ADiM
Accademia Diritto e Migrazioni
UNIVERSITÀ DEGLI STUDI DELLA TUSCIA

ADiM BLOG
August 2024
EDITORIAL

Judicial Dynamism and Its Limits: The Role of National Courts and their Interaction with the CJEU

Daniel Thym
Professor of EU Law
University of Konstanz

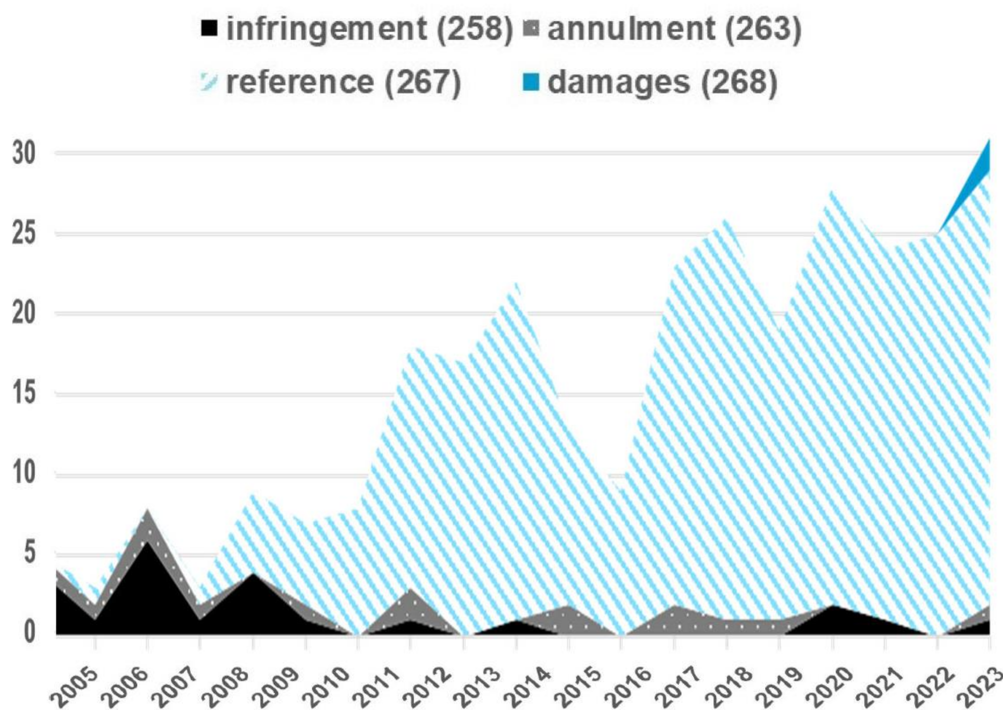
Abstract

One of the deficits of the international debate about European Migration Law in the English language is the predominant focus on EU legislation and judges in Luxembourg and Strasbourg, as if the supranational institutions shaped migration law single-handedly. That is obviously incorrect. We all know from our respective national settings that the domestic level can be crucial: in the form of implementing legislation, administrative practices, and judicial oversight.
This contribution will assess the interaction between the national judiciary and the Court of Justice in six interrelated steps illustrating that the supranational judicial output is heavily influenced by the behaviour of domestic courts, as demonstrated by two perplexing statistics on the thematic focus of all CJEU judgments on the different migration law instruments and the number of references per Member State. On that basis, the final two sections will put the spotlight on national legal cultures as a critical variable and discuss the repercussions of the increasing politicisation of migration law for the role of domestic and supranational courts.

1. Procedure: Who Seizes the CJEU?

A statistical breakdown of the procedure behind all 299 judgments delivered by the Court of

Justice on the migration law instruments up until the end of 2023 confirms what most readers will know already: the preliminary reference procedure is the central gateway. No less than 86% of all judgments originate in references by domestic courts. These statistics include all judgments delivered on the Legislation adopted on the basis of Articles 77 to 80 TFEU (the data, updated, are taken from my book on *European Migration Law*, 2023).



