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

# IRISH COURTS AND THE EUROPEAN COURT OF JUSTICE: EXPLAINING THE SURPRISING MOVE FROM AN ISLAND MENTALITY TO ENTHUSIASTIC ENGAGEMENT

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Abstract: Ireland has always had a mixed relationship with the EU. It is one of the few EU Member States in which the people rejected EU constitutional changes. Until the EU enlargement of 2004, Ireland had the lowest rate of preliminary references to the Court of Justice across all EU Member States. The latter has changed in recent years. Irish courts have been at the forefront with important references in sensitive areas (Court of Justice: judgment of 27 November 2012, case C-370/12, *Pringle*; case C-293/12, *Digital Rights Ireland* [GC]; judgment of 6 October 2015, case C-362/14, *Schrems* [GC]; judgment of 25 July 2018, case C-216/18 PPU, *Celmer* [GC]). While only 44 cases where referred in its first 30 years of membership (1973-2003), 45 references were made in the six years between 2013-

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2018. This *Article* explains this marked change from what seems an island mentality to enthusiastic engagement with the Court of Justice. Why have Irish courts become more active interlocutors of the Court of Justice? What are their motives to refer (or not)? This question is studied on the basis of a legal-empirical research consisting of interviews with Irish judges and a systematic analysis of all decisions (not) to refer since 2013. This *Article* attributes the increase in references to the arrival of new judges with more knowledge about EU law and a more positive attitude towards referring. Other factors are the previous positive experiences with the Court of Justice that have stimulated (other) judges to refer. Legal considerations also played a role. Not only the Supreme Court, but also the High Court and the Court of Appeal have rather faithfully applied *Cilfit* (Court of Justice, judgment of 6 October 1982, case 283/81, *Cilfit v. Ministero della Sanità*).

KEYWORDS: preliminary ruling procedure – *Cilfit* – motives to refer – knowledge of EU law – domestic litigation – (dis)satisfaction with Court of Justice judgments.

## I. INTRODUCTION

Until 2003 Ireland had the lowest rate of requests for preliminary rulings from the European Court of Justice across the EU Member States.[1] This has changed radically in recent years. While only 44 cases were referred in its first 30 years of membership (1973-2003), 45 references were made in the six years between 2013-2018 (see Table 1).[2] These figures present an intriguing puzzle: how can this marked change from what seems an island mentality[3] to extensive engagement be explained?

Not only do the Irish references stand out in quantitative terms, Irish courts have also been at the forefront with important references in sensitive areas often involving complex questions on constitutional matters and fundamental rights, such as *Pringle* (about the European Stability Mechanism), *Digital Rights Ireland* (dealing with the invalidity of the data retention directive), *Schrems* (about the invalidity of the US Safe Harbour decision), and *Celmer* (about European arrest warrant – EAW – surrender and fair trail).[4] *Pringle* was even the first time that the Court of Justice heard a reference in a full Court formation, implying that the case was of "exceptional importance".[5] Because of the

[1] E. FAHEY, *An Analysis of Trends and Patterns in the Irish Courts of Practice and Procedure in 30 Years of Article 234 Preliminary References*, in *Irish Journal of European Law*, 2004, p. 6.

[2] I. MAHER, *EU Law and the Courts: the Mundane and the Exceptional*, in E. CAROLAN (ed.), *The Irish Judiciary*, Dublin: Institute of Public Administration, 2018, p. 172; E. FAHEY, *EU Law and Ireland: on the Measurement of Legal Evolutions Through Judicial Activity*, 2013, available at papers.ssrn.com.

[3] Island mentality refers to an idea that the outside world, in this case EU law and the obligation to refer, is not relevant or is considered an unwanted intrusion into the state's sovereignty (*i.e.* Euroscepticism). See also C. GIFFORD, *The UK and the European Union: Dimensions of Sovereignty and the Problem of Eurosceptic Britishness*, in *Parliamentary Affairs*, 2010, p. 334.

[4] Court of Justice: judgment of 27 November 2012, case C-370/12, *Pringle*; judgment of 16 May 2014, case C-293/12, *Digital Rights Ireland* [GC]; judgment of 6 October 2015, case C-362/14, *Schrems* [GC]; judgment of 25 July 2018, case C-216/18 PPU, *Celmer* [GC].

[5] Art. 16 of the Statute of the Court of Justice of the European Union (hereafter, "Statute"); interview 155.

general reluctance of constitutional courts to engage with the Court of Justice, this constitutional dialogue can best be studied in relation to ordinary national courts with a constitutional mandate.[6] The Irish referral practice thus proves to be an interesting opportunity to examine the evolution of this "constitutional dialogue" over time.

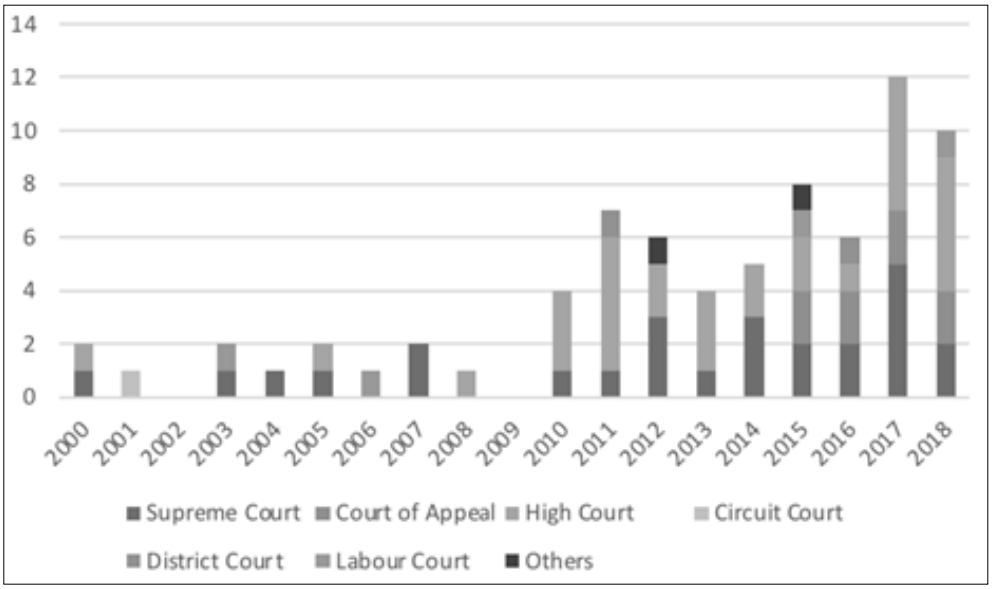


TABLE 1. Irish references 2000-2018.[7]

Ireland acceded to the EU in the first round of accessions in 1973, at the same time as the UK and Denmark. There is a genuine appreciation among the Irish population that the EU has helped Ireland in transforming the country and that this transformation has been

[6] The German Constitutional Court recently held that the fundamental rights in the German Basic Law remain the primary standard of review even when EU law and the Charter are applicable. A preliminary reference will only be made when German fundamental rights "exceptionally" do not ensure the Charter's level and incorporation of the Charter's standard into the domestic standard leads to "unresolved questions"; Press release No. 83/2019 of 27 November 2019 about the order of 6 November 2019, 1 BvR 16/13, para. 2c. Cf. R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts' Preliminary Questions to the CJEU: Start of a Dialogue or Talking to Deaf Ears*, in *Cambridge International Law Journal*, 2017, p. 124; the exception is the Belgian Constitutional Court and to a lesser extent the Austrian court See M. DANI, *National Constitutional Courts in the European Constitutional Democracy: A Reply to Jan Komárek*, in *International Journal of Constitutional Law*, 2017, p. 785 *et seq*.

