

# THE REALITY OF NATIONAL JUDGES AS EU LAW JUDGES: KNOWLEDGE, EXPERIENCES AND ATTITUDES OF LOWER COURT JUDGES IN SLOVENIA AND CROATIA

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*Abstract: With a Member State's accession to the EU, national judges acquire new powers as well as responsibilities. National judges as 'juges communautaire de droit commun' are expected to uphold the principle of EU law supremacy; interpret national law in conformity with EU law; set aside national provisions incompatible with EU law rules; when required, apply EU law ex officio; and send a preliminary question to the CJEU when the CJEU's answers are needed for the resolution of a domestic legal dispute. Yet, is this feasible and how does this description of the EU law-minded national judge compare with reality? Based on survey and interview results with judges, this paper explores the knowledge of, experiences with, and attitudes towards EU law among lower court judges in Slovenia and Croatia. The paper aims to compare the reality of the application of EU law by national judges with the EU's expectations of them. The results reveal that national judges are sceptical of their knowledge of EU law, encounter EU law only sporadically, and are fairly pessimistic of their role as EU law judges. Furthermore, this paper reveals that the constraints to the effective application of EU law by national judges do not necessarily stem from any negative sentiment towards the EU or EU law, but are rather of a practical nature. I discuss the relevance of these findings for discussions on the Europeanisation of national judiciaries.*

*Keywords: national judges, national courts, application of EU law, EU law, Europeanised judiciary, preliminary ruling procedure*

## 1 National judges as 'juges communautaire de droit commun'?

The European Union's legal system has given national courts and judges a special status. National courts have been recognised as 'Community courts of general jurisdiction'<sup>1</sup> which are responsible for 'disputes arising from the insertion of Community law into the national legal or-

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<sup>1</sup> Case T-51/89 Tetra Pak Rausing SA v Commission ECLI:EU:T:1990:41, para 42.

ders'.<sup>2</sup> Scholars have singled out national courts as the first in line to enforce and apply EU law in a particular Member State,<sup>3</sup> as the core enforcers of individuals' rights and obligations under EU law,<sup>4</sup> which play a critical role in the process of judicial protection in the EU.<sup>5</sup> In this respect, 'national judges at all levels are potentially judges of [European Union] law'.<sup>6</sup>

This new role of 'juges communautaire de droit commun' entrusted to national judges by means of EU membership comes with new powers but also new responsibilities. A national judge wearing an EU law wig is expected to uphold the supremacy of EU law; protect the rights of individuals, which are conferred on them by means of EU law; interpret national law in conformity with EU law; set aside national provisions incompatible with the rules of EU law; apply EU law *ex officio*; confirm the meaning of an EU law rule by comparing all 24 language versions and interpret it in light of EU law as a whole; and send a preliminary question to the CJEU when the resolution of the national legal dispute requires it. The question this paper asks is: is this feasible? And how does this description of the EU law-minded domestic judge compare to reality? Recent studies have highlighted problems that national judges encounter when applying EU law.<sup>7</sup> National judges have been found to be sceptical of their knowledge of EU law,<sup>8</sup> have reported to encounter EU law only sporadically, and have

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<sup>2</sup> F Grévisse and J-CI Bonichot, 'Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les États membres' in Jean Boulouis (ed), *L'Europe et le droit: Mélanges en hommage à Jean Boulouis* (Daloz 1991) 297.

<sup>3</sup> Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 3.

<sup>4</sup> U Jaremba and Juan Mayoral, 'Perspectives on Europeanization of National Judiciaries: Old and New Questions' (2016) iCourts Working Paper Series, No 59, 4.

<sup>5</sup> Juan A Mayoral, Urszula Jaremba, and Tobias Nowak, 'Creating EU Law Judges, the Role of Generational Differences, Legal Education and Career Paths in National Judges' Assessment Regarding EU Law Knowledge' (2014) 8(21) *Journal of European Public Policy* 1135.

<sup>6</sup> Claes (n 3) 3; Lord Hadley, 'What Is a European Community Law Judge?' (1993) 52(2) *Cambridge Law Journal* 234, 240.

<sup>7</sup> Michal Bobek, 'A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe' (2006) 2 *Croatian Yearbook of European Law & Policy* 265; M Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45(6) *CML Rev* 1611; T Nowak et al, *National Judges as European Union Judges* (Eleven Publishers 2011); Allan F Tatham, 'The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary' (2012) 18(4) *European Law Journal* 577.

<sup>8</sup> Nowak (n 7) 83; John Coughlan et al, 'Judicial Training in the European Union Member States' (2011) Study for the European Parliament 25; European Parliament, 'The Role of the National Judge in the European Judicial System' (European Parliament Resolution of 9 July 2008 (2007/2027(INI))); U Jaremba, 'Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes' (PhD thesis, Erasmus University Rotterdam 2012) 199; A Lazowski, 'Half Full and Half Empty Glass: The Application of EU Law

admitted that it is not always clear what the EU expects of them.<sup>9</sup> In view of the foregoing, is it true that ‘forty years after *Van Gend en Loos* and *Costa v ENEL* it has become a truism to say that every national court in the [EU] is now a [European Union] law court’?<sup>10</sup> Can we conclude with certainty that every national judge across the EU is a European Union judge? Can we be sure that every judge knows what the EU expects of them and complies with these expectations? Most importantly, what explains the divergences between national judges in the way and extent they apply (and comply with) EU law in their day-to-day work?

The present paper seeks to answer these questions. It does so by exploring the knowledge of, experiences with, and attitudes towards EU law among lower court national judges in two EU Member States: Slovenia and Croatia. The aim of this paper is to see how the perception of national judges as EU law judges compares to reality and whether there are any significant differences between Slovenia and Croatia that could be explained by the duration of their EU membership. The paper is based on survey results obtained from 416 judges that are complemented with the results of in-depth interviews with 31 judges.

This paper is structured as follows. Section one introduces the survey on the knowledge of, experiences with, and attitudes towards EU law. Section two presents the results by grouping them into three parts: (1) judicial knowledge of EU law; (2) judicial experience with EU law; and (3) judicial attitudes towards the EU and EU law. The research findings reveal considerable discrepancy between what the EU expects from national judges and how the application of EU law looks in practice. National judges report insufficient knowledge of EU law and specific EU law mechanisms, encounter EU law only sporadically in their day-to-day cases, and consider how negative sentiments towards the EU and EU law hamper its effective application. In the concluding discussion, I consider the relevance of these findings for research on the rule of national courts in the process of European integration and give recommendations for future study.

## 2 Data and methods

The present research is based on a survey and on interview results conducted with Slovenian and Croatian lower court judges. The survey on the knowledge of, experiences with, and attitudes towards EU law was

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in Poland (2004–2010)’ (2011) 48(2) CML Rev 503, 521–22; Mayoral, Jaremba, and Nowak (n 5) 1130.

<sup>9</sup> Nowak (n 7) 83.

<sup>10</sup> Claes (n 3) 3.

launched in spring 2017 and covered the entire population of first- and second-instance court judges in Slovenia (n=857) and Croatia (n=1,750) (see Table 1 and Figure 1 for an overview of the response rate).<sup>11</sup> The questionnaire itself is based on the questionnaire developed by Nowak et al to survey Dutch and German judges<sup>12</sup> and has subsequently also been used on Polish<sup>13</sup> and Spanish judges.<sup>14</sup> Individual judges were approached through the president of the respective court at which they sit.<sup>15</sup> The response rate was similar for both countries: 16.6 percent in Croatia and 14.4 percent in Slovenia. Taken in real numbers, 290 judges from Croatia and 126 judges from Slovenia participated in the survey (see Table 1).

Table 1. Response rate overview

	<b>Courts approached</b>	<b>Judges approached</b>	<b>Participants</b>	<b>Response rate</b>
<b>Croatia</b>	76	1,750	290	16.6%
<b>Slovenia</b>	65	857	126	14.7%

For a better understanding of the results, the findings obtained via the survey are complemented with the findings of in-depth semi-structured interviews conducted with 18 judges from Croatia and 13 judges from Slovenia. The interview respondents were approached via the survey. At the end of the survey questionnaire, participants were asked whether they were willing to participate in an interview in the continuation of the research. A total of 74 judges expressed interest: 54 from Croatia and 20 from Slovenia. For practical reasons, a purposive sampling design was used, selecting at least one judge per type and level of court. To analyse the interview results, thematic content analysis was used.

<sup>11</sup> Peak courts, that is, supreme and constitutional courts, were excluded from the research and the survey was designed exclusively for first- and second-instance court judges.

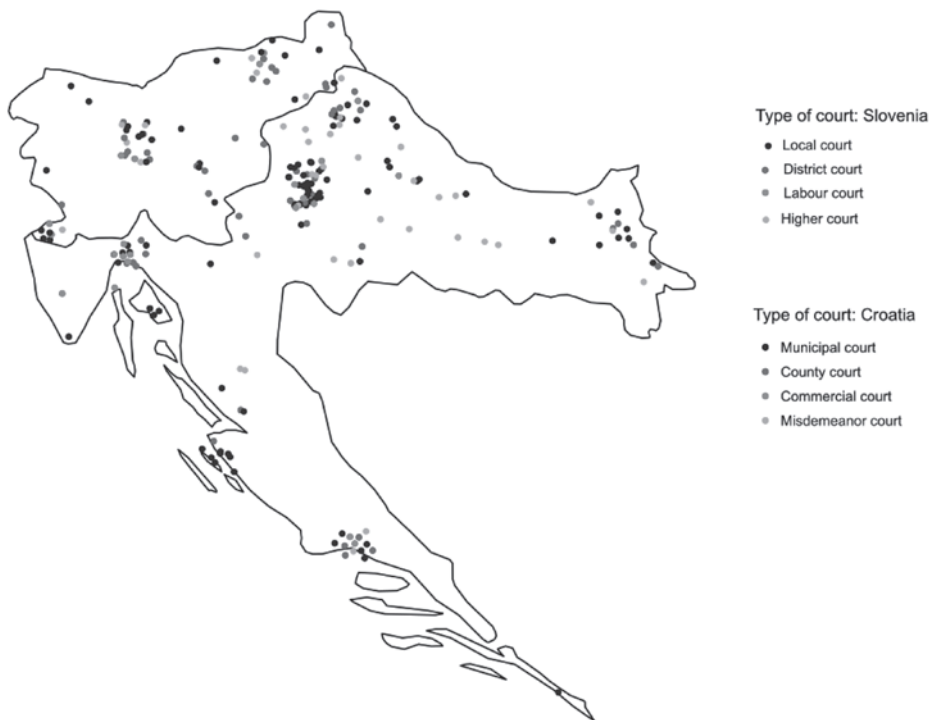
<sup>12</sup> Nowak (n 7).

<sup>13</sup> Jaremba (n 8).

<sup>14</sup> Juan Antonio Mayoral Díaz-Asensio, 'The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe' (PhD thesis, European University Institute 2013).

<sup>15</sup> This was done for practical reasons because, unlike the contact information of individual judges, the email addresses of court presidents are publicly available on the website of the respective court for Croatia or on the official judiciary website in Slovenia.

Figure 1. Visual overview of the survey respondents according to the court type



Approaching judges themselves was not without limitations. A survey on EU law is more likely to attract judges with more positive perceptions of the EU and their role under EU law. This problem may be more pronounced in interview-based research because of the confidentiality issue. Participation in the survey was completely anonymous and judges on both sides of the EU-integration dimension could anonymously give their opinion on their knowledge of, experience with, and attitudes towards EU law. Participating in an interview, in contrast, required judges to disclose their name and contact information. Although they were promised full confidentiality, judges with more pro-EU attitudes, with more experience with EU law and with higher knowledge of EU law, might have been keener to participate in an interview. This creates self-selection bias, where the group who ignored the interview invitation might differ in their characteristics, such as their knowledge or attitudes, from the group who participated in the interviews. The results, therefore, should be interpreted with caution.

