Doctrinal and Empirical Perspectives on Preliminary References to the European Court of Justice: Separate Worlds, Unanswered Questions

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European legal scholarship is struggling to determine how doctrinal and empirical legal research should interrelate. Although ideal scenarios of mutually beneficial exchanges have been sketched, the reality seems to be that both fields operate more or less in isolation. Against this background, this article develops two main claims, using research on preliminary references to the European Court of Justice as a case study. First, it provides further evidence that doctrinal legal research indeed does not engage with relevant empirical legal scholarship. This is problematic because, as demonstrated, the commonly deployed teleological reasoning in doctrinal legal research posits not only normative claims, but also empirical ones, although the latter often remain insufficiently substantiated. Second, it is argued that the lack of engagement from doctrinal legal researchers with empirical legal scholarship also raises concerns for the latter. It will be shown that empirical legal research requires a sound doctrinal legal basis. The engagement and verification by doctrinal legal scholars is therefore quintessential for the development of the empirical legal field as well.

Keywords: Methodology; doctrinal legal research; empirical legal research; EU law; European Court of Justice; preliminary ruling procedure

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TABLE OF CONTENTS

I. INTRODUCTION

European legal research is undergoing a period of self-reflection. The continuing inability of traditional doctrinal legal research to explain its methodology and value to other disciplines, has raised questions about the direction in which European legal scholarship must develop.[1] In this regard, the field of empirical legal research has been presented as a path for legal scholars to become 'scientifically credible'. By treating law as data, empirical legal scholars would be able to fulfil the common criteria for evaluating the quality of scientific research, such as replicability, hypothesis testing, external

[1] Rob van Gestel, Hans-Wolfgang Micklitz and Edward Rubin, 'Introduction' in Rob van Gestel, Hans-Wolfgang Micklitz and Edward Rubin (eds), *Rethinking Legal Scholarship. A Transatlantic Dialogue* (Cambridge University Press 2017), 1; Marija Bartl, Pola Cebulak and Jessica C Lawrence, 'Introduction to The Politics of European Legal Research' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) 1; Robin Gadbled and Elise Muir, 'Actors and Roles in EU Law: Asking 'Who Does What?' in the European Union Legal System' (2022) 18(4) European Constitutional Law Review 621, 628.

validity, and sample representativeness.[2] But the rigid, almost exclusively quantitative, methodology adopted by parts of the empirical legal studies community, seems to have isolated the domain from mainstream legal research.[3] Julien Bois and Mark Dawson, for example, determine that in the literature on judicialisation in the EU, there is a clear lack of dialogue between doctrinally and empirically oriented scholarship.[4] Rather than a transformation of the entire legal field, the rise of empirical methods thus seems to result in a silent *Methodenstreit* between doctrinal legal research and empirical legal research, where both camps implicitly disqualify each other's work and refuse to engage with it.

Against this background, this article develops two main claims. First, it provides further evidence that doctrinal legal research indeed does not engage with relevant empirical legal scholarship. This is problematic because, as will be demonstrated, the commonly deployed teleological reasoning in doctrinal legal research posits not only normative claims, but also empirical ones, although the latter often remain insufficiently substantiated (Section II). Second, it is argued that the lack of engagement from doctrinal legal researchers with empirical legal scholarship also raises concerns for the latter. As will be shown, empirical legal research namely requires a sound doctrinal legal basis. The engagement and verification by doctrinal legal scholars is therefore quintessential for the development of the empirical legal field as well (Section III).

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[2] Arthur Dyevre, Wessel Wijtvliet, and Nicolas Lampach, 'The Future of European Legal Scholarship: Empirical Jurisprudence' (2019) 26(3) Maastricht Journal of European and Comparative Law 348, 349.

[3] Tommaso Pavone and Juan Mayoral, 'Statistics as if Legality Mattered: The Two-Front Politics of Empirical Legal Studies' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) 78, 91; Urška Šadl, 'Who needs the European Society for Empirical Legal Studies?' (2023) 29(6) Maastricht Journal of European and Comparative Law 643.

[4] Julien Bois and Mark Dawson, 'Towards a legally plausible theory of judicialization in the European Union' (2023) 45(5) Journal of European Integration 823.

