National Courts Proposing Answers to the Questions Referred for Preliminary Ruling

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Abstract

In the preliminary ruling procedure under Article 267 TFEU, national courts refer questions of interpretation of EU law to the Court of Justice of the EU. At times, national courts not only ask questions but immediately propose answers to those questions. Recently, this kind of behaviour of national courts has attracted increased scholarly attention. In this article, I focus on these situations in two aspects. First, I analyse a selected set of references for preliminary ruling received by the Court of Justice between 2018 and 2020 to see how often the Court gets to the same answers to the referred questions as proposed by national courts. Second, I reflect on the factors that could make an impact on this practice. Among them are judicial resources and specialisation in EU law-related matters on the one hand, and values and interests that are promoted by specific answers on the other. More specifically, it appears that when national courts take into consideration and invoke most or all relevant arguments, as well as when they propose integrationist outcomes, the Court of Justice tends to reach the same answers they suggest. These observations in the end lead to a number of important questions about the national courts' en-

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forcement and interpretation of EU law and the viability of their role of "EU courts" more broadly.

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A. Introduction

In the preliminary ruling procedure, national courts refer questions to the Court of Justice of the European Union (CJEU, the Court). These questions are largely about interpretation of EU primary and secondary law. A smaller number of them are about validity of EU secondary law. These basic points follow from Article 267 of the Treaty on the Functioning of the EU (TFEU).

Scholars have often hailed this reference mechanism as the most important head of jurisdiction of the Court of Justice;[1] a "jewel" in its "crown".[2] The most cases the Court deals with are preliminary references sent by national courts. The most important judgments the Court ever issued, in which fundamental doctrines and principles of EU law were introduced, came in reply to national courts' questions.[3] The preliminary ruling procedure thus enabled the Court to "constitutionalise" EU law and via national courts give life to it in domestic legal systems. Consequently, this procedure made it possible for the Court to turn itself into "a *sensu lato* constitutional court".[4]

In the Court's own words, the preliminary ruling procedure is important for several reasons. Most notably, it enables a dialogue between national courts and the Court of Justice about the meaning and effects of EU law,[5] and is thus the "keystone"[6] of the Union's judicial system, essential for ensuring uniformity, consistency, effectiveness, and autonomy of the EU legal order,[7] for enforcing and safeguarding the rule of law across the EU,[8] and for protecting subjective rights guaranteed under EU law.[9]

1 *Tridimas*, CMLR 2003/1, pp. 9–11.
2 *Craig/de Búrca*, p. 496.
3 Everyone can name their "Top 5" or "Top 10", but most of these lists would arguably feature cases like *van Gend en Loos*, *Costa v. ENEL*, *Internationale Handelsgesellschaft*, *Cassis de Dijon*, *Defrenne*, *Francovich*, or *Associação Sindical dos Juízes Portugueses*, which all came before the CJEU as references for preliminary ruling. Therefore, if principles and doctrines stemming from these judgments are "pillars of the [EU] legal order", the preliminary ruling procedure "is the keystone in the edifice; without it the roof would collapse and … pillars would be left as a desolate ruin"; see *Mancini/Keeling*, YEL 1991/1, pp. 2–3.
4 *Itzcovich*, in: Jakab/Dyevre/Itzcovich (eds.), pp. 279–280.
5 CJEU, case C-210/06, *Cartesio Oktató*, ECLI:EU:C:2008:723, para. 91.
6 CJEU, opinion 2/13, *Draft agreement on accession of the European Union to the European Convention on Human Rights*, ECLI:EU:C:2014:2454, para. 176.
7 CJEU, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 37.
8 CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, paras. 33–34.
9 CJEU, opinion 1/09, *Draft agreement on the European and Community Patents Court*, ECLI:EU:C:2011:123, para. 84.

When sending references, some national courts are not only asking questions. They are also proposing answers to those questions. They are invited to do so by the Court of Justice itself. Its *Recommendations to national courts regarding the preliminary ruling procedure* thus say that "[t]he referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling" and that such "information may be useful to the Court".[10] Similar provision is found in the Court's Rules of Procedure, whose Article 107(2) states that in the urgent preliminary ruling procedure "[t]he referring court or tribunal … shall, in so far as possible, indicate the answer that it proposes to the questions referred".

This aspect of the preliminary ruling procedure has recently attracted considerable attention in EU legal scholarship. Different issues, using different approaches and different materials, have so far been explored.

Initial studies were mostly quantitative in nature. They tracked certain patterns in behaviour of national courts. They analysed larger numbers of data gathered from national courts' orders for reference, judgments of the Court of Justice, case reports, etc. They described which courts proposed answers to the referred questions, in what kind of situations, how often, etc. In general, it was reported that national courts rarely used the opportunity to express their views about the referred questions.[11] Lower courts seemed more likely than higher courts to propose answers in their references, as well as courts more experienced with the preliminary ruling procedure.[12]

Contrary to that, several more recent studies were more qualitative in nature. They were based, for instance, on the surveys or interviews with national judges. Their interest was in finding out what motivates national judges to propose answers to the referred questions, and what inhibits them from doing so. Reasons such as the opportunity to actively influence development of EU law, or (rather mistaken) belief that it is a formal requirement under EU law, were cited by national judges who were positive about expressing their views about the referred questions. On the other hand, numerous reasons were typically mentioned as inhibiting that practice, including reputational risks in case of incorrectly proposed answers; judicial impartiality and appearance of bias; lack of time, resources, and expertise in EU law;

10 CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01) OJ L 265, 29 September 2012, para. 18. For the origins of this idea, see "The Future of the Judicial System of the European Union (Proposals and Reflections), Paper of the Court of Justice and the Court of First Instance ('The Courts' Paper')", in: Dashwood/Johnston (eds.), pp. 136–137; and "Report by the Working Party on the Future of the European Communities' Court System from 18–19 January 2000 ('The Wise Persons' Report' or 'The Due Report')", in Dashwood/Johnston (eds.), p. 168.

11 *van Gestel/de Poorter*, Cambridge Int'l LJ 2017/2, p. 122; *Wallerman*, in: Derlén/Lindholm (eds.), p. 153.

12 *Nyikos*, Eur J Pol Research 2006/4, p. 527.

strict understanding of the division of competences in the preliminary ruling procedure between national courts and the Court of Justice; etc.[13]

Various materials have been used from which the views of the referring courts were extracted. Some scholars came to these views indirectly, by reconstructing them based on the judgments of the Court of Justice, deducing them from the text of the referred questions, or identifying them in the case reports that used to be published in the European Court Reports.[14] Others were looking for the views of the referring courts directly in their orders for reference.[15] The issue with these materials was that they were not publicly or fully accessible, or depended on the approval of national authorities.[16] However, since mid-2018 all requests for preliminary rulings are made fully available on the website of the CJEU (curia.europa.eu), translated to all official EU languages.[17] This provides easier access to these materials and opens new possibilities for researching different aspects of behaviour of national courts in the preliminary ruling procedure.

In this article, I analyse these materials with two main questions in mind. The first is how successful are national courts in proposing answers to the questions referred to the Court of Justice? In other words, how often do national courts propose answers that the Court of Justice subsequently confirms? The second question is what are the reasons that could explain the success rate of national courts when it comes to proposing answers to the referred questions?

The article is structured as follows. After this introduction (section A), I explain the design of my study (section B). Then I present the main findings (section C). The study shows that national courts successfully proposed answers to the referred questions in around half of the instances, which is a rather inconclusive finding. Since this overall success rate does not reveal much, I move on to discuss the reasons that might indicate why some national courts were more successful than others (section D). In particular, I touch upon the question of judicial resources and specialisation in EU law-related matters (section D.I). It appears that having most or all relevant arguments in most situations correlated with national courts proposing an-

13 *Leijon*, EP 2020/2, p. 871; *van Gestel/de Poorter*, p. 9; *van Gestel/de Poorter*, Cambridge Int'l LJ 2017/2, pp. 134–137.

14 *Nyikos*, Eur J Pol Research 2006/4.

15 *Wallerman*, in: Derlén/Lindholm (eds.); *van Gestel/de Poorter*, Cambridge Int'l LJ 2017/2.

16 For example, *Rob van Gestel* and *Jurgen de Poorter* used in their study a database of the Dutch Ministry of Foreign Affairs, which kept translations of all preliminary references sent by the highest administrative courts of Member States from 2013 onwards; see *van Gestel/de Poorter*, Cambridge Int'l LJ 2017/2. Similarly, *Anna Wallerman Ghavanini* worked with the Swedish translations of preliminary references made available by the Swedish Ministry for Foreign Affairs; see *Wallerman Ghavanini*, EP 2020/2, p. 887.

17 Judicial associations of supreme courts in the EU – Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA-Europe) and Network of the Presidents of the Supreme Judicial Courts of the EU – proposed this to the CJEU more than a decade ago; see Report of the Working Group on the Preliminary Rulings Procedure (2007) pp. 11–12 and 14–15, available at: www.aca-europe.eu/seminars/2007_DenHaag/Final_report.pdf (10/1/2024).

swers that were accepted by the Court of Justice. Afterwards, I discuss the question of values and interests that are promoted by specific answers (section D.II). More specifically, it appears that the fact that certain answers promote EU values and interests, and others do not, correlated with the success rate of national courts. Following this, I reflect on the relevance of key insights of this study of national courts in the preliminary ruling procedure for their contribution to the interpretation of EU law in general and their position in the EU legal order more broadly (section E). The final part concludes (section F).

