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Propositions and Hypothesises

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Economic analysis of preliminary references: propositions and hypothesises

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Each year, the number of preliminary references sent by the national courts of the Member States, amounts to almost 600 cases representing more than 70% of the overall caseload of the European Court of Justice (hereinafter: ECJ).[1] It proves that the judicial dialogue - established with the creation of a European Court in 1952 and unprecedented until that time at international level - is in fact working and used by the national judiciary as an important hint when interpreting EU law. The procedure itself "is designed to ensure the uniform interpretation and application of EU law within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the ECJ for a preliminary ruling questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union"[2]. In this paper we will only focus on the former: questions of interpretation.

As Jacques Pertek submits, the preliminary ruling procedure is the guarantor of a smart compromise to ensure both the decentralised application and the uniform interpretation of EU law at the same time. (Pertek [2013] 44.) The essence of the cooperation is that it is for the European judicial forum to ensure uniform interpretation while the national court is in charge of the genuine application of the norm in the given case but taking into account this interpretation. Therefore, in an idealistic word divergence between the decisions of the national courts could occur to the extent that the facts and circumstances of their cases differ (Somssich [2016] 9.).

The very nature of the preliminary ruling procedure puts the initiation of this particular vertical communication in the hands of the forum acting in the specific case. This principle is only overridden by the obligation of courts of final instance to refer under Article 267(3) TFEU. While the discretionary power to initiate the preliminary ruling procedure granted to the lower courts gives priority to decentralised application, the obligation of the higher courts to seize the ECJ, with certain exceptions, gives priority to uniform interpretation. This is how the dual objective comes together. It also means that, in cases where national courts do not use the right of preliminary reference, they themselves interpret EU law as part of their judicial function and they most probably take a number of factors into account when assessing their choices such as the risk of the eventual fragmentation of EU law but also other subjective or objective drivers might motivate or discourage them.

In the following we will try to provide an economic analysis of the decisions taken by the different actors of a national procedure concerning the initiation or the proposing of the initiation of a preliminary ruling procedure.

Economic modelling. Of course, many other methods beyond the economic modelling can also help us to understand the drivers of actors – such are sociology, anthropology, psychology, etc. A distinctive feature of economic modelling is however that it assumes that decision-makers are essentially (though not unboundedly) rational, who are informed (though not gathering all the information) about the consequences of their decisions and choose the best one according to their preferences. In an economic analysis, we typically consider two types of questions. The first is to formulate propositions based on the assumption of rationality (or bounded rationality). This is typically a mathematical, logical analysis – drawing inferences from how rational (or bounded rational) decision-makers would make decisions. The second issue – or the second step in temporal, logical sequence – is to take these propositions as hypotheses and then try to test them. Typically, by empirical means. This research takes the first step along this path: we attempt to formulate hypotheses based on the model of rationality or bounded rationality – hypotheses that can be tested empirically,

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[1] For the relevant data see the 2021 Annual Report of the Court of Justice of the European Union (Synopsis of the judicial activity of the Court of Justice and the General Court of the European Union), p. 236.

[2] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01) par. 1.

In economics, these propositions, hypotheses can be of two types: positive or normative ones. These two types of propositions can be formulated about any legal institution, including the preliminary ruling procedure. Positive propositions focus on the incentives and disincentives for the parties to initiate a preliminary ruling procedure. The normative ones, on the other hand, address the question of when such an initiative is efficient. Efficient – from an economic point of view. Our research focuses on the first, positive analysis. The problem under consideration is not to assess in which cases it is worth, advisable or effective to initiate preliminary procedure but rather to identify those factors which make such a decision happen.

Reasons for narrow scope. The current research is namely not able to analyse the normative question for two reasons.

1. On the one hand, incentives [and disincentives] that influence the initiation of the procedure should be understood before analysing the socio-economic impact of the reference. In other words, without answering the positive questions, we cannot move on to the normative ones.
2. On the other hand, in order to answer the normative questions, additional information should be gathered about the extent such decisions affect the subsequent decisions of economic actors, i.e.:
    a. do they launch in a later similar situation a lawsuit in order to seek a preliminary ruling procedure,
    b. do they commit a breach of law that could give rise to a lawsuit in which preliminary ruling procedure might be sought (hereinafter referred to as primary breach of law),
    c. are they engaged in an activity (not necessarily economic) where such a primary breach of law may occur [start an investment, an economic activity, etc.].

    Without knowing these effects, we cannot carry out a normative analysis. It can be seen that normative analysis requires the answering of considerably more complex questions in addition to the positive problems.
3. Even if all of these effects were known, economics could only examine them in terms of allocative efficiency.[3] A legitimate counter-argument to this normative analysis is that other social and economic impacts of the preliminary ruling procedure may be much more important. For example, it should not be forgotten that allocative efficiency and legality or the efficiency and the uniform interpretation of EU law may sometimes - perhaps not so rarely - come into conflict.

