Articles

It Takes Two to Tango: The Preliminary Reference Dance Between the Court of Justice of the European Union and National Courts

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Judicial Hierarchy in the Preliminary Ruling Procedure: Exploring the Relationship Between the First and Second Instance Courts

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Abstract: The *Article* contributes to the scholarly debate on cross-court variations in referral rates by exploring the role of the judicial hierarchy on the propensity of national judges to refer legal questions to the Court of Justice. The focus of this *Article* lies in exploring the relationship between the first and the second instance court judges and the question of how these two groups of judges perceive their role in the preliminary ruling. The *Article* places the study of judicial behaviour with respect to the preliminary ruling procedure on more rigorous theoretical grounds. Building on the team model of adjudication and based on mixed-method research design, it argues that law-finding specialisation, a more beneficial workload v. resources ratio and the fact that preliminary questions can only address points of law give the second instance courts judges more reasons to engage with Art. 267 TFEU proceedings as compared to their first instance counterparts.

Keywords: judicial cooperation – preliminary ruling procedure – Art. 267 TFEU – national courts – Europeanisation of national courts – team model.

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I. Introduction

Ever since the preliminary ruling procedure was introduced by the Rome Treaty, national courts have supplied the Court of Justice with a steady and rising stream of cases (see Figure 1), allowing it to become arguably the world's most powerful and most influential international court.[1] Much of what the Court has achieved can be traced back to the preliminary ruling procedure: from furthering the legal, political and economic integration of Europe to delivering landmark decisions that strengthened the constitutionalisation of EU law.[2] The question of why national courts cooperate with the Court of Justice by means of Art. 267 TFEU proceedings inspires a great deal of literature. One of the reasons why this cooperation captured so much attention is its visibility. The preliminary ruling procedure pinpoints situations where EU legal rules are *de facto* being transposed into concrete action at the national level.[3] When national judges refer a legal question on the interpretation or validity of EU law, they either cooperate with the Court of Justice to enforce EU law over a conflicting national provision or assist the Court in its task of ensuring uniform interpretation and greater compliance with EU law.[4]

A variety of factors have been put forward to explain why national courts cooperate with the Court of Justice by means of the preliminary ruling procedure. Legal scholars relied on the plain meaning of Art. 267, para. 3, TFEU and the Court's case law,[5] emphasising courts' obligation to refer questions on the interpretation and validity of EU law to the Court.[6] Later research drew empirical conclusions based on a large-scale dataset on Member States' referral rates. The focus centred on explaining variations in referral rates across time, different Member States, and legal areas.

Such variations were attributed to, among others, the difference in transnational economic exchange;[7] intra EU-trade;[8] legal culture;[9] Member State's litigation rates;[10]

[1] K.J. Alter, *The European Court's Political Power: Selected Essays*, Oxford: Oxford University Press, 2009, p. 5.

[2] A. Stone Sweet, T.L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, in *Journal of European Public Policy*, 1998, p. 66 *et seq.*; K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press, 2001; P. Craig, G. De Burca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2015; A. Dyevre, M. Glavina, A. Atanasova, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2020, p. 912 *et seq.*

[3] T. Pavone, R.D. Keleman, *The Political Geography of Legal Integration: Visualizing Institutional Change in the European Union*, in *World Politics*, 2018, p. 360.

[4] *Ibid.*; N. Lampach, A. Dyevre, *Choosing for Europe: Judicial Incentives and Legal Integration in the European Union*, in *European Journal of Law and Economics*, 2019, p. 1 *et seq.*

[5] Court of Justice: judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*, paras 18-19; judgment of 22 October 1987, case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

[6] M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart, 2006, p. 247.

[7] A. Stone Sweet, T.L. Brunell, *The European Court and the National Courts*, cit. p. 79.

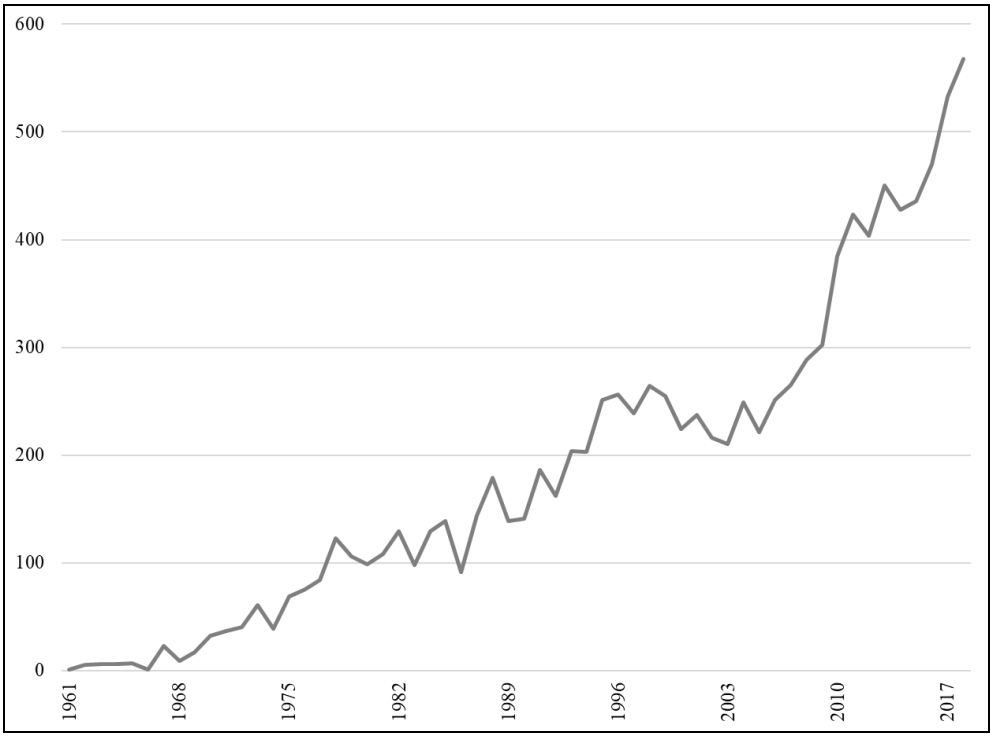

FIGURE 1. Rise in the number of Art. 267 TFEU referrals, EU-28 (1961-2018). Source: CJEU annual reports.

country size and population;[11] and public support for EU membership.[12] Recent research efforts, driven by inspiration to look beyond cross-national variations, started

[8] W. MATTLI, A.M. SLAUGHTER, *Revisiting the European Court of Justice*, in *International Organization*, 1998, p. 177; C.J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, in *International Organization*, 2005, p. 399.

[9] J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, cit. p. 411; M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis*, paper presented at 11th Biennial Conference of the European Union, 2009, available at aei.pitt.edu.

[10] L.J. CONANT, *Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries*, in M.G. COWLES, J. CAPORASO, T. RISSE (eds), *Transforming Europe: Europeanization and Domestic Change*, Ithaca: Cornell University Press, 2001, p. 97 *et seq.*; K.J. ALTER, J. VARGAS, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, in *Comparative Political Studies*, 2000, p. 452 *et seq.*; L.J. CONANT, *Europeanization and the Courts*, cit., p 105 *et seq.*; M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States*, cit.

