Articles

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

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No Preliminary References from Dutch Overseas Judges: Is It Tambu or Tumba Dancing with the Court of Justice?

Wessel Geursen*

Table of Contents: I. Introduction. – II. Study design and research method. – III. Dutch Caribbean case law and legislation concerning EU law. – IV. OCT judge opinions on preliminary reference. – V. Conclusion.

Abstract: Under EU law, parts of several Member States are characterised as Overseas Countries and Territories (OCT); the metropolitan parts of those Member States are situated in Europe. Courts established in OCT areas are considered Member State courts as described in Art. 267 TFEU. Because of this status, they may ask preliminary questions to the Court of Justice. Only two French OCT courts have ever made a preliminary reference to the Court of Justice, while Danish and Dutch OCT judges have never referred their cases to the Court; nor did judges from the British OCT before Brexit. The question I seek to answer in this *Article* is whether judges of the OCT courts are unaware or unwilling to refer "their" cases to the Court. To arrive at an answer, the opinions from judges – retired and currently on the bench alike – from the Dutch OCT on both EU law and the EU preliminary references procedure were collected through an online questionnaire and interviews. The results demonstrate that judges are mainly unaware, but – once well informed – willing to refer to the Court. This conclusion fits within researches regarding other national judges. It also indicates that there are several ways to improve the awareness of the Dutch OCT judiciary from when *i*) EU law applies, and *ii*) the preliminary reference can be used; both in theory and also in practice.

* Affiliated PhD Fellow, Vrije Universiteit, Amsterdam and Senior Legal Adviser, De Brauw Blackstone Westbroek, wesselgeursen@gmail.com. An earlier version of this *Article* was presented at the conference "It takes two to tango. The preliminary reference dance between the Court of Justice of the European Union and national courts" in June 2019. The Author would like to thank participants at this conference, the two anonymous peer reviewers for their useful comments, the judges who participated in the research, and in particular Eunice Saleh, Jan de Boer, Gerard Lewin, Pieter ter Berg, Jasper Krommendijk and Leticia Vasquez.

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I. INTRODUCTION

Overseas Countries and Territories (OCTs) are to be found in three Member States: Denmark,[1] France and the Netherlands (which also have a metropolitan part located in continental Europe). The United Kingdom (UK) also had OCT before Brexit.[2] Courts established in OCT areas are considered Member State courts as described in Art. 267 TFEU. They may, therefore, ask preliminary questions to the Court of Justice. And the Court necessarily has jurisdiction to issue a preliminary ruling in return, as it affirmed in the *Kaefer and Procacci* case.[3] Only two judges on the French OCT have made a preliminary reference to the Court.[4] No preliminary reference[5] has been made by courts of Greenland and the Dutch OCT; nor one by courts on the British OCT before Brexit.[6]

[1] The Danish OCT is Greenland. After Danish accession in 1972 to 1985, Greenland was not an OCT yet, and was considered from an EU law point of view "just" a standard territory. As of 1985, Greenland became an OCT, for which special arrangements have been made (Treaty of Greenland, 1984). The Danish Faroe Island are not an OCT. EU law does not apply to those islands (Art. 355, para. 5, let. a), TFEU), although a Free Trade Agreement does apply.

[2] Art. 3, para. 1, let. e), of the Agreement on the withdrawal of the UK from the EU stipulates that it also applies to the OCT.

[3] Court of Justice, judgment of 12 December 1990, joined cases C-100/89 and C-101/89, *Kaefer and Procacci v. French State*, paras 6-10. See further: M. BROBERG, *Access to the European Court of Justice by Courts in Overseas Countries and Territories*, in D. KOCHENOV (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, Alphen aan den Rijn: Kluwer Law International, 2011, p. 137 *et seq*.

[4] *Kaefer and Procacci*, cit., and Court of Justice, judgment of 12 February 1992, case C-260/90, *Leplat v. Territoire de la Polynésie française*.

[5] To put this into perspective: according to Davies "[m]ost cases involving EU law are decided in national courtrooms without a preliminary reference"; G.T. DAVIES, *Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 76 *et seq*. Furthermore, constitutional courts from large EU Member States have only recently started to refer preliminary questions to the Court of Justice. The Spanish Tribunal Constitucional in 2011, the French Conseil Constitutionnel, the Italian Corte Costituzionale in 2013 and the German Bundesverfassungsgericht in 2014; see A. PÉREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, p. 308 *et seq*.; O. POLLICINO, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, in *European Constitutional Law Review*, 2014, p. 143 *et seq*.; M. WENDEL, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, in *European Constitutional Law Review*, 2014, p. 263 *et seq*.

[6] A text search on 21 November 2018 in the online database of the CJEU (curia.europa.eu) with the term Greenland did not show any preliminary references from Greenland's judges as of 1985, when Greenland became an OCT. In a case dating before 1985, concerning illegal shrimp fishery by a British trawler in Greenland's territorial waters, the lawyer representing Jack Noble Kerr, the prosecuted captain of the trawler, explicitly asked the Grønlands Landsret, the provincial court in Greenland, to refer preliminary questions to the Court, but it did not. It was the Danish Østre Landsret, Eastern Division of the High Court, on appeal which referred the case to the Court; Court of Justice, judgment of 30 November 1982,

At first sight, one might consider that this is the result of only a small portion of EU law applying to the OCT: "only" the association regime of Part Four of the TFEU,[7] the more detailed rules of the Overseas Association Decision[8] and some general rules such as Art. 267 TFEU apply to the OCT *ratione loci*. Since most residents of the OCTs are citizens of the Member States to which the OCTs belong, EU citizenship rules also apply to EU citizens residing in the OCT *ratione personae*.[9] However, at second sight, a quite large and varied body of primary and secondary EU law provisions apply *ratione loci* on the OCT in various fields of law,[10] because regional and national legislatures voluntarily render EU law to apply through regional and domestic law.[11] For example, the various legislatures can voluntarily

case 287/81, *Kerr*. A text search on 21 November 2018 in the online database of the CJEU (curia.europa.eu) with the names of all Dutch OCTs did not show any preliminary references from judges from the Dutch OCT. Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger* [GC], concerning two Arubans wanting to participate in the EP-elections but who were disallowed, was a preliminary reference from the Dutch Council of State in the Hague. A text search on 21 November 2018 in the online database of the CJEU (curia.europa.eu) with the names of all British OCTs did not show any preliminary references from judges from the British OCT. In this light it must be noted that judges from some other special British territories do have made preliminary references to the Court of Justice, such as from the Channel Island of Jersey and the Isle of Man, but those islands are not OCTs in the meaning of Art. 355, para. 2, TFEU but territories *sui generis* mentioned in Art. 355, para. 5, let. c), TFEU; Court of Justice: judgment of 16 July 1998, case C-171/96, *Pereira Roque v. His Excellency the Lieutenant Governor of Jersey*; case C-199/97, *Rios*; although this case was removed from the register on 7 October 1998, a Jersey court did refer the case to the Court; Court of Justice, judgment of 8 November 2005, case C-293/02, *Jersey Produce Marketing Organisation*; and the Isle of Man: Court of Justice, judgment of 3 July 1991, case C-355/89, *Department of Health and Social Security v. Barr and Montrose Holdings*. No reference has been made by a judge from Gibraltar which is a territory for whose external relations the UK is responsible in the meaning of Art. 355, para. 3, TFEU; see further: M.A. ACOSTA SÁNCHEZ, *Aplicación del Derecho Europeo en Gibraltar: la Libre Prestación de Servicios y la Consideración de una Única Entidad Estatal con Reino Unido*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 309 *et seq*. Gibraltar was, however, involved in some actions for annulment, such as Court of Justice: judgment of 29 June 1993, case C-298/89, *Gibraltar v. Council*; judgment of 15 November 2011, joined cases C-106/09 P and C-107/09 P, *Commission and Spain v. Government of Gibraltar and United Kingdom* [GC].

