



## 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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## POWER TALK: EFFECTS OF INTER-COURT DISAGREEMENT ON LEGAL REASONING IN THE PRELIMINARY REFERENCE PROCEDURE

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TABLE OF CONTENTS: I. Introduction. – II. Conceptual framework and terminology. – III. Data and research design. – III.1. The dataset. – III.2. Research process. – IV. The Court's behaviour. – V. The Court's strategies. – VI. Conclusions.

ABSTRACT: Recent cases of national court rebellion against the rulings of the Court of Justice have raised questions about the meaning of judicial cooperation within the preliminary reference procedure. Although tensions are inevitable, the trust of Member State judiciaries is crucial for the dissemination and enforcement of the Court's rulings. This *Article* uses legal empirical method to study how the Court cultivates its relationship with national courts. Specifically, it examines the reasoning and drafting style of the Court of Justice when it delivers a judgment that conflicts with the referring court's view, as expressed in the order for reference, on how the questions ought to be resolved. The findings indicate that disagreement with the referring court affects the Court's drafting and justification choices. In particular, the *Article* identifies two strategies that the Court resorts to when rejecting the view taken by a referring court: conflict avoidance and appeal to (illegitimate) authority. It is argued that these strategies are not conducive to furthering the judicial cooperation that the Court claims to be engaged in, nor to the legitimacy of its judgments within the Member States.

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## I. INTRODUCTION

It is an established truth of EU legal history that the process of constitutionalisation of Union law was spearheaded by the Court of Justice in collaboration with national courts through what Weiler has called a “remarkable consensual multilogue”.<sup>1</sup> In this process, the preliminary reference procedure laid down in Art. 267 TFEU was and continues to be a main avenue for legal and constitutional development. Consequently, national courts play a crucial role as the Court’s interlocutors. The success of the preliminary reference procedure hinges upon the trust and support of national courts, who not only decide whether cases reach the Court but also enforce its rulings against (potentially reluctant) national executives and corporate interests.<sup>2</sup> Such trust has not always been forthcoming; one needs only to think of the protracted (albeit diminishing) reluctance of constitutional courts to engage with the Court.<sup>3</sup> Against this background, it is reasonable to assume that the Court would be at least somewhat wary of delivering judgments liable to frustrate or disappoint the referring court.<sup>4</sup>

<sup>1</sup> E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.* See also J.H.H. WEILER, *The Essential (and Would-Be Essential) Jurisprudence of the European Court of Justice: Lights and Shadows Too*, in I. PERNICE, P. STÖBENER, J. KOKOTT, J. MALL, C. SAUNDERS (eds), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden: Nomos, 2006, p. 117 *et seq.*; D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.*; G. DAVIES, *The European Legislature as an Agent of the European Court of Justice*, in *Journal of Common Market Studies*, 2016, p. 846 *et seq.*; R.D. KELEMEN, A.S. SWEET, *Assessing the Transformation of Europe: A View from Political Science*, in M. POIARES MADURO, M. WIND (eds), *The Transformation of Europe: Twenty-Five Years On*, Cambridge: Cambridge University Press 2017, p. 193 *et seq.* Cf. however M. RASMUSSEN, D. SINDBJERG MARTINSEN, *EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies*, in *European Law Journal*, 2019, p. 251 *et seq.*

<sup>2</sup> Y. LUPU, E. VOETEN, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, in *British Journal of Political Science*, 2011, p. 413 *et seq.*; cf. also 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. 88; J. A. MAYORAL, *In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe*, in *Journal of Common Market Studies*, 2017, p. 551 *et seq.*

<sup>3</sup> J. KOMAREK, *The Place of Constitutional Courts in the EU*, in *Review of European Constitutional Law*, 2013, p. 427 *et seq.*; M. CLAES, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, in *German Law Journal*, 2015, p. 1331 *et seq.*

<sup>4</sup> See G. DAVIES, *Activism Relocated*, cit., p. 85 *et seq.*; M. BOBEK, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts*, in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined*, Oxford: Hart, 2013, p. 218; R. VAN GESTEL, J. DE POORTER, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts*, Cambridge: Cambridge University Press, 2019, p. 50.

When making a reference for a preliminary ruling, national courts are invited to set out their own opinions as to how the questions referred ought to be answered.<sup>5</sup> Offering its view on the outcome is optional for the referring court and likely to increase the effort connected with making the reference.<sup>6</sup> It is therefore reasonable to expect that national courts set out their opinions sparingly, and only where the stakes offset the effort.<sup>7</sup> Where provided, however, referring court outcome preferences represent an opportunity, if not necessarily translating into a practice, of dialogue between the two courts, including an increased possibility for the Court to properly understand the referring court's concerns and expectations. They can also make the Court better informed as to when a judgment is likely to cause disruptions in the national legal systems.

This *Article* aims to examine how the Court justifies its judgments when it reaches another conclusion than that proposed or predicted by the national court in the order for reference, and whether this differs from its justification of judgments in which it concurs with the interpretation offered by the referring court. It does so by, first, identifying a dataset of cases where the referring courts took a clear position on the preferred or expected answer to the questions referred and, second, comparing the drafting of judgments in cases of agreement and disagreement with the referring court's interpretation.

The findings indicate that judgments where the Court disagrees with the outcome proposed by the referring court display certain characteristics that distinguish them from judgments where the two courts concur. In particular, the former contains more references, and generally more positive references, to the Commission and the intervening Member State governments. They also tend to rely more heavily on substantive law and cite more Union legislative acts. Lastly, when disagreeing with the referring court, the Court is more likely to substantively reformulate the question(s) referred. These results do not appear to be driven by the political sensitivity or legal complexities of the cases.

<sup>5</sup> Court of Justice, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para. 18.

<sup>6</sup> 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. 135; cf. also 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. 204.

<sup>7</sup> Some commentators argue that referring courts are less concerned with the substantive outcome of a case, as long as it is presented in the form of "feasible, understandable guidance" (M. BOBEK, *Of Feasibility and Silent Elephants*, cit., p. 214; cf. also p. 206 *et seq.*; J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and Dutch Courts in the Field of Migration*, in *European Journal of Legal Studies*, 2018, p. 142 *et seq.*). While it is possible that provision of clear answers is generally a good recipe for keeping good relations with referring courts, one can question whether the Court's most dedicated and opinionated interlocutors, having put particular effort into the order for reference, might not have higher-than-average expectations on the response (similarly see R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 135).

The *Article* offers empirically-based evidence of the influential role of the national courts within the preliminary reference procedure,<sup>8</sup> indicating that the Court takes the referring court's opinions into account when drafting its judgments and is conscious of disagreements with its national counterparts. Furthermore, the *Article* argues that disagreement with the referring courts triggers two distinct but complementary response strategies on the side of the Court: conflict avoidance and appeal to authority (argumentation *ad verecundiam*).