Two factors help to explain this centrality of preliminary references in this area of EU law. Firstly, the Commission remains passive with regard to infringement proceedings. The small black column at the lower part of the chart indicates that we may distinguish three phases. In the early years, several judgments originated in infringement proceedings, but they mainly dealt with late transposition when a State fails to adopt implementing legislation. All judgments concerned instruments of minor political importance (here, pp. 80-83). Throughout the 2010s, the Commission hardly ever brought Member States to Court, despite the emergence of controversial laws and practices, especially after the policy crisis of 2015/16. The Commission was passive, thus leaving national courts with the onus to fill the void.

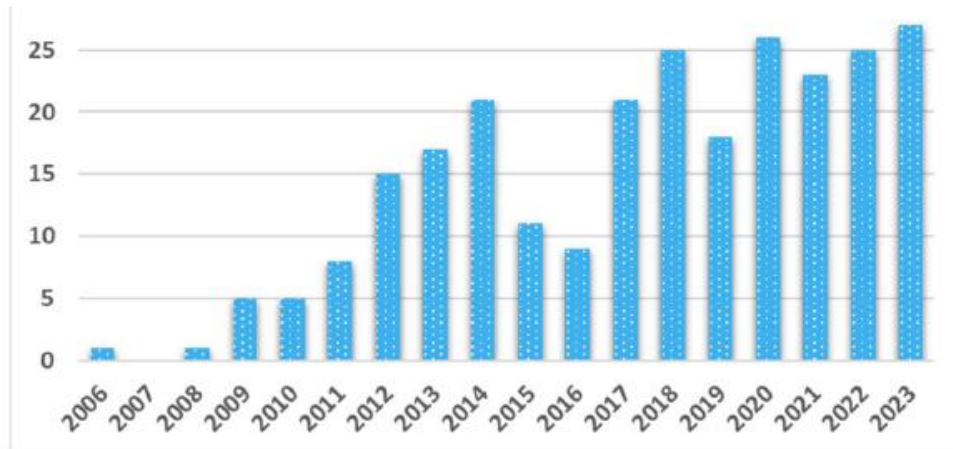
Things changed somewhat in 2020. Evers since we have seen several judgments against Hungary in particular, starting with the refusal to comply with the Council Decisions on the relocation of asylum seekers. They responded to instances of open defiance, when a state wilfully violates EU law. We can expect a similar activism when the new asylum legislation enters into force and when some Member States refuse to participate in the solidarity mechanism. Such infringement proceedings against "rebels" (here, point 141) are essential to

prevent open disobedience from undermining the normative integrity of EU law. They do not, however, change the predominantly passive role of the Commission with regard to "regular" breaches of Union law. In this respect, national courts remain a critical gateway at present and in future.

There is a second background for the essential role of national courts, which receives much attention these days: actions for damages, notably with regard to Frontex. There were two judgments on this highly salient issue last year. While these judgments can have some legal impact, I would warn, from the perspective of general European law, against high expectations for the simple reason that judges in Luxembourg have interpreted the right to standing for individuals restrictively for decades (here, here, here). The underlying reason is simple. Preliminary references allow judges in Luxembourg to leave complex matters of fact to national courts. That is critical for a Court with 27 judges dealing with numerous subject matters, not only migration. For reasons of capacity, the Courts in Luxembourg depend on national courts serving as "filters" to identify legal questions of interpretation where guidance from Luxembourg is warranted.

2. Timing: When Should Preliminary References Be Made?

If national courts have an essential filtering function, a critical follow-up question is when they should make a reference – or should decide by themselves. In an opinion of 2021, Advocate General Bobek brought forward an argument which essentially boiled down to the conclusion that Luxembourg should be consulted for legally complex or politically salient topics, especially when they concern more than one country. The rest: national courts should decide by themselves (here, points 36-51). The Court of Justice did *not* sign up to the idea and reiterated the well-known *CILFIT* formula that all questions of interpretation which are not self-evident must be referred to Luxembourg by the highest national courts.



