



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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ACTIVE OR PASSIVE: THE NATIONAL JUDGES' EXPRESSION OF OPINIONS IN THE PRELIMINARY REFERENCE PROCEDURE

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ABSTRACT: What motivates national judges to be either active in the preliminary reference procedure by expressing opinions in the requests they send to the Court of Justice or passive by not voicing their views? This *Article* sheds light on how national judges perceive the possibility of framing the cases they refer to the Court, for instance, by expressing an opinion in defence of the challenged national law. Based on interviews with Swedish judges, this *Article* shows that the respondents express opinions to provide the Court with information and to influence the development of EU law. The *Article* also uncovers what motivates national judges *not* to express opinions. These three previously untheorised motivations are: 1) protecting one's reputation, 2) respecting the division of competences between the Court and national courts and 3) upholding the impartiality of the courts. Furthermore, the findings indicate that high court judges in particular are opposed to the inclusion of opinions in a request. In contrast, most of the interviewed lower court judges view the inclusion of opinions in the requests as practically mandatory. This *Article* proposes that this difference in attitudes towards opinions between high and low court judges originate from variations in professional norms regarding what constitutes appropriate behaviour.

KEYWORDS: preliminary reference procedure – national court opinion – Court of Justice – judicial dialogue – EU legal integration – active and passive courts.

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I. INTRODUCTION

The dominant view in the literature on European legal integration is that national courts play a pivotal role in ensuring the enforcement of EU law, and they continue to be the Court of Justice's main interlocutors.¹ The Court and the national courts are in a constant dialogue with each other within the preliminary reference procedure (Art. 267 TFEU). This procedure is the means by which the Court has been able to establish important principles of the EU's constitutional system such as the supremacy of EU law. However, the scholarly debate regarding how and why national courts engage in the preliminary reference procedure is far from resolved.² Whether or the extent to which national courts take part in the EU legal dialogue and loyally refer cases to the Court of Justice are premised upon a question of whether national courts seek to be *active co-producers* of EU legal norms in the preliminary reference procedure.³ By being active, national courts take part in constructing the European constitution.⁴ In contrast, if national courts do not engage in shaping EU legal development, it means that they leave the Court of Justice to apply EU law as it sees fit.⁵ Moreover, if courts from only a few Member States introduce their constitutional traditions before the Court while other national courts remain silent, the pluralistic European constitutional dialogue is likely to be undermined.⁶

An important aspect of how national courts engage in the preliminary reference procedure is whether they take advantage of the opportunity to express opinions on how a legal dispute they refer to the Court of Justice should be resolved. Such opinions have been described as a way for national courts to influence the course of EU legal integration.⁷ For instance, a national court may express that it finds a national provision to be incompatible

¹ E.g. A.-M. SLAUGHTER, *A Typology of Transjudicial Communication*, in *University of Richmond Law Review*, 1994, p. 99 *et seq.*; J. WEILER, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1994, p. 510 *et seq.*; W. MATTLI, A.-M. SLAUGHTER, *Revisiting the European Court of Justice*, in *International Organization*, 1998, p. 177 *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.34 *et seq.*; A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2007, p. 121 *et seq.*; G. DAVIES, *Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 76 *et seq.*

² J. KROMMENDIJK, *It Takes Two to Tango. The Preliminary Reference Dance Between the Court of Justice of the European Union and National Courts: An Introduction*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 745 *et seq.* .

³ J.E. RYTTER, M. WIND, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, in *International Journal of Constitutional Law*, 2011, p. 470 *et seq.*

⁴ M. CARTABIA, *Europe and Rights: Taking Dialogue Seriously*, in *European Constitutional Law Review*, 2009, p. 25.

⁵ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, *cit.*, p. 500.

⁶ M. CARTABIA, *Europe and Rights*, *cit.*, p. 25 *et seq.*

⁷ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process—Stage 1: National Court Preemptive Opinions*, in *European Journal of Political Research*, 2006, p. 531.

with EU law.⁸ By expressing opinions, national courts can be understood as actively engaging in both a dialogue with the Court and the shaping of EU legal norms. Conversely, if national courts refrain from including opinions in their referrals, they leave the stage open for the Court to apply EU law, effectively becoming passive consumers of EU law.