[11] A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts*, cit., p. 76; M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States*, cit.; R.D. KELEMAN, T. PAVONE, *Mapping European Law*, in *Journal of European Public Policy*, 2016, p. 1118 *et seq.*

exploring regional disparities in referral rates. Scholars argued that there are few theoretical justifications and little empirical evidence to suggest that the referral rates are uniformly distributed within a country.[13] Researchers pointed to the existence of "hotspots" for EU law litigation[14] and the fact the referral activity tends to be concentrated in a small subset of regions within the Member States, *i.e.* in regions that host a capital city, a peak court, or a cargo port.[15]

One area of research, in particular, has focused on explaining cross-court variations and on how is the referral propensity of national courts affected by the position that the concerned court occupies in a national judicial system. Early contributions came from Joseph Weiler and Karen Alter who saw the desire for power as the main driver of Art. 267 TFEU proceedings. They argued that lower courts cooperate with the Court of Justice by means of the preliminary ruling procedure out of the desire to expand their powers *vis-à-vis* other branches of government[16] or *vis-à-vis* higher courts in the national judicial hierarchy.[17] Stone Sweet and Brunell took issue with this argument and asserted that, because the task of the appellate level is to resolve questions of legal interpretation and conflict of law, appellate courts will be more involved in the procedure as opposed to what Alter argues.[18] It was not until recently that scholars returned to this question. Based on a large-scale data collection, Dyevre *et al.* found that first instance courts did pioneer the use of the preliminary ruling procedure until the late 1990s. Yet, at the turn of the century, they were overtaken by peak courts who now dominate Art. 267 TFEU proceedings.[19]

Common to these research efforts on cross courts divergences in referral activity is a focus on explaining referral disparities among the lower and higher national courts, where the term "lower courts" encompasses first and second instance courts, while the term "higher courts" typically refers to the courts of the third instance (most commonly

[12] C.J. Carrubba, L. Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, cit., p. 411.

[13] R.D. Keleman, T. Pavone, *Mapping European Law*, cit., p. 1119. See also A. Dyevre, N. Lampach, *The Unequal Reach of Transnational Institutions*, in *SSRN Scholarly Paper*, 2018, available at papers.ssrn.com.

[14] R.D. Keleman, T. Pavone, *Mapping European Law,* cit., pp. 1134-1135.

[15] N. Lampach, A. Dyevre, *The Origins of Regional Integration: Untangling the Effect of Trade on Judicial Cooperation*, in *International Review of Law and Economics*, 2018, p. 122 *et seq.*

[16] J.H.H. Weiler, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, p. 2403 *et seq.*; J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1994, p. 510 *et seq*.

[17] K.J. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A.M. Slaughter (ed.), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford: Hart, 1998, p. 227 *et seq.*; K.J. Alter, *Establishing the Supremacy of European Law*, cit., p. 48.

[18] A. Stone Sweet, T.L. Brunell, *The European Court and the National Courts*, cit., p. 90.

[19] A. Dyevre, M. Glavina, A. Atanasova, *Who Refers Most?*, cit., p. 923 *et seq.*

supreme and constitutional courts).[20] Much less, however, has been written on the relationship between the first and second instance courts, and how the position of a court at these lower levels of the judicial hierarchy affects the propensity of national judges to send legal questions to Luxembourg. Legal scholars did focus on the empowerment of lower national courts by the Court of Justice through judgments such as *Cartesio*, *Melki* or *ERG and others*, where the Court made it clear that higher national courts cannot deprive lower courts of the right to make a referral to the Court of Justice, even if the superior court has explicitly deemed the reference unnecessary.[21] Lower national courts, in the Court's view, are free to determine whether higher courts' ruling could lead to the interpretation contrary to EU law and respectively refer a question to Luxembourg.[22] This showed that the Court of Justice will respond to any attempt that might jeopardise the alliance it has built with lower national courts over the years.[23] These studies, however, explore the relationship between lower and higher national courts from a legal perspective, focusing primarily on the Court's case law. Empirical insights into what drives participation of different court levels in the preliminary ruling procedure, particularly those focusing on the perspective of national judges themselves, are still missing.

This *Article* contributes to the scholarly debate on cross-court variations in referral rates by exploring the role of the judicial hierarchy on the propensity of national judges to refer legal questions to the Court of Justice. The novelty of the *Article* lies in placing a particular emphasis on the cooperation between the first instance and appellate national courts and by exploring the sub-national penetration of EU law from a judge-level. The questions that this *Article* deals with are the following: How do first and second instance judges perceive their role in the preliminary ruling procedure? Are there any differences in judicial use of Art. 267 TFEU between the first and second instance

[20] In some cases, the term "peak court" or the "top court" includes courts of second instance whose role in the national judicial system is just too important to be considered as the "appellate court" (e.g. the UK Court of Appeal or the Scottish Court of Session) or when the access to the national supreme court is limited (e.g. the Slovenian Administrative Court, the Maltese Court of Appeal, the Maltese Court of Criminal Appeal).

[21] In the pre-*Cartesio* era, the Court of Justice allowed for appellate courts to overturn the lower court's decision to make a preliminary question. Once the decision has been overturned, the Court would remove the case from its register. This changed after *Cartesio* judgment in which the Court held that right to appeal governed by rules of national law cannot deprive lower courts of the possibility of making a referral to the Court of Justice by means of Art. 267 TFEU. According to the interpretation of the Court, "national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of [EU] law, or consideration of their validity". Court of Justice, judgment of 16 December 2008, case C-210/06, *Cartesio*, paras 88-98; H. Storey, *Preliminary References to the Court of Justice of the European Union (CJEU)*, in *EALJA Guidance Note*, 2010, www.iarmj.org; M. Bobek, *Cartesio: Appeals Against an Order to Refer Under Article 234(2) of the EC Treaty Revisited*, in *Civil Justice Quarterly*, 2010, p. 307 *et seq*.

[22] Court of Justice, judgment of 9 March 2010, case C-378/08, *ERG and Others*, para. 32.

[23] G. Martinico, *Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order*, in *International Journal of Constitutional Law*, 2012, p. 871 *et seq.*

judges? If yes, what could explain these differences? Although some of these questions have been addressed before, this is the first time they are explored empirically, on the basis of the data obtained by surveying and interviewing national judges from two new EU Member States: Slovenia and Croatia. This *Article* further contributes to European judicial politics literature by placing the study of judicial behaviour in the preliminary ruling procedure on more rigorous theoretical grounds. Building on the team model of judicial decision making, it offers a theoretical framework and empirical evidence to explain the divergence in referral rates between first and second instance national courts.

This *Article* is structured as follows. Section II discusses the debates and theories on cross-court divergences in the context of the preliminary ruling procedure. Section III gives its own account of referral behaviour of first and second instance national courts, building on the team model of adjudication. Section IV describes the data and methodology. Section V presents and discusses the interview results and the results of the statistical analysis. The *Article* concludes with the implications of results for the grand theories of European integration.

II. Debates on cross-court divergences

II.1. Legal explanation

When seeking to explain divergences in judicial participation in the preliminary ruling procedure, legal academics typically resort to the wording of Art. 267 TFEU.[24] Art. 267 distinguishes between two types of national courts: those "against whose decisions there is no judicial remedy under national law" and other courts against whose decision there is a possibility of appeal.[25] If a question on the interpretation of EU law appears before a court against whose decision there is no possibility of appeal, that court "shall" request a preliminary ruling from the Court of Justice, which implies obligation. By contrast, if that question appears before any other court, that court "may" ask for a preliminary ruling, which implies discretion. There are two exceptions to this rule. The first one concerns the question of the validity of EU law. Although not explicitly implied by Art.

[24] G. Bebr, *Article 177 of the EEC Treaty in the Practice of National Courts*, in *International & Comparative Law Quarterly*, 1977, p. 241 *et seq.*; A. Arnull, *The Use and Abuse of Article 177 EEC*, in *The Modern Law Review*, 1989, p. 622 *et seq.*; A. Arnull, *The Past and Future of the Preliminary Rulings Procedure*, in *European Business Law Review*, 2002, p. 183 *et seq.*; M. Claes, *The National Courts' Mandate in the European Constitution*, cit., p. 59; M. Bobek, *Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice*, in *Common Market Law Review*, 2008, p. 1611 *et seq.*; M. Broberg, *Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times*, in *Common Market Law Review*, 2008, p. 1383 *et seq.* Another explanation given by legal academics suggests that national courts have been convinced by the Court of Justice by the legal arguments of the validity of the supremacy of EU law over national law. See M. Claes, *The National Courts' Mandate in the European Constitution*, 2004, cit., p. 247.

[25] Art. 267, para. 3, TFEU.

