguments and legal reasoning of these actors in order to determine the extent to which these are reported, partly reported or ignored in the public documents. This analysis makes it possible to reflect on the general handling of submissions by the Court, i.e, the way in which it incorporates the arguments of other parties to support its own reasoning, or the way in which it ignores or refutes the arguments that it chooses not to follow.

3.2.1 Pretore di Bra: the reference for a preliminary ruling

The Pretore, in its account of the facts leading to the submissions ('in fatto'), begins by noting that the plaintiff (Mr Foglia), in the domestic proceedings between *Foglia I* and *II*, claimed that the decision of the Court of Justice in *Foglia I* constituted an implicit acknowledgement of the conformity of the French tax with Community law, whereas the defendant insisted that there had been no ruling on the matter.[45] Interestingly, these facts, which are of crucial importance in determining the existence of a 'genuine dispute' (given that it shows contradictory positions in the domestic litigation) are not reported in the publicly available documents.

In its legal statement of reasons,[46] the Pretore stressed the need to clarify the circumstances of fact and law concerning the preliminary reference. In what constitutes its central argument (duly reflected in the official reports), the domestic judge claimed that Italian procedural law allowed the defendant, in its right of defence, to submit an autonomous claim in order to obtain a declaratory ruling. This was not a sign of a lack of a dispute, or of an artificial one, but of a specific type of dispute characteristic of Italian law.

The Pretore built on the argument of Mrs Novello in order to differentiate between the existence of a dispute at the national level on the one hand, and the fact that both parties happened to agree on the interpretation of Community law to be afforded by the Court of Justice on the other, which by no means entailed an artificially constructed case, but simply that two parties, which have conflicting interests, held a similar view on the interpretation of a provision of Community law.[47]

In addition, the submission criticised the implications of the Court's interpretation in *Foglia I*, namely: the power of the Court of Justice to appraise the substance of the case under Article 177; the assertion that the case before it was artificial, and that preliminary references could

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[44] The documents will be analysed in chronological order, as they appear in the *dossier*. The documents were however presented in a different order in the report of the judge-rapporteur.

[45] See Annex Doc. 1, 1-2.

[46] It should be stressed that, in the original submission by the Pretore, the factual report ('in fatto') is followed by the legal statement of reasons ('in diritto'), which is then followed by the submission of the questions. In the report of the judge-rapporteur, however, the questions are placed within the legal reasoning of the Pretore.

[47] This argument is not included in the official reports, although it is very briefly included when summarising the observations of Mrs Novello.

not be brought concerning provisions of a Member State other than that of the judge making the reference.[48]

Lastly, in yet another unreported argument, the Pretore expressed its concern that the real intention of AG Warner's Opinion in *Foglia I*, which was followed by the Court, was not to avoid an abusive interpretation of Article 177, but to protect Member States whose norms were being questioned by the tribunals of a different Member State.[49]

3.2.2 Observations of the Commission

The observations made by the Commission, which were considerably shorter than the reference for a preliminary ruling of the Pretore, were, in general terms, faithfully reported by the judge-rapporteur in his report.

Indeed, the Commission argued that the new submission provided valuable insight into Italian procedural law which, if known by the Court, would have surely led to a different ruling in *Foglia I*.[50] In light of this, the Commission argued that there was therefore no doubt that there was a conflict of interest between the parties, the scope of which was entirely new. Whereas the Commission did not position itself on the generic issue of whether the Court should have appraisal powers (and which ones) to deny jurisdiction under Article 177, it voiced its concerns about the possibility that the denial of jurisdiction might lead to domestic judges interpreting Community law themselves, thereby potentially affecting the unity, uniformity and primacy of Community law and weakening the protection of individual rights.

As in Case 104/79, the Commission concluded that the French legislation breached Article 95 of the EEC Treaty.

3.2.3 Observations of the French government

The French observations revolved around two main arguments, which are broadly reflected in the official report. Firstly, the French government argued that, as in *Foglia I*, there was an artificial dispute. Whereas it was for domestic courts to evaluate the need to pose preliminary reference questions, there were exceptions to the rule (for example, in a case of abuse of rights). In this case, the artificial nature of the dispute was self-evident and already established in *Foglia I*, and there were no new issues that could justify a change of criteria (*res judicata*). In France's view, the role of the Court was not that of providing legal opinions but to assist in solving real jurisdictional disputes.[51]

Secondly, the French government questioned the possibility of summoning a foreign State before a national court. According to France, this had damaged the rights of the French government, firstly because the parties had not employed the procedures available under French law and, secondly, because the French government had not been represented before

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[48] Annex, Doc. 1, 11. This argument is included in the judge-rapporteur summary.

[49] Annex, Doc. 1, 16-17.

[50] Annex, Doc. 20, 3. The Commission argued as follows: 'Tale ordinanza espone, in dettaglio, molteplici fatti e circostanze processuali peculiari all'ordinamento giuridico italiano (...) i quali, se fossero stati conosciuti dalla Corte all'epoca della causa pregiudiziale n. I04/7 9, avrebbero certamente deteminato una pronuncia diversa da quella contenuta nella citata sentenza dell'11 marzo 1980'.

[51] This specific argument was not reported by the judge-rapporteur but was however one of the key arguments used by the Court in its final judgment.

the Italian Court. It also argued that the presence of France before a foreign court was not a matter of Community law, but of State immunity and private international law.

3.2.4 Observations of Foglia

The observations of Mr Foglia, the plaintiff in the main action, are the longest in the *dossier* (21 pages) and they are very rich in factual information and legal arguments, some of which are not reported in the final judgment. His submissions are particularly rich as regards information seeking to debunk the claim that there was not a genuine dispute in the main proceedings.

