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EDITORIAL

NEITHER REPRESENTATION NOR TAXATION? OR, “EUROPE’S MOMENT” – PART I

The philosophical implication of the abused formula “no taxation without representation”, or, in medieval terms *“nullum scutagium nisi per commune consilium”* can hardly be overshadowed. It underlies a conception of social organisation which departs from the Hobbesian paradigm, based on the unconditioned devolution to an absolute sovereign of all the prerogatives hitherto possessed by self-determined individuals. In contrast to that model, the link between representation and taxation rather suggests the existence of a community endowed with common institutions, possessing prerogatives and powers to be exercised for the common good.

Although historically sprouting as a limit to the unfettered power to levy tax, the relation between taxation and representation appears to be bidirectional. Taxation requires representation, as only the social body and its representatives have the moral authority to impose individual sacrifice for the common good. Conversely, representation also requires taxation; not only for the quite trite consideration that determining the common good without the means to attain it is an empty word. In addition, taxation, though unpleasant as it may be, establishes a link between the input and the output of the political decision, between the expectations created and the results attained. It is, therefore, a necessary ingredient to ensure legitimacy to political power. Taxation and representation are an indissoluble dyad marking the border between democracy and autocracy.

Yet, as well known, in the Union order this dyad is split. From the inception of the process of integration, the Union’s claim to represent the citizenry of Europe was not accompanied by the power to provide for the means to pursue its objectives and values. In spite of the emphatic proclamation of Art. 311, paras 1 and 2, TFEU the relevance of the Union’s own resources in the budget is still quite limited.

The weakness of the Union as a fiscal power is easily explained by the procedure necessary to adopt a Decision on its own resources. Under Art. 311, para. 3, TFEU, this Decision not only requires the unanimity within the Council, after consulting the Parliament, but also the approval by the Member States (MS) in accordance with their respective constitutional requirements. This is a very special procedure, whereby the MS must express their unanimous consent under two different forms: as members of the Council as well as in their capacity as subjects of international law. The rationale for this distinction probably lies in the constitutional implication of the Decision on own resources, which could transform the nature of the Union and make it a self-determined entity, possessing the power to provide by itself the means to pursue its objectives. The control exerted by the MS over this procedure is tantamount as a form of external control over the development of European integration.



This transformation seems to have suddenly materialised between the late spring and the late autumn 2020, when the Commission proposed a package of measures concerning the recovery and the relaunch of the economy of the MS seriously affected by the Covid-19 pandemic, ambitiously labelled *Next Generation EU* (communication COM(2020) 456 final of 27 May 2020 from the Commission, *Europe's moment: Repair and Prepare for the Next Generation*). These measures ought to be funded by Union's own resources which should then be increased in order to allow the Commission to borrow money on a very large scale on the financial markets. The funds raised should be repaid through a corresponding increase of the Union's budget.

This communication closely follows the scheme usually employed by States to finance public expenditures. In the absence of financial resources to fund public policies, States can borrow money on the financial market and repay it with future revenues, mainly taxation. In modern democracies, this process is entirely based on democratic decisions, from assessing the necessity of public expenditure to borrowing money, from employing the money for public need to raising the means for their repayment. If that were the case, one could maintain that the Unions is breaking free from the direction and control of its MS in shaping its policies; that, after the title of the communication of the Commission, "Europe's moment" has finally arrived.

The Commission's proposal contained all the elements of this virtuous process. The Commission determined that "Europe was confronted by a public health challenge that quickly became the most drastic economic crisis in its history"; it went on by pointing out that "[i]t is in our common interest to support the hardest hit, strengthen our single market and invest in our shared European priorities". The communication went further on by determining the dangers ahead, unemployment, poverty and inequalities, and the remedies thereto, namely "massive investment in a sustainable recovery and future", defined as the "common good for our shared future". This is an unequivocal assessment of the existence of public needs requiring a European common effort. On that basis, the Commission proposed to fund the new recovery instrument entirely out of the EU's own resources and, for this purpose, to use its very strong credit rating to borrow a very large amount of money on the financial markets. The details of these projects were spelled out in the proposal for a Regulation of the European Parliament and the Council establishing a recovery and resilience facility (COM(2020) 408 final of 28 May 2020).

In its meeting of 14-21 July 2020, the European Council, while highlighting the exceptional-ity of the project in light of the extraordinariness of the events, reached a substantial political agreement on the proposals submitted by the Commission. After another tensed meeting of the European Council on 10 December 2020, the Council adopted, on 14 December 2020, a new Decision on the Union's own resources (Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom).

However, in spite of the intense on-going debate between the supporters of a fiscal Europe and the custodians of the budgetary discipline, the very nature and implication of this ambitious project are still nebulous. Is the idea of common debt for common goods really heralding a new phase in the process of integration, featured by massive redistributive policies, or is it rather, and more modestly, an expedient to obtain convenient credits rating, unapproachable for most of the MS, to boost their own economic policies and strategies? In the former case, this new turn could well materialise the ideal inspiration which emerges from some new objectives and values of the Union enshrined in Art. 3 TEU, such as the social market economy, the social progress or the social justice, hitherto mainly considered as mere ideal types, which do not really contribute to determine the normative powers assigned to the Union. In the latter case, this project would further sublimate the prominent role of the MS and their ability to bend the Union constitutional setting for their own purposes.

These two approaches are not only philosophically diverse. They are also politically and normatively antithetic. The magnitude of the financial resources to be raised and the objectives of economic policy to be attained would have pleaded for a common European recovery plan, developed and implemented by the European Institutions or under their close direction and control. This approach would have not been inconsistent with the primary competence in the field of economic policy, conferred to the MS by the founding treaties, in particular by Arts 120 and 121 TFEU. Quite the contrary, Art. 122, para. 1, bestows upon the Union the power to take actions in the field of economic policy, in situations of serious crises symmetrically affecting all the MS. A recovery plan facing the economic and social consequences of the Covid-19 pandemic would have plainly fallen within the scope of this provision.

Presumably because of its intrusiveness in a field jealously guarded by the MS, such an approach was never seriously considered in the long and thorny debate preceding the first proposals of the Commission. The prevailed view regarded the Union's action as limited to provide financial assistance to the national plans of the MS, and to control their consistency with broad European guidelines. Both the SURE Regulation (Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak), the first program related to the consequences of the pandemic, and the proposal for a Regulation establishing a Recovery and Resilience Facility (COM(2020) 408 final, cit.), the beating heart of Next Generation EU, follow this scheme (see Art. 2 of the SURE Regulation and Art. 4 of Proposal for a Regulation COM(2020) 408 final, cit.). The amount of financial assistance is provided by the Commission within national limits set by the European Council.

It is not easy, however, to identify an appropriate legal basis for this scheme.

The SURE Regulation is grounded on two legal bases: Art. 122, para. 1, and Art. 122, para. 2, none of them plainly conferring to the Union that power. In *Pringle* (judgment of 27 November 2012, case C-370/12, para. 116), the Court of Justice found that Art. 122, para. 1, TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems. Conversely, Art. 122, para. 2, TFEU allows for measures of financial assistance to individual MS, but only in asymmetrical crises (see European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, recital 4; *Pringle*, cit., paras 65, 118). By no way the cumulation of these two legal bases could have formed the foundation for a third action, namely measures of financial assistance to all the MS in symmetrical crises.

The proposal for a Regulation establishing a Recovery and Resilience Facility is based on Art. 175, para. 3, TFEU, which is part of Title XVIII, whose main objective is to support MS's economic policies and to secure the overall harmonious development of the Union through structural funds. Structural funds, however, are instruments of ordinary intervention, chiefly inappropriate to support projects which, for the magnitude of the objectives pursued and of the means required, should be considered as extraordinary. This consideration may have played a role in the decision to have recourse to Art. 175, para. 3, which confers to the Union a broad power to take specific actions "outside the funds". However, measures which exceed the limits of the structural funds arguably also exceed the entire competence of the Union under Title XVIII, including actions outside the funds. In addition, even assuming that Art. 175, para. 3, confers to the Union a large power to take actions of economic policy in extraordinary situations, in which the social and economic cohesion of the Union is at stake, it would be a logical oddity to act "outside the funds" while using typical means of actions of the funds. In addition, as pointed out by the CJEU, actions outside the fund are, by nature, actions specific to the Union (Court of justice, judgment of 3 September 2009, case C-166/07, *Parliament v. Council*, para. 46).

Even more controversial appears the second part of the game, namely that related to the repayment. Even though the loans are formally own resources for the purposes of Art. 311 TFEU, they are substantially debts which the Union must redeem with cold cash. Thus, their final qualification depends on how they will be repaid. If there is a credible plan of repayment, the European loans can be plausibly be qualified as “genuine” own resources under Art. 310, para. 4; otherwise, the recovery fund will create public debt of the Union: not really a great European moment.

With regard to this issue, everything under heaven is in utter chaos. In the proposal for a Council Decision on the system of own resources of the European Union (COM(2018) 325 final of 2 May 2018), the Commission proposed a basket of new own resources: a reform of the corporate tax base, a contribution from the EU emissions trading system, a plastic packaging waste contribution. In its communication of 27 May 2020, COM(2020) 456, it expressly mentioned a carbon border adjustment mechanism, which has been lingering for years in the debate on own resources. More detailed proposals, inspired by a different philosophy, whereby the repayment should be entirely covered by income “from genuine new own resources” and in a “pre-defined time frame”, were put forward by the European Parliament in its legislative resolution P9_TA(2020)0220 of 16 September 2020 on the draft Council Decision on the system of own resources of the European Union.

What is left of all this in the final Decision on own resources? Recital 7 mentions a national contribution calculated on the basis of non-recycled plastic packaging waste, which “should be introduced”. Recital 8 formulates a request to the Commission to put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy with a view to their introduction “at the latest by 1 January 2023”; it further “takes note” of the European Council’s invitation to put forward a revised proposal on the EU emissions trading system, and reiterates the intention to “work towards” the introduction of other own resources, which may include a financial transaction tax. It is apparent that, apart from national contribution based on non-recycled plastic packaging, uncertainty reigns about the other prospective own resources: their content and revenue, the time of entry into force, the operating mechanism, the natural or legal persons on which they will levy and even their legal nature.

In spite of the magnitude of the financial stakes mobilised by the Union and of the ambitious objective to transform a dramatic event into an opportunity to change Europe and its Union, this “Europe’s moment” appears to be much less momentous than it is claimed to be.

Virtually, all the elements which contribute to the virtuous process underlying the relationship between representation and taxation are lacking. It is not the Union which determines the common goods to be attained. Nor does the Union lay down the modalities and the timing of their attainment. All these elements are determined by individual MS in their national recovery plans, prepared and implemented by national authorities, under a broad control and surveillance of the Commission. Finally, although the Union is the sole debtor vis-à-vis the international investors, it does not possess, at the present time, the means to repay its debt. In other terms, the Union does not dispose of the power to present itself in front of the European citizenry and to impose taxation in return for the common good prospectively to be attained. For the time being, it is virtually acting as a debt agency of its MS.

The constitutional moment whereby *scutagium* and *consilium* represent two distinct but related aspects of the European democratic legitimacy has not arrived yet.



ARTICLES

THE EEA AGREEMENT AS A JACK-IN-THE-BOX IN THE RELATIONSHIP BETWEEN THE CJEU AND THE EUROPEAN COURT OF HUMAN RIGHTS?

HALVARD HAUKELAND FREDRIKSEN* AND STIAN ØBY JOHANSEN**

TABLE OF CONTENTS: I. Introduction. – II. Attribution of conduct and the European Court of Human Rights case-law on international organisations. – II.1. European Court of Human Rights review of MS-attributed conduct. – II.2. European Court of Human Rights review of IO-attributed conduct. – III. The European Court of Human Rights' first stab at the EEA: *Konkurrenten.no v. Norway*. – IV. The equivalent protection doctrine and its (in-)applicability to the EEA/EFTA system. – IV.1. The EEA Agreement's lack of a written catalogue of fundamental rights. – IV.2. The lack of EEA law principles of direct effect and supremacy. – IV.3. Other EEA/EFTA peculiarities that might justify non-application of the equivalent protection doctrine. – IV.4. Preliminary conclusion on the applicability of the equivalent protection doctrine to the EEA. – V. The (in-)applicability of *Matthews* to the EEA/EFTA system. – V.1. *Matthews* and its relationship to the equivalent protection doctrine. – V.2. Open-ended commitments and the EEA/EFTA system. – VI. A jack-in-the-box in the relationship between the CJEU and the European Court of Human Rights?

ABSTRACT: In the scholarly debate about the relationship between the European Court of Human Rights and the CJEU, the potential impact of the Agreement on the European Economic Area (EEA) is often overlooked. Unless the European Court of Human Rights' equivalent protection doctrine is extended to the EEA, the door is open for indirect ECHR review of all the parts of EU law that have been made part of the EEA Agreement and as such implemented into the national laws of the participating European Free Trade Association (EFTA) States. The impact of CJEU case-law in the EFTA pillar of the EEA is such that this will come very close to full (albeit indirect) scrutiny of the CJEU's protection of fundamental rights within the EU's internal market. An extension of the equivalent protection doctrine to EEA law admittedly presupposes a novel approach to the question of whether an international treaty establishes a system that offers a level of human rights protection equivalent to that of the ECHR, and to the limitation to strict legal obligations established in *Bosphorus*. Nevertheless, we submit that the European Court of Human Rights ought to rethink its apparent opposition to the idea. This will also offer an opportunity to clarify the relationship between

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the judgments in *Matthews* and *Bosphorus* with regard to obligations flowing from international treaties to which Member States have freely entered into.

KEYWORDS: European Court of Human Rights – CJEU – EFTA Court – EFTA States – EEA – equivalent protection.

I. INTRODUCTION

In the scholarly debate about the complex and complicated relationship between the European Court of Human Rights and the CJEU, the potential impact of the 1992 Agreement on the European Economic Area (EEA) is often overlooked. The EEA Agreement is an international agreement between the EU, the EU Member States and three of the remaining four Member States of the European Free Trade Association (EFTA), which for more than 25 years have integrated the latter (Iceland, Liechtenstein and Norway) into the better part of the EU's internal market.¹ Its principal objective, in the words of both the CJEU and the separate Court of Justice of the EFTA pillar of the EEA (EFTA Court),² is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market is extended to the participating EFTA States.³ In order to fulfil this objective, more or less the entire internal market *acquis* is incorporated into the Agreement⁴ and as such subjected to specific rules of interpretation intended to secure uniform application of EU and EEA law in “a homogeneous European Economic Area” (Art. 1 EEA).⁵ As a result of this, the well-known need to balance the fundamental freedoms of the internal market and the fundamental (human) rights that the CJEU has recognised as general principles of EU law is also to be found in the EEA. Furthermore, as the three EEA/EFTA States are all parties to the European Convention on Human Rights (ECHR), the potential for conflicts between their EEA and ECHR obligations is comparable to the better-known potential for conflicts between EU Member States obligations under EU and ECHR law.

¹ Agreement on the European Economic Area. The fourth remaining EFTA State, Switzerland, remains outside the EEA as the result of a referendum held in 1992. Certain sectors of the internal market are kept outside the EEA Agreement (agriculture, fisheries, etc.), but that is of no concern for our present purposes.

² Established by the participating EFTA States as a substitute for the CJEU, as required by Art. 108 EEA.

³ See Court of Justice, judgment of 23 September 2003, case C-452/01, *Ospelt and Schlössle Weissenberg*, para. 29, and the EFTA Court's follow-up in its judgment of 12 December 2003, case E-1/03, *EFTA Surveillance Authority v. Iceland*, para. 27. This understanding of the Agreement's objective has been normative for the interpretation of EEA law ever since, see e.g. the recent confirmation by the Court of Justice, judgment of 2 April 2020, case C-897/19 PPU, *Ruska Federacija* [GC], para. 50.

⁴ At the time of writing, more than 12 500 EU legal acts have been incorporated into the EEA Agreement since the signing in 1992. Of these acts, around half are currently in force, see www.efta.int.

⁵ For an introduction, see H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles: The EEA Agreement 20 Years On*, in *Common Market Law Review*, 2015, p. 629 *et seq.*

As far as the EU Member States are concerned, the European Court of Human Rights decided in the seminal *Bosphorus* judgment that they are shielded from full ECHR review by the so-called equivalent protection doctrine. Holding that EU law provides “equivalent protection” of human rights “as regards both the substantive guarantees offered and the mechanisms controlling their observance”,⁶ the European Court of Human Rights established a strong presumption of convention compatibility that applies if an EU Member State has done nothing more than to implement EU law obligations. The presumption is rebutted only if it is demonstrated that the protection of ECHR rights was “manifestly deficient” in the circumstances of that particular case.⁷ Indirectly, but hardly inadvertently, this established a pragmatic allocation of tasks between the European Court of Human Rights and the CJEU that has reduced the potential for judicial conflicts between the two courts considerably.

The question of whether the equivalent protection doctrine extends to the EEA and the participating EFTA States, however, remains open.⁸ There are indeed differences between EU law and the law of the EFTA pillar of the EEA that may suggest an answer in the negative. However, such a conclusion would leave the door wide open for indirect ECHR review of all parts of EU law that have been incorporated into the EEA Agreement and as such implemented into the national laws of the participating EFTA States. The impact of CJEU case-law in the EFTA pillar of the EEA is such that this would come very close to full (albeit indirect) scrutiny of the CJEU’s protection of fundamental rights within the scope of the EU’s internal market. It would also leave the EEA/EFTA States in a difficult situation in cases where there indeed are tensions between the CJEU’s and the European Court of Human Rights’ balancing of fundamental rights and freedoms.

⁶ European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], para. 155. The doctrine is often referred to as the “*Bosphorus* doctrine”, but we prefer the term “equivalent protection doctrine” as it predates the *Bosphorus* judgment. The roots of the equivalent protection doctrine at least go back to European Commission of Human Rights, decision of 9 February 1990, no. 13258/87, *M & Co v. Germany*.

⁷ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 156 *et seq.*

⁸ There is some, but not much literature on this. See, in the English language: C. BAUDENBACHER, *Fundamental Rights in EEA Law or: How Far from Bosphorus Is the European Economic Area Agreement?*, in S. BREITENMOSER, B. EHRENZELLER, M. SASSOLI, W. STOFFEL, B. W. PFEIFER (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber*, Baden-Baden: Nomos, 2007, p. 59 *et seq.* (suggesting that *Bosphorus* could be extended to cover the EEA/EFTA system); D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, in The EFTA Court (ed.), *The EEA and the EFTA Court – Decentered Integration*, Oxford: Hart, 2014, p. 271 *et seq.* (rejecting analogous application of *Bosphorus*). An early contribution in the Norwegian language is H.H. FREDRIKSEN, K.E. SKODVIN, *Den europeiske menneskerettighetsdomstolens kontroll med vern av grunnleggende rettigheter i EF, EU og EØS*, in *Tidsskrift for Rettsvitenskap*, 2006, p. 566 *et seq.* (scepticism towards the *Bosphorus* doctrine as such carried over to the question of its applicability to the EEA/EFTA System, but partially for reasons that have later been remedied – such as the EFTA Court’s subsequent recognition of fundamental rights as unwritten general principles of EEA law, see section IV.1 below).

In its recent judgment in the case of *Konkurrenten.no v. Norway*, the European Court of Human Rights suggested in passing (*obiter dictum*) that the equivalent protection doctrine does not apply to the EEA Agreement.⁹ This inherent differentiation between EU and EEA law parts with the approach of the CJEU, which has come to consider the EEA/EFTA States to be “on the same footing as Member States of the European Union”¹⁰ and their citizens to be in a situation “objectively comparable with that of an EU citizen to whom, in accordance with Art. 3, para. 2, TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured”.¹¹

In this *Article*, we will first sketch out the European Court of Human Rights’ case-law on the interaction between the ECHR regime and international organisations (section II) and then present the *Konkurrenten.no* case (section III). The main part of our contribution is a critical review of the European Court of Human Rights’ reasons for the suggested non-application of the equivalent protection doctrine to the EEA/EFTA system (section IV), followed by an analysis of whether other characteristics of the EEA nevertheless compel the same result (section V). We identify the delimitation of the equivalent protection doctrine towards international legal obligations “freely entered into”, as established in *Matthews* and apparently upheld in *Bosphorus*, as the main challenge to an extension of the doctrine to the EEA. We nevertheless argue that the *raison d’être* of the equivalent protection doctrine suggests that obligations flowing from judicial evolution of (implicitly) *open-ended treaty commitments* ought to be covered by the equivalent protection doctrine, and on this basis that the doctrine can be extended to the EEA/EFTA system. In the final section, we submit that the European Court of Human Rights ought to reconsider the *obiter dictum* in *Konkurrenten.no* when ruling upon the pending case *LO and NTF v. Norway*.¹²

In the following, we use the term “EEA/EFTA system” to refer to the substantive and procedural system established by the EEA Agreement and the closely related Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (EEA/EFTA Surveillance and Court Agreement – SCA).¹³ The European Union and its Member States are also parties to the EEA Agreement, but not to the

⁹ European Court of Human Rights, decision of 5 November 2019, no. 47341/15, *Konkurrenten.no AS v. Norway*, para. 45.

¹⁰ Court of Justice, judgment of 18 December 2015, case C-81/13, *United Kingdom v. Council* [GC], para. 59 (differentiating the EEA Agreement from the EEC-Turkey Association Agreement).

¹¹ *Ruska Federacija* [GC], cit., para. 58.

¹² European Court of Human Rights, no. 45487/17, *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers’ Union (NTF) v. Norway* (communicated 30 April 2019).

¹³ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 2 May 1992 (hereafter: SCA). For the consolidated Agreement with all its protocols and annexes, see www.efta.int.

SCA.¹⁴ For the purposes of this *Article*, it is the situation for the EEA/EFTA States *vis-à-vis* the ECHR and the European Court of Human Rights that is of interest. The EEA Agreement forms an integral part of the Union legal system and is as such to be applied by the EU Member States in conformity with the fundamental rights guaranteed by primary EU law.¹⁵ It follows from this that the application of EEA law in the EU Member States is already covered by the *Bosphorus* presumption of ECHR conformity.¹⁶

The scope of the contribution is limited to whether the equivalent protection doctrine, *as it currently applies to the EU Member States*, ought to be extended to the EFTA States in the EEA. We will not enter into the debate about the continued justification of the *Bosphorus* presumption in a situation where the road to EU accession to the ECHR has become much longer than originally anticipated, and where the CJEU has arguably become more interested in the EU's own Charter of Fundamental Rights than in the ECHR. From the perspective of the EEA/EFTA States, the main concern is equal treatment with the EU Member States, not so much the exact level of scrutiny to which the European Court of Human Rights subjects them all. If the European Court of Human Rights instead took the step of abolishing the equivalent protection doctrine altogether, rather than extending it to the EEA, we would thus not object.

II. ATTRIBUTION OF CONDUCT AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW ON INTERNATIONAL ORGANISATIONS

The European Court of Human Rights has developed a voluminous case-law on the interaction between the ECHR regime and international organisations. We do not need to reiterate all the twists and turns of this case-law here.¹⁷ Nevertheless, one fundamental distinction is crucial for properly understanding the equivalent protection doctrine and its (potential) applicability to the EEA/EFTA system. That is the distinction between conduct attributed solely to an international organisation (IO-attributed conduct) and conduct attributed solely or partially to a Member State implementing a decision of an international organisation (MS-attributed conduct).¹⁸

¹⁴ As EU Member States' fulfilment of their EEA law obligations is monitored by the European Commission and adjudicated upon by the CJEU, in accordance with the general rules of the TFEU, see (implicitly) Art. 108 EEA and (explicitly, as far as the Commission is concerned) Art. 109 EEA.

¹⁵ In the hierarchy of EU norms, international agreements rank above legal acts enacted by the EU institutions, but below the Treaties, the Charter of Fundamental Rights and the general principles that together constitute so-called primary EU law.

¹⁶ Despite the general wording of the *obiter dictum* in *Konkurrenten.no AS v. Norway*, cit., it thus seems safe to assume that the European Court of Human Rights had only the EFTA pillar of the EEA in mind.

¹⁷ For a recent study of this case-law, see E. RAVASI, *Human Rights Protection by the ECtHR and the ECJ*, Leiden: Brill, Nijhoff, 2017, p. 19 *et seq.*

¹⁸ We are far from the first to emphasise this distinction. See e.g.: T. LOCK, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, in *Human Rights Law Review*, 2010, p. 529 *et seq.*; C.

As we will explain in this section, the starting point when assessing the responsibility of a Member State for these two forms of conduct differs. MS-attributed conduct should engage the responsibility of that Member State, while IO-attributed conduct should not generally engage the responsibility of its Member States. The European Court of Human Rights nominally applies the equivalent protection doctrine to both MS-attributed conduct and IO-attributed conduct. However, despite the use of identical terminology to these two different forms of conduct, the European Court of Human Rights' standard of review differs sharply depending on the form of conduct – thus recognising the fundamental differences between them.

II.1. EUROPEAN COURT OF HUMAN RIGHTS REVIEW OF MS-ATTRIBUTED CONDUCT

The *Bosphorus* case is a stereotypical example of MS-attributed conduct: Irish officials seized a Bosphorus Airways' plane in order to implement Council Regulation 990/93 regarding sanctions against the Federal Republic of Yugoslavia. As the European Court of Human Rights confirmed, the conduct of Irish officials is attributable to Ireland, even when they are merely implementing an obligation under the law of an international organisation Ireland is a member of – *in casu* the EU.¹⁹ Given this, the point of departure is that such MS-attributed conduct engages that Member State's responsibility, if it violates the ECHR.

What the European Court of Human Rights did in *Bosphorus* was to carve out an exception to the Member State's responsibility, on the basis that EU law provides "equivalent protection" of human rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance".²⁰ For the EU and other international organisations providing "equivalent protection", a strong presumption of Convention compatibility applies if the State has done nothing more than implementing legal obligations flowing from its membership of the organisation. To rebut this presumption, it must be demonstrated that the protection of ECHR rights was "manifestly deficient" in the circumstances of a particular case.²¹

RYNGAERT, *Oscillating Between Embracing and Avoiding Bosphorus: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the European Union*, in *European Law Review*, 2014, p. 176 et seq.; E. RAVASI, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 19 et seq.

¹⁹ When acting outside the strict legal obligations flowing from their membership in the organisation, Member States are fully responsible for their conduct, see e.g. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 157; European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece* [GC], para. 338.

²⁰ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 155.

²¹ *Ibid.*, para. 156.

II.2. EUROPEAN COURT OF HUMAN RIGHTS REVIEW OF IO-ATTRIBUTED CONDUCT

In situations of IO-attributed conduct, no relevant acts or omissions are attributable to the organisation's Member States. From the perspective of international law, an international organisation is a subject of law separate from its Member States. The organisation's rights and duties are separate from those of its members. Consequently, IO-attributed conduct does not engage the responsibility of the organisation's Member States.

The European Court of Human Rights, however, does not leave states completely off the hook when they transfer powers to an international organisation. The act of entering into the constituent instrument of the organisation is attributable to the Member States, and so far the European Court of Human Rights has identified two situations where responsibility may arise on this basis:

a) If the constituent instrument itself directly violates a substantive ECHR right (*Matthews*).²²

b) If the organisation is established with structural weaknesses in its system of procedural guarantees rendering it manifestly deficient compared to the ECHR system (*Gasparini*).²³

In *Matthews* the applicant successfully argued before the European Court of Human Rights' Grand Chamber that the provisions of the EU Treaties providing for direct elections to the European Parliament violated his right to vote under Art. 3 of Protocol no. 1 to the ECHR. According to the treaties as they stood at the time, the residents of Gibraltar (a dependent territory of the UK) were precluded from voting in the European Parliament elections – even though Union law applied there.²⁴ The European Court of Human Rights came to the rather blunt conclusion that the relevant parts of the EU Treaties were “freely entered into by the United Kingdom”, and consequently that it, “together with all the other parties to the Maastricht Treaty”, was responsible for “the consequences of” the EU Treaties.²⁵

The *Matthews* situation is, in other words, not really an example of IO-attributed conduct, as it may appear to be at first glance, but of MS-attributed conduct. As the European Court of Human Rights correctly concludes, the constituent treaties of interna-

²² European Court of Human Rights, judgment of 18 February 1999, no. 24833/94, *Matthews v. United Kingdom* [GC].

²³ European Court of Human Rights, decision of 12 May 2009, no. 10750/03, *Gasparini v. Italy and Belgium*.

²⁴ *Matthews v. United Kingdom* [GC], cit., para. 33.

²⁵ *Ibid.*, para. 33. The violation of Protocol no. 1, Art. 3 ECHR flowed from the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, which the European Court of Human Rights considered to “a treaty within the Community legal order”, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. For the sake of completeness, it should be noted that the UK (but not the other EU Member States) could also have been held responsible for its *implementation* of its treaty obligation not to extend the right to vote to the Gibraltarians.

tional organisations are not acts of the organisations, but rather “common acts of the Member States”, for which the parties to the ECHR are fully liable.²⁶ The act of entering into a treaty is a free choice, and thus an MS-attributed act. Even if the conduct directly causing the violation may be IO-attributed, it is directly mandated by a treaty provision, which is a form of MS-attributed conduct.

Such violations, which are directly caused by a treaty obligation (*Matthews* – MS-attributed conduct), must be distinguished from violations that result from the subsequent *exercise by the organisation alone* of its powers (*Gasparini* – IO-attributed conduct). International organisations have a legal personality separate from that of their Member States, and consequently some degree of autonomy. For Member States, international organisations may represent a so-called “Frankenstein problem”: When an organisation is created, it attains a life of its own and cannot be fully controlled – at least not by individual states.²⁷ If the European Court of Human Rights were to hold the Member States fully responsible for the IO-attributed conduct, thus piercing the institutional veil, the “Frankenstein problem” would become acute. As a response, the Member States would keep the organisation under even closer control, which in turn would hinder international cooperation.²⁸ The underlying rationale differs from that which applies to MS-attributed conduct,²⁹ and suggests that the standard of review must be lenient if IO-attributed conduct is susceptible to European Court of Human Rights review.

The European Court of Human Rights’ approach to this issue in *Gasparini* and subsequent case-law is well in line with these considerations. In *Gasparini*, a NATO staff member alleged that proceedings before the NATO Appeals Board did not meet the requirements of fair trial under Art. 6 ECHR. An organ of NATO, the Appeals Board was in practice the final arbiter in disputes between NATO and its staff, due to the organisation’s jurisdictional immunity. Since NATO is not party to the ECHR, the applicant filed the case against Belgium (NATO’s host country) and Italy (his state of nationality), arguing that they should have ensured that NATO’s dispute resolution mechanisms sufficiently protected the right to a fair trial when the organisation was created.

²⁶ E. RAVASI, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 35.

²⁷ A. GUZMAN, *International Organizations and the Frankenstein Problem*, in *European Journal of International Law*, 2013, p. 1000.

²⁸ M. HARTWIG, *International Organizations or Institutions, Responsibility and Liability*, in R WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law (online edition)*, Oxford: Oxford University Press, 2011, opil.ouplaw.com, para. 32; E. RAVASI, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 72. This rationale also shines through in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., particularly in para. 150.

²⁹ Whether in the form of acceding to an organization’s constituent instrument (e.g. *Matthews v. United Kingdom* [GC], cit.) or of implementing obligations established by the secondary law of that organisation (e.g. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit.).

Rather than dismissing the case for lack of jurisdiction *ratione personae*, as it had done in the comparable cases of *Boivin* and *Connolly*,³⁰ the European Court of Human Rights entertained the applicant's novel argument in *Gasparini*. The European Court of Human Rights distinguished *Boivin* and *Connolly*, since the applicants in those cases only challenged specific decisions of the applicable dispute resolution mechanisms, rather than a structural deficiency. It then stated, borrowing some phrases from *Bosphorus*, that there was a presumption of EHCR compliance that could be rebutted if the procedural regime was manifestly deficient.³¹

Despite the similarity in phrasing, this *Gasparini* test is more lenient than the *Bosphorus* test. To rebut the *Gasparini* presumption of equivalent protection, it is not sufficient to demonstrate that there is a manifest deficiency in the human rights protection in the particular case – as is possible in cases concerning MS-attributed conduct. Rather, the *Gasparini* test entails that applicants must prove that there are manifest and *structural* deficiencies in the system of human rights protection. Moreover, the assessment is fixed in time; it is sufficient that when the Member State(s) in question joined the organisation, they did so with the good faith that there were no such manifest and structural deficiencies.³² The *Gasparini* test has therefore been accurately characterised as the “light” version of the equivalent protection doctrine – in contrast to the stricter (but still not very strict) version that is applicable to MS-attributed conduct.³³

Zooming out, we see that the use of different versions of the equivalent protection doctrine for these two situations reflects the variable involvement of the respondent Member State. The strict version is applicable where the Member State itself has implemented legal obligations flowing from its membership. The light version is applicable where the Member State has merely been involved in setting up the organisation, and not taken part in the conduct causing the alleged violation at hand.

III. THE EUROPEAN COURT OF HUMAN RIGHTS' FIRST STAB AT THE EEA: *KONKURRENTEN.NO V. NORWAY*

In the recent case of *Konkurrenten.no v. Norway*, a chamber of the European Court of Human Rights addressed the applicability of the equivalent protection doctrine to the EFTA pillar of the EEA for the first time:

“43. [...] the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework

³⁰ European Court of Human Rights: decision of 9 September 2008, no. 73250/01, *Boivin v. 34 Member States of the Council of Europe*; decision of 9 December 2008, no. 73274/01, *Connolly v. 15 Member States of the European Union*.

³¹ *Gasparini v. Italy and Belgium*, cit.

³² E. RAVASI, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 74.

³³ *Ibid.*, p. 70.

of the EEA Agreement, due to the specificities of the governing treaties, compared to those of the European Union. For the purpose of the present analysis, two distinct features need to be specifically highlighted. Firstly, and in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy (contrast [*Bosphorus*] § 164). Secondly, and although the EFTA Court has expressed the view that the provisions of the EEA Agreement ‘are to be interpreted in the light of fundamental rights’ in order to enhance coherence between EEA law and EU law (see, inter alia, the EFTA Court’s judgment in its case E-28/15 *Yankuba Jabbi* [2016] para. 81), the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention”.

Importantly, this statement is an *obiter dictum*, as the case was not about MS-attributed conduct. Rather, it fell in the category of IO-attributed conduct, and more precisely the subcategory of alleged violations that result from the exercise by the organisation alone of its powers (*Gasparini*). That is because the case concerned the handling of the EFTA Court – which is an international organisation of its own³⁴ – of a particular case.

In short, the complaint in *Konkurrenten.no* concerned the compatibility of the rules on standing in direct actions before the EFTA Court with Art. 6 ECHR. The applicable standing rule of the SCA, Art. 36, para. 2, is based on Art. 263, para. 4, TFEU and requires the plaintiff to be either an addressee of the decision of the EFTA Surveillance Authority or directly and individually concerned by it. As the EFTA Court has essentially adopted the CJEU’s (in)famous *Plaumann* formula, both the very strict “direct and individual concern” test and the question of its compatibility with the principle of effective judicial protection will be familiar to EU law lawyers.³⁵ However, there are (as always) some twists on the EEA version of the matter.

In EU law, the strict rules on standing in actions for annulment of EU legal acts are compensated for by the possibility to bring an action before a national court, with the *Foto-Frost* doctrine obliging even a first instance court to refer the matter to the CJEU if it considers the objections to the validity of the EU legal act in question to be well founded.³⁶ Furthermore, the 2007 Treaty of Lisbon omitted the “individual concern” criteria for regulatory acts that do not entail implementing measures.³⁷ In the EEA/EFTA system,

³⁴ Art. 1 of Protocol no. 7 SCA.

³⁵ Court of Justice, judgment of 15 July 1963, case 25/62, *Plaumann v. Commission of the EEC*, as confirmed with regard to its compatibility with the principle of effective judicial protection in Court of Justice, judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*. From the EFTA Court, see e.g. judgment of 19 June 2003, case E-2/02, *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v. EFTA Surveillance Authority*; judgment of 21 February 2008, case E-5/07, *Private Barnehagers Landsforbund*.

³⁶ As held by the Court of Justice in *Unión de Pequeños Agricultores v. Council*, cit., para. 40. See also Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

³⁷ Art. 263, para. 4, third limb, TFEU. See also P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2020, pp. 559-564.

however, the prevailing view is that national courts are never obliged to refer a case to the EFTA Court, not even in a *Foto-Frost* scenario.³⁸ Even if a reference is made, the EFTA Court can only give an advisory opinion on the interpretation of the EEA Agreement, not rule upon the validity of a decision from the EFTA Surveillance Authority (or from the EEA Joint Committee).³⁹ Furthermore, the special regime for EU regulatory acts has no parallel in the EEA/EFTA system.⁴⁰

Thus, it is indeed possible to argue that the EFTA Court's adoption of the *Plaumann* formula may, in certain cases, leave certain individuals without adequate judicial protection against decisions of the EFTA Surveillance Authority. However, the merits of this argument depend on the national court's ability to remedy the problem.⁴¹

As to the case brought before the European Court of Human Rights by the Norwegian bus transportation company Konkurrenten.no, however, this mattered little. Before the EFTA Court, the company had brought actions for annulment against two decisions from the EFTA Surveillance Authority that concerned the closing of investigations into alleged State aid to a competitor.⁴² The EFTA Court dismissed both applications due to lacking *locus standi*. Such decisions are not regulatory acts within the meaning of Art. 263, para. 4, TFEU,⁴³ nor are they acts where the differences concerning the preliminary ruling procedures in Union law and in the EEA/EFTA system appear to be of any relevance.

True, Konkurrenten.no could not have brought an action against the EFTA Surveillance Authority in Norwegian courts, but neither can such decisions of the European Commission be challenged before the national courts of EU Member States. On the other hand, the underlying matter of substantive EU/EEA law, whether the competitor had indeed been given unlawful State aid by Norway, could have been brought before Norwegian courts. But Konkurrenten.no had not done so.⁴⁴

The conduct complained about to the European Court of Human Rights – *i.e.* the dismissals of the two actions for annulment – was authored by the EFTA Court alone.

³⁸ See section IV.3 below.

³⁹ *Ibid.*

⁴⁰ Art. 36 SCA has not been updated to include the third limb of Art. 263, para. 4, TFEU, which was added by the 2007 Treaty of Lisbon.

⁴¹ Which again may challenge the European Court of Human Rights' above-mentioned differentiation between IO-attributed and MS-attributed conduct, since the ECHR-compatibility of the standing rules before the EFTA Court and the national courts will be interdependent. This, however, is a matter that will not be pursued further in this *Article*.

⁴² EFTA Court, order of 20 March 2015, case E-19/13, *Konkurrenten.no v. ESA* (one of the two orders that gave rise to the complaint to the European Court of Human Rights in the case under discussion).

⁴³ As noted by the EFTA Court in *Konkurrenten.no v. ESA*, cit., para. 91. If the decisions had been regulatory acts within the meaning of Art. 263, para. 4, TFEU, the EFTA Court would have had to consider the possibility, within acknowledged EEA law rules of interpretation, of adopting a more liberal approach to Art. 36, para. 2, SCA in order to provide for equal access to justice in the EFTA pillar and the EU pillar of the EEA.

⁴⁴ Presumably because it is very difficult to substantiate such a claim without the assistance of the EFTA Surveillance Authority, with its far reaching investigatory powers, resources, and expertise.

That said, Konkurrenten.no attempted to argue otherwise, namely that the intervention of the Norwegian government in the proceedings before the EFTA Court was a reason for attributing the EFTA Court's dismissal of the case to Norway. However, the European Court of Human Rights noted that the EFTA Court is a judicial body, deciding cases independently and impartially. Should a court ultimately decide a case "more or less along the same lines as [a State] argued in [its] submission, that cannot itself trigger the responsibility of that State".⁴⁵

Thereafter, without discussing the broader EEA context of the case, the European Court of Human Rights applied the *Gasparini* test to the EFTA Court. The EFTA Court had used the CJEU's *Plaumann* formula for legal standing, and given adequate (arguably even detailed) reasons for why Konkurrenten.no, as "only" a competitor of the recipient of the alleged State aid, did not pass the test. The European Court of Human Rights found that this did not constitute a structural shortcoming in the procedural regime of the EFTA Court – as required to trigger member state responsibility for IO-attributed conduct.⁴⁶ This confirmation of the ECHR conformity of the *Plaumann* formula in the EEA setting will not please everyone, but given the applicable test (*Gasparini*) it can hardly be considered surprising.

IV. THE EQUIVALENT PROTECTION DOCTRINE AND ITS (IN-)APPLICABILITY TO THE EEA/EFTA SYSTEM

In the *obiter dictum* in *Konkurrenten.no*, the European Court of Human Rights asserts that the equivalent protection doctrine is inapplicable to the EFTA pillar of the EEA because EEA law does not provide a level of fundamental rights protection "equivalent" to that of the ECHR system. The Court offers two arguments to support this view: the lack of EEA law principles of direct effect and supremacy, and the lack of a textual basis for the recognition of fundamental rights as part of EEA law.

As we will explain in sub-sections IV.1 and IV.2 below, we are of the opinion that neither of these arguments justify the finding that the EEA law of the EFTA pillar does not provide equivalent protection to that of the ECHR. On the other hand, as we will demonstrate in sections IV.3 and IV.4, there are other differences between EU and EEA law that might perhaps justify the conclusion drawn by the European Court of Human Rights. Most notable among them are the differences between the EU and the EEA/EFTA versions of the preliminary ruling procedure and the fact that all decisions of the EEA Joint Committee require the consent of all three EEA/EFTA States.

⁴⁵ *Konkurrenten.no AS v. Norway*, cit., para. 41.

⁴⁶ *Ibid.*, paras 42-48.

IV.1. THE EEA AGREEMENT'S LACK OF A WRITTEN CATALOGUE OF FUNDAMENTAL RIGHTS

As mentioned in section II above, the equivalent protection doctrine consists of two limbs: the equivalence of the substantive guarantees offered and the equivalence of the mechanisms controlling their observance.⁴⁷ The European Court of Human Rights' remark in *Konkurrenten.no* concerning the lack of an EEA equivalent to the EU Charter of Fundamental Rights, "or any reference whatsoever to other legal instruments having the same effect", relates to the first of these: Are the substantive fundamental rights guarantees offered by the EEA Agreement equivalent to those of the ECHR?

If one looks at the text of the EEA Agreement, the European Court of Human Rights is certainly right that an EEA catalogue of fundamental rights is nowhere to be found. Nor are there references to the Charter of Fundamental Rights, the ECHR or other human rights instruments. Indeed, the only relevant reference in the main part of the EEA Agreement is the contracting parties' intention, expressed in the very first recital of the preamble, that the European Economic Area will contribute "to the construction of a Europe based on peace, democracy and human rights". This hardly compares to the present state of EU law, where the Charter of Fundamental Rights is given the same legal value as the Treaties (Art. 6, para. 1, TEU) and fundamental rights, "as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States", are recognised as general principles of EU law (Art. 6, para. 3, TEU).

However, if one compares the EEA Agreement with the state of EU law in 2005, when *Bosphorus* was decided, the contrast is much less stark. While the Charter of Fundamental Rights was solemnly proclaimed by the EU's Parliament, Council and Commission on 7 December 2000, it remained a soft law instrument until the 2007 Treaty of Lisbon made it part of primary EU law. In *Bosphorus*, the European Court of Human Rights took note of the Charter of Fundamental Rights, but stressed that it was not legally binding.⁴⁸ Thus, unless the *obiter dictum* in *Konkurrenten.no* is meant to raise the bar for application of the equivalent protection doctrine, the lack of an EEA equivalent to the Charter of Fundamental Rights cannot be decisive.

As to the ECHR, it is true that today's Art. 6, para. 3, TEU was introduced into the EU Treaties already by the 1992 Treaty of Maastricht (as Art. F of the Treaty on the European Union).⁴⁹ Still, as noted by the European Court of Human Rights itself in *Bosphorus*, this was no more than a reflection of the case-law of the CJEU, which at that time had long recognised fundamental rights as general principles of Community law and high-

⁴⁷ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 155.

⁴⁸ *Ibid.*, para. 159.

⁴⁹ Treaty on European Union (adopted 2 July 1992, in force 1 November 1993).

lighted the special significance of the ECHR as a source of inspiration.⁵⁰ The reasoning in *Bosphorus* hardly suggests that the codification of the case-law of the CJEU was particularly important – not to mention decisive – to the assessment of the substantive guarantees of fundamental rights offered by EU law in 2005.

If one attempts to compare the approach to fundamental rights in the CJEU case-law prior to the entry into force of the Charter of Fundamental Rights with that of the EFTA Court today, the similarities outweigh the differences. It is true that the EFTA Court occasionally “only” states that provisions of the EEA Agreement “are to be interpreted in the light of fundamental rights”, as it indeed did in the *Jabbi* case that the European Court of Human Rights chose to cite in *Konkurrenten.no*. On other occasions, however, the EFTA Court has made quite clear that fundamental rights are recognised as *unwritten general principles* of EEA law. One example is provided by *Posten Norge*, in which the EFTA Court noted that “[t]he principle of effective judicial protection including the right to a fair trial, which is *inter alia* enshrined in Art. 6 ECHR, is a general principle of EEA law”.⁵¹ Another more generally phrased example is the case of *Olsen* from 2014, where the EFTA Court was confronted with the question of whether the imposition of a particular Norwegian wealth tax was contrary to the requirement to respect “the fundamental rights guaranteed under the EEA Agreement”.⁵² The Norwegian government argued that the scope of fundamental rights was irrelevant to the case as the wealth tax in question fell outside the scope of the EEA Agreement. The EFTA Court replied that:

“In essence, the fundamental rights guaranteed in the legal order of the EEA Agreement are applicable in all situations governed by EEA law. The Court [...] must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures. [...]”

Where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the EEA Agreement, it may benefit from the exceptions provided for by EEA law in order to justify that fact only insofar as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights manifestly comes within the scope of EEA law [...].⁵³

⁵⁰ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 159, cf. para. 73 et seq.

⁵¹ EFTA Court, judgment of 18 April 2012, case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority*, para. 86.

⁵² EFTA Court, advisory opinion of 9 July 2014, joined cases E-3/13 and E-20/13, *Fred. Olsen and Others and Petter Olsen and Others and The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes*, para. 224.

⁵³ *Ibid.*, paras 225 and 227.

In the 2016 case of *Holship*, the EFTA Court summed this up in one short sentence: “Fundamental rights form part of the unwritten principles of EEA law”.⁵⁴

Moreover, the EFTA Court has long highlighted that all of the EEA States (the three EEA/EFTA States *and* all of the EU Member States) are parties to the ECHR, and constantly held that the provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of the fundamental rights of EEA law.⁵⁵ As a result, there is by now consensus in EEA literature that provisions of the EEA Agreement are to be interpreted and applied in a manner that is consistent with the EEA States’ obligations under the ECHR.⁵⁶ The situation is less clear when it comes to fundamental rights enshrined in the Charter of Fundamental Rights that go beyond those found in the ECHR.⁵⁷ However, that is a matter of no relevance to the question of whether the EEA/EFTA system provides substantive fundamental rights guarantees equivalent to those of the ECHR system.⁵⁸

If any difference is to be found in the ECHR-equivalence of the substantive fundamental rights that form part of EEA and EU law, it is that the EFTA Court has remained more ECHR-centred than the CJEU. After the entry into force of the Charter of Fundamental Rights, the CJEU appears to have turned its attention towards the EU’s own Charter and lost some of its previous interest in the ECHR.⁵⁹ Whether the EFTA Court will side with the CJEU or the European Court of Human Rights in a case of divergences in the case-law between the latter two, remains open. A qualified guess is that it will try to mitigate the conflict and search for the middle ground. The point advanced here, however, is that this cannot impact upon the European Court of Human Rights’ assessment of the ECHR-equivalence of the substantive fundamental rights guarantees offered by the EEA Agreement as long as the European Court of Human Rights maintains that the EU meets this test.

⁵⁴ EFTA Court, advisory opinion of 19 April 2016, case E-14/15, *Holship Norge AS and Norsk Transportarbeiderforbund*, para. 123.

⁵⁵ Including in EFTA Court, advisory opinion of 26 July 2016, case E-28/15, *Yankuba Jabbi and The Norwegian Government, represented by the Immigration Appeals Board*, to which the European Court of Human Rights referred in *Konkurrenten.no AS v. Norway*, cit.

⁵⁶ For an analysis, see D.T. BJÖRGVINSSON, *Fundamental Rights in EEA Law*, cit., p. 263 *et seq.* See also R. SPANO, *The EFTA Court and Fundamental Rights*, in *European Constitutional Law Review*, p. 476 *et seq.*

⁵⁷ See, e.g., H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles*, cit., p. 647 *et seq.*; R. SPANO, *The EFTA Court and Fundamental Rights*, cit., p. 479 *et seq.*

⁵⁸ It may be added here that the European Court of Human Rights’ remarks on the lack of a written EEA catalogue of human rights was “acknowledged” in the opinion of AG Tanchev delivered on 27 February 2020, case C-897/19 PPU, *Ruska Federacija*, para. 113, but then essentially brushed aside with reasoning that takes for granted that EEA law prohibits extradition to conditions of inhuman or degrading treatment in the same way as Art. 3 ECHR and Art. 4 of the Charter of Fundamental Rights, see para. 114 *et seq.* The CJEU itself did not comment on this in the judgment in the case.

⁵⁹ See, in particular, G. DE BÚRCA, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 168 *et seq.*

Thus, assuming that an *obiter dictum* in an ordinary chamber judgment is not meant to raise the bar for what constitutes equivalent (substantive) protection, as this concept was fleshed out in *Bosphorus*, the emphasis put on the EEA Agreement's lack of a written catalogue of fundamental rights appears misguided.⁶⁰

IV.2. THE LACK OF EEA LAW PRINCIPLES OF DIRECT EFFECT AND SUPREMACY

The second of the European Court of Human Rights' two arguments for not extending the equivalent protection doctrine to the EEA/EFTA system is that "in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy (contrast [*Bosphorus*] § 164)".⁶¹ As the pinpoint reference indicates, supremacy and direct effect was indeed mentioned in *Bosphorus*. However, in *Konkurrenten.no* the European Court of Human Rights appears to have put far more emphasis on these two doctrines than the *Bosphorus* precedent suggests.

a) Supremacy and direct effect in *Bosphorus*.

In *Bosphorus*, supremacy and direct effect are mentioned in connection with the question of whether the EU offers a level of human rights protection equivalent to that of the ECHR system *in procedural terms*.⁶² As the European Court of Human Rights put it, "the effectiveness of [the] substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance".⁶³

An obvious argument against procedural equivalency between the ECHR system and the EU system was (and still is) the limited direct access to the CJEU for individuals. An individual can only institute review proceedings before the CJEU against an act of institutions, bodies, offices or agencies of the Union addressed to that person or which is of direct and individual concern to them, and these conditions are interpreted and applied strictly by the CJEU (the above-mentioned *Plaumann* formula).⁶⁴ As is well known, there is no individual complaint procedure to the CJEU resembling that of Art. 34 ECHR. Compared with the rules on standing before the European Court of Human Rights, one can thus hardly say that direct actions before the CJEU provide an equivalent level of protection. The question for the European Court of Human Rights in *Bosphorus* was

⁶⁰ This finding does not alter the fact that the EEA/EFTA States in our opinion ought to implement the EEA-relevant parts of the Charter of Fundamental Rights into the EEA legal framework, either in the EEA Agreement as such (with the consent of the EU) or, alternatively, in the SCA. Such formal recognition of the Charter will strengthen the legitimacy of the fundamental rights case-law of the EFTA Court and prevent misunderstandings as to the status of fundamental rights within EEA law.

⁶¹ *Konkurrenten.no AS v. Norway*, cit., para. 43.

⁶² *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., paras 160-165.

⁶³ *Ibid.*, cit., para. 160.

⁶⁴ Art. 263, para. 4, TFEU; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 162.

therefore whether other aspects of the EU system of judicial protection compensated for the lack of direct access to the CJEU.

Key here is the EU system of preliminary references from national courts to the CJEU. The European Court of Human Rights began its analysis by outlining the relationship between the CJEU and domestic courts, and it is in this context that supremacy and direct effect are mentioned in passing:

“it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for a breach of Community law [...]. It was the development by the ECJ of important notions such as the *supremacy of Community law*, *direct effect*, indirect effect and State liability [...] which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights guarantees”.⁶⁵

As we can see, supremacy and direct effect are mentioned as part of an array of Union law doctrines. However, there is nothing in the quotation that suggests that supremacy and direct effect have a particular prominence when assessing equivalency. Moreover, when read in context, the above-quoted subparagraph appears to be a mere introduction to the European Court of Human Rights’ main point:

“The ECJ maintains its control on the application by national courts of [Union] law, including its fundamental rights guarantees, through the procedure for which [Art. 267 TFEU] provides. While the ECJ’s role is limited to replying to the interpretative or validity question referred by the domestic court, the reply will often be determinative of the domestic proceedings (as, indeed, it was in the present case [...]) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the [TFEU] and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the [Art. 267 TFEU] process. It is further noted that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees”.⁶⁶

Immediately thereafter, the European Court of Human Rights concluded that “[i]n such circumstances, the Court finds that the protection of fundamental rights by [Union] law can be considered to be, and to have been at the relevant time, ‘equivalent’ [...] to that of the Convention system”.⁶⁷

Although the European Court of Human Rights is not explicit with regard to the relative importance of the different factors it mentions in this part of *Bosphorus*, its focus appears to be on the CJEU and its relationship with – and control over – domestic courts. Taken as a whole, the European Court of Human Rights’ reasoning reads as a

⁶⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 164, subpara. 1 (emphasis added).

⁶⁶ *Ibid.*, para. 164, subpara. 2.

⁶⁷ *Ibid.*, para. 165.

justification for why the CJEU is in control of the application of Union law in the Member States, and consequently able to review it against the EU catalogue of fundamental rights (which is substantively equivalent to that of the ECHR).

In this light, the brief references to the doctrines of supremacy and direct effect in *Bosphorus* come across as ancillary factors. The European Court of Human Rights appears to see them as tools for the CJEU's enforcement of EU fundamental rights *vis-à-vis* domestic courts, thus contributing towards a procedurally equivalent level of protection.

b) Does the lack of supremacy and direct effect of EEA law lessen the protection of fundamental rights?

Given the importance that the European Court of Human Rights seems to attach to the lack of EEA law principles of direct effect and supremacy in *Konkurrenten.no*, it is pertinent to ask whether supremacy and direct effect actually contribute towards protection of fundamental rights in the context of EU law. And, if so, when and how?

In order to answer these questions, it is paramount to distinguish between the direct effect and supremacy of the fundamental rights recognised as part of EU law, on the one hand, and the direct effect and supremacy of EU law obligations that allegedly interfere with ECHR rights and freedoms, on the other. *Bosphorus* itself belongs in the latter category, as the conduct of Irish authorities and courts were governed by the direct effect (or rather, according to the wording of Art. 288, para. 2, TFEU, direct applicability) and supremacy of Council Regulation 990/93 regarding sanctions against the Federal Republic of Yugoslavia. To *Bosphorus Airways*, the effect that EU law gives to e.g. regulations hardly improved the company's effective judicial protection against the alleged violations of the right to property. Quite the contrary.

Thus, the fact that the EFTA Court has made clear that the decisions of the EEA Joint Committee are not directly effective at the national level *qua* EEA law,⁶⁸ simply cannot matter for EU/EEA obligations that allegedly interfere with ECHR rights and freedoms. If an alleged ECHR-interfering EEA law obligation has not been implemented into the national legal system of the dualist EEA/EFTA States (now only Iceland and Norway), its harmful effect will simply not be effective in the national courts and the question of its compatibility with the ECHR will not materialise.⁶⁹

In this connection, it should be emphasised that EEA law's lack of direct effect does not imply that the EEA/EFTA States can exercise any more discretion in implementing their EEA obligations than EU Member States have in implementing their Union law ob-

⁶⁸ See, e.g., EFTA Court, judgment of 28 January 2015, case E-15/14, *EFTA Surveillance Authority v. Iceland*, para. 32.

⁶⁹ It may be added that non-implemented EEA rules can produce indirect effects in the dualist EEA/EFTA States, e.g. due to the EEA law principle of conform interpretation and/or domestic law doctrines of EEA-conform interpretation of national law. However, it is difficult to see how this can be relevant to the question of the applicability of the equivalent protection doctrine to the EEA.

ligations. This is an important point, because the equivalent protection doctrine is only applicable to MS-attributed conduct mandated by a strict legal obligation.⁷⁰ A Member State remains fully responsible for conduct falling outside the scope of its legal obligations, including where the rules allow for discretion.⁷¹ The *M.S.S.* case exemplifies this well: Belgium argued that they were obliged under the so-called Dublin II Regulation⁷² to return an asylum seeker to Greece – the asylum seeker's first state of entry.⁷³ However, as the European Court of Human Rights correctly pointed out, that regulation contains a general exception granting each Member State the competence to examine an application for asylum, despite not being the first state of entry.⁷⁴ Belgium was thus able to exercise discretion under the rules, and consequently could not invoke the equivalent protection doctrine.⁷⁵

Within the scope of the EEA Agreement, EU and EEA Member States have the same substantive legal obligations. The difference between the two systems is simply that EU Member States are required to ensure that implementation happens automatically in some instances, through the domestic application of the doctrine of direct effect, while EEA/EFTA states are not. The difference thus merely relates to the choice of means of domestic implementation of the obligation, and not its binding nature as a matter of international law. Consequently, there is no difference between EU and EEA law when it comes to assessing the fulfilment of the strict legal obligation prerequisite for applying the equivalent protection doctrine to MS-attributed conduct.

Turning to the direct effect of the fundamental rights themselves, the lack of an EEA equivalent to the EU law principle of direct effect may at first sight seem to be a very real problem. In the context of EU law, the direct effect of the Charter of Fundamental Rights and the general principles of EU law guarantees that national courts can defend fundamental rights in all situations where national authorities act within the scope of EU law, if need be with the assistance of a preliminary ruling from the CJEU.⁷⁶

However, the effect of the general principles of EEA law in the national legal orders of the dualist EEA/EFTA States was settled long ago by a pragmatic proposition by the

⁷⁰ See e.g. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 157; *M.S.S. v. Belgium and Greece* [GC], cit., para. 338.

⁷¹ *Ibid.*

⁷² Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national. Now Art. 17, para. 1, of Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

⁷³ *M.S.S. v. Belgium and Greece* [GC], cit.

⁷⁴ *Ibid.*, para. 339.

⁷⁵ *Ibid.*, para. 340.

⁷⁶ See e.g. Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC].

EFTA Court in the seminal *Sveinbjörnsdóttir* case on the principle of State liability for violations of EEA obligations. Knowing that both of the remaining dualist EEA/EFTA States, Iceland and Norway, have given the main part of the EEA Agreement the status of statutory law, the EFTA Court stated that the unwritten principle of State liability had to be seen as “an integral part of the EEA Agreement as such” and that it was therefore “natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability”.⁷⁷ This somewhat bold proposition as to the interpretation of the EEA Acts of Iceland and Norway was accepted by the Icelandic as well as the Norwegian Supreme Court, respectively.⁷⁸ There is no compelling reason why this should not extend to other generally accepted unwritten principles of EEA law, including fundamental rights.

As far as fundamental rights equalling those of the ECHR are concerned, it may be added that all of the EEA/EFTA States have incorporated the Convention into their national legal orders. It would simply make no sense for them or their national courts to refuse to recognise such common EEA/ECHR fundamental rights as part of the EEA Agreement *as implemented into national law*. Tellingly, the Supreme Court of Norway didn't even contemplate this matter when it held, in the *Holship* case of 2016, that “[f]undamental rights under EU and EEA law include, *inter alia*, the ECHR and other fundamental international human rights”.⁷⁹ The Supreme Court simply considered it self-explanatory that the fundamental rights recognised as part of EEA law are fully effective in the Norwegian legal order.

Turning to the question of supremacy, it is true that the EEA Agreement only knows of a watered-down version of this EU law principle. According to Protocol no. 35 of the Agreement, the EFTA States have undertaken to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflicts between implemented EEA rules and other statutory provisions.⁸⁰ The limitation to “implemented” EEA rules follows from the above-mentioned lack of direct effect, but has – as demonstrated above – no practical interest as far as fundamental rights are concerned, as they are indeed implemented into Icelandic and Norwegian law as an integral part of the main part of the

⁷⁷ EFTA Court, advisory opinion of 10 December 1998, case E-9/97, *Erla María Sveinbjörnsdóttir v. the Government of Iceland*, para. 63.

⁷⁸ Icelandic Supreme Court, judgment of 16 December 1999, case 236/1999, *Sveinbjörnsdóttir*; Norwegian Supreme Court, judgment of 28 October 2005, case HR-2005-1690-P, *Finanger II*.

⁷⁹ Norwegian Supreme Court, judgment of 16 December 2016, case HR-2016-2554-P, *Holship*, para. 111. An English translation of the judgment is available from the Norwegian Supreme Court's webpage: www.domstol.no. This case has been brought before the European Court of Human Rights, where it is pending as *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, cit. See also sections V.2 and VI below.

⁸⁰ For an introduction, see M.K.F. DYSTLAND, I. SØREBØ, F.B. FINSTAD, *Article 7 [Binding Effect and Implementation of EU Legal Acts]*, in F. ARNESEN, H.H. FREDRIKSEN, H.P. GRAVER, O. MESTAD, C. VEDDER (eds), *Agreement on the European Economic Area: A Commentary*, Baden-Baden: Nomos, 2018, p. 262.

EEA Agreement. The same holds true for the fact that the obligation under Protocol no. 35 itself has to be implemented into the national legal orders of the dualist EEA/EFTA States, since both Iceland and Norway have done just that.⁸¹ For the purposes of the equivalent protection doctrine, there are thus “only” two relevant differences between the EU law principle of supremacy and the EEA law obligation to ensure the primacy of implemented EEA rules: that the latter do not demand primacy in case of a conflict with constitutional law, and that its implementation by way of a provision of domestic (statutory) law cannot guarantee against new legislation setting the primacy provision aside.

