Articles

It Takes Two to Tango: The Preliminary Reference Dance Between the Court of Justice of the European Union and National Courts

edited by Jasper Krommendijk

It Takes Two to Tango: An Introduction

Jasper Krommendijk*

Abstract: The most important procedure of EU law is the preliminary ruling procedure. Academic scrutiny by way of a Special Section is pertinent for three reasons. Firstly, there are still many outstanding legal and practical questions with respect to Art. 267 TFEU as illustrated by the continuous flow of new judgments of the Court of Justice and European Court of Human Rights. Secondly, there are growing allegations that (some) national court judges are dissatisfied with the procedure, their interaction with the Court of Justice and the resulting answers. Thirdly, there has been little (empirical) research into the effective functioning of the procedure and its application by national courts. The *Articles* of this Special Section examine – often in an empirical way on the basis of interviews or questionnaires – why national courts refer (or not), what they think of their interaction with the Court of Justice and whether and how they implement the answers of the Court of Justice.

Keywords: preliminary ruling procedure – judicial dialogue – national courts – *CILFIT* – motives to refer – (dis)satisfaction with Court of Justice judgments.

I. Introduction

It is an often-told story, but it is one worth repeating to begin this Special Section: national courts have been and still are crucial in the development of EU law, both in terms of its

* Associate Professor of International and European Law, Radboud University Nijmegen, j.krommendijk@jur.ru.nl. This *Article* forms part of the research project "It takes two to tango. The preliminary reference dance between the Court of Justice of the European Union and national courts" (2017-2021) funded by the Netherlands Organisation for Scientific Research (NWO).

ISSN 2499-8249
doi: 10.15166/2499-8249/410

application and interpretation. The preliminary ruling procedure, as laid down in Art. 267 TFEU, has been a central element in this important position of national courts. It is therefore not surprising that the CJEU has consistently referred to this procedure as the "keystone" of the EU legal system.[1] In recent years, the Court of Justice has underscored this even more in its judgments dealing with the deteriorating rule of law situation in several EU Member States. It even elevated Art. 19 TEU, obliging Member States to provide effective judicial remedies, to a legally enforceable standard for national justice given in *Associação Sindical dos Juízes Portugueses*.[2] It did so, partly on the basis of a combined reading of this provision with Art. 47 of the Charter of Fundamental Rights protecting the right to effective judicial protection. The central message in subsequent judgments dealing with Poland has been that not only Polish courts are affected by governmental measures, but EU courts also remain fully equipped to refer questions of EU law.[3]

Another truism is that the EU legal order would look completely different, had the preliminary ruling procedure not been included in the Treaties since the beginning. Seminal judgments of the Court of Justice, such as *Van Gend en Loos*, *Costa v. ENEL* laying down the foundations of the EU legal system, have mostly been the result of questions from national courts.[4] The procedure has thus enabled the Court of Justice to be an important driver of the European integration. This will not change in the foreseeable future. It seems likely to assume that legal issues stemming from the current corona crisis will also reach the court primarily through the preliminary ruling procedure.

There are three reasons why this procedure deserves further academic attention, justifying this Special Section. They will be discussed shortly (sections II-IV), after which a discursive overview is provided of all the contributions in this Special Section (section V).

II. Evolving legal questions surrounding Art. 267 TFEU

Even though this procedure has been around since the beginning of the European Economic Communities, there are still many unresolved legal and practical questions that remain unanswered. One illustration of this is the inclusion of the topic of national courts and the enforcement of EU law as one of the three themes of International Federation

[1] Court of Justice, opinion 2/13 of 18 December 2014, para. 176. The procedure is commonly referred to as the "jewel in the crown" of the CJEU. P. Craig, *The Jurisdiction of the Community Courts Reconsidered*, in G. de Búrca, J. Weiler (eds), *The European Court of Justice*, Oxford: Oxford University Press, 2001, p. 559.

[2] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses* [GC], para. 37; M. Krajewksi, *Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 395 *et seq*.

[3] E.g. Court of Justice: judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême*) [GC]; judgment of 5 November 2019, case C-192/18, *Commission v. Poland (Indépendance des juridictions de droit commun)* [GC].