In his account of the facts leading to the case, Mr Foglia notes, as the Pretore did, that after *Foglia I*, Mr Foglia had argued before the Pretore that the ruling of the Court was implicitly asserting the conformity of French legislation with Community law, and thus Mrs Novello should pay the sum owed. Mrs Novello, however, had maintained that this interpretation invaded the competences of the Court and thus focused on the submission of an unconstitutionality appeal derived from the impossibility of obtaining a declaratory ruling.[52] Again, it is noteworthy that the judge-rapporteur decided to omit this information in his report, given that it clearly provided relevant evidence concerning the existence of a dispute between the parties. Indeed, the report merely stated that '[t]he plaintiff in the main action begins by recalling the previous history of the case in order to show the existence of a genuine dispute between the parties to the main action'.[53]

As regards the speculations of AG Warner in *Foglia I* about the fact that Danzas S.p.A was not called by the Pretore as a third party, Mr. Foglia noted that this was purely a matter of procedural economy, given that, if the answer to the preliminary question had been that the French tax was lawful, his joinder in the proceedings would have proved pointless.[54]

Foglia further noted that he had never argued before the domestic judge that the taxes were not in conformity with Community law, given that this was indifferent (but by no means 'neutral', as the AG had observed) to him,[55] and that the sole object of its action was to obtain a ruling determining that Mrs Novello should bear the costs of the tax. He then argued that the AG had confused the attitude of the parties within the domestic proceedings (where they had clearly conflicting positions) with that adopted before the Court of Justice, where both parties happened to have a similar interpretation of Article 95 of the Treaty.[56] These arguments are not mentioned in the public report, although, when the argument is made again by Foglia at the end of his submissions, this is briefly accounted for by the judge-rapporteur. Foglia's submissions, as found in the *dossier*, seem to contribute to the notion of the case as an example of activist litigation. Indeed, whereas Mr Foglia could have easily argued that French legislation was in conformity with Community law so that Mrs Novello would bear the costs (probably showing a clearer confrontation with Novello before the eyes of the Court), his lawyer sustained that the process before the Court of Justice was one of pure law, without parties, in

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[52] Annex, Doc 22, 72-73.

[53] Case C-244/80 *Foglia v Novello* (n 1) 3052.

[54] This point (see doc.22, 8 in the *dossier*), is adequately addressed in the final judgment (3052).

[55] Argument reported in the public documents. Indeed, the legality of the French tax was indifferent to Foglia, because, if it was declared compatible with Community law, it should have been paid by Mrs. Novello, whereas if it was incompatible it should have been assumed by Danzas S.p.A. It is because of this that the legality of the tax was indifferent to him and thus never contested by him before the Pretura di Bra.

[56] This is explained by Foglia's lawyer in the following terms: 'L'avvocato Generale deve aver confuso l'atteggiamento del Foglia nel corso del giudizio d'interpretazione con quello tenuto innanzi al Giudize nazionale' (see Annex, Doc.22, 7).

which he felt compelled to advocate for a coherent interpretation of Community law, which happened to converge with that of Novello (but also the Commission and AG). This was done, according to Mr Foglia's lawyer, with the intent to represent interests beyond those of his client.[57]

Beyond the genuineness of the dispute in the contested proceedings, Mr. Foglia agreed that, in obvious cases, it must be for the Court to analyse if a case is purely artificial and made up by the parties with the sole purpose of obtaining a ruling from the Court of Justice. This was not the case, however, in the dispute in question, due to the reasons given above. He thus wondered if, in the end, all the 'inquisition' into the facts of the case did not respond to a concern about the correct interpretation of Article 177, but about the position of a Member State whose legislation was questioned before the tribunals of another Member State.[58] It is remarkable how these arguments, which are central to Foglia's claim, are neither reported by the judge-rapporteur, nor considered by the Court in the judgment. Indeed, these arguments are pivotal as they show that the main claim of Mr Foglia was not as much about questioning the Court of Justice's power of appraisal (which Foglia seemed to accept in this paragraph), but about demonstrating that, in this specific case, there was a genuine dispute before it.

In answering the first question submitted by the Pretore, Mr Foglia further noted that, whereas it was not possible to achieve a solution solely on the basis of the wording of Article 177, the article was inspired by the principle of collaboration and autonomy of both parties. In this line, he argued that the Court had stepped over the Pretore's competences by appraising the circumstances of fact and the motives underlying the question.[59] This would imply a radical change of approach in the Court's jurisprudence, entailing risks such as: undermining the mutual confidence between Courts; requiring the Court of Justice to appraise in detail every submission before it; and the adoption of a concept as abstract as that of a 'genuine dispute'.

3.2.5 Observations of Novello

Mrs Novello maintained that the decision of the Court in *Foglia I* implied a jurisprudential shift which blocked the jurisdictional powers of the Italian judge and limited individual rights. Yet again, Mrs Novello pointed out that, in *Foglia I*, neither the Court nor the AG wanted to give a judgment which had a negative effect on a Member State other than that of the referring judge (France in this case), this being a political choice with enormous consequences in terms of access to justice, individual rights, and harmonisation of Community law. This argument

[57] This expression of legal activism is truly impressive and is not fully reflected in the judgment. See Annex, Doc. 22, 9: 'La linea difensiva tenuta dal Sig. Foglia nelle osservazioni presentate nella causa 104/79 fu giustificata, in fatto, con la sua indifferenza sostanziale rispetto all'esito del giudizio e con l'onesta e franca dichiarazione di rappresentare interessi più ampii di quelli individuali (...) In una parola, le nostre osservazioni nella causa 104/79 furono svolte nell'interese della corretta interpretazione della norma di diritto comunitario (...) [u]na tale convinzione non è venuta a meno per effetto del'esito della causa 104/70. E' pertanto con lo stesso spirito, per una interpretazione cioè dell'art. 177, coerente con l'interesse dell'ordenamiento comunitario e adeguata ad una effettiva tutela delle situazioni giuridiche soggettive attribuite ai privati da norme comunitarie'.

