E.L. Rev. 2019, 44(2), 159-177

European Law Review
2019

Can two walk together, except they be agreed? Preliminary references and (the erosion of) national procedural autonomy

Anna Wallerman [1]

Subject: European Union
Other Related Subject: Administration of justice. Civil procedure.

Keywords: EU law; European Court of Justice; National courts; Procedure; References to European Court; Rules;

Cases:

Banco Espanol de Credito SA v Calderon Camino (C-618/10) EU:C:2012:349; [2012] 3 C.M.L.R. 25; [2012] 6 WLUK 273 (ECJ (1st Chamber))

Criminal Proceedings against Bob-Dogi (C-241/15) EU:C:2016:385; [2016] 1 W.L.R. 4583; [2016] 6 WLUK 19 (ECJ (2nd Chamber))

Littlewoods Retail Ltd v Revenue and Customs Commissioners (C-591/10) EU:C:2012:478; [2012] S.T.C. 1714; [2012] 7 WLUK 654 (ECJ (Grand Chamber))

***159** Abstract

The Court of Justice's case law on procedures and remedies before national courts has been highly scrutinised and often criticised, in particular for intruding on the procedural autonomy of the Member States. This article argues that the responsibility for such a development lies at least partially with the national courts. Drawing on an empirical analysis as well as in-depth case studies, the article shows that national courts requesting preliminary references from the Court often actively seek an answer promoting European integration over national autonomy. Furthermore, the analysis suggests that, when a national court assertively argues for the preservation of national procedural rules, it has a comparatively good chance of persuading the Court of Justice. The article concludes that there is still a case to be made for national procedural autonomy, but the success of that case depends upon the national courts' use of the preliminary reference procedure.

Introduction

As the European Union's (EU) competences in substantive law—be it public, private or criminal—have successively expanded through treaty revisions over the EU's lifespan, common mechanisms or standards for the enforcement of Union rights have proven indispensable.[1] However, the Member States have firmly resisted surrendering general competence in the field of procedures and remedies to the Union legislature.[2] Instead, following the path indicated by the Court of Justice (ECJ),[3] art.19 of the Treaty on the European Union (TEU) places upon the Member States an obligation to "provide remedies sufficient to ensure effective legal protection", and the so-called principle of national procedural autonomy[4] provides that they may discharge this obligation through the courts designated by and procedures laid down in domestic law. ***160** Meanwhile, piecemeal harmonisation of procedures and remedies at Union level has taken place based on sectoral, substantive competences

in fields such as consumer, environmental and competition law,[5] on the mandate to enhance judicial co-operation in cross-border cases within the Area of Freedom, Security and Justice,[6] and on general principles of law.[7]

Under this fragmented and at times contradictory multilevel system of judicial remedies, it has fallen to the judiciary to work out the balance between the often competing interests of effective enforcement and procedural fairness. Whereas on a day-to-day basis this balancing act takes place before the national courts of the Member States, its guiding principles—notably those of effectiveness and equivalence—have been developed by the ECJ within the preliminary ruling procedure laid down in art.267 of the Treaty on the Functioning of the EU (TFEU). Unsurprisingly, this case law has been highly scrutinised and often criticised. In particular, several commentators have argued that by adopting an all-too extensive interpretation of the effectiveness and equivalence requirements, the ECJ has overstepped its competence, thereby intruding on or interfering with the autonomy of the Member States.[8] These criticisms display close kinship to another, more general accusation routinely raised against the ECJ, namely that of judicial activism.[9]

However, while the ECJ is at the apex of the Union judiciary, it does not operate in isolation. Recognising this, a growing scholarship has turned its attention to actors such as Advocates General,[10] Member State ***161** governments,[11] national courts[12] and individual litigants.[13] Joining their numbers, this article seeks to explore the role that national courts play in drawing and re-drawing the boundaries of national procedural autonomy. It examines the behaviour of national courts when initiating preliminary reference procedures in cases concerning the enforcement of Union law through procedures and remedies before national courts. By focusing on the input of national courts, the judgments of the ECJ are reduced from independent, authoritative statements to dialogical reactions.[14] This opens up for a more nuanced and contextualised understanding of the development of judge-made law.

Drawing on an empirical analysis of a set of cases referred to the ECJ since 2008, the article will present three main findings. First, it will show that where national courts take a stand on the question of national autonomy versus harmonisation and enforcement of Union rights, they overwhelmingly argue in favour of the latter. This suggests that if the ECJ has intruded on national procedural autonomy, this is not (only) the result of the Court seeking self-empowerment. Secondly, analysing the positions taken by the ECJ in the (rare) instances where the referring court defended the position taken in national law, the findings suggest that the Court really does display greater caution when faced with issues that it perceives as procedural in nature than when dealing with issues situated within substantive law. This implies that there is still a case to be made for national procedural autonomy. Thirdly, the study finds that where national courts assertively state that they wish the Court's ruling to respect and reinforce national autonomy, the Court will more often than not acquiesce. This suggests that the Court is open to persuasion.

The argument proceeds as follows. The second section will describe the research design and the dataset. The third section contains the main findings from the empirical study. It shows the extent to which referring courts disclose normative preferences as to the delimitations between national and Union competences, and which preferences they express. It also examines variations between referring courts at different levels of the judiciary and in different legal cultures. The fourth section narrows the focus to cases where the national courts attempt to defend the national mandate. Based on in-depth case studies of the orders for reference (OfRs) and judgments in question, it identifies the strategies employed by the national courts when advancing such positions and evaluates their effectiveness in eliciting the desired reactions of the ECJ. Lastly, the fifth section summarises the findings and discusses their wider implications for the functioning of the preliminary reference procedure.

Data and method

The preliminary reference procedure is initiated by an OfR sent by the referring court to the ECJ. In the OfR, the referring court sets out the questions, the legal and factual background of the case and the reasons ***162** for requesting the Court's assistance.[15] The national court is also invited to offer its own view on the question(s) referred.[16]

For the present study, I identified all ECJ judgments that contain either of the phrases "procedural autonomy" and "judicial protection". This selection was complemented with the cases cited in the chapter on procedures and remedies before national courts in the renowned textbook *EU Law: Text, Cases, and Materials*.[17] In order to make the size of the dataset manageable and ensure the actuality of the study, I then limited the dataset temporally to cases initiated in 2008 or later, and where judgments were delivered no later than March 2017. Having excluded the judgments that, at closer inspection, turned out not to raise any questions in the field of procedures and remedies,[18] the final dataset consisted of 143 judgments. These judgments correspond to 175 OfRs; the higher number of OfRs compared to judgments is explained by the fact that cases brought by separate OfRs are sometimes joined by the Court.[19] The OfRs were obtained in the Swedish language version[20] from the archives of the Swedish Ministry for Foreign Affairs.[21]

The 175 OfRs together brought 586 questions before the ECJ.[22] However, as it is not uncommon for a national court to request clarifications on both procedural and substantive issues at the same time, not all questions concern procedures or remedies. Having analysed the questions and taking an extensive view on what constitutes procedures and remedies, the dataset was reduced to 402 questions that concern the application of procedures and remedies by national courts in EU law cases.