[7] Art. 198 TFEU *et seq*.

[8] The Overseas Association Decision is replaced periodically. The eighth Overseas Association Decision has been in force since 1 January 2014; Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union.

[9] *Eman and Sevinger* [GC], cit.

[10] Such as intellectual property law, labour law, competition law, direct and indirect tax law, environmental law and international private law. For a more detailed overview, see section III below.

[11] This is common to the OCT and to Member States, whose legislatures voluntarily consider EU law to apply to internal situations as well, whereas the specific EU norm (either from the Treaties, regulations, or directives) only applies to cross-border situations; see Court of Justice, judgment of 14 March 2013, case C-32/11, *Allianz Hungária Biztosító and Others*, para. 20 and cited case law there.

implement EU directives into overseas legislation, or enact legislation which concurs with EU law definitions and norms,[12] such as enacting competition law in Curacao.

With respect to the Dutch OCT, the constitutional principle of legislative and judicial concordance conserves unity of law within the Kingdom of the Netherlands. This leads to the convergence between significant portions of the Dutch OCT legislation with Dutch continental European legislation. Since the law of the Dutch continental European part of the Kingdom of the Netherlands already "contains" a lot of EU law, it applies to the Dutch OCT by concordance, as demonstrated by the Maintenance Regulation in private international law,[13] and custom duties[14] in tax law. Dutch OCT judges, therefore, apply and interpret the OCT association regime and primary and secondary EU law; the latter of which comes in through the "back door" of voluntary concordance/implementation.

The Court also assumes jurisdiction for preliminary rulings in cases where EU law provisions have been rendered applicable by domestic law.[15] On such occasions, the need to uniformly interpret EU law is also eminent.

Dutch OCT judges must look to EU law when deciding on cases, which means that they have to interpret and apply EU law.[16] However, they have never made a preliminary reference to the Court. There is no judicial dialogue between the OCT judges and

[12] Either by referring to EU law in legislation text, such as Art. 44a General Tax Ordinance of Aruba which refers to the Savings Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage; or by stating in the *travaux préparatoires* of the law, that they seek to concur with EU law, such as the explanatory *memorandum* to the National Ordinance on Competition on Curacao.

[13] To conserve unity within the Kingdom of the Netherlands, the judge ruled that the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) and its interpretation by the Dutch Supreme Court led to the rules applying to Curacao, even though the regulation did not apply to the OCT territory. Gerecht in eerste aanleg van Curacao, judgment of 8 October 2015, para. 3.4. In another case, the Dutch Supreme Court applied the same regulation to the inhabitants of Curacao; Hoge Raad, judgment of 2 May 2014, case 13/04255, *[women] v. [man]*.

[14] The relevant EU law on custom duties did not directly apply to the former Netherlands Antilles. However, the regional legislature wanted to align its decision with EU law as much as possible, paras 7.1.1 and 6.2.1; Raad van Beroep voor Belastingzaken, judgment of 15 September 1997, case 1996-177, *[taxpayer] v. tax inspector*.

[15] The Court of Justice has often ruled on this type of jurisdiction, but not in cases concerning an OCT. Most cases have concerned an internal situation where EU law was declared applicable by national law; *Allianz Hungária*, cit., para. 20 and the case law cited there.

[16] Or perhaps, it is not up to national judges to interpret EU law, but up to the Court of Justice, as Coutinho put it: "Art. 267 TFEU establishes a procedural mechanism based on a 'mandatory' division of tasks by which the Court of Justice interpret and national courts apply EU law" (F.P. COUTINHO, *Protecting the Jewel in the Crown: The Ognyanov Case and the Preliminary Reference Procedure*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 393 *et seq*.). Davies critiques this monopolistic interpretation and argues for co-interpretation: G.T. DAVIES, *Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation*, in *European Law Journal*, 2018, p. 358 *et seq*.

the Court, whereas this dialogue is considered a keystone of the EU law system.[17] Or as Barbou des Places, Cimiotta, and Santos Vara put it: the Court is "obsessed by the preliminary ruling procedure, as it is best suited to ensure a judicial dialogue that can secure interpretation of EU law consistent with the Member States' common values".[18]

My research centres on the following question: *Do Dutch OCT judges appreciate preliminary references to the Court of Justice?*

And more specifically, are those judges unaware or aware of the possibility to refer their cases to the Court or are they unwilling to do so?[19] And is the Court considered by Dutch OCT judges as being helpful?

Krommendijk compares the preliminary reference procedure between national and EU judges with a couple dancing the tango, since it takes two.[20] With regard to Dutch OCT judges, I take this dance metaphor and contrast two Caribbean dances. Do they dance the Tumba, which was danced in the Caribbean in "mutual help societies"?[21] Or, since they have not referred a preliminary question to the Court of Justice based on distrust/euroscepticism,[22] do they dance the Tambu which on "Curacao is a present day case of oppression/victory over the dominant Eurocentric culture"?[23]

This *Article* presents my findings as follows. First, I explain the design of the study and the research method used, providing more background information on the set up of the online questionnaire, the respondents and their place in the judiciary system of the Dutch OCT. Third, I set out Dutch Caribbean case law where EU law and legislation

[17] Although Di Marco demonstrates that dialoguing through the preliminary reference procedure can also lead to tensions and can be far from constructive; 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*.

[18] S. BARBOU DES PLACES, E. CIMIOTTA, J. SANTOS VARA, *Achmea Between the Orthodoxy of the Court of Justice and Its Multi-faceted Implications: An Introduction*, in *European Papers*, 2019, Vol. 4, No 1, www.europeanpapers.eu, p. 7 *et seq*.

[19] Most judges are not judges of last resort and are therefore not required to refer a preliminary question to the Court if they are in doubt of how EU law should be interpreted. See a description of the judiciary system on the Dutch OCT in section II.

[20] J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and Dutch Courts in the Field of Migration*, in *European Journal of Legal Studies*, 2018, p. 101 *et seq.*

[21] J. LAMMOGLIA, *Dances at the Center of Social Discourse: from Europe Through the Caribbean to Latin America*, in *Pensamiento Humanista*, 2010, p. 38.

[22] Wallerman identifies three archetypes of judges and to which extent societal euro scepticism might influence those judges; A. WALLERMAN, *Who is the National Judge? A Typology of Judicial Attitudes and Behaviours Regarding Preliminary References*, in C. RAUCHEGGER, A. WALLERMAN (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law*, Oxford: Hart, 2019, p. 155 *et seq*. I have not researched whether the respondents from the Dutch OCT fit in which of those archetypes. That would have meant to ask the judges for their motives to refer or not. Epstein and King indicate that [a]sking someone to identify his or her motive is one of the worst methods of measuring motives; L. EPSTEIN, G. KING, *The Rules of Inference*, in *University of Chicago Law Review*, 2002, p. 93.