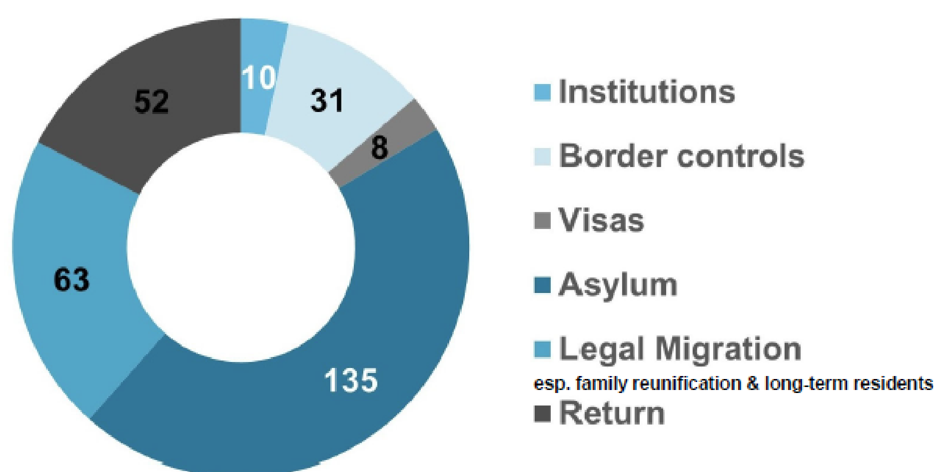
Overall number of preliminary references per year

It is no secret that reality on the ground has always looked different in all areas of EU law (here). The graph demonstrates that there are present approximately 25 references per year on all aspects of migration law combined. This number alone explains why judgments from Luxembourg will always be the proverbial "tip of the iceberg". The rationale proposed by Advocate General Bobek remains relevant: not as a legal standard, but as a normative guideline as to when national courts should make a reference. Luxembourg should be consulted whenever a question is legally tricky or politically salient for more than one country.

3. Themes: Topics (Not) Reaching Luxembourg

The asymmetry of the judicial output becomes perplexing when we analyse the thematic output on the multiple aspects of European migration law: institutional questions, border controls, visas, asylum, family reunification, economic migration, return, and cooperation with third states. All these issues are practically, legally, and politically relevant, even though the number of court rulings on these different themes varies markedly – both at the domestic and the supranational levels.

The discrepancy is striking: while asylum, return, and family reunification get a lot of attention, visas and border controls feature in few judgments. Some discrepancies can be explained by contextual factors (here, pp. 87-89). By way of example, labour migration is not usually conflictual in administrative practice – unlike family reunification and asylum. Moreover, asylum applicants have a strong incentive to go to court, since they usually benefit from a right to remain up until the delivery of the judgment. By contrast, those refused a visa will rarely seize domestic courts. Why? Courts tend to give the executive leeway in visa matters, and a legal remedy does not bring about a preliminary right to enter Union territory.



Thematic focus of CJEU judgments on migration law 2006-23

In addition, we may witness a "snowball effect", with a first reference on a topic triggering follow-up references. By way of example, think of the *El Dridi* saga about the criminalisation of illegal stay, which originated in a first reference by an Italian court in response to a lively domestic debate involving many academics (here). More recently, a series of several follow-up judgments has dealt with the status of Palestinian refugees under the Qualification Directive or subsequent applications under the Asylum Procedures Directive. Notably, these references tend to come from different countries, indicating that CJEU judgments are read across the Union. National courts may serve as a pioneer putting new themes on the agenda.

Even if we figure in these contextual factors, the absence of judgments on critical aspects stands out. Border controls and access to the asylum procedure are a case in point. Controversial pushback practices have reached Luxembourg on two occasions only, regarding Lithuanian practices and in the context of Dublin transfers (here, here). By contrast, there have been no references on pushbacks from Poland, Croatia, Greece, and Spain (with regard to Ceuta and Melilla), as well as for the harsh French internal border control practices towards Italy and Spain.