In general, abstract terms, the mutual dependency between doctrinal and empirical legal scholarship has been advocated regularly in recent literature.[5] In order to concretise the dynamics at play, this article moves beyond such abstract discussions, and focuses on the research on preliminary references to the European Court of Justice (ECJ) as a case study. This is a prime example of a topic in EU legal scholarship where doctrinally and empirically oriented scholars cross paths. The importance of the preliminary ruling procedure has never been understated. The ECJ itself has referred to the procedure as the 'keystone' of the EU's judicial system,[6] and in the literature, Article 267 TFEU has been qualified as 'one of the most important Treaty provisions', and praised as 'the "jewel in the Crown" of the Court's jurisdiction'.[7] What makes the preliminary ruling procedure an evergreen in the doctrinal EU legal debate is the persistently unclear delineation of the obligation for national courts to refer preliminary questions to the ECJ, and the subsequent issue of enforcement. At the same time, other fields of social science are drawn to the procedure, because the preliminary references from national courts have been a key factor for the ECJ's prominent role in the process of EU integration through law.

[5] Matthias Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7(1) Journal of Commonwealth Law and Legal Education 5; Emanuel V Towfigh, 'Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a "Doctrinal Turn"?' (2014) 12(3) International Journal of Constitutional Law 670; Gareth Davies, 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research' (2018) 13(2) Erasmus Law Review 3; Julien Bois and Mark Dawson, 'Sociological Institutionalism as a Lens to Study Judicialization: A Bridge between Legal Scholarship and Political Science' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) 94; Bruno De Witte, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18(4) European Constitutional Law Review 637.

[6] Opinion 2/13, ECLI:EU:C:2014:2454, para 176.

[7] Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (7th edn, Oxford University Press 2020), 496.

II. Doctrinal Legal Perspectives

In this article, doctrinal legal research is understood as research which 'aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law'.[8] In this sense, doctrinal legal research is an exercise in hermeneutics; it is about the interpretation of legal texts. According to Dworkin, such legal interpretation is not purely descriptive (discovering what the author of the text meant to say in the words he used), nor is it evaluative (describing what the researcher believes is objectively required by an ideal political morality).[9] Instead, legal interpretation combines elements of both, as it attempts to show the legal source as the best it can be *within the broader legal framework*. To what extent, and how, an interpretation must fit within the broader legal framework is then dependent upon one's own legal philosophy.[10] In the view of Hart, due to the internal point of view of the legal field, it is eventually the epistemic community – in this case: lawyers within a specific legal system – which develops a common legal philosophy for the interpretation of legal texts.[11]

Within the various legal systems, different interpretations methods have been developed, such as grammatical, historical, systematic, and teleological interpretation. It seems, however, that in European doctrinal legal scholarship, teleological interpretation is among the most frequently used

[8] Jan Smits, 'What is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-Wolfgang Micklitz and Edward Rubin (eds), *Rethinking Legal Scholarship. A Transatlantic Dialogue* (Cambridge University Press 2017) 207, 210.

[9] Ronald Dworkin, 'Law as Interpretation' (1982) 9(1) Critical Inquiry 179, 180-181.

[10] Ibid 195-196.

[11] HLA Hart, *The Concept of Law* (Clarendon Press 1961), 102; compare Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) European Journal of Legal Studies 1, 3.

techniques. With teleological interpretation, the meaning of a legal norm is derived from the norm's instrumental function in realising a particular purpose. According to Rob van Gestel and Hans-Wolfgang Micklitz, there is a strong tendency in Europe for such policy-driven legal research, where the aim is to solve a societal problem through legal intervention.[12] This is perhaps also not surprising, since the ECJ also relies heavily on teleological interpretation in its case law.[13]

The issue here is that the argumentation behind teleological interpretation consists of both a normative and an empirical element, where the latter is often overlooked in doctrinal legal scholarship. In essence, teleological interpretation amounts to the following reasoning: Rule (R) must be interpreted as R', because interpretation R' is a means to attain goal (G), and goal G is a goal the law ought to promote.[14] The second argument that goal G is a goal the law ought to promote, is a normative one. It can be made subjectively (the legislator has intended rule R as a means for attaining goal G) or objectively (goal G is a rational goal objectively prescribed by general legal principles and values underlying the legal order),[15] but both are common practice for doctrinal legal scholars. In contrast, the first argument that interpretation R' is a means to attain goal G, is an empirical argument, ie 'based on observations of the world', also known as data.[16] It presupposes insight in the effect that a certain legal interpretation will have on a policy objective, based on, for example, human behaviour and its underlying

[12] Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) European Law Journal 292, 300-301.

