JUDICIAL DIALOGUE *À LA NORDIQUE*: PREDOMINANT PASSIVISM AND SPORADIC PROACTIVISM IN THE PRELIMINARY REFERENCE PROCEDURE

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Traditionally loyal to the legislature, Nordic courts are well known for keeping a low profile. This culture has largely withstood, albeit not unshaken, the introduction of European law into the domestic legal orders. Comparing the well-known ruling of the Danish Supreme Court in Ajos to the less controversial decision delivered by the Swedish Supreme Court under similar circumstances in Braathens, this article argues that both rulings can be understood as expressions of judicial passivism – a form of judicial activism characterised by underreach or excessive conservatism. The article further demonstrates that passivism is well in line with the Nordic courts' attitude to the preliminary reference procedure more generally, where they tend to bolster the position of the national legislatures while minimalising their own agency. Examples of a more proactive approach can however be found in the case law of the supreme courts of all three Nordic Member States. As the judicial culture is slowly changing, such cases may become more prevalent.

1. INTRODUCTION

When the Swedish Supreme Court (*Högsta domstolen*, SSC) received an answer to its request for a preliminary ruling from the EU Court of Justice (CJEU) in C-30/19 *Braathens*,[1] it was faced with a problem very similar to that encountered five years earlier by the Danish Supreme Court (DSC) in the (in)famous

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C-441/14 *Ajos* case.[2] Like its Danish counterpart, it had been advised that national legislation was contrary to an EU anti-discrimination directive. It had been reassured, as the CJEU had previously reassured the DSC, that directives do not take direct effect in disputes between individuals. Nevertheless, it had been informed, as the Danish court had before it, that the directive in question was merely a specific expression of a general principle of law, and that the latter *was* capable of producing effects between individuals.

While the problems faced by the two Supreme Courts were similar, the solutions adapted were different. The DSC, as is well known, gave a ruling that caused shock waves through the European legal community, refusing to accede to the supremacy to EU law.[3] The SSC, on the other hand, avoided to take a stand on the relationship between national and EU law, merely observing that the CJEU's ruling gave rise to 'questions', which would be best answered by the legislature.[4] As far as known, this ruling failed to cause a stir even in narrow Swedish legislative circles.

This article argues that, albeit highly dissimilar in terms of controversy, the responses of the Danish and Swedish Supreme Courts are both expressions of an attitude that will be termed *judicial passivism*. Following Goldner Lang, the article understands judicial passivism as a form of judicial activism, whereby the judiciary takes an ideological position not through overreach but by underreach.[5] More broadly, it argues that this attitude is in line with the approach of Nordic courts more generally in the preliminary reference procedure.

In support of these arguments, the article seeks to pinpoint the way in which Nordic judicial traditions manifest themselves in the Nordic courts' application of EU law and in particular in their approach to the preliminary reference procedure. Relying on examples of EU law cases referred by Nordic courts, underpinned by findings from systematic empirical data analysis,[6] it describes

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1 Case C-30/19, Diskrimineringsombudsmannen v Braathens Regional Aviation, EU:C:2021:269.

2 Case C-441/14, Dansk Industri v Estate of Karsten Eigil Rasmussen, EU:C:2016:278.

3 Supreme Court of Denmark, judgment of 6 December 2016 in case 15/2014.

4 Supreme Court of Sweden, decision of 21 December 2021 in case Ö 2343-18 (NJA 2021 s. 1093).

5 Iris Goldner Lang, Towards "Judicial Passivism" in EU Migration and Asylum Law?, in Tamara Ćapeta et al (ed), The Changing European Union: A Critical View on the Role of Law and Courts, Hart Publishing, 2022; Iris Goldner Lang Judicial passivism in EU migration and asylum law revisited, in Mark Dawson et al (eds), Revisiting Judicial Politics in the European Union, Edward Elgar Publishing, 2024.

6 Alongside the empirical research conducted by other researchers, the article reports some empirical observations from a hand-coded dataset produced in a previous research project conducted by this author. The dataset consists of the orders for reference and the CJEU judgments in 192 cases concerning procedures and remedies between 2008 and 2015. The dataset is presented in full in Anna Wallerman Ghavanini, Mostly Harmless: The Referring Court in the Preliminary Reference Procedure (2022) 47 European Law Review 310–330 at 316–320. The data will be described in detail where relevant throughout this article.

the characteristic traits of preliminary references from Nordic courts, demonstrating that Nordic courts bolster the position of the national legislatures while minimalising their own agency (section 2). Against this background, the article examines the orders for reference and the final rulings in *Ajos* and *Braathens* through the lens of judicial passivism, explaining the difference in approach by reference to the distincition between broad-sense and narrow-sense passivism (section 3). Finally, this attitude is contrasted with arguably less representative cases of *judicial proactivity* (section 4). The article concludes by a discussion on the effects of judicial passivism on the reception of EU law in the Nordic legal orders (section 5).

2. NORDIC COURTS AS REFERRING COURTS

Traditionally loyal to the legislature and reluctant to engage in judicial review of national legislation,[7] Nordic courts are well known for keeping a low profile.[8] Their reluctance to participate in the preliminary reference procedure has been widely acknowledged and analysed;[9] until 2018, Sweden was the only Member State to have been subject to an infringement procedure for its highest courts' restrictiveness in requesting preliminary references.[10] Less attention has been paid to the Nordic courts' behaviour on the (rare) occasions when they do refer to the CJEU. A previous study suggests, however, that the same restraint char-

7 Helle Krunke and Trine Baumbach, The Role of the Danish Constitution in European and Transnational Governance, in Anneli Albi and Samo Bardutzky (eds), National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, Springer, 2019, at 301; Maija Dahlberg et al, The Nordic courts: An example of cooperation and dialogue, in Kálmán Pócza (ed), Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective, Routledge, 2024.