Positive analysis. Positive analysis should be organised according to the important actors in the decision-making process. These are (i) first and foremost, the judge initiating the proceedings. However, he or she might be influenced in this decision by (ii) the parties to the litigation and (iii) their legal representatives, if they are acting through legal representation.

For each of them, we will take into account the factors that influence their decisions in the procedure. It is important to make it clear from the outset that we are not looking at the consequences and effects of the initiation, but only those factors that encourage the actors to initiate (judge) or propose the initiation (parties, legal representatives) of the procedure. This is a narrower scope in two respects.

i. On the one hand, only the effects on the decision-makers are considered here - i.e. the effects on the economy and the rest of society are not.
ii. On the other hand, these are only insofar as they are incorporated into their expectations and perceptions. The effects of which they are unaware may not even influence them.

Incentive. We see that the key concept is incentive: what motivates the judge, the parties, the legal representatives to refer or to propose a reference - and what motivates them not to. However, as a starting point, we need to define what we mean by incentive: what we will and will not be looking at. To

[3] By allocative efficiency economic theory means either the Pareto efficiency or the so-called Kaldor-Hicks compensation criterion. Pareto efficiency is of little use in the case of legal problems because it considers something to be a Pareto improvement if there is no loser. According to the Kaldor-Hicks criterion, an action is efficient if the losers lose less than the winners gain. But this criterion also does not distinguish between losers and winners (losers can be those who should be protected by the law or those who are right.

understand the distinction, it is worth setting up the following simple model. Decision-makers are motivated to choose an alternative by two elements:

- what they think is right and wrong, how important a certain aspect is to them, and
- what are the known options available and what are their known consequences and impacts.

The former is called preference. Obviously, this influences decisions: even if two decision-makers know the same alternatives, even if they agree on their effects, they evaluate them differently because of their different preferences. For example, although two judges may have the same opinion about the consequences of seeking a preliminary ruling (how obvious EU law is, how long it will take for the ECJ to give an answer, etc.), they may have different preferences about the risk of mistake, or they may have different views about how important they think it is (what is worth sacrificing) to have uniform interpretation across the EU. Although preferences are important, their analysis is also neglected here, partly because of the difficulty of identifying them. Moreover, preferences are so idiosyncratic that they cannot be changed in the short term - and it is doubtful that it would be possible in the longer term.

By contrast, through modifying incentives, i.e. by transforming the effects of alternatives (or just making them known), an external actor can influence decisions even in the shorter term. While it is true that the same effects are valued differently by different people, depending on their preferences, there are some that the vast majority of people see as *positive* and others that they see as a *negative incentive* (in other words, a disincentive). What people generally consider to be positive in terms of their preferences can be identified from general assumptions in neoclassical models and behavioral economics. On this basis, we assume here that people, ceteris paribus, prefer decisions that

- reduce as little as possible the material and non-material resources available to them before the decision is taken - that is, they seek to minimise the resources used,
- improve their financial situation,
- raise their social profile - among their immediate colleagues, business and other partners,
- reduce risks, increase predictability,
- deliver benefits as quickly as possible and costs as late as possible.

In order to interpret incentives correctly, it is important to note that the effects that are usually perceived as positive or negative do not necessarily mean that decisions will actually change. Incentives are strong if they change the dichotomous decision - for example, a judge initiates the preliminary ruling procedure due to an incentive but would not initiate one without it. However, the fact that an incentive does not change a decision, or even the vast majority of decisions, does not mean that the incentive is ineffective. Such incentives are effective but weak. What makes an incentive effective is that there are people on margin who change their decision even if for others, or even for the majority the decision remains unchanged.[4]

1. The role of judges

Except in courts against the decisions of which there are no legal remedies, the initiation of the preliminary ruling procedure is a discretionary right of judges. They may initiate the procedure even if the parties do not ask them to do so - or they may refuse to do so.

The economic analysis focuses on the choice between alternatives. We can only analyse a judicial decision if we consider its alternatives. The alternative to initiating a preliminary ruling procedure is that the judge takes the view that

- the given question is in no way EU law related,

[4] Although we will not be able to analyse it in detail, some of the decisions of the actors are not dichotomous, but quantitative, continuous decisions. (For example, when a lawyer is deciding whether to propose the initiation a preliminary ruling in a lawsuit, he or she is making a dichotomous decision - but if the question is how much effort to put in to convince the judge, it will become a quantitative decision.) Economics assumes that, for quantitative, continuous decisions, the optimum (for example, the optimal amount of effort) always changes in response to incentives.

- he or she will interpret EU law by himself or herself (courts against whose decisions there is no legal remedy can only do so if the correct interpretation of the relevant EU provision is beyond doubt)
- the case-law of the ECJ gives already clear answer to the given question.