[7] The *Dunauskis and Lisauskas* and *Hampshire County Council* cases were counted as one, see Court of Justice: judgment of 27 May 2019, joined cases C-508/18 and 509/18, *Dunauskis and Lisauskas* [GC]; judgment of 19 September 2018, joined cases C-325/18 PPU and C-375/18 PPU, *Hampshire County Council.*

hugely beneficial.[8] The Irish population is among the most pro-EU Member States and Ireland is "a willing participant" at the EU level.[9] Even though Ireland lacks a constitutional court, it has a solid "home-grown" constitutional and fundamental rights tradition. Ireland's Constitution, with a catalogue of fundamental rights and express powers of judicial review, came into force in 1937.[10] The Irish Supreme Court, Court of Appeal and High Court have jurisdiction to conduct constitutional review. It was only in 2003 that the European Convention on Human Rights was incorporated into Irish statutory law with the Human Rights Act 2003. A result of this is that Irish courts are inclined to consider constitutional rights prior to, for example, the European Convention on Human Rights or the Charter.[11] Irish courts are seen as one of the "most activist judiciaries" in the world and "*de facto* lawmakers", because court decisions were responsible for 7 of the 29 constitutional amendments.[12] Irish courts are also used to finding Irish law to be in breach of the Constitution.[13] As mentioned above, Irish courts have frequently asked questions that could be labelled "constitutional".[14] In addition, Irish courts have also asked questions on EU law doctrines, such as direct effect and the supremacy of EU law.[15]

This *Article* shows that ordinary national courts communicate relatively easily with the Court of Justice, arguably more so than constitutional courts.[16] It thus complements previous contributions that focused on high-profile cases referred by constitutional courts that primarily illustrate problematic features of the preliminary ruling procedure.[17] The Irish case presents a different, more positive account of the procedure and the interaction with the Court of Justice.

[8] Interviews 159 and 187. The people of Ireland have approved Constitutional provisions in relation to EU law in seven instances since it became a Member of the EU, while only rejecting others twice. A.M. COLLINS, *EU Law in Ireland Post-Brexit*, in *Trinity College Law Review*, 2018, p. 12 *et seq*.

[9] M. COLLINS, *EU Law in Ireland Post-Brexit*, cit., p. 12 et seq.

[10] Interviews 159 and 162; E. FAHEY, *EU Law and Ireland*, cit., p. 3.

[11] S. KINGSTON, L. THORNTON, *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review*, Dublin: Law Society of Ireland, 2015, p. 121. See further e.g. Irish Court of Appeal, judgment of 14 March 2016, [2016] IECA 86.

[12] R. EGIE, A. MCAULEY, E. O'MALLEY, *The (Not-So-Surprising) Non-Partisanship of the Irish Supreme Court*, in *Irish Political Studies*, 2018, p. 88 *et seq*.

[13] T. HICKEY, *The Separation of Powers in Irish Constitutional Law*, in D. FARRELL, N. HARDIMAN (eds), *Oxford Handbook of Irish Politics*, Oxford: Oxford University Press, 2020, (forthcoming); interviews 152 and 159.

[14] Cf. M. CLAES, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Ruling Procedure*, in *German Law Journal*, 2015, p. 1332 *et seq*.

[15] E.g. Court of Justice, judgment of 15 April 2008, case C-268/06, *Impact*; Court of Justice, judgment of 7 August 2018, case C-122/17, *Smith* [GC].

[16] X. GROUSSOT, *Constitutional Dialogues, Pluralism and Conflicting Identities*, in J. KOMÁREK, M. AVBELJ (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart, 2012, p. 321.

[17] A. DYEVRE, *European Integration and National Courts: Defending Sovereignty under Institutional Courts?*, in *European Constitutional Law Review*, 2013, p. 139 *et seq*.; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure*, in *European Constitutional Law Review*, 2014, p. 54 *et seq*.; O. POLLICINO, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative*

This *Article* proceeds as follows. After presenting the research design (section II), this *Article* discusses four explanations for the increase in Irish references. Section III focuses on legal explanations, including the stricter application of *Cilfit* by the Supreme Court, as well as the Court of Appeal and the High Court. Section IV links with the recent literature pointing to the arrival of new judges with more knowledge about EU law and a more positive attitude towards referring. Section V points to the increased litigation on the basis of EU law. Section VI shows that Irish courts have been influenced in their decisions to refer by their (and other Irish courts') previous positive experiences with the Court of Justice.

## II. Research design and literature review

The main research question of this *Article* is what has motivated Irish courts to (increasingly) refer to the Court of Justice. To establish these motives, all Irish decisions to refer in the period 2013-2018 were studied, together with the subsequent Court of Justice judgment, the AG opinion and the follow-up judgment of the referring Irish court. All decisions *not* to refer, identified on the basis of an Irish case law search, were also examined.[18] The analysis of judgments was complemented with interviews. 28 interviews were conducted with judges and judicial assistants as well as legal practitioners and academics, including judges who did not make a reference.[19] Prior approval for these interviews was obtained from the Chief Justice Frank Clarke of the Irish Supreme Court. To guarantee the anonymity of interviewees, their identity is not disclosed.[20] During the semi-structured interviews, open-ended questions were raised about reasons to refer (or not), in general and in relation to particular cases identified in the legal analysis. In addition, interviewees were asked to reflect on the motives and factors identified in the literature to date.

This literature to date has offered various explanations for the references of national courts. The early literature primarily focused on differences between EU Member States, often involving quantitative studies to explain why more references come from

*Step of the Italian Constitutional Court*, in *European Constitutional Law Review*, 2014, p. 143 *et seq*.; A. Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, p. 308 *et seq*.; U. Šadl, S. Mair, *Mutual Disempowerment: Case C-441/14 Dansk Industri*, in *European Constitutional Law Review*, 2017, p. 347 *et seq*.; B. Guastaferro, *The Unexpectedly Talkative "Dumb Son": the Italian Constitutional Court's Dialogue with the European Court of Justice in Protecting Temporary Workers' Rights in the Public Education Sector*, in *European Constitutional Law Review*, 2017, p. 493 *et seq*.

[18] Searched under "267 TFEU", "preliminary ruling", "preliminary reference", "cilfit" and "article 267" on www.bailii.org.

[19] This includes five Supreme Court judges, three Court of Appeal judges, eleven High Court judges, five Circuit or District court judges or tribunal members and four academics and/or practitioners. One interviewed judge withdrew from this study, three candidates could not be contacted or did not respond, and one was unable to meet.

[20] A number between 101 and 200 was randomly assigned to the interviewees. References are only made when the identity cannot be determined indirectly.

particular Member States.[21] Several structural factors at the Member State level have been tested statistically with econometric models, often with conflicting results, including the level of GDP, the level of support for European integration and the monist or dualist nature and possibilities for judicial review. This literature highlighted mainly politico-strategic reasons for referral (see also Jaremba in this Special Section). Firstly, national courts "leapfrog" the national judicial hierarchy and "bypass" the highest national court with a view to getting support from the Court of Justice for their interpretation of EU Law.[22] A second reason is that courts use a reference to seek support from the Court of Justice vis-à-vis the legislature when they think that national law breaches EU law.[23]

More recent studies have, however, come up with different explanations and moved beyond the state by looking at variances *within* Member States.[24] Firstly, legal-formalist explanations emphasise that courts refer simply because they consider themselves obliged to refer on the basis of Art. 267 TFEU and feel responsible for ensuring a correct application of EU law.[25] There is, secondly, much literature on personal and psychological differences between individual judges in terms of their knowledge about EU law or the preliminary ruling procedure or their personal views as to the desirability of referring (see also Geursen's *Article* in this Special Section).[26] It has been noted that there are also generational differences between older and younger judges.[27] In addition, recent studies also highlight the position of a judge in the hierarchy as a fact-finder or law-finder, as Glavina also observes in her *Article* in this Special Section.[28] Other studies point, thirdly, to pragmatic considerations, such as case specific reasons which relate

[21] E.g. A. Stone Sweet, T.L. Brunell, *The European Court and National Courts: A Statistical Analysis of Preliminary References 1961-95*, in *Journal of European Public Policy*, 1998, p. 66.

[22] 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. Weiler (eds), *The European Courts and National Courts*, Oxford: Hart, 1998, p. 241.

[23] An opposite thesis is that national courts "shield" national legislation from the Court of Justice by withholding references: see J. Golub, *The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice*, in *West European Politics*, 1996, p. 377.

[24] 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*.

[25] D.C. Hübner, *The Decentralized Enforcement of European Law: National Court Decisions on EU Directives With and Without Preliminary Reference Submissions*, in *Journal of European Public Policy*, 2018, p. 1817 *et seq.*

[26] 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, p. 49; A. Dyevre, *European Integration and National Courts*, cit., p. 151 *et seq.*

[27] U. Jaremba, J.A. Mayoral, *The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms*, in *Journal of European Public Policy*, 2019, p. 386 *et seq*.