While significant steps have been taken to investigate the occurrence and content of national court opinions⁹ and how the Court of Justice responds to those opinions,¹⁰ little is known about how national judges perceive the practise of including their views in requests for preliminary rulings. For instance, the issue of what motivates national judges to include opinions in the request for preliminary rulings has not yet been empirically examined. However, answering such questions is necessary for understanding the national courts' dialogue with the Court and their role in the EU legal system. To address this gap in the previous research and to shed new light on the discussion regarding the extent to which national courts are active in the preliminary reference procedure, this *Article* explores what motivates national judges to either express opinions in the requests for preliminary rulings or refrain from doing so.

Drawing upon interviews with 20 Swedish judges, the findings show that although some judges view opinions as being formally required and a means to influence the course of EU law, the majority is opposed to the practise of expressing opinions in referrals. According to the results, national judges are hesitant to voice opinions because they believe that such opinions are inappropriate and undermine the impartiality of the courts. Moreover, the results suggest that high court judges in particular find the expression of opinions to be irreconcilable with the overarching principle of judicial impartiality and the division of competences between the national courts and the Court of Justice. This *Article* proposes that this difference in attitudes towards opinions between high and low court judges originate from variations in professional norms.

The remainder of this *Article* is organised as follows. Section II presents the previous research regarding why national courts express opinions in requests for preliminary rulings. Section III describes the materials and methods. Section IV presents the empirical findings regarding what motivates national judges to either express opinions in requests for preliminary rulings or refrain from stating their views. Section V develops a theoretical explanation for the difference in attitudes between lower courts and courts

⁸ K. LEIJON, *National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?*, in *West European Politics*, 2020, p. 13.

⁹ *Ibid.* p. 1 *et seq.*; S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 527 *et seq.*

¹⁰ R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts' Preliminary Questions to the CJEU: Start of a Dialogue or Talking to Deaf Ears?*, in *Cambridge International Law Journal*, 2017, p. 122 *et seq.*; A. WALLERMAN, *Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example*, in M. DERLÉN, J. LINDHOLM (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Oxford: Hart, 2018, p. 153 *et seq.*

of final instance. Section VI discusses the implications of the findings for the functioning of the judicial dialogue between the Court of Justice and the national courts and the debate about active and passive national judges in the EU legal system.

II. NATIONAL COURT OPINIONS IN THE PRELIMINARY REFERENCE PROCEDURE

The dialogue between the Court of Justice and the national courts in the preliminary reference procedure includes many different aspects. The most well-studied aspect of the procedure is the extent to which national courts initiate a dialogue by referring cases to the Court and asking questions regarding EU law.¹¹ However, *how* national courts initiate the dialogue varies: do national courts, or do they not, provide their own answers to the questions they ask the Court? According to the formal recommendations, when drafting a request for a preliminary ruling, a national court may express an opinion regarding how it believes EU law should be interpreted and how the legal case at hand should be resolved.¹²

Including opinions in the request for a preliminary ruling is allowed but not mandatory,¹³ which raises the question of why national courts spend time formulating opinions. Drawing upon previous research, two main explanations can be discerned. First, the expression of opinions can be understood as a way for national courts to share valuable information with the Court of Justice.¹⁴ Cartabia emphasises that the preliminary reference procedure can be “a tool in bringing traditions, experience, reasoning and different points of view before the Court of Justice”.¹⁵ This type of information sharing becomes important because the Court is said to lack knowledge about the legal particularities of each Member State, which leads it to deliver rulings that are insensitive to the

¹¹ J. WEILER, *A Quiet Revolution*, cit.; A.S. 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.; M. BROBERG, N. FENGER, *Variations in Member States’ Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?*, in *European Law Journal*, 2013, p. 488 et seq.; A. DYEURE, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?*, in *European Constitutional Law Review*, 2013, p. 139 et seq.; A. DYEURE, M. GLAVINA, A. ATANASOVA, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2019, p. 1 et seq.

¹² E.g., F.G. JACOBS, *Judicial Dialogue and the Cross-fertilization of Legal Systems: The European Court of Justice*, in *Texas International Law Journal*, 2003, p. 547 et seq.; S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit.; A. ROSAS, *The European Court of Justice in Context*, cit., p. 126.

¹³ CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para. 18: “The referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling”.

¹⁴ F. RAMOS ROMEU, *Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior*, in *Global Jurist Frontiers*, 2002, p. 31.

¹⁵ M. CARTABIA, *Europe and Rights*, cit., p. 25.