As the dataset has been selected based on topical and temporal criteria only, the questions originate from a wide variety of courts and Member States. The distribution of the geographical origins of the questions is illustrated in Table 1, where Member States are categorised based on legal cultures.[23] The table shows that countries within the French legal tradition contribute almost half (45 per cent) of the questions in the dataset, and questions from former socialist Member State courts form the second largest group (26 per cent of the dataset). This roughly mirrors the ECJ's caseload as a whole; in the same period, 45 and 19 per cent of all OfRs submitted to the ECJ came from these two groups of Member States, respectively.[24] The most remarkable difference between the composition of the dataset and that of the ECJ's caseload is that the two smallest groups—the Nordic and common law cultures—were of comparable ***163** size in the ECJ's overall caseload (5 and 6 per cent, respectively), whereas in this dataset Nordic countries are noticeably underrepresented (2 per cent) while questions from common law courts are comparatively more frequent (9.5 per cent). We will return to the possible importance of this in the third section (Fig.5). At the level of individual Member States, questions from Spanish courts are most frequent (13.9 per cent), followed by questions from German (12.2 per cent), Italian (11.9 per cent) and Belgian (9.2 per cent) courts. Only Greece, Sweden and Croatia are not represented at all in the dataset.

Table 1

Member State of origin	Questions
French legal culture	181
Belgium	37
France	10
Italy	48
Luxembourg	2
Netherlands	25
Portugal	3
Spain	56
German legal culture	70
Germany	49
Austria	21
Nordic legal culture	8
Denmark	2
Finland	6
Common law culture	38
Ireland	14
UK	20
Cyprus	1
Malta	3
Ex socialist culture	104
Czech Republic	4
Estonia	5
Hungary	27
Latvia	6
Lithuania	9
Poland	13
Slovakia	14
Slovenia	1
Bulgaria	15
Romania	10
Non-state entity	1
Grand Total	**402**

As for variation over the echelons of the national judiciary, questions from first or lower instance courts are the most frequent, accounting for 44 per cent of the total dataset, while close to 30 per cent of the ***164** questions were referred by peak courts (see Fig.1).[25] This is somewhat surprising, as recent research indicates that peak courts submitted more references than first-instance courts—even in absolute numbers—during the relevant period.[26] While it can partly be explained by the fact that first-instance courts generally asked more questions per OfR than peak courts,[27] this does not fully explain the discrepancy.[28] It thus seems that first-instance courts are over-represented in the current dataset compared with the ECJ's overall caseload. The possible implications of this will be discussed in the third section (Fig.4).

Figure 1: Number of questions by court category

For each of the 402 questions, the OfRs have been read and analysed in order to establish whether the referring court offers its own view on how the question ought to be answered. Where such views have been identified, they have been categorised as either integrationist or autonomy-oriented.[29] An integrationist position typically entails the referring court offering the view that national law is incompatible with Union law (and therefore should be set aside), or that European rather than national laws are applicable. Conversely, an autonomy-oriented position would include arguments to the effect that EU law does not cover the issue in question or is dependent on Member State provisions for its effect, or that EU law should be interpreted so as not to preclude a certain national measure. In cases where the proposed answer did not easily fit into either of these categories, outcome preferences have instead been put into a third category labelled "other outcome preferences".

The outcome preferences have further been divided into two main types, which I call "bold" and "deferential preferences", respectively. Bold preferences are typically characterised by an explicit statement of how the referring court wishes or believes that the question should be answered. Additionally, questions where the referring court engages in analysis of the problem have been referred to this category, *if* the ***165** analysis leads the court to a clear conclusion as to how the problem ought to be resolved, even if the referring court does not phrase this conclusion as a preference. An example of a bold outcome preference is found in the national court's reasoning on the first question referred in Banco Primus:

"Consequently, the question arises whether [a national provision] is compatible with Directive 93/13 … The referring court is of the opinion that the provision is incompatible with the Directive, for the reasons discussed above."[30]

Deferential preferences, on the other hand, make the referring court's opinion clear without taking the assertive stand of the bold preferences. In my analysis, I have identified five different subtypes of deferential preferences: (1) outcome preference statements that are put in tentative or hesitant terms[31]; (2) OfRs where the referring court lists the problems that will follow from discarding a particular answer, without expressing its support for that solution in positive terms[32]; (3) statements that refer implicitly to EU principles or provisions, for example by referring to tests or prerequisites[33]; (4) bold statements on issues that have implications for, but do not entirely correspond with, the question referred[34]; and (5) bold outcome preference statements followed by an expression of doubt or deference.[35]

Referring court preferences—relocating activism

The analysis reveals that, while referring courts in most cases refrain from stating their opinions on the outcome, when they do they are overwhelmingly integrationist. Figure 2 shows that national courts take ***166** a view on the answers to slightly less than a third (31.6 per cent) of the referred questions.[36] However, as Fig.3 shows, when the referring court does take a stand, it argues for an integrationist solution 57 per cent of the time. Another 28 per cent of the preferred outcomes cannot be classified as integrationist or autonomy-oriented. Only on 19 questions—i.e. 15 per cent of the questions that the referring courts attempt to answer and only 4.7 per cent of all questions in the dataset—does the court take a position that can be considered autonomy-oriented.

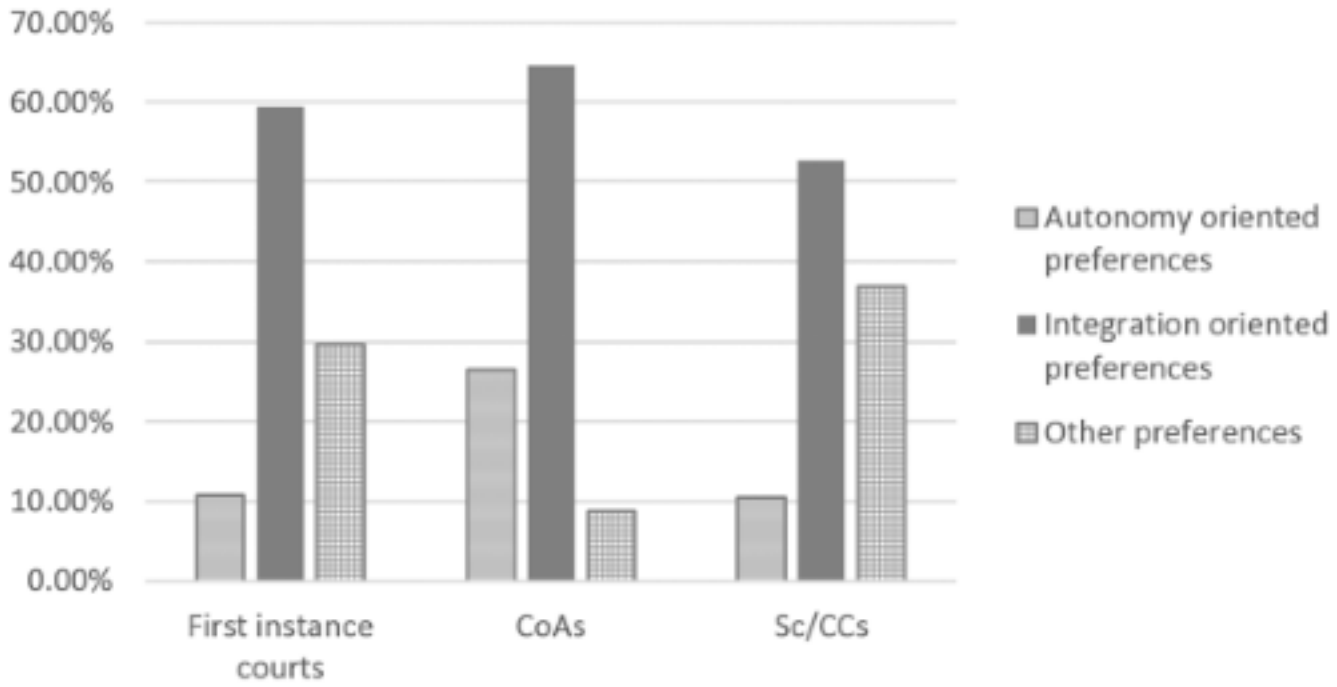
Figure 2: Frequency of outcome preference statements