The economic analysis assumes that these alternatives are always available. In a particular case it is possible that only one or the other may be the correct legal standpoint - but the judge may still decide otherwise. First of all, the judge may be wrong in his or her assessment of the situation. And whatever the decision will be, there's always a chance of being wrong and the judge has to take the risk. It is indeed possible to reduce this chance of mistake by asking for help. The request for a preliminary decision can be understood as such help – in this case the judge is helped by the ECJ.

Before we start analysing the factors influencing the decision of the judges, one point is important to underline: here we are looking at the moment of decision-making, i.e. the moment when the parties, their legal representatives, have already presented their arguments for the initiation of the preliminary ruling procedure or against it (preferring one of the other three alternatives).

Mistake, resource saving. One of the most important considerations for judges may be to reduce the chance of a wrong decision. One such way of reducing the chances is to seek information and advice from others (e.g. colleagues, academics). However, this is not costless. Seeking preliminary ruling itself can be perceived as a request for help. This also obviously reduces the chances of misinterpretation of the law. Importantly, they do not disappear completely in this case either. It is possible that the decision of the ECJ will not provide a clear-cut answer to the applicable case. It is possible, for example, that the referring judge will only receive a guidance to be taken into account, which he or she will still have to concretize, meaning that the interpretation of EU law will actually impose an even greater burden and responsibility on him or her in relation to the application of domestic law (especially when it is the compatibility of that latter which must be assessed).

Based on the usual model of economics, it is worth describing the judges' decision in terms of costs and benefits - and the risk of mistake. Accordingly, the initiation of a preliminary ruling procedure is rational for a given judge if

$$p \times B_J + (1-p) \times B_R < (p + a_{EDH}) \times B_J + \big(1 - (p + a_{EDH})\big) \times B_R - C_{EDH} \quad (1)$$

where:

p: is the chance of making a good decision without asking for help,

a_{EDH}: is the increase in chance of a good decision due to a preliminary ruling procedure,

B_J or B_R the (absolutely subjective, preference-dependent) "usefulness", happiness, pleasure that the good or bad decision - once it has been made – brings,

C_{EDH}: is the cost of the preliminary ruling procedure (e.g. cost due to loss of time) for the judge.

It is not hard to see that equation (1) is true, i.e. the judge will refer p if

$$C_{EDH} < a_{EDH} \times \big(B_J - B_R\big) \quad (2)$$

That is, if the incremental cost of the preliminary ruling procedure is less than the resulting benefit. That benefit depends on the (subjective) difference between the perception of a good and a bad decision and the increase in the chance of a good decision - the product of the two. Let us add: cost is as subjective an element as benefit. For example, it is not the loss of time itself that matters, but how the judge assesses that loss of time. Whether a quick decision is important to him, whether he expects some kind of sanction in case of delay.

If, on the other hand, there is more than one way of asking for help - and equation (1) holds true for all of them, i.e. all of them are better than no help, then we must use the fundamental concept of economics, the so-called opportunity cost. The idea is that when you choose one alternative, the cost of that alternative is always what you give up. In the present case, if the judge decides to initiate a preliminary ruling, he or she forgoes other assistance - the assistance to make a decision himself or herself. In light

of this, it is optimal for him or her to initiate a preliminary procedure if he or she obtains worse expected benefits, pleasure, etc. from other assistance than he would through the preliminary ruling procedure.

That is:

$$(p + a_i) \times B_J + \big(1 - (p + a_i)\big) \times B_R - C_i < (p + a_{EDH}) \times B_J + \big(1 - (p + a_{EDH})\big) \times B_R - C_{EDH} \tag{3}$$

From here:

$$C_{EDH} - C_i < (a_{EDH} - a_i) \times \big(B_J - B_R\big) \tag{4}$$

In other words, initiating a preliminary ruling procedure is a rational decision if the potential additional cost of the procedure - compared to seeking help from someone else - is smaller than the additional benefit (measured relative to other help). The latter depends primarily on how much less the chance of making a mistake will be in the case of a preliminary ruling procedure. These formulas - like most formulas - are not important for us to calculate the exact value of left and right. (If only because - in a dichotomous decision - it is only the larger one that matters, not the exact value.) The point of such formulas and inequalities is to see what increases the chances of initiating a preliminary ruling procedure and what decreases them. What increases the right-hand side of equations (3) and (4), and what decreases the left-hand side of equations (3) and (4), respectively, increases the probability of initiating the procedure.