B. Design of the study and a note on methodology

I started by reading all requests for preliminary ruling received by the Court of Justice in the first year and a half after the beginning of publication of orders for reference on the Court's website, which is in total 720 orders for reference in the period between 1 July 2018 and 1 January 2020. From this number, 263 orders for reference contained some indication of the referring courts' views about the referred questions. The remaining 457 orders for reference contained no clearly expressed views of the referring courts. These numbers show that slightly more than one in every three referring courts (36.5 percent, to be precise) include in their references some views about the questions of interpretation EU law that they send to the Court of Justice. This finding roughly corresponds to earlier findings, where different authors noted that between 30 and 40 percent of national courts state their views about possible answers to the referred questions.[18]

Then, of these 263 orders for reference, I singled out those in which national courts had fully developed their legal reasoning. Those were in total 99 orders for reference.[19] These references contained not only the referring court's clearly stated view about the answer to the referred question – what I termed "outcome" – but also specific arguments that national courts offered in support of the proposed answer. The content of these references was mapped, analysed systematically and in detail, and then compared to the content of the follow up judgments of the Court of Justice.

The remaining 164 orders for reference were omitted from the analysis for different reasons. In some, it was not clear which of the several possible outcomes that were identified the referring courts preferred. In others, the referring courts might have expressed their view on the outcome, but without offering any distinct argu-

18 For instance, *Stacy Nyikos* reported that what she terms "preemptive opinions" were found in 41.3% of the cases analysed in her early study; see *Nyikos*, Eur J Pol Research 2006/4, p. 539. More recently, *Karin Leijon* found that in 39% of preliminary references covered in her study national courts have expressed opinions on relevant points of EU law; see *Leijon*, West Eur Pol 2021/3, p. 520; whereas in a study focusing on the case law on procedures and remedies, *Anna Wallerman* found that national courts expressed their views about possible answers to the referred questions in 31.6% of references; see *Wallerman*, ELR 2019/2, p. 166.

19 The complete list is provided in the annex to this article.

ments in support of that outcome, so that their legal reasoning was not elaborated and hence could not be used for the present purposes.

Furthermore, in a number of references, views of the referring courts could have been reconstructed – to some extent, at least – by using different proxies. For instance, some national courts in their references present in detail arguments of the parties about the referred questions of interpretation of EU law. Then, from their remarks or statements of reasons for referral, it might be possible to infer whether they agree or disagree with the parties' positions concerning those questions. This way, the referring courts' views on the interpretation of EU law could be indirectly gathered.

The same could be done in references in which the referring courts present arguments of other national courts. For instance, when a lower court makes a reference to the Court of Justice questioning the interpretation of EU law adopted by its higher court, it could be presumed that that lower court disagrees with the outcome reached by the latter court and/or its reasoning and argumentation.[20] However, in this case one could arguably arrive only at a negative opinion of the referring court. In other words, one finds out which outcomes the national court does not endorse, or which arguments that court does not find convincing or relevant, etc.

These are some ways in which it could be possible to reconstruct the referring court's views. However, in the present article I worked only with those orders for reference in which national courts clearly suggested the interpretation of EU law to the Court of Justice and added distinct arguments to support that. In other words, I have included only directly, positively, and elaborately expressed opinions of the referring courts. The reason for that was to avoid possible misinterpretations and incorrect inferences from "reading between the lines" or reading too much into the available texts.

The important thing that needs to be clarified is that the unit of analysis were not orders of reference and judgments of the CJEU as a whole. Rather, individual questions of interpretation of EU law contained in those documents were treated as relevant units of analysis. Thus, 99 orders for reference included in my study contained 132 questions of interpretation. For each of these questions, the outcome proposed by the referring court and the outcome reached by the Court of Justice were identified and compared; as well as the arguments adopted by the referring court to justify the proposed outcome and the arguments adopted by the Court of Justice to justify the outcome it reached.[21]

20 Cf. Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), order for reference of 11 December 2018, case C-34/19, *Telecom Italia*, paras. 9–10; Gerechtshof Amsterdam (Court of Appeal, Amsterdam), order for reference of 5 March 2019, joined cases C-229/19 and C-289/19, *Dexia Nederland*, paras. 7–8; and Tribunal Supremo (Supreme Court), order for reference of 9 July 2019, case C-683/19, *Viesgo Infraestructuras Energéticas*, paras. 12–22.

21 The following catalogue of arguments was used: (i) ordinary meaning; (ii) technical meaning; (iii) contextual harmonisation; (iv) precedent; (v) analogy; (vi) general principles and legal concepts; (vii) linguistic-logical formulae; (viii) purpose; (ix) consequences (including effectiveness); (x) substantive reasons; (xi) intention; and (xii) expertise or persuasiveness.

It is also important to briefly mention several points regarding the analysed sample of cases. First of all, it included questions of interpretation of different substantive areas of EU law, from customs and taxes to consumer protection and free movement of workers, to environment and asylum.[22] Second, it included courts from twenty-one Member States.[23] Third, it included courts of different jurisdiction and rank: from ordinary, administrative, financial, and constitutional courts[24] to first instance, appellate, and apex courts.[25] Therefore, the sample of cases is more representative, the scope of the study is broader and its findings more generalisable,

It was modelled after a catalogue of arguments proposed in MacCormick/Summers (eds.), Chapters 1–2 and 12–13.

22 Distribution of questions (in total 132) by subject area was as follows: air passengers' rights (6); asylum and migration (13); consumer protection (8); customs (8); environment (11); food law (6); workers' rights (15); judicial cooperation in civil (5) and criminal (7) matters; public procurement (4); services and establishment (6); transport (9); VAT and taxation (18); the remaining questions (15) concerned various other areas of law. It should also be added that only 3 questions exclusively concerned the interpretation of primary law, whereas 129 questions concerned the interpretation of secondary law; among these, almost all (122) concerned the interpretation of regulations and directives.

23 Distribution of references per Member State (99 in total) was the following: Germany (38), Netherlands (8), Poland (8), Italy (7), Austria (6), Romania (4), Czech Republic (3), France (3), Latvia (3), Spain (3), Slovakia (3), Finland (2), Ireland (2), Sweden (2), Belgium (1), Bulgaria (1), Croatia (1), Hungary (1) Lithuania (1), Luxembourg (1), and Slovenia (1). Courts from the following Member States were not included in the study: Cyprus, Denmark, Estonia, Greece, Malta, Portugal, and the United Kingdom (which was still a Member State during the reference period).

24 Regarding the type of jurisdiction, there were 45 ordinary courts; 31 administrative courts; 13 financial courts; 3 social courts; 3 commercial courts, 1 constitutional court; 3 remaining courts were a tribunal for asylum and immigration proceedings, a specialist court, and a patent court.

25 The study included 57 first instance and appellate courts that had no obligation to submit a reference for the preliminary ruling under Article 267(2) TFEU, and 42 last instance courts that were under obligation to submit a reference under Article 267(3) TFEU. It should be further noted that what counts as a court of "last instance" under Article 267(3) TFEU in accordance with the established case law of the CJEU is not a formal but a substantive matter, which has to be assessed on a case-by-case basis. Thus, in certain situations some first instance and appellate (or "middle instance") courts could be courts of last instance that are under obligation to refer, given that in those particular circumstances or proceedings national law does not provide a judicial remedy against their decision. However, in practice that happens only exceptionally. Almost as a rule, courts in the sense of Article 267(3) TFEU are what we would regularly consider as courts of last instance in national legal systems – supreme courts, councils of state, high administrative/financial/commercial courts, etc. – and not some first instance or appellate courts that in particular disputes rule as a final instance. Moreover, this has been reinforced by the interpretation of the term "judicial remedy" from Article 267 TFEU in judgments like CJEU, case C-99/00, *Lyckeskog*, ECLI:EU:C:2002:329, and CJEU, case C-210/06, *Cartesio Oktató*, ECLI:EU:C:2008:723, in which it was held that that term encompasses certain remedies that are in some national legal systems known as "exceptional remedies". The same turned out to be the case in the present study: among 42 courts of last instance under Article 267(3) TFEU appeared predominantly the highest courts in Member States (40 of them), including the Austrian Oberster Gerichtshof (Supreme Court), the Dutch Hoge Raad (Supreme Court) and Raad van State (Council of State), the Finish Korkein hallintooikeus (Supreme Administrative Court), the French Cour de cassation (Court of Cassa-

since they are not restricted to specific area(s) of law, Member State(s), or type(s) of courts. Therefore, the chances of getting to more skewed conclusions is minimised.

Finally, it is important to stress what this article exactly aims at and is possible to achieve, compared with other related works. A considerable amount of literature on national courts and the preliminary ruling procedure comes from social science scholars, in particular political scientists. One of their primary interests is judicial behaviour: for instance, motives that national courts are driven by, factors that influence the CJEU's decision-making, etc. They are concerned with the "why" question – why has a national court/judge decided to make a reference or suggest a particular answer to the Court of Justice? Which motives did they have? Which factors led them to do so, or led the CJEU to reach a particular decision? And so on. In other words, this strand of literature deals with what in legal theory is sometimes referred to as "discovery" in judicial decision-making.[26] Contrary to that, the present article deals with "justification" in judicial decision-making. It is a doctrinal analysis of the case law and describes legal reasoning and outcomes of adjudication that can be read out of published references and rulings. In that sense, it is concerned with the "how" question – how has a national court/judge justified their proposed answer to the question of interpretation of EU law, irrespective of why they came to that answer or what motivated them to propose it? Which legal arguments they used to justify that answer, or the CJEU used to justify the outcome it ultimately reached? So, when analysing and comparing outcomes and reasoning found in the national courts' references and the Court's rulings in the preliminary ruling procedure, I am not proving motives or interests by which these courts are driven nor the background physiological and psychological decision-making processes they go through when ascertaining the meaning of EU law. Rather, by looking into outcomes they reach and their reasoning, I only observe how national courts and the CJEU, each in their own domain, approach the interpretation of EU law. Of course, from there legal scholars may infer or speculate about questions that intersect with the domain of social science, like judicial ideology, policy, future behaviour, etc. This is something I will also do in the final part of this article, in order to explore broader implications of my doctrinal study and chart possible avenues for future research across disciplines. The underlying assumption is clearly a legalistic one: that legal rules and legal arguments represent important drivers of (and constraints on) judicial decision-making.

tion), the German Bundesgerichtshof (Federal Court of Justice), Bundesverwaltungsgericht (Federal Administrative Court), the Bundesfinanzhof (Federal Finance Court) and Bundessozialgericht (Federal Social Court), the Italian Corte suprema di cassazione (Supreme Court of Cassation), the Consiglio di Stato (Council of State) and Corte costituzionale (Constitutional Court), the Latvian Augstākā tiesa (Supreme Court), Lithuanian Vyriausiasis administracinis teismas (Supreme Administrative Court), the Polish Sąd Najwyższy (Supreme Court) and Naczelny Sąd Administracyjny (Supreme Administrative Court), the Slovak Najvyšší súd (Supreme Court), the Slovenian Vrhovno sodišče (Supreme Court), and the Swedish Högsta förvaltningsdomstolen (Supreme Administrative Court).