Figure 3: Outcome preferences

The willingness to provide outcome preferences varies across the different types of referring courts. Peak courts are more reluctant than first-instance and mid-level courts to offer their own views on the outcome. In the whole dataset, peak courts provided outcome preference statements for only 15.8 per cent of the questions they referred, to be compared with 35.2 per cent for courts of appeal and 41.8 per cent for first instances. This is perhaps not surprising.[37] As peak courts are obliged under art.267(3) TFEU to make references when an unclear question of EU law appears before them, they are less likely to feel strongly about every issue they refer, whereas lower courts have the option not to refer a question that does not particularly interest them. Furthermore, the possible loss of prestige, should the ECJ answer the question in a way different from the one advocated by the referring court, is arguably smaller for a lower ***167** instance court than for a peak one, whose judgments attract more attention and whose claim to dependability is stronger.[38] Lastly, peak courts typically operate in larger collegiate settings than lower instances, which may lead to a higher frequency of internal disagreement within the bench, thus preventing the court from presenting a single view on the preferred outcome.[39] Since first-instance courts appear to be overrepresented in the dataset, the overall occurrence of outcome preference statements is likely to be higher here than the general average.

However, court hierarchy does not seem to be significant for the stance taken by referring courts. This is illustrated in Fig.4. When peak courts do express an opinion on the outcome, like their subordinates they most often advocate an integrationist stance. In fact, both first-instance and peak courts behaved in exactly the same way in this regard, offering only one autonomy-oriented outcome preference for every five integrationist preferences. Instead, mid-level courts stand out as the most autonomy-oriented category, contributing almost half of the autonomy-oriented outcome preferences (47.4 per cent) despite providing only about a quarter (26.1 per cent) of the total amount of questions in the dataset. Indeed, courts of appeal took autonomy-oriented positions in 26.5 per cent of the cases where they took a position at all.

Figure 4: Significance of court hierarchy



This seems to contrast with certain previous assumptions about peak court behaviour, and it also runs counter to the so-called inter-court competition theory, which argues that lower courts will use the preliminary reference procedure to circumvent higher court jurisprudence whereas higher courts will refer restrictively and "virtually no questions which could allow the European Court to expand the reach of European law into their own sphere of jurisdictional authority".[40] However, as courts on the higher

levels of the judiciary were generally reluctant to offer any views on the outcome, it should be noted that the ***168** finding in Fig.4, as regards peak courts, is based on only 19 questions. This makes any attempt at interpretation fraught with uncertainty. The observation should thus not be taken as a refutation of the conventional wisdom on peak court attitudes or behaviour.

Lastly, findings revealed that courts in the common law countries were considerably more prone to expressing autonomy-oriented preferences than their colleagues in all other Member States. Figure 5 shows that on average, autonomy-oriented outcome preferences were voiced for 4.7 per cent of the questions. Courts from the French, German and former socialist legal cultures all expressed such preferences for 2–3 per cent of the questions they referred, whereas the Nordic courts never took an autonomy-oriented position. Common law courts, however, defended national autonomy in close to one fifth (18.4 per cent) of the questions they referred. Since common law courts are somewhat over-represented in the dataset, this may imply that the distinct integrationist leaning of national referring courts, as demonstrated in Figure 3 above, is still understated in this study.

Figure 5: Percentage of autonomy-oriented outcome preferences by legal culture

Pleading for autonomy—requests and reactions

Introductory remarks

With regard to the restraint shown by referring courts when it comes to promoting the national interest, it could reasonably be expected that when autonomy-oriented outcome preferences are expressed, the ECJ should be willing to listen and ready to compromise.[41] Table 2 lists the 19 questions where the referring courts took autonomy-oriented positions in the OfRs. It also notes the approaches taken by the referring courts as well as the solutions chosen by the ECJ. The table shows that, not counting the three questions that the ECJ for various reasons did not answer, the referring courts were successful on almost two-thirds of the questions (62.5 per cent or 10 of the remaining 16). This section will be dedicated to case studies of the nine cases included in Table 2, with the aim of finding out which national court strategies turned out to be more successful in defending national procedural autonomy. ***169**

Table 2

Case	Name of party	Question	Preference type	Outcome preference	ECJ outcome
C-292/10	G	1st	Bold	Autonomy-oriented	Autonomy-oriented
C-292/10	G	2nd	Deferential	Autonomy-oriented	n/a
C-591/10	Littlewoods Retail	1st	Bold	Autonomy-oriented	Autonomy-oriented
C-591/10	Littlewoods Retail	2nd	Bold	Autonomy-oriented	Autonomy-oriented
C-591/10	Littlewoods Retail	3rd	Bold	Autonomy-oriented	Autonomy-oriented
C-591/10	Littlewoods Retail	4th	Bold	Autonomy-oriented	Autonomy-oriented
C-618/10	Banco Español	1st	Deferential	Autonomy-oriented	Integrationist

C-618/10	Banco Español	2nd	Deferential	Autonomy-oriented	Integrationist
C-618/10	Banco Español	3rd	Deferential	Autonomy-oriented	n/a
C-618/10	Banco Español	6th	Deferential	Autonomy-oriented	n/a
C-41/11	Terre wallonne	1st	Deferential	Autonomy-oriented	Autonomy-oriented
C-175/11	D and A	1st	Bold	Autonomy-oriented	Autonomy-oriented
C-175/11	D and A	2nd	Bold	Autonomy-oriented	Autonomy-oriented
C-418/13	Napolitano	2nd	Deferential	Autonomy-oriented	Integrationist
C-212/15	ENEFI	1st	Bold	Autonomy-oriented	Integrationist
C-212/15	ENEFI	2nd	Bold	Autonomy-oriented	Integrationist
C-241/15	Bob-Dogi	1st	Bold	Autonomy-oriented	Autonomy-oriented
C-241/15	Bob-Dogi	2nd	Bold	Autonomy-oriented	Autonomy-oriented
C-429/15	Danqua	2nd	Bold	Autonomy-oriented	Integrationist

Overall, the analysis failed to identify a clear pattern of convergence between the OfRs and the judgments. Nor did there seem to be a correlation between the ECJ engaging with or approving of the arguments put forward by the referring court and eventually reaching the same conclusion (s.4.2). Instead, findings suggest that two factors are significant in producing ECJ outcomes in line with referring court pleas to uphold national procedural autonomy: bold outcome preference statements and procedurally oriented reasoning (ss.4.3 and 4.4, respectively).

Arguments and outcomes—a game of mix'n'match

The ECJ's acceptance of the arguments brought forward by the referring court appears to be quite detached from its acceptance of the proposed outcome. Only in half of the cases did the ECJ either completely follow or completely reject the position, i.e. both the argumentation and the preferred outcome, of the referring court. In four of the nine cases, it either approved, in principle, of the arguments but still reached an integrationist solution contradicting the wishes of the referring court, or, on the contrary, rejected the arguments brought by the referring court while still reaching the same conclusion on other grounds. This is illustrated in Fig.6. ***170**

Figure 6 OfR argumentation

For instance, in Banco Espanol, the referring court failed, despite lengthy[42] and multifaceted argumentation, to persuade the Court to take an autonomy-oriented approach.[43] The case concerned the duties of national courts regarding unfair consumer clauses—an area in which the Court's case law was already relatively well developed and overwhelmingly integrationist.[44] In arguing for an autonomy-oriented solution and party autonomy over ex officio enforcement of consumer rights, the OfR must be considered an example of what one commentator has called an "invitation to the ECJ to respect the standards of the national constitution, an opportunity to repent, rather than a request for assistance".[45]

While the ECJ resisted this call for an autonomy-oriented turn, its reasoning in the judgment suggests some deference to the point of view of the referring court. In its consideration of the first question, the ECJ did recognise the difference, crucial to the argumentation in the OfR, between a summary procedure and a fully fledged civil procedure trial.[46] The operative parts of the judgment were not presented as simply following from previous precedent—which would have been quite possible—but as the conclusion of a de novo examination of the implications of the principle of effectiveness in the light of the applicable national procedure, which was examined in some detail.[47] While the OfR does not appear to have influenced the conclusions reached by the ECJ, it is thus possible that it contributed to triggering a more thorough and tailor-made response than could otherwise have been expected. This is particularly noteworthy in ***171** light of the frequent criticism voiced against the brief and formulaic style normally adopted by the Court,[48] and from which the judgment in Banco Espanol is relatively free.