Increases the chances of a referral if

1. Judges see a greater difference between good and bad decisions according to their own preferences (greater $B_J - B_R$). This is influenced by the effects of a good or bad decision on judges. These will be addressed below.
2. There is a greater discrepancy, in the judge's view, between the effect of a preliminary ruling procedure and other forms of request for help: ceteris paribus
   - the chance of making mistake reduces less if turning to someone else for help,
   - the ECJ can be trusted more – the chance of making a mistake reduces when initiating preliminary ruling procedure (e.g. less fear of getting an ambiguous answer)
3. The relative expected costs of a preliminary ruling procedure are lower compared to other forms of assistance. For example, ceteris paribus, the judge believes that he or she will get a quicker response from the ECJ; or fear the higher cost of other forms of assistance. This difference is increased if the administrative system treats the delay in decision-making differently in the case of a preliminary ruling procedure than when seeking help from others. This leads to the first hypothesis.

   Hypothesis (opportunity cost): more references are made by judges who
   (a) believe that they do not have, or find it more difficult to get help in interpreting EU law without using the preliminary ruling procedure;
   (b) expect the ECJ to take a decision more quickly;
   (c) expect more precise guidelines from the ECJ.

Career, reputation. In the previous formulas, we did not deal with the differences between the "utility", pleasure, etc., that can be obtained from a good and a bad decision. Although these are essentially idiosyncratic elements of the decision, we can make some observations based on the assumptions stemming from the neoclassical and behavioural economics indicated above.

It may be important for judges, either for their future career prospects or for the esteem of their colleagues[5], that their decisions fit in with the national jurisprudence - even if it is (or later turns out to be) wrong. This claim is known as path dependency in economic literature[6]

can be supported by the literature if we assume that

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[5] About the role of reputational concern see O’Hara [1993], Rubin [2011] 100, Depoorter&Rubin [2017] [2017] 133

[6] See for example Kornhauser [1992a,b], Roe [1996], Rubin [2011] 99, Fon et al [2005], Zywicki&Stringham [2011] 113, Hathaway [2001] Depoorter&Rubin [2017]131

1. Judges' careers are fundamentally determined by the proportion of their decisions that are overruled by the higher courts. If there is an established case law and they stick to it, there is less chance that a decision taken without a preliminary ruling procedure - even if objectively wrong under EU law - will be overturned by a higher court. (And since this national practice is also known to the higher courts, there is less chance of a reference being made there, and of an erroneous interpretation of the law being revealed there, for similar reasons.) In cases where there is no such established practice, it is less clear how the higher courts will react to a decision without a preliminary ruling procedure.
2. If there is no such clear, established case law and therefore it is not predictable what the higher court would decide but many courts interpret the problem in the same way, then this interpretation will be followed by the judges even in cases where the chance of appeal or overruling is low.[7] This is because a judge who disagrees with the majority - and who does not follow the practice and requests a preliminary ruling procedure - imposes a cost on the others, since it is their previous decisions that he or she challenges with a preliminary ruling procedure. For this, he or she may face non-judicial retaliation. Such an initiative challenging their practice will not be popular with judges who have decided on the basis of previous case law.

Let us note, however, that the second effect cannot be sharply separated from the risk-related effect just seen. If there is an established national jurisprudence, one can assume that the issue in question either does not raise an EU law problem or that there is no doubt about the interpretation of EU law (one could say that EU law seems to be clear and the national practice seems to be in line with it). That is, if there is national jurisprudence, the risk of the subsequent decision being wrong is lower than in the absence of such jurisprudence.

But the judiciary is not united. There may be judges who are dissatisfied with clear or majority jurisprudence, and who are happy for *others* to challenge it. However, this is a typical public goods problem: they want to change the law but are reluctant to bear the cost (conflict with their colleagues). In their circle, the reputation of the judge who initiates the preliminary ruling procedure on their behalf (who assumes the role of the "hero" in game theory terms) can be explicitly enhanced.[8]

Of course, it should also be pointed out that, in contrast to the classical collective action problem of economics the failure to act may be caused not simply by waiting for others to act, by the (game-theoretical sense of the term) free-riding, but also by the fact that the judge in question has no opportunity to initiate the procedure, because he or she has no such case. It is only in his or her first genuine case concerning the issue at hand the he or she will be in a position to challenge the national jurisprudence through a preliminary ruling procedure.

If we want to test this, we will again not be able to test preferences (e.g. how important is career for them). Therefore, we can analyse this problem not from the judges' perspective but on the basis of the facts: in cases where the established jurisprudence, and thus the position of the judges, is clearer, there are fewer references.

> **Hypothesis (path dependence, reputation):** Fewer references are made in cases where there is established national case law - even if the judge sees a greater chance that the ECJ's decision would be contrary to it.