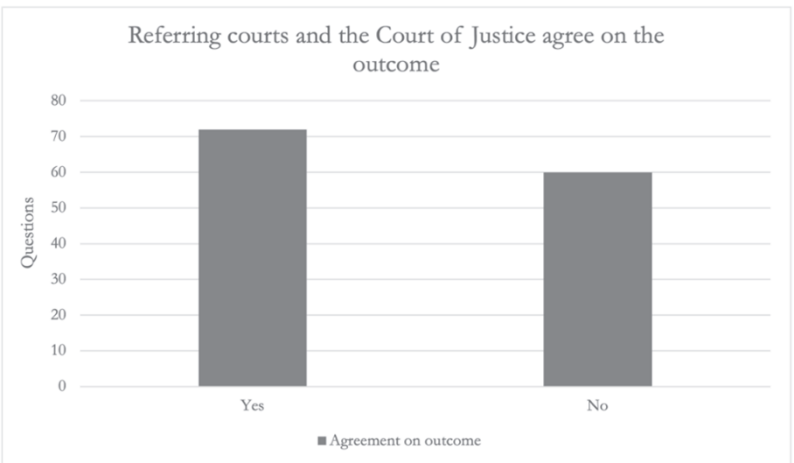
26 See *Anderson*.

C. Main findings: half the time get it right, half the time not?

I. Getting the right outcome

In more than half of 132 questions of interpretation of EU law analysed, the referring courts and the Court of Justice got to the same answer. In 72 questions (54.5%) the referring courts in their orders for reference proposed outcomes that the Court subsequently confirmed in its judgments. Conversely, in 60 questions (45.5%) the referring courts proposed outcomes that differed from those reached by the Court.

Figure 1. Convergence in outcomes



This finding seems inconclusive, unfortunately.[27] It is difficult to evaluate a success rate that stands around fifty percent and seems to come down to a coin toss. Is that number high or low? Does it make national courts successful or unsuccessful in proposing answers to the referred questions? It is hard to tell. In any event, it may be more a matter of expectations. If one seriously doubts that national courts are capable of consistently reaching the right outcome[28] – the "right" indicating the one

27 Similar finding was reported by *Anna Wallerman Ghavanini*, who found approximately equal number of cases of "agreement" and "disagreement" between the national courts' references and the CJEU's judgments included in her study; see *Wallerman Ghavanini*, EP 2020/2, pp. 896 ff.

28 A leading textbook in EU law has long ago voiced cautiousness over capabilities of national courts to offer meaningful views on the interpretation of EU law when submitting preliminary references. It viewed that "[m]ost national courts are not specialists in EU law. It is one thing for the national court to identify a question that is necessary for the resolution of the case. It is another thing to be able to answer it. Higher level national courts may be able to furnish some answer to the question posed. [But this] would none the less transform the task of such courts. There would have to be detailed argument before the national court of the EU issues in order to provide the judge with the requisite material from which to give an answer to the question posed"; see *Craig/de Búrca*, pp. 534–535.

that the Court of Justice would later arrive at – then one could see this number as indicating a rather successful performance and capability of national courts to provide convincing interpretations of EU law. If, on the other hand, one sees national courts that refer questions for preliminary ruling as the most informed and knowledgeable ones among all national courts,[29] and those that are confident enough to suggest the outcome to the Court of Justice as being at the very top of this group,[30] then one could be disappointed with their performance and capability to interpret EU law. So, depending on which perspective one takes will be their evaluation of this finding.

Be that as it may, the more interesting and relevant question concerns reasons that may influence the success rate of the referring courts. Are there any factors that may reveal why some national courts get the same outcome as the Court of Justice and others do not?

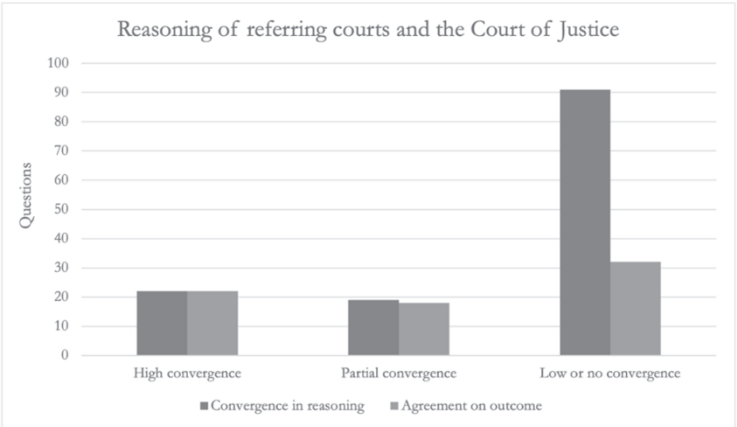
II. Getting the right arguments

Let us first look into the findings concerning the legal reasoning of the referring courts. It turns out that whenever national courts took into consideration and invoked similar or the same arguments as the Court of Justice – on their own motion or after parties brought them to their attention – they also got to the right outcome. For instance, in all 22 questions in which their reasoning was similar (13 questions) or very close (9 questions) to the reasoning of the Court of Justice, the referring courts and the Court came to the same outcome. Next, in 19 questions in which their reasoning was only partially convergent with the Court's – meaning that they had approximately half of the arguments in common with the Court of Justice – the referring courts came to the right outcome in 18 instances. Finally, in the remaining 91 questions in which the referring courts' reasoning contained no or only few arguments found in the Court's judgments, they got to the right outcome only 32 times.

29 Extensive literature on the participation of national courts in the preliminary ruling procedure has shown that judges with more experience with EU law, greater knowledge about its substantive and procedural aspects, more educational and training opportunities in EU law, more EU law-related resources at their institution, better research assistance in accessing the CJEU's case law, better foreign language skills, who have a pro-EU law attitude, are the ones that (are likely to) refer the most; cf. among others, *Nowak/Amtenbrink/Hertogh/Wissink*; *Mayoral/Jaremba/Nowak*, JEPP 2014/8, p. 1120; and *Glavina*, CYELP 2020, p. 25.

30 This would follow from two observations. On the one hand, proposing an informed and reasoned interpretation of EU law is a time- and resource-consuming activity. On the other, it was noted that one of the main reasons for the national courts' reserved attitude towards proposing answers to the referred questions is "the fear of rejection" and of receiving negative reply from the CJEU and thus appearing incompetent; cf. *Nyikos*, Eur J Pol Research 2006/4, p. 533; *van Gestel/de Poorter*, Cambridge Int'l LJ 2017/2, pp. 135, 137; *Leijon*, EP 2020/2, p. 880; *Wallerman Ghavanini*, EP 2020/2, p. 894; and in general, *Leijon/Glavina*, MJECL 2022/2, p. 263.

Figure 2. Convergence in reasoning



What to make of these numbers? Perhaps unsurprisingly (for lawyers, at least), it appears that there is a correlation between national courts having the right arguments and them getting the right answers. From this it may follow that situations in which national courts take into consideration many or most of the same arguments as the Court of Justice, but eventually miss the outcome, will come very exceptionally. Which is not to say that the opposite would also be true: that when national courts do not have the right arguments, they will never get the right outcome. As shown above, in around one in every three situations in which there was little to no similarities between the reasoning of the referring courts and the Court of Justice, they nevertheless got the same outcome. The question then becomes what else, apart from legal arguments, might have led national courts to successfully propose answers to the referred questions. To this we return later. For now, let us discuss the importance of having the right arguments.

D. Searching for the explanation(s)

I. A matter of resources?

To have the right arguments that can lead to the right outcome, a court has to benefit from either material resources that enable it to find those arguments or specific procedures that enable other actors to submit those arguments for its consideration. And when a court is presented with seemingly relevant arguments, it must have a proper expertise to know how to evaluate them and later invoke them in its decision.

In this respect, one should be reminded of the enormous differences in EU law-related expertise, specialisation, and institutional capacities and resources that exist between national courts and the Court of Justice. They could be the primary reason

why in only 22 questions (out of 132) the referring courts' reasoning was comparable to the Court's reasoning, what arguably led them to the same outcome.

As is well known, the CJEU is composed of EU law specialists, at the bench and in their cabinets. Its institutional memory, accumulated over decades of practice, is huge.[31] It also has on its disposal a research and documentation service, which supplies expert assistance on matters of EU law and comparative law. Moreover, the preliminary ruling procedure is organised in a way that brings forward every possible angle on relevant questions of EU law. The Court of Justice thus benefits from the expertise of the EU institutions and their lawyers and arguments they introduce, most often the Commission's legal service which regularly intervenes in the proceedings; as well as the lawyers representing Member States' governments. To the parties in domestic proceedings, the Court is able to direct specific questions in writing and during oral hearings, to tease out their arguments in detail. And obviously, the Court benefits from the arguments raised by the referring courts when they include them in their references.