An example of the opposite is provided by Bob-Dogi.[49] The case concerned the execution of a European arrest warrant (EAW), which the referring court strongly opposed. In particular, it asserted that, besides the mandatory and optional grounds for refusal to execute an EAW provided for by Framework Decision 2002/584,[50] the case law of the ECJ also recognised implied grounds for such refusal.[51] The ECJ, however, forcefully rejected this argument, holding that a court "may refuse to execute [an EAW] only in the cases, exhaustively listed, of obligatory non-execution … or of optional non-execution".[52] Nevertheless, by introducing the alternative concept of "requirements as to the lawfulness" of the EAW,[53] the ECJ ended up allowing the referring court to not execute the EAW in question, thus arriving at the conclusion promoted by its national counterpart. Again, the message to the referring court was thus one of simultaneous concession and reprimand, as the Court rejected the reasons put forward by its national interlocutor while submitting to—or, to put it in more traditional legal terms, reaching on other grounds—the requested outcome.

In general, the ECJ proved relatively willing to engage with the reasoning of the referring courts, regardless of whether it agreed with the reasons given in the OfR and whether it then went on to deliver an outcome in line with the referring court's preference. Only in two cases did the ECJ wholly reject the approach taken by the referring court. In Littlewoods Retail,[54] the referring court had asked four detailed questions on the calculation of interest on sums levied but not due, referring to various methods provided for by national law. The ECJ took a rather more detached approach, avoiding direct engagement with the questions raised. Instead it confined itself to reaffirming the principle of procedural autonomy, reminding the referring court of the limits imposed by the principles of effectiveness and equivalence, and beyond that left the question of interest calculation to the referring court's discretion. In Danqua,[55] the Court went a step further and rejected the question entirely, ruling on the implications of the principle of effectiveness instead of those of the principle of equivalence, which was the topic of the question referred.

In the remaining seven cases, the ECJ either explicitly referred to the points made in the OfR—be it to confirm or refute them—or based its own reasoning upon the same lines of argumentation. Napolitano provides a good illustration.[56] The case concerned the Italian system for recruiting teachers to public schools, which relied heavily on fixed-term contracts and whose compatibility with EU law was questioned. The referring court provided a lengthy argument based on national law and the practical needs of the ***172** domestic school system, arguing that the system was "necessary" and "unavoidable" and that offering permanent contracts was "not possible".[57]

Despite ultimately reaching another conclusion than that supported by the referring court, the ECJ engaged extensively with its position. Like the referring Corte costituzionale, the ECJ based its reasoning on a lengthy description of the domestic recruitment system, its functions and needs.[58] In this discussion, it referred repeatedly and explicitly to the OfRs and the information provided by the referring courts (the judgment joined five OfRs from two courts, but only in the Napolitano OfR did the referring court express an autonomy-oriented outcome preference). This line of reasoning implies that the ECJ recognised the relevance of many of the considerations brought forward by the Corte costituzionale. It went so far as to accept the domestic system as compatible in principle with Union requirements before it turned its attention to the application and effects of the system (which had been briefly raised by the referring court in the other joined cases), which it found less satisfactory. The result is that, although ultimately the ECJ took an integrationist position, the judgment can be read constructively as pointing to a need for improvement of the national legislation, rather than as a complete rejection.

Relatedly, the case studies did not find any correlation between the quality of the OfR reasoning and the outcome of the case. OfRs containing extensive and well-informed reasoning and argumentation were in several cases unsuccessful as regards the outcome, and conversely the ECJ in certain cases issued the ruling sought by the referring court despite poorly reasoned OfRs. This can be illustrated already by a comparison between the abovementioned Banco Español and Bob-Dogi cases, where the former OfR, which displayed both considerable knowledge of ECJ case law and an understanding of its potential effects for national legislation and practice, failed to impress the Court, whereas the significantly less impressive Bob-Dogi OfR achieved the results sought.

Further illustration is provided by the judgment in ENEFI,[59] where a Romanian court referred two questions concerning the scope of the Insolvency Regulation[60] to the ECJ. The OfR[61] is well structured. It clearly sets out the facts of the case and pinpoints the legal problem in relation to particular locutions of the applicable EU law provision. Furthermore, the OfR is particularly transparent in that the referring court clearly separates the reasons for the referral—i.e. the elaboration of the legal issue at stake and the interpretative difficulties—from its own view. The latter is clearly and compellingly substantiated with reference to established interpretation methods and recognised interests. A possible weakness is that the OfR makes no reference to the case law of the ECJ; however, considering that even the Court's own judgment makes very limited references to previous case law, this could reflect a scarcity of relevant precedent rather than a lack of knowledge or engagement on the part of the referring court. Overall, the OfR comes across as an excellent example of sound reasoning and argumentation in a spirit of loyal co-operation. Nevertheless, the OfR is also one of those most completely rejected by the ECJ, which not only reached an integrationist solution opposed to that suggested by the referring court but also took a quite different approach and referred to its national counterpart's submission only in order to explicitly refute it.

Taking a stand—boldness pays off

The correlation between bold outcome preference statements and ECJ outcomes is illustrated in Fig.7. As can be seen, on 9 of the 10 questions where the ECJ took an autonomy-oriented position, the referring ***173** court had phrased its outcome preference in bold terms. The only exception is Danqua, which concerned a time-limit laid down in national immigration procedure. While in the ECJ's case law time-limits have mainly been considered in relation to the principle of effectiveness, the referring court had questioned only the compatibility of the national provision with the principle of equivalence. In this regard, the referring court failed not only to explain why the principle of effectiveness had been left out, but also to comment upon the applicability of the principle of equivalence—which was manifestly questionable as the referring court sought to compare two rules that were both based on EU law.[62] Taking into account these oversights alongside the brevity of the OfR, the referring court in Danqua comes across—compared with the OfRs in the other cases under consideration here—as neither very insightful, nor particularly engaged in the questions referred.[63] Against this background, it is not surprising that the Court failed to adhere to even a clearly expressed outcome preference by the referring court.

Figure 7: Relation between type of outcome preference statement and ECJ outcome

The findings suggest that unless a court expresses its wish to uphold national procedural autonomy in bold terms, it has little chance of gaining the ECJ's approval. However, they also show that bold outcome preference statements were no guarantee for preferential treatment by the Court; while autonomy-oriented outcomes were predominantly (in 90 per cent of the cases) preceded by a bold, autonomy-oriented outcome preference statement, integrationist judgments also, albeit to a significantly lesser extent (50 per cent), followed such statements. Nevertheless, this finding, particularly coupled with the high number of autonomy-oriented judgments in this subset of questions, suggests that it is possible for referring courts to sway the Court of Justice. This is consistent with the claim that the Court is aware of its dependence on the support of national courts in order to have its rulings implemented and consequently wary of appearing insensitive and dictatorial.[64] Following the same line of reasoning, it is not surprising that this wariness intensifies where the referring court signals that it holds a strong opinion in the matter.

