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ARTICLE

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What Happens After the Court of Justice Has Given its Ruling? Promises and Pitfalls of Strategic Litigation Against Internal Border Controls in EU Law

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Abstract

This Article inquires into the aftermath of judgments by the CJEU under the preliminary ruling procedure under article 267 TFEU in cases of strategic litigation. As the principal objective of strategic litigants is to effectively achieve broader societal, political, economic, or legal change, the afterlife of a judgment is crucial for them. While excellent scholarship exists on strategic litigation in EU law, much remains unclear on what happens to a case after the Court of Justice of the EU (CJEU) has given its judgment. Does the referring court and other national courts faithfully comply with the judgment of the CJEU? Do governments implement the ruling? This Article takes the decision of the CJEU in *Landespolizeidirektion Steiermark*, which concerns the reintroduction of internal border controls, as case study to inquire into the different factors that affect the implementation of a preliminary ruling that is the outcome of strategic litigation. The main argument in this Article is that the implementation of preliminary rulings is determined by the interplay between three different factors: The role of strategic litigants to initiate follow-up litigation, the receptivity of national courts to comply with a preliminary ruling, and the European Commission's willingness to enforce a preliminary ruling.

Keywords: Border controls; strategic litigation; implementation of judgments; enforcement of EU law; Schengen

A. Introduction

In August 2019, I returned from a vacation in Croatia to Graz, a medium-sized Austrian town, where I lived at the time. About two kilometers before the border, traffic slowed down. I continued driving at a walking pace and, forty five minutes later, reached the Austrian border. "Travel documents!" barked the police officer. My explanation for refusing to show my travel documents—"the border controls are contrary to EU law"—was not met with much enthusiasm. I was charged with a fine for illegally entering the country. I contested the fine before an Austrian administrative court, which eventually referred several questions to the Court of Justice of the EU. In April 2022, the Court of Justice held that the Schengen Border Code—the principal EU legal instrument that governs the absence of internal border controls in the Schengen area—sets clear and precise limits on reintroducing internal border controls. Controls, the Court of Justice made

clear, cannot be maintained beyond the maximum six months duration prescribed by the Schengen Borders Code.[1]

The background of the litigation against border controls maintained by the Austrian government is exemplary of the broader "crisis of the Schengen regime" that has been noted both in the academic literature and in broader public discourse.[2] As a reaction to the increasing arrival of refugees, several member states—Austria, Germany, Denmark, Sweden and the Schengen-associated country Norway—had reintroduced in the fall of 2015 internal border controls and consecutively prolonged these controls every six months. Moreover, the French government reinstated controls at all of its internal borders in reaction to the terrorist attacks in Paris in November 2015 and consecutively prolonged these controls six months at a time during the following years. Although border controls in the area without internal borders are meant to be an experience of the past—they should only be exceptionally reinstated for a short time in situations of a serious threat to internal security or public policy—"temporary" controls "have become more or less permanent in six European countries," as *The Economist* noted already in 2018.[3]

My initial joy on "winning" the case was soon followed by disenchantment. Although the decision of the Court of Justice was meant to put an end to the quasi-permanent internal border controls, all member state mentioned above continued, seemingly unimpressed by the decision of the Court Justice, to carry out controls at their internal borders. Moreover, instead of faithfully implementing the decision of the Court of Justice, member states, together with the Commission, pushed for an amendment of the Schengen Borders Code in order to evade the implications of the decision. Two years after the decision of the Court of Justice, the amendment of the Schengen Borders Code entered into force, which adds additional grounds on which border controls may be reinstated,[4] and significantly extends the duration during which internal border controls may be reintroduced.[5] The amendment of the Schengen Borders Code illustrates how member states may evade the ramifications of strategic litigation by legalizing a blatantly unlawful situation.

This Article inquires into the promises and pitfalls of strategic litigation by focusing on the afterlife of a case of strategic litigation before the Court of Justice. I thereby focus on the implementation of judgments under the preliminary ruling procedure under article 267 of the Treaty on the Functioning of the European Union (TFEU). The reason for focusing on preliminary rulings is that the preliminary ruling procedure, although initially envisaged by the drafters of the Treaties as an instrument of cooperation between the national courts and the Court of Justice, became the most important means for private parties to enforce EU law.[6] Due to the narrow interpretation of standing requirements for direct actions by the Court of Justice, the preliminary ruling procedure has turned into an important instrument for private parties to

[1]Joined Cases C-368 & 369/20, NW v. Landespolizeidirektion Steiermark, ECLI:EU:C:2022:298, ¶ 69 (Apr. 26, 2022).

[2]*See* Franz Schimmelfennig, *European Integration (Theory) in Times of Crisis: A Comparison of the Euro and Schengen Crises,* 25 J. Eur. Pub. Pol'y 969, 969 (2018). *See also* Tanja Börzel & Thomas Risse, *From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics*, 25 J. Eur. Pub. Pol'y 83, 83 (2018).

[3]*Border Checks Are Undermining Schengen*, The Economist (Oct. 27, 2018), https://www.economist.com/europe/2018/10/27/border-checks-are-undermining-schengen.

[4]Large scale migratory movements are explicitly include as grounds on which border controls may be reinstated, although they have been explicitly excluded in the previous version of the Schengen Borders Code. *See* Commission Regulation 2024/1717, of the European Parlimament and of the Council of 13 June 2024, amending Regulation 2016/399 on a Union Code on the Rules Governing the Movement of Persons Across Borders, 2024 O.J. (L 1717), 16, 17 [hereinafter, Schengen Borders Code 2024].

[5]*See* Schengen Borders Code 2024, arts. 25a (5)-(6) (stating that member states may now unilaterally reinstate border controls up to three years, instead of the six months maximum duration under the old rules).

[6]*See* Statistics of the Court of Justice 2022 (2023), https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf (detailing that in 2022, more than 67 percent of new cases before the CJEU were preliminary reference). *See also* Morton Broberg, *Preliminary References as a Means for Enforcing EU Law,* in The Enforcement of EU Law and Values, 99 (Dimitri Kochenov and Andras Jakab eds., 2017).

litigate strategically against national policies and/or overturn EU legislation.[7] I take the decision of the Court of Justice in *Landespolizeidirektion Steiermark* —joined cases C-368/20 and C-369/20— which concerns the reintroduction of internal border controls in the area without internal borders, as case study to inquire into the different factors that affect the implementation of a judgment of the Court of Justice that is the outcome of strategic litigation. I understand strategic litigation as "legal action initiated to achieve broader social, political, or economic ends."[8] It is a particular form of legal mobilization and a way to exert influence over policies and political processes.[9] As the principal objective of strategic litigants is to effectively achieve broader societal, political, economic, or legal change, the afterlife of a judgment is crucial for strategic litigants.[10] Achieving change through strategic litigation before the Court of Justice may require follow-up measures by strategic litigants. Even when the referring national court faithfully complies with a preliminary ruling, additional measures may be needed to give full effect to the judgment of the Court of Justice: A detention center for asylum seekers must be closed,[11] a residence permit be issued,[12] or a decision on disbursing social benefits be adopted.

The main argument in this Article is that the implementation of preliminary rulings is determined by the interplay between three different factors: (i) The role of strategic litigants and their networks to initiate follow-up litigation, (ii) the receptivity of national courts to comply with a preliminary ruling, and (iii) the European Commission's willingness to enforce a preliminary EU law. I thereby focus on five different member states: Austria, Germany, Denmark, Sweden, and France. These are the states that maintain internal border controls since the fall of 2015 and intervened in the preliminary proceedings before the Court of Justice, which suggests that the outcome of the case has a direct bearing on their border policies.

In the literature, compliance with preliminary rulings by national courts and implementing authorities and the role of activists in enforcing compliance of preliminary rulings before national courts and, or, EU institutions are usually considered separate. Much of the literature on compliance with judgments of the Court of Justice focuses on decisions of the Court of Justice in infringement procedures under article 258 TFEU and the role of national implementing authorities.[13] The sparse literature on compliance with preliminary rulings, focuses on referring courts' compliance and does not consider the role of activists in enforcing

[7]Virginia Passalacqua, *Legal Mobilization via Preliminary Reference: Insight from the Case of Migrant Rights'*, 58 COMMON MKT. L. REV. 751, 752 (2021).

[8]Pola Cebulak, Marta Morvillo, & Stefan Salomon, *Strategic Litigation in EU Law: Who Does it Empower?*, 25(6) GERMAN. L.J. (2024).

[9]*Id.*

[10]There is of course disagreement in the literature on whether strategic litigation can actually achieve such change. *See generally* GERALD ROSENBERG, THE HOLLOW HOPE (3d ed. 2023) (arguing with more skepticism that courts contribute to societal or political change in the US context). *See also* GRAINNE DE BURCA, REFRAMING HUMAN RIGHTS IN A TURBULENT ERA 137-148 (2021) (explaining that the more positive that strategic litigation contributes to change in the context of children and reproductive rights in Ireland).

[11]*See* Joined Cases C-924 & 925/19 PPU, FMS v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, ECLI:EU:C:2020:367 (May 14 2020). *See also Hungary: Abolishment of Transit Zone Following CJEU Ruling*, ECRE (May 22, 2020), https://ecre.org/hungary-abolishment-of-transit-zone-following-cjeu-ruling/ (discussing the policy of the Hungarian government in the aftermath of the judgment).

[12]*See* Case C-34/09, Zambrano, ECLI:EU:C:2011:124 (Mar. 8, 2011). *See e.g.*, Charlotte O'Brien, *Acte Cryptique? Zambrano, Welfare Rights, and Underclass Citizenship in the Tale of the Missing Preliminary Reference*, 56 COMMON MKT. L. REV. 1697, 1697–1705 (2019) (discussing the aftermath of the 2011 Zambrano decision in the UK).

[13]*See* TANJA A. BÖRZEL, WHY NON-COMPLIANCE: THE POLITICS OF LAW IN THE EUROPEAN UNION 5-9 (2021); LISA CONANT, *Compliance and What EU Member States Make of it*, *in* COMPLIANCE AND THE ENFORCEMENT OF EU LAW 1, 2 (Marise Cremona ed., 2012) (noting that "[f]ewer scholars have investigated the extent to which national courts comply with the preliminary rulings they receive after sending a reference to the ECJ") [hereinafter CONANT, *Compliance*]; JONAS TALLBERG, PATHS TO COMPLIANCE: ENFORCEMENT, MANAGEMENT, AND THE EUROPEAN UNION, 56 INTERNATIONAL ORGANIZATION 609, 627–28 (2002); Geoffrey Garret, R. Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149, 150 (1998).

preliminary rulings.[14] By contrast, scholarship on strategic litigation and legal mobilization in EU law, which often relies on socio-legal methods, emphasizes the role of collective actors for initiating strategic litigation. However, that body of literature focuses of the role of collective actors in bringing preliminary references to the Court of Justice and shows little interests in in what happens after a preliminary ruling.[15] This Article thus contributes to the literature by linking a socio-legal perspective on the role of different actors in enforcing preliminary rulings with a more doctrinally oriented perspective on compliance with preliminary rulings. These aspects—the interplay of different actors in enforcing compliance with the rules of the Schengen Borders Code—have also been neglected by the literature discussing the crisis of Schengen.[16]

Before proceeding with the remainder of this Article, a note on methodology is in order. Evidence on the role of different actors in enforcing EU law—especially activists at the national level and Commission officials—stems from semi-structured interviews that have been conducted from June to August 2024 via phone or Zoom. I conducted a total of five interviews with activists and lawyers in different member states, as well as officials from the European Commission. To obtain more candid responses, I promised the interviewees full anonymity. Interviewees were chosen on the basis of the following criteria: (1) when follow-up litigation occurred before national courts and (2) whether the interviewees were the applicants in the cases. When no follow up litigation occurred, interviewees were activists who contested internal border controls with political means chosen based on their public profile in the struggle against internal border controls and legal experts, to inquire into structural factors that may hamper litigation. Commission officials were chosen based on their technical expertise of and proximity with Schengen law. Notifications on the reintroduction of border controls have been obtained through access to information requests from the Commission and national ministries of interior.