[4] Court of Justice: judgment of 5 February 1963, case C-26/62, *Van Gend en Loos*; judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

for European Law (FIDE) 2020.[5] The Court of Justice's "control" of the discretion of national courts is still in development and there have been recent noteworthy developments. Furthermore, it is no longer only the Court of Justice that has surveilled the limits of Art. 267 TFEU but, increasingly, the European Court of Human Rights has also addressed this issue. With respect to the Court of Justice, one could point firstly to the ambiguities surrounding the *CILFIT* doctrine and especially the *acte clair* standard.[6] It is conventional wisdom that there is a discrepancy between the theory of *CILFIT* and its actual application. The official line of the Court of Justice is, however, still that the *CILFIT* exceptions need to be taken literally and applied restrictively, even though some judgments seem to diverge from this.[7] Two years ago, the Court of Justice found a breach of Art. 267, para. 3, in an infringement procedure against France for the failure of the highest court (the French Conseil d'État) to refer a second follow-up question. The Court of Justice reasoned that the interpretation of the Conseil was "at variance" with its own subsequent interpretation.[8] The latter is something which happens quite regularly, and one can wonder whether such a situation always leads to a breach. This judgment thus shows that the Court of Justice does not shy away from imposing burdensome requirements on national courts and it is not willing (yet) to alleviate the *CILFIT* requirements, at least on paper. The burdensome *CILFIT* requirements have also met fierce criticism in the literature and by some national court judges.[9] In this light, it is not surprising that there are considerable differences between national courts in their application of *CILFIT*, as the Research and Documentation Centre of the Court of Justice also noted in May 2019.[10]

The preliminary ruling procedure is no longer solely relevant for the (CJ)EU. The European Court of Human Rights has already found a breach of Art. 6 of the European Convention on Human Rights, the right to a fair trial, four times since 2014, for the failure of

[5] One of six sub-questions discussed in the context of this theme is how national courts apply the procedure. See Fédération Internationale Pour le Droit Européen (FIDE), *Topics*, www.fide2020.eu.

[6] Court of Justice, judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*.

[7] E.g. Court of Justice, judgment of 9 September 2015, joined cases C-72/14 and C-197/14, *X. and T.A. van Dijk*.

[8] A. TURMO, *A Dialogue of Unequals – The European Court of Justice Reasserts National Courts' Obligations Under Article 267(3) TFEU*, in *European Constitutional Law Review*, 2019, p. 340.

[9] A literal reading would mean that the likelihood of establishing a "true" *acte clair* would "seem just as likely as encountering a unicorn". Opinion of AG Wahl delivered on 13 May 2015, joined cases C-72/14 and C-197/14, *X. and T.A. van Dijk*, para. 62; N. FENGER, M. BROBERG, *Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine*, in *Yearbook of European Law*, 2011, p. 180. A reasonable reading of *CILFIT* is also mentioned in Association of the Councils of State and Supreme Administrative Jurisdictions of the EU and Network of the Presidents of the Supreme Judicial Courts of the EU (ACA), *Report of the Working Group on the Preliminary Rulings Procedure*, www.aca-europe.eu, pp. 10-11.

[10] For a recent overview of the application of these *CILFIT* exceptions, see A. ARNULL, *The Use and Abuse of Article 177 EEC*, in *Modern Law Review*, 1989, p. 631; G. DAVIES, *Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 84; Directorate-General for Library, Research and Documentation, *Application of the CILFIT Case-law by National Courts or Tribunals Against Whose Decisions There Is No Judicial Remedy under National Law*, May 2019, curia.europa.eu.

the highest courts in some Member States to give reasons for decisions not to refer.[11] In conclusion, this short overview shows that the legal framework of Art. 267 TFEU is still developing and that both Luxembourg and Strasbourg have increased the pressure on national courts to fulfil their obligation to refer loyally. This warrants the question whether national courts act in line with those demands in reality.