Judging the EU compatibility of national legislation. Similar, but not quite identical to the review of established case law, is the case where the conformity of a specific national legislation with EU law is in question and where the eventual non-conformity might lead to the disapplication of the national rule in the dispute concerned. Of course there might be considerable overlaps between the previous category analysed above and the present one in cases where there is an established case-law confirming the EU conformity of the national legislation. We will still analyse these categories from different perspectives. Obviously, the basic assumption in cases where the EU conformity of national legislation is at stake is

[7] This is called in the literature path dependence or *herd behaviour*. See Wagenheim [1993]

[8] Timur Kuran draws attention to the fact that the judge who break form the preferences can experience „preference satisfaction", and reputational gain from the colleagues. (Kuran [1990]) For similar anaylsis, see Whitman [2000], , De Mot [2011] 136, Depoorter&Rubin [2017] 133-134

still the same: national law is not in conflict with EU law, since the national legislator is also bound by the primacy of EU law.

However, playing the role of "hero" can be rewarding here - that is, taking on the conflict that in this case must be taken on against the legislator, instead of the colleagues. The undeniable conceptual, ethical or political (ideological) differences among judges can of course play a major role here. If a particular piece of legislation is contrary to the convictions of the judge in question, then a preliminary ruling may be an attractive step. This is clearly a point where individual preferences should be analysed. But this is, of course, outside the scope of the current research.

However, there are two aspects that reduce the cost of being such a hero and thus increase the chances of such references.

1. If there has been a political change between the adoption of the rule and the initiation of the preliminary ruling procedure, and the legislator's [the government's] principled, ethical, ideological position has changed, the "political cost" of the initiative, the chance of a politically motivated sanction (real or perceived) is reduced. This political cost is also one that appears on the left-hand side of inequality (2): if it is lower, the chances of an initiative are higher.
2. If the EU law changes, national law must also adapt to it. Therefore, the chances of national law being in conflict with EU law are higher if it is unchanged. There is a greater chance of mistake if it is considered to be compatible with EU law in the same way as under previous EU law.

Both statements point in the same direction: ceteris paribus, the chances of initiating the compatibility review of a new national law are lower. On the other hand, ceteris paribus the national case-law is assumed to be certain, which is obviously less so in the case of new legislation. A new law is therefore more likely to be reviewed because of less clear judicial practice, while a stronger presumption in favour of EU conformity (and a stronger fear of political sanctions) has the opposite effect.

> **Hypothesis (political aspects, reputation):** proportionally fewer preliminary references are initiated on issues where EU legislation remains unchanged but a new national regulation is adopted than if
> 1. a law of a previous government law needs to be reviewed,
> 2. EU law changes.

Repeat players - the subsequent benefits of information. It can also be inferred from inequalities (1) to (4) that initiating preliminary ruling procedure is more likely if such an interpretation of the EU law may help the judge in subsequent cases. This reduces the chance of making a mistake in later cases - and also the difference between a good decision and a bad one. If a judge encounters a specific type of case only once, a bad decision will only affect that one case. It is this way that it will affect his or her career, reputation, or causes him or her a guilty conscience. On the other hand, if the judge can expect a series of similar decisions, then, again from a game theory point of view, the lawsuit can be considered a recurring situation. The current interpretation of the ECJ not only affects that specific case but also reduces the chance of future mistakes. It also simplifies the handling of those cases - making them quicker and easier to decide.[9]

> **Hypothesis (individual return, predictability):** Judges who are likely to hear more of the same cases in the future send more references to the ECJ. Although there can only be highly subjective expectations about the number of future cases, a proxy variable must be found to underlie this expectation.

2. The role of the parties

It is the judge who decides whether to initiate the preliminary ruling procedure, but the role of the parties is indisputable. Except in criminal cases of public prosecution, a preliminary ruling can only be sought

[9] However, the collective-action problem can also arise here: such an initiative reduces not only the cost and chance of error of one's own subsequent decisions, but also those of other judges.

in a case that has been initiated by the parties.[10] It is important to note that this often requires a preliminary step: just because someone thinks that domestic case law or a national law is not EU-conform does not mean that they can bring a case to seek a preliminary ruling. What is needed, for example, is an administrative decision that he can be challenged - an administrative decision that is accompanied by an unpaid tax, an unpaid fine, etc. And a deliberate breach of domestic law, precisely in order to trigger a preliminary ruling procedure.

But the parties do not only play an important role as the initiators of the main proceedings: although it is for the judge to decide, for example, whether EU law is relevant to the case or whether its interpretation is - in his or her view – without any doubt, it is clear that the party seeking to obtain a preliminary ruling will try to convince the judge to initiate the procedure. If, on the other hand, the other party is against this – because for instance the established or majority jurisprudence or the national law being challenged is in its favour or because this opposing party is a state authority itself (in cases of administrative litigation) - it will argue against it. It sets in motion what the game theory literature calls an arms-race-competition (Tullock [1997]): if one side devotes resources to convince the court of its own rightness, the other side will respond by increasing its resource commitment. The end result may be the same decision (the same 'balance of power') that would have been made without this bilateral resource extraction: i.e. the resource use is a net social loss.