[28] 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*.

to the importance of the questions concerned or the delay which causes a referral.[29] Fourthly, institutional and organisational factors related to the institutional dynamics of a particular court have been put forward, including the need to meet production targets.[30] Fifthly, the litigating parties also affect the courts willingness to refer. This notion relates to the literature on legal mobilisation, Eurolegalism and Euro-lawyers as essential norm entrepreneurs, which is the primary focus of the *Article* by Hoevenaars in this Special Section.[31] What could also affect the willingness of court is, sixthly, the court's previous experience with judgments from the Court of Justice.[32] When national courts have received unsatisfactory answers from the Court of Justice, this may discourage them from referring in the future. There has been little systematic research on such "feedback loops" (yet).[33]

This research on Ireland found little support for politico-strategic reasons, both on the basis of the legal analysis as well as interviews.[34] The rest of this *Article* will engage with four of the six alternative explanations. The two other explanations, pragmatic considerations and institutional factors, are the focus of another publication.[35]

## III. Legal explanations

Legal-formalist motives have played an important role in the increase in Irish references. Irish courts, and not only the Supreme Court, feel increasingly responsible for a correct application of EU law and feel obliged to refer even in cases not stipulated by Art. 267

[29] J. Krommendijk, *The Highest Dutch Courts and the Preliminary Ruling Procedure: Critically Obedient Interlocutors of the Court of Justice*, in *European Law Journal*, 2019, p. 394.

[30] A. Dyevre, M. Glavina, A. Atanasova, *Who Refers Most?*, cit.; T. Nowak, F. Amtenbrink, M.L.M. Hertogh, M.H. Wissink, *National Judges as European Union Judges*, cit., p. 54.

[31] L.J. Conant, *Europeanization and the Courts: Variable Patterns of Adaptation Among National Judiciaries*, in M.G. Cowles, J.A. Caporaso, T. Risse (eds), *Transforming Europe: Europeanization and Domestic Change*, Ithaca, London: Cornell University Press, 2001, p. 97 *et seq*.; R.D. Kelemen, *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard: Harvard University Press, 2011; J. Hoevenaars, *A People's Court? A Bottom-up Approach to Litigation before the European Court of Justice*, The Hague: Eleven, 2018; J. Miller, *Explaining Paradigm Shifts in Danish Anti-Discrimination Law*, in *Maastricht Journal of European and Comparative Law*, 2019, p. 540 *et seq*.

[32] M. Jacobs, M. Münder, B. Richter, *Subject Matter Specialization of European Union Jurisdiction in the Preliminary Ruling Pocedure*, in *German Law Journal*, 2019, p. 1218.

[33] Cf 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*.; 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.

[34] Interviews 105, 136, 152, 155, 166 and 191.

[35] 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*.

TFEU. This also reflects the strong position of EU law within Irish courts.[36] The EU legal order is an "easy fit" with Irish courts and the Court of Justice is not perceived as a "jurisdictional threat".[37] The Irish judiciary is "pro-communautaire" and cooperative and the supremacy of EU law has been accepted unquestioningly, which contrasts with the approach in several other EU Member States.[38] The same holds true for vertical direct effect and the emanation of the state in relation to which there has been a "forceful shift in judicial thinking".[39] This paragraph will expound on the way in which the Supreme Court and the Court of Appeal have applied the legal framework of Art. 267 TFEU.

### III.1. A stricter application of *Cilfit* by the Supreme Court

While the Supreme Court referred only eight cases between 2000-2011, 18 references were made between 2012-2018. One explanation for this increase is the strict(er) application of the *Cilfit* exceptions. *Cilfit* provides an exception to the highest courts' obligation to refer on the basis of Art. 267, para. 3, TFEU when the Court of Justice has "already dealt with the point of law in question" (*acte éclairé*) or when "the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt" (*acte clair*).[40] The legal analysis as well as the interviews lead to the conclusion that the Supreme Court has become more mindful of and loyal towards *Cilfit* in recent years.[41] One interviewed judge noted that the Supreme Court is "very, very cautious" if there is a lack of clarity, also because it is aware that it is the "end of the road".[42] Another judge argued that: "by and large, when we think it is referable, off it goes", even when most judges think a reference is unnecessary.[43] If one or two of the five judges feel strongly about the need to refer, than the idea is that the Supreme Court must refer because of such "internal respect".[44] This caution stems from some unexpected answers of the

[36] E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 years of Article 234 EC Case Law from the Irish Courts*, Dublin: First Law, 2007, p. 2; I. Maher, *EU Law and the Courts*, cit., pp. 177-178 and 185.

[37] G. Butler, *Standing the Test of Time: Reference for a Preliminary Ruling*, in *Irish Journal of European Law*, 2017, p. 108 *et seq*.

[38] A. Dyevre, *European Integration and National Courts*, cit.

[39] E. Fahey, *EU Law and Ireland*, cit., p. 3.

[40] Court of Justice, judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*, paras 14 and 16.

[41] Interviews 113, 152 and 181; see e.g. the extensive discussion of *Cilfit* in Irish Supreme Court, judgment of 2 December 2014, *James Elliot*, [2014] IESC 74, paras 154-159 and 184. This does not mean, however, that the *Cilfit* exceptions are mentioned consistently and explicitly in its decisions (not) to refer.

[42] See interview 105, cf. interview 128. This position can be compared with the tax and civil law chambers of the Dutch Supreme Court, J. Krommendijk, *The Highest Dutch Courts and the Preliminary Ruling Procedure*, cit.

[43] Interview 113.

[44] Interview 152.

Court of Justice that differed from the majority view opposed to a reference.[45] This has made judges careful in subsequent cases.[46] In addition, if it is too much of a struggle to explain why it is not a referable point, then the Supreme Court is prone to refer.[47]

One judge acknowledged that the Supreme Court possibly refers too many cases and stated the following: "The European system cannot continue to insist that everyone is as loyal as we are, otherwise the Court of Justice would be swamped by cases".[48] Irish lower court judges and other interviewees acknowledged the Supreme Court's willingness to refer.[49] One interviewee argued that, when there is a question, "off it goes", while some others noted that the Supreme Court applies *Cilfit* rigorously.[50] One Supreme Court judge attributed the cautious approach to the limited judicial assistance and limited resources. He/she observed that the Irish Supreme Court does not work with Advocates General (AGs) who "sift" the legal thinking. The Supreme Court has thus less material to be able to conclude that there is no doubt. Furthermore, cases can also "hit" the Supreme Court after only one judicial stage at the High Court.[51] The latter could explain why the Supreme Court has made a considerable number of references in areas in which there was only one previous trial instance due to limited appeal possibilities, including EAW cases, planning and environmental law, as well as asylum and migration cases.[52]

The practice of the Irish Supreme Court contrasts with the highest (constitutional) courts in other EU Member States, sometimes (or often) abusing *Cilfit* to dodge their obligations to refer.[53] It is revealing to compare the position of the Irish Supreme Court with the highest Dutch courts. While the approach of Irish Supreme Court mirrors the approach of its Dutch counterpart, it differs considerably from the application of *Cilfit* by the highest Dutch administrative courts. Some judges from these courts proposed a "lighter test" than *Cilfit* and argued that it is not necessary to refer immediately when there is some doubt about the interpretation of EU law. Several highest administrative court judges, for example, held that, when the question is 75-80 per cent *clair*, there is no need to refer.[54] When confronted with the pragmatic application of *Cilfit*, one Su-

[45] This happened in at least three cases, including Court of Justice: judgment of 27 October 2016, case C-428/15, *D.*; judgment of 10 October 2017, case C-413/15, *Farrell* [GC]; judgment of 25 July 2018, case C-164/17, *Grace and Sweetman*; interviews 152 and 181.

[46] Interview 181.

[47] Interview 113.

[48] Interview 113.

[49] Interviews 106, 126, 136, 139, 144, 146, 148 and 191.

[50] Interviews 139 and 155.

[51] Interview 128.

[52] E.g. s. 5, para. 3, of the Illegal Immigrants Act 2000; s. 50A, para. 7, and s. 50A, para. 11. of the Planning and Development Act 2000.

[53] 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. 354 *et seq*.