III. Stocktaking: the procedure under pressure?

It seems that national courts have become more critical of their interaction with the Court of Justice in recent years. Ironically, the greater involvement of several constitutional courts making their first reference in the last decade is not necessarily a sign of their sincere engagement and trust in the legitimacy of the procedure and the Court of Justice.[12] Rather, these references could perhaps better be seen as proactive acts challenging the authority of the Court of Justice. The *Gauweiler* reference of the German Constitutional Court is an apt example of this as is the recent follow-up judgment of the German Constitutional Court in *Weiss* in which the Court of Justice ruling was found to be *ultra vires*.[13] Other high-profile cases, including *Ajos* involving the Danish Supreme Court and the Italian *Taricco* cases provide further evidence of this allegedly worsening relationship.[14] Courts in seemingly more EU-law-friendly Member States have also expressed their criticism of the Court of Justice. Some Dutch judges, for example, lamented the "ivory tower" mentality of the Court of Justice and the lack of a genuine dialogue.[15] Judges in other countries, such as Spain and the UK, have delivered similar criticism.[16] The ques-

[11] European Court of Human Rights: judgment of 8 April 2014, no. 17120/09, *Dhahbi v. Italy*; judgment of 21 July 2015, no. 38369/09, *Schipani v. Italy*; judgment of 16 April 2019, no. 55092/16, *Baltic Master v. Lithuania*; judgment of 13 February 2020, no. 25137/16, *Sanofi Pasteur v. France*; J. Krommendijk, *"Open Sesame!" Improving Access to the CJEU by Obliging National Courts to Reason Their Refusals to Refer*, in *European Law Review*, 2017, p. 46 *et seq.*; M. Broberg, *National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom*, in *European Public Law*, 2016, p. 243 *et seq.*; C. Lacchi, *The ECrtHR's Interference in the Dialogue Between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure*, in *Review of European Administrative Law*, 2015, p. 95 *et seq.*

[12] Court of Justice: judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*; judgment of 26 February 2013, case C-399/11, *Melloni* [GC]; judgment of 16 June 2015, case C-62/14, *Gauweiler* [GC].

[13] Court of Justice, judgment of 11 December 2018, case C-493/17, *Weiss and Others* [GC]; German Federal Constitutional Court, judgment of 5 May 2020, 2 BvR 859/15.

[14] Court of Justice: judgment of 19 April 2016, case C-441/14, *Dansk Industri* [GC]; judgment of 8 September 2015, case C-105/14, *Taricco and Others* [GC]; judgment of 5 December 2017, case C-42/17, *M.A.S. and M.B.* [GC]; R. Di Marco, *The "Path Towards European Integration" of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17*, in *European Papers*, 2018, Vol. 3, No. 2, www.europeanpapers.eu, p. 843 *et seq*.

[15] J. Hoevenaars, J. Krommendijk, *Black Box on the Kirchberg: The Bewildering Experience of National Court Judges and Lawyers with the CJEU*, in *European Law Review*, 2021 (forthcoming).

[16] Lord Mance, *The Interface Between National and European Law*, Second lecture in honour of Sir Jeremy Lever QC, 1 February 2013, available at www.supremecourt.uk; M. García, *Cautious Openness: The Spanish*

tion remains whether the aforementioned high profile cases are illustrative of a significant problem in the functioning of the preliminary ruling procedure, or whether they are exceptions that are not surprising, because they all deal with highly salient and politically controversial issues. One can also wonder whether the national courts' appraisal of their interaction with the Court of Justice and resulting Court of Justice judgments also affects their willingness to refer. This was suggested by the President of the Danish Supreme Court: "If the interpretation of the European Court of Justice is taking national courts by surprise, one may fear a growing unwillingness of national courts and parties to a legal conflict to present matters before the Court of Justice".[17] A persistent failure of national courts to refer and their adoption of erroneous interpretations of EU law could have detrimental effects for the development and uniformity of EU law. In addition, from the perspective of judicial protection, it could also mean that breaches of EU law are not tackled, and the rights of natural and legal persons are not protected sufficiently. At the same time, as the title of this Special Section also suggests, it is not only the Court of Justice that is to be blamed. "It takes two to tango" implies that there is also a responsibility for national courts to refer when they need to and to compose a well-reasoned order for reference that also enables the Court of Justice to address the question in a satisfactory way. Several problematic cases, such as the first *Taricco* judgment in fact stem from a poorly drafted request for a preliminary ruling.[18] In sum, it is crucial to know how the procedure functions in practice and whether there is indeed (considerable) dissatisfaction among national courts.