[58] Annex, Doc 22, 9. 'C'è da chiedersi se, in fondo, tutta "l'inquisizione" sulle circostanze della controversia di merito non fosse diretta piè a rispondere a queste preoccupazioni che ad una corretta applicazione dell'art. 177'.

[59] Again, the position of Mr Foglia is more nuanced than it appears in the official reports. In its submission, Foglia argues that Article 177 is based on collaboration and separation of powers, granting a wide margin of appreciation to the domestic judge but allowing for exceptions. In the official report, however, it is simply stated that 'p.a]ccording to Foglia (…) it is for the Court of Justice to interpret Community law and for the national court to distinguish the specific individual issues to be resolved (…) and to assess in each case whether it is appropriate (…) for it to obtain an interpretation by the Court of Justice' (3053).

occupies a residual place in the judge-rapporteur's report,[60] despite being Novello's central argument in the original observations (occupying over four pages out of 10).

In her view, the Court trespassed on the discretionary power of the Italian judge to appraise the relevance of the questions and it arrogated to itself the power to review the questions submitted to it.[61] In addition, Novello argued that the Court determined that the dispute would be artificial whenever the parties proposed the same interpretation of Community law, overlooking the existence of a dispute within domestic law. In this sense, the judicial concept of a dispute (which consisted of a contrast of interests among the parties) was different from that of the question of interpretation.[62]

3.2.6 Observations of Danish government

The Danish observations revolved around the first question submitted by the Pretore, on the division of competences between domestic courts and the Court of Justice in Article 177 proceedings, and were generally well reported in the final judgment.

The Danish government noted that there was a clear distinction between the competences of the domestic judge and those of the Court, according to which national judges exercised their powers autonomously and with discretion, the general rule being that the Court answered the questions each time that it was asked by a national judge. Yet, whereas the national judge was the one competent to establish the questions to be answered, the Court was the one able to decide which questions it was competent to solve. It was therefore necessary for the Court to escape its excessive formalism and protect its autonomy under Article 177 by refusing those cases manifestly beyond its jurisdiction. This occurred, with exceptions, in those cases in which the preliminary questions referred to the legislation of a Member State other than that in which the court making the reference was situated. In the case before the Court it appeared appropriate for the Court to deny its jurisdiction without deciding on the facts of the case. This was particularly clear in the case of *Foglia*, where the claims could and should have been brought before the tribunals of the Member State whose legislation was put into question. Thus, the Danish submissions did not focus on the existence of a genuine dispute in the proceedings, but rather on the need of the Court to confirm or reject its jurisdiction based on objective criteria, this being the case when a referral is made by a judge of a Member State over the validity of the legislation of another Member State.[63]

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[60] See Case C-244/80 *Foglia v Novello* (n 1) 3055.

[61] In this context, Mrs Novello did not discard the possibility of the Court of Justice holding appraisal powers over the domestic case, but mentioned instead the existence of a 'wide margin of appreciation' for domestic courts. See Annex, Doc. 22, 11: 'Il modo in cui è redatto il 2º comma della norma in esame (...) lascia anzi pensare a a un margine di apprezzamento relativamente ampio a favore del giudice di rinvio'. Mrs Novello's submissions therefore claim that the Court had trespassed the domestic court's discretionary powers *in this case*: 'La Corte CEE si è spinta sino al punto si stabilire quali fossero gli interessi "materiali" delle parti in causa dinanzi al giudice nazionale (...) il preteso proprio potere, autoassunto dal giudice comunitario per l'ocassione – di cui non è traccia nei Trattati istitutivi nei Protocolli sullo Statuto della Corte – di sottopporre ad ulteriore e successivo esame tale rilevanza' (Annex, Doc. 23, 6-7).

[62] This argument, which was also made by Mr Foglia and by AG Slynn, reads as follows: '[L]a Corte CEE ha nello stesso contest ritenuto (...) che una controversia pendente dinanze al Giudice nazionale deve riternerse artificiosa, fittizia, deve considerare un "accorgimento" tutte le volte che le parti ritengano di prospettare a quest'ultimo (...) una analoga od anche identica soluzione interpretattiva di norme del Trattato, negando, su questa base, l'essistenza stessa della lite per il diritto nazionale' (Annex, Doc. 23, 8).

[63] Annex, Doc 24, (Italian version), 4-5.