267 TFEU, the Court has affirmed that if the validity of EU law is at stake, lower national courts' discretion to refer transforms into an obligation.[26] Furthermore, an exception is extended to the top courts as well. The courts that are otherwise obliged to send a preliminary question to the Court of Justice in case of interpretative doubts with EU law can avoid this obligation by following the *CILFIT* criteria. This includes three situations: where the Court's ruling would have no bearing on the final decision of the referring national court; where the Court has already ruled on an identical question (*acte éclairé*); and where the interpretation of an EU law legal provision is so obvious that it leaves no room for any reasonable doubt (*acte clair*).[27]

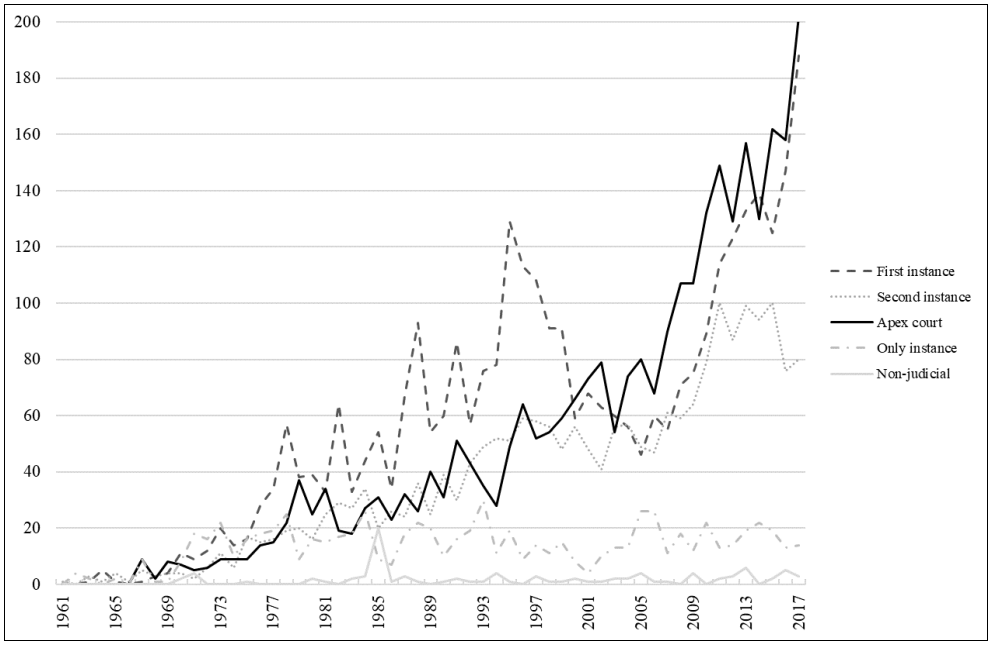

FIGURE 2. Referral activity according to the level of the referring court, 1961-2018. Source: EUTHORITY project data collection, www.euthority.eu.

Following the legal explanation, last instance courts should be expected to refer more questions to the Court of Justice compared to lower (first or second instance) courts simply because Art. 267 TFEU obliges them to do so. Yet, as can be seen from Figure 2, this is not (or at least has not always been) the case. Since the 1960s and until the early 2000s, first instance national courts pioneered the use of the preliminary rul-

[26] *Foto-Frost v. Hauptzollamt Lübeck-Ost*, cit.
[27] *CILFIT v. Ministero della Sanità*, cit.

ing procedure. A steady rise in the number of referrals coming from the highest courts led to these overtaking the lower courts. The legal explanation could explain the referral activity of peak courts after the 2000s. Yet, because the wording of Art. 267 TFEU has not changed since it was introduced, it cannot explain why top national courts started using the procedure extensively only after 2000. This point will be further explored when discussing the role of the judicial organisation.

II.2. Judicial empowerment and court competition

Probably the most well-known early work on cross-court variations in referral rates was authored by Joseph Weiler. Weiler's most important contribution to the study of law and courts in Europe lies in his empowerment thesis. In his seminal work, Weiler argued that the constitutional revolution of the EU "was a narrative of plain and simple judicial empowerment [...] of the Member State courts, [...] lower national courts in particular".[28] The reason behind lower courts' enthusiastic acceptance of the preliminary ruling procedure, according to Weiler, is the fact that lower courts were given the power to engage with the higher jurisdiction of the EU, that is — the power of judicial review. The EU legal system gave the lowest national courts powers that have been typically reserved for the highest courts in a country.[29] What lower court judges want, according to Weiler's empowerment thesis, is to expand their powers to those enjoyed by a country's highest court and to use these powers to oppose other branches of government.[30]

Weiler's thesis was later endorsed by Karen Alter who saw "lower national courts as the motors of legal integration".[31] Her central argument was that unlike higher courts – whose authority was under a threat due to EU law supremacy – lower courts found only a few costs and numerous benefits in making a referral to the Court of Justice via the preliminary ruling procedure. Sending a preliminary question to Luxembourg "allowed the lower national courts to circumvent the jurisprudence of higher courts that they do not agree with and to obtain legal outcomes they prefer from the CJEU".[32] In brief, she argued that the preliminary ruling procedure became a powerful weapon of lower national courts to bypass higher courts. Weiler's and Alter's argument on lower courts as motors of European legal integration has later been endorsed by many other legal scholars and political scientists and remains to be one of the most used explanations of the referral activity of national courts.[33]

[28] J.H.H. Weiler, *The Transformation of Europe*, cit., p. 2426.

[29] *Ibid*.

[30] *Ibid.*; J.H.H. Weiler, *A Quiet Revolution*, cit.

[31] K.J. Alter, *The European Court's Political Power*, in *West European Politics*, 1996, p. 467; K.J. Alter, *The European Court's Political Power: Selected Essays*, cit., p.101.

[32] K.J. Alter, *The European Court's Political Power: Selected Essays*, cit., p.100.

[33] G. Tridimas, T. Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, in *International Review of Law and Economics*, 2004, p. 125 *et seq.*; S.A.

II.3. The role of the judicial organisation

Scholars further sought to explain cross-courts variations in referral rates by looking at the organisational structure of judicial systems. Based on, what was at that time the largest data-collection effort in the field of EU law, Stone Sweet and Brunell found that lower courts have produced fewer references as compared to intermediate courts and, by doing so, challenged Alter's view on lower courts as motors of legal integration. Stone Sweet and Brunell wrote that the discrepancy is even more striking knowing that there are far fewer appellate courts than the first instance courts. They explain this divergence by looking at the core function of the appellate level, which is to resolve disputes involving legal interpretation and conflict of law.[34] Because of the organisation of national judicial systems, they conclude, "we would expect the appellate courts to be far more involved in the construction of the legal system than Alter imagines them to be".[35] This was the first mention of the judicial organisation in the literature on the preliminary ruling procedure.

This argument was later revisited by Romeu. Building on the team model of adjudication, Romeu argued that if a first instance judge encounters an EU law issue during the fact-finding task, they will normally resort to the use of the EU law precedent on the issue instead of sending a preliminary question to the Court of Justice. This is because engaging with a preliminary question is costly and a first instance judge has limited access to resources in addition to a heavier workload. In such cases, a first instance judge will give, what is in their knowledge, the best answer to an EU law issue and leave the cases where it is necessary to generate new legal knowledge to be adjudicated by higher courts. EU law issues are, thus, more likely to be subjected to an appeal. Second instance court judges, by contrast, engage in the resolution of legal issues. Furthermore, this is the level where most of the cases are resolved. Dealing with EU law issues and using the preliminary ruling procedure is, thus, part of the appellate courts' main role. Finally, the highest courts in the national hierarchy will, according to Romeu, be the most active participants of the preliminary ruling procedure.[36] This is also the level

Nyikos, *The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment*, in *European Union Politics*, 2003, p. 397 *et seq.*; S.A. Nyikos, *Courts*, in P. Graziano, M.P. Vink (eds), *Europeanization*, London: Palgrave Macmillan, 2008, p. 182 *et seq.*; K. Leijon, *The Choices Courts Make: Explaining When and Why Domestic Courts Express Opinions in the Preliminary Ruling Procedure*, paper presented at ECPR General Conference, Montréal, 2015, available at ecpr.eu; J.A. Mayoral, *The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe*, Doctoral Thesis, European University Institute, 2013.