IV. Contributing to the academic debate

Lastly, we know surprisingly little about why specific courts and individual judges decide to refer, or not. Until a few years ago, there were primarily quantitative studies aiming to explain why the number of references diverges considerably among the EU Member States.[19] Such studies focused on aggregate-level factors, such as the level of GDP or population size. They also emphasised politico-strategic reasons for courts (not) to refer.[20] Yet, still little is known of the motives of individual judges and the considerations that play a role in the

Constitutional Court's Approach to EU Law in Recent National Case Law, in *European Law Blog*, 7 June 2017, europeanlawblog.eu.

[17] U. Neergaard, K.E. Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case*, in *Yearbook of European Law*, 2017, p. 312.

[18] M. Bonelli, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union*, in *Maastricht Journal of European and Comparative Law*, 2018, p. 368.

[19] E.g. M. Wind, D.S. Martinsen, G.P. Rotger, *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, in *European Union Politics*, 2009, p. 63 *et seq*.

[20] E.g. J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1994, p. 520; K.J. Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A-M. Slaughter, A.S. Sweet, J.H.H. Weiler (eds), *The European Courts and National Courts*, Oxford: Hart, 1998, p. 225 *et seq*.

decision making in concrete cases. This question was taken up more recently by scholars, several of whom are also involved in this Special Section.[21] We know even less about what national courts "think" of the resulting Court of Justice judgments and whether they implement those judgments fully.[22] There have been some studies addressing implementation, but such studies tell us little about the national court's true appraisal of their interaction with the Court of Justice. As was mentioned in section III, it is crucial to know the level of satisfaction of national court judges from the perspective of the effectiveness of EU law and the proper functioning of the preliminary ruling procedure.

V. Overview of the Special Section

In the light of these three challenges and questions, a workshop was organised on 13-14 June 2019 at the Radboud University Nijmegen, the Netherlands. This workshop was part of the research project "It takes two to tango. The preliminary reference dance between the Court of Justice of the European Union and national courts" (2017-2021) funded by a VENI grant by the Netherlands Organisation for Scientific Research (NWO). The following research questions were addressed during this workshop: Firstly, why and how do national courts use the preliminary ruling procedure and engage with the Court of Justice? More specifically, what are judges' (individual) motives to refer or not to refer? Secondly, how has the Court of Justice dealt with the reference and to what extent has the Court of Justice truly listened to the national court, engaging in a genuine dialogue? Thirdly, how are the requested Court of Justice rulings received and implemented by national courts? To what extent is there a feedback relationship between the national judges' perceptions of their interaction with the Court of Justice and the national court judges' willingness to refer cases in future?

Most of the contributions to this Special Section take a legal-empirical or social scientific approach, combining the study of law with interviews, questionnaires or statistical analysis. Some contributions compare several EU Member States, others offer an in-depth single country study or focus on the interaction in one legal area. The variety in

[21] E.g. without being exhaustive: U. Jaremba, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure: in Search of a Mid-Range Theory*, in B. De Witte, J.A. Mayoral, U. Jaremba, M. Wind, K. Podstawa (eds), *National Courts and EU Law. New Issues, Theories and Methods*, Cheltenham: Elgar, 2016, p. 49 *et seq.*; J. Mayoral, *In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe*, in *Journal of Common Market Studies*, 2017, p. 551 *et seq.*; T. Pavone, *Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance*, in *Journal of Law and Courts*, 2018, p. 303 *et seq.*; A. Dyevre, M. Glavina, A. Atanasova, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2019, p. 912 *et seq.*; R. van Gestel, J. de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration Between the ECJ and Supreme Administrative Courts*, Cambridge: Cambridge University Press, 2019; K. Leijon, *National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?*, in *West European Politics*, 2020, p. 1 *et seq.*

[22] A recent exception is L. Squintani, D. Annink, *Judicial Cooperation in Environmental Matters: Mapping National Courts' Behaviour in Follow-Up Cases*, in *Journal for European Environmental and Planning Law*, 2018, p. 147 *et seq*.

methodologies and approaches offers new and unique insights into the functioning of the most important procedure in EU law.