Table 2: Summary of key legal arguments[64]

Position of Actors	A Genuine dispute?	Court's Appraisal Powers in Preliminary Rulings?	Compatibility of French legislation with Community law
Foglia	**Yes**: -Examples of domestic confrontation - Common interpretation of Community law ≠ artificial domestic litigation -Indifference to tax ≠ neutrality in the proceedings -Absence of carrier company as a matter of procedural economy.	**Yes**, in self-evident cases, but wide margin of appreciation for domestic courts, principle of mutual confidence not respected in *Foglia I*.	Incompatible with Community Law
Novello	**Yes:** - Common interpretation of Community law ≠ artificial domestic litigation	**NA**[65]	Incompatible with Community Law
Commission	**Yes**: 'there is a conflict of interest between the parties in the main action the scope of which is entirely new'.	**NA**	Incompatible with Community Law
France	**NA**: No new facts justifying a fresh appraisal of jurisdiction.	**Yes**, if *Abus de droit*. Role of Court not giving legal opinions.	**NA**
Denmark	**NA**	**Yes**, if preliminary questions refer to the legislation of a	**NA**

[64] For purposes of clarity and given the limited scope of this report, this table does not include the responses of the parties to all the preliminary questions raised by the Pretore, which also covered other issues such as the possibility to interpret Community law by domestic courts in the absence of jurisdiction by the ECJ (which was not answered by the Court), the possibility of summoning foreign States before national courts, or whether the individual rights of private persons under Community law obtained a lesser degree of protection if the administration of the Member State whose laws are questioned was absent from the domestic proceedings.

[65] Mrs Novello was ambiguous on the issue of whether or not the Court holds any appraising powers over the fact of the case, but it notes that *even if* it were to possess the power to review the relevance of the question of interpretation, there was a genuine dispute in the domestic proceedings, which differed from the convergent views on the question of interpretation at the Community level (see note 61). She also claims that the Court invaded the Pretore's competences *in this case* (see note 60).

		MS other than that deciding the case.	
AG	**Yes**: -Fuller explanation of domestic dispute by Pretore. -Common interpretation of Community law ≠ artificial domestic litigation	**Yes**, exceptionally in obvious cases of abuse of preliminary ruling proceedings.	Incompatible with Community Law
Court	**NA:** No new facts justifying a fresh appraisal of jurisdiction	**Yes**, it is for the Court of Justice to examine the conditions in which the case has been referred to it by the national court.	**NA**

3.3. Reflections on the added value of the dossier

The documents found in the *dossier* are not at all surprising concerning the actors and institutions involved in the process and their overall stance on the legal controversies. Yet, their role within it, their legal reasoning, their degree of influence upon the Court and the Court's way of handling the submissions become much clearer by looking at the *dossier*. The *dossier* also confirms the legal activism of the Pretore, who seems to have known EU law very well and openly confronted the decision of the Court of Justice in *Foglia I* and its implications for the European legal framework, as well as that of Foglia's lawyers who seemingly compromised Mr Foglia's interests for the sake of the 'right' interpretation of Community law. The *dossier* also shows that, in the domestic proceedings between *Foglia I* and *Foglia II*, the plaintiff had maintained that the ruling of the Court of Justice constituted an implicit acknowledgement of the legality of the French tax and therefore Mrs Novello should bear the costs. This is very relevant because it shows the confrontation of both parties (one of which did not want to bring the case before the Court of Justice) and the decision of the Pretore to refer the case to the Court nonetheless, in a case in which the amount of money at stake was rather small.

The *dossier* adds to the debate on the importance of protecting France as the underlying driver of the judgment over the genuineness of the dispute. It does so both by showing more clearly the influence of the French government upon the reasoning of the judgment, but mainly by showing the arguments that the Court chose not to answer. However, the lack of access to the *délibéré* makes it impossible to assert this beyond a reasonable doubt.

3.3.1 A genuine dispute?

The most remarkable findings of the *dossier* concern what the judge-rapporteur left unsaid in his report and the arguments omitted by the Court in its final judgment.

Indeed, the legal arguments of the Pretore di Bra, the Commission, Foglia and Novello sought to demonstrate, not only that under Article 177 the appraisal of the circumstances of fact leading to the submission was for the national judge to perform (as the judgment seems to suggest), but also that, in this particular case, there was certainly a genuine dispute. Thus, the arguments in support of the admissibility of the preliminary reference were twofold: 1) The

Court had trespassed upon the discretionary powers granted to domestic judges under Article 177. 2) Even if based on the premise that the Court of Justice can inquire into the circumstances of fact that led to the submission of the preliminary reference, there was a genuine dispute between Mr Foglia and Mrs Novello. Whereas the Court dealt extensively with the relationship between domestic courts and the Court of Justice, it did not attempt to counter the arguments dealing with the genuineness of the dispute, which were partially reported or simply discarded in the report drafted by the judge-rapporteur, and completely absent in the final judgment.

By looking at the *dossier*, it is possible to observe that, for those actors who advocated for the jurisdiction of the Court, demonstrating the existence of a genuine dispute between the two parties was as important as (or more important than) questioning the competence of the Court of Justice to deal with the circumstances of fact leading to the preliminary reference. For instance, Mr Foglia agreed that, in self-evident cases, it should have been for the Court of Justice to rule on its own (lack of) jurisdiction and decide if the case was purely artificial and constructed with the sole purpose of obtaining a ruling from the Court, essentially agreeing with the vision of the Court.[66] Its fundamental disagreement with the Court, however, referred to the fact that, due to a variety of reasons, he did not consider this specific case to be artificially constructed.

In demonstrating the genuine nature of the dispute, the Pretore di Bra and Mr Foglia noted that within the domestic proceedings leading to *Foglia II,* Mr Foglia had argued that the Court of Justice had implicitly acknowledged the conformity of French law with Community law, whereas Mrs Novello opposed that view and insisted on the need to obtain a ruling on the matter. The Pretore further contended that the submission of an autonomous claim for a declaratory ruling by Mrs Novello was not a sign of an artificial dispute, but of a very specific type of dispute distinctive of Italian law. Moreover, both the Pretore and Mrs Novello highlighted the need to differentiate between the existence of a dispute at the domestic level on the one hand, and the fact that both parties happened to hold a similar interpretation of Community law on the other. In their view, this did not undermine the existence of a conflict between the parties at the national level.