[54] J. KROMMENDIJK, *The Highest Dutch Courts and the Preliminary Ruling Procedure*, cit.

preme Court judge held that "we have to err on the side of caution", while another acknowledged that they certainly do not follow the Dutch logic.[55]

### III.2. The Court of Appeal: a *de facto* court of final appeal applying *Cilfit*

The Court of Appeal started operating on 28 October 2014 and is a court that sits between the High Court and the Supreme Court. It was created with the intention of reducing the backlogs at the Supreme Court. The Court of Appeal made nine references in its first four years. This is quite considerable for such a new court that started with a small number of judges (up to nine) and was quickly trapped in large backlogs.[56] The legal-formalist explanation (partly) accounts for the Court of Appeal's willingness to refer. This Court tends to use the same criteria as the Supreme Court and feels *de facto* obliged to refer.[57] Even though there is the possibility of appeal to the Supreme Court, the Court of Appeal regards itself as the final court in the sense of Art. 267 TFEU, because of the very limited grounds to appeal in practice.[58] The idea has been that, when an issue is referable, the Court of Appeal refers, because of the risk that appeal is not granted by the Supreme Court.[59] Two judges likewise noted that the Court of Appeal "must" make a reference, because it cannot assume that the case can go to the Supreme Court and the Court of Appeal is probably the final court of appeal.[60] One Court of Appeal judge argued that, when there is a real question of EU law, "we should go to get a definitive view", while another admitted: "we look with *Cilfit* eyes", even though the Court of Appeal is not bound to refer.[61] Interestingly, some High Court judges also reasoned along similar lines as the Court of Appeal. One High Court judge even argued that, if there is uncertainty about EU law, then there is an obligation to refer, because an autonomous interpretation of EU law is not allowed.[62]

[55] Interviews 128 and 152; cf. interview 105.

[56] F. Geoghegan, *The New Supreme Court and Court of Appeal: 2014 to 2016 and Their Future*, in *Trinity College Law Review*, 2017, p. 20; interviews 108 and 153.

[57] Interview 108.

[58] Since the Court of Appeal has started to function, the Supreme Court has become more and more "exclusively a true Court of Final Appeal" with a low number of appeals, F. Geoghegan, *The New Supreme Court and Court of Appeal*, cit., p. 28.

[59] Interview 113. A reference was "required" in Irish Court of Appeal, judgment of 10 June 2015, *Danqua*, [2015] IECA 118 (Hogan J.), para. 43.

[60] Interviews 166 and 174; cf. interview 191.

[61] Interviews 108 and 174; e.g. Irish Court of Appeal, judgment of 26 January 2018, *Mahmood*, [2018] IECA 3 (Hogan J.), para. 61.

[62] Interview 161.

## IV. A generational change in knowledge and mentality

A second factor explaining the increase in references are the personal backgrounds of the judges serving on the bench. A generational change in recent years has led to judges with more extensive knowledge about EU law and a different mindset with respect to referring. This has happened in the three Irish top courts, which will be discussed in turn starting with the Supreme Court.

Two interviewed Supreme Court judges stated that the older generation of judges had less experience in EU law, also because they had not studied or practiced EU law. This resulted in a reluctance to engage with EU law, whereby referencing was seen as "a required thing".[63] The Supreme Court was, for example, "hostile" towards the idea of referring *Masterfoods* in 2002 about parallel competition proceedings before national and EU courts.[64] References that were made by the Supreme Court, but also other Irish courts, in this period were not necessarily signs of true engagement with EU law. Rather, they aimed to have Luxembourg sort out complex and delicate issues for the national court.[65] Fahey, for example, observed this in relation to the 2005 reference in *McCauley Chemists* about the recognition of pharmacist diplomas. She argued that the Supreme Court was overburdening the Court of Justice with "considerations that it does not wish to resolve itself".[66]

The reluctance or discomfort with referring has clearly decreased over time.[67] One interviewee noted that the current Chief Justice Clarke shows a greater willingness to refer than his predecessors.[68] Another noted likewise that the Chief Justice is pragmatic ("let's get it sorted out") and is not sensitive to the notion that the Court of Justice "should not be telling us what to do".[69] This attitude is also visible in the Supreme Court's reference in *Pringle* about the validity of the European Stability Mechanism. Both O'Donnell and Clarke emphasised in their separate concurring judgments, without problematising, that a government loses its sovereignty when it accedes to a binding

[63] Interviews 113 and 128. One High Court judge (interview 187) noted that not all previous Supreme Court judges liked the notion of a European superior court.

[64] Court of Justice, judgment of 14 December 2000, case C-344/98, *Masterfoods and HB*; interview 113.

[65] One interviewee (188; cf. interview 133) referred to the equal treatment case of *Kenny* (judgment of 28 February 2003, case C-427/11, *Kenny and Others*) as an example of a case in which the (criminal law) judge referred an equal treatment case to the Court of Justice "to get it off his plate so that he did not have to worry about it".

[66] This judgment was rendered without an AG opinion in merely 35 paragraphs in slightly more than a year; Court of Justice, judgment of 13 July 2006, case C-221/05, *Sam Mc Cauley Chemists and Sadja*; E. Fahey, *McCauley Chemists: the Supreme Court Invokes Article 234 EC to Resolve the "Necessitated" Question*, in *Dublin University Law Journal*, 2006, p. 401.

[67] Interview 113; cf. interview 187.

[68] Interview 133.

[69] Interview 187.

treaty.[70] One Supreme Court judge argued in a similar vein that referencing is nowadays considered part of the normal business; "we have to resolve a case and if that involves a reference, so be it".[71] Another Supreme Court judge also mentioned that the current judges know the people in the Court of Justice and that this "creates an atmosphere of trust", which was not there before.[72]

An intriguing puzzle is whether the nomination of three former members of the Court of Justice has led to more Supreme Court references. Around the turn of the millennium the following three judges with a Luxembourg background became Supreme Court judges: Fennelly (judge in the Court of Justice from 1995-2000 and in the Supreme Court from 2000-2013), Murray (1992-1999; 1999-2015) and Macken (1999-2004; 2005-2012). There are two conflicting views as to the impact of these three members. On the one hand, it could be argued that this has led to more engagement with EU law and more references.[73] On the other hand, it could also have led to fewer references, because there is allegedly sufficient knowledge to solve EU law cases without Court of Justice guidance.[74] The figures and the interviews hint at the second hypothesis.[75] The Supreme Court made nine references in the 1990s as opposed to six references in the 2000s. Two interviewees noted that the three members knew the answers to questions of EU law and would consider matters to be *acte clair* quicker ("we understand this stuff").[76] Likewise, one current Supreme Court judge held: "there is less confidence when we do not have people from Luxembourg on the court".[77] Another interviewee observed that the more you know about EU law, the less likely you are to refer, even though he/she acknowledged that Judge Hogan contradicts this.[78] A more reluctant position can also be discerned from some older Supreme Court decisions not to refer. In several decisions, Fennelly J. presented the option of referral as a last resort that should be used only when the case cannot be solved on other grounds.[79] In sum, it seems that the three former members have not affected the actual referring rate positively, at least

[70] Irish Supreme Court, judgment of 31 July 2012, *Pringle v. Government of Ireland*, [2012] IESC 47 (Denham C.J.).

[71] Interview 113.

[72] Interview 128.

[73] E. Fahey, *EU Law and Ireland*, cit., p. 9; I. Maher, *EU Law and the Courts*, cit., p. 179.

[74] E. Fahey, *EU Law and Ireland*, cit., p. 9; I. Maher, *EU Law and the Courts*, cit., p. 179.

[75] Three interviewees (113, 118, 187) argued in the opposite direction. One (113) noted that they had a good sense of which issues need (not) be referred.

[76] Interviews 152 and 166.

[77] Interview 152.

[78] Interview 108.

[79] Irish Supreme Court: judgment of 6 December 2012, *Mallak*, [2012] IESC 59 (Fennelly J.), para. 30; judgment of 26 July 2006, *Albatros Feeds*, [2006] IESC 52 (Fennelly J.); one interviewee (113), nonetheless, pointed to the competition law case of *Beef Industry Development* in which he thought Fennelly was decisive in the decision to refer to the Court of Justice, while some members were not eager to refer a "minor issue".

in quantitative terms, while they were members of the bench. It is nevertheless reasonable to assume that they had an impact on the awareness of and knowledge about EU law and the case law of the Court of Justice. The latter could have had a more indirect impact on the increase in the number of Supreme Court references since 2012.