### 3 Results

#### 3.1 Knowledge of EU law among Slovenian and Croatian judges

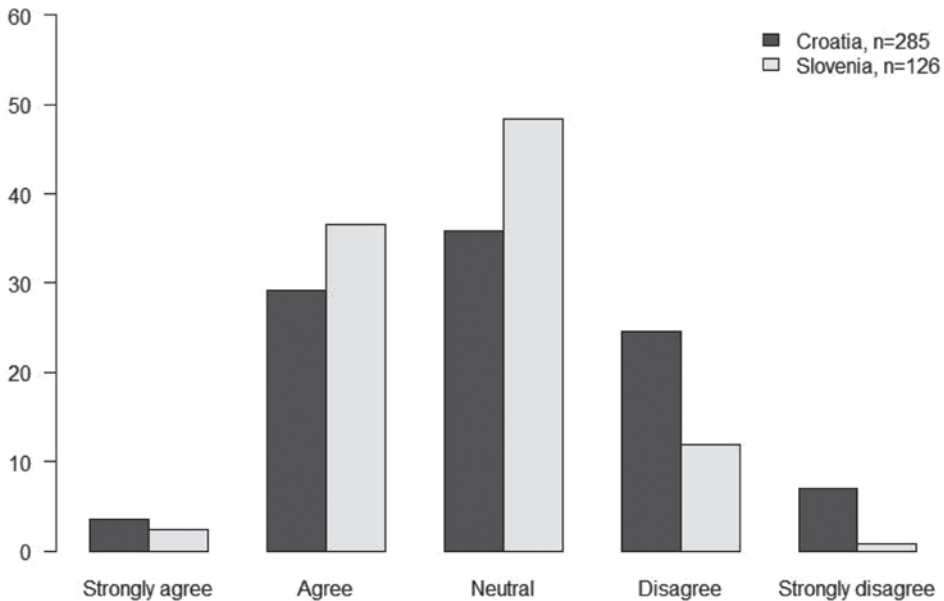
'HOW JUDGES EVALUATE THEIR KNOWLEDGE OF EU LAW AND HOW THEY ACQUIRE IT'

The first part of the results section explores judicial knowledge on EU law in general but also knowledge of specific EU law mechanisms such as the preliminary ruling procedure, the application of EU law *ex officio*, and the principle of harmonious interpretation. This part also touches upon some of the problematic aspects of EU law knowledge, such as access to training on EU law.

##### 3.1.1 Knowledge of EU law in general

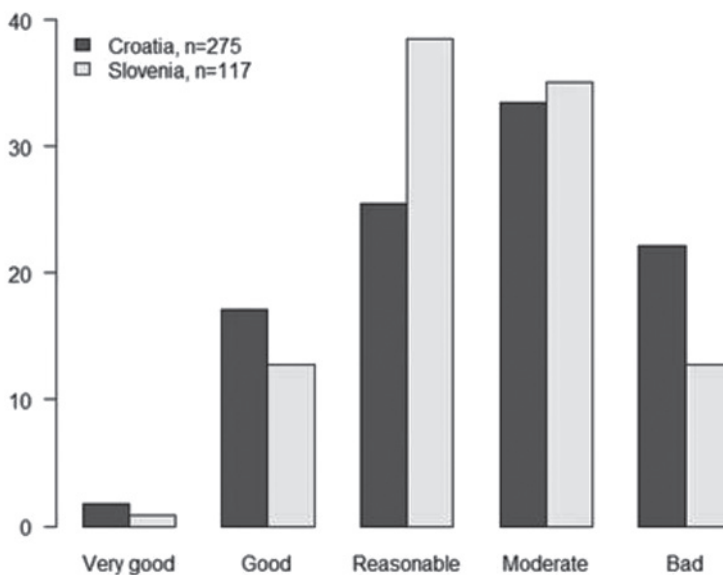
When asked about their general knowledge of EU law, approximately one-third of judges (37 percent of Slovenian and 31 percent of Croatian judges) reported that they are well informed about developments in EU law. The results show that Slovenian judges are better informed about developments in EU law than their Croatian counterparts: thirty-three percent of Croatian judges said they are not well informed about the developments in EU law, compared to 13 percent of Slovenian judges.

Figure 2. I am in general well informed about developments in EU law (%)



This difference, which is significant at the 0.0001 level,<sup>16</sup> could be explained by two factors: first, the different length of EU membership and, second, the difference in training on EU law offered to national judges. The interview results suggest that, while Slovenian judges are in general satisfied with the offer of training on EU law,<sup>17</sup> systematic and comprehensive education on EU law is missing in Croatia. Judges argue that the coverage of judges with education is poor and ‘it all comes down to one or two judges attending [the seminar]’.<sup>18</sup> Furthermore, education on EU law rarely goes beyond basic introductory courses. The president of one court, for example, discloses that ‘my judges succeeded in participating in [training on] the introduction to EU law and the preliminary ruling mechanism. But now [the education] should be upgraded and this is not happening’.<sup>19</sup>

Figure 3. How do you assess your knowledge of EU law? (%)



When it comes to knowledge of EU law, Croatian judges assess it slightly higher than their Slovenian counterparts, although the differ-

<sup>16</sup> An ANOVA test was performed to see if the mean for Croatian judges is significantly different from the mean for Slovenian judges, p-value = 0.00208\*\*.

<sup>17</sup> One labour court judge says: ‘Every year we have these so-called schools for judges [where] the latest judgments are presented. [...] I think we have a good training system’. Slovenian judge 8, labour and social court, 1<sup>st</sup> instance.

<sup>18</sup> Croatian judge 1, municipal court, 1<sup>st</sup> instance.

<sup>19</sup> Croatian judge 11, misdemeanour court, 1<sup>st</sup> instance.

ence is not statistically significant.<sup>20</sup> This is surprising, as Slovenia has been an EU Member State much longer than Croatia. Based on Figure 3, a total of 13 percent of Slovenian and 18 percent of Croatian judges rate their knowledge of EU law as very good or good. There are, however, many more Croatian judges who rate their knowledge of EU law as bad. This is reported by 24 percent of Croatian as compared to 13 percent of Slovenian judges.

Often invoked during the interviews was the belief that the knowledge of EU law of the older generation of judges is much worse than that of younger generations. Judges believe that there is a generational gap when it comes to knowledge of EU law. One judge discloses that although 'there are judges who are – irrespective of age – experts who have been following EU law for a long time, [...] there is a pattern where senior judges refuse to accept new things'.<sup>21</sup> A Slovenian judge similarly argues that because there were too many judges in Slovenia, the ministry stopped new employment. He says that 'the problem is that even when new judges come, they are not 30 years old but they are 40 and they have been working for some time'. What is needed, he argues, is 'some fresh wind in the judiciary. [...] Someone who would bring new perspectives and would push things a little bit forward. Without that, [...] everything is done in the old way'.<sup>22</sup>

Table 2. Knowledge of EU law among different age groups: Slovenian and Croatian judges (in absolute numbers and percentages)

	<b>Very good</b>	<b>Good</b>	<b>Reasonable</b>	<b>Moderate</b>	<b>Bad</b>
<b>29-40</b>	1(2%)	9(17%)	16(29%)	21(39%)	7(13%)
<b>41-50</b>	2(1%)	20(13%)	42(28%)	51(34%)	32(21%)
<b>51-60</b>	2(1%)	27(19%)	39(28%)	41(29%)	29(20%)
<b>61+</b>	1(4%)	4(14%)	12(44%)	7(26%)	3(11%)

Table 2 above, however, does not show significant disparities in EU knowledge based on the age of a judge. Reported knowledge of EU law among judges in their 30s corresponds closely to that reported by judges in the age group 61+. The percentage of judges with good knowledge and those with bad knowledge of EU law are comparable across all age groups. This supports the findings of Mayoral et al who, contrary to the common belief that younger generations of judges have a higher knowl-

<sup>20</sup> ANOVA test, p-value=0.334.

<sup>21</sup> Croatian judge 1, municipal court.

<sup>22</sup> Slovenian judge 1, local court.



edge of EU law, found that older generations having undergone training in EU law rate their EU law knowledge the highest.<sup>23</sup> They explain this result as evidence that older judges have more incentive to maintain their reputation, which includes good handling of EU law cases. The difference between the age groups in their knowledge of EU law in this research is, however, not statistically significant.<sup>24</sup>

As for gender differences, female judges were found to be much more critical of their knowledge of EU law than their male colleagues. This difference is statistically significant at the 0.1 level.<sup>25</sup> While 23 percent of male judges rate their knowledge of EU law as good or very good, only 14 percent of female judges do so. Similar results were reported by Jaremba when it comes to Polish judges.<sup>26</sup> This may be explained by the lower participation of female judges in training on EU law. Based on the survey results, female judges spend fewer hours on EU law courses than their male colleagues. This difference between male and female judges is statistically significant at the 0.05 level.<sup>27</sup> Several interviews discussed this divergence, pointing out the difficulty of maintaining a good work-family balance. One Croatian judge says: 'I have two sons and it has not always been easy for me. [...] This is one of the reasons why female judges do not participate in training. Only now in my 50s and 60s, when my sons are grown up, can I educate myself. Until now, I have been under the pressure of family life. And this is despite the fact that our courts are feminised. More than 70 percent [of judges] are women.'<sup>28</sup>

### 3.1.2 Knowledge of specific EU law mechanisms

This section discusses judges' familiarity with specific mechanisms and principles of EU law, namely the preliminary ruling mechanisms, the obligation to apply EU law *ex officio*, and the principle of harmonious interpretation of national law in line with EU law.

#### The preliminary ruling procedure

Presumably the most well-known and most researched EU law mechanism is the preliminary ruling procedure, enshrined in Article 267 TFEU. Because the procedure consists of both the preliminary reference submitted by the referring national court and of the preliminary

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<sup>23</sup> Mayoral, Jaremba, and Nowak (n 5).

<sup>24</sup> ANOVA test, p-value = 0.365.

<sup>25</sup> ANOVA test, p-value = 0.087.

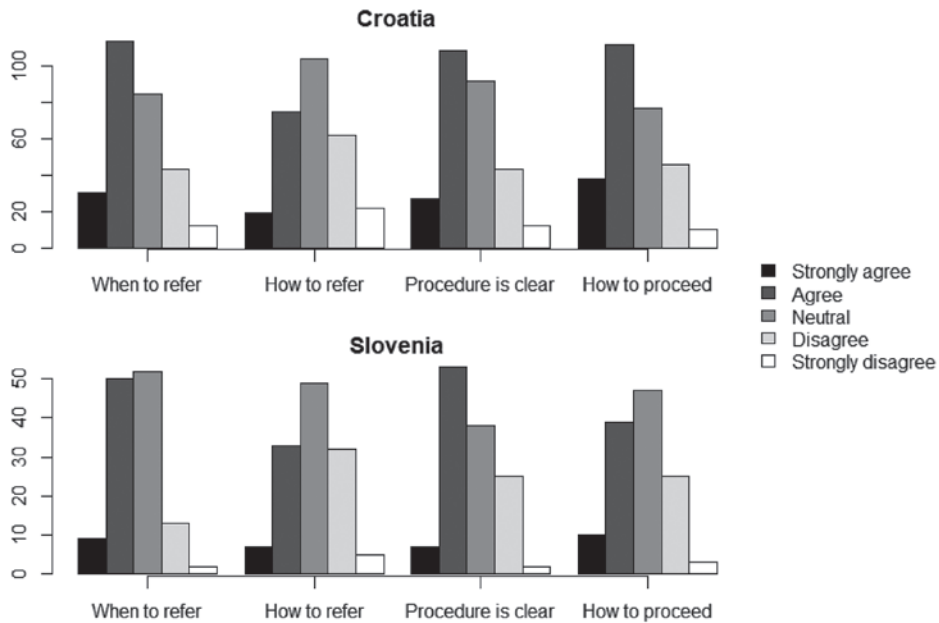
<sup>26</sup> Jaremba, 'Polish Civil Judges as European Union Law Judges' (n 8) 178, fn 756.

<sup>27</sup> ANOVA test, p-value = 0.048\*.

<sup>28</sup> Croatian judge 2, county court.

ruling issued by the CJEU, the survey measured four aspects of judicial participation in the preliminary ruling procedure: whether judges know in which situations and how to refer questions to the CJEU, whether the procedure is clear to them, and whether they know how to proceed with an answer from the CJEU to the question referred. The results are illustrated in Figure 4.

Figure 4. Familiarity with the preliminary ruling procedure



When it comes to knowledge of the preliminary ruling procedure, the survey gives mixed results. Almost half of the survey participants indicated that the preliminary ruling procedure is clear to them (48 percent in both countries) and that they know in which situations they are expected to refer a preliminary question to the CJEU (40 percent of Croatian and 46 percent of Slovenian judges). Furthermore, 53 percent of Croatian and 39 percent of Slovenian judges know how to proceed with the CJEU's answer to the preliminary question.<sup>29</sup>

<sup>29</sup> The results between the two group of judges are not statistically significant, except with the last aspect of the preliminary ruling procedure: 'I know how to proceed with an answer of the CJEU to the question referred', where the difference between Slovenian and Croatian judge is significant at the 0.1 level. ANOVA test, p-value = 0.058.