Whilst certainly relevant to the comparison of the protection of fundamental rights under EU and EEA law as a matter of principle, we dare suggest that the practical effect of these differences is very limited. Firstly, after more than 25 years, there are no examples of any of the EEA/EFTA States invoking their constitutions as a shield against EEA fundamental rights or enacting new legislation to the same effect. Moreover, the theoretical possibility such situations should at most negate the application of the equivalent protection doctrine in those (theoretical) cases where there is an alleged conflict between the ECHR and a EEA/EFTA State’s constitution. In other words, these fringe cases could be EEA/EFTA examples where the “manifest deficiency” exception to the equivalent protection doctrine is applicable. Finally, it is not clear whether EU law really offers much better protection in a scenario where an EU Member State should wish to limit the effect of EU fundamental rights in such ways.⁸²

IV.3. OTHER EEA/EFTA PECULIARITIES THAT MIGHT JUSTIFY NON-APPLICATION OF THE EQUIVALENT PROTECTION DOCTRINE

So far we have argued that neither the lack of a written fundamental rights catalogue nor the lack of direct effect and supremacy disprove that the EFTA pillar of the EEA offers a level of human rights protection equivalent to that of the ECHR system. However, there are at least three other differences between the EU and EEA/EFTA systems which must be included in the equivalent (procedural) protection assessment. The first is the lack of an obligation for apex courts to refer cases to the EFTA Court. The second is the non-binding nature of the EFTA Court’s answers to questions of interpretation put to it by the national courts. The third is the EFTA Court’s lack of jurisdiction to review decisions of the EEA Joint Committee.

a) No obligation for apex courts to refer cases to the EFTA Court.

⁸¹ Section 2 of the Norwegian EEA Act (Law no. 109/1992) and Section 3 of the Icelandic EEA Act (Law no. 2/1993).

⁸² For a recent example of a domestic apex court limiting the effect of Union law, albeit in the name of (domestic) human rights provisions, see the German Federal Constitutional Court, judgment of 5 May 2020, 2 BvR 859/15, *Weiss/PSPP*.

The CJEU's control over the application of EU law in domestic courts, in lieu of direct access, appear to be central to the European Court of Human Rights' assessment of procedural equivalent protection in *Bosphorus*.⁸³ It follows from Art. 267, para. 3, TFEU that when questions of Union law are raised before an apex court of an EU Member State – i.e. “a court or tribunal [...] against whose decisions there is no judicial remedy under national law” – the court in question “shall” refer the question to the CJEU. While this obligation has been moderated somewhat by the *CILFIT* doctrine (*acte clair* and *acte éclairé*), it remains that apex courts are obliged to refer a question of Union law to the CJEU, unless the answer to it is “so obvious as to leave no scope for any reasonable doubt”.⁸⁴ In *Bosphorus*, the European Court of Human Rights explained the *CILFIT* doctrine in the introductory part of the judgment, and referred back to that explanation when conducting its detailed assessment of whether EU law affords individuals equivalent (procedural) protection.⁸⁵

EEA law, on the other hand, contains no obligation for domestic apex courts to refer cases to the EFTA Court.⁸⁶ The EEA Agreement itself does not require the EEA/EFTA States to establish a system of preliminary references from national courts to the EFTA Court.⁸⁷ When the EEA/EFTA States nevertheless did just that through Art. 34 SCA, they deliberately omitted the third paragraph of Art. 267 TFEU. Whilst it is true that the EFTA Court itself has suggested that the general duty of loyal cooperation under Art. 3 EEA can oblige the apex courts of the EEA/EFTA States to refer unresolved questions of EEA law to it,⁸⁸ this push has convinced neither the Icelandic nor the Norwegian Supreme Court, nor the EFTA Surveillance Authority.⁸⁹ We need not pursue this controversial

⁸³ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 164; European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC], para. 104.

⁸⁴ Court of Justice: judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*, paras 12–16; judgment of 9 September 2015, case C-160/14, *Ferreira da Silva e Brito and Others*, para. 38.

⁸⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., paras 98 and 164, respectively.

⁸⁶ See H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles*, cit., pp. 672–673, with further references.

⁸⁷ Cf. Art. 108, para. 2, EEA, which makes clear that jurisdiction to deal with preliminary references from national courts is not among the competences which the Contracting Parties agreed that the EFTA Court had to have. See further Art. 107 EEA, which instead opens up for preliminary references to the CJEU, but which also makes clear that this is only an option (of which none of the EFTA States, for reasons of sovereignty, have availed themselves).

⁸⁸ See, e.g., EFTA Court, advisory opinion of 28 September 2012, case E-18/11, *Irish Bank*, para. 58 *et seq.*; EFTA Court, advisory opinion of 20 March 2013, case E-3/12, *Jonsson*, para. 60.

⁸⁹ The Icelandic Supreme Court has referred only two cases to the EFTA Court over the last five years. The Supreme Court of Norway has been more cooperative, with seven referrals in the same period, but there are several examples of complex matters of EEA law being decided without a reference and nothing in the referrals that suggest that the justices feel obliged to send certain types of cases to the EFTA Court. Some of the refusals to refer have led to complaints to the EFTA Surveillance Authority – so far to no avail.

matter further here, as the European Court of Human Rights' assessment of the procedural protection of fundamental rights in the EFTA pillar of the EEA must clearly be based on "facts on the ground".

Since the domestic courts of the EEA/EFTA States do not consider themselves obliged to refer questions of EEA law, the EFTA Court's control over them is less firm than the control the CJEU exercises over the domestic courts of EU Member States. As a consequence, the EFTA Court's ability to ensure that EEA law is interpreted and applied in line with human rights law is weaker than the corresponding ability of the CJEU.

When reading *Bosphorus*, it appears that the preliminary ruling procedure is one of the key factors, if not *the* key factor, leading to the finding of equivalent (procedural) protection. Indeed, the European Court of Human Rights has itself stated that in *Bosphorus* it "attached considerable importance to the role and powers of the CJEU".⁹⁰

On the face of it, the EFTA Court's role and powers are less prominent than those of the CJEU. However, cases where there is an alleged conflict between Union law and the ECHR may reach the European Court of Human Rights without prior intervention by the CJEU. One example is *Avotiņš*. The applicant had not asked for, nor did the Latvian Supreme Court on its own motion request, a preliminary ruling from the CJEU.⁹¹ The European Court of Human Rights nevertheless upheld its finding in *Bosphorus* that Union law provides equivalent protection.⁹² Moreover, after a detailed (yet opaque) discussion it concluded that the presumption of equivalent protection could not be rebutted, because the fundamental rights protection was not manifestly deficient in the circumstances of that particular case.⁹³

In the earlier case of *Michaud*, however, the presumption of equivalent protection *was* rebutted. In that case, prior CJEU involvement was precluded by the French Conseil d'Etat's refusal to accept the applicant's request for a preliminary ruling.⁹⁴ According to the European Court of Human Rights, by refusing to entertain a request for preliminary ruling even though the CJEU had not had an opportunity to examine the legal issue at hand, "the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the

⁹⁰ *Avotiņš v. Latvia* [GC], cit., para. 104.

⁹¹ *Ibid.*, para. 111. For these reasons, the European Court of Human Rights explicitly distinguished this case from judgment of 6 December 2012, no. 12323/11, *Michaud v. France*, which is discussed just below.

⁹² *Avotiņš v. Latvia* [GC], cit., paras 105-112. For more detailed commentary on the case, see S.Ø. JOHANSEN, *EU Law and the ECHR: The Bosphorus Presumption Is Still Alive and Kicking – the Case of Avotiņš v. Latvia*, in *EU Law Analysis*, 24 May 2016, eulawanalysis.blogspot.com.

⁹³ *Avotiņš v. Latvia* [GC], cit., paras 115-125.

⁹⁴ *Michaud v. France*, cit.

Convention – having been deployed”.⁹⁵ Therefore, there was a manifest deficiency in the circumstances of that particular case.⁹⁶

By contrast, in *Avotiņš*, the applicant had not even advanced any specific arguments regarding the interpretation of the Union law at issue.⁹⁷ It thus appears that *Avotiņš* constitutes an example of Union law being (more or less) overlooked in the domestic proceedings, while *Michaud* is an example of a case where the domestic apex court wrongly considered that the *CILFIT* doctrine was applicable.

As the *Michaud* and *Avotiņš* cases illustrate, a formal obligation to refer cases to the CJEU is no ironclad guarantee for the actual deployment of the full potential of the Union’s supervisory mechanism.⁹⁸ Thus, the European Court of Human Rights will assess, in each individual case, whether there are manifest deficiencies in the deployment of the Union’s supervisory mechanisms – notably the CJEU.

If transferred to the EFTA pillar of the EEA, *Michaud* and *Avotiņš* suggest that the lack of an obligation to refer cases to the EFTA Court need not be decisive after all. Rather, *Michaud* and *Avotiņš* could be interpreted as suggesting that the equivalent protection doctrine will apply if the domestic courts of the EEA/EFTA States have the *opportunity* to submit questions to an international court embedded within a system that provides substantially equivalent protection to that of the ECHR. If the full potential of the applicable supervisory mechanisms is not realised in the circumstances of a particular case – for example a *Michaud*-style refusal to refer a case to the EFTA Court – that may constitute a manifest deficiency, so that the presumption of equivalent protection is rebutted. If, on the other hand, a case has been referred, and the EFTA Court has thus been given the opportunity to assess the fundamental rights invoked by the parties, the fact that referrals are voluntary ought not to be decisive.⁹⁹

b) Non-binding preliminary rulings from the EFTA Court.

⁹⁵ *Ibid.*, para. 115.

⁹⁶ *Ibid.* In both *Michaud* and *Avotiņš* the European Court of Human Rights’ reasoning is somewhat muddled with regard to whether the deployment of “the full potential of the relevant institutional machinery” is a prerequisite for a general finding of equivalent protection, or whether it forms part of the case-by-case assessment of manifest deficiency. We agree with E. RAVASI, *Human Rights Protection by the ECtHR and the ECJ*, cit., p. 116 and pp. 112-123 that the latter understanding is correct. This is also how the European Court of Human Rights’ First Section understood the *Michaud* case in decision of 18 June 2013, no. 3890/11, *Povse v. Austria*, para. 83 – which is in turn was referenced by the European Court of Human Rights’ Grand Chamber when setting the stage for its assessment of manifest deficiency in *Avotiņš v. Latvia* [GC], cit., para. 112.

⁹⁷ *Avotiņš v. Latvia* [GC], cit., para. 111.

⁹⁸ *Michaud v. France*, cit., para. 115; *Avotiņš v. Latvia* [GC], cit., para. 105.

⁹⁹ One such example is the pending European Court of Human Rights case *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers’ Union (NTF) v. Norway*, cit., where the Supreme Court of Norway indeed obtained an advisory opinion from the EFTA Court on, e.g., the right to collective bargaining and collective action as a fundamental right under EEA law.

Another peculiarity of the EEA/EFTA system when compared to that of the EU is the non-binding nature of the EFTA Court's answers to any question of interpretation put to it by a national court. Formally speaking, the EFTA Court's decisions in cases under Art. 34 SCA are "advisory opinions". Admittedly, this has not prevented the EFTA Court from styling them as "judgments"¹⁰⁰ and considering them part of its case-law on the same footing as the binding judicial decisions that other provisions of the SCA vests in the court. Still, both the Icelandic and the Norwegian Supreme Court have emphasised that the EFTA Court's opinions on the interpretation of the EEA Agreement are advisory. In the *Holship* case of 2016, the Supreme Court of Norway, sitting in plenary session (Full Court), held this to entail that "the courts of the EFTA States must independently consider how to interpret and apply EEA law".¹⁰¹

At the same time, however, the Norwegian Supreme Court has emphasised that national courts shall attach "considerable importance" to the opinions of the EFTA Court. Again, the *Holship* case is instructive:

"The EFTA states' courts must [...] normally apply the EFTA Court's interpretation of EEA law, and cannot disregard an advisory opinion by the EFTA Court unless 'special circumstances' so indicate, cf. Rt. 2013, p. 258, paragraphs 93–94, with reference to the plenary judgment of Rt. 2000, pp. 1811–1820. In order for the EFTA Court to fulfil its intended purpose, the court's interpretation of EEA law cannot normally be disregarded unless there are weighty and compelling reasons for doing so".¹⁰²

The assessment of the effect in the EEA/EFTA States of the EFTA Court's advisory opinions for the purpose of the applicability of the equivalent protection doctrine is further complicated by the intricate relationship between EU and EEA law. Whilst it is true that the Supreme Court of Norway has on a few occasions deviated from the interpretation of EEA law advocated by the EFTA Court, it has only done so in cases where it was convinced that CJEU case-law necessitates adjustments of the advice received from the EFTA Court.¹⁰³ This may seem strange to EU and ECHR lawyers unfamiliar with the peculiarities of the EEA, but in essence both the national courts of the EEA/EFTA States and

¹⁰⁰ This practice of the EFTA Court began with its very first ruling under Art. 34 SCA: EFTA Court, advisory opinion of 16 December 1996, case E-1/94, *Restamark*. After some deviations early on, e.g. in *Erla María Sveinbjörnsdóttir v. the Government of Iceland*, cit., it has stuck to styling them as judgments. For recent examples, see e.g. EFTA Court: advisory opinion of 13 May 2020, case E-4/19, *Campbell*, and advisory opinion of 4 February 2020, case E-5/19, *Criminal proceedings against F and G*.

¹⁰¹ Norwegian Supreme Court, *Holship*, cit., para. 76. The Norwegian Supreme Court's emphasis put on the advisory character of the answers received from the EFTA Court goes all the way back to the plenary judgment of 16 November 2000, case HR-2000-49-B, *Finanger I*.

¹⁰² Norwegian Supreme Court, *Holship*, cit., para. 77.

¹⁰³ See further H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles*, cit., p. 674.

the EFTA Court itself agrees that the EEA Agreement can only work if common EU/EEA law is interpreted and applied in line with CJEU case-law.¹⁰⁴

For our present purposes, we need not go into the controversies that naturally arise in cases where the Norwegian Supreme Court believes that it knows the ways of the CJEU better than does the EFTA Court. It will rather suffice to note that more than 25 years after the entry into force of the EEA Agreement, no court of an EEA/EFTA State has disregarded *CJEU case-law* in a manner even remotely comparable to the rebellion of the German Constitutional Court in *Weiss* or of the Czech Constitutional Court in *Landtová*.¹⁰⁵ Furthermore, if a national court of an EEA/EFTA State ever was to disregard an advisory opinion received from the EFTA Court without firm support in CJEU case-law, the EFTA Surveillance Authority could be expected to initiate an infringement action under Art. 31 SCA. Since the EFTA Court has jurisdiction to issue binding judgments in infringement actions, this constitutes an indirect route to a binding decision.

Thus, if one focuses on the *adherence to joint EFTA Court and CJEU case-law* by the national courts rather than the “mere” advisory character of the EFTA Court’s opinions, the situation in the EEA/EFTA States is at least comparable and arguably even better than in quite a few of the EU Member States. If one interprets *Bosphorus* to the effect that the European Court of Human Rights was concerned with the actual control exercised by the CJEU over the fundamental rights protection offered by domestic courts, and not so much the formal framework, the lack of binding preliminary rulings from the EFTA Court cannot alone be decisive. The European Court of Human Rights could therefore extend the equivalent protection doctrine to the EEA/EFTA system and then check carefully if the procedural protection offered is “manifestly deficient” if there is ever a case where a national court has deviated from an advisory opinion from the EFTA Court in a way that appears detrimental to the protection of the fundamental rights of the complainant.¹⁰⁶

¹⁰⁴ The most explicit example from the EFTA Court is the advisory opinion of 8 July 2008, joined cases E-9/07 and E-10/07, *L'Oréal*, para. 28, where, in a remarkably open and straightforward manner, the Court held that the objective of a homogeneous EEA “calls for an interpretation of EEA law in line with new case-law of the [CJEU] regardless of whether the EFTA Court has previously ruled on the question”.

¹⁰⁵ German Federal Constitutional Court, *Weiss/PSPP*, cit.; J. KOMÁREK, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, in *European Constitutional Law Review*, 2012, p. 323 *et seq.*

¹⁰⁶ It may be added here that the European Court of Human Rights itself “merely” renders advisory opinions in cases where national apex courts refer questions of interpretation to it, see Protocol no. 16 ECHR. However, the relevance of this to the assessment of the advisory opinions of the EEA/EFTA system remains doubtful. On the one hand, it may be argued that the European Court of Human Rights presumably expects its advisory opinions to be adhered to by the referring courts, and that it may therefore also acknowledge the advisory opinions of the EEA/EFTA system as not so different from the preliminary rulings of the CJEU. On the other hand, the right under Art. 34 ECHR to bring a complaint before the European Court of Human Rights also applies in cases where the national court has obtained an advisory opinion, something which arguably suggests that the parties to the ECHR acknowledge that a system with ad-

c) The lack of jurisdiction to annul EEA Joint Committee decisions.

A further challenge to an extension of the equivalent protection doctrine to the EEA/EFTA system lies in the fact that the EFTA Court lacks jurisdiction to rule on the validity of decisions from the “EEA legislator” (the EEA Joint Committee).¹⁰⁷ In direct actions, the EFTA Court only has jurisdiction to review the legality of EFTA Surveillance Authority decisions (Art. 36 SCA), whereas its jurisdiction under the preliminary reference procedure is limited to questions concerning interpretation of EEA law (Art. 34 SCA).¹⁰⁸

For present purposes, the problem can be illustrated by the infamous Data Retention Directive, which the CJEU declared invalid in the 2014 *Digital Rights Ireland* case for violating the fundamental right to privacy enshrined in Art. 7 of the Charter of Fundamental Rights.¹⁰⁹ At the time of this judgment, the directive was still stuck in the EEA Joint Committee due to Icelandic opposition to it, but it was only a matter of time before it would have been incorporated into the EEA Agreement. If one imagines e.g. an Icelandic version of *Digital Rights Ireland*, with an Icelandic court referring it to the EFTA Court under Art. 34 SCA, the EFTA Court could not have declared the EEA Joint Committee’s decision to incorporate the directive into the EEA Agreement invalid.

Upon reflection, however, this difference between EU law and the law of the EEA/EFTA system hardly adds much to the already discussed difference between the binding preliminary rulings of the CJEU and the advisory opinions of the EFTA Court. An advisory opinion could never declare a legal act invalid; it could merely suggest that the national court behind the referral should draw this conclusion. If one is prepared to accept the judicial protection of fundamental rights in the EEA/EFTA system as equivalent

visory opinions to national courts cannot replace a system with direct individual complaints to the European Court of Human Rights. Still, an attempt to apply the latter argument to criticise the protection of fundamental rights offered by the EEA/EFTA system would also risk affecting the positive assessment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., of the preliminary ruling procedure before the CJEU. The fact that the preliminary rulings of the CJEU are binding as to the *interpretation* of relevant EU law does not remove the risk of a national apex court applying it in a way that the losing party nevertheless considers to be incompatible with fundamental rights. It may be added that both the EU and the EEA/EFTA system offer indirect enforcement by way of possible infringement proceedings brought by the EU Commission/the EFTA Surveillance Authority, something which Protocol no. 16 ECHR does not (as there is no need for it in light of Art. 34 ECHR).

¹⁰⁷ Novel EU legislation of EEA relevance is constantly incorporated into the EEA Agreement by decisions of the EEA Joint Committee, see Art. 102 EEA. The Joint Committee has the power to adapt the EU legal acts to the EEA framework and may also grant requests for substantive adjustments (although the EU side rarely agrees to such requests from the EEA/EFTA States). The legal basis for the applicability of EU legislation in the EEA is the EEA Joint Committee’s decisions, which justifies the characterisation of the Committee as the legislature in the EEA.

¹⁰⁸ Art. 34 SCA has no parallel to Art. 267, para. 1, let. b), TFEU, which gives the CJEU jurisdiction to issue preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

¹⁰⁹ Court of Justice, judgment of 8 April 2014, joined cases C-293/12 and C- 594/12, *Digital Rights Ireland* [GC].

to that offered by the ECHR, despite that fact that the EFTA Court only has jurisdiction to render advisory opinion, then the lack of jurisdiction to declare EEA Joint Committee decisions invalid ought not to create additional problems. If the focus is on the overall protection offered jointly by the EFTA Court and the national courts of the EEA/EFTA States, it should suffice that an Icelandic version of *Digital Rights Ireland* could be solved by the EFTA Court recognising an EEA fundamental right to privacy mirroring the one found in Art. 7 of the Charter of Fundamental Rights and Art. 8 ECHR and holding that the overarching objective of homogeneity between EU and EEA law does not allow for the directive to be applicable in the EEA in a situation where it would have to be considered invalid and therefore inapplicable in the EU, without there being any need for a formal declaration of the EEA Joint Committee decision being null and void.¹¹⁰

IV.4. PRELIMINARY CONCLUSION ON THE APPLICABILITY OF THE EQUIVALENT PROTECTION DOCTRINE TO THE EEA

Based on the analysis above, we are not convinced by the European Court of Human Rights' view that the basis for the presumption established by *Bosphorus* is lacking in the EFTA pillar of the EEA. There are certainly significant differences between EU law and the law of EEA/EFTA system: no written catalogue of fundamental rights, no direct effect, no obligation to refer, only advisory opinions, no review powers. However, these differences do not, in our view, hinder the fact that the overall protection of fundamental rights, *as guaranteed by the complex interplay between the EFTA Court, the CJEU and the national courts of the EEA/EFTA States*, are comparable to the protection offered in the EU, and which the European Court of Human Rights found to suffice in *Bosphorus*.

An extension of the equivalent protection doctrine to the EEA/EFTA system nevertheless requires that the role of national courts of the EEA/EFTA States are taken into consideration to a greater extent than the role of the national courts of the EU Member States in *Bosphorus* itself. To EEA lawyers, familiar with the more "partner-like" relationship between the EFTA Court and the national courts,¹¹¹ this would seem a natural adaptation of *Bosphorus* to the characteristics of the EEA. Still, to shield the EEA/EFTA States from full ECHR review in cases where the national courts, in the words of the Supreme Court of Norway, "must independently consider how to interpret and apply EEA law",¹¹² is undoubtedly quite a stretch of *Bosphorus*.

¹¹⁰ Another albeit related matter is whether the EFTA Court would in fact have been prepared to "go first" in such a scenario and hold the directive to violate fundamental rights, *i.e.* before the CJEU reached this conclusion in *Digital Rights Ireland* [GC], cit. In hard cases such as *Digital Rights Ireland*, is the judicial protection of fundamental rights in the EEA/EFTA system not only *de jure*, but also *de facto* comparable to that offered by EU law? For a sceptical view, see H.H. FREDRIKSEN, C. FRANKLIN, *Of Pragmatism and Principles*, cit., pp. 682-683.

¹¹¹ As highlighted by the EFTA Court itself in *Irish Bank*, cit., para. 59.

¹¹² Norwegian Supreme Court, *Holship*, cit., para. 76.

However, the *raison d'être* of *Bosphorus* lies in the European Court of Human Rights' desire to facilitate European integration and to establish a workable relationship with the CJEU. In section VI below, we will address this matter and ask if this justifies an extension of *Bosphorus* to the EEA/EFTA system. First, however, we need to address a more fundamental question, overlooked by the European Court of Human Rights in *Konkurrenten.no*, but in our opinion the crux of the matter when considering whether to extend the equivalent protection doctrine to the EEA/EFTA system: the European Court of Human Rights' finding in *Matthews* that a State can never be shielded from ECHR review of its application of international obligations which it has "freely entered into".¹¹³

V. THE (IN-)APPLICABILITY OF *MATTHEWS* TO THE EEA/EFTA SYSTEM

In *Konkurrenten.no* the European Court of Human Rights did not address whether obligations under the EEA Agreement flow from membership of an international organisation to which the EEA/EFTA States have transferred part of their sovereignty, or whether they rather are to be considered obligations "freely entered into" and therefore as such exempted from the equivalent protection doctrine.¹¹⁴

At a glance, there appears to be good reasons to question both whether, by entering into the EEA agreement, the EEA/EFTA States have become members of an international *organisation* and whether they have delegated *sovereign* powers to it. As we will come back to, the EEA Agreement was drafted specifically to avoid transfer (or, more precisely: delegation) of sovereign powers. Moreover, the EEA/EFTA system is not encapsulated by an overarching international organisation.

Before considering this issue further, we need to analyse *Matthews* and its rationale more closely – in particular its far from clear relationship to *Bosphorus* and the equivalent protection doctrine. This is done in section V.1. We then return to the EEA/EFTA system in section V.2.

V.1. *MATTHEWS* AND ITS RELATIONSHIP TO THE EQUIVALENT PROTECTION DOCTRINE

The relationship between *Matthews* and the judgment in *Bosphorus* six years later, is far from clear. In *Bosphorus*, the European Court of Human Rights affirmed *Matthews*, distinguishing it along the lines set out in section II above.¹¹⁵ Subsequent case-law has not explicitly overruled or limited *Matthews*, either. The approach in *Gasparini* was to hold Member States responsible for a violation caused by conduct attributable to the organi-

¹¹³ *Matthews v. United Kingdom* [GC], cit., para. 33.

¹¹⁴ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 154; *Matthews v. United Kingdom* [GC], cit., para. 33.

¹¹⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., para. 157.

sation alone, because that organisation was set up with a manifestly deficient system of (procedural) human rights protection. The *Matthews* doctrine therefore appears to hold: parties to the ECHR are responsible for violations caused by treaty commitments they have “freely entered into”.¹¹⁶

If taken literally, however, the “freely entered into” approach of *Matthews* encompasses all of the EU Treaties, thus excluding all cases where EU Member States comply with obligations flowing directly from them from the scope of the equivalent protection doctrine. As the *raison d'être* of *Bosphorus* lies in the European Court of Human Rights' desire to facilitate European integration and to establish a workable relationship with the CJEU, this begs the question of whether *Matthews* must nevertheless be considered at least partially overruled by *Bosphorus*.

In our view, there are valid arguments in favour of handling treaty commitments by a State (as in *Matthews*) differently from binding decisions taken by an international organisation that is later implemented by its Member States (as in *Bosphorus*). The act of committing to a treaty is a voluntary exercise of state sovereignty. While there may be significant political pressure to commit to new treaty obligations, for example when the constituent treaties of the European Union are renegotiated, each state is formally free to decide for itself.

In contrast, states that set up international organisations with the power to take legally binding decisions addressed to them as members, are in effect delegating – and pooling – their sovereign powers. Those powers are then exercised by the organisation, which is endowed with a certain degree of autonomy, as well as a legal personality separate from that of its Member States. This contrast is less stark for decisions of international organisations that are taken by consensus. In the EU system, most legal acts are based on competences that provide for majority voting, but some legal bases still require unanimity.¹¹⁷ Even in areas where majority voting is possible, most decisions by the EU Council are nevertheless taken by consensus.¹¹⁸ However, to attribute decisions of an organisation to its member states (whether all or just those taken unanimously) is tantamount to piercing the organisation's institutional veil. International law knows no such doctrine of veil-piercing; the clear, general rule is that the separate legal personali-

¹¹⁶ *Matthews v. United Kingdom* [GC], cit., para. 33; see also, e.g. European Court of Human Rights, judgment of 12 July 2001, no. 42527/98, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], para. 47. Of course, this only applies to the treaty commitments that are subsequent to the entry into force of the ECHR for the state in question: see European Commission of Human Rights, decision of 28 May 1975, no. 6231/73, *Hess v. UK*.

¹¹⁷ Unanimity is still the rule in over 70 areas post-Lisbon, see P. CRAIG, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 43.

¹¹⁸ For example, in 2019 the EU Council adopted 104 legislative acts using the qualified majority voting procedure. Only 14 of those acts were adopted with one or more votes against. Abstentions were more common, though, with 49 acts adopted with at least one Member State either abstaining or voting against. See www.consilium.europa.eu.

ty of the organisation cannot be circumvented.¹¹⁹ Tellingly, in *Bosphorus* the European Court of Human Rights did not enquire whether Ireland could have blocked Council Regulation 990/93 regarding sanctions against the Federal Republic of Yugoslavia.

Joining an international organisation with decision-making powers that also bind the member states therefore entails an *explicitly* open-ended commitment. When a state joins the EU, it knows that it operates on the basis of the principle of conferral (like all other international organisations) as well as the contours of the competences conferred upon the Union, which are laid down in its constituent treaties. The content of secondary Union law cannot be known in advance, however, as it is the result of the political processes in Brussels.

As well demonstrated by the EU constituent treaties, however, the view of the European Court of Human Rights in *Matthews* that treaty obligations as such are static and their consequences therefore foreseeable for a state freely entering into them, does not hold. A treaty commitment may in practice entail an *implicitly* (and partially) open-ended commitment, because they may contain terms that by design are capable of evolving through interpretation.¹²⁰ The interpretation of vague treaty terms may be particularly evolutive when an international court has jurisdiction to interpret and apply the treaty in question – especially when the court in question favours the object and purpose above the treaty text, as the CJEU is (in)famous for doing.

The Union's constituent treaties provide clear examples of this. They establish both decision-making institutions and far-reaching substantive treaty obligations. Of substantive treaty obligations, some are of a more static nature, while others have shown themselves highly susceptible to evolutionary interpretation. Joining the EU thus entails:

- 1) explicitly open-ended commitments (with regard to secondary law and other binding decisions of its institutions – like those at issue in *Bosphorus*),
- 2) more or less static treaty commitments (e.g. the black letter treaty provision on elections to the European Parliament – like those at issue in *Matthews*), and
- 3) implicitly open-ended treaty commitments (e.g. the four freedoms, competition law, Union citizenship, and much more).

Commitment type (1) is covered by the equivalent protection doctrine. Commitment type (2) appear to be covered by the *Matthews* doctrine, meaning that member states are fully responsible for the consequences flowing from them. However, as of yet there are no

¹¹⁹ Though, in very rare instances a single piece of conduct may be attributed both to the organisation and (one or more) Member States. Such dual attribution would, however, require a very high degree of involvement by the Member State(s) in question that goes far beyond a mere affirmative vote in the relevant decision-making body of the organisation. See generally, and with further references, S.Ø. JOHANSEN, *Dual Attribution of Conduct to Both an International Organisation and a Member State*, in *Oslo Law Review*, 2019, p. 178.

¹²⁰ E. BJØRGE, *The Evolutionary Interpretation of Treaties*, Oxford: Oxford University Press, 2014, p. 2 *et seq.*

European Court of Human Rights cases concerning commitment type (3): implicitly open-ended commitments under the constituent treaties of the Union. Nor do we know of any cases involving other treaty commitments that are of an implicitly open-ended nature.¹²¹

At present, it is therefore somewhat uncertain how the European Court of Human Rights will handle open-ended treaty commitments. On the one hand, the rationale behind *Matthews* appears to be that states enter into (static) treaty commitments freely, and may foresee the consequences of binding themselves to the mast. If it were otherwise, states could simply circumvent ECHR responsibility by entering into treaties detailing their planned human rights violations. On the other hand, the rationale behind the equivalent protection doctrine is the importance of international cooperation and the consequent need to secure the proper functioning of international organisations.¹²²

The rationale that best fits implicitly open-ended treaty commitments is in our view the one underlying the equivalent protection doctrine. While it may not be a perfect fit, it is certainly more relevant than the rationale underlying *Matthews*. This suggests that the *Matthews* doctrine should not be applied to implicitly open-ended treaty commitments. Instead, some version of the equivalent protection doctrine should be applied to such treaty commitments, which – although “freely entered into” – are developed by international courts.

The distinction between static and (implicitly) open-ended treaty commitments that we suggest here may appear vague. An alternative way of distinguishing would be to delimit the equivalent protection doctrine in the line with the CJEU’s jurisdiction. It would then only be outside the scope of the CJEU’s jurisdiction that the *Matthews* doctrine – full ECHR responsibility for treaty commitments – should apply.¹²³ We are not opposed to such an approach, but it does require the European Court of Human Rights to explicitly overrule *Matthews* and thus admit that the distinguishing of that judgment in *Bosphorus* was misguided. That is because the CJEU did indeed have jurisdiction to interpret the rules of EU primary law that were at issue in *Matthews* – although it obviously could not set them aside.¹²⁴ Drawing the line where the CJEU has jurisdiction not only to interpret, but also to annul, is in our view not recommendable. That is because

¹²¹ However, a case of this kind originating in the EEA/EFTA system is presently before the European Court of Human Rights: *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers’ Union (NTF) v. Norway*, cit. We will come back to this case in section V.2 below.

¹²² *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], para. 150, subpara. 2.

¹²³ As suggested, e.g., by H.H. FREDRIKSEN, K.E. SKODVIN, *Den europeiske menneskerettighetsdomstolens kontroll med vern av grunnleggende rettigheter i EF, EU og EØS*, cit., pp. 552-554.

¹²⁴ That the Court of Justice has jurisdiction to interpret these rules is most clearly evidenced by judgment of 12 September 2006, case C-145/04, *Spain v. UK* [GC], where Spain challenged the UK’s attempt at remedying the ECHR violation identified in *Matthews v. United Kingdom* [GC], cit.

such a demarcation would lump all treaty commitments together, whether static or open-ended, which we have already demonstrated as being problematic.¹²⁵

The distinction we propose preserves both (the core of) *Matthews* and the equivalent protection case-law, while identifying that there is space for an equivalent protection-like doctrine for implicitly open-ended treaty commitments. Against this background, we will now turn to (re)analysing the EEA/EFTA system.

V.2. OPEN-ENDED COMMITMENTS AND THE EEA/EFTA SYSTEM

The EEA/EFTA system is replete with open-ended treaty commitments. Not only does the main part of the EEA Agreement contain commitments of this nature copied from the (pre-Maastricht) EEC Treaty. As we will now demonstrate, secondary Union law – notably regulations and directives – make their way over to the EEA/EFTA system in the form of treaty commitments.

For the EU Member States, obligations flowing from secondary Union law are covered by the equivalent protection doctrine because it is enacted by the organs of the Union – an international organisation. Secondary EU law then makes its way into the EEA Agreement through decisions of the EEA Joint Committee. But what is the nature of the Joint Committee? Is it just the name for a meeting of the parties to the EEA Agreement, or something more – an international organisation?

While there is some dispute regarding the exact criteria for what constitutes an international organisation, one fundamental requirement is that it must have at least one organ with a will of its own (*volonté distincte*).¹²⁶ This criterion is closely intertwined with the notion of international legal personality, which is a reflection of the organisation's *volonté distincte*.¹²⁷ This distinguishes organisations from mere treaty bodies, which do not have international legal personality.

The more fine-grained question is thus whether the EEA Joint Committee is (a part of) an international organisation, or whether it is a mere treaty body. There is nothing in the EEA agreement that suggests that it establishes an organisation with international legal personality. As mentioned above, the EEA Agreement was drafted with the specific intention of avoiding delegation of sovereign powers to an international organisation. This is reflected in the design of the Joint Committee. Its decisions are taken not just unanimously, but “by agreement” between the EEA/EFTA states and the Union.¹²⁸ Moreover, the Joint Committee does not have a proper secretariat, but one official of

¹²⁵ Other demarcations of the equivalent protection-like doctrine are also possible, such as e.g. one focusing on the binding effect of the CJEU's case-law interpreting the EU Treaties rather than the treaties as such (essentially equating CJEU case-law with secondary EU law elaborating EU primary law).

¹²⁶ H.G. SCHERMERS, N.M. BLOKKER, *International Institutional Law: Unity within Diversity*, Leiden: Brill Nijhoff, 2018, pp. 48–50, with further references.

¹²⁷ *Ibid.*, p. 48.

¹²⁸ Art. 93, para. 2, EEA.

the EU Commission and one official nominated by the EEA/EFTA States acting jointly as secretaries.¹²⁹ Each side additionally has their own secretariat. The EU side uses the European External Action Services as their secretariat. The EEA/EFTA states coordinate their positions in the so-called Standing Committee of the EFTA States, to which secretariat services are offered by the EFTA organisation. Overall, the Joint Committee lacks any semblance of *volonté distincte* and/or international legal personality. It is thus clearly not an international organisation.

While the Joint Committee is not an international organisation, it may be a part of one. A treaty can create a body that forms part of an organisation constituted on the basis of a different treaty.¹³⁰ However, there is no larger “EEA organisation” that the Joint Committee is docked with. While the EEA Agreement does not establish any international organisation, the Surveillance and Court Agreement establishes two: the EFTA Surveillance Agency and the EFTA Court.¹³¹ But the EEA Joint Committee is not associated with any of them.¹³²

Since the Joint Committee is merely a treaty body, its decisions to incorporate EU legal acts into the annexes to the EEA Agreement must be regarded as amending treaties. As noted both by the European Commission and the EFTA Court, a decision of the EEA Joint Committee constitutes “a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other”.¹³³

The question is then whether these amending treaties are freely entered into by, on the one hand, the EEA/EFTA states, and, on the other, the Union. Since the EEA Joint Committee decisions are taken “by agreement” between the parties, at first glance this appears to be the case.¹³⁴ While there is no doubt a high degree of political duress involved, that is of no relevance – the same was likely also the case for the instruments at issue in *Matthews*.

However, there are some aspects of the EEA Agreement that make the issue less clear. First, while there is no legal obligation to accept new EU legislation into the EEA

¹²⁹ Art. 19 of the Rules of procedure for the EEA Joint Committee.

¹³⁰ H.G. SCHERMERS, N.M. BLOKKER, *International Institutional Law*, cit., p. 304, with further references.

¹³¹ Art. 1 of Protocol no. 6 and Art. 1 of Protocol no. 7 SCA confer legal personality upon, respectively, the EFTA Surveillance Authority and the EFTA Court.

¹³² In this connection it should be noted that the European Free Trade Association (EFTA) is indeed an international organisation, set up by the 1960 EFTA Convention. However, neither the EEA Joint Committee nor the EFTA Court or the EFTA Surveillance Agency are associated with EFTA as such. The reason behind the highly confusing names of the latter two institutions was the expectation that all of the EFTA states would become parties to the EEA Agreement, but this was frustrated by the Swiss “No” to the EEA in a 1992 referendum on the matter.

¹³³ EFTA Court, advisory opinion of 9 October 2002, case E-6/01, *CIBA Speciality Chemicals Water Treatment*, para. 33.

¹³⁴ Art. 93, para. 2, EEA.

Agreement, its object and purpose depend on this being done. Thus, Art. 102, para. 1, EEA states that: "In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement".¹³⁵

In the 25 years that the EEA Agreement has been in operation, there is still no clear example of a "veto" by the EEA/EFTA States against new EU legislation of EEA relevance. At best, certain adjustments may be made to adapt e.g. a regulation to the scope and context of the EEA Agreement. The EEA Agreement is, in other words, a uniquely dynamic treaty – as close to explicitly open-ended that a treaty not establishing an international organisation can be.

Second, within the EFTA pillar of the EEA, both the main part of the EEA Agreement and the EU legislation included in its annexes are interpreted and applied by independent bodies: the EFTA Court and the EFTA Surveillance Authority. Not only do they contribute significantly to the dynamism of the EEA Agreement; they are also both international organisations – thus further blurring the line between implicitly and explicitly open-ended commitments.

Particularly notable among the implicitly open-ended commitments in the main part of the EEA Agreement are the four freedoms, as well as the provisions on competition and state aid. These closely mirror their respective twin provisions in the TFEU. While this core bundle of EU/EEA law obligations form part of the constituent treaties of the Union and the main part of the EEA Agreement – and are in that sense quite "freely entered into" by the EU and EEA/EFTA States – they are also stereotypical examples of implicitly open-ended commitments. Indeed, one of the core characteristics of Union law (and thus, by extension, EEA law) is the CJEU's evolutive and pro-integration interpretations of them.¹³⁶ Some have characterised this as a constitutionalisation process – where particularly the four freedoms have taken on a (quasi-)constitutional character.¹³⁷ As pointed out by

¹³⁵ But "shall" does not imply an obligation on the EEA/EFTA States to agree to the incorporation of novel EU legislation into the Agreement, cf. e.g. para. 4 of the same article: "If [...] an agreement on an amendment of an Annex to this Agreement cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation".

¹³⁶ See e.g. M.P. MADURO, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998.

¹³⁷ See, in particular, the seminal work of J. H. H. WEILER, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, p. 2403 *et seq.*, with further references. It is also worth noting that the current president of the CJEU has long adopted this constitutionalist narrative, see K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *The American Journal of Comparative Law*, 1990, p. 205.

Stone Sweet, a “potentially explosive problem lurks behind these considerations: Constitutional Courts cannot perform their assigned tasks without making law”.¹³⁸

Surprisingly, there has yet to be a European Court of Human Rights case challenging the human rights compatibility of the four freedoms. A clear candidate for such a case presented itself following the CJEU’s infamous ruling in *Laval*.¹³⁹ However, the trade unions eventually chose to bring their case to the European Committee of Social Rights rather than to the European Court of Human Rights.¹⁴⁰

Now, however, the EFTA pillar of the EEA has produced a case of this kind that is currently pending before the European Court of Human Rights: *LO and NTF v. Norway*.¹⁴¹ In essence, the complainants (the Norwegian Transport Workers’ Union and the Norwegian Confederation of Trade Unions) argue that the Supreme Court of Norway has violated Art. 11 ECHR by giving priority to the right to provide services under EEA law in a case where a transportation company refused to enter into a collective agreement with provisions on preferential right to loading and unloading work for stevedores affiliated with the port of call. As the Supreme Court’s judgment closely followed the interpretation of EEA law advocated by the EFTA Court,¹⁴² the complaint is a clear attempt to get the European Court of Human Rights to review EFTA Court case-law. Furthermore, since the EFTA Court relied heavily on CJEU case-law,¹⁴³ the complaint is also a clear example of a possible indirect European Court of Human Rights review of CJEU case-law. And finally, as the right to provide services is guaranteed by a provision of the main part of the EEA Agreement (Art. 36 EEA), mirroring a provision of EU primary law (now Art. 56 TFEU), the case also raises questions as to the reach of *Matthews* and its “freely entered into” test.

From the reasons developed above in section V.1, we submit that the European Court of Human Rights should not apply the *Matthews* doctrine to the EEA/EFTA system when deciding *LO and NTF v. Norway*.

VI. A JACK-IN-THE-BOX IN THE RELATIONSHIP BETWEEN THE CJEU AND THE EUROPEAN COURT OF HUMAN RIGHTS?

Our analysis has demonstrated that an extension of the equivalent protection doctrine to the EEA/EFTA system presupposes both a rethinking of the “freely entered into” doctrine

¹³⁸ A.S. SWEET, *The European Court of Justice*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 130.

¹³⁹ Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval Un Partneri Ltd* [GC].

¹⁴⁰ European Committee of Social Rights, decision of 3 July 2013, no. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*.

¹⁴¹ *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers’ Union (NTF) v. Norway*, cit.

¹⁴² Norwegian Supreme Court, *Holship*, cit., particularly paras 72-78 and 88-99.

¹⁴³ EFTA Court, *Holship Norge AS and Norsk Transportarbeiderforbund*, cit., particularly paras 104-131.

established in *Matthews* and a holistic approach to the question of whether the EEA/EFTA system offers a level of human rights protection equivalent to that of the ECHR system.

Admittedly, it may therefore be argued that the *obiter dictum* in *Konkurrenten.no* ought to be upheld by the European Court of Human Rights in the pending case of *LO and NTF v. Norway* – albeit for other reasons than those given in the judgment. However, as suggested in the very title of this contribution, such a finding would make the EEA/EFTA system a proverbial jack-in-the-box in the relationship between the CJEU and the European Court of Human Rights. Since both the CJEU and the EFTA Court have confirmed on numerous occasions that corresponding provisions of the EU and EEA law are to be interpreted uniformly,¹⁴⁴ European Court of Human Rights review of the application of EEA law in the EEA/EFTA States will come very close to full (albeit indirect) review of CJEU case-law.

Therefore, the arguments in favour of an extension of the equivalent protection doctrine to the EFTA States in the EEA include not only appreciation for the international cooperation embodied in the EEA Agreement and/or considerations of comity *vis-à-vis* the EFTA Court – but also consideration of the relationship between the European Court of Human Rights and the CJEU.

As explained in the introduction, the CJEU has essentially accepted the law of the EEA/EFTA system as equivalent to EU law, holding the EEA/EFTA States to be “on the same footing as Member States of the European Union”¹⁴⁵ and their citizens to be in a situation “objectively comparable with that of an EU citizen to whom, in accordance with Art. 3, para. 2, TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured”.¹⁴⁶ In doing so, the CJEU has implicitly recognised as at least comparable the overall protection of fundamental rights offered jointly by the EFTA Court and the national courts of the EEA/EFTA States. The essence of the question on the application of an equivalent protection-like doctrine to the EEA/EFTA system is whether the European Court of Human Rights is prepared to do the same.

¹⁴⁴ The seminal judgment of the Court of Justice is *Ospelt and Schlössle Weissenberg*, cit., para. 29. For a recent confirmation, see *Ruska Federacija* [GC], cit.

¹⁴⁵ *UK v. Council*, cit., para. 59 (differentiating the EEA Agreement from the EEC-Turkey Association Agreement).

¹⁴⁶ *Ruska Federacija* [GC], cit., para. 58.



ARTICLES

IT TAKES TWO TO TANGO:

THE PRELIMINARY REFERENCE DANCE BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

edited by Jasper Krommendijk

IT TAKES TWO TO TANGO: AN INTRODUCTION

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TABLE OF CONTENTS: I. Introduction. – II. Evolving legal questions surrounding Art. 267 TFEU. – III. Stocktaking: the procedure under pressure? – IV. Contributing to the academic debate. – V. Overview of the Special Section. – V.1. Factors and motives to refer. – V.2. Quality of Court of Justice answers and dialogue. – V.3. Implementation of Court of Justice judgments.

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

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

I. INTRODUCTION

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

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

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

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

II. EVOLVING LEGAL QUESTIONS SURROUNDING ART. 267 TFEU

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

¹ Court of Justice, opinion 2/13 of 18 December 2014, para. 176. The procedure is commonly referred to as the “jewel in the crown” of the CJEU. P. CRAIG, *The Jurisdiction of the Community Courts Reconsidered*, in G. DE BÚRCA, J. WEILER (eds), *The European Court of Justice*, Oxford: Oxford University Press, 2001, p. 559.

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

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

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

for European Law (FIDE) 2020.⁵ The Court of Justice's "control" of the discretion of national courts is still in development and there have been recent noteworthy developments. Furthermore, it is no longer only the Court of Justice that has surveilled the limits of Art. 267 TFEU but, increasingly, the European Court of Human Rights has also addressed this issue. With respect to the Court of Justice, one could point firstly to the ambiguities surrounding the *CILFIT* doctrine and especially the *acte clair* standard.⁶ It is conventional wisdom that there is a discrepancy between the theory of *CILFIT* and its actual application. The official line of the Court of Justice is, however, still that the *CILFIT* exceptions need to be taken literally and applied restrictively, even though some judgments seem to diverge from this.⁷ Two years ago, the Court of Justice found a breach of Art. 267, para. 3, in an infringement procedure against France for the failure of the highest court (the French Conseil d'État) to refer a second follow-up question. The Court of Justice reasoned that the interpretation of the Conseil was "at variance" with its own subsequent interpretation.⁸ The latter is something which happens quite regularly, and one can wonder whether such a situation always leads to a breach. This judgment thus shows that the Court of Justice does not shy away from imposing burdensome requirements on national courts and it is not willing (yet) to alleviate the *CILFIT* requirements, at least on paper. The burdensome *CILFIT* requirements have also met fierce criticism in the literature and by some national court judges.⁹ In this light, it is not surprising that there are considerable differences between national courts in their application of *CILFIT*, as the Research and Documentation Centre of the Court of Justice also noted in May 2019.¹⁰

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

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

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

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

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

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

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

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

III. STOCKTAKING: THE PROCEDURE UNDER PRESSURE?

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

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

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

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

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

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

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

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

IV. CONTRIBUTING TO THE ACADEMIC DEBATE

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

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

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

¹⁸ M. BONELLI, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union*, in *Maas-tricht Journal of European and Comparative Law*, 2018, p. 368.

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

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

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

V. OVERVIEW OF THE SPECIAL SECTION

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

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

²¹ E.g. without being exhaustive: U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure: in Search of a Mid-Range Theory*, in B. DE WITTE, J.A. MAYORAL, U. JAREMBA, M. WIND, K. PODSTAWA (eds), *National Courts and EU Law. New Issues, Theories and Methods*, Cheltenham: Elgar, 2016, p. 49 et seq.; J. MAYORAL, *In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe*, in *Journal of Common Market Studies*, 2017, p. 551 et seq.; T. PAVONE, *Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance*, in *Journal of Law and Courts*, 2018, p. 303 et seq.; A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2019, p. 912 et seq.; R. VAN GESTEL, J. DE POORTER, *In the Court We Trust: Cooperation, Coordination and Collaboration Between the ECJ and Supreme Administrative Courts*, Cambridge: Cambridge University Press, 2019; K. LEIJON, *National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?*, in *West European Politics*, 2020, p. 1 et seq.

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

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

V.1. FACTORS AND MOTIVES TO REFER

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

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

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

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

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

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

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

V.2. QUALITY OF COURT OF JUSTICE ANSWERS AND DIALOGUE

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

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

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

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

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

V.3. IMPLEMENTATION OF COURT OF JUSTICE JUDGMENTS

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

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

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

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

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



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

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.

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KEYWORDS: preliminary reference procedure – national courts – motives to refer – overseas countries and territories (OCT) – association regime – Caribbean.

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 reference⁵ 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 Decision⁸ 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 duties¹⁴ 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/euro scepticism,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. HERTOOGH, 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 and 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, Curacao²⁷ in the South of the Caribbean sea near the Venezuelan shore (windward islands) and Saba, Saint Eustatius, Saint Martin²⁸ 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 mandatory³² 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 still 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 cases 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 Kingdom 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 decision⁴⁰ 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 through 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 (Curacao) 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 (Curacao) 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 through 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 concordance⁵⁹ 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. HERTOOGH, 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 Kohl/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. JAHAË, 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. HERTOOGH, 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. HERTOOGH, 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 belief 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 from 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 Tumba 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.



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

LAWYERING EUROLAW: AN EMPIRICAL EXPLORATION INTO THE PRACTICE OF PRELIMINARY REFERENCES

JOS HOEVENAARS*

TABLE OF CONTENTS: I. Introduction. – II. A European opportunity structure. – III. Lawyers and references: an unexpected task. – III.1. Allocating resources. – III.2. Going to Luxembourg. – III.3. Legal aid and references. – III.4. Lawyers' motivation. – III.5. The "language" of EU law. – III.6. The significance of the hearing. – III.7. The ways of the court. – III.8. Coping strategies. – IV. Macro effects of the allocation of Eurolaw expertise. – V. Conclusions.

ABSTRACT: The preliminary reference procedure is often credited as the engine behind European integration. Until very recently however, the role of lawyers in this parable of law-led political unification has remained relatively unexplored. As a result, we still lack empirical insight into the day-to-day on-the-ground practice of "doing EU law" by legal professionals that represent parties before the Court of Justice. Without an exclusive focus on highly transformative, salient, or "landmark" cases, and opting instead for a bottom-up approach, this *Article* looks at the everyday practice of references to the Court of Justice from the perspective of the legal practitioners that litigate these cases. This *Article* draws on interviews with lawyers that have assisted individual litigants in preliminary reference procedures and presents an empirical exploration into the everyday context in which legal practitioners work on preliminary references cases. The central question this *Article* aims to answer is: How do lawyers deal with the challenges of representing individual parties in preliminary references cases? The findings underscore how the effective use of the preliminary

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reference procedure is reserved largely for organisations and “strategy entrepreneurs” with the necessary credentials, means, and expertise. On the one hand, it provides possibilities for “trumping” the domestic legal system whenever supranational legislation provides opportunities against national policy or legislation; on the other hand, in terms of access to justice and as a form of remedy, the preliminary reference procedure remains a difficult “sword” to yield.

KEYWORDS: preliminary reference procedure – Court of Justice – lawyers – legal expertise – legal opportunity structure – qualitative analysis.

I. INTRODUCTION

The EU is in many respects a genuine “lawyer’s paradise”¹ – a unique regional polity with at its core a legal system capable of shaping political development in a most remarkable international integration project. In studying the co-development of law and politics in Europe’s history, it is revealed that an abundance of legal and political science research credits EU law as being the “engine” of European integration.² At the core of this story of the construction of Europe is the “judicial dialogue” between the Court of Justice (hereafter: the Court) and national courts, in which the latter send references for a preliminary ruling to the Court in Luxemburg for clarification of EU law, and how it is to be applied in particular court cases within the national context. Through its historic judgments in such cases, the Court was able to constitutionalise EU law, curtail the sovereignty of EU Member States, and transform a politically divided Europe into a semi-federalist political union.³

Until very recently, the role of lawyers in this parable of law-led political unification has remained relatively unexplored. Lawyers participating in the foundational legal contestations before Europe’s most powerful institution, the Court of Justice, featured in this grand story of Europeanisation as mere neutral agents in the service of the more prominent players (Member States, EU institutions, corporations, interest groups, and so on) of the Euro-law game. A recent turn towards this “most invisible of actors” revealed the unquestioned role legal professionals have had in the historical develop-

¹ A. VAUCHEZ, *Brokering Europe*, New York: Cambridge University Press, 2015.

² E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *The American Journal of Comparative Law*, 1981, p. 1 *et seq.*; J.H.H. WEILER, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, p. 2403 *et seq.*; A.M. BURLEY, W. MATTLI, *Europe Before the Court: A Political Theory of Legal Integration*, in *International Organization*, 1993, p. 41 *et seq.*; K.J. ALTER, *The European Court’s Political Power*, in *West European Politics*, 1996, p. 458 *et seq.*; A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95*, in *Journal of European Public Policy*, 1998, p. 66 *et seq.*; R.D. KELEMEN, *Eurolegalism*, Cambridge: Harvard University Press, 2011.

³ E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, cit., p. 1; A. STONE SWEET, J. CAPORASO, *From Free Trade to Supranational Polity: The European Court and Integration*, in W. SANDHOLTZ, A. STONE SWEET (eds), *European Integration and Supranational Governance*, Oxford: Oxford University Press, 1998, p. 102; A.M. BURLEY, W. MATTLI, *Europe Before the Court*, cit., p. 41 *et seq.*; W. MATTLI, A.M. SLAUGHTER, *Revisiting the European Court of Justice*, in *International Organization*, 1998, p. 177 *et seq.*

ment of this “model of transnational justice”.⁴ With a focus on what are referred to as “Euro-lawyers”, legal professionals that have contributed to the “construction of Europe”, these practitioners feature in the literature as important actors – both as “brokers”⁵ in EU law and as “ghost writers”⁶ of the emerging European legal order. While lawyers are now given their rightful position among the host of actors included as protagonists of supranational legal development, they almost exclusively feature in case studies, prosopography, and historiographic accounts of some of the leading scholars involved in transformative or “landmark” judgments by the Court. As a result, we still lack empirical insight into the day-to-day on-the-ground practice of “doing EU law” by legal professionals that represent parties before the Court.

With an academic trend towards characterising the supranational judicial dialogue between courts as an opportunity for parties seeking to use European law to their benefit,⁷ the question remains: How is this “legal opportunity structure” negotiated in practice? Without an exclusive focus on highly transformative, salient, or “landmark” cases, and opting instead for a bottom-up approach, this *Article* looks at the everyday practice of references to the European Court of Justice from the perspective of the legal practitioners that litigate these cases. As such, this *Article* presents an empirical exploration into the everyday context in which legal practitioners work on preliminary reference cases, the kinds of issues that arise from peculiarities of the procedure, the options lawyers have for dealing with these matters, and the considerations that play a role in this respect. Therefore, the central question this *Article* aims to answer is: How do lawyers deal with the challenges of representing individual parties in preliminary references cases?

In order to gain insight in the day-to-day practise of preliminary reference cases from the perspective of lawyers this *Article* draws on interviews with lawyers that have assisted individual litigants in preliminary reference procedures conducted in the context of a study into litigation before the Court.⁸ For this study, a selection was made of references for a preliminary ruling by Dutch courts between 2008 and 2012. This result-

⁴ Y. DEZALAY, B.G. GARTH, *Lawyers and the Construction of Transnational Justice*, New York: Routledge, 2012, p. 4.

⁵ A. VAUCHEZ, *Brokering Europe*, cit.

⁶ T. PAVONE, *The Ghostwriters: Lawyers and Politics Behind the Judicial Construction of Europe*, unpublished doctoral dissertation, on file with the Author.

⁷ Cf. K.J. ALTER, J. VARGAS, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, in *Comparative Political Studies*, 2000, p. 452 et seq.; D. CHALMERS, M. CHAVES, *The Reference Points of EU Judicial Politics*, in *Journal of European Public Policy*, 2011, p. 25 et seq.; R.A. CICHOWSKI, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Cambridge: Cambridge University Press, 2007; L. VANHALA, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, in *Law & Society Review*, 2012, p. 523 et seq.

⁸ A more extensive discussion of the results of this study can be found in J. HOEVENAARS, *A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice*, The Hague: Eleven International, 2017.

ed in a total of forty-five preliminary references that included one or more individual litigants.⁹ In total of 26 preliminary reference cases the actors involved in the case were successfully traced and approached for an interview. These respondents included litigants, their legal counsel as well as third parties such as labour union lawyers, EU law professors, and NGO representatives.

The insights presented in this *Article* are based on a total of 28 semi-structured interviews conducted with the lawyers and legal advisers involved in these cases. With the aim of reconstructing case trajectories from the perspectives of the actors involved in those cases, respondents were asked about both the development of the cases itself – including the underlying dispute, legal rationale and strategy followed – and their experiences during the preliminary reference procedure. In particular, respondents were asked about their experiences with regard to the decision to refer by the national court and to the preparation of the case as well as both the written and the oral phase of the preliminary ruling procedure. They were invited to reflect on the course of events during the hearing, the judgment by the Court and the course of the case after referral back to the national court. Respondents were especially asked about the issues and challenges they faced and what strategies they employed to deal with them. To increase the validity of the findings, data collected from the interviews was triangulated where possible with document analysis of sources including newspaper articles; relevant databases; legal documents of judges, lawyers, and/or other actors involved in the litigation; newspapers; personal and digital files. This data was used to provide the context for the reconstruction of these cases and their trajectory through the national and supranational legal system. The insights from this study are limited to references in the Dutch context. The extent to which the result can be translated to other jurisdictions, therefore, remains uncertain. However, the number of cases that were studied in-depth through the abovementioned methodology represent almost 60 per cent of the total amount of references involving individual litigants made by Dutch courts in the selected period and should therefore provide a reliable representation of lawyers' experiences with the procedure for the Dutch context.

This *Article* is structured as follows. Section II provides a concise exploration of the European legal system and the opportunities it is purported to provide to disenfranchised parties. Section III then presents the results from the interviews and analyses the context within which legal practitioners¹⁰ have to work on preliminary reference cases, the kinds of issues that arise from peculiarities of the procedure, and the strategies lawyers employ in dealing with these matters. Section IV subsequently discusses the consequences of the presented findings and their relevance in terms of the distribution

⁹ Due to the focus of this study on matters of individual rights and empowerment through litigation, the cases selected for this investigation included only those involving at least one individual party. Companies and institutions were therefore not taken into consideration.

¹⁰ The practitioners discussed in this *Article* include both lawyers and non-lawyers, such as tax advisors; therefore, I use the term practitioner to cover both groups.

of legal agency within the functioning of the European legal system. Finally, section V concludes with a discussion on how these findings help our understanding of the relationship between law and politics in Europe.

II. A EUROPEAN OPPORTUNITY STRUCTURE

It has generally been understood that litigation, a court's resolution of societal questions or disputes, can lead to the clarification and expansion of existing laws and to the construction of new rules.¹¹ Within the European system, the semi-constitutional character of EU law and the fact that the Court's judgments are binding throughout the European Union has made the Court in Luxembourg the subject of both legal and political analysis. The Court is now widely considered to be responsible to a great extent for not only the unprecedented European integration of – first and foremost – its legal system but, by extension, also of its political and social spheres. In this respect, the preliminary reference procedure is rightfully heralded as the backbone of the European legal system, since historically the Court's most far-reaching judgments have resulted from preliminary references. The procedure has been the focus of research in terms of the opportunities it provides to parties invoking EU law in contests against state law and policy, on the one hand, and because of its role in the transformation and integration of Europe as a result of doctrines of EU law developed by the Court of Justice in preliminary rulings, on the other.

While the vast majority of EU law claims are still dealt with within the national courtrooms, the preliminary reference procedure provides a form of supranational judicial review, and the Court's judgments on principle have the capacity to halt certain national policies and set precedents that have an effect beyond the Member State. The mobilisation of EU law in the national courtroom therefore provides the public with new means of addressing possible government trespasses as well as bypassing the domestic system by invoking the powers of the Court.¹² In this sense, the "shield and sword" analogy, as borrowed from Dworkin, has been used to describe the use of EU law and the preliminary reference procedure as a strategic tool in the hands of litigants and civil society.¹³ From a rule of law perspective – the idea that law, the legal system, and especially judicial review provide the means for the public to call their government to account – EU law and the preliminary reference procedure provide a means of review of government acts that was previously unavailable.

Additionally, a large body of research into the integration of Europe has given special weight to the role of private litigation in activating the preliminary reference system

¹¹ M. SHAPIRO, *Courts: A Comparative and Political Analysis*, Chicago: University of Chicago Press, 1981.

¹² R. RAWLINGS, *The Euro-Law Game: Some Deductions for a Saga*, in *Journal of Law and Society*, 1993, p. 309 *et seq.*

¹³ G. TRIDIMAS, T. TRIDIMAS, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, in *International Review of Law and Economics*, 2004, p. 128.

and, by extension, fostering integration dynamics in Europe.¹⁴ Private parties are recognised as playing an integral part in this equation, in that they are the ones expected to activate this system – or to initiate the dialogue between courts – by engaging in the procedure. In its report on access to justice in the Union, the Directorate-General for Internal Policies defined the purpose of the preliminary reference procedure as that of ensuring both the uniform interpretation of EU law throughout the Union and the effective application of EU law,¹⁵ while stressing its effective function of enabling citizens to enforce their Union rights within their national jurisdiction: “By being able to request references for a preliminary ruling before their national courts, citizens may be able to draw the CJEU’s attention to national application or judicial interpretation of EU law in the field of justice which they believe impedes effective access to justice”.¹⁶

As such, it is argued that preliminary rulings can encourage national legal reforms to comply with EU law, and that citizens, when they are party to a dispute before a national court, can ask the court to refer the matter to the Court of Justice. This possibility to request preliminary rulings means that citizens can draw the attention of the Court to the national application or judicial interpretation of EU law where a national interpretation hinders their effective access to justice. Such requests may increase in the future, as there is a recent trend in the case law of the European Court of Human Rights to protect citizens’ ability to make these requests. It follows from case law that where a national court refuses to refer a case to the Court of Justice following a request by a party to the case, it is for the national court to indicate why the question should not be referred. If it does not give reasons and ignores the request, this refusal may prove to be arbitrary, thus infringing the right to a fair trial under Art. 6 of the European Convention on Human Rights.¹⁷

Although there is strong consensus about the pivotal role the procedure has had in the transformation of Europe, there remains significant ambiguity as to why the system is used, and who is primarily responsible for its success. The litigation process in itself has remained relatively unexplored. Scholarly work as well as occasional national re-

¹⁴ For an overview see L. CONANT, *Review Article: The Politics of Legal Integration*, in *Journal of Common Market Studies*, 2007, p. 45 *et seq.*

¹⁵ See also M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, Oxford, New York: Oxford University Press, 2014, p. 2.