In this chapter, we leave aside the agent problem, i.e. the fact that the parties are represented by their legal representatives. This can be a problem because the party might, especially one who is not well informed on the issue, make easily a decision, either for or against the initiation of a preliminary ruling procedure, that is against his or her interests. The parties will typically follow the advice of their lawyers, who will also influence the parties' decision, at least by distorting the information, for example by over- or underestimating the chances before the ECJ. And if lawyers are explicitly allowed to make some of the decisions themselves, their "power" is even stronger. In this section we discuss why parties may have an interest in initiating a preliminary ruling procedure. In the next section, we will examine the extent to which lawyers' objectives may distort these decisions.

The classic rationality of the initiation. It is also worth starting this analysis with a simple formula which, like inequalities (1) - (4), shows the factors that make the decision - in this case the proposal of the initiation of a preliminary ruling procedure - more and less likely. The initiation of the procedure is rational on the part of the parties if it is true that

$$p \times B^{+} + (1-p) \times B^{-} < q \times \Big((p+\Delta) \times B^{+} + \big(1-(p+\Delta)\big) \times B^{-} - C_{EDH}\Big) + (1-q) \times (p-d) \times B^{+} + \big(1-(p-d)\big) \times B—C \quad (5)$$

where:

p: is the chance of a favourable decision for the party without seeking preliminary ruling procedure;

q: is the chance that the court will initiate the procedure, if it is proposed by the parties;

Δ: the increased chance of a favourable decision due to the preliminary ruling procedure;

d: the "penalty" against a party - how much (if at all) does it damage the chances of winning if the party proposes the initiation of the preliminary ruling procedure but the judge refuses it;

B^{+} or B^{-} the (absolutely subjective, preference-dependent) "usefulness", happiness, pleasure that a favourable or unfavourable judgement brings;

C: the cost of proposing the initiation of the procedure, which will be incurred even if the court does not initiate the procedure;

C_{EDH}: the cost of the procedure if the court actually initiates the preliminary ruling procedure - for example, the loss of time.

[10] This selection effect also has a significant impact on the overall development of the law. See Fon&Parisi [2003], Hadfiled [1992], DeMot [2011]137-138, Depoorter&Rubin [2017] 132

In the latter context, it is worth noting that the preliminary ruling procedure does not necessarily increase the cost of litigation (and may even reduce it). For example, if the first instance already initiates a preliminary ruling procedure, the issue will be decided at that first instance, and there is no need to take the dispute to the second instance or even to the supreme court.

It follows from inequality (5) that it is rational to propose the initiation of a preliminary ruling procedure if

$$C < (B^{+} - B^{-}) \times (q \times \Delta - (1 - q) \times d) - q \times C_{EDH} \quad (6a)$$

Or put it differently:

$$C < q \times [(\Delta + d) \times (B^{+} - B^{-}) - C_{EDH}] - d \times (B^{+} - B^{-}) \quad (6b)$$

It is more likely that the parties will propose to initiate the preliminary ruling procedure if

1. the stakes – that is the difference between the evaluation of a good and a bad decision – are higher (which depends on both the "real" deviation and subjective preferences, $B^{+} - B^{-}$),
2. there is a greater improvement (in the party's opinion) in the chances of winning in the case of a preliminary ruling procedure,
3. the party expects less that the initiation will be frowned upon by the judge - in particular, he or she will be "punished",
4. the preliminary ruling procedure itself will have lower cost (e.g. less time),
5. there is a greater chance that the court will actually initiate the preliminary ruling procedure.[11]

The size of the stakes. The five previous statements based on inequalities (5) and (6a-6b) will be useful in the following, but it is difficult to formulate testable hypotheses directly from them. An exception to this is perhaps the size of the stake, for which one direct and one indirect hypothesis can be formulated. The direct hypothesis clearly follows from the first of the five statements above.

> **Hypothesis (stake – direct):** more references are made in lawsuits where the stakes (especially the monetary value of the case) are higher. In these cases, the higher prize money makes it more worthwhile for the parties to bear the costs of the preliminary ruling procedure.

The problem with the direct hypothesis is that it identifies the stake of the lawsuit with its monetary value, which is far more narrow than the economics concept of utility in $B^{+} - B^{-}$. For a procedural step, such as the initiation of a preliminary ruling procedure, the stakes can be significantly higher. In a lawsuit, the moral aspect obviously plays its role: the prevailing party also gains a moral victory. The revenge also has its own role – this is when not his or her own gain but the other's loss (often moral, reputational loss) motivates the action. The parties can also have political objectives - especially when a decision makes it impossible to apply a piece of government legislation.