[34] A. Stone Sweet, T.L. Brunell, *The European Court and the National Courts*, cit., p. 90.

[35] *Ibid.*

[36] F. Ramos Romeu, *Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior*, in *Global Jurist Frontiers*, 2006, pp. 12-13.

where judges have more experience to deal with complex legal questions such as making a referral to the Court of Justice.[37]

It was not until recently that scholars provided empirical evidence on cross-court variations in referral activity.[38] Based on the large-scale data collection of all preliminary questions submitted between 1961 and 2015, Dyevre *et al.* demonstrated that the first instance courts did pioneer the use of the preliminary ruling procedure but were soon caught up by peak courts, who now dominate the preliminary ruling procedure. They explain this temporal shift in referral activity by relying on the resource v. workload ratio as well as on the fact- v. law-finding specialisation across the judicial hierarchy. Because top courts enjoy a higher workload v. resources ratio and they specialise in law-finding and law creation, they display a higher propensity to refer a legal question to the Luxembourg Court.[39]

III. Judicial organisation and the team model

This *Article* extends the organisational structure argument and employs it to explore the referral activity of the first and the second instance courts. To explain why judicial hierarchies exist, two different explanations have arisen from two different models of decision-making: the team model and the principal-agent (also known as "the agency") model. The team model, as the name suggests, treats the judicial system as a team and supposes that all judges in the judicial system share the same goal: to maximise the number of "correct" decisions.[40] The objective of the hierarchy is to minimise possible errors.[41] The agency model, by contrast, points out to conflicting interests among the judges. It assumes that judges have ideologically opposed preferences and seek to implement those preferences through their decisions.[42] The agency model perceives higher courts (supreme courts in particular) as the principal, while lower courts (the first

[37] J. Komarek, *"In the Court(s) We Trust?" On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, in *European Law Review*, 2007, p. 486 *et seq.*: Komarek argues that "judicial wisdom" is unevenly distributed across judicial system. Judges sitting at the highest national court typically possess more skills and experience.

[38] A. Dyevre, M. Glavina, A. Atanasova, *Who Refers Most?*, cit., p. 919.

[39] *Ibid.*, p. 930.

[40] According to Kornhauser, "correctness" may be interpreted in many ways. Judges might want to maximise the number of cases brought before them, or they might want to maximise the certainty of law through precedents. The content of the aim is not important. What matters is that the aim is shared by all in the system. See L.A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System Symposium on Positive Political Theory and Law*, in *Southern California Law Review*, 1994, pp. 1606 and 1613.

[41] *Ibid.*, p. 1606; L.A. Kornhauser, *Appeal and Supreme Courts*, in B. Bouckaert, G. De Geest (eds), *Encyclopedia of Law and Economics*, Cheltenham, Northampton: Elgar, 2000, p. 46.

[42] L.A. Kornhauser, *Adjudication by a Resource-Constrained Team*, cit., p. 1609.

instance and the appellate courts) are identified as agents.[43] Hierarchy exists "so that the small set of politically dominant judges can enforce their views on recalcitrant judges lower in the hierarchy".[44] The idea of an error is, thus, very different in the agency model when compared to the team model. In the team model, an error arises from imperfect information about the case. In the agency model, by contrast, errors are deliberate and "rebellious" decisions of lower court judges to apply their rule instead of the preferred rule of a higher court.[45]

The idea to treat a judicial system as a team was first expressed by Marschak and Radner,[46] and was later revised by Kornhauser[47] and Romeu.[48] Kornhauser argued that some features of the US judicial system are very difficult to fit into the political model where judges are seen as political actors, each of them promoting their own interests. One of the features is the fact-finding specialisation of the first instance. The agency model seems to suggest that appellate courts have the authority to reassess facts of the case formerly determined by the first instance in order to achieve their desired outcomes, which is not the case.[49] The team approach, by contrast, offers a very different view on the decision making process. The principal source of error is not conflict (as in the case of the agency model) but rather hidden information. Because resources are limited and because knowledge is very costly to acquire or to verify, errors are inevitable.[50] This argument opposes the agency model which assumes that each judge possesses complete information. In other words, that each lower court possesses complete information on the ideal point of the higher courts.[51]

In achieving the common goal, a hierarchy has several advantages over a completely flat and decentralised system. First, the existence of a hierarchy allows for the specialisation of labour: trial judges deal with fact-finding and appellate judges with law-finding. Dividing caseload equality among all judges would be inefficient as each judge would spend his resources on both fact-finding and law-finding. With increased specialisation, that is, by separating the fact- and law-finding task, the number of correct deci-

[43] J.P. KASTELLEC, *The Judicial Hierarchy: A Review Essay*, in *Oxford Research Encyclopedia of Politics*, 2016, p. 8.

[44] L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit., p. 46.

[45] J.P. KASTELLEC, *The Judicial Hierarchy*, cit., p. 8; C.M. CAMERON, L.A. KORNHAUSER, *Appeals Mechanism, Litigant Selection, and the Structure of Judicial Hierarchies*, in J.R. ROGERS, R.B. FLEMMING, J.R. BOND (eds), *Institutional Games and the U.S. Supreme Court*, Charlottesville: University of Virginia Press, 2006, p. 177.

[46] J. MARSCHAK, R. RADNER, *Economic Theory of Teams*, New Haven: Yale University Press, 1972.

[47] L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit., p. 1612.

[48] F. R. ROMEU, *Law and Politics in the Application of EC Law: Spanish Courts and the ECJ 1986-2000*, in *Common Market Law Review*, 2006, p. 395 *et seq.*

[49] C.M. CAMERON, L.A. KORNHAUSER, *Appeals Mechanism, Litigant Selection, and the Structure of Judicial Hierarchies*, cit., p. 178.

[50] *Ibid*.

[51] L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit., p. 48.

sions would rise.[52] Second, hierarchy decreases the number of cases a judge has to consult. In other words, judges have to consult only the cases decided by a court above them and not all cases decided by all courts in the country. This feature prevents wasting resources on scanning cases for precedent.[53] Finally, hierarchy permits the shifting of judicial resources towards important cases that set precedent. In a decentralised system, each judge would have to examine the caseload of every other judge in order to identify cases for review. In a hierarchical system, by contrast, only the appellate judges are expected to perform a systematic review of the caseload.[54] Although not directly suggested by Kornhauser, hierarchy further plays an important role in error correction. A key assumption is that unsuccessful litigants who appeal a trial court decision have a superior understanding of the facts of the case and are more competent to detect "mistakes" in the decision of the trial judge.[55] In brief, inter-court interactions and the division of workload and resources across the tiers of the judicial hierarchy are all necessary for an efficient division of labour.[56]

Following Romeu,[57] I apply the team model of adjudication to the study of judicial behaviour with regard to EU law. In doing so, I focus in particular on the relationship between the first instance and the appellate courts. In order to understand the question of why national judges turn to the Court of Justice with a preliminary question, one needs to understand the logic of a "team". Achieving an efficient division of labour that minimises the possibility of an error and leads to the maximum possible number of "correct" judicial decision makes a referral to the Court desirable. The logic behind this argument is twofold. First, a national judge knows that the Court of Justice is a specialised court for EU law matters and will produce a better answer while investing the same amount of resources.[58] Second, once a referral has been made, a judge can spare the resources that they would otherwise have had to invest in solving an EU law issue and redirect those resources to the resolution of other cases.[59] Referrals, thus, outsource the production of knowledge which is needed to resolve an EU law issue, which ultimately leads to an efficient division of labour. Outsourcing, "is desirable when actors within an organization face problems that only appear infrequently and thus for which it makes no sense that someone within the organization develop the knowledge neces-

[52] L.A. Kornhauser, *Adjudication by a Resource-Constrained Team*, cit., p. 1613.

[53] *Ibid.*, p. 1623; J.P. Kastellec, *The Judicial Hierarchy*, cit., p. 5.