In this regard, it could also be noted that the six integrationist rulings include some borderline cases. Most prominently, the autonomy-oriented outcome preference expressed in Napolitano could to some extent be considered neutralised by the integrationist preferences expressed by the referring court in the OfRs in the cases of Mascolo,[65] Forni[66] and Racca.[67] These cases were not only joined by the ECJ,[68] but ***174** the relevant questions were examined together and ruled upon in a joint operative part, entailing that the ECJ was faced with opposing outcome preferences when delivering its judgment.

It is also notable that the ECJ did not decline to rule upon any question where the referring court had taken a bold stance in favour of procedural autonomy. Admittedly, such a correlation could be expected as the Court regularly declines to answer questions on the grounds that they are contingent on certain outcomes on previous questions, and it could reasonably be assumed that referring courts would be less assertive on questions asked only on such a secondary basis. However, this only applies to one of the questions at issue, namely the second question in G.[69] On the other two questions—the third and sixth in Banco Espanol—the ECJ declined jurisdiction on account of the questions being hypothetical.[70] Although the sample is too small to allow inferences, the observation might suggest that bold outcome preferences also could make the ECJ less prone to withhold rulings.

Framing the question—making the case for national procedural autonomy

The second significant finding concerns the referring court's framing of the question. In this regard, I have assumed that a referring court can place the questions referred in either a substantive or a procedural context.

The OfR in Banco Espanol can illustrate this distinction. As was noted above, the case concerned consumer litigation. More specifically, it concerned an application by a creditor, a bank, for an order for payment against one of its debtors, a consumer, who had failed to make the monthly repayments agreed upon in the credit agreement. The application covered the sums due in repayment and ordinary interest, plus an additional interest rate of 29 per cent on late payments. It was the allegedly unfair nature of the additional interest rate that gave rise to questions before the national court.

In providing reasons for the referral, the national court took an approach clearly informed by the liberal laissez-faire outlook underlying civil procedure. At the outset, it defined the core question as being "whether it is possible in the initial stages of the proceedings to rule ex officio on the validity of an interest rate clause considered unfair".[71] Having set out the relevant legal provisions, it then went on to discuss the predominant domestic position, with particular emphasis on procedural principles such as the right of defence and the principle of inter partes proceedings.[72] After a lengthy examination of Union law and ECJ jurisprudence, it concluded its argumentation by pointing to the particular features of the order for payment procedure, being a summary procedure, and questioning whether these did not strengthen the importance of the *audi alteram partem* rule.[73] Thus, the OfR is an example of a procedurally oriented reasoning.

However, the referring court could also have chosen a more substantively oriented approach, focusing on assumptions and considerations underlying substantive consumer law. That alternative approach can be exemplified by the introductory paragraphs of the ECJ's judgment in the case, which set the scene by noting that the "consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge", and that this imbalance "may be corrected only by positive action unconnected with the actual parties to the contract". [74] Reasoning based on these kinds of ideas would have been considered substantively oriented.

The study shows that where the referring courts mainly discussed the issues referred to the Court of Justice from the perspective of procedural law, the ECJ was significantly more likely to adhere to their ***175** request to uphold national procedural autonomy. Conversely, where national courts took a mainly substantive law outlook, the ECJ tended to reach an integrationist conclusion. This is illustrated in Fig.8.

Figure 8: Relation between OfR point of view and ECJ outcome

This observation suggests that there is still a difference in the attitude of the ECJ between substantive law, where the EU has legislative competence (at least in the matters that come before the ECJ), and procedural issues, where as a rule it has not. [75] This in turn implies that, despite numerous claims as to the decline of national procedural autonomy, there is still a case to be made for the principle of national procedural autonomy not only as a shorthand for the ECJ's stance on national procedures and remedies, [76] but also as a description of a *Rechtslage* where Member States do enjoy greater autonomy in procedural than in substantive issues.

National procedural autonomy and the function of the preliminary reference procedure

The study has shown that when national courts address the ECJ within the preliminary reference procedure, they typically seek to challenge national procedural autonomy rather than uphold it. This implies that if the Court of Justice has overstepped the boundaries between national and Union competences on procedures and remedies, it has done so largely at the invitation of referring courts. Indeed, the findings could lend support to the hypothesis that the integrationist interests are represented primarily by the referring courts, with the ECJ, as one commentator put it, acting as an agent of those courts rather than as their principal. [77] Ultimately, this challenges the established narratives about the Court of Justice's activist or integrationist agenda.

Furthermore, while this observation supports the proposition that referring courts use the preliminary ruling procedure to gain the ECJ's support for their empowerment in relation to other actors within the Member States, [78] it calls into question the related theory that peak courts seek to conserve their authority, ***176** and consequently that of the national legal system. [79] The results suggest that, rather than being engaged in power struggles, referring courts at all levels and the ECJ are essentially pursuing a common goal, which can perhaps be broadly described as the effective enforcement of Union law before national courts.

Referring courts cannot, however, be equated with national courts. Indeed, most EU law litigation takes place before national courts without the ECJ ever getting involved; most references originate with a small number of repeat-player courts; and most courts—let alone most judges—never make preliminary references. [80] Thus, while referring courts appear to largely promote European integration and harmonisation of procedures and remedies, it is quite possible that the silent majority of non-referring national courts take another view. [81] Such courts may have a significant influence on everyday judicial practice.

This raises a question as to the function of the preliminary reference procedure. The ECJ has consistently held that that function is to offer assistance to national courts in order to ensure the uniform application of EU law. [82] However, the fact that many references emanate from a small number of courts, which presumably already are—or at least gradually through experience become—the most knowledgeable courts in the field, casts doubt on the procedure's effectiveness in this regard by suggesting that the courts that are in most need of guidance and support do not make use of it. Indeed, the patterns of referrals and outcome

preference statements make it possible to perceive at least some of the questions referred to the ECJ less as genuine questions from courts seeking assistance and more as disguised arguments or complaints. [83]

Furthermore, the ECJ's description of the functions of the procedure fails to take into account the role that the preliminary reference procedure has allowed the Court to play in the legal development of the European project. In its case law on national procedural autonomy, the ECJ is not only drawing up a common European standard of judicial protection and working out the balance between the often competing interests of effective enforcement and procedural fairness, but is indeed also deciding upon the vertical division of competence between the Union and its Member States. Only courts that do refer will have (the possibility of asserting) a voice in that development. The findings indicate that, in this fundamentally normative process, that voice is primarily used to seek agreement or approval, and perhaps even to silence or at any rate overrule competing voices within the national systems of government. [84] They also point to a possible Brexit effect; as common law courts were by far the most likely to take an autonomy-oriented stance, the loss of the largest common law jurisdiction in the Union could have perceptible consequences for the tone and content of the preliminary reference procedure dialogue. Ultimately, even if the behaviour of national courts to a certain extent exonerates the ECJ from accusations of judicial activism in national ***177** procedural autonomy, the patterns revealed by this study may at a deeper institutional level indicate that the preliminary reference procedure as a whole has become an integrationist institution.

Happily, the study also suggests a possible way out. The case studies in the rare occasions where national courts do defend Member State autonomy indicate that the ECJ is willing to listen and follow suit when approached by a strong, assertive court clearly positioning the question within the scope of the principle of national procedural autonomy. As the sample in this regard is relatively small, further research is needed before any certain conclusions can be drawn. However, if the indications presented by this study are correct, it implies that the preliminary reference procedure has the potential to function not only as a tool for the one-sided enforcement of Union law, but also as a deliberative forum for legal development, where both integrationist and more autonomy-oriented courts could engage in an open dialogue aiming to balance competing rationalities, reach common understandings, and smoothen out the remaining differences between national procedure and Union rights.