8 Marlene Wind, The Nordics, the EU and the Reluctance Towards Supranational Judicial Review (2012) 48 Journal of Common Market Studies 1039–1063; Allan Rosas, The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue (2007) 1 European Journal of Legal Studies 121–136 at 121f.

9 See Marlene Wind, The Scandinavians: The Foot-Dragging supporters of European Law? in Mattias Derlén and Johan Lindblom (eds), The Court of Justice of the European Union: Multidisciplinary perspectives, Hart, 2018; Tuomas Ojanen, From Constitutional Periphery toward the Center – Transformation of Judicial Review in Finland, (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 194–207; and Krunke and Baumbach, n 7, at 299f. Challenging this view, see Morten Broberg and Niels Fenger, Variations in Member States' Preliminary References to the Court of Justice—Are Structural Factors (Part of) the Explanation? (2013) 19 European Law Journal 488–501 at 500.

10 See Ulf Bernitz, The Duty of Supreme Courts to Refer Cases to the ECJ: The Commission's Action Against Sweden in Per Cramér and Nils Wahl (eds), Swedish studies in European law, vol 1, Hart Publishing, 2006; Andreas Hofmann, Resistance against the Court of Justice of the European Union (2018) 14 International Journal of Law in Context 258–274 at 266.

acterises the Nordic courts' referrals.[11] The finding is supported by the empirical data available to this author.

In particular, two traits appear to be characteristic of the Nordic courts when they refer cases to the CJEU for preliminary references. According to the CJEU's rules of procedure, an order for reference needs to provide not only a factual background to the case but also the 'tenor of any national provisions applicable' as well as the reasons that prompted the court to refer, including the relationship between applicable national and Union law.[12] Generally speaking, Nordic courts tend to be expansive on the former and restrictive on the latter. First, while overall the Nordic courts are comparatively reluctant to engage in any deeper analysis of Union law in their orders for reference, they tend to provide extensive and annotated descriptions of national law.[13] Second, they tend to provide brief and neutral reasons for requesting the preliminary ruling, only rarely disclosing their own position on the questions referred.[14]

The first trait can be aptly illustrated by the order for reference in C-94/10 *Danfoss*.[15] The case was referred to the CJEU by the High Court of Western Denmark (*Vestre Landsret*) and concerned the classical EU law issue of repayment of taxes levied but not due. More specifically, a claim for reimbursement had been brought by two companies suffering damages as a result of the passing on of unlawful taxes, but rejected by the national authorities who considered that only the taxable person would be entitled to reimbursement. In the order for reference, the national court not only reproduced the relevant tax provisions, but also recounted the purpose of the tax as it had been stated by the government at the time of introduction.[16] In particular, the excerpt from the *travaux préparatoires* quoted showed that the legislature had expected the taxable persons to be able to pass on the tax, but were aware that actors further down the chain may not have that opportunity. Furthermore, the referring court set out in detail the legislative procedure and debate at the time when the tax was abolished. At that time, a national government official had clearly stated

11 See Anna Wallerman, Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example, in Derlén and Lindblom (eds), n 9.

12 Article 94 of the Rules of Procedure of the Court of Justice of 25 September 2012 OJ L 265.

13 For the 192 orders for reference in the dataset, the description of national law was coded on a five-grade scale from 0 (uncommented verbatim reproduction of national legislative provisions) to 1 (heavily annotated descriptions of the national *Rechtslage* in which the referring court evaluates legislation, case law and doctrine). The average value for orders from Nordic courts was 0,75, compared to the overall average of 0,40.

14 Cf Article 18 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2019/C 380/01. For each of the 443 questions concerning procedures and remedies in the dataset, I coded the referring court's position on a scale from 0 (taking no position) to 1 (a strongly stated outcome preference). The average value for references from courts in the Nordic countries was 0,10, to be compared with the overall average of 0,41.

15 Case C-94/10, Danfoss and Sauer-Danfoss v Skatteministeriet, EU:C:2011:674.

16 Order for reference in Case C-94/10 Danfoss, section 1.2.1.

his conviction, following case law from the CJEU, that the tax was incompatible with EU law. The national court then reproduced at length communications from the responsible national ministry to a trade body for many of the companies affected by the unlawful tax, setting out the ministry's position on how and by whom recovery of sums paid but not due could be achieved. In sum, it is clear that the national court endeavoured to provide the CJEU with a full understanding of not only the national *Rechtslage* in the strict sense, but also of the purposes of the legislation in question.

A similar approach is visible in the order for reference in case C-318/13 *X*,[17] referred by the Supreme Administrative Court (*Korkein hallinto-oikeus*) of Finland and concerning the calculation of a lump-sum compensation for workplace injury. According to national law, the calculation should be made taking into account *inter alia* the life expectancy of the person injured, the effect of which was that men consistently received lower compensation. Having described the relevant national legislation, the referring court gave an account of the preparatory works, highlighting that the government had assessed the inclusion of sex as one of the criteria was compatible with EU law whereas the parliamentary committee on social and healthcare matters had questioned this assessment. It also observed that the committee had objected to the inclusion of sex on other grounds than its presumed incompatibility with EU law, and concluded the section on national law by pointing out that preparatory works are considered binding sources of law in Finland.