The rather high number of references of the newly created court, the Court of Appeal, can also be attributed to the background of individual judges. Several interviewees attributed the references to two previous Court of Appeal judges with a lot of expertise and interest in EU law: Hogan (2014-18), currently AG in the Court of Justice, and Finlay Geoghegan (2014-17), currently in the Supreme Court.[80] One interviewee held that when Hogan and/or Finlay Geoghegan proposed a reference, the other judges would normally defer to them.[81] One of the two would normally also prepare the order for reference.[82] These views are corroborated by the actual references made. There was only one reference in which neither of the two were involved, namely *Vilkas*. As a High Court judge (2010-2014), Hogan made at least five references including *Schrems*.[83]

Just as with the Supreme Court, a similar generational shift occurred at the High Court. This Court consists of 40 judges who, in principle, judge individually. A few years ago, references were restricted to only a few judges, including Hogan (until 2010 a High Court judge). Several judges have nonetheless started to make their first reference in recent years, including Humphreys, Donnelly, Barrett, Keane, Costello, and Simons.[84] These new judges are often younger and they replaced older judges whose legal education predated the Irish accession to the European Community in 1973.[85] Such older judges were allegedly "dismayed" when EU law came in or saw referencing as "a big step".[86] While older judges were "steeped in the common law" and tended to frown upon EU law, new judges appointed in the last five years are more aware of the option, also because they have all studied EU law at university and/or have practiced EU law.[87]

[80] Irish High Court, judgment of 14 March 2008, *Metock*, [2008] IEHC 77 (Finlay Geoghegan J.), para. 53.

[81] Interviews 113 and 166.

[82] Interview 166.

[83] Not all orders for reference could be retrieved on *Bailii*, as a result of which it is not always clear which judge made the reference. Some interviewees (113 and 152) thus cautioned against drawing too firm conclusions as to a possible increase, because it is still a relatively small number of engaged judges and not necessarily a trend. The fact that some judges are more eager to refer in a small jurisdiction has a disproportionate effect on the number of references. One interviewee (113) thus noted that, when Hogan is taken out of the equation, the numbers would be different.

[84] The reason that some High Court judges have not been involved in a reference depends upon the cases assigned to those judges and does not so much indicate a reluctance or hostility. References are confined to certain areas that have a connection to EU law, while there are few references outside those areas, including personal injuries, chancery, equity, or domestic criminal law. See interviews 102, 105, 148, 152, 155, 188, and 191.

[85] Interviews 105 and 166.

[86] Interviews 155, 159 and 191.

[87] Interviews 105, 118, 126, 133, 136, 153, 166, 171 and 187.

According to several interviewees, new judges are more willing and comfortable with referring.[88] EU law poses "no fear" for them, especially when they also worked in Luxembourg as advocates.[89]

In sum, this overview showed that personalities and background matter, especially in a small country as Ireland.[90]

## V. Increased (EU law) litigation and requests to refer

A third explanation for the increase in the number of references is the growing importance of EU law in general, as well as increased litigation whereby the parties request the court to refer. Fahey observed in 2004 that EU law arose "only infrequently".[91] This has changed remarkably in the last 15 years. The role of EU law has become more important in day-to-day litigation. Interviewees held, among other things, that: "you cannot avoid it" and it "creeps into more cases".[92] They noted that litigants and practitioners are more aware of EU law and are increasingly better at addressing EU law issues.[93] There has been more specialisation by lawyers in specific areas of EU law, which has led to more pointed submissions in recent years.[94] In addition, the complexity of cases with EU law elements has increased, as a result of which there are simply more cases in which there is no clear answer and, thus, a necessity (or even obligation) to refer arises.[95]

The amount of litigation in a particular field affects the number of references. There has been a relatively high number of references in the fields of asylum and migration (9), European arrest warrants (8), environmental law (5), and privacy (3). The growth in EAW references is not surprising, considering the 42 per cent increase in European arrest warrant cases, from 243 to 344 in 2017.[96] Litigation has also expanded in the environmental field as a result of the growing economy, the building of wind parks and Ireland's relatively pristine environment.[97] This has led to a growing number of disputes in which these conflicting interests played a role. Much of this litigation is driven by envi-

[88] Interviews 126, 148, 155, 159, 187 and 191.

[89] Interviews 166 and 174.

[90] Interviews 108, 113, 148, 166 and 187.

[91] E. Fahey, *An Analysis of Trends and Patterns in the Irish Courts*, cit., p. 6.

[92] Interviews 108, 153, 187 and 191; I. Maher, *EU Law and the Courts*, cit., p. 180.

[93] Interviews 105, 108, 113, P126, 153, 159 and 191.

[94] Interview 153.

[95] Interview 105.

[96] See "annual report" on www.courts.ie. It can also be attributed to the Irish declaration which precluded references until December 2014. See interviews 113, 153, 155, 166, 187 and 191; Irish Supreme Court, judgment of 1 March 2012, *Bailey*, [2012] IESC 16, para. 24.

[97] Interviews 108, 113 and 162.

ronmental campaigners or groups, such as Peter Sweetman or People over Wind.[98] EU law plays an important role in this area, because it offers more protection than Irish law.[99] The incidence of privacy references relates to the attractive corporation tax rates and the fact that Ireland houses the headquarters of several big multinationals such as Facebook and Google, which generally have sufficient resources for court cases.[100]

The (near) absences of references in particular fields could also be attributed to limited litigation. For example, there have been no competition law references since 2013. One interviewee observed that very few competition law cases come before the court, because cases are generally settled by the competition authority.[101] A similar explanation applies to intellectual property (one reference). There are generally very few "full-blown" IP trials. Usually only interlocutory IP proceedings take place, during which there is a reluctance to refer, because this is considered more appropriate for a substantive trial.[102] In addition, only three custom and tax cases have made it to Luxembourg, because not many cases go to court in Ireland and most cases stop at the level of the Tax Appeals Commission.[103]

The empirical findings of this research support the claim that the parties affect the court's decision (not) to refer. The increase in Irish references is not surprising from this perspective, because the increased incidence of litigation has been coupled with a growing number of requests to refer. Interviewees observed that there has also been a growing number of requests of (one of) the parties to refer to the Court of Justice.[104] Especially in free movement and asylum cases, almost all applicants propose a reference if the court would dismiss their case.[105] Supreme Court judges likewise noted that, in recent years, there has more often been a request than not in cases dealing with EU law.[106] This is also because the leave to appeal form mentions the preliminary ruling

[98] Sweetman was involved in three references: Court of Justice, judgment of 11 April 2013, case C-258/11, *Sweetman and Others*; judgment of 12 April 2018, case C-323/17, *People over Wind and Sweetman*; judgment of 25 July 2018, case C-164/17, *Grace and Sweetman*.

[99] Ireland has "struggled with the implementation" of EU law, Irish Supreme Court, judgment of 24 February 2017, *Klohn*, [2017] IESC 11 (Clarke C.J.), para. 1.1; interview 162.

[100] S. Darcy, *Battling for the Rights to Privacy and Data Protection in the Irish Courts*, in *Utrecht Journal of International and European Law*, 2015, p. 131.

[101] Interview 136.

[102] Irish High Court, judgment of 11 January 2018, *Fitzpatrick*, [2018] IEHC 77 (Ní Raifeartaigh J.), para. 88; cf. Irish Supreme Court, judgment of 19 December 2013, *Dowling*, [2013] IESC 58 (Fennelly J.), paras 64 and 66; Interview 113; see, however, the recent reference in Irish High Court, judgment of 11 January 2019, *Recorded Artists Actors Performers Limited*, [2019] IEHC 2 (Simons J.).

[103] In addition, tax law is not an area of specialisation for judges or at the bar, interviews 113, 152. By contrast, almost one third of all Dutch references are made in this area.

[104] Interviews 105, 148 and 108.

[105] Interviews 144 and 161.