There are two possible explanations for why national courts do not refer such controversial topics. On the one hand, there might be no domestic cases. In the absence of domestic proceedings, national courts cannot make a reference. On the other hand, domestic courts may prefer not to send certain subject matters to the Court in Luxembourg, thus “resolving” them domestically. Of course, both explanations may be inter-twined if asylum applicants, or NGOs supporting them, refrain from initiating domestic proceedings, since they do not expect the national judiciary to engage with pushback practices proactively. We shall come back to these underlying considerations of national legal culture later on.

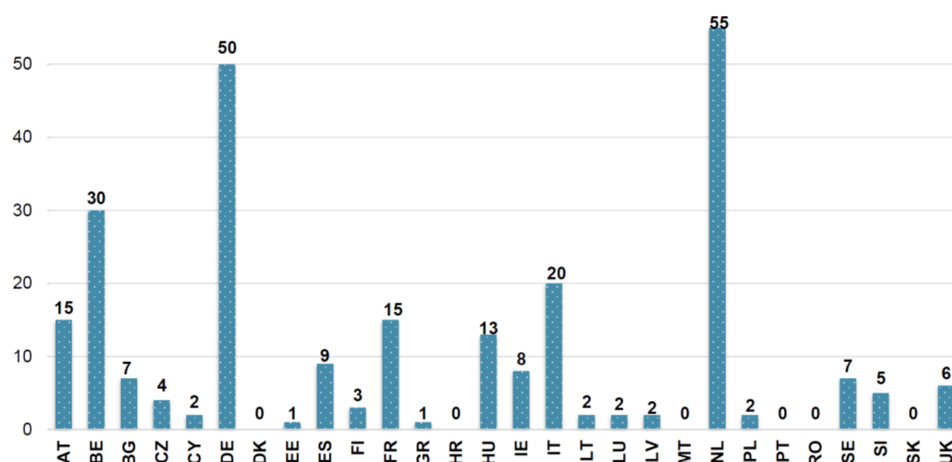
This brings me to a recommendation. In case you are curious to understand why national courts engage in references, read the work of our Dutch colleague Jasper Krommendijk, for instance the open access publication *National Courts and Preliminary References*. Krommendijk’s empirical work unearths a plethora of practical and sociological factors supporting or hindering the willingness of national courts to consult Luxembourg. They include practical aspects: knowledge of Union law, workload, length of proceedings, and the role of the parties. Then, there are institutional factors, such as the organisation and self-image of the judiciary, to which we shall come back in a minute. Finally, the answer from Luxembourg has an impact. Talking to German judges, I regularly feel a sense of frustration with what they perceive to be a lack of quality of the CJEU output. That can reduce the willingness to send references in the future. In the German case, the sense of frustration stems from very high expectations.

4. Silence: Number of References per Member State

Readers who are not familiar with the Court practice might be surprised that so many references come from a few countries, which can be identified on the graph below through the use of Internet top-level domains (AT for Austria, BE for Belgium, BG for Bulgaria, and so on). In the field of migration, two jurisdictions account for 41% of all references: DE for Germany and the Netherlands. If we add Belgium, Italy, Austria, and France, the “top six” countries account for 72% of all references. By contrast, the courts of more than half of the Member States (14) have sent two references or less which have resulted in a judgment up until the end of 2023 (pending cases are not included in the statistical overview). That contrast is remarkable even if we take into account the overall picture of wide discrepancies: German and Italian

courts have been the most willing collaborators of the Court of Justice for decades (here, p. 11-12, 33-35).

How to interpret these data? While the high number of references from Germany and the Netherlands reflects a high loyalty towards Union law and the practical importance of asylum, the relative insignificance of other countries invites comments. To start with, the low number



CJEU judgments in response to references per country 2006–23

of references from Denmark, Ireland, and the UK, before Brexit, can be explained by their opt-outs. Moreover, the lesser visibility of domestic courts from Central and Eastern Europe can be rationalised by the comparatively low number of third country nationals living there. Note that temporary protection for Ukrainians does not, unlike asylum, raise many legal problems.