The *Article* contributes to our understanding of the dynamics between the national courts and the Court within the preliminary reference procedure and adds another flavour to the debate on the Court's reasoning style. By analysing the Court's drafting and justification choices from the perspective of the referring court and with the order for reference as a benchmark, the *Article* questions whether the Court's behaviour is conducive to the cooperation and dialogue it claims to be engaging in. This should cause further discussion into what the preliminary reference procedure is, and what it ought to be.

The argument proceeds as follows. The following section develops a framework and terminology for the analysis based on previous research on referring court preferences and Court drafting style. Section III defines the dataset and discusses the research process and design. Section IV presents the findings of the empirical analysis. These are subsequently interpreted in section V, which argues that they reveal tendencies within the Court of Justice to, first, meet opposition with appeals to external, political support and, second, deflect from the disagreement by altering the problem and its context. Section VI concludes with a critical assessment of these strategies, situating them in the broader debate on the role of the Court and the function of the preliminary reference procedure.

## II. CONCEPTUAL FRAMEWORK AND TERMINOLOGY

An emerging body of scholarship studies particular aspects of the Court's reasoning and drafting strategies, often based on legal empirical analysis. These studies cover aspects such as the reference patterns in the Court's judgments,<sup>9</sup> the Court's practice of reformu-

<sup>8</sup> Previous commentators have suggested such a role but offered only anecdotal or commonsensical support, see e.g. M. BOBEK, *Of Feasibility and Silent Elephants*, cit. p. 223; T. TRIDIMAS, *Bifurcated Justice: The Dual Character of Judicial Protection in EU Law*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, The Hague: Asser Press, 2013, p. 378 et seq.

<sup>9</sup> U. SADL, *Case – Case-Law – Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments*, in *Review of European Constitutional Law*, 2013, p. 205 et seq.; M. DERLÉN, J. LINDHOLM, *Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions*, in *German Law Journal*, 2015, p. 1073 et seq.; M. DERLÉN, J. LINDHOLM, *Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective*, in *German Law Journal*, 2017, p. 647 et seq.

lating the questions referred,<sup>10</sup> its use of linguistic signalling devices,<sup>11</sup> the importance of the parties' identity,<sup>12</sup> the Court's willingness to defer to national courts and authorities<sup>13</sup> and its reliance on the Advocates General.<sup>14</sup> Together they contribute to a deeper understanding of the constitutive elements of the Court's reasoning and its judgments.

Within this current, a few recent works have studied the relationship between the judgment and the order for reference. Most notably, van Gestel and de Poorter examined the dialogue between the Court and the supreme administrative courts of ten Member States between 2013 and 2015.<sup>15</sup> They found that the Court only rarely engages with the answers proposed by the referring courts, preferring to draft the judgment without directly citing the orders for reference. While acknowledging that multiple reasons underlie these choices, van Gestel and de Poorter argue that their study points to a mutual lack of trust between the Court and the supreme administrative courts.

Terminologically, van Gestel and de Poorter speak of the referring courts' opinions as *provisional answers*. This is in contrast to a previous study by Nyikos, which analysed the prevalence of and conditions for referring court opinions using the term "preemptive opinions".<sup>16</sup> This terminological discrepancy mirrors conceptual as well as methodological differences.

Nyikos' "preemptive opinions" are mainly gathered from case reports published in the European Court Reports, and occasionally deduced from the formulation of the preliminary questions.<sup>17</sup> Both methods appear to suffer from drawbacks; the former as they rely on a second-hand account that may misrepresent or omit the referring court's

<sup>10</sup> U. SADL, A. WALLERMAN, "The Referring Court Asks, in Essence": Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-Making Approach?, in *European Law Journal*, 2019, p. 416 et seq.

<sup>11</sup> U. SADL, *The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU*, in *European Journal of Legal Studies*, 2015, p. 18 et seq.; A. TRKLJA, K. MCAULIFFE, *Formulaic Metadiscursive Signalling Devices in Judgments of the Court of Justice of the European Union: A New Corpus-Based Model for Studying Discourse Relations of Texts*, in *International Journal of Speech, Language and the Law*, 2019, p. 21 et seq.

<sup>12</sup> G. DAVIES, *Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication*, in *Journal of European Public Policy*, 2018, p. 1442 et seq.

<sup>13</sup> J. ZGLINSKI, *The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law*, in *Common Market Law Review*, 2018, p. 1341 et seq.

<sup>14</sup> U. ŠADL, S. SANKARI, *The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship*, in *Yearbook of European Law*, 2017, p. 421 et seq.

<sup>15</sup> R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts' Preliminary Questions*, cit.; R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 59 et seq.

<sup>16</sup> 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. 527 et seq.

<sup>17</sup> *Ibid.*, p. 545 et seq.

opinion, and the latter because of the uncertainty connected with interpreting the question as an opinion.<sup>18</sup>

The term “provisional answers”, utilised by van Gestel and de Poorter, covers three alternative types of statements in the order for reference: “a) offering one right answer; b) offering a number of alternative answers and c) offering several answers with an additional assessment of their potential consequences for the national legal order”.<sup>19</sup> While clearly defined, the term is also, as the authors appear to acknowledge,<sup>20</sup> quite extensive. In particular, it seems to cover orders for reference where it is in fact not possible to conclude which outcome (if any) the referring court would prefer.

For the purposes of this study, I have developed a system of grading the referring courts’ opinions based on explicit statements in the orders for reference and with a view to differentiate between, on the one hand, cases where the referring court enters into a discussion on possible ways to resolve the case (outcome discussions) and, on the other hand, cases where the referring court expresses a preference of its own (outcome preference statements). *Outcome discussions* include orders for reference where the referring court outlines one or more possible ways of answering the question but stops short of disclosing a preference for one of them. This category includes statements of types b) and c) in van Gestel and de Poorter’s above-mentioned definition of provisional answers, as well as orders for reference where the court offers one answer without pronouncing it to be the “right” one.

The term *outcome preference statement* is used to denote order for reference statements where the referring court does not merely note possible answers but also discloses its own conclusion, prediction or preference as to how the question ought to be answered.<sup>21</sup> This category includes, first, statements introduced with phrases such as “The referring court is of the opinion...” or similar. These declarations give clear, unequivocal and (almost) non-context-dependent information about the referring court’s position, and they represent in a sense the ideal-type outcome preference statement. Second, the term covers statements where the referring court’s position is expressed hesitantly or deferentially, for instance by holding one argument more convincing than

<sup>18</sup> Nyikos herself describes the latter method as “controversial”, S.A. NYIKOS, *Strategic Interaction among Courts Within the Preliminary Reference Process*, cit., p. 546.

<sup>19</sup> R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts’ Preliminary Questions*, cit., p. 128. Cf. also R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 69.

<sup>20</sup> R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts’ Preliminary Questions*, cit., p. 130.