[106] Interviews 105, 113 and 152.

procedure and asks whether the applicant wants a reference.[107] It is not surprising that a growing number of requests also contributes to an increase in the actual references, even when the majority of requests are badly substantiated or irrelevant, also at the Supreme Court level.[108] A request at least forces the court to think carefully about the issue. This is even more so the case in a legal system with a tradition of extensive reasoning in judgments, even in case of a "complete failure" to set out EU law arguments.[109] The position of the parties is particularly important in an adversarial system.[110] A reference was made by lower courts, without a request by the parties, only in a small number of cases.[111] This also holds true for the Supreme Court, even though it seems to refer slightly earlier on its own initiative compared to other Irish courts.[112]

In conclusion, the parties' requests to refer are an essential factor in the courts' decision to refer. Since there has been more litigation on the basis of EU law and more requests to refer, the increase in Irish references is not surprising. This conclusion also fits nicely with Pavone's work on spatial micro-foundations.[113] Location has also been an important catalyst in Ireland, since (almost) all courts and statutory tribunals as well as law firms are based in Dublin, with the superior courts (High Court, Court of Appeal and Supreme Court) all housed in one building (the Four Courts). In the words of Pavone, Dublin increasingly becomes a "hub" for EU law with specialised Euro-lawyers and large

[107] "Are you asking the Supreme Court to: make a reference to the Court of Justice of the European Union? Yes/ No. If Yes, please give details below:". Interview 113.

[108] Interviews 102, 105, 136, 139, 144, 161, 162 and 181. The conclusion that Irish courts base their decisions (not) to refer more on the wishes of the parties is partly validated by the analysis of the decision of Irish courts (not) to refer. Nine out of the 30 decisions to refer published on *Bailii* mentioned a request of one of the parties. It could well be that a request was made in the other 21 decisions to refer, even though no mention was made thereof. This was the case in *Nowak*, involving the question whether written exams constitute personal data. Clarke J. mentioned at a later occasion that "a litigant in person persuaded this Court to refer". Irish Supreme Court, judgment of 24 February 2017, [2017] IESC 11, para. 4.2 (C-434/16). Even with this caveat, this means that in at least 30 per cent of the cases a request was made, which is considerable in comparison with the Netherlands, cf. J. KROMMENDIJK, *The Highest Dutch Courts and the Preliminary Ruling Procedure*, cit., p. 410.

[109] Interview 144; Irish Supreme Court, judgment of 16 July 2015, *O.*, [2015] IESC 64 (MacMenamin J.), paras 44-46; see also Irish High Court, judgment of 28 July 2015, *Toal*, [2015] IEHC 512 (Keane J.), paras 48-49.

[110] Interviews 113, 148, 155, and 159; I. MAHER, *EU Law and the Courts*, cit., p. 180; E. FAHEY, *Practice and Procedure in Preliminary References to Europe*, cit., p. 19.

[111] E.g. Irish High Court, judgment of 18 July 2014, *Schrems*, [2014] IEHC 310 (Hogan J.). A reference can also be the result of the judge "probing the parties" without a specific request from either side. Interviews 133, 136, 144, 148, 153, 155, 159, 162, 166, 174 and 191.

[112] Interviews 105, 113, 152 and 153.

[113] T. PAVONE, *Dancing in Place: The Spatial Micro-foundations of the EU's Judicial Dialogue*, on file with the Author.

law firms. This, in itself, has a reinforcing or flywheel effect that will gain additional impetus after Brexit.[114]

## VI. No negative feedback loops: general satisfaction with Court of Justice answers

Another explanation for the growth of Irish references is the existence of a positive feedback loop (section VI.1).[115] There is a general satisfaction with requested Court of Justice judgments, also because many of the references resulted in cases of helpful outcomes (section VI.2). These previous references of other judges also inspired other judges to refer. This positive dynamic runs counter to practice in some other EU Member States where (constitutional) courts have been more critical of their interaction with the Court of Justice.[116]

### VI.1. General satisfaction and inspiration

Interviewees considered almost all Court of Justice judgments to be helpful and of high quality.[117] This can also be attributed to the fact that Irish courts have primarily referred closed questions resulting in outcome cases, in which the Court of Justice *de facto* decided the case on the merits, because it gave very specific answers that leave no margin for manoeuvre for the national court.[118] Judges generally prefer such outcome cases over deference judgments, provided that the Court of Justice interprets the national legal framework and the facts of the case correctly.[119] Since the majority of Irish references resulted in outcome cases, few Court of Justice judgments resulted in an argument during the hearing.[120] In such outcome cases, the national court often closed the case by way of an oral order instead of a written judgment.[121]

[114] F. Clarke, *Ireland as a Dispute Resolution Hub after Brexit*, 21 November 2018, available at www.iiea.com.

[115] Irish judges were, however, noticeably less critical than their Dutch counterparts. See J. Krommendijk, *The Highest Dutch Courts and the Preliminary Ruling Procedure*, cit., pp. 399-405.

[116] See *supra*, notes 7 and 17.

[117] Interviews 105, 108, 113, 133, 136, 139, 144, 152, 166, 181, 187 and 191.

[118] T. Tridimas, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, in *International Journal of Constitutional Law*, 2011, p. 737 *et seq*.

[119] J. Krommendijk, *The Highest Dutch Courts and the Preliminary Ruling Procedure*, cit., pp. 404-405.

[120] There have been arguments in, for instance, *Danqua*, *M.M.*, *Dowling*, *Cussens*, *Celmer* and *North East Pylon.* See interviews 148, 152, 153, 155 and 181.

[121] It could also be that (one of) the parties can withdraw the case after the Court of Justice's judgment or a settlement is reached. See interviews 121, 133, 136, 152, 166, 174 and 188. The Supreme Court explicitly noted in its follow-up to H.N. that it is not necessary "to repeat the clarification provided by the decision of the ECJ". Irish Supreme Court, judgment of 10 April 2014, *Nawaz*, [2014] IESC 30 (O'Donnell J.), para. 14.

Furthermore, the follow-up has almost always be in line with the Court of Justice judgment, even in the problematic judgments discussed above.[122] Even though judges were sometimes critical about the Court of Justice and specific judgments (see below, section VI.2), they considered themselves absolutely bound by Luxembourg.[123] One judge, for example, stated: "if Irish law turns out to be deficient, so be it. If Court of Justice arrives at a different interpretation, so be it".[124] Hogan J., who was involved in the references in *M.M.* and *Danqua*, held: "I do not see how this Court can in any way look behind the judgment of the Court of Justice, even if some might regard the fact that the Court went beyond the scope of the questions posed in the original Article 267 reference by addressing an entirely new question as unsatisfactory".[125] The situation of full implementation equals the finding of Squintani and Kalisvaart, as outlined in their *Article* in this Special Section, at least for Italy, Belgium, the Netherlands, and the United Kingdom in the field of environmental law. The obedience of the Irish courts stands in sharp contrast with (constitutional) courts in other EU Member States that have had more difficulties complying with Court of Justice judgments and reversing their own case law.[126]

The positive experience with the procedure has inspired other judges to refer. It was already mentioned that several recently appointed High Court judges made their first reference in recent years (see above, section IV). This was (partly) attributed to prominent and visible Irish references, such as *Digital Rights Ireland*, *Pringle*, *Schrems*, and the recent reference of Donnelly in the famous *Celmer* case about the consequences of the rule of law backsliding in Poland for the surrender of a person on the basis of an EAW.[127] Judges are increasingly aware that some of their colleagues are referring.[128] These prominent references contributed to an increased awareness of the procedure and thus enhanced the likelihood of referring.

[122] Interview 166.

[123] Interviews 146, 159, and 162; F. Clarke, *Apex Court Dialogue: The View from Dublin*, speech during the annual conference of the Irish Supreme Court Review, 6 October 2018, in *Irish Supreme Court Review 2017-2019*, Dublin: Clarus Press, 2019.

[124] Interview 159.

[125] Irish Court of Appeal, judgment of 6 February 2017, *Danqua*, [2017] IECA 20, para. 36; cf. interview 166.

[126] E.g. the Danish Supreme Court in *Dansk Industri*. See U. Šadl, S. Mair, *Mutual Disempowerment*, cit., p. 359. See, however, the Belgian Constitutional Court that has been eager to refer as well as loyal in terms of compliance, suggesting a positive feedback loop as well. L. Burgorgue-Larsen, *The Constitutional Dialogue in Europe: A "political" Dialogue*, in *European Journal of Current Legal Issues*, 2015, webjcli.org.

[127] *Celmer* [GC], cit.; interviews 148, 155 and 162.

[128] Interviews 153, 181 and 188.