¹⁶ N. RASS-MASSON, V. ROUAS, *Effective Access to Justice*, Study for the European Parliament, Directorate General for Internal Policies, PE 596.818, 2017. See also: T. COWEN, “Justice Delayed is Justice Denied”: *The Rule of Law, Economic Development and the Future of the European Community Courts*, in *European Competition Journal*, 2008, p. 16; G. TRIDIMAS, T. TRIDIMAS, *National Courts and the European Court of Justice*, *cit.*, p. 125 *et seq.*

¹⁷ European Court of Human Rights: judgment of 8 April 2014, no. 17120/09, *Dhahbi v. Italy*; judgment of 21 July 2015, no. 38369/09, *Schipani v. Italy*; judgment of 16 April 2019, no. 55092/16, *Baltic Master v. Lithuania*; judgment of 13 February 2020, no. 25137/16, *Sanofi Pasteur v. France*. See also J. KROMMENDIJK, “Open Sesame!” *Improving Access to the CJEU by Obliging National Courts to Reason Their Refusals to Refer*, in *European Law Review*, 2017, p. 46 *et seq.*; M. BROBERG, N. FENGER, *Preliminary References to the Court of Justice of the EU and the Right to a Fair Trial Under Article 6 ECHR*, in *European Law Review*, 2016, p. 607.

ports dealing with the procedure tends to focus predominantly on the interinstitutional “dialogue” between the national courts and the Court of Justice.¹⁸ As a result, existing literature fails to capture the contributions of other essential actors. These actors include the parties to the proceedings, as well as intervening parties such as the Member States and the European Commission, which play a pivotal role in the preliminary ruling procedure. Art. 23, para. 2, of the Statute of the Court enables “the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute” to submit their written observations. Art. 32 of the Statute makes it possible for the Court to “examine” the parties to the case during the oral hearing, “through their representatives”.¹⁹ Since compliance by Member States is not self-evident²⁰ – owing to administrative incompetence, misinterpretations, the linking of implementation to a national development, or a deliberate choice by the government – domestic pressure is needed in order to ensure compliance with EU law. When such pressure is essentially channelled through the courts, effective advocacy becomes especially salient.

While private litigants are seen as central actors in the integration dynamics, there is still little insight into who goes to Court in Europe, and why. As such, “Euro-litigation” remains somewhat of a black box. Studies into the use of the preliminary reference procedure from the perspective of litigating parties have understandably tended to focus on strategic litigation and its effects in terms of fostering and steering the dynamics of integration. However, in order to gain insight into the practice of the preliminary reference procedure from a broader perspective and to avoid a confirmation bias due to selective data-collection,²¹ it is necessary to take a look at the procedure from the inside and without prejudice towards the (academic) salience of certain cases: that is, without pre-selecting for “landmark” judgments. Moreover, there remains significant ambiguity about the extent to which parties to the national proceedings are involved in pushing national judges towards using the preliminary reference procedure.²² As will be pre-

¹⁸ General Report ACA Europe Seminar on the preliminary ruling procedure, The Hague, 7 November 2016, available at www.aca-europe.eu.

¹⁹ While these other institutions, and especially the European Commission, play a pivotal part during the proceedings, the sole focus of this *Article* is on the representatives of the parties and their experiences with the preliminary reference procedure.

²⁰ G. FALKNER, M. HARTLAPP, O. TREIB, *Worlds of Compliance: Why Leading Approaches to European Union Implementation Are Only “Sometimes-True Theories”*, in *European Journal of Political Research*, 2007, p. 395 *et seq.*

²¹ Cf. Börzel who argues that research on litigation and participation in the EU tends to suffer from a selection bias on the dependent variable and as such fails to recognise the paradox that arises from increased opportunities available in EU law – *i.e.* the empowerment of the already powerful. T. BÖRZEL, *Participation Through Law Enforcement: The Case of the European Union*, in *Comparative Political Studies*, 2006, p. 128 *et seq.*

²² Cf. D. CHALMERS, M. CHAVES, *The Reference Points of EU Judicial Politics*, cit., p. 33 *et seq.* find in the British context, that “[a]lthough national courts formally make the references to the Court of Justice, often

sented in the next sections, in which the result from interviews are discussed, the extent to which this is actually the case has significant bearing on the ways in which lawyers are able to navigate the procedure and advocate effectively on behalf of their client.

III. LAWYERS AND REFERENCES: AN UNEXPECTED TASK

The EU legal system – which combines both centralised enforcement through the vigilance and supervision of the European Commission and a decentralised form of enforcement through national courts – relies to a significant extent on the responsiveness of the European polity. The EU political institutions and the Court of Justice alone cannot ensure the effective application of EU law. It depends strongly on domestic courts and on citizens that initiate proceedings before these courts to enforce their rights. When it comes to signalling possible infringements and stimulating the application of EU rules and principles, a large part of this responsibility falls into the hands of legal practitioners that use and invoke these rules in national legal proceedings and stimulate the referral of matters to the Court. Earlier research has focused on familiarity with and experience of the procedure among national judges, with divergent but overall not all too promising results.²³ As also highlighted by Geursen's *Article* in this Special Section with regard to national judges in overseas territories, national judges generally seem to lack the necessary knowledge of EU law. The "institutional consciousness" and the demands of everyday labour may cause judges to resist confrontations with new, foreign, and little-known sets of rules. An in-depth study of lawyers that have experience with the preliminary reference procedure provides the opportunity to see how similar aspects play a role among lawyers and their referred cases.

Before discussing their accounts of the practical aspects of the preliminary reference, it is helpful to have a look at the selection of lawyers under scrutiny. Legal practitioners that have worked on a case that has reached the Court through a preliminary reference belong to a very select group. When considering that judges in the Netherlands – a country with a total caseload in the tens of thousands, and one of the Member States with the highest number of references to the Court every year – still only make

the reference will have been drafted by the litigants, and it is highly unusual, other than in criminal cases, for a national court to refer without one litigant pushing for it". While Hoevenaars concludes about the Dutch context only in about a third of the cases studied can be considered "proactive" in the sense that "the litigants had an express wish and aim to have their case adjudicated by the CJEU, and implored the national court(s) to refer their case" (J. HOEVENAARS, *A People's Court?*, cit., p. 75).

²³ J. BLOM, B. FITZPATRICK, J. GREGORY, R. KNEGT, U. O'HARE, *The Utilisation of Sex Equality Litigation Procedures in the Member States of the European Community, a Comparative Study*, Report given by the Commission, DG V, Brussels, 1995; T. NOWAK, F. AMTENBRINK, M. HERTOCH, M. WISSINK, *National Judges as European Union Judges*, The Hague: Eleven International, 2012; U. JAREMBA, *At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-level Legal Order*, in *Erasmus Law Review*, 2013, p. 191 et seq.

some 30 references annually,²⁴ participation in this procedure is a rare experience.²⁵ For most, it will happen only once in their entire career. By the very nature of preliminary reference proceedings, the uncertainty of referrals, and the multiplicity of subjects and legal disciplines, the collection of legal practitioners in the cases at hand can therefore hardly be considered homogeneous. In many respects, these practitioners share only the fact that they have participated in these proceedings. The practitioners interviewed include lawyers from larger legal firms, especially in tax law, as well as many from solo law practices. However, one striking characteristic shared among most of them is that they are not in any way specialised in EU law. The in-depth study of preliminary reference cases in Dutch courts reveals that in a significant portion of the cases a reference to the Court comes as a surprise to the parties in the national proceedings, regardless of whether or not EU law arguments have been used. In over 60 per cent of the cases studied, the parties made no active effort to push for a reference. This in itself is an important observation about the (non-) purposefulness behind references to the Court, but it also has important repercussions for the way legal practitioners can or cannot work a case once it is referred. When the decision to refer cannot be ascribed to pressure from the litigating party, it is less likely that the lawyer in question has any particular expertise in EU law or experience with preliminary references.

Some of the lawyers do advertise their experience with litigating before the Court, but for most this is a form of *post hoc* advertising of broadened expertise after they have had one case before the Court, rather than actually profiling themselves as experienced “Euro-lawyers”. The main exceptions are law firms that specifically profile themselves as Euro-lawyers, even for individual claimants, specifically targeting their services at certain societal groups or professions with distinct – usually cross-border – characteristics. Such groups are likely to encounter EU law in ways that might lead to judicial procedures: for instance, cross-border workers or migrating pensioners. Of the 28 lawyers interviewed, only one had a standing record of acting before the Court. This particular lawyer – over the course of 25 years – had acted, among others, on behalf of larger associations of farmers, but mainly on behalf of government agencies²⁶ in over 50 preliminary reference procedure cases and over 30 direct actions, of which over 10 were appealed before the Court. In the case studied in the context of this research, he was hired by a large association of pensioners – who sought to take on Dutch policy on health insurance for pensioners living abroad – after their case was referred to the Court.

²⁴ On average, 28 references were made annually by the Dutch judiciary in the period between 2003–2012. Statistics available at curia.europa.eu.

²⁵ According to statistics from the Dutch Bar Association, the Netherlands has over 17,000 active lawyers. This number does not include legal practitioners such as tax advisors (over 11,000) who may also act as counsel in preliminary reference cases.

²⁶ In particular the *Sociale Verzekeringsbank* (the agency responsible for national insurance schemes in the Netherlands).

Beyond a general familiarity, the majority of lawyers in this study admitted to having no previous experience in EU law before their case was referred to the Court of Justice. This included all cases where the referral was not the aim of the litigants or their counsel; but even in cases where lawyers were pressing for a reference, some of them underlined their relative inexperience going in. On the micro level, an unexpected referral to the Court can create different challenges for lawyers, especially since they are not prepared for a reference, nor do they generally possess the expertise or experience to work a case at the level of the Court of Justice.

III.1. ALLOCATING RESOURCES

One of the major challenges for lawyers related to preliminary references is the extra time that is involved when working a case after reference to the Court. The amount of time spent by a lawyer on the reference part of any single case varied considerably, ranging from no additional work done up to several full working weeks. The extra hours involved in preparing a reference does not fall within a lawyer's regular day-to-day practice. Initially, the time consumption can increase by the simple fact that the procedure is different from what lawyers are used to. Apart from the substantive legal work, a reference comes with its own timeline, its own rules of procedure and requirements. Even before dealing with the intricacies of EU law, these practitioners are therefore confronted with procedural requirements with which they are unfamiliar.

The difference in the amount of time lawyers spend on references is in large part dependent upon the complexity of the case as well as on the nature of the questions that are referred to the Court. The preliminary questions can be the result of arguments presented in the national court that cast doubt on the interpretation of certain EU legislation. The substantive argumentation that is built before the national court then coincides largely with the way in which a case is advocated before the Court. In these cases, practitioners tend to choose to do little more than adjust their main written arguments to the format of the Court, and possibly expand on certain arguments brought forward in national proceedings. In other cases, the central questions that lie at the basis of a referral involve much more complex combinations of national rules, EU legislation, and the Court's jurisprudence, along with written observations by the European Commission and possibly multiple Member States. In such an instance, a lawyer may wish to respond to these observations during the oral stage of a case. This can require a whole new line of argumentation aimed at taking a position on the specific matter dealt with in the reference, which may be a significant diversion from the arguments brought forth in the main proceedings. In such cases, lawyers spend several full working weeks simply preparing the written part of the proceedings, and more hours on the remainder of the procedure. This creates a significant challenge especially for the solo law practices that do not have as much flexibility in allocating their resources.

If colleagues are part of their network, lawyers turn for help to those who have previous experience with preliminary references. However, given the scarcity of references, this is not a large pool from which to source. Some lawyers, being unfamiliar with the preliminary reference procedure, unaware of the way such cases are dealt with, and without help from their network, decide to do nothing and simply await answers from the Court.

III.2. GOING TO LUXEMBOURG

All preliminary reference cases include a written stage, in which parties to the proceedings, as well as privileged actors like the European Commission and Member States, may submit their written observations. Within the written procedure there is no opportunity to respond to the observations filed by other parties. The only opportunity for parties to respond to these positions is during the oral proceedings, requiring the lawyers to travel to Luxembourg.²⁷ The extra costs involved in a preliminary procedure therefore include not only the additional work that goes into the reference part of a case but also the cost involved with regard to a trip to Luxembourg if the parties choose to participate in the oral proceedings. Participation in the oral proceedings thus becomes, at least in part, a financial consideration. In a common private practice, the financial burden of the added hours, and additional expenses, will be charged to the client. The cases studied, however, all involve individual litigants, and unless third parties back them financially, such additional costs are not easily covered. In such cases, lawyers have to come to an agreement with their client about the amount they will charge. This generally results in two possible outcomes. Either the decision is made to stick with the written observations and forego the possibility of participating in the oral proceedings, or the lawyers charge only a minor amount or even none of the costs related to the trip to Luxembourg and pick up the bill themselves. In only one instance did the client insist on going to Luxembourg, and was willing and able to pay the additional costs.²⁸ Where these costs are considered too high, clients and their counsel may choose to forego their chance to plead their case before the Court, and with it the chance to respond to questions from the judges and to the observations of both the opposing party and other intervening parties.

Since the selection of cases for this study included only individual litigants, a large number of them were eligible for subsidised legal aid in the Netherlands.²⁹ In cases financed through legal aid, similar but also different financial considerations play a role.

²⁷ Not every case includes an oral stage. The rules of procedure of the Court of Justice allow the oral procedure to be dispensed with unless one of the litigants or an interested party taking part in the procedure has lodged a request for a hearing to be held, giving the reasons that the litigant or interested party wishes to be heard. Art. 59 of the Statute of the Court.

²⁸ In other cases, where clients insisted on attending the hearing, third parties such as a union or an interest group covered the costs, and therefore the individuals themselves did not incur additional costs.

²⁹ The Netherlands has a centralised system, which provides legal aid to people of limited means.

The next section deals with the importance as well as the difficulties of legal aid schemes with respect to preliminary references.

III.3. LEGAL AID AND REFERENCES

A large number of legal practitioners, especially those working in the areas of asylum, migration, and social security, practise social advocacy, assisting people who cannot afford a lawyer. They help clients who receive support from the government for financing their legal actions through subsidised legal aid. The importance of legal aid increases when one's case is referred to the Court. References, however, generally cause more work than is planned. And as previously discussed, the relative complexity of such cases in comparison to practitioners' day-to-day practice provides lawyers with a substantial number of extra hours to charge. Without the possibility of legal aid, the costs would be well-nigh impossible for low-income individuals to cover.

Therefore, as far as the Dutch context is concerned, subsidised legal aid for the most part relieves litigants of such a burden. The Dutch system is based on the granting of an amount of "points" for providing legal aid at a certain stage in the procedure. One point equals 106 euro and reflects approximately one hour of work.³⁰ However, since subsidised legal aid only provides for a fixed fee based on the stage of proceedings, there is a limit to the number of hours of work for which a lawyer can be reimbursed. In very complicated and therefore time-consuming cases, officially called "laborious cases", a lawyer can request reimbursement of extra hours on top of the compensation granted by the fixed fee system. Every hour above the fixed fee is compensated with one point: that is, if the request – including a budget estimating the hours needed – is authorised by the Legal Aid Board in advance.³¹ The Board can accept the request and award additional remuneration when there is substantial factual complexity that is legally relevant or when the case is legally complex.³² However, even when considering the extra remuneration, there is no compensation for the expenses of the trip to Luxembourg. And even when the extra hours are granted, remuneration may still not completely cover the effective time put into such a case. It is up to the lawyer to decide whether or not he or she is willing to bear this additional expenditure. Consequently, advocating the client's interests in these cases depends to a large extent on his or her lawyer's personal investment in a case.

³⁰ Previously, this hourly wage was indexed every year. However, because of government budget cuts, this amount has been reduced several times in recent years. Since 2012, the hourly wage is around 106 euro. Even with subsidised legal aid, clients have to contribute an income-dependent contribution varying from 143 euro to 823 euro. Art. 3 of the Remuneration Legal Aid Decree 2000 (*Besluit vergoedingen rechtsbijstand 2000*), available at maxius.nl.

³¹ Art. 5a, para. 6, Remuneration Legal Aid Decree 2000.

³² Legal Aid Board's Complex Cases Guide (*Leidraad Bewerkelijke Zaken*), available at www.recht.nl.

Preliminary references therefore put an added strain on the legal assistance provided by these lawyers. Where it is the explicit aim of the lawyer to obtain a judgment on principle, either specifically from the Court of Justice or the highest national court, these considerations can of course be made beforehand, and some form of agreement can be reached with the client or several interested parties, as will be the case in strategic test cases. In the case of multiple interested clients, or other parties such as interest groups and unions, these costs can more easily be covered. Such options are not available for individual clients, and financial aspects therefore truly have an impact on individual litigants to a greater extent.

III.4. LAWYERS' MOTIVATION

Regardless of the costs involving references, many lawyers choose to invest in these cases and are willing to make the trip to Luxembourg. Lawyers give several non-exclusionary reasons for their decision to do so. The motivation for such a trip often comes from both personal interest and professional ethics with regard to representing the interests of one's client. Some consider the opportunity to plead a case before the Court an honour, or feel it is their professional duty to work a case to the full extent of their ability.

Due to their legal complexity as well as the possibility of creating a precedent at the Court of Justice level, cases like these are very appealing to lawyers. Consequently, part of the motivation and interest is usually at least partly of a more personal nature in that it is simply a once-in-a-lifetime opportunity to plead a case before the highest court in the EU. Professional considerations and a personal interest in the "Luxembourg experience" are not mutually exclusive. When it comes to representing the interests of one's client, even when neither the client nor subsidised legal aid covers the costs, professional ethics compel lawyers to at least try to make the most of what for some is a significant investment. However, not all lawyers are willing to do so, as is evidenced from one joined case where the lawyers in cases that were joined with others appeared to have contributed nothing – neither written observations nor attendance at the hearing – to the proceedings before the Court. This lack of involvement could be due to the fact that in this case the lawyer was aware that a team of academics was assisting the lawyer being interviewed, and thus chose to leave matters up to them. In some cases, however, and on the basis of a general unfamiliarity with and possible misunderstanding of the nature of these proceedings, counsel refrain from filing any observations, and simply await answers from the Court.

Lawyers have a key role to play in the dynamics of these cases and in balancing collective and individual interests, taking on cases that in and of themselves, from a commercial point of view, are not viable. This applies especially to cases pertaining to migrants and asylum seekers. Asylum and migration law are areas where practitioners can be found to have a professional engagement specific to these types of legal action, which is related directly to the stakes in these cases. Lawyers are forced to make deci-

sions on the amount of time and overtime they are willing to spend on a case, which therefore will effectively be truly *pro bono*. Moreover, since these lawyers have no certainty as to the chances of a case actually being referred to the Court – in many cases it comes as a complete surprise – they have no way of preparing for this additional expenditure, and therefore have to make *ad hoc* decisions on whether or not they are willing to spend additional time, and/or if the client can be asked to cover those costs.

III.5. THE “LANGUAGE” OF EU LAW

Apart from structural obstacles like time and financial considerations, there is also the added as well as linked challenge of a general lack of expertise in working cases within the context of EU law, supranational jurisprudence, and possible conflicts between EU and national law. EU law has its own structure and logic and the Court’s jurisprudence its own language.³³ Scholars and lawyers that deal with EU law are regularly very familiar with its logic and have been acculturated into this language. They share the *argot* of EU law and are familiar both with the legal grammar of EU principles and the reasoning style in the Court’s jurisprudence.³⁴ Common practitioners, who deal only occasionally with EU law, let alone have their case referred to the Court, do not share this characteristic. Once a case is referred to the Court, both the venue and the context of the case change, which means lawyers have to adapt both their “language” and strategy accordingly. As a result, practitioners are confronted with a situation in which they have to argue a matter within the framework of an unfamiliar legal sphere, in a different language so to speak: namely, that of EU law and the Court’s jurisprudence.

Most of the lawyers interviewed are not in any way experts in the field of Euro-litigation, at least not beyond the point of bringing up possible infringements of EU law in national proceedings. Only six of the 28 lawyers interviewed for this research claimed to have more than a basic knowledge of the Court’s jurisprudence relevant to their case. Moreover, the expertise that lawyers did claim to have was usually *post hoc*, gained while working on that one particular case. Depending on the complexity of the questions referred to the court, references are something outside of the daily expertise of many lawyers. Ranging from the formulation of the questions that are referred to the Court to the writing of observations and effective participation in the oral stage before the Court, this lack of knowledge and expertise in the field of EU law affects practitioners’ capacity to undertake effective advocacy at different stages in the preliminary reference proceedings.

³³ V. RÉVEILLÈRE, *Le juge et le travail des concepts juridiques: le cas de la citoyenneté de l’Union européenne*, doctoral thesis, European University Institute, 2018, available at cadmus.eui.eu.

³⁴ The Court’s jurisprudence is structured particularly along very specific, almost syntax-like lines due to the need for uniformity. As analysed by Lasser, who states “ECJ decisions are rather short, terse, and magisterial decisions that offer condensed factual descriptions, impersonally clipped and collegial legal reasoning, and ritualized stylistic forms”. See M. DE S.-O.-L’E. LASSER, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford: Oxford University Press, 2004, p. 104.

III.6. THE SIGNIFICANCE OF THE HEARING

The technical legal nature of procedures before the Court leads some lawyers to conclude that the oral proceedings do not matter a great deal to the outcome of a case at the national level. And even among insiders the idea is that the hearing is more a sign of goodwill from the judges, the practical importance of which – for the conclusion of a case – is seen as being auxiliary to the written proceedings. The idea of its relatively diminished usefulness can play a role in practitioners' decision not to attend the hearing in Luxembourg. However, the oral stage of the proceedings provides parties with the only possibility to respond to observations filed by both the European Commission and intervening Member States. And there are a number of reasons that these proceedings can and do matter, and that the parties involved have an interest in pleading their case both in the written and in the oral stage. Firstly, the fact that Member States choose to intervene and provide their view on the matter at hand shows that they acknowledge the importance of pleading a case before the Court. Secondly, the Advocate General's opinion³⁵ is formulated after the written and – if applicable – oral proceedings, giving him or her the chance to ask questions that may help in formulating a stance. Thus, written and oral observations and the possibility of answering questions on the matter may influence the Advocate General's stance. And thirdly, a lawyer has the opportunity at a hearing especially to provide and clarify "pure facts or aspects of national law".³⁶ Broberg and Fenger describe how "[o]ften the judges or the Advocate General will ask more argumentative questions in order to test the strength of a legal argument".³⁷ Such questions can play an important role in the framing of the issue before the Court, and allow for elaboration on the way national policies work out in practice – details that may matter greatly for the conclusion of the case.

As Edward states: "The court relies heavily on the Commission, to fill in the factual and legal background".³⁸ The Court examines cases on the basis of observations by the parties, and being present gives an opportunity for parties to fill in the blanks and clarify certain points as well as to respond to the representation of the facts by the other parties. Where they have an interest in a certain outcome of a case, Member States intervene in order to provide their viewpoint. The fact that the Court relies on these pleadings for its judgment, and therefore the significance of providing one's viewpoint, is confirmed by lawyers who attended the hearing and who describe how clarifying and providing a competing representation of the fact to that of the Member State in opposition was an important part of the proceedings.

³⁵ The Court may choose to deal with cases without an opinion of the appointed Advocate General.

³⁶ D. EDWARD, *How the Court of Justice Works*, in *European Law Review*, 1995, p. 545. See also D. VAUGHAN, M. GRAY, *Litigating in Luxembourg*, in *Jersey & Guernsey Law Review*, 2007, p. 1 *et seq.*

³⁷ M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, cit., p. 382.

³⁸ D. EDWARD, *How the Court of Justice Works*, cit., p. 539 *et seq.*

Choosing to plead one's case before the Court of Justice may prove worthwhile and can be important in providing the Court's judges with the necessary facts and context of a case. The general lack of lawyers' experience in this arena diminishes their effectiveness once their case is brought before the Court, where they find themselves up against – often several – representatives of Member States who litigate before the Court on a regular basis. This can put lawyers at a significant disadvantage, especially when compared to the genuine repeat players before the Court: namely, the representatives of Member States and the European Commission, who work on Court's cases on a daily basis, and who are able to build up significant familiarity with the Court's *modus operandi* and culture.

III.7. THE WAYS OF THE COURT

Language and translation play an immense role in the day-to-day practice of the Court. Almost 1,000 posts and over 45 per cent of the Court's staff consist of language – and translation – related services. These include over 600 lawyer linguists and over 70 interpreters that translate all the work done at the Court into 24 official languages in 552 language combinations, with over one million pages being translated each year.³⁹ The multi-linguistic nature of the EU also plays an important role during the oral proceedings. While the written observations are meticulously translated, and often discussed in detail in the judgment itself, the oral observations are subject to simultaneous interpretation, with the consequent risk of communication problems, translation mistakes, and the failure of judges to understand immediately the points that a party is trying to get across. Lawyers are therefore implored to speak slowly and clearly, and, where possible, to provide their plea notes beforehand to the relevant interpreters.

When it comes to pleading one's case before the Court, language also matters in a different sense. Lawyers acting more often before the Court know how to address the Court. Repeat players know its "language" and style, and this is certainly true of the European Commission's representatives and agents of the Member States, in addition to specialised lawyers that are hired to appear before the Court. Where most Member States have an experienced array of lawyers at their disposal who attend hearings and deal with cases before the Court on a regular basis, the average litigant does not have access to such representation. This applies to his or her knowledge of EU law, knowledge of procedural requirements, accurate knowledge of the possibilities and importance of the written and oral stages in the proceedings, and knowledge of the "ways of the Court". As a long-standing member of the Court bench has said, "[t]he basic rules of advocacy apply as

³⁹ Since the 2004 enlargement, all court documents must be written in one of the five pivot languages, which are English, French, German, Italian, or Spanish (and from 2018 Polish), and are then translated into one of the 24 recognised EU languages in a two-stage process. See K. McAULIFFE, *Enlargement at the European Court of Justice: Law, Language and Translation*, in *European Law Journal*, 2008, p. 806 *et seq.*

much in pleading before the European Court of Justice as before any court or tribunal [...]: know your court; know your procedure; and know what you are trying to achieve".⁴⁰

In addition to preparing the way one will address the Court, it also proves useful to be aware not only of how proceedings are conducted but also of the preferences of the judges. Lawyers who only appear occasionally before the Court will in a sense be addressing the Court in another language, in another *argot*. He or she may be very blunt in making certain points or simply speaking in the legal language of their national jurisdiction, possibly causing difficulty in communication. It is then for the Court to determine whether this one-shotter really has a good point, even though he or she is not as capable of making this point *à la communautaire*. At times, however, this may require the Court to go beyond the arguments that are presented to it. The question remains open as to what extent the judges and Advocates General of the Court of Justice are willing to do so, and therefore as to how effective these lawyers can be.

III.8. COPING STRATEGIES

The aforementioned lack of experience and expertise among lawyers confronted with a reference to the Court prompts many of them to seek outside assistance. Turning to experts, usually EU law scholars, helps them work their case at the Court of Justice's level. For many lawyers, the first time they are called on to deal with matters beyond their daily practice is the moment a national judge decides to refer questions to the Court. The questions that the national judge will ask the Court are sometimes formulated in cooperation with the parties to the proceedings, and are usually provided to them for comments, revision, or reformulation. Debating the formulation of questions with the aim of steering them in a desired direction again requires at least some expertise in the field of EU law. The formulation of questions that are referred to the Court can have an important bearing not only on the focus of what will be discussed before the Court but also on the scope of the eventual judgment. Where questions are formulated very narrowly and focused on very specific circumstances, the impact of the Court's answers will potentially be smaller than when the questions are formulated more broadly. The understanding of these nuances – as well as signalling possible opportunities and suggesting other formulations to the national court – also requires expertise.

After the questions are referred to the Court, the parties are requested to send in their observations and to formulate their stance on how the questions are supposed to be answered. This is the next stage where lawyers may feel ill-equipped to be effective in their advocacy. Strikingly, over half of the lawyers interviewed decided to reach out to experts in academic circles for help. Such a response to their lack of expertise, and soliciting help from external experts, not only underscores a general lack of expertise

⁴⁰ D. EDWARD, *Advocacy Before the Court of Justice: Hints for the Uninitiated*, in G. BARLING, M. BREALEY (eds), *Practitioners Handbook of EC Law*, London: Trenton, 1998, p. 28.

among those confronted unexpectedly with a reference but it also reveals where the expertise is to be found. Academia is the obvious choice for most lawyers when seeking help with working on the complexities of EU law questions. Experts with a good understanding of particular fields of EU law, and with knowledge of the relevant Court's jurisprudence, are usually found among scholars. However, while their expertise helps lawyers to formulate their arguments and to include relevant case law, their knowledge of the practice of Court of Justice proceedings is usually also limited.

IV. MACRO EFFECTS OF THE ALLOCATION OF EUROLAW EXPERTISE

The previous sections have provided an overview of the general lack of experience and expertise among lawyers confronted with a reference to the Court of Justice. The unpredictability of preliminary references is an important aspect of these procedures and is related to the possibility for litigants to solicit expert services. In comparison, in direct actions before the Court, the dispute clearly unfolds within the sphere of EU law, since it is addressed at one of the EU institutions. In the preliminary reference procedure, however, a dispute may in the course of proceedings turn gradually into a matter of EU law, which makes it unlikely that the litigants will have EU law expertise at their immediate disposal. Hence, the unpredictability of a reference forms an inherent obstacle to the effective advocacy of preliminary cases at the Court of Justice's level.

Given the inherent obstacles to hiring expertise, when looking at the lawyers involved in these proceedings it is all the more striking to see some names occurring more than once. Considering that only a few dozen references are made each year, together with the fact that the case selection in this study spans only a period of five years, being involved in more than one case suggests something more than coincidence. This could lead to the conclusion that these lawyers must have some form of expertise in EU law and are actively approached by parties – litigants or other interested actors involved in litigation – because of that. However, this could only be confirmed in four cases. In only two cases did the litigant or litigants themselves hire them before their case was referred to the Court. In the other cases, other parties were responsible for involving these lawyers in the proceedings. In two cases, lawyers were approached by colleagues to assist in a preliminary reference case based on their – albeit single – previous experience with the procedure. Another lawyer, who had no significant expertise in EU law, considered it a complete coincidence that he had participated in two preliminary reference cases, especially given the fact that the two cases were in two completely unrelated fields of law. These lawyers, although they have had some repeated experiences with the Court, cannot be considered true repeat players.

Although small in number, there are repeat players before the Court among lawyers in the cases studied. Of all the legal counsel in the total of selected cases that could be identified, a small minority was specialised specifically in EU law. Among them were professors of European fiscal law, lawyers with a specialisation in the Association

Agreement between the EU and Turkey, and lawyers working in the area of labour law and social security specifically for cross-border workers. It can easily be reasoned that the individual one-shotter will not be among those able to solicit the services of these professionals with extensive Euro-litigation expertise. This is why experienced Euro-lawyers in preliminary reference procedure cases show up mainly in support of larger repeat players, both private and public or semi-public. As such, this is an illustration of what Galanter called the “allocating effects” of lawyer expertise, meaning that some lawyers may specialise and build up experience with Euro-litigation, but that we can expect these lawyers to take up positions litigating on behalf of the more affluent parties: *i.e.* the larger companies, Member States and institutions, NGOs, interest groups, and so forth. As we have seen, this is also why these “Euro-litigation one-shotters” – litigants as well as lawyers – often reach out to academics with expertise in the field of EU law, who subsequently act *pro bono* in support of these parties. For these one-shotters, soliciting the expertise of scholars who are willing to lend their services free of charge tends to be the only option of getting help.

V. CONCLUSIONS

Insight into the day-to-day practise of lawyers working on preliminary references cases reveals the challenges and dilemmas these legal professionals face when their case is referred to the Court of Justice. This *Article* set out to open the existing black box of context in which legal practitioners work on preliminary reference cases. The interviews with lawyers that have experienced a reference reveal several aspects of the preliminary procedure that significantly challenge the effectiveness of lawyers in working a case at the Court of Justice's level. Due to the highly infrequent nature of referrals, the more general build-up of expertise of lawyers in this area is less likely. For a practitioner, having a case referred to the Court is a highly improbable event, and is often a once-in-a-lifetime experience. For most lawyers, therefore, the Court of Justice remains an unlikely destination, both in result as well as in objective. This makes it difficult for parties to find and solicit lawyers specialised in Euro-litigation. In a financial sense, hiring specialised Eurolaw experts does not prove to be an option for the bulk of the individual litigants in these cases, considering that these lawyers will usually be more expensive as compared to any generalist practitioner the litigants may be able to afford through subsidised legal aid. Therefore, cost considerations often fall on the lawyers themselves, who have to decide how much unpaid extra work they are willing to put into a case. In terms of legal representation, this raises the question to which extent these cases are advocated – and litigants represented – effectively, before the Court.

These observations have certain consequences in terms of the functioning of the European legal system and the preliminary reference procedure. Where the enforcement of EU law relies heavily on the “vigilance” of the polity and on claims brought before national courts, the burden of enforcement falls on individuals and organisations signalling Mem-

ber States' trespasses. In practice, the larger part of this responsibility lies with the legal profession. This mechanism of enforcement presupposes the profession's ability to monitor Member States' implementation of rules stipulated by EU law effectively and to be alert to possible infringements. The findings presented in this *Article* provide an indication of how EU law and EU norms have – or have not – become integrated into the “legal consciousness” of practitioners. It reveals the lacunae in practical knowledge among practitioners when it comes to applying EU law in a meaningful way. To the extent that lawyers are confronted with a reference more or less unexpectedly, the procedure will constitute unknown territory. While the data presented in this *Article* are limited to the Dutch context, and the question remains to what extent this translates to other jurisdictions, it is likely that similar dynamics play a role throughout the EU.

Given that compliance by Member States is not self-evident – owing to administrative incompetence, misinterpretations, the linking of implementation to a national development, or a deliberate choice by the government – domestic pressure is needed in order to ensure compliance with EU law. When such pressure is essentially channelled through the courts, effective advocacy becomes especially salient. When it comes to preliminary references taking on the character of judicial review of national policy and compliance with EU law, the fact that such cases do not necessarily fall into the hands of the practitioners best equipped to argue such claims can, on a macro scale, further undermine the effectiveness of the system. The self-reported domestic focus and lack of EU law expertise of legal practitioners – lawyers as well as national judges – could result in the structural neglect of implementation errors and potential breaches of EU law.⁴¹

It has been stressed in the literature that the distinct nature of the EU legal system, with the preliminary reference procedure as its most important instrument, makes for an enhanced opportunity to circumvent the domestic legal system. That same nature, however, makes deliberately aiming for the Court of Justice via this route a highly uncertain endeavour. The ability to make use of this procedure for underprivileged parties is, next to structural barriers, greatly hampered by an unequal distribution in legal agency and largely contingent on the ability to employ experts. Although the development of the European legal system has provided new avenues for individuals to seek justice, the emancipating rhetoric surrounding this opportunity structure should be viewed with some scepticism. The focus on “landmark cases” in current research arguably contributes to an overestimation of the deliberative nature as well as the enfranchising effects of preliminary references. The findings presented in this *Article* underscore how the effective use of the preliminary reference procedure is reserved largely for organisations

⁴¹ J. HOEVENAARS, *A People's Court?*, cit., p. 284.

and “strategy entrepreneurs”⁴² with the necessary credentials, means, and expertise.⁴³ On the one hand, it does provide new possibilities for “trumping” the domestic legal system whenever the supranational legislation provides opportunities against national policy or legislation; on the other hand, in terms of access to justice and as a form of remedy, the preliminary reference procedure remains a difficult “sword” to yield.

⁴² Cf. L. VANHALA, *Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy*, in *Comparative Political Studies*, 2017, p. 1 *et seq.*

⁴³ A. VAUCHEZ, *Democratic Empowerment Through EU Law?*, in *European Political Science*, 2008, p. 45.



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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JUDICIAL HIERARCHY IN THE PRELIMINARY RULING PROCEDURE: EXPLORING THE RELATIONSHIP BETWEEN THE FIRST AND SECOND INSTANCE COURTS

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TABLE OF CONTENTS: I. Introduction. – II. Debates on cross-court divergences. – II.1. Legal explanation. – II.2. Judicial empowerment and Court competition. – II.3. The role of the judicial organisation. – III. Judicial organisation and the team model. – IV. Data and methodology. – V. Results – V.1. Fact-finding v. law-finding specialisation. – V.2. Workload v. resources ratio. – VI. Conclusion.

ABSTRACT: The *Article* contributes to the scholarly debate on cross-court variations in referral rates by exploring the role of the judicial hierarchy on the propensity of national judges to refer legal questions to the Court of Justice. The focus of this *Article* lies in exploring the relationship between the first and the second instance court judges and the question of how these two groups of judges perceive their role in the preliminary ruling. The *Article* places the study of judicial behaviour with respect to the preliminary ruling procedure on more rigorous theoretical grounds. Building on the team model of adjudication and based on mixed-method research design, it argues that law-finding specialisation, a more beneficial workload v. resources ratio and the fact that preliminary questions can only address points of law give the second instance courts judges more reasons to engage with Art. 267 TFEU proceedings as compared to their first instance counterparts.

KEYWORDS: judicial cooperation – preliminary ruling procedure – Art. 267 TFEU – national courts – Europeanisation of national courts – team model.

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I. INTRODUCTION

Ever since the preliminary ruling procedure was introduced by the Rome Treaty, national courts have supplied the Court of Justice with a steady and rising stream of cases (see Figure 1), allowing it to become arguably the world's most powerful and most influential international court.¹ Much of what the Court has achieved can be traced back to the preliminary ruling procedure: from furthering the legal, political and economic integration of Europe to delivering landmark decisions that strengthened the constitutionalisation of EU law.² The question of why national courts cooperate with the Court of Justice by means of Art. 267 TFEU proceedings inspires a great deal of literature. One of the reasons why this cooperation captured so much attention is its visibility. The preliminary ruling procedure pinpoints situations where EU legal rules are *de facto* being transposed into concrete action at the national level.³ When national judges refer a legal question on the interpretation or validity of EU law, they either cooperate with the Court of Justice to enforce EU law over a conflicting national provision or assist the Court in its task of ensuring uniform interpretation and greater compliance with EU law.⁴

A variety of factors have been put forward to explain why national courts cooperate with the Court of Justice by means of the preliminary ruling procedure. Legal scholars relied on the plain meaning of Art. 267, para. 3, TFEU and the Court's case law,⁵ emphasising courts' obligation to refer questions on the interpretation and validity of EU law to the Court.⁶ Later research drew empirical conclusions based on a large-scale dataset on Member States' referral rates. The focus centred on explaining variations in referral rates across time, different Member States, and legal areas.

Such variations were attributed to, among others, the difference in transnational economic exchange;⁷ intra EU-trade;⁸ legal culture;⁹ Member State's litigation rates;¹⁰

¹ K.J. ALTER, *The European Court's Political Power: Selected Essays*, Oxford: Oxford University Press, 2009, p. 5.

² A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, in *Journal of European Public Policy*, 1998, p. 66 et seq.; K.J. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press, 2001; P. CRAIG, G. DE BURCA, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2015; A. DYEURE, M. GLAVINA, A. ATANASOVA, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2020, p. 912 et seq.

³ T. PAVONE, R.D. KELEMAN, *The Political Geography of Legal Integration: Visualizing Institutional Change in the European Union*, in *World Politics*, 2018, p. 360.

⁴ *Ibid.*; N. LAMPACH, A. DYEURE, *Choosing for Europe: Judicial Incentives and Legal Integration in the European Union*, in *European Journal of Law and Economics*, 2019, p. 1 et seq.

⁵ Court of Justice: judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*, paras 18–19; judgment of 22 October 1987, case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

⁶ M. CLAES, *The National Courts' Mandate in the European Constitution*, Oxford: Hart, 2006, p. 247.

⁷ A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts*, cit. p. 79.

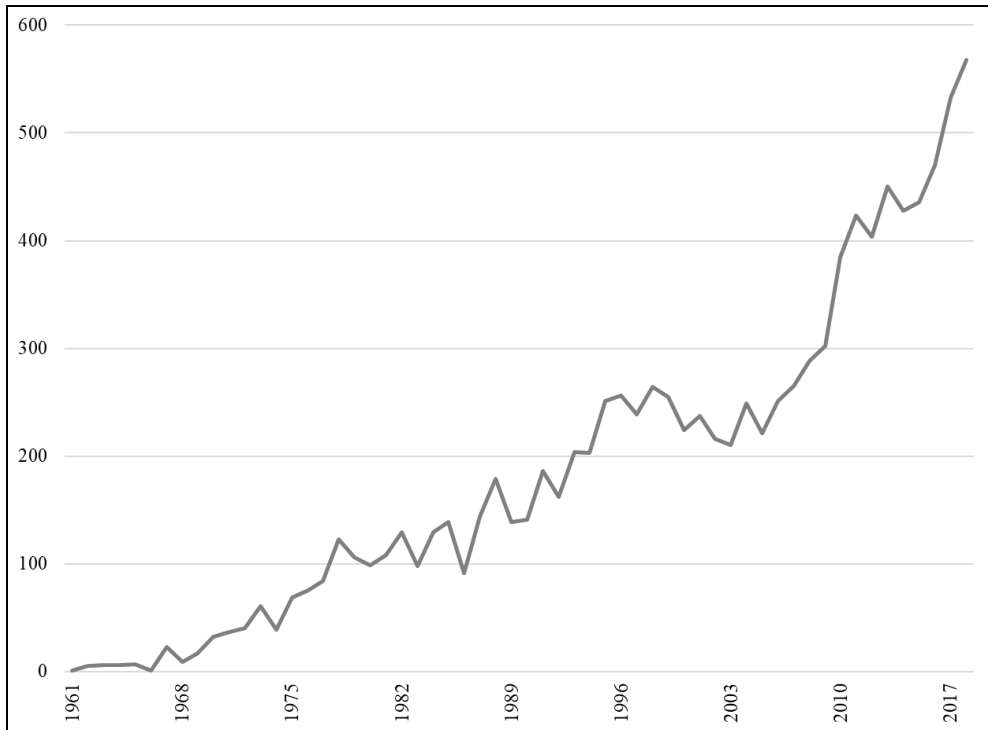


FIGURE 1. Rise in the number of Art. 267 TFEU referrals, EU-28 (1961-2018). Source: CJEU annual reports.

country size and population;¹¹ and public support for EU membership.¹² Recent research efforts, driven by inspiration to look beyond cross-national variations, started

⁸ W. MATTI, A.M. SLAUGHTER, *Revisiting the European Court of Justice*, in *International Organization*, 1998, p. 177; C.J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, in *International Organization*, 2005, p. 399.

⁹ J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, cit. p. 411; M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis*, paper presented at 11th Biennial Conference of the European Union, 2009, available at aei.pitt.edu.

¹⁰ L.J. CONANT, *Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries*, in M.G. COWLES, J. CAPORASO, T. RISSE (eds), *Transforming Europe: Europeanization and Domestic Change*, Ithaca: Cornell University Press, 2001, p. 97 et seq.; K.J. ALTER, J. VARGAS, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, in *Comparative Political Studies*, 2000, p. 452 et seq.; L.J. CONANT, *Europeanization and the Courts*, cit., p. 105 et seq.; M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States*, cit.

¹¹ A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts*, cit., p. 76; M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States*, cit.; R.D. KELEMAN, T. PAVONE, *Mapping European Law*, in *Journal of European Public Policy*, 2016, p. 1118 et seq.

exploring regional disparities in referral rates. Scholars argued that there are few theoretical justifications and little empirical evidence to suggest that the referral rates are uniformly distributed within a country.¹³ Researchers pointed to the existence of “hotspots” for EU law litigation¹⁴ and the fact the referral activity tends to be concentrated in a small subset of regions within the Member States, *i.e.* in regions that host a capital city, a peak court, or a cargo port.¹⁵

One area of research, in particular, has focused on explaining cross-court variations and on how is the referral propensity of national courts affected by the position that the concerned court occupies in a national judicial system. Early contributions came from Joseph Weiler and Karen Alter who saw the desire for power as the main driver of Art. 267 TFEU proceedings. They argued that lower courts cooperate with the Court of Justice by means of the preliminary ruling procedure out of the desire to expand their powers *vis-à-vis* other branches of government¹⁶ or *vis-à-vis* higher courts in the national judicial hierarchy.¹⁷ Stone Sweet and Brunell took issue with this argument and asserted that, because the task of the appellate level is to resolve questions of legal interpretation and conflict of law, appellate courts will be more involved in the procedure as opposed to what Alter argues.¹⁸ It was not until recently that scholars returned to this question. Based on a large-scale data collection, Dyeve *et al.* found that first instance courts did pioneer the use of the preliminary ruling procedure until the late 1990s. Yet, at the turn of the century, they were overtaken by peak courts who now dominate Art. 267 TFEU proceedings.¹⁹

Common to these research efforts on cross courts divergences in referral activity is a focus on explaining referral disparities among the lower and higher national courts, where the term “lower courts” encompasses first and second instance courts, while the term “higher courts” typically refers to the courts of the third instance (most commonly

¹² C.J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, cit., p. 411.

¹³ R.D. KELEMAN, T. PAVONE, *Mapping European Law*, cit., p. 1119. See also A. DYEVE, N. LAMPACH, *The Unequal Reach of Transnational Institutions*, in SSRN Scholarly Paper, 2018, available at papers.ssrn.com.

¹⁴ R.D. KELEMAN, T. PAVONE, *Mapping European Law*, cit., pp. 1134-1135.

¹⁵ N. LAMPACH, A. DYEVE, *The Origins of Regional Integration: Untangling the Effect of Trade on Judicial Cooperation*, in *International Review of Law and Economics*, 2018, p. 122 *et seq.*

¹⁶ J.H.H. WEILER, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, p. 2403 *et seq.*; J.H.H. WEILER, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1994, p. 510 *et seq.*

¹⁷ K.J. ALTER, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A.M. SLAUGHTER (ed.), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford: Hart, 1998, p. 227 *et seq.*; K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 48.

¹⁸ A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts*, cit., p. 90.

¹⁹ A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 923 *et seq.*

supreme and constitutional courts).²⁰ Much less, however, has been written on the relationship between the first and second instance courts, and how the position of a court at these lower levels of the judicial hierarchy affects the propensity of national judges to send legal questions to Luxembourg. Legal scholars did focus on the empowerment of lower national courts by the Court of Justice through judgments such as *Cartesio*, *Melki* or *ERG and others*, where the Court made it clear that higher national courts cannot deprive lower courts of the right to make a referral to the Court of Justice, even if the superior court has explicitly deemed the reference unnecessary.²¹ Lower national courts, in the Court's view, are free to determine whether higher courts' ruling could lead to the interpretation contrary to EU law and respectively refer a question to Luxembourg.²² This showed that the Court of Justice will respond to any attempt that might jeopardise the alliance it has built with lower national courts over the years.²³ These studies, however, explore the relationship between lower and higher national courts from a legal perspective, focusing primarily on the Court's case law. Empirical insights into what drives participation of different court levels in the preliminary ruling procedure, particularly those focusing on the perspective of national judges themselves, are still missing.

This *Article* contributes to the scholarly debate on cross-court variations in referral rates by exploring the role of the judicial hierarchy on the propensity of national judges to refer legal questions to the Court of Justice. The novelty of the *Article* lies in placing a particular emphasis on the cooperation between the first instance and appellate national courts and by exploring the sub-national penetration of EU law from a judge-level. The questions that this *Article* deals with are the following: How do first and second instance judges perceive their role in the preliminary ruling procedure? Are there any differences in judicial use of Art. 267 TFEU between the first and second instance

²⁰ In some cases, the term "peak court" or the "top court" includes courts of second instance whose role in the national judicial system is just too important to be considered as the "appellate court" (e.g. the UK Court of Appeal or the Scottish Court of Session) or when the access to the national supreme court is limited (e.g. the Slovenian Administrative Court, the Maltese Court of Appeal, the Maltese Court of Criminal Appeal).

²¹ In the pre-*Cartesio* era, the Court of Justice allowed for appellate courts to overturn the lower court's decision to make a preliminary question. Once the decision has been overturned, the Court would remove the case from its register. This changed after *Cartesio* judgment in which the Court held that right to appeal governed by rules of national law cannot deprive lower courts of the possibility of making a referral to the Court of Justice by means of Art. 267 TFEU. According to the interpretation of the Court, "national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of [EU] law, or consideration of their validity". Court of Justice, judgment of 16 December 2008, case C-210/06, *Cartesio*, paras 88-98; H. STOREY, *Preliminary References to the Court of Justice of the European Union (CJEU)*, in *EALJA Guidance Note*, 2010, www.iarmj.org; M. BOBEK, *Cartesio: Appeals Against an Order to Refer Under Article 234(2) of the EC Treaty Revisited*, in *Civil Justice Quarterly*, 2010, p. 307 *et seq.*

²² Court of Justice, judgment of 9 March 2010, case C-378/08, *ERG and Others*, para. 32.

²³ G. MARTINICO, *Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order*, in *International Journal of Constitutional Law*, 2012, p. 871 *et seq.*

judges? If yes, what could explain these differences? Although some of these questions have been addressed before, this is the first time they are explored empirically, on the basis of the data obtained by surveying and interviewing national judges from two new EU Member States: Slovenia and Croatia. This *Article* further contributes to European judicial politics literature by placing the study of judicial behaviour in the preliminary ruling procedure on more rigorous theoretical grounds. Building on the team model of judicial decision making, it offers a theoretical framework and empirical evidence to explain the divergence in referral rates between first and second instance national courts.

This *Article* is structured as follows. Section II discusses the debates and theories on cross-court divergences in the context of the preliminary ruling procedure. Section III gives its own account of referral behaviour of first and second instance national courts, building on the team model of adjudication. Section IV describes the data and methodology. Section V presents and discusses the interview results and the results of the statistical analysis. The *Article* concludes with the implications of results for the grand theories of European integration.

II. DEBATES ON CROSS-COURT DIVERGENCES

II.1. LEGAL EXPLANATION

When seeking to explain divergences in judicial participation in the preliminary ruling procedure, legal academics typically resort to the wording of Art. 267 TFEU.²⁴ Art. 267 distinguishes between two types of national courts: those “against whose decisions there is no judicial remedy under national law” and other courts against whose decision there is a possibility of appeal.²⁵ If a question on the interpretation of EU law appears before a court against whose decision there is no possibility of appeal, that court “shall” request a preliminary ruling from the Court of Justice, which implies obligation. By contrast, if that question appears before any other court, that court “may” ask for a preliminary ruling, which implies discretion. There are two exceptions to this rule. The first one concerns the question of the validity of EU law. Although not explicitly implied by Art.

²⁴ G. BEBR, *Article 177 of the EEC Treaty in the Practice of National Courts*, in *International & Comparative Law Quarterly*, 1977, p. 241 *et seq.*; A. ARNULL, *The Use and Abuse of Article 177 EEC*, in *The Modern Law Review*, 1989, p. 622 *et seq.*; A. ARNULL, *The Past and Future of the Preliminary Rulings Procedure*, in *European Business Law Review*, 2002, p. 183 *et seq.*; M. CLAES, *The National Courts' Mandate in the European Constitution*, cit., p. 59; M. BOBEK, *Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice*, in *Common Market Law Review*, 2008, p. 1611 *et seq.*; M. BROBERG, *Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times*, in *Common Market Law Review*, 2008, p. 1383 *et seq.* Another explanation given by legal academics suggests that national courts have been convinced by the Court of Justice by the legal arguments of the validity of the supremacy of EU law over national law. See M. CLAES, *The National Courts' Mandate in the European Constitution*, 2004, cit., p. 247.

²⁵ Art. 267, para. 3, TFEU.

267 TFEU, the Court has affirmed that if the validity of EU law is at stake, lower national courts' discretion to refer transforms into an obligation.²⁶ Furthermore, an exception is extended to the top courts as well. The courts that are otherwise obliged to send a preliminary question to the Court of Justice in case of interpretative doubts with EU law can avoid this obligation by following the *CILFIT* criteria. This includes three situations: where the Court's ruling would have no bearing on the final decision of the referring national court; where the Court has already ruled on an identical question (*acte éclairé*); and where the interpretation of an EU law legal provision is so obvious that it leaves no room for any reasonable doubt (*acte clair*).²⁷

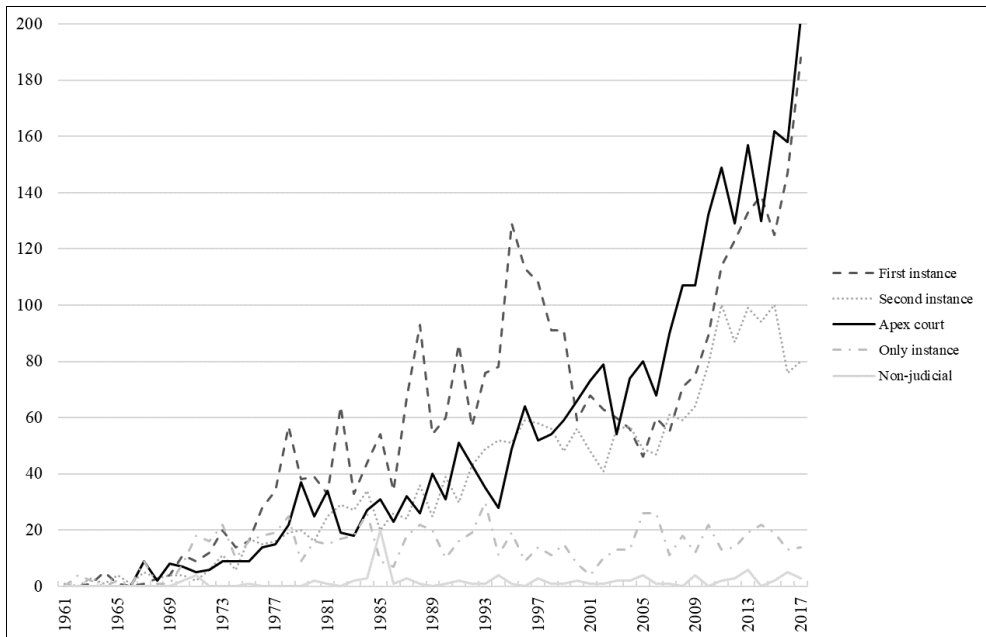


FIGURE 2. Referral activity according to the level of the referring court, 1961-2018. Source: EUTHORITY project data collection, www.euthority.eu.

Following the legal explanation, last instance courts should be expected to refer more questions to the Court of Justice compared to lower (first or second instance) courts simply because Art. 267 TFEU obliges them to do so. Yet, as can be seen from Figure 2, this is not (or at least has not always been) the case. Since the 1960s and until the early 2000s, first instance national courts pioneered the use of the preliminary rul-

²⁶ *Foto-Frost v. Hauptzollamt Lübeck-Ost*, cit.

²⁷ *CILFIT v. Ministero della Sanità*, cit.

ing procedure. A steady rise in the number of referrals coming from the highest courts led to these overtaking the lower courts. The legal explanation could explain the referral activity of peak courts after the 2000s. Yet, because the wording of Art. 267 TFEU has not changed since it was introduced, it cannot explain why top national courts started using the procedure extensively only after 2000. This point will be further explored when discussing the role of the judicial organisation.

II.2. JUDICIAL EMPOWERMENT AND COURT COMPETITION

Probably the most well-known early work on cross-court variations in referral rates was authored by Joseph Weiler. Weiler's most important contribution to the study of law and courts in Europe lies in his empowerment thesis. In his seminal work, Weiler argued that the constitutional revolution of the EU "was a narrative of plain and simple judicial empowerment [...] of the Member State courts, [...] lower national courts in particular".²⁸ The reason behind lower courts' enthusiastic acceptance of the preliminary ruling procedure, according to Weiler, is the fact that lower courts were given the power to engage with the higher jurisdiction of the EU, that is — the power of judicial review. The EU legal system gave the lowest national courts powers that have been typically reserved for the highest courts in a country.²⁹ What lower court judges want, according to Weiler's empowerment thesis, is to expand their powers to those enjoyed by a country's highest court and to use these powers to oppose other branches of government.³⁰

Weiler's thesis was later endorsed by Karen Alter who saw "lower national courts as the motors of legal integration".³¹ Her central argument was that unlike higher courts – whose authority was under a threat due to EU law supremacy – lower courts found only a few costs and numerous benefits in making a referral to the Court of Justice via the preliminary ruling procedure. Sending a preliminary question to Luxembourg "allowed the lower national courts to circumvent the jurisprudence of higher courts that they do not agree with and to obtain legal outcomes they prefer from the CJEU".³² In brief, she argued that the preliminary ruling procedure became a powerful weapon of lower national courts to bypass higher courts. Weiler's and Alter's argument on lower courts as motors of European legal integration has later been endorsed by many other legal scholars and political scientists and remains to be one of the most used explanations of the referral activity of national courts.³³

²⁸ J.H.H. WEILER, *The Transformation of Europe*, cit., p. 2426.

²⁹ *Ibid.*

³⁰ *Ibid.*; J.H.H. WEILER, *A Quiet Revolution*, cit.

³¹ K.J. ALTER, *The European Court's Political Power*, in *West European Politics*, 1996, p. 467; K.J. ALTER, *The European Court's Political Power: Selected Essays*, cit., p.101.

³² K.J. ALTER, *The European Court's Political Power: Selected Essays*, cit., p.100.

³³ G. TRIDIMAS, T. TRIDIMAS, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, in *International Review of Law and Economics*, 2004, p. 125 et seq.; S.A.

II.3. THE ROLE OF THE JUDICIAL ORGANISATION

Scholars further sought to explain cross-courts variations in referral rates by looking at the organisational structure of judicial systems. Based on, what was at that time the largest data-collection effort in the field of EU law, Stone Sweet and Brunell found that lower courts have produced fewer references as compared to intermediate courts and, by doing so, challenged Alter's view on lower courts as motors of legal integration. Stone Sweet and Brunell wrote that the discrepancy is even more striking knowing that there are far fewer appellate courts than the first instance courts. They explain this divergence by looking at the core function of the appellate level, which is to resolve disputes involving legal interpretation and conflict of law.³⁴ Because of the organisation of national judicial systems, they conclude, "we would expect the appellate courts to be far more involved in the construction of the legal system than Alter imagines them to be".³⁵ This was the first mention of the judicial organisation in the literature on the preliminary ruling procedure.

This argument was later revisited by Romeu. Building on the team model of adjudication, Romeu argued that if a first instance judge encounters an EU law issue during the fact-finding task, they will normally resort to the use of the EU law precedent on the issue instead of sending a preliminary question to the Court of Justice. This is because engaging with a preliminary question is costly and a first instance judge has limited access to resources in addition to a heavier workload. In such cases, a first instance judge will give, what is in their knowledge, the best answer to an EU law issue and leave the cases where it is necessary to generate new legal knowledge to be adjudicated by higher courts. EU law issues are, thus, more likely to be subjected to an appeal. Second instance court judges, by contrast, engage in the resolution of legal issues. Furthermore, this is the level where most of the cases are resolved. Dealing with EU law issues and using the preliminary ruling procedure is, thus, part of the appellate courts' main role. Finally, the highest courts in the national hierarchy will, according to Romeu, be the most active participants of the preliminary ruling procedure.³⁶ This is also the level

NYIKOS, *The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment*, in *European Union Politics*, 2003, p. 397 *et seq.*; S.A. NYIKOS, *Courts*, in P. GRAZIANO, M.P. VINK (eds), *Europeanization*, London: Palgrave Macmillan, 2008, p. 182 *et seq.*; K. LEIJON, *The Choices Courts Make: Explaining When and Why Domestic Courts Express Opinions in the Preliminary Ruling Procedure*, paper presented at ECPR General Conference, Montréal, 2015, available at ecpr.eu; J.A. MAYORAL, *The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe*, Doctoral Thesis, European University Institute, 2013.

³⁴ A. STONE SWEET, T.L. BRUNELL, *The European Court and the National Courts*, cit., p. 90.

³⁵ *Ibid.*

³⁶ F. RAMOS ROMEU, *Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior*, in *Global Jurist Frontiers*, 2006, pp. 12-13.

where judges have more experience to deal with complex legal questions such as making a referral to the Court of Justice.³⁷

It was not until recently that scholars provided empirical evidence on cross-court variations in referral activity.³⁸ Based on the large-scale data collection of all preliminary questions submitted between 1961 and 2015, Dyeve *et al.* demonstrated that the first instance courts did pioneer the use of the preliminary ruling procedure but were soon caught up by peak courts, who now dominate the preliminary ruling procedure. They explain this temporal shift in referral activity by relying on the resource v. workload ratio as well as on the fact- v. law-finding specialisation across the judicial hierarchy. Because top courts enjoy a higher workload v. resources ratio and they specialise in law-finding and law creation, they display a higher propensity to refer a legal question to the Luxembourg Court.³⁹

III. JUDICIAL ORGANISATION AND THE TEAM MODEL

This *Article* extends the organisational structure argument and employs it to explore the referral activity of the first and the second instance courts. To explain why judicial hierarchies exist, two different explanations have arisen from two different models of decision-making: the team model and the principal-agent (also known as “the agency”) model. The team model, as the name suggests, treats the judicial system as a team and supposes that all judges in the judicial system share the same goal: to maximise the number of “correct” decisions.⁴⁰ The objective of the hierarchy is to minimise possible errors.⁴¹ The agency model, by contrast, points out to conflicting interests among the judges. It assumes that judges have ideologically opposed preferences and seek to implement those preferences through their decisions.⁴² The agency model perceives higher courts (supreme courts in particular) as the principal, while lower courts (the first

³⁷ J. KOMAREK, “In the Court(s) We Trust?” *On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, in *European Law Review*, 2007, p. 486 *et seq.*: Komarek argues that “judicial wisdom” is unevenly distributed across judicial system. Judges sitting at the highest national court typically possess more skills and experience.

³⁸ A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 919.

³⁹ *Ibid.*, p. 930.

⁴⁰ According to Kornhauser, “correctness” may be interpreted in many ways. Judges might want to maximise the number of cases brought before them, or they might want to maximise the certainty of law through precedents. The content of the aim is not important. What matters is that the aim is shared by all in the system. See L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System Symposium on Positive Political Theory and Law*, in *Southern California Law Review*, 1994, pp. 1606 and 1613.