The difference is not statistically significant for the other three answers: (1) 'I know in which situations I am expected to refer a preliminary question to the CJEU', p-value =

What seems problematic is the question of how to refer a preliminary question to Luxembourg. Only 30 percent of Slovenian and Croatian judges know how to refer a legal question to the CJEU. This result was further clarified during the interviews. A Croatian judge says that the problem lies in the ‘education of judges who are probably running away from it because you need to know how to draft it in a proper way, how to address it, invoke the relevant case law, and already know the existing case law not to repeat the question. Well, maybe one more elegant solution is just to bypass it’.<sup>30</sup> Another judge argues that a judge who has ‘not undergone the relevant education has no idea in what form, to whom, and how [to make the reference]’,<sup>31</sup> and that it is ‘not Strasbourg but rather the European Court in Luxembourg that should be asked for a preliminary ruling’.<sup>32</sup>

Seminars and workshops on EU law play an important role in educating judges on the preliminary ruling mechanism, yet many will still never pose a preliminary question in their entire judicial career. One reason is that judges lack experience and practical knowledge of the procedure. One Croatian judge says: ‘Look, we have all been through some seminars, we have had some education on EU law. [...] Although we know theoretically something about it, in practice [we know] less’.<sup>33</sup> Lack of practical experience could explain the finding that judges know in which situations to ask for a preliminary ruling and how to proceed with it, but have very little knowledge of how this works in practice.

#### Application of EU law *ex officio* (raising points of EU law on its own motion)

The obligation of national judges to raise EU law in a dispute *ex officio* revolves around the question of whether or not a national judge can, should, or is obliged to raise and apply EU law in situations where the parties to the case did not invoke it, although there are certain exceptions to its use.<sup>34</sup> When asked about the application of EU law *ex officio*,

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0.784; (2) ‘I know how to ask a preliminary question to the CJEU’, p-value = 0.891; (3) ‘The preliminary ruling procedure is clear to me’, p-value = 0.734.

<sup>30</sup> Croatian judge 1, municipal court.

<sup>31</sup> Croatian judge 10, county court.

<sup>32</sup> Croatian judge 10, county court.

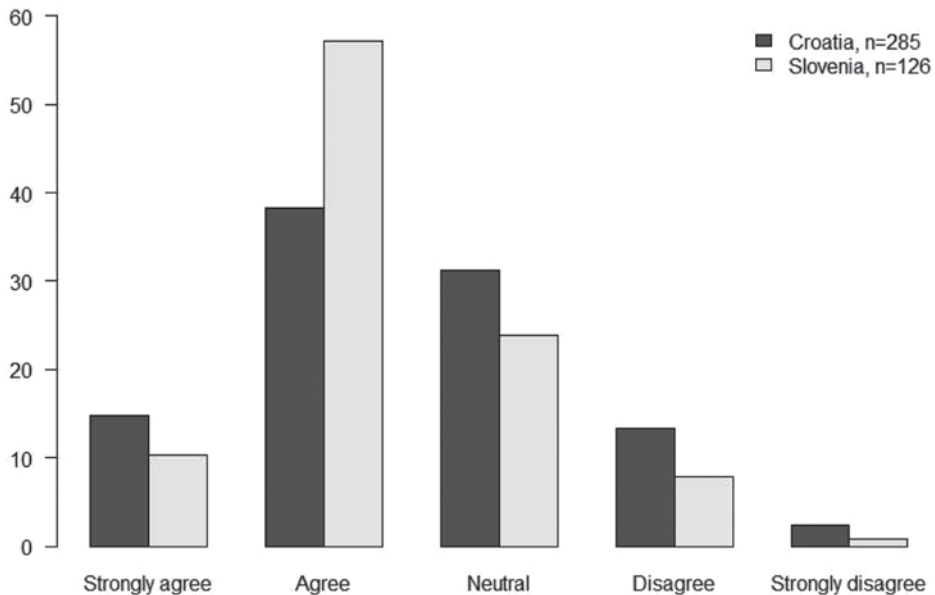
<sup>33</sup> Croatian judge 5, county court.

<sup>34</sup> The obligation of national courts to raise points of EU law *ex officio* is limited by the principle of party autonomy, which ‘safeguards the rights of the defence; and it ensures the proper conduct of the proceedings by, in particular, protecting them from delays inherent in the examination of new pleas’. The obligation, however, does apply in situations in which national law would have to be applied *ex officio*, when it is possible but not compulsory for the court to apply national law *ex officio*, and when the public interest protected by EU law

Slovenian judges show greater familiarity with the principle. Figure 5 shows that more than two-thirds of Slovenian respondents (67 percent) know when EU law should be applied *ex officio*, as compared to 50 percent of Croatian respondents. This difference is significant at the 0.1 level<sup>35</sup> and could be explained by the fact that the principle is part of well-established education on EU law in Slovenia, as emphasised in the previous section.

Although judges are quite aware of their duty to raise points of EU law on their own motion, the interview results suggest that they still rely heavily on the parties' invocation of EU law before the court. An often-cited reason for not applying EU law in cases that appear before them is because the parties did not invoke it. Judges believe that the parties 'should propose if EU law is different from ours' and 'we cannot do anything without the positions of the parties'.<sup>36</sup>

Figure 5. It is clear to me when EU law should be applied *ex officio* (%)



Only three interviewed judges mentioned the possibility of invoking EU law of their own motion. Yet they too agree that the parties' proposal would be helpful. One Croatian judge argues that 'the parties are not

is at stake even in situations where *ex officio* application is not required. See Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* ECLI:EU:C:1995:44.

<sup>35</sup> ANOVA test, p-value = 0.0594.

<sup>36</sup> Croatian judge 8, municipal court.

those who are obliged to [invoke EU law]. The court is the one who should know the law [...]. Of course, it is helpful for the court if the parties themselves refer to a provision of EU law. But [...] if the court determined that a provision should be applied *ex officio*, then it must apply it'.<sup>37</sup> A Slovenian judge believes that the application of EU law *ex officio* requires a certain amount of knowledge of EU law. He argues that 'if a party does not refer to European law, the only possibility is that the judge himself uses this law *ex officio*, which means that he must know it. If he knows it, he will use it'.<sup>38</sup> This finding supports the previous literature on the role of litigants in the process of European legal integration, where litigants' invocation of EU law is seen as a type of resource that lowers the opportunity costs of the application of EU law at the national level.<sup>39</sup>

### The principle of harmonious interpretation

Another obligation of national judges in their role as EU law judges is to interpret national law in the light of the wording and the purpose of an EU act.<sup>40</sup> This obligation applies to all national courts and to all national law, irrespective of the relationship between the parties, that is, whether the relationship is vertical or horizontal.<sup>41</sup>

<sup>37</sup> Croatian judge 14, municipal civil court.

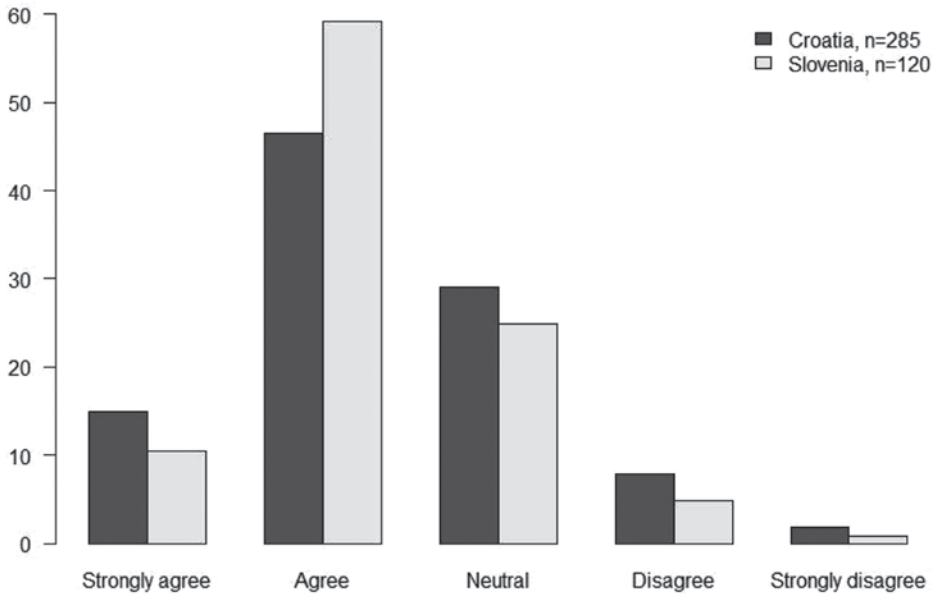
<sup>38</sup> Slovenian judge 13, administrative court.

<sup>39</sup> Claire Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in Silvana Sciarra (ed), *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart Publishing 2001); Elise Muir, 'Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices' in Elise Muir and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (European University Institute, EUI Working Papers 2017); Elise Muir and Sarah Kolf, 'Belgian Equality Bodies Reaching out to the CJEU: EU Procedural Law as a Catalyst' in Elise Muir and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (European University Institute, EUI Working Paper 2017); Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002). \u0022 in \iHow EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum, ed. Elise Muir, C. Kilpatrick, and B. De Witte, vol. 2017 (EUI Working Paper, 2017

<sup>40</sup> Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen ECLI:EU:C:1984:153, para 26.

<sup>41</sup> Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA ECLI:EU:C:1990:395.

Figure 6. I know how to interpret national law in conformity with EU law (%)



When it comes to the principle of harmonious interpretation, the results do not differ significantly among the judges from the two countries, although Slovenian judges show a slightly greater familiarity with the principle.<sup>42</sup> The survey results show that 28 percent of Slovenian and 20 percent of Croatian judges know the rules on the harmonious interpretation of EU law and that 69 percent of Slovenian judges and 59 percent of Croatian judges know how to interpret national law in conformity with EU law.

The interview results revealed that problems with the principle of harmonious interpretation often revolve around the question of teleological v grammatical interpretation. Judges argue that they 'are not really used to the creative interpretation of decisions'<sup>43</sup> and the way of thinking of the CJEU, which includes 'the concept of the teleological. Let's go interpret it. Let's not just apply the text mathematically and textually, let's be creative'.<sup>44</sup> As argued by one Croatian judge, Croatian 'traditional judiciary is based on grammatical and semantic interpretation'.<sup>45</sup> Following the rules of harmonious interpretation, this 'creates [...] uncertainty.

<sup>42</sup> The difference between Slovenian and Croatian judges is not statistically significant. ANOVA test, p-value = 0.339.

<sup>43</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

<sup>44</sup> Croatian judge 10, county court, 2<sup>nd</sup> instance.

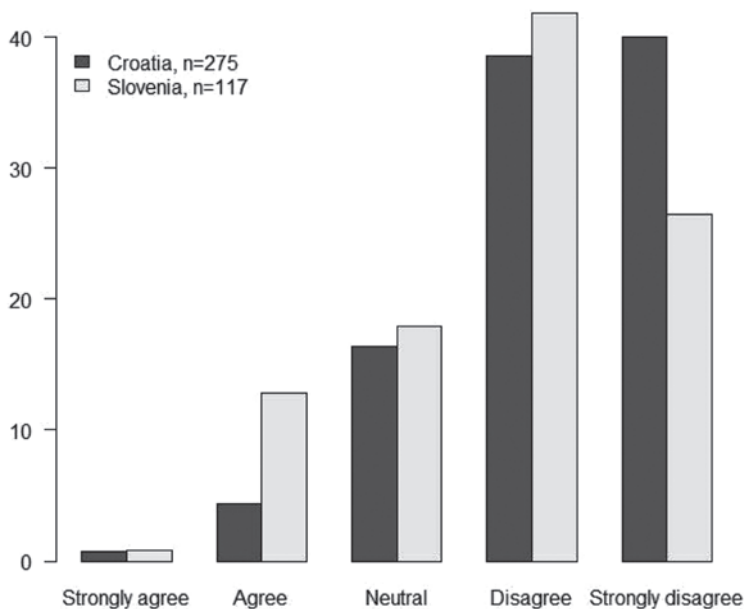
<sup>45</sup> Croatian judge 16, municipal court, 1<sup>st</sup> instance.