Anna Wallerman

University of Gothenburg

Footnotes

1 Associate Senior Lecturer and Ragnar Söderberg Postdoctoral Fellow in Law.

1 See, e.g., H.-W. Micklitz, "The Transformation of Enforcement in European Private Law: Preliminary Considerations" (2015) 23 European Review of Private Law 491, 492.

2 For an overview of the tug-of-war between the Commission and the Member States over the competence to regulate civil procedure, see *E. Storskrubb, "Civil justice: The Contested Nature of the Scope of EU Legislation" in F. Trauner and A. Ripoll-Servent (eds), Policy Change in the Area of Freedom, Security and Justice (Abingdon: Routledge, 2015), p.197*.

3 See in particular Unión de Pequeños Agricultores v Council (C-50/00 P) EU:C:2002:462; [2002] 3 C.M.L.R. 1 at [41]–[42].

4 The term "procedural autonomy" was developed in the literature and appeared for the first time in the Court's reasoning in the 2004 judgment in R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions (C-201/02) EU:C:2004:12; [2004] 1 C.M.L.R. 31.

5 See, e.g., M. Tulibacka, "Europeanization of Civil Procedures: In Search of a Coherent Approach" (2009) 46 C.M.L. Rev. 1527; B. Krans, "EU Law and National Civil Procedure Law: An Invisible Pillar" (2015) 23 European Review of Private Law 567, and the contributions to issue 1/2015 of the Review of European Administrative Law (in particular M. Eliantonio and E. Muir, "Concluding Thoughts; Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law" (2015) 8 Review of European Administrative Law 177).

6 See, for a comprehensive but somewhat outdated overview, *E. Storskrubb, Civil Procedure and EU Law (Oxford: Oxford University Press, 2008)*, and further the contributions to *B. Hess, M. Bergström, and E. Storskrubb (eds), EU Civil Justice: Current Issues and Future Outlook (Oxford: Hart Publishing, 2016)*.

7 In particular those of effectiveness and equivalence (Rewe v Landwirtschaftskammer für das Saarland (33/76) EU:C:1976:188; [1977] 1 C.M.L.R. 533; and Comet v Produktschap voor Siergewassen (45/76) EU:C:1976:191; [1977] 1 C.M.L.R. 533 and more recently Criminal Proceedings against XC, YB, and ZA (C-234/17) EU:C:2018:853) and effective judicial protection (Johnston v Chief Constable of the Royal Ulster Constabulary (222/84) EU:C:1986:206; [1986] 3 C.M.L.R. 240; and more recently DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (C-279/09) EU:C:2010:811; [2011] 2 C.M.L.R. 21).

8 See, e.g., M. Hoskins, "Tilting the Balance: Supremacy and National Procedural Rules" (1996) 21 E.L. Rev. 365; C. Delicostopoulos and E. Szyszczak, "Intrusions into National Procedural Autonomy: the French Paradigm" (1997) 22 E.L. Rev. 141; *P. Haapaniemi, "Procedural Autonomy: A Misnomer?" in L. Ervo, M. Gräns, and A. Jokela (eds), Europeanization of Procedural Law and the New Challenges to Fair Trial (Groningen: Europa Law Publishing, 2009), p.87*; *D.-U. Galetta, Procedural Autonomy of the EU Member States: Paradise Lost? (Berlin/Heidelberg: Springer, 2010), p.117*; A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) 36 E.L. Rev. 51; *M. Bobek, "Why there is no Principle of 'Procedural Autonomy' of the Member States", in H. -W. Micklitz and B. de Witte (eds), The European Court of Justice and the Autonomy of the Member States (Cambridge: Intersentia, 2012), p.305*.

9 See, e.g., *H. Rasmussen, On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking (Dordrecht: Martinus Nijhoff, 1986)*; T. Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union" (1996) 112 L.Q.R. 95; A. Arnull, "The European Court and Judicial Objectivity: a Reply to Professor Hartley" (1996) 112 L.Q.R. 411; *M. Pollack, The Engines of European Integration: Delegation, Agency, and Agenda-Setting in the EU (Oxford: Oxford University Press, 2003), pp.189–190*; P. Craig, "The ECJ and Ultra Vires Action: a Conceptual Analysis" (2011) 48 C.M.L. Rev. 395; R.D. Kelemen and S.K. Schmidt, "Introduction – the European Court of Justice and Legal Integration: Perpetual Momentum?" (2012) 19 Journal of European Public Policy 2012, 1; *B. de Witte, E. Muir and M. Dawson, Judicial Activism at the European Court of Justice (Cheltenham: Edward Elgar Publishing, 2013)*.

10 U. Šadl and S. Sankari, "The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship" (2017) 36 Yearbook of European Law 421.

11 *P. Cramér, O. Larsson, A. Moberg, and D. Naurin, "See You in Luxembourg? EU Governments' Observations Under the Preliminary Reference Procedure", Swedish Institute for European Policy Studies (2016), p.5*.

12 S. Nyikos, "Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions" (2006) 45 European Journal of Political Research 527; G. Davies, "Activism Relocated: The Self-restraint of the European Court of Justice in its National Context" (2012) 19 Journal of European Public Policy 76; R. van Gestel and J. de Poorter, "Supreme Administrative Courts' Preliminary Questions to the CJEU: Start of a Dialogue or Talking to Deaf Ears?" (2017) 6 Cambridge International Law Journal 122.

13 S. Nyikos, "The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment" (2003) 4 European Union Politics 397; S.K. Schmidt, "Who Cares about Nationality? The Path-dependent Case Law of the ECJ from Goods to Citizens" (2012) 19 Journal of European Public Policy 8.

14 On the preliminary reference procedure as dialogue, see inter alia *A. Arnull, "Judicial Dialogue in the European Union" in J. Dickson and P. Eleftheriadis, Philosophical Foundations of European Union Law (Oxford: Oxford University Press, 2012), p.109*; M. Claes and M. de Visser, "Are You Networked Yet? On Dialogues in European Judicial Networks" (2012) 8 Utrecht Law Review 100.

15 Rules of Procedure of the Court of Justice [2013] OJ L173/65 art.94.

16 Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2016] OJ C439/01, para.17. For a description of the background and rationale of this provision, see van Gestel and de Poorter, "Supreme Administrative Courts' Preliminary Questions to the CJEU" (2017) 6 Cambridge Int. L.J. 122, 126–127.

17 *P. Craig and G. de Búrca, EU Law: Text, Cases, and Materials, 6th edn (Oxford: Oxford University Press, 2015), Ch.8*: "The application of EU law: remedies in national courts".

18 E.g. SIA VM Remonts (formerly SIA DIV un KO) v Konkurences padome (C-542/14) EU:C:2016:578; [2016] 5 C.M.L.R. 13, where the term "procedural autonomy" occurs only because the ECJ points out that the question does *not* concern a procedural issue (at [21]).

19 Rules of Procedure art.54.

20 Quotes from OfRs are translated from Swedish by the author.

21 Article 98 of the Rules of Procedure provides that the Court, where it deems it appropriate, may draw up a summary of the OfR, to be translated and served on the interested parties in place of the original OfR. I have received such summaries in 39 cases.

22 This number is calculated from the OfRs and includes some questions that are very similar or even identical, as references may have been sent in very similar cases and sometimes even by the same court. For instance, in Specht v Land Berlin (C-501/12) EU:C:2014:2005; [2015] 1 C.M.L.R. 7, a German administrative court simultaneously referred eight cases to the ECJ. The questions in the eight OfRs, which in many cases consist only of cross-references to each other, are virtually identical, which means that these joined cases alone account for 18 of the questions in the dataset—although in reality only three different questions.