<sup>21</sup> I have previously discussed my definition of this term in A. WALLERMAN, *Can Two Walk Together, Except They Be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy*, in *European Law Review*, 2019, p. 159 *et seq.* There I distinguish between bold and deferential preferences. This distinction is largely irrelevant for the purposes of this *Article* and will thus not be repeated here. However, it may be noted that of the three types of outcome preference statements discussed in this paragraph, the first corresponds to the bold outcome preference statements whereas the second and third belong to the deferential variety.

another or emphasising that the opinion is subject to approval (or rejection) by the Court. Such statements, while less confident, still express a normative position of the referring court. Third, outcome preference statements can be indirect and context-dependent. This includes cases where the referring court refers to EU legal criteria as being unfulfilled, for instance by noting that a national provision makes it “excessively difficult” for a claimant to exercise their right (thereby implying a breach of the principle of effectiveness and, consequently, that the provision is incompatible with EU law).

The outcome preference statement concept has distinct advantages. First, it is based directly on the orders for reference, thus removing possible transmission distortions.<sup>22</sup> Second, it minimises the need for reading between the lines by relying only on explicit normative or evaluative statements. Third, it allows for the distinction between cases where the referring court favours one particular interpretation and those where it merely discusses possible interpretation(s).

Yet, the concept is not clear-cut. In particular, drawing the line between, on the one hand, outcome discussions including only one option and, on the other, outcome preference statements of the third, contextual type may prove challenging. The guiding principle has been the presence of normative assertions attributable to the referring court. For instance, in *Kamino and Datema*, the Dutch Supreme Court referred to the Court of Justice a question concerning the possible direct effect of the principle of respect for the rights of the defence by the authorities.<sup>23</sup> Justifying its decision to refer, the referring court recalled a previous ruling of the Court and noted that this ruling had been interpreted in legal doctrine as disqualifying the principle in question from having direct effect.<sup>24</sup> This is one possible answer to the question, and the referring court offered no alternatives. Nor, however, did it express its support for it. Consequently, its reasoning in this regard has been taken down in my analysis as outcome discussion, but not as outcome preference.

This can be contrasted to the order for reference in *Di Donna*.<sup>25</sup> The case concerned a national piece of legislation on mediation, whose compatibility with Union law was being questioned. Without explicitly stating that it thought the national act to be contrary to EU law, the referring court consistently interspaced its description of the national act and its effects with its own evaluations, noting *inter alia* that “it could take exceptionally long time to resolve the dispute in question” and that costs would be “at least twice as high” as in

<sup>22</sup> Almost the orders for reference have been mediated by translation (I have had access to the Swedish versions) and sometimes by being offered in summary rather than in full (cf. Art. 98, para. 1, of the Rules of Procedure of the Court of Justice).

<sup>23</sup> Netherlands Hoge Raad, order for reference of 18 March 2013, in joined cases C-129/13 and C-130/13, *Kamino and Datema* (the first question in both cases).

<sup>24</sup> *Ibid.*, section 3.4.2.

<sup>25</sup> Italian Giudice di pace of Mercato S. Severino, order for reference of 26 September 2011 in case C-492/11, *Di Donna*, paras 4-8.

comparable proceedings, which it deemed “disproportionate”. Unlike in *Kamino and Datema*, the order for reference thus contains clear indications of a value judgement by the referring court, which has been interpreted as an outcome preference statement.

The concept also has limitations. First, it does not distinguish between *predictions* on the outcome based on a legal analysis and *opinions* held by the referring court on more political grounds. Most courts, even if giving expression to a political stance, are likely to frame it as a result of legal interpretation in order to avoid accusations of stepping outside their mandate.<sup>26</sup> Any attempt at distinction would therefore be both difficult and fraught with uncertainty. Second, and relatedly, the textual analysis that the concept is based on cannot determine the referring court’s motivation for offering its opinion, such as whether its decision to offer an outcome preference statement is dictated by a sense of duty and loyalty with the procedure or by a genuine wish to influence the development of EU law. However, while disagreement between the courts would arguably be more problematic in the latter case, it appears likely that a court that goes to the trouble of articulating an outcome preference statement has at least some interest – if only as a matter of legal coherence and effectiveness – in seeing that outcome upheld; especially as any sense of duty might be assuaged by an open-ended outcome discussion.

### III. DATA AND RESEARCH DESIGN

#### III.1. THE DATASET

The materials were selected within the field of procedures and remedies, as orders for reference on this topic can be presumed to contain a larger than average proportion of outcome preference statements. Two considerations underpin this assumption. First, it is a field of shared competences and only partial harmonisation, which according to previous research entails that referring courts are more likely to articulate their view on the questions referred.<sup>27</sup> This tendency is, secondly, likely to be exacerbated in a field that all national judges encounter on a daily basis and thus have ample opportunity to form confident views on.

The dataset was defined by a search for the alternative keywords “procedural autonomy” and “judicial protection” in the Court’s Curia database, complemented with a

<sup>26</sup> A.-M. BURLEY, W. MATTLI, *Europe Before the Court: A Political Theory of Legal Integration*, in *International Organization*, 1993, p. 72 *et seq.* call this the “mask and shield” function of the law. The findings by K. Leijon in her *Article* in this Special Section (K. LEIJON, *Active or Passive: The National Judges’ Expression of Opinions in the Preliminary Reference Procedure*, in *European Papers*, 2020, Vol. 5, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 871 *et seq.*) appear to underline this point.

<sup>27</sup> S.A. NYIKOS, *Strategic Interaction among Courts Within the Preliminary Reference Process*, *cit.*, p. 540 *et seq.*

qualitative selection based on citations in a leading textbook.<sup>28</sup> The resulting list of judgments was then delimited temporally to cases referred after 31 December 2007 and decided no later than 1 April 2017, in order to ensure the actuality of the findings, and purposively to cases where the order for reference contained an outcome preference statement on at least one of the questions referred, in order to isolate cases where the Court was aware of the referring court's position.

Within the dataset, I compared the answers of the Court with the positions taken by the referring courts in outcome preference statements. The data was coded using two parallel units of analysis: whole judgments and individual questions.<sup>29</sup> The former unit of analysis is better suited to capture the Court's reasoning and overall justification of its interpretation, whereas the latter allows for a more detailed analysis and differentiation between competing approaches within the same judgment.<sup>30</sup> I categorise judgments where the outcome corresponded to the content of the outcome preference statement as *agreement judgments* and those where the Court's conclusion differed from the referring court's preference as *disagreement judgments*. Where one judgment comprised both agreement and disagreement on different questions, the judgment was excluded from further analysis in order to avoid ambiguities. The final dataset comprises 62 judgments, corresponding to 77 orders for reference,<sup>31</sup> and 112 questions, of which 27 judgments (42.8 per cent) and 60 questions (53.6 per cent) contain disagreement between the courts.

### III.2. RESEARCH PROCESS

The analysis seeks, first, to verify the assumption that the opinion of the referring court is a factor of relevance to the Court of Justice and, second, to examine the Court's strategies for dealing with disagreement. These aims are accomplished by comparing the judgments in the disagreement category with those in the agreement category. The comparison is undertaken on a variety of judgment characteristics (variables) pertaining both to the judgment as a whole and to individual questions and answers. The variables can be roughly divided into four categories: 1) the structure and set-up, 2) attitudes to other actors appearing before the Court, 3) reasoning style, including references to legal sources and 4) the outcome (operative parts).