⁴¹ *Ibid.*, p. 1606; L.A. KORNHAUSER, *Appeal and Supreme Courts*, in B. BOUCKAERT, G. DE GEEST (eds), *Encyclopedia of Law and Economics*, Cheltenham, Northampton: Elgar, 2000, p. 46.

⁴² L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit., p. 1609.

instance and the appellate courts) are identified as agents.⁴³ Hierarchy exists “so that the small set of politically dominant judges can enforce their views on recalcitrant judges lower in the hierarchy”.⁴⁴ The idea of an error is, thus, very different in the agency model when compared to the team model. In the team model, an error arises from imperfect information about the case. In the agency model, by contrast, errors are deliberate and “rebellious” decisions of lower court judges to apply their rule instead of the preferred rule of a higher court.⁴⁵

The idea to treat a judicial system as a team was first expressed by Marschak and Radner,⁴⁶ and was later revised by Kornhauser⁴⁷ and Romeu.⁴⁸ Kornhauser argued that some features of the US judicial system are very difficult to fit into the political model where judges are seen as political actors, each of them promoting their own interests. One of the features is the fact-finding specialisation of the first instance. The agency model seems to suggest that appellate courts have the authority to reassess facts of the case formerly determined by the first instance in order to achieve their desired outcomes, which is not the case.⁴⁹ The team approach, by contrast, offers a very different view on the decision making process. The principal source of error is not conflict (as in the case of the agency model) but rather hidden information. Because resources are limited and because knowledge is very costly to acquire or to verify, errors are inevitable.⁵⁰ This argument opposes the agency model which assumes that each judge possesses complete information. In other words, that each lower court possesses complete information on the ideal point of the higher courts.⁵¹

In achieving the common goal, a hierarchy has several advantages over a completely flat and decentralised system. First, the existence of a hierarchy allows for the specialisation of labour: trial judges deal with fact-finding and appellate judges with law-finding. Dividing caseload equally among all judges would be inefficient as each judge would spend his resources on both fact-finding and law-finding. With increased specialisation, that is, by separating the fact- and law-finding task, the number of correct deci-

⁴³ J.P. KASTELLE, *The Judicial Hierarchy: A Review Essay*, in *Oxford Research Encyclopedia of Politics*, 2016, p. 8.

⁴⁴ L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit., p. 46.

⁴⁵ J.P. KASTELLE, *The Judicial Hierarchy*, cit., p. 8; C.M. CAMERON, L.A. KORNHAUSER, *Appeals Mechanism, Litigant Selection, and the Structure of Judicial Hierarchies*, in J.R. ROGERS, R.B. FLEMMING, J.R. BOND (eds), *Institutional Games and the U.S. Supreme Court*, Charlottesville: University of Virginia Press, 2006, p. 177.

⁴⁶ J. MARSCHAK, R. RADNER, *Economic Theory of Teams*, New Haven: Yale University Press, 1972.

⁴⁷ L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit., p. 1612.

⁴⁸ F. R. ROMEU, *Law and Politics in the Application of EC Law: Spanish Courts and the ECJ 1986-2000*, in *Common Market Law Review*, 2006, p. 395 et seq.

⁴⁹ C.M. CAMERON, L.A. KORNHAUSER, *Appeals Mechanism, Litigant Selection, and the Structure of Judicial Hierarchies*, cit., p. 178.

⁵⁰ *Ibid.*

⁵¹ L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit., p. 48.

sions would rise.⁵² Second, hierarchy decreases the number of cases a judge has to consult. In other words, judges have to consult only the cases decided by a court above them and not all cases decided by all courts in the country. This feature prevents wasting resources on scanning cases for precedent.⁵³ Finally, hierarchy permits the shifting of judicial resources towards important cases that set precedent. In a decentralised system, each judge would have to examine the caseload of every other judge in order to identify cases for review. In a hierarchical system, by contrast, only the appellate judges are expected to perform a systematic review of the caseload.⁵⁴ Although not directly suggested by Kornhauser, hierarchy further plays an important role in error correction. A key assumption is that unsuccessful litigants who appeal a trial court decision have a superior understanding of the facts of the case and are more competent to detect “mistakes” in the decision of the trial judge.⁵⁵ In brief, inter-court interactions and the division of workload and resources across the tiers of the judicial hierarchy are all necessary for an efficient division of labour.⁵⁶

Following Romeu,⁵⁷ I apply the team model of adjudication to the study of judicial behaviour with regard to EU law. In doing so, I focus in particular on the relationship between the first instance and the appellate courts. In order to understand the question of why national judges turn to the Court of Justice with a preliminary question, one needs to understand the logic of a “team”. Achieving an efficient division of labour that minimises the possibility of an error and leads to the maximum possible number of “correct” judicial decision makes a referral to the Court desirable. The logic behind this argument is twofold. First, a national judge knows that the Court of Justice is a specialised court for EU law matters and will produce a better answer while investing the same amount of resources.⁵⁸ Second, once a referral has been made, a judge can spare the resources that they would otherwise have had to invest in solving an EU law issue and redirect those resources to the resolution of other cases.⁵⁹ Referrals, thus, outsource the production of knowledge which is needed to resolve an EU law issue, which ultimately leads to an efficient division of labour. Outsourcing, “is desirable when actors within an organization face problems that only appear infrequently and thus for which it makes no sense that someone within the organization develop the knowledge neces-

⁵² L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit., p. 1613.

⁵³ *Ibid.*, p. 1623; J.P. KASTELLEC, *The Judicial Hierarchy*, cit., p. 5.

⁵⁴ L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit., p. 1623.

⁵⁵ J.P. KASTELLEC, *The Judicial Hierarchy*, cit., p. 6.

⁵⁶ L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit., p. 48.

⁵⁷ L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit., p. 1609; L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit., p. 46.

⁵⁸ F. RAMOS ROMEU, *Law and Politics in the Application of EC Law*, cit., p. 395.

⁵⁹ *Ibid.*, p. 397.

⁵⁹ F. RAMOS ROMEU, *Judicial Cooperation in the European Courts*, cit., p. 11.

sary to confront them".⁶⁰ The referring national judge then complies with the Court's ruling because they know that the Court of Justice produces a better quality decision than they would. Deciding an EU law issue without involving the Court would result in spending more resources without necessarily improving the quality of the decision.

Not all national courts are, however, in the best position to make a referral to the Court of Justice. This brings me to court specialisation. The existence of a hierarchy, according to the team model, allows for specialisation of labour: fact-finding v. law-finding. Since lower courts have to process a heavy workload, they have less time to devote to individual cases. Their task is, therefore, to focus on fact-finding and the quick resolution of cases. Higher national courts, by contrast, enjoy a more favourable workload v. resources ratio and have more time to devote to individual cases. Dividing case-load equally between all judges would be inefficient as each judge would spend their resources on both fact-finding and law-finding. The task specialisation allows for the division of labour across levels of judicial hierarchy, where appellate review of higher courts is typically restricted to points of law. In other words, appellate courts do not re-examine the facts of the case established by the lower instance.

How does the court's specialisation affect the referral behaviour of national judges? Based on the team model rationale, if a first instance judge encounters an EU law issue during the fact-finding task, he will normally resort to the use of the EU law precedent on the issue instead of sending a preliminary question to the Court of Justice. This is because a first instance judge has limited access to resources and has to process a heavy workload. Relying on a precedent is, thus, desirable in order to maximise the number of "correct" decisions. Furthermore, engaging with the preliminary ruling procedure is costly. It would require the first instance judge to invest resources in law-finding and to go beyond the scope of their ordinary tasks. In such cases, a first instance judge will give, what is in their knowledge, the best answer to an EU law issue and leave to higher courts those cases where it is necessary to generate new knowledge. EU law issues are, thus, more likely to be subjected to an appeal. Second instance court judges, by contrast, engage in the resolution of legal issues. Furthermore, this is the level where most of the cases are resolved. Dealing with EU law issues and using the preliminary ruling procedure is, thus, part of the courts' main role.⁶¹ Finally, in giving a preliminary ruling, the Court of Justice is typically restricted to points of law and does not re-examine the facts of the case established by the referring courts. Making a referral, consequently, relates more directly to the work of appellate courts. Based on this I argue that because of their specialisation in law-finding and law creation, and because of a more beneficial workload v. resources ratio, and since preliminary questions can only address points of law, appellate court judges will exhibit higher propensity to refer legal questions to the Court of Justice.

⁶⁰ *Ibid.*

⁶¹ F. RAMOS ROMEU, *Law and Politics in the Application of EC Law*, cit., pp. 398-399.

IV. DATA AND METHODOLOGY

In order to explore how first and second instance judges perceive their role in the preliminary ruling procedure and whether there any differences between these two groups, I employ a mixed-method approach, combining survey data with the results of in-depth interviews. The survey on the knowledge of, experiences with and attitudes towards EU law was conducted among all first and second instance courts in Slovenia and Croatia in spring 2017. It covered a population of 1,792 judges from Croatia and 857 judges from Slovenia, resulting in a response rate of 16.6 per cent for Croatia and 14.7 per cent for Slovenia.⁶² Survey respondents were asked whether they are willing to participate in an interview in a continuation of the research. The affirmative response was given by 74 judges. Because of the practical reasons, a maximum variation purposive sampling was used, covering judges of different levels and subject matter jurisdiction. Ultimately, 32 judges were covered and interviews were conducted in spring and autumn 2017. Results obtained by means of both research methods (qualitative and quantitative) are expected to complement each other, which will strengthen research conclusions. This research builds on the research efforts of Nowak *et al.* (covering Dutch and German judges), Jar-emba (covering Polish civil law judges)⁶³ and Mayoral (covering Spanish judges),⁶⁴ and complements the research of Krommendijk (covering Dutch and Irish judges).⁶⁵

	Number of referrals	Years of membership	Referrals per years of membership	Population in million inhabitants	Referrals per million inhabitants	Judges per capita	Referrals per judges per capita
Cyprus	7	13	0.5	0.86	8.14	13.1	0.53
Estonia	28	13	2.1	1.31	21.37	17,6	1.59
Hungary	158	13	12.1	9.77	16.17	28.7	5.51
Latvia	60	13	4.6	1.93	31.09	25.5	2.35
Lithuania	55	13	4.2	2.80	19.64	27.3	2.01
Malta	3	13	0.2	0.47	6.38	10.2	0.29

⁶² Although this may seem as a low response rate, it is higher than the response rate obtained by Nowak *et al.* on German Judges (10 per cent) and by Jaremba obtained on Polish judges (eight per cent). See T. NOWAK, A. AMTENBRINK, M. HERTOIGH, M. 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, *National Judges as EU Law Judges: The Polish Civil Law System*, The Hague: Nijhoff, 2014. The response rate obtained on Dutch judges was 32 per cent. Nowak *et al.* justified this by the fact that Dutch judges are used to filling in survey and to participate in research.

⁶³ U. JAREMBA, *National Judges as EU Law Judges*, cit.

⁶⁴ J.A. MAYORAL, *The Politics of Judging EU Law*, cit.

⁶⁵ 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.*

	Number of referrals	Years of membership	Referrals per years of membership	Population in million inhabitants	Referrals per million inhabitants	Judges per capita	Referrals per judges per capita
Poland	127	13	9.7	37.97	3.34	26.0	4.88
Czech R.	57	13	4.3	10.61	5.37	28.4	2.01
Slovakia	44	13	3.4	5.44	8.09	24.1	1.83
Slovenia	20	13	1.5	2.06	9.71	42.6	0.47
Bulgaria	117	10	11.7	7.05	16.60	31.8	3.68
Romania	139	10	13.9	19.52	7.12	23.6	5.89
Croatia	11	5	2.2	4.10	2.68	43.3	0.25

TABLE 1. Comparing post-2004 enlargement Member States (2004-2017). Includes data for the year 2017. Data source: CJEU annual report; Eurostat; EU Scoreboard.

The decision to focus on Slovenian and Croatian judges has been made primarily because of the low number of preliminary questions submitted to the Court of Justice. Taken in absolute numbers, Slovenian and Croatian courts have submitted the lowest number of preliminary questions compared to all post-2004 enlargement Member States, with the exception of Malta and Cyprus (see Table 1). Furthermore, the two countries have the highest number of judges per capita in the entire EU: Slovenia has 42.6 per 100,000 inhabitants and Croatia 43.3, while the EU average is only 21.2 judges per 100,000 inhabitants.⁶⁶ Yet, they have the lowest number of referrals per number of judges and happen to be in the same groups as Malta and Cyprus, the two smallest EU Member States. The argument that some Member States will refer more simply because they have more court and judges that can refer questions, thus, does not hold for Slovenia and Croatia.⁶⁷ Furthermore, research on Central and Eastern European Member States has focused on the application of EU law in Poland,⁶⁸ the Czech Republic,⁶⁹ Slovakia⁷⁰ and Hungary,⁷¹ leaving other post-2004 enlargement countries largely under-

⁶⁶ European Commission, EU Justice Scoreboard, 2016, ec.europa.eu, p. 33.

⁶⁷ M. VINK, M. CLAES, C. ARNOLD, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States*, cit., p. 13.

⁶⁸ U. JAREMBA, *National Judges as EU Law Judges*, cit., p. 173; U. JAREMBA, *At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order*, in *Erasmus Law Review*, 2013, p. 191 et seq.

⁶⁹ M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, in *European Constitutional Law Review*, 2014, p. 54 et seq.; J. KOMAREK, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, in *European Constitutional Law Review*, 2012, p. 323 et seq.

⁷⁰ M. MATCZAK, M. BENCZE, Z. KUHN, *Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland*, in *Journal of Public Policy*, 2010, p. 81 et seq.

researched. Very little has been written on the Europeanisation of Slovenian and Croatian national judiciaries and the use of EU law by their national judges.

For analysing interview results, I rely on thematic content analysis. The aim of this technique is to find common patterns across the data, which relate to the research question. All interviews were transcribed and translated from Croatian and Slovenian into English. What followed was the coding process, that is, the process of marking in the text those words, phrases, sentences, or stories that are relevant for the research question.⁷² Whenever appropriate, I will refer to interview results of Nowak, Jaremba, Mayoral and Krommendijk, and how they compare to results obtained on Slovenian and Croatian judges.

	Variable name	Type of data	Explanation
Dependent variable	The probability of making a referral	Discrete	Question: What is the probability that you would send a preliminary question to the CJEU in case of interpretative doubt? Answers: (1) I would definitely not refer; (2) I would probably not refer; (3) I would probably refer; (4) I would definitely refer.
Independent variable	Court level	Discrete	Question: At which court do you adjudicate? Answers: (1) First instance; (2) Second instance.

TABLE 2. Research variables.

For the purpose of the quantitative part of this *Article*, the dependent variable is defined as the probability of sending a preliminary question to the Court of Justice in case of interpretative doubts. I employ ordinal logistic regression where the dependent variable is considered ordinal with four levels interpreted as 1) very low, 2) low, 3) high, and 4) very high. The independent variable includes the level of the court. Based on the question “At which instance do you adjudicate?” judges were divided into two groups: 1) those sitting at the first instance court and 2) those sitting at the second instance court (see Table 2). The analysis is performed on two different models. Model 1 relies on complete cases, that is, cases with no missing values and it includes 145 observations. As for Model 2, missing values were predicted by the Random Forest imputation technique.⁷³

⁷¹ D. KOSAR, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice*, in *European Constitutional Law Review*, 2017, p. 96 et seq.

⁷² H.J. RUBIN, I.S. RUBIN, *Qualitative Interviewing*, Thousand Oaks: Sage, 2012, p. 190.

⁷³ F. TANG, H. ISHWARAN, *Random Forest Missing Data Algorithms*, in *Statistical Analysis and Data Mining. The ASA Data Science Journal*, 2017, p. 363.

V. RESULTS

V.1. FACT-FINDING V. LAW-FINDING SPECIALISATION

I start with interview results on how judges perceive their role in the preliminary ruling procedure and how this perception differs according to the hierarchical level of the court at which the judge sits. In line with the theoretical section of this *Article*, interviewed judges confirm the role of court's specialisation on judicial participation in the preliminary ruling procedure. When asked why they never made a referral to the Court of Justice, a first instance judge from Slovenia explains:

"I do not think it is the purpose [of the first instance] to [send preliminary questions]. The purpose of the first instance is to quickly process cases. [...] [Sending a preliminary question] goes more for the application of the law. [...] I think that this is also the role of the Supreme Court according to our system. It is its mission. The top that directs the development of the whole law".⁷⁴

Another judge, in a similar vein, argues that the preliminary ruling procedure

"goes for a more legal issue. We at the first instance are somehow more concerned with the operative part [of the judgment]. We also have a lot of work, including work with the parties and with the unexplored factual situation. [...] Should I deal here with this legal theory? Maybe this is not really a task for the first instance. [...] I will write about the factual situation, and very briefly about what is the legal background so that there is no legal dilemma. Perhaps this is more in a domain of higher courts that deal better with the legal theory and solving issues. And not of the first instance. [...] Some questions that are a bit more complicated, a bit more abstract, it seems to me that I would rather step aside and let this to be dealt with by the [higher court]".⁷⁵

Interviewed first instance judges further share a belief that their colleagues at the appellate and the peak level "are more mature, capable, and have insight and a wider perspective. As a first instance judge, you have to work fast and you have to work a lot. [...] Half of our cases do not reach the second instances. [...] this is also the purpose [of the first instance], to solve the dispute as soon as possible".⁷⁶

Similar results were reported by other scholars. Based on interview results with German and Dutch judges, Nowak *et al.* found that the reasons for engaging with the preliminary ruling procedure are very often not connected to an anti-EU sentiment but are rather practical and based on the belief that turning to the Court of Justice would prolong the duration of the trial.⁷⁷ Some interviewed judges explicitly referred to the

⁷⁴ Slovenian judge 4, 1st instance.

⁷⁵ Slovenian judge 8, 1st instance.

⁷⁶ Slovenian judge 6, 1st instance.

⁷⁷ T. NOWAK, A. AMTENBRINK, M. HERTOOGH, M. WISSINK, *National Judges as European Union Judges*, cit., p. 78.

level of the court at which they sit. Because the task of the first instance is to quickly resolve cases, judges argue, making a referral is often left to be dealt with by the higher instance. Interview judges say that “asking a preliminary question takes time and I prefer to end cases quickly. Thus I prefer to make the choice about the application of rules myself and leave it to the parties to appeal” and “as a judge of the first instance and in connection with the time delay [...] I would allow appeal”.⁷⁸ In a similar vein, a Dutch judge admits: “I am not in favour of first instance judges asking for preliminary rulings from Luxembourg. I think this should be done via the higher courts or the Supreme Court [...] because it slows down the procedure enormously”.⁷⁹

Jaremba reported on a similar attitude among Polish judges. She argued that EU law is often perceived by the judges as something too sophisticated, too abstract and too singular “to have any bearing on the simple and common [...] cases which appear before the first instance civil courts”.⁸⁰ The first instance judges restrict their role to “the mere application of the existing rules to the disputes they are presiding over” while “the task of questioning the law, deliberating upon its content and establishing its correct interpretation should [...] take place [...] at the higher level of adjudication, that is to say at the level of the appeal courts and the Supreme Court”.⁸¹ In a more recent study, Krommendijk reports that one of the most important factors influencing judicial referral activity is the way in which lower court judges see their role *vis-à-vis* the highest courts. Because of their limited law-making function and limited time and expertise on the issue, the first instance judges often step aside and leave the issue for the higher courts.⁸² This is because the role of the first instance is believed to be limited to making decisions and resolving disputes.⁸³

V.2. WORKLOAD V. RESOURCES RATIO

A judge’s workload v. resources ratio also plays an important role. Figure 3 illustrates the average number of incoming cases per judges for all three judicial instances across 20 EU Member States.⁸⁴ The fact that the first instance judges process the heaviest workload holds for nearly all EU Member States with the exception of Bulgaria, Romania

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ U. JAREMBA, *National Judges as EU Law Judges*, cit., p. 330.

⁸¹ *Ibid.*, pp. 330–331.

⁸² J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit., p. 790.

⁸³ *Ibid.*, p. 776.

⁸⁴ Council of Europe, European Commission for the efficiency of justice (CEPEJ), *Report on the European Judicial Systems – Efficiency and Quality of Justice*, 2014.

and Sweden.⁸⁵ The opportunity costs associated with making a referral are, therefore, much higher for judges at the bottom than for those at the higher tiers of a judicial hierarchy.⁸⁶ Yet, unlike workload – which exhibits the shape of a pyramid – resources typically exhibit the shape of a reverse pyramid. Judges sitting at the higher levels of judicial hierarchy (at the appellate or peak level) are more likely to enjoy the highest level of staff support (from law clerks, assistants and other staff) and are also more likely to have access to research units, court libraries and online databases.⁸⁷

The fact that the appellate and peak court judges have an advantage over their colleagues sitting at the first instance courts when it comes to a workload v. resources ratio has not been overlooked by the interviewees. To justify why have they never turned to the Court of Justice with a preliminary question, Slovenian first instance judges admit that “the judge in the first instance is so burdened that simply [...] it is hard to imagine that he would take one month’s time to work only on [a preliminary question]”⁸⁸ and, because of this, making a referral “seems [...] more appropriate for higher instances”.⁸⁹ In fact, a less beneficial workload v. resources ratio is often used as a reason for not turning to the Court by means of the preliminary ruling procedure, even in situations that require the use of such procedure. Two of the interviewed judges encountered the need to ask for a preliminary ruling but have rather left it for the appellate level to deal with it. One judge says “I will let it to a higher instance to deal with it. They have a bit more time to spend on [the preliminary question]. We are burdened with a bunch of other things that are not exactly a high law”.⁹⁰ Another judge admits that she is aware of the need to make a referral but is “waiting a bit to see whether the higher court will [send a preliminary question], given the fact that I am alone here, and up [at the appellate court], there are three judges”.⁹¹ Krommendijk reports that the appellate court judges are aware of the workload at the first instance. An interviewed high court judge from the Netherlands admits that, because

⁸⁵ Such exceptions can be explained by the docket control mechanism of a court. Supreme courts’ cases can be disposed of by no or very little formal reasoning, yet some countries still include them in the official court’s workload. A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 920.

⁸⁶ I do, however, acknowledge that although lower court judges handle a high number of cases, many of them can be solved without much effort. The burden of cases of the higher instance is often more beneficial, yet judges working at the appellate and peak courts often do not have “the luxury” of having too many easy cases.

⁸⁷ A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 920; 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.

⁸⁸ Slovenian judge 5, 1st instance.

⁸⁹ Slovenian judge 6, 1st instance.

⁹⁰ Slovenian judge 8, 1st instance.

⁹¹ Slovenian judge 5, 1st instance.

he has more time to hear cases compared to a first instance judge, “I save them work when I refer myself when it is inevitable”.⁹²

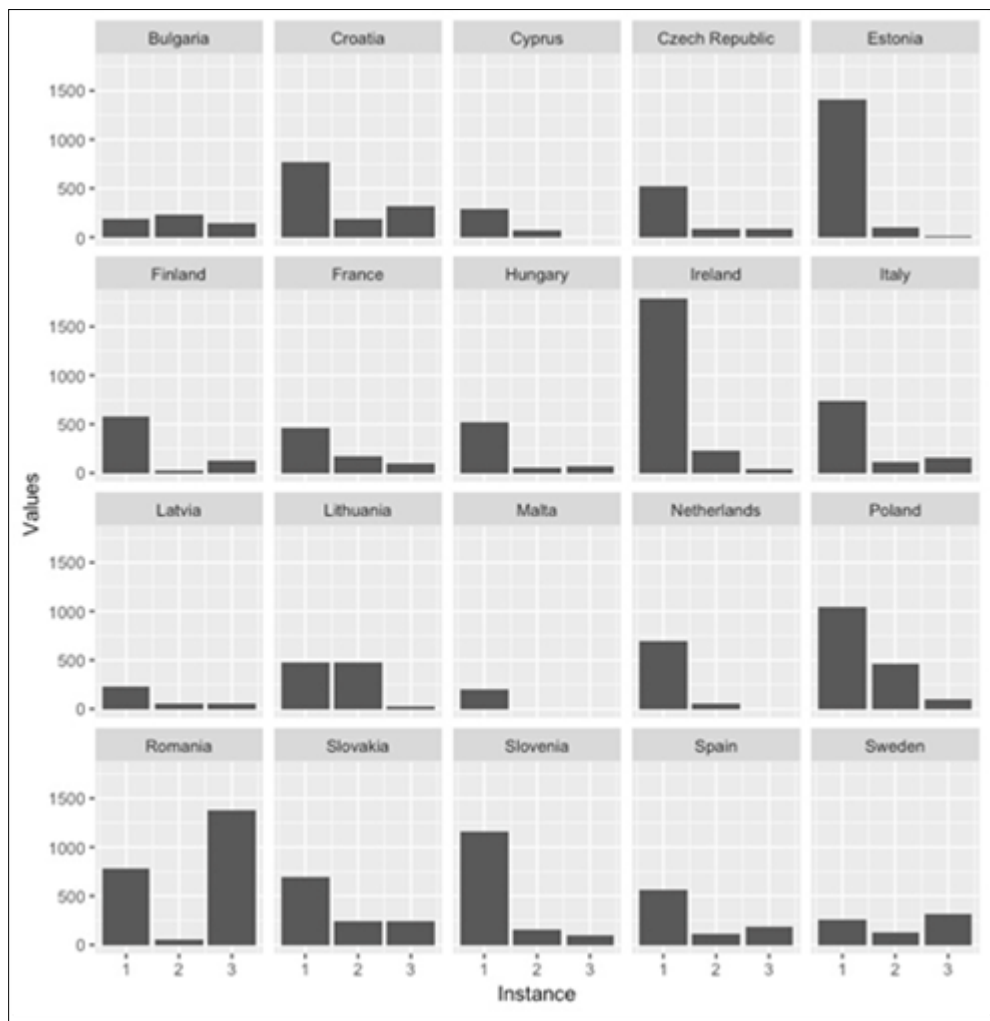


FIGURE 3. Average workload per judge across levels of judicial hierarchy (2014, civil cases). Source: CEPEJ, *Report on the European Judicial Systems – Efficiency and Quality of Justice*, in *CEPEJ Studies*, no. 26, rm.coe.int. The Figure illustrates judicial work-load across three judicial instances: 1) first instance courts; 2) second in-stance courts; and 3) supreme courts. The workload was calculated as a fraction between the total number of incoming cases and the number of judges. There was no existing data

⁹² J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit., p. 778.

for Austria, Belgium, Germany, Greece, Germany, Luxembourg and Portugal. Denmark was also excluded because of the doubtfully high data on the number of the first instance in-coming cases.

Interviewed judges have further stressed the importance of law clerks in unburdening judges, especially in the area of EU law application. A first instance judge says that at their court, they “have 7 law clerks for more than 20 judges”. Appellate court judges, by contrast, “have relatively a lot of them”.⁹³

Talking about the role of law clerks, an appellate court judge says that clerks

“take care of the case-law, enter the case-law into the computer, review the legal basis for the case. Every case that comes to our court is examined by law clerks. [...] A judge tells his law clerk: prepare me your legal position in this case. [...] In our Senate we have 4 judges and 2 law clerks. Generally, there is one law clerk per judge. [...] Law clerks unburden the work of a judge”.⁹⁴

When asked to describe their experience with making a referral, one appellate court judge from Croatia admits that

“a law clerk worked on the preliminary question, a higher law clerk who has been at this court for 12 years now. We also contacted [...] a judge at the High Commercial Court [and] she had a look at the question. Then she said that she thinks it is done well and that it will succeed and we were the first [court] whose preliminary question succeeded [and resulted in a judgment of the Court]”.⁹⁵

Similar results on the role of the workload at the first instance of judging were reported by Nowak *et al.*⁹⁶ and Jaremba.⁹⁷ For example, a German judge who recently got promoted to the appellate level says: “When I was working at the first instance, I did not have time. But at this court, I have to get it right”.⁹⁸

That the appellate court judges show a higher propensity to refer legal questions to the Luxembourg Court is further supported by the statistical analysis. I find a strong and positive association between the level of the court and the propensity of national judges to turn to the Court of Justice in case of interpretative doubts with EU law (see Figure 4). In other words, judges sitting at the appellate court are more likely to use the procedure in practice as compared to their colleagues at the first instance. From a statistical point of view, this effect is significant at the 0.001 level in both models. As shown in Table 3, based on the first model the odds of having a “(very) high” probability of

⁹³ Slovenian judge 1, 1st instance.

⁹⁴ Slovenian judge 12, 2nd instance.

⁹⁵ Croatian judge 11, 2nd instance.

⁹⁶ T. NOWAK, A. AMTENBRINK, M. HERTOOGH, M. WISSINK, *National Judges as European Union Judges*, cit., p. 42.

⁹⁷ U. JAREMBA, *National Judges as EU Law Judges*, cit., p. 220 *et seq.*

⁹⁸ T. NOWAK, A. AMTENBRINK, M. HERTOOGH, M. WISSINK, *National Judges as European Union Judges*, cit., p. 52.

sending a preliminary question to Court are 2.41 times ($1 - \exp(-0.8221) = -2.41$) lower among the first instance judges as compared to judges sitting at the appellate courts.

I illustrate the marginal effects of the variable “court level” on the referral-free EU law application in Figure 4⁹⁹. We can see that on the response level “I would definitely make a referral to the CJEU in case of interpretative doubts with EU law” is higher for the appellate level court judges than for those sitting at the first instance.

	Probability of sending a preliminary question	
	CC (1)	Random Forest (2)
Court level Reference: First instance	1.277*** (0.391)	0.923** (0.316)
Intercepts		
1 2	-3.3653	-3.3168
2 3	-1.4033	-1.3826
3 4	1.1447	1.3820
Nagelkerke R2	0.0835	0.0474
AIC	308.35	425.40
Number of observations	145	252

TABLE 3. Ordinal logistic regression. Note: *** $p < 0.001$.

Both qualitative and quantitative data seems to suggest that the law-finding specialisation, as well as a more beneficial resource v. workload ratio give appellate national courts more incentive to turn to the Court of Justice with a preliminary question. Furthermore, since preliminary questions can only address points of law, second instance judges have much more to gain from outsourcing the law-creation task to the Court. These results go against the court empowerment and court competition offered by Weiler and Alter. The primary objective of national judges seems to be the uniformity of national jurisprudence and the desire to deliver as many “correct” decisions as possible and not the desire to expand their powers *vis-à-vis* other courts or other branches of the government. This finding supports the argument of Kornhauser,¹⁰⁰ Romeu,¹⁰¹ Micklitz,¹⁰² Dyevre *et al.*,¹⁰³ and Krommendijk¹⁰⁴ who argued that judicial participation is not

⁹⁹ Marginal effects show how the dependent variable changes with the change in a specific independent variable, while other explanatory variables are assumed to be held constant.

¹⁰⁰ L.A. KORNHAUSER, *Adjudication by a Resource-Constrained Team*, cit.; L.A. KORNHAUSER, *Judicial Organization & Administration*, in B. BOUCHAERTS, G. DE GEEST (eds), *Encyclopedia of Law and Economics*, cit., p. 317 *et seq.*; L.A. KORNHAUSER, *Appeal and Supreme Courts*, cit.

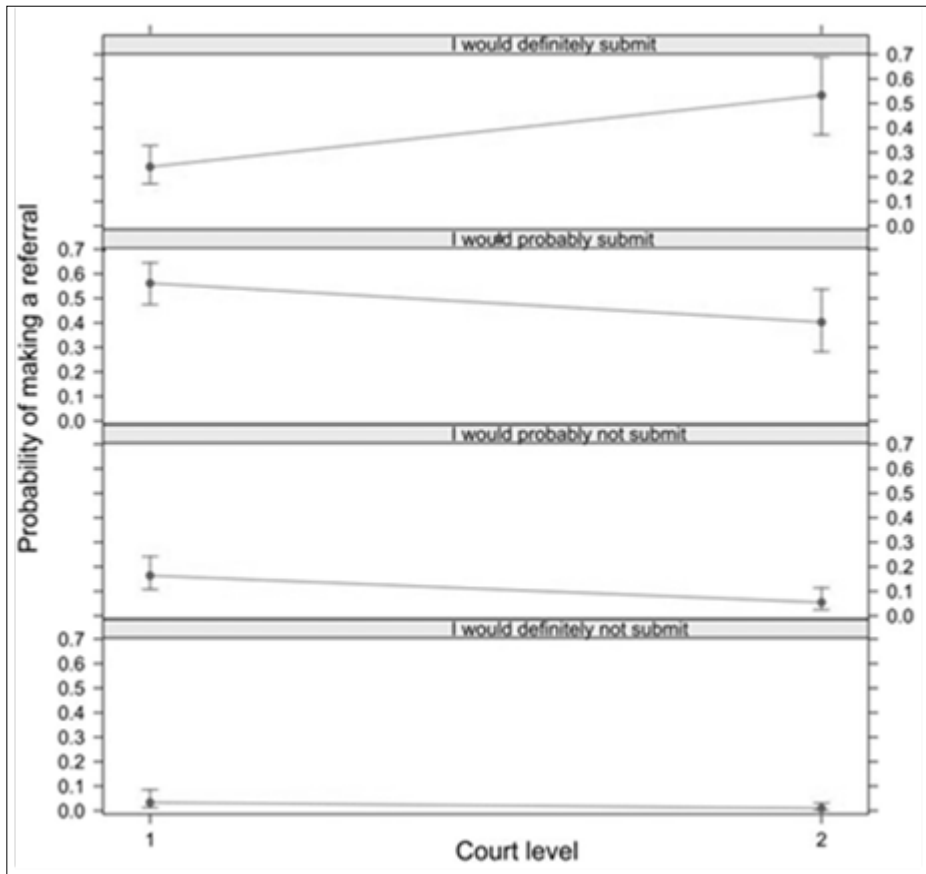


FIGURE 4. Marginal effects of the variable “court level”.

driven by court competition (as believed by Alter) but rather by the desire to resolve disputes that appear on their dockets. Furthermore, looking at what the preliminary references are actually about, one can notice that a high number of referrals address technical questions, such as, corporate taxation, trademarks, patents, intellectual property, establishment freedom (for example, the recognition of foreign driving licences) public pro-

¹⁰¹ F. RAMOS ROMEU, *Law and Politics in the Application of EC Law*, cit.; F. RAMOS ROMEU, *Judicial Cooperation in the European Courts*, cit.

¹⁰² H.W. MICKLITZ, *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith*, Cambridge: Cambridge University Press, 2005.

¹⁰³ A. DYEYRE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit.

¹⁰⁴ J. KROMMENDIJK, *Why Do Lower Courts Refer in the Absence of a Legal Obligation?*, cit.

curement and VAT.¹⁰⁵ In situations like these, resorting to the preliminary ruling procedure is not necessarily about enforcing EU law over a conflicting national provision and challenging a Member State's noncompliance before the Court of Justice,¹⁰⁶ but it is rather connected to outsourcing the creation of knowledge to the Court about a specific problem of EU law interpretation. This is in line with the team model of decision making. In case of a technical problem with EU law interpretation, a national judge will turn to the Court of Justice because they know that this Court is a specialised EU law court and will produce a high-quality answer.¹⁰⁷ If a national judge decides to rule on an EU law issue alone, without involving the Court, this would require investing time and resources without necessarily improving the quality of the decision.¹⁰⁸ These findings add an additional dimension to the grand theories of European legal, political, economic and social integration that developed in the course of the last two decades.

VI. CONCLUSION

This *Article* contributes to the scholarly debate on cross-court variations in referral rates by exploring the role of the judicial hierarchy on the propensity of national judges to participate in the preliminary ruling procedure. A particular emphasis has been given to the relationship between the first and the second instance national judges and the question of how these two types of judges perceive their role in the preliminary ruling procedure and what could explain differences between them. Based on the mixed-method research design that combines qualitative and quantitative data, I find evidence that judicial participation in the preliminary ruling procedure is largely determined by the court specialisation and the division of labour and resources within a national judicial hierarchy. The results of in-depth interviews show that the time constraints arising from the pressure to handle a large caseload and to resolve cases quickly work as a counter-incentive for first instance judges to submit legal questions to the Court of Justice. The law-finding specialisation, a more beneficial workload v. resources ratio and the fact that preliminary questions can only address points of law, by contrast, give the second instance courts judges more reasons to engage with Art. 267 TFEU proceedings.

The Court of Justice has responded very defensively to any attempts of higher courts to jeopardise its alliance with lower courts and, by doing so, empowered the position of first instance judges. Yet, as I demonstrate in this *Article*, court specialisation and the division of labour and resources across judicial hierarchy made making a referral “the task for

¹⁰⁵ A. DYEVE, N. LAMPACH, *Issue Attention on International Courts: Evidence from the European Court of Justice*, in *The Review of International Organizations*, 2020, p. 1 *et seq.*; U. JAREMBA, *National Judges as EU Law Judges*, cit., p. 342.

¹⁰⁶ R.D. KELEMAN, T. PAVONE, *Mapping European Law*, cit., p. 360.

¹⁰⁷ F. RAMOS ROMEU, *Law and Politics in the Application of EC Law*, cit., p. 397.

¹⁰⁸ F. RAMOS ROMEU, *Judicial Cooperation in the European Courts*, cit., p. 11.

the higher instance". This does not mean that first instance courts will never send legal questions to the Court of Justice – they are still the most numerous courts in the EU and will resort to the Court's interpretation when the resolution of the case requires it. Instead, what this *Article* suggests is that, when confronted with a decision to make a referral under Art. 267 TFEU or to manage their workload, judges will make a trade-off in favour of the latter and let the higher instance deal with the Luxembourg Court.



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 were 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 mentality³ 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 trial).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.

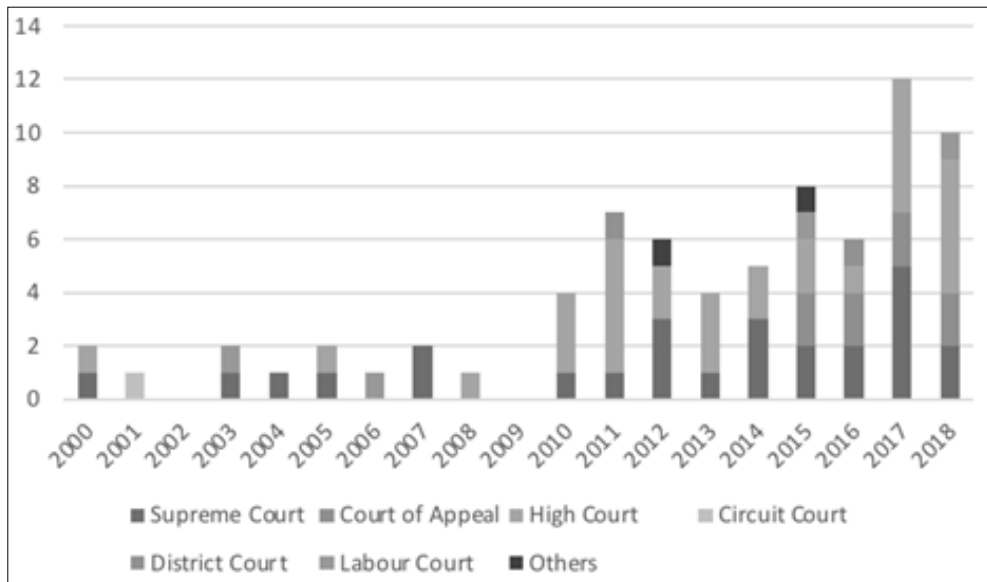


TABLE 1. Irish references 2000-2018.⁷

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. DYEVE, *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. HERTOOGH, 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. DYEYRE, *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. DYEYRE, 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. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit.; T. NOWAK, F. AMTENBRINK, M.L.M. HERTOOGH, 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. MÜNDE, B. RICHTER, *Subject Matter Specialization of European Union Jurisdiction in the Preliminary Ruling Procedure*, 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, then 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. DYEVE, *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, *Dan-qua*, [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.



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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DEFENDING THE RULE OF LAW OR REALITY BASED SELF-DEFENSE? A NEW POLISH CHAPTER IN THE STORY OF JUDICIAL COOPERATION IN THE EU

URSZULA JAREMBA*

TABLE OF CONTENTS: I. Introduction. – II. Theoretical framework: why national judges participate in judicial dialogue with the CJEU. – III. Judiciary reforms in Poland 2017-2018: a brief overview. – IV. Preliminary questions as reaction of Polish courts to the judiciary reforms. – V. Defending the rule of law or reality based self-defense? – VI. Conclusions.

ABSTRACT: In the course of the last two years, the Polish courts frequently resorted to the procedure of preliminary ruling requesting the Court of Justice to qualify the Polish judiciary reforms introduced by the PIS-regime in the light of the principle of judicial independence, the rule of law and effective judicial protection. Against this backdrop, one could suggest that the issue regarding the use of the preliminary ruling mechanism by national courts and the reasons that incentivise the judges to engage in dialogue with the Court of Justice have gained a novel dimension. It is the aim of this *Article* to discuss the relevant preliminary questions referred by the Polish courts and place them in the context of various theoretical streams that aim at explaining the reasons and motivation behind national courts' participation in judicial dialogue with the Luxembourg Court.

KEYWORDS: Polish courts – constitutional crisis – judiciary reforms – preliminary ruling procedure – judicial dialogue – rule of law.

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I. INTRODUCTION

On the 25th of October 2015, the conservative, populist and nationalist Law and Justice Party (hereinafter referred to as PIS) won the majority of seats in both chambers of the Polish Parliament, becoming the first party since the collapse of Communism able to govern alone, without needing a coalition, in Poland. A vivid constitutional crisis has since confronted the Polish legal system.¹ The comprehensive and far-reaching changes in the Polish legal, particularly the judicial, system commenced soon after the parliamentary elections, with PIS' offensive aimed at dismantling and paralyzing the Constitutional Tribunal. Despite the uproar this process triggered at both the national and European level,² the government continued to advance its attempts at forming the Tribunal into a personal tool that would acquiesce to its perverse political agenda.³ The changes introduced by the PIS regime caused so much concern that Poland became the first EU Member State to face an inquiry into its rule of law (the Rule of Law Framework mechanism) by the European Commission.⁴

After it gained political control over the Constitutional Tribunal in 2017, the government continued its strategy, launching an offensive on the ordinary courts and regular judges. It targeted the National Council for the Judiciary (KRS), the Supreme Court, and the organization of ordinary courts. The government began to pass laws to reform the judiciary system, often in overnight parliamentary sessions and without any public consultation. The amended Act on the National Council for the Judiciary shifted the power to appoint members of the Council from the judiciary itself to the Parliament, thus strengthening political influence over the appointment process. The comprehensive amendment to

¹ U. JAREMBA, *The Rule of the Majority vs. the Rule of Law - How Poland Has Become the New enfant terrible of the European Union*, in *Tijdschrift voor Constitutioneel Recht*, 2016, p. 262 *et seq.*; T.T. KONCEWICZ, *The Polish Constitutional Crisis and "Politics of Paranoia"*, in *Verfassungsblog*, 11 March 2016, verfassungsblog.de; M. MATCZAK, *Poland's Constitutional Crisis. Facts and interpretations*, The Foundation for Law, Justice and Society, 2018, www.fljs.org; W. SADURSKI, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, 2018, p. 22 *et seq.*; S. BIERNAT, *The Rule of Law in Poland*, May 2019, trema.nvvr.org; Helsinki Foundation for Human Rights, *Disciplinary Proceedings against Judges and Prosecutors*, 2019, www.hfhr.pl; F. ZOLL, L. WORTHAM, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, in *Fordham International Law Journal*, 2019, p. 874 *et seq.* Several posts by L. Pech and others regarding the developments in Poland at *Verfassungsblog*, verfassungsblog.de, offer an excellent and comprehensive academic analysis of the situation in Poland.

² See Opinion of the Venice Commission on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, to be found at www.venice.coe.int.

³ See W. SADURSKI, *How Democracy Dies (in Poland)*, *cit.*, p. 31, for illustration of the clearly politically motivated change in the way the Constitutional Tribunal adjudicates cases.

⁴ For more see D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, p. 512 *et seq.*; D. KOCHENOV, L. PECH, *Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation*, in *Journal of Common Market Studies*, 2016, p. 1062 *et seq.*; R. UITZ, *Poland, Hungary and Europe: Pre-Article 7 Hopes and Concerns*, in *Verfassungsblog*, 14 March 2016, verfassungsblog.de.

the Act on the Supreme Court lowered the retirement age of judges and forced 27 of them, including the President of the Supreme Court, to retire. The Act also created two new chambers of the Supreme Court – the Disciplinary Chamber and the Chamber of the Extraordinary Control and Public Affairs – whose members would be selected by the new and politicised KRS. The amended Act on the Organization of the Common Courts altered the process of appointing and dismissing the presidents of the courts making them dependent on the Ministry of Justice. The government also simultaneously introduced a new model of disciplinary proceedings that made the liability of judges to be subjected to the control by the Minister of Justice.⁵ The above-mentioned reforms, which were introduced by the amendments to the three main laws regulating the functioning of the Polish judiciary, are now accompanied by disciplinary proceedings against judges and prosecutors who do not favour the reforms or act contradictory to the government's preferences.⁶ Even without detailing these legal changes and their political motivations too much at this point, the respective amendments appear to contradict the fundamental guarantees of judicial independence and aim to undermine the position of the judiciary.⁷

Unsurprisingly, due to the aforementioned reasons, these comprehensive judicial reforms have drawn much attention and triggered a fierce backlash, both internally and at the European level. Indeed, much has been said and written regarding the distressing, and perhaps even dramatic,⁸ developments in Poland.⁹ Political, media and academic voices claiming the death of the Polish democracy and the systemic threat to the rule of law have become common.¹⁰ However, the political, academic and societal circles do not represent the only groups to respond to this undermining of the core elements of the rule of law; the judges themselves have also actively and somewhat ingeniously reacted to this new legal reality. In addition to publicly showing their objection to and disapproval of the PIS reforms, Poland's judges have vigorously attempted to employ the mechanism of preliminary rulings under Art. 267 TFEU. In a relatively short time, the Polish courts have referred a high number of preliminary questions to the Court of Justice that contested the legality of the reforms *vis-à-vis* EU law, and specifically, the rule of law.

In particular, in August 2018, the Polish Supreme Court referred six preliminary questions on the position of the post-Supreme-Court-reform Polish judiciary and the alleged limiting of their independence and impartiality. Soon after, the regional court in

⁵ Prior to the amendment the model of disciplinary proceedings was formally independent of public authorities.

⁶ Komitet Obrony Sprawiedliwości, *A Country that Punishes. Pressure and Repression of Polish Judges and Prosecutors*, 2019, see citizensobservatory.pl, p. 10 *et seq.*

⁷ S. BERNAT, *The Rule of Law in Poland*, cit.

⁸ W. SADURSKI, *How Democracy Dies (in Poland)*, cit., p. 2.

⁹ See various Authors cited in footnote 1.

¹⁰ W. SADURSKI, *What Went Wrong with Poland's Democracy*, in *OUP Blog*, 14 August 2019, blog.oup.com; L.D. SPIEKER, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, in *German Law Journal*, 2019, p. 1182 *et seq.*

Łódź referred preliminary questions to the Court of Justice asking it to assess the new disciplinary proceedings. Another preliminary question regarding the very same issue came from the Regional Court in Warsaw. On 20 September 2018 the Supreme Court referred questions asking whether the newly-created chamber at the Supreme Court is an independent court or a tribunal within the meaning of EU law. On 3 October 2018, two different cases before the Supreme Court resulted in a referral of a further five preliminary questions identical to the ones from August. Later that month, the same court filed another preliminary question concerning the issue of judicial independence. On 21 November, the Supreme Administrative Court referred several preliminary questions concerning the amended Act on the Supreme Court to assess if it violated the rule of law and the principle of effective judicial protection. On 21 May 2019, the Supreme Court chose to refer another preliminary question regarding the issue of judicial independence and impartiality, specifically questioning the procedure regulating the appointment of judges and the lawfulness of sitting on the bench. Finally, in 2019, the Supreme Court referred another set of comprehensive questions regarding the position of judges in light of the principle of effective judicial protection and the rule of law.

Clearly, the number of Polish preliminary ruling requests alleging that the PIS judiciary acts violated the principles of judicial independence and effective judicial protection grew quite rapidly at the Court of Justice over the course of 11 months. This background suggests that the attempts of Polish courts to use the preliminary ruling mechanism and the reasons why they have chosen to do so represent a novel dimension in the academic discourse regarding the use of the preliminary ruling mechanism by national courts and the reasons that incentivise the judges to engage in dialogue with the Court of Justice. This *Article* aims to discuss the relevant preliminary questions referred by the Polish courts and contextualise them within various academic theories that attempt to explain the motivation behind the national courts' participation in the judicial dialogue with the Luxembourg Court.¹¹

This *Article* is structured as follows. First, the existing theories explaining the motives behind referring preliminary questions by national courts are briefly discussed. Next, the judiciary reforms introduced by the PIS government are addressed in more

¹¹ On judicial dialogue see for instance: E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue between the ECJ and National Court*, in *NoFo*, 2010, p. 7 et seq.; M. CLAES, M. DE VISSER, *Are You Networked Yet? On Dialogues in European Judicial Networks*, in *Utrecht Law Review*, 2012, p. 100 et seq.; 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.; 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.; D. KOCHENOV, M. VAN WOLFEREN, *Dialogical Rule of Law and the Breakdown of Dialogue in the EU*, in *EUI Working Papers*, no. 1, 2018; K. LEMMENS, *Protocol No 16 to the ECHR: Managing Backlog Through Complex Judicial Dialogue?*, in *European Constitutional Law Review*, 2019, p. 691 et seq.

detail. This elaboration is followed by an examination of the relevant preliminary questions referred by Polish courts to the Court of Justice before September 2019. Those references are subsequently assessed against the previously discussed theoretical streams. Finally, some conclusions are drawn. It is important to emphasise that the general topic of the judiciary reforms in Poland is subject to a constant and intense evolution. However, this topic comprises many interesting issues that pose questions of constitutional importance but are not directly relevant for the discussion at hand. In this respect, the political and media discourse surrounding the judicial reforms, the steps taken by the EU (and elsewhere) as a reaction to the PIS reforms, the (fierce) reaction of the Polish government to the aforementioned referral of preliminary questions, the later legislative changes to the original reforms, and the answers of the Court of Justice to the questions at hand, although absorbing and important, are only addressed to the extent necessary for some basic understanding of the contextual framework.

II. THEORETICAL FRAMEWORK: WHY JUDGES PARTICIPATE IN JUDICIAL DIALOGUE WITH THE CJEU

The motives underlying the participation of national courts in judicial dialogue with the Court of Justice have been subject to an absorbing and very comprehensive academic debate for several decades. Many distinct and competing theories exist that attempt to explain why national judges resort to the Court of Justice. Much of the relevant scholarship examines why judges appear reluctant to resort to this route or, put differently, the non-cooperative element of the judicial dialogue.¹² In addition, scholars have tried to explain cross-national variations in preliminary references.¹³ A global review of the relevant scholarship reveals that, on the one hand, scholars disagree on the motives underlying the referral of preliminary questions,¹⁴ and on the other hand, judicial behaviour in the context of the procedure might be affected by various legal and extra-legal factors.¹⁵ Scholars therefore point to several constitutional, institutional, procedural, cultural, political, and individual variables to explain the participation (or the lack thereof)

¹² See M. GLAVINA, *To Refer or Not to Refer, That Is the (Preliminary) Question: Exploring Factors Which Influence the Participation of National Judges in the Preliminary Ruling Procedure*, in *Croatian Yearbook of European Law of Policy*, 2020, available at www.cyelp.com, p. 3.

¹³ 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 et seq.

¹⁴ See M. GLAVINA, *To Refer or Not to Refer, That Is the (Preliminary) Question*, cit., pp. 2-3.

¹⁵ See U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure. In Search for a Mid-range Theory*, in B. DE WITTE, J. MAYORAL, U. JAREMBA, M. WIND, K. PODSTAWA (eds), *National Courts and EU Law. New Issues, Theories and Methods*, Cheltenham: Elgar, 2016, p. 49 et seq.; 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.

of national courts in engaging in judicial dialogue with the Court of Justice.¹⁶ Several Authors already provide an excellent analysis of the existent theories, thus rendering an extensive summary in this *Article* redundant and repetitive.¹⁷ Therefore, only the most relevant theories from the academic discourse on this topic will be reviewed below.

In general, scholars mainly suggest five explanations for national courts' participation in the processes of legal integration and judicial dialogue in the EU. These explanations are referred to as legalism, neo-realism, neo-functionalism, inter-court competition theory (seen as a sub-theory of neo-functionalism), and individual profiles theory.¹⁸ The legalists claim that the referral of preliminary questions is motivated by legal considerations – that is, the quality of the Court's reasoning and the fact that judges need to know how the law should be interpreted to apply it motivate judges to resort to the Court of Justice for clarification.¹⁹ Neo-realists suggest that national political concerns influence the involvement of courts with EU law, and, consequently, the preliminary ruling procedure. According to this theory, judges consider national political and economic interests to choose their approach towards the application of EU law or the use of the preliminary ruling procedure.²⁰

Neo-functionalism focuses on the interests and motivations of individual judges and other legal actors. It posits that the appearing before the CJEU provides different actors in the procedure with various (personal) incentives that determine whether they choose to participate in the processes of judicial dialogue with the CJEU. Hence, national judges

¹⁶ *Ibid.*

¹⁷ See *inter alia* Authors *supra* footnotes 12, 13 and 15. See also A.-M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context*, Oxford: Hart, 1998; S.A. NYIKOS, *The European Court of Justice and National Courts: Strategic Interaction within the EU Judicial Process*, 2000, www.semanticscholar.org; C.J. CARRUBBA, L. MURRAH, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, in *International Organization*, 2005, p. 399 *et seq.*; B. DE WITTE, J. MAYORAL, U. JAREMBA, M. WIND, K. PODSTAWA (eds), *National Courts and EU Law*, *cit.*, offers a more recent multidisciplinary analysis.

¹⁸ For more on judicial politics and relevant theories see for instance: M.L. VOLCANSEK, *Judicial Politics in Europe. An Impact Analysis*, New York-Berne-Frankfurt am Main: Peter Lang, 1986; J.H.H. WEILER, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, in *Journal of Common Market Studies*, 1993, p. 417 *et seq.*; H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU. Sunday Trading, Equal Treatment and Good Faith*, Cambridge: Cambridge University Press, 2005; T. SELCK, M. RHINARD, F.M. HÄGE, *The Evolution of European Legal Integration*, in *European Journal of Law and Economics*, 2007, p. 187 *et seq.*; M. WIND, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, in *Journal of Common Market Studies*, 2010, p. 1039 *et seq.*; S.A. NYIKOS, *The European Court of Justice and National Courts*, *cit.*

¹⁹ See M. CLAES, *The National Courts' Mandate in the European Constitution*, Oxford: Hart, 2006; A. ARNULL, *Judicial Dialogue in the European Union*, in J. DICKSON, P. ELEFThERiADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 109 *et seq.*

²⁰ For more see K. ALTER, *Explaining National Courts Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in A.-M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and National Courts*, *cit.*, p. 225 *et seq.*

choose to employ the preliminary ruling for various reasons that generally fall under the concept of “judicial empowerment”.²¹ The judicial empowerment stream focuses on extra-legal incentives, namely, “the extent to which judges work to enhance their own authority to control legal (and, therefore, policy) outcomes, and to reduce the control of other institutional actors, such as national executives, parliament, and other judges, on those same outcomes”.²² However, this notion of empowerment is broad, and the process can take different forms. In this sense, judges seek to employ the preliminary ruling to advance their own interests over those of the government or other courts.²³ Alter’s inter-court competition theory suggests that national judges use EU law and resort to the preliminary ruling to maximise their interests in the process of “bureaucratic struggles” between different levels of the judiciary.²⁴ In that sense, referring to the Court of Justice should be seen as a strategic action related to inter-court competition. Finally, a more recent theoretical stream arisen from empirical insights emphasises the role and impact of judges’ individual profiles on their participation in judicial dialogue with the Court. The proponents of this theory hypothesise, backed up by empirical data, that factors such as judges’ knowledge of EU law, experiences with applying it, and their attitudes towards the EU impact the way they use (or not) the preliminary ruling mechanism.²⁵ It also suggests that the operational context in which judges function can profoundly impact the way they apply EU law and resort to the preliminary ruling mechanism.²⁶

III. JUDICIARY REFORMS IN POLAND 2017-2018: BRIEF OVERVIEW

The “crusade against Polish courts and judges”²⁷ started soon after PIS took power in 2015. The new regime launched its “reforms” by first attacking the Constitutional Tribu-

²¹ J.H.H. WEILER, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1992, p. 510 *et seq.* For more recent discussion on the judicial empowerment theory see 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.*

²² A. STONE SWEET, T.L. BRUNELL, *The European Court and National Courts*, cit., p. 69.

²³ S.A. NYIKOS, *The European Court of Justice and National Courts*, cit., p. 9 *et seq.*

²⁴ K. ALTER, *National Courts Acceptance of European Court Jurisprudence*, cit., p. 234.

²⁵ T. NOWAK, F. AMTENBRINK, M. HERTOCH, 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; J.A. MAYORAL DIAZ-ASENSIO, *The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe*, Florence: European University Institute, 2013; U. JAREMBA, *National Judges as EU Law Judges: the Polish Civil Law System*, Leiden, Boston: Nijhoff, 2014; J.A. MAYORAL, U. JAREMBA, T. NOWAK, *Creating EU Law Judges, the Role of Generational Differences, Legal Education and Career Paths in National Judges. Assessment Regarding EU Law Knowledge*, in *Journal of European Public Policy*, 2014, p. 1120 *et seq.*; U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure*, cit.; U. JAREMBA, J.A. MAYORAL, *The Europeanization of National Judiciaries*, cit.

²⁶ See U. JAREMBA, *National Judges as EU Law Judges*, cit., p. 321 *et seq.*

²⁷ See S. BIERNAT, *The Rule of Law in Poland*, cit.

nal.²⁸ In 2017, after its capture of the Constitutional Tribunal²⁹, the government targeted ordinary courts and their judges. They chose three different paths for legal changes, altering the functioning of the National Council for the Judiciary³⁰ and amending the Act on the Supreme Court³¹ as well as the Law on Organization of Ordinary Courts.³²

The Council for the Judiciary, which is predominantly composed of judges,³³ is a constitutionally designated body with the power to nominate all candidates for judicial positions and propose them to the President.³⁴ The Council also fulfils other essential tasks such as safeguarding the independence of courts and judges,³⁵ referring questions on the constitutionality of normative acts regarding courts and judges to the Constitutional Tribunal, adopting a code of ethics governing the judicial profession, expressing opinions on drafts of normative acts concerning the judiciary,³⁶ selecting a disciplinary prosecutor for judges, and voicing opinions in the case of dismissal of the president of the court.³⁷ Importantly, the judicial members of the Council were, prior to the PIS reform, chosen by the judiciary itself.³⁸ The amended Act on National Council shifted the power to appoint its members from the judiciary to the Parliament, thus greatly strengthening its political influence over the process of appointment.³⁹ In fact, the new provisions provide the ruling party a decisive say on the composition of the Council, consequently greatly politicizing the process of judge nomination. In line with the amended act, Council's previous term of office was terminated in January 2018, and the Parliament started the process of appointing new members. As observed, the process was highly politicised and non-transparent.⁴⁰ The concerns over the vivid politicisation of the Council and its (lack of) independence from the legislature and executive were reflected in the action taken by the European

²⁸ See U. JAREMBA, *The Rule of the Majority vs. the Rule of Law*, cit.

²⁹ See W. SADURSKI, *How Democracy Dies (in Poland)*, cit., p. 17.

³⁰ The Law on the National Council for the Judiciary of 12 May 2011. That law was amended by the *Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* (Law amending the Law on the National Council for the Judiciary and certain other laws) of 8 December 2017 which entered into force on 17 January 2018.

³¹ Law amending the Law on the Supreme Court of 21 November 2018.

³² Law on the Organisation of the Ordinary Courts of 27 July 2001.

³³ Art. 187 stipulates that 15 of Council members are "chosen from amongst the judges". Next to 15 judges, the Council consists of 6 representatives of the Parliament, one representative of the President, Minister of Justice and Presidents of the Supreme Court and the National Administrative Court.

³⁴ Art. 179 of the Polish Constitution.

³⁵ *Ibid.*, Art. 186, para. 1.

³⁶ *Ibid.*, Art. 186, para. 2.

³⁷ Art. 3 of statute of 12 May 2011 on the National Council of the Judiciary.

³⁸ As such the right to choose the 15 members of the Council by the judiciary was not guaranteed by the Constitution.

³⁹ Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, 2019, www.hfhr.pl, p. 6.

⁴⁰ The Chancellery of Sejm refused to release the information on the list of judges supporting the candidates to the Council, see Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 5.

Network of Councils for the Judiciary, which on 17 September 2018 proposed a suspension of the Polish Council's membership in the Network, stripped it of its voting rights, and excluded it from participation in its activities.⁴¹

Next, the comprehensive amendment to the Act on the Supreme Court on 8 December 2017 lowered the retirement age of judges from 70 to 65 and consequently forced 27 out of 72 of the Supreme Court judges, including the President, to retirement. The possibility that Supreme Court judges could continue their service beyond the age of 65 was contained in the amendment but was subject to the submission of a statement indicating that the judge desired to continue his duties and his health allowed her or him to do so. This possibility was also subject to the consent of the President of Poland.⁴² Furthermore, the new law provided the President the power to freely decide, until 3 April 2019, whether to increase the number of Supreme Court judges. The Act also created two new chambers of the Supreme Court – the Disciplinary Chamber and the Chamber of the Extraordinary Control and Public Affairs. The judges sitting in these two new chambers would be appointed by the newly selected KRS.⁴³

On 24 September 2018, the European Commission brought an infringement action against Poland before the Court of Justice in relation to the amendment to the Act on the Supreme Court. The Commission considered that by, first, lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court up until 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges, Poland has infringed EU law, *i.e.* Art. 19, para. 1, TEU and Art. 47 of the Charter of Fundamental Rights of the European Union.⁴⁴ On 17 December 2018, the Court of Justice issued a final order imposing interim measures to stop the implementation of the Polish law on the Supreme Court. On 24 June 2019, the Court ruled that the law lowering the retirement age of judges of the Supreme Court, ran contrary to EU law and breached the fundamental doctrine of the irremovability of judges and, consequently, the principle of judicial independence.⁴⁵

⁴¹ It is a condition of European Networks of Council for the Judiciary (ENCJ) membership that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice; see www.encj.eu. See further ENCJ's website for their critical opinions concerning the judicial reforms in Poland: www.encj.eu.

⁴² In making his decision, the President of the Republic of Poland is not bound by any criteria and that decision is not subject to any form of judicial review.