23 The classification of Member States by legal culture is based on A.H. Zhang, J. Liu and N. Garoupa, "Judging in Europe: Do Legal Traditions Matter?" (2018) 14 Journal of Competition Law & Economics 144.

24 Data on the Court's caseload is collected from *Court of Justice of the European Union, 2017 Annual Report: Judicial Activity (Luxembourg: 2018), p.122*.

25 I have defined first-instance courts as courts with original jurisdiction in more than merely exceptional cases; courts of appeal as courts with jurisdiction to hear appeals from first-instance courts; and peak courts as supreme and constitutional courts as well as specialised courts against whose judgments there is no ordinary remedy. Where this classification leads to there being several levels of first-instance courts within a national legal system, only the courts hearing appeals from the highest first-instance courts have been classified as courts of appeal. In the identification of peak courts, I have, inter alia, consulted the *Court of Justice of the European Union, 2017 Annual Report: Judicial Activity (2017) pp.123–125*.

26 A. Dyevre, A. Atanasova and M. Glavina, "Who Asks Most? Institutional Incentives and Referral Activity in the European Union Legal Order" (August 2017), SSRN, https://ssrn.com/abstract=3051659 [Accessed 12 February 2019].

27 OfRs from first-instance courts in my dataset contained on average 3.75 questions, to be compared with 2.7 for peak court OfRs.

28 Another possible explanation lies in differences and difficulties connected with the coding of the courts' hierarchical positions, cf. Dyevre, Atanasova and Glavina, "Who Asks Most?" (August 2017), p.12, SSRN, https://ssrn.com/abstract=3051659 [Accessed 12 February 2019].

29 For a similar approach regarding Member State goverments' positions, see *Cramér, Larsson, Moberg and Naurin, "See You in Luxembourg?", Swedish Institute for European Policy Studies (2016), pp.18–19*.

30 OfR by the Juzgado de Primera Instancia n° 2 de Santander (Spain) of 10 September 2014 (para.20), in Banco Primus SA v Gutiérrez García (C-421/14) EU:C:2017:60; [2017] 2 C.M.L.R. 26.

31 E.g. OfR by the High Court of Justice (UK) of 21 January 2010 (para.23), in Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue and The Commissioners for Her Majesty's Revenue & Customs (C-35/11) EU:C:2012:707; [2013] 1 C.M.L.R. 50, where the referring court remarked that it "tended to agree with the claimants, but that the question was so unclear that a request for a preliminary reference to the Court was necessary".

32 E.g. summary of OfR by the Giudice di pace di Mercato S. Severino (Italy) (26 September 2011), paras 4–8, in Ciro Di Donna v Società imballaggi metallici Salerno Srl (SIMSA) (C-492/11) EU:C:2013:428. In that OfR, the referring court, without explicitly expressing the view that national legislation was contrary to EU law, noted that the national provisions in question i.a. could "strongly affect a party's decision to … agree or not to a settlement proposal". It further pointed out that the natonal legislation in question entailed that "it could take exceptionally long time to resolve the dispute in question" and that costs would be "at least twice as high" as in comparable proceedings.

33 E.g. OfR by by the Tribunal d'instance d'Orléans (France) (5 August 2013) para.32, in CA Consumer Finance SA v Bakkaus (C-449/13) EU:C:2014:2464; [2017] 2 C.M.L.R. 28, where the referring court alluded to the principle of effectiveness by noting that national rules "may make it difficult, or even impossible, for the consumer to exercise his rights", but stopped short of claiming them to be contrary to the principle of effectiveness and instead concluded its reasoning with a deferential invitation to the ECJ to offer its interpretation.

34 E.g. summary of OfR by the Curtea de Apel Bucuresti (24 September 2014) in SC Star Storage SA v Institutul Naţional de Cercetare-Dezvoltare în Informatică (ICI) (C-349/14) EU:C:2016:688, where the referring court, inter alia, remarked that "the good conduct guarantee does not in any way constitute a guarantee but hinders effective access to remedies against the contracting authorities" (at [26]). While this remark was certainly relevant for the question of whether the guarantee was compatible with EU law, it hardly amounts to a proposed answer.

35 E.g. OfR by the Administrativen sad Sofia grad (Bulgaria) (21 February 2012) in ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie'—Razplashtatelna agentsia (C-93/12)

EU:C:2013:432; [2014] 1 C.M.L.R. 3, where the referring court concluded its reasoning on the first question by noting that "the judicial proceedings thus cannot be brought to an end within what constitutes a reasonable time considering the subject-matter of the dispute, and the parties consequently do not have access to effective judicial protection". However, it immediately added "For these reasons, this court asks [whether the national provision in question was compatible with the right to an effective remedy]", thereby calling into question the otherwise obvious conclusion following from the foregoing statement.

36 Nyikos, "Strategic Interaction among Courts within the Preliminary Reference Process" (2006) 45 E.J.P.R. 527 found outcome preference statements in 41.3 per cent of the cases. However, since her study concerned a different time period as well as different fields of law and a limited set of countries, there are many possible explanations for this discrepancy.

37 Cf. Nyikos, "Strategic Interaction among Courts within the Preliminary Reference Process" (2006) 45 E.J.P.R. 527, 536.

38 Cf. Van Gestel and De Poorter, "Supreme Administrative Courts' Preliminary Questions to the CJEU" (2017) 6 Cambridge Int. L.J. 122, 139; G. Tridimas and T. Tridimas, "National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure" (2004) 24 International Review of Law and Economics 125, 135–137. This argument seems to lose some of its pertinence in jurisdictions where the OfRs are not made publicly available; however, even under such circumstances, the risk of embarrassment subsists vis-à-vis actors within the procedure: parties and intervenients as well as the judges of the ECJ and, as the case may be, appeal courts.

39 Cf. OfR by the Supreme Court (UK) of 30 July 2012 in Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Commissioners for Her Majesty's Revenue and Customs (C-362/12) EU:C:2013:834; [2014] 2 C.M.L.R. 33, where the referring court disclosed the minority and majority vote on the issue in question. Such disclosures of internal disagreements are uncommon, but this does not necessarily indicate that disagreements are, too.

40 *K. Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration" in A.-M. Slaughter, A. Stone Sweet and J. Weiler (eds), The European Court and National Courts: Doctrine and Jurisprudence (Oxford: Hart Publishing, 1997), p.227 at p.242*; *K. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (Oxford: Oxford University Press, 2001), pp.47–50*.

41 Davies, "Activism relocated" (2012) 19 J.E.P.P. 76, 88; *S. Weatherill, "Activism and Restraint in the European Court of Justice" in P. Capps, M. Evans, and S. Konstadinides (eds), Asserting Jurisdiction: International and European Legal Perspectives (Oxford: Hart Publishing, 2003) p.255 at p.266*.

42 The reasoning section runs close to 10 pages, compared with an average of 3.3 pages for all OfRs in the dataset.

43 Summary of OfR by Audencia Provincial de Barcelona (Spain) of 29 December 2010, in Banco Español de Crédito, SA v Calderón Camino (C-618/10) EU:C:2012:349; [2012] 3 C.M.L.R. 25.

44 See, e.g., V. Trstenjak, "Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU" (2013) 2 European Review of Private Law 451; H.-W. Micklitz and N. Reich, "The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)" (2014) 51 C.M.L. Rev. 771, 779–785; *T. Andersson, "Ex Officio Application of the Unfair Terms Directive Cases against Consumers: A Swedish Perspective" in A. Nylund and M. Strandberg, Civil Procedure and Harmonisation of Law: EU, International and Soft Law (Cambridge: Intersentia, 2019), p.153*.