<sup>28</sup> P. CRAIG, G. DE BURCA, *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, 2015, p. 225 *et seq.*

<sup>29</sup> In the question-level dataset, I included only questions concerning procedures and remedies (in a broad sense).

<sup>30</sup> For instance, the Court may within one judgment reformulate some questions but not others; it may defer to the referring court on one question but not on the next, etc.

<sup>31</sup> The lower number of judgments compared with orders for reference is explained by the practice of joining cases at the Court of Justice (Art. 54 of the Rules of Procedure), meaning that one judgment (identified by a unique Celex and a unique ECLI number) may correspond to several references (identified by unique case numbers).

Variables in the first category include admissibility issues; the division, joining and reformulation of questions; the description of the background of the reference; and the length of the judgments. They are used to establish whether the context of disagreement permeates the whole judgment and in particular whether the Court frames the (supposedly unbiased) description of the legal and factual background to the case to better fit its own conclusion.

The second set of variables concerns the extent and way in which the Court refers to other actors. For each category of actors – referring court, parties before the national court, Member State governments, the Commission and other institutions, and the Advocates General – I record the number of times the Court referred to each actor and whether it did so approvingly, dismissively or neutrally. The two former options were used in relation to arguments with which the Court either agreed or disagreed, whereas the third option was reserved for statements of fact (including national law) that the Court merely attributed to another actor as the source. Variables in this category will be used to approximate to what extent the Court addresses other actors' arguments and concerns, and in particular whether disagreement changes these patterns.

The third set of variables are related to the judicial style and argumentative authority of the Court's judgments, including references to legal sources, principles and interpretation methods and to the individual dispute and its characteristics. These variables are designated to explore whether the Court explains or justifies its conclusions differently or more forcefully when expecting disappointment and possibly rebellion from the referring court. The Court might for instance be expected to use more legal sources when refuting a mistaken outcome preference statement than when upholding a correct one, or to downplay disagreement by more abstract and/or deferential reasoning.

The fourth set of variables concern the operative part of the judgments. Their objective is to enable assessment of whether disagreement affects the outcome and the way it is phrased. I record whether the operative part referred to specific characteristics of the case, such as an identified national rule or a fact of the case before the national court. I also identify instances of deference to the referring court, grading every occurrence by intensity on a scale from minimal (0) to full (2), on the assumption that extensive deference may be a way to soften disagreement and make the judgment more palatable to the referring court.

Lastly, the analysis includes variables designed to detect possible differences between the two judgment categories and offer alternative explanations to any patterns observed. These variables include the origin of the referring court and its position in the national judicial hierarchy, as well as the number of intervenients in the case before the Court of Justice, the involvement of public bodies as parties to the dispute, and the number of judges

assigned to the case. None of them revealed any noteworthy discrepancies.<sup>32</sup> Furthermore, differences between the two categories of judgments were, where relevant, compared with the orders for reference in order to determine whether judgment characteristics could be explained by reference to the input received by the Court.

#### IV. THE COURT'S BEHAVIOUR

The empirical analysis found clear differences between the agreement and the disagreement judgments within all four sets of variables discussed above. The strongest correlations pertained to the Court's references to other actors, most notably the Commission and the Member State governments, which increased substantially in disagreement judgments (see Table 2 below). Another key finding was that substantive reformulation of the preliminary question – *i.e.* reformulations that effectively change the meaning or content of the question – was noticeably more common in disagreement judgments (see Table 1 below).

The findings are listed in Tables 1–4, which correspond with the four sets of variables set out above. Table 1 combines variables at judgment and question level, whereas Tables 2 and 3 examine only aggregated judgments and Table 4 contains only variables at individual question level.<sup>33</sup>

The structure and set-up of the judgment	Agreement	Disagreement
1. Inadmissible questions per judgment (average)	0,00	0,33
2. Joined questions	40%	34%
3. Judgments containing subdivided questions	3%	4%
4. Judgments containing reordered questions	11%	7%

<sup>32</sup> Lower instance courts referred the most (49 and 58 per cent of the cases in the agreement and disagreement categories, respectively), whereas supreme and constitutional courts in both categories provided just over one fifth of the orders for reference (23 and 21 per cent, respectively). Disagreement judgments were delivered by an average of 5.4 judges having heard submissions from 3.6 intervenients on average, compared to 6.2 judges and 3.9 intervenients for disagreement judgments. Member State public bodies were party to the dispute in 71 per cent of the agreement cases and 70 per cent of the disagreement cases, most often (76 and 74 per cent, respectively) acting as defendant. As for the referring courts' geographical origin, the disagreement category showed an overrepresentation of orders for reference from ex-socialist Member States (27 per cent compared with 14 per cent in the whole dataset) and an underrepresentation of orders for reference from the French legal tradition (38 per cent compared with 53 per cent overall), whereas in the agreement category common law courts were overrepresented (15 per cent compared with only 3 per cent overall) at the expense of courts from the Germanic legal tradition (21 per cent compared with 29 per cent overall). However, as these variations appear to be contained *within* the categories, they are of less relevance for explaining differences *between* them.

<sup>33</sup> Cf. the discussion on units of analysis *supra*, section III.1.

<b>The structure and set-up of the judgment</b>	<b>Agreement</b>	<b>Disagreement</b>
5. Reformulated questions	100%	98%
5.1 of which substantive reformulation	40%	55%
5.1.1 of which restrictive effect	14%	34%
5.1.2 of which substitution effect	43%	31%
5.1.3 of which expansive effect	43%	34%
6. Paragraphs per judgment (average)	65,09	68,07
7. Paragraphs on facts of the case* (average)	11,80	11,07
8. Paragraphs on national law** (average)	5,89	5,41
9. Paragraphs on reasoning in substance per judgment (average)	34,43	34,56
10. Paragraphs on reasoning in substance per question (average)	22,62	21,53
11. National provisions cited** (average)	4,71	4,19
11.1 National provisions reproduced	74%	52%
11.2 National provisions described	16%	17%
11.3 Combination of reproduction and description	10%	30%
12. References to the parties' positions* (average)	0,66	0,70
13. References to the referring court in facts section* (average)	3,00	2,85
14. Judgments reporting OfR outcome discussion	34%	33%
15. Judgments reporting OPS	43%	33%
15.1 OPS consistency (OfR/judgment)	86%	100%

TABLE 1. The structure and set-up of the judgment.

\* Variable concerns the section of the judgment entitled "The dispute before the national court and the questions referred" (or similar).

\*\* Variable concerns the section of the judgment entitled "National law".

Table 1 shows no relations between the anticipated reception of the judgment within the referring court and its length. Both the overall length of the judgment (variable 7) and the length of its various subsections (variables 8-11) were virtually the same in both categories of judgments.