⁴³ The Disciplinary Chamber is responsible for hearing the disciplinary proceedings in the case of judges of the Supreme Court and appeals against the decisions issued in the disciplinary proceedings of attorneys at law, solicitors and prosecutors. The Chamber of the Extraordinary Control and Public Affairs is responsible for *inter alia* hearings in the cases concerning extraordinary appeal and declaring the validity of the elections.

⁴⁴ Court of Justice, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*.

⁴⁵ Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)* [GC].

Finally, in July 2017, the Parliament adopted the Act on the Organization of the Ordinary Courts, which altered the process of appointing and dismissing the presidents of the courts making them dependent on the Ministry of Justice.⁴⁶ The presidents of the courts were henceforth appointed by the Minister of Justice without any consultation with the general assemblies of the judges in each court. The amendments broadened the opportunities for the Ministry of Justice to influence the working of ordinary courts. Within a short period of time, the posts of the courts' presidents were filled by candidates selected by the Ministry.⁴⁷ At the same time, a new model of disciplinary proceedings for judges was introduced in which judicial discipline is subject to the control of the Minister of Justice, now Prosecutor General as well. Prior to the changes, disciplinary proceedings were independent of the public authorities; now, the Minister of Justice endows disciplinary court judges with their duties and appoints and recalls the Disciplinary Commissioner of Ordinary Court Judges and his deputies. The Minister of Justice may request the initiation of proceedings against a selected judge. He may also appoint a special disciplinary commissioner for handling a disciplinary case against a judge. In certain cases, this commissioner may serve as a prosecutor in the case.⁴⁸ The objective of those reforms seems to be to place the system of penalising judges for disciplinary reasons under the control of the executive, in order to influence judges and their decisions and obtain tools for investigating and removing troublesome judges from the profession.⁴⁹ Onlookers have observed that these systemic reforms have been followed by many instances of disciplinary proceedings against judges and prosecutors who either criticised the judicial reforms introduced by the government or ruled on decisions undesirable from the government's perspective.⁵⁰ On 3 April 2019, the European Commission has launched a new infringement procedure against Poland due to this disciplinary regime. The Commission claimed that the regime undermined the judicial independence of Polish judges by failing to offer guarantees necessary to protect them from po-

⁴⁶ In a short period of time, the Minister replaced almost 150 presidents in the courts of every rank across the country, without providing any justification, see Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 6.

⁴⁷ As observed by Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 6, the entire process was conducted in a non-transparent way and based on irrelevant criteria. The Ministry of Justice was not bothered to conduct any open consultations with the judicial community on the appointment of new presidents. As informed by media outlets the presidents in office were dismissed from office in a very short time by means of receiving faxed letters, see katowice.wyborcza.pl. In the end, more than 150 presidents and vice presidents of courts were replaced including presidents of the largest court in Poland.

⁴⁸ See Komitet Obrony Sprawiedliwości, *A Country that Punishes*, cit., p. 6.

⁴⁹ *Ibid.*

⁵⁰ Helsinki Foundation for Human Rights, *The Situation of the Judiciary in Poland*, cit., p. 7; Komitet Obrony Sprawiedliwości, *A Country that Punishes*, cit., p. 10. In 2019 the Helsinki Foundation for Human Rights published a list of recent disciplinary proceedings against judges and prosecutors: www.hfhr.pl. See also Amnesty International, *Polska: wolne sądy, wolni ludzie*, 2019, amnesty.org.pl, where 10 cases of disciplinary proceedings against judges are discussed.

litical control.⁵¹ These charges were followed by a reasoned opinion released on 17 July 2019 and, finally, a case filed against Poland by the Commission in the Court of Justice on 25 October 2019.⁵²

IV. PRELIMINARY QUESTIONS AS REACTION OF POLISH COURTS TO THE JUDICIARY REFORMS

The relevant preliminary questions concerning PIS judiciary reforms evaluated against the principle of judicial independence and effective judicial protection commenced on 9 August 2018 with six preliminary questions submitted by the Supreme Court.⁵³ The questions concerned the position of the Polish judiciary after the amendments introduced by the Act on the Supreme Court that allegedly undermined the principles of judicial independence and impartiality. The case appeared before the Supreme Court as the result of the proceedings started by the Polish Insurance Institution against an individual.⁵⁴ However, the relevant preliminary questions were in no way linked to the substantive merits of this main case. Moreover, the Supreme Court formulated its preliminary questions even before proceeding with its substantive examination of the main case. At the chamber hearing, the main case was heard by seven judges, two of which had been forced to retire as a consequence of the new regime. The question standing central in this preliminary question was whether the forced retirement of Supreme Court judges is compatible with EU law. More precisely, the Supreme Court sought to answer whether the new rules on retirement are compatible with EU primary law, that is, Art. 19, para. 1, TEU, in conjunction with Art. 4, para. 3, TEU, Art. 2 TEU, Art. 267, para. 3, TFEU and Art. 47 of the Charter, as well as EU secondary law, that is, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Simultaneously, the Supreme Court suspended the application of the controversial provisions of the amended Act. The Court of Justice agreed to consider the questions through an expedited procedure due to the importance of the issues raised, as well as the many uncertainties on the functioning of the Supreme Court and the application of Art. 267 TFEU, which could not properly work without independent national courts, created by the new laws.⁵⁵

Only eight days after referring the above questions, the Supreme Court again resorted to the Court of Justice. The new questions were formulated from an appeal case

⁵¹ Commission, Press release of 3 April 2019.

⁵² Court of Justice, case C-791/19 brought on 25 October 2019, *Commission v. Poland*.

⁵³ Court of Justice, case C-522/18, *Zakład Ubezpieczeń Społecznych*.

⁵⁴ The issue concerned the social insurance contributions in a situation when a Polish person has a company in Slovakia or Czech Republic. The main proceedings related to the coordination of social security systems as regulated in Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁵⁵ Court of Justice, order of 26 September 2018, case C-522/18, *Zakład Ubezpieczeń Społecznych*.

lodged by a judge of the same court, who had been forbidden by the Council to continue his service in the judiciary.⁵⁶ The Supreme Court essentially sought to answer whether Art. 47 of the Charter, in conjunction with Art. 9, para. 1, of Directive 2000/78, should be interpreted as meaning that the Supreme Court should refuse to apply a national law that claims jurisdiction over a unit of that court that cannot operate due to a failure to appoint the judges adjudicating within it.

Shortly after, on 3 September 2018, the regional court in Łódź was called to rule in a case arising between the municipality of Łowicz and the national Treasury. According to the plaintiff, the municipality did not receive adequate subsidies from the state to perform its activities.⁵⁷ In this case's context, the regional court judge chose to stay the proceedings and refer the preliminary questions to the Court of Justice.⁵⁸ Namely, the judge asked the Court to assess whether the new disciplinary proceedings contradicted the principle of judicial independence and the principle of effective judicial protection in general and Art. 19, para. 1, TEU in particular. The judge expressed fears that she would face disciplinary sanctions if the case between the state and the local municipality were decided in favour of the latter. Clearly, the preliminary questions were, once again, not linked to the subject of the main proceedings; rather, they concerned a much more fundamental issue of judicial independence. Just two days later, another preliminary question nearly identical to the one above was filed by the Regional Court in Warsaw in a criminal proceeding.⁵⁹ The Warsaw judge considered the possibility of applying a milder penalty to members of organised crime responsible for assassinations and kidnappings. However, the referring judge expressed concerns that the application of a milder punishment might result in disciplinary proceedings initiated against him by the Ministry of Justice. The judge, similar to his colleague in Łódź, felt concerned about political influence on the proceedings and the possibility that the new disciplinary regime could be used to assert political control over the decisions of the courts. The Court of Justice later decided to combine both cases.⁶⁰

On 20 September 2018, the Labour and Social Insurance Chamber of the Supreme Court referred preliminary questions asking, essentially, whether the newly created Disciplinary Chamber of the Supreme Court represents an independent court or tribunal as prescribed by EU law, or, more precisely, whether it is compatible with Art. 267 TFEU,

⁵⁶ Court of Justice, request for a preliminary ruling lodged on 17 August 2018, case C-537/18, *Krajowa Rada Sądownictwa*.

⁵⁷ In this case it was quite likely that the ruling would be disadvantageous for the Treasury.

⁵⁸ Court of Justice, request for a preliminary ruling lodged on 3 September 2018, case C-558/18, *Miasto Łowicz*.

⁵⁹ Court of Justice, request for a preliminary ruling lodged on 5 September 2018, case C-563/18, *Prokurator Generalny (Régime disciplinaire concernant les magistrats)*.

⁶⁰ The Court of Justice rejected the request for the expedited procedure on 1 October 2018.

Arts 2 and 19, para. 1, TEU and Art. 47 of the Charter.⁶¹ The question was motivated by the fact that the members of the new chamber are chosen by the new Council, whose independence could no longer be guaranteed due to the PIS reforms. In the case underlying the reference, a judge from the Supreme Administrative Court who turned 65 before the new Act on the Supreme Court became effective, submitted a declaration indicating his wish to continue in his office. On 27 July 2018, the new KRS issued a negative opinion to that request. On 10 August 2018, the judge brought an action before the Supreme Court challenging this opinion. He contended that his forced retirement at 65 infringed Art. 19, para. 1, TEU, Art. 47 of the Charter and Directive 2000/78.⁶² Clearly, the main case concerned the issue of a mandatory retirement age, as introduced by the judiciary reforms. However, the Supreme Court used this chance to refer an additional question about the legality of the Disciplinary Chamber when evaluated against the principle of judicial independence.⁶³

In the meantime, on 25 September 2018, the Polish Insurance Institution, allegedly under political pressure from the government,⁶⁴ withdrew its original claim before the Supreme Court, thus terminating the proceedings which had induced the preliminary questions from 9 August. Since the original case no longer existed, the Supreme Court was expected to withdraw the preliminary questions referred in case C-522/18. Instead, on 3 October 2018 the Labour and Social Insurance Chamber of the Supreme Court referred five further preliminary questions in two other cases.⁶⁵ This occurred just a day after the European Commission brought an infringement action against Poland due to their mandatory judicial retirement age.⁶⁶ Those cases concerned two judges of the Supreme Court who had also turned 65 before the new regime became effective but did not submit declarations indicating their wish to continue. Once informed that they had been forcibly retired as of 4 July 2018, both judges brought actions before the Supreme Court against the President of the Republic for a declaration that their employment relationship as a judge had not been transformed into an employment relationship as a retired judge. Both requests for a preliminary ruling concerned the interpretation of Arts 2 and 19, para. 1, TEU, Art. 267 TFEU, Art. 47 of the Charter and Art. 9, para. 1, of

⁶¹ Court of Justice, request for a preliminary ruling lodged in case C-585/18, later joined by the Court with cases C-624/18 and case C-625/18, see further.

⁶² See (extensive) decision of the Supreme Court of 19 September 2018 to refer preliminary questions, III PO 8/18, www.sn.pl.

⁶³ For the background of the cases see S. PLATON, *Writing Between the Lines. The Preliminary Ruling of the CJEU on the Independence of the Disciplinary Chamber of the Polish Supreme Court*, in *EU Law Analysis*, 26 November 2019, eulawanalysis.blogspot.com.

⁶⁴ As observed by *Gazeta Wyborcza*, wyborcza.pl.

⁶⁵ Court of Justice, joined cases C-624/18 and C-625/18, *CP, DO v. Sąd Najwyższy*. Those two cases were later joined with case C-585/18, *A.K. v. Krajowa Rada Sądownictwa*. The Court of Justice also granted an expedited procedure on 26 November 2018.

⁶⁶ *Commission v. Poland (Indépendance de la Cour suprême)*, cit.

Directive 2000/78. However, in these cases, similarly to case C-585/18, the Supreme Court cast doubts on the circumstances in which the new judges of the Disciplinary Chamber would be appointed. In particular, they raised the question of whether their members would be sufficiently independent and impartial. The CJEU later decided to combine the three cases.⁶⁷

On 26 October 2018, the Supreme Court referred another preliminary question that considered whether the forced retirement age of Supreme Court judges violated the principle of judicial independence. Those questions were virtually identical to those referred in case C-522/18.⁶⁸ The main cassation case heard by the Supreme Court regarded the correctness of the application of national procedural law implementing the EU Regulation on jurisdiction and recognition of judicial decisions and their enforcement in civil and commercial matters, as well as the EU Directive concerning the posting of workers under the provision of services.⁶⁹ As in some of the aforementioned cases, the preliminary questions referred to the Court of Justice were unrelated to the main case under consideration. Furthermore, similarly to before, the chamber meant to hear the main case comprised one judge who had been forced to retire. The Supreme Court argued that referring similar preliminary questions to the Court of Justice was justified by the fundamental importance of the issue to the maintenance of the EU as a community based on the rule of law. The Supreme Court also observed that political authorities had undertaken various activities aimed at preventing the CJEU from interpreting EU law provisions on the independence of judges in case C-585/18.⁷⁰

On 21 November 2018, the Polish Parliament amended the Supreme Court Act reversing the forced retirement of Supreme Court judges. The amendment reinstated the previous retirement age for judges who performed their duties prior the reform taking effect. Consequently, Supreme Court judges who had retired in accordance with the amended Act were reinstated in the positions they had held on the day of the adoption of the amendment. Only a few hours after the amendment was passed, the Supreme Administrative Court (SAC) decided to refer two extensive preliminary questions concerning the just amended Act on the Supreme Court in the light of the rule of law and the principle of effective judicial protection.⁷¹ The cases considered by the SAC were initiated by candidates for the vacant judges positions at the Supreme Court who had been informed by the new Council for the Judiciary that their requests to be appointed

⁶⁷ Court of Justice, judgment of 19 November 2019, joined cases C-585/18, C- 624/18 and C- 625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC].

⁶⁸ Court of Justice, case C-668/18, *Uniparst*. The Court of Justice agreed to expedite the procedure for the same reasons as in case C-522/18.

⁶⁹ Polish Supreme Court, decision of 3 October 2018, II PK 153/17, www.sn.pl.

⁷⁰ *Ibid.*, p. 5 *et seq.*

⁷¹ Court of Justice, request for preliminary ruling lodged on 28 December 2018, case C-824/18, *A.B. and Others*.

to a post of a Supreme Court judge would not be presented to the President of Poland. The five applicants decided to challenge those resolutions before the SAC.⁷² However, according to the SAC, the results of such an appellate proceeding could not be considered an effective legal remedy.⁷³ Considering the situation and relevant standards of EU law, the Supreme Administrative Court decided to refer preliminary questions to the Court of Justice on the interpretation of the right to effective remedy and the legality of the new Council for the Judiciary. The extensive and somewhat tortuous preliminary questions related to the interpretation of Arts 2, 4, para. 3, 6, para. 1, 19, para. 1, TEU, Art. 47 of the Charter, Art. 9, para. 1, of Directive 2000/78 and Art. 267 TFEU.

On 26 June 2019, the Supreme Court lodged a preliminary question regarding the appointment of a judge and possible breach of the principle of judicial independence and effective judicial protection.⁷⁴ The underlying main proceeding concerned a judge who, by the decision of a president of a court, had been transferred to another chamber in the same court. The judge appealed this decision at the Council for the Judiciary but the Council dismissed his appeal and discontinued the proceeding. This decision was in turn appealed at the Supreme Court. At this point, the Supreme Court began to doubt whether the newly created Chamber of the Extraordinary Control and Public Affairs, which had been considered competent to hear the case, fulfilled the criteria of an independent court, upon considering that its member(s) were appointed by the new Council. The referred question boiled down to the issue of whether such a single-person court that had been appointed in breach of national law on judicial appointments could be considered an independent and impartial court within the meaning of EU law.

On 3 July 2019, the Supreme Court referred another comprehensive set of questions regarding the position of a judge in light of the principle of effective judicial protection and the rule of law.⁷⁵ The case was initiated before the Supreme Court by a first instance court judge who had been disciplined in the new disciplinary regime. This judge brought action to establish the lack of service relationship of the President of the Supreme Court Disciplinary Chamber, who had appointed a disciplinary court of first instance in her case. Determining that the absence of such a service relationship could undermine the very act that had created a disciplinary court, the Labour and Social Security Chamber hearing the main claim decided to refer five extensive preliminary questions regarding the admissibility, conditions and mechanisms for examining the status of a judge (such as the president

⁷² See decision of SAC of 21 November 2018, II GOK 2/18, *orzeczenia.nsa.gov.pl*.

⁷³ In view of the Supreme Administrative Court, challenging a Council resolution does not stop an appointment for a Supreme Court judge and this, in turn, affects the efficiency of the challenge and prevents the carrying out by the Court of any effective control of the course of the proceedings for the vacant post at the Supreme Court. See decision II GOK 2/18, *cit*.

⁷⁴ Court of Justice, request for preliminary ruling lodged on 26 June 2019, case C-487/19, *W.Ż.* Case III CZP 25/19, *www.sn.pl*.

⁷⁵ Court of Justice, request for preliminary ruling, case C-508/19, *Prokurator Generalny*.

of disciplinary chamber) as well as the consequences of an incorrect appointment of a judge for the binding force of her judgments. Similar to their predecessors, the questions were considered within the framework of Art. 19, para. 1, Arts 2 and 4, para. 3, TEU and Art. 47 of the Charter, in conjunction with Art. 267 TFEU.

V. DEFENDING THE RULE OF LAW OR REALITY BASED SELF-DEFENSE?

Disagreeing with the claim that the judiciary reforms introduced by PIS breach the fundamental guarantees of the rule of law is a difficult task. These reforms aim to undermine the position of the judiciary and they notably disregard the principle of judicial independence and impartiality.⁷⁶ As observed by Sadurski, the cumulative effects of the reforms “amount to the full capture of the judiciary by the ruling party”.⁷⁷ The severe and fast-moving interference of the PIS government with the functioning of Polish courts and the architecture of judicial protection could not be left unchallenged. However, time has revealed that neither widespread public protests⁷⁸ nor the EU and other international fora denouncing Poland could persuade the government to divert from the chosen route. In the face of rapid, progressive and nearly irreversible changes to the judiciary system and the impotence showed by the EU institutions, Poland’s judges decided to take matters into their own hands and sought help at the Court of Justice by referring preliminary questions on their positions that are, at the same time, of fundamental importance for the legal system of the EU.

The previously discussed series of preliminary questions raised by various Polish courts appears to write a new narrative in the long story of judicial dialogue in the EU. The questions also illuminate the possible motives and incentives behind national judges’ participation in this dialogue. Undoubtedly, this intense involvement of the Polish judges with the Court of Justice represents a novel and peculiar example of judicial activism. Clearly, the anti-democratic course taken by the PIS regime and the unprecedented attack on the judiciary, checks and balances and the integrity of the entire judicial system incentivised cooperation with the CJEU. To better understand this new development, a few elements of the respective preliminary references must be emphasised.

Firstly, most of the discussed questions originate from the Supreme Court, which had been most affected by the PIS reforms. The extent of activism of ordinary courts in that regard is somewhat less impressive. However, as has been suggested, the possibility of being sanctioned for referring a preliminary question by means of the (contested) disciplinary proceedings might influence the willingness of ordinary courts judges to

⁷⁶ S. BIERNAT, *The Rule of Law in Poland*, cit.

⁷⁷ W. SADURSKI, *How Democracy Dies (in Poland)*, cit., p. 40.

⁷⁸ M. MATCZAK, *Poland’s Constitutional Crisis*, cit., p. 4.

reach for the procedure.⁷⁹ Ironically, the events following the preliminary questions from cases C-558/18 and C-563/18 indeed triggered disciplinary action against the judges in both cases on account of their preliminary questions.⁸⁰

Secondly, some of the referred questions did not demonstrate a connection to the substantive action in the main national cases which were subject to courts' considerations. According to established case law, the Court of Justice may refuse to rule on a referred question when the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, when the questions raised appear irrelevant to the resolution of the dispute or where the problem is hypothetical.⁸¹ In that sense, the admissibility of some of the aforementioned questions could be disputed, as in fact happened *inter alia* in case C-522/18.⁸² This problem was also illuminated by Advocate General Tanchev in his opinion in joined cases C-558/18 and C-563/18. Tanchev concluded that the requests for a preliminary ruling in the respective cases are inadmissible as the referred questions concerned general or hypothetical problems.⁸³ While admitting that judges have the right to refer preliminary questions about judicial independence *vis-à-vis* the new disciplinary system, the AG nevertheless concluded that both judges did not provide sufficient explanations linking the new disciplinary regime and the second paragraph of Art. 19, para. 1, TEU.⁸⁴ The judges must have been aware that this admissibility issue could have played a role in their references. Despite the risk of their cases being found inadmissible, they still decided to approach the Court. These actions emphasise their determination in the face of the PIS reforms.

Thirdly, quite strikingly the questions emerged from situations surrounding a specific judge (or judges). The two questions referred in cases C-558/18 and C-563/18 constitute perhaps the most distinct examples in that regard.⁸⁵ These cases underscore the personal motivations of judges to have their questions being heard by the Court of Justice. Fourth, some of the questions do not differ from ones previously asked by the same court. This fact, again, seems to stress the determination of the courts to ensure

⁷⁹ See K. PODSTAWA, *Living on the Edge – How the Poles Hang in there whilst the Court Deliberates*, in *Verfassungsblog*, 31 May 2019, verfassungsblog.de.

⁸⁰ See L. PECH, P. WACHOWIEC, *1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)*, in *Verfassungsblog*, 17 January 2019, verfassungsblog.de.

⁸¹ See Court of Justice, judgment of 11 March 1980, case 104/79, *Foglia v. Novello*; judgment of 16 December 1981, case 244/80, *Foglia v. Novello*; judgment of 17 May 1994, case C-18/93, *Corsica Ferries*.

⁸² For further analysis of the referred questions and his arguments why the questions are admissible, see S. BIERNAT, *Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after All*, in *Verfassungsblog*, 23 August 2018, verfassungsblog.de.

⁸³ Opinion of AG Tanchev delivered on 24 September 2019, joined cases C-558/18 and C-563/18, *Miasto Łowicz*, para. 4.

⁸⁴ *Ibid.*, para 5.

⁸⁵ In fact, the names of those judges who referred both preliminary questions are even directly mentioned in the opinion of AG Tanchev.

these questions are heard and answered by the Court of Justice but can also be seen as an attempt to draw more attention to the deteriorating situation of the Polish judiciary.

Finally, most of the referred questions are comprehensive but all of them place the contested Polish laws in the context of fundamental provisions of EU primary law, that is, Arts 2 and 19 TEU, Art. 47 of the Charter and Art. 267 TFEU. In that regard, the preliminary questions are not only well considered but also extensive and quite boldly formulated. By requesting the CJEU to express its view on the EU standards regarding the rule of law, the right to effective judicial protection, and the principle of judicial independence, the concerned courts consciously and deliberately placed the discussion in the context of the vital principles underpinning the entire EU legal system. Simultaneously, these all-embracing questions created a unique opportunity for the Court of Justice to express its views on and advance the protection of EU core values and its system of judicial protection in general.

Taking all these elements into consideration, it can be proposed that the judicial activism represented by the Polish courts and the possible motives behind their preliminary questions can be viewed as linked to a strategic action – that is, they represent (determined) attempts at self-protection in the face of a real and immediate threat and a risk of instant harm.⁸⁶ Also, one would agree with a thesis that the preliminary questions can be perceived as a case of judicial empowerment, or “the extent to which judges work to enhance their own authority to control legal (and, therefore, policy) outcomes, and to reduce the control of other institutional actors, such as national executives, parliament, and other judges, on those same outcomes”.⁸⁷ This *Article* illustrates, however, that the Polish judges resorted to the mechanism not to *enhance* but to *preserve* their authority. In the end, they aimed to impair the attempts of the legislative and executive actors to take control of the judiciary. In that sense, the preliminary questions represent a vivid example of the desire to protect key elements of the rule of law, such as independence and impartiality of the judiciary and the right to a fair trial and effective judicial protection. At the same time, they also aim to defend the judiciary's own place in the legal system and, ultimately, to secure the position of specific judges serving at the Supreme Court and other courts.

VI. CONCLUSIONS

As prior studies have observed, while the various theories that aim to explain the reasons why national courts participate in the process of judicial dialogue with the Court of Justice provide many valuable explanations of judicial behaviour, none seem to offer a

⁸⁶ The term of “judicial self-defence” is borrowed from T.T. KONCEWICZ, *Unconstitutional Capture and Constitutional Recapture. Of the Rule of Law, Separation of Powers and Judicial Promises*, in *Jean Monnet Working Papers*, no. 3, 2017, p. 41.

⁸⁷ A. STONE SWEET, T.L. BRUNELL, *The European Court and National Courts*, cit., p. 69.

full and exhaustive explanation of this phenomenon.⁸⁸ An onlooker can only agree with Arnulf, who argues that understanding what prompts national judges to refer to the Court of Justice clearly requires legal as well as political and other factors to be considered.⁸⁹ This *Article* indeed supports the argument that the story of judicial dialogue is not only a very complex one but also an evolving one that is, new reasons and factors may appear that motivate the national courts to refer preliminary questions to the Court of Justice. This *Article* also reaffirms the claim that the motivations behind preliminary questions might be very much context related.

This *Article* illustrates a new chapter in the story of judicial cooperation in the EU that can be viewed from either a negative or positive angle. Sadly, the preliminary questions of interest reveal the dramatic derailment of one of the EU's Member States and paint a disturbing picture of a failing democracy and integral national institutions in distress. The preliminary questions referred to the Court of Justice by the Polish judges touch upon the very fundamental EU values such as the rule of law, democracy, independent courts, and the right to a fair trial, which underlie the entire system of judicial protection in the EU. They also represent a desperate cry for help and illustrate that national judges are prepared to exploit different paths of redress. Sadly, the discussion in this *Article* also underscores the impotent reaction of the EU to the democratic backsliding of one of its members and the lack of effective EU mechanisms capable of enforcing the rule of law. On positive note, the disturbing events in Poland clearly incentivised some Polish judges to become truly active members of the European judicial community and genuine co-creators of the supranational legal order, particularly if we consider the fundamental values at the centre of the discussed preliminary questions. However, though it is fascinating and leaves much room for further academic analysis, this particular example of judicial activism will hopefully remain a unique example in the process of European Union integration.

On a final note, it must be emphasised that the story of judicial empowerment and self-defence, that is pictured in this *Article* remains incomplete. To fully understand the factors that motivated the judges to cooperate with the Court of Justice, empirical investigation of the reasons would be necessary. However, such an exercise seems too involved and intricate from both methodological and ethical perspective, at least for the time being.

⁸⁸ U. JAREMBA, *Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure*, cit., p. 66.

⁸⁹ A. ARNULL, *Judicial Dialogue in the European Union*, cit., p. 123.



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

ACTIVE OR PASSIVE: THE NATIONAL JUDGES' EXPRESSION OF OPINIONS IN THE PRELIMINARY REFERENCE PROCEDURE

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TABLE OF CONTENTS: I. Introduction. – II. National court opinion in the preliminary reference procedure. – III. Methods and material. – IV. Results. – IV.1. Active courts: motivations for expression opinions. – IV.2. Passive courts: motivations for not expressing opinions. – V. Passive high court judges? – VI. Concluding discussion.

ABSTRACT: What motivates national judges to be either active in the preliminary reference procedure by expressing opinions in the requests they send to the Court of Justice or passive by not voicing their views? This *Article* sheds light on how national judges perceive the possibility of framing the cases they refer to the Court, for instance, by expressing an opinion in defence of the challenged national law. Based on interviews with Swedish judges, this *Article* shows that the respondents express opinions to provide the Court with information and to influence the development of EU law. The *Article* also uncovers what motivates national judges *not* to express opinions. These three previously untheorised motivations are: 1) protecting one's reputation, 2) respecting the division of competences between the Court and national courts and 3) upholding the impartiality of the courts. Furthermore, the findings indicate that high court judges in particular are opposed to the inclusion of opinions in a request. In contrast, most of the interviewed lower court judges view the inclusion of opinions in the requests as practically mandatory. This *Article* proposes that this difference in attitudes towards opinions between high and low court judges originate from variations in professional norms regarding what constitutes appropriate behaviour.

KEYWORDS: preliminary reference procedure – national court opinion – Court of Justice – judicial dialogue – EU legal integration – active and passive courts.

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I. INTRODUCTION

The dominant view in the literature on European legal integration is that national courts play a pivotal role in ensuring the enforcement of EU law, and they continue to be the Court of Justice's main interlocutors.¹ The Court and the national courts are in a constant dialogue with each other within the preliminary reference procedure (Art. 267 TFEU). This procedure is the means by which the Court has been able to establish important principles of the EU's constitutional system such as the supremacy of EU law. However, the scholarly debate regarding how and why national courts engage in the preliminary reference procedure is far from resolved.² Whether or the extent to which national courts take part in the EU legal dialogue and loyally refer cases to the Court of Justice are premised upon a question of whether national courts seek to be *active co-producers* of EU legal norms in the preliminary reference procedure.³ By being active, national courts take part in constructing the European constitution.⁴ In contrast, if national courts do not engage in shaping EU legal development, it means that they leave the Court of Justice to apply EU law as it sees fit.⁵ Moreover, if courts from only a few Member States introduce their constitutional traditions before the Court while other national courts remain silent, the pluralistic European constitutional dialogue is likely to be undermined.⁶

An important aspect of how national courts engage in the preliminary reference procedure is whether they take advantage of the opportunity to express opinions on how a legal dispute they refer to the Court of Justice should be resolved. Such opinions have been described as a way for national courts to influence the course of EU legal integration.⁷ For instance, a national court may express that it finds a national provision to be incompatible

¹ E.g. A.-M. SLAUGHTER, *A Typology of Transjudicial Communication*, in *University of Richmond Law Review*, 1994, p. 99 et seq.; J. WEILER, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1994, p. 510 et seq.; W. MATTLI, A.-M. SLAUGHTER, *Revisiting the European Court of Justice*, in *International Organization*, 1998, p. 177 et seq.; K.J. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press, 2001, p.34 et seq.; A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2007, p. 121 et seq.; G. DAVIES, *Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 76 et seq.

² J. KROMMENDIJK, *It Takes Two to Tango. The Preliminary Reference Dance Between the Court of Justice of the European Union and National Courts: An Introduction*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 745 et seq. .

³ J.E. RYTTER, M. WIND, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, in *International Journal of Constitutional Law*, 2011, p. 470 et seq.

⁴ M. CARTABIA, *Europe and Rights: Taking Dialogue Seriously*, in *European Constitutional Law Review*, 2009, p. 25.

⁵ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit., p. 500.

⁶ M. CARTABIA, *Europe and Rights*, cit., p. 25 et seq.

⁷ S.A. NIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process—Stage 1: National Court Preemptive Opinions*, in *European Journal of Political Research*, 2006, p. 531.

with EU law.⁸ By expressing opinions, national courts can be understood as actively engaging in both a dialogue with the Court and the shaping of EU legal norms. Conversely, if national courts refrain from including opinions in their referrals, they leave the stage open for the Court to apply EU law, effectively becoming passive consumers of EU law.

While significant steps have been taken to investigate the occurrence and content of national court opinions⁹ and how the Court of Justice responds to those opinions,¹⁰ little is known about how national judges perceive the practise of including their views in requests for preliminary rulings. For instance, the issue of what motivates national judges to include opinions in the request for preliminary rulings has not yet been empirically examined. However, answering such questions is necessary for understanding the national courts' dialogue with the Court and their role in the EU legal system. To address this gap in the previous research and to shed new light on the discussion regarding the extent to which national courts are active in the preliminary reference procedure, this *Article* explores what motivates national judges to either express opinions in the requests for preliminary rulings or refrain from doing so.

Drawing upon interviews with 20 Swedish judges, the findings show that although some judges view opinions as being formally required and a means to influence the course of EU law, the majority is opposed to the practise of expressing opinions in referrals. According to the results, national judges are hesitant to voice opinions because they believe that such opinions are inappropriate and undermine the impartiality of the courts. Moreover, the results suggest that high court judges in particular find the expression of opinions to be irreconcilable with the overarching principle of judicial impartiality and the division of competences between the national courts and the Court of Justice. This *Article* proposes that this difference in attitudes towards opinions between high and low court judges originate from variations in professional norms.

The remainder of this *Article* is organised as follows. Section II presents the previous research regarding why national courts express opinions in requests for preliminary rulings. Section III describes the materials and methods. Section IV presents the empirical findings regarding what motivates national judges to either express opinions in requests for preliminary rulings or refrain from stating their views. Section V develops a theoretical explanation for the difference in attitudes between lower courts and courts

⁸ K. LEIJON, *National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?*, in *West European Politics*, 2020, p. 13.

⁹ *Ibid.* p. 1 *et seq.*; S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 527 *et seq.*

¹⁰ 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. 122 *et seq.*; A. WALLERMAN, *Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example*, in M. DERLÉN, J. LINDHOLM (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, Oxford: Hart, 2018, p. 153 *et seq.*

of final instance. Section VI discusses the implications of the findings for the functioning of the judicial dialogue between the Court of Justice and the national courts and the debate about active and passive national judges in the EU legal system.

II. NATIONAL COURT OPINIONS IN THE PRELIMINARY REFERENCE PROCEDURE

The dialogue between the Court of Justice and the national courts in the preliminary reference procedure includes many different aspects. The most well-studied aspect of the procedure is the extent to which national courts initiate a dialogue by referring cases to the Court and asking questions regarding EU law.¹¹ However, *how* national courts initiate the dialogue varies: do national courts, or do they not, provide their own answers to the questions they ask the Court? According to the formal recommendations, when drafting a request for a preliminary ruling, a national court may express an opinion regarding how it believes EU law should be interpreted and how the legal case at hand should be resolved.¹²

Including opinions in the request for a preliminary ruling is allowed but not mandatory,¹³ which raises the question of why national courts spend time formulating opinions. Drawing upon previous research, two main explanations can be discerned. First, the expression of opinions can be understood as a way for national courts to share valuable information with the Court of Justice.¹⁴ Cartabia emphasises that the preliminary reference procedure can be “a tool in bringing traditions, experience, reasoning and different points of view before the Court of Justice”.¹⁵ This type of information sharing becomes important because the Court is said to lack knowledge about the legal particularities of each Member State, which leads it to deliver rulings that are insensitive to the

¹¹ J. WEILER, *A Quiet Revolution*, cit.; A.S. SWEET, T.L. BRUNELL, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, in *Journal of European Public Policy*, 1998, p. 66 et seq.; M. BROBERG, N. FENGER, *Variations in Member States’ Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?*, in *European Law Journal*, 2013, p. 488 et seq.; A. DYEVE, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?*, in *European Constitutional Law Review*, 2013, p. 139 et seq.; A. DYEVE, 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. 1 et seq.

¹² E.g., F.G. JACOBS, *Judicial Dialogue and the Cross-fertilization of Legal Systems: The European Court of Justice*, in *Texas International Law Journal*, 2003, p. 547 et seq.; S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit.; A. ROSAS, *The European Court of Justice in Context*, cit., p. 126.

¹³ CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para. 18: “The referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling”.

¹⁴ F. RAMOS ROMEU, *Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior*, in *Global Jurist Frontiers*, 2002, p. 31.

¹⁵ M. CARTABIA, *Europe and Rights*, cit., p. 25.

Member States' legal and political traditions.¹⁶ In a worst-case scenario, the rulings of the Court of Justice may even have a disruptive effect on a national legal system.¹⁷ National court opinions have the potential to alleviate this problem. By stating their views, national judges may provide the Court with a better understanding of the circumstances of the referred case and the national legal context,¹⁸ thereby giving the Court an opportunity to show respect for national constitutional traditions.

Others believe that the national courts' expression of opinions is not merely about providing the Court of Justice with essential information. Instead, the second explanation builds on the assumption that opinions are intended to directly steer the course of EU legal integration. Nyikos describes the opinions as rhetorical weapons that national courts use to influence the Court's understanding of the legal questions referred and, by extension, its final ruling.¹⁹ Previous research has theorised that the Court sometimes takes the national courts' opinions into account when deciding cases because it wants to mollify the national courts and thereby ensure that they continue to request preliminary rulings.²⁰ The EU legal system is dependent on the willingness of national courts to refer cases to the Court. National courts, in particular constitutional courts, have at times refused to refer cases to the Court when they disapprove of the interpretations made by the supranational court.²¹ The Court is therefore well aware of the need to accommodate the views of national courts. Similarly, as stressed by Wallerman-Ghavanini (in this Special Section),²² the Court wishes not to upset the national courts and undermine their trust by delivering judgments that the referring court finds problematic.

Regarding the actual content of the opinions, national courts have been found to express support for either a national law (or decision) or for EU law.²³ By expressing support for EU law, *i.e.*, stating that they consider a national policy to be incompatible with EU law, national courts signal to the Court that an expansion of the EU legal scope is acceptable.

¹⁶ F.W. SCHARPF, *Legitimacy in the Multilevel European Polity*, in *European Political Science Review*, 2009, p. 192; D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 471.

¹⁷ K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 48; R. DEHOUSSE, *The European Court of Justice: The Politics of Judicial Integration*, Basingstoke: Macmillan, 1998, p. 173.

¹⁸ F.G. JACOBS, *Judicial Dialogue and the Cross-fertilization of Legal Systems*, cit., p. 548; A. ROSAS, *The European Court of Justice in Context*, cit., p. 126; A.-M. SLAUGHTER, *A Typology of Transjudicial Communication*, cit., p. 101.

¹⁹ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 530.

²⁰ *Ibid.*, p. 531.

²¹ K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 61 et seq.

²² A. WALLERMAN GHAVANINI, *Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 887 et seq.

²³ K. LEIJON, C. KARLSSON, *Nationella domstolar som politiska aktörer: Främjare av rättslig integration eller försvarare av nationella intressen?*, in *Statsvetenskaplig Tidskrift*, 2013, p. 5 et seq.; K. LEIJON, *National Courts and Preliminary References*, cit., p. 13.

National courts that instead express support for a national provision, for instance, by stating that a national policy that restricts the free movement of goods should be deemed compatible with EU law since it aims to protect public health,²⁴ show the Court that an expansion of EU law is not acceptable in their Member State's political context. However, the national courts do not always express opinions. Previous studies have identified opinions in approximately 40 per cent of requests for preliminary rulings.²⁵ Nyikos suggests that formulating opinions is time consuming, and therefore, the national courts that lack the necessary resources will refrain from including opinions in the requests.²⁶

The previous research on national court opinions has also theorised about the expected behaviours of courts at different levels of the judicial hierarchy. Building upon Alter's inter-court competition hypothesis,²⁷ Nyikos suggests that lower national courts are more likely to include opinions in the requests than courts of final instance. The argument is that the EU legal system mainly provides lower national courts with new powers that increase their influence *vis-à-vis* national courts of final instance. By referring cases to the Court and expressing opinions, a lower court is able to communicate its preferred outcome, that which it is trying to "insulate against revisions".²⁸ With the support of the Court's answers to the legal questions posed in requests for preliminary rulings, lower national courts can create precedents and exercise judicial review – powers that previously were reserved for the courts of final instance. Lower national courts are therefore expected to actively participate in the preliminary reference procedure since it empowers them.

In sum, national court opinions are understood in the literature as an important part of the dialogue between national courts and the Court of Justice. Based on the previous research, the national courts with the necessary resources are expected to express opinions because they want to share information with the Court or influence its final ruling.

III. METHODS AND MATERIALS

The previous research has proposed plausible theoretical explanations as to why national courts would spend time writing opinions. However, national judges' reasons for including opinions in requests for preliminary rulings have not yet been investigated empirically. In addition, why some national judges choose not to express opinions is under-theorised. To address these gaps in the literature, this *Article* aims to understand

²⁴ Referred to as the norm of proportionality, see G. DAVIES, *Activism Relocated*, cit., p. 81.

²⁵ K. LEIJON, *National Courts and Preliminary References*, cit., p. 11; S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 539.

²⁶ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 533.

²⁷ K.J. ALTER, *The European Court's Political Power*, in *West European Politics*, 1996, p. 458 *et seq.*; K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 46.

²⁸ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 536.

what drives the actions of individual national judges in the preliminary reference procedure. Therefore, it is necessary to turn to these actors and enquire about their view of the possibility of expressing opinions.

The study builds on semi-structured interviews²⁹ with 20 Swedish judges who have all participated in the preliminary reference procedure at least once.³⁰ The selection of respondents among judges with experience of the procedure was made with the intention of achieving variation in one aspect that previous research has identified as important namely, court level. Nyikos found that courts of final instance appear to be less likely to express opinions compared to lower courts.³¹ Thus, a random selection of respondents was made from each of the three court levels with the purpose of capturing how judges from first-instance courts and courts of appeal perceive the expression of opinions in the preliminary reference procedure compared to judges in the courts of final instance.³²

This *Article* contributes to the literature in two ways. First, examining the motivations of Swedish judges makes an important empirical contribution to our knowledge of national court behaviour in the preliminary reference procedure. To date, there have been no studies of how judges in any Member State perceive the possibility of including opinions in requests for preliminary rulings. Moreover, while several studies have investigated the attitudes of other Member State judges towards the preliminary reference procedure, for example, in Denmark,³³ France, Germany,³⁴ Poland,³⁵ Croatia and Slovenia,³⁶ there has been no systematic investigation of how Swedish judges view the procedure.

Second, Sweden is arguably a suitable case for exploring national judges' reasons for *not* expressing opinions in the requests to the Court of Justice. The Swedish constitutional architecture has been described as a system in which the judiciary is an integral

²⁹ For information on how the interviews were carried out, see section IV.

³⁰ The reason for excluding judges who have never referred cases to the Court is that any discussion about their views on the actual expression of opinions would be hypothetical, which in turn would undermine the reliability of the findings.

³¹ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 540.

³² Based on a list of all 102 requests for preliminary rulings made by Swedish courts from 1995 to 2015 the cases were sorted into two groups according to which court branch (civil or administrative) they belonged to. Then, the cases were sorted by court level (courts of first instance, courts of appeal and courts of last instance). The cases were then chosen at random from each court level and branch. This selection process resulted in ten cases from the courts of final instance, six cases from the courts of appeal and four cases from the courts of first instance.

³³ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit.; M. WIND, D.S. MARTINSEN, G.P. ROTGER, *The Uneven Legal Push for Europe Questioning Variation when National Courts Go to Europe*, in *European Union Politics*, 2009, p. 63 *et seq.*; M. WIND, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, in *Journal of Common Market Studies*, 2010, p. 1039 *et seq.*

³⁴ K.J. ALTER, *Establishing the Supremacy of European Law*, cit.

³⁵ U. JAREMBA, *National Judges as EU Law Judges: The Polish Civil Law System*, Leiden: Nijhoff, 2013.

³⁶ 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. 251 *et seq.*

part of the public administration system rather than an independent branch of government.³⁷ It can be hypothesised that judges in this type of constitutional system have a negative attitude towards the expression of opinions. The logic behind this expectation is that Swedish courts do not perceive themselves as an independent power³⁸ whose goal is to evaluate whether Swedish policies stand in conflict with supreme EU law. Examining Swedish judges' views on the expression of opinions is therefore expected to generate new hypotheses regarding why national judges do not express opinions in dialogue with the Court.

There are certain limitations to the data. Only judges who had participated in the preliminary reference procedure were included in the study, which means that judges with no such experience were omitted. However, the aim of the study is not to generalise about the beliefs of the full population of Swedish judges. Instead, the purpose of the inquiry is to capture the in-depth perspectives of individuals³⁹ who are closely involved in the preliminary reference procedure. For this reason, it is necessary to concentrate on the judges with experience of the procedure and who have (or have not) actually made a decision to include an opinion in the referral.

IV. RESULTS

During the in-person interviews, the judges were asked to describe the case(s) they had referred to the Court of Justice to allow them to reflect upon the decision-making process using their own words. This type of "grand tour question"⁴⁰ allows respondents to talk freely about issues with which they are familiar. The approach also allowed for more in-depth probing into the specific decisions that the judges had made regarding the expression of opinions in these cases and their reasons for such decisions.

The analysis of the respondents' answers shows that four of the judges had not thought at all about including opinions in the request for preliminary rulings.⁴¹ However, the other sixteen respondents had reflected upon including opinions and had, as will be shown, rather divergent views on the practice.

³⁷ M. ZAMBONI, *The Positioning of the Supreme Courts in Sweden – A Democratic Oddity?*, in *European Constitutional Law Review*, 2019, p. 671.

³⁸ *Ibid.*, p. 678 et seq.

³⁹ O. TANSEY, *Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling*, in *PS: Political Science & Politics*, 2007, p. 765 et seq.

⁴⁰ B.L. LEECH, *Asking Questions: Techniques for Semistructured Interviews*, in *PS: Political Science & Politics*, 2002, p. 667.

⁴¹ Respondents 7, 8, 11, and 12.

IV.1. ACTIVE COURTS: MOTIVATIONS FOR EXPRESSING OPINIONS

A minority of the respondents (six) believed that national courts should be active and express opinions in the preliminary reference procedure because opinions are required⁴² or because opinions give national judges the possibility of influencing EU law.⁴³ The following quotation illustrates the former view: "You should still state the court's preliminary understanding of how this EU legal issue should be assessed. Yes, in principle, it is your responsibility to do so" (respondent 9). As the above quotation shows, the respondent believes that national courts are basically required to state their view of the legal issues that they refer to the Court of Justice. With regard to the theoretical expectations derived from the previous research, this motivation corresponds fairly well with the proposal that national courts express opinions with the purpose of providing the Court with information.⁴⁴ Interestingly, the respondent's answer could be perceived to imply that opinions are somehow mandatory. However, according to the written recommendations, courts *may* state their view but are not required to do so. Nevertheless, several respondents described expressing opinions as part of the national courts' responsibility. This finding suggests that the judges' understanding of the recommendations may have been shaped by signals from the Court of Justice or from peers within the Swedish legal system about how the recommendations should be interpreted, effectively encouraging the use of opinions.

In addition, two respondents⁴⁵ said that they were in favour of including opinions in requests for preliminary rulings because it is required. However, they had not done so themselves because they considered it too risky. One of them stated: "[Q: What about expressing opinions?] I did not have the resources, and I did not have the skills, so I would have thought it to be incredibly risky to start predicting how it should go, so I didn't. But one can always, if one wants to, hide behind the shield of impartiality" (respondent 4).

The same judge further elaborated on the potential risk associated with expressing opinions: "An important part is that you're simply afraid to seem stupid. [Q: Of making mistakes?] Yes, you're afraid to write something that will be in letters of fire, especially if the Court of Justice says, 'But how can you not realise that this is a completely impossible way to see it?'" (respondent 4).

This quotation sheds light on one of the theoretically less explored aspects of national court opinions, specifically, why courts sometimes choose not to include opinions. The previous research has suggested that time constraints may prevent courts

⁴² Respondent 1, 2, 3, 4 and 9. However, respondents 3 and 4 mentioned that although they believed that opinions should be expressed by national courts, they had not yet done so themselves.

⁴³ Respondent 18.

⁴⁴ F.G. JACOBS, *Judicial Dialogue and the Cross-fertilization of Legal Systems*, cit.; A. ROSAS, *The European Court of Justice in Context*, cit., p. 126.

⁴⁵ Respondents 3 and 4.

from formulating opinions.⁴⁶ While the judges mentioned a lack of resources, it was not the only factor influencing their decision. Instead, these judges' decision not to express opinions was built on considerations of how to avoid appearing "stupid" in front of colleagues and peers. As the quotation shows, the perceived risk of expressing opinions is that the national judges might be publicly criticised by the Court of Justice for having misinterpreted EU law. This finding is in line with previous research regarding how lower court judges think about their decisions in light of the expected reactions from high courts. The fear of the lower court judges is that critical remarks from higher court judges will have a negative effect on their future career and on their reputation within the legal community.⁴⁷ The same type of consideration was also made by judges who were afraid of referring the "wrong" type of cases to the Court.⁴⁸

Another respondent agreed that national judges should include opinions in requests for preliminary rulings. However, this interviewee differed from the aforementioned judges in regard to the reason. As the quotation below shows, the respondent thought that judges working in the courts of final instance should state their opinions to influence the development of EU law:

"It has been discussed at a general meeting in court 'X', namely, that court 'X' should provide some suggestions, so to say, or views that can steer the work of the EU court, and I thought that could well be done. [...] We are the bigger ones; we are more used than other courts to cracking hard cases and to seeing matters from a broad perspective; there would be nothing wrong with that" (respondent 18).

According to this judge, the highest national courts have the competence to formulate opinions while the other lower courts do not. The quotation offers a clearly articulated statement about what the respondent saw as the desired consequences of including opinions: to steer the course of EU law. This view corresponds to the theoretical expectations formulated by Nyikos, specifically, that national court opinions are used to influence the course of EU law.⁴⁹ This makes it distinct from the reasoning of the respondents who said that national judges should state their view because it is required.

⁴⁶ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 533.

⁴⁷ M. HEUMANN, *Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys*, Chicago: University of Chicago Press, 1978, pp. 144-146; G. TRIDIMAS, T. TRIDIMAS, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, in *International Review of Law and Economics*, 2004, p. 135.

⁴⁸ K. LEIJON, *National Courts as Gatekeepers in European Integration: Examining the Choices National Courts Make in the Preliminary Ruling Procedure*, doctoral thesis, Acta Universitatis Upsaliensis, Uppsala University, 2018.

⁴⁹ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 530.

IV.2. PASSIVE COURTS: MOTIVATIONS FOR NOT EXPRESSING OPINIONS

Thus far, the analysis has mainly focused on why judges think opinions should be included in requests for preliminary rulings. However, most⁵⁰ of the respondents held the opposite view. When asked to elaborate on why they believed that national judges should not state their opinions, the respondents said that doing so would be incompatible with their role as judges: expressing opinions is simply not something national judges should do. Their motivation for not expressing opinions appeared to rest on a certain conception of the responsibilities of national judges in the EU legal system.

Six of the respondents⁵¹ referred to the division of competences between the Court of Justice and the national courts when explaining why national judges should not include opinions in their requests for a preliminary ruling. This view is illustrated in the following quotations: "It's not the national courts' responsibility to defend the implementation that has been done but rather to say that 'this is what Swedish law looks like, and that's what we're dealing with.' But that the national court would assess whether the Swedish law has been correct or not, that feels a bit strange" (respondent 19).

"I can't remember that we have ever expressed our own opinion regarding the questions we ask; it feels a bit strange [...]. I think about it as being a question of constitutional division of skills, and we do not have the competence to take a position on that question. There is someone else who is supposed to do that, and then it is up to that court [the Court of Justice] to make the decision" (respondent 16).

The respondents thought that a judge who includes an opinion in the request for a preliminary ruling exceeds his or her powers. It is the responsibility of the Court, not the national judges, to interpret EU law. The following quotation provides valuable information as to why opinions were seen as an inappropriate practice in the Swedish context: "I was thinking, we have something called 'the lift', that a first instance court can send a legal matter concerning precedent to the Supreme Court and say: 'We think this is difficult, we think you should take a stand on this matter'. It would then be quite strange if the first instance court says: 'We think you should decide the case in this way'; that's about the same thing" (respondent 16).

In this quotation, the judge uses analogical reasoning and compares the preliminary reference procedure with a similar domestic procedure, "the lift". In this domestic procedure, lower court judges do not state their view when asking higher court judges for guidance. According to the respondent, the same "rule" applies in the relationship between the national judges and the Court of Justice. National judges are subordinate to the Court and should therefore not forestall its work by stating their own view. The respondent's standpoint on the matter cannot be traced to any formal guidelines or policies. Instead, it

⁵⁰ 10 judges (of the 16 respondents that had considered the expression of opinions).

⁵¹ Respondents 5, 14, 15, 16, 17 and 19.

appears that the respondent's reasoning is built on his or her understanding of what informal professional norms in the Swedish legal system prescribe as appropriate.

Among the respondents who did not think that opinions should be expressed were four judges who commented that the main problem with having national judges expressing opinions is that it clashes with the courts' role as an impartial arbitrator⁵². One respondent stated: "I perceive it as a party writing. We are not supposed to sit around and argue how we think that the Court of Justice should interpret EU law. It's like we are some sort of party to the case, and we are not. We do not represent Sweden; we are a Swedish court that is supposed to request preliminary rulings" (respondent 6).

According to this respondent, opinions are something expressed by the parties to the case, not the court itself. The judge also underscored that national judges do not represent the Swedish government during the proceeding in any way. Another respondent reflected upon the discrepancy between the practice of including opinions and the task of judging: "Yes, I just thought about this thing about expressing an opinion, I felt now when you said it, that it feels very odd in some way. If you were to decide that case later, will you then be disqualified from judging? It would be an unfamiliar practice for me to express an opinion on how I think the case should be decided before I actually decide the case" (respondent 10).

As the judge made clear in this quotation, expressing opinions stands in conflict with the judges' main task, namely, to be impartial and deliver legitimate rulings. The respondent identified the main problem with including opinions as the possibility that it might disqualify the judges from judging.

These ten judges' approach to the preliminary reference procedure and EU law can be understood as passive, at least in terms of expressing opinions. The recurring theme in the judges' responses was that opinions are "odd" and "strange" and that expressing them exceeds the national judges' authority. These descriptive terms suggest that the respondents did not perceive the stating of opinions as being part of their responsibilities in the preliminary reference procedure; they even considered it inappropriate. The respondents' reasoning appears to follow from their understanding of the obligations of being a judge in the Swedish legal system. From the statements, we can also discern what the respondents thought is appropriate behaviour for a judge: to be an impartial arbitrator who keeps within the perimeters of one's competences.

V. PASSIVE HIGH COURT JUDGES?

One of the main findings of this *Article* is that approximately half of the interviewed judges consider the inclusion of opinions in the requests for preliminary rulings to be inappropriate. Their view was that the inclusion of opinions is alien and that expressing opinions

⁵² Respondents 6, 10, 13 and 20.

means exceeding the judge's authority, possibly disqualifying him or her from being an impartial arbitrator. It may appear to be a trivial finding that judges perceived impartiality and keeping within the perimeters of their authority as important. However, what makes it interesting is that these principles were understood by the judges as irreconcilable with the inclusion of opinions in the request for a preliminary ruling. In addition, the judges did not base their standpoint regarding opinions on the prescription of any formal rule. Recall that opinions are allowed under the official recommendations. Instead, the answers from the respondents show that the rendering of national court opinions is not an accepted practice within some segments of the Swedish judiciary. What makes this finding even more intriguing is that almost all of the respondents who considered the practice of expressing opinions to be inappropriate and incompatible with the norm of impartiality belonged to courts of final instance. In contrast, the respondents who viewed the inclusion of opinions as close to mandatory belonged to lower courts. Of course, the uncovered differences between high and low court judges cannot be generalised to the population of Swedish judges due to the fairly small number of respondents. Nevertheless, the finding can be used as a basis for theorising about different approaches to the expression of opinions in requests for preliminary rulings.

This *Article* proposes that the differences in how high and low court judges view the expression of opinions stem from how judges at different levels of the judicial hierarchy interpret their role in the preliminary reference procedure. What is particular about high courts is that they have a prominent role in the legal system. The responsibility of high courts and, by extension, high court judges, is to protect the legal order and to steer the overall legal development.⁵³ In contrast, lower court judges need to focus only on the case at hand. Given the differences in responsibilities, it is reasonable to expect that the professional norms shaping judges' reasoning also differ between high and low courts. In turn, it can be argued that these differences result in varying conceptions of what is appropriate behaviour for a judge in the preliminary reference procedure. The high court judges are likely to place a greater emphasis on the professional norms related to matters of overarching judicial principles since they are part of an institution that has the responsibility of protecting the legal order. They are expected to be wary of potential threats to fundamental principles such as the impartiality of the judiciary. If they perceive the expression of opinions as a threat to judicial impartiality and the legitimacy of the courts, it would be nearly impossible for them to include opinions in a request for a preliminary ruling. Impartiality is embedded in the high court judges' professional identity, and expressing opinions is simply incompatible with what they represent. Indeed, lower court judges may also care about broad legal principles and the legitimacy of the judicial system. However, considering overall legal development or how to protect the legitimacy of the judiciary is not part of their everyday job description.

⁵³ K.J. ALTER, *Establishing the Supremacy of European Law*, cit., p. 48.

Therefore, they are not expected to experience a conflict between fundamental principles such as impartiality and the inclusion of opinions in such requests.

An objection to this interpretation is that the high court judges may be referring to the need to safeguard the courts' impartiality instead of admitting that they are not comfortable with expressing opinions for other reasons. An example of such a reason that was brought up by other respondents is that national judges are simply afraid of being criticised by the Court of Justice for expressing the "wrong" opinion. However, although this fear of appearing incompetent may explain why a few judges refrain from expressing opinions, it does not fit with the overall impression from the interviews. When asked about the practice of including opinions in the requests, the instinctive reaction of most high court judges was that opinions are inappropriate and a threat to the judges' impartiality. Then, they proceeded to elaborate on their reasons for this view in a rather probing manner, revealing various considerations connected to informal professional norms. The lasting impression from the interviews is that these judges did not refer to "impartiality" simply as a pretext for not including opinions. Instead, it seemed that the respondents based their decisions on what they thought the informal norms prescribed as the appropriate course of action.

VI. CONCLUDING DISCUSSION

What motivates national judges to be either active in dialogue with the Court of Justice by expressing opinions in the requests or passive by refraining from doing so? This *Article* has provided the first systematic analysis of how judges perceive the possibility of including their own opinions in their referrals to the Court of Justice. First, the findings show that the interviewed judges have divergent views regarding the appropriateness of including opinions in the requests. While some believe that expressing opinions is close to mandatory, others find the practice highly inappropriate. Second, the respondents' reasons for expressing opinions correspond to the expectations formulated in the literature such as their influence on the development of EU law and the information that is provided to the Court. However, the study also uncovered what motivates national judges *not* to express opinions. These three previously unknown motivations are: 1) protecting one's reputation, 2) respecting the division of competences between the Court and national courts and 3) upholding the impartiality and legitimacy of the courts.

In addition, the results suggest that high court judges in particular find the expression of opinions to be irreconcilable with the overarching principle of judicial impartiality and the division of competences between the national courts and the Court of Justice. In contrast, most of the interviewed lower court judges view the inclusion of opinions in the requests as practically mandatory. These findings challenge the hypothesis presented in previous research which proposed that differences in the number of opinions expressed

between lower courts and courts of final instance is the result of lower courts seeking judicial empowerment.⁵⁴ Instead, this *Article* argues that different attitudes towards opinions between high and low court judges originate from variations in professional norms. Judges working in final instance courts face norms that place a greater emphasis on overarching judicial principles such as impartiality since they have the responsibility of protecting the legal order. This, in turn, leads high court judges to find opinions to be inappropriate because such opinions, in their view, stand in conflict with impartiality.

The results of the study have several important implications for our understanding of both the dialogue between the national courts and the Court of Justice and the role of the national courts in the preliminary reference procedure. Expressing their opinions in the requests is one way for national judges to actively engage in a dialogue with the Court and to possibly influence the final ruling of the EU court. As Rytter and Wind emphasise, it is vital that national courts take part in the development of EU legal norms; otherwise, they leave the shaping of EU law to the Court.⁵⁵ However, four of the respondents were unaware of the possibility to include opinions in the requests. Moreover, the findings indicate that there is resistance towards expressing opinions among high court judges in Sweden. Although the design of this study does not allow for generalisations of this result to all Swedish judges, it is imperative to discuss the implications of the identified resistance. As Glavina (in this Special Section) and others⁵⁶ have shown, judges in the higher courts have more resources at their disposal than lower court judges and should therefore be able to formulate high quality opinions. The Court of Justice has also been found to show respect towards the constitutional traditions of certain Member States.⁵⁷ However, if high court judges refuse to include opinions in the requests, there is a risk that the Court will remain unaware of the national legal and political context and, as a result, deliver a ruling that overrides salient national policies. This may become a problem for the Swedish judiciary. If a national judiciary is not active in the preliminary reference procedure, it runs the risk of becoming constitutionally irrelevant.⁵⁸ After all, the preliminary reference procedure is an opportunity for national courts "to influence the direction of European law in an ongoing conversation and dialogue".⁵⁹

This *Article* has generated new hypotheses regarding why national judges do not always express opinions and why high court judges are less likely than lower court judges to include their views in requests for preliminary rulings. However, we still have only limited knowledge about what drives the actions of individual judges in the preliminary reference procedure. Future studies should aim to test these hypotheses in other

⁵⁴ S.A. NYIKOS, *Strategic Interaction among Courts within the Preliminary Reference Process*, cit., p. 536.

⁵⁵ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit., p. 500.

⁵⁶ A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most?*, cit., p. 920.

⁵⁷ M. CARTABIA, *Europe and Rights*, cit., p. 28.

⁵⁸ J.E. RYTTER, M. WIND, *In Need of Juristocracy?*, cit., p. 499.

⁵⁹ *Ibid.*, p. 500.

contexts, for instance, whether or the extent to which informal professional norms, such as upholding the impartiality of the courts, also shape the behaviour of high court judges in other Member States and make them less willing to express opinions in dialogue with the Court of Justice.



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

POWER TALK: EFFECTS OF INTER-COURT DISAGREEMENT ON LEGAL REASONING IN THE PRELIMINARY REFERENCE PROCEDURE

ANNA WALLERMAN GHAVANINI*

TABLE OF CONTENTS: I. Introduction. – II. Conceptual framework and terminology. – III. Data and research design. – III.1. The dataset. – III.2. Research process. – IV. The Court's behaviour. – V. The Court's strategies. – VI. Conclusions.

ABSTRACT: Recent cases of national court rebellion against the rulings of the Court of Justice have raised questions about the meaning of judicial cooperation within the preliminary reference procedure. Although tensions are inevitable, the trust of Member State judiciaries is crucial for the dissemination and enforcement of the Court's rulings. This *Article* uses legal empirical method to study how the Court cultivates its relationship with national courts. Specifically, it examines the reasoning and drafting style of the Court of Justice when it delivers a judgment that conflicts with the referring court's view, as expressed in the order for reference, on how the questions ought to be resolved. The findings indicate that disagreement with the referring court affects the Court's drafting and justification choices. In particular, the *Article* identifies two strategies that the Court resorts to when rejecting the view taken by a referring court: conflict avoidance and appeal to (illegitimate) authority. It is argued that these strategies are not conducive to furthering the judicial cooperation that the Court claims to be engaged in, nor to the legitimacy of its judgments within the Member States.

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KEYWORDS: Court of Justice – preliminary reference procedure – national courts – judicial dialogue – conflict avoidance – appeal to authority.