Member States' legal and political traditions.¹⁶ In a worst-case scenario, the rulings of the Court of Justice may even have a disruptive effect on a national legal system.¹⁷ National court opinions have the potential to alleviate this problem. By stating their views, national judges may provide the Court with a better understanding of the circumstances of the referred case and the national legal context,¹⁸ thereby giving the Court an opportunity to show respect for national constitutional traditions.

Others believe that the national courts' expression of opinions is not merely about providing the Court of Justice with essential information. Instead, the second explanation builds on the assumption that opinions are intended to directly steer the course of EU legal integration. Nyikos describes the opinions as rhetorical weapons that national courts use to influence the Court's understanding of the legal questions referred and, by extension, its final ruling.¹⁹ Previous research has theorised that the Court sometimes takes the national courts' opinions into account when deciding cases because it wants to mollify the national courts and thereby ensure that they continue to request preliminary rulings.²⁰ The EU legal system is dependent on the willingness of national courts to refer cases to the Court. National courts, in particular constitutional courts, have at times refused to refer cases to the Court when they disapprove of the interpretations made by the supranational court.²¹ The Court is therefore well aware of the need to accommodate the views of national courts. Similarly, as stressed by Wallerman-Ghavanini (in this Special Section),²² the Court wishes not to upset the national courts and undermine their trust by delivering judgments that the referring court finds problematic.

Regarding the actual content of the opinions, national courts have been found to express support for either a national law (or decision) or for EU law.²³ By expressing support for EU law, *i.e.*, stating that they consider a national policy to be incompatible with EU law, national courts signal to the Court that an expansion of the EU legal scope is acceptable.

¹⁶ F.W. SCHARPF, *Legitimacy in the Multilevel European Polity*, in *European Political Science Review*, 2009, p. 192; D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 471.

¹⁷ K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 48; R. DEHOUSSE, *The European Court of Justice: The Politics of Judicial Integration*, Basingstoke: Macmillan, 1998, p. 173.

¹⁸ F.G. JACOBS, *Judicial Dialogue and the Cross-fertilization of Legal Systems*, cit., p. 548; A. ROSAS, *The European Court of Justice in Context*, cit., p. 126; A.-M. SLAUGHTER, *A Typology of Transjudicial Communication*, cit., p. 101.

¹⁹ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 530.

²⁰ *Ibid.*, p. 531.

²¹ K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 61 *et seq.*

²² A. WALLERMAN GHAVANINI, *Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 887 *et seq.*

²³ K. LEIJON, C. KARLSSON, *Nationella domstolar som politiska aktörer: Främjare av rättslig integration eller försvarare av nationella intressen?*, in *Statsvetenskaplig Tidskrift*, 2013, p. 5 *et seq.*; K. LEIJON, *National Courts and Preliminary References*, cit., p. 13.

National courts that instead express support for a national provision, for instance, by stating that a national policy that restricts the free movement of goods should be deemed compatible with EU law since it aims to protect public health,²⁴ show the Court that an expansion of EU law is not acceptable in their Member State's political context. However, the national courts do not always express opinions. Previous studies have identified opinions in approximately 40 per cent of requests for preliminary rulings.²⁵ Nyikos suggests that formulating opinions is time consuming, and therefore, the national courts that lack the necessary resources will refrain from including opinions in the requests.²⁶

The previous research on national court opinions has also theorised about the expected behaviours of courts at different levels of the judicial hierarchy. Building upon Alter's inter-court competition hypothesis,²⁷ Nyikos suggests that lower national courts are more likely to include opinions in the requests than courts of final instance. The argument is that the EU legal system mainly provides lower national courts with new powers that increase their influence *vis-à-vis* national courts of final instance. By referring cases to the Court and expressing opinions, a lower court is able to communicate its preferred outcome, that which it is trying to "insulate against revisions".²⁸ With the support of the Court's answers to the legal questions posed in requests for preliminary rulings, lower national courts can create precedents and exercise judicial review – powers that previously were reserved for the courts of final instance. Lower national courts are therefore expected to actively participate in the preliminary reference procedure since it empowers them.

In sum, national court opinions are understood in the literature as an important part of the dialogue between national courts and the Court of Justice. Based on the previous research, the national courts with the necessary resources are expected to express opinions because they want to share information with the Court or influence its final ruling.

III. METHODS AND MATERIALS

The previous research has proposed plausible theoretical explanations as to why national courts would spend time writing opinions. However, national judges' reasons for including opinions in requests for preliminary rulings have not yet been investigated empirically. In addition, why some national judges choose not to express opinions is under-theorised. To address these gaps in the literature, this *Article* aims to understand

²⁴ Referred to as the norm of proportionality, see G. DAVIES, *Activism Relocated*, cit., p. 81.