[23] J. LAMMOGLIA, *Dances at the Center of Social Discourse*, cit., p. 31.

has been applied and incorporated. In the fourth section, I present the opinions of OCT judges about the preliminary reference procedure and relate that to similar studies on the reasons why national judges refer or not.[24] Finally, I conclude that the Dutch OCT judges are not unwilling to refer preliminary questions and were often unaware.

II. Study design and research method

In order to answer the research question, I gathered the opinions from retired and practicing Dutch OCT judges about EU law, and on both aspects of the EU preliminary references procedure (referring questions to and receiving answers from the Court). The study aimed to collect qualitative results based on the personal experiences and opinions of participating judges. It did not aim to achieve a statistical and quantitative result. To obtain this qualitative result, the Dutch Caribbean judges were asked questions about their personal experiences and opinions, and not about legal qualifications or interpretation.

Given the distance between the European part of the Kingdom of the Netherlands – where the researchers reside – and the six Caribbean islands where the respondents reside, the most effective way, in terms of cost and efficiency, to execute this research was by issuing an online questionnaire using the Google form platform, and not by live interviews with judges. The questionnaire was anonymous, in Dutch, and took approximately 15 minutes to answer. The questionnaire consisted of 22 questions, including multiple choice questions (sometimes with the possibility of multiple answers), linear numeric scales and open questions.

The questionnaire consisted of three parts. The first part of the questionnaire focused on judges' first thoughts/feelings about EU law and the preliminary reference procedure. No background information was given on whether EU law applied to the OCT. (Some judges believe that EU law does not apply to the OCT or that they cannot refer preliminary questions to the Court, for example).

The second part of the document did not contain any questions. Instead, it included information about how EU law applies to the OCT, both under EU law as regional/domestic law, as well as information about how OCT judges are authorised to make preliminary references to the Court. To support this, I refer to the French OCT case *Kaefer and Procacci* and to cases on the Dutch OCT where EU law applies by prima-

[24] Such as T. Nowak, F. Amtenbrink, M.L.M. Hertogh, M.H. Wissink, *National judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands*, The Hague: Eleven International, 2011; U. Jaremba, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes*, Utrecht: Ponsen & Looijen, 2012; J. Krommendijk, *Why Do Lower Courts Refer in the Absence of a Legal Obligation? Irish Eagerness and Dutch Disinclination*, in *Maastricht Journal of European and Comparative Law*, 2019, p. 770 *et seq.*

ry/secondary EU law and by voluntary convergence/implementation through regional/domestic law in which the Court is also competent to rule preliminary rulings.[25]

After providing clear information about the EU law's stance on OCTs, the third part of the document contained further questions to the judges. The judges were explicitly requested not to adjust the answers to the questions, which were asked in the first part, since the information in the second part could influence the answers. Unfortunately, it was not possible in Google forms to automatically finalise the answers to the questions in the first part once a respondent had read the information in second part. Nevertheless, the answers demonstrate that they probably did not (for example, in the first part, some judges answered that they felt that OCT judges were not empowered to refer questions to the Court).

In the second part of the document providing clear background information for judges, we thoroughly examined both existing case law of Dutch OCT courts in various legal sectors where EU law is interpreted an applied and EU law as applying through voluntary implementation in domestic/regional law.

The study's results can be found in section III of this *Article*: *OCT case law and legislation concerning EU law*, below.

With regard to the respondents, the following background is relevant. At the end of 2018, nearly 70 judges were appointed to one of five Dutch Caribbean courts. Approximately half were employed full-time, while the other half were deputy judges and often full-time judges in the European constitutional part of the Kingdom of the Netherlands.[26] The organisational bureau of the Joint Court of Justice sent a request (and reminder) to participate in the online questionnaire to all Dutch Caribbean judges (those presiding over Courts of First Instance, and those sitting on the Joint Court of Justice). Invitations to participate were also sent to judges with a LinkedIn profile, and to former Caribbean judges who were informally grouped through an e-mail network. Twelve judges completed the questionnaire between February and April 2019. Half of them were judges at courts of first instances and the other half consisted of judges at the Joint Court of Justice. Half of them were employed full-time, while the other half were substitute judges. Two-thirds of respondents had been judges in the *Land* of the Netherlands (one of the four *Lands* which together constitute the Kingdom of the Netherlands). In that capacity, two judges had at one point or another referred preliminary questions to the Court. Two judges responded to additional questions; one during a live interview in Amsterdam, and the other by e-mail.

In order to understand the position of the Dutch OCTs and their judges, some relevant background is described in this section. Currently, the Dutch OCT consist of six, is-

[25] See *Allianz Hungária*, cit., para. 20 and the case law cited there.

[26] This is based on the online publicly available register of ancillary position of the judges per January 2019.

land territories: Aruba, Bonaire, Curacao[27] in the South of the Caribbean sea near the Venezuelan shore (windward islands) and Saba, Saint Eustatius, Saint Martin[28] in the north-eastern part of the Caribbean Sea (leeward islands); all are geographically part of the Antilles island group. Under national constitutional law, the Kingdom of the Netherlands presently consists of four *Lands*:[29] Aruba, Curacao, Saint Martin and the Netherlands. Bonaire, Sint Eustatius and Saba (together known as the BES islands), constitutionally are part of the *Land* Netherlands.

In terms of the judiciary and its relationship with administrative, civil and criminal law procedure, the three Caribbean *Lands* each have a Court in First Instance. In the BES islands, there is one joint Court in First Instance.[30] An appeal can be brought before the Joint Court of Justice of Aruba, Curacao, Saint Martin and of Bonaire, Sint Eustatius and Saba.[31] This is the court of last resort for administrative proceedings, which is important to remember in terms of preliminary references under Art. 267 TFEU since it is mandatory[32] for a court of last instance to make a reference when doubting the interpretation

[27] In close proximity to the islands of Bonaire and Curacao, lie two islets named little Bonaire and little Curacao. These belong to the same regional public body as their "bigger siblings".

[28] Although the island of Saint Martin is "shared" among France and the Netherlands, the French part of Saint Martin is not an OCT, but an outermost region under Art. 355, para. 1, TFEU. EU law applies to outermost regions, although some temporary exceptions are possible on the basis of Art. 349 TFEU; see for a more detailed description: P. WOLFCARIUS, *Les effets de l'octroi du statut de région ultrapériphérique: l'exemple de Mayotte*, in *L'Observateur de Bruxelles*, July 2014, p. 14 *et seq*.