Because old patterns of thinking and judicial decision making are not always applicable'.<sup>46</sup>

### 3.1.3 Judicial training on EU law

Discussion on the knowledge of EU law among national judges would be incomplete without taking into account judicial participation in EU law education available to judges both at the national and the EU level. This section, therefore, explores the questions of when and how national judges acquired knowledge of EU law, whether they continuously educate themselves in EU law and whether they are satisfied with the courses available on EU law.

Figure 7. During law school, I acquired sufficient knowledge of EU law (%)



I start with the question of how judges acquire their knowledge of EU law. As can be seen from Figure 7, 80 percent of Slovenian and Croatian judges believe that they did not acquire sufficient knowledge on EU law during law school. This result does not come as a surprise, taking into account that the majority of the respondents to the survey belong to the age group of 40-60 and did not have EU law courses during their studies. Missing education on EU law during university was often invoked as

<sup>46</sup> Croatian judge 16, municipal court, 1<sup>st</sup> instance.

problematic during interviews. Judges argue that ‘the majority of judges in the Croatian judiciary are judges who graduated from university and finished their education in the old regime<sup>47</sup> and ‘did not have [EU law] courses at university, [which has to be] learned “as we go”’.<sup>48</sup>

This difference is statistically significant at the 0.001 level<sup>49</sup> and can be explained by the longer membership of Slovenia in the EU. While, at the time of the survey, Slovenia had been an EU Member State for twelve years (since 2004), Croatia had joined only three years previously (in 2013). Thus, a certain percentage of young Slovenian judges was certainly covered by education on EU law during their studies. Yet, the interview results confirm that this number is low. A Slovenian judge says ‘I graduated in 1996. Then there was [...] very little on EU law at the faculty. In the fourth year, there was one half-year course on EU law. Slovenia was then not in the EU, not even close’.<sup>50</sup> Younger judges, in contrast, might be better at recognising EU law because they did have some connection with EU law during their studies. Talking about law clerks and their better understanding of EU law, a Croatian judge says that ‘this is a younger generation who already had EU law at university’.<sup>51</sup> Furthermore, ‘judges of the first instance are in general younger and they have gained some kind of education that has already pointed to European law during the university’.<sup>52</sup>

Figures 8 and 9 show that as many as 90 percent of Slovenian and Croatian judges feel the need to broaden their knowledge of EU law, and the majority of respondents (89 percent from Slovenia and 83 percent from Croatia) are willing to participate in training in EU law. Yet, this enthusiasm is not shared by everyone, as almost ten percent of judges would not be willing to participate in training in EU law.<sup>53</sup>

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<sup>47</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

<sup>48</sup> Croatian judge 9, municipal court, 1<sup>st</sup> instance.

<sup>49</sup> ANOVA test, p-value = 0.00162\*\*.

<sup>50</sup> Slovenian judge 1, local court, 1<sup>st</sup> instance.

<sup>51</sup> Croatian judge 10, county court, 2<sup>nd</sup> instance.

<sup>52</sup> Croatian judge 13, municipal court, 1<sup>st</sup> instance.

<sup>53</sup> The results between Slovenian and Croatian judges are not statistically significant, based on the ANOVA test.



Figure 8. I feel the need to broaden my EU law knowledge (%)

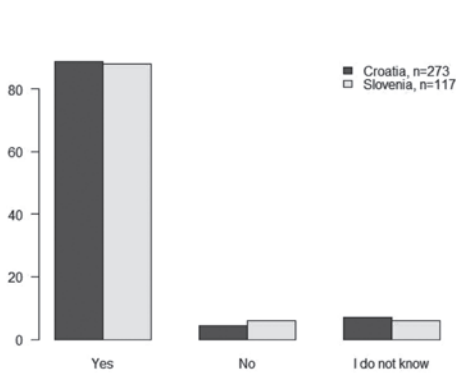
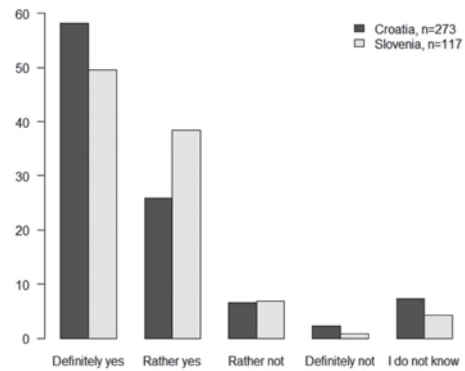


Figure 9. I am willing to participate in training in EU law (%)



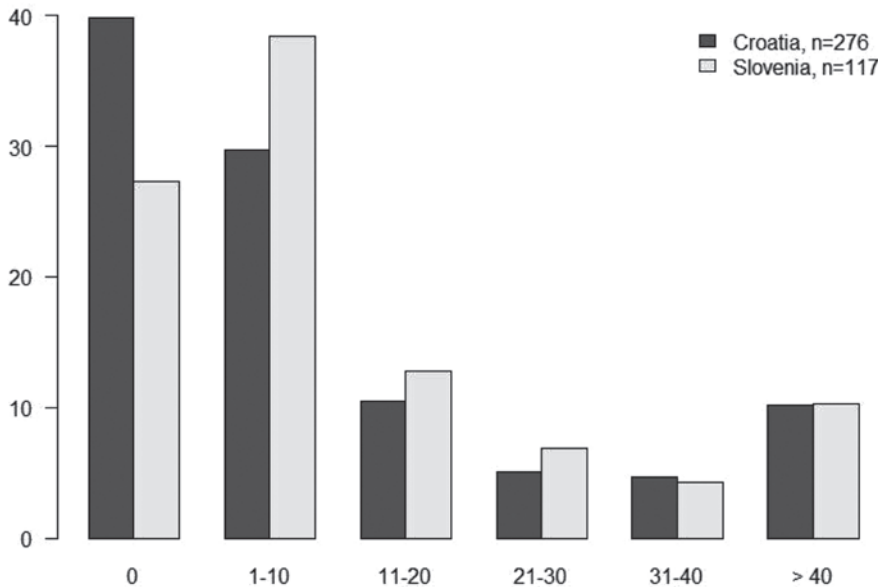
These judges were further asked about the reasons for their unwillingness to participate in EU law courses. Because of the small number of observations, these results can be discussed only qualitatively. Most of the 'unwilling' judges said that they do not have time to follow courses on EU law, five of them are not interested in EU law, and three judges stated that they do not need EU law in practice. Two Croatian judges and one Slovenian gave their own personal view, arguing that they would shortly be eligible for retirement and, therefore, do not see the point in participating in EU law courses. One Croatian judge gave an elaborated answer, emphasising the effect of the judicial workload on willingness to learn and apply EU law in practice. He says:

The salary I receive is not stimulating enough to spend my time on additional education. Furthermore, I spend too much time at work and, unfortunately, free time and energy to meet the annual targets (around 250 cases are to be solved, or 1 per day if you are looking at the number of working days). Thus, I do not have time to read and to learn about regulations which are anyway more or less incorporated into Croatian laws.

Although the majority of judges feel the need to broaden their knowledge, only a handful of them spent more than ten hours on classes on EU law in the previous twelve months. One-third of Slovenian judges and almost half of the Croatian judges spent zero hours on courses on EU law during the last year (see Figure 10).<sup>54</sup>

<sup>54</sup> The results of Slovenian and Croatian judges do not differ significantly. ANOVA test, p-value = 0.324.

Figure 10. How many hours did you spend on courses on EU law in the last 12 months? (%)



The interviews revealed several reasons for such a low level of participation. First, courses are too theoretical and not sufficiently focused on practice.<sup>55</sup> One Croatian judge shared his disappointment with education on an EU regulation. He says: 'I, unfortunately, did not hear anything new [...]. I did not get an answer for all the problems in practice that bother me. That was a theoretical presentation about the regulation. The lecturer had less practical knowledge than me because I deal with [this regulation] every day'.<sup>56</sup> Second, there is not enough money for EU law courses. A Croatian judge says:

Attending a seminar means paying a registration fee, paying the [judge's] daily salary, the seminar is organised in Zagreb at 9 in the morning and you cannot spend a night. A judge then has to go at 5 in the morning like some kind of bakery assistant [...] and then the judges will not go. You need to get up at 4 am, travel to Zagreb, sit in the seminar and then return home. There is no money.<sup>57</sup>

<sup>55</sup> This was also one of the survey questions. The results show that almost half of Slovenian and Croatian judges (strongly) agree with the statement that EU law courses offered to them are too theoretical and not sufficiently focused on practice.

<sup>56</sup> Croatian judge 1, municipal court, 1<sup>st</sup> instance.

<sup>57</sup> Croatian judge 12, municipal court, 1<sup>st</sup> instance.

Furthermore, there are limited places available for EU law courses. A president of a misdemeanour court criticised this, arguing that:

They give an introductory class on EU law. And then for [our region], they foresee one workshop on EU law in one year. Our court at that time [...] had 11 judges. And we have a right to one participant. It takes 10 years for all of us to get our turn to participate in the seminar on an introduction to the law of the European Union or on the preliminary question. Well, that just does not make sense.<sup>58</sup>

Finally, judges are too overburdened with cases to be able to participate in courses on EU law. One judge argues that

judges spend a lot of time preparing for work [...], for examining jurisprudence, case law, for meeting these framework criteria. This is constantly pressing you. You have to meet the norm! You have to meet the norm! [...] These workshops are organised during office hours and they last all day. So, for that one day a judge cannot work on his cases. I believe this is one of the problems. [...] They are not interested in it, they would rather work on their cases.<sup>59</sup>

Judges who do participate in training on EU law mostly attend courses organised by national institutions. Two-thirds of judges who participated in some sort of training in the last 12 months did so with the Slovenian Judicial Training Centre (*Center za izobraževanje v pravosodju*) and with the Croatian Judicial Academy (*Pravosudna akademija*). The interview results with Croatian and Slovenian judges suggest that judges prefer training organised by national institutions because they are often the only free means, that is, they are fully subsidised by the government. For example, one Croatian judge says that ‘the only thing what we judges have for free is the judicial academy. Going abroad within some other organisations, this has to be paid for’.<sup>60</sup>

### **3.2 Experiences with EU law among Slovenian and Croatian judges**

‘HOW OFTEN DO JUDGES ENCOUNTER EU LAW AND HOW DO THEY PERCEIVE ITS APPLICATION IN THEIR DAY-TO-DAY WORK?’

Several scholars emphasised that the number of national decisions involving EU law is much larger than the number of questions referred

<sup>58</sup> Croatian judge 11, misdemeanour court, 1<sup>st</sup> instance.

<sup>59</sup> Croatian judge 14, county court, 2<sup>nd</sup> instance.

<sup>60</sup> Croatian judge 12, county court, 2<sup>nd</sup> instance.

to the CJEU.<sup>61</sup> Yet, how and to what extent judges apply EU law is much more difficult to assess without a formal referral to the CJEU and this is why a reliable number of cases involving EU law is still missing.<sup>62</sup> I attempt to give my own estimation based on the survey results.

Slovenian and Croatian judges were first asked to estimate how many cases they decide on an annual basis. As can be seen from Table 3, Slovenian judges decide on average 147 cases annually, while the workload of Croatian judges is slightly higher, at 188 cases on an annual basis. The difference between the two groups of judges is statistically significant at the 0.01 level.<sup>63</sup>

Table 3. Presence of EU law in the total number of cases

Descriptive statistics Croatia				Descriptive statistics Slovenia			
		Workload	EU law cases			Workload	EU law cases
N	Valid	263	262	N	Valid	113	115
	Missing	51	52		Missing	21	19
<b>Mean</b>		188	25	<b>Mean</b>		147	11
<b>Median</b>		176	2	<b>Median</b>		100	3
<b>Mode</b>		0	0	<b>Mode</b>		0	0
<b>Minimum</b>		0	0	<b>Minimum</b>		0	0
<b>Maximum</b>		1000	600	<b>Maximum</b>		1000	133

Table 3 further shows that EU law appears only sporadically in the overall workload of national judges. Based on judges' responses, EU law appears on average in 13 percent of cases in Croatia and 7.6 percent of cases in Slovenia.<sup>64</sup> The interview results support this finding. One Croatian judge admits 'I have very little experience [with EU law]. My experi-

<sup>61</sup> Conant (n 39); Gareth Davies, 'Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context' (2012) 19(1) *Journal of European Public Policy* 76; Damian Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom, (2000) 23(4) *West European Politics* 169; Karen J Alter, 'The European Union's Legal System and Domestic Policy' (2000) 54(3) *International Organisation* 489; A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 *Living Reviews in European Governance* 1.