[54] L.A. Kornhauser, *Adjudication by a Resource-Constrained Team*, cit., p. 1623.

[55] J.P. Kastellec, *The Judicial Hierarchy*, cit., p. 6.

[56] L.A. Kornhauser, *Appeal and Supreme Courts*, cit., p. 48.

[56] L.A. Kornhauser, *Adjudication by a Resource-Constrained Team*, cit., p. 1609; L.A. Kornhauser, *Appeal and Supreme Courts*, cit., p. 46.

[57] F. Ramos Romeu, *Law and Politics in the Application of EC Law*, cit., p. 395.

[58] *Ibid.*, p. 397.

[59] F. Ramos Romeu, *Judicial Cooperation in the European Courts*, cit., p. 11.

sary to confront them".[60] The referring national judge then complies with the Court's ruling because they know that the Court of Justice produces a better quality decision than they would. Deciding an EU law issue without involving the Court would result in spending more resources without necessarily improving the quality of the decision.

Not all national courts are, however, in the best position to make a referral to the Court of Justice. This brings me to court specialisation. The existence of a hierarchy, according to the team model, allows for specialisation of labour: fact-finding v. law-finding. Since lower courts have to process a heavy workload, they have less time to devote to individual cases. Their task is, therefore, to focus on fact-finding and the quick resolution of cases. Higher national courts, by contrast, enjoy a more favourable workload v. resources ratio and have more time to devote to individual cases. Dividing caseload equally between all judges would be inefficient as each judge would spend their resources on both fact-finding and law-finding. The task specialisation allows for the division of labour across levels of judicial hierarchy, where appellate review of higher courts is typically restricted to points of law. In other words, appellate courts do not re-examine the facts of the case established by the lower instance.

How does the court's specialisation affect the referral behaviour of national judges? Based on the team model rationale, if a first instance judge encounters an EU law issue during the fact-finding task, he will normally resort to the use of the EU law precedent on the issue instead of sending a preliminary question to the Court of Justice. This is because a first instance judge has limited access to resources and has to process a heavy workload. Relying on a precedent is, thus, desirable in order to maximise the number of "correct" decisions. Furthermore, engaging with the preliminary ruling procedure is costly. It would require the first instance judge to invest resources in law-finding and to go beyond the scope of their ordinary tasks. In such cases, a first instance judge will give, what is in their knowledge, the best answer to an EU law issue and leave to higher courts those cases where it is necessary to generate new knowledge. EU law issues are, thus, more likely to be subjected to an appeal. Second instance court judges, by contrast, engage in the resolution of legal issues. Furthermore, this is the level where most of the cases are resolved. Dealing with EU law issues and using the preliminary ruling procedure is, thus, part of the courts' main role.[61] Finally, in giving a preliminary ruling, the Court of Justice is typically restricted to points of law and does not re-examine the facts of the case established by the referring courts. Making a referral, consequently, relates more directly to the work of appellate courts. Based on this I argue that because of their specialisation in law-finding and law creation, and because of a more beneficial workload v. resources ratio, and since preliminary questions can only address points of law, appellate court judges will exhibit higher propensity to refer legal questions to the Court of Justice.

[60] *Ibid*.

[61] F. Ramos Romeu, *Law and Politics in the Application of EC Law*, cit., pp. 398-399.

IV. Data and methodology

In order to explore how first and second instance judges perceive their role in the preliminary ruling procedure and whether there any differences between these two groups, I employ a mixed-method approach, combining survey data with the results of in-depth interviews. The survey on the knowledge of, experiences with and attitudes towards EU law was conducted among all first and second instance courts in Slovenia and Croatia in spring 2017. It covered a population of 1,792 judges from Croatia and 857 judges from Slovenia, resulting in a response rate of 16.6 per cent for Croatia and 14.7 per cent for Slovenia.[62] Survey respondents were asked whether they are willing to participate in an interview in a continuation of the research. The affirmative response was given by 74 judges. Because of the practical reasons, a maximum variation purposive sampling was used, covering judges of different levels and subject matter jurisdiction. Ultimately, 32 judges were covered and interviews were conducted in spring and autumn 2017. Results obtained by means of both research methods (qualitative and quantitative) are expected to complement each other, which will strengthen research conclusions. This research builds on the research efforts of Nowak *et al.* (covering Dutch and German judges), Jaremba (covering Polish civil law judges)[63] and Mayoral (covering Spanish judges),[64] and complements the research of Krommendijk (covering Dutch and Irish judges).[65]

	Number of referrals	Years of membership	Referrals per years of membership	Population in million inhabitants	Referrals per million inhabitants	Judges per capita	Referrals per judges per capita
Cyprus	7	13	0.5	0.86	8.14	13.1	0.53
Estonia	28	13	2.1	1.31	21.37	17,6	1.59
Hungary	158	13	12.1	9.77	16.17	28.7	5.51
Latvia	60	13	4.6	1.93	31.09	25.5	2.35
Lithuania	55	13	4.2	2.80	19.64	27.3	2.01
Malta	3	13	0.2	0.47	6.38	10.2	0.29

[62] Although this may seem as a low response rate, it is higher than the response rate obtained by Nowak *et al.* on German Judges (10 per cent) and by Jaremba obtained on Polish judges (eight per cent). See T. Nowak, A. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands*, The Hague: Eleven International, 2011; U. Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System*, The Hague: Nijhoff, 2014. The response rate obtained on Dutch judges was 32 per cent. Nowak *et al.* justified this by the fact that Dutch judges are used to filling in survey and to participate in research.

[63] U. Jaremba, *National Judges as EU Law Judges*, cit.

[64] J.A. Mayoral, *The Politics of Judging EU Law*, cit.

[65] J. Krommendijk, *Why Do Lower Courts Refer in the Absence of a Legal Obligation? Irish Eagerness and Dutch Disinclination*, in *Maastricht Journal of European and Comparative Law*, 2019, p. 770 *et seq.*

	Number of referrals	Years of membership	Referrals per years of membership	Population in million inhabitants	Referrals per million inhabitants	Judges per capita	Referrals per judges per capita
Poland	127	13	9.7	37.97	3.34	26.0	4.88
Czech R.	57	13	4.3	10.61	5.37	28.4	2.01
Slovakia	44	13	3.4	5.44	8.09	24.1	1.83
Slovenia	20	13	1.5	2.06	**9.71**	**42.6**	**0.47**
Bulgaria	117	10	11.7	7.05	16.60	31.8	3.68
Romania	139	10	13.9	19.52	7.12	23.6	5.89
Croatia	11	5	2.2	4.10	**2.68**	**43.3**	**0.25**

TABLE 1. Comparing post-2004 enlargement Member States (2004-2017). Includes data for the year 2017. Data source: CJEU annual report; Eurostat; EU Scoreboard.

The decision to focus on Slovenian and Croatian judges has been made primarily because of the low number of preliminary questions submitted to the Court of Justice. Taken in absolute numbers, Slovenian and Croatian courts have submitted the lowest number of preliminary questions compared to all post-2004 enlargement Member States, with the exception of Malta and Cyprus (see Table 1). Furthermore, the two countries have the highest number of judges per capita in the entire EU: Slovenia has 42.6 per 100,000 inhabitants and Croatia 43.3, while the EU average is only 21.2 judges per 100,000 inhabitants.[66] Yet, they have the lowest number of referrals per number of judges and happen to be in the same groups as Malta and Cyprus, the two smallest EU Member States. The argument that some Member States will refer more simply because they have more court and judges that can refer questions, thus, does not hold for Slovenia and Croatia.[67] Furthermore, research on Central and Eastern European Member States has focused on the application of EU law in Poland,[68] the Czech Republic,[69] Slovakia[70] and Hungary,[71] leaving other post-2004 enlargement countries largely under-

[66] European Commission, EU Justice Scoreboard, 2016, ec.europa.eu, p. 33.

[67] M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States*, cit., p. 13.