[29] A *Land* of the Kingdom is not a state under international public law, but a regional autonomous body, just like a *Bundesland* in Bundes Republic Germany, or a *state* of the United States of America. The constitutional structure of the Kingdom of the Netherlands contained – and sill contains – elements of a federal, a unitary and, surprising to some, a confederal state. Because of the various characteristics, it was therefore often characterised as being *sui generis*; H.G. HOOGERS, G. KARAPETIAN, *Het Koninkrijk Tegen het Licht*, Groningen: Rijksuniversiteit Groningen, 2019, p. 7. Santos do Nascimento agrees to the view that it is a federal nor a unitary state; he rejects however the *sui generis* character and characterises it as a colonial state; R.R. SANTOS DO NASCIMENTO, *Het Koninkrijk Ontsluierd*, Apeldoorn-Antwerpen: Maklu, 2016, p. 282. According to Besselink the relation between the four *Lands* within the Kingdom "is rather characterized as federal in nature", whereas the *Land* of the Netherlands uses a "model of decentralization within a unitary state"; L.F.M. BESSELINK, *The Kingdom of the Netherlands*, in L.F.M. BESSELINK, P. BOVEND'EERT, H. BROEKSTEEG, R. DE LANGE, W. VOERMANS (eds), *Constitutional Law of the EU Member States*, Deventer: Kluwer, 2014, p. 1230.

[30] Art. 1, let. f), of the Rijkswet Gemeenschappelijk Hof van Justitie.

[31] *Ibid.*, Art. 17, para. 1. This court was formally known as the Joint Court of Justice of the Netherlands Antilles and Aruba and has had many name changes. It exists 150 years already.

[32] According to the Court that EU law "is binding on all their authorities, including, for matters within their jurisdiction, the courts"; Court of Justice, judgment of 4 October 2018, case C-416/17, *Commission v. France*, para. 106, concerning an infringement procedure *inter alia* because the Conseil d'État had not made a preliminary reference contrary to this obligation. The attitude of the French highest administrative court remains, however, ambivalent according to Clément-Wilz when she analyses les obligations pesant sur les juges internes en matière de renvoi préjudiciel, in L. CLÉMENT-WILZ, *L'office du juge interne pour moduler les effets de l'annulation d'un acte contraire au droit de l'Union. Réflexions sur l'arrêt Association France Nature Environnement du Conseil d'Etat français*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 259 *et seq*., p. 265.

of EU law.[33] With regard to civil, criminal and tax law, appeals on points of law (cassation) can be lodged with the Supreme Court of the Netherlands, which is located in The Hague. As of 1 March 2017, the Joint Court of Justice can pose preliminary questions to the Dutch Supreme Court as well in civil and tax law cases.[34] Until now, two civil law case have been referred to the Dutch Supreme Court by the Joint Court of Justice.[35]

III. Dutch Caribbean case law and legislation concerning EU law

This overview was presented to the respondents as the second part of the online questionnaire.

The three Caribbean *Lands* of the Kingdom are not Member States of the EU. That is also the case for the *Land* of the Netherlands, and other local bodies, such as provinces and municipalities. The Kingdom of the Netherlands is the EU Member State.[36] And the EU Treaties apply to the Member States (Art. 52 of the EU Treaty). That means that it cannot be said that EU law does not apply at all to the Caribbean part of the Kingdom of the Netherlands.[37] This is supported by the fact that judges on the OCT are judges of a Member State who can refer preliminary questions to the Court under Art. 267 TFEU as af-

[33] According to the Court "[t]hat obligation is in particular designed to prevent a body of national case law that is not in accordance with the rules of Community law from coming into existence in any Member State": Court of Justice, judgment of 4 June 2002, case C-99/00, *Lyckeskog*, para. 14 and the case law mentioned there.

[34] On the basis of Art 1, let. b) and x), of the Rijkswet rechtsmacht Hoge Raad voor Aruba, Curacao, Saint Martin en voor Bonaire, Sint Eustatius en Saba.

[35] Gemeenschappelijk Hof van Justitie, judgment of 12 May 2017, *[two individuals requesting Dutch nationality] v. Minister of Justice of Curacao and Others*, case GH 76493 – HAR 58/15, answered by Hoge Raad, judgment of 19 January 2018, case 17/02344; and Gemeenschappelijk Hof van Justitie, judgment of 11 June 2019, cases CUR2018H00415 and CUR2018H00417; one of the questions referred to the Dutch Supreme Court concerned the interpretation of EU citizenship by the Court in the *Tjebbes* case; Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes and Others* [GC]; see D. Kochenov, *The Tjebbes Fail*, in *European Papers*, 2019, Vol. 4, No 1, www.europeanpapers.eu, p. 319 *et seq*. The Supreme Court did not refer the case to the Court, but decided that the *Tjebbes* case was not relevant in this case, since the Dutch Caribbean case concerned obtaining Dutch nationality and not the loss of it as in the *Tjebbes* case: Hoge Raad, judgment of 20 December 2019, case 19/02852, *[two individuals requesting Dutch nationality] v. Minister of Justice of Curacao and Others*.

[36] Since the Kindgom is the only public body which can conclude treaties under international law; regional *Lands*, provinces, municipalities cannot; cf. J.M. Saleh, *Advies Inzake de Staatkundige Aspecten van het Kiesrecht van Inwoners van de Nederlandse Antillen en Aruba met de Nederlandse Nationaliteit voor Nederlandse Leden van het Europees Parlement*, EK 2009/10, 31 392, H, answer to question e.

[37] Several authors have done this, such as F.H. van der Burg, *Europees Gemeenschapsrecht in de Nederlandse Rechtsorde*, Deventer: Kluwer, 2003, p. 191 *et seq*.

firmed by the Court in the *Kaefer and Procacci* case.[38] According to Ziller "E[U] law applies to the entire territory of all Member States, but with a variable intensity".[39]

Nevertheless, the entire Caribbean part of the Kingdom has been characterised as Overseas Countries and Territories (OCT) under the EU Treaties (Art. 355, para. 2, TFEU). For OCTs, it is mainly the OCT Association Regime of Part Four of the TFEU (Art. 198 *et seq*.) and the OCT association decision[40] which apply. Dutch Caribbean judges have issued rulings supported by provisions from the OCT association decision.[41]

Most EU law is incorporated in Part Three of the TFEU. Those rules or primary EU law do not apply to the OCT on the basis of the EU Treaties. Neither secondary EU law which is based on Part Three applies to (such as internal market and environmental rules). Those rules may apply trough the "back door" of domestic legislation. For example, environmental directives are also based on Part Three and, as such, do not apply to the OCT. This was made clear in a dispute over sulphur dioxide emissions from the Isla refinery on Curacao, which was eventually limited to 80µg/m3 on the basis of Art. 8 of the European Convention on Human Rights instead of the – back then – applicable EU standard of 20µg/m3, since that standard did not apply to the OCT.[42]

Next to EU law being applicable in the OCT by virtue of EU law itself, there are three national mechanisms where EU law – other than the OCT association regime – applies to the Caribbean part of the Kingdom (where, for example, it is based on Part Three TFEU).

First, there is legal convergence by principle of concordance. Through the principle of concordance as enshrined in Art. 39 of the Charter of the Kingdom, "civil and commercial law, civil procedural law, criminal law, criminal procedural law, copyright [and] industrial property [...] are arranged as much as possible in a similar way" in the four *Lands* of the Kingdom.

For example, in the *Land* of the Netherlands, elements of copyright law are based on EU directives. Through the principle of concordance, this can have an impact on the Caribbean part of the Kingdom as well. Dutch Caribbean judges therefore can face situations where they have to interpret those EU Copyright Directives, while applying a re-

[38] *Kaefer and Procacci*, cit., paras 6-10.

[39] J. Ziller, *The European Union and the Territorial Scope of European Territories*, in *Victoria University of Wellington Law Review*, 2007, p. 51 *et seq.*

[40] See *supra*, footnote 8.