[13] Maduro (n 10) 7.

[14] Eveline T Feteris, 'The Pragma-Dialectical Analysis and Evaluation of Teleological Argumentation in a Legal Context' (2008) 22 Argumentation 489, 497. The formulation is based on Robert Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (Clarendon Press 1989).

[15] Ibid 498.

[16] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) 3.

motives and perceptions. Yet such insights are often absent, or at least not explicated, in doctrinal legal scholarship.

1. *Interpreting the obligation to refer preliminary questions*

A clear example of this is the doctrinal legal debate concerning the obligation for national courts to refer preliminary questions to the ECJ. This debate revolves around Article 267(3) TFEU, which stipulates that the national courts deciding in final instance are obliged to refer questions of EU law to the ECJ, without providing any exceptions. The ECJ did develop exceptions to this obligation in its case law, starting with the case *Cilfit* in 1982.[17] With the objective of safeguarding the uniform interpretation of EU law, the ECJ was very careful in allowing the national courts space for deviation. The ECJ granted very little room for national courts to deviate from the obligation to refer on the basis of the more subjective *acte clair* exception, next to the more objective situations where a question of EU law cannot affect the outcome of the national proceedings, or where it has already been answered by the ECJ. In order to ascertain that the answer to an EU law question is 'so obvious as to leave no scope for any reasonable doubt',[18] a national court of final instance awaits the Herculean task of taking into account the 24 different language versions of the respective EU law norm, the peculiar EU law terminology, and the objectives and state of evolution of EU law as a whole.[19] For quite some time, there was consensus that these standards were simply practically infeasible. Until, after 39 years, the ECJ nuanced its standards in the case *Consorzio Italian Management*, and thereby blurred the limits of the obligation to refer.[20]

It is due to these, firstly, infeasible, and now, unenforceable operationalisations of the obligation to refer, that there has been an ongoing

[17] Case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335.

[18] Ibid para 16.

[19] Ibid paras 17-20.

[20] Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* ECLI:EU:C:2021:799.

doctrinal debate about how to revise this duty. In the light of the risk of diverging EU law interpretations among national courts on the one hand, and the ECJ's workload on the other, the key issue underlying this debate boils down to the question: do we want more or less preliminary references? What is interesting here, is that the dominant narrative is that the obligation to refer should be relaxed. The national courts, the argument goes, have matured, and should therefore receive more responsibility, so that the ECJ can focus its resources on addressing the most fundamental questions. However, these normative views are hardly ever supported with convincing empirical evidence of the current referral activity of the national courts. This is well illustrated by the five Advocate General Opinions on this topic over the years.[21] Usually, Advocate General Opinions differ from scholarly work in the sense that they are more inclined to interpret the law on the basis of past case law than scholarly publications.[22] In this case, however, the consensus in the Opinions was that this past case law was up for revision anyway. Therefore, these Opinions offer the usual extensive doctrinal analysis, but with an interpretative openness akin to scholarly work.

In their Opinions, the Advocates General take strong, normative positions on the direction in which the obligation to refer ought to be moving. Yet

[21] Case C-338/95 *Wiener v Hauptzollamt Emmerich* ECLI:EU:C:1997:352, Opinion of AG Jacobs; Case C-99/00 *Criminal proceedings against Kenny Roland Lyckeskog* ECLI:EU:C:2002:108, Opinion of AG Tizzano; Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* ECLI:EU:C:2005:415, Opinion of AG Ruiz-Jarabo Colomer; Joined Cases C-72/14 and C-197/14 *X v Inspecteur van de Rijksbelastingdienst and T.A. van Dijk v Staatssecretaris van Financiën* ECLI:EU:C:2015:319, Opinion of AG Wahl; Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* ECLI:EU:C:2021:291, Opinion of AG Bobek. AG Tizzano was the only one going against the dominant narrative, arguing for a strict obligation to refer.