The Court's treatment of individual questions differed between the categories in two main ways. First, findings of inadmissibility were distinctively more common among the disagreement judgments (variable 1). Second, while reformulation of questions was very common throughout the dataset (variable 5), the intensity of reformulation varied.

In disagreement judgments, the Court's reformulations affected the content and meaning of the question (substantive reformulation) for more than half of the questions, to be compared with two fifths in the category of agreement judgments (variable 5.1).<sup>34</sup> The changes resulting from substantive reformulation also differed between the two categories. The findings indicate that, when the Court is about to give an answer in line with the national court's outcome preference statement, substantive reformulations tend to be either expansive, giving the answer a potentially broader scope than would have followed from the original question (variable 5.1.3), or substitutive, *i.e.* altering the content of the question without making its scope wider or narrower (variable 5.1.2). When, on the other hand, the Court is to contradict the referring court on the question, substantive reformulations have restrictive, expansive or neutral effects in equal measure (variables 5.1.1-5.1.3), entailing, in comparison with the agreement judgments, an overall more restrictive effect.

The findings show some variation in the Court's contextualisation of the questions between agreement and disagreement judgments. In setting up the national legal context of the dispute, neither section length nor the number of national provisions cited seemed to correspond with anticipated approval of the judgment by the referring court. However, the way in which the Court relates national law differed between the categories. In the section titled "National law", the Court typically conveys the relevant national legal provisions either by reproducing them as word-for-word quotations or by describing them in its own words (or possibly words supplied by somebody else). As shown in Table 1, reproduction is the most common method used in both categories (variable 11.1). However, in agreement judgments this method is used in, on average, three out of four judgments, compared with in only half of the disagreement ones. Conversely, the Court was more likely to combine description and reproduction of national law in disagreement judgments (almost one in three disagreement judgments, compared with one in ten agreement ones), while the proportion of purely descriptive sections on national law are similar in both categories (variables 11.2 and 11.3). This difference, furthermore, cannot be explained as a response to differences in the referring courts' ways of relaying national law, as an analysis of the orders for reference revealed no corresponding pattern.

Lastly, the findings show the Court was more likely to describe an outcome preference statement in judgments where it eventually agreed with opinions of the referring court. Outcome preference statements were ascribed to the referring court in 43 per cent of agreement judgments, compared with only 33 per cent of disagreement judgments (variable 15). (Recall that the dataset comprises only cases where the order for

<sup>34</sup> The distinction between this type of *substantive*, intrusive reformulations and more cautious, *stylistic* reformulations has been discussed at length in U. SADL, A. WALLERMAN, "The Referring Court Asks, in Essence", *cit.*, p. 418.

reference contained at least one outcome preference statement, entailing that the Court fails to recount more than half of the outcome preference statements national courts submit to it). Outcome preferences were largely correctly described, although some discrepancies between the national court's position as expressed in the order for reference and as relayed in the judgment were found (surprisingly) among the agreement judgments (variable 15.1).

<b>The Court's attitude to other actors</b>	<b>Agreement</b>	<b>Disagreement</b>
1. References to referring court	2,20	2,44
1.1 Evaluation of national court	0,09	-0,06
2. References to parties	1,40	1,96
3. References to applicant	0,57	1,48
3.1 Evaluation of applicant	-0,34	-0,51
4. References to defendant	0,83	0,48
4.1 Evaluation of defendant	-0,15	-0,14
5. References to AG	1,18	1,15
5.1 Evaluation of AG	0,91	1,00
6. References to MS governments	1,41	3,31
6.1 Evaluation of MS government	-0,22	0,47
7. References to the Commission	0,51	1,11
7.1 Evaluation of the Commission	0,42	0,36

TABLE 2. The Court's attitude to other actors. (The Table reflects references in the reasoning section of the judgments).

Table 2 describes how the Court refers to the submissions of various actors as part of its justification of the judgment. On average, it referred to the referring court a little more than twice per judgment. References to the referring court generally consisted of recollections of information supplied by that court on points of fact or national law outside of the Court's jurisdiction, and consequently the Court only exceptionally evaluated the referring court's position. Unsurprisingly, however, its appraisal of the referring court's input tended towards the positive in agreement judgments and the negative in disagreement ones (variable 1.1).

As for other actors submitting observations, the Court referred more frequently to the parties (in particular the applicant) in disagreement judgments (variables 2 and 3) and significantly more often to submissions by Member State governments and the Commis-

sion (variables 6 and 7). This can partly be explained by the higher frequency of inadmissibility among the unpopular judgments, as admissibility objections are most often attributed to one or more of the intervenients; this observation is however insufficient to account for the large discrepancies between agreement and disagreement judgments as regards in particular the references to Member State governments and the Commission. The parties' submissions were generally unfavourably received in both categories (variables 3.1 and 4.1), while the opposite applied for the Commission's submissions. However, the receptions of the Member State government's positions were significantly more positive in the disagreement judgments (variable 6.1), suggesting that the Court relies on the support of the Member States to a larger extent where it disagrees with the referring court. References to the Advocates General, finally, were consistently approving and occurred with equal frequency in both categories of judgments.

<b>Reasoning style and legal source citations</b>	<b>Agreement</b>	<b>Disagreement</b>
1. CJEU cases cited	14,43	13,93
1.1 of which referred to in OfR	18%	11%
1.2 OfR case law references recurring in judgment	41%	32%
2. EU legislative provisions cited	14,17	18,07
3. Principles cited	3,29	3,22
3.1 References to legal principles	7,14	7,89
4. International treaties cited	0,09	0,15
5. References to facts of the case	0,94	1,19
6. Distinguishing the case	11%	22%
6.1 of which response to OfR	50%	57%
7. National law citations	3,37	3,04
8. References to the proceedings before the national court	6,80	8,93
9. Expressions of deference in reasoning	1,37	1,26
10. Part of reasoning with procedures & remedies focus	53%	39%

TABLE 3. Reasoning style and legal source citations. (All variables reflect average per judgment in reasoning section).

Table 3 explores two facets of judicial reasoning: the citation of legal authority (variables 1-4) and the level of abstraction (variables 5-10). As for judicial authority, the only type of legal source where a notable difference between the two categories of judgments was found was legislation. Agreement judgments cited on average just above 14

provisions of EU primary or secondary law, compared with 18 such citations in disagreement judgments (variable 2). International treaties were relied on sparingly, but also with somewhat higher frequency in disagreement judgments (variable 4). Citations of case law and general principles showed no noticeable correlation with the Court's attitude to referring courts' outcome preferences. However, the overlap between cases cited in the order for reference and the judgment was larger in agreement cases. In agreement judgments, 18 per cent of the cases cited by the Court had also been referred to in the order for reference (variable 1.1) and these cases represented on average 43 per cent of all cases cited by the referring court (variable 1.2), whereas the corresponding figures for disagreement judgments were 11 and 32 per cent, respectively.