The remainder of this Article proceeds as follows. In Section B I first present a doctrinal argument on why preliminary rulings are binding not only on the referring court, but also on other actors. I then present the legal and political background on reintroduction of internal border controls in Section C, the preliminary rulings of the Court of Justice in *Landespolizeidirektion Steiermark* and its aftermath in Section D. As none of the member states complied with the preliminary ruling, I discuss in section E—the principal section in this Article—the interplay of the different actors in enforcing the preliminary ruling. Section F concludes.

[14]Marton Varju & Ernő Várnay, *After the Judgment: The Implementation of Preliminary Rulings in the Hungarian Judicial System 2004–2019 and Beyond,* 59 COMMON MKT. L. REV. 1743, 1743 (2022); JASPER KROMMENDIJK, NATIONAL COURTS AND PRELIMINARY REFERENCES TO THE COURT OF JUSTICE 1-8 (2021); Stacy Nyikos, *The Preliminary Reference Process: National Court Implementation, Changing Opportunity*, 4 EUR. UNION POL. 397, 397 (2003); JÜRGEN SCHWARZE, DIE BEFOLGUNG VON VORABENTSCHEIDUNGEN DES EUROPÄISCHEN GERICHTSHOFS 1 (1998).

[15]*See* Kris van der Pas, *All That Glitters Is Not Gold? Civil Society Organisations and the (non-)Mobilisation of European Union Law*, 62 J. COMMON MKT. STUD. 525, 525-527 (2024); Passalacqua, *supra* note 7; Lisa Vanhala, *Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy*, 51 COMPAR. POL. STUD. 380, 380 (2018). For more on literature that focuses on the aftermath of strategic litigation, *see* Karen Alter & Jeanette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMPAR. POL. STUD. 452, 462–65 (2000) (analyzing the broader strategies of civil society actors to follow-through on judgments of the Court of Justice, but limited to the UK context).

[16]Literature discussing the crisis of Schengen either focuses on member states' motives for maintaining internal border controls or on the effects of these controls on free movement rights or political structures of cooperation. What these writings have in common is that their analytical approaches focus on the state and or EU institutions and do not take into account the role of activists and lawyers who contest the reintroduction of border controls through strategic litigation. *See e.g.* Johanna Pettersson Fürst, *Defensive Integration Through Cooperative Re-Bordering? How Member States Use Internal Border Controls in Schengen,* 31 J. EUR. PUB. POL'Y 478, 478 (2024); Sandra Mantu, *The Contributions in the Special Issue: Schengen, Free Movement and Crises*, 23 EUR. J. MIGRATION & L. 377, 377 (2021); Sara Casella Colombeau, *Crisis of Schengen? The Effect of Two "Migrant Crises" (2011 and 2015) on the Free Movement of People at an Internal Schengen Gorder*, 46 J. ETHNIC & MIGRATION STUD. 2258, 2258 (2020); Philipp Genschel & Markus Jachtenfuchs, *From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory*, 56 J. COMMON MKT. STUD 178, 178 (2018); Schimmelfenning, *supra* note 2; Börzel & Risse, *supra* note 2.

B. Who is Bound by a Preliminary Reference Judgment?

The preliminary reference procedure has become the "most important"[17] means for private parties to enforce EU law and turned the preliminary reference procedure into a "citizens' infringement procedure."[18] This is also true in the context of strategic litigation. Even though article 267 TFEU is not a remedy available to private parties before a national court and litigants have only limited agency over whether the domestic court refers questions to the Court of Justice, literature on strategic litigation emphasizes that the preliminary reference procedure has become an important instrument for strategic litigants to contest the compatibility of national law with EU law, as well as the validity of EU Directives and Regulations with higher ranking EU law, before national courts.[19] Strategic litigants choice for using the preliminary reference procedure lies not only in the supremacy of EU law over national law, but also in the transnational effects of preliminary rulings, which are binding on all member states. In the following discussion on the legal effect of preliminary rulings, I distinguish between direct and indirect bindingness.

Preliminary rulings are directly binding on the national court that makes the preliminary reference. In its early case law, the Court of Justice made clear that the response that it gives to preliminary questions are binding on the referring national court.[20] The national court that makes the preliminary reference is not the only national court which is bound by the judgement; any subsequent appeal court that takes a decision in the concrete legal dispute is also bound.[21] Regarding the scope of the bindingness of preliminary rulings, national courts are not only bound by the operative part of the judgment, but also by the reasoning of the Court of Justice in the ruling. The operative part of a judgment must be understood in light of the reasons given in that judgment.[22] As a preliminary ruling constitutes only an interim stage in the national proceedings, which continue after the judgment from the Court of Justices, the preliminary ruling is neither directly binding on the parties in a preliminary proceeding, nor on national courts from other member states, EU institutions or other member states.[23] However, this does not mean that these actors may simply disregard the ruling.

In the years following the entry into force of the Treaty of Rome, there was much discussion in EU legal scholarship about whether preliminary rulings are binding only *inter partes*, that is between the Court of Justice and the national court making the preliminary reference, or *erga omnes*.[24] In the early 1980s the Court of Justice dispelled these doubts. In *International Chemical Cooperation*, the Court of Justice held that a national court cannot apply an act of an EU institution that had been declared void in a different preliminary ruling.[25] The corollary of the Court's dictum was that that preliminary rulings are *indirectly* binding on all national courts—at least those preliminary rulings that declare invalid an act of EU law. However, preliminary rulings

[17]Passalacqua, *supra* note 7, at 752 (quoting Bruno de Witte).

[18]*See* ECJ, *Statistics of the Court of Justice 2022* (2023), https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf (providing statistics showing that in 2022, more than 67 percent of new cases before the CJEU were preliminary references). *See also* Morton Broberg, *Preliminary References as a Way of Enforcing EU Law*, *in* The Enforcement of EU Law and Values: Ensuring Member States' Compliance 99, 99 (Dimitri Kochenov & Andras Jakab eds., 2017).

[19]Passalacqua, *supra* note 7, at 752.

[20]*See* Case C-29/68, Milch- Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken, ¶ 2 (June 24, 1969), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-29/68. *See also* Case C–52/76, Luigi Benedetti v. Munari F.lli s.a.s., ¶ 26 (Feb. 3, 1977) http://curia.europa.eu/juris/liste.jsf?language=en&num=C-52/76.

[21]Morton Broberg & Niels Fenger, Preliminary References to the Court of Justice, 400 (2021).

[22]Case C–135/77, Robert Bosch GmbH v. Hauptzollamt Hildesheim, ¶ 4 (Mar. 16, 1978) http://curia.europa.eu/juris/liste.jsf?language=en&num=C-135/77.

[23]Case C–69/85, Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany, ¶¶ 13–14 (Mar. 5, 1986) http://curia.europa.eu/juris/liste.jsf?language=en&num=C-69/85.

[24]Broberg & Fenger, *supra* note 21, at 406. *See also* Case C–66/80, SpA Int'l Chem. Corp., 1224, 1227 (May 13, 1981) http://curia.europa.eu/juris/liste.jsf?language=en&num=C-66/80.

[25]Case C–66/80, SpA Int'l Chem. Corp., (Jan. 21, 1981), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-66/80.

have a general *erga omnes* effect—not limited to rulings that declare an act of EU law invalid—which derives from different doctrinal considerations.

First, the function of judgments of the Court of Justice is like those of judgments of constitutional or supreme courts in continental legal systems.[26] Judgments by constitutional or supreme courts authoritatively interpret the law. In the same vein, the Court of Justice authoritatively "says what EU law is."[27] Judgments of the Court of Justice, including preliminary rulings, have a declaratory function in that they authoritatively declare, often choosing between a plethora of different possibilities of interpretation, how a specific provision of EU law must be understood. A judgment of the Court of Justice becomes not only part of the specific EU legal norm that it interprets, but also of the EU legal order in general.[28] As all national courts are bound to faithfully apply EU law, they are also indirectly bound by a preliminary ruling.

Second, the core objective of the preliminary reference procedure is to ensure a uniform interpretation of EU law in all national legal orders. This objective is doctrinally reflected, among others, in the *acte éclaire* doctrine. A national court, which otherwise has a duty to refer questions to the Court of Justice, may refrain from doing so if the Court has answered these questions already in an earlier judgement. In fact, if the Court of Justice already addressed the same legal issue in an earlier judgment, it regularly rejects the preliminary reference as inadmissible,[29] which presupposes that judgments in preliminary references are not only binding *inter partes*—between the referring court and the Court of Justice—but *erga omnes*. The Court of Justice indeed suggested in several cases that it attaches such general effects to its judgments in preliminary references.[30]

Third, disregarding a preliminary ruling that clarifies the interpretation of a norm of EU law might result in liability of a member state. If a member state continues a conduct despite a preliminary ruling from which it transpires that this conduct clearly infringes EU law, the state's conduct will generally meet the threshold of a sufficiently serious breach of EU law for that member state to be liable under EU law.[31]

Fourth, the general effect of preliminary rulings on member states is also reflected in article 23 of the Statute of the Court of Justice, which provides that member states and, where appropriate, EU institutions may make submissions to the CJEU in preliminary proceedings to which they are not parties. It is precisely because of the general effect of preliminary rulings that article 23 of the Statute of the Court of Justice provides member states—and EU institutions—which are not parties to the dispute, with a possibility to submit their views on the interpretation of EU law to the Court of Justice. In this regard, article 23 forms the link between the *erga omnes* effect of preliminary rulings and procedural rights of member states by ensuring that the legal interests of member states are upheld in proceedings which might have legal consequences for them but to which they are not parties.[32]

The *erga omnes* effect of preliminary rulings renders the preliminary reference procedure a transnationally effective instrument for strategic litigants. Indeed, the reason for adopting a

[26]Broberg & Fenger, *supra* note 21, at 407.

[27]Koen Lenaerts & Jose Gutierez-Fons, *To Say What the Law of the EU is: Methods of Interpretation and European Court of Justice,* 20 Colum. J. Eur. L. 3, 3 (2013).

[28]Hans Kelsen, The Pure Theory of Law, 4–10 (Max Knight trans., 2005).

[29]Koen Lenaerts, Kathleen Gutman, & Janek Tomasz Nowak, EU Procedural Law 99 (2015).