[22] Christina Eckes, 'European Union Legal Methods – Moving Away from Integration' in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – Towards a New European Legal Realism?* (DJOF Publishing 2013) 163, 168.

these positions require empirical evidence on what the current state of the preliminary ruling procedure actually is. In order to ascertain this state, the Advocates General rely on experience with how national courts deal with the procedure,[23] on a few national court judgments without addressing their representativeness,[24] on the number of preliminary references by courts of last instance compared to other courts,[25] on the national courts' assumed increased knowledge over the years,[26] on legal remedies for failure to refer preliminary questions, without assessing the effectiveness of these remedies,[27] and on the actual number of preliminary references compared to the potential number, should the national courts apply *Cilfit* strictly.[28]

All these arguments do not convince, because they do not address the actual question at stake: are the right preliminary questions being referred? In order to answer that question convincingly, one needs structured information on which questions the ECJ is receiving, and which questions are decided by the national courts on their own. For the referred questions, the ECJ's Curia database provides an exhaustive overview. With about 500 annual preliminary references in recent years, it is also manageable to keep up with the incoming questions. In that sense, the Advocates General will have a good insight in the questions referred, and their experience on that side cannot be completely neglected, although the source referencing is scientifically not very sound.

[23] *Wiener*, Opinion of AG Jacobs (n 19) para 61; *Lyckeskog*, Opinion of AG Tizzano (n 19) para 69.

[24] *Lyckeskog*, Opinion of AG Tizzano (n 19) para 65; *X/Van Dijk*, Opinion of AG Wahl (n 19) para 64.

[25] *Lyckeskog*, Opinion of AG Tizzano (n 19) para 68.

[26] *Gaston Schul*, Opinion of AG Ruiz-Jarabo Colomer (n 19) para 58.

[27] *X/Van Dijk*, Opinion of AG Wahl (n 19) para 63, 69.

[28] *Consorzio Italian Management*, Opinion of AG Bobek (n 19) paras 127-128.

The story is different, however, when it comes to the other side: the EU law questions which are decided by the national courts without a preliminary reference. As Bobek wrote before becoming an Advocate General,

> The genuine life of EU law on the national level generally is one huge black box. We know very little of what is actually going on in normal national courts in terms of EU law application and enforcement.[29]

In addition to the issues relating to accessing the case law of all Member States, a major difficulty here lies in identifying questions of EU law in national judgments. If a national court does not want to engage with EU law, it may 'hide' from the EU law norms by deciding the case exclusively on the basis of national law. It is thus highly questionable whether the Advocates General have the required insight in the questions of EU law which are not referred to the ECJ, although this insight is crucial in assessing how the preliminary ruling procedure ought to develop.

III. EMPIRICAL LEGAL PERSPECTIVES

The foregoing shows how doctrinal legal research tends to make normative claims which require empirical evidence, while it does not offer the methods to provide such evidence. But what is more, it also demonstrates that doctrinal legal scholarship does not engage with empirically oriented research from other disciplines. When it comes to preliminary references, there is namely a significant body of empirical research available from primarily political scientists. Political scientists are intrigued by the preliminary ruling procedure, because the procedure is often considered to be the motor which has allowed the ECJ to spur the process of EU

[29] Michal Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart 2013) 197, 201.

integration via law.[30] Preliminary references are thus considered to be a proxy for the power of the ECJ. Against this background, the recurring question among political scientists is why national courts refer preliminary questions to the ECJ in the absence of a clear, enforceable legal obligation. Furthermore, a puzzle which many have attempted to solve is which factors can explain the variation in the absolute numbers of preliminary references between Member States.[31] None of this empirical research on national courts' referral activity is cited in the AG Opinions, however.

As said, this lack of engagement from doctrinal legal scholars with empirical scholarship has severe implications for the credibility of their normative claims. But at the same time, it poses a risk for empirical legal scholarship as well. As will be concretised in this section with reference to research on preliminary references, empirical legal research namely requires a sound doctrinal legal basis. Therefore, the engagement, and thereby the validation, from doctrinal legal scholars is essential for the development of this field as well. Focusing on three methodological issues in empirical legal research – the coding of variables, the representativeness of samples, and the use of interviews and surveys – it is demonstrated that also empirical legal studies require significant doctrinal legal knowledge.