I. INTRODUCTION

It is an established truth of EU legal history that the process of constitutionalisation of Union law was spearheaded by the Court of Justice in collaboration with national courts through what Weiler has called a “remarkable consensual multilogue”.¹ In this process, the preliminary reference procedure laid down in Art. 267 TFEU was and continues to be a main avenue for legal and constitutional development. Consequently, national courts play a crucial role as the Court’s interlocutors. The success of the preliminary reference procedure hinges upon the trust and support of national courts, who not only decide whether cases reach the Court but also enforce its rulings against (potentially reluctant) national executives and corporate interests.² Such trust has not always been forthcoming; one needs only to think of the protracted (albeit diminishing) reluctance of constitutional courts to engage with the Court.³ Against this background, it is reasonable to assume that the Court would be at least somewhat wary of delivering judgments liable to frustrate or disappoint the referring court.⁴

¹ E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.* See also J.H.H. WEILER, *The Essential (and Would-Be Essential) Jurisprudence of the European Court of Justice: Lights and Shadows Too*, in I. PERNICE, P. STÖBENER, J. KOKOTT, J. MALL, C. SAUNDERS (eds), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden: Nomos, 2006, p. 117 *et seq.*; D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.*; G. DAVIES, *The European Legislature as an Agent of the European Court of Justice*, in *Journal of Common Market Studies*, 2016, p. 846 *et seq.*; R.D. KELEMEN, A.S. SWEET, *Assessing the Transformation of Europe: A View from Political Science*, in M. POIARES MADURO, M. WIND (eds), *The Transformation of Europe: Twenty-Five Years On*, Cambridge: Cambridge University Press 2017, p. 193 *et seq.* Cf. however M. RASMUSSEN, D. SINDBJERG MARTINSEN, *EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies*, in *European Law Journal*, 2019, p. 251 *et seq.*

² Y. LUPU, E. VOETEN, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, in *British Journal of Political Science*, 2011, p. 413 *et seq.*; cf. also G. DAVIES, *Activism Relocated: The Self-restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 88; J. A. 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.*

³ J. KOMAREK, *The Place of Constitutional Courts in the EU*, in *Review of European Constitutional Law*, 2013, p. 427 *et seq.*; M. CLAES, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, in *German Law Journal*, 2015, p. 1331 *et seq.*

⁴ See G. DAVIES, *Activism Relocated*, cit., p. 85 *et seq.*; M. BOBEK, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts*, in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined*, Oxford: Hart, 2013, p. 218; R. VAN GESTEL, J. DE POORTER, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts*, Cambridge: Cambridge University Press, 2019, p. 50.

When making a reference for a preliminary ruling, national courts are invited to set out their own opinions as to how the questions referred ought to be answered.⁵ Offering its view on the outcome is optional for the referring court and likely to increase the effort connected with making the reference.⁶ It is therefore reasonable to expect that national courts set out their opinions sparingly, and only where the stakes offset the effort.⁷ Where provided, however, referring court outcome preferences represent an opportunity, if not necessarily translating into a practice, of dialogue between the two courts, including an increased possibility for the Court to properly understand the referring court's concerns and expectations. They can also make the Court better informed as to when a judgment is likely to cause disruptions in the national legal systems.

This *Article* aims to examine how the Court justifies its judgments when it reaches another conclusion than that proposed or predicted by the national court in the order for reference, and whether this differs from its justification of judgments in which it concurs with the interpretation offered by the referring court. It does so by, first, identifying a dataset of cases where the referring courts took a clear position on the preferred or expected answer to the questions referred and, second, comparing the drafting of judgments in cases of agreement and disagreement with the referring court's interpretation.

The findings indicate that judgments where the Court disagrees with the outcome proposed by the referring court display certain characteristics that distinguish them from judgments where the two courts concur. In particular, the former contains more references, and generally more positive references, to the Commission and the intervening Member State governments. They also tend to rely more heavily on substantive law and cite more Union legislative acts. Lastly, when disagreeing with the referring court, the Court is more likely to substantively reformulate the question(s) referred. These results do not appear to be driven by the political sensitivity or legal complexities of the cases.

⁵ Court of Justice, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para. 18.

⁶ 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. 135; cf. also 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. 204.

⁷ Some commentators argue that referring courts are less concerned with the substantive outcome of a case, as long as it is presented in the form of "feasible, understandable guidance" (M. BOBEK, *Of Feasibility and Silent Elephants*, cit., p. 214; cf. also p. 206 *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. 142 *et seq.*). While it is possible that provision of clear answers is generally a good recipe for keeping good relations with referring courts, one can question whether the Court's most dedicated and opinionated interlocutors, having put particular effort into the order for reference, might not have higher-than-average expectations on the response (similarly see R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 135).

The *Article* offers empirically-based evidence of the influential role of the national courts within the preliminary reference procedure,⁸ indicating that the Court takes the referring court's opinions into account when drafting its judgments and is conscious of disagreements with its national counterparts. Furthermore, the *Article* argues that disagreement with the referring courts triggers two distinct but complementary response strategies on the side of the Court: conflict avoidance and appeal to authority (argumentation *ad verecundiam*).

The *Article* contributes to our understanding of the dynamics between the national courts and the Court within the preliminary reference procedure and adds another flavour to the debate on the Court's reasoning style. By analysing the Court's drafting and justification choices from the perspective of the referring court and with the order for reference as a benchmark, the *Article* questions whether the Court's behaviour is conducive to the cooperation and dialogue it claims to be engaging in. This should cause further discussion into what the preliminary reference procedure is, and what it ought to be.

The argument proceeds as follows. The following section develops a framework and terminology for the analysis based on previous research on referring court preferences and Court drafting style. Section III defines the dataset and discusses the research process and design. Section IV presents the findings of the empirical analysis. These are subsequently interpreted in section V, which argues that they reveal tendencies within the Court of Justice to, first, meet opposition with appeals to external, political support and, second, deflect from the disagreement by altering the problem and its context. Section VI concludes with a critical assessment of these strategies, situating them in the broader debate on the role of the Court and the function of the preliminary reference procedure.

II. CONCEPTUAL FRAMEWORK AND TERMINOLOGY

An emerging body of scholarship studies particular aspects of the Court's reasoning and drafting strategies, often based on legal empirical analysis. These studies cover aspects such as the reference patterns in the Court's judgments,⁹ the Court's practice of reformu-

⁸ Previous commentators have suggested such a role but offered only anecdotal or commonsensical support, see e.g. M. BOBEK, *Of Feasibility and Silent Elephants*, cit. p. 223; T. TRIDIMAS, *Bifurcated Justice: The Dual Character of Judicial Protection in EU Law*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*, The Hague: Asser Press, 2013, p. 378 et seq.

⁹ U. SADL, *Case – Case-Law – Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments*, in *Review of European Constitutional Law*, 2013, p. 205 et seq.; M. DERLÉN, J. LINDHOLM, *Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions*, in *German Law Journal*, 2015, p. 1073 et seq.; M. DERLÉN, J. LINDHOLM, *Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective*, in *German Law Journal*, 2017, p. 647 et seq.

lating the questions referred,¹⁰ its use of linguistic signalling devices,¹¹ the importance of the parties' identity,¹² the Court's willingness to defer to national courts and authorities¹³ and its reliance on the Advocates General.¹⁴ Together they contribute to a deeper understanding of the constitutive elements of the Court's reasoning and its judgments.

Within this current, a few recent works have studied the relationship between the judgment and the order for reference. Most notably, van Gestel and de Poorter examined the dialogue between the Court and the supreme administrative courts of ten Member States between 2013 and 2015.¹⁵ They found that the Court only rarely engages with the answers proposed by the referring courts, preferring to draft the judgment without directly citing the orders for reference. While acknowledging that multiple reasons underlie these choices, van Gestel and de Poorter argue that their study points to a mutual lack of trust between the Court and the supreme administrative courts.

Terminologically, van Gestel and de Poorter speak of the referring courts' opinions as *provisional answers*. This is in contrast to a previous study by Nyikos, which analysed the prevalence of and conditions for referring court opinions using the term "preemptive opinions".¹⁶ This terminological discrepancy mirrors conceptual as well as methodological differences.

Nyikos' "preemptive opinions" are mainly gathered from case reports published in the European Court Reports, and occasionally deduced from the formulation of the preliminary questions.¹⁷ Both methods appear to suffer from drawbacks; the former as they rely on a second-hand account that may misrepresent or omit the referring court's

¹⁰ U. SADL, 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 et seq.

¹¹ U. SADL, *The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU*, in *European Journal of Legal Studies*, 2015, p. 18 et seq.; A. TRKLA, K. McAULIFFE, *Formulaic Metadiscursive Signalling Devices in Judgments of the Court of Justice of the European Union: A New Corpus-Based Model for Studying Discourse Relations of Texts*, in *International Journal of Speech, Language and the Law*, 2019, p. 21 et seq.

¹² G. DAVIES, *Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication*, in *Journal of European Public Policy*, 2018, p. 1442 et seq.

¹³ J. ZGLINSKI, *The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law*, in *Common Market Law Review*, 2018, p. 1341 et seq.

¹⁴ U. ŠADL, S. SANKARI, *The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship*, in *Yearbook of European Law*, 2017, p. 421 et seq.

¹⁵ R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts' Preliminary Questions*, cit.; R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 59 et seq.

¹⁶ S.A. NYIKOS, *Strategic Interaction among Courts Within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions*, in *European Journal of Political Research*, 2006, p. 527 et seq.

¹⁷ *Ibid.*, p. 545 et seq.

opinion, and the latter because of the uncertainty connected with interpreting the question as an opinion.¹⁸

The term “provisional answers”, utilised by van Gestel and de Poorter, covers three alternative types of statements in the order for reference: “a) offering one right answer; b) offering a number of alternative answers and c) offering several answers with an additional assessment of their potential consequences for the national legal order”.¹⁹ While clearly defined, the term is also, as the authors appear to acknowledge,²⁰ quite extensive. In particular, it seems to cover orders for reference where it is in fact not possible to conclude which outcome (if any) the referring court would prefer.

For the purposes of this study, I have developed a system of grading the referring courts’ opinions based on explicit statements in the orders for reference and with a view to differentiate between, on the one hand, cases where the referring court enters into a discussion on possible ways to resolve the case (outcome discussions) and, on the other hand, cases where the referring court expresses a preference of its own (outcome preference statements). *Outcome discussions* include orders for reference where the referring court outlines one or more possible ways of answering the question but stops short of disclosing a preference for one of them. This category includes statements of types b) and c) in van Gestel and de Poorter’s above-mentioned definition of provisional answers, as well as orders for reference where the court offers one answer without pronouncing it to be the “right” one.

The term *outcome preference statement* is used to denote order for reference statements where the referring court does not merely note possible answers but also discloses its own conclusion, prediction or preference as to how the question ought to be answered.²¹ This category includes, first, statements introduced with phrases such as “The referring court is of the opinion...” or similar. These declarations give clear, unequivocal and (almost) non-context-dependent information about the referring court’s position, and they represent in a sense the ideal-type outcome preference statement. Second, the term covers statements where the referring court’s position is expressed hesitantly or deferentially, for instance by holding one argument more convincing than

¹⁸ Nyikos herself describes the latter method as “controversial”, S.A. NYIKOS, *Strategic Interaction among Courts Within the Preliminary Reference Process*, cit., p. 546.

¹⁹ R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts’ Preliminary Questions*, cit., p. 128. Cf. also R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 69.

²⁰ R. VAN GESTEL, J. DE POORTER, *Supreme Administrative Courts’ Preliminary Questions*, cit., p. 130.

²¹ I have previously discussed my definition of this term in A. WALLERMAN, *Can Two Walk Together, Except They Be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy*, in *European Law Review*, 2019, p. 159 *et seq.* There I distinguish between bold and deferential preferences. This distinction is largely irrelevant for the purposes of this *Article* and will thus not be repeated here. However, it may be noted that of the three types of outcome preference statements discussed in this paragraph, the first corresponds to the bold outcome preference statements whereas the second and third belong to the deferential variety.

another or emphasising that the opinion is subject to approval (or rejection) by the Court. Such statements, while less confident, still express a normative position of the referring court. Third, outcome preference statements can be indirect and context-dependent. This includes cases where the referring court refers to EU legal criteria as being unfulfilled, for instance by noting that a national provision makes it “excessively difficult” for a claimant to exercise their right (thereby implying a breach of the principle of effectiveness and, consequently, that the provision is incompatible with EU law).

The outcome preference statement concept has distinct advantages. First, it is based directly on the orders for reference, thus removing possible transmission distortions.²² Second, it minimises the need for reading between the lines by relying only on explicit normative or evaluative statements. Third, it allows for the distinction between cases where the referring court favours one particular interpretation and those where it merely discusses possible interpretation(s).

Yet, the concept is not clear-cut. In particular, drawing the line between, on the one hand, outcome discussions including only one option and, on the other, outcome preference statements of the third, contextual type may prove challenging. The guiding principle has been the presence of normative assertions attributable to the referring court. For instance, in *Kamino and Datema*, the Dutch Supreme Court referred to the Court of Justice a question concerning the possible direct effect of the principle of respect for the rights of the defence by the authorities.²³ Justifying its decision to refer, the referring court recalled a previous ruling of the Court and noted that this ruling had been interpreted in legal doctrine as disqualifying the principle in question from having direct effect.²⁴ This is one possible answer to the question, and the referring court offered no alternatives. Nor, however, did it express its support for it. Consequently, its reasoning in this regard has been taken down in my analysis as outcome discussion, but not as outcome preference.

This can be contrasted to the order for reference in *Di Donna*.²⁵ The case concerned a national piece of legislation on mediation, whose compatibility with Union law was being questioned. Without explicitly stating that it thought the national act to be contrary to EU law, the referring court consistently interspaced its description of the national act and its effects with its own evaluations, noting *inter alia* that “it could take exceptionally long time to resolve the dispute in question” and that costs would be “at least twice as high” as in

²² Almost the orders for reference have been mediated by translation (I have had access to the Swedish versions) and sometimes by being offered in summary rather than in full (cf. Art. 98, para. 1, of the Rules of Procedure of the Court of Justice).

²³ Netherlands Hoge Raad, order for reference of 18 March 2013, in joined cases C-129/13 and C-130/13, *Kamino and Datema* (the first question in both cases).

²⁴ *Ibid.*, section 3.4.2.

²⁵ Italian Giudice di pace of Mercato S. Severino, order for reference of 26 September 2011 in case C-492/11, *Di Donna*, paras 4-8.

comparable proceedings, which it deemed “disproportionate”. Unlike in *Kamino and Datema*, the order for reference thus contains clear indications of a value judgement by the referring court, which has been interpreted as an outcome preference statement.

The concept also has limitations. First, it does not distinguish between *predictions* on the outcome based on a legal analysis and *opinions* held by the referring court on more political grounds. Most courts, even if giving expression to a political stance, are likely to frame it as a result of legal interpretation in order to avoid accusations of stepping outside their mandate.²⁶ Any attempt at distinction would therefore be both difficult and fraught with uncertainty. Second, and relatedly, the textual analysis that the concept is based on cannot determine the referring court’s motivation for offering its opinion, such as whether its decision to offer an outcome preference statement is dictated by a sense of duty and loyalty with the procedure or by a genuine wish to influence the development of EU law. However, while disagreement between the courts would arguably be more problematic in the latter case, it appears likely that a court that goes to the trouble of articulating an outcome preference statement has at least some interest – if only as a matter of legal coherence and effectiveness – in seeing that outcome upheld; especially as any sense of duty might be assuaged by an open-ended outcome discussion.

III. DATA AND RESEARCH DESIGN

III.1. THE DATASET

The materials were selected within the field of procedures and remedies, as orders for reference on this topic can be presumed to contain a larger than average proportion of outcome preference statements. Two considerations underpin this assumption. First, it is a field of shared competences and only partial harmonisation, which according to previous research entails that referring courts are more likely to articulate their view on the questions referred.²⁷ This tendency is, secondly, likely to be exacerbated in a field that all national judges encounter on a daily basis and thus have ample opportunity to form confident views on.

The dataset was defined by a search for the alternative keywords “procedural autonomy” and “judicial protection” in the Court’s Curia database, complemented with a

²⁶ A.-M. BURLEY, W. MATTILI, *Europe Before the Court: A Political Theory of Legal Integration*, in *International Organization*, 1993, p. 72 *et seq.* call this the “mask and shield” function of the law. The findings by K. Leijon in her Article in this Special Section (K. LEIJON, *Active or Passive: The National Judges’ Expression of Opinions in the Preliminary Reference Procedure*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 871 *et seq.*) appear to underline this point.

²⁷ S.A. NYIKOS, *Strategic Interaction among Courts Within the Preliminary Reference Process*, *cit.*, p. 540 *et seq.*

qualitative selection based on citations in a leading textbook.²⁸ The resulting list of judgments was then delimited temporally to cases referred after 31 December 2007 and decided no later than 1 April 2017, in order to ensure the actuality of the findings, and purposively to cases where the order for reference contained an outcome preference statement on at least one of the questions referred, in order to isolate cases where the Court was aware of the referring court's position.

Within the dataset, I compared the answers of the Court with the positions taken by the referring courts in outcome preference statements. The data was coded using two parallel units of analysis: whole judgments and individual questions.²⁹ The former unit of analysis is better suited to capture the Court's reasoning and overall justification of its interpretation, whereas the latter allows for a more detailed analysis and differentiation between competing approaches within the same judgment.³⁰ I categorise judgments where the outcome corresponded to the content of the outcome preference statement as *agreement judgments* and those where the Court's conclusion differed from the referring court's preference as *disagreement judgments*. Where one judgment comprised both agreement and disagreement on different questions, the judgment was excluded from further analysis in order to avoid ambiguities. The final dataset comprises 62 judgments, corresponding to 77 orders for reference,³¹ and 112 questions, of which 27 judgments (42.8 per cent) and 60 questions (53.6 per cent) contain disagreement between the courts.

III.2. RESEARCH PROCESS

The analysis seeks, first, to verify the assumption that the opinion of the referring court is a factor of relevance to the Court of Justice and, second, to examine the Court's strategies for dealing with disagreement. These aims are accomplished by comparing the judgments in the disagreement category with those in the agreement category. The comparison is undertaken on a variety of judgment characteristics (variables) pertaining both to the judgment as a whole and to individual questions and answers. The variables can be roughly divided into four categories: 1) the structure and set-up, 2) attitudes to other actors appearing before the Court, 3) reasoning style, including references to legal sources and 4) the outcome (operative parts).

²⁸ P. CRAIG, G. DE BURCA, *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, 2015, p. 225 *et seq.*

²⁹ In the question-level dataset, I included only questions concerning procedures and remedies (in a broad sense).

³⁰ For instance, the Court may within one judgment reformulate some questions but not others; it may defer to the referring court on one question but not on the next, etc.

³¹ The lower number of judgments compared with orders for reference is explained by the practice of joining cases at the Court of Justice (Art. 54 of the Rules of Procedure), meaning that one judgment (identified by a unique Celex and a unique ECLI number) may correspond to several references (identified by unique case numbers).

Variables in the first category include admissibility issues; the division, joining and reformulation of questions; the description of the background of the reference; and the length of the judgments. They are used to establish whether the context of disagreement permeates the whole judgment and in particular whether the Court frames the (supposedly unbiased) description of the legal and factual background to the case to better fit its own conclusion.

The second set of variables concerns the extent and way in which the Court refers to other actors. For each category of actors – referring court, parties before the national court, Member State governments, the Commission and other institutions, and the Advocates General – I record the number of times the Court referred to each actor and whether it did so approvingly, dismissively or neutrally. The two former options were used in relation to arguments with which the Court either agreed or disagreed, whereas the third option was reserved for statements of fact (including national law) that the Court merely attributed to another actor as the source. Variables in this category will be used to approximate to what extent the Court addresses other actors' arguments and concerns, and in particular whether disagreement changes these patterns.

The third set of variables are related to the judicial style and argumentative authority of the Court's judgments, including references to legal sources, principles and interpretation methods and to the individual dispute and its characteristics. These variables are designated to explore whether the Court explains or justifies its conclusions differently or more forcefully when expecting disappointment and possibly rebellion from the referring court. The Court might for instance be expected to use more legal sources when refuting a mistaken outcome preference statement than when upholding a correct one, or to downplay disagreement by more abstract and/or deferential reasoning.

The fourth set of variables concern the operative part of the judgments. Their objective is to enable assessment of whether disagreement affects the outcome and the way it is phrased. I record whether the operative part referred to specific characteristics of the case, such as an identified national rule or a fact of the case before the national court. I also identify instances of deference to the referring court, grading every occurrence by intensity on a scale from minimal (0) to full (2), on the assumption that extensive deference may be a way to soften disagreement and make the judgment more palatable to the referring court.

Lastly, the analysis includes variables designed to detect possible differences between the two judgment categories and offer alternative explanations to any patterns observed. These variables include the origin of the referring court and its position in the national judicial hierarchy, as well as the number of intervenients in the case before the Court of Justice, the involvement of public bodies as parties to the dispute, and the number of judges

assigned to the case. None of them revealed any noteworthy discrepancies.³² Furthermore, differences between the two categories of judgments were, where relevant, compared with the orders for reference in order to determine whether judgment characteristics could be explained by reference to the input received by the Court.

IV. THE COURT'S BEHAVIOUR

The empirical analysis found clear differences between the agreement and the disagreement judgments within all four sets of variables discussed above. The strongest correlations pertained to the Court's references to other actors, most notably the Commission and the Member State governments, which increased substantially in disagreement judgments (see Table 2 below). Another key finding was that substantive reformulation of the preliminary question – *i.e.* reformulations that effectively change the meaning or content of the question – was noticeably more common in disagreement judgments (see Table 1 below).

The findings are listed in Tables 1–4, which correspond with the four sets of variables set out above. Table 1 combines variables at judgment and question level, whereas Tables 2 and 3 examine only aggregated judgments and Table 4 contains only variables at individual question level.³³

The structure and set-up of the judgment	Agreement	Disagreement
1. Inadmissible questions per judgment (average)	0,00	0,33
2. Joined questions	40%	34%
3. Judgments containing subdivided questions	3%	4%
4. Judgments containing reordered questions	11%	7%

³² Lower instance courts referred the most (49 and 58 per cent of the cases in the agreement and disagreement categories, respectively), whereas supreme and constitutional courts in both categories provided just over one fifth of the orders for reference (23 and 21 per cent, respectively). Disagreement judgments were delivered by an average of 5.4 judges having heard submissions from 3.6 intervenients on average, compared to 6.2 judges and 3.9 intervenients for disagreement judgments. Member State public bodies were party to the dispute in 71 per cent of the agreement cases and 70 per cent of the disagreement cases, most often (76 and 74 per cent, respectively) acting as defendant. As for the referring courts' geographical origin, the disagreement category showed an overrepresentation of orders for reference from ex-socialist Member States (27 per cent compared with 14 per cent in the whole dataset) and an underrepresentation of orders for reference from the French legal tradition (38 per cent compared with 53 per cent overall), whereas in the agreement category common law courts were overrepresented (15 per cent compared with only 3 per cent overall) at the expense of courts from the Germanic legal tradition (21 per cent compared with 29 per cent overall). However, as these variations appear to be contained *within* the categories, they are of less relevance for explaining differences *between* them.

³³ Cf. the discussion on units of analysis *supra*, section III.1.

The structure and set-up of the judgment	Agreement	Disagreement
5. Reformulated questions	100%	98%
5.1 of which substantive reformulation	40%	55%
5.1.1 of which restrictive effect	14%	34%
5.1.2 of which substitution effect	43%	31%
5.1.3 of which expansive effect	43%	34%
6. Paragraphs per judgment (average)	65,09	68,07
7. Paragraphs on facts of the case* (average)	11,80	11,07
8. Paragraphs on national law** (average)	5,89	5,41
9. Paragraphs on reasoning in substance per judgment (average)	34,43	34,56
10. Paragraphs on reasoning in substance per question (average)	22,62	21,53
11. National provisions cited** (average)	4,71	4,19
11.1 National provisions reproduced	74%	52%
11.2 National provisions described	16%	17%
11.3 Combination of reproduction and description	10%	30%
12. References to the parties' positions* (average)	0,66	0,70
13. References to the referring court in facts section* (average)	3,00	2,85
14. Judgments reporting OfR outcome discussion	34%	33%
15. Judgments reporting OPS	43%	33%
15.1 OPS consistency (OfR/judgment)	86%	100%

TABLE 1. The structure and set-up of the judgment.

* Variable concerns the section of the judgment entitled "The dispute before the national court and the questions referred" (or similar).

** Variable concerns the section of the judgment entitled "National law".

Table 1 shows no relations between the anticipated reception of the judgment within the referring court and its length. Both the overall length of the judgment (variable 7) and the length of its various subsections (variables 8-11) were virtually the same in both categories of judgments.

The Court's treatment of individual questions differed between the categories in two main ways. First, findings of inadmissibility were distinctively more common among the disagreement judgments (variable 1). Second, while reformulation of questions was very common throughout the dataset (variable 5), the intensity of reformulation varied.

In disagreement judgments, the Court's reformulations affected the content and meaning of the question (substantive reformulation) for more than half of the questions, to be compared with two fifths in the category of agreement judgments (variable 5.1).³⁴ The changes resulting from substantive reformulation also differed between the two categories. The findings indicate that, when the Court is about to give an answer in line with the national court's outcome preference statement, substantive reformulations tend to be either expansive, giving the answer a potentially broader scope than would have followed from the original question (variable 5.1.3), or substitutive, *i.e.* altering the content of the question without making its scope wider or narrower (variable 5.1.2). When, on the other hand, the Court is to contradict the referring court on the question, substantive reformulations have restrictive, expansive or neutral effects in equal measure (variables 5.1.1-5.1.3), entailing, in comparison with the agreement judgments, an overall more restrictive effect.

The findings show some variation in the Court's contextualisation of the questions between agreement and disagreement judgments. In setting up the national legal context of the dispute, neither section length nor the number of national provisions cited seemed to correspond with anticipated approval of the judgment by the referring court. However, the way in which the Court relates national law differed between the categories. In the section titled "National law", the Court typically conveys the relevant national legal provisions either by reproducing them as word-for-word quotations or by describing them in its own words (or possibly words supplied by somebody else). As shown in Table 1, reproduction is the most common method used in both categories (variable 11.1). However, in agreement judgments this method is used in, on average, three out of four judgments, compared with in only half of the disagreement ones. Conversely, the Court was more likely to combine description and reproduction of national law in disagreement judgments (almost one in three disagreement judgments, compared with one in ten agreement ones), while the proportion of purely descriptive sections on national law are similar in both categories (variables 11.2 and 11.3). This difference, furthermore, cannot be explained as a response to differences in the referring courts' ways of relaying national law, as an analysis of the orders for reference revealed no corresponding pattern.

Lastly, the findings show the Court was more likely to describe an outcome preference statement in judgments where it eventually agreed with opinions of the referring court. Outcome preference statements were ascribed to the referring court in 43 per cent of agreement judgments, compared with only 33 per cent of disagreement judgments (variable 15). (Recall that the dataset comprises only cases where the order for

³⁴ The distinction between this type of *substantive*, intrusive reformulations and more cautious, *stylistic* reformulations has been discussed at length in U. SADL, A. WALLERMAN, "The Referring Court Asks, in Essence", *cit.*, p. 418.

reference contained at least one outcome preference statement, entailing that the Court fails to recount more than half of the outcome preference statements national courts submit to it). Outcome preferences were largely correctly described, although some discrepancies between the national court's position as expressed in the order for reference and as relayed in the judgment were found (surprisingly) among the agreement judgments (variable 15.1).

The Court's attitude to other actors	Agreement	Disagreement
1. References to referring court	2,20	2,44
1.1 Evaluation of national court	0,09	-0,06
2. References to parties	1,40	1,96
3. References to applicant	0,57	1,48
3.1 Evaluation of applicant	-0,34	-0,51
4. References to defendant	0,83	0,48
4.1 Evaluation of defendant	-0,15	-0,14
5. References to AG	1,18	1,15
5.1 Evaluation of AG	0,91	1,00
6. References to MS governments	1,41	3,31
6.1 Evaluation of MS government	-0,22	0,47
7. References to the Commission	0,51	1,11
7.1 Evaluation of the Commission	0,42	0,36

TABLE 2. The Court's attitude to other actors. (The Table reflects references in the reasoning section of the judgments).

Table 2 describes how the Court refers to the submissions of various actors as part of its justification of the judgment. On average, it referred to the referring court a little more than twice per judgment. References to the referring court generally consisted of recollections of information supplied by that court on points of fact or national law outside of the Court's jurisdiction, and consequently the Court only exceptionally evaluated the referring court's position. Unsurprisingly, however, its appraisal of the referring court's input tended towards the positive in agreement judgments and the negative in disagreement ones (variable 1.1).

As for other actors submitting observations, the Court referred more frequently to the parties (in particular the applicant) in disagreement judgments (variables 2 and 3) and significantly more often to submissions by Member State governments and the Commis-

sion (variables 6 and 7). This can partly be explained by the higher frequency of inadmissibility among the unpopular judgments, as admissibility objections are most often attributed to one or more of the intervenients; this observation is however insufficient to account for the large discrepancies between agreement and disagreement judgments as regards in particular the references to Member State governments and the Commission. The parties' submissions were generally unfavourably received in both categories (variables 3.1 and 4.1), while the opposite applied for the Commission's submissions. However, the receptions of the Member State government's positions were significantly more positive in the disagreement judgments (variable 6.1), suggesting that the Court relies on the support of the Member States to a larger extent where it disagrees with the referring court. References to the Advocates General, finally, were consistently approving and occurred with equal frequency in both categories of judgments.

Reasoning style and legal source citations	Agreement	Disagreement
1. CJEU cases cited	14,43	13,93
1.1 of which referred to in OfR	18%	11%
1.2 OfR case law references recurring in judgment	41%	32%
2. EU legislative provisions cited	14,17	18,07
3. Principles cited	3,29	3,22
3.1 References to legal principles	7,14	7,89
4. International treaties cited	0,09	0,15
5. References to facts of the case	0,94	1,19
6. Distinguishing the case	11%	22%
6.1 of which response to OfR	50%	57%
7. National law citations	3,37	3,04
8. References to the proceedings before the national court	6,80	8,93
9. Expressions of deference in reasoning	1,37	1,26
10. Part of reasoning with procedures & remedies focus	53%	39%

TABLE 3. Reasoning style and legal source citations. (All variables reflect average per judgment in reasoning section).

Table 3 explores two facets of judicial reasoning: the citation of legal authority (variables 1-4) and the level of abstraction (variables 5-10). As for judicial authority, the only type of legal source where a notable difference between the two categories of judgments was found was legislation. Agreement judgments cited on average just above 14

provisions of EU primary or secondary law, compared with 18 such citations in disagreement judgments (variable 2). International treaties were relied on sparingly, but also with somewhat higher frequency in disagreement judgments (variable 4). Citations of case law and general principles showed no noticeable correlation with the Court's attitude to referring courts' outcome preferences. However, the overlap between cases cited in the order for reference and the judgment was larger in agreement cases. In agreement judgments, 18 per cent of the cases cited by the Court had also been referred to in the order for reference (variable 1.1) and these cases represented on average 43 per cent of all cases cited by the referring court (variable 1.2), whereas the corresponding figures for disagreement judgments were 11 and 32 per cent, respectively.

Within the second subset of variables, findings indicate that the Court's reasoning in disagreement judgments tended to be more specifically oriented to the circumstances of the case before the national courts. The Court would distinguish the case at hand from named, similar precedent twice as often in disagreement judgments compared with those where it agreed with the outcome preference statement of the referring court (variable 6). Additionally, the Court referred to the case before the national court on average nine times per disagreement judgment, compared with less than seven times in agreement judgments (variable 8). It also more often highlighted facts of the case in its reasoning in disagreement judgments (variable 5). Citations of national law and instances of deference to the referring court were, on the other hand, equally frequent in both categories of judgments.

Lastly, the Court tended to take a more procedurally oriented perspective in agreement judgments and a more substantive one in cases where it disagreed with the referring court (variable 10). This is a departure from the perspectives taken in the orders for reference, where orders resulting in agreement judgments were oriented towards procedures and remedies to a significantly lesser extent than the other orders for reference in the dataset (38 per cent compared to 60 per cent).

The operative part	Agreement	Disagreement
1. Deference to referring court	35%	46%
1.1 of which minimum deference	39%	63%
1.2 of which partial deference	33%	7%
1.3 of which maximum deference	28%	30%
2. <i>In casu</i> reference	28%	28%
3. <i>In casu</i> outcome	6%	0%

TABLE 4. The operative party.

The findings in Table 4, concerning the operative part of the judgments, show that the Court defers more often to the assessment of the referring court in disagreement judgments (variable 1). However, findings also show that the deference given in disagreement judgments tends to be minimal. In two thirds of the deferential disagreement judgments, the deference was minimal (variable 1.1), whereas in agreement judgments the degree of deference was evenly distributed over the spectrum from minimal to maximal (variables 1.1-1.3).

The higher level of references to factual circumstances in the reasoning of disagreement judgments, noted above, does not come through in the operative parts. References to case-specific factors, which here include both facts of the case and national law, occurred with equal frequency in both categories (variable 2). In a small number of cases, references to such factors had the effect of altering the answer to the question (variable 3, *in casu outcomes*). This happened only in agreement judgments, indicating that case-specific factors were used as a way of achieving the solution *in casu* that the referring court had suggested, even though the Court disagreed in principle. However, as this occurred on only three occasions (*i.e.* three questions), the finding should be treated with caution.

V. THE COURT'S STRATEGIES

The findings reveal clear and systematic differences in drafting and justification between the judgments in which the Court concurs with the referring court and those in which it does not. Such differences indicate, in and of themselves, that even if the inclusion of an outcome preference statement in the order for reference may not deter the Court from ruling the other way – although it is of course impossible to know how the 35 agreement judgments in this dataset would have been decided had the referring court not argued the point it did – it will affect the reasoning and justification provided in support of the conclusion. From the point of view of precedent-setting and development of the law, this may be at least as important as what eventually goes into the operative part; some of the Court's most famous precedents have been established only in the reasoning.³⁵ The different ways in which the Court replies when it agrees or disagrees with its national counterpart offers support to the assumption that the Court takes into account the perspective of the referring courts when drafting its judgment, and that its strategy for communicating disagreement differs from the way in which it confirms and upholds the views of its national counterpart.

The findings suggest that the Court employs two different (but complementary) strategies when encountering a referring court outcome preference statement that it does not agree with: *appeal to authority* (argumentation *ad verecundiam*) and *conflict*

³⁵ E.g. Court of Justice: judgment of 29 February 1979, case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 8; judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

avoidance. Appeal to authority is understood as a form of argumentation where the soundness of a statement is proven by reference to an external authority, such as an expert or a ruling of a higher court. This form of argumentation is often reasonable and effective. It becomes problematic, however, when the authority appealed to lacks legitimacy or expertise on the matter at issue; appeals to such authority are considered fallacious and are often referred to by the Latin term *ad verecundiam*.³⁶ Conflict avoidance, on the other hand, entails that the Court takes measures to conceal, circumvent or minimise the area of disagreement through its reasoning, such as redefining the issue, delivering partial or incomplete answers and deferring definitive judgment.³⁷ Two alternative hypotheses, namely that the Court might have sought to persuade the referring court of the soundness of its conclusions and that it might have attempted to find a compromise solution or to sugarcoat the outcome to facilitate compliance, find less support in the empirical observations.

The most suggestive finding concerning appeal to authority is that the Court relies substantially more often on the argumentation of Member State governments when disagreeing with the referring court. When agreeing with the referring court, references to the governments submitting observations were generally negative, whereas the opposite was true in disagreement judgments. The Court also referred more than twice as often to the Commission, although references were generally positive and indeed slightly more so in agreement judgments.

The finding cannot be explained by political salience, which might have increased the Court's sensitivity to political argumentation; the number of judges assigned to the cases and the number of national governments intervening indicate, if anything, that the agreement cases tended to be slightly more controversial.³⁸ Nor can the substantial disparity of references to government interventions be explained by the Court failing to distinguish between an intervening government and a public body party to the procedure (the government being the superior of the party in question, as the government of

³⁶ I.M. COPI, C. COHEN, *Introduction to Logic*, Upper Saddle River, New Jersey: Pearson, 2009, p. 145 *et seq.* For a more extensive exploration of the term and its meaning, see D. WALTON, *Appeal to Expert Opinion: Arguments from Authority*, University Park, Pennsylvania: Penn State University Press, 1997, p. 63 *et seq.*

³⁷ J. ODERMATT, *Patterns of Avoidance: Political Questions before International Courts*, in *International Journal of Law in Context*, 2018, p. 221 *et seq.*; J. VON BERNSTORFF, O. KRAMER, J. SAURER, S. THOMAS, *Evasive Courts: A Rhetorical Analysis of Judicial Conflict Avoidance*, 2018, available at www.researchgate.net.

³⁸ See *supra*, note 32. On using these factors to approximate political sensitivity, see O. LARSSON, D. NAURIN, M. DERLÉN, J. LINDHOLM, *Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union*, in *Comparative Political Studies*, 2017, p. 894 *et seq.*; J. DEDERKE, D. NAURIN, *Friends of the Court? Why EU Governments File Observations Before the Court of Justice*, in *European Journal of Political Research*, 2018, p. 878.

the Member State of referral almost consistently intervenes), as public bodies appeared as parties in equal measure in both categories.³⁹

The observation suggests that the Court finds judicial and executive support at least to some extent interchangeable. The finding mirrors previous research by Larsson *et al.*, which has shown the Court to rely more heavily on legal argumentation when entering into disagreement with political actors.⁴⁰ Taken together, these findings may be suggestive of a broader disagreement strategy of the Court, which can be described as compensating for the anticipated resistance or disappointment by seeking the support of other actors – effectively trading one collaborator for another. Furthermore, while the influence of Member State governments on the Court has been well documented,⁴¹ the Court's response to disagreement with the referring courts adds important nuance by demonstrating that the latter occupy a comparably privileged position.⁴²

The resorting to political argumentation in response to legal divergence – and vice versa – demonstrates that the Court considers itself part of a political as well as a legal community. Furthermore, it suggests that it uses its dual roles to gain an advantage over the least sympathetic interlocutor. This strongly suggests that choice of references is strategic.⁴³ However, while legal reasons are binding also upon the executive, the interventions by members of the executive branch before an independent court of law hold no legal or, in a society based on the rule of law, legitimate authority.⁴⁴ This entails that responding to judicial opposition with political arguments is different from the reverse. Thus, the Court's reliance on national governments is typical of argumentation *ad verecundiam*; the (executive) authority invoked lacks a legitimate claim in the (judicial) context. When supporting an assertion by reference to a Member State government, the Court in effect appeals not to legal authority but to extrajudicial, executive power.

The other authority more frequently invoked in disagreement judgments was legislation. This form of appeal to authority is, as MacCormick has pointed out, not only acceptable but indeed standard in legal reasoning, legislation being the legal authority par

³⁹ See *supra*, note 32. It may in this context be recalled that references to the defendant, *i.e.* typically the public party, were twice as common in agreement judgments (see Table 2 *supra*).

⁴⁰ O. LARSSON, D. NAURIN, M. DERLÉN, J. LINDHOLM, *Speaking Law to Power*, cit., p. 895 *et seq.*

⁴¹ E.g. C.J. CARRUBBA, M. GABEL, C. HANKLA, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, in *American Political Science Review*, 2008, p. 435 *et seq.*; J. FRANKENREITER, *The Politics of Citation at the ECJ: Policy Preferences of EU Member State Governments and the Citation Behaviour of Judges at the European Court of Justice*, in *Journal of Empirical Legal Studies*, 2017, p. 813 *et seq.*

⁴² Cf. similarly in a broader context Y. LUPU, E. VOETEN, *Precedent in International Courts*, cit., p. 414.

⁴³ Cf. O. LARSSON, D. NAURIN, M. DERLÉN, J. LINDHOLM, *Speaking Law to Power*, cit., p. 902, who left open whether the Court's response to political disagreement was strategic or merely judicial default.

⁴⁴ Cf. M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING, *Introduction: On Constitutional Conversations*, in M. CLAES, M. DE VISSER, P. POPELIER, C. VAN DE HEYNING (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Cambridge-Antwerp-Portland: Intersentia, 2012, p. 2: "Judicial decisions must by their nature be based on legal argumentation and rational and reasoned persuasion, not on power or mere interest, or even institutional authority".

excellence.⁴⁵ However, it is also a source of law that – like the support of actors such as the Commission and the Member State governments but unlike general principles and case law – is external in relation to the Court of Justice itself. Related to this tendency is the Court's greater focus on substantive aspects of the issue in disagreement judgments; as substantive law tends to be harmonised to a greater extent than the law of procedures and remedies, framing the issue in substantive terms offers the Court a stronger position that is clearly within the Union's competence and can be backed up by primary and secondary legislation, whereas taking a procedural or remedial perspective would force it to justify what may be perceived as an encroachment upon the Member States' so-called "national procedural autonomy" and to rely largely on judge-made law. While it is common judicial practice to draft judgments diminishing the court's agency and externalising responsibility for the outcome,⁴⁶ an increased reliance on the most external and least controversial types of legal source might indicate that the Court feels this need more urgently in disagreement cases.

Increased reliance on legislation in disagreement judgments might also be interpreted as an effort to pedagogically explain or convince the referring court of the soundness of the outcome. However, three other observations speak against this interpretation. First, the absence of a corresponding increase in references to case law and general principles is conspicuous; if the Court sought to increase the persuasive qualities of its reasoning by increasing the number of references, this increase should have occurred for all sources of law.⁴⁷ Second, one would have expected a pedagogical aim to entail more thorough, and consequently lengthier, reasoning. Third, a pedagogical or persuasive effort might have included explanations of where the referring court went wrong. While the Court distinguished the circumstances of the case from previous rulings twice as often in disagreement than in agreement judgments,⁴⁸ such distinguishing in both categories occurred only half of the time in response to an argument in the order for reference.⁴⁹ Generally, overlaps in case law citations between the judgments and the orders for reference were more common in the agreement category, which is unsurprising (two courts reaching the same conclusion would naturally cite the same cases to a larger degree than courts disagreeing on the outcome) yet indicative of the Court not seeking to address the referring court's (erroneous) reasoning.

⁴⁵ N. MACCORMICK, *Argumentation and Interpretation in Law*, in *Ratio Juris*, 1993, p. 18.

⁴⁶ Cf. *supra*, section II at note 26.

⁴⁷ In agreement judgments, the Court referred to as many cases as it referred to individual legal provisions, which indicates the centrality of case law in the field.

⁴⁸ On the practice of distinguishing, see T. KOOPMANS, *Stare Decisis in European Law*, in D. O'KEEFE, H.G. SCHERMERS (eds), *Essays in European Law and Integration; to Mark the Silver Jubilee of the Europa Institute Leiden 1957–1982*, Deventer: Kluwer, 1982, p. 11.

⁴⁹ See variable 6.1 in Table 3 *supra*.

Turning to the conflict avoidance strategy, the findings reveal several features of disagreement judgment drafting that entail subtle reframing and rephrasing of the problem. This indicates that the Court is attempting to avoid or draw attention away from the conflict with the referring court. Most importantly in this regard, the findings show that the Court is significantly more likely to reformulate the questions in a way that alters their meaning when it proceeds to deliver an answer different than that advocated by the referring court. A previous study has already suggested that conflict avoidance is part of the reason the Court reformulates questions substantively,⁵⁰ and the more frequent occurrence of substantive reformulations of questions where the Court and the referring court disagree on the answer appears to further support this argument. The fact that such reformulations generally tend to restrict the scope of the question to a larger extent than they do in agreement judgments suggests that substantive reformulation in conflict situations may be a way for the Court to control the damage.

The (more extensive) non-disclosure of referring court outcome preference statements in disagreement judgments appears to serve the same purpose by diminishing the impression of conflict between the courts. Moreover, the description of national law in disagreement judgments tends to be less faithful to the wording of the provisions, which may indicate an attempt to conceal possible norm collisions.

The approach can be illustrated by the judgment in *Fastweb*.⁵¹ In that case, the Italian Consiglio di Stato referred a question on the validity of Art. 2, let. d), para. 4, of Directive 89/665, which prevented it from voiding a public contract entered into following an erroneous procedure – an action that would have been open to it under national law. The Court, first, recounted the content of national law without disclosing its exact wording, being particularly vague on the content of the most relevant national provision.⁵² It then went on to describe the facts of the case and the prior findings of the referring court in the case but left out the outcome preference statement, noting only that the referring court was “uncertain”.⁵³ Lastly, it reformulated the question by excluding two of the four superior norms (the principle of equality between the parties and the principle of protecting competition) that the referring court had put forward as a basis for the judicial review.⁵⁴ The effect is that the Court responded to a more narrowly construed question than that referred, while obscuring the discrepancy between national and EU law and suppressing the opposing opinion of the referring court.

The Court also defers more often to the referring court in the operative part of disagreement judgments; however, deference is more often minimal. This might be inter-

⁵⁰ U. SADL, A. WALLERMAN, “*The Referring Court Asks, in Essence*”, cit., p. 430.

⁵¹ Court of Justice, judgment of 11 September 2014, case C-19/13, *Fastweb*.

⁵² *Ibid.*, in particular para. 17. It should be noted, however, that the Italian Council of State's order for reference of 14 December 2012 was similarly vague on this point (paras 10.5-6).

⁵³ *Fastweb.*, cit., paras 30-32.

⁵⁴ *Ibid.*, para. 55.

preted as a way of offering a compromise, or at least of sugarcoating the outcome, by leaving a margin of appreciation as an olive branch to the referring court (but simultaneously keeping it small to minimise the risk of distortion). A compromising approach could also be identified in the three answers where the Court reached *in casu* outcomes, accommodating the referring court on the basis of an exception while establishing a principled conclusion to the opposite effect. However, outcomes of this kind are very rare in the dataset, the differences in deference patterns are relatively subtle, and little else supports an explanation of the Court's behaviour as compromise-seeking. Instead, the increased deference in disagreement judgments may be interpreted as another means of pasting over conflict by leaving the final conclusion nominally – or symbolically? – open and in the hands of its national “collaborator”.

VI. CONCLUSIONS

The drafting of a judgment contradicting the expectations or preferences of a referring court can be presumed to be something of a balancing act between, on the one hand, promoting (what the Court perceives to be) the correct interpretation and development of EU law and, on the other, maintaining good relations with the national courts.⁵⁵ This *Article* examined the Court's drafting and justification of such disagreement judgments. It departed from the assumption that the Court is aware of the risk of disappointing its national interlocutor and takes this into consideration when communicating its disagreement. The findings confirm this assumption, in particular by revealing that the Court's response to disagreement with referring courts is analogous to the one it resorts to when confronted with political opposition.

However, the findings do not support an assumption that the Court of Justice would be particularly prone to diplomacy or legal articulacy when rejecting a referring court's proposition. Instead, based principally on the observations of, first, a considerable increase in the references to the positions taken before the Court by the Member State governments and the Commission and, second, a greater tendency to substantially reformulate the questions and reframe the legal background of the case, the *Article* argues that the Court's main strategies for communicating disagreement to the national courts are appeal to authority (argumentation *ad verecundiam*) and conflict avoidance.

This conclusion tells a different story from the judicial dialogue and collaboration that the Court itself claims to be engaging in.⁵⁶ Conflict avoidance may be a successful

⁵⁵ Although that balance may be tilted to the benefit of the former and the detriment of at least lower and mid-level national courts; see R.D. KELEMEN, T. PAVONE, *The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited*, in *European Law Journal*, 2019, p. 352 *et seq.*

⁵⁶ E.g. Court of Justice: judgment of 19 June 2012, case C-307/10, *Chartered Institute of Patent Attorneys* [GC], para. 31; judgment of 7 August 2018, case C-472/16, *Colino Sigüenza*, para. 57. See also, writing in

strategy from a pragmatic perspective,⁵⁷ facilitating compliance and sparing the referring court the embarrassment of being publicly reprimanded by the Court.⁵⁸ However, avoidance also suggests a lack of trust and transparency in the Court's relation to its national interlocutors, leading to courts talking past each other.⁵⁹ As for argumentation *ad verecundiam*, this concept is traditionally traced to John Locke's *An Essay Concerning Human Understanding*, according to which the argument is often used towards others "to prevail on their assent; or at least to awe them as to silence their opposition", but is notably not helpful for attaining knowledge or truth.⁶⁰ Unlike the rejected hypotheses of persuasion and compromise, neither strategy engages with the substantive arguments pertaining to the questions referred to the Court, and neither appears conducive to constructive judicial dialogue.⁶¹

As Besselink has pointed out, the constitutional dialogue between EU courts must be based on "a minimum of shared values", including "the acceptance that not all values are shared".⁶² The order for reference is an ideal occasion for the Court to become acquainted with such, potentially diverging, legal values and priorities and to properly understand the referring courts' concerns and expectations. The inclusion of the referring courts' opinions in the orders for reference entails the prospect of upgrading the preliminary reference procedure to a genuine exchange of opinions, with potential gains for both the legitimacy of the ongoing constitutionalisation process and the effective dissemination of Union law through national courts – not to mention a jurisprudential development that is able to benefit from the thinking of highly qualified legal minds belonging not only to the Court of Justice judges. The Court's attitude to national colleagues holding views other than its own does little to facilitate the diversity that forms

their extra-judicial capacities, A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2008, p. 121 *et seq.*; K. LENAERTS, *Upholding the Rule of Law Through Judicial Dialogue*, in *Yearbook of European Law*, 2019, p. 2 *et seq.*

⁵⁷ J. ODERMATT, *Patterns of Avoidance*, cit., p. 222 *et seq.*

⁵⁸ On embarrassment and fear of "getting it wrong" as a factor that dissuades national judges from entering into dialogue with the Court, see R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 117 *et seq.*, cf. p. 160; and K. Leijon's *Article* in this Special Section: K. LEIJON, *Active or Passive*, cit.

⁵⁹ Cf. R. VAN GESTEL, J. DE POORTER, *In the Court We Trust*, cit., p. 179 *et seq.*, and more generally H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith*, Cambridge: Cambridge University Press, 2005, p. 446 *et seq.*

⁶⁰ J. LOCKE, *An Essay Concerning Human Understanding*, book IV, ch. XVII, paras 19–22. Available at www.gutenberg.org.

⁶¹ For a more in-depth exploration of such a failed dialogue resulting from insufficient attention paid by the Court to the arguments raised by the referring court, see the *Article* by M. Eliantonio and C. Favilli in this Special Section: M. ELIANTONIO, C. FAVILLI, *When Two Preliminary Questions Result in One and Half Answers: A Constitutional Tragedy in Four Acts*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 991 *et seq.*

⁶² L. BESSELINK, *National and Constitutional Identity Before and After Lisbon*, in *Utrecht Law Review*, 2010, p. 49; see also E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue Between the ECJ and National Courts*, in *NoFo: Journal of Extreme Legal Positivism*, 2010, p. 21 *et seq.*

a precondition for a “mutually inspiring further development of the European constitutional culture”,⁶³ suggesting that order for reference outcome preference statements represent (yet another) missed opportunity in the preliminary reference procedure.

⁶³ A. VOßKUHL, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, in *Review of European Constitutional Law*, 2010, p. 198.



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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WHEN TWO PRELIMINARY QUESTIONS RESULT IN ONE AND HALF ANSWERS: A “CONSTITUTIONAL TRAGEDY” IN FOUR ACTS

MARIELINA ELIANTONIO* AND CHIARA FAVILLI**

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ABSTRACT: As is well known, in order for the preliminary reference procedure to function properly, national courts must have both the cognitive and the political ability to engage in a judicial dialogue with the Court of Justice. The Court of Justice itself must be able to – at least sufficiently – understand the factual background and the legal issues (and possibly the broader legal and political background) of the question posed. In this *Article*, we discuss a case study, which shows that a number of procedural variables – often outside the control of the referring court – can come in the way of a fully functional preliminary reference mechanism. The *Article* examines two preliminary questions (from Italy and the Netherlands), by focusing specifically on the reasoning of both national referring courts, and the answers given to both courts by the Court of Justice, in order to assess whether and to which extent the Italian court has grounds to consider that its questions have not been properly answered. Ultimately, the contribution will attempt at teasing out, from this case study, a number of challenges posed to the correct functioning of the preliminary ruling procedure.

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I. INTRODUCTION

The preliminary reference procedure, enshrined in Art. 267 TFEU, has, since *Van Gend en Loos*,¹ been considered by doctrine and the Court itself the keystone of the judicial architecture of the EU.² With the use of the preliminary reference procedure, the Court of Justice has been able to steer the process of European integration, and deliver seminal judgments which have shaped the EU legal system politically and economically.³

The procedure is, however, a delicate object, in that the mechanism only works under certain conditions, entailing the participation of both national courts and the Court of Justice. As Krommendijk put it, “it takes two to tango”.⁴ National courts must be able and willing to dance, in that they should have both the cognitive and the political ability to engage in a judicial dialogue with the Court of Justice by sending preliminary questions. The Court itself must understand the steps of the dance the domestic courts are willing to initiate, in that it should be able to – at least sufficiently – understand the factual background and the legal issues (and possibly the broader legal and political background) of the question posed.

While for a long time these claims have remained largely unsubstantiated, increasingly more research points to the fact that there is evidence to show that the tango, while being danced, is not delivering a cohesive and well-functioning performance. Indeed, earlier research did indicate that judges are often unwilling to refer⁵ or that the quality of the references is often still below the acceptable levels, thereby impairing the Court of Justice’s understanding of the problem posed by the national court.⁶ Furthermore, it has

¹ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos v. Administratie der Belastingen*.

² J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, in *European Journal of Legal Studies*, 2018, p. 103.

³ Most recently, see A. DYEVE, M. GLAVINA, A. ATANASOVA, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, in *Journal of European Public Policy*, 2020, p. 912 et seq., and the literature cited therein.

⁴ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 101.

⁵ M. BOBEK, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts*, in M. ADAMS, H. DE WAELE, J. MEEUSEN, G. STRAETMANS (eds), *Judging Europe’s Judges: The Legitimacy of the European Court of Justice Examined*, Oxford: Hart, 2013, p. 212 et seq.

⁶ S. PRECHAL, *Communication Within the Preliminary Ruling Procedure. Responsibilities of the National Courts*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 755 et seq.

been argued that, because of the vague nature of the rulings of the Court of Justice, national courts do not know how to adequately implement the reply received by the Court.⁷

Within this debate, we are particularly interested in the “receiving end” of the spectrum in the judicial interaction between national courts and the Court of Justice, thereby contributing to three open strands of research on the functioning of the preliminary question. First, we contribute to the research which has focused on how national courts react to answers to preliminary questions, a topic on which, as has been aptly observed,⁸ little is known, especially in comparison with the growing empirical literature on the motives to (not) refer.⁹ In particular, we discuss in this *Article* a case study, which shows that a number of procedural variables – often outside the control of the referring court – can come in the way of a fully functional preliminary reference mechanism, thereby adding to the complexity of the system. Because of these variables, a “short circuit” is often produced in the channel of communication between national courts and the Court of Justice. Second, we feed into the research which has shown that, when preliminary questions posed by the national courts concern fundamental and politically sensitive constitutional values, the short circuit might ultimately undermine the very trust in the procedure by the national courts¹⁰ which might prefer, where available, to use the Constitutional Court as privileged interlocutor. Furthermore, because of the constitutional and politically sensitive subject matter of the litigation, this case study feeds into the more general debate on the “rebellious” attitude of national courts *vis-à-vis* the Court of Justice when certain core values are at stake.¹¹ Third, we look into the “micro-physics” of some problematic aspects of the daily workings of the preliminary reference procedure, thereby complementing earlier contributions that have primarily

⁷ E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 763 *et seq.*; M. DE WERD, *Dynamics at Play in the EU Preliminary Ruling Procedure*, in *Maastricht Journal of European and Comparative Law*, 2015, p. 152.

⁸ M. BOBEK, *Of Feasibility and Silent Elephants*, *cit.*, p.197.

⁹ See e.g. S.A. NYIKOS, *The Preliminary Reference Process. National Court Implementation, Changing Opportunity Structures and Litigant Desistment*, in *European Union Politics*, 2003, p. 397 *et seq.*; S.A. NYIKOS, *Strategic Interaction Among Courts Within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions*, in *European Journal of Political Research*, 2006, p. 527 *et seq.*; M. WIND, D.S. MARTINSEN, G.P. ROTGER, *The Uneven Legal Push for Europe: Questioning Variation when National Courts Go to Europe*, in *European Union Politics*, 2009, p. 63 *et seq.* On the implementation of Court of Justice’s judgments see in this Special Section: J. KROMMENDIJK, *Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 825 *et seq.*; as well as L. SQUINTANI, S. KALISVAART, *Environmental Democracy And Judicial Cooperation In Environmental Matters: Mapping National Courts Behaviour in Follow-up Cases*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 931 *et seq.*

¹⁰ This point has been specifically investigated by 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.*

¹¹ See O. GARNER, *The Borders of European Integration on Trial in the Member States: Dansk Industri, Miller and Taricco*, in *European Journal of Legal Studies*, 2017, p. 1 *et seq.*

focused on high-profile cases referred by constitutional courts.¹² In this light, the aim of this *Article* is to critically discuss two sets of preliminary questions,¹³ and their national antecedents and follow-ups, concerning asylum procedures in Italy and the Netherlands, and to tease out a number of possible implications for the functioning of the preliminary ruling procedure.¹⁴ The selected sample is interesting in the context of a discussion of the possible shortcomings of the preliminary reference procedure, because an Italian and a Dutch court, autonomously from each other, and approximately around the same time, sent two preliminary questions to the Court of Justice concerning Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.¹⁵ This sequence of events, as will be shown below, irrelevant as it may look, has triggered a chain reaction that ultimately led to a useless and possibly even – for the referring Italian court – frustrating answer by the Court of Justice. The *Article* examines the reasoning of both national referring courts, and the answers given to both courts by the Court of Justice, in order to assess, specifically, whether and to which extent the Italian court has grounds to consider that its questions have not been properly answered. These points will also be considered in light of the potential consequences of a preliminary question, namely the duty to set aside national legislation and to interpret it, as far as possible, in conformity with EU law. Ultimately, the contribution will attempt at teasing out, from this case study, a number of challenges posed to the correct functioning of the preliminary ruling procedure.

¹² See. A. DYEVE, *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 Step of the Italian Constitutional Court*, in *European Constitutional Law Review*, 2014, p. 143 et seq.; A. TORRES PEREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, p. 308 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.; U. SADL, S. MAIR, *Mutual Disempowerment: Case C-441/14 Dansk Industri*, in *European Constitutional Law Review*, 2017, p. 347 et seq.

¹³ Court of Justice: judgment of 26 September 2018, case C-180/17, *Staatssecretaris van Veiligheid en Justitie (suspensory effect of appeal)*; order of 27 September 2018, case C-422/18 PPU, *FR*.

¹⁴ These two cases have been discussed in a contribution by a Dutch and Italian judge. See A. PAHLADISINGH, A. SCALERA, *Tension Between the Obligation to Return for Illegal Third Country Nationals and an Effective Remedy in Appeal in the Light of the Case Law of the Court of Justice EU*, in *Jaarboek Vreemdelingenrecht*, 2018, p. 31 et seq.

¹⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

II. HOW THE STORY UNFOLDED: THE FOUR ACTS OF THE “CONSTITUTIONAL TRAGEDY”

As mentioned in the introduction, the case study analysed in this *Article* revolves around two sets of preliminary questions, which concerned the same legal instrument and partly the same legal point, *i.e.* the absence of automatic suspensory effect of review procedures in asylum matters and its compliance with the principle of equivalence and effective judicial protection. The questions were, however, partly different in their argumentations, and were referred to different legislative frameworks. In the following, the series of acts that lead to the epilogue of the story will be detailed, while paying particular attention to the differences in the ways in which the two preliminary questions were phrased.

II.1. ACT 1: THE REFERRING ORDER OF THE DUTCH COUNCIL OF STATE

On 27 March 2017, the Dutch Council of State decided to refer to the Court of Justice a preliminary question on whether EU law prohibits that the Dutch applicable legislation did not foresee a system of automatic suspensory effect of a challenged ruling when an appeal against a first instance ruling is brought before the Council of State in asylum matters.¹⁶ The case concerned a Russian asylum seeker, who had asked for international protection. After the Dutch authorities rejected his application, a claim was brought to a first instance court (Rechtbank), who upheld the authorities' decision. Subsequently, an appeal against this ruling was brought before the Council of State, and, in that context, the request was made to suspend the challenged decision. According to the referring court, this legal setup might entail a possible violation of the Charter, and in particular Art. 47 on the right to an effective remedy. The question of the Dutch judge is, therefore, centred on the compatibility of the Dutch legislation exclusively with Art. 47 of the Charter. Specifically – and this point is worth mentioning in light of the subsequent Italian ruling – in the referring order, the Dutch court did refer to the fact that in some cases Dutch law knows of a system of automatic suspensory effect, but did not ask a question concerning the compatibility of the Dutch legislation with the principle of equivalence.

II.2. ACT 2: THE REFERRING ORDER OF THE TRIBUNAL OF MILAN

On 9 May 2018, before the Court of Justice delivered its ruling on the Dutch referral, an Italian court asked the Court of Justice a similar – yet not identical – question to that referred by the Dutch court.¹⁷ The facts at stake were very similar to the ones the Dutch

¹⁶ Dutch Council of State, judgment of 29 March 2017, no. 20169659/3/V2.

¹⁷ Tribunal of Milano, decision of 9 May 2018, no. 44718/2017, available at: www.questionegiustizia.it. See on this ruling, A. ADINOLFI, *Diritto dell'Ue e soggiorno del richiedente protezione internazionale in attesa dell'esito del ricorso in Cassazione: qualche osservazione a margine dell'ordinanza di rinvio pregiudiziale del Tribunale di Milano (n. 44718/2017)*, in *Questione Giustizia*, 29 June 2018, www.questionegiustizia.it.

judge was faced with, as the claim concerned an asylum seeker whose request for international protection has been rejected by the authorities and by the first instance court (the Tribunal of Milan). The applicant subsequently brought an appeal before the Italian Supreme Court (Corte di Cassazione) and, in accordance with the applicable Italian legislation, a request to the tribunal itself to suspend the execution of its ruling. The Italian referring court had two main questions for the Court of Justice, which it referred to the Court through an urgent preliminary ruling procedure pursuant to Art. 107 of the Rules of Procedure of the Court of Justice. The first question of the Italian judge is very much dubbing what the Dutch court had been pondering and concerned the compatibility with EU law of the Italian applicable legislation which did not foresee a system of automatic suspensory effect when an appeal against a first instance ruling is brought before the Court of Cassation. In the opinion of the Italian court, the lack of an automatic suspensive effect of the appeal before the Supreme Court makes it difficult, if not impossible, to grant an effective right of defence to asylum seekers, because the person, whose presence in the territory is illegal pending the appeal, can be subject to a return measure and cannot, therefore, participate to the proceedings.