These extensive descriptions of national law provides courts with a subtle way to nudge the CJEU, without exposing themselves to the risk of appearing biased.[18] Yet, the effect of contextualising national law may be argumentative. In *Danfoss* in particular, the impression created is that the purpose of the national legislature aligns rather with the applicant companies than with the more rigid approach adopted by the national tax authority. It is thereby a considerably more cautious form of argumentation than the alternative, namely to expressly position oneself in the analysis of Union law or even discuss the virtues of one or the other interpretation. This, Nordic courts appear particularly reluctant to do.

Again, the above-mentioned *Danfoss* case provides apt illustration. As per the Rules of Procedure, the order for reference does contain a section bearing the heading 'The Western Court of Appeal's assessment'. It consists of a single sentence: 'Since the outcome of the case depends on an interpretation of community law on reimbursement and on Member State liability, the Court of

17 Case C-318/13, X, EU:C:2014:2133.

18 Cf Rob van Gestel and Jürgen de Poorter, In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Adminstrative Courts, Cambridge University Press, 2019, 117f, who find that the risk of appearing biased may discourage national courts from taking a position.

Appeal finds it necessary to refer the following questions to the Court of Justice with a request for a preliminary ruling.'[19]

A somewhat lengthier example of a similar approach can be found in the order for reference sent by the SSC in C-472/14 *Canadian Oil*.[20] In that case, a company and its managing director had been penalised for failure to notify the Swedish Chemicals Agency of an import of chemical products, in breach of national legislation that implemented but went beyond the requirements of EU law. The defendant argued that the national legislation in question was incompatible with EU law. The section on the need for a preliminary reference comprises five (albeit relatively short) paragraphs. In the first three of these paragraphs, the referring court merely observes that certain issues are unclear under EU law; in effect, they are little more than a restatement of the questions referred. The fourth paragraph states that the issues have not previously been subject to interpretation by the CJEU. Finally, the fifth paragraph makes clear that an answer to the question is necessary in order to rule on the case pending before the referring court (which is a condition for referral under Article 267 TFEU) and that the answer is not obvious (and thus that the *CILFIT* doctrine does not apply).[21] Consequently, while the referring court in *Canadian Oil* was somewhat less terse than the referring court in *Danfoss*, it still refrained entirely from engaging with Union law (although it did summarise the judgment under appeal, in which the lower court, having chosen not to refer to the CJEU, had naturally had to engage with these questions in order to reach a decision).

This rather minimalistic approach can be contrasted with that of courts in the German-speaking Member States, who are among the most active in proposing a solution to the questions they refer.[22] For instance, in case C-506/12 *Schini*, the referring administrative court (*Verwaltungsgericht*) of Berlin devoted more than seven pages to analysing each of the five referred questions in detail, observing what arguments may be brought in favour of one or the other solution and frequently stating what interpretations it found more or less convincing.[23] In C-282/13 *T-mobile Austria*, the Austrian Supreme Administrative Court (*Wervaltungsgerichtshof*) expressed itself to be in agreement with one of the parties on a point regarding the relevance of a previous CJEU ruling, but continued to provide reasons for why that party's argument may nevertheless

[19] Order for reference in Case C-94/10, Danfoss, p. 16. Author's translation of the Swedish language version.
[20] Case C-472/14, Canadian Oil Company and Anders Rantén v Riksåklagaren, EU:C:2016:171.
[21] Order for reference in Case C-472/14, Canadian Oil, paras 26–30.
[22] On the scale described in n 14 above, the average value for German and Austrian courts was 0,62 (to be compared with the average of 0,41 for the entire dataset and 0,10 for the Nordic courts). Similarly, see van Gestel and de Poorter, n 18, 76–78.
[23] Order for reference in Case C-506/12, Schini v Land Berlin, EU:C:2014:2005.

be less than satisfactory.[24] In Case C-26/22 *SCHUFA Holding*, the referring administrative court of Wiesbaden laid out its analysis of the referred questions over 26 paragraphs, concluding by explicitly stating its own preferred answer to the questions while reiterating the need for a preliminary ruling in order to ensure uniform interpretation of pertinent questions of law.[25]

Understanding the second trait as reticence on the part of the referring court offers no difficulty. The Nordic courts' larger-than-average propensity to elaborate on the content, purpose, and effect of national law may not immediately stand out the same way. The trait should however be seen in the context of what it (apparently) substitutes, namely explicit legal analysis and direct dialogue with the CJEU. The behaviour can also be seen as another facet of the Nordic courts' deference to the legislature, as they prefer to voice their concerns in relation to national legislation (even when critical of it), rather than as the product of independent reasoning.