These are only some of the reasons posited by the Pretore and both parties to convince the Court of the genuineness of the dispute.[67] These arguments seemed to convince both AG Slynn, who maintained that it was irrelevant that the parties agreed in their interpretation of Community law,[68] and the legal service of the Commission, which argued that this new information demonstrated beyond any reasonable doubt that there was a conflict of interests between the parties and would have led to a different judgment if known by the Court in the first *Foglia*.

Yet the Court, when asked to rule on the lawfulness of the French legislation in question, simply declined its jurisdiction by referring to *Foglia I*, stating that '[t]he circumstance referred to by the national court in its second order for reference does not appear to constitute a new fact which would justify the Court of Justice in making a fresh appraisal of its own jurisdiction'.[69] If the Court's claim was that there were no new circumstances justifying the need for a fresh appraisal of its jurisdiction, it then comes as no surprise that it declined to address the

[66] As stated above, this argument (Annex, Doc 22, 10) is not reported in the previously available materials.

[67] See the previous section of the report for a larger summary of the arguments of the parties.

[68] Case C-244/80 *Foglia v Novello* (AG Opinion) (n 15) 3071. The fundamental aspect was, according to AG Slynn, 'whether the judge considers that the question has to be determined for the purposes of giving judgment'. Here, the AG echoes the argument made by Foglia in his observations.

[69] ibid 3067.

aforementioned arguments, the importance of which can only be perceived through the analysis of the arguments of the parties in their full length through the *dossier*.

3.3.2 France as the legal entrepreneur?[70]

The *dossier* also sheds light on the role of France in the judicial process. As noted in the second section of this report, part of the literature already questioned the common understanding of *Foglia* as a demonstration of jurisdictional control by the Court and pointed at the wish of the Court not to offend France as a hidden motivation behind the judgment.[71] In the judgment it could already be observed that, in response to the fourth question raised by the Pretore, the Court answered that 'in the case of preliminary questions intended to permit the national court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community law (…) the Court of Justice must take special care to ensure that the procedure under Article 177 is not employed for purposes which were not intended by the Treaty'.[72] Whereas it is not possible to access the inner reasoning of the Court in the *délibéré*, the *dossier* adds to this debate in various ways.

The archive makes it possible to see the influence of the French observations in the judgment in terms of arguments and legal reasoning. The French government, as the Court in its judgment, argued that the question of competence was one that was already solved in *Foglia I* and that no new information was made available that justified a fresh appraisal of the facts.[73] It must be stressed, again, that there were at least five novel arguments presented by the Pretore, Mr Foglia and Mrs Novello that sought to demonstrate there was a genuine dispute between the parties, none of which were contradicted by the French government or the Court in its judgment. Moreover, the French government questioned the possibility of summoning foreign states before a national court, an issue which was not present in *Foglia I* and was included by the Court in its response to the fourth question of the Pretore, as described above. The Court built on the argumentation of France when, ruling on the possibility of summoning national courts before the courts of another Member State, referred to the general principles of International Law. In addition, the French government conducted a teleological interpretation of Article 177 by noting that the provision was never intended to deliver advisory opinions for fictional or hypothetical disputes, but to solve jurisdictional disputes.[74] This argument, which is not included in the official reports, is however adopted by the Court in full in the final judgment.[75]

Lastly, it is interesting to observe that the Pretore,[76] Foglia,[77] and Novello[78] all pointed at the hidden intention of the Court to protect a Member State (France) whose legislation was challenged before the Courts of another Member State, this being one of their pivotal claims.

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[70] On the concept of legal entrepreneurs in EU Case-law, see Vauchez (n 21).

[71] See Hartley (n 25) 301.

[72] *Case C-244/80 Foglia v Novello* (n 1) para 31.

[73] Annex, Doc 21, 2.

[74] Annex, Doc 21, 4-5.

[75] Case C-244/80 *Foglia v Novello* (n 1) para 18.

[76] Annex, Doc 1, 13-14.

[77] Annex, Doc 22, 9. Foglia's claim reads as follows: 'C'è da chiedersi se, in fondo, tutta "l'inquisizione" sulle circostanze della controversia di merito non fosse diretta piè a rispondere a queste preoccupazioni [garantire una particolare tutella alla posizione anche processuale di uno Stato membro] che ad una corretta applicazione dell'art. 177'.

[78] Annex, Doc 23, 5-6.

These claims, which played a key role in the arguments of these actors, and which cast doubts as to the underlying motivations of the Court, were largely omitted in the official reports.[79]

Yet, the ruling remains a puzzling one. Even if the influence of France in the judgment seems evident (even more so after accessing the *dossier*), it might be too far-fetched to describe France as the sole 'legal entrepreneur' behind the judgment. It must be recalled that it was AG Warner who, in *Foglia No1,* already argued against the jurisdiction of the Court based on the absence of a genuine dispute at a time when France had not contested the competence of the Court to rule on the questions posed, and had instead focused its efforts on defending the compatibility of the French tax with Article 95 of the Treaty.[80] In this sense, it will be key to access the *dossier* in *Foglia I* in order to compare the Opinion of the AG with the original submissions of the Commission and the French government to ascertain whether the reasoning of AG Warner stems from arguments made by the French government which were not previously available to the public.