Within the second subset of variables, findings indicate that the Court's reasoning in disagreement judgments tended to be more specifically oriented to the circumstances of the case before the national courts. The Court would distinguish the case at hand from named, similar precedent twice as often in disagreement judgments compared with those where it agreed with the outcome preference statement of the referring court (variable 6). Additionally, the Court referred to the case before the national court on average nine times per disagreement judgment, compared with less than seven times in agreement judgments (variable 8). It also more often highlighted facts of the case in its reasoning in disagreement judgments (variable 5). Citations of national law and instances of deference to the referring court were, on the other hand, equally frequent in both categories of judgments.

Lastly, the Court tended to take a more procedurally oriented perspective in agreement judgments and a more substantive one in cases where it disagreed with the referring court (variable 10). This is a departure from the perspectives taken in the orders for reference, where orders resulting in agreement judgments were oriented towards procedures and remedies to a significantly lesser extent than the other orders for reference in the dataset (38 per cent compared to 60 per cent).

<b>The operative part</b>	<b>Agreement</b>	<b>Disagreement</b>
1. Deference to referring court	35%	46%
1.1 of which minimum deference	39%	63%
1.2 of which partial deference	33%	7%
1.3 of which maximum deference	28%	30%
2. <i>In casu</i> reference	28%	28%
3. <i>In casu</i> outcome	6%	0%

TABLE 4. The operative party.

The findings in Table 4, concerning the operative part of the judgments, show that the Court defers more often to the assessment of the referring court in disagreement judgments (variable 1). However, findings also show that the deference given in disagreement judgments tends to be minimal. In two thirds of the deferential disagreement judgments, the deference was minimal (variable 1.1), whereas in agreement judgments the degree of deference was evenly distributed over the spectrum from minimal to maximal (variables 1.1-1.3).

The higher level of references to factual circumstances in the reasoning of disagreement judgments, noted above, does not come through in the operative parts. References to case-specific factors, which here include both facts of the case and national law, occurred with equal frequency in both categories (variable 2). In a small number of cases, references to such factors had the effect of altering the answer to the question (variable 3, *in casu outcomes*). This happened only in agreement judgments, indicating that case-specific factors were used as a way of achieving the solution *in casu* that the referring court had suggested, even though the Court disagreed in principle. However, as this occurred on only three occasions (*i.e.* three questions), the finding should be treated with caution.

## V. THE COURT'S STRATEGIES

The findings reveal clear and systematic differences in drafting and justification between the judgments in which the Court concurs with the referring court and those in which it does not. Such differences indicate, in and of themselves, that even if the inclusion of an outcome preference statement in the order for reference may not deter the Court from ruling the other way – although it is of course impossible to know how the 35 agreement judgments in this dataset would have been decided had the referring court not argued the point it did – it will affect the reasoning and justification provided in support of the conclusion. From the point of view of precedent-setting and development of the law, this may be at least as important as what eventually goes into the operative part; some of the Court's most famous precedents have been established only in the reasoning.<sup>35</sup> The different ways in which the Court replies when it agrees or disagrees with its national counterpart offers support to the assumption that the Court takes into account the perspective of the referring courts when drafting its judgment, and that its strategy for communicating disagreement differs from the way in which it confirms and upholds the views of its national counterpart.

The findings suggest that the Court employs two different (but complementary) strategies when encountering a referring court outcome preference statement that it does not agree with: *appeal to authority* (argumentation *ad verecundiam*) and *conflict*

<sup>35</sup> E.g. Court of Justice: judgment of 29 February 1979, case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 8; judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

*avoidance*. Appeal to authority is understood as a form of argumentation where the soundness of a statement is proven by reference to an external authority, such as an expert or a ruling of a higher court. This form of argumentation is often reasonable and effective. It becomes problematic, however, when the authority appealed to lacks legitimacy or expertise on the matter at issue; appeals to such authority are considered fallacious and are often referred to by the Latin term *ad verecundiam*.<sup>36</sup> Conflict avoidance, on the other hand, entails that the Court takes measures to conceal, circumvent or minimise the area of disagreement through its reasoning, such as redefining the issue, delivering partial or incomplete answers and deferring definitive judgment.<sup>37</sup> Two alternative hypotheses, namely that the Court might have sought to persuade the referring court of the soundness of its conclusions and that it might have attempted to find a compromise solution or to sugarcoat the outcome to facilitate compliance, find less support in the empirical observations.

The most suggestive finding concerning appeal to authority is that the Court relies substantially more often on the argumentation of Member State governments when disagreeing with the referring court. When agreeing with the referring court, references to the governments submitting observations were generally negative, whereas the opposite was true in disagreement judgments. The Court also referred more than twice as often to the Commission, although references were generally positive and indeed slightly more so in agreement judgments.

The finding cannot be explained by political salience, which might have increased the Court's sensitivity to political argumentation; the number of judges assigned to the cases and the number of national governments intervening indicate, if anything, that the agreement cases tended to be slightly more controversial.<sup>38</sup> Nor can the substantial disparity of references to government interventions be explained by the Court failing to distinguish between an intervening government and a public body party to the procedure (the government being the superior of the party in question, as the government of

<sup>36</sup> I.M. COPI, C. COHEN, *Introduction to Logic*, Upper Saddle River, New Jersey: Pearson, 2009, p. 145 *et seq.* For a more extensive exploration of the term and its meaning, see D. WALTON, *Appeal to Expert Opinion: Arguments from Authority*, University Park, Pennsylvania: Penn State University Press, 1997, p. 63 *et seq.*

<sup>37</sup> J. ODERMATT, *Patterns of Avoidance: Political Questions before International Courts*, in *International Journal of Law in Context*, 2018, p. 221 *et seq.*; J. VON BERNSTORFF, O. KRAMER, J. SAURER, S. THOMAS, *Evasive Courts: A Rhetorical Analysis of Judicial Conflict Avoidance*, 2018, available at [www.researchgate.net](http://www.researchgate.net).

<sup>38</sup> See *supra*, note 32. On using these factors to approximate political sensitivity, see O. LARSSON, D. NAURIN, M. DERLÉN, J. LINDHOLM, *Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union*, in *Comparative Political Studies*, 2017, p. 894 *et seq.*; J. DEDERKE, D. NAURIN, *Friends of the Court? Why EU Governments File Observations Before the Court of Justice*, in *European Journal of Political Research*, 2018, p. 878.

the Member State of referral almost consistently intervenes), as public bodies appeared as parties in equal measure in both categories.<sup>39</sup>

The observation suggests that the Court finds judicial and executive support at least to some extent interchangeable. The finding mirrors previous research by Larsson *et al.*, which has shown the Court to rely more heavily on legal argumentation when entering into disagreement with political actors.<sup>40</sup> Taken together, these findings may be suggestive of a broader disagreement strategy of the Court, which can be described as compensating for the anticipated resistance or disappointment by seeking the support of other actors – effectively trading one collaborator for another. Furthermore, while the influence of Member State governments on the Court has been well documented,<sup>41</sup> the Court's response to disagreement with the referring courts adds important nuance by demonstrating that the latter occupy a comparably privileged position.<sup>42</sup>

The resorting to political argumentation in response to legal divergence – and vice versa – demonstrates that the Court considers itself part of a political as well as a legal community. Furthermore, it suggests that it uses its dual roles to gain an advantage over the least sympathetic interlocutor. This strongly suggests that choice of references is strategic.<sup>43</sup> However, while legal reasons are binding also upon the executive, the interventions by members of the executive branch before an independent court of law hold no legal or, in a society based on the rule of law, legitimate authority.<sup>44</sup> This entails that responding to judicial opposition with political arguments is different from the reverse. Thus, the Court's reliance on national governments is typical of argumentation *ad verecundiam*; the (executive) authority invoked lacks a legitimate claim in the (judicial) context. When supporting an assertion by reference to a Member State government, the Court in effect appeals not to legal authority but to extrajudicial, executive power.