[30]*See* Case C–66/80, SpA Int'l Chem. Corp., ¶¶ 9–18 (Jan. 21, 1981) (stating if the Court declares an act of an EU institution in a preliminary reference invalid, not only the referring court but any other domestic court is bound by that finding). *See also* Case C-465/93, Atlanta Fruchthandelsgesellschaft mbH et al. v. Bundesamt für Ernährung und Forstwirtschaft, ¶ 46 (Nov. 9, 1994) http://curia.europa.eu/juris/liste.jsf?language=en&num=C-465/93 (declaring that it attaches the same precedential value to preliminary rulings as it does to direct actions).

[31]Case C-118/00, Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants, ¶ 44 (June 28, 2001) http://curia.europa.eu/juris/liste.jsf?language=en&num=C-118/00.

[32]Broberg & Fenger, *supra* note 21, at 408.

strategy of litigating at EU level, instead of merely at national level, is that EU law offers a "comparative advantage" to national law.[33] From the perspective of the litigant, the *erga omnes* effects of the judgment in a preliminary reference procedure might be such a comparative advantage, especially in situations in which several member states have similar laws or practices in place that are contrary to EU law. Unlike the judgment of a domestic supreme or constitutional court, which only unfolds legal effects in the domestic legal order, the *erga omnes* effect of a preliminary ruling means that instead of cumbersome separate litigation in, for example, five different member states it may be sufficient to initiate only one proceeding in one member state.[34] In principle, these transnational effects of preliminary rulings would also be favorable to building up an economy of scale in transnational strategic litigation expertise.

However, to what extent does legal obligation translate into factual compliance? In Part C, I first provide a description of the background of the strategic litigation against the reintroduction of internal border controls. In Part D, I discuss the judgment of the Court of Justice, before turning to the aftermath of the judgment in Part E.

C. Background: the "Temporary" Reintroduction of Internal Border Controls

On September 13, 2015, then German Minister of Interior, Thomas de Maizière, announced that Germany would reintroduce controls at its border to Austria as reaction to the increasing numbers of persons seeking international protection in Germany. De Maizière left no doubt that the objective of this measure was to "limit the actual flow [of refugees] to Germany and to return to an ordered entry procedure."[35] The reintroduction of internal border controls by Germany set off a chain reaction and eight other states reinstated border controls in the fall of 2015 with the objective to curb the arrival of refugees to their territories.[36] After the terror attacks in Paris on November 13, 2015, the French government declared a state of emergency in the country and, as part of national emergency measures, reintroduced internal border controls on December 14, 2015.[37] France already had internal border controls in place since mid-November 2015 because of the 21st UN Conference on Climate Change.[38]

The Schengen Borders Code includes narrow exceptions from the principle that there shall be no controls at internal borders. If a member state faces a serious risk to internal security or public policy, that member state may exceptionally reintroduce temporary internal border controls as a measure of last resort. The Schengen Borders Code stipulates two different procedures for the reintroduction of internal border controls. First, article 25 Schengen Borders Code 2016 permits

[33]Passalacqua, *supra* note 7, at 772.

[34]The strategic litigation against the national laws implementing the Passenger Name Records Directive in Belgium and Germany. After the Court of Justice delivered its ruling the preliminary reference from the Belgian Constitutional Court. *See* ECJ, Case C-817/19, Ligue des droits humains ASBL v. Conseil des ministers (June 21, 2022), https://curia.europa.eu/juris/liste.jsf?num=C-817/19 (stating German and Slovenian courts discontinued their preliminary requests). In the preliminary proceedings before the Court of Justice in the case C-817/19, a total of 15 governments intervened, which suggests that more member states have legislation in place that raises doubts as to their compatibility with EU law. *See also* Case C-486/20, Varuh človekovih pravic Republike Slovenije, ECLI:EU:C:2022:766 (Sept. 14, 2022); Joined Cases C-215/20 and C-222/20, Bundesrepublick Deutschland, -ECLI-:-EU-:C:2022:773 (Aug. 22, 2022) https://op.europa.eu/publication-detail/-/publication/9df9d08e-9545-11ed-b508-01aa75ed71a1.

[35]Press Release, German Ministry of Interior, Press Statement of Minster Thomas de Maizière (Sept. 13, 2015) (on file with author).

[36]These states were: Austria, Hungary, Slovenia, Malta, Norway, Denmark, Sweden, and Belgium. In May 2016, Hungary, Slovenia, and Malta had already stopped carrying out controls at their internal borders.

[37]Council doc. 15181/15, Notification of 7 December 2015 by the French Authorities to the Commission (Dec. 7, 2015) (available at https://data.consilium.europa.eu/doc/document/ST-15181-2015-INIT/en/pdf).

[38]Council doc. 13171/15, Notification of 15 October 2015 by the French Authorities to the Commission (Oct. 15, 2015) (available at https://www.statewatch.org/media/documents/news/2015/oct/eu-france-schengen-temporary-controls-13171-15.pdf).

member states to unilaterally reintroduce border controls after notifying the Commission on the reasons for reintroducing controls.[39] The reintroduction of controls must be proportionate and is subject to strict time limits: member states may reinstate controls for a maximum of six months, foreseeable threats, or two months, unforeseeable threats, respectively.[40] Under the amended Schengen Borders Code 2024, member states may now unilaterally extend border controls to a maximum of two years and, in exceptional circumstances and under stricter criteria, up to three years.[41]

Second, article 29 Schengen Borders Code 2016 envisages a supranational procedure for the reintroduction of internal border controls. Under article 29 Schengen Borders Code 2016, member states may reinstate internal border control, after a proposal from the Commission, on the basis of a Council implementing decision. These controls can be extended to maximum of two years.[42] Although the amended Schengen Borders Code 2024 does not, in principle, change the maximum two-year limitation, it creates the possibility for the Council to recommend "as a last resort" and "where all other measures [. . .] are ineffective in mitigating the serious threat" to reintroduce internal border controls *ad infinitum*.[43]

When member states reinstated border controls in the fall of 2015, they first based these controls on article 28 Schengen Borders Code 2016, unforeseeable events, and when the two months time limit in article 28 had come to an end, they relied on article 25 from September 2015 to May 2016. From May 2016 to November 2017, internal border controls were based on article 29. The Council adopted on May 12, 2016 its first implementing decision, based on article 29, in which it recommended five member states—Germany, Austria, Sweden, Denmark, and Schengen associated country Norway—to carry out border controls at their internal borders for a maximum of six months.[44] In three subsequent implementing decisions the Council recommended that the same five member states prolong controls until November 11, 2017.[45] When the last implementing decision ended, these states relied again on article 25 Schengen Borders Code 2016 to prolong controls at their internal borders. Since November 2017, Austria, Germany, Denmark, and Sweden consecutively prolonged border controls each six months. Although these member states advanced a potpourri of justifications, from an elevated "terrorism threat level,"[46] to a "volatile migration situation in the neighbourhood of the EU,"[47] and an "increasing activity of human

[39]Commission Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) (codification), 2016 O.J. (L 77) [Hereinafter, Schengen Borders Code 2016].

[40]Schengen Borders Code 2016, arts. 25(4), 28(4).

[41]Schengen Borders Code 2024, arts. 25a (5), (6).

[42]Schengen Borders Code 2016, art. 29.

[43]Schengen Borders Code 2024, art. 29(2).

[44]*See* Council Implementing Decision 2016/894 of 12 May 2016 Seting out a Recommendation for Temporary Internal Border Control in Exceptional Circumstances Putting the Overall Functioning of the Schengen Area at Risk, 2016 O.J. (L. 149) (setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk on May 12, 2016).

[45]*See* Council Implementing Decision 2017/246 of 7 February 2017 setting out a Recommendation for Prolonging Temporary internal border control in Exceptional circumstances Putting the Overall Functioning of the Schengen Area at Risk, 2017 O.J. (L. 36) (setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, recommending extension of border controls for three months on February 7, 2017). *See also* Council Implementing Decision 2017/818 of 11 May 2017 setting out a Recommendation for Prolonging Temporary internal border control in Exceptional circumstances Putting the Overall Functioning of the Schengen Area at Risk, 2017 O.J. (L. 123) (setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, recommending extension of border controls for six months on May 11, 2017).

[46]Council doc. 7899/19, Notification of 12 April 2019 by the Swedish Ministry of Justice to the Commission (Apr. 12, 2019).

[47]Council doc. 8274/22, Notification of 12 April 2022 by the Austrian Ministry of Interior to the Commission, (Apr. 12, 2022).

smugglers,"[48] to "increasing numbers of asylum applications,"[49] and "shortcomings in the protection of the external borders and irregular secondary migration that results from it,"[50] their prime concern in the notification is to prevent and deter irregular secondary migration. The French government also prolonged border controls at consecutive six months intervals; however, as France was not included in the Council implementing decisions, the French government based the prolongation of border controls exclusively on article 25 Schengen Borders Code 2016. Virtually all notifications by the French authorities refer to a threat of terrorism as reason for prolonging border controls, even though notifications from October 2019 onwards include secondary migration as well.[51]

In 2017 and 2019, French migrant NGOs unsuccessfully challenged the quasi-permanent prolongation of internal border controls before the French Council of State.[52] In 2019, a member of the Bavarian parliament contested the reintroduction of internal border controls by the German government, but the Munich Administrative Court dismissed the action as inadmissible due to a lack of standing.[53] None of these national courts chose to refer questions on the interpretation of EU law to the Court of Justice. Neither private enforcement of the rules of the Schengen Borders Code before national courts nor public enforcement by the Commission through the use of the infringement procedure, article 258 TFEU, was succesful.

D. The Court's Decision in *Landespolizeidirektion Steiermark* and its Aftermath

It was against this background that I challenged the reintroduction of internal border controls before the Administrative Court of Styria. When driving back from vacation in Croatia to Austria, I refused to show my travel documents at the Austrian-Slovenian border crossing point. I was fined €36 for illegally entering Austria and subsequently appealed the fine before the Administrative Court of Styria, where the single judge eventually referred three preliminary questions to the Court of Justice.[54]

The principal legal question that the Court of Justice had to answer concerned the six-month time limit in article 25(4) Schengen Borders Code 2016. All intervening member states had argued that if a threat persisted beyond six months, EU law would not be contrary to maintaining internal border controls beyond the six-month maximum duration.

The Court of Justice distinguished between new threats and renewed threats. As the Advocate General put it, a new threat would be a "serious threat which is new by its nature."[55] For example, a terrorist threat would be different from a large sporting event, as would be a pandemic from a political summit. The existence of a new threat would result in a new and different application of article 25 Schengen Border Code 2016. The clock would simply start to run anew. The Court of Justice followed the Advocate General on this point. A renewed threat, by contrast, refers to a situation in which the same threat persists beyond the six-month limitation in article 25(4) Schengen Borders Code 2016. The Court made clear that article 25(4) Schengen Borders Code

[48] *Id.*

[49] *Id.*

[50] Notification of 11 October 2017 by the German Minister of Interior to the Commission (Oct. 11, 2017). *See also* Notification of 12 April 2019 by the Swedish Ministry of Justice to the Commission (Apr. 12, 2019). *See also* Notification of 11 October 2017 by the Danish Minister of Immigration and Integration to the Commission (Oct. 11, 2017) (on file with the author).