It is understandable that national courts come nowhere near the CJEU's material and procedural advantages. They are primarily trained in national law and not EU law. Education and training in EU law to some national judges remains scarcely available.[32] At best, some – most likely high national courts – will have specific research units that assist them with EU law. For the most part, they will rely on their own knowledge and on the submissions of the parties.[33] In many situations, EU law will be entangled with the issues of fact and/or national law, which makes it difficult to focus most (or any) of the attention on questions of EU law.

Another point worth mentioning concerns (in)determinacy of EU law in general. EU law can be considered as being imbued with a great degree of indeterminacy,

31 By "institutional memory", I mean knowledge, practices, and experiences that are inherited and passed on among the people that make the institution. The most important among them are, of course, judges, many of whom get reappointed to the bench for several times; the best example is the current President of the CJEU *Lenaerts*, who serves at the Court of Justice (first General Court, now Court) since 1989. Other judges with the longest mandate are *Ilešič* (since 2004), *Bay Larsen* (since 2006), *Bonichot* (since 2006), and *von Danwitz* (since 2006). Also, many judges arrive at the Court of Justice following a mandate (or mandates) as Advocates General or judges of the General Court. They are assisted by legal secretaries or *référendaires*, who are often "inherited" by incoming judges and Advocates General and work at the CJEU for multiple terms, in that way also contributing to the sharing of legal culture and patterns of behaviour. Some judges and Advocates General have been *référendaires* themselves in the early stages of their careers.

32 Cf. *European Parliament*, Resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)), 2009/C 294 E/06, and European Parliament, Resolution of 14 March 2012 on judicial training (2012/2575(RSP)), 2013/C 251 E/07.

33 Cf. *Hoevenaars/Krommendijk*, ELR 2021/1, p. 71, who discussed a lack of resources of lawyers representing parties before the CJEU compared to the agents of the Commission and national governments.

arguably more so than national laws.[34] This is due to certain characteristics of EU law,[35] such as the "open-textured" nature of many of its provisions – especially those found in the EU Treaties, which are drafted in broad, goal-oriented and purpose-oriented terms, with many vague and evaluative expressions – as well as numerous statements of purpose in the preambles to acts of EU secondary law, multilingualism, specific legal terminology and autonomous legal concepts, and a complex process of law making.

This indeterminacy comes at two levels.[36] The first level concerns outcomes of interpretation, i.e. the meaning and the scope of application of legal provisions. There could exist a number of different plausible meanings of an EU provision or different factual circumstances to which it applies. The second level concerns arguments of interpretation that support a particular meaning or scope of legal provisions. There could likewise exist a number of available arguments that support each of the different outcomes. Indeterminacy of EU law is arguably greater at this second level. When a question about the interpretation of EU law is raised before a national court, which in certain instances merits a reference for preliminary ruling, there usually exist several possible answers to that question. At the same time, multiple different arguments exist that support each of those answers. We saw earlier that national courts appear more capable of determining which of the available answers seems the most appropriate than identifying and mobilising all the relevant arguments. This is where the difference in EU law-related expertise and resources between them and the Court of Justice may become the most prominent. For reasons discussed above, the Court of Justice is able to get hold of more of these arguments than national courts can. But not only that: when it has more arguments before itself, the Court is then also better suited than national courts to evaluate them and determine which of these arguments in a particular situation are more important and weightier and should thus be invoked in support of a given outcome.

As we just saw, this difference in judicial resources and specialisation in EU law-related matters is relevant when national courts are compared to the Court of Justice. This seems hardly surprising or unexpected. However, the same appears to be largely irrelevant when different national courts are compared to each other. What do I mean by this?

34 This has been emphasised by some national courts. To quote a famous passage by *Lord Denning* in UK Court of Appeal, *Bulmer v. Bollinger* (1974) 2 All ER 1226 (referring to EU primary law): "How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the Judges, or by Regulations or Directives. It is the European way".

35 Cf. CJEU, case 283/81, *CILFIT*, ECLI:EU:C:1982:335, para. 17, in which the CJEU speaks about "characteristic features of [EU] law and the particular difficulties to which its interpretation gives rise".

36 Cf. *Beck*, YEL 2016/1, pp. 485–487.

It is often assumed that some national courts are in a better position than others to identify relevant questions of interpretation of EU law that merit referral, and by extension to propose convincing answers to those questions. A first relevant distinction concerns the different instance or rank of courts. As a general matter, high national courts enjoy important advantages that may impact their interpretive practice in the preliminary ruling procedure.[37] For instance, these courts have more resources in terms of time and expertise than lower courts, which could enable them to analyse questions of EU law in greater detail. Also, they may be more versed with the interpretation of EU law given their specialisation in law-finding and not fact-finding. A second relevant distinction concerns different types of jurisdiction of courts. For example, courts with specialised jurisdiction in areas of law that are extensively regulated at the EU level, like administrative and financial courts, may be on average more informed and knowledgeable about EU law. The reason would be that in these areas of law there is significant legislative production at the EU level. This leaves less space for the application of national law. Consequently, parties are likely to rely more on EU law in these areas. And national courts specialised in these areas will be more familiar with EU law. They are also more likely to refer questions of interpretation to the Court of Justice in these areas, meaning that there will be more relevant case law to work with.[38]

However, the present study did not find support for any of these assumptions. Irrespective of their rank or type of jurisdiction, national courts were performing equally (un)successfully when it comes to determining outcomes of interpretation or invoking arguments of interpretation of EU law. So, last instance courts were not more successful in proposing outcomes to the Court of Justice than lower courts, nor was their reasoning more comparable to the Court's reasoning.[39] Similarly, there were no significant differences between ordinary courts and specialised courts concerning the outcomes they proposed or legal arguments they cited.[40]

37 Cf. *Bobek*, CYELP 2006/2, pp. 293–294; and *Glavina*, EP 2020/2, pp. 815–822.

38 Cf. *van Gestel/de Poorter*, p. 3.

39 Out of 71 questions referred by the lower courts (first instance and appellate courts), they proposed the outcome that was confirmed by the CJEU in 39 instances (54.9% success rate), and in those 39 instances their reasoning was similar to the Court's in 13 cases (or 33.3% of time); whereas out of 61 questions referred by the last instance courts, they proposed the outcome that was confirmed by the CJEU in 33 instances (54.1% success rate), and in those 33 instances their reasoning was similar to the Court's in 9 cases (or 27.3% of time). Cf. *Wallerman Ghavanini*, EP 2020/2, pp. 896–897, for a study that also did not find any significant differences between lower and higher courts in the "agreement" and "disagreement" categories of the cases observed.

40 Out of 60 questions in which ordinary courts proposed outcomes to the CJEU, the Court agreed with them in 30 instances (50% success rate), and in those 30 instances their reasoning was similar to the Court's in 10 cases (or 33.3% of time); out of 46 questions in which administrative courts proposed outcomes to the CJEU, the Court agreed with them in 25 instances (54.3% success rate), and in those 25 instances their reasoning was similar to the Court's in 6 cases (or 24% of time); whereas out of 15 questions in which financial courts proposed outcomes to the CJEU, the Court agreed with them in 9 instances (60% success rate), and in those 9 instances their reasoning was similar to the Court's in 2 cases (or 22.2% of time); in total, out of 72 questions in which all courts with

What this might indicate is that although there exists a big gap in resources and specialisation in EU law between the Court of Justice and all national courts, the same gap between national courts themselves, if it exists at all, seems to be much smaller. And in any event, it would not impact on whether some national courts are better than others in producing interpretations of EU law or recognising and using relevant arguments. In that sense, national courts seem equally competent and knowledgeable – or incompetent and ignorant, depending on the point of view – when it comes to the interpretation of EU law.

II. A matter of values and interests?

Earlier it was noted how in some situations, even though national courts did not take into consideration the same or similar arguments like the Court of Justice, they nonetheless arrived at the same outcome. The question here is whether something else, in addition to or instead of the legal arguments, might determine whether national courts successfully propose answers to the questions referred for preliminary ruling.

To answer it, another element was added to the analysis of outcomes proposed by national courts. This element was termed "value-interest orientation" of the outcome. Put simply, a distinction was made between the outcomes proposed by the referring courts that were integrationist or "pro-EU", non-integrationist or "anti-EU", or integration-indifferent or "neutral".

For the present purposes, this "value-interest orientation" of the outcome was taken as corresponding to certain structural values and interests of the EU legal order. Hence, an outcome was considered integrationist or "pro-EU" if it involved one of the following situations: (i) broadening the scope of EU law; (ii) restricting exceptions from application of general rules of EU law; (iii) ensuring more efficient enforcement of EU rules, including via their direct effect; (iv) precluding an application of national law that restricts the application of EU rules, and consequently narrowing discretion of national authorities; or (v) being supported by the Commission in the proceedings before the Court. Conversely, an outcome was considered non-integrationist or "anti-EU" if it involved any of the opposite situations: (i) restricting the scope of EU law; (ii) widening exceptions from application of general rules of EU law; (iii) leading to less efficient enforcement of EU rules, including by rejecting their direct effect; (iv) allowing an application of national law that restricts the application of EU rules, leaving instead wide discretion to national authorities; or (v) being opposed by the Commission in the proceedings before the Court.[41] The remaining outcomes, which did not involve any of these situations, were considered

specialised i.e. non-ordinary jurisdiction proposed outcomes to the CJEU, the Court agreed with them in 42 instances (58.3% success rate), and in those 42 instances their reasoning was similar to the Court's in 12 cases (or 28.5% of time).