[68] U. JAREMBA, *National Judges as EU Law Judges*, cit., p. 173; U. JAREMBA, *At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order*, in *Erasmus Law Review*, 2013, p. 191 *et seq.*

[69] M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, in *European Constitutional Law Review*, 2014, p. 54 *et seq.*; J. KOMAREK, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, in *European Constitutional Law Review*, 2012, p. 323 *et seq.*

[70] M. MATCZAK, M. BENCZE, Z. KUHN, *Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland*, in *Journal of Public Policy*, 2010, p. 81 *et seq.*

researched. Very little has been written on the Europeanisation of Slovenian and Croatian national judiciaries and the use of EU law by their national judges.

For analysing interview results, I rely on thematic content analysis. The aim of this technique is to find common patterns across the data, which relate to the research question. All interviews were transcribed and translated from Croatian and Slovenian into English. What followed was the coding process, that is, the process of marking in the text those words, phrases, sentences, or stories that are relevant for the research question.[72] Whenever appropriate, I will refer to interview results of Nowak, Jaremba, Mayoral and Krommendijk, and how they compare to results obtained on Slovenian and Croatian judges.

	Variable name	**Type of data**	**Explanation**
Dependent variable	The probability of making a referral	Discrete	Question: What is the probability that you would send a preliminary question to the CJEU in case of interpretative doubt? Answers: (1) I would definitely not refer; (2) I would probably not refer; (3) I would probably refer; (4) I would definitely refer.
Independent variable	Court level	Discrete	Question: At which court do you adjudicate? Answers: (1) First instance; (2) Second instance.

TABLE 2. Research variables.

For the purpose of the quantitative part of this *Article*, the dependent variable is defined as the probability of sending a preliminary question to the Court of Justice in case of interpretative doubts. I employ ordinal logistic regression where the dependent variable is considered ordinal with four levels interpreted as *1*) very low, *2*) low, *3*) high, and *4*) very high. The independent variable includes the level of the court. Based on the question "At which instance do you adjudicate?" judges were divided into two groups: *1*) those sitting at the first instance court and *2*) those sitting at the second instance court (see Table 2). The analysis is performed on two different models. Model 1 relies on complete cases, that is, cases with no missing values and it includes 145 observations. As for Model 2, missing values were predicted by the Random Forest imputation technique.[73]

[71] D. KOSAR, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice*, in *European Constitutional Law Review*, 2017, p. 96 *et seq.*

[72] H.J. RUBIN, I.S. RUBIN, *Qualitative Interviewing*, Thousand Oaks: Sage, 2012, p. 190.

[73] F. TANG, H. ISHWARAN, *Random Forest Missing Data Algorithms*, in *Statistical Analysis and Data Mining*. *The ASA Data Science Journal*, 2017, p. 363.

V. Results

V.1. Fact-finding v. law-finding specialisation

I start with interview results on how judges perceive their role in the preliminary ruling procedure and how this perception differs according to the hierarchical level of the court at which the judge sits. In line with the theoretical section of this *Article*, interviewed judges confirm the role of court's specialisation on judicial participation in the preliminary ruling procedure. When asked why they never made a referral to the Court of Justice, a first instance judge from Slovenia explains:

> "I do not think it is the purpose [of the first instance] to [send preliminary questions]. The purpose of the first instance is to quickly process cases. [...] [Sending a preliminary question] goes more for the application of the law. [...] I think that this is also the role of the Supreme Court according to our system. It is its mission. The top that directs the development of the whole law".[74]

Another judge, in a similar vein, argues that the preliminary ruling procedure

> "goes for a more legal issue. We at the first instance are somehow more concerned with the operative part [of the judgment]. We also have a lot of work, including work with the parties and with the unexplored factual situation. [...] Should I deal here with this legal theory? Maybe this is not really a task for the first instance. [...] I will write about the factual situation, and very briefly about what is the legal background so that there is no legal dilemma. Perhaps this is more in a domain of higher courts that deal better with the legal theory and solving issues. And not of the first instance. [...] Some questions that are a bit more complicated, a bit more abstract, it seems to me that I would rather step aside and let this to be dealt with by the [higher court]".[75]

Interviewed first instance judges further share a belief that their colleagues at the appellate and the peak level "are more mature, capable, and have insight and a wider perspective. As a first instance judge, you have to work fast and you have to work a lot. [...] Half of our cases do not reach the second instances. [...] this is also the purpose [of the first instance], to solve the dispute as soon as possible".[76]

Similar results were reported by other scholars. Based on interview results with German and Dutch judges, Nowak *et al.* found that the reasons for engaging with the preliminary ruling procedure are very often not connected to an anti-EU sentiment but are rather practical and based on the belief that turning to the Court of Justice would prolong the duration of the trial.[77] Some interviewed judges explicitly referred to the

[74] Slovenian judge 4, 1st instance.
[75] Slovenian judge 8, 1st instance.
[76] Slovenian judge 6, 1st instance.
[77] T. Nowak, A. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, cit., p. 78.

level of the court at which they sit. Because the task of the first instance is to quickly resolve cases, judges argue, making a referral is often left to be dealt with by the higher instance. Interview judges say that "asking a preliminary question takes time and I prefer to end cases quickly. Thus I prefer to make the choice about the application of rules myself and leave it to the parties to appeal" and "as a judge of the first instance and in connection with the time delay [...] I would allow appeal".[78] In a similar vein, a Dutch judge admits: "I am not in favour of first instance judges asking for preliminary rulings from Luxembourg. I think this should be done via the higher courts or the Supreme Court [...] because it slows down the procedure enormously".[79]

Jaremba reported on a similar attitude among Polish judges. She argued that EU law is often perceived by the judges as something too sophisticated, too abstract and too singular "to have any bearing on the simple and common [...] cases which appear before the first instance civil courts".[80] The first instance judges restrict their role to "the mere application of the existing rules to the disputes they are presiding over" while "the task of questioning the law, deliberating upon its content and establishing its correct interpretation should [...] take place [...] at the higher level of adjudication, that is to say at the level of the appeal courts and the Supreme Court".[81] In a more recent study, Krommendijk reports that one of the most important factors influencing judicial referral activity is the way in which lower court judges see their role *vis-à-vis* the highest courts. Because of their limited law-making function and limited time and expertise on the issue, the first instance judges often step aside and leave the issue for the higher courts.[82] This is because the role of the first instance is believed to be limited to making decisions and resolving disputes.[83]

V.2. Workload v. resources ratio

A judge's workload v. resources ratio also plays an important role. Figure 3 illustrates the average number of incoming cases per judges for all three judicial instances across 20 EU Member States.[84] The fact that the first instance judges process the heaviest workload holds for nearly all EU Member States with the exception of Bulgaria, Romania

[78] *Ibid*.
[79] *Ibid*.
[80] U. Jaremba, *National Judges as EU Law Judges*, cit., p. 330.
[81] *Ibid.*, pp. 330–331.
[82] J. Krommendijk, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit., p. 790.
[83] *Ibid.*, p. 776.
[84] Council of Europe, European Commission for the efficiency of justice (CEPEJ), *Report on the European Judicial Systems – Efficiency and Quality of Justice*, 2014.

and Sweden.[85] The opportunity costs associated with making a referral are, therefore, much higher for judges at the bottom than for those at the higher tiers of a judicial hierarchy.[86] Yet, unlike workload − which exhibits the shape of a pyramid − resources typically exhibit the shape of a reverse pyramid. Judges sitting at the higher levels of judicial hierarchy (at the appellate or peak level) are more likely to enjoy the highest level of staff support (from law clerks, assistants and other staff) and are also more likely to have access to research units, court libraries and online databases.[87]

The fact that the appellate and peak court judges have an advantage over their colleagues sitting at the first instance courts when it comes to a workload v. resources ratio has not been overlooked by the interviewees. To justify why have they never turned to the Court of Justice with a preliminary question, Slovenian first instance judges admit that "the judge in the first instance is so burdened that simply [...] it is hard to imagine that he would take one month's time to work only on [a preliminary question]"[88] and, because of this, making a referral "seems [...] more appropriate for higher instances".[89] In fact, a less beneficial workload v. resources ratio is often used as a reason for not turning to the Court by means of the preliminary ruling procedure, even in situations that require the use of such procedure. Two of the interviewed judges encountered the need to ask for a preliminary ruling but have rather left if for the appellate level to deal with it. One judge says "I will let it to a higher instance to deal with it. They have a bit more time to spend on [the preliminary question]. We are burdened with a bunch of other things that are not exactly a high law".[90] Another judge admits that she is aware of the need to make a referral but is "waiting a bit to see whether the higher court will [send a preliminary question], given the fact that I am alone here, and up [at the appellate court], there are three judges".[91] Krommendijk reports that the appellate court judges are aware of the workload at the first instance. An interviewed high court judge from the Netherlands admits that, because

[85] Such exceptions can be explained by the docket control mechanism of a court. Supreme courts' cases can be disposed of by no or very little formal reasoning, yet some countries still include them in the official court's workload. A. DYEVRE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 920.