Remarkably, with the exception of Lithuania, there have been no references with regard to the controversies regarding the "instrumentalization" of asylum by Belarus or pushback allegations in Croatia. As a legal academic, I find this failure of the judiciary in some countries frustrating and disappointing, since it undermines the normative integration of EU law. Most striking in this respect, is the marginal role of Greek courts. They have triggered only one case on the Return Directive which, moreover, concerned a Bulgarian national in a post-accession scenario (here). Not a single Greek court consulted judges in Luxembourg on how to interpret the asylum acquis in the aftermath of 2015/16 before last year, when a reference on the safe third country provision was made, which is currently pending and does not, therefore, feature in the statistical survey yet (here).

The Greek example may be an extreme case, but it is illustrative of a more general divergence between the theory of mandatory referral, enshrined in Article 267 TFEU, and widespread factual flexibility. Even if we are willing to embrace the guideline of Advocate General Bobek presented a minute ago, it is quite simply inconceivable that the highest courts dealing with migration are not confronted with more questions which raise legally tricky or politically

salient issues affecting more than one country. With regard to Italy, one might have expected more judgments given that Italian courts are generally making a lot of references to Luxembourg: 20 judgments on migration in 18 years is not impressive, also considering the high numbers of asylum applicants entering Italy each year.

5. Member States: National Legal Cultures

Anyone working in different countries or speaking to colleagues from abroad realises that national legal cultures differ (here). Academic teaching is a case in point. At the beginning of each semester, I explain to Erasmus students that legal education in Germany is quite different from law lectures at their home universities. The same holds true for academia: while it sits in the proverbial "ivory tower" in some countries, it actively cooperates with legal practice elsewhere. In the UK and the Netherlands, academia tends to be interdisciplinary; in Germany and Italy, it has traditionally been more doctrinal (here). Similar differences characterise the national judiciary.

At an abstract level, we may distinguish between "self-confident" and "passive" as well as between "neutral" and "political" courts – as indicated on the graph. The vertical distinction between "self-confident" and "passive" concerns the self-confidence of the judiciary to assume an independent standpoint, not least on controversial topics. The German judiciary is highly self-confident in this sense: it stands ready to deal with more or less any topic, irrespective of its political sensitivity.

At the same time, it is decisively "neutral". The horizontal distinction between "neutral" and

"political" concerns the judicial output. German legal practice is famously doctrinal, meaning that it concentrates on legal hermeneutics. Such interpretation does have a political dimension, but it usually plays a lesser role for the outcome. By contrast, I would classify a national court as being "political" when policy guides the outcome. Such a "political" court can produce "migrant-friendly" or it can, alternatively, favour state interests when judges close their eyes to illegalities. I'm fully aware that this categorisation has it limits, even more so when we place individual countries on the scheme in a tentative manner which is not based on extensive research or a thorough knowledge of the national judiciary. Nevertheless, even a rough and tentative categorisation might prove useful to stimulate further reflection.

It is inherent in such simple categorisation that it glosses over internal differences. By way of example, criminal judges in Italy may play a different role than other branches of the judiciary, for instance in civil or administrative matters. Moreover, one chamber within a court may have a different leaning than their colleagues; such discrepancies may also exist within a judicial formation. My categorisation is, in other words, a conscious exercise in simplification to stimulate debate.

Differences can also be found between lower and higher courts. By way of example, the Dutch Raad van State appears to be more state-oriented than lower courts, even though the Dutch courts are, on the whole, quite neutral. That's why I place them close to the Germans. Let me tentatively put three more countries on the graph, considering both cooperation with the Court of Justice and what I perceive to be their national output.

Greece might be an obvious case of a "passive" and "political" legal culture: "passive" in the sense of shying away from tricky questions, and "political" in the sense of siding with state interests. For all I understand, one of the reasons for the ADiM symposium is an Italian debate about how "political" the Italian judiciary is and should be. I would tentatively put it here: self-confident and somewhat political – in full awareness of the internal discrepancies between different segments of the judiciary. By contrast, my understanding of Sweden and Finland is that the judiciary there is "passive" in the sense that it has not traditionally played an active role in domestic affairs; at the same time, its output is fairly "neutral". We shall see what this means for the new Finnish legislation on pushbacks to Russia.