[41] Gerecht in Eerste Aanleg van Aruba, judgment of 5 February 2016, case 73890/2015, *X N.V. v. Inspecteur der Belastingen*; Gemeenschappelijk Hof van Justitie, judgment of 3 June 2016, case HLAR 74437/15, *[appellant] v. minister van Justitie*; Gerecht in Eerste Aanleg van Aruba, judgment of 31 October 2016, case 659/2016, *[appellanten] v. het hoofd van de Dienst Burgerlijke Stand en Bevolkingsregister*.

[42] Gemeenschappelijk Hof van Justitie: judgment of 30 October 2007, *Refineria ISLA (Curazao) S.A. v. Stichting Humanitaire Zorg Curacao*, *Stichting Schoon Milieu Op Curacao and others*; and judgment of 12 January 2010, joined cases KG 403/06-H 199/09 and H 200/09, *Stichting Humanitaire Zorg Curaçao and others v. Refineria Isla (Curazao) S.A.*

gional ordinance on copyright. Although it must be said that the principle of concordance is not absolute and does not always lead to concordance.[43]

The principle of concordance also plays a role in private international law. The definition of *Erfolgsort* in the private international law of Curacao is in line with the private international law of the Netherlands, where Art. 3 of the EEX Regulation applies.[44] The same was true for the EU Maintenance Regulation that does not apply to the Caribbean part of the Kingdom. Instead, it is meant to harmonise existing differences in the legal system between the different parts of the Kingdom where EU regulation was followed.[45]

With regard to a labour law case before one of the Dutch Caribbean courts, the question arose of how the transfer of undertaking should be defined. The Joint Court of Justice held that there was concordance between Aruban law and the law of the Netherlands, where the Transfers of Undertakings Directive was implemented. For the interpretation of the relevant provision the Dutch Caribbean court even referred to case law of the Court of Justice.[46]

Second, judicial convergence takes place by concordant interpretation. Caribbean judges also use EU law as a means of interpretation, even in cases where there is no concordance of laws.[47] That is especially true in administrative and tax cases which fall

[43] This situation arose when Diageo wanted to stop the parallel trade of its trademarked "Johnnie Walker" and "Black Label" whiskies by supermarkets in Curacao. Regional legislation enshrined the concept of worldwide exhaustion, so parallel trade could not be stopped. The EU directive implemented in the Netherlands only knew of EU-wide exhaustion. This difference was too large to overcome under the principle of concordance; therefore, the laws did not concord; Hoge Raad, judgment of 1 June 2007, case R05/169HR, *Diageo Brands BV v. Esperamos NV a.o.*

[44] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the EEX Regulation). The relevant provision regarding the *Erfolgsort* of the Curacao Code on Civil Procedures is similar to the equivalent provision of the Dutch Code on Civil Procedures which, in turn, is equivalent to Art. 3 of the EEX Regulation. The judge took the interpretation of the EEX Regulation as issued by the Court into account; Gerecht in eerste aanleg van Curacao, judgment of 30 October 2017, *First Curacao International Bank N.V. v. [89 British bank accountholders which were part of the Missing Trader Intra Community Fraud (MTICF)]*, para. 5.17.

[45] To conserve unity within the Kingdom of the Netherlands, the Curacao judge ruled that the Maintenance Regulation and its interpretation by the Dutch Supreme Court led to the applying of the rules on Curacao, even though the regulation did not apply to the OCT *ratione loci*; Gerecht in eerste aanleg van Curacao, judgment of 8 October 2015, case EJ 72800/2015, *[man] v. [woman]*, para. 3.4; and in a different case concerning the same regulation: Hoge Raad, judgment of 2 May 2014, case 13/04255, *[woman] v. [man]*.

[46] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Gemeenschappelijk Hof van Justitie, judgment of 22 May 2018, case EJ 2003/2016 – AUA2017H00173, *Federacion di Trahadornan di Aruba v. Exi-Gaming Executive Island Gaming Management N.V.*, para. 3.8.

[47] According to the Dutch Supreme Court, concordance through judicial interpretation logically complements legal concordance in conserving unity of law; Hoge Raad, judgment of 14 February 1997, *Zunoca Freezone Aruba NV v. het Land Aruba*.

outside the scope of Art. 39 of the Charter of the Kingdom, which limits legal concordance to specific areas of law. For example, even though there is no mandatory concordance between the Aruban national ordinance on sales taxes and the EU VAT Directive,[48] the Dutch Supreme Court agreed with the directive-compliant interpretation by the Joint Court of Justice.[49] In the absence of BES legislation on applicable law in the event of succession, the Court of First Instance BES looked to the EU Succession Regulation for guidance.[50] In a previous health insurance case concerning reimbursement of costs incurred in the US, the Court of First Instance in Aruba looked to Dutch Supreme Court case law. In arriving at its decision, the Dutch Supreme Court had referred to Court of Justice case law on reimbursement for healthcare costs incurred in another EU Member State (under the freedom to provide services within the internal market).[51]

Third, legal convergence takes place by voluntary implementation of EU law. Through this mechanism EU law applies in the Dutch Caribbean by regional and domestic legislation which has "copied" primary or secondary EU law. For example, as previously indicated, environmental EU legislation does not apply to the OCT *ratione loci.* The Netherlands' legislature has nevertheless adopted the definition of environmental damage from the Environmental Damage Directive in the environmental legislation of the BES islands.[52] A possible dispute about environmental damages at the BES before a Dutch Caribbean court could thus involve the application and interpretation of this directive. The same can be said about EU directives on emissions.[53] In a case before a Dutch Caribbean court about a permit for a factory Sint Eustatius those directives were at stake because of voluntary implementation of those directives. More specifically the dispute was about the definition of the "best available techniques" to limit emissions, one of the rules of those directives.[54]

[48] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

[49] Hoge Raad, judgment of 30 November 2018, case 17/01640, *[X] N.V. v. Inspecteur der Belastingen*.

[50] Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation). Gerecht in eerste aanleg BES, 26 April 2017, case AR 25/2015, *[claimant] v. [defendant]*.

[51] The Dutch Supreme Court referred to Court of Justice, judgment of 12 July 2001, case C-157/99, *Smits & Peerbooms*; Gerecht in Eerste Aanleg van Aruba, judgment of 7 May 2018, case AUA201701800, *[Child with trisomie 18 and his parents] v. Minister van Volksgezondheid & het uitvoeringsorgaan van de Algemene ziektekostenverzekering*, para. 5.4.

[52] Directive 2004/35, cit.

[53] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (IPPC Directive); Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (NEC Directive).

[54] Gemeenschappelijk Hof van Justitie, judgment of 3 June 2016, case HLAR 73758/15, *NuStar N.V.*, para. 5.1.1 in which it referred to case law of the Dutch Council of State which were the aftermath of Court of Justice, judgment of 26 May 2011, joined cases C-165/09 to C-167/09, *Stichting Natuur en Milieu*.