3. TWO FACES OF JUDICIAL PASSIVISM

The question of horizontal direct effect of directives has been subject to debate for decades. The controversy was heighten by the 2007 ruling in *Mangold*, in which the Court held that although a directive cannot take direct effect in a dispute between individuals, the situation changes if the directive codifies a general principle of Union law.[26] As observed in the introduction to this article, both Denmark and Sweden have in recent years experienced their own '*Mangold* moments'. While neither supreme court embraced the doctrine, the SSC in *Braathens* at least did not explicitly reject it, whereas the DSC in *Ajos* unambiguously joined the CJEU's critics. At first glance, the SSC's approach seems representative of the Nordic judicial culture described above whereas the strong, confrontational stance of its Danish counterpart appears to go against the tide. While this is to some extent true, especially as concerns the orders for reference in the two cases, this section will argue that both rulings are expressions of *judicial passivism*. This implies on the one hand that the SSC's approach may be less neutral than it may seem, and on the other that the DSC's ruling, while admittedly atypical, is atypical in a rather typical way.

Judicial passivism is understood in this article as a specific brand of the much more discussed concept of judicial activism.[27] The activist label is typically used

[24] Order for reference in Case C-282/13, T-Mobile Austria v Telekom-Control-Kommission, EU:C:2015:24.
[25] Order for reference in Case C-26/22, UF v Land Hessen (SCHUFA Holding), EU:C:2023:958.
[26] C-144/04, Werner Mangold v Rüdiger Helm, EU:C: 2005:709.
[27] Goldner Lang (2022), n 5; Goldner Lang (2024), n 5.

to indicate that a court has gone beyond its proper function.[28] This categorization necessarily includes an element of normative evaluation.[29] In particular, accusations of activism often arise when a ruling has failed to convince from a legal perspective, typically by straying too far from black letter law, thus giving rise to suspicions that the ruling was at least partially underpinned by political or ideological considerations.[30] Labelling a ruling as passivist, conversely, indicates that these considerations have led the court not to overstep its mandate but rather the opposite: to underreach, e.g. by avoiding an issue or by failing to pursue a line of reasoning to its justified conclusion.[31]

The concept of passivism is typically divided into a narrow and a broad sense.[32] In the narrow sense, it implies that the court avoids ruling altogether, for instance by relying on limitations on jurisdiction or admissibility. In the broad sense, it includes rulings that address the issue in substance, but where the court is not using the powers available to it, for instance by refraining from such expansive, systematic or teleological interpretations that would be available to it.[33] Naturally, rulings of both kinds are sometimes entirely justifiable; it bears repeating that the passivism label is reserved for rulings that are *overly* (unconvincingly) reticent or conservative.

The *Ajos* and *Braathens* cases both concerned the right to equal treatment, in *Ajos* on grounds of age and in *Braathens* on grounds of ethnicity. In *Ajos*, the applicant was an employee who had been let go without receiving a severance allowance. Neither this fact nor its being related to the employee's age were disputed between the parties, and was indeed in accordance with national law. The employee, however, challenged the Union law compatibility of the national provision in question, which excepted workers over a certain age from the right to a severance allowance. In *Braathens*, the claimant was instead a person who

[28] Goldner Lang (2002), n 5, 175; Mark Dawson, How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice (2014) 20 European Law Journal 423–435; Anthony Arnull, Judicial activism and the European Court of Justice: how should academics respond?' in Mark Dawson, et al (eds), *Judicial Activism at the European Court of Justice*, Edward Elgar 2013, 215.

[29] Mark Dawson et al, Introduction, in Dawson et al (eds) n 5; Goldner Lang (2002), n 5, 179; Thomas Horsley, Reflections on the role of the Court of Justice as the "motor" of European integration: *Legal* limits to judicial lawmaking (2013) 50 *Common Market Law Review* 931–964, 939f.

[30] Goldner Lang (2022), n 5, 176 defines passivism as a *conscious* act. While compelling as a definition, legal scholars are rarely privy to the consciousness of judges (process of discovery), meaning that this in practice often has to be divined from the reasoning provided in the ruling (process of justification).

[31] Goldner Lang (2022), n 5; Goldner Lang (2024), n 5; Pierre Thielbörger, Judicial Passivism at the European Court of Human Rights (2012) 19 Maastricht Journal of European and Comparative Law 341–347.

[32] Goldner Lang (2022) n 5; Goldner Lang (2024) n 5; Ernö Varnay, Judicial Passivism at the European Court of Justice? (2019) 60 Hungarian Journal of Legal Studies 127–154.

[33] Goldner Lang (2024) n 5, 230; Varnay n 32, 129.

had been (allegedly) subjected to racial profiling at the pre-departure security check by an airline crew. As the defendant offered to pay compensation without acknowledging the accusation of discrimination, the claimant was unable to pursue a judicial remedy under national law, giving rise to question on whether national law fulfilled EU law requirements of effective judicial protection. In both cases, the questions were thus a staple of preliminary references: whether the national provisions were compatible with EU law, and if not, what the national courts should do about it.

Relevant for these questions were a set of legal circumstances that, too, were common to the two disputes. Both disputes arose in a private law relationship between two individuals: an employee and his employer in the one, and a customer and a commercial enterprise in the other. Both cases were governed by EU directives: the Employment Equality Directive[34] in *Ajos*, and the Racial Equality Directive[35] in *Braathens*. Both cases were referred, by the national supreme courts, to the CJEU, which in preliminary rulings found national legislations to be incompatible with EU law but neither directive capable of producing direct effects between the parties because of the horizontal nature of the dispute. However, in both cases the directives were considered by the CJEU to constitute mere 'concrete expressions' of higher principles codified in the EU Charter of Fundamental Rights (CFR), more specifically the right to non-discrimination (Article 21) in *Ajos* and the right to an effective judicial remedy (Article 47) in *Braathens*. Both of these Articles, finally, had been previously held by the CJEU to 'confer on individuals a right which they may rely on as such'.[36]

Nevertheless, the treatment and eventual outcome of the cases before the national courts were very different. This mainfested itself already in the orders for reference. The reference by the SSC in *Braathens* largely displays the traits discussed above as characteristically Nordic. Having set out the circumstances of the case and summarised the lower courts' judgments, the referring court thoroughly described national substantive and procedural law, citing not only the relevant legislative provisions but also *traveaux préparatoires*, national precedents, and domestic scholarly literature. The justification of the need for a

[34] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303, 16–22.