[51] Council doc. 12867/19, Notification of 3 October 2019 by the French Authorities to the Commission (Oct. 3, 2019).

[52] CE Ass., Dec. 26, 2017, 415291, Rec. Lebon N° 5/2017 (Fra.); CE Ass., June 28 2019, 426666, Rec. Lebon N° 3/2019 (Fra.).

[53] VG München, July 31, 2019, M 7 K 18.3255, ¶ 2, https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-19455?hl=true.

[54] *Landespolizeidirektion Steiermark*, ECLI:EU:C:2022:298.

[55] Joined Cases C-368/20 and C-369/20, NW v. Landespolizeidirektion Steiermark, at ¶ 43 (Oct. 6, 2021), https://curia.europa.eu/juris/document/document.jsf?docid=247108&doclang=EN (Opinion of Advocate General Saugmandsgaard Øe).

2016 lays down clearly and precisely the maximum duration of six months for prolonging internal border controls. Thus, any prolongation beyond the maximum duration "is difficult to reconcile with the setting of commonly agreed clear and objective criteria for such reintroduction."[56] The Court thereby emphasized the exceptional nature of internal border controls.[57] As the provisions on reintroducing internal border controls constitute derogations from the free movement of persons, they must therefore be strictly interpreted, as the Court made clear.[58]

Related to the strict time limits of article 25(4) Schengen Borders Code 2016, member states had argued that the prerogatives to maintain their national security in article 72 TFEU would permit them to derogate from the provisions of the Schengen Borders Code, if their national security was threatened. In its recent case law on article 72 TFEU, the Court had already stated that "when the EU legislator has already taken into account member states" interest in safeguarding public policy and internal security in EU secondary law, there is no room to invoke article 72 TFEU or article 4(2) TEU.[59] Because the EU legislator had laid down a "comprehensive framework" in the Schengen Borders Code on reinstating internal border controls, member states cannot invoke their security prerogatives enshrined in articles 72 TFEU and 4(2) TEU.[60] Contrary to the Advocate General, who thought that a fair balance between free movement and member states security prerogatives would need to be struck by the Court, the Court held that the EU legislator had already determined this balance by adopting a comprehensive framework on the reintroduction of internal border controls.[61]

The judgment of the referring Administrative Court of Styria followed barely a month and a half after the ruling of the Court of Justice. The Administrative Court of Styria held that "the Republic of Austria has not substantiated the existence of a new threat" since the last Council implementing decision had expired on November 10, 2017; therefore, since that date, border controls maintained by the Austrian government were contrary to EU law.[62]

Despite the clear judgments delivered by Luxemburg and the referring national court, the reaction of the Austrian government was ambiguous. On the one hand, the government formally complied with the decision. It did not enforce the criminal sanction for illegally entering Austria and reimbursed, most of, my legal costs as the referring court had ordered the government. On the other hand, the Austrian government continued to prolong internal border controls. On May 11, 2022, the government adopted a national regulation that prolonged controls at its internal borders with Slovenia and Hungary for another six months.[63] In its notification to the Commission the government referred again to migratory events as serious threats to internal security and public policy that would require the prolongation of internal border controls.[64] Already the preceding notifications of the Austrian government to the European Commission were based on the same

[56]*NW*, ECLI:EU:C:2022:298 at ¶ 69.

[57]*See id.* The Court mentions eight times in its judgment that internal border controls should be "exceptional" and temporarily reintroduced only under "exceptional circumstances."

[58]*NW*, ECLI:EU:C:2022:298 ¶¶ 54, 64, 66, 75, 86.

[59]*NW*, ECLI:EU:C:2022:298 at ¶ 86 (referring to Case C-808/18, Commission v. Hungary, et al., EU:C:2020:1029, ¶¶ 214–15 (Dec. 17, 2020)). *See also* Case C-72/22, PPU M.A. v. Valstybės sienos apsaugos tarnyba, EU:C:2022:505, ¶¶ 69–74 (June 30, 2022).

[60]*NW*, ECLI:EU:C:2022:298 ¶ 87.

[61]*NW*, ECLI:EU:C:2022:298 ¶ 88–89.

[62]Landesverwaltungsgericht Steiermark [Administrative Court of Styria] June 1, 2022, No. 20.3-3028/2019-20, ¶ 6, https://www.ris.bka.gv.at/ (Austria).

[63]Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen zur Republik Slowenien und Ungarn [Ordinance of the Federal Minister of the Interior Regarding the Temporary Reintroduction of Border Controls at the Internal Borders to Slovenia and Hungary] Bundesgesetzblatt [BGBl] II No. 186/2021, as amended, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011529&FassungVom=2021-11-11 (Austria).

[64]Council doc. 8274/22, Notification of Austria to the Commission ("Due to the continuing volatile migration situation in the EU, the increasing activity of smuggling organizations and the already high level of asylum applications in Austria since the

reasons of "high migratory pressure," a "volatile migratory situation," "increasing asylum application figures," and the activity of human smuggler organizations.[65] When the government was quizzed by the Austrian parliament in May 2022 on how it implemented the judgment of the Court of Justice, it responded that:

> The findings of the ECJ are taken into account when border controls are reintroduced. Such a measure can only be justified in the event of a new serious threat. A comprehensive evaluation of the aforementioned circumstances [i.e. continuing migratory movements to Europe and secondary migration in the Schengen area], in light of the ruling, has determined that there is certainly a new threat, necessitating the reintroduction of internal border controls at Austria's national borders with Slovenia and Hungary.[66]

The reference to a new threat by the government seems to be mere lip service, as the government had prolonged border controls for the twentieth time on the basis of essentially identical grounds, secondary migration and migratory movement, and remained silent on why secondary migration and migratory movements would amount to a new threat.[67] In October 2022, the Austrian government announced that it would again extend controls at its internal borders with Slovenia and Hungary for another six months. The reasons? Irregular "secondary migration" and an "increase in irregular migration flows."[68] In subsequent years, the Austrian Ministry of the Interior continued to prolong internal border based on nearly identical reasons, which all concern unauthorized migration.[69] The implementation of the decision in *Landespolizeidirektion Steiermark* by the Austrian government reflects what Lisa Conant calls "contained compliance," a national government complies with the specific terms of a preliminary ruling as it relates to the parties of the dispute but ignores the broader legal implications of the decision.[70]

The Austrian government, however, was not alone in its practice of non-compliance. Although the Court of Justice emphasized the general importance of the principle that there shall be no border controls for the area without internal borders, the German, French, Danish, and Swedish government have been recalcitrant to faithfully heed to the Court's dictum. The day after the publication of the preliminary ruling in *Landespolizeidirektion Steiermark*, the Bavarian Minister of the Interior called on the German Federal authorities to use all possible legal leeway to keep

summer of last year, the Austrian Federal Government has come to the conclusion that the situation is still not sufficiently stable.").

[65]Council doc. 12907/21, Notification of Austria to the European Commission (finding serious threats would constitute "the still high migratory pressure in the EU", the " and the "increasing figures of asylum applications in Austria") (available at https://www.parlament.gv.at/dokument/XXVII/EU/76762/imfname_11099548.pdf); Council doc. 7785/21, Notification of Austria to the European Commission (finding serious threats would constitute "the high migratory pressure, the fragile situation at the Greek land and sea borders, the tense situation along different migratory routes, the increasing activities of human smuggler organizations, and the increasing asylum application figures in Austria") (available at https://data.consilium.europa.eu/doc/document/ST-7785-2021-INIT/x/pdf); Council doc. 11881/20, Notification of Austria to the European Commission Pursuant to Article 25 Schengen Borders Code (finding serious threats would constitute "the continuing high migratory pressure and the ongoing volatile migration situation along various routes and within the EU, the increasing activity of smuggling organisations and the renewed rise in the number of asylum applications in Austria.").

[66]Bundes ministerium für Inneres [Austrian Ministry of Interior], Anfragebeantwortung [Reply to Parliamentary Request] No. 10786/AB (July 18, 2022), https://www.parlament.gv.at/dokument/XXVII/AB/10786/imfname_1462296.pdf.

[67]*Member States' Notifications of the Temporary Reintroduction of Border Control at Internal Borders Pursuant to Article 25 and 28 et seq. of the Schengen Borders Code,* Commission (Aug. 2024), https://home-affairs.ec.europa.eu/document/download/11934a69-6a45-4842-af94-18400fd274b7_en?filename=Full-list-of-MS-notifications_en_0.pdf.

[68]Notification of Autria to Commission, *supra* note 64.

[69]At the time of writing, July 2024, the Austrian government still maintains internal border controls.

[70]Lisa Conant, Justice Contained: Law and Politics in the European Union 149 (2002) [hereinafter Conant, *Justice Contained*].

internal border controls as long as possible.[71] A few days later, the Swedish government announced the extension of internal border controls and justified these controls with "shortcomings at the external borders."[72] Over the following years, these governments continued to consecutively prolong controls at their internal borders six months at a time and justify these controls with nearly identical reasons.[73]

E. Implementing a Preliminary Ruling Through Follow-up Litigation

When member states are unwilling to implement a preliminary ruling, actors who are willing and capable of initiating follow up litigation before national courts are crucial in generating compliance pressure on member states.[74] Different actors mobilized in all member states to different degrees against the reintroduction of border controls: Engaged journalists investigated into the reasons given by national governments for extending internal border controls;[75] individuals citizens petitioned national parliaments and the European Parliament to take action;[76] and a few individuals engaged in deliberate acts of civil resistance by refusing to show their travel documents at the border. However, follow-up litigation did not occur in all five member states. Although individual and collective actors brought cases before national courts in France and Germany, no follow up litigation occurred in Denmark, Sweden, and Austria. In the following section, I inquire into the factors that determine why follow-up litigation has been brought in some but not other member states. In the folwing subsection, I discuss the meso-level and micro-level factors determine the capacities of individual and collective actors' to bring follow-up litigation before national courts. Even when actors initiate follow up litigation, a court's willingness to comply with a preliminary ruling is essential. As I will discuss in subsection -II-, national courts adopt different approaches to comply with the preliminary ruling. I subsection III, I argue that when national courts are unwilling to faithfully apply the Court's interpretation of EU law in the preliminary ruling, the role of the Commission is essential in enforcing EU law (III).

I. Actors Initiating Follow Up Litigation

As courts cannot enforce their judgments themselves, they depend on other actors to ensure that judgments are complied with. Literature on strategic litigation has shown that individual and collective actors play an important role in enforcing judgments of the Court of Justice by generating compliance pressure through legal mobilization.[77] Although the actors that mobilized

[71]Pola Cebulak & Marta Morvillo, *Backtracking or Defending Free Movement Within the Schengen Area? NW v. Landespolizei Steiermark*, 60 COMMON MKT. L. REV. 1075, 1092 (2023).

[72]Notification of Autria to Commission, *supra* note 64.

[73]*See* Fabian Gülzau, *A "New Normal" for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?*, 36 J. BORDERLAND STUD. 1 (2021) (discussing the reasons that member states gave to justify the reintroduction of controls); Armaghan Naghipour, Stefan Salomon, & Leon Züllig, *The Compatibility of German Internal Border Controls with the Schengen Borders Code with Particular Reference to the Case Law of the European Court of Justice and the Current Reform of the Schengen Borders Code*, STUDY FOR THE GREENS/EFA IN THE EUROPEAN PARLIAMENT, 15–23 (Apr. 2024), https://erik-marquardt.eu/wp-content/uploads/2024/04/Gutachten-Binnengrenzkontrollen_EN.pdf.