41 The categories related to "value-interest orientation" of interpretive outcomes were modelled after some earlier attempts in EU legal literature to capture the same point; see references in footnote 49 below. Obviously, not all proposed outcomes could easily be placed

integration-indifferent or "neutral". They mostly concern certain technical questions which seemingly do not involve political or value considerations of this sort. For instance, that a copper rod[42] or a medicinal product or insecticide[43] should be classified under one or the other customs heading, or that a package leaflet of homeopathic medicinal products can or cannot contain information about dosage schedules,[44] was difficult to characterise as being "pro-EU" or "anti-EU", absent indications that would suggest otherwise.[45]

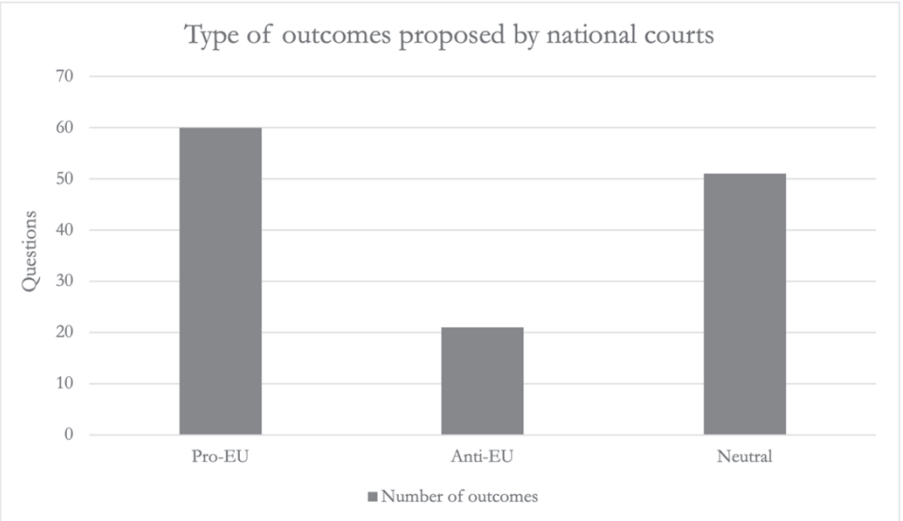
under one of the three categories. There were several instances in which two elements pointed towards opposite directions. This was especially the case with the position adopted by the Commission, which could not always be taken as a proxy for "pro-EU" outcome. See, for example, Opinion of AG *Øe*, case C-535/19, *A v. Latvian Ministry of Health*, ECLI:EU:C:2021:114, paras. 69–76, and Opinion of AG *Bobek*, case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, ECLI:EU:C:2020:375, paras. 29–30 and 100–101. In these cases, the Commission supported outcomes that would lead to more obstacles for free movement of EU citizens, more discretion being given to national authorities to restrict EU rules, or application of EU rules being limited to cross-border situations only. However, the referring courts proposed the opposite; see Augstākā tiesa (Senāts) (Supreme Court), order for reference of 9 July 2019, case C-535/19, *A v. Latvian Ministry of Health*, paras. 50–58, and Corte suprema di cassazione (Supreme Court of Cassation), order for reference of 29 January 2019, case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, paras. 27–31. For that reason, and despite the Commission's opposition, their outcomes were considered "pro-EU". In addition, in some cases the outcome proposed by the referring court could not be immediately considered "pro-EU" although it suggested preclusion of national law and had "anti-Member State" orientation; see Spetsializiran nakazatelen sad (Specialized criminal court), order for reference of 7 October 2019, case C-769/19, *UC and TD*, paras. 36–40, and Trgovački sud u Zagrebu (Commercial Court, Zagreb), order for reference of 20 March 2019, joined cases C-267/19 and C-323/19, *PARKING and Interplastics*, pp. 6–7. However, in these situations there was no apparent contradiction between properly interpreted EU law and national law, nor was there anything at stake for the EU legal order in case of allowing application of national law, which would qualify that outcome as "pro-EU"; see CJEU, case C-769/19, *UC and TD*, ECLI:EU:C:2021:28, paras. 43–49 and 52–58; and CJEU, joined cases C-267/19 and C-323/19, *PARKING and Interplastics*, ECLI:EU:C:2020:351, paras. 44–53. Therefore, both outcomes were classified as "neutral". On the flipside, in other situations the referring court was offering a "pro-Member State" outcome, which could not be immediately considered "anti-EU"; see Raad van State (Council of State), order for reference of 4 September 2019, case C-673/19, *M and Others*, paras. 17–18. The referring court argued that national law should not be precluded given that EU law itself envisaged a possibility of going beyond commonly agreed standards. So, national measures were in line with the discretion left to Member States under EU law; see CJEU, case C-673/19, *M and Others*, ECLI:EU:C:2021:127, paras. 43–46. Therefore, this outcome was also classified as "neutral".

42 See Augstākā tiesa (Supreme Court), order for reference of 18 April 2019, case C-340/19, *Hydro Energo*; and CJEU, case C-340/19, *Hydro Energo*, ECLI:EU:C:2020:488.

43 See Krajský soud v Ostravě (Regional Court, Ostrava), order for reference of 13 December 2019, case C-941/19, *Samohýl group*; and CJEU, case C-941/19, *Samohýl group*, ECLI:EU:C:2021:192.

44 See Bundesverwaltungsgericht (Federal Administrative Court), order for reference of 6 November 2018, joined cases C-101/19 and C-102/19, *Deutsche Homöopathie-Union*; and CJEU, joined cases C-101/19 and C-102/19, *Deutsche Homöopathie-Union*, ECLI:EU:C:2020:304.

Figure 3. "Value-interest orientation" of outcomes



The findings regarding the "value-interest orientation" of the outcome were as follows. Firstly, out of 132 questions of interpretation referred during the reference period, national courts proposed the most "pro-EU" outcomes – 60 of them or 45.5% – and "neutral" outcomes – 51 of them or 38.6%; and the least "anti-EU" outcomes – 21 of them or 15.9%.[46] This could be read as another indication that national courts that appear in the preliminary ruling procedure have mostly a positive attitude towards EU law,[47] irrespective of their national background, type of jurisdiction or position in domestic judicial hierarchy. It also lends support to the argument that "the preliminary reference procedure as a whole has become an integrationist institution",[48] across all areas of EU law.

Secondly, and more importantly, it turned out that when national courts proposed "pro-EU" outcomes to the referred questions of interpretation of EU law, they very often saw those outcomes confirmed by the Court of Justice. In 60 such

45 One such indication that would point towards a "pro-EU" outcome could be e.g. the Commission's view that certain customs classification is the only one compatible with the EU's international obligations; cf. CJEU, case C-559/18, *TDK-Lambda Germany*, ECLI:EU:C:2019:667, paras. 37–38.

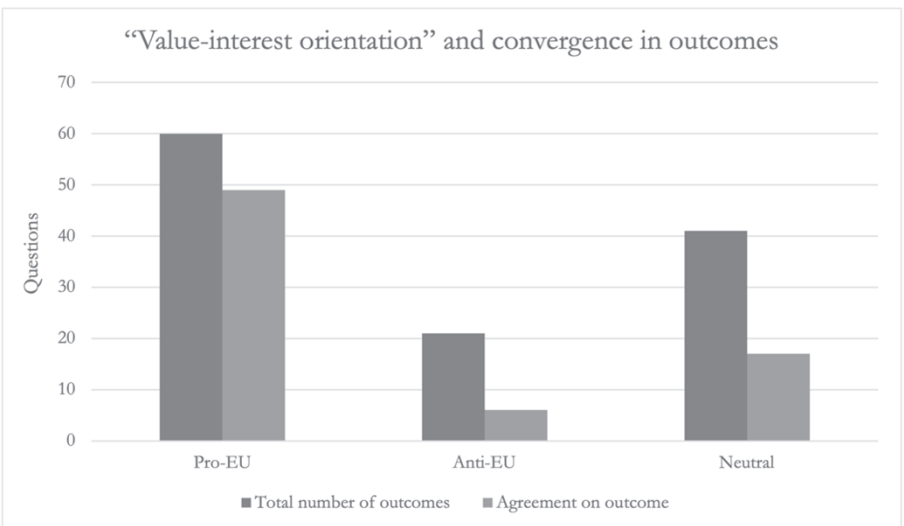
46 Similar numbers were reported by *Anna Wallerman*, whose study focused on the case law concerning procedures and remedies. She found that in situations in which national courts express their views about possible answers to the referred questions, they argue predominantly (57%) in favour of integrationist solutions, contrary to a much smaller number of references (15%) in which they argue in favour of national procedural autonomy (whereas the remaining 28% references could not be classified as either pro-integration or pro-national autonomy); see *Wallerman*, ELR 2019/2.

47 See footnote 29.

48 *Wallerman*, ELR 2019/2, p. 177.

instances, they got the right outcome 49 times, a (whopping) 81.7% success rate. Contrary to that, in other two categories national courts were significantly less successful in proposing outcomes to the Court. Out of 51 questions that were characterised as "neutral", national courts proposed the right outcome 17 times, which makes a 33.3% success rate. And out of 21 questions which were characterised as "anti-EU", they got only six outcomes right, with the lowest success rate of 28.6%. From this we can conclude that there may be a correlation between national courts proposing integrationist or "pro-EU" outcomes and the CJEU reaching those same outcomes, and vice versa. To my knowledge, such a stark difference in absolute numbers – where national courts that propose "pro-EU" outcomes appear to be more than twice as successful than those that propose "neutral" or "anti-EU" outcomes – has not yet been reported in EU legal scholarship.