Therefore, it is worth starting from the assumption (which also follows from equation (5)) that, ceteris paribus (for example if the odds of winning are similar), we are willing to invest more if the payoff is higher. (Rubin [1977], Zywicki – Stringham [2011] 111) Therefore, we can infer the size of the real stakes from the resources used in the lawsuit. The more resources one devotes to the lawsuit, the higher the perceived stakes are likely to be.

> **Hypothesis (stake – proxy):** the preliminary ruling procedure is more often initiated in lawsuits where the party proposing the initiation is likely to use more resources (more evidence) - this competition for evidence is an indication that the lawsuit is more important to him or her.

Repeat players. A judgment of the ECJ in the preliminary ruling procedure will be applied in all similar cases. A party who may have many similar disputes, or who may be affected by the legislation more

[11] There is a necessary condition: $(\Delta + d) \times (B^{+} - B^{-}) > C_{EDH}$, i.e. the cost generated by the preliminary ruling procedure, if initiated, must be less than the difference between the probability of winning in the case of a successful reference and the probability of failing a reference, multiplied by the difference between the subjective benefits of winning and losing. It is worth focusing here on the "penalty" for a moment. Indeed, if the expected penalty is large, then this condition is satisfied – ceteris paribus – even at a higher preliminary ruling cost. Conversely, if the penalty is large, it makes the initiation of the preliminary ruling procedure less profitable for the other reason.

than once (e.g. may have to pay tax, may be fined for the same action repeatedly, or even continuously), may be able to resolve the problem of legal uncertainty with the preliminary ruling procedure in a way that covers all other cases. If there were no preliminary rulings, such parties would be – in game theory terms – repeat players. Indeed, if the national court rules in favour of such player, it would only decide the case in question, and the player must return. The judgment would not be binding on the other judges – indeed, it is often not even known to them. For repeat players, the stakes are therefore higher for the same game. Especially if the case decides other cases – i.e. if it is the ECJ which issues the judgment. Sometimes already in a first instance procedure. (Zywicki – Stringham [2011] 110)

> **Hypothesis (repeat players - stakes and predictability):** preliminary references are more often proposed by people who may have several similar cases - therefore the decision in a given case spill over his or her other cases.

Opportunity cost. As we have seen with judicial decisions, it is important to consider the alternatives – one chooses litigation (often the primary activity that gives rise to a lawsuit) over other options. Indeed, the examination of the conflict between national and EU law cannot be achieved through the preliminary ruling procedure alone: in many cases, it is possible to trigger an infringement procedure by lodging an (anonymous) complaint with the Commission. (Of course, this anonymity is not good for all complainants - as we will see shortly. However, anonymity is not mandatory: if someone wants to add their name or face to the proceedings, there is no obstacle: they can go public through the media.) Moreover, such initiatives do not require the initiation of a lawsuit - and (often) the primary breach of law that leads to it. At the same time, the Commission has an ongoing obligation to inform the complainant under the internal rules of the complaint procedure (whether or not to initiate an infringement procedure, the stage of the procedure, etc.), so the notification of a complaint is not lost and has a tangible effect. However, the length of the possible infringement procedure (including the administrative phase) may exceed the combined length of the preliminary ruling procedure and the national procedure.

> **Hypothesis (opportunity cost):** fewer referrals are made in cases where – according to the parties – it is easier to enforce an interpretation of EU law through an infringement procedure or where it is less important for them to be involved in the litigation.

Risk, predictability. The decision of the parties depends not only on how much they are likely to win, but also on how risk averse they are.[12] We have seen with judges that one effect of the preliminary ruling procedure is to make sentencing more predictable in the long run - reducing the chance of mistake. (Mathematically, it pushes p closer to 1 or 0 in later trials.) Of course, this predictability applies to the follow-up cases – i.e. again it is important for repeat players, who were the subject of the previous hypothesis.[13]

However, another important point can be made on the basis of the risk associated with litigation and with the preliminary ruling procedure: the risk associated with the same litigation and the same procedural step is more easily borne by those who are less risk averse. (Persons are typically assumed to be risk averse.) However, risk preference, being an idiosyncratic element, is difficult to assess. [14] There is, however, one element on the basis of which risk aversion can be predicted relatively well; and therefore the hypothesis of risk aversion can be formulated on that basis. Risk is typically measured by the size of the difference between a good and a bad period.[15] The same discrepancy is easier to bear for those who have a smaller discrepancy compared to their total wealth or portfolio: for them, it is less risky.

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[12] This is also reflected in the size of the $B^{+} - B^{-}$ difference.

[13] In the Austrian School of economics, the main goal of the legal system is not to impose rules that promote economic efficiency (Pareto efficiency or Kaldor-Hicks criterion) but to provide stability – this stability is the basis of individual planning. (Buchanan [1954], Hayek [1981], Zywicki&Stringham [2011] 124-128)

[14] Risk aversion is also an important consideration for judges. A risk-averse judge does more to reduce the risk of error. But for judges it is difficult to assess the rather idiosyncratic aspect of risk avoidance.