It should also be stressed that, unlike AG Slynn, Jean-Pierre Warner was born and educated in France and was a French-speaking lawyer (although also a lawyer trained in a common law system)[81] before joining the Court as Britain's first Advocate General. Thus, the civil law notion of *Abuse de droit*, upon which the concept of *genuine dispute* is clearly inspired, was probably familiar to him when he delivered his Opinion in *Foglia I*. AG Slynn, on the other hand, was probably a common law lawyer to a greater extent than AG Warner or Lord Mackenzie Stuart, the Scottish judge (and first British judge on the ECJ) sitting in both *Foglia I* and *Foglia II.* It is therefore reasonable to assume that AG Slynn would likely see the approach followed by the Court in *Foglia I* as a bizarre self-limitation on the Court's power of judicial review.

Moreover, even if the *dossier* seems to confirm the intention of the Court to protect the interests of those Member States whose legislation is challenged before the Courts of another Member State, the subsequent jurisprudence of the Court clearly contradicts this legal approach.[82] If, on the other hand, the intention of the Court (as the Court itself argued) was to shield itself from artificially constructed disputes, the *dossier* shows that it clearly failed to rebut the arguments of the parties and convincingly show that there was no genuine dispute in the case. In addition, the 'genuine dispute' standard remained isolated and was not followed by the Court in its jurisprudence. If the intention of the Court was simply to demonstrate its capacity to exert control over its own jurisdiction (this being the true living legacy left by the *Foglia* judgments as argued above), it clearly had had, and would have, better occasions to make this point.

This erratic evolution of the case law does not limit in any way the argument that the role of France was key in reaching this ruling, given that the decision was certainly contingent on the historical and political context existing at the time. In this case it seems that, whatever (political or other) reasons made it impossible for an Italian Court to rule on French law, clearly ceased

[79] The exception to this is found in the judge-rapporteur's summary of Novello's arguments. The report notes: 'According to Mrs. Novello the reasons advanced by the Advocate General and the Court of Justice (…) conceal the wish (…) to preclude an interpretation having a negative effect for the Member State arranged'.

[80] It would be very useful, in this line, to access the *dossier* of *Foglia I*, as this could shed light on the arguments (if any) that inspired AG Warner to challenge the genuine nature of the dispute in question.

[81] Rosa Greaves, *Advocate General Jean-Pierre Warner and EC Competition Law* (Oxford University Press 2007) 183–184.

[82] As shown in section I.

to exist later on.[83] As a result, the conditions under which the ECJ may refuse to rule on a question referred for a preliminary ruling are now very different to those envisaged in *Foglia*, even though the notion that the Court can be the ultimate decision-maker of its own jurisdiction remains. In this context, the analysis of the *dossier*, together with a deeper understanding of the historical and sociological context, can provide a plausible explanation for why the Court adopted the decision it did in *Foglia,* but cannot explain the legal developments in the decades that followed. In other words, the argument that the interests of France had a crucial impact on the judgment tries to make historical sense of a decision that does not seem to flow logically from a legal perspective.

4. Conclusion

The case of *Foglia v Novello* is very much alive as the seminal case on the relationship between domestic courts and the Court of Justice under Article 267 proceedings. *Foglia* challenged the existing paradigm and made clear that the Court would not be a passive receptor for any question put before it, but that it had the power to determine its own jurisdiction. As the jurisprudence of the ECJ stands today, the Court may refuse to give a preliminary ruling if it is obvious that there is no relation between the interpretation of Community law and the facts of the case, where the problem posed is hypothetical, or if the Court does not have the necessary legal and factual information necessary to answer the questions before it.

In spite of this, the *Foglia* judgments, and specifically *Foglia II,* are particularly enigmatic and controversial for many reasons. Firstly, the Court shifted from an extremely liberal approach to preliminary references in which the Court was even willing to correct improperly framed references, to a position in which it rejected its jurisdiction in what seemed to be a regular, genuine litigation between two parties at the national level. Whether the purpose of the Court was to shield itself from artificial disputes or to protect a Member State whose legislation was put into question by the tribunals of another Member State, it clearly had had better occasions to do so, and the criteria established by the Court were not followed in subsequent jurisprudence. Secondly, if the Court was seriously concerned (as it claimed) about the need to protect itself from artificially constructed litigations, one wonders, after reading the *dossier*, why it did not bother to challenge the numerous arguments made by the national judge, the parties and the Commission, that aimed precisely at demonstrating the genuine nature of the dispute.

In this context, the *dossier* does not provide any novelty concerning the actors involved in the process and their overall role within it. Neither does it reveal clearly why the Court ruled the way it did. Yet, it gives valuable insights into the way in which the Court handled the submissions and it seems to suggest that the historical and political context can explain a decision which appears to be legally incoherent when compared with its predecessors and successors. The two main findings articulated in this report are:

1. The official reports undermine the magnitude of the arguments evidencing the existence of genuine litigation at the domestic level. In the final judgment the Court does not even

[83] It is very telling that, to the author's knowledge, the Court's claim in *Foglia II* that 'the Court of Justice for its part must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law.' (Case 244/80 *Foglia v Novello* (n 1) para 30), has been only repeated once by the Court throughout its jurisprudence. This was however done in a case in which the dispute could seemingly be solved easily without the UK Courts having to interpret French legislation, and hence the referring court had clearly failed to explain why a reply to its questions was necessary for it to give judgment (see Case C-318/00 *Bacardi-Martini*, EU:C:2003:41 paras. 43-44.).

seek to rebut these arguments. Whereas AG Slynn reflected on the arguments of the parties when he noted the irrelevance of the fact that both parties adopted the same interpretation of Community Law,[84] the Court simply noted that there was no new matter justifying a fresh appraisal of its jurisdiction and referred to *Foglia I*. It then comes as no surprise that the Court avoided dealing with these claims, as they run against the Court's narrative that there were no circumstances justifying the re-examination of the facts.