Finally, I consider the Court of Justice in Luxembourg to be reasonably "self-confident". It is somewhat "political" in constitutional cases whenever the future of the European project is at stake. This conclusion is not called into question by two well-known rulings on the EU-Turkey Statement and humanitarian visas in which the CJEU evaded dealing with the substance (here, here). In my categorisation, these evasion tactics would qualify as a political and passive behaviour. At the same time, we should be careful not to take two singular judgments from 2017 and 2018 as a definite statement about the role of the Court in Luxembourg on

constitutional matters. Remember that the Court was fairly self-confident and active in judgments on the relocation decisions (here), infringement proceedings against Hungary (here), and a series of rulings on the rights of the child in the Charter (here). By contrast, many rulings on secondary legislation exhibit what I have called an "administrative mindset" on a previous occasion (here). They engage in a technical exercise of doctrinal hermeneutics.

Finally, we all may wish to position ourselves, as academics, on the graph. My own self-perception as an academic is close to the German judiciary, especially for my publications in English, whereas I engage in quite some policy advice at the national level in German, where, as a result, I perceive myself to be more "political". My impression is that many younger academics have shifted in that direction in recent years.

6. Context: The Implications of Politicisation

One of the most famous descriptions of the Court of Justice comes from the American law professor Eric Stein: about a Court «tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect» (here). Conventional knowledge has it that this "benign neglect" has facilitated the constitutionalisation of the European project, through judgments on primacy, direct effect, and the economic freedoms (here), which have been sustained by a permissive consensus" among national governments and the electorate (here). This argument informed the evolution of both the European Union generally and of migration policy specifically. When it comes to migration, the output of the EU institutions was not subject to heated debate until nine years ago. This was one contextual factor for the adoption of moderately liberal legislation (here).

It is apparent that the situation is different nowadays. Migration has become a salient topic which defines the democratic political contest and influences election outcomes. Political scientists maintain that the former "permissive consensus" has given way to a "constraining dissensus" (here). In such a context, it is highly unlikely that EU institutions and the judiciary can maintain the moderately liberal direction they have followed during the first 15 years of EU migration law.

If that is correct, it has repercussions for the role of judges – as illustrated by the example of the European Court of Human Rights. Anyone reading judgments from Strasbourg will realise that the period of judicial activism on the part of human rights court in the field of migration stopped a decade ago around the time of the *Hirsi* judgment. There continue to be many judgments, but they essentially apply legal standards developed previously (here, pp. 588-595). The Court of Justice in Luxembourg may be less vulnerable than its sister court in Strasbourg. Nevertheless, its output on migration will inevitably unfold in a different context

nowadays than in the heyday of dynamic judgments before the millennium change. Luxembourg may still be a fairyland Duchy, but the Court is no longer blessed with benign neglect.

The same holds true for the national judiciary. It can be risky for judges to openly confront governments on politically salient topics when doing so requires a dynamic interpretation of the law. Whether courts will be willing to confront that risk will depend, in part at least, on their self-perception and the national legal culture in line with previous comments. This leaves me with a very last finding from my statistical overview of the CJEU output. I have always been surprised by the high number of references from Hungary: 13 up until the end of last year. Hungary is the seventh most active Member State in terms of preliminary references on migration.

Many of these references are what one might call "primacy references". The outcome is comparatively straightforward from a legal perspective, but it does concern politically salient topics – with lower courts openly confronting the restrictive asylum policies of the Hungarian government. Consulting the Court of Justice can play a critical role in enhancing the legitimacy of national court judgments censoring state practices. In a way, the judgment from Luxembourg serves as a "shield" to protect the national judiciary against the accusation of politicisation. Of course, such a strategy will only work if the Court of Justice sides with the referring court. Against this background, I would recommend Italian courts to consult Luxembourg whenever they think that it overstretches their legitimacy to decide by themselves or whenever the outcome requires a dynamic interpretation of the law.

To cite this article: D. THYM, *Judicial Dynamism and Its Limits: The Role of National Courts and their Interaction with the CJEU,* ADiM Blog, Editorial, August 2024.