[74]CONANT, *Justice Contained supra* note 70, at 11.

[75]Emma Louise Stenholm, *Grænsekontrollen er "ulovlig", vurderer forskere* [Border Control is Considered "Illegal," Researchers Assess], FOLJETON (Oct. 28, 2022), https://www.foljeton.dk/post/danmark-kan-straffes-for-graensekontrollen-ministerium-tilboed-ulovlige-studehandler; Marle Liebelt, *Vorgehen ["Illegal"]: Scharfe Kritik am dänischen Justizministerium* [Illegal Actions: Harsh Criticism of the Danish Ministry of Justice], DER NORDSCHLESWIGER (Oct. 31, 2022), https://www.nordschleswiger.dk/de/nordschleswig-daenemark/vorgehen-illegal-scharfe-kritik-daenischen-justizministerium.

[76]*See* Controls at the Danish-German Border Allegedly Violating the Schengen Borders Code; EUR. PARL., PV 0037 (2023); On Border Checks in Denmark and Sweden, EUR. PARL., PV 0719 (2022); On Stopping Boarder Controls Within the Schengen Area, Especially Between Germany and Austria, EUR. PARL., PV 0227 (2022).

[77]CONANT, *Compliance supra* note 13, at 11.

against internal border controls are heterogeneous, they share one particular characteristic: They were all individuals or groups who mobilized on behalf of migrants. It is interesting to note that even though the reintroduction of border controls imposes significant economic costs on transport companies and commuters, neither companies nor commuters initiated follow-up litigation before national courts.[78] Recent scholarship on strategic litigation before the Court of Justice notes that the forces that drive strategic litigation are, among others, the belief in a cause and the desire to advance the cause.[79] The specific context in which these altruistic motives materialize differ. In France, follow-up litigation was initiated barely two weeks after the publication of the preliminary ruling by collective actors. Three migrant rights groups, who had already unsuccessfully challenged border controls in 2017 and 2019, initiated follow-up litigation before the Council of State. One activist who initiated litigation in Germany reported that:

> I started my observations in the fall of 2021. It was around the time when I began observing checks and who was being checked at all [. . .] According to my empirical observations, meaning, I kept memory protocols, it was mainly racial profiling. Predominantly non-white persons were being checked. At the beginning of 2022, I started systematically recording these checks [. . .] I also noticed a change over time. When stricter COVID-19 measures were in place, everyone was checked. When the measures were relaxed, it was very much racial profiling.[80]

Litigating on behalf of a migrant is not merely a motive for but also a mode—strategy—of litigation against restrictive migration policies. As one interviewee put it: "It's very important to understand that these controls are part of a broader migration debate in Denmark."[81] Although the interviewee mentioned the Danish context specifically, this also applies to other member states. The constantly rehearsed reasons in the notifications on reinstating internal border controls, which were discussed above, make this clear. The litigation strategy is that Union citizens, who are "legal insiders" and thus have more rights available in their bundle of rights to challenge the reintroduction of border controls than unauthorized migrants as "legal outsiders," contest restrictive migration policies. In times in which governments adopt increasingly restrictive migration laws and courts sanction these restrictions by scaling back the scope of human rights in the context of unauthorized migration, using human rights of unauthorized migrants might not be an effective strategy to contest restrictive migration policies and laws anymore.

However, as Passalacqua points out, we should not overestimate the role of individual litigants or ordinary citizens when bringing follow-up litigation.[82] Persisting with follow-up litigation often requires resources, time, and EU legal expertise. EU legal expertise is essential when bringing follow-up litigation.[83] The type of actors that brought follow-up litigation before national courts after the decision in *Landespolizeidirektion Steiermark* reflects that. The three migrant rights organizations that initiated litigation before the French Council of State regularly litigate before the Court of Justice.[84] One follow-up litigation in Germany was initiated by a group of migrant

[78]The lack of information on border controls being likely incompatible with EU law does not explain the lack of engagement. After the preliminary ruling in *Landespolizeidirektion Steiermark*, various media outlets regularly published on the incompatibility of member states border controls with EU law and the preliminary ruling would have, arguably, lowered the risks and costs of litigating against the reintroduction of controls.

[79]Passalacqua, *supra* note 7, at 765.

[80]Interview with German activist (July 22, 2024).

[81]Interview with Danish activist (July 17, 2024).

[82]Passalacqua, *supra* note 7, at 756.

[83]Cebulak et al., *supra* note 8.

[84]The three organizations are: l'Association nationale d'assistance aux frontières pour les étrangers (ANAFE), le Groupe d'information et de soutien des immigrées (GISTI), and la Cimade. GISTI litigated three cases before the Court of Justice. ANAFE and CIMADE litigated each one case before the Court of Justice.

rights activists. Although the group's activities primarily "operates at the political level and not through strategic litigation [. . .] Solidarity actions, everything related to the right to stay, and restrictive migration policies," the group is also comprised of lawyers with EU law expertise who had suggested to litigate before national courts.[85] A second case before German administrative courts was initiated by Christoph Tometten, a Berlin-based lawyer who had argued the case *Landespolizeidirektion Steiermark* before the Court of Justice, and a legal academic—the author. The absence of follow-up litigation in Austria illustrates the limitations of individual litigants: Litigation had been initiated by a "loner," an individual litigant with extensive knowledge in EU law but limited network embeddedness and limited access to resources to persist with litigation.[86] This situation was exacerbated by the absence of migrant rights organizations with the requisite EU legal expertise and experience in strategic litigation in Austria, which meant there were no collective actors that could readily initiate follow-up litigation.

Another factor that determines why follow-up litigation occurred in some—Germany and France—but not other member states—notably Denmark and Sweden—is the political culture in a member state. Sociolegal scholarship has shown that political culture significantly shapes actors' inclination to turn to courts for solving conflicts in the first place. Scholarship on the Nordic countries emphasizes the prevalence of a "prudent and cautious" position towards judicial review due to a strong cultural preference for popular sovereignty,[87] which is reflected in low levels of referrals by Danish and Swedish courts,[88] as well as lower levels of litigation in public law compared to other European countries.[89] The strong cultural preference for majoritarian democracy in Denmark and Sweden does not only affect judges' inclination not to refer cases to the Court of Justice, but also lawyers' behavior to use EU law to overturn national laws or administrative practices. As one interviewee put it:

> It's a wide-spread cultural thing. If you use EU law in Danish courts, judges are almost laughing. The common view is that Danish law has supremacy, and the majority has supremacy . . . A lot of lawyers say EU law is not relevant, it's too cumbersome, and the majority should decide.[90]

Indeed, the absence of any litigation before Danish and Swedish courts against the reintroduction of internal border controls shows actors inclination to turn to political routes rather than litigating with EU law before Danish or Swedish courts. In Denmark, media covered extensively and critically the reintroduction of border controls by the government, which resulted in a parliamentary consultation on the legality of Danish border controls. When quizzed by members of the parliament on the necessity of prolonging border controls, the Danish Minister of Justice stated that "our assessment is that it constitutes a sufficiently new threat to justify implementing border controls for a new period. But we cannot deny that the European Court of Justice would see it differently."[91] Yet, despite these legal doubts by the government itself on the legality of its own

[85]*See* Interview with German activist (July 22, 2024).

[86]Cebulak et al., *supra* note 8.

[87]Maija Dahlberg, Haukur Logi Karlsson, & Katalin Kelemen, *The Nordic Courts: An Example of Cooperation and Dialogue*, *in* Constitutional Reveview in Western Europe 290 (Kalman Pocza ed., 2024).

[88]Marlene Wind, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, 49 J. common Mkt. Stud. 1039, 1041 (2010).

[89]Robert Kessel, Die Kontrolldichte der Normenkontrolle in Skandinavien aus deutscher Sicht 297 [The Review of Norms in Scandinavia from a German Perspective] (2016), (*quoted in* Dahlberg et al.); Interview with German activist (July 22, 2024).

[90]Interview with Danish scholar (Aug. 15, 2024).

[91]Sabine Dybdahl Christoffersen, *Hummelgaard i samråd om grænsekontrollen: Vi kan ikke afvise, at det er i strid med EU-retten* [*Hummelgaard in Consultation on Border Control: We Cannot Deny That it is in Breach of EU Law*], Altinget (May 5, 2023), https://www.altinget.dk/eu/artikel/hummelgaard-i-samraad-om-graensekontrollen-vi-kan-ikke-afvise-at-det-er-i-strid-med-eu-retten.

practice of prolonging border controls, no legal actions to challenge these controls occurred; rather, individuals citizens lodged petitions before the PETI Committee of the European Parliament to take action against the Danish border control practice.[92]

II. The Implementation of Preliminary Rulings by Domestic Courts: Acceptance, Evasion, Refusal

When activists and lawyers seek the implementation of a preliminary ruling before national courts, national courts have—legally speaking—only one possibility: To faithfully follow the reasoning of the Court of Justice in the preliminary ruling. However, empirical research presents a more detailed and nuanced picture of different degrees of compliance by national courts with the interpretation of EU law by the Court of Justice in preliminary rulings. Even though referring national courts almost always fully comply with preliminary rulings, even if they do not agree with the reasoning of the Court of Justice,[93] national judges can comply with a preliminary ruling to different degrees: They can accept, evade or overtly refuse to comply. Even though cases of overt refusal are rare, research has shown that referring national courts adopts different strategies to evade compliance with the interpretation in a preliminary ruling with which they disagree.[94] In the following, I discuss the different degrees of compliance by national courts with the preliminary ruling in *Landespolizeidirektion Steiermark*.

1. Acceptance: The Referring Austrian Court

A domestic court accepts a preliminary reference judgment when it faithfully follows in its judgment not only the operative part of the preliminary ruling but also its legal reasoning. The judgment of the Administrative Court of Styria, which made the preliminary reference to the Court of Justice, demonstrates acceptance. After the Court of Justice had delivered its ruling, the referring court held that, if no new threat exists, article 25 of the Schengen Borders Code precludes the reintroduction of internal border controls for longer than six months.[95] The judgment of the referring court not only reproduces *ad verbatim* the operative part of the preliminary ruling, but also closely follows the Court of Justice in its legal reasoning and its thinly veiled suggestion on how the facts of the case ought to be appreciated. The Court of Justice suggested that:

> In the present instance, as the Commission contends, it seems—a matter which will, however, be for the referring court to determine—that, from November 10, 2017, the date on which the last of the four Council recommendations [. . .] expired, the Republic of Austria

[92] *Public Hearing on "Schengen Borders — Issues Raised By Petitioners"* EUROPEAN PARLIAMENT, (July 18, 2023), https://www.europarl.europa.eu/committees/en/public-hearing-on-schengen-borders-issue/product-details/20230531CHE11802.