²⁵ K. LEIJON, *National Courts and Preliminary References*, cit., p. 11; S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 539.

²⁶ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 533.

²⁷ K.J. ALTER, *The European Court's Political Power*, in *West European Politics*, 1996, p. 458 *et seq.*; K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 46.

²⁸ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 536.

what drives the actions of individual national judges in the preliminary reference procedure. Therefore, it is necessary to turn to these actors and enquire about their view of the possibility of expressing opinions.

The study builds on semi-structured interviews²⁹ with 20 Swedish judges who have all participated in the preliminary reference procedure at least once.³⁰ The selection of respondents among judges with experience of the procedure was made with the intention of achieving variation in one aspect that previous research has identified as important namely, court level. Nyikos found that courts of final instance appear to be less likely to express opinions compared to lower courts.³¹ Thus, a random selection of respondents was made from each of the three court levels with the purpose of capturing how judges from first-instance courts and courts of appeal perceive the expression of opinions in the preliminary reference procedure compared to judges in the courts of final instance.³²

This *Article* contributes to the literature in two ways. First, examining the motivations of Swedish judges makes an important empirical contribution to our knowledge of national court behaviour in the preliminary reference procedure. To date, there have been no studies of how judges in any Member State perceive the possibility of including opinions in requests for preliminary rulings. Moreover, while several studies have investigated the attitudes of other Member State judges towards the preliminary reference procedure, for example, in Denmark,³³ France, Germany,³⁴ Poland,³⁵ Croatia and Slovenia,³⁶ there has been no systematic investigation of how Swedish judges view the procedure.

Second, Sweden is arguably a suitable case for exploring national judges' reasons for *not* expressing opinions in the requests to the Court of Justice. The Swedish constitutional architecture has been described as a system in which the judiciary is an integral

²⁹ For information on how the interviews were carried out, see section IV.

³⁰ The reason for excluding judges who have never referred cases to the Court is that any discussion about their views on the actual expression of opinions would be hypothetical, which in turn would undermine the reliability of the findings.

³¹ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 540.

³² Based on a list of all 102 requests for preliminary rulings made by Swedish courts from 1995 to 2015 the cases were sorted into two groups according to which court branch (civil or administrative) they belonged to. Then, the cases were sorted by court level (courts of first instance, courts of appeal and courts of last instance). The cases were then chosen at random from each court level and branch. This selection process resulted in ten cases from the courts of final instance, six cases from the courts of appeal and four cases from the courts of first instance.

³³ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit.; M. WIND, D.S. MARTINSEN, G.P. ROTGER, *The Uneven Legal Push for Europe Questioning Variation when National Courts Go to Europe*, in *European Union Politics*, 2009, p. 63 *et seq.*; M. WIND, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, in *Journal of Common Market Studies*, 2010, p. 1039 *et seq.*

³⁴ K.J. ALTER, *Establishing the Supremacy of European Law*, cit.

³⁵ U. JAREMBA, *National Judges as EU Law Judges: The Polish Civil Law System*, Leiden: Nijhoff, 2013.

³⁶ 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, p. 251 *et seq.*

part of the public administration system rather than an independent branch of government.³⁷ It can be hypothesised that judges in this type of constitutional system have a negative attitude towards the expression of opinions. The logic behind this expectation is that Swedish courts do not perceive themselves as an independent power³⁸ whose goal is to evaluate whether Swedish policies stand in conflict with supreme EU law. Examining Swedish judges' views on the expression of opinions is therefore expected to generate new hypotheses regarding why national judges do not express opinions in dialogue with the Court.

There are certain limitations to the data. Only judges who had participated in the preliminary reference procedure were included in the study, which means that judges with no such experience were omitted. However, the aim of the study is not to generalise about the beliefs of the full population of Swedish judges. Instead, the purpose of the inquiry is to capture the in-depth perspectives of individuals³⁹ who are closely involved in the preliminary reference procedure. For this reason, it is necessary to concentrate on the judges with experience of the procedure and who have (or have not) actually made a decision to include an opinion in the referral.