<sup>62</sup> One of the few attempts to estimate the number of national decisions involving EU law is the study of Hübner. See Denise C Hübner, 'The 'National Decisions' Database (Dec.Nat): Introducing a Database on National Courts' Interactions with European Law' (2016) 17(2) *European Union Politics* 324.

<sup>63</sup> Chi-Square test, p-value = 0.00004\*\*\*.

<sup>64</sup> The difference between Slovenian and Croatian judges is not statistically significant. Chi-Square test, p-value = 0.3373.

ences are in fact minimal'.<sup>65</sup> Other judges add that 'this is not something that you apply every day and there are not many cases of this type'<sup>66</sup> and that 'this is just breaking through'.<sup>67</sup> A Slovenian judge similarly argues that EU law does not appear 'that often. Maybe [...] a few times per year. I don't know if this is 10 or 50 cases'. Although the number of cases with an EU law element is still much higher than the number of cases that end up referred to the CJEU, the estimations given by some scholars have been exaggerated.<sup>68</sup> Based on the survey results, fewer than 15 percent of national decisions involve EU law.<sup>69</sup> When it comes to the overall workload of Slovenian and Croatian judges, the interview results suggest that judges from both countries feel overburdened. This case burden is partly a result of the existence of the court's targets. The norm, as judges call it, refers to numerical and time targets. Numerical targets are in force in Croatia and are prescribed by the Ministry of Justice and differ according to the type and level of the court, as well as according to the type of cases brought before the court.<sup>70</sup> They prescribe the number of cases each judge should solve in one calendar year. Judges do not hide their dissatisfaction with the existence of the numerical target. One Croatian judge says: 'As for the workload of judges in Croatia, there is a so-called judicial target, a statistic that does not follow the actual situation, the type, the quality of the case [...]. We are burdened with the number. And the quality and how much time we spend is irrelevant'.<sup>71</sup>

In Slovenia, numerical standards have been abolished and replaced with so-called time standards, which prescribe the period of time in which certain types of cases should be solved. A Slovenian judge explained this in the following way:

Until recently, until the beginning of 2016, there were court targets. Informally, they were called norms. Formally it was: the minimum-expected scope of judicial work. But we all talked about the norm as in a factory. [...] Currently, this numerical target has been abolished. However, judges are still being checked. First, how much a judge has done,

<sup>65</sup> Croatian judge 9, municipal court, 1<sup>st</sup> instance.

<sup>66</sup> Croatian judge 9, municipal civil court, 1<sup>st</sup> instance.

<sup>67</sup> Croatian judge 9, municipal court, 1<sup>st</sup> instance.

<sup>68</sup> Hübner (n 62); Denise C Hübner, 'The Decentralized Enforcement of European Law: National Court Decisions on EU Directives with and without Preliminary Reference Submissions' (2018) 25(12) *Journal of European Public Policy* 1817.

<sup>69</sup> National decisions involving EU law refer to these decisions with a direct citation to EU law primary and secondary legislation and/or to the CJEU's case law. This notion does not cover EU law that has been transposed into national law.

<sup>70</sup> 'Framework Standards for the Workload of Judges, Law on Courts', Official Gazette, Number 150/05, -16107, 113108, 153109 I 11,6110, 271I, 57III and 13011, D.

<sup>71</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

this is being monitored, this counts [...]. Besides, we have so-called time targets. They are like a deadline. The deadline [when] the case must be resolved.<sup>72</sup>

The court targets and judicial workload are among the most commonly cited reason for not applying EU law and for not sending a preliminary question to the CJEU among Slovenian and Croatian judges. A Croatian judge says: ‘We have complex cases. And judges spend a lot of time on preparing [...] a case, on examining jurisprudence, case law, on meeting these framework criteria. This is constantly pressing you. You have to meet the norm! You have to meet the norm!’<sup>73</sup> Another judge similarly discloses that ‘the existence of this norm has a negative impact on the application of EU law, as it prevents judges from spending time on learning and searching for EU law’.<sup>74</sup>

Slovenian judges are similarly burdened with time targets. Judges argue that ‘time targets have a major impact on [EU law] because you are under pressure to work faster. Even faster’<sup>75</sup> and ‘have a negative effect on the effective and proper application of international law, including EU law and ECHR law’.<sup>76</sup> Furthermore, sending a preliminary question under the time targets requires writing a special report where judges have to ‘justify why they think a case [...] should take a longer. And then the president of the senate, as well as the president of the court, have to agree with it. But this is all extra work’.<sup>77</sup>

### 3.2.1 *Consultations within ones’ own court*

#### ‘WHO JUDGES APPROACH WHEN AN EU LAW PROBLEM APPEARS’

Judges who worked on cases with an EU element were asked whether they have consulted someone with expertise in EU law in relation to such cases. As I illustrate in Figure 11, when judges encounter an EU law-related problem, the majority of them approach their fellow colleague judges.<sup>78</sup> A Slovenian judge argues that colleague judges can even motivate others to start applying EU law. He says: ‘someone writes a judgment in which he cites three judgments of the European Court of Justice. And in the next office there works another judge who does not deal with

<sup>72</sup> Slovenian judge, local court, 1<sup>st</sup> instance.

<sup>73</sup> Croatian judge 12, municipal court, 2<sup>nd</sup> instance.

<sup>74</sup> Croatian judge 18, High Commercial Court, 2<sup>nd</sup> instance.

<sup>75</sup> Slovenian judge 6, labour court, 1<sup>st</sup> instance.

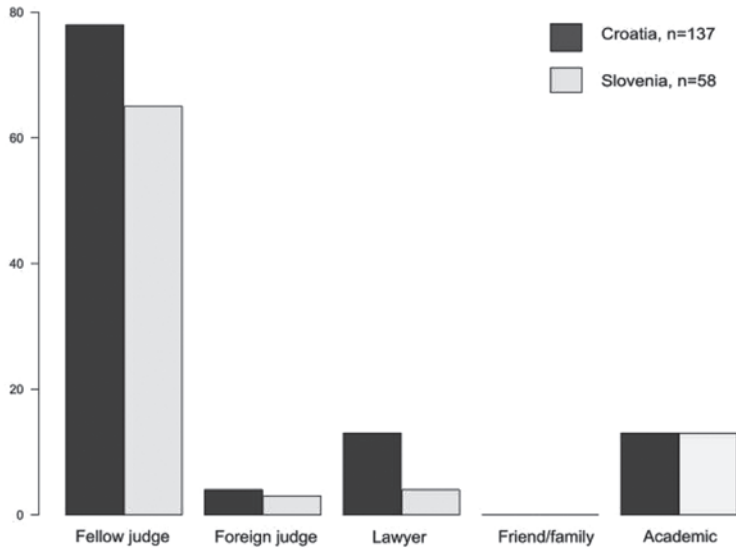
<sup>76</sup> Slovenian judge 13, Administrative Court, single instance.

<sup>77</sup> Slovenian judge 13, administrative court, 1<sup>st</sup> instance.

<sup>78</sup> Results do not differ significantly between the two countries, Chi-Squared test, p-value = 0.229.

[EU law], but he checks this judgment from his colleague and maybe next time he will also use [EU law]'.<sup>79</sup>

Figure 11. Who judges consult for an EU law issue (multiple answers possible, %)



Although much less common, judges also approach a university professor, other university employees or an academic scholar. Judges from both countries whose court is close to a law faculty reported that they often refer to someone from the faculty for help with an EU law case. A Slovenian judge says that their 'court is cooperating with the Faculty of Law in city X, within the framework of an *amicus curie* project. And when a judge gets a case [with an EU law element], a judge gives it to students within this project [...]. They can check the case and write a case report. Whether the court has jurisdiction and which law applies. This can be helpful'.<sup>80</sup> A Croatian judge similarly says that 'it is not a problem for us to call people at the law faculty who are dealing with [EU law]. They will always help us and advise us'.<sup>81</sup> These findings suggest that informal consultations among fellow judges and between judges and academics act as a type of resource and play an important role in lowering the opportunity costs judges face when applying EU law.

<sup>79</sup> Slovenian judge 13, administrative court, 2<sup>nd</sup> instance.

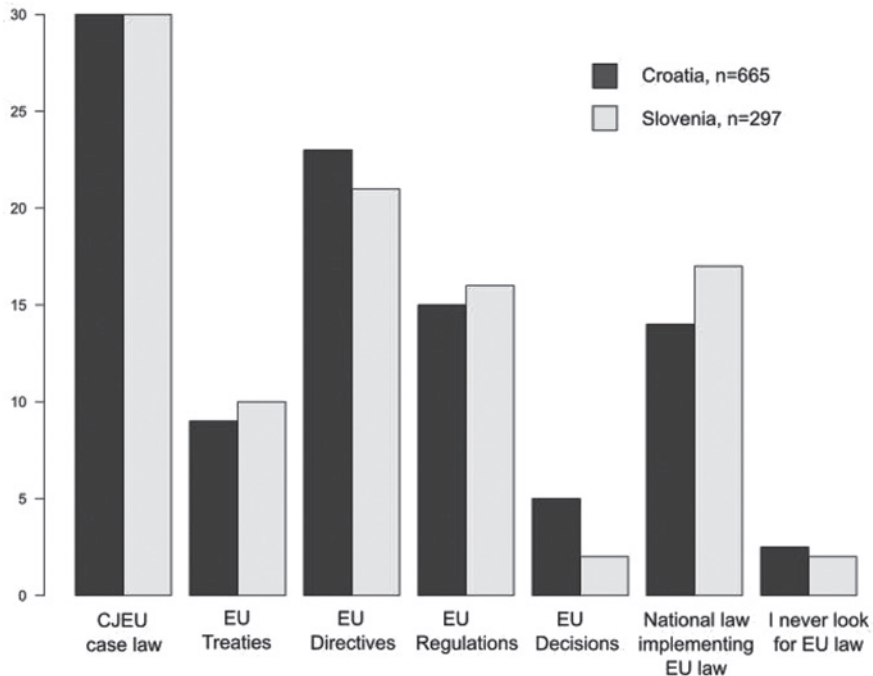
<sup>80</sup> Slovenian judge 5, district court, 1<sup>st</sup> instance.

<sup>81</sup> Croatian judge 5, county court, 2<sup>nd</sup> instance.

### 3.2.2 Search for EU law

This section explores questions such as where judges find information on EU law, which EU law sources they use to find relevant provisions, as well as how time consuming the search for EU law is. As can be seen from Figure 12, when looking for information on EU law, judges primarily consult the case law of the CJEU, a source which is closely followed by EU directives and EU regulations. The survey results suggest that EU treaties and EU decisions are rarely used by national judges as a source of information on EU law. One way of explaining this is the fact that treaties use language which is vaguer compared to the language used in other secondary legislation, particularly in EU directives.<sup>82</sup> Another source often used by national judges is national law implementing EU law. A smaller percentage of judges admit that they never search for information on EU law.

Figure 12. Which of the following sources of law do you use to look for information on EU law? (% , multiple answers possible)



<sup>82</sup> FR Romeu, 'Law and Politics in the Application of EC Law: Spanish Courts and the ECJ 1986-2000' (2006) 43(2) CML Rev 395, 398.



The interview results reveal judges' frustration with the number of legal sources they need to use in their daily life. One judge, for example, says that 'there is a forest of laws and regulations in Croatia, and now this European law. Some judges have just had enough of it'.<sup>83</sup> Another judge says that 'what is constraining the application of EU law is the fact that this is a [...] huge substance. [...] We are also confronted with an enormous amount of our national regulations. And every legal area is overwhelmed with legal rules'.<sup>84</sup>

The problem appears to be not only in the number of regulations but also in non-existing or imprecise translations. Judges say that 'the decisions of the court in Luxembourg are, primarily, in English. It takes some time for them to get translated into Croatian. Decisions against the other Member States are [...] in most cases in a foreign language'.<sup>85</sup> Another judge says:

A lot of judgments have not been translated into Croatian. And the translations of some of the regulations are catastrophic and have a bunch of mistakes. I have noticed in the Brussels I bis Regulation that the word 'before' has been translated with the word 'after'. So if you read the Croatian version only, it might happen that you apply EU law wrongly because of a translation error. [...] I am not sure how many judges manage with the English language but if you rely solely on the Croatian version, this can be problematic because, first, judgments are not translated into Croatian, and second, the translations [...] are bad.<sup>86</sup>

Some judges pointed out that 'translations are, for one lawyer, insufficiently precise. [...] There is lack of understanding: logical, grammatical misunderstanding of the text'<sup>87</sup> and that 'these translations are a little problematic. That is, some sort of meta-Croatian that is not in line not only with the grammar of our language but also with some of the legal institutes that exist in Croatian laws'.<sup>88</sup>

Figure 13 shows that when it comes to the forms of dissemination when looking for information on EU law, judges rely heavily on online databases such as EUR-LEX, Curia, and IUS-INFO.<sup>89</sup> This was report-

<sup>83</sup> Croatian judge 1, municipal court, 1<sup>st</sup> instance.