[93] *See* Nyikos, *supra* note 14, at 397 (describing "implementation prejudice" as the fact that referring courts almost always faithfully comply with preliminary reference judgments); KROMMENDIJK, *supra* note 14, at 142 (describing how domestic judges who do the additional work of referring a case to the Court of Justice do not intend to follow the Court of Justice's response); SCHWARZE, *supra* note 14, at 39ff (showing a study from 1961 to 1985 on German courts which showed that 95% of preliminary rulings were faithfully implemented by the referring courts, even when the referring court disagreed with the interpretation of the law by the Court of Justice); Nyikos, *supra* note 14, at 410 (describing another study on courts in Germany, UK, Belgium, Netherlands, and France that suggests domestic courts fully implement preliminary rulings in 96.3% of the sample cases). The study covers preliminary rulings in three different fields of EU law—free movement of workers, goods and non-discrimination of men and women in employment—in the period 1961-1994.Only in 3.7 percent of the sample cases domestic courts either evaded or refused to with the preliminary ruling of the Court of Justice. Although parts of the literature assumes that rule of law deficits in a domestic legal order will negatively affect faithful compliance by domestic courts.

[94] *See* Andreas Hofmann, *Resistance Against the Court of Justice of the European Union*, 14 INT'L J. L. CONTEXT 258, 264–67 (2018); KROMMENDIJK, *supra* note 14, 142—57; Nyikos, *supra* note 14, at 402–03.

[95] Landesverwaltungsgericht [Administrative Court of Styria], *supra* note 62, at 3.

> did not demonstrate the existence of a new threat [. . .] that would have justified triggering anew the periods provided for in Article 25 [Schengen Borders Code].[96]

The referring court took up this suggestion and held that "since November 10, 2017, the day the last Council implementing decision expired, the Republic of Austria has not substantiated the existence of a new threat," which meant that since that date border controls were contrary to EU law.[97]

Notably, the referring court reiterates the reasoning of the Court of Justice in another part of the judgment. Although the Court of Justice stated in an *obiter dictum* that the area without internal borders where persons may move freely "constitutes one of the main achievements of the European Union," it did not answer the preliminary question whether Union citizens to freedom of movement, article 21 TFEU and article 45 Charter of Fundamental Rights of the EU, entails the right to cross internal borders without being subject to border controls.[98] The Administrative Court of Styria reiterated the Court of Justice's *obiter dictum* as premise for its interpretation that article 21 TFEU and article 45 EU-CFR entail the right of Union citizens to "move freely" across internal borders, which may only be restricted under exceptional circumstances.[99]

2. Evasion: German Administrative Courts

National courts can also avoid compliance with a preliminary ruling. Instead of directly rejecting the interpretation by the Court of Justice, research has shown that national courts avoid compliance by reinterpreting the facts of a case, referring questions again to the Court of Justice, deciding a case on points of national law, or rejecting a case as inadmissible on the basis of national procedural norms after a preliminary ruling. In this way, domestic courts may "contain" the effects of a preliminary ruling without directly questioning the Court of Justice. The position adopted by German administrative courts showcases evasion.

After the decision of the Court of Justice, activists brought two legal actions before German administrative courts to challenge the reintroduction of internal border controls.[100] Already in 2019, a member of the Bavarian parliament had brought a legal action that challenged internal border controls at the German border to Austria. German administrative courts dismissed all actions as inadmissible.[101] Before going into the details of the decisions, it might be helpful to provide a brief background on the relevant legal remedies under German administrative procedural law that govern admissibility under German administrative procedural law—and thus, the possibilities for strategic litigants to challenge border controls before German courts.

Two different types of legal remedies are relevant in the context of unlawful border checks. The first type is an action for annulment against an administrative act.[102] Under German administrative law, any type of action by authorities that entails an order to do or abstain from doing something amounts to an administrative act. In the context of internal border controls, measures by the police that require a person to establish their identity, such as stopping someone or requesting travel documents, amounts to an administrative act. An action for annulment is only admissible if the contested administrative act still unfolds legal effects. The

[96] *NW*, ECLI:EU:C:2022:298 ¶ 82.

[97] Landesverwaltungsgericht [Administrative Court of Styria], *supra* note 62, at 6.

[98] *NW*, ECLI:EU:C:2022:298 ¶¶ 37, 48, 95.

[99] Landesverwaltungsgericht [Administrative Court of Styria], *supra* note 62.

[100] VG München [Admin. Court Munich], Jan. 31, 2024, M 23 K 22.3422, https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2024-N-9673.

[101] VG München [Admin. Court Munich], July 31, 2019, M 7 K 18.3255, https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-19455?hl=true.

[102] Verwaltungsgerichtsordnung (VwGO) [Code of Administrative Court Procedure], § 42(1), https://www.gesetze-im-internet.de/englisch_vwgo/index.html.

principal problem in the context of border controls is that an administrative act, in the moment it is contested before courts, does not anymore produce legal effects because the specific measures, for example showing a passport or being stopped, has ended. An action of annulment is therefore generally inadmissible.[103]

The second type of legal remedy is an action for a declaratory judgment.[104] With the action for a declaratory judgment a plaintiff can seek a judicial declaration that an administrative act had been unlawful, even if the act does not anymore produce legal effects. The action for a declaratory judgment is however subject to strict standing requirements. German courts consider an action for a declaratory judgment only admissible if the plaintiff has a legitimate interest in the *ex-post* determination of the lawfulness of an administrative act. A legitimate interest can result from, among others, a particularly serious infringement of fundamental rights that results from a border check or the risk that the plaintiff is subject to a recurrent unlawful border check—risk of recurrence. Both standing criteria are restrictively interpreted by German administrative courts.

The Administrative Court Munich held that there was no risk of recurrence or serious infringement of fundamental rights. The court held that the high threshold for a risk of recurrence would only be met if the plaintiff would be frequently subject to unlawful border checks. The court considered that crossing the German-Austrian border several times a year did not suffice for meeting the threshold of recurrence.[105] Likewise, the court rejected that an unlawful border check would amount to a serious infringement of fundamental rights:

> An identity check is generally a relatively minor interference. [T]he measures to establish identity only interfere with the general right of personality or the general freedom of action of the plaintiff in an insignificant manner without any recognizable lasting effect due to their objective, the short duration of a few minutes and the intensity of the interference with the protected legal interest.[106]

Therefore, the court rejected the action for a declaratory judgment as inadmissible. Already in an earlier decision by a different chamber, the Administrative Court of Munich considered an action for a declaratory judgment, which was brought by a member of the Bavarian parliament, as inadmissible on the same grounds of a lack of risk of recurrence and lack of serious infringement of fundamental rights.[107]

Evasion becomes obvious in the approach adopted by the Administrative Court of Munich. The Administrative Court of Munich explicitly acknowledges the dilemma between narrow standing criteria in German administrative procedural law and the right to an effective remedy under article 47 of the EU Charter of Fundamental Rights. A narrow interpretation of standing criteria means that individuals have no legal remedy against, unlawful, border controls under German administrative law. Yet, the Administrative Court of Munich based its hermeneutic position entirely on German law. It neither substantively addressed this dilemma, nor did it decide to refer the case to the Court of Justice. Instead, the court referred to the case law of the German Federal Administrative Court and argued that article 47 of the Charter on Fundamental Rights

[103]Alternatively, an individual subject to a border check could engage in civil disobedience, for instance by actively resisting the measure or refusing to show identity documents, which would render the individual liable for a fine. This fine, in turn, could then be challenged with an action for annulment. However, the fact that an individual has to incur a fine in order to effectively avail themselves of their free movement rights under EU law would be incompatible with the principle of effectiveness under Union law.

[104]Verwaltungsgerichtsordnung (VwGO) [Code of Administrative Court Procedure], § 113(4), sentence 4, https://www.gesetze-im-internet.de/englisch_vwgo/index.html.

[105]VG München [Admin. Court Munich], supra note 100, ¶ 27.

[106]*Id.*

[107]VG München [Admin. Court Munich], supra note 101, ¶34.

would clearly not mandate a higher standard of protection than German fundamental rights law.[108]

However, the court stated in an *obiter dictum* that the prolongation of internal border controls by the German government is very likely contrary to EU law, because the government had not shown the existence of a new threat. The court relied in its argumentation on the legal reasoning of the Court of Justice in *Landespolizeidirektion Steiermark*. The court argued that the Court of Justice stated "unequivocally" that unexceeding the six-month maximum duration would inevitably mean that internal border controls are incompatible with the Schengen Border Code.[109] The upshot of the ambiguous position adopted by the Administrative Court Munich is that it creates spaces in which the exercise of state power remains unchecked by the courts.

3. Refusal: The French Council of State

A national court may also overtly refuse to comply with a preliminary reference judgment. Prominent examples are the decisions of the German Constitutional Court in *Weiss*,[110] the Italian Constitutional Court in the *Taricco* decisions,[111] or the Danish Supreme Court in the *Dansk Industri* judgment.[112] Such cases of overt disagreement on the interpretation of EU law between a highest national court and the Court of Justice are rare though. Much more common is a more subtle form of non-compliance: The refusal of highest courts to refer a case to the Court of Justice when they are clearly obliged to do so. We can see both forms of refusals in the decisions of the French Council of State on the reintroduction of internal border controls by the French government.

Two weeks after the Court of Justice had published its decision in *Landespolizeidirektion Steiermark*, three organizations for migrant rights brought legal actions before the Council of State against the prolongation of internal border controls from May 1 to October 31, 2022 by the French government. The Council of State held that the novel prolongation of internal border controls by the French government was in accordance with EU law, because the controls were based on the existence of new threats. Several points in the decision demonstrate the overt refusal of the Council of State to comply with the preliminary ruling in *Landespolizeidirektion Steiermark*.

First, the Council of State seems to deliberately ignore the decision in *Landespolizeidirektion Steiermark*. Although the Council of State refers to *Landespolizeidirektion Steiermark* when it distinguishes between new and renewed threats, it is the only reference to the Court of Justice in the entire decision by the Council of State. The Council of State's decision does not include any substantive engagement with the reasoning of the Court of Justice. Second, the Council of State develops its own broad interpretation of a new threat that is difficult to square with the reasoning in *Landespolizeidirektion Steiermark*.[113] For the French judges, a new threat would constitute either circumstances that are "of different nature than the preceding threat" or "new circumstances and events that modify" its timeliness, scope or intensity, or the geographic origins of a threat.[114] This

[108]*See* Thomas Giegerich, *In Deutschland gibt es verwaltungsgerichtlichen Rechtsschutz gegen unionsrechtswidrige Binnengrenzkontrollen – anders als das VG München meint*, JEAN MONNET SAAR (June 4, 2024), https://jean-monnet-saar.eu/?p=297636 (critiquing the hermeneutic position).

[109]*See* VG München [Admin. Court Munich], supra note 100, ¶ 35.

[110]Bundesverfassungsgericht (BVerfG) [German Federal Constitutional Court], BvR 859/15, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

[111]Chiara Amalfitano & Oreste Pollicino, *Two Courts, Two Languages? The Taricco Saga Ends on a Worrying Note*, VERFASSUNGSBLOG (June 5, 2018), https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/.

[112]Højesteret [Supreme Court] 2014-09-22 P1 No. 15/2014 (Denmark).