The voluntary adoption of EU law has also taken place in tax law. Examples abound. The Savings Directive, although repealed in 2015,[55] still applies indirectly though the Tax Regulation for the Kingdom.[56] The Aruban General National Ordinance also explicitly refers to that directive. Finally, the customs legislation of the former Netherlands Antilles has converged, almost in its entirety, with EU law.[57]

A final example of this national mechanism can be found in competition law. Curacao's national ordinance on competition copied concepts of EU competition law, almost in their entirety. As a consequence, the Fair Trade Authority Curacao (FTAC), Curacao's competition authority, refers extensively to several European Commission guidelines on the interpretation of EU competition law.[58]

IV. OCT judge opinions on preliminary reference

This first part of the questionnaire aimed to mine the initial thoughts and feelings of participants in terms of their knowledge about EU law and the preliminary reference procedure, without providing much background information on the applicability of EU law to the OCT. In reviewing the answers provided in the first part of the questionnaire, the following can be deduced.

First, with respect to EU law the respondents had the following first thoughts. Over half of the respondents indicated that they actually did look to EU law in cases they were ruling on. This outcome is confirmed by the results of the research on the Dutch Caribbean case law as described above in part III, *supra*, which demonstrated that they apply and interpret EU law in the cases they have to adjudicate. Most of them were presiding over civil law cases, often combined with administrative law. Participants who indicated that they did not have to involve EU law in their cases were for the most part presiding over matters concerning criminal and administrative law (including tax and civil servant cases). One survey participant heard matters in civil and criminal law cases, and indicated that EU law was rarely looked to.

Most respondents had to address EU law through both the principle of concordance[59] and by reviewing the case law of decisions issued by judges in the *Land* of the

[55] Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments.

[56] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

[57] Raad van Beroep voor Belastingzaken (Nederlandse Antillen en Aruba), judgment of 15 September 1997, case 1996-177, *[tax payer] v. de Inspecteur der Belastingen*.

[58] Informal guidance letter of the FTAC of 14 November 2017 on the applicability of merger control on an intra-group restructuring.

[59] *Ibid*.

Netherlands.[60] Occasionally, they reviewed EU law when looking at local legislation incorporating EU law,[61] or when parties themselves invoking EU law.[62]

Second, with respect to the preliminary reference procedure the respondents had the following first thoughts. Over half of the respondents indicated that they at one time or another have doubted the interpretation of EU law in a case. Only one respondent considered referring the case to the Court and discussed this issue with the other judges on that case. In the end, they decided to leave a possible reference to the Court to the Dutch Supreme Court in the event that an appeal in cassation was lodged. They are not alone in their stance. Other Dutch lower court judges also think the Supreme Court is better placed to refer, mostly because they esteem the Supreme Court to have more time and expertise.[63] This contrasts the attitude of Irish lower courts who adopted a "better sooner than later" logic according to the research conducted by Krommendijk.[64] Other lower court judges seek support from the Court by referring a preliminary question to shield themselves against different opinions higher up the hierarchy in their national judiciary system,[65] or a sword against the legislative and executive powers.[66]

After indicating that no judge in the Caribbean part of the Kingdom had ever made a preliminary reference to the Court, respondents were asked if they could think of reasons why this has not happened. Multiple answers were possible. Half of the respondents believed that EU law does not apply to the Dutch OCT. Although the results of the research on the Dutch Caribbean case law presented in section III, *supra*, demonstrate differently, the respondents are not alone to incorrectly believe that EU law does not apply to the OCT.[67] A quarter of respondents indicated that if there were a reason to refer, a judge on appeal or cassation would make that reference. As indicated above, this fits within the general attitude of Dutch lower court judges.[68] Two respondents saw practical difficulties in referring preliminary questions from the Dutch Caribbean to the Court in Luxembourg.

[60] This is the principle of judicial convergence as found in the research on the Dutch Caribbean case-law presented in section III.

[61] This is the principle of voluntary implementation as found in the research on the Dutch Caribbean law presented in section III.

[62] In general parties seem to play an important role in identifying the applicable EU law. From the study of Nowak *et al.*, it appears that a majority of Dutch and German judges found it hard to spot EU law to be applicable in a case if the parties did not point it out; T. NOWAK, F. AMTENBRINK, M.L.M. HERTOGH, M.H. WISSINK, *National Judges as European Union Judges*, cit. para. 4.1.

[63] J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit.

[64] *Ibid*.

[65] K.J. ALTER, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A.-M. SLAUGHTER, A. STONE-SWEET, J.H. WEILER (eds), *The European Courts and National Courts*, Oxford: Hart, 1998, p. 242.

[66] A.J. OBERMAIER, *The National Judiciary. Sword of European Court of Justice Rulings: The Example of the Kohll/Decker Jurisprudence*, in *European Law Journal*, 2008, p. 735 *et seq.*

[67] F.H. VAN DER BURG, *Europees Gemeenschapsrecht in de Nederlandse Rechtsorde*, cit., p. 191 *et seq.*

[68] J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit.

Two respondents indicated that they simply did not think of the option of referring a matter. One respondent indicated that the Dutch OCT is not a Member State of the EU.[69]

One respondent indicated that in the criminal law cases he/she heard, there was no need to refer matters. Only since the Treaty of Lisbon in 2009, the third pillar of police and judicial cooperation in criminal matters became part of the more "general" system of EU law. Before, it was long time considered that the framework decisions adopted under the third pillar with regard to criminal law were not capable of being interpreted by the Court of Justice in a preliminary ruling. The Court decided otherwise in the *Pupino* case.[70] Nevertheless, criminal law judges still remained quite reluctant to refer to the Court of Justice.[71]

Another respondent indicated that he/she only remembered EU law issues in summary proceedings and that because of the required speed of those proceedings, a preliminary reference would take too much time.[72] No judge cited European influence as not being appreciated by the Dutch Caribbean due to the colonial past (this was one of the provided multiple-choice answers).

The second part of the questionnaire included clear information about the EU law framework and its relationship with OCTs, including Dutch Caribbean case law, and the *Kaefer and Procacci* case which makes clear that judges from the OCT are competent to pose preliminary questions. After having been informed, the judges were asked additional questions about EU law on the Dutch OCT and preliminary references from the Dutch Caribbean judges. Their informed thoughts are as follows. Three quarters of the respondents indicated that their idea about EU law applying to the OCT had changed because of the information provided in the second part.[73] With regard to referring preliminary questions, all respondents (except for two) indicated that the clear information had helped them change their mind.[74] This outcome seems to fit with outcomes from other researches. As Glavina states it: "the higher is the knowledge and understanding of EU law, the lower are the opportunity costs of making a referral".[75]

[69] Which is true and was confirmed by the General Court, order of 17 September 2003, case T-54/98, *Aruba v. Commission*, para. 34. But this does not mean that EU law therefore does not apply to the OCT.

[70] Court of Justice, judgment of 16 June 2005, case C-105/03, *Pupino* [GC], para. 37.

[71] J.I.M.G. Jahae, Th.O.M. Dieben, *Prejudiciële Vragen aan het HvJ EU: Liever geen Pottenkijkers?*, in *Strafblad*, 2015, p. 182 *et seq.*

[72] On more than one occasion, the Caribbean judges indicated that the possible length of a preliminary procedure could be a reason not to refer. See for a further analysis of this more general point on the length of the procedure, at the end of this *Article* where the national preliminary reference procedure is compared with the EU procedure.

[73] On a scale from 1 (did not change at all) to 5 (completely changed), 3 respondents indicated 1, 3: 2, 3: 3 and 3: 4.