2. Secondly, the archives allow us to confirm the influence of the French arguments and legal reasoning upon the judgment. These findings are consistent with the arguments of the Pretore, Mr Foglia and Mrs Novello (largely overlooked in the official reports) and part of the academic commentary which already pointed at the ruling as hiding a policy choice to protect France.

This would lead us, again, to the original suspicion that the intention of the Court was not to claim control over its jurisdiction or to shield itself from artificial disputes and abuses of rights, but to protect France, whose influence upon the judgment becomes clearer after reading the *dossier*. The fact that the Court discarded the arguments that challenged its 'artificial dispute' narrative in *Foglia I*, and the influence of France upon the reasoning of the Court seem to suggest it, but the reasons that might have led the Court to take such a position in this particular case remain unknown. Moreover, it does not seem realistic to point at France as the sole 'legal entrepreneur' behind the judgment, since in *Foglia I* both AG Warner and the Court already found that the lack of a genuine dispute in the case allowed the Court to reject its jurisdiction at a time when the French government had not even considered contesting the jurisdiction of the Court. Access to the *dossier* of *Foglia I* could provide valuable insights in this regard.

[84] The key issue being whether the judge considers that the question has to be determined for the purpose of giving judgment.

Annex: List of documents[85]

	Type of Document	Author	Date	Number of Pages
Cover				
Reference for a Preliminary Ruling				
Written Procedure				
Doc. 1	Reference for a Preliminary Ruling	Pretura di Bra	18/10/1980	21
Doc.2	Acknowledgement of Receipt of the reference for a preliminary ruling	Registrar of the Court	05/11/1980	1
Doc. 3	Communication informing the Commission on its right to submit observations	Registrar	5/11/1980	1
Doc. 4	Communication informing the Council …	Registrar	5/11/1980	1
Doc. 5	Appointment of Lord Mackenzie Stuart as judge-rapporteur	President of the Court (J. Mertens de Wilmars)	10/11/1980	1
Doc. 6	Communication informing Foglia's lawyers on right to submit observations	Registrar	19/11/1980	1
Doc. 7	Communication informing Novello's lawyers…	Registrar	19/11/1980	1
Doc. 8	Communication informing Italy…	Registrar	19/11/1980	1
Doc. 9	Communication informing the Netherlands…	Registrar	19/11/1980	1
Doc.10	Communication informing France…	Registrar	19/11/1980	1
Doc.11	Communication informing Belgium…	Registrar	19/11/1980	1

[85] As most of the documents are procedural documents of which the Registrar sends identical copies to the domestic judge, the parties, Community Institutions and Member States, I will use "…" or "(…)" when the document is identical to the one referred immediately above (the sole difference being the recipient of the document).

Doc. 12	Communication informing Luxembourg…	Registrar	19/11/1980	1
Doc. 13	Communication informing Germany…	Registrar	19/11/1980	2
Doc. 14	Communication informing the United Kingdom…	Registrar	19/11/1980	1
Doc. 15	Communication informing Ireland…	Registrar	19/11/1980	1
Doc. 16	Communication informing Denmark…	Registrar	19/11/1980	1
Doc. 17	Request to AG Warner for him to become the AG in the case	First Advocate General (G. Reischl)	19/11/1980	1
Doc. 18	Communication informing the Court that Germany would not make any observations	Germany	06/01/1981	1
Doc. 19	Appointment of Commission's legal adviser (Antonio Abate)	Commission	07/01/1981	1
Doc. 20	Observations of the Commission	Commission (Antonio Abate)	7/01/1981	7
Doc. 21	Observations of the French Government	France (Thierry Le Roy)	20/01/1981	20 (French + Italian translation)
Doc. 22	Observations of Foglia	Foglia's lawyers (Emilio Cappelli and Paolo De Caterini)	28/01/1981	21
Doc. 23	Observations of Novello	Novello's lawyers (Giovanni Motzo and Maurilio Fratino)	29/01/1981	10
Doc. 24	Observations of Danish Government	Denmark (Per Lachman)	03/02/1981	10 (Danish + Italian Translation)
Doc. 25	Letter attaching a copy of the observations to the Pretore di Bra	Registrar	26/02/1981	1

Doc. 26	Letter (…) Foglia's Lawyers	Registrar	26/02/1981	1
Doc. 27	Letter (….) to Novello's Lawyers	Registrar	26/02/1981	1
Doc. 28	Letter (….) to the Commission	Registrar	26/02/1981	1
Doc. 29	Letter (….) to Council	Registrar	26/02/1981	1
Doc. 30	Letter (….) to Italy	Registrar	26/02/1981	1
Doc. 31	Letter (….) to the Netherlands	Registrar	26/02/1981	1
Doc. 32	Letter (….) to France	Registrar	26/02/1981	1
Doc. 33	Letter (….) to Belgium	Registrar	26/02/1981	1
Doc. 34	Letter (….) to Luxembourg	Registrar	26/02/1981	1
Doc. 35	Letter (….) to Germany	Registrar	26/02/1981	1
Doc. 36	Letter (….) to the UK	Registrar	26/02/1981	1
Doc. 37	Letter (….) to Ireland	Registrar	26/02/1981	1
Doc. 38	Letter (….) to Denmark	Registrar	26/02/1981	1
Doc. 39	Letter (….) to Greece	Registrar	26/02/1981	1
Instruction				
The pages 129 to 142 are not available for public consusltation	Unknown (redacted material)	-	-	14
Oral Procedure				
Doc. 40	Notification of the date of the Oral Hearing to the Pretore di Bra	Registrar	15/04/1981	1
Doc. 41	Notification (…) to Foglia's Lawyers	Registrar	15/04/1981	1
Doc. 42	Notification (…) to Novello's Lawyers	Registrar	15/04/1981	1
Doc. 43	Notification (…) to Commission	Registrar	15/04/1981	1
Doc. 44	Notification (…) to Council	Registrar	15/04/1981	1
Doc. 45	Notification (…) to Italy	Registrar	15/04/1981	1