[35] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180, 22–26.

[36] See eg Case C-176/12, Association de médiation sociale v Union locale des syndicats CGT and Others, EU:C:2014:2, para 47; Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., EU:C:2018:257, para 78; and further Eleni Frantziou, The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle (2020) 22 Cambridge Yearbook of European Legal Studies 208–32; Elise Muir, The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer (2019) 12 Review of European Administrative Law 185–215.

preliminary reference, on the other hand, is succinct and contains no analysis and no hint of the referring court's own view (if it had one).

The order for reference in *Ajos*, in comparison, is strikingly combative. In its (relatively extensive) reasons for the referral, the DSC explicitly and unequivocally ruled out the possibility of a harmonious interpretation of national law, holding that any such interpretation would go against its own settled case law and therefore be contra legem. It went on to recall not only the *Mangold* case law but also, and at length, the reservations raised against it by Advocate General Trstenjak (but not heeded by the Court) in *Dominguez*.[37] Having thus 'a bit harshly'[38] invited the Court of Justice to reconsider its previous case law, the referring court set out the preliminary questions. The second question is particularly noteworthy. Instead of asking how EU law should be interpreted, the national court in principle laid out the conclusion it would like to reach and the justification it would provide to support it, and asked the CJEU's permission to proceed as proposed. This, too, is a comparatively audacious way of formulating a preliminary question – not only, but especially, for a Nordic court.

As is well known, the CJEU did not budge. As both judgments have been discussed at length elsewhere,[39] the Court's reasons will not be reproduced here. Suffice it recollect the conclusion that, in both cases, national legislation was found to be incompatible not only with the Directives but also with the underlying general principles, and that it was consequently to be interpreted in accordance with Union law or else set aside.

Nevertheless, the two national courts both continued on the respective paths mapped out in their orders for reference. The SSC reacted in the more representative way. First, by the time the case was finally decided, the defendant had made concessions that, according to the SSC entailed that there was no longer any need to decide the case on the merits. Second, while dismissing the appeal, all participating justices issued an addendum in which they observed that the

[37] Opinion of AG Trstenjak in Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, EU:C:2011:559. See further Laurent Pech, Between judicial minimalistm and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominquez* (2012) 49 Common Market Law Review 1841–1880.

[38] Helle Krunke and Sune Klinge, The Danish Ajos Case: The Missing Case from Maastricht and Lisbon (2018) 3 European Papers,157–182, 180.

[39] On *Ajos*, see e.g. Urška Šadl and Sabine Mair, Mutual Disempowerment: Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A* (2017) 13 Review of European Constotutional Law 347–368; Rass Holdgaard et al, From cooperation to collision: The ECJ's *Ajos* ruling and the Danish Supreme Court's refusal to comply (2018) 55 Common Market Law Review 17–54; Krunke and Klinge, n 38. On *Braathens*, see Anna Wallerman Ghavanini, Remedies for non-material damages: Striking out in a new direction? *Braathens* (2022) 59 Common Market Law Review 155–170; Henrik Bellander and Johanna Munck af Rosenschöld, Flygpassageraren och rättegångsbalken: Omkullkastade grundprinciper eller business as usual?" (2022) Svensk Juristtidning 941–958.

CJEU's ruling gave rise to a number of 'questions' on how EU law as interpreted by the CJEU could be accommodated. The justices however declined to answer any of these questions, holding – true to form – that they were 'such that they should more appropriately be considered by the legislature'.[40]

The ruling of the SSC fits simultaneously into both categories of judicial passivism. On the one hand, in its actual decision, the SSC relied on party dispositions to avoid pronouncing on the direct horizontal application of the CFR, thus exercising judicial passivity in the narrow sense. Following the CJEU's ruling, the claimant had made 'a concession of the kind required in the CJEU's ruling'. Despite the concession's clearly forced nature (the defendant at first admitted that the concession was made for reasons of procedural economy, but subsequently withdrew this explanation), the SSC – but, notably, not the applicant – considered this a 'categorical and unreserved' recognition of its discriminatory behaviour against the claimant. Under these circumstances, EU law no longer required a judicial action to be available, and the SSC could uphold the lower courts' dismissal of the action without acknowleding that it had been unlawful at the time. On the other hand, the addendum – the use of which was by definition not necessary and thus signals the SSC going beyond the bare minimum that distinguishes passivism in the narrow sense – is an expression of passivism in the broad sense. While the SSC did raise the questions of Union law compatibility avoided in the ruling proper, it not only left these to the legislature but also refused to clearly identify the incompatibility and indeed even to explicitly acknowledge that national law was – indeed, remains[41] – incompatible with EU law, referring only to 'questions' raised by the CJEU's ruling.