[86] I do, however, acknowledge that although lower court judges handle a high number of cases, many of them can be solved without much effort. The burden of cases of the higher instance is often more beneficial, yet judges working at the appellate and peak courts often do not have "the luxury" of having too many easy cases.

[87] A. DYEVRE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 920; M. GLAVINA, *Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia*, in C. RAUCHEGGER, A. WALLERMAN (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law*, Oxford: Hart, 2019.

[88] Slovenian judge 5, 1st instance.

[89] Slovenian judge 6, 1st instance.

[90] Slovenian judge 8, 1st instance.

[91] Slovenian judge 5, 1st instance.

he has more time to hear cases compared to a first instance judge, "I save them work when I refer myself when it is inevitable".[92]

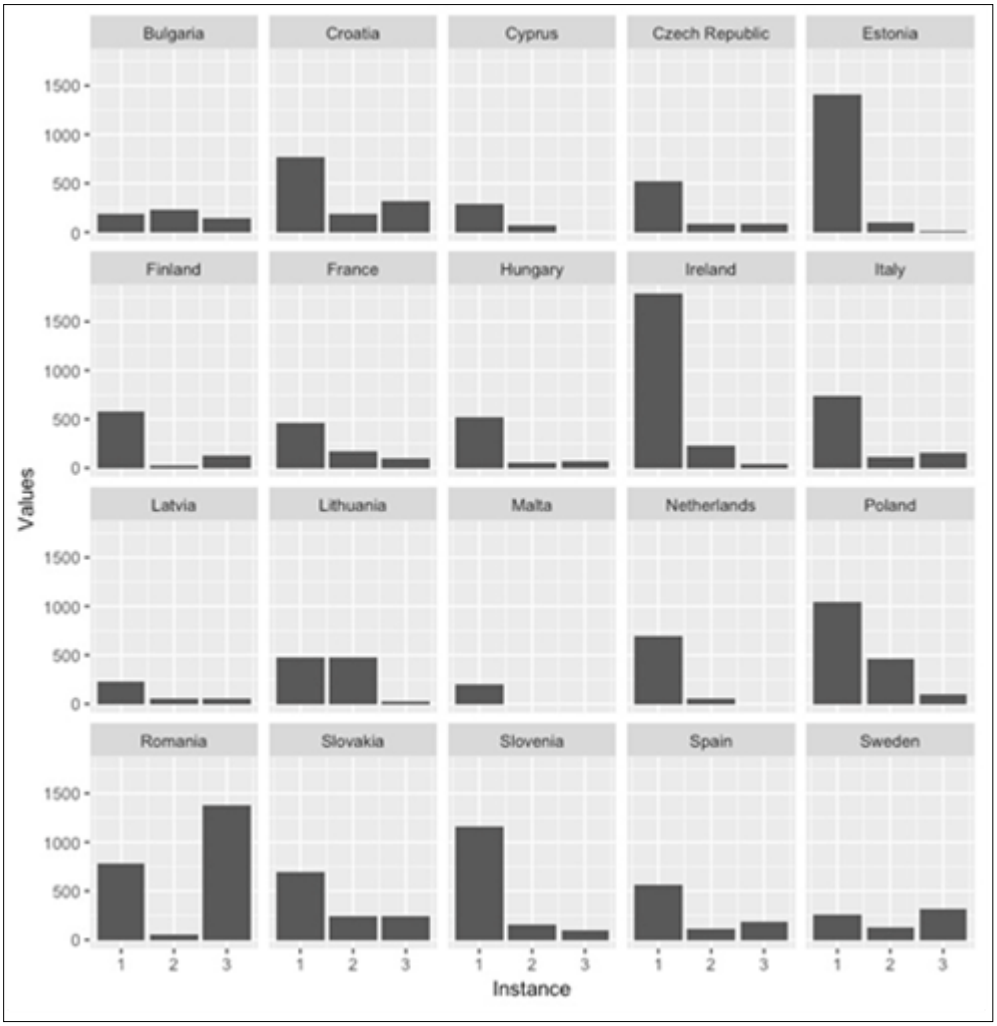

FIGURE 3. Average workload per judge across levels of judicial hierarchy (2014, civil cases). Source: CEPEJ, *Report on the European Judicial Systems – Efficiency and Quality of Justice*, in *CEPEJ Studies*, no. 26, rm.coe.int. The Figure illustrates judicial work-load across three judicial instances: *1*) first instance courts; *2*) second in-stance courts; and *3*) supreme courts. The workload was calculated as a fraction between the total number of incoming cases and the number of judges. There was no existing data

[92] J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit., p. 778.

for Austria, Belgium, Germany, Greece, Germany, Luxembourg and Portugal. Denmark was also excluded because of the doubtfully high data on the number of the first instance in-coming cases.

Interviewed judges have further stressed the importance of law clerks in unburdening judges, especially in the area of EU law application. A first instance judge says that at their court, they "have 7 law clerks for more than 20 judges". Appellate court judges, by contrast, "have relatively a lot of them".[93]

Talking about the role of law clerks, an appellate court judge says that clerks

> "take care of the case-law, enter the case-law into the computer, review the legal basis for the case. Every case that comes to our court is examined by law clerks. [...] A judge tells his law clerk: prepare me your legal position in this case. [...] In our Senate we have 4 judges and 2 law clerks. Generally, there is one law clerk per judge. [...] Law clerks unburden the work of a judge".[94]

When asked to describe their experience with making a referral, one appellate court judge from Croatia admits that

> "a law clerk worked on the preliminary question, a higher law clerk who has been at this court for 12 years now. We also contacted [...] a judge at the High Commercial Court [and] she had a look at the question. Then she said that she thinks it is done well and that it will succeed and we were the first [court] whose preliminary question succeeded [and resulted in a judgment of the Court]".[95]

Similar results on the role of the workload at the first instance of judging were reported by Nowak *et al.*[96] and Jaremba.[97] For example, a German judge who recently got promoted to the appellate level says: "When I was working at the first instance, I did not have time. But at this court, I have to get it right".[98]

That the appellate court judges show a higher propensity to refer legal questions to the Luxembourg Court is further supported by the statistical analysis. I find a strong and positive association between the level of the court and the propensity of national judges to turn to the Court of Justice in case of interpretative doubts with EU law (see Figure 4). In other words, judges sitting at the appellate court are more likely to use the procedure in practice as compared to their colleagues at the first instance. From a statistical point of view, this effect is significant at the 0.001 level in both models. As shown in Table 3, based on the first model the odds of having a "(very) high" probability of

[93] Slovenian judge 1, 1st instance.
[94] Slovenian judge 12, 2nd instance.
[95] Croatian judge 11, 2nd instance.
[96] T. Nowak, A. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, cit., p. 42.
[97] U. Jaremba, *National Judges as EU Law Judges*, cit., p. 220 *et seq.*
[98] T. Nowak, A. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, cit., p. 52.

sending a preliminary question to Court are 2.41 times (1-exp(-0.8221)= -2.41) lower among the first instance judges as compared to judges sitting at the appellate courts.