The second question was, however, entirely peculiar to the Italian system and concerned the conditions for obtaining interim relief (upon request). In particular, the Italian court had doubts on the fact that, in order to obtain interim relief in asylum cases, an applicant had to prove the existence of “serious doubts” concerning the lawfulness of the first instance ruling, and on the circumstance that it is the same court which issued the first instance ruling to rule on the existence of these “serious doubts”.

While the referring order of the Dutch court revolved around the compatibility of Dutch legislation with Art. 47 of the Charter, the Italian judge brought forward not only the right to an effective remedy (which the judge specified into the right of defence), but also the right to an impartial judge under the Charter and the ECHR. Importantly, a very significant part of the referring order concerned the compatibility of Italian legislation with the principle of equivalence. To explain and ground this point, the Italian court identified, as required by the Court of Justice case law,¹⁸ a “similar claim”, which the court saw in the “ordinary” claim in cassation – *ricorso in cassazione*.¹⁹ In such cases, the only requirement to obtain interim relief to suspend a ruling which is subject to a claim in cassation is the existence of a situation of urgency and threat of irreparable damage to the individual's legal sphere. The requirement of existence of serious doubts on the lawfulness of the contested ruling does not need to be met. Arguably, according to the Italian court, this different regime is not based on any objective reasons other than combatting abuses of the

¹⁸ See Court of Justice: judgment of 1 December 1998, case C-326/96, *Levez v. Jennings Ltd*; judgment of 17 March 2016, case C-161/15, *Bensada Benallal*; judgment of 30 June 2016, case C-200/14, *Câmpean*.

¹⁹ Art. 373 of the Italian Code of Civil Procedure.

right to asylum, with the consequent application of special rules that are less favourable to the applicant than those generally provided by the Italian legal system.

Finally, and this is yet another peculiarity of the Italian referral *vis-à-vis* the Dutch one, the Italian court asked explicitly whether it is possible to interpret the applicable Italian legislation in asylum matters in light of EU law and therefore allowing national courts to grant interim relief by assessing the requirement of urgency and threat of irreparable damage and not the existence of serious doubts concerning the lawfulness of the first instance ruling.

II.3. ACT 3: THE REPLY TO THE DUTCH REFERRAL

On 26 September 2018, the Court of Justice delivered its ruling on the Dutch case.²⁰ The answer of the Court of Justice to the Dutch referral tackled the points raised by the national court (albeit perhaps failing to provide the answer the referring judge had hoped for).²¹ By relying on earlier and well-established case law, the Court concluded that EU law (including both EU secondary law and the Charter) does not require either a second instance of judicial review system of automatic suspensory effect or, *a fortiori*, the existence, as such, of interim relief proceedings. Despite the fact that this was not explicitly part of the questions posed by the Dutch judge, the Court of Justice felt the need to add that, if there are interim relief proceedings foreseen to transpose the relevant EU legislation, the law must respect the well-known principles of equivalence and effectiveness, the respect of which is for the national court to check.

II.4. ACT 4: THE REPLY TO THE ITALIAN REFERRAL

The day after delivering its ruling on the Dutch case, the Court of Justice answered the questions posed by the Italian judge.²² Importantly, the Court chose to answer the Italian question through an order, applying Art. 99 of the Rules of Procedure of the Court of Justice and reasoning, in essence, that the answer to the Italian question, could be “clearly deduced from existing case-law”.²³ Having taken that road, in the rest of the ruling the Court did not do much else than essentially referring to the reasoning employed in the answer to the Dutch question to reach the very same conclusion with respect to the Italian legislation.

As a consequence, the Italian questions were answered only in part, namely only with respect to the lack of automatic suspensory effect in appeal proceedings. Indeed, the Court ignored completely the specifics of the Italian legislation, in particular with re-

²⁰ *Staatssecretaris van Veiligheid en Justitie*, cit.

²¹ The referring order is indeed very much suggesting that the Dutch judge considered Dutch legislation in violation of Art. 47 of the Charter by not providing a system of automatic suspensory effect.

²² *FR*, cit.

²³ This is the formulation used in Art. 99, which provides for the situations in which a reasoned order can be used by the Court. This point will be dealt with more in depth in section III.

gard to the point concerning the conditions for obtaining interim relief, and therefore did not tackle at all the points of the Italian court concerning the right of defence and right to an impartial judge.²⁴

Even in the assessment of the compliance with the principle of equivalence, the Court is very brief, despite the fact that the Italian court had clearly brought arguments in support of its position and given all elements to make the assessment on the violation of the principle by the Italian legislation. It can be speculated that perhaps the Court of Justice did not want to take responsibility for making the assessment and left the “hot potato” in hands of the Italian court. However, it should be noted that, in other – also recent – cases, the Court of Justice did not shy away from assessing the principle of equivalence itself.²⁵ Finally, the Court was completely silent on the question of whether consistent interpretation of Italian legislation concerning the conditions for obtaining interim relief was possible, a question which had explicitly been asked by the national court.

III. THE LESSON LEARNT FOR THE PRELIMINARY RULING PROCEDURE

This case study lends itself to a number of reflections on the risks surrounding the functioning of the preliminary reference procedure. This *Article* does not have the ambition to empirically test how often these risks occur in practice (and how damaging they are for a fully functional interaction between national courts and the Court of Justice). However, it does provide a reflection on the concrete existence of these risks and how they influenced the outcome of the Italian case discussed above, as well as subsequent related cases. Below we present these reflections.

III.1. THE “PROCEDURAL X FACTORS”: AN URGENT PRELIMINARY QUESTION, ANSWERED THROUGH A REASONED ORDER, AND A LIMITED ROLE FOR THE NATIONAL COURT

A first feature of the series of events presented above, which might have contributed to triggering the “short circuit” in the communication channel between the referring Italian court and the Court of Justice, was the use made by the Italian court of the system of urgent preliminary ruling. This procedure was created in application of the requirement, contained in Art. 267, para. 4, TEFU, on the basis of which, if a question “is raised

²⁴ See on this point the *Article* by A. Wallerman Ghavanini in this Special Section: A. WALLERMAN GHAVANINI *Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 887 *et seq.*

²⁵ Court of Justice, judgment of 24 October 2018, case C-234/17, *XC and Others* [GC].

in a case pending before a court or tribunal of a Member State with regard to a person in custody, the CJEU shall act with the minimum delay".²⁶

Given that the procedure is activated when certain conditions of urgency occur, the aim of the procedure is to significantly shorten the ordinary length of wait to receive a preliminary ruling from the Court.²⁷ Concretely, and according to the latest statistics available, this means that urgent rulings are delivered, on average, within 3.1 months from the reference.²⁸ Considering that the referral of the Italian court was registered at the Court on 28 June 2018, and in light of the judicial vacation period of the Court from mid-July to end of August,²⁹ the Court of Justice must have viewed the prior submission of the Dutch referral as a good opportunity to rule first on the Dutch case and then, immediately, on the Italian case, by referring *per relationem* to the earlier judgment. As discussed above, the outcome of this approach of the Court is that the reasoning developed by the Italian court, which was partially different from that in the Dutch case, in particular regarding the respect of the principle of equivalence, was not the object of a specific consideration.

While this point could hardly have been foreseen by the Italian referring court, it does cast some shadows on the functioning of the urgent preliminary ruling mechanism as a functional mechanisms to protect EU fundamental rights.³⁰ Indeed, it has been argued that the procedure can be used to "test the extent to which the EU is a mature legal order with regard to the protection of EU fundamental rights".³¹ If the urgent preliminary ruling is to be seen as instrument to unequivocally protect vulnerable individuals when there is a serious threat of their EU fundamental rights being violated, the conclusion in our case study cannot but be that the instrument (or rather, the use that has been made of it) failed the applicant in the main proceedings. This is because the answer provided by the Court of Justice did not shed any light at all onto an extremely problematic aspect (from a fundamental right perspective) of the Italian judicial proceedings in asylum cases, namely that the request for interim relief is conditional upon the acknowledgment, by the same court who issued the contested ruling, of the fact that its own ruling is doubtful from a legal point of view.

²⁶ S. BARTOLINI, *The Urgent Preliminary Ruling Procedure: Ten Years On*, in *European Public Law*, 2018, p. 214.

²⁷ The average duration of proceedings for references for preliminary ruling in recent years has been 15 months in 2014, 15.3 in 2015, 15 in 2016, 15.7 in 2017, 16 in 2018. CJEU, *Judicial Activity - Annual Report 2018, 2019*, curia.europa.eu, p. 134.

²⁸ *Ibid.*

²⁹ See curia.europa.eu for the years 2019/2020 and 2020/2021.

³⁰ These are discussed by Bartolini and the doctrine referred to therein. S. BARTOLINI, *The Urgent Preliminary Ruling Procedure*, cit., p. 214. See also Sharpston who argues that speediness often goes to the detriment of quality. E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, cit., p. 765 *et seq.*

³¹ S. BARTOLINI, *The Urgent Preliminary Ruling Procedure*, cit., p. 215.

A second key circumstance, which seems to have generated the “constitutional tragedy” we sketched above, was the fact that the Court made use of Art. 99 of its Rules of Procedure and answered the Italian question by reasoned order and in essence by reference to its earlier answer in the Dutch case. According to this provision,

“[W]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge- Rapporteur and after hearing the Advocate General, decide to rule by reasoned order”.

Art. 99 of the Rules of Procedure codifies to some extent the *acte claire* doctrine established through the *CILFIT* ruling.³² The provision was introduced in 1991 and simplified in 2012 and was indeed aimed at responding to the increasing workload created by repetitive questions.³³ Indeed, speedy and quicker answers have been at the core of much of the reforms of the Court of Justice,³⁴ and the possibility to issue “reasoned orders” instead of rulings certainly can be regarded as a mechanism to speed up the preliminary reference procedure before the Court.

However, much like the *CILFIT* ruling, this provision brings along a number of risks. Indeed, *CILFIT* has been subject to much criticism and has been regarded as being liable to endanger the coherent and uniform application of EU law, by dissuading national courts from asking preliminary questions in cases in which these questions ought to have been asked.³⁵ To some extent, one could argue that Art. 99 is, in a rather specular

³² Court of Justice, judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*.

³³ M. JACOB, *Precedents and Case-Based Reasoning in the European Court of Justice*, Cambridge: Cambridge University Press, 2014, p. 258.

³⁴ See for example the increasing practice of joining cases. According to the 2018 Annual Report, “[w]hile the number of cases closed in 2018 is significantly higher than in 2017, the number of decisions delivered by the Court [Court of Justice] in 2018 is fairly close to the number of decisions delivered in 2017. This factor is mainly due to the similarity between cases brought before the Court. Having received a large number of requests for preliminary ruling in 2017 [...] the Court, in the interests of procedural economy and efficiency, joined most of these cases for the purposes of the written and oral phase of the procedure and the judgment, thereby reducing the overall number of decisions delivered”. CJEU, *Judicial Activity – Annual Report 2018*, cit., p. 117.

³⁵ P. CRAIG, *The Classics of EU Law Revisited: CILFIT and Foto-Frost*, in L.M. POIARES, L. AZOULAI (eds), *The Past and the Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, 2010, pp. 185-191. See also N. FENGER, M. BROBERG, *Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine*, in *Yearbook of European Law*, 2011, p. 180 *et seq.* For example, it has been argued that “the judgment in *CILFIT* has three outstanding features: rigour, subjectivity and confusion”. A. KORNEZOV, *The New Format of the Acte Clair Doctrine and Its Consequences*, in *Common Market Law Review*, 2016, p. 1319 *et seq.*

fashion, “encouraging” the Court of Justice to regard preliminary questions as “identical” or as having been previously answered in earlier case law.

In the context of Art. 99 of the Rules of Procedure, Bobek has indeed suggested that “it is open to argument whether the Court has always used this procedural tool exclusively for questions that can be ‘clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt’”.³⁶ This point has not been subject to much scholarly debate, and has never been tested empirically. Without ambition of completeness, it can be noted, from a search in the Curia database, that the Court of Justice is generally very brief in its choice to opt for the use of Art. 99 and answer by reasoned order, and hardly motivates this choice.³⁷ The same conclusion can be reached with respect to the case at hand, where the Court simply stated that Art. 99 could find application in this case and went on to replicate the answer to the Dutch case, which, as mentioned above, in fact only partly tackled the doubts raised by the Italian referring judge.

The use of Art. 99 by the Court certainly ought to be the subject matter of further research, which would shed light on the possible “misuse” by the Court of this procedural tool, to the detriment of the functioning of the preliminary reference mechanism.³⁸

Linked to this conclusion, a second key point which could be made with respect to the use of the reasoned order concerns a more general observation on the role of national judges in the preliminary ruling mechanisms. Indeed, both de Werd³⁹ and Prechal⁴⁰ note that the mechanism of interaction between the Court of Justice and national courts is currently insufficiently geared to repair possible misunderstandings between the European and national judiciaries. They both observe that this is because there is no provision in the Statute or the Rules of Procedure to ensure that the national referring judge is heard in the procedure. Of course this point cannot be tested, but it can be argued that, specifically with respect to the use of Art. 99, it would seem sensible to provide for an opportunity for the referring court to be heard (a possibility which the provision currently affords only to the Advocate General). It can be speculated that, in the case at hand, if the Italian referring court had been given the opportunity to be heard, the possible additional explanation on the peculiarities of the Italian situation *vis-à-vis* the Dutch one might have decreased the risk of the occurrence of the “constitutional tragedy”.

³⁶ M. BOBEK, *Talking Now? Preliminary Rulings in and from the New Member States*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 786.

³⁷ See recently Court of Justice: judgment of 5 September 2019, case C-801/18, *Caisse pour l'avenir des enfants*; judgment of 20 June 2019, case C-424/18, *Italy Emergenza and Associazione Volontaria di Pubblica Assistenza “Croce Verde”*; judgment of 14 February 2019, case C-54/18, *Cooperativa Animazione Valdocco*.

³⁸ Kornezov, in the context of the *CILFIT* ruling, quotes a number of studies which range “from deliberate abuses through negligence to genuine mistakes”. See A. KORNEZOV, *The New Format of the Acte Clair Doctrine and Its Consequences*, cit., p. 1322.

³⁹ M. DE WERD, *Dynamics at Play in the EU Preliminary Ruling Procedure*, cit., p. 152.

⁴⁰ S. PRECHAL, *Communication Within the Preliminary Ruling Procedure*, cit., p. 756 et seq.

III.2. THE “USEFULNESS” OF THE RULING

As mentioned in the introduction, and aptly noted by Krommendijk, there is little systematic empirical evidence about how preliminary rulings are “received” at the national level, with earlier research pointing at rather contradictory results.⁴¹

Nyikos conceptualised the possible attitudes of national courts with the notions of “implementation”, which includes situations in which a national court abides by the Court of Justice’s ruling, or “evasion”, or “non-implementation”.⁴² According to her, “[a] national court can “evade” the ruling by adopting procedural measures to bypass an ECJ decision. [...] The two main methods of evasion are to refer a case again or to reinterpret the facts of the case such that the ECJ ruling does not apply”.⁴³ As we show below, these categories seem to assume that the Court of Justice has delivered a “useful” ruling for the national court, which is not always the case.

Indeed, having carried out empirical research on national courts’ perceptions of the preliminary ruling (with a special focus on migration cases), Krommendijk points out to the fact that the focus of the national courts is on whether the ruling of the Court of Justice is “useful” for them to solve the case.⁴⁴ In particular, he reports that, according to the interviewed judges, many judgments – significantly in migration cases – lack an unambiguous answer and only include criteria for assessments. Instead the interviewed judges in the Netherlands prefer “clear-cut” guidance.⁴⁵ A similar point is made by Sharpston, who argues that, because of the need to reduce the time being devoted to each case and the aim to achieve a quicker resolution of the cases, the Court might resort to shortcuts in the reasoning and deletion of more controversial passages. However, in order to replace that reasoning, more time is needed to reason and reach consensus, which is inconsistent with the attempt to reduce the time spent on the resolution of each case.⁴⁶ This may, in her opinion, lead to judgments handed over that are unclear or ambiguous. Her conclusion is that often “the national court is left with a muddled mess”.⁴⁷

These findings very much resonate with ours: the Court of Justice did not provide “operational” guidance to the national court and instead referred it to the well-known principle of equivalence, without testing it or providing any benchmark for the national court.⁴⁸ In

⁴¹ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 112 *et seq.*

⁴² S.A. NYIKOS, *The Preliminary Reference Process*, cit., p. 397.

⁴³ *Ibid.*, p. 399.

⁴⁴ A. KORNEZOV, *The New Format of the Acte Clair Doctrine and Its Consequences*, cit., p. 142.

⁴⁵ *Ibid.*, p. 145.

⁴⁶ E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, cit., p. 765 *et seq.*

⁴⁷ *Ibid.*, p. 766.

⁴⁸ A different question, which is not explored in this *Article*, is the relationships between the principles of equivalence, effectiveness and effective judicial protection and norms of secondary EU law of procedural nature and specifically the question of whether and to which extent these principles remain ap-

the case at stake, “usefulness” of the ruling was therefore not ensured, since the reply does not guide the Italian court at all, and does not tell it anything it did not know beforehand.

To follow with Sharpston’s concerns, she argues that, because of the “muddled mess” they are faced with, national courts may either ignore or circumvent the decision of the Court of Justice or make new references anew in the attempt to get clarity.⁴⁹

This is exactly what has happened after the ruling has been handed over. In particular concerning the principle of equivalence, the national court had extensively provided reasons as to why the principle of equivalence seemed to have been violated, and why functionally equivalent claims were treated differently. Nevertheless, the Court of Justice did not provide any answer to the national court on this and remitted to the national court the evaluation on the point of equivalence. This brought as a consequence the weakening of the argument of the national court: the “silence” or at least reticence of the part of the Court of Justice, despite the depth of the arguments brought forward by the national court was interpreted in subsequent rulings as meaning that the arguments of the national court were not that strong after all.

Indeed, in several other proceedings, national courts ended up interpreting the provisions at stake very differently. Even within the referring court (the Milan Tribunal), several following rulings reaching different conclusions have been adopted. In applying the reasoned order of the Court of Justice in the proceedings during which the preliminary question was asked, the tribunal adopted a literal (and thus restrictive) interpretation of the “serious grounds” requirements, without any further analysis of the principle of equivalence.⁵⁰

In a subsequent ruling, however, the same tribunal adopted a different interpretation of the contested provision, and, in implicit application of the principle of equivalence, interpreted extensively the notion of “serious grounds” in a way which would be coherent with the general framework of interim relief set out in Art. 373 of the Italian Civil Procedure Code.⁵¹ According to the tribunal, the “serious grounds” requirement must be regarded as being fulfilled whenever the claim in appeal brings forward flaws in the first instance ruling which are “abstractly within the scope of the jurisdiction of the Court of Cassation”. In other words, in this ruling, the tribunal considered that the “serious grounds” which need to exist for the first instance ruling to be provisionally suspended do not need to concretely relate to the merits of the claim (which have as such already been ruled on by the first instance court, the same court finding itself ruling on the appeal proceedings). The “serious grounds”, according to this extensive interpretation, merely need to be grounds which in abstract the Court of Cassation is competent to examine when ruling on the interim relief proceedings. However, what is noteworthy is that, even when using such

plicable also in presence of EU secondary procedural rules. This question is explored in a special issue of the *Review of European Administrative Law* by M. Eliantonio and E. Muir (2019).

⁴⁹ E. SHARPSTON, *Making the Court of Justice of the European Union More Productive*, cit., p. 765 *et seq.*

⁵⁰ Tribunal of Milano, judgment of 7 November 2018, no. 44718-1/2017.

⁵¹ Tribunal of Milano, judgment of 16 November 2018, no. 7765/2018.

intensive interpretation, the tribunal does not make any reference to the principle of equivalence, as instead the Court of Justice had suggested.

Indeed, no other court made reference to the question of equivalence, which was instead the main argument brought forward by the referring court to criticize the Italian legislation from the perspective of EU law. Also those Italian courts which, similarly to the Milan court mentioned above, adopted an extensive interpretation of the “serious grounds” requirements, reached that conclusion by arguing that, “in order to fulfil the requirement of the existence of ‘serious doubts’ concerning the lawfulness of the first instance ruling, the mere existence of an admissible claim and of non-manifestly ungrounded reasons to bring it” had to be considered sufficient, thereby significantly lowering the threshold to obtain interim protection.⁵² Interestingly, the same courts held that the question of whether there is a threat of serious and irreparable damage to the legal situation of the applicant (in particular whether he or she, once repatriated, might not be able to return to Italy) need to be considered in the assessment of the existence of serious doubt on the lawfulness of the first instance ruling.⁵³

Instead, other courts have continued to adopt a literal interpretation of the notion of “serious grounds”, giving it a fully different meaning than that of “grave and irreparable threat” which is applicable in the ordinary interim relief proceedings before the Court of Cassation. In those rulings, the main argument used by the courts relies on the point made by the Court of Justice that neither EU law nor the European Convention on Human Rights require a second degree of proceedings or the automatic suspensory effect of the first instance ruling.⁵⁴ In conclusion, it seems quite clear that, at least with respect to our case study, the “hands-off” attitude of the Court of Justice did not contribute to “responsabilise” national courts, but, much in line with Krommendijk’s findings, seemed to have delivered a “useless” ruling, which was unanimously and unequivocally ignored by the referring courts and other courts subsequently faced with the same legal problem and the same legislative framework.

Can one therefore conclude that the “relation of trust” between national courts and the Court of Justice has been endangered? From a mere observation of the attitude of the referring court and the rest of the Italian courts rulings on the same matter, and the conspicuous absence of the order of the Court of Justice in them, or of any reference of assessment of the principle of equivalence, one might be tempted to conclude that the national courts felt “abandoned” by the Court. This conclusion resonates very much with Mayoral’s findings on the “trust” of national courts in the context of the preliminary reference procedure.⁵⁵ Indeed, he points out, in the context of a broad investigation in-

⁵² Tribunal of Bologna, judgment of 25 November 2019, no. 18051/2019.

⁵³ *Ibid.* See also Tribunal of Firenze, judgment of 20 November 2019, no. 2019/15398.

⁵⁴ Tribunal of Trieste, judgment of 7 August 2018, no. 495/2018; Tribunal of Napoli, judgment of 8 July 2019.

⁵⁵ J. MAYORAL, *In the CJEU Judges Trust*, cit., p. 557.

volving judges of several Member States, that “national judges trust more in the CJEU when they believe its rulings are clear”.⁵⁶

Furthermore, as the diverging interpretations reached by the national courts show, it seems that this “hands-off” approach of the Court undermined the uniform application of EU law. This conclusion confirms to some extent earlier doubts expressed on the suitability (for the purposes of ensuring a uniform application of EU law) of broadly formulated principles, to be tested by national courts, as “outer limits”⁵⁷ of national procedural autonomy.⁵⁸

As the next section shows, the winner in this situation might be the Constitutional Court.

III.3. THE CONSTITUTIONAL IMPLICATIONS: WHEN A PRELIMINARY RULING TOUCHES A “SOFT SPOT”

While often concerning “high profile cases”,⁵⁹ it is well known that opposition and mistrust towards the Court of Justice is more likely to arise with respect to matters which are politically sensitive. Bobek has in this respect spoken about “uncooperative courts”.⁶⁰

The Court of Justice might have been unaware of the political context in which the Italian preliminary question may be placed, or it might more likely have been acutely aware of this context (and consciously made a decision not to interfere with Italian politics), but the sensitive nature of asylum legislation in Italy can hardly be overstated. Indeed, the applicable provisions to asylum procedures were modified in Italy in 2017.⁶¹ Under the previous regime, the suspensory effect of an appeal was automatic and lasted until the final judgment ending the entire judicial procedure, which could include three instances. With the 2017 reform, the Italian legislator removed the system of automatic suspensory effect and provided that a separate application for suspension of the effects of the challenged measure may be lodged before the same court who pronounced the challenged judgment, if serious doubts on the lawfulness of the first instance ruling exist.⁶² The question sent by the Italian court should, therefore, very much be seen as an attempt at not rendering interim relief in asylum proceedings anything

⁵⁶ *Ibid.*, p. 562.

⁵⁷ This phrase is used by S. PRECHAL, R. WIDDERSHOVEN, *Redefining the Relationship Between “Rewe Effectiveness” and Effective Judicial Protection*, in *Review of European Administrative Law*, 2011, p. 31.

⁵⁸ See e.g. the conclusion drawn by F. GRASHOF, *National Procedural Autonomy Revisited: Consequences of Differences in National Administrative Litigation Rules for the Enforcement of European Union Environmental Law: The Case of the EIA Directive*, Groningen: Europa Law Publishing, 2016.

⁵⁹ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 104.

⁶⁰ M. BOBEK, *Landtová, Holubec and the Problem of an Uncooperative Court*, cit., p. 54.

⁶¹ Law Decree no. 13 of 17 February 2017 was adopted, then transposed into Law no. 46 of 13 April 2017.

⁶² Art. 35bis, para. 13, of Legislative Decree no. 25/2008, introduced by Law Decree no. 13/2017.

more than empty procedural shells.⁶³ The Court of Justice seemed to ignore or be unaware of the sensitivity of the issues underlying the preliminary ruling, leaving the national court “alone” in the application of the principle of equivalence and in the consequent non-application of the national law considered to be in contrast with the same.

This approach of the Court of Justice is all the more criticisable because of the constitutional protection afforded by the Italian Constitution to the right to asylum. Asylum is indeed a typical case of multilevel protection of fundamental rights in the European legal space, where multiple sources are relevant to the shaping of the same right. The Charter contains some provisions specifically relating to the protection of asylum seekers, notably Art. 18 (right to asylum), Art. 19 (protection against return), and Art. 4 (prohibition of torture and inhuman or degrading treatment or punishment). However, this right is also protected under Art. 10, para. 3, of the Italian Constitution, which is formulated in very broad terms⁶⁴ and may be directly activated.⁶⁵ Secondary legislation can introduce limits and conditions to the right of asylum guaranteed by the Constitution, but cannot affect the existence of a right of asylum in Italy, as directly recognized by the Constitution.⁶⁶

The Italian court thus had, abstractly, the option⁶⁷ of both referring a preliminary question to the Court of Justice and of referring a question of constitutionality to the Constitutional Court pursuant to Art. 134 of the Constitution. As such, a referral to the Constitutional Court has the procedural advantage of the *erga omnes* effects of the ruling, leading to the abrogation of the law declared unconstitutional.⁶⁸ A preliminary ruling, instead, leads only to an *inter partes* effect, to the extent that the national conflicting

⁶³ This matter has been at the centre of a heated doctrinal debate in Italy at the time of the procedural reforms discussed in this Article. See G. IMPAGNATELLO, *La provvisoria esecuzione e l'inibitoria nel processo civile*, Milano: Giuffrè, 2008, p. 371; F. DEL ROSSO, *L'istituzione delle sezioni specializzate in materia di immigrazione e il nuovo rito per il riconoscimento della protezione internazionale*, in *Il giusto processo civile*, 2017, p. 939; F. CAPOTORTI, *Il ruolo del giudice nazionale dell'asilo tra effettività dei ricorsi e autonomia procedurale degli Stati membri: il punto sulla sospensiva*, in *Questione Giustizia*, 27 November 2018, www.questionegiustizia.it; F. DEL ROSSO, L. PISONI, *Garanzie e principio di effettività del processo nella tutela del richiedente asilo*, in *Questione Giustizia*, 6 March 2019, www.questionegiustizia.it; L. PISONI, *L'istanza cautelare nel procedimento per Cassazione in materia di protezione internazionale: un giudice che si morde la coda*, in *Questione Giustizia*, 6 March 2019, www.questionegiustizia.it.

⁶⁴ “A third-country national, who is prevented in his own country from exercising the democratic freedom and rights guaranteed by the Italian Constitution, has the right to seek asylum in the territory of the Republic, according to the conditions established by law” (Art. 10, para. 3, of the Italian Constitution, available at www.cortecostituzionale.it).

⁶⁵ Italian Supreme Court: judgment 26 May 1997, no. 4674; judgment of 17 December 1999, no. 907.

⁶⁶ M. BENVENUTI, *La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità*, in *Questione Giustizia*, 2018, p. 15 *et seq.*

⁶⁷ Indeed, lower courts have the possibility and not the duty to refer preliminary questions to the Court of Justice pursuant to Art. 267 TFEU.

⁶⁸ G. MARTINICO, *Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order*, in *International Journal of Constitutional Law*, 2012, p. 871 *et seq.*

provision will have to be set aside for the concerned national proceedings.⁶⁹ The limited “external” effects of the preliminary ruling of the Court of Justice in the case at stake are exacerbated by the vague answer of the Court, which, as discussed above, did not frame any principled statement which could be used by other national courts faced with the same legal question.⁷⁰

Furthermore, as is well known, according to the Court of Justice, national courts should have the choice of seizing the Constitutional Court instead of the Court, but this possibility should not jeopardise their freedom to seize also the Court whenever they deem this fit.⁷¹ For a moment, it seemed, however, that the Italian Constitutional Court wanted to somehow control this freedom. Indeed, the Constitutional Court stated in its ruling no. 269 of 2017,⁷² that when a question concerns potentially the violation of both national and European fundamental rights, national courts must first seize the Constitutional Court and only thereafter the Court of Justice, when the case raises “other questions” of possible incompatibility with EU law than those referred to the Constitutional Court. This ruling should be seen in the context of the “*Taricco saga*”,⁷³ one of the notable examples of a constitutional court engaging in a judicial dialogue with the Court of Justice,⁷⁴ and of the attempts of the Italian Constitutional Court to re-affirm a greater role for the mechanism of constitutionality review.⁷⁵

⁶⁹ Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*.

⁷⁰ And, one might add, also by the State concerned who should amend a national provision which turns out to be in violation of EU law as a consequence of a preliminary ruling.

⁷¹ Court of Justice, judgment of 22 June 2010, joined cases C-188/10 and C-189/10, *Melki & Abdeli* [GC].

⁷² See on this ruling, which has sparked a heated academic debate, 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.; L.S. Rossi, *La sentenza 269/2017 della Corte costituzionale italiana: obiter ‘creativi’ (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell’Unione europea*, in *Federalismi*, 31 January 2018, available at www.federalismi.it, p. 1 et seq.; D. GALLO, *Efficiacia diretta del diritto UE, procedimento pregiudiziale e Corte costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018*, in *Rivista AIC*, 2019, p. 160 et seq.

⁷³ See M. BONELLI, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and Others*, ECLI:EU:C:2015:555; and C-42/17 M.A.S., M.B., ECLI:EU:C:2017:936 *Italian Constitutional Court, Order no. 24/2017*, in *Maastricht Journal of European Law*, 2018, p. 357 et seq. See also G. PICCIRILLI, *The “Taricco Saga”: the Italian Constitutional Court continues its European Journey: Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgment of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.*, in *European Constitutional Law Review*, 2018, p. 814 et seq.

⁷⁴ On this point see M. CLAES, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, in *German Law Journal*, 2015, p. 1331 et seq.

⁷⁵ G. MARTINICO, *Multiple Loyalties and Dual Preliminarity*, cit., p. 871.

In subsequent rulings, and after a rich doctrinal debate,⁷⁶ and a ruling of the Italian Court of Cassation departing from the position of the Constitutional Court,⁷⁷ the latter has further refined its position. It concluded in favour of the possibility for lower courts to use the preliminary question mechanism (or the tool of disapplication of national law in violation of EU law) also with respect to the same provision on which the Constitutional Court has previously been seized,⁷⁸ thereby putting itself fully in line with the Court of Justice's position.

Consequently, as of today, there is no doubt on the possibility for lower courts to use the preliminary question mechanism, in whichever moment of the proceedings, on whichever ground, both before or after seizing the Constitutional Court. Furthermore, should the Constitutional Court be seized first, nothing prevents this court from itself sending a preliminary question to the Court of Justice and "join the conversation".⁷⁹ The Constitutional Court then can, after receiving the answer of the Court of Justice, declare the unconstitutionality of the contested provision, removing the latter from the legal system with *erga omnes* effects.⁸⁰

An important step of what Italian constitutional scholars have dubbed the "European journey" (*cammino comunitario*) of the Constitutional Court has thereby been crystallized, inaugurating a new "trialectic" phase in the relationships between lower courts, Court of Justice and Constitutional Court, the latter decisively trying to not lose the centre stage of the multi-level protection of fundamental rights in Europe.⁸¹ For the purposes of this analysis, this new dynamic goes to show that, while it does take two to tango, this specific tango variant might well be masterfully danced also with a third actor on the scene. In light of these developments, it is all the more "brave" for the Italian court to have side-

⁷⁶ C. CARUSO, *La Corte costituzionale riprende "il cammino comunitario": invito alla discussione sulla sentenza n. 269 del 2017*, in *Forum di Quaderni Costituzionali*, 18 December 2017, www.forumcostituzionale.it; A. COSENTINO, *La Carta di Nizza nella giurisprudenza di legittimità dopo la sentenza della Corte costituzionale n. 269 del 2017*, in *Osservatorio sulle fonti*, 2018, www.osservatoriosullefonti.it; M. MASSA, *Dopo la «precisazione». Sviluppi di Corte cost. n. 269/2017*, in *Osservatorio sulle fonti*, 2019, www.osservatoriosullefonti.it; D. TEGA, *Tra incidente di costituzionalità e rinvio pregiudiziale: lavori in corso*, in *Quaderni costituzionali*, 2019, p. 615 et seq.; A. TIZZANO, *Sui rapporti tra giurisdizioni in Europa*, in *Il diritto dell'Unione europea*, 2019, p. 9. et seq.

⁷⁷ Italian Supreme Court, judgment of 17 May 2018, no. 12108.

⁷⁸ Italian Constitutional Court: judgment of 21 March 2019, no. 63; judgment of 21 February 2019, no. 20; judgment of 10 May 2019, no. 112, and order of 10 May 2019, no. 117. These rulings and their implications have been analysed in G. MARTINICO, G. REPETTO, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, in *European Constitutional Law Review*, 2019, p. 731 et seq.

⁷⁹ See M. BONELLI, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union*, cit., p. 369.

⁸⁰ A. RUGGERI, *La Consulta rimette a punto i rapporti tra diritto eurounitario e diritto interno*, in *Consulta on line*, 25 February 2019, www.giurcost.org, p. 117.

⁸¹ F. MEDICO, *I rapporti tra ordinamento costituzionale ed europeo dopo la sentenza n. 20 del 2019: verso un doppio custode del patrimonio costituzionale europeo?*, in *Il diritto dell'Unione Europea*, 2019, p. 87 et seq.

stepped the “constitutional route” and framed the question under EU law only. It is also all the more “disappointing” for the Italian court to have received an answer from the Court of Justice which the referring court cannot “directly” apply, and which does not provide clear and unequivocal answers.

At the same time, the national courts are “under the pain” of having to manage a situation of “double loyalty”,⁸² and, when determining which court to seize first, they would not be wrong in keeping considerations of “effectiveness” into account. And indeed, in the follow-up rulings, while the reference to EU law, the principle of equivalence and the reasoned order of the Court of Justice disappeared, reference to fundamental rights protected by the Italian Constitution, especially Art. 24 on the right of defence, Art. 111 on the right to a fair trial and Art. 3 on the equality principle, have appeared. It is therefore not hard to imagine that the referring Italian court, or any other Italian court seized of a question concerning asylum protection, might be more inclined to ask a question of constitutionality rather than a preliminary question, unless there would be questions which specifically require to take the road to Luxembourg instead of that to Rome.⁸³

The practice emerging in the aftermath of the reasoned order of the Court of Justice shows that the Constitution has been evoked, but the road to Rome has not been taken. Courts have instead made their own autonomous assessment, much to the detriment to the principle of legal certainty and possibly also of equality.

V. CONCLUSION

The importance of the preliminary ruling mechanism in the process of European integration can hardly be overestimated. However, the complex dynamics between national courts and the Court of Justice is influenced by a number of factors which might impair its correct functioning. Krommendijk, in his extensive empirical investigation on national judges in migration cases, concluded that, overall, the preliminary ruling system seems to be working well and in accordance with the envisioned aim.⁸⁴ The results of this *Article* tell us a different story. How much should one case weigh over a trend which shows the opposite? Our results do not aim at reaching overarching conclusions on the success of the preliminary reference procedure, but at showing that several factors might come in the way of a functioning system. While it is true that often dysfunctionalities come to the fore

⁸² G. MARTINICO, *Multiple Loyalties and Dual Preliminarity*, cit., p. 872.

⁸³ F. CAPOTORTI, *Il ruolo del giudice nazionale dell'asilo tra effettività dei ricorsi e autonomia procedurale degli Stati membri*, cit.

⁸⁴ J. KROMMENDIJK, *The Preliminary Reference Dance Between the CJEU and the Dutch Courts in the Field of Migration*, cit., p. 153.

of (academic) light more than the cases in which the mechanism functions correctly,⁸⁵ it is nevertheless important to consider these risks so as to see how they can be mitigated.

By taking the case study of two preliminary questions, asked by the courts of different Member States, on an overlapping, yet not identical problem, we have shown above that a number of “procedural x factors” might come in the way of a smooth interaction between national courts and the Court of Justice. Indeed, the combined use of the urgent preliminary reference procedure on the part of the Italian referring court and a reasoned order by the Court of Justice produced an answer, which only partially answered the questions of the referring court and completely omitted to consider the specificities of the Italian legislative framework *vis-à-vis* the Dutch one.

Furthermore, also with respect to the question which has been answered by the Court, the ruling only provides vague standards and lacks any form of operational guidance for the national referring court. Despite the fact that, at an abstract level, the national court had all the powers to apply the ruling, in practice this could prove difficult, not least also because of the media exposure of certain topics, such as migration and asylum. And indeed, the aftermath of the ruling shows that national courts have ignored the ruling of the Court of Justice and adopted divergent interpretation of the contested provisions.

Finally, the *Article* has shown that such – for the national courts – disappointing results might weigh quite strongly in the delicate balancing exercise of managing the double loyalty which national courts owe to the Court of Justice and their national constitutional courts.

While some factors might have been outside the control of both the referring court and the Court of Justice, the “constitutional tragedy” we have sketched in this *Article* goes to show that the Court of Justice ought to take its own form of loyalty to national courts seriously, if it does not want to put the trust of national courts at risk.

⁸⁵ This is a point made by M. DE WERD, *Dynamics at Play in the EU Preliminary Ruling Procedure*, cit., p. 156.



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

ENVIRONMENTAL DEMOCRACY AND JUDICIAL COOPERATION IN ENVIRONMENTAL MATTERS: MAPPING NATIONAL COURTS BEHAVIOUR IN FOLLOW-UP CASES

LORENZO SQUINTANI* AND SJOERD KALISVAART**

TABLE OF CONTENTS: I. Introduction. – II. Mapping judicial cooperation: the uncharted waters of follow-up judgments. – II.1. The criteria for assessing judicial cooperation in follow-up judgments. – II.2. Known categories of judicial cooperation and uncooperation. – II.3. Chartering new waters: Italy and Belgium. – III. Italian and Belgian judges as European judges in the context of preliminary references in environmental matters. – III.1. Preliminary references in environmental matters in Italy and Belgium. – III.2. Full cooperation. – III.3. Presumed cooperation. – III.4. Fragmented cooperation. – III.5. Interrupted cooperation. – III.6. Gapped cooperation. – III.7. Suspended cooperation. – IV. Synthesis and comparison. – V. Initiation reflection for a preliminary research agenda. – VI. Conclusions.

ABSTRACT: Judicial cooperation in environmental matters is a key aspect of the move towards environmental democracy undertaken by the European Union. This *Article* presents the preliminary findings about the kind of behaviour that national courts can show with their judgments once they received a preliminary ruling from the Court of Justice of the European Union, so-called follow-up judgments. It first shows the results of the latest two empirical studies, namely that Italian and Belgian courts tend to cooperate fully with the Court of Justice in environmental matters. Besides, only one new category of judicial cooperation is highlighted, that of suspended cooperation. The unfolding of the categories of judicial cooperation seems to have reached the saturation point. Accordingly, this *Article* presents the first quantitative and qualitative findings that emerge when looking at judicial cooperation in follow-up judgments from five jurisdictions: next to Belgium and Italy, also the United Kingdom (UK), Sweden, and the Netherlands. This comparison suggests that coun-

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try-by-country, theme-by-theme and case-by-case circumstances influence national courts behaviour, potentially affecting the level of environmental democracy enjoyed in certain Member States. Accordingly, this *Article* introduces an empirical research agenda to investigate factors and reasons explaining the findings, therefore contributing to the improvement of judicial cooperation in environmental matters.

KEYWORDS: environmental democracy – judicial protection – preliminary ruling – judicial subsidiarity – follow-up judgments – national courts behaviour.

I. INTRODUCTION

This *Article* focuses on the cooperation between national and EU courts under the preliminary reference procedure as a means to advance environmental democracy in the EU.

The “von der Leyen” Commission underlined the need to involve the people in climate change policy and in the transition to a healthy planet.¹ It thus demonstrates the willingness to advance environmental democracy, as a form of transparent and accountable government which involves people in decisions which affect the quality of their lives and their environment.² The debate on environmental democracy is long-standing in the EU and beyond.³ Democracy is deeply entrenched in the EU Treaties, with Arts 1, 10, paras 1 and 3, and 11, para. 1, TEU referring to the need to take decisions as near as possible to the citizens, the foundational character of representative democracy to the EU, the right of every citizen to participate in the democratic life of the EU, and the right to make their views publicly known in all areas of Union action. Both representative democracy, *i.e.* democracy through elected representatives, and direct democracy, *i.e.* democracy through direct involvement of people in decision making, are thus envisaged under the TEU. In environmental matters, these grounds are reinforced by the fact that the EU and all of its Member States are members of the United Nations-based Aarhus Convention of 1998,⁴ which yielded several implementing acts.⁵ This Convention establishes environmental

¹ Commission, *The von der Leyen Commission: for a Union that strives for more*, Brussels, 10 September 2019, Press release no. IP/19/5542.

² E.g. G. BÁNDI, *Introduction into the Concept of “Environmental Democracy”*, in G. BÁNDI (ed.) *Environmental Democracy and Law*, Zutphen: Europa Law Publishing, 2014, p. 4, with further references.

³ *Ibid.*; W.F. BABER, R.V. BARTLETT, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law*, Cambridge: The MIT Press, 2009, all with further references; F. LA CAMERA, *Economy, Ecology and Environmental Democracy*, in M. PALLEMAERTS (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Zutphen: Europa Law Publishing, 2011; A. KLINKE, *Democratizing Regional Environmental Governance: Public Deliberation and Participation in Transboundary Ecoregions*, in *Global Environmental Politics*, 2012, p. 79 *et seq.*; G. PAROLA, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship*, London: Versita, 2013.

⁴ 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

⁵ Most notably, Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participa-

democracy on three pillars: *a)* access to information, *b)* public participation and *c)* access to justice.⁶ This *Article* focuses on the third pillar, access to justice, by looking at the functioning of the preliminary reference procedure in environmental matters.

There is, indeed, an ongoing dispute between the EU and the Aarhus Convention Compliance Committee (ACCC) concerning whether the EU complies with the Aarhus Convention requirements.⁷ The ACCC considers current EU provisions insufficient because of the barrier imposed by the well-known *Plaumann* doctrine⁸ to the concept of “individually concerned” under Art. 263 TFEU. The EU disagrees, arguing that a full system of remedies is foreseen, where alleged barriers under Art. 263 TFEU are addressed by means of the preliminary reference procedure under Art. 267 TFEU.⁹ The preliminary reference procedure is thus an intrinsic component of the EU system for environmental democracy envisaged under the Treaties.

The preliminary reference procedure is not an ordinary procedure, however, as it establishes a peculiar relationship between national courts and the Court of Justice. The Court of Justice is tasked with ensuring the uniform interpretation and effective application of the large body of EU regulation across the EU. EU environmental law began developing even before its official introduction in the Treaties in 1987. It is composed today of hundreds of binding acts covering the vast majority of environmental aspects. Under the Treaties, the Court of Justice acts as the ultimate interpretative authority on

tion in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. On environmental justice, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final, was withdrawn in 2014.

⁶ J. WATES, *The Aarhus Convention: a Driving Force for Environmental Democracy*, in *Journal for European Environmental & Planning Law*, 2005, p. 2 *et seq.*; J. JENDROŠKA, *Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice*, in *Journal for European Environmental & Planning Law*, 2012, p. 71 *et seq.*; G. BÁNDI, *Introduction into the Concept of “Environmental Democracy”*, *cit.*

⁷ For a political science approach of the dispute, N. BERNY, *Failing to Preach by Example? The EU and the Aarhus Convention*, in *Environmental Politics*, 2018, p. 757 *et seq.*; M. VAN WOLFEREN, *To Justify the Ways of God to Men: Limits to the Court's Powers of Interpretation*, doctoral thesis, University of Groningen, 2018, www.rug.nl, p. 210 *et seq.*; See also R. LANCEIRO, *Access to Justice in Environmental Matters in the EU: Cooperation and Tension between the Aarhus Compliance Committee and the Court of Justice of the EU*, in M. BELOV (ed.), *The Role of Courts in Contemporary Legal Orders*, Den Haag: Eleven International, 2019, p. 483 *et seq.*; M. VAN WOLFEREN, M. ELIANTONIO, *Access to Justice in Environmental Matters – The EU's Difficult Road Towards Non-Compliance With the Aarhus Convention*, in M. PEETERS, M. ELIANTONIO (eds), *Research Handbook on European Environmental Law*, Cheltenham: Elgar, 2020, pp. 148-165.

⁸ Court of Justice, judgment of 15 July 1963, case 25/62, *Plaumann v. Commission of the EEC*.

⁹ M. VAN WOLFEREN, *To Justify the Ways of God to Men*, *cit.*

questions of EU (environmental) law.¹⁰ Opinions 2/13 and 1/17 underline the peculiar character of the Court of Justice's jurisdiction and the Court of Justice's determination to protect its prerogatives,¹¹ as an essential element of the EU legal order. This role is also pivotal when the Court of Justice and national courts from the Member States enter into judicial dialogue.¹² Both the Court of Justice and the national courts work together to rule on matters of EU law.¹³ The preliminary reference plays a crucial role in this shared responsibility,¹⁴ as the only "bridge" between the Court of Justice and national courts,¹⁵ at least legally speaking.

How the tandem formed by the Court of Justice and the national courts contributes to ensuring access to justice in environmental matters to support the functioning of environmental democracy in the EU needs consideration. Little is known about what national judges do with the answer they receive to a preliminary ruling in their "follow-up judgments".

Building on the studies of Bogojević,¹⁶ Squintani, Rakipi and Annink,¹⁷ who provided empirical evidence on follow-up judgments in Sweden, the United Kingdom (UK) and the Netherlands, we first explain the state-of-the-art and the persisting knowledge gap as regards follow-up judgments (section II). Section II also refines the research question and introduces the cases studies on Italy and Belgium. The empirical data are then presented in section III. Section IV presents a synthesis of the results. From the Italian and Belgian studies, only one new category of judicial cooperation appears, that of *suspended* cooperation. This finding suggests the possibility that the number of categories of

¹⁰ C.O. LENZ, G. GRILL, *The Preliminary Ruling Procedure and the United Kingdom*, in *Fordham International Law Journal*, 1995, p. 844 et seq.; E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue Between the ECJ and National Courts*, in *No Foundations: Journal of Extreme Legal Positivism*, 2010, p. 5 et seq.; Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*; Arts 19 TEU and 267 TFEU.

¹¹ Court of Justice: opinion 2/13 of 18 December 2014; opinion 1/17 of 30 April 2019. On opinion 2/13 see in particular J. LINDEBOOM, *Why EU Law Claims Supremacy*, in *Oxford Journal of Legal Studies*, 2018, p. 328 et seq. On the Court's approach to international dispute settlement mechanisms see M. FERMEGLIA, A. MISTURA, *The Fate of EU Environmental and Investment Law after the Achmea Decision*, in *Journal for European Environmental & Planning Law*, 2020, p. 29 et seq.

¹² A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2007, p. 121 et seq.

¹³ The "bridge" metaphor was used by F. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, in *Texas International Law Journal*, 2003, p. 547 et seq.

¹⁴ J. LANGER, *The Preliminary Ruling Procedure: Old Problems or New Challenges?*, University of Groningen, 2016, available at papers.ssrn.com.

¹⁵ F. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems*, cit.

¹⁶ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary*, in *Journal of Environmental Law*, 2017, p. 263 et seq.

¹⁷ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, in *Environmental Law Reports*, 2018, p. 89 et seq.; L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters: Mapping National Courts' Behaviour in Follow-up Cases*, in *Journal for European Environmental & Planning Law*, 2018, p. 147 et seq.

judicial cooperation identified and distinguished might be nearing *saturation*.¹⁸ Accordingly, section V provides a first initial reflective analysis of the findings from the Netherlands, UK, Italy, Belgium and Sweden, in light of the move towards environmental democracy. It also sets a research agenda for an in-depth comparative project aiming to unveil the reasons for the empirical findings presented in this mapping project.

II. MAPPING JUDICIAL COOPERATION: THE UNCHARTERED WATERS OF FOLLOW-UP JUDGMENTS

The novelty of this *Article* stems from the fact that scholarly works on the functioning of the preliminary reference mechanism, both generally¹⁹ and specifically on environmental matters,²⁰ mainly focus on the *upload* phase, thus on whether questions are asked and answered. Less is known about what national courts do with the answers they receive from the Court of Justice, the *download* phase. Most scholars focus only on landmark cases,²¹ or on the dialogue between the constitutional courts and the Court of Justice on specific aspects.²² A systematic study of the download phase is missing.²³

¹⁸ C. SEALE, *Grounding Theory*, in C. SEALE (ed.), *The Quality of Qualitative Research*, London: Sage, 1999, p. 87 et seq.; G.A. BOWEN, *Naturalistic Inquiry and the Saturation Concept: A Research Note*, in *Qualitative Research*, 2008, p. 137 et seq.; M. O'REILLY, N. PARKER, "Unsatisfactory Saturation": A Critical Exploration of the Notion of Saturated Sample Sizes in Qualitative Research, in *Qualitative Research*, 2013, p. 190 et seq.

¹⁹ F. JACOBS, A. DURAND, *References to the European Court: Practice and Procedure*, in *Cambridge Law Journal*, 1976, p. 192 et seq.; T. TRIDIMAS, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling System*, in *Common Market Law Review*, 2003, p. 9 et seq.; C. TIMMERMANS, *The European Union's Judicial System*, in *Common Market Law Review*, 2004, p. 393 et seq.; M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press, 2010, p. 37 et seq.; M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press, 2014; L. HOINUF, S. VOIGT, *Analyzing Preliminary References as the Powerbase of the European Court of Justice*, in *European Journal of Law and Economics*, 2015, p. 287 et seq.; J. LANGER, *The Preliminary Ruling Procedure*, cit.

²⁰ V. HEYVAERT, J. THORNTON, R. DRABBLE, *With Reference to the Environment: The Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary*, in *Law Quarterly Review*, 2014, p. 413 et seq.

²¹ E.g., A. TORRES PÉREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2010, p. 308 et seq.; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, in *European Constitutional Law Review*, 2014, p. 54 et seq.; M. BOBEK, *EU Law in National Courts: Viking, Laval, and Beyond*, in M.R. FREEDLAND, J. PRASSL (eds), *Viking, Laval and Beyond*, Oxford: Hart, 2014, p. 323 et seq.; U. ŠADL, S. MAIR, *Mutual Disempowerment: Case C-441/14 Dansk Industri*, in *European Constitutional Law Review*, 2017, p. 347 et seq.

²² E.g., A. DYEVE, *European Integration and National Courts: Defending Sovereignty Under Institutional Courts?*, in *European Constitutional Law Review*, 2013, p. 139 et seq.; O. POLICINO, *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.; A. TORRES PÉREZ, *Melloni in Three Acts*, cit.; 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. See also M. ELIANTONIO, C. FAVILLI, *When Two Preliminary Questions Result in One and Half Answers: A Constitutional Tragedy in Four Acts*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 911 et seq.

A study of the download phase has two dimensions: general and specific. The general dimension concerns how the *national judiciaries* across the EU react to the Court of Justice's answer in the light of the unwritten *stare decisis* system confirmed by the "*acte éclairé*" doctrine declared in *Da Costa*²⁴ and *CILFIT*.²⁵ The specific dimension, which is this *Article's* focal point, concerns how the *referring* national court responds to the Court of Justice's answer – the follow-up judgment. Section II.1 explains the criteria for distinguishing follow-up judgments as judicial cooperation or uncooperation. Section II.2 presents known examples of the two kinds. Section II.3 delimits the research question while introducing the new studies.

II.1. THE CRITERIA FOR ASSESSING JUDICIAL COOPERATION IN FOLLOW-UP JUDGMENTS

Although there are various kinds of judicial dialogue,²⁶ Jacobs highlights two main features about the judicial dialogue internal to the EU legal system. The first main feature is the "constitutional" judicial dialogue, *i.e.* the jurisdiction of the Court of Justice to hear complaints lodged by other EU institutions or the Member States.²⁷ Second, and the object of this *Article*, is the judicial dialogue through the preliminary reference mechanism.

In summary,²⁸ lower courts have the right to ask a preliminary question,²⁹ courts of last instance are obliged to ask,³⁰ and the Court of Justice has a duty to respond. The national court referring the question is obliged to comply with the Court of Justice's an-

²³ See however, J. KROMMENDIJK, *Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 825 *et seq.*, who albeit by means of a qualitative methodology, provides a more holistic approach to the Irish follow-up practice, without touching on environmental law in particular.

²⁴ Court of Justice, judgment of 27 March 1963, joined cases 28/62, 29/62 and 30/62, *Da Costa en Schaake NV and Others v. Administratie der Belastingen*.

²⁵ Court of Justice, judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*; see also H. RASMUSSEN, *The European Court's Acte Clair Strategy in C.I.L.F.I.T.*, in *European Law Review*, 1984, p. 242 *et seq.*; A. ARNULL, *The Use and Abuse of Article 177 EEC*, in *Modern Law Review*, 1989, p. 622 *et seq.*; F. MANCINI, D. KEELING, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, in *Yearbook of European Law*, 1991, p. 1 *et seq.*; P. ALLOTT, *Preliminary Rulings: Another Infant Disease?*, in *European Law Review*, 2000, p. 538 *et seq.*; P. WATTEL, Köbler, *CILFIT and Welthgrove: We Can't Go on Meeting Like This*, *Common Market Law Review*, 2004, p. 177 *et seq.*; N. FENGER, M. BROBERG, *Finding Light in the Darkness: On the Actual Application of the Acte Éclairé Doctrine*, in *Yearbook of European Law*, 2011, p. 180 *et seq.*; V. HEYVAERT, J. THORNTON, R. DRABBLE, *With Reference to the Environment*, *cit.*

²⁶ A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2007, p. 125.

²⁷ F. JACOBS, *Judicial Dialogue and the Cross-Fertilization*, *cit.*

²⁸ On the various aspects of this procedure see the seminal work of M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, *cit.*

²⁹ Art. 267, para. 2, TFEU.

³⁰ Art. 267, para. 3, TFEU.

swer,³¹ but it does not have to report its final judgment to the Court of Justice. Despite the Court of Justice having recommended that follow-up judgments should be communicated,³² CURIA and EUR-Lex usually lack information about follow-up judgments, as discussed further in section V, *infra*. When asked, the Court of Justice only confirmed that the preliminary ruling is binding on the referring court without providing any comment on why the majority of national cases could not be located.³³ The national courts' responses to the Court of Justice's answers cannot therefore be considered as ever reaching the Court of Justice, therefore at best amounting to a *dialogue of the deaf*.³⁴ Proposals have been made to improve the dialogue, ranging from making better use of Art. 101 of the Rules of Procedure to inviting national referring judges to participate in the hearing before the Court of Justice, but they are not actually applied.³⁵

In light of the above, this *Article* will approach the subject in terms of sincere *cooperation* rather than judicial dialogue. Indeed, the principle of sincere cooperation goes hand-in-hand with the objective of the preliminary reference itself. First, because a judicial system built on the division of competences between the national courts and the Court of Justice calls for a greater cooperation.³⁶ Second, because it is through the correct application of preliminary references that the national courts are enabled to demonstrate a cooperative attitude towards the Court of Justice *par excellence*.³⁷ In this regard, it could perhaps be argued that the willingness of the national courts to refer questions to the Court of Justice might also indicate their willingness to give effect to its rulings.³⁸ Yet judicial cooperation does not need to be based on mutual understanding: it can highlight conflicts and power struggles.³⁹ Ascertaining the source of this willing-

³¹ Court of Justice, judgment of 24 June 1969, case 29/68, *Milch, Fett und Eierkontor v. Hauptzollamt Saarbrücken*; see also H. SCHERMERS, *Judicial Protection in the European Communities*, Den Hague: Kluwer, 1976, who at p. 392 showed that, at least until the 1970s, most national courts seemed to support this rule.

³² CJEU, Recommendations of 6 November 2012 to national courts and tribunals in relation to the Initiation of preliminary ruling proceedings.

³³ E-mail correspondence with the Court of Justice, through the Press and Information Unit, received on 9 March 2017, on file with the Authors.

³⁴ Theories on dialogue define dialogues as a process in which "there is no attempt to gain points, or to make your particular view prevail. Rather, whenever any mistake is discovered on the part of anybody, everybody gains. It's a situation called win-win [...] in which we are not playing a game against each other, but with each other. In a dialogue, everybody wins". D. BOHM, L. NICHOL, *On Dialogue*, London, New York: Routledge, 1996, p. 7; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court*, cit.

³⁵ J. LANGER, *The Preliminary Ruling Procedure*, cit.; see also R. BARENTS, *Procedures en procesvoering voor het Hof van Justitie en het Gerecht van eerste aanleg van de EG*, Deventer: Kluwer, 2005.

³⁶ T. TRIDIMAS, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, in *International Journal of Constitutional Law*, 2012, p. 737 et seq.

³⁷ S. PRECHAL, *Communication Within the Preliminary Rulings Procedure Responsibilities of the National Courts*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 754 et seq.

³⁸ H. SCHERMERS (ed.), *Judicial Protection in the European Communities*, The Hague, London, New York: Springer, 1979, p. 392.

³⁹ E. PAUNIO, *Conflict, Power, and Understanding*, cit.

ness or unwillingness would require inquiry into national courts' perceptions of EU law,⁴⁰ and a sociological inquiry into a Member State's approach to the EU as such,⁴¹ which is not the objective of this *Article*, as discussed further in section II.3, *infra*.

We focus on classifying national courts' follow-up judgments in terms of sincere cooperation. To this extent, the criteria to distinguish when national courts engage in sincere cooperation or uncooperation can be based on the two main positive obligations and three negative obligations binding the national courts according to Verhoeven.⁴² The positive obligations are that the courts should ensure the effective application of EU law and the protection of rights stemming from Union legislation, and the negative obligations are that they should refrain from measures which impede the effectiveness of EU law, the proper functioning of the internal market or the process of Union integration. National courts' behaviour in follow-up judgments can be assessed and categorised based on these criteria.

II.2. KNOWN CATEGORIES OF JUDICIAL COOPERATION AND UNCOOPERATION

When considered from the perspective of Verhoeven's criteria, Bogojević's findings all show varying degrees of judicial uncooperation.⁴³ Four different kinds of judicial interaction emerged from Sweden: interchanged, gapped, interrupted and silenced. *Interchanged* cooperation means that there is an interchange of values. The preliminary reference is absorbed into national law and applied as though it were national case law.⁴⁴ For example, in *Gävle Kraftvärme* the Court of Justice had clarified what "incinerator" meant under the Waste Incineration Directive.⁴⁵ The Swedish Supreme Court tasked a lower court to apply the criteria set out by the Court of Justice. In doing so, the lower court only referred to the Swedish Supreme Court ruling and not to the Court of Justice's ruling.⁴⁶ The lower national court did not therefore treat the preliminary reference as though the information had been provided by the Court of Justice.⁴⁷ *Gapped* cooperation signifies that there is a lack of judicial dialogue between the Court of Justice and the national court. There can be instances where a national court questions the validity of the Court of Justice's ruling.⁴⁸ For example, in *Billerud* the national court considered

⁴⁰ C.O. LENZ, G. GRILL, *The Preliminary Ruling Procedure and the United Kingdom*, cit.

⁴¹ P. CRAIG, *Report on the United Kingdom* in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and National Courts: Doctrine and Jurisprudence*, Oxford: Hart, 1998, p. 197.

⁴² M. VERHOEVEN, *The Costanzo Obligation: The Obligations of National Administrative Authorities in the Case of Incompatibility Between National Law and European Law*, Cambridge: Intersentia, 2011, p. 41.

⁴³ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁴⁴ *Ibid.*

⁴⁵ Court of Justice, judgment of 11 September 2008, case C-251/07, *Gävle Kraftvärme*.

⁴⁶ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

after receiving the Court of Justice's ruling whether the Court of Justice's interpretation of the Emissions Trading System Directive complied with the European Convention of Human Rights.⁴⁹ This was done without further references to the Court of Justice. *Interrupted* cooperation means that national law may in the meantime have been revised and/or facts added, rendering the preliminary reference useless while the procedure remains ongoing.⁵⁰ For example, in *Jan Nilsson* the relevance of the Court of Justice's answer to the question of whether mounted specimens fell under the regulation transposing the Convention on International Trade in Endangered Species became moot as the criminal offence for trading in such species was abrogated, leading to the criminal charges against Mr Nilsson being dropped.⁵¹ Finally *silenced* cooperation covers cases where the national court ignores the preliminary ruling.⁵² For example, in *Mickelsson and Roos* the national court ultimately cleared Mr Mickelsson and Mr Roos of the criminal charges on grounds different from the ones considered in the Court of Justice's ruling, which was not even mentioned.⁵³

While Bogojević's categories represent cases of uncooperative dialogue, Squintani and Rakipi's categories, focusing on the UK judiciary, represent three different cases of cooperative dialogue.⁵⁴ First, they identified cases of *full* cooperation, *i.e.* cases where the national court applies the Court of Justice's judgment to the letter. This was the case for example in *R v. Secretary of State for the Environment (ex parte Society of Birds)*.⁵⁵ Exactly in accordance with the Court of Justice's interpretation,⁵⁶ the House of Lords quashed the decisions handed down by the Court of Appeal and the High Court and declared invalid the Secretary of State's decision on the delineation of a special protection area under the Wild Birds Directive. Second, they identified cases of *fragmented* cooperation, where the Court of Justice decides to reformulate the question and the national court applies the Court of Justice's ruling inasmuch as it can be applied to the part of the answer it considers relevant. This category differs from Bogojević's *gapped* category in that in the latter the national court would omit certain parts of the issue when requesting a preliminary reference, and the Court of Justice would rule only on the other parts. In the former, the national court does not omit any part of the problem in its

⁴⁹ Court of Justice, judgment of 17 October 2013, case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*.