IV. RESULTS

During the in-person interviews, the judges were asked to describe the case(s) they had referred to the Court of Justice to allow them to reflect upon the decision-making process using their own words. This type of "grand tour question"⁴⁰ allows respondents to talk freely about issues with which they are familiar. The approach also allowed for more in-depth probing into the specific decisions that the judges had made regarding the expression of opinions in these cases and their reasons for such decisions.

The analysis of the respondents' answers shows that four of the judges had not thought at all about including opinions in the request for preliminary rulings.⁴¹ However, the other sixteen respondents had reflected upon including opinions and had, as will be shown, rather divergent views on the practice.

³⁷ M. ZAMBONI, *The Positioning of the Supreme Courts in Sweden – A Democratic Oddity?*, in *European Constitutional Law Review*, 2019, p. 671.

³⁸ *Ibid.*, p. 678 *et seq.*

³⁹ O. TANSEY, *Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling*, in *PS: Political Science & Politics*, 2007, p. 765 *et seq.*

⁴⁰ B.L. LEECH, *Asking Questions: Techniques for Semistructured Interviews*, in *PS: Political Science & Politics*, 2002, p. 667.

⁴¹ Respondents 7, 8, 11, and 12.

IV.1. ACTIVE COURTS: MOTIVATIONS FOR EXPRESSING OPINIONS

A minority of the respondents (six) believed that national courts should be active and express opinions in the preliminary reference procedure because opinions are required⁴² or because opinions give national judges the possibility of influencing EU law.⁴³ The following quotation illustrates the former view: "You should still state the court's preliminary understanding of how this EU legal issue should be assessed. Yes, in principle, it is your responsibility to do so" (respondent 9). As the above quotation shows, the respondent believes that national courts are basically required to state their view of the legal issues that they refer to the Court of Justice. With regard to the theoretical expectations derived from the previous research, this motivation corresponds fairly well with the proposal that national courts express opinions with the purpose of providing the Court with information.⁴⁴ Interestingly, the respondent's answer could be perceived to imply that opinions are somehow mandatory. However, according to the written recommendations, courts *may* state their view but are not required to do so. Nevertheless, several respondents described expressing opinions as part of the national courts' responsibility. This finding suggests that the judges' understanding of the recommendations may have been shaped by signals from the Court of Justice or from peers within the Swedish legal system about how the recommendations should be interpreted, effectively encouraging the use of opinions.

In addition, two respondents⁴⁵ said that they were in favour of including opinions in requests for preliminary rulings because it is required. However, they had not done so themselves because they considered it too risky. One of them stated: "[Q: What about expressing opinions?] I did not have the resources, and I did not have the skills, so I would have thought it to be incredibly risky to start predicting how it should go, so I didn't. But one can always, if one wants to, hide behind the shield of impartiality" (respondent 4).

The same judge further elaborated on the potential risk associated with expressing opinions: "An important part is that you're simply afraid to seem stupid. [Q: Of making mistakes?] Yes, you're afraid to write something that will be in letters of fire, especially if the Court of Justice says, 'But how can you not realise that this is a completely impossible way to see it?'" (respondent 4).

This quotation sheds light on one of the theoretically less explored aspects of national court opinions, specifically, why courts sometimes choose not to include opinions. The previous research has suggested that time constraints may prevent courts

⁴² Respondent 1, 2, 3, 4 and 9. However, respondents 3 and 4 mentioned that although they believed that opinions should be expressed by national courts, they had not yet done so themselves.

⁴³ Respondent 18.

⁴⁴ F.G. JACOBS, *Judicial Dialogue and the Cross-fertilization of Legal Systems*, cit.; A. ROSAS, *The European Court of Justice in Context*, cit., p. 126.

⁴⁵ Respondents 3 and 4.

from formulating opinions.⁴⁶ While the judges mentioned a lack of resources, it was not the only factor influencing their decision. Instead, these judges' decision not to express opinions was built on considerations of how to avoid appearing "stupid" in front of colleagues and peers. As the quotation shows, the perceived risk of expressing opinions is that the national judges might be publicly criticised by the Court of Justice for having misinterpreted EU law. This finding is in line with previous research regarding how lower court judges think about their decisions in light of the expected reactions from high courts. The fear of the lower court judges is that critical remarks from higher court judges will have a negative effect on their future career and on their reputation within the legal community.⁴⁷ The same type of consideration was also made by judges who were afraid of referring the "wrong" type of cases to the Court.⁴⁸

Another respondent agreed that national judges should include opinions in requests for preliminary rulings. However, this interviewee differed from the aforementioned judges in regard to the reason. As the quotation below shows, the respondent thought that judges working in the courts of final instance should state their opinions to influence the development of EU law:

"It has been discussed at a general meeting in court 'X', namely, that court 'X' should provide some suggestions, so to say, or views that can steer the work of the EU court, and I thought that could well be done. [...] We are the bigger ones; we are more used than other courts to cracking hard cases and to seeing matters from a broad perspective; there would be nothing wrong with that" (respondent 18).