Figure 4. Convergence in outcomes depending on their orientation



A number of additional points can be inferred from this. First of all, these findings can be read as another indication of a strong integrationist bias by the Court of Justice. Different authors made similar observations long ago.[49] Reaching an integrationist outcome in four out of five cases in which these considerations are at stake

49 Most notably, see *Bredimas*, p. 179 (noting that "the only consistent and overriding principle of interpretation, which can be traced throughout the case law [of the CJEU], is interpretation promoting European integration"); *Stein*, AJIL 1981/1, pp. 24–27 (analysing eleven landmark rulings of the CJEU from the early, formative years of the EU, by identifying and comparing the positions of the Commission, national governments (individually or in the Council), Advocates General, and the Court itself, and finding that in all eleven cases the Court promoted an expansive reading of the EU Treaty, despite the continuous opposition of Member States and occasionally even its Advocates General); *Rasmussen*, p. 3 (claiming that in its case law, the CJEU was, whenever possible, giving priority to the interests of the EU legal, political, social, and economic order); and *Hartley*, p.

paints quite a picture, indeed. But present findings go even beyond what has been argued so far. The Court's alleged integrationist bias was constructed mostly around exceptional or "landmark" judgments that received the greatest scholarly or public attention and involved salient legal and political controversies of constitutional nature. However, "[g]reat cases, like hard cases, make bad law".[50] They make only a tiny fraction of all cases the Court of Justice deals with. And they can give false impressions about the Court's actual practices and lead to a distorted picture of its policy preferences and biases when interpreting EU law. Unlike that, here we have an indication of the Court's integrationist bias in a type of cases it deals with in the vast majority of its judgments – those involving ordinary and routine questions of interpretation of EU secondary law that feature non-salient legal controversies and receive scant attention. In any event, earlier remarks have not been verified by a comprehensive case law analysis that attempts to define more precisely the measure of "integrationism", like the one suggested above.

However, we should be reminded that there is still that one case out of five, in which the CJEU reached a non-integrationist outcome.[51] This calls for caution when discussing the Court's policy biases and predicting its behaviour based on any single explanation. The remaining cases in which the Court did not endorse integrationist outcomes proposed by national courts reveal important limitations to pursuing one-sidedly (putative) EU interests in judicial decision-making. For instance, in some of them national courts were suggesting broader protection of EU rights when it was eventually established that EU law either provides only a minimum level of protection,[52] or does not regulate the matter in question at all.[53] In a similar vein, overly ambitious integrationist outcomes were rejected when the Court found that it was clearly the intention of the EU legislator to introduce a minimum standard or a limited protection under EU law and leave the matter for Member States

78 (arguing that "[o]ne of the distinctive characteristics of the [CJEU] is the extent to which its decision-making is based on policy. By policy is meant the values and attitudes of the judges – the objectives they wish to promote. The policies of the [CJEU] are basically the following: 1. strengthening the [Union] (and especially the federal elements in it); 2. increasing the scope and effectiveness of [Union] law; 3. enlarging the powers of [Union] institutions. They may be summed up in one phrase: the promotion of European integration").

50 US Supreme Court, *Northern Securities Co. v. United States*, 193 US 197 (1904) 400 (Holmes, J., dissenting).

51 Which can be qualified as such at least in the framework I established for the purposes of this study.

52 See Oberster Gerichtshof (Supreme Court), order for reference of 17 June 2019, case C-530/19, *NM v. ON (Niki Luftfahrt)*; and CJEU, case C-530/19, *NM v. ON (Niki Luftfahrt)*, ECLI:EU:C:2020:635, especially paras. 27–28 and 38–39.

53 See Oberlandesgericht Frankfurt am Main (Higher Regional Court of Frankfurt am Main), order for reference of 11 September 2018, case C-581/18, *RB v. TÜV Rheinland LGA Products and Allianz*, paras. 15–17; and CJEU, case C-581/18, *RB v. TÜV Rheinland LGA Products and Allianz*, ECLI:EU:C:2020:453, paras. 44–58.

to regulate, even if that may lead to undesirable social consequences.[54] In the light of the principle of separation of powers, it seems sensible that the Court would defer to the choices made by the EU legislator, especially when those choices concern striking a delicate balance between the important societal interests expressed as competing purposes of the same legislative act.[55] But there is a counterweight to this, obviously: establishing in unequivocal terms that the EU legislator has clearly intended to achieve something is not a straightforward interpretive exercise. That is where the discretion of the Court increases, and its policy preferences (or other extra-legal reasons) can kick in.

Furthermore, these cases also suggest that some national courts may appear more integrationist than the Court of Justice – "more Catholic than the Pope" – perhaps even too much "pro-EU" oriented; as well as that some integrationist decisions rendered by the Court may have actually followed from a subtle push by referring courts into that direction.[56]

What is interesting, moreover, is that even in those rare cases in which their integrationist outcomes were not accepted, national courts appear not to be completely dismissed. A good example is *ratiopharm v. Novartis*. The referring court proposed that the Directive 2001/83/EC on medicinal products for human use should be interpreted as allowing pharmaceutical companies to distribute free samples of medicines not only to doctors but also to pharmacists.[57] From the entire context of the directive, read in conjunction with the freedom of pharmaceutical companies and pharmacists to choose occupation and to conduct business guaranteed under Articles 15 and 16 of the Charter, the *Bundesgerichtshof* inferred that doctors and pharmacists should not be treated differently when it comes to receiving free medicinal products, with which they want to get familiar and demonstrate their use to patients and customers. The Court of Justice eventually did not accept such a wide in-

54 See CJEU, case C-535/19, *A v. Latvian Ministry of Health*, ECLI:EU:C:2021:595, para. 62; and CJEU, case C-906/19, *Criminal proceedings against FO*, ECLI:EU:C:2021:715, para. 45.

55 Cf. Opinion of AG *Øe*, case C-264/19, C*onstantin Film Verleih v. YouTube and Google*, ECLI:EU:C:2020:261, paras. 58–59: "[I]t is not for the Court to alter the scope of the terms used by the EU legislature in Article 8(2) of Directive 2004/48 [on the intellectual property rights], which would have the effect of upsetting the balance that the legislature had intended to achieve when adopting that directive. The EU legislature alone has the competence to strike that balance. […] [T]o adopt the interpretation suggested by Constantin Film Verleih would be tantamount to the Court not only rewriting Article 8(2) of Directive 2004/48, but also upsetting the balance that was struck by the EU legislature in such a way as to favour the interests of holders of intellectual property rights" (references omitted).

56 Cf. *Maduro*, EJLS 2007/2, p. 148 (noting that "[i]t was often national courts that proposed some of the most dynamic and creative interpretations of [EU] law", thus contributing with their references to the development and "shaping" of EU law).

57 Bundesgerichtshof (Federal Court of Justice), order for reference of 31 October 2018, case C-786/18, *ratiopharm v. Novartis Consumer Health*, paras 27–32; the relevant provision stated that free samples of medicinal products "shall be provided on an exceptional basis only to persons qualified to prescribe them", and pharmacists, unlike doctors, are not qualified to prescribe medicines but only to supply them.

terpretation. Instead, it met the referring court halfway. Namely, after adopting a more nuanced approach based on a distinction between different kinds of medicinal products, it ruled that the directive allows pharmaceutical companies to distribute free samples of *prescription-only* medicines only to persons qualified to prescribe them, i.e. doctors and not pharmacists; but, at the same time, the directive does not prohibit distribution of free samples of *non-prescription* medicines to pharmacists too.[58] So, in cases where national courts propose a bit too ambitious "pro-EU" outcome, the Court might at times respond with a "neutral" outcome at worst, or with a moderate "pro-EU" outcome at best.[59]

Another issue worth mentioning concerns the importance of having a right value orientation as opposed to having the right arguments. Recall that it was shown earlier that whenever national courts got the same arguments as the Court of Justice, they came to the same outcome. But in many other situations, although their reasoning was far from the Court's reasoning, national courts nevertheless got to the same outcome. What could account for these situations? Besides legal reasoning, one of the most relevant factors in the interpretation of EU law could be this value orientation of the proposed outcome. In these situations, suggesting integrationist outcomes seems to matter more than having all the relevant arguments.[60] In other words, having the right mindset might be more important than having the right reasons. So, in the interpretation of EU law, values and interests promoted by an outcome may often matter more than the reasoning behind that outcome, a thesis that would arguably be supported by legal realists.

That values and interests at times seem to matter more than the reasoning is illustrated in many cases. On the one hand, we have situations in which the referring courts proposed integrationist outcomes with which the Court of Justice concurred,

58 CJEU, case C-786/18, *ratiopharm v. Novartis Consumer Health*, ECLI:EU:C:2020:459, paras. 34–53.

59 Another example with a similar outcome can be found in Okresný súd Košice I (Košice I District Court), order for reference of 5 August 2019, case C-799/19, *NI and Others*, paras. 34–56; and CJEU, case C-799/19, *NI and Others*, ECLI:EU:C:2020:960, paras. 54–59 and 67–71.

60 It should be noted that the value-interest orientation of the proposed outcome had no relation to the convergence of reasoning of the referring courts and the CJEU. Hence, out of 49 questions in which they proposed the right "pro-EU" outcome, national courts had reasoning similar to the Court's in 15 instances, or 30.6%; out of 17 questions in which national courts proposed the right "neutral" outcome, their reasoning was similar to the Court's in five instances, or 29.4%; and out of six questions in which they proposed the right "anti-EU" outcome, their reasoning was similar to the Court's in two instances, or 33.3%. This merely reflects the point made earlier – that national courts rarely use the same arguments as the CJEU, across the board – which was explained by a gap in resources and specialisation. In other words, although an integrationist value orientation might mean that national courts are after the correct outcome, such orientation would rarely mean that they managed to take into consideration and invoke the relevant arguments in the interpretation of EU law.

although their reasoning was completely different than the Court's.[61] What is more, the arguments they used were arguably based on a dubious (if not obviously incorrect) reading of the applicable EU law.[62] However, the outcomes they proposed were firmly "pro-EU", since they concerned things like guaranteeing better protection of victims of violent crimes in the EU,[63] ensuring efficient protection of the rights of third-country nationals guaranteed under EU law,[64] or securing uninhibited performance of commercial activities in the online marketplace.[65]

On the other hand, we have a situation in which the referring court's reasoning was almost identical to the CJEU's until the very end, when the referring court took a turn and reached a different outcome. The problem was that the outcome was "anti-EU", since it suggested an exception from finding indirect discrimination of EU migrant workers. Unsurprisingly, the Court of Justice rejected it, although the two

61 See Corte suprema di cassazione (Supreme Court of Cassation), order for reference of 29 January 2019, case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, and CJEU, case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, ECLI:EU:C:2020:566; Naczelny Sąd Administracyjny (Supreme Administrative Court), order for reference of 4 November 2019, case C-949/19, *M. A. v. Consul of the Republic of Poland*, and CJEU, case C-949/19, *M. A. v. Consul of the Republic of Poland*, ECLI:EU:C:2021:186; and Bundesgerichtshof (Federal Court of Justice), order for reference of 26 July 2018, case C-567/18, *Coty Germany v. Amazon*, and CJEU, case C-567/18, *Coty Germany v. Amazon*, ECLI:EU:C:2020:267.