[74] On a scale from 1 (did not change at all) to 5 (completely changed), 2 respondents indicated 1, 2: 1, 3: 3 and 4: 4.

[75] "Yet, not all judges have a sufficient knowledge of EU law or sufficient access to resources. Judges with limited EU law knowledge and without a law clerk will face a trade-off: to devote less time and effort

All of the respondents (except for two) found themselves qualified to refer such questions. One was unwilling to refer such questions if the opportunity arose, but did provide a reason.[76] None of them indicated that they should have referred a preliminary question in the past, even though most of them had changed their ideas on EU law and preliminary references after reading the second part.

First, with regard to the position of the OCT judges *vis-à-vis* the Court, the respondents had the following informed thoughts. When asking which position fits them best with regard to referring preliminary questions half of the judges indicated that they would welcome an interpretation by the Court. One third of the judges answered that it is their job as judges to interpret and apply law and that they do not need the Court for that. That answer fits with the indifference from German and Dutch judges towards EU law researched by Nowak *et al*. They conclude that some judges see it as their primary task to resolve the dispute and offer legal certainty.[77] One judge indicated that the parties in proceedings would be jeopardised, as the proceedings would take longer.[78] Only three of the respondents would take another position with regard to referring preliminary questions if they were judges of last resort. As indicated, the Joint Court of Justice is the court of last resort in administrative procedures. No respondent indicated that they were reluctant to ask preliminary questions because European involvement through a preliminary ruling procedure with the Court would make the ruling less accepted by the Caribbean population; this was one of the provided multiple-choice answers.

Second, when asked if they saw any practical difficulties in referring preliminary questions to the Court in Luxembourg from the Dutch Caribbean, half of the respondents replied that this would lengthen the procedure too much.[79] A quarter indicated that they did not see any practical difficulties. Two respondents answered that the distance between the Dutch OCTs and Luxembourg is too large, which means, forcing parties to make an expensive trip to Luxembourg. One respondent indicated that his/her unfamiliarity with the preliminary ruling procedure is a practical difficulty. Although only

to other cases and to focus on making a preliminary question, or to ignore the need to make a referral and to continue managing their workload"; M. GLAVINA, *Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law. A Case Study on Slovenia and Croatia*, in C. RAUCHEGGER, A. WALLERMAN (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law*, Oxford: Hart, 2019, p. 191 *et seq*. In a similar way: U. JAREMBA, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes*, cit., p. 319.

[76] L. EPSTEIN, G. KING, *The Rules of Inference*, cit.

[77] T. NOWAK, F. AMTENBRINK, M.L.M. HERTOGH, M.H. WISSINK, *National Judges as European Union Judges*, cit., para. 4.3.

[78] On more than one occasion, the Caribbean judges indicated that the possible length of a preliminary procedure could be a reason not to refer. See for a further analysis of this more general point on the length of the procedure, at the end of this *Article* where the national preliminary reference procedure is compared with the EU procedure, *infra*.

[79] See for a further analysis of the length of the procedure, at the end of this *Article*, *infra.*

one indicated the lack of familiarity is a reason not to refer, the study of Nowak *et al.* on German and Dutch judges demonstrates that a majority of their respondents did not know how to make a preliminary reference.[80]

As indicated above, judges from the Joint Court of Justice can pose preliminary questions to the Dutch Supreme Court about the interpretation of the law. Until now, two cases have been referred by a chamber of three judges. When interviewing the referring judges about their experience with the national preliminary ruling, they had a positive experience with that procedure, both from a practical, a substantial and procedural point of view. They felt it was fast and found the answers useful. They indicated that, based on this experience, they are willing to refer preliminary questions to the Dutch Supreme Court again and have actually done so. The distance was not considered a problem, since the procedure was mainly digital.

Respondents feel that the preliminary reference procedure to the Dutch Supreme Court is a better solution than handing down a judgment which can be appealed at the Dutch Supreme Court. Using the preliminary reference procedures is less costly for parties than lodging an appeal with the Supreme Court. This ultimately improves access to justice for the financially weak. And it is faster than appeal proceedings at the Supreme Court. The referring judges did not find it problematic that parties were not present in The Hague to appear before the Supreme Court. After all, parties were given the possibility of responding to: *a*) the draft preliminary questions before they were referred by the Joint Court of Justice; as well as *b*) the preliminary answers from the Dutch Supreme Court.

When asked whether they would be more inclined to make a preliminary reference to the Court based on their positive experiences with the national preliminary reference, respondents stated that they are of the opinion that it is more appropriate and safer to refer to the national Supreme Court also on a question on the interpretation of EU law. It would then be up to the Supreme Court to refer the questions to the Court.[81] The OCT judges are not alone in this point of view. Judges of other lower Dutch courts have done the same with regard to their choice of using the national instead of the EU preliminary reference.[82]

[80] T. NOWAK, F. AMTENBRINK, M.L.M. HERTOGH, M.H. WISSINK, *National Judges as European Union Judges*, cit, para. 4.2.

[81] The Dutch Supreme Court once referred preliminary questions to the Court when it was asked for a preliminary ruling itself under the domestic preliminary reference procedure; Hoge Raad, judgment of 3 October 2014, case 14/01472, *J.E.A. Massar v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV*, and Court of Justice, judgment of 7 April 2016, case C-460/14, *Massar*. In July 2016 the parties in the procedure settled. Therefore, the Supreme Court decided that an answer to the preliminary question was no longer necessary; Hoge Raad, judgment of 2 September 2016. The preliminary procedures started with preliminary questions from the District Court of Amsterdam, judgment of 18 March 2014, case C/13/558839 / KG ZA 14-184. Therefore, this procedure took more than two years, where the Court answered the preliminary questions within 18 months.

[82] J. KROMMENDIJK, *Samenloop van de Nationale en Unierechtelijke Prejudiciële Procedure: Straight to the Top of een Hink-Stap-Sprong?*, in *Rechtsgeleerd Magazijn Themis*, 2018, p. 149 *et seq.*

Furthermore, they indicated that they believe that there are more restrictions to refer to the Court than to the Dutch Supreme Court. For example, they wondered if they were allowed to ask questions about voluntarily adopted EU law. And they have heard that the issuing of a preliminary ruling from the Court takes much more time than one from the Dutch Supreme Court. On various moments the respondents have indicated that a preliminary procedure to the Court would unduly lengthen the procedure. That is a reason for them not to refer. These Dutch Caribbean judges are not alone in their believe that the procedure would be too long. The research conducted by Jaremba demonstrates similar reasons why Polish judges do not refer.[83] The Dutch Supreme Court even refused to refer preliminary questions to the Court of Justice in a criminal law case because a preliminary reference procedure would be long and therefore unacceptable.[84] Timmermans criticised the Supreme Court's judgment by indicating that for that reason the urgent preliminary ruling procedure was introduced.[85] In their study, Nowak, Amtenbrink, Hertogh and Wissink also found that lengthening the procedure by a preliminary reference was a reason not to refer, especially for lower courts judges.[86] In the last five years, the average length of time for a preliminary procedure before the Court to be completed has been between 15-16 months.[87] This, while the amount of new preliminary cases has steadily increased by almost one third over the last five years.[88] The Court feels that "despite the increasing number and complexity of the cases it has had to deal with, the Court has managed to keep the length of proceedings within extremely reasonable time limits".[89]

In cases where the Joint Court of Justice refers preliminary questions to the Supreme Court, the average amount of time is eight months between referral and the ruling.[90] This is more or less average for preliminary rulings from the Dutch Supreme Court; to date no procedure has taken longer than a year.[91] So the national preliminary reference procedure is almost twice as fast as the EU procedure. Once informed about

[83] U. JAREMBA, *Polish Civil Judges as European Union Law Judges*, cit., footnote 440 and the literature and case-law mentioned there on p. 108 and Judge O on p. 262. This added to the already lengthy procedures in Poland identified by Jaremba, p. 141.