<sup>84</sup> Croatian judge 17, High Commercial Court, 2<sup>nd</sup> instance.

<sup>85</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

<sup>86</sup> Croatian judge 14, civil municipal court, 1<sup>st</sup> instance.

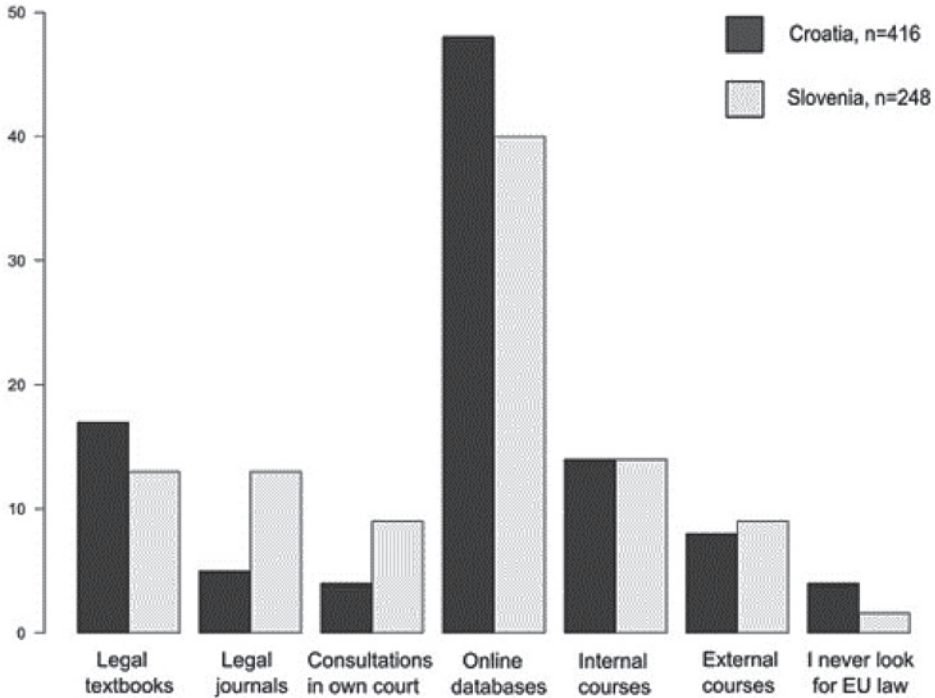
<sup>87</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

<sup>88</sup> Croatian judge 17, high commercial court, 2<sup>nd</sup> instance.

<sup>89</sup> IUS-INFO is an online legal information system in Croatia and Slovenia which contains national and European legislation as well as the case law of the CJEU, the ECtHR and national second- and third-instance courts. IUS-INFO is run by a private company and courts pay a monthly subscription fee to access case law from other courts.

ed by almost half of the respondents from Croatia and more than one-third of the respondents from Slovenia. While the second most popular form of dissemination for Croatian judges is legal textbooks, Slovenian judges rely on courses given at their own court. Two Slovenian judges stated that they use the newsletter that is released once a month by the Supreme Court's department for monitoring case law. This was further elaborated on during the interview. One Slovenian judge said that '[the Supreme Court] has one professional department which is responsible for publications. Once a month a judicial newsletter is released, [which] publishes domestic and foreign judgments [...]. All employees in the judiciary system receive it in electronic form'.<sup>90</sup>

Figure 13. Which of the following forms of dissemination do you use to look for information on EU law? (% , multiple answers possible)



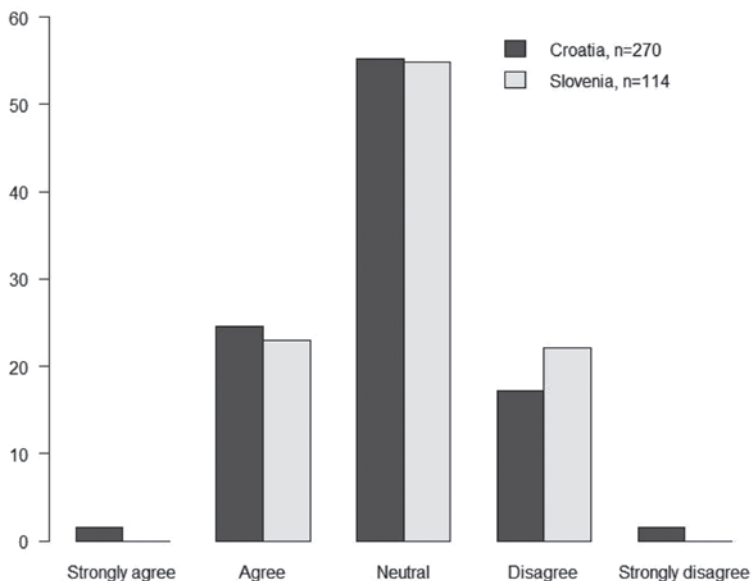
The popularity of online sources of dissemination among Croatian and Slovenian judges is not surprising as seminars and workshops on EU law place great emphasis on getting judges familiar with using these databases when searching the case law of European courts. One Croatian judge gives an example of a workshop organised by their own court

<sup>90</sup> Slovenian judge 3, local court, 1<sup>st</sup> instance.

where the first lecture dealt exclusively with using the Curia database. She says: '[We] decided, through our small micro world, to bring the application of EU law closer to our judges. And there we started this education. First, we started training on the application of Curia's search engine. For [judges] to learn this first'.<sup>91</sup> Another judge responsible for organising workshops on EU law says: 'We showed judges how they can technically come to a decision. Where to search, by which criteria. How to get [...] decisions that have been translated and those that have not. [...] Briefly, we tried to provide information where they could find European law: sources, decisions, etc'.<sup>92</sup>

Judges were further asked about how time consuming the search for EU law is. As shown in Figure 14, a quarter of judges from both countries experience the search for EU law as time consuming.<sup>93</sup> By contrast, more than 20 percent of judges do not find the search for EU law time consuming and believe that EU law provisions are, in general, easy to find.

Figure 14. I experience the search for EU law as a time-consuming process (%)



This divergence could be explained by different coverage by education, during which particular attention is given to online databases. The

<sup>91</sup> Croatian judge 3, municipal court, 1<sup>st</sup> instance.

<sup>92</sup> Croatian judge 10, county court, 2<sup>nd</sup> instance.

<sup>93</sup> There are no significant differences between the two studied countries. ANOVA test, p-value = 0.412.

search for EU law is, according to the interview participants, aggravated by the difficult names of EU law sources. A Slovenian judge shares his frustration:

What bothers me the most with EU law is that the names of the sources of law are very long and unclear. They are hard to find and it is hard to memorise them. Our domestic laws have clear names, for example, the Residence Law. [...] And there is a Directive of the Council with that long name, and it is difficult to know what it is about. And it is hard to find it. If you type this in Google [...] the question is whether you will get the right one.<sup>94</sup>

Another judge argues that 'because of [EU law], the decision-making process is more complex. I observe this among my colleagues, and I would almost say that there are more unpleasant feelings and experiences than pleasant ones. For the majority, this is a problem'.<sup>95</sup>

### 3.2.3 *Experience with the preliminary ruling mechanism*

An important part of the questionnaire on national judges' experiences with EU law was dedicated to the preliminary ruling procedure. Only four out of 448 judges who participated in the survey sent a preliminary question to the CJEU. This result is not surprising as, at the time of the survey, there were altogether eight preliminary questions sent by Croatian courts in three years of membership and 17 by Slovenia in a twelve-year period.

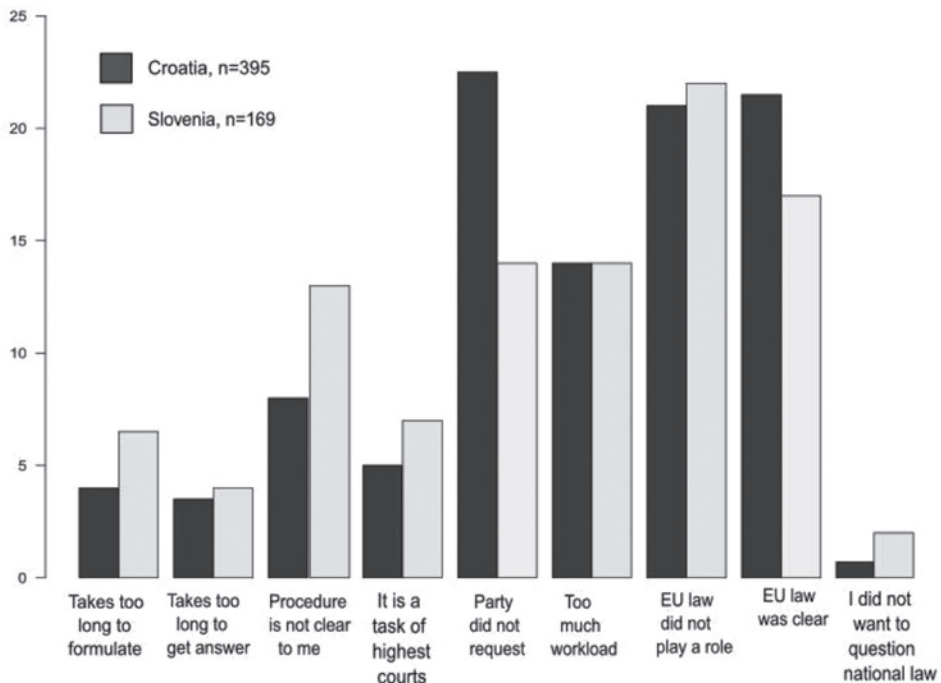
Because Slovenian and Croatian judges are not very active in the preliminary ruling procedure, it is interesting to explore why they do not send preliminary questions to Luxembourg. Depicted in Figure 15 are the ten possible reasons for non-participation offered to the survey participants. Interestingly, Slovenian and Croatian judges share the top four reasons. These are the following: (1) EU law was always clear in my cases; (2) EU law never played a role in my cases; (3) the party to the case did not ask me to pose a preliminary question; and (4) too much workload does not make it possible to engage in the issue. Furthermore, the ANOVA test shows no statistically significant difference between Slovenian and Croatian judges.

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<sup>94</sup> Slovenian judge 1, local court, 1<sup>st</sup> instance.

<sup>95</sup> Slovenian judge 13, administrative court, 2<sup>nd</sup> instance.

Figure 15. Why did you never pose a preliminary question to the Court of Justice of the EU? (% , multiple answers)



Notwithstanding the similarities in the answers, there are some differences worth mentioning. The most popular justification for not making a referral among Slovenian judges is the fact that EU law never played a role in their cases (24 percent). Croatian judges, in contrast, justify it by the fact that there was no request from the party to turn to the CJEU with a preliminary question (24 percent).

The interviews support these results. Judges argue that ‘there are not many cases of such a nature yet’<sup>96</sup> and that ‘even those situations that require this preliminary question are rare’.<sup>97</sup> Several judges connected this reason to the economic situation of the country. One judge gave the reason of ‘a bad economic situation and the fact that you will not have a lot of cases with an international element in the economy’s current state. You do not have a lot of movement of goods, capital, workers. Croatia is not an economically attractive country’.<sup>98</sup>

<sup>96</sup> Croatian judge 10, county court, 2<sup>nd</sup> instance.

<sup>97</sup> Croatian judge 13, commercial court, 1<sup>st</sup> instance.

<sup>98</sup> Croatian court 7, county court, 2<sup>nd</sup> instance.