The other authority more frequently invoked in disagreement judgments was legislation. This form of appeal to authority is, as MacCormick has pointed out, not only acceptable but indeed standard in legal reasoning, legislation being the legal authority par

<sup>39</sup> See *supra*, note 32. It may in this context be recalled that references to the defendant, *i.e.* typically the public party, were twice as common in agreement judgments (see Table 2 *supra*).

<sup>40</sup> O. LARSSON, D. NAURIN, M. DERLÉN, J. LINDHOLM, *Speaking Law to Power*, cit., p. 895 *et seq.*

<sup>41</sup> E.g. C.J. CARRUBBA, M. GABEL, C. HANKLA, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, in *American Political Science Review*, 2008, p. 435 *et seq.*; J. FRANKENREITER, *The Politics of Citation at the ECJ: Policy Preferences of EU Member State Governments and the Citation Behaviour of Judges at the European Court of Justice*, in *Journal of Empirical Legal Studies*, 2017, p. 813 *et seq.*

<sup>42</sup> Cf. similarly in a broader context Y. LUPU, E. VOETEN, *Precedent in International Courts*, cit., p. 414.

<sup>43</sup> Cf. O. LARSSON, D. NAURIN, M. DERLÉN, J. LINDHOLM, *Speaking Law to Power*, cit., p. 902, who left open whether the Court's response to political disagreement was strategic or merely judicial default.

<sup>44</sup> Cf. M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING, *Introduction: On Constitutional Conversations*, in M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Cambridge-Antwerp-Portland: Intersentia, 2012, p. 2: "Judicial decisions must by their nature be based on legal argumentation and rational and reasoned persuasion, not on power or mere interest, or even institutional authority".

excellence.<sup>45</sup> However, it is also a source of law that – like the support of actors such as the Commission and the Member State governments but unlike general principles and case law – is external in relation to the Court of Justice itself. Related to this tendency is the Court's greater focus on substantive aspects of the issue in disagreement judgments; as substantive law tends to be harmonised to a greater extent than the law of procedures and remedies, framing the issue in substantive terms offers the Court a stronger position that is clearly within the Union's competence and can be backed up by primary and secondary legislation, whereas taking a procedural or remedial perspective would force it to justify what may be perceived as an encroachment upon the Member States' so-called "national procedural autonomy" and to rely largely on judge-made law. While it is common judicial practice to draft judgments diminishing the court's agency and externalising responsibility for the outcome,<sup>46</sup> an increased reliance on the most external and least controversial types of legal source might indicate that the Court feels this need more urgently in disagreement cases.

Increased reliance on legislation in disagreement judgments might also be interpreted as an effort to pedagogically explain or convince the referring court of the soundness of the outcome. However, three other observations speak against this interpretation. First, the absence of a corresponding increase in references to case law and general principles is conspicuous; if the Court sought to increase the persuasive qualities of its reasoning by increasing the number of references, this increase should have occurred for all sources of law.<sup>47</sup> Second, one would have expected a pedagogical aim to entail more thorough, and consequently lengthier, reasoning. Third, a pedagogical or persuasive effort might have included explanations of where the referring court went wrong. While the Court distinguished the circumstances of the case from previous rulings twice as often in disagreement than in agreement judgments,<sup>48</sup> such distinguishing in both categories occurred only half of the time in response to an argument in the order for reference.<sup>49</sup> Generally, overlaps in case law citations between the judgments and the orders for reference were more common in the agreement category, which is unsurprising (two courts reaching the same conclusion would naturally cite the same cases to a larger degree than courts disagreeing on the outcome) yet indicative of the Court not seeking to address the referring court's (erroneous) reasoning.

<sup>45</sup> N. MACCORMICK, *Argumentation and Interpretation in Law*, in *Ratio Juris*, 1993, p. 18.

<sup>46</sup> Cf. *supra*, section II at note 26.

<sup>47</sup> In agreement judgments, the Court referred to as many cases as it referred to individual legal provisions, which indicates the centrality of case law in the field.

<sup>48</sup> On the practice of distinguishing, see T. KOOPMANS, *Stare Decisis in European Law*, in D. O'KEEFE, H.G. SCHERMERS (eds), *Essays in European Law and Integration; to Mark the Silver Jubilee of the Europa Institute Leiden 1957–1982*, Deventer: Kluwer, 1982, p. 11.

<sup>49</sup> See variable 6.1 in Table 3 *supra*.

Turning to the conflict avoidance strategy, the findings reveal several features of disagreement judgment drafting that entail subtle reframing and rephrasing of the problem. This indicates that the Court is attempting to avoid or draw attention away from the conflict with the referring court. Most importantly in this regard, the findings show that the Court is significantly more likely to reformulate the questions in a way that alters their meaning when it proceeds to deliver an answer different than that advocated by the referring court. A previous study has already suggested that conflict avoidance is part of the reason the Court reformulates questions substantively,<sup>50</sup> and the more frequent occurrence of substantive reformulations of questions where the Court and the referring court disagree on the answer appears to further support this argument. The fact that such reformulations generally tend to restrict the scope of the question to a larger extent than they do in agreement judgments suggests that substantive reformulation in conflict situations may be a way for the Court to control the damage.

The (more extensive) non-disclosure of referring court outcome preference statements in disagreement judgments appears to serve the same purpose by diminishing the impression of conflict between the courts. Moreover, the description of national law in disagreement judgments tends to be less faithful to the wording of the provisions, which may indicate an attempt to conceal possible norm collisions.

The approach can be illustrated by the judgment in *Fastweb*.<sup>51</sup> In that case, the Italian Consiglio di Stato referred a question on the validity of Art. 2, let. d), para. 4, of Directive 89/665, which prevented it from voiding a public contract entered into following an erroneous procedure – an action that would have been open to it under national law. The Court, first, recounted the content of national law without disclosing its exact wording, being particularly vague on the content of the most relevant national provision.<sup>52</sup> It then went on to describe the facts of the case and the prior findings of the referring court in the case but left out the outcome preference statement, noting only that the referring court was “uncertain”.<sup>53</sup> Lastly, it reformulated the question by excluding two of the four superior norms (the principle of equality between the parties and the principle of protecting competition) that the referring court had put forward as a basis for the judicial review.<sup>54</sup> The effect is that the Court responded to a more narrowly construed question than that referred, while obscuring the discrepancy between national and EU law and suppressing the opposing opinion of the referring court.