According to this judge, the highest national courts have the competence to formulate opinions while the other lower courts do not. The quotation offers a clearly articulated statement about what the respondent saw as the desired consequences of including opinions: to steer the course of EU law. This view corresponds to the theoretical expectations formulated by Nyikos, specifically, that national court opinions are used to influence the course of EU law.⁴⁹ This makes it distinct from the reasoning of the respondents who said that national judges should state their view because it is required.

⁴⁶ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 533.

⁴⁷ M. HEUMANN, *Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys*, Chicago: University of Chicago Press, 1978, pp. 144-146; 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. 135.

⁴⁸ K. LEIJON, *National Courts as Gatekeepers in European Integration: Examining the Choices National Courts Make in the Preliminary Ruling Procedure*, doctoral thesis, Acta Universitatis Upsaliensis, Uppsala University, 2018.

⁴⁹ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 530.

IV.2. PASSIVE COURTS: MOTIVATIONS FOR NOT EXPRESSING OPINIONS

Thus far, the analysis has mainly focused on why judges think opinions should be included in requests for preliminary rulings. However, most⁵⁰ of the respondents held the opposite view. When asked to elaborate on why they believed that national judges should not state their opinions, the respondents said that doing so would be incompatible with their role as judges: expressing opinions is simply not something national judges should do. Their motivation for not expressing opinions appeared to rest on a certain conception of the responsibilities of national judges in the EU legal system.

Six of the respondents⁵¹ referred to the division of competences between the Court of Justice and the national courts when explaining why national judges should not include opinions in their requests for a preliminary ruling. This view is illustrated in the following quotations: "It's not the national courts' responsibility to defend the implementation that has been done but rather to say that 'this is what Swedish law looks like, and that's what we're dealing with.' But that the national court would assess whether the Swedish law has been correct or not, that feels a bit strange" (respondent 19).

"I can't remember that we have ever expressed our own opinion regarding the questions we ask; it feels a bit strange [...]. I think about it as being a question of constitutional division of skills, and we do not have the competence to take a position on that question. There is someone else who is supposed to do that, and then it is up to that court [the Court of Justice] to make the decision" (respondent 16).

The respondents thought that a judge who includes an opinion in the request for a preliminary ruling exceeds his or her powers. It is the responsibility of the Court, not the national judges, to interpret EU law. The following quotation provides valuable information as to why opinions were seen as an inappropriate practice in the Swedish context: "I was thinking, we have something called 'the lift', that a first instance court can send a legal matter concerning precedent to the Supreme Court and say: 'We think this is difficult, we think you should take a stand on this matter'. It would then be quite strange if the first instance court says: 'We think you should decide the case in this way'; that's about the same thing" (respondent 16).

In this quotation, the judge uses analogical reasoning and compares the preliminary reference procedure with a similar domestic procedure, "the lift". In this domestic procedure, lower court judges do not state their view when asking higher court judges for guidance. According to the respondent, the same "rule" applies in the relationship between the national judges and the Court of Justice. National judges are subordinate to the Court and should therefore not forestall its work by stating their own view. The respondent's standpoint on the matter cannot be traced to any formal guidelines or policies. Instead, it

⁵⁰ 10 judges (of the 16 respondents that had considered the expression of opinions).

⁵¹ Respondents 5, 14, 15, 16, 17 and 19.

appears that the respondent's reasoning is built on his or her understanding of what informal professional norms in the Swedish legal system prescribe as appropriate.

Among the respondents who did not think that opinions should be expressed were four judges who commented that the main problem with having national judges expressing opinions is that it clashes with the courts' role as an impartial arbitrator⁵². One respondent stated: "I perceive it as a party writing. We are not supposed to sit around and argue how we think that the Court of Justice should interpret EU law. It's like we are some sort of party to the case, and we are not. We do not represent Sweden; we are a Swedish court that is supposed to request preliminary rulings" (respondent 6).