Doc. 46	Notification (…) to the Netherlands		15/04/1981	1
Doc. 47	Notification (…) to France	Registrar	15/04/1981	1
Doc. 48	Notification (…) to Belgium	Registrar	15/04/1981	1
Doc. 49	Notification (…) to Luxembourg	Registrar	15/04/1981	1
Doc. 50	Notification (…) to Germany	Registrar	15/04/1981	1
Doc. 51	Notification (…) to the UK	Registrar	15/04/1981	1
Doc. 52	Notification (…) to Ireland	Registrar	15/04/1981	1
Doc. 53	Notification (…) to Denmark	Registrar	15/04/1981	1
Doc. 54	Notification (…) to Greece	Registrar	15/04/1981	1
Doc. 55	Report of the Oral Hearing	Judge-Rapporteur (Mackenzie Stuart)	Not available	21
Doc. 56	Letter attaching the Report of the Oral Hearing to the Pretore di Bra	Registrar	25/05/1981	1
Doc. 57	Letter (…) to Foglia's lawyers	Registrar	25/05/1981	1
Doc. 58	Letter (…) to Novello's lawyers	Registrar	25/05/1981	1
Doc. 59	Letter (…) to the Commission	Registrar	25/05/1981	1
Doc. 60	Letter (…) to the Council	Registrar	25/05/1981	1
Doc. 61	Letter (…) to Italy	Registrar	25/05/1981	1
Doc. 62	Letter (…) to the Netherlands	Registrar	25/05/1981	1
Doc. 63	Letter (…) to France	Registrar	25/05/1981	1
Doc. 64	Letter (…) to Belgium	Registrar	25/05/1981	1
Doc. 65	Letter (…) to Luxembourg	Registrar	25/05/1981	1
Doc. 66	Letter (…) to Germany	Registrar	25/05/1981	1
Doc. 67	Letter (…) to Ireland	Registrar	25/05/1981	1
Doc. 68	Letter (…) to the UK	Registrar	25/05/1981	1
Doc. 69	Letter (…) to Denmark	Registrar	25/05/1981	1

Doc. 70	Letter (…) to Greece	Registrar	25/05/1981	1
The pages 195 to 245 are not available for public consultation	Unknown (Redacted Material)	-	-	51
Doc. 71	Appointment of French Representatives before the Court	France	02/06/1981	1
Doc. 72	Notification of the date of the Opinion of the AG to the Pretore	Registrar	04/06/1981	1
Doc. 73	Notification (…) to Foglia's lawyers	Registrar	04/06/1981	1
Doc. 74	Notification (…) to Novello's lawyers	Registrar	04/06/1981	1
Doc. 75	Opinion of the Advocate General	AG Slynn	09/07/1981	36 (English + Italian translation)
Doc. 76	Notification of the date of the Opinion of the AG to the Commission	Registrar	04/06/1981	1
Doc. 77	Notification (…) to the French Government	Registrar	04/06/1981	1
Sentenza				
Doc. 78	Notification of the date of the hearing to read the judgment to the Pretore di Bra	Registrar	27/07/1981	1
Doc. 79	Notification (…) to Foglia's lawyers	Registrar	27/07/1981	1
Doc. 80	Notification (…) to Novello's lawyers	Registrar	27/07/1981	1
Doc. 81	Notification (…) to Commission	Registrar	27/07/1981	1
Doc. 82	Notification (…) to France	Registrar	27/07/1981	1
Doc. 83	Notification on the amendment of the date of the hearing to read the judgment to Pretore di Bra	Registrar	02/12/1981	1
Doc. 84	Notification (…) to Foglia's lawyers	Registrar	02/12/1981	1

Doc. 85	Notification (…) to Novello's lawyers	Registrar	02/12/1981	1
Doc. 86	Notification (…) to the Commission	Registrar	02/12/1981	1
Doc. 87	Notification (…) to France	Registrar	02/12/1981	1
Doc. 88	Judgment	Court	16/12/1981	40
Doc. 89	Letter attaching a certified copy of AG's Opinion and final judgment to Pretore di Bra	Registrar	16/12/1981	1
Doc. 90	Letter (…) to Foglia's layers	Registrar	16/12/1981	1
Doc. 91	Letter (…) to Novello's lawyers	Registrar	16/12/1981	1
Doc. 92	Letter (…) to the Commission	Registrar	16/12/1981	1
Doc. 93	Letter (…) to the Council	Registrar	16/12/1981	1
Doc. 94	Letter (…) to Italy	Registrar	16/12/1981	1
Doc. 95	Letter (…) to the Netherlands	Registrar	16/12/1981	1
Doc. 96	Letter (…) to France	Registrar	16/12/1981	1
Doc. 97	Letter (…) to Belgium	Registrar	16/12/1981	1
Doc. 98	Letter (…) to Luxembourg	Registrar	16/12/1981	1
Doc. 99	Letter (…) to Germany	Registrar	16/12/1981	1
Doc. 100	Letter (…) to the UK	Registrar	16/12/1981	1
Doc. 101	Letter (…) to Ireland	Registrar	16/12/1981	1
Doc. 102	Letter (…) to Denmark	Registrar	16/12/1981	1
Doc. 103	Letter (…) to Greece	Registrar	16/12/1981	1

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