62 For instance, in order for reference in case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, the referring court, the Italian *Corte suprema di cassazione*, based the proposed outcome on an erroneously construed scope of application of EU law, whereas it read Directive 2004/80/EC on compensation to crime victims and the relevant case law of the CJEU as covering only victims of crimes committed in cross-border situations; in order for reference in case C-949/19, *M. A. v. Consul of the Republic of Poland*, the referring court, the Polish *Naczelny Sąd Administracyjny*, similarly misunderstood the scope of EU law, given that it proposed that EU law required that judicial review of national decisions refusing long-stay visas for the purpose of studies should be ensured, after concluding that the Convention implementing the Schengen Agreement (CISA) was applicable to that situation, although its provisions conferred rights only to third-country nationals who have already been granted long-stay visas; while in order for reference in case C-567/18, *Coty Germany v. Amazon*, the referring court, the German *Bundesgerichtshof*, based its interpretation of Regulations (EC) No 207/2009 and (EU) 2017/1001 on the EU trademark on an analogy between trademark law and patent law, more specifically national (German) regulation and case law concerning the latter area of law.

63 Corte suprema di cassazione (Supreme Court of Cassation), order for reference of 29 January 2019, case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, paras. 27 ff.; and CJEU, case C-129/19, *Presidenza del Consiglio dei Ministri v. BV*, ECLI:EU:C:2020:566, paras. 37 ff.

64 Naczelny Sąd Administracyjny (Supreme Administrative Court), order for reference of 4 November 2019, case C-949/19, *M. A. v. Consul of the Republic of Poland*, paras. 3.2.3–3.3.2; and CJEU, case C-949/19, *M. A. v. Consul of the Republic of Poland*, ECLI:EU:C:2021:186, paras. 43–46.

65 Bundesgerichtshof (Federal Court of Justice), order for reference of 26 July 2018, case C-567/18, *Coty Germany v. Amazon*, para. 22; and CJEU, case C-567/18, *Coty Germany v. Amazon*, ECLI:EU:C:2020:267, paras. 34–47.

courts cited more or less the same arguments but read them "in different spirit" and hence came to opposite conclusions.[66]

Through this example, we can clearly see that at times it is not only important that national courts get hold of all the relevant arguments when interpreting EU law. It is equally (if not more) important that they use those arguments in order to promote EU values and not particular national values.

E. Who are national judges?

What can these key findings tell us about the interpretation of EU law in general? Or about national courts and their position in the EU legal system?

First of all, the more specialised in and knowledgeable about EU law, the more successful national courts appear to be when proposing answers to the Court of Justice and, by extension, with the interpretation of EU law more generally. This can arguably be addressed by building up the resources which national judges have at their disposal, as well as by improving their basic education and training in EU law and opportunities to refine their expertise through life-long learning. Calls for a better access to information on EU law and the case law of the CJEU, and more learning opportunities at all levels of the national judiciary, have been raised long ago at the EU level.[67] So, improving knowledge and resources of national courts could make a significant contribution to ensuring that national courts perform their

66 Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court, Rhineland-Palatinate), order for reference of 11 December 2018, case C-830/18, *PF and Others*; and CJEU, case C-830/18, *PF and Others*, ECLI:EU:C:2020:275. The case concerned the interpretation of Regulation (EU) No 492/2011 on free movement of workers in the EU. Relevant provision states that workers who are EU citizens enjoy in the territory of other Member States the same social and tax advantages as national workers. In the German state of Rhineland-Palatinate, the payment of school transport costs was subject to a requirement of residence in the territory of that state. One of the questions that was raised was whether such a measure constituted indirect discrimination. The referring court and the Court of Justice started their analysis in the same direction. Citing provisions of the regulation, general principles of EU law, and relevant case law, they concurred on many points, including that the concept of "social advantage" encompasses school transport costs paid to the children of migrant workers; that the residence requirement is "intrinsically liable to affect migrant workers more than national workers" and consequently is indirectly discriminatory; and that it is immaterial for that finding to establish that the requirement in fact affects a substantially higher proportion of foreign workers but that it is sufficient that it can potentially lead to such a consequence. However, when it came to the assessment of whether that measure constituted indirect discrimination, the two courts disagreed. The referring court suggested that, given that almost all workers – more than 95%, as shown by relevant data – who were affected by different treatment were domestic (German) nationals, the residence requirement in these circumstances should not be characterised as indirectly discriminatory. However, the CJEU disagreed and found indirect discrimination. It swiftly rejected the statistical data offered by the referring court as irrelevant for that finding, adding (for good measure) that instances of reverse discrimination are not a matter of EU law.

67 See footnote 32.

"European mandate"[68] more successfully as well as to preserving the uniformity of EU law.

But being more informed about EU law – about the functioning of the preliminary ruling procedure, relevant case law, admissible arguments of interpretation, etc. – is only a first step. In a second step, the use of this knowledge and arguments should ideally be informed by specific values and interests, and those are EU values and interests. This is where national courts might part ways with the Court of Justice more often. They may read the same sources of EU law and follow the same mode of legal reasoning like the Court, but be driven by national instead of EU values, which will eventually lead them into different directions and further different interests.[69] This could mean that in the hands of national courts, EU law becomes a "patchwork" of different versions of the same law: being expressed in the same form and with the same "vocabulary" as the official version that comes out the Luxembourg benches but having different substance and meaning in different Member States.[70]

This is especially important given that national courts handle the most cases involving EU law.[71] In many of them, they will have to interpret EU law on their own. And only in a smaller number of those cases they will seek assistance of the Court of Justice.[72] Therefore, interpretations of EU law they adopt in those situations may differ from those that are adopted by other national courts concerning the same provisions, and from those that would be adopted by the Court of Justice were it presented with the questions of interpretation of those provisions. If this is indeed the case on a larger scale, the consequences for the uniformity, effectiveness, and autonomy of EU law, and by extension equality of EU citizens and Member States, would be nothing short of dire.

On the flipside, most of those everyday situations might not involve serious doubts about the interpretation of EU law. And when they do, reasonably informed national courts might solve those doubts without much trouble and in a sufficiently uniform manner. Even when greater doubts about the interpretation of EU law do arise, national courts might still do a decent job irrespective of their knowledge and resources, given that greater value controversies might emerge only exceptionally; and even when they do emerge, national and EU values might be for the most part fully compatible and aligned. It might be only in that small number of exceptional or "hard" cases that national courts will be informed by different values and conse-

68 *Claes*.
69 Cf. footnote 66.
70 Cf. *Dougan*, in: Botman/Langer (eds.), p. 58: "[T]he reception of Union law into the Member State legal systems and its enforcement before their national courts is an extremely intricate phenomenon. Union law must be filtered through, adapt itself to and find self-expression in the terms of 27 different sets of institutions, structures, concepts, regimes and processes. In many contexts, it is surely misleading to speak of Union law as if it were a single and uniform being: there are in fact 28 versions of EU law – that of the Union legal order and those constructed within each and every Member State".
71 *Davies*, JEPP 2012/19, p. 76.
72 Cf. *Bobek*, in: Adams/de Waele/Meeusen/Straetmans (eds.), pp. 208–218.

quently reach different outcomes than the Court of Justice. In such a scenario, the abovementioned dire consequences would not obtain.

A well-known example that could illustrate this situation is the *PSPP* controversy.[73] In its (in)famous ruling, the German Federal Constitutional Court (GFCC) declared a decision of the European Central Bank (ECB), together with the judgment of the Court of Justice that confirmed the validity of that decision, to be *ultra vires*. The GFCC took issue with the "methodology" of the CJEU, i.e. with its reasoning in *Weiss*. The CJEU's flawed reasoning made its judgment contrary not only to the German Basic Law but also to the EU Treaties as they were understood by the GFCC. To substantiate its finding, the German court went on to demonstrate how the ECB's decision was supposed to be interpreted and its validity assessed. While doing that, for the most part the GFCC was citing arguments that are specific to EU law: Article 5 TFEU, other provisions of the TFEU concerning the ECB's mandate and the Union's monetary policy, and extensive case law of the Court of Justice concerning the principle of proportionality as it was applied in different areas of EU law. And eventually, the German court concluded that the CJEU's application of that principle to the delineation of competences between the EU and Member States in economic and monetary policy was erroneous: erroneous not only from the perspective of German law but from the perspective of EU law itself.

In the process, the GFCC was presented with most of the relevant arguments that the Court of Justice later took into account; unsurprisingly, given that it is arguably the most resourceful and knowledgeable of all national courts when it comes to EU law. But the GFCC read those arguments differently than the CJEU. The difference came from the different conceptions of the same values their interpretations were informed by, i.e. democracy and separation of powers. These values are recognised in both constitutional orders, German and the EU's. And interpretations of EU law by the two courts were driven by nominally the same values. However, the German court's conception of these values required stricter scrutiny of unelected EU institutions, which escape democratic oversight from other supranational institutions. Therefore, these values came out with a German pedigree. On the other hand, the Court of Justice preferred to give more deference to the EU's expert technocratic central bank. Due to the Court's institutional position in the EU constitutional framework, its conceptions of democracy and separation of powers represent the EU conceptions of these values. The two courts used the same arguments (EU principles and case law), were informed by formally the same values (democracy and separation of powers), yet reached different outcomes (judicial deference versus strict scrutiny, and ultimately valid versus invalid EU acts). So, from this disagreement over values ensued misunderstanding and then constitutional clash between the two courts.