The Court also defers more often to the referring court in the operative part of disagreement judgments; however, deference is more often minimal. This might be inter-

<sup>50</sup> U. SADL, A. WALLERMAN, “*The Referring Court Asks, in Essence*”, cit., p. 430.

<sup>51</sup> Court of Justice, judgment of 11 September 2014, case C-19/13, *Fastweb*.

<sup>52</sup> *Ibid.*, in particular para. 17. It should be noted, however, that the Italian Council of State's order for reference of 14 December 2012 was similarly vague on this point (paras 10.5-6).

<sup>53</sup> *Fastweb.*, cit., paras 30-32.

<sup>54</sup> *Ibid.*, para. 55.

preted as a way of offering a compromise, or at least of sugarcoating the outcome, by leaving a margin of appreciation as an olive branch to the referring court (but simultaneously keeping it small to minimise the risk of distortion). A compromising approach could also be identified in the three answers where the Court reached *in casu* outcomes, accommodating the referring court on the basis of an exception while establishing a principled conclusion to the opposite effect. However, outcomes of this kind are very rare in the dataset, the differences in deference patterns are relatively subtle, and little else supports an explanation of the Court's behaviour as compromise-seeking. Instead, the increased deference in disagreement judgments may be interpreted as another means of pasting over conflict by leaving the final conclusion nominally – or symbolically? – open and in the hands of its national “collaborator”.

## VI. CONCLUSIONS

The drafting of a judgment contradicting the expectations or preferences of a referring court can be presumed to be something of a balancing act between, on the one hand, promoting (what the Court perceives to be) the correct interpretation and development of EU law and, on the other, maintaining good relations with the national courts.<sup>55</sup> This *Article* examined the Court's drafting and justification of such disagreement judgments. It departed from the assumption that the Court is aware of the risk of disappointing its national interlocutor and takes this into consideration when communicating its disagreement. The findings confirm this assumption, in particular by revealing that the Court's response to disagreement with referring courts is analogous to the one it resorts to when confronted with political opposition.

However, the findings do not support an assumption that the Court of Justice would be particularly prone to diplomacy or legal articulacy when rejecting a referring court's proposition. Instead, based principally on the observations of, first, a considerable increase in the references to the positions taken before the Court by the Member State governments and the Commission and, second, a greater tendency to substantially reformulate the questions and reframe the legal background of the case, the *Article* argues that the Court's main strategies for communicating disagreement to the national courts are appeal to authority (argumentation *ad verecundiam*) and conflict avoidance.

This conclusion tells a different story from the judicial dialogue and collaboration that the Court itself claims to be engaging in.<sup>56</sup> Conflict avoidance may be a successful

<sup>55</sup> Although that balance may be tilted to the benefit of the former and the detriment of at least lower and mid-level national courts; see R.D. KELEMEN, T. PAVONE, *The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited*, in *European Law Journal*, 2019, p. 352 *et seq.*

<sup>56</sup> E.g. Court of Justice: judgment of 19 June 2012, case C-307/10, *Chartered Institute of Patent Attorneys* [GC], para. 31; judgment of 7 August 2018, case C-472/16, *Colino Sigüenza*, para. 57. See also, writing in

strategy from a pragmatic perspective,<sup>57</sup> facilitating compliance and sparing the referring court the embarrassment of being publicly reprimanded by the Court.<sup>58</sup> However, avoidance also suggests a lack of trust and transparency in the Court's relation to its national interlocutors, leading to courts talking past each other.<sup>59</sup> As for argumentation *ad verecundiam*, this concept is traditionally traced to John Locke's *An Essay Concerning Human Understanding*, according to which the argument is often used towards others "to prevail on their assent; or at least to awe them as to silence their opposition", but is notably not helpful for attaining knowledge or truth.<sup>60</sup> Unlike the rejected hypotheses of persuasion and compromise, neither strategy engages with the substantive arguments pertaining to the questions referred to the Court, and neither appears conducive to constructive judicial dialogue.<sup>61</sup>

As Besselink has pointed out, the constitutional dialogue between EU courts must be based on "a minimum of shared values", including "the acceptance that not all values are shared".<sup>62</sup> The order for reference is an ideal occasion for the Court to become acquainted with such, potentially diverging, legal values and priorities and to properly understand the referring courts' concerns and expectations. The inclusion of the referring courts' opinions in the orders for reference entails the prospect of upgrading the preliminary reference procedure to a genuine exchange of opinions, with potential gains for both the legitimacy of the ongoing constitutionalisation process and the effective dissemination of Union law through national courts – not to mention a jurisprudential development that is able to benefit from the thinking of highly qualified legal minds belonging not only to the Court of Justice judges. The Court's attitude to national colleagues holding views other than its own does little to facilitate the diversity that forms

their extra-judicial capacities, A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2008, p. 121 *et seq.*; K. LENAERTS, *Upholding the Rule of Law Through Judicial Dialogue*, in *Yearbook of European Law*, 2019, p. 2 *et seq.*

<sup>57</sup> J. ODERMATT, *Patterns of Avoidance*, cit., p. 222 *et seq.*

<sup>58</sup> On embarrassment and fear of "getting it wrong" as a factor that dissuades national judges from entering into dialogue with the Court, see R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 117 *et seq.*, cf. p. 160; and K. Leijon's *Article* in this Special Section: K. LEIJON, *Active or Passive*, cit.

<sup>59</sup> Cf. R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 179 *et seq.*, and more generally H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith*, Cambridge: Cambridge University Press, 2005, p. 446 *et seq.*

<sup>60</sup> J. LOCKE, *An Essay Concerning Human Understanding*, book IV, ch. XVII, paras 19–22. Available at [www.gutenberg.org](http://www.gutenberg.org).

<sup>61</sup> For a more in-depth exploration of such a failed dialogue resulting from insufficient attention paid by the Court to the arguments raised by the referring court, see the *Article* by M. Eliantonio and C. Favilli in this Special Section: M. ELIANTONIO, C. FAVILLI, *When Two Preliminary Questions Result in One and Half Answers: A Constitutional Tragedy in Four Acts*, in *European Papers*, 2020, Vol. 5, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 991 *et seq.*

<sup>62</sup> L. BESSELINK, *National and Constitutional Identity Before and After Lisbon*, in *Utrecht Law Review*, 2010, p. 49; see also E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue Between the ECJ and National Courts*, in *NoFo: Journal of Extreme Legal Positivism*, 2010, p. 21 *et seq.*

a precondition for a “mutually inspiring further development of the European constitutional culture”,<sup>63</sup> suggesting that order for reference outcome preference statements represent (yet another) missed opportunity in the preliminary reference procedure.

<sup>63</sup> A. VOßKUHLÉ, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, in *Review of European Constitutional Law*, 2010, p. 198.