[15] Mathematically, we measure it by the standard deviation, or variance.

Hypothesis (risk-taking – proxy): more references are proposed by people with greater wealth – they typically find a procedure with a given amount of litigation costs easier to bear than a party with less wealth.

3. The role of lawyers

We should also have a look at the legal representatives separately because they are affected by the same decision differently from their clients. Since they often act for and inform their clients, the incentives they face may also determine the initiatives, evidence, arguments and information that go before the judge. The phenomenon, known in the literature as the agency problem, should also be investigated with regard to the preliminary ruling procedure. It is not an exaggeration to say that if any of the hypotheses seen in the previous point cannot be justified, the agency problem is almost certainly to cause the problem: the legal representative does not represent the interests of his client. As Paul H. Rubin and Martin J. Bailey proved the interest of the lawyers is generally larger than the interest of their clients, because they are repeat players. (Bailey&Rubin [1994], Rubin&Bailey [1994])[16]

For example, other alternatives (such as triggering an infringement procedure) may be suitable for the client, and may even be less risky, but the lawyer may also gain something from the case that the client gains: publicity, reputation. The reputational objective itself shows that the legal representative is often a repeat player. The literature identifies it as one of the most important repeat players. However, in their case, we can formulate the relationship between repeat players and the proposing of a preliminary ruling procedure in a slightly different way. We can build on collective action theory here.

Collective action problem. A lawsuit does not only affect the parties, but also others - their legal problems can be solved by the preliminary ruling, as it should be applied to their similar cases. And it is not only important if the ECJ rules in their favour - the ruling itself is important because it reduces risk and makes the law more predictable. And predictability, less legal risk, also influences whether someone will take on the primary activity.

However, these stakeholders are not always – and most of the time not – involved (for example, as interveners) in the litigation. They have no incentive to do so – for them, free-riding can be a very attractive strategy: waiting for someone else to start the case, take it to the ECJ, fight for a favourable decision there. The costs (as we have seen) are borne by the party that proposes the initiation of the preliminary ruling procedure – but everyone else (including the free riders) shares in the benefits. In the language of economics: they cannot be excluded from the effects of the lawsuit. However, if everyone waits for everyone else, then no one is acting for the common good.[17]

But this is where legal representatives can play a role. Although the parties involved may try to get out of the way, the lawyer may have an interest in fighting for favourable decisions (or at least decisions that make the legal system more predictable). After all, they do not simply benefit from the public good, but can gain reputation through litigation. It will be more attractive for parties interested in similar cases to hire legal representation and fight for their justice. In addition, they will be more likely to hire the legal representative who has already achieved the initiation of a preliminary ruling procedure. In this sense, the gains from repeated - but repeated for others - litigation are not left out of the equation when the proposing of the initiation of a preliminary ruling procedure (or indeed settlement) is decided by one party: it is precisely from these other stakeholders that the legal representative can expect subsequent mandates, and it is therefore in their interests that it is worth fighting this litigation. It is also in their interests that a preliminary ruling procedure should be initiated: this can improve the chances of winning in subsequent litigation and create a more predictable legal environment.

Hypothesis (potential number of similar cases and predictability): the initiation of a preliminary ruling procedure is more likely to be proposed in cases where many parties other

[16] For other analysis of the role of lawyers as repeat players, see Rubin[2011]97-98, DeMot [2011] 132-133, Zywicki – Stringham [2011] 111

[17] For the public or collective good problem in the litigation see Merill [1997], Zywicki – Stringham [2011] 110,

than the litigant in question may be in similar shoes – for example, in cases involving a large industry.

4. Conclusion

Applying the positive approach to the economic analysis of law, the paper addressed the question of when it is more likely to have a preliminary ruling procedure initiated – in which cases the actors of a national procedure (judges, litigants, their lawyers) have more incentives to initiate the procedure or to propose the initiation of it. Based on this analysis, 10 propositions are formulated and transformed into empirically testable hypotheses. According to our hypotheses more references are made in lawsuits

- where judges
  a. expect to hear more of the same cases in the future;
  b. believe that it is more difficult to get an alternative help for the interpretation of EU law;
  c. expect the ECJ to take a decision more quickly;
  d. expect more precise guidelines from the ECJ;
- where there is no established national case law;
- after a government change;
- where new EU law provisions must be interpreted;
- where the parties proposing the initiation
  a. have higher stakes (especially the monetary value) in the given lawsuit;
  b. use more resources (present more evidence);
  c. have several similar cases;
  d. believe that alternative enforcement of EU law (e.g. through an infringement procedure) is more difficult or would bring less benefit (e.g. because it is more important for him or her to be personally involved in the litigation);
  e. have greater wealth;
- where many other clients' similar cases can be closed or simplified due to this procedure.

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