The judicial workload was one of the most cited reasons for non-participation in the procedure among the interviewed judges. Judges argued that 'a judge at first instance is so burdened that [...] it is hard to imagine that he would take one month to work only on [the preliminary question]<sup>99</sup> and that 'courts at first instance are burdened with individual cases, and it seems that this is more appropriate for higher instances'.<sup>100</sup>

The role of the parties in the conduct of referral has proven to be much higher among Croatian than among Slovenian judges, although the difference is not statistically significant.<sup>101</sup> While 23 percent of Croatian judges never submitted a preliminary question because there was no request from the party, this was reported by only 15 percent of Slovenian judges. The interviewed judges did not hide their dependence on lawyers to raise EU law questions before the court. Judges argue that referrals would certainly be encouraged 'if the parties insisted on it. If a judge was compelled [to ask a preliminary question]'.<sup>102</sup>

As can be seen from Figure 15, the other reasons for not submitting a preliminary question to the CJEU were much less frequently given. Eight percent of Croatian and 15 percent of Slovenian judges admitted that the preliminary ruling procedure is not clear to them. Less than five percent of them said that their reason for non-referral is that it takes too long to formulate the preliminary question and that the CJEU takes too long to provide them with an answer. A total of five percent of Croatian and ten percent of Slovenian judges believe that sending a preliminary question is the exclusive task of the highest instance. This belief was also confirmed during interviews. Judges argue that '[a] first instance judge can, but the court of last instance has to, ask a preliminary question if the need arises'<sup>103</sup> and 'I, as the first instance, am not obliged. I am not the last instance'.<sup>104</sup>

The interview results further show that Slovenian judges not only believe that sending preliminary questions is the task of a higher instance, but they also believe that the Supreme Court will do a better job of making a referral. One judge admits that for 'questions that are a bit more complicated, a bit more abstract, [...] I would rather step aside and let this be dealt with by the Supreme Court'.<sup>105</sup>

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<sup>99</sup> Slovenian judge 1, local court, 1<sup>st</sup> instance.

<sup>100</sup> Slovenian judge 2, district court, 1<sup>st</sup> instance.

<sup>101</sup> ANOVA test, p-value = 0.606.

<sup>102</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

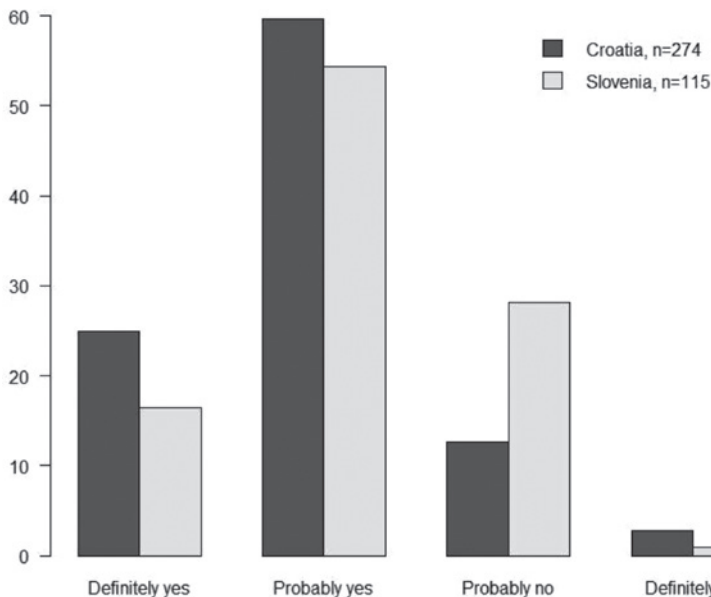
<sup>103</sup> Croatian judge 10, county court, 2<sup>nd</sup> instance.

<sup>104</sup> Slovenian judge 3, district court, 1<sup>st</sup> instance.

<sup>105</sup> Slovenian judge 8, labour court, 1<sup>st</sup> instance.

The fact that Slovenian and Croatian judges have not been very active users of the procedure does not mean that they oppose the idea of sending a preliminary question to the CJEU. Most surveyed judges (65 percent from both countries) would use the preliminary ruling mechanism in the case of interpretative doubts concerning EU law.

Figure 16. The probability of making a referral in the case of interpretative doubts (%)



### 3.3 Attitudes towards the EU and EU law among Slovenian and Croatian judges

'HOW JUDGES FEEL ABOUT THE EU AND EU LAW'

#### 3.3.1 Attitudes towards membership in the EU

The final part of the survey explored judicial attitudes towards the EU and EU law. As illustrated in Figure 17, an overwhelming majority of Slovenian and Croatian judges agree that membership in the EU is beneficial for their countries. This attitude was reported by 80 percent of Slovenian and 73 percent of Croatian judges. Only two Slovenian judges and nine Croatian judges disagreed.<sup>106</sup>

<sup>106</sup> There is no statistically significant difference between the two counties. ANOVA test, p-value = 0.995.

Figure 17. Membership in the EU is beneficial for Slovenia/Croatia (%)

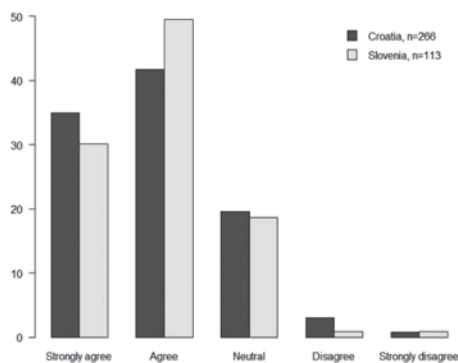
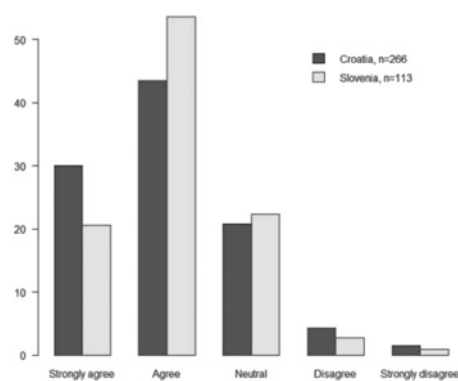


Figure 18. I have in general a positive view of the EU (%)



Furthermore, Figure 18 shows that almost two-thirds of the surveyed judges have a positive view of the EU. By contrast, a total of 14 judges from Croatia and four judges from Slovenia reported having a negative view of the EU.<sup>107</sup> What is interesting is that some judges believe that membership in the EU is beneficial for their country, yet they still do not hold a positive view of the EU.

Only a few interview participants confirmed the role of ideology in the application of EU law, with the majority arguing that there is no scepticism towards the EU and EU law in the judiciary. Talking about the role of attitudes, one Croatian judge discloses:

Today there is no noticeable or vivid opposition to the integration of Croatia in the EU. There is no party in Croatia that does not want us to be in the EU. This is almost uniform. At the referendum, the percentage of those in favour of the EU was not so big, but this changed later and I think that today there are no political tensions. Neither among our colleagues in the judiciary, nor among the population, nor among the parties.<sup>108</sup>

Similar answers came from Slovenian judges who argued that ‘everyone here is very fond of Europe. We did not have any bad consequences of membership, [...] only benefits’.<sup>109</sup> Others did, however, discuss the possibility of negative attitudes towards European integration and how it might affect the application of EU law. They say that ‘there is a pattern

<sup>107</sup> There is no statistically significant difference between the two counties. ANOVA test, p-value = 0.543.

<sup>108</sup> Croatian judge 5, county court, 2<sup>nd</sup> instance.

<sup>109</sup> Slovenian judge 2, district court, 1<sup>st</sup> instance.



where senior judges may refuse to accept some new things<sup>110</sup> and that ‘there is no great will in Croatia to apply EU law [which] still feels quite like a foreign body’.<sup>111</sup> Furthermore, ‘there are some who call European law “cosmic law”. As was said during one court hearing “European law is cosmic law, let’s get back to our Earth law!”’<sup>112</sup>

### 3.3.2 *Accepting the role of EU judge and the principle of supremacy*

As I argued in the introduction, national courts are the first in line to apply and enforce EU law. Yet, giving national judges the right and the duty to act as Union judges can be quite different from whether and to what extent national judges accept this role. An important aspect of judicial attitudes towards the EU and EU law is, thus, whether national judges feel like Union judges, a status given to them by EU membership.

The survey results presented in Figure 19 suggest that the majority of national judges (68 percent of Croatian and 65 percent of Slovenian judges) feel part of the EU legal order. The results look slightly different when national judges are asked whether they see themselves as Union judges. Only half of Croatian (52 percent) and Slovenian respondents (48 percent) see themselves as Union judges.<sup>113</sup> A Slovenian judge explained this result during the interview. He argues that the question of national judges as EU judges ‘is a difficult [one]. [...] I do not know whether all of us are EU law judges. Whether this is fully accepted from the inside. I think that most judges, if you ask them who they are, would say: “A judge in Slovenia, a Slovenian judge.” This law [...] is being applied in Slovenia [...] but it is not internally ours yet’.<sup>114</sup>

<sup>110</sup> Croatian judge 2, county court, 2<sup>nd</sup> instance.

<sup>111</sup> Croatian judge 4, municipal court, 1<sup>st</sup> instance.

<sup>112</sup> Croatian judge 3, municipal court, 1<sup>st</sup> instance.

<sup>113</sup> This difference between Slovenian and Croatian judges is statistically significant at the 0.05 level. ANOVA test, p-value = 0.0373\*.

<sup>114</sup> Slovenian judge 1, local court, 1<sup>st</sup> instance.

Figure 19. As a national judge, I feel part of the EU legal order (%)

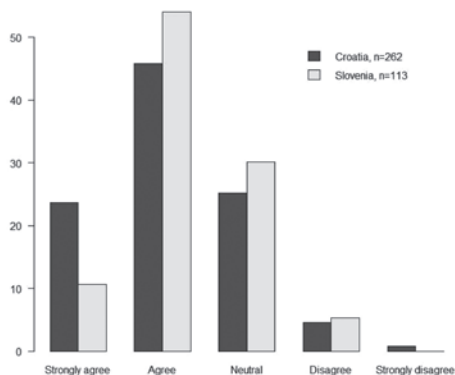
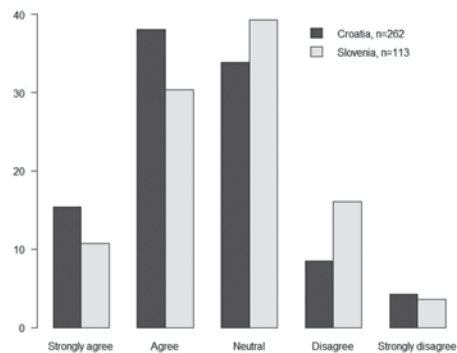


Figure 20. I see myself as a Union law judge (%)



The survey placed great emphasis on the principle of supremacy of EU law, as one of the most important principles of EU law. Knowing how judges feel about EU primacy over their national law tells us a great deal about their attitudes towards EU law. Notwithstanding that the majority of Slovenian and Croatian judges feel part of the EU legal order, the survey results show that they are not so sure about the supremacy of EU law. As can be seen from Figure 21, less than half (43 percent) of Slovenian respondents agree that EU law takes precedence over national law. As many as 20 percent disagree. Croatian judges are slightly more accepting of the principle of EU law supremacy. Fifty-eight percent agree that EU law is hierarchically above national law. Only 13 percent of Croatian judges reject the principle of supremacy of EU law over national law. This difference between Slovenian and Croatian respondents is statistically significant at the 0.001 level.<sup>115</sup>

<sup>115</sup> ANOVA test, p-value = 0.00262\*\*.