1. The coding of relevant variables

A first main challenge in empirical legal research concerns the coding of relevant legal variables. To find patterns in judicial decision-making, empirical researchers may categorise or quantify factors which might affect the judicial decision under scrutiny. It must not be forgotten, however, that even the seemingly rigorous statistical methods used to unravel these

[30] JHH Weiler, 'A Quiet Revolution. The European Court of Justice and Its Interlocutors' (1994) 26(4) Comparative Political Studies 510.

[31] Virginia Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' (2021) 58(3) Common Market Law Review 751, 754-755.

patterns, establish correlation and not causality. The theories underlying the tested variables must therefore be thick and comprise all possible factors, including legal ones.[32]

In the context of preliminary references, this means that researchers must fully grasp the limits of the obligation to refer preliminary questions. Although national courts have a wide margin of discretion, there are still instances where a breach of the obligation to refer has been established, or, on the other side of the spectrum, where preliminary questions are declared inadmissible. The legal aspect – ie: How much doubt does a certain question raise? Are the judges capable of gauging this doubt objectively? – can thus not be neglected. Furthermore, it must be acknowledged that due to the wide margin of discretion, the actual referral of preliminary questions is often the exception in a much bigger pool of potential, but non-referred preliminary questions. A mere focus on actual preliminary references is thus bound to give a skewed impression.

Once these variables have been identified, the next difficulty lies in quantifying or otherwise measuring them.[33] The variables mentioned in the context of preliminary references show that this may again require quite in-depth legal knowledge. For example, to assess whether a non-referred question was 'referrable', one must not only be able to understand the reasoning in the national court's judgment (which will often not explicitly mention the consideration of referral), but also to critically reflect on it from a legal perspective. There is always the temptation here to opt for more easily

[32] Bois and Dawson (n 4) 827.

[33] Simon Deakin, 'The Use of Quantitative Methods in Labour Law Research: An Assessment and Reformulation' (2018) 27(4) Social & Legal Studies 456, 461; Poul F Kjaer, 'How to Study Worlds: Or Why One Should (Not) Care about Methodology' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) 208, 210.

available data as a proxy.[34] Explicit requests for referral by litigants, for example, could be an indication that a question was referrable, and can be extracted from judgments relatively easily from some national case law databases. But upon closer inspection, one could cast serious doubts about what can actually be inferred from such requests, considering the completely different interests that litigants have in referral compared to the obligation for national courts to refer.

2. The representativeness of samples

A further aspect of empirical legal research which requires significant doctrinal legal knowledge, concerns the representativeness of the studied samples.[35] In order to assess the generalisability of findings relating to a specific sample, scholars must be able to compare the relevant legal circumstances across the broader population. While a lot of studies on preliminary references focus on selected Member States, there can be quite a lot of variation in the transposition of EU legislation, and thereby the need for referral, at the national level.[36] To give an example: in fields where the EU legislature opts for minimum harmonisation, EU law only sets the common minimum standard, from which the Member States may deviate to adopt stricter standards. In Member States opting for stricter standards, there is much less room for preliminary questions than in a Member State which only strives for the EU's minimum standard. For the former, the exact limits of EU law's minimum standards are namely hardly relevant.

On the other hand, given the focus on variation between Member States,[37] the bigger issue is perhaps which conclusions can be drawn from the

[34] Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (Edward Elgar 2022) 109, 120.

[35] Maryam Salehijam, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23(1) Tilburg International Law Review 34, 40.

[36] Brook (n 32) 120.

[37] Passalacqua (n 29) 754-755.

aggregated number of preliminary references in a Member State. With these aggregated numbers, the judiciaries within a Member State are treated as homogenic entities; perhaps distinguishing courts of final instance, which are in principle obliged to refer, from the other courts without such obligation. These studies thus give the impression that if some national courts are exceptionally active in referring, all courts in that Member State are active referrers. Yet from a legal perspective, a lot of variances can be expected between the various national courts within Member States. Some fields of law are for example much more extensively covered by EU law, have developed much further as EU policy areas, or are politically way more accepted at the national level as EU policy areas, than others. Moreover, some national courts possess much more specialised (EU law) knowledge than their more generalist counterparts. These are all examples of factors which can be expected to result in different attitudes towards the referral of preliminary questions between the different national courts. It should therefore be critically assessed what the aggregated number of preliminary references in a Member State actually tells us about the referral practice of specific national courts.