According to this respondent, opinions are something expressed by the parties to the case, not the court itself. The judge also underscored that national judges do not represent the Swedish government during the proceeding in any way. Another respondent reflected upon the discrepancy between the practice of including opinions and the task of judging: "Yes, I just thought about this thing about expressing an opinion, I felt now when you said it, that it feels very odd in some way. If you were to decide that case later, will you then be disqualified from judging? It would be an unfamiliar practice for me to express an opinion on how I think the case should be decided before I actually decide the case" (respondent 10).

As the judge made clear in this quotation, expressing opinions stands in conflict with the judges' main task, namely, to be impartial and deliver legitimate rulings. The respondent identified the main problem with including opinions as the possibility that it might disqualify the judges from judging.

These ten judges' approach to the preliminary reference procedure and EU law can be understood as passive, at least in terms of expressing opinions. The recurring theme in the judges' responses was that opinions are "odd" and "strange" and that expressing them exceeds the national judges' authority. These descriptive terms suggest that the respondents did not perceive the stating of opinions as being part of their responsibilities in the preliminary reference procedure; they even considered it inappropriate. The respondents' reasoning appears to follow from their understanding of the obligations of being a judge in the Swedish legal system. From the statements, we can also discern what the respondents thought is appropriate behaviour for a judge: to be an impartial arbitrator who keeps within the perimeters of one's competences.

V. PASSIVE HIGH COURT JUDGES?

One of the main findings of this *Article* is that approximately half of the interviewed judges consider the inclusion of opinions in the requests for preliminary rulings to be inappropriate. Their view was that the inclusion of opinions is alien and that expressing opinions

⁵² Respondents 6, 10, 13 and 20.

means exceeding the judge's authority, possibly disqualifying him or her from being an impartial arbitrator. It may appear to be a trivial finding that judges perceived impartiality and keeping within the perimeters of their authority as important. However, what makes it interesting is that these principles were understood by the judges as irreconcilable with the inclusion of opinions in the request for a preliminary ruling. In addition, the judges did not base their standpoint regarding opinions on the prescription of any formal rule. Recall that opinions are allowed under the official recommendations. Instead, the answers from the respondents show that the rendering of national court opinions is not an accepted practice within some segments of the Swedish judiciary. What makes this finding even more intriguing is that almost all of the respondents who considered the practice of expressing opinions to be inappropriate and incompatible with the norm of impartiality belonged to courts of final instance. In contrast, the respondents who viewed the inclusion of opinions as close to mandatory belonged to lower courts. Of course, the uncovered differences between high and low court judges cannot be generalised to the population of Swedish judges due to the fairly small number of respondents. Nevertheless, the finding can be used as a basis for theorising about different approaches to the expression of opinions in requests for preliminary rulings.

This *Article* proposes that the differences in how high and low court judges view the expression of opinions stem from how judges at different levels of the judicial hierarchy interpret their role in the preliminary reference procedure. What is particular about high courts is that they have a prominent role in the legal system. The responsibility of high courts and, by extension, high court judges, is to protect the legal order and to steer the overall legal development.⁵³ In contrast, lower court judges need to focus only on the case at hand. Given the differences in responsibilities, it is reasonable to expect that the professional norms shaping judges' reasoning also differ between high and low courts. In turn, it can be argued that these differences result in varying conceptions of what is appropriate behaviour for a judge in the preliminary reference procedure. The high court judges are likely to place a greater emphasis on the professional norms related to matters of overarching judicial principles since they are part of an institution that has the responsibility of protecting the legal order. They are expected to be wary of potential threats to fundamental principles such as the impartiality of the judiciary. If they perceive the expression of opinions as a threat to judicial impartiality and the legitimacy of the courts, it would be nearly impossible for them to include opinions in a request for a preliminary ruling. Impartiality is embedded in the high court judges' professional identity, and expressing opinions is simply incompatible with what they represent. Indeed, lower court judges may also care about broad legal principles and the legitimacy of the judicial system. However, considering overall legal development or how to protect the legitimacy of the judiciary is not part of their everyday job description.

⁵³ K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 48.

Therefore, they are not expected to experience a conflict between fundamental principles such as impartiality and the inclusion of opinions in such requests.