[113]Christoph Tometten, *Contrôles aux frontières intérieures. La CJUE met fin à une pratique illégale*, LA REVUE DES DROITS DE L'HOMME 1, 5 (2022).

[114]Case C-507/17, Google LLC v. Commission Nationale de l'informatique et des Liberéts (CNIL), ECLI:EU:C:2019:772 (Sept. 24, 2019).

broad interpretation runs afoul of the Court of Justice's reasoning that the existence of a new threat must be assessed against the same criteria used for the assessment of the initial threat.[115] The Court of Justice unequivocally held that assessing an initial threat "in light of new elements" is not sufficient to amount to a new threat, which would permit a fresh application of article 25(4) of the Schengen Borders Code 2016.[116] Third, the appreciation of the facts by the Council of State show an almost boundless deference to the government. When the Council of State assesses whether the French Prime Minister's decision to extend internal border controls is based on threats relating to terrorism, the Council haphazardly enumerates various situations that would constitute a new serious threat to internal security or public policy: An attack on a prison in Northern Syria, the general instability in regions of Iraq and Syria, an increase of calls by ISIS to carry out attacks against Western targets, and terrorist networks in central and western Africa.[117] Following this reasoning, events occurring anywhere in the world would amount to a serious threat to the internal security of France that would justify the prolongation of internal border controls.[118] The generic and haphazard assessment by the Council of State is difficult to square with the dictum of the Court of Justice that the assessment of whether an event amounts to a serious threats must be based on "clear and objective criteria."[119]

The Council of State's overt refusal to comply with the decision in *Landespolizeidirektion Steiermark* has a longer trajectory. In 2017 and 2019 the Council of State rejected two legal actions brought by migrant rights organizations against the decision of the government to prolong internal border controls.[120] In both cases, the Council of State did not make a preliminary reference to the Court of Justice, although it is obliged to submit a reference as a highest national court.[121] As mentioned above, overt disagreement on the interpretation and the refusal of a highest court to make a reference to the Court of Justice represent two sides of the same coin of non-compliance.

4. Explaining Variations in Judicial Receptivity

The preceding discussion of the different degrees of (non)compliance—acceptance, evasion, refusal—by national courts with the preliminary reference judgment in *Landespolizeidirektion Steiermark* suggests that these differences are determined by a variety of structural factors: The hegemonic national legal culture, national procedural rules, entrenched institutional hierarchies and institutional path dependencies, among others, determine compliance by national courts. For instance, the narrow doctrine the admissibility of actions for a declaratory judgment shapes the approach by German administrative courts in follow-up cases. Virtually every textbook on German administrative procedural law includes this doctrine, which is symptomatic of the reluctance of judges, especially first instance judges, to change that doctrine. Yet, at the same time, German judges did not shy away from finding clear words that the reintroduction of border controls is substantively contrary to EU law. Compare this to the French context: Liberal standing rules enable civil society organizations to seek annulment of the decision of the government to reintroduce internal border controls before the Council of State. The position of the judges at the Council of State on such a sensitive question as internal border controls seems to be conditioned

[115]Although, the Court stopped short of establishing clear criteria for identifying a new threat. *See NW*, ECLI:EU:C:2022:298 ¶ 71.

[116]*NW*, ECLI:EU:C:2022:298 ¶ 66.

[117]*Id.* ¶ 6.

[118]Cebulak, *supra* note 71, at 1095.

[119]*NW*, ECLI:EU:C:2022:298 ¶ 69.

[120]CE Ass., Dec. 28, 2017, 415291, Rec Lebon (Fr.); Case C-507/17, Google LLC v. Commission Nationale de l'informatique et des Libertées (CNIL), ECLI:EU:C:2019:772 (Sept. 24, 2019).

[121]Art. 267 TFEU.

by their proximity to the government,[122] as well as the Council of State's track record of non-compliance with judgments of the Court of Justice.[123]

Yet, even full compliance with a preliminary reference judgment by national courts is not necessarily a cause for celebration for strategic litigants, as the practice of contained compliance by the Austrian government shows. By ignoring the *erga omnes* effect of the judgment by the Court of Justice and "containing" its effects to the individual case, the government effectively forces individuals to claim their free movement rights under EU law again and again, which is, as Hofmann notes, a "cumbersome strategy that only few can afford."[124] Moreover, contained compliance by the Austrian government also shows a more structural legal issue. The prolongation of border controls in Austria are based on a new national regulation that the ministry of interior adopts every six months. However, the average duration of procedures before Austrian administrative courts amounts from almost six months to significantly more than six months given regional differences between different administrative courts.[125] This means that by the time Austrian administrative courts invalidate a national regulation that reinstates internal border controls, the government will likely have adopted a novel national regulation that must be contested again in new proceedings that again are likely to last longer than six months. In such a context of contained compliance, judicial review becomes a farcical spectacle in which the rule of law is reduced to an absurdity.

III. The Absent Guardian: the Enforcement of Preliminary Rulings by the Commission

Public and centralised and private and decentralised enforcement of EU law are often described as two complementary sides of the enforcement of EU law. As the Commission lacks the adequate resources to monitor compliance with EU law in member states, let alone to bring a representative number of infringement cases before the Court of Justice,[126] an effective enforcement of EU law depends on private individuals bringing their cases to the Court of Justice by way of preliminary references. Strategic litigation through preliminary reference procedures is part of an effective enforcement of EU law.[127] What is less noticed, however, is that private enforcement of EU law is only effective if it is backed up by public enforcement, especially in situations in which

[122]Bruno Latour, The Making of Law, 14–16, 27–28 (2009).

[123]In earlier decisions the Council of State held that a preliminary ruling from the Court of Justice only binds French courts to the extent that the ruling stays within the boundaries of the preliminary questions as formulated by the national court. *See* Conseil d'État, Section du Contentieux, 26.7.1985, affair no. 42.204, Office National Interprofessionnel des Céréales (ONIC) Rec. Lebon 233. Scholars regularly mention the Council of State as an exception to the general practice of compliance by domestic courts with preliminary rulings. *See e.g.* Broberg & Fenger, *supra* note 21, at 401–02; Nyikos, *supra* note 14, at 402–03.

[124]Hofmann, *supra* note 94, at 261.

[125]For example, the mean duration of proceedings before the Federal Administrative Court exceeds six months (2014-2021). *See* Bundesverwaltungsgericht, 2023/5, III-886 der Beilagen XXVII. GP, Rechnungshof, pp. 31–32, https://www.parlament.gv.at/dokument/XXVII/III/886/imfname_1524369.pdf (presenting the 2023 report for the Court of Auditors, which contains data relating to proceedings before the Federal Administrative Court). The mean duration of proceedings before the Administrative Court Styria (2023) amounted to 4 months. *See Landesverwaltungsgericht Steiermark [Administrative Court of Styria],* Tätigkeitsbericht (Sept. 9, 2024), https://www.lvwg-stmk.gv.at/cms/dokumente/12762685_134825543/522f4cbd/T%C3%84TIGKEITSBERICHT%202023%20LVwG%20Steiermark.pdf.

[126]Stine Andersen, The Enforcement of EU Law 122–130 (2012).

[127]*Effective Legal Protection and Access to Justice. 2023 Annual Report on the Application of the EU Charter of Fundamental Rights*, at 42, COM (2023) 786 final (Dec. 4, 2023). The Commission emphasizes that more cases using the EU Charter on Fundamental Rights should be brought to the CJEU, which " [. . .] highlights the need to ensure that legal professionals receive regular training on fundamental rights and effective legal protection and to enable civil society organizations and human rights defenders to bring strategic litigation cases at national and EU level." The Commission also created a program aiming at strengthening strategic litigation skills of civil society organizations and individual lawyers. *See* European Commission, *CERV Programme: Call for Proposals on promoting capacity building awareness on the EU Charter of Fundimental Rights and activities on atrategic litigation,* (Feb 24., 2022), https://ec.europa.eu/newsroom/just/items/725683/en.

governments or courts at the national level are unwilling to comply with a preliminary ruling. I distinguish between two different forms of enforcement by the Commission: First, traditional "hard" enforcement of preliminary rulings under article 258 TFEU; and second "soft" enforcement of preliminary reference judgments by exercising pressure on member states through processes of cooperation mandated by EU legislative instruments.

First, if a member state fails to comply with a preliminary ruling, the Commission may use its powers under article 258 TFEU and initiate an infringement procedure against the recalcitrant member state. When a member state still does not take the necessary steps to comply with the judgment in the infringement procedure, the Commission can seek in a second procedure the imposition of financial sanctions against the member state under article 260(2) TFEU. In the enforcement of preliminary reference judgments, this two-step procedure might prove inefficient as it takes several years before financial sanctions might be finally imposed on a recalcitrant member state. To avoid such an inefficient enforcement of preliminary rulings, some scholars point out that article 260(2) TFEU could be applied to preliminary rulings under article 267 TFEU. Indeed, the wording of article 260(2) TFEU only speaks of judgments in general and does not distinguish between different types of judgments. Although structural differences between the preliminary reference procedure and the infringement procedure militate against the application of article 260(2) TFEU to preliminary rulings—in preliminary references the Court of Justice neither decides on the compatibility of national law with EU law, nor does it apply EU law to a specific case, and the ruling is only directly binding on the referring court—article 260(2) TFEU could, nevertheless, be applied to preliminary rulings which "in fact pass judgment on the legality of the national measure."[128] This would include preliminary rulings in which the reasoning of the Court of Justice leaves little doubt that the national measure is incompatible with EU law.[129] Indeed, the Court of Justice acknowledges that specific preliminary rulings make it "apparent that national legislation is incompatible with EU law."[130] By contrast, the enforcement of preliminary rulings in which the Court of Justice expressly leaves different options on how to faithfully apply the preliminary ruling to the case before the domestic court would not be covered by article 260 TFEU.

Second, in addition to the hard enforcement of EU law under article 258 TFEU, article 27a of the Schengen Borders Code 2024 entails a procedure for the "soft" enforcement of the rules of the Schengen Borders Code. Under article 27a Schengen Borders Code 2024, the Commission shall, first, establish consultations when a member state plans to reinstate internal border controls with the objective to establish the necessity and proportionality of controls. If a member state reinstates controls contrary to a negative assessment by the Commission, the Commission shall issue an opinion on the necessity and proportionality of controls. The opinion issued by the Commission is thus part of a broader framework of mutual cooperation between member states and the Commission with the objective to ensure the proper functioning of the Schengen Borders Code.[131] This could be labeled the preemptive function of article 27a Schengen Borders Code 2024—it essentially aims at avoiding litigation by triggering procedures of political cooperation and deliberation. Yet, article 27a Schengen Borders Code 2024 also has a remedying function. When strategic litigants seek to implement the decision in *Landespolizeidirektion Steiermark* before national courts, an opinion on the compliance of internal border controls with EU law by the Commission can create a normative compliance pull on national judges who often have little

[128]Pal Wenneras, *Making Effective Use of Article 260 TFEU*, *in* THE ENFORCEMENT OF EU LAW AND VALUES 81 (Andras Jakab & Dimitri Kochenov eds., 2017).

[129]*Id.*

[130]Wenneras, *supra* note 128, at 82 (quoting Cases C-231 to C-233/06, Jonkman, ECLI:EU:C:2007:373, ¶ 38 (June 21, 2017).