### VI.2. Very few deficient Court of Justice judgments: exceptions proving the rule

There have naturally been Court of Justice judgments that were not received with open arms, as this section will show. This has, however, not discouraged the courts from referring, as interviewees stressed.[129] In addition, Irish judges were considerably less critical than their Dutch counterparts who gave more examples of problematic judgments during interviews. Irish interviewees clearly emphasised that they were dissatisfied with only a small minority of Court of Justice judgments.[130] Furthermore, most interviewees also showed understanding for the difficult context in which the Court of Justice operates with 28 different Member States. One judge warned that judges should act judicially and realise that "none of the tasks of the Court of Justice are easy" and that these "things happen".[131] Another interviewee remarked that it is "almost unavoidable" that judgments are not always clear, also because there is only one Irish judge who understands the Irish system.[132] Another noted about the *M.M.* saga that such "cultural misunderstandings" can sometimes happen, while Supreme Court judge O'Donnell pointed to the "difficulties of communication between different legal systems".[133] In addition, several interviewees also argued that referring courts should be blamed for having drawn up an apparently unclear reference.[134] One judge stated that deficient answers teach us that we should be careful how questions are framed and to avoid posing general questions.[135]

It is nonetheless instructive to focus on some problematic cases with a view to showing that (most) Irish judges have not been affected in a negative way in subsequent decisions to refer by deficient answers. Irish judges have neither been discouraged from referring, even though most of them recognised that the Court of Justice is different and in the words of one interviewee "alien to our tradition".[136] Irish judges, for example, criticised Court of Justice judgments for being brief, formalistic and difficult to digest.[137] Several noted that it is difficult to get in tune with the thinking of the Court of

[129] Interviews 108, 144, 146, 155, 181 and 187; see more extensively about such "feedback loops", J. Krommendijk, *The Preliminary Reference Dance Between the CJEU and Dutch Courts in the Field of Migration*, cit.

[130] Irish judges were actually much less critical than their Dutch counterparts who mentioned more deficient judgments during interviews, interviews 113, 171 and 181.

[131] Interview 155.

[132] Interview 113, cf. interview 155.

[133] Interview 181; Irish Supreme Court, judgment of 14 February 2018, *M.M.*, [2018] IESC 10 (O'Donnell), paras 315 and 1.

[134] Interviews 144, 152, 161 and 181.

[135] Interview 181.

[136] Interview 144.

[137] Interviews 139, 144, 152, 181, 187 and 191. One interviewee (166), however, appreciated that they are not too long.

Justice.[138] In addition, it was mentioned that Court of Justice judgments are not so readable and "fairly boring".[139] One judge, for example, characterised Court of Justice judgments as "very flattening in terms of content" and stated: "There is a pretense that the law is a continuous march. Major changes in the jurisprudence are camouflaged and not even admitted when there are contradictory judgments".[140] Another judge also reasoned along this line and put forward that the Court of Justice presents itself as an "oracle" that does not make clear why it has spoken in a certain way.[141] The formulaic character of Court of Justice judgments is especially problematic when the Court of Justice does not follow the AG or when the Court of Justice judgment is applied in a subsequent case with a different factual constellation.[142] This is even more relevant in a common law jurisdiction where judges "cannot be loose with language" and primarily look at the reasoning in a judgment.[143] It is therefore not surprising that there is a preference of some for the more discursive AG opinions.[144]

It was, firstly, noted that not all questions are always clarified by the Court of Justice, because of unclear language.[145] On the basis of the interviews and legal analysis, only one case in this category was retrieved, *North East Pylon*.[146] The Court of Justice used three different notions in *North East Pylon* about the requirement that judicial environmental procedures are not prohibitively expensive: the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters, "rights conferred by EU law" and "effective judicial protection in the fields covered by EU environmental law". One interviewee wondered whether the Court of Justice means the same thing with these concepts and noted that this lack of clarity might require a second reference.

A second problem noted by interviewees is that the Court of Justice sometimes reformulates the questions, which can be problematic for a national court when the original question asked is not answered or the Court of Justice misunderstands the question (see also the *Articles* of Wallerman Ghavanini and Eliantonio and Favilli in this Special

[138] Interviews 102, 108, 187 and 191.
[139] Interviews 102, 139, 166 and 191.
[140] Interview 139, cf. interviews 136 and 144.
[141] Interview 144, cf. interview 155.
[142] Interviews 152 and 187.
[143] Interview 133; cf. interview 155.
[144] Interviews 108, 139 and 152.
[145] Interviews 139 and 148.
[146] *Farrell* was referred twice (once by the High Court in case C-356/05 and ten years later by the Supreme Court (case C-413/15)), but interviewee 152 considered this the "fault" of the High Court that had initially not referred all questions. See Court of Justice: judgment of 19 April 2007, case C- 356/05, *Farrell*; judgment of 10 October 2017, case C-413/15, *Farrell* [GC].

Section).[147] Several interviewed judges mentioned this, but they could not mention concrete examples of cases they had been involved in themselves.[148] The only case discussed was *Danqua* in which the Court of Appeal asked about the 15-day time limit for applications for subsidiary protection in relation to the principle of *equivalence*.[149] The Court of Justice nonetheless disregarded the question as "irrelevant" and determined that the questions "must be understood" as asking whether the principle of *effectiveness* precludes the Irish procedural rule (answer: yes).[150] Hogan J. criticised the Court of Justice for answering questions not posed and that were not previously raised in the domestic proceedings.[151] At the same time, AG Bot gave the Court of Appeal a rap over the knuckles for insufficiently setting out the national legal framework.[152]

A third problem arises when the Court of Justice does not grasp the facts or misunderstands the national legal framework. Again, only one case was mentioned by several interviewees: the "long running drama" of the *M.M.* saga that lasted 11 years.[153] This case, which just as *Danqua* dealt with the peculiar Irish subsidiary protection scheme, was actually referred twice, first by the High Court in 2011 and later by the Supreme Court in 2014.[154] While most EU Member States have a single procedure for asylum and subsidiary protection claims, Ireland had a system whereby applicants whose application for a refugee status had been refused could subsequently apply for subsidiary protection. High Court judge Hogan asked in 2011 whether the administrative authorities are obliged to supply an applicant with a draft decision on the application for subsidiary protection before a final decision is made, given that the first refugee application had been rejected. The Court of Justice determined that there is no such obligation.[155] To the dismay of Hogan J., the Court of Justice "went beyond the scope of the referred question" and examined "the more general question of fair procedures" and the right to

[147] Interviews 108, 113, 152, 161, 162, 166 and 174. Two judges (interviews 108 and 152) held that the Court of Justice should consult the referring court when it reformulates question, U. ŠADL, A. WALLERMAN, *'The Referring Court Asks, in Essence': Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-making Approach*, in *European Law Journal*, 2019, p. 416.

[148] Interviews 108, 161, 166 and 174. In *Schrems*, the Court of Justice reformulated the question as one about the validity of the Safe Harbour Decision in the light of the Charter of Fundamental Rights, even though the referring High Court Judge Hogan clearly decided against this in his order for reference. Irish High Court, judgment of 16 July 2014, *Schrems*, [2014] IEHC 351 (Hogan J.), paras 37-39.

[149] Irish Court of Appeal, judgment of 10 July 2015, *Danqua*, [2015] IECA 118 (Hogan J.); interview 166.

[150] Court of Justice, judgment of 20 October 2016, case C-429/15, *Danqua*, paras 35-36 and 38.

[151] Irish Court of Appeal, judgment of 6 February 2017, *Danqua*, [2017] IECA 20 (Hogan J.), paras 1, 3, 15 and 19.

[152] Opinion of AG Bot delivered on 29 June 2016, case C-429/15, *Danqua*, paras 21 and 26.

[153] Interviews 113, 128, 144, 152, 159, 171 and 181; Irish Supreme Court, judgment of 14 February 2018, *M.M.*, [2018] IESC 10 (O'Donnell J.), para. 31.