The case for judicial passivism may be less intuitive in the *Ajos* ruling. The reader will not need to be reminded that the DSC refused to disapply national law, citing the domestic act on accession to the EU, thereby staging a revolt against the CJEU. Declaring itself bound by the Danish accession act, the DSC most likely perceived itself as the opposite of activist, reacting to and restoring a status quo upset by the CJEU's activism in particular in the *Mangold* ruling.[42] Nevertheless, it bears pointing out that the DSC's assessment, that harmonious interpretation would be contra legem, stemmed not from national legislation but from its own case law. Arguably, this is a rather broad interpretation of the contra legem concept, that entails placing the DSC's case law hierarchically

[40] Addendum by justices Toijer, Lindeblad, Herre, Bäcklund, and Mattsson in case Ö 2343-18. Translation from Swedish by the author.

[41] A proposal has however been made for legislative intervention accommodating *Braathens* in wage discrimination cases, see SOU 2024:40, 198–200 and 341f.

[42] Ulla Neergaard and Karsten Engsig Sørensen, Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos* Case, (2017) 36 Yearbook of European Law, 275–313, 280f.

above the CJEU's.[43] Furthermore, as Ŝadl points out, while rejecting general principles of EU law as a legal source, the DSC relied closely on the position of the Danish government,[44] thus mirroring the Nordic interest in legislative history and intent described above. Doing so, the ruling arguably displays a rather Nordic, 'inward-turning' form of revolt.[45] Taking judicial restraint to an extreme where it looks less like caution than like resistance, the DSC engaged in what on these grounds must be considered judicial passivism in the broad sense.[46]

The head-on conflict created by the *Ajos* ruling is clearly uncharacteristic of the Nordic courts (indeed, one might say of courts in general). However, it would not be unfair to brand the Nordic courts' overall approach to judge-made EU law as minimalist, and their application of law as defined by a reluctance to draw the consequences of CJEU precedents outside of the precise circumstances in which they were delivered.[47] Arguably, this, too, goes beyond caution towards inhibition.

4. THE POTENTIAL OF JUDICIAL PROACTIVITY

The picture of Nordic legal culture pained above is by necessity crude and perhaps also unfairly focused on what may be perceived as its shortcomings. Counterpoints can and should be offered. Fulfilling the double purpose of providing a more nuanced picture and demonstrating how a more harmonious integration of EU law within the Nordic legal orders may occur, this section will briefly examine an example of judicial creativity in the SSC.

In *Fransson*, the CJEU declared the Swedish practice of pursuing criminal charges in cases of fiscal offences where a tax surcharge had already been levied to be contrary to Article 50 CFR,[48] leading the SSC to follow suit by

[43] Cf Ruth Nielsen and Christina D Tvarnø, Danish Supreme Court Infringes the EU Treaties by Its Ruling in the Ajos case (2017) Europarättslig Tidskrift 303–326, 319.

[44] Urška Šadl, "A Dane, a German, and a Pole walk into a court: National courts as critics of the European Court of Justice" European University Institute LAW Working Paper, 2024/03, 7.

[45] Šadl, n 44, 19.

[46] Cf Mikael Rask Madsen et al, Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation (2017) 23 European Law Journal 140–150, 150.

[47] Particularly clearly put by Ojanen, n 9, 201, regarding the Finnish courts: 'Each case is dealt with individually, without the court expressing general views about the domestic status of EU law. One looks in vain for the kind of bold and sweeping observations on the relationship between EU law and national law that have been issued by certain English or German courts, for example.' Similarly regarding the legislative reception of EU law, see Anna Jonsson, An introduction to Swedish Legal Culture, in Søren Koch and Marius Mikkel Kjølstad (eds), Handbook on Legal Cultures, Springer, 2023, 1064, speaking of an 'institutional resistance towards the introduction of an international abstract system of norms'.

[48] Case C-617/10, Åklagaren v Åkerberg Fransson, EU:C:2013:105.

reversing its previous case law.[49] Predictably, this gave rise to numerous applications for relief from individuals having been previously subject to double sanctions. Considering whether it would be possible to reopen cases already finally decided in breach of Article 50 CFR, the SSC observed that, according to settled case law and established interpretation of the relevant national provision, the conditions for reopening were not met. Under either of the passivism approaches discussed in the previous subsection, this would have been the end of the matter. While the confrontative stance of *Ajos* would perhaps have been (more) difficult to defend in a vertical relationship, the *Braathens* approach of leaving to the legislature to provide for adequate relief would certainly have been available. Nevertheless, the SSC took a different course of action, stating that since it was a question of safeguarding rights guaranteed under European law, there may be reason to 'modify, amend, or set aside' national law.[50] On this basis, the Court held that reopening of final decisions in some cases must be possible, notwithstanding the conditions laid down in national law. This would be the case especially where reopening would be necessary to stop an ongoing fundamental rights violation, or else where the rights violation had been of a particularly serious character and the reopening of the case appeared a considerably more appropriate form of compensation than other available options.[51] In the case at hand, the Court found the criteria to be fulfilled, citing the fundamental nature of the *ne bis in idem* principle as well as the social stigma associated with a criminal conviction.