[84] Hoge Raad, judgment of 22 December 2015, case 14/01680, *[suspect] v. [public prosecutor]*, para. 6.3.

[85] C.W.A. TIMMERMANS, *Post-Salduz: Prejudiciële Vragen aan het Hof van Justitie van de Europese Unie over het EVRM*, in *Rechtsgeleerd Magazijn Themis*, 2017, p. 239 *et seq.*

[86] T. NOWAK, F. AMTENBRINK, M.L.M. HERTOGH, M.H. WISSINK, *National Judges as European Union Judges*, cit., para. 4.3.

[87] CJEU, Annual Report 2018 – Judicial Activity, 2019, p. 134.

[88] *Ibid*., p. 122.

[89] *Ibid*., p. 118.

[90] The referral decision dates form 12 May 2017 and the ruling from the Supreme Court of 19 January 2018.

[91] For the calculation of this period, the dates from this online database Hoge Raad, www.hogeraad.nl, were used.

these averages, the Dutch Caribbean judges did not find 16 months at the Court insurmountable compared to the length of the national preliminary procedure.

V. Conclusion

The research question is: "Do Dutch OCT judges appreciate preliminary references to the Court?" and taking it to Krommendijk's dancing metaphor: do they dance the Tumba, which was danced at Caribbean mutual-aid societies, or do they dance the Tambu, which is a dance expressing resistance against the dominant Eurocentric culture?

The answer to the research question breaks down into three parts. First, the answers from the respondents demonstrate that they are not unwilling to refer preliminary questions. Therefore, they do not dance the Tambu as an act of protest. Second, the respondents are not dancing at all with the Court, demonstrated by the fact that they have not referred any preliminary questions to the Court. EU law music is, however, playing full blast, since many Dutch Caribbean judges have applied EU law. Even so, the respondents were often unaware of: *a*) their competence to refer; *b*) how to refer; and *c*) how long the preliminary question procedure generally takes. The majority of these results are not specific to the Dutch OCT and the Dutch Caribbean judges, but have been found in similar studies into the reasons why lower court judges do refer preliminary questions to the Court or do not refer them (similar results have been found with regard to judges in Croatia, Germany, Ireland, the Netherlands, Poland and Slovenia).

The difference with those lower court judges from the metropolitan part of the EU, is that the results of this study demonstrates that most OCT judges believed that they were not competent to refer preliminary questions to the Court because of the special OCT status under EU law and furthermore that some of them believed EU law did simply not apply to the OCT. This specific outcome could well be relevant for judges of the Danish and French OCT as well.[92]

When taking into account their positive experience with the national preliminary reference procedure: digital in nature; surprisingly fast; and faster and less costly than a full appellate procedure at the Supreme Court, participating judges seemed to be enthusiastic about dancing the preliminary question referral dance with their dancing partner from the Netherlands.[93]

Some respondents indicated to leave a possible preliminary reference to the Court to the higher-placed judge (on a possible appeal, cassation or through a preliminary reference to the Supreme Court, which then should refer, once again, the case the Court). In

[92] In a follow-on study, it would be worthwhile to research whether similar sentiments also live under the Danish and French OCT judges.

[93] I must resist the urge to take the metaphor further to the Dutch dance of the Horlepiep.

order to evaluate this judicial practice,[94] I feel it is worthwhile to take into account the experience of judges under the national preliminary reference procedure. They have concluded that a preliminary procedure is faster and less costly than a full cassation procedure. In the Author's opinion, the same holds true for a direct preliminary reference to the Court instead of leaving it to the "next" judge and fits with the "better sooner than later" approach of lower Irish court judges.[95] Wouldn't it be faster and less costly to refer to the Court directly instead of leaving it up to another judge on appeal/cassation/national preliminary procedure?[96] A counterargument that the distance between the Dutch Caribbean and Luxembourg is prohibitive for parties is solved in the same way the Dutch Caribbean judges have done in the national preliminary reference procedure: they give parties the possibility to respond to first, the draft preliminary questions and finally, the preliminary ruling from the Dutch Supreme Court. They could do the same when referring to the Court. Furthermore, parties residing on the Dutch OCT can intervene in a cost-effective way by submitting their written observations to the Court.[97]

This leads to the third part of the research question. The results of my research demonstrate that OCT judges are willing to learn to dance the Tumba with the Court.

Dutch Caribbean judges are likely to become better equipped in making informed decisions about referring to the Court (or not) when they: *i*) realise that more EU law can apply to the OCT than previously thought (admittedly, the ratio of awareness differs per area of law; civil vs administrative vs criminal law); *ii*) know that they are competent to refer to the Court; *iii*) know how to refer (by email)[98]; and *iv*) realise that the 15 to 16-month average for rulings at the Court is still faster and less costly than an appeal/cassation, because it is free of charge.[99]

[94] Although under Dutch law there is no legal obligation to "leave" a possible preliminary reference to a hierarchical, higher-placed judge, if it were judicial practice, it might be contrary to the effectiveness of EU law. The Court already stated in the *Simmenthal II* case that "any legislative, administrative or judicial practice which might impair the effectiveness" of Art. 267 TFEU is contrary to EU law; Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle finanze dello Stato v. Simmenthal*, paras 19-24. In the *Simmenthal II* case, the Italian judicial practice was at stake under which cases concerning the national law which was contrary to EU law had to be referred to the Italian constitutional court which could then declare a national law unconstitutional.

[95] J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit.

[96] A double preliminary reference, *i.e.* first to the Dutch Supreme Court and then to the Court would take even more time; I. GIESEN, F.G.H. KRISTEN, E.R. JONG, C.J.D. DE, WARREN, E. SIKKEMA,, A.M. OVERHEUL, A.S. NIJS, A.L. DE, VYTOPIL, *De Wet Prejudiciële Vragen aan de Hoge Raad: Een Tussentijdse Evaluatie in het Licht van de Mogelijke Invoering in het Strafrecht*, Utrecht: Universiteit Utrecht, 2016, p. 98.

[97] As was done on behalf of the Arubans Eman and Sevinger in *Eman and Sevinger* [GC], cit.

[98] Court of Justice, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para. 20.

[99] *Ibid*., para. 26.

Since it takes two to tango, it is up to the Court to live up to the expectations of its new Dutch Caribbean dancing partners by not turning them down by, for example, declaring preliminary rulings inadmissible.[100]

[100] From interviews with national judges it was concluded that "judges were deterred from even considering making a reference because of a lack of expertise, but also where a reference is not made for fear of the ECJ declaring it inadmissible": European Parliament, Report on the role of the national judge in the European judicial system, 4 June 2008, www.europarl.europa.eu, p. 24.