Figure 21. I consider EU law to take precedence over national law (%)

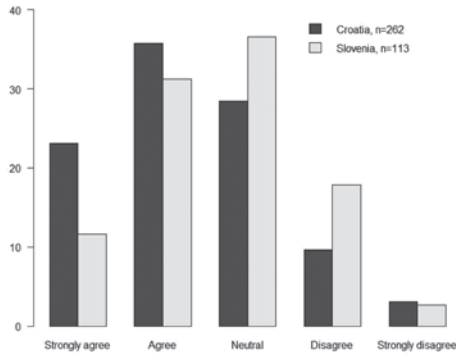
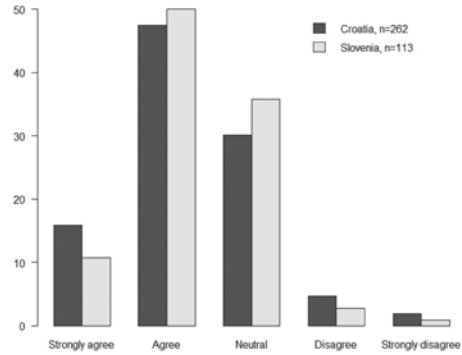


Figure 22. The principle of supremacy of EU law is essential for the existence of the EU legal order (%)



The interviewed judges, nonetheless, reject the notion that attitudes towards EU law affect its application. One Slovenian judge says: ‘I think it should not affect it. I think that the large majority of judges know that we have to use EU law. Whatever we think about it. In principle, it should not affect it. But it can affect some people. It is possible, I guess, but it has not been proven’.<sup>116</sup>

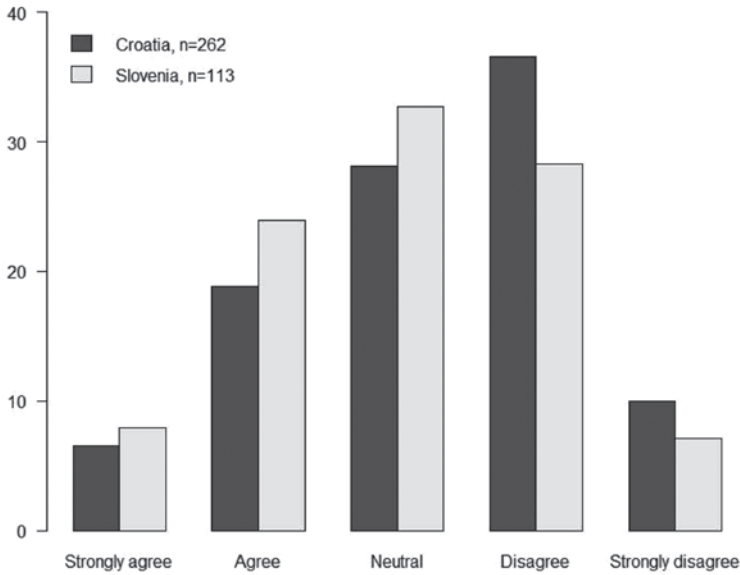
Notwithstanding that many Slovenian and Croatian judges do not believe that EU law takes precedence over national law, a high number of judges agree that the principle of supremacy is essential for the existence of the EU legal order. As can be seen from Figure 22, almost two-thirds of judges from both countries agree with the statement. However, how judges feel about the supremacy of EU law can differ greatly from whether they would recognise the principle in situations which would require them to do so. In order to test how ready national judges are to recognise the principle of supremacy in their day-to-day cases, national judges were asked how they would proceed if the judgments of the CJEU were in conflict with a judgment of one of the top courts in their countries.

The results illustrated in Figure 23 once again suggest that Slovenian judges are much more sceptical towards the principle of supremacy than their Croatian counterparts. While almost half of the respondents from Croatia (47 percent) would follow the judgment of the CJEU, the same would be done by only 35 percent of Slovenian judges. In contrast, 32 percent of Slovenian judges said that they would follow the decision of

<sup>116</sup> Slovenian judge 1, local court, 1<sup>st</sup> instance.

their national court even in the case of conflict with the CJEU.<sup>117</sup> The difference between the countries is statistically significant at the 0.1 level.<sup>118</sup>

Figure 23. I believe that when judgments of the CJEU and the Supreme/Constitutional Court are in conflict, a national judge should follow the judgment of the national court (%)



This finding can be explained by the dependence of Slovenian lower court judges on the Supreme Court when dealing with EU law cases. For example, one interviewed judge discloses that judges become familiar with the judgments of the CJEU predominantly through the judgments of the Slovenian Supreme Court. He says that 'through reading the case law of the Supreme Court, we become familiar with various judgments of the European Court of Justice and with EU law as well. So, it is the other way around. I do not have printed directives that I would use. But the opposite. Through the practice of the Supreme Court'.<sup>119</sup> Another judge argues that he uses EU law 'in a way that I recycle examples which the Supreme Court encounters'.<sup>120</sup> This dependence of Slovenian judges on their Supreme Court could explain why they would follow the Supreme Court's judgment, even if it contravenes the decision of the CJEU. When

<sup>117</sup> Twenty-five percent of Croatian judges would follow the decision of their national top court.

<sup>118</sup> ANOVA test, p-value = 0.0701.

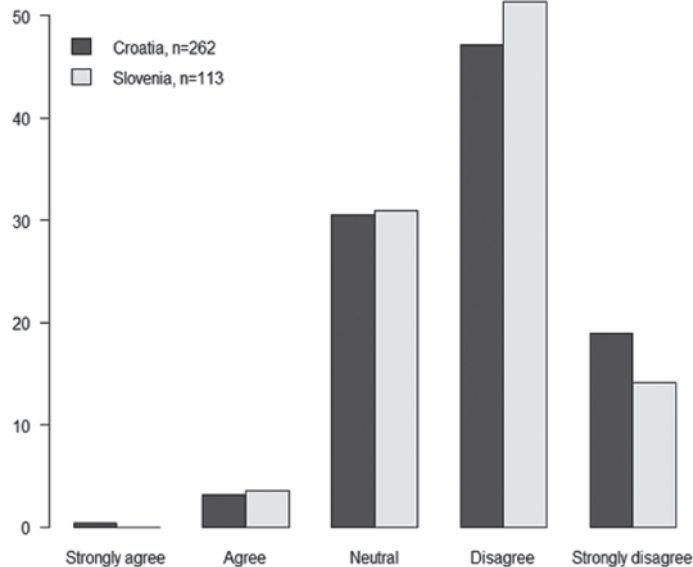
<sup>119</sup> Slovenian judge 6, labour and social court, 1<sup>st</sup> instance.

<sup>120</sup> Slovenian judge 8, labour court, 1<sup>st</sup> instance.

asked about this question, Croatian judges were, by contrast, more likely to rely on EU law primacy. One judge argues: ‘we got into [the EU]. Nobody forced us. We have accepted it and now we have to apply it. [...] It can happen that I apply some things wrongly, [...] maybe I have the wrong interpretation [...]. But I cannot say: I will not do it. Every judgment from the year we accessed the EU must be reasoned with European law’.<sup>121</sup>

Figure 24 shows that when presented with the statement ‘I reluctantly apply EU law because I am of the opinion that its origins are undemocratic’, many judges remained neutral. Two-thirds of them (66 percent for both countries) disagreed with the statement. There were, nonetheless, nine judges from Croatia and four from Slovenia who believe in the democratic deficit of the EU.<sup>122</sup> A judge whose words I have already quoted in this paper confirms the existence of this attitude among judges. She says that ‘there are some [judges] who call European law “cosmic law”. As it was said during one court hearing “European law is cosmic law, let’s get back to our Earth law!”’<sup>123</sup>

Figure 24. I reluctantly apply EU law because I believe its origins are undemocratic (%)



<sup>121</sup> Croatian judge 6, municipal court 1<sup>st</sup> instance.

<sup>122</sup> There is no statistically significant difference between Slovenian and Croatian judges. ANOVA test, p-value = 0.568.

<sup>123</sup> Croatian judge 3, municipal court, 1<sup>st</sup> instance.

#### 4 Conclusion: national judges as EU law judges?

In the introduction to this paper, I argued that a Member State's accession to the EU entails new powers and duties for its judges. A national judge wearing an EU law wig is expected to uphold the principle of the supremacy of EU law; protect the rights of individuals which are conferred on them by means of EU law; interpret national law in conformity with EU law; set aside national provisions incompatible with EU law; apply EU law *ex officio*; confirm the meaning of an EU law rule by comparing all 24 language versions and interpret it in the light of EU law as a whole; and send a preliminary question to the CJEU in cases that require the interpretation of the Luxembourg court.

In this paper, however, I illustrate that the reality of the application of EU law by judges in Slovenia and Croatia differs from what is expected of national judges as 'judges communautaire de droit commun'. The findings suggest that national judges are quite sceptical of their knowledge of EU law, with merely 13 percent of Slovenian and 18 percent of Croatian judges rating their EU law knowledge as very good or good. Furthermore, while Slovenian and Croatian judges report sufficient knowledge of the preliminary ruling procedure and of the situations that require sending a preliminary question to the CJEU, this is less the case for the practical aspects of the procedure, that is, how to make a referral to the CJEU. Only 30 percent of Slovenian and Croatian respondents stated that they would know how to send a preliminary question to the CJEU. The interview results indicate that this discrepancy between theoretical and practical knowledge of the preliminary ruling procedure can be traced to courses and workshops on EU law that are too theoretical and not sufficiently focused on practice.

The survey and interview results suggest that insufficient knowledge of EU law is often connected to the unavailability of resources at a specific court. As many as 90 percent of Slovenian and Croatian judges feel the need to broaden their knowledge of EU law, yet the opportunities to do so are often limited. The interview participants reveal that workshops on EU law are organised sporadically, have a restricted number of places, and are often geographically limited to the capital city. Furthermore, because of their case burden, many judges report having little or no time to increase their EU law knowledge.

Regarding national judges' experience with EU law, the survey results show that judges do not encounter EU law very often. In fact, the EU law element appears in merely 13 percent of cases of Croatian and in 7.6 percent of cases of Slovenian judges. This finding suggests that the estimations given by some scholars on the number of EU law cases involving

EU law have been exaggerated.<sup>124</sup> When confronted with EU law cases, as many as 40 percent of the surveyed judges consider the application of EU law problematic and time consuming. Furthermore, only four out of 448 survey participants have made a referral to the CJEU. The survey results reveal that Slovenian and Croatian judges share four main reasons for not turning to the CJEU by means of the preliminary ruling procedure: (1) EU law is clear; (2) EU law does not play a role; (3) there is no initiative from the parties to the case; and (4) workload pressure.

Finally, this paper has explored judicial attitudes towards the EU and EU law. The survey results show that the majority of Slovenian and Croatian judges believe that membership in the EU is beneficial for their country and feel they are part of the EU legal order. Although this seems to suggest that national judges have accepted their role as EU law judges, the results indicate that judges are not so sure about the supremacy of EU law. Less than half (43 percent) of the Slovenian survey respondents support the primacy of EU law over national law, while as many as 20 percent of them disagree with it. Croatian judges are much more accepting of the principle of supremacy, with 58 percent accepting that EU law is hierarchically above national law. What causes this difference between the two counties is unknown. The results of the EU Barometer, for example, do not show a discrepancy in public support towards EU membership between the citizens of Slovenia and Croatia. In fact, Slovenian citizens show slightly higher support for EU membership than citizens in Croatia.<sup>125</sup> These aspects of judicial attitudes towards EU law require future investigation.

These findings have important implications for our understanding of the Europeanisation of national judges and their role as decentralised EU law judges who are key players in the process of the application and enforcement of EU law. The main contribution of this paper lies in emphasising that the obstacles to the effective application of EU law by national judges do not necessarily stem from negative sentiment towards the EU or EU law, but are rather of a practical nature. The practical constraints of acting as EU law judges include, among other things, the uncommonness of EU law cases in the daily work of a national judge, workload management, and the (un)availability of resources at specific courts. This paper concludes that although the survey and interview re-

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<sup>124</sup> Denise Carolin Hübner, 'The 'National Decisions' Database (Dec.Nat): Introducing a Database on National Courts' Interactions with European Law' (2015) 17(2) *European Union Politics* 324; Denise Carolin Hübner, 'The Decentralized Enforcement of European Law: National Court Decisions on EU Directives with and without Preliminary Reference Submissions' (2018) 25(12) *Journal of European Public Policy* 1817.

<sup>125</sup> European Parliament, 'Eurobarometer Survey 90: A Public Opinion Monitoring Study' (October 2018) 22.

sults do reveal a group of judges who accept their new role as Union law judges and the duties that come with it, the claim that every national judge in the EU is a Union law judge is an overstatement.

What does it take for national judges to effectively assume their role as EU law judges? While changes in negative attitudes and beliefs might be more difficult to achieve, other reforms are possible. Changes to the existing institutional structure, such as removing court targets in EU law cases, increasing practical training in EU law and the preliminary ruling procedure, or providing additional resources to courts that process more EU law cases, may increase judges' willingness and ability to accept the responsibilities that come with their new role as EU law judges. These types of reforms, however, require not only economic resources but also political action.



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