It is possible to find similar examples of proactive and systematic approaches in the other Nordic Member States. In *Lady & Kid*,[52] which concerned an appeal against a lower court's decision to refer questions to the CJEU for a preliminary ruling, the DSC observed that, according to the CJEU's *Cartesio* case law,[53] it was not prevented from hearing the appeal, but its ruling would not be binding on the lower court. It found this 'difficult to reconcile' with the Danish legal order, under which decisions made on appeal were as a rule binding on the lower court. Instead of creating a narrow exception to accommodate *Cartesio*, however, the DSC took a broader systematic outlook and ruled that appeals against decisions to request preliminary rulings would not be permissible at all. Mention may also be made of a 2018 judgment of the Supreme Court (*Korkein oikeus*) of Finland (FSC). The case concerned discrimination on the basis of obesity, which the FSC – having considered the CJEU's case law on the definition of disability as a discrimination ground – classified as falling under the

[49] Supreme Court of Sweden, decision of 11 June 2013 in case B 4946-12 (NJA 2013 s. 502).
[50] Supreme Court of Sweden, decision of 16 July 2013 in case Ö 1526-13 (NJA 2013 s. 746), para 16.
[51] Ibid. at paras 23–24.
[52] Supreme Court of Denmark, decision of 11 February 2010 in case 334/2009 (U 2010. 1389 H).
[53] Case C-210/06, CARTESIO Oktató és Szolgáltató bt, EU:C:2008:723.

discrimination ground of health and therefore outside the scope of EU law.[54] Nevertheless, the FSC observed that the case law of the CJEU could nevertheless be relevant as interpretation data for the national Equality Act, in order to ensure the a uniform meaning to the provisions governed by EU law, such as the burden of proof. It then proceeded to refer to judgments of the CJEU in its assessment of the justifications offered by the defendant.

This proactive approach in which the national courts using a creative balancing approach resolve problems themselves and in a generally applicable fashion rather than awaiting legislative intervention, is clearly different from the two cases discussed in the previous section. The prevalence of this kind of 'soft' europeanisation is hard to properly gauge, as it may also occur without explicit references to EU law.[55] The rulings demonstrate the potential, (even) within the Nordic legal culture, of courts defining the impact of EU law within the Member States constructively and proactively in a way that integrates EU and national law in a systemic fashion. It remains to be seen whether this is a road that the Nordic courts will keep travelling down.

5. CONCLUSION

This article took its point of departure in the different reactions of the Swedish and Danish Supreme Courts to two rather similar problems of EU law implementation established by the CJEU through the preliminary rulings in *Ajos* and *Braathens*. It has argued that, despite the differences, the national courts' reactions can both be understood as expressions of *judicial passivism*, where the latter concept is used to denote a negative but no less ideologically loaded side of judicial acticvism. It has furthermore argued that this passivism is characteristic of the Nordic courts' attitudes in the preliminary reference procedure more generally.

It is illustrative that both the Danish and the Finnish delegates at a recent seminar in the Association of the Councils of State and Supreme Administrative Juridictions of the European Union (ACA) emphasised the division of functions between the national courts and the CJEU.[56] The national court's task, in their view, is first and foremost to resolve the case (which in itself is a rather revealing self-perception at the highest national jurisdiction). Within the pre-

[54] Supreme Court of Finland, judgment of 18 May 2018, FI:KKO:2018:39.

[55] In this contect it is worth observing that, even though it was the CJEU's *Fransson* ruling that caused the SSC to change its case law, the reasoning was primarily predicated on the ECHR and not the CFR, possibly testament to a continued tendency to be more receptive of the ECHR than of EU law.

[56] ACA seminar on *Preliminary rulings, from CILFIT to Consorzio*, held in Stockholm 9–10 October 2023. See https://www.aca-europe.eu/index.php/en/seminars/1039-seminar-in-stockholm-from-9-to-10-october-2023 (last visited 8 April 2024).

liminary reference procedure, that task includes providing the adequate context and formulating precise and useful questions. The responsibility of answering those questions, however, falls squarely to the CJEU. For a referring court to openly engage in that analysis and admit to an opinion of its own would, it appears, be considered out of place in the Nordic judicial culture, which continues to value the neutral referee over the ambitious judicial law-maker.

Interestingly, the Nordic courts' abovementioned attention to the precise formulation of questions (rather than to proposing solutions) appears to pay off. While the CJEU routinely reformulates preliminary questions, the questions referred by Nordic courts are subject to less far-reaching reformulations than questions referred by courts in other Member States.[57] This entails that Nordic courts receive more direct answers to their questions than courts in other legal traditions.[58] Whether they like the answers they receive, is another question. I have demonstrated elsewhere that – unsurprisingly – more insightful analysis of EU law in the order for reference coincides with a higher chance of the CJEU reaching the same conclusion as the referring court (at least so long as the latter does not become overly opinionated).[59] Contextualisation of national law in the way characteristic of the Nordic courts does not appear to have the same effect, even though, as illustrated in section 2, the effect of such contextualisation can be argumentative.[60] On the other hand, receiving clear and direct answers to the question may be more valuable to a national judge than the substantive content of the answer.[61]

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[57] The CJEU routinely reformulates the questions referred for preliminary rulings. These reformulations can be substantive, i.e., altering the meaning or content of the question, or merely stylistic (see further Urška Šadl and Anna Wallerman, 'The referring court asks, in essence': Is reformulation of preliminary questions by the Court of Justice a decision writing fixture or a decision-making approach? (2019) 25 European Law Journal 416–433, 426). 11 per cent of the questions referred from Nordic courts were substantively reformulated, compared to 42 per cent of all questions in the dataset.