73 CJEU, case C-493/17, *Weiss*, ECLI:EU:C:2018:1000; and BVerfG, 2 BvR 859/15, *PSPP*, judgment of 5 May 2020 (Second Senate), ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

This example shows again that in the interpretation of EU law the question of values is equally important, if not more important, than the question of knowledge and resources.[74] The latter can be influenced through university education, professional training, life-long learning programs, institutional assistance, and judicial resources. Law and legal education certainly have tools to equip national judges in this sense.

However, the question of values is much more complicated. They are shaped through socialisation. They can be influenced through aforementioned processes, but never fully.[75] They are intimately attached to political identities, which are still primarily formed at the national level and by local traditions.[76] In a pluralist and multicultural legal realm, they will always be much harder to influence in a "top-down" manner. National judges are "national" and "EU" at the same time,[77] and by becoming latter – if they ever truly become that – they certainly do not stop being former. This question of values is what ultimately determines who national judges really are when they "wear their EU wigs",[78] as well as what they can and what they cannot become.

The answer to that question, as already hinted, is less in the domain of law and *legal* and more in the domain of socialisation, identities, and *political*.

F. Concluding remarks

In this article I have looked into situations in which national courts propose answers to the questions referred to the Court of Justice for preliminary ruling. The findings suggest that two important factors that can influence the performance of national courts in these situations are judicial resources and values and interests that are promoted by the outcomes they suggest. Concerning the resources, there was a correlation between national courts getting hold of most or all relevant arguments and the Court endorsing the outcomes they propose. Concerning the values, there was likewise a correlation between national courts proposing integrationist outcomes and the Court arriving at those same outcomes.

These findings may have certain implications for the role of national courts as EU courts, as I have further discussed. To have national courts fully embracing their mandate under the EU Treaties and accomplishing tasks that come with it, it would

74 Certainly, this may not be the case for EU law only. In fact, values are implicit in every judicial reasoning. They "form the ultimate level of justification of interpretative arguments" that are used to justify judicial decisions, whether they are expressly acknowledged or not. As *Neil MacCormick* and *Robert Summers* argued, arguments "have genuine justificatory force to the extent that they are grounded in values, particularly the underpinning values of legal and constitutional order"; see *MacCormick/Summers*, in: MacCormick/Summers (eds.), p. 532.

75 Cf. *Jaremba/Mayoral*, JEPP 2019/3, pp. 388–389.

76 Cf. *Olsen*, JCMS 2002/5, p. 935.

77 For a variety of ways national judges see and exercise their role of EU judges, see *Nowak/Glavina*, Journal of Eur Integration 2021/6, p. 739.

78 The phrase comes from *Lord Slynn of Hadley*, Cambridge LJ 1993/2, p. 234.

be necessary not only to invest in their knowledge about EU law and resources to help them in navigating through that legal system, but also to build and cherish their European identity that reflects common values and interests of a political and economic integration project. The big question is whether the latter can be achieved, and if yes how.

In the end, it should be reiterated that legal reasoning and "value-interest orientation" of the outcome do not exhaust factors that may influence judicial interpretations of EU law in the preliminary ruling procedure. Rather, these two are what I was able to observe in the present doctrinal study. In other situations, factors such as ideological or policy preferences of individual judges, political salience of the issue, the Member State from which the question originates, chamber formation, time constraints or workload, and so on, may be the primary causes of (dis)agreements between national courts and the CJEU about answers to the referred questions of interpretation of EU law. But investigating those factors and their impact would require a different kind of study.[79] These are the questions that future research may choose to explore, complementing this doctrinal study with, in particular, social science approaches based on quantitative and qualitative methodology, in order to build upon the insights provided here and verify my main observations.

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79 See the remarks on methodology in the last part of section B, above.

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ANNEX

List of analysed orders for reference (July 2018–December 2020)

AUSTRIA

1) Bundesfinanzgericht (Federal Finance Court), order for reference in case C-931/19, *Titanium*
2) Landesverwaltungsgericht Niederösterreich (Regional Administrative Court of Lower Austria), order for reference in case C-96/19, *VO v. Bezirkshauptmannschaft Tulln*
3) Landesverwaltungsgericht Steiermark (Regional Administrative Court of Styria), order for reference in case C-629/19, *Sappi Austria Produktions*
4) Oberster Gerichtshof (Supreme Court), order for reference in case C-532/18, *GN v. ZU (Niki Luftfahrt)*
5) Oberster Gerichtshof (Supreme Court), order for reference in case C-530/19, *NM v. ON (Niki Luftfahrt)*
6) Verwaltungsgericht Wien (Administrative Court, Vienna), order for reference in case C-477/19, *IE (Grand hamster)*

BELGIUM

7) Raad voor Vreemdelingenbetwistingen (Council for asylum and immigration proceedings), order for reference in case C-706/18, *X v. Belgische Staat*

BULGARIA

8) Spetsializiran nakazatelen sad (Specialized criminal court), order for reference in case C-769/19, *UC and TD*

CROATIA

9) Trgovački sud u Zagrebu (Commercial Court, Zagreb), order for reference in joined cases C-267/19, and C-323/19 *PARKING and Interplastics*

CZECH REPUBLIC

10) Krajský soud v Brně (Regional Court, Brno), order for reference in case C-881/19, *Tesco Stores ČR*
11) Krajský soud v Ostravě (Regional Court, Ostrava), order for reference in case C-941/19, *Samohýl group*
12) Městský soud v Praze (Prague City Court), order for reference in case C-502/18, *CS and Others v. České aerolinie*

FINLAND

13) Korkein hallinto-oikeus (Supreme Administrative Court), order for reference in case C-578/18, *Energiavirasto*
14) Korkein hallinto-oikeus (Supreme Administrative Court), order for reference in case C-215/19, *Veronsaajien oikeudenvalvontayksikkö (Computing centre services)*

FRANCE

15) Cour de cassation (Court of Cassation), order for reference in case C-906/19, *Criminal proceedings against FO*
16) Tribunal de commerce de Paris (Commercial court in Paris), order for reference in case C-828/18, *Trendsetteuse v. DCA*
17) Tribunal d'instance d'Aulnay-sous-Bois (District Court, Aulnay-sous-Bois), order for reference in case C-756/18, *LC and MD v. easyJet Airline*

GERMANY

18) Bundesfinanzhof (Federal Finance Court), order for reference in case C-488/18, *Golfclub Schloss Igling*
19) Bundesfinanzhof (Federal Finance Court), order for reference in case C-715/18, *Segler-Vereinigung Cuxhaven*

20) Bundesfinanzhof (Federal Finance Court), order for reference in case C-48/19, *X v. Finanzamt Z*
21) Bundesfinanzhof (Federal Finance Court), order for reference in case C-346/19, *Bundeszentralamt für Steuern v. Y*
22) Bundesfinanzhof (Federal Finance Court), order for reference in case C-373/19, *Dubrovin & Tröger – Aquatics*
23) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-432/18, *Consorzio Tutela Aceto Balsamico di Modena*
24) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-524/18, *Willmar Schwabe v. Queisser Pharma*
25) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-527/18, *Gesamtverband Autoteile-Handel v. KIA Motors Corporation*
26) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-567/18, *Coty Germany v. Amazon*
27) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-786/18, *ratiopharm v. Novartis Consumer Health*
28) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-264/19, *Constantin Film Verleih v. YouTube and Google*
29) Bundesgerichtshof (Federal Court of Justice), order for reference in case C-540/19, *WV v. Landkreis Harburg*
30) Bundessozialgericht (Federal Social Court), order for reference in case C-29/19, *ZP v. Bundesagentur für Arbeit*
31) Bundesverwaltungsgericht (Federal Administrative Court), order for reference in case C-535/18, *IL and Others*
32) Bundesverwaltungsgericht (Federal Administrative Court), order for reference in case C-605/18, *Adler Real Estate*
33) Bundesverwaltungsgericht (Federal Administrative Court), order for reference in joined cases C-101/19 and C-102/19, *Deutsche Homöopathie-Union*
34) Bundesverwaltungsgericht (Federal Administrative Court), order for reference in case C-189/19, *Spenner v. Germany*
35) Bundesverwaltungsgericht (Federal Administrative Court), order for reference in case C-546/19, *BZ v. Westerwaldkreis*
36) Bundesverwaltungsgericht (Federal Administrative Court), order for reference in case C-619/19, *Land Baden-Württemberg v. D. R.*
37) Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg), order for reference in case C-559/18, *TDK-Lambda Germany*
38) Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg), order for reference in case C-449/19, *WEG Tevesstraße*
39) Finanzgericht Berlin-Brandenburg (Finance Court Berlin-Brandenburg), order for reference in case C-868/19, *M v. Finanzamt für Körperschaften Berlin*
40) Finanzgericht Düsseldorf (Finance Court, Düsseldorf), order for reference in case C-97/19, *Pfeifer & Langen*
41) Finanzgericht Hamburg (Finance Court, Hamburg), order for reference in case C-543/19, *Jebsen & Jessen*

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43) Finanzgericht des Saarlandes (Finance Court, Saarland), order for reference in case C-288/19, *QM v. Finanzamt Saarbrücken*
44) Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main), order for reference in case C-191/19, *OI v. Air Nostrum*
45) Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), order for reference in case C-796/18, *Informatikgesellschaft für Software-Entwicklung*
46) Oberlandesgericht Frankfurt am Main (Higher Regional Court of Frankfurt am Main), order for reference in case C-581/18, *RB v. TÜV Rheinland LGA Products and Allianz*
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