V.1. Factors and motives to refer

The Special Section starts with five *Articles* that are primarily focused on the first question about factors and motives to refer. These *Articles* are an illustration of the recent acknowledgement in the literature that differences within the Member States are as important, or possibly even more important, than differences among the Member States. In addition, they point to the importance of EU law knowledge and specialisation among judges and lawyers, as well as a certain institutional culture or consciousness. By highlighting these factors, these contributions move beyond aggregate state-level factors and politico-strategic reasons that have dominated the literature to date. They show that the dynamic beyond the judicial dialogue is more complex and nuanced than the earlier literature suggests.

Geursen focuses on an issue that received almost no attention until now: courts in Overseas Countries and Territories (OCT). He makes the points that they are courts in the sense of Art. 267 TFEU and thus competent to refer. Only two French courts, from all the OCT courts, have made references so far. On the basis of an online questionnaire and interviews with Dutch OCT judges, Geursen attributes their non-engagement to the unfamiliarity of the judges with the possibility to refer. Once well informed, judges are in principle not unwilling to request a preliminary ruling. This conclusion has relevance going beyond the particular and rather exceptional OCT context. It shows that awareness and knowledge about EU law (procedures) are important factors and that judges are also guided by certain path-dependent practices and a "this is just the way it goes" logic. Krommendijk likewise concludes that an important reason for the exponential growth in Irish references stems from the arrival of new judges with more knowledge about EU law and a more positive attitude towards referring. Increased knowledge among lawyers is another factor, leading to ever-growing litigation based on EU law. Dublin has become a true "hub" for EU law with specialised Euro-lawyers and major law firms. It is not surprising that such a culture has been absent in the often distant OCT territories.

Hoevenaars' *Article* is focused on lawyering in Eurolaw and also addresses knowledge as an important factor. He points to a lacuna in practical knowledge among practitioners when it comes to applying EU law in a meaningful way. In most instances, a reference to the Court of Justice comes unexpectedly for the lawyers involved in the Dutch migration and social security cases studied. EU law and the procedures before the Court of Justice are unknown territory for lawyers. At the same time, he points to structural barriers for disadvantaged persons to access the Court of Justice (indirectly). Such access is only possible for organisations and "strategy entrepreneurs" with the necessary credentials, financial means and expertise.

Glavina engages with the debate addressing cross-court variations in referral rates. She shows that the courts' or judge's role and position in the judicial hierarchy determines

their propensity to refer. Building on the team model of adjudication, she concludes that second instance courts are more likely to refer because of their law-finding specialisation and a more beneficial workload to resources ratio, whereas first instance courts tend to be fact finders. This finding is not surprising from the perspective of Art. 267 TFEU, since this provision only enables questions on points of law.

Krommendijk focuses, like Glavina, not so much on differences among the EU Member States, but on variances within a Member State over time. His *Article* explains – on the basis of a legal analysis and interviews with judges – why only 44 cases were referred by Irish courts in the first 30 years of membership (1973-2003), while 45 references were made in the six years between 2013-2018. In addition to the already mentioned knowledge factor, he attributes this growth to legal formalist explanations. That is to say, he recognises a stricter application of *CILFIT* by the Irish Supreme Court than before. He also finds that the Court of Appeal and the High Court have adopted a rather strict interpretation of *CILFIT*, even though they are not obliged to refer. These courts have not acted as reluctant fact finders, but they have adopted a "better sooner than later" logic.

Jaremba touches upon the peculiar case of judicial empowerment and self-defense in Poland in the context of the rule of law backsliding. She attributes the recent references about the principle of judicial independence to a desire among judges to protect their constitutional position in the national legal framework. Even though she notes that this judicial activism has primarily politico-strategic elements, she – just like the previous contributors – also leaves room for other explanations for judicial behaviour. Her conclusion is that the story of judicial dialogue is very complex, continuously evolving and that motives to refer are context related.