An objection to this interpretation is that the high court judges may be referring to the need to safeguard the courts' impartiality instead of admitting that they are not comfortable with expressing opinions for other reasons. An example of such a reason that was brought up by other respondents is that national judges are simply afraid of being criticised by the Court of Justice for expressing the "wrong" opinion. However, although this fear of appearing incompetent may explain why a few judges refrain from expressing opinions, it does not fit with the overall impression from the interviews. When asked about the practice of including opinions in the requests, the instinctive reaction of most high court judges was that opinions are inappropriate and a threat to the judges' impartiality. Then, they proceeded to elaborate on their reasons for this view in a rather probing manner, revealing various considerations connected to informal professional norms. The lasting impression from the interviews is that these judges did not refer to "impartiality" simply as a pretext for not including opinions. Instead, it seemed that the respondents based their decisions on what they thought the informal norms prescribed as the appropriate course of action.

VI. CONCLUDING DISCUSSION

What motivates national judges to be either active in dialogue with the Court of Justice by expressing opinions in the requests or passive by refraining from doing so? This *Article* has provided the first systematic analysis of how judges perceive the possibility of including their own opinions in their referrals to the Court of Justice. First, the findings show that the interviewed judges have divergent views regarding the appropriateness of including opinions in the requests. While some believe that expressing opinions is close to mandatory, others find the practice highly inappropriate. Second, the respondents' reasons for expressing opinions correspond to the expectations formulated in the literature such as their influence on the development of EU law and the information that is provided to the Court. However, the study also uncovered what motivates national judges *not* to express opinions. These three previously unknown motivations are: 1) protecting one's reputation, 2) respecting the division of competences between the Court and national courts and 3) upholding the impartiality and legitimacy of the courts.

In addition, the results suggest that high court judges in particular find the expression of opinions to be irreconcilable with the overarching principle of judicial impartiality and the division of competences between the national courts and the Court of Justice. In contrast, most of the interviewed lower court judges view the inclusion of opinions in the requests as practically mandatory. These findings challenge the hypothesis presented in previous research which proposed that differences in the number of opinions expressed

between lower courts and courts of final instance is the result of lower courts seeking judicial empowerment.⁵⁴ Instead, this *Article* argues that different attitudes towards opinions between high and low court judges originate from variations in professional norms. Judges working in final instance courts face norms that place a greater emphasis on overarching judicial principles such as impartiality since they have the responsibility of protecting the legal order. This, in turn, leads high court judges to find opinions to be inappropriate because such opinions, in their view, stand in conflict with impartiality.

The results of the study have several important implications for our understanding of both the dialogue between the national courts and the Court of Justice and the role of the national courts in the preliminary reference procedure. Expressing their opinions in the requests is one way for national judges to actively engage in a dialogue with the Court and to possibly influence the final ruling of the EU court. As Rytter and Wind emphasise, it is vital that national courts take part in the development of EU legal norms; otherwise, they leave the shaping of EU law to the Court.⁵⁵ However, four of the respondents were unaware of the possibility to include opinions in the requests. Moreover, the findings indicate that there is resistance towards expressing opinions among high court judges in Sweden. Although the design of this study does not allow for generalisations of this result to all Swedish judges, it is imperative to discuss the implications of the identified resistance. As Glavina (in this Special Section) and others⁵⁶ have shown, judges in the higher courts have more resources at their disposal than lower court judges and should therefore be able to formulate high quality opinions. The Court of Justice has also been found to show respect towards the constitutional traditions of certain Member States.⁵⁷ However, if high court judges refuse to include opinions in the requests, there is a risk that the Court will remain unaware of the national legal and political context and, as a result, deliver a ruling that overrides salient national policies. This may become a problem for the Swedish judiciary. If a national judiciary is not active in the preliminary reference procedure, it runs the risk of becoming constitutionally irrelevant.⁵⁸ After all, the preliminary reference procedure is an opportunity for national courts "to influence the direction of European law in an ongoing conversation and dialogue".⁵⁹

This *Article* has generated new hypotheses regarding why national judges do not always express opinions and why high court judges are less likely than lower court judges to include their views in requests for preliminary rulings. However, we still have only limited knowledge about what drives the actions of individual judges in the preliminary reference procedure. Future studies should aim to test these hypotheses in other

⁵⁴ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 536.

⁵⁵ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit., p. 500.

⁵⁶ A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 920.

⁵⁷ M. CARTABIA, *Europe and Rights*, cit., p. 28.

⁵⁸ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit., p. 499.

⁵⁹ *Ibid.*, p. 500.

contexts, for instance, whether or the extent to which informal professional norms, such as upholding the impartiality of the courts, also shape the behaviour of high court judges in other Member States and make them less willing to express opinions in dialogue with the Court of Justice.