[58] For discussion on the effect of reformulation on the usefulness of the ruling, see Morten Broberg and Niels Fenger, Broberg and Fenger on Preliminary References to the European Court of Justice, 3rd ed, Oxford University Press, 2021, 372–379; Jasper Krommendijk, National Courts and Preliminary References to the Court of Justice, Edward Elgar Publishing, 2021, 129–131.

[59] Wallerman Ghavanini, n 6.

[60] As explained in n 11, the orders for reference were coded for contextualization of national law on a five-grade scale from 0 (uncommented verbatim reproduction of national legislative provisions) to 1 (heavily annotated descriptions of the national *Rechtslage* in which the referring court evaluates legislation, case law and doctrine). On average, the level of correspondence between the proposed and the actual answer to the questions was as follows (minimum to maximum contextualization: 46% – 69% – 26% – 44% – 77%. The lack of an either upwards or downwards trend in the percentages of judgments favourable to the referring courts' positions, to correspond with the level of contextualisation, suggests that there is no meaningful connection between the two factors.

[61] Krommendijk, n 58, 121ff; Michal Bobek, Of Feasibility and Silent Elephants: Legitimacy of the Court of Justice Through the Eyes of National Courts, in Maurice Adams et al (eds),

Furthermore, the persuasive effect of different referencing styles should not be exaggerated. Despite the CJEU's insistence on the preliminary reference procedure as a judicial 'dialogue',[62] referring courts in general appear to have limited opportunity in practice to influence the Court's judgments. Several recent empirical studies, covering a variety of fields and time periods, have found that the CJEU generally fails to respond to – let alone follow – the proposed solutions of even the most qualified national referring courts.[63] Indeed, the president of the CJEU appeared to provide some corroboration of these findings at the above-mentioned ACA seminar. While acknowledging that referring courts' proposed answers provide helpful insights into what the real problem is, he revealingly did not mention them as having value beyond *identifying* the legal problem – i.e., not in the process of *resolving* it.[64] Consequently, there is no particular risk of Union law taking a Germanic turn as a result of the many and engaged references from German and Austrian courts, nor, conversely, of the Nordic legal tradition missing out on an opportunity to leave its mark on Union law due to the cautious approaches preferred by Nordic courts.[65] The CJEU's development of Union law remains – for better or worse – guided not by the manner in which it is addressed, but primarily by the Court's own 'idea of Europe'.[66]

On the domestic scene, however, the approaches of national courts, even in EU law matters, matter. The CJEU's lack of both competence and opportunity to put its interpretations of EU law into actual application has a significantly deteriorating effect on its practical authority. As the SSC has pointedly argued: While application 'clearly and irrefutably' inconsistent with preliminary rulings would be unlawful, the CJEU's rulings can be 'unclear and open to multiple interpretations.'[67] Even after hearing the CJEU, the national courts thus have

Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice, Hart Publishing, 2013.

62 See eg. Opinion 2/13 (Accession of the EU to the ECHR), EU:C:2014:2454, para. 176; Case C-561/19, Consorzio Italian Management and Catania Multiservizi v Rete Ferroviaria Italiana, EU:C:2021:799, para 27; Case C-204/21, Commission v Poland, EU:C:2023:442, paras 275 and 279.

63 Van Gestel and de Poorter, n 18; Wallerman Ghavanini, n 6; Davor Pétric, National Courts Proposing Answers to the Questions Referred for Preliminary Ruling (2024) 27 Zeitschrift für europarechtliche Studien 3–39.

64 Cf also van Gestel and de Poorter, n 18, 118f.

65 On the impact of national legal traditions on the Court more generally, see Thijmen Koopmans, The birth of european law at the crossroads of legal traditions' (1991) 39 American Journal of Comparative Law 493–508; Fernanda Nicola, National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union (2016) 64 American Journal of Comparative Law 865–889.

66 Pierre Pescatore, The Doctrine of 'Direct Effect': An Infant Disease of Community Law (1983) 40 European Law Review 155–177 at 157.

67 Supreme Court of Sweden, decision of 15 December 2023 in case Ö 5569-22 (NJA 2020 p. 147), paras 15–16.

a rather decisive voice on the implications of EU law in their Member State.[68] The conservatism, at least at times drawn to the point of judicial passivism, of Nordic courts when it comes to EU law, within and probably also beyond the preliminary reference procedure, affects what Union law means in the Nordic Member States. Europeanisation is accepted reluctantly, and only just to the extent necessary to avoid infringement of Union law (or in the case of *Ajos*, a little short even of that). Yet, there is, of course, no reason to suppose that Nordic judges are less capable than other judges, for instance their Germanic peers, to engage in EU legal reasoning. The difference more likely lies in how they perceivee of their role and function. As recent research show that Nordic courts and in particular the Nordic Supreme Courts have gradually become more willing to challenge the legislature and deliver controversial judgments,[69] the more proactive approach – of which some examples can already be seen – may become more prominent.

[68] Cf Morten Broberg and Niels Fenger, If you love somebody set them free: On the Court of Justice's revision of the *acte clair* doctrine (2022) 59 Common Market Law Review 711–738.

[69] Ran Hirschl, The Nordic counternarrative: Democracy, human development, and judicial review (2013) 9 International Journal of Constitutional Law 449–469; Dahlberg et al, n 7, 293f; Anna W Ghavanini et al, Institutions that define the policymaking role of courts: A comparative analysis of the supreme courts of Scandinavia (2023) 21 International Journal of Constitutional Law 770–797.