[131]Joined Cases C-368/20 and C-369/20, NW v. Landespolizeidirektion Steiermark, ¶¶ 71–72 (Oct. 6, 2021), https://curia.europa.eu/juris/document/document.jsf?docid=247108&doclang=EN (Opinion of Advocate General Saugmandsgaard Øe).

knowledge on the EU law that governs the absence of internal border controls. Moreover, a *public* opinion might also be an important source in shaping a broader public discourse by feeding valuable legal information into a broader public discourse on migration policies, of which border controls are part.

Despite the various possibilities to enforce the rules of the Schengen Borders Code and the preliminary ruling in *Landespolizeidirektion Steiermark*, the Commission chose not to use any of the available instruments. Rather, the Commission made use of its discretion and did not initiate an infringement procedure under article 258 TFEU against any of the member states that maintain internal border controls. The non-initiation of infringement proceedings by the Commission reflects a general and significant decrease of infringement procedures initiated by the Commission.[132] Keleman and Pavone argue that the decrease in infringement procedures reflects the Commission's turn to a "politics of forbearance."[133] With the swearing in of the new Commission in 2004, the political leadership of the Commission seem to have worried that vigorous public enforcement would jeopardize member states support for its law-making agenda. The Commission's political leadership therefore privileged its role as motor of integration over its role as guardian of the Treaties. This became possible, as Keleman and Pavone argue, because the political leadership of the Commission was not sufficiently insulated from external political pressure from member states.[134] To implement this agenda of prioritizing the Commission's role as motor of integration, cabinets of the Commissioners increasingly began to rein in the Commission's career officials and lawyers who handled the infringements.[135] The Commission's choice to prioritize its agenda setting role and push for an amendment of the Schengen Borders Code became clear soon after member states reinstated internal border controls. In 2017, the Commission tabled a legislative proposal to reform the Schengen Borders Code.[136] Due to different political views between member states, as well as the Commission and the European Parliament, the proposal got stuck in the legislative process. However, the priority of the Commission's political leadership was set on reforming the Schengen Borders Code for which it needed the support of member states. Even though Commission officials were "convinced" that maintaining internal border controls beyond November 2017 was contrary to EU law,[137] the Commission's political leadership decided not to take any action against member states— neither under article 258 TFEU, even though enforcing the preliminary ruling in *Landespolizeidirektion Steiermar*k would qualify as priority case under the Commission's own criteria,[138] nor to issue an

[132]R. Daniel Kelemen & Tommaso Pavone, *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union,* 75 WORLD POL. 779, 783–84 (2023). *See also* STINE ANDERSEN, *supra* note 126, at 100 (pointing out that when the UK proposed during the Intergovernmental Conference to the Treaty of Lisbon strengthening article 260 TFEU, the Commission was skeptical and instead suggested to strengthen and codify state liability, in other words, decentralized enforcement).

[133]Kelemen & Pavone, *supra* note 132, at 781.

[134]*Id.*

[135]*Id.*

[136]*Commission Proposal for a Regulation of the European Parliament and of the Council Amending Regulation 2016/399 as Regards the Rules Applicable to the Temporary Reintroduction of Border Control at Internal Borders,* COM (2017) 571 final (Sept. 29, 2017).

[137]Pola Cebulak & Marta Morvillo, *The Guardian is Absent*, VERFASSUNGSBLOG (June 25, 2021), https://verfassungsblog.de/the-guardian-is-absent/.

[138]*See EU Law: Better Results Through Better Application, Communication*, at 14-16, C/2016/8600 (2017), Final (Jan. 19, 2017). Compliance with a preliminary ruling and the absence of internal borders both constitute important objectives of the EU, the prolongation of internal border controls undermines the right to free movement of goods and citizens" free movement rights, the continued prolongation of internal border controls in light of the decision in *Landespolizeidirektion Steiermark* would arguably amount to a "persistent failure" to apply EU law correctly, and non-compliance with preliminary rulings is in certain situations, as argued above, akin to non-compliance with a judgment in an infringement case. These criteria are exacerbated by the absence of effective legal protection before national courts for individuals, who challenge the reintroduction of border controls. These criteria are exacerbated by the absence of effective legal protection before national courts for individuals, who challenge the reintroduction of border controls. The Commission states that: "if there is effective legal

opinion under article 27a Schengen Borders Code[139]— even though several opinions on under article 27a Schengen Borders Code had been prepared by Commission officials.

However, none of these opinions were eventually published and they were all shelved after interventions from the political cabinets. As one Commission official explains: "It's [i.e. the opinion] a political signal to the member states. It's a shot across the bow of the member states, which is why the procedure is not being applied. The next logical step in the case of a negative opinion would be to initiate infringement proceedings."[140] Notably, the Commission's role as motor of integration and the resulting politicization of enforcement of EU law also seems to be prioritized over the Commission's legal obligations by its political leadership. Both the Court of Justice and the Advocate General held in clear terms that the Commission has a legal obligation to issue an opinion under article 27a Schengen Borders Code, if it has doubts on the necessity or proportionality of internal border controls.[141] Indeed, in 2021 the Commission tabled another legislative proposal to amend the Schengen Borders Code, which sought to change primarily the rules relating to the reintroduction of internal border controls with the objective of giving member states more leeway when deciding to reinstate internal border controls.[142] The behavior of the Commission seems to be more influenced by the "hard-nosed interest politics of the cabinets" to pursue the reform of the Schengen Borders Code,[143] and the unwillingness of several Commissioners to go against "their" member states on such a politically sensitive issue of reintroduction of border controls.

Politicization of enforcing the rules of the Schengen Borders Code and the tight control exercised by the cabinets over Commission officials was also confirmed in interviews, as well as the different past approaches to the enforcement of the Schengen rules by the Commission. In the past, the Commission took a fiercer stance on defending the principle that there shall be no border controls.[144] When France reintroduced internal border controls in 2011 as reaction to Italian migration policies, "there was still fundamental support in the [Commission] for initiating infringement proceedings."[145] This changed in 2015 and the ensuing more restrictive migration policies and discourse in member states: "A politicization of infringement proceedings [in AFSJ] has taken place, especially since 2015. From that moment on, there has been very strong control by the political level."[146] The tight political control exercised over the enforcement of EU law might also have a chilling effect on Commission officials and lawyers: "This political expediency is frustrating. It also leads to pre-emptive obedience of the technical staff: if it no longer seems politically opportune, the technical staff does not even propose initiating infringement proceedings anymore."[147]

protection available, the Commission will, as a general rule, direct complainants in this context to the national level."This implies that if no effective legal protection of rights guaranteed by EU law is available at the national level, as a general rule, the Commission will give priority to such cases.

[139]*See* Commission Decision 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, 2016 O.J. (L 151) 8. The only instance in which the Commission issued an opinion under article 27(4) Schengen Borders Code was in September 2015 on the reintroduction of border controls by Germany and Austria in which the Commission concluded that the reintroduction of border controls could be justified on public policy concerns that the uncontrolled entry of third country nationals gave rise to.

[140]Interview with an official from the European Commission (July 12, 2024).

[141]*See* Cebulak & Morvillo, *supra* note 137.

[142]*Proposal for a Regulation Amending Regulation (EU) 2016/399 as Regards the Rules Applicable to the Temporary Reintroduction of Border Control at Internal Borders*, COM (2017) 571 final (Sept. 27, 2017); *Proposal for a Regulation Amending Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons Across Borders*, COM(2021) 891 final (Dec. 14, 2021).

[143]Interview with an official from the European Commission (July 12, 2024).

[144]Stefan Salomon, *Temporary Reintroduction of Internal Border Controls,* THE LAW OF SCHENGEN (Phillipe de Bruycker, Fabian Lutz, Jorrit Rijpma & Daniel Thym eds., 2025) [forthcoming].

[145]Interview with an official from the European Commission (July 12, 2024).

[146]*Id.*

[147]*Id.*

F. Conclusion

This Article discussed the promises and pitfalls of strategic litigation in EU law by focusing on the afterlife of a preliminary ruling in several member states. I want to emphasise three specific points that emulate from the preceding discussion. First, the preceding discussion has shown the limits of strategic litigation by collective actors and individual citizens when they face recalcitrant implementing authorities. Even though national courts remain the most important for implementing preliminary rulings, public enforcement by the Commission is crucial when either implementing authorities contain the effects of a preliminary ruling or national courts are unwilling to faithfully apply the Court of Justice's reasoning in the preliminary ruling. A more political Commission and the prioritization of its legislative function as well as a reduction of public enforcement imply a stronger shift of enforcement of EU law towards private actors and individual citizens. Indeed, the Commission's policy entails, among others, to enhance the capacities of citizens to strategically litigate with EU law.[148] Yet, if strategic litigation by citizens and private actors is not backed up by the threat of public enforcement by the Commission, it might counter these efforts to enhance citizens' strategic use of EU law. EU law then does not live up to its promise of ensuring that citizens enjoy effective rights under EU law.

Second, in situations in which national authorities are unwilling to implement a preliminary ruling, national courts are reluctant to faithfully apply the preliminary ruling, and the Commission as guardian of the Treaties is absent, litigants may need to adapt their litigation strategies. For instance, if national administrative courts are unwilling to faithfully apply the preliminary ruling in *Landespolizeidirektion Steiermark*, either because of strict standing requirements or their proximity to the executive, as discussed above, litigants may need to adapt their litigation strategies and identify other branches of the national judiciary and other remedies under national law through which the preliminary ruling could be enforced. Further, in member states where administrative courts open refuse to comply with the preliminary ruling, litigants may adapt their litigation strategies and turn to either criminal courts—contesting criminal charges that are based on border checks that are contrary to EU law—or civil courts by using the doctrine of state liability to claim damages incurred by travelers, companies, or commuters from border checks contrary to EU law.[149] Yet, there are limitations to such a change of the litigation strategy; the actors that contested the reintroduction of internal border controls are migrant rights NGOs or other collective actors with expertise in migration law, who likely lack an expertise in the field of state liability in EU law and national torts law. The specific knowledge of EU law is, as the introductory Article emphasizes, perhaps the most important resource that actors require to litigate strategically with EU law.[150]

Third, the aftermath of the preliminary ruling in *Landespolizeidirektion Steiermark* also shows the necessity to embed strategic litigation, as Lisa Conant points out, in broader strategies of and campaigns of legal mobilization.[151] For otherwise a "successful" judgment, from the view of the litigants, risks to be legislatively overturned and the objectives of strategic litigation—to achieve broader societal, political, or economic change—to be buried. Strategic litigation would then be nothing but the fulfilment of individual ambitions of lawyers, rather than an effective means for change.

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[148] *Effective Legal Protection and Access to Justice. 2023 Annual Report on the Application of the EU Charter of Fundamental Rights*, at 42, COM (2023) 786 final (Dec. 4, 2023).

[149] *See generally* STAATSHAFTUNG IN EUROPA: NATIONALES UND UNIONSRECHT (Oliver Dörr ed., 2014) (describing that most member states civil courts are competent to adjudicate on state liability).

[150] Cebulak, Morvillo & Salomon, *supra* note 8.

[151] CONANT, *Justice Contained supra* note 70, at 214.

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