3. The legal context in interviews and surveys

In addition to studying human behaviour based on concrete actions, empirical legal research may also delve into the motives or perceptions behind these actions. To that end, empirical legal scholars may ask relevant actors, such as judges, for their views via interviews or surveys.[38] Yet, here again, although the data comes directly from the interviewee, without the right legal context, the value of such data may turn out to be rather limited.

[38] Urszula Jaremba and Elaine Mak, 'Interviewing Judges in the Transnational Context' (2014) 5 Law and Method.

As Epstein and King put it, in general, 'asking someone to identify his or her motive is one of the worst methods of measuring motive.'[39]

In the case of elite interviews, eg with judges, there is always a risk that the interviewee consciously or unconsciously tries to justify his or her work, rather than telling the truth. It is therefore essential that the interviewer can rely on multiple sources so that they are able to validate the information received.[40] Translated to research on preliminary references, this means that researchers must have a decent understanding of the relevant cases in which judges or litigants have been involved. Furthermore, in the formulation of questions, researchers should strive to gear their questions towards considerations in specific cases ("What were your considerations for (not) referring in case XYZ?"), rather than making referral a general, abstract decision outside the scope of a legal case ("What are your reasons to refer?").

IV. Concluding Remarks

In conclusion, doctrinal and empirical legal research both have their uses and limitations. Doctrinal legal researchers interpret the law, using the methods of interpretation which are accepted within their legal system. However, the tendency to rely on teleological interpretation and pursue policy-driven questions, requires that doctrinal legal scholars also assess how the law works out in practice. For that, it needs to rely on empirical legal scholarship. In turn, this empirical legal scholarship cannot operate in isolation either. In order to come to convincing results, empirical legal research must build on a sound doctrinal legal basis. Doctrinal and empirical legal research are thus mutually dependent on one another. Although they ask different questions

[39] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69(1) University of Chicago Law Review 1, 93.

[40] Jeffrey M Berry, 'Validity and Reliability Issues in Elite Interviewing' (2002) 35(4) Political Science and Politics 679, 680-681.

and deploy different methods, they must engage with each other to come to satisfactory results.

This article provides further evidence, however, that European legal research still has a long way to go towards this symbiosis between the two perspectives. Research on preliminary references to the ECJ is perhaps a most-likely case for interaction between doctrinal and empirical legal scholars, as it has strongly attracted scholars with both backgrounds for a long period of time already. Yet it seems that this doctrinal legal scholarship does not engage with the significant body of empirical literature, and still fails to see the resulting shortcomings in its own findings. Given the many doctrinal legal questions which the empirical research on preliminary references raises, this lack of engagement is also regrettable for the development of this field.

From the perspective of doctrinal legal scholarship, the question is how the lack of engagement with empirical legal scholarship can be explained. Is it a matter of unawareness regarding the limitations of their field's methods? Is the empirical literature considered too difficult to grasp? Or are there concerns regarding the quality of the empirical findings? If so, why do doctrinal legal scholars not enter into a dialogue with their empirically oriented peers? In any case, this ideal synergetic relation with the empirical legal field clearly does require structural investments from the doctrinal legal community. There is no need to switch to empirical methods; doctrinal legal scholarship will maintain its own value. But doctrinal legal scholars will need to comprehend the fundamentals of empirical research, in order to be able to critically assess how that field builds on doctrinal legal insights. Perhaps that is a shift which has yet to fully take shape.

And although this article did not strive to assess the engagement of empirical legal scholarship with doctrinal legal work, the findings do suggest that the situation is not much better on that side either.

Because if the empirical legal scholars researching national courts' preliminary references would really build on the doctrinal legal literature, would they not strongly question the (implicit) empirical claims made there when they publish their findings? And would that questioning not prompt some kind of response from the doctrinal legal literature? Yet no such dynamics seem to be taking place. In the development of European legal scholarship, also empirical legal scholars thus have some steps to take.