[154] Irish High Court, judgment of 18 May 2011, *M.M.*, [2011] IEHC 547 (Hogan J.). See Court of Justice: judgment of 22 November 2012, case C-277/11, *M.*; judgment of 9 February 2017, case C-560/14, *M.M.*

[155] Court of Justice, judgment of 22 November 2012, case C-277/11, *M.*

a hearing.[156] The Court of Justice concluded that the fact that the applicant had already been duly heard in the (first) refugee procedure does not mean that the right to be heard may be dispensed with in the second subsidiary protection procedure. Hogan J. lamented that this point "was never argued" before the High Court and also pointed to another "complicating issue" that the Court of Justice "ascribed certain views" to the referring court.[157] The Court of Justice seemed to assume that procedural safeguards were lacking and that there was no possibility at all to make submissions.[158] Several interviewees noted that the Court of Justice "fundamentally misunderstood" the facts and the context of the case and offered its views about the subsidiary protection system "without having the details".[159] One interviewee held that the Court of Justice "should not have made its hands dirty with facts".[160] This was at the same time also partly the result of the order for reference which talked about a bifurcated system, implying a choice between the two procedures (asylum and subsidiary), while it is more of a two-step system.[161] The order gave too little information about the procedure and the High Court should have stated what is obvious for every Irish lawyer, namely that a hearing implies an *oral* hearing in common law jurisdictions.[162] This saga is thus a perfect example of "lost in translation" and talking across each other.[163] Despite these problems, Hogan's follow-up decision was fully in line with the Court of Justice judgment, noting that he "must naturally apply the judgment".[164] Following this judgment, the Irish authorities introduced personal interviews for subsidiary protection applicants and broadened their appeal rights. This caused a "gridlock in the system", because every case was stalled.[165] It also led to "an internal controversy" and "marked tension" within the Irish judiciary between judges following Hogan's interpretation of the first Court of Justice judgment.[166] According to one interviewee, Hogan J. reasoned along the lines: "I cannot really say that the Court of Justice failed to understand. There must be some-

[156] Irish High Court, judgment of 5 March 2013, *M.R.*, [2013] IEHC 91 (Hogan J.), paras 6 and 22; cf. Irish Supreme Court, judgment of 14 February 2018, *M.M.*, [2018] IESC 10 (O'Donnell), para. 10.

[157] Hogan J. held at a later instance as a Court of Appeal judge that it was not appropriate for the Court of Justice to challenge his analysis and order for reference in the light of the division of tasks between the Court of Justice and national courts. Irish Court of Appeal, judgment of 6 February 2017, *Danqua*, [2017] IECA 20 (Hogan J.), paras 34-35.

[158] Interviews 144 and 152.

[159] Interviews 113, 144, and 181.

[160] Interview 113.

[161] Interview 144.

[162] Interviews 144, 152 and 159.

[163] Interview 152; Irish Supreme Court, judgment of 14 February 2018, *M.M.*, [2018] IESC 10 (O'Donnell), para. 8.

[164] Irish High Court, judgment of 5 March 2013, *M.R.*, [2013] IEHC 91 (Hogan J.), para. 50; interviews 144 and 181.

[165] Interviews 113, 181 and 171.

[166] Interview 144.

thing wrong with the Irish procedure. I have to condemn the procedure, even though I am not quite sure how". Hogan J. thus made an "informed guess" as to what the Court of Justice would have meant on the basis that the Court of Justice was "evidently troubled".[167] This short overview shows the faithful application of and adherence to EU law by Irish courts (see above, sections III and VI.1). The case reached the Supreme Court in 2014. The Court basically asked whether the Court of Justice had truly understood the Irish procedure and whether Hogan's inference did not actually go too far.[168] It asked whether the right to be heard requires an *oral* hearing. This time, the Court of Justice answered clearly and noted that a personal interview is not always required.[169]

There has, fourthly, been substantive disagreement with or disappointment in relation to particular Court of Justice judgments. One interviewee argued that, to his/her surprise, the Court of Justice took a narrow view of the Aarhus Convention in *North East Pylon*, requiring litigants to have specifically engaged with public participation to have their costs awarded. This view makes litigation in environmental cases more risky.[170] Another judge held that *Vilkas* does not make sense. The Court of Justice determined that the authorities remain obliged to agree on a new surrender date if the strict time limits in the EAW Framework Decision have expired. However, a person often has to be released in the case of expiry, as a result of which it is difficult to execute the EAW, since the person is no longer in custody.[171] Two interviewees also noted that the Court of Justice case law in the field of consumer law goes too far, requiring courts to examine the fairness of contractual terms *ex officio*, especially for a common law adversarial system where judges have to act on evidence presented by the parties. It is not surprising that Irish courts have been reluctant to examine such terms on their own initiative.[172] In addition, in the child protection case *JD*, one judge "respectfully disagreed" with the Court of Justice on some issues.[173] The Supreme Court "made a grumpy judgment afterwards", albeit it did not deviate from it.[174] As discussed before, a difference of opinion "does not matter" and national courts comply with the Court of Justice judgment (see also above, section VI.1).[175]

[167] *Ibid*.

[168] Interviews 128 and 181.

[169] Court of Justice, judgment of 9 February 2017, case C-560/14, *M*; Irish Supreme Court, judgment of 14 February 2018, *M.M.*, [2018] IESC 10 (O'Donnell J.), para. 10.

[170] Interview 162.

[171] Court of Justice, judgment of 25 January 2017, case C-640/15, *Vilkas*; interview 155.

[172] Interviews 139 and 161; P. Kenna, *Who Will Bell the Cat?*, in *Law Society Gazette*, 2018, p. 32 *et seq*.

[173] Court of Justice, judgment of 27 October 2016, case C-428/15, *D*.

[174] The Supreme Court judgment also notes that "these conclusions were at variance from those I expressed" in the order for reference. Irish Supreme Court, judgment of 19 July 2017, *J.D.*, [2017] IESC 56 (Charleton J.); interview 128.

[175] Interview 133, cf. interviews 121 and 188.

This section discussed four types of deficient or problematic Court of Justice judgments. Only a handful of such judgments were found for Ireland. This small amount has, to date, not discouraged Irish courts from referring.

## VII. Concluding remarks

This *Article* aimed to explain the enormous growth in Irish references. It discussed four main reasons: firstly, a more loyal application of the legal framework of Art. 267 TFEU by the Supreme Court but also courts that are not obliged to refer; secondly, a generational change of judges with the introduction of new judges being more aware of and inclined to engage with EU law; thirdly, increased and improved litigation on the basis of EU law coupled with more frequent and better substantiated requests to refer; and fourthly, a generally positive dialogical dynamic between Irish courts and the Court of Justice which has also inspired other judges to refer.

These findings put the previous research on constitutional courts in a different light. At first sight, it is not surprising that constitutional courts are by their nature critical interlocutors of the Court of Justice. These courts often deal with sensitive areas and tend to defend *national* human rights instead of relying on "external" sources. This is even more the case in EU Member States with a strong domestic tradition of the rule of law.[176] This also explains why most of the very few recent references by these constitutional courts, such as *Melloni*, *Gauweiler* and *Taricco II*, are not necessarily positive signs of their willingness to engage with EU law.[177] Rather, these courts tend to use the vehicle of references for a preliminary ruling as a means to challenge the authority and legitimacy of the Court of Justice. This situation has become even more tense after the EU Charter of Fundamental Rights became legally binding in 2009, as the cases of *Melloni* and *Taricco II* also illustrate. The Irish case shows that this more negative, competitive dynamic between national (constitutional) courts and the Court of Justice need not necessarily be the case, even in a country which also has a rather solid "home-grown" constitutional and fundamental rights tradition. The preliminary ruling procedure and interaction with the Court of Justice is approached almost unanimously in a positive way. This *Article* pointed to several factors that could also turn the negative tide in other EU Member States: more training in EU law for judges and lawyers and more attention to the way in which the questions for the Court of Justice are formulated, namely primarily referring outcome cases that lead to concrete answers from the Court of Justice. What

[176] Cf. with respect to the role of these courts in relation to the European Convention on Human Rights, H. Keller, A.S. Sweet, *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford: Oxford University Press, 2008, p. 686.

[177] Court of Justice: judgment of 26 February 2013, case C-399/11, *Melloni* [GC]; judgment of 16 June 2015, case C-62/14, *Gauweiler and Others* [GC]; judgment of 5 December 2017, case C-42/17, *M.A.S. and M.B.* [GC].

seems to matter above all is a mentality change among judges, whereby referring is not seen merely as "a required thing" but is approached more pragmatically as a useful way of solving complex legal questions.[178]

[178] Popelier and Van de Heyning showed that the Belgian Constitutional Court referred above all to solve a domestic legal problem and not necessarily because the topic affects fundamental principles of EU law, P. Popelier, C. Van de Heyning, *Constitutional Dialogue as an Expression of Trust and Distrust in Multi-level Governance*, in M. Belov (ed.), *Judicial Dialogue*, The Hague: Eleven, 2019, p. 59.