V.2. Quality of Court of Justice answers and dialogue

The second set of *Articles* focuses on the quality of the answers of the Court of Justice and the dialogical nature of the interaction between national courts and the Court of Justice. One *Article* (Leijon) shows that national courts have an important responsibility to take part in this dialogue by being active interlocutors. The two other *Articles* focus on the responsibility of the Court of Justice and critically expose the way the Court of Justice has handled particular references or its approach more in general.

Leijon focuses on an often-neglected aspect of the interaction between national courts and the Court of Justice, namely the occurrence and content of national court's opinions in their order for references. On the basis of interviews, Leijon examines what motivated Swedish judges to express opinions or refrain from doing so. She argues that most judges, and especially high court judges, are hesitant to voice opinions on how cases should be resolved, because they believe that such opinions undermine their impartiality and run counter to the division of competences between national courts and the Court of Justice. She laments that Swedish courts are not active co-producers of EU legal norms and points to the consequent danger that the Court of Justice is more likely to overrule

national laws and policies. She argues that, if courts from only a few Member States are proactive and introduce their constitutional traditions before the Court while other national courts remain silent, this undermines a truly pluralistic judicial dialogue.

Wallerman Ghavanini looks at the subsequent step, namely how the Court of Justice handles the referring court's view. She uses a legal empirical method to study how the Court of Justice reasons and drafts judgments that diverge from the referring court's view, as expressed in the order for reference. She points to two strategies that the Court of Justice uses when it disagrees with the referring court: conflict avoidance and appeal to (illegitimate) authority. Wallerman Ghavanini puts her findings in the light of the notion of "trust" and notes that these strategies are not helpful in contributing to judicial cooperation and the legitimacy of Court of Justice judgments.

Eliantonio and Favilli describe a tragedy of two sets of preliminary asylum law references from Italy and the Netherlands resulting in one and half answers. They point to several "procedural x factors" preventing a smooth interaction between national courts and the Court of Justice, such as the partial answering of the Italian question because of the use of the urgent procedure and reasoned order and the failure to take into account the specificities of Italian law.

V.3. Implementation of Court of Justice judgments

The last part of the Special Section is focused on the implementation of the Court of Justice judgments by the referring court, as well as the notion of feedback loops and trust. While this part "only" contains one contribution, several other *Articles* presented earlier (Eliantonio and Favilli and Krommendijk) also touch upon follow-up.

Squintani and Kalisvaart show that Italian, Belgian, Dutch, and UK courts have cooperated fully with the Court of Justice in terms of implementing the requested Court of Justice rulings in the field of environmental law. These findings contrast with Sweden, which has a strong national environmental law tradition distinct from EU mainstream environmental law. In addition, there is a specialised Swedish court dealing with environmental matters with technical judges that are not lawyers but ecologists. This divergence shows that differences in judicial cultures could also affect the follow-up. This finding implies that specialisation is not only a factor favouring (positive) engagement with EU law, as the first part showed, but it can also be a negative factor. The more specialised a court is, the more able it is to spot deficiencies in its interaction with a supranational court that allegedly lack such technical and specialised knowledge.

Krommendijk found that Irish courts have almost fully implemented the requested Court of Justice judgments, even when the judgment was problematic because the Court of Justice wrongly reformulated the question or misunderstood the facts or national law. Krommendijk points to a generally positive and satisfied attitude among Irish judges, which has even encouraged Irish courts to refer more and more. The latter suggests that there are positive feedback loops. Eliantonio and Favilli show in their *Article* that the Court

of Justice asylum law judgment included vague standards and lacked any form of operational guidance. As a result, national courts ignored the judgment and adopted divergent interpretations. One can wonder how much importance should be given to this single case. The Authors rightly point out that often more attention is paid to dysfunctionalities than on the majority of cases in which the mechanism functions correctly. It is nevertheless important to consider the problematic cases in order to mitigate risks and improve the system. I would add that it is not unreasonable that such individual cases can have a lasting impact on judges and have some effect on the propensity of judges to refer.

In sum, the third part of this Special Section shows, just as the first, the enormous variety of outcomes and factors. While some contributions are positive about the implementation of Court of Justice judgments, other contributions are more critical. This shows that there is responsibility for both national courts and the Court of Justice to ensure that the interaction runs smoothly: it takes two to tango.