I illustrate the marginal effects of the variable "court level" on the referral-free EU law application in Figure 4[99] We can see that on the response level "I would definitely make a referral to the CJEU in case of interpretative doubts with EU law" is higher for the appellate level court judges than for those sitting at the first instance.

	Probability of sending a preliminary question	
	CC (1)	Random Forest (2)
Court level Reference: First instance	1.277*** (0.391)	0.923** (0.316)
Intercepts		
1|2	-3.3653	-3.3168
2|3	-1.4033	-1.3826
3|4	1.1447	1.3820
Nagelkerke R2	0.0835	0.0474
AIC	308.35	425.40
Number of observations	145	252

TABLE 3. Ordinal logistic regression. Note: ***p<0.001.

Both qualitative and quantitative data seems to suggest that the law-finding specialisation, as well as a more beneficial resource v. workload ratio give appellate national courts more incentive to turn to the Court of Justice with a preliminary question. Furthermore, since preliminary questions can only address points of law, second instance judges have much more to gain from outsourcing the law-creation task to the Court. These results go against the court empowerment and court competition offered by Weiler and Alter. The primary objective of national judges seems to be the uniformity of national jurisprudence and the desire to deliver as many "correct" decisions as possible and not the desire to expand their powers *vis-à-vis* other courts or other branches of the government. This finding supports the argument of Kornhauser,[100] Romeu,[101] Micklitz,[102] Dyevre *et al.*,[103] and Krommendijk[104] who argued that judicial participation is not

[99] Marginal effects show how the dependent variable changes with the change in a specific independent variable, while other explanatory variables are assumed to be held constant.

[100] L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit.; L.A. KORNHAUSER, *Judicial Organization & Administration*, in B. BOUCHAERTS, G. DE GEEST (eds), *Encyclopedia of Law and Economics*, cit., p. 317 *et seq.;* L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit.

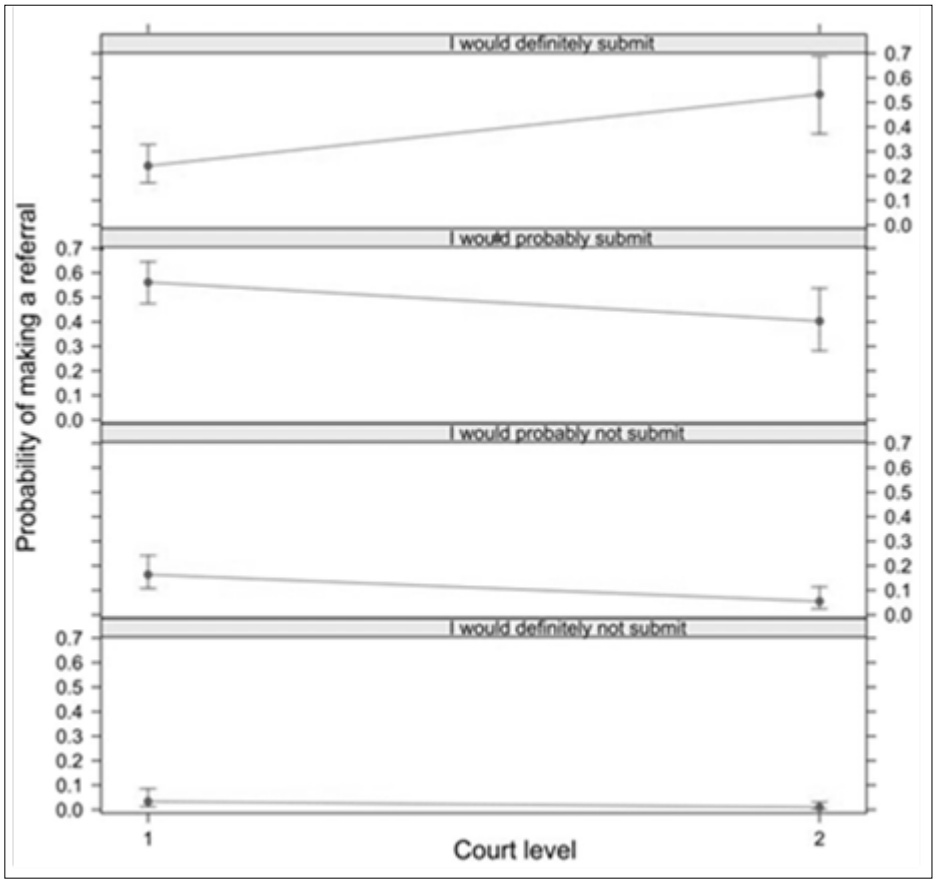

FIGURE 4. Marginal effects of the variable "court level".

driven by court competition (as believed by Alter) but rather by the desire to resolve disputes that appear on their dockets. Furthermore, looking at what the preliminary references are actually about, one can notice that a high number of referrals address technical questions, such as, corporate taxation, trademarks, patents, intellectual property, establishment freedom (for example, the recognition of foreign driving licences) public pro-

[101] F. RAMOS ROMEU, *Law and Politics in the Application of EC Law*, cit.; F. RAMOS ROMEU, *Judicial Cooperation in the European Courts*, cit.

[102] H.W. MICKLITZ, *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith*, Cambridge: Cambridge University Press, 2005.

[103] A. DYEVRE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit.

[104] J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit.

curement and VAT.[105] In situations like these, resorting to the preliminary ruling procedure is not necessarily about enforcing EU law over a conflicting national provision and challenging a Member State's noncompliance before the Court of Justice,[106] but it is rather connected to outsourcing the creation of knowledge to the Court about a specific problem of EU law interpretation. This is in line with the team model of decision making. In case of a technical problem with EU law interpretation, a national judge will turn to the Court of Justice because they know that this Court is a specialised EU law court and will produce a high-quality answer.[107] If a national judge decides to rule on an EU law issue alone, without involving the Court, this would require investing time and resources without necessarily improving the quality of the decision.[108] These findings add an additional dimension to the grand theories of European legal, political, economic and social integration that developed in the course of the last two decades.

VI. Conclusion

This *Article* contributes to the scholarly debate on cross-court variations in referral rates by exploring the role of the judicial hierarchy on the propensity of national judges to participate in the preliminary ruling procedure. A particular emphasis has been given to the relationship between the first and the second instance national judges and the question of how these two types of judges perceive their role in the preliminary ruling procedure and what could explain differences between them. Based on the mixed-method research design that combines qualitative and quantitative data, I find evidence that judicial participation in the preliminary ruling procedure is largely determined by the court specialisation and the division of labour and resources within a national judicial hierarchy. The results of in-depth interviews show that the time constraints arising from the pressure to handle a large caseload and to resolve cases quickly work as a counter-incentive for first instance judges to submit legal questions to the Court of Justice. The law-finding specialisation, a more beneficial workload v. resources ratio and the fact that preliminary questions can only address points of law, by contrast, give the second instance courts judges more reasons to engage with Art. 267 TFEU proceedings.

The Court of Justice has responded very defensively to any attempts of higher courts to jeopardise its alliance with lower courts and, by doing so, empowered the position of first instance judges. Yet, as I demonstrate in this *Article*, court specialisation and the division of labour and resources across judicial hierarchy made making a referral "the task for

[105] A. Dyevre, N. Lampach, *Issue Attention on International Courts: Evidence from the European Court of Justice*, in *The Review of International Organizations*, 2020, p. 1 *et seq.*; U. Jaremba, *National Judges as EU Law Judges*, cit., p. 342.

[106] R.D. Keleman, T. Pavone, *Mapping European Law*, cit., p. 360.

[107] F. Ramos Romeu, *Law and Politics in the Application of EC Law*, cit., p. 397.

[108] F. Ramos Romeu, *Judicial Cooperation in the European Courts*, cit., p. 11.

the higher instance". This does not mean that first instance courts will never send legal questions to the Court of Justice – they are still the most numerous courts in the EU and will resort to the Court's interpretation when the resolution of the case requires it. Instead, what this *Article* suggests is that, when confronted with a decision to make a referral under Art. 267 TFEU or to manage their workload, judges will make a trade-off in favour of the latter and let the higher instance deal with the Luxembourg Court.