45 *T. Tridimas, "Bifurcated Justice: The Dual Character of Judicial Protection in EU Law" in A. Rosas, E. Levits, and Y. Bot (eds), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law (The Hague: Asser Press, 2013) p.367 at pp.378–379*.

46 Banco Español (C-618/10) EU:C:2012:349 at [45].

47 Banco Español (C-618/10) EU:C:2012:349 at [50]–[54]. See also Trstenjak, "Procedural Aspects of European Consumer Protection Law" (2013) 2 E.R.P.L. 477, who concludes that the judgment in Banco Español displays the Court's "willingness to fine-tune".

48 See, e.g., *J. Weiler, "Epilogue: The Judicial Après Nice" in G. de Búrca and J.H.H. Weiler (eds), The European Court of Justice (Oxford: Oxford University Press, 2001), p.215 at p.225*; *M. Bobek, "Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts" in M. Adams, J. Meeusen, G. Straetmans, H. de Waele (eds), Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined (Oxford: Hart Publishing, 2013), p.197*.

49 Criminal Proceedings against Bob-Dogi (C-241/15) EU:C:2016:385; [2017] 3 C.M.L.R. 40.

50 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

51 Summary of OfR by the Curtea de Apel Cluj — Sectia penală si de minor of 22 May 2015 (para.17) in Bob-Dogi (C-241/15) EU:C:2016:385.

52 Bob-Dogi (C-241/15) EU:C:2016:385 at [61].
53 Bob-Dogi (C-241/15) EU:C:2016:385 at [63].
54 Littlewoods Retail Ltd v Her Majesty's Commissioners of Revenue and Customs (C-591/10) EU:C:2012:478; [2012] S.T.C. 1714.
55 Danqua v Minister for Justice and Equality (C-429/15) EU:C:2016:789.
56 Napolitano (C-418/13), joined with Mascolo v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli (C-22/13) EU:C:2014:2401.
57 OfR by the Corte costituzionale (Italy) of 23 July 2013 in Napolitano (C-418/13).
58 Mascolo (C-22/13) EU:C:2014:2401 at [89]–[95].
59 ENEFI Energiahatékonysági Nyrt v Directia Generală Regională a Finantelor Publice Brasov (DGRFP) (C-212/15) EU:C:2016:841; [2017] I.L.Pr. 10.
60 Council Regulation 1346/2000 on insolvency proceedings [2000] OJ L160/1.
61 OfR by Tribunalul Mures (Romania) of 8 May 2015 in ENEFI (C-212/15) EU:C:2016:841.
62 In the subsequent judgment of the national court (Judgment of Mr Justice Gerard Hogan delivered on 6 February 2017 [2017] I.E.C.A. 20), that court recognises the latter omission as an error of judgment (at [14]), whereas it defends the former on the grounds that neither of the parties had contested the compatibility of the time-limit with the principle of effectiveness (at [3] and [36]).
63 AG Bot in his Opinion in the case briefly considered recommending that the questions be declared inadmissible on account of the poor quality of the OfR: Opinion in Danqua (C-429/15) EU:C:2016:485 at [24]–[26].
64 See Davies, "Activism Relocated" (2012) 19 J.E.P.P. 76, 88.
65 OfR by the Tribunale di Napoli of 17 January 2013 in Mascolo (C-22/13) EU:C:2014:2401.
66 OfR by the Tribunale di Napoli of 7 February 2013 in Forni (C-61/13) EU:C:2014:2401.
67 OfR by the Tribunale di Napoli of 7 February 2013 in Racca (C-62/13) EU:C:2014:2401.
68 Mascolo (C-22/13) EU:C:2014:2401.
69 G v De Visser (C-292/10) EU:C:2012:142; [2013] Q.B. 168.
70 Banco Español (C-618/10) EU:C:2012:349 at [79] and [85]–[87].
71 OfR in Banco Español (C-618/10) EU:C:2012:349 at [14].
72 OfR in Banco Español (C-618/10) EU:C:2012:349 at [25]–[26].
73 OfR in Banco Español (C-618/10) EU:C:2012:349 at [55].
74 Banco Español (C-618/10) EU:C:2012:349 at [39]–[41].
75 Cf. Nyikos, "Strategic Interaction among Courts within the Preliminary Reference Process" (2006) 45 E.J.P.R. 527, 532, who hypothesises that the "ECJ is more likely to listen when its intervention is less accepted; in other words, in those areas where national law still predominates".
76 Cf. A. Arnull, "The Principle of Effective Judicial Protection in EU Law" (2011) 36 E.L. Rev. 52; S. Prechal, "Community Law in National Courts: The Lessons from Van Schijndel" (1998) 35 C.M.L. Rev. 681, 682.
77 Cf. Davies, "Activism Relocated" (2012) 19 J.E.P.P. 76, 87.
78 W. Mattli and A.-M. Slaughter, "Revisiting the European Court of Justice" (1998) 52 International Organization 177, 193–194; *Alter, Establishing the Supremacy of European Law (2001), pp.49–50*; F. Ramos Romeu, "Law and Politics in the Application of EU Law: Spanish Courts and the ECJ 1986–2000" (2006) 43 C.M.L. Rev. 395, 401–402; M. Wind, "The Nordics, the EU and the Reluctance Towards Supranational Judicial Review" (2010) 48 J.C.M.S. 1039, 1044–1045. See, however, Davies, "Activism Relocated" (2012) 19 J.E.P.P. 76, 87 for a range of alternative explanations for the referring judges' stance.
79 *Alter, Establishing the Supremacy of European Law (2001), pp.47–49*; J.H.H. Weiler, "The Transformation of Europe" (1991) 100 Yale Law Journal 2403, 2426.
80 J. Golub, "The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice" (1996) 19 West European Politics 360; *L. Conant, Justice Contained: Law and Politics in the European Union (Ithaca/London: Cornell University Press, 2002), pp.81–82*; Davies, "Activism Relocated" (2012) 19 J.E.P.P. 76, 76; M. Bobek, "Talking Now? Preliminary Rulings in and from the New Member States" (2014) 21 Maastricht Journal of European and Comparative Law 785; M. Glavina, "'To Submit or Not to Submit – That Is the (Preliminary) Question': Explaining National Judges' Reluctance to Participate in the Preliminary Ruling Procedure" (July 2018), SSRN, https://ssrn.com/abstract=3218256 [Accessed 12 February 2019].
81 Davies, "Activism Relocated" (2012) 19 J.E.P.P. 76, 85–86, argues that courts have stronger incentives to refer when they find a national measure to be contrary to EU law than when they believe it to be compatible.
82 See, e.g., Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (166/73) EU:C:1974:3; [1974] 1 C.M.L.R. 523 at [2]; CILFIT Srl v Ministry of Health (283/81) EU:C:1982:335; [1983] 1 C.M.L.R. 472 at [7]; Cartesio Oktató és Szolgáltató bt (C-210/06) EU:C:2008:723; [2009] 1 C.M.L.R. 50 at [90].

83 Cf. *T. de la Mare and C. Donnelly, "Preliminary Rulings and EU Legal Integration: Evolution and Stasis" in P. Craig and G. de Búrca, The Evolution of EU Law, 2nd edn (Oxford: Oxford University Press, 2011) p.363 at p.379*, who distinguish between "weak or inquisitive discourse" and "strong or confrontational discourse".

84 Similar concerns are raised by *Bobek, "Of Feasibility and Silent Elephants" in Judging Europe's Judges (2013) p.224*.

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