⁵⁰ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁵¹ Court of Justice, judgment of 23 October 2003, case C-154/02, *Nilsson*.

⁵² S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁵³ Court of Justice, judgment of 4 June 2009, case C-142/05, *Mickelsson and Roos*.

⁵⁴ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit. Although after Brexit the UK no longer is an EU Member State, findings from this jurisdiction are still useful for unfolding the categories of judicial cooperation in follow-up judgments and to set a follow-up research agenda.

⁵⁵ *Ibid.*, p. 99.

⁵⁶ For the ruling of the Court of Justice see judgment of 11 July 1996, case C-44/95, *Regina v. Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds*.

question, but instead chooses to only engage with the parts of the preliminary reference response it deems helpful for its judgment, while ignoring the reasoning of the rest. This was done in *Client Earth*, concerning air quality management.⁵⁷ The Court of Justice rephrased the UK Supreme Court's question about a temporary exception under Art. 22 of the Air Quality Directive. In turn, the UK Supreme Court considered the Court of Justice's answer to solve part of the case. The Supreme Court was willing to apply the Commission's reasoning and deem Art. 22 non-mandatory, but the court considered this irrelevant as the legal deadlines had already expired.⁵⁸ Finally, Squintani and Rakipi introduced the *presumed* cooperation category, where the Court of Justice's judgment is not applied because the unsuccessful party before the Court of Justice withdraws from the proceedings, anticipating the decision being applied in full by the national judge. In such cases, the judicial cooperation chain breaks, and the national decision "disappears", making it impossible to gauge the national court's degree of compliance.⁵⁹ However, these are examples of *presumed cooperation* rather than *uncooperation*, because the parties dropped their claims in the anticipation of full compliance by the national judges. This happened for example in *Seaport (NI) and Others*.⁶⁰ Seaport withdrew its claim on delivery of the judgment, which had gone against it, so the case was never considered further by the national court.⁶¹

Squintani and Annink uncovered a fourth category of judicial cooperation when studying the behaviour in follow-up cases in the Netherlands, that of *withdrawn* cooperation.⁶² A peculiarity of the EU judiciary system is its unwritten *stare decisis* system, as stated in section II, *supra*. Consequently, preliminary questions which are similar to those in an earlier case will be answered by the Court of Justice recommending that the national court apply the Court of Justice's ruling in these earlier cases and withdraw its preliminary ruling request, as occurred in the *Stichting Greenpeace* case.⁶³ This case concerned a permit issued for the cultivation of genetically modified corn. As similar questions had already been asked, the Dutch Council of State (Raad van State) was asked to

⁵⁷ UK Supreme Court, judgment of 29 April 2015, [2015] UKSC 28, *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*.

⁵⁸ *Ibid.*

⁵⁹ This type of withdrawal must be distinguished from when, for instance, parties agree a settlement and the national court withdraws the reference request. In this case the Court of Justice will not rule on the matter, unless it has already given notice of a date on which its decision will be communicated. Art. 100, para. 1, of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012.

⁶⁰ Court of Justice, judgment of 20 October 2011, case C-474/10, *Seaport (NI) and Others*.

⁶¹ As confirmed by email from the case counsel James Maurici, Landmark Chambers, 8 March 2017.

⁶² L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters*, cit.

⁶³ Court of Justice, judgment of 2 April 2009, joined cases C-359/08, C-360/08, C-361/08, *Stichting Greenpeace Nederland*; follow-up Dutch Council of State, judgment of 9 September 2009, C-200702758/3/M1.

withdraw its preliminary reference and apply *Azelvandre* instead.⁶⁴ This is exactly what the Dutch Council of State did.⁶⁵ In doing so, the Dutch Council of State included the questions asked in the preliminary reference and a substantial account of the answers provided in *Azelvandre*. It also based its final decision on these findings, showing full cooperation.

II.3. CHARTERING NEW WATERS: ITALY AND BELGIUM

Despite the pioneering work of Bogojević, Squintani, Rakipi and Annink, the vast majority of the map remains uncharted, and new categories of judicial cooperation could still be discerned.

To further develop the map of judicial cooperation in environmental matters, this *Article* focuses on judicial cooperation between the Court of Justice and the national courts in Italy and Belgium. Focusing on these jurisdictions is justified because Italian and Belgian courts have both used the preliminary reference procedure in environmental matters several times. Italy's legal tradition differs from the states in the previous studies. The Belgian legal tradition in environmental matter might not differ too much from the Dutch one. Yet Belgium's federal structure makes it an excellent candidate for assessing whether there can be cultural differences among courts within a single jurisdiction. This conclusion is reinforced by the fact that the Belgian legislator has the peculiar practice of enabling permit decisions by legislative act, as further discussed in section III, *infra*. This peculiarity has fostered an active role for the Belgian Constitutional Court in the context of judicial cooperation in environmental matters, something not encountered in any of the previous case studies.

Accordingly, as with the previous studies,⁶⁶ we searched the CURIA database for preliminary references from Italy and Belgium using the term "environment". The results were then filtered to exclude judgments which did not concern EU acts, as defined in Art. 288 TFEU, having as their primary or explicit secondary objective the protection of the environment.

As noted above, we focus on classifying follow-up judgments as judicial cooperation or uncooperation based on the criteria set out in section II.1. It goes without saying that the behaviour of national courts in follow-up judgments can be influenced by several factors, firstly related to the quality of communication,⁶⁷ such as the quality of the preliminary reference,⁶⁸ the translating officers' work,⁶⁹ and whether the Court of Justice

⁶⁴ Court of Justice, judgment of 17 February 2009, case C-552/07, *Azelvandre*.

⁶⁵ Dutch Council of State, C-200702758/3/M1, cit.

⁶⁶ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit.; L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters*, cit.

⁶⁷ S. PRECHAL, *Communication Within the Preliminary Rulings Procedure*, cit.

⁶⁸ J. LANGER, *The Preliminary Ruling Procedure*, cit.

⁶⁹ M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court*, cit.

wants to make a general point or solve the specific case before it.⁷⁰ Judgments clarifying theoretical aspects could cause national courts to consider the Court of Justice's ruling too theoretical to resolve the case in question.⁷¹ Judges might then choose not to apply such rulings.⁷² At times the Court of Justice tries to help preserve the interpretative uniformity of EU law by delivering *guidance cases*, which explain general principles or rules while presenting a specific criteria to guide national courts in solving the actual case.⁷³ A further step in controlling the outcome of national cases is when the Court of Justice delivers *outcome cases*,⁷⁴ where the Court of Justice states expressly that a Member State, for instance, has failed to implement a directive correctly, thus leaving to the national court only the task of annulling the contested national measure.

All these variables are important in understanding why a national court behaves in a particular way, but they are irrelevant to this *Article's* mapping exercise. Indeed, as in the previous studies, the question at the heart of this *Article* is *how* national courts react to a Court of Justice's ruling, and not *why* they react that way. The variables indicated in this section are relevant for follow-up studies explaining the meaning and relevance of the finding presented in this *Article*, as discussed in section V, *infra*. Such follow-up studies will also have to take into account the meta-juridical aspects related to judicial cultures and national attitudes towards the EU integration process. The comparative methodology needed to link the national experiences together would require a rigid framework to avoid comparing "apples" and "pears", thus requiring a broad-based interdisciplinary research project. Accordingly, while we keep these variables in mind, we do not address the "why" question in this *Article*, but confine ourselves to indicating whether, based on the information available, any or all of the variables mentioned in this section can be observed. This does not detract from this *Article's* relevance. It is not possible to organise and conduct research into the reasons for how the judicial dialogue in environmental matters is shaped before obtaining empirical data on this dialogue.

III. ITALIAN AND BELGIAN JUDGES AS EUROPEAN JUDGES IN THE CONTEXT OF PRELIMINARY REFERENCES IN ENVIRONMENTAL MATTERS

As presented in section II.2, so far *eight* categories of judicial cooperation and uncooperation have been identified. Five forms of cooperation emerge from the conduct of Italian and Belgian courts in environmental matters: full, presumed, fragmented, interrupted and gapped. One new form of cooperation was also distinguished: *suspended*

⁷⁰ G. DAVIES, *Activism Relocated: The Self-restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 76 et seq.

⁷¹ M. BOBEK, Landtová, Holubec, and the Problem of an Uncooperative Court, cit.

⁷² *Ibid.*

⁷³ T. TRIDIMAS, *Knocking on Heaven's Door*, cit.

⁷⁴ *Ibid.*

cooperation. These categories are discussed below, starting with the two categories to emerge both in Italy and Belgium, full and presumed cooperation (sections III.2 and III.3, respectively). Evidence of fragmented, interrupted and gapped cooperation was only found in Italy (sections III.4 to III.6). We will then describe the new form, suspended cooperation, visible in both jurisdictions (section III.7). Before presenting the empirical data, section III.1 provides a general overview of the context in Italy and Belgium.

III.1. PRELIMINARY REFERENCES IN ENVIRONMENTAL MATTERS IN ITALY AND BELGIUM

a) Italy.

The preliminary reference procedure in environmental cases is used relatively often by Italian national courts compared other Member States.⁷⁵ Between 1986 and April 2019, 46 judgments concerning EU environmental law were handed down by the Court of Justice in referrals from national courts from Italy, not counting joined cases.⁷⁶ Of the 46 judgments, thirteen follow-up cases could be retrieved. Four of these cases mainly concern nature conservation,⁷⁷ three waste management,⁷⁸ two renewable energy sources,⁷⁹ two environmental damage,⁸⁰ one genetically modified organisms⁸¹ and one landscape

⁷⁵ Evincible from, L. KRÄMER, *The Commission's Omission to Use Article 267 TFEU as a Tool to Enforce EU Environmental Law*, in *Journal for European Environmental & Planning Law*, 2016, p. 255 et seq.

⁷⁶ Counting for the joined cases, the total number is 64.

⁷⁷ Court of Justice, judgment of 3 April 2014, case C-301/12, *Cascina Tre Pini*; follow-up case Italian Council of State, judgment of 30 March 2015, no. 1635/2015; Court of Justice, judgment of 21 July 2011, case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*; follow-up case Italian Regional Administrative Court (Puglia), judgment of 3 May 2013, no. 674/2013; Court of Justice, judgment of 21 December 2016, case C-444/15, *Associazione Italia Nostra Onlus*; follow-up case Italian Regional Administrative Court (Veneto), judgment of 13 November 2017, no. 1005/2017; and Court of Justice, judgment of 16 September 1999, case C-435/97, *WWF and Others*; follow-up case Italian Regional Administrative Court (Bolzano), judgment of 12 January 2000, no. 114/2000.

⁷⁸ Court of Justice, judgment of 28 July 2016, case C-147/15, *Edilizia Mastrodonato*; follow-up case Italian Council of State, judgment of 21 September 2017, no. 4690/2017; Court of Justice, judgment of 11 November 2004, case C-457/02, *Niselli*; follow-up case Italian First Instance Court (Terni), judgment of 29 June 2005, no. 546/2005; and Court of Justice, judgment of 25 February 2010, case C-172/08, *Pontina Ambiente*; content of the follow-up case available only via the judgment of the Italian Court of Cassation, judgment of 24 June 2016, no. 13123/2016.

⁷⁹ Court of Justice, judgment of 14 April 2005, joined cases C-128/03 and 129/03, *AEM Torino*; follow-up case Italian Council of State, judgment of 15 July 2005, no. 6362/2005; and Court of Justice, judgment of 26 November 2014, case C-66/13, *Green Network*; follow-up case Italian Council of State, judgment of 7 July 2015, no. 5421/2015.

⁸⁰ Court of Justice: judgment of 9 March 2010, case C-378/08, *ERG and Others* (ERG I) [GC]; judgment of 9 March 2010, joined cases C-379/08 and 380/08, *ERG and Others* (ERG II) [GC]; in both cases the follow-up case is Italian Regional Administrative Court (Sicilia) no. 2117/2012.

⁸¹ Court of Justice, judgment of 6 September 2012, case C-36/11, *Pioneer Hi Bred Italia*; follow-up case Italian Council of State, judgment of 11 September 2012, no. 2361/2016.

protection.⁸² The other cases could not be retrieved: four Court of Justice's judgments were too recent at the time we gathered our data to have follow-up cases;⁸³ the difficulties with retrieval for the rest lay in the repartition of competences in environmental matters under the Italian legal order and its enforcement system. Although the legislative competence in environmental matters is reserved to the central legislator under Art. 117 of the Italian Constitution, regulatory, application and enforcement activities are shared with the regions and lower territorial bodies. The majority of environmental law falls under Italian administrative law, explaining why most of the follow-up cases which could be retrieved come from the administrative courts, in particular from the court of last resort in administrative cases, the Italian Council of State (Consiglio di Stato). But enforcement can also occur in criminal law, especially in the field of waste management. Most of the cases which could not be retrieved were from criminal investigation judges,⁸⁴ whose judgments are difficult to obtain in general, as these are lower instance judges tasked with guiding the pre-judicial phase. Some matters can also concern fiscal measures, in particular environmental taxes, which explains why certain referrals come from tributary courts, pertaining to the civil law circuit in Italy. The follow-up judgments from these courts are also generally difficult to find, unless they reach higher courts.⁸⁵

b) Belgium.

Between 28 February 1982 and 12 June 2019, 31 environmental law judgments were published by the Court of Justice following preliminary references from Belgium. Of the 31 cases, 18 follow-up judgments could be retrieved:⁸⁶ six on environmental impact assessments,⁸⁷ one on habitats conservation,⁸⁸ six on waste management,⁸⁹ two

⁸² Court of Justice, judgment of 6 March 2014, case C-206/13, *Siragusa*; follow-up case Italian Regional Administrative Court (Sicilia), judgment of 7 December 2016, no. 2264/2016.

⁸³ Court of Justice: judgment of 28 March 2019, joined cases C-487/17 to 489/17, *Verlezza and Others*; judgment of 4 October 2018, case C-242/17, *L.E.G.O.*; judgment of 28 February 2018, case C-117/17, *Comune di Castelbellino*; judgment of 26 July 2017, joined cases C-196/16 and C-197/16, *Comune di Corridonia*.

⁸⁴ E.g., Court of Justice, judgment of 28 March 1990, case C-359/88, *Zanetti and Others*.

⁸⁵ E.g., *Pontina Ambiente*, cit.

⁸⁶ Mind that with regard to Court of Justice, judgment of 1 April 2004, joined cases C-53/02 and C-217/02, *Commune de Braine-le Château and Others*, a follow-up judgment for each respective case is included. Further to that, Court of justice, judgment of 26 September 2013, case C-195/12, *IBV & Cie*, yielded two follow-up judgments.

⁸⁷ Court of Justice, judgment of 7 June 2018, case C-671/16, *Inter-Environnement Bruxelles and Others (II)*; follow-up case Belgian Council of State (FR), judgment of 24 October 2018, no. 242.764; Court of Justice, judgment of 27 October 2016, case C-290/15, *Patrice D'Oultremont and Others*; follow-up case Belgian Council of State (FR), judgment of 16 November 2017, no. 239.886; Court of Justice, judgment of 9 April 2014, case C-225/13, *Ville d'Ottignies-Louvain-la-Neuve and Others*; follow-up case Belgian Council of State (FR), judgment of 11 August 2015, no. 232.028; Court of Justice, judgment of 28 February 2012, case C-41/11, *Inter-Environnement Wallonie and Terre wallonne* [GC]; follow-up case Belgian Council of State (FR), judgment of 13 November 2013, no. 225.473; Court of Justice, judgment of 22 March 2012, case C-567/10, *Inter-Environnement Bruxelles and Others (I)*; follow-up case Belgian Constitutional Court (NL), judgment of 19 July 2012, no. 95/2012; Court of Justice, judgment of 17 March 2011, case C-275/09, *Brussels Hoofd-*

on judicial protection in environmental matters,⁹⁰ and three on animal trade and capture.⁹¹ Six of those for which follow-up judgments could not be retrieved were preliminary questions originating from courts other than the Belgian Council of State (Conseil d'Etat/Raad van State) or the Belgian Constitutional Court (Cour Constitutionnelle/Grondwettelijk Hof).⁹² Three were too recent at the time that the empirical data was collected.⁹³ No clear reason could be construed for the rest.⁹⁴

In Belgium, the Regions are mainly competent in matters relating to environmental protection.⁹⁵ An important part of environmental law is administrative law and administrative regulations and permit decision fall under the jurisdiction of the Belgian Council of State, from which most of the retrieved cases originate. The Belgian Constitutional Court is competent to review acts of the federal or regional parliaments (called decrees or ordinances). This court can also decide to refer questions to the Court of Justice, because it combines constitutional review with the review of conformity of the legislation with EU and International law. Enforcement can also be conducted through criminal or civil law.

stedelijk Gewest and Others; follow-up case Belgian Council of State (NL), judgment of 28 February 2013, no. 222.678.

⁸⁸ Court of Justice, judgment of 21 July 2016, joined cases C-387/15 and C-388/15, *Hilde Orleans and Others*; follow-up case Belgian Council of State (NL), judgment of 20 December 2016, no. 236.837.

⁸⁹ *IBV & Cie*, cit.; follow-up case Belgian Council of State (NL), judgment of 12 November 2014, no. 229.118 and Belgian Constitutional Court (FR), judgment of 17 December 2015, no. 180/2015; Court of Justice, judgment of 19 April 2012, case C-121/11, *Pro-Braine and Others*; follow-up case Belgian Council of State (FR), judgment of 27 May 2013, no. 223.602; Court of Justice, judgment of 17 June 2010, joined cases C-105/09 and 110/09, *Terre Wallonne and Inter-Environnement Wallonie*; follow-up case Belgian Council of State (FR), judgment of 13 November 2013, no. 225.473; Court of Justice, order of 28 January 2005, case C-208/04, *Inter-Environnement Wallonie*; follow-up case Belgian Council of State (FR), judgment of 23 March 2006, no. 156.825; *Commune de Braine-le Château*, cit.; follow-up case Belgian Council of State (FR), judgment of 11 July 2005, no. 147.570 and Belgian Council of State (FR), judgment of 16 October 2008, no. 187.140; Court of Justice, judgment of 18 December 1997, case C-129/96, *Inter-Environnement Wallonie v. Région wallonne*; follow-up case Belgian Council of State (FR), judgment of 25 January 2001, no. 92.669.

⁹⁰ Court of Justice, judgment of 16 February 2012, case C-182/10, *Solvay and Others*; follow-up case Belgian Constitutional Court (NL), judgment of 21 February 2013, no. 11/2013; Court of Justice, judgment of 18 October 2011, joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and Others* [GC]; follow-up case Belgian Council of State (FR), judgment of 14 July 2014, no. 228.078.

⁹¹ Court of Justice, judgment of 19 June 2008, case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers Andibel*; follow-up case Belgian Council of State (NL), judgment of 9 March 2009, no. 191.161; Court of Justice, order of 1 October 2004, case C-480/03, *Clerens*; follow-up case Belgian Constitutional Court (FR), judgment of 9 February 2005, no. 28/2005.

⁹² E.g., Court of Justice, judgment of 10 February 1982, case 21/81, *Bout*.

⁹³ Court of Justice: judgment of 29 July 2019, case C-411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* [GC]; judgment of 12 June 2019, case C-321/18, *Terre Wallonne and Inter-Environnement Wallonie*; and judgment of 12 June 2019, case C-43/18, *CFE*.

⁹⁴ E.g., Court of Justice, judgment of 21 April 2005, case C-186/04, *Housieaux*.

⁹⁵ Art. 6, paras 1-2, Loi spéciale du 8 août 1980 de réformes institutionnelles (Special Law on institutional reform of 8 August 1980).

III.2. FULL COOPERATION

In light of the principle of sincere cooperation, national courts have to conduct themselves cooperatively in applying the Court of Justice's guidance. Italian and Belgian courts tend to cooperate fully with the Court of Justice. Indeed, the relative majority of national cases – seven out of thirteen for Italy⁹⁶ and sixteen out of eighteen for Belgium⁹⁷ – fall under the category of full cooperation. In these cases, the national courts applied the EU provisions in the manner that the Court of Justice explained. Two cases, one per Member State, will illustrate this full cooperation.

For Italy, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* concerns an Italian regional measure introducing a *general* prohibition on the construction of wind farms in and near areas covered by the Natura 2000 network.⁹⁸ The main question put to the Court of Justice was essentially whether the Italian measure was a legally imposed more stringent protective measure under Art. 193 TFEU.⁹⁹ The Court of Justice answered this question in the affirmative. After concluding that the Italian measure does indeed fall under Art. 193 TFEU, the Court of Justice cleared the measure on condition that the principles of non-discrimination and proportionality are respected.

In its follow-up ruling, the Italian Regional Administrative Court (Puglia) quoted the operative part of the Court of Justice's ruling¹⁰⁰ and applied the two conditions to determine whether the regional measure complied with EU law,¹⁰¹ concluding that it did.

For Belgium, the follow-up case following the Court of Justice's judgment in *Boxus and Others*¹⁰² represents a case where full cooperation was achieved thanks the joined efforts of the Belgian Council of State and Belgian Constitutional Court, which however ended with a peculiar twist. This case concerns authorisation and consent orders for works and the operation of installations in connection with *inter alia* the Liège-Bierset and Brussels South Charleroi airports and the transport links to them. While actions against the permits were being brought before the Conseil d'Etat, the Walloon parlia-

⁹⁶ See cases *Edilizia Mastrodonato*, cit.; *Cascina Tre Pini*, cit.; *AEM Torino*, cit.; *Green Network*, cit.; *Pontina Ambiente*, cit.; *WWF and Others*, cit.; and *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, cit.

⁹⁷ See cases *Inter-Environnement Bruxelles and Others (I)*, cit.; *Hilde Orleans and Others*, cit.; *Patrice d'Oultremont and Others*, cit.; *Ville d'Ottignies-Louvain-la-Neuve and Others*, cit.; *IBV & Cie*, cit.; *Pro-Baine ASBL*, cit.; *Inter-Environnement Bruxelles and Others (II)*, cit.; *Solvay and Others*, cit.; *Brussels Hoofdstedelijk Gewest*, cit.; *Terre Wallonne and Inter-Environnement Wallonie*, cit.; *Inter-Environnement Wallonie v. Région wallonne*, cit.; *Clerens*, cit.; *Antoine Boxus and Others*, cit.; *Inter-Environnement Wallonie*, cit.; *Commune de Braine-le-Chateau*, cit.; and *Inter-Environnement Wallonie and Terre wallonne*, cit.

⁹⁸ *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, cit.

⁹⁹ On the classification of such measure as such, see L. SQUINTANI, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*, Cambridge: Cambridge University Press, 2019, p. 13 et seq.

¹⁰⁰ Italian Regional Administrative Court (Puglia), no. 674/2013, section "Fatto", para. 6.

¹⁰¹ *Ibid.*, section "Diritto", para. 1.1.

¹⁰² *Boxus and Others*, cit.

ment and government ratified them on the basis of overriding reasons of public interest, giving them legislative status and thus depriving the Belgian Council of State of jurisdiction.¹⁰³ Jurisdiction therefore shifted to the Belgian Constitutional Court, before which several actions for annulment of the ratifying decree were brought. This caused the Belgian Council of State to stay the proceedings and to refer preliminary questions to the Court of Justice, on the compatibility of the Walloon Parliament's act with the Environmental Impact Assessment Directive and the Aarhus Convention. Similar questions were referred to the Belgian Constitutional Court,¹⁰⁴ which in turn referred similar questions to the Court of Justice.¹⁰⁵

The Court of Justice first noted that a simple ratifying act without a substantive legislative process enabling the conditions in Art. 1, para. 5, of the Directive to be fulfilled, is not sufficient to exclude a project from the ambit of the Directive.¹⁰⁶ The Court of Justice then noted that it must be possible to subject such a legislative act to review by an independent and impartial body established by law. If such a review option is lacking, any court before which a claim is brought must carry out the review and may disapply that legislative act.¹⁰⁷ The case is then sent back to the Belgian Council of State for further ruling. However, so long as the contested legislative act is not annulled, the Belgian Council of State continues to have no jurisdiction. It is therefore necessary to turn to the Belgian Constitutional Court.¹⁰⁸

In *Solvay* the Court of Justice had ruled almost identically to the judgment in *Boxus*, though a few more questions were answered regarding the Aarhus Convention, which fall outside the scope of this research.¹⁰⁹ The judgment was quoted extensively by the Belgian Constitutional Court on multiple occasions¹¹⁰ and the contested legislative act was annulled.¹¹¹ We returned to the Belgian Council of State, which again had jurisdiction.

The Belgian Council of State referenced the Court of Justice's ruling,¹¹² but did not delve into its substance. It claimed jurisdiction in line with the Court of Justice's ruling, nonetheless, therefore cooperating fully. Interestingly, however, when considering the merits, the Belgian Council of State concluded that the project did not transgress the limits set out in the Directive and was therefore outside its scope of application, clearing the pro-

¹⁰³ *Commune de Braine-le Château*, cit., para. 14.

¹⁰⁴ Belgian Constitutional Court (FR), judgment of 22 November 2012, no. 144/2012, p. 3 *et seq.*

¹⁰⁵ *Solvay and Others*, cit.

¹⁰⁶ *Boxus and Others*, cit., para. 48.

¹⁰⁷ *Ibid.*, para. 57.

¹⁰⁸ Belgian Constitutional Court (FR), no. 144/2012, cit.

¹⁰⁹ *Solvay and Others*, cit., para. 80.

¹¹⁰ Belgian Constitutional Court (FR), no. 144/2012, cit., paras B.9.2, B.9.3, B.11, B.12.1, B.12.2, B.12.3, and B.13.

¹¹¹ *Ibid.*, para. B.15.3.

¹¹² Belgian Council of State (FR), judgment of 14 July 2014, no. 228.078, p. 2.

ject.¹¹³ It is of course debateable whether this outcome is in line with EU law. Yet if any kind of uncooperation occurred, it did not concern the Belgian Council of State's conduct in the follow-up judgment on the point of its jurisdiction. It cooperated fully on that question.

III.3. PRESUMED COOPERATION

In a study focusing on follow-up judgments, it is logical to expect that a judgment from the national referring court will follow the Court of Justice's. However, it is possible that the party losing the case before the Court of Justice will *withdraw* from the national proceedings. In such cases the judicial cooperation chain will end, resulting in there being no follow-up judgment from the referring court on the points raised in the preliminary ruling.

An example of this form of cooperation in the Italian legal order is *Associazione Italia Nostra Onlus*.¹¹⁴ This case concerns both the meaning and validity of Art. 3, para. 3, of the Strategic Environmental Assessment Directive. Italian public authorities had agreed on a construction project planned for an island in the Venetian Lagoon without performing an environmental assessment, despite the fact that part of the Lagoon is part of the Natura 2000 network under the Habitats Directive. Associazione Italia Nostra Onlus, an environmental non-governmental organisation (NGO), disagreed with this decision and appealed before the administrative judge. The case turned on the meaning and validity of Art. 3, para. 3, of the Directive, establishing that for small areas at local level an environmental assessment should be carried out only if Member States so decide. The Court of Justice first ruled that this provision is valid and then clarified that the term "small areas at local level" must be defined with reference to the size of the area concerned where the plan or programme is prepared and/or adopted by a local authority, as opposed to a regional or national authority, and the area within the territorial jurisdiction of the local authority is small relative to that territorial jurisdiction.

Based on the Court of Justice's judgment, the NGO withdrew the point in its appeal based on the Directive, and continued proceedings only on the remaining points.¹¹⁵ Presumably, the NGO expected the Italian court to follow the Court of Justice's judgment and to conclude accordingly. The NGO presumed therefore the national court's full cooperation with the Court of Justice.

Something similar occurred in the *Siragusa* case,¹¹⁶ in which however, another form of cooperation, or rather uncooperation, seemed also to emerge. Accordingly, this case is dealt with under the section on gapped cooperation (section III.6, *infra*).

A case of presumed cooperation can also be retrieved from Belgium in *Nationale Raad van Dierenkwekers*. This case deals with an absolute prohibition on importing, hold-

¹¹³ *Ibid.*, p. 9 *et seq.*

¹¹⁴ *Associazione Italia Nostra Onlus*, cit.

¹¹⁵ Italian Regional Administrative Court (Veneto), no. 1005/2017, cit., section "Fatto".

¹¹⁶ *Siragusa*, cit.

ing or trading in mammals belonging to species not included on a list established by Royal Decree. The Belgian Council of State considers that this prohibition undeniably influenced trade.¹¹⁷ It then referred questions to the Court of Justice on whether this prohibition conflicts with Art. 30 TEC [current 34 TFEU]. The Court of Justice ruled that Arts 28 and 30 TEC and/or the Convention on International Trade in Endangered Species Regulation¹¹⁸ do not preclude national legislation such as that at issue in the proceedings, so long as it can be justified.¹¹⁹ The Court of Justice then set out the requirements to be applied by the referring court to determine whether the contested decree complied with EU law.

The Belgian Council of State, having received the judgment, reopened the proceedings. However, the parties did not enter a request to continue proceedings within 30 days, which triggered a fast-track procedure.¹²⁰ Since the auditor recommended the annulment of the decree and the applicants did not object properly, the decree was annulled.¹²¹ While the Belgian Council of State did not reflect on the actual contents of the Court of Justice's ruling, cooperation can be presumed, since the parties were seemingly unwilling to contest the outcome.

III.4. FRAGMENTED COOPERATION

Referring courts do not always follow the Court of Justice's judgment in its entirety. National courts can separate what they consider relevant to resolving the dispute from what they consider irrelevant. This we term *fragmented* cooperation.

The follow-up cases in *ERG I* and *ERG II* present elements of this form of cooperation.¹²² Both concerned a dispute over the restoration of a polluted site on the basis of the Environmental Liability Directive. The Italian authorities had charged several parties, including ERG, with tasks in this respect and in particular ordered the construction of a containment wall on part of the site. The national court asked questions on the interpretation of the Directive in three different proceedings (two of which were joined by the Court of Justice). In both cases, the Court of Justice stated *of its own motion* that the scope of application of the Directive is limited in time. It nevertheless left it to the national court to decide whether the cases fell within the scope of application of the Directive. It then interpreted the Directive as requested by the national court.

In *ERG I* the Court of Justice concluded in short that the Directive was not an obstacle to Italy's interpretation of the casual link criterion, as long as the polluter pays prin-

¹¹⁷ *Nationale Raad van Dierenkwekers*, cit., para. 11.

¹¹⁸ Council Regulation (EEC) 3626/82 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora.

¹¹⁹ *Nationale Raad van Dierenkwekers*, paras 33-36.

¹²⁰ Belgian Council of State (NL), judgment of 9 March 2009, no. 191.161, p. 3.

¹²¹ *Ibid.*

¹²² *ERG I* [GC], cit., and *ERG II* [GC], cit.

ciple was respected.¹²³ It also decided that proving fault, negligence or intent is not required under Arts 3, para. 1, 4, para. 5, and 11, para. 2, of the Directive, as long as the authorities conduct a prior investigation into the origin of the pollution found, and establish a causal link between the activities of the operators to whom the remedial measures are directed and the pollution.¹²⁴

In *ERG II* the Court of Justice decided in particular that the Directive permits competent authorities to alter substantially measures for remedying environmental damage chosen at the conclusion of a procedure conducted on a consultative basis with the operators concerned and which had already been implemented or begun to be put into effect. However, it subjected this competence to a series of conditions, which were for the national court to review.¹²⁵

In the follow-up proceedings, in which both Court of Justice judgments were considered in one case, the national court clearly quotes the relevant passages of the Court of Justice's ruling and applies the criteria set out therein to determine the various aspects of the case,¹²⁶ showing full collaboration.

However, in the follow-up judgment there is no trace of the part of the Court of Justice's rulings concerning the applicability of the Directive to the subject matter of the dispute. The relevant passages of the Court of Justice's ruling are not mentioned by the national court. The Court of Justice had also left this matter to the national court to decide. The silence of the follow-up judgment as regards this aspect of the Court of Justice's rulings cannot therefore be considered a case of gapped cooperation, *i.e.* a case in which the national court disagrees with the Court of Justice. The cooperation was very successful as regards the core parts of the Court of Justice's rulings. Accordingly, this is an example of fragmented cooperation.

III.5. INTERRUPTED COOPERATION

In one case the Italian Council of State did not sincerely cooperate with the Court of Justice, and engaged in interrupted cooperation. This means that by the time the follow-up judgment was handed down, national law may have been revised and/or the facts changed, rendering the preliminary reference useless.¹²⁷ This is what seems to have happened in the follow-up judgment to *Pioneer Hi Bred Italia*.¹²⁸

This case concerns the interpretation of Art. 26 of Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms (GMOs). Pio-

¹²³ *ERG I* [GC], cit., operative part.

¹²⁴ *Ibid.*

¹²⁵ *ERG II* [GC], cit., operative part.

¹²⁶ Italian Regional Administrative Court (Sicilia), no. 2117/2012, cit.

¹²⁷ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

¹²⁸ *Pioneer Hi Bred Italia*, cit.

neer challenged a note from the Italian Ministry of Agricultural, Food and Forestry Policies informing Pioneer that, pending the adoption by the regions of rules to ensure the coexistence of conventional, organic and genetically modified crops, it could not consider the company's application for permission to cultivate hybrids of genetically modified maize, even when listed in the EU common catalogue of varieties of agricultural plant species. The Italian Council of State had doubts about the meaning of EU law on this issue and addressed the Court of Justice for clarification. The Court of Justice answered that EU law prohibits first subjecting to a national authorization procedure the use and marketing of those GMOs varieties which are authorised pursuant to Art. 20 of Regulation (EC) 1829/2003¹²⁹ and those included in the EU common catalogue. Second, national authorities cannot even issue a general ban on the cultivation of such GMOs pending the adoption of coexistence measures to avoid the unintended presence of genetically modified organisms in other crops.

In light of this judgment it is not surprising that Pioneer expected no longer to be restricted in its undertaking.¹³⁰ Yet the Italian Council of State sought to wind down the clock in its follow-up judgment. Rather than issuing its verdict, it asked the relevant Ministry to express its opinion on the matter in light of the Court of Justice's ruling. This was done not once, but several times as the Ministry's answers were not conclusive. In the meanwhile, the Italian regulatory framework for GMOs changed. While in all other follow-up judgments concerning the Italian Council of State analysed in this *Article*, a follow-up judgment was obtained within two years of the Court of Justice's judgment, in this case, it took the Italian Council of State four years to issue its verdict. By that time, the Italian legal framework was so altered that the Italian Council of State decided that it was not possible to continue the proceedings and Pioneer would have to start new proceedings should it continue to want to. Not once in its judgment did the Italian Council of State engage with the Court of Justice's judgment, in striking contrast with what we observed in all other follow-up judgments concerning this court as reviewed in this research.

III.6. GAPPED COOPERATION

Following the case of interrupted cooperation described in the previous section, *Siragusa*¹³¹ presents the contours of a gapped cooperation. Two things occurred in the follow-up case. This case concerns the interpretation of Art. 17 of the Charter of Fundamental Rights of the European Union and of the principle of proportionality in the context of proceedings in which Mr Siragusa appealed against a decision to the Regione Sicilia mandating Mr Siragusa to restore a site on which Mr Siragusa had built without permis-

¹²⁹ Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.

¹³⁰ Italian Council of State, no. 2361/2016, cit.

¹³¹ *Siragusa*, cit.

sion. In the preliminary reference, the Italian court had made a link between landscape protection and EU environmental law. The Commission, however, concluded that the case did not fall under any provision of EU environmental law. In light of the lack of link with EU law, the Court of Justice ruled the matter outside its jurisdiction.

Having received the Court of Justice's judgment, the Italian Regional Administrative Court (Sicilia) asked Mr Siragusa whether he wanted to continue the proceedings.¹³² Mr Siragusa did not reply to the Italian Regional Administrative Court (Sicilia), at least not within the time limit of 90 days available in this regard, and therefore the Italian Regional Administrative Court (Sicilia) ended the proceedings.

In light of the above, this case presents all the characteristics to be qualified as presumed cooperation, as discussed in section III.3, *supra*. It does not seem unreasonable to consider that Mr Siragusa expected the national court to cooperate fully with the Court of Justice and therefore that the national court would have considered the arguments based on EU law as unfounded. However, the Italian Regional Administrative Court (Sicilia)'s follow-up judgment contains another element which suggests that the Italian court did not completely agree with the Court of Justice. Indeed, when deciding upon the costs of the proceedings, the Italian Regional Administrative Court (Sicilia) indicated circumstances allowing the granting of an exception to the rule that the losing party, Mr Siragusa in this case, should pay the winning party's costs, the Regione Sicilia. According to the national court, the special circumstances consisted in the doubtful compatibility of the Regione Sicilia's order with EU law. Despite the Court of Justice's judgment indicating the non-applicability of EU law to the case concerned, the Italian court seemed convinced that this was in doubt. Accordingly, this case could also be categorised as gapped cooperation.

III.7. SUSPENDED COOPERATION

Among the follow-up cases retrieved in this *Article*, there are two – one per jurisdiction – which while hinting at the national court's intention to cooperate fully with the Court of Justice, cannot be considered examples of full cooperation because the national courts suspended the proceedings and made a fresh preliminary reference rather than render judgment. In such cases, the cooperation with the Court of Justice is *suspended* while awaiting the ruling in the further reference. Judicial cooperation or uncooperation will therefore only become visible after an answer is received to the further reference.

This occurred in Italy in *Niselli*,¹³³ which ended with a further reference to the Italian Constitutional Court. This case concerns criminal proceedings against Antonio Niselli who was charged with managing waste without a permit in breach of national law transposing the Old Waste Directive. In 2002 a subsequent Italian law had redefined the concept of

¹³² Italian Regional Administrative Court (Sicilia), no. 2264/2016, cit.

¹³³ *Niselli*, cit.

waste in such a manner that Mr Niselli's behaviour no longer constituted a breach of Italian law. Yet the Italian First Instance Court (Terni), hearing the case, had doubts about the compatibility of this subsequent Italian law with the definition of waste as prescribed under the Old Waste Directive. Accordingly, it turned to the Court of Justice for clarification of the meaning of the Directive. The Court of Justice concluded essentially that the Directive could not be interpreted in the manner indicated by the subsequent Italian law. In the follow-up judgment, the Italian First Instance Court (Terni), quotes the relevant passages from the Court of Justice's ruling and concludes that Italian law is incompatible with the Directive.¹³⁴ However, the Italian court doubted whether it was correct in such a case to set aside the conflicting national norm, given that this could for instance lead to criminal charges. In this regard the national court quoted the landmark cases of the Court of Justice on the direct effect of directives in criminal proceedings to sustain its doubts.¹³⁵ The Italian court framed its doubts in the context of the Italian Constitution and therefore decided that the matter needed to be considered by that court.

We also retrieved an example of suspended cooperation from Belgium. As in the Italian case, the reference in Belgium was made to the national Constitutional Court. This example concerns one of the follow-up cases to *Commune de Braine-le Château and Others*.¹³⁶ In this case, one of the applicants challenged a permit granted to BIFFA Waste Services SA to extend and operate a landfill site in Braine-le-Château. The other applicant sought the annulment of a ministerial order, allowing the Société anonyme "Propreté, Assainissement, Gestion de l'environnement" (PAGE) to continue operating a landfill site at "Les trois burettes" in Mont-Saint-Guibert. The Belgian Council of State essentially asked the Court of Justice whether Art. 7 of the Old Waste Directive required Member States to mark on a geographical map the precise locations of a planned waste disposal site, or to determine location criteria which are sufficiently precise to ascertain whether applicants for a permit fall within the management framework, and whether not having done so within the period prescribed precludes Member States from issuing individual permits to operate waste disposal installations, such as landfill sites. Thirdly, the Court of Justice was asked if Art. 7, para. 1, of the Directive meant that drawing up plans relating to suitable disposal sites or installations must be drawn up before the period prescribed for transposing the Directive into national law, or whether this must be done within a reasonable period, which may exceed the transposition-deadline. The Court of Justice first ruled that it is indeed required either to pinpoint locations on a geographical map, or to draw up sufficiently precise selection criteria within a reasonable period,

¹³⁴ Italian First Instance Court (Terni), no. 546/2005, cit.

¹³⁵ On this matter, see extensively, L. SQUINTANI, J. LINDEBOOM, *The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction Between Obligations and Mere Adverse Repercussions*, in *Yearbook of European Law*, 2019, p. 18 et seq.

¹³⁶ *Commune de Braine-le Château*, cit.

which may well exceed the transposition period.¹³⁷ Finally, the Court of Justice ruled that, though it is true that a failure to fulfil the above obligation can be grounds for an infringement procedure against the Member State concerned, this failure does not preclude Member States from issuing new permits.¹³⁸

The Belgian Council of State in its follow-up judgment quotes the Court of Justice's ruling.¹³⁹ It then goes on to consider that having seen the Court of Justice's ruling and the debate by the parties involved, there is cause to address additional questions to the Belgian Constitutional Court, thus suspending a final ruling.¹⁴⁰ In doing so the Belgian Council of State showed cooperative behaviour.

IV. SYNTHESIS AND COMPARISON

Section II.2, *supra*, noted that judicial cooperation in environmental matters in Sweden ranged from complete non-implementation of the Court of Justice's ruling to the non-referral of certain legal issues raised in the national proceedings. Conversely, UK judges tend to follow the Court of Justice's rulings as closely as possible. They give full account of the Court of Justice's reasoning, thus refraining from engaging in silenced cooperation. Almost all of the cases retrieved from Belgium were also of full cooperation (16 out of 18), with one case indicating presumed cooperation and one suspended cooperation.

A somewhat mixed practice emerges from Italy, like the Netherlands, with follow-up judgments situated at both ends of the spectrum of judicial interaction, though with a greater variety of behaviours on display in Italy than in the Netherlands. While in the Netherlands, only three categories were highlighted, this *Article* found six different kinds. Only the interchanged, silenced, and withdrawn cooperation were not encountered among the thirteen environmental law cases retrieved in the Italian legal order in this research. In twelve such cases the Italian courts displayed cooperative behaviours. Judicial uncooperation could only be clearly identified in one case, as interrupted cooperation. Another case of potential gapped cooperation could only be regarded as modestly so, given that this case also showed characteristics of presumed cooperation.

It can therefore be concluded that the national courts of both Italy and Belgium tend to cooperate with the Court of Justice in environmental matters. In their successful interactions the national courts apply the interpretations provided by the Court of Justice in ways which do not deviate from the intention of that interpretation, which can be observed in particular in the practice of quoting the relevant passages and the operative part of the Court of Justice's ruling.

¹³⁷ *Ibid.*, paras 35 and 38.

¹³⁸ *Ibid.*, paras 41-42.

¹³⁹ Belgian Council of State (FR), no. 187.140, cit., p. 4 *et seq.*

¹⁴⁰ *Ibid.*, p. 8 *et seq.*

As regards Italy, this is not true of the interrupted interaction observed in *Pioneer Hi Bred Italia*, where the Italian Council of State delayed its follow-up judgment and, intentionally or not, permitted the applicable national framework to change in the meantime. As a consequence, the national court dispensed with its judgment, which means that the Court of Justice's ruling was not applied in this follow-up case. Considering that the subject matter of this case, GMOs, is highly politicised in Italy,¹⁴¹ it would be interesting to research whether and to what extent the political unwillingness to allow GMO cultivation in Italy influenced the *modus operandi* of the Italian Council of State in this case.



FIGURE 1. Map of judicial dialogue in environmental matters in the EU (five Member States; year: 2014), available at: www.lovelljohns.com.

In addition, a new category of judicial interaction was identified in both jurisdictions: suspended cooperation. The application of the Court of Justice's ruling in such cases is suspended while further doubts requiring further clarification are resolved. The

¹⁴¹ For an account in English of the Italian legislative initiatives to block GMO cultivation, see the site of the Library of Congress, under the heading "Restrictions on Genetically Modified Organisms: Italy", available at www.loc.gov.

cases identified in Italy and Belgium led to a national court process to request further clarification from the respective national Constitutional Courts. Because these Italian and Belgian follow-up procedures involving further references indicate the courts' willingness to cooperate with the Court of Justice, these postponed cooperation cases can be considered examples of judicial cooperation. However, such cases could result in uncooperation in future, or in other jurisdictions.

In light of the above, the known part of the judicial dialogue in environmental matters map can be shaped as depicted in Figure 1.

V. INITIATION REFLECTION FOR A PRELIMINARY RESEARCH AGENDA

The empirical studies performed so far have considered a total of 64 follow-up judgments for the behaviour of national courts in the jurisdictions investigated.¹⁴² When subdividing this according to the kind of interaction between the national courts and the Court of Justice, the following overview emerges:

Cooperation Countries	Cooperative behaviour					Uncooperative behaviour			
	Full	Presumed	Fragmented	Suspended	Withdrawn	Gapped	Interrupted	Silenced	Interchanged
SE	-	-	-	-	-	2/9	2/9	2/9	3/9
NL	13/16	-	-	-	1/16	2/16	-	-	-
UK	5/8	2/8	1/8	-	-	-	-	-	-
IT	7/13	2/13 ¹⁴³	2/13	1/13	-	0/13149	1/13	-	-
BE	16/18	1/18	-	1/18 ¹⁴⁴	-	-	-	-	-
Total	41/64	5/64	3/64	2/64	1/64	4/64	3/64	2/64	3/64
Aggregated Total	52/64					12/64			

TABLE 1. Overview of follow-up cases per category of judicial cooperation.

¹⁴² It should be noted that this figure depends on how joined cases are considered.

¹⁴³ In addition to being a case of presumed cooperation, *Siragusa*, cit., could also be categorised as gapped cooperation.

¹⁴⁴ *Commune de Braine-le-Chateau*, cit., was a joined case. While the follow-up for case C-53/02 falls under full cooperation, the follow-up for case C-217/02 falls under suspended cooperation.

Overall, a tendency in favour of judicial *cooperation* in the context of Art. 267 TFEU in environmental matters seems to emerge. It could thus be argued that this aspect of the access to justice pillar is functioning effectively, at least in the majority of the cases. Environmental democracy thus seems guaranteed, at least in this regard. This finding would however be premature. First, because only a minority of jurisdictions have been investigated. Even if the categories of judicial cooperation seem to have *unfolded* almost to saturation point, given that the studies in Italy and Belgium revealed the presence of only one new category, this does not mean that national courts' behaviour in the EU has been *mapped* well enough. Indeed, 23 jurisdictions still need to be mapped. Comparative research could surely help improve the quality of the picture in this regard.

Second, a close look at the findings reveals some marked differences. In Sweden the findings show a tendency towards uncooperative behaviour. Differently, in the UK first and now Belgium, the findings show a tendency towards *cooperative* behaviour. The marked difference in the findings of the empirical research in Sweden, the UK and Belgium suggests that the national judicial cultures have a strong impact on judicial dialogue.¹⁴⁵ A specific research question in this regard is whether the presence of a national environmental law tradition distinct from EU mainstream environmental law influences national court behaviour in follow-up judgments. Sweden, for instance, has a specialised court dealing with environmental matters with unique features, such as technical judges (judges who are not lawyers but ecologists).¹⁴⁶ Moreover, Swedish environmental law is generally considered at the forefront of environmental protection. The same cannot be said for the UK, Italian and Belgian environmental law. The former in particular is known to base its environmental law almost verbatim on EU environmental law.¹⁴⁷ Follow-up research could establish whether the more national environmental law departs from EU environmental law, the greater is the chance that judicial uncooperation will occur. Comparative research focusing both on legislative standards and case law practice will provide a quantitative answer in this regard. Qualitative interviews with national judges could also help understanding whether peculiarities concerning environmental law in one country create a sense of judicial identity, explaining marked differences in judicial cooperation.

In contrast to Sweden, the UK and Belgium, the findings from the Netherlands first, and even more those from Italy now – especially the examples of interrupted cooperation – suggest that rather than discussing judicial cultures in general, a case-by-case analysis of the reasons beyond national court behaviour is necessary. The noticeably peculiar approach adopted by the Italian Council of State in the case of *Pioneer Hi Bred*

¹⁴⁵ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit.

¹⁴⁶ M. SCHULTZ, *Scientific Evidence in Swedish Courts: The Use of Technical Judges for Better Integration of Scientific Data in Environmental Decision-Making*, in L. SQUINTANI J. DARPO, L. LAVRYSEN, P.-T. STOLL (eds), *Managing Facts and Feelings in Environmental Governance*, Cheltenham: Elgar, 2019, p. 118 *et seq.*

¹⁴⁷ L. SQUINTANI, *Beyond Minimum Harmonisation*, cit.

Italia on GMOs could even indicate that within each jurisdiction, judicial interaction differs on a theme-by-theme basis. Empirical research going beyond the “how” question posed in this *Article* is thus necessary to uncover judicial dialogue fully. Qualitative interviews with key stakeholders, such as judges and lawyers active in the proceedings, could provide a first set of data in this regard.

Considered from the perspective of access to justice as a fundamental pillar of environmental democracy, the finding that the functioning of the link between national courts and the Court of Justice changes on a case-by-case, theme-by-theme or even country-by-country basis is concerning. Especially differences on a country-by-country basis are problematic in the context of environmental democracy. Indeed, it could suggest the existence of ranks of environmental citizenship, with first-rank environmental citizenship being provided in those countries where judicial cooperation is complete, and second or even lower rank environmental citizenship in those countries in which judicial cooperation is not cooperative.

An easy rebuttal to this argument is that it concerns a failure by the Member States, not by the EU institutions.¹⁴⁸ This rebuttal is problematic for several reasons, including the absence of infringement procedures for failure to comply with the Court of Justice’s rulings in uncooperative follow-up judgments.¹⁴⁹ The well-known *Köbler* case shows that errors in follow-up judgments can lead to state liability for breach of EU law.¹⁵⁰ *Köbler* started as a case of *withdrawn* cooperation, with the national court withdrawing its questions once the Court of Justice had ruled that the question had already been answered in *Schöning-Kougebetopoulou*.¹⁵¹ After withdrawing the referral, the referring court should have noticed that the Court of Justice’s answer did not fit the new national normative framework. Accordingly, it should have suspended the proceedings and asked for a fresh clarification. Yet, instead of engaging in *suspended* cooperation by asking another question of the Court of Justice, the national court handed down a wrong judgment, thus engaging in *interrupted* cooperation. It is because of this interrupted cooperation that Mr Köbler started a case based on state liability. If state liability for wrongful court follow-up is possible, at least in theory,¹⁵² an infringement procedure is also possible. Of course, the burden of proof for the Commission to prove the existence of a manifest breach could be high. Still, *Commission v. France* shows that there is no

¹⁴⁸ We are thankful towards Matthijs van Wolferen for sharing his thoughts with us about this aspect.

¹⁴⁹ We searched for infringement procedures on the CURIA database using the C-number of the preliminary rulings for which the follow-up judgments showed uncooperative behaviour.

¹⁵⁰ Court of Justice, judgment of 30 September 2003, case C-224/01, *Köbler*.

¹⁵¹ Court of Justice, judgment of 15 January 1998, case C-15/96, *Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg*.

¹⁵² In this specific case the Court of Justice ruled that there was not liability as there was not a *manifest* breach of EU law.

need to prove systematic mistakes.¹⁵³ Accordingly, not only Sweden, in which basically all cases show examples of uncooperative behaviour, but also Italy and the Netherlands could face infringement procedures for wrongful follow-up judgments. Nevertheless, no infringement procedure can be found on CURIA. Certainly, the lack of case law on this point does not automatically mean that informal phases of infringement procedures have never taken place. However, a peculiarity of wrongly decided follow-up judgments must be that they cannot be restored and prevented. If initiated, an infringement procedure for a wrongly decided follow-up judgment should lead to a case before the Court of Justice. Moreover, Krämer already noted the lack of Commission's effort to assess whether national implementing legislation is in accordance with rulings in preliminary references on environmental matters.¹⁵⁴ Accordingly, the finding that there have been no infringement procedures regarding the follow-up judgments included in this *Article* which show uncooperative behaviour seems most plausible. Further research could focus on whether such an absence of infringement procedures is caused by a lack of capacity on the part of the Commission, lack of political will or more simply due to a lack of information.

The lack of information is surely a plausible explanation, considering the difficulties encountered in all jurisdiction in retrieving follow-up judgments. Further research into national approaches to the storage of judgments, and into ICT services, could provide further clarification. The relatively low number of follow-up judgments retrieved in the various jurisdictions surely highlights the difficulty of providing a complete picture of the functioning of the preliminary reference procedure, not only for academics, but also for the Commission.

In this regard, we would like to underline the lack of data available on CURIA. On its website, the Court of Justice refers to the database of national case law on EU law handed down by supreme administrative courts, the Dec.Nat database, which is regularly updated,¹⁵⁵ including with national jurisprudence in follow-up cases. However, as shown in Table 2, only about 28 per cent of follow-up cases retrieved in our study are included on this database.

¹⁵³ Court of Justice, judgment of 4 October 2018, case C-416/17, *Commission v. France (Précompte mobilier)*.

¹⁵⁴ L. KRÄMER, *The Commission's Omission to Use Article 267 TFEU*, cit. Even when action is undertaken, the overall outcome might not be sufficient to ensure full compliance, see M. ELIANTONIO, F. GRASHOF, *Wir müssen reden! – We Need to Have a Serious Talk! The Interaction between the Infringement Proceedings and the Preliminary Reference Procedure in Ensuring Compliance with EU Environmental Standards: A Case Study of Trianel, Altrip and Commission v. Germany*, in *Journal for European Environmental & Planning Law*, 2016, p. 325 *et seq.*

¹⁵⁵ On 7 October 2019, when we checked for the last time, it stated that it was current to 18 September 2019.

Countries	Follow-up available on Dec.Nat
SE	6/9
NL	0/16
UK	2/8
IT	2/13
BE	8/18
TOTAL	18/64

TABLE 2. Overview of follow-up cases available on www.aca-europe.eu.

Most interestingly, even though the Italian national court in *Green Network*¹⁵⁶ explicitly mandates the transmission of the judgment to the Court of Justice in the operative part of the follow-up judgment, it is not available on the Court of Justice's site.

No pattern emerges to explain why one case is included and another not from the cases available or absent from the Court of Justice's database. In particular, it is hard to establish a link between cooperation and inclusion in this database. While the Dutch judiciary shows complete cooperation in 13/16 cases, none are included in the database. On the other hand, most of the Swedish referral judgments were included, even though the Swedish judiciary showed signs of uncooperative behaviour.

Transparency is a key element of any democratic system. A current and reliable database would therefore be invaluable for the mapping exercise. The difficulties encountered at national level, especially in Italy and more generally as regards first instance courts, and the generalised lack of data on the CURIA database cannot be considered to contribute to transparency on the functioning of Art. 267 TFEU as a tool to guarantee environmental democracy.

VI. CONCLUSIONS

The studies presented in this *Article* show that Italian and Belgian courts tend to cooperate fully with the Court of Justice, aligned to the findings from the Netherlands and the UK. Moreover, with only one new category of judicial cooperation being found, these case studies suggest that the *unfolding* of the categories of judicial cooperation is almost complete. Yet many more jurisdictions need to be investigated to complete the *mapping* exercise.

From the perspective of access to justice as a pillar of environmental democracy, a comparative perspective on the findings from Sweden, the Netherlands, the UK, Italy and Belgium shows the presence of different approaches, displaying a case-by-case,

¹⁵⁶ *Green Network*, cit.

theme-by-theme or even a country-by-country approach to judicial cooperation. This points to the existence of different levels of environmental democracy across the Member States. More generally, the lack of readily available information at national and EU level about follow-up judgments shows that transparency can be improved.

In conclusion, these findings are essential reading if the “von der Leyen” Commission seriously intends to advance on environmental democracy, and further research should be carried out to understand their origin of such findings, enabling the development of strategies to improve the functioning of preliminary references in environmental matters, and more generally, the quality of environmental democracy in the EU.



DIALOGUES

CONFERENCE ON THE FUTURE OF EUROPE

REFORMING THE EU OUTSIDE THE EU? THE CONFERENCE ON THE FUTURE OF EUROPE AND ITS OPTIONS

FEDERICO FABBRINI*

ABSTRACT: This contribution to the *Dialogue* offers a first analysis of the recent initiative to establish a Conference on the Future of Europe – discussing whether it can become a new model to reform the EU, and if so, how it should be designed to succeed. The contribution examines the technicalities of the EU treaty amendment rules and emphasises the challenge that the need to obtain unanimous approval by all Member States poses towards reform. The contribution then assesses the increasing tendency by Member States to use international treaties outside the EU legal order and underlines how these have introduced new ratification rules, overcoming unanimity. Drawing lessons from these precedents, the contribution suggests that to achieve its ambitious reform objectives the Conference on the Future of Europe should consider the option to reform the EU outside the EU, by drafting a new, separate treaty with an entry-into-force rule which replaces unanimity with a super-majority vote.

KEYWORDS: Conference on the Future of Europe – EU reform – treaty amendments – *inter se* agreements – Political Compact – Brexit.

I. INTRODUCTION

Ahead of the European Parliament (EP) elections in Spring 2019, French President Emmanuel Macron – who had unveiled in a number of speeches an ambitious plan for a sovereign, united and democratic Europe¹ – proposed in an open letter, addressed to all European citizens and written in all the official languages of the EU, to set up a Conference for Europe as a way to renew the EU and to “propose all the changes our political project

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¹ E. MACRON, *Speech at Université La Sorbonne*, 26 September 2017, www.elysee.fr; E. MACRON, *Speech at the award of the Prix Charlemagne, Aachen*, 11 May 2018, www.elysee.fr.



needs”.² Following the EP elections in May 2019 – which for the first time in the history of European integration saw a major increase in citizens’ participation³ – the idea of a Conference on the Future of Europe was taken on board by the new EU leadership team.⁴ In particular, the new European Commission President Ursula von der Leyen committed in her political guidelines to establish “a Conference on the Future of Europe”.⁵ Moreover, with Brexit – the withdrawal of the United Kingdom (UK) from the EU – taking place on 31 January 2020, the plan for a Conference on the Future of Europe was endorsed also by the other EU institutions as a way to relaunch the project of European integration, and address a number of weaknesses in the EU governance system.⁶

The aim of this contribution to the *Dialogue* is to offer a first analysis of the ambitious plan for a Conference on the Future of Europe. In particular, the contribution discusses from an EU law perspective whether the Conference can become a new model to reform the EU, and if so, how the process should be designed to succeed. As such, the contribution focuses on the perspective outcome of the Conference, exploring the EU reform mechanisms with a view to identify possible avenues towards further political integration in Europe.⁷ To this end, the contribution analyses the formal legal rules for treaty change enshrined in the current TEU, and explains the challenges that these pose towards a successful reform of the EU given the veto points embedded in it. At the same time, however, the contribution sheds light on the increasing tendency by the Member States to conclude *inter-se* agreements outside the legal order of the EU, and examines how this may offer an opportunity to policy-makers involved in the Conference to overcome obstacles towards reform and make this initiative a success.

The argument of the contribution is that the Conference on the Future of Europe can be an innovative model to reform the EU but that if the Conference wants to succeed in its ambitious objective, it must address face-on the challenge of treaty change.

² E. MACRON, *Lettre pour une renaissance européenne*, 4 March 2019, www.elysee.fr.

³ European Parliament press release, *2019 European Elections: Record Turnout Driven by Young People*, 24 September 2019, www.europarl.europa.eu (reporting a 50.6 percent turnout for EP elections, which is the largest participation increase since 1979).

⁴ See European Council statement, *European Council appoints new EU leaders*, 2 July 2019, press release 522/19.

⁵ U. VON DER LEYEN, *A Union that strives for more: My Agenda for Europe. Political Guidelines for the Next European Commission 2019-2024*, 16 July 2019, ec.europa.eu, p. 19.

⁶ See European Parliament resolution P9_TA(2020)0010 of 15 January 2020 on the European Parliament’s position on the Conference on the Future of Europe; Communication COM(2020) 27 final of 22 January 2020 from the Commission, *Shaping the Conference on the Future of Europe*; European Parliament resolution P9_TA(2020)0153 of 18 June 2020 on the European Parliament’s position on the Conference on the Future of Europe; and Council, Note from the Presidency of 24 June 2020, *Conference on the Future of Europe: Council Position*, Council Document 9102/20, www.consilium.europa.eu.

⁷ See further F. FABBRINI, *Possible Avenues for Further Political Integration in Europe*, study commissioned by the European Parliament Constitutional Affairs Committee, June 2020, from which this contribution draws.

In fact, the EU treaty amendment rule – by conditioning changes to the EU Treaties to the approval by all the Member States meeting in an intergovernmental conference (IGC) and unanimous ratification at the national level – represents a formidable obstacle to reforming the EU. However, in recent years – particularly in responding to the euro-crisis – EU Member States have increasingly resorted to *inter-se* international agreements concluded outside the EU legal order – which have done away with the unanimity requirement. And, within limits, this practice has been held to be legal by the CJEU. Drawing on this experience, therefore, policy-makers involved in the Conference on the Future of Europe should resolve to draft a new treaty – call it Political Compact – with a new ratification rule, which replaces the unanimity requirement with a super-majority vote: while Member States which have not ratified the new treaty would not be bound by it,⁸ they could not block the Political Compact from entering into force among those Member States that wish to advance integration further towards ever closer union.⁹

As such the contribution is structured as follows. Section II overviews the positions of the EU institutions and Member States on the mandate of the Conference on the future of Europe, and outlines its reform ambitions. Section III analyses the formal rules for treaty change enshrined in EU primary law, emphasising the requirement of unanimous ratification for treaty changes which is set therein – and the vain proposals to overcome it. Section IV explains how – given the failure to amend the EU treaty amendment rule – Member States have increasingly resorted to *inter-se* international agreements outside the EU legal order to avoid ratification crises. Building on this analysis, section V suggests that the Conference on the Future of Europe should therefore reflect on producing a Political Compact, whose entry into force would be subject to less-than-unanimous ratification rules – and offers guideposts that policy-makers could consider. Section VI, finally, concludes pointing out that reforming the EU outside the EU may be the best option to relaunch the project of EU integration at a time of crisis.

II. PLANS FOR THE CONFERENCE ON THE FUTURE OF EUROPE

While the debate on the future of Europe is now several years in the making,¹⁰ the proposal in favour of a Conference on the Future of Europe is relatively recent: as mentioned in the Introduction, the idea was first flouted by French President Emmanuel Macron in Spring 2019. Before the EP elections – at a moment of profound restructuring of the party system, with a strong polarization between pro- and anti-European political forces – President Macron proposed to renew the EU by putting square and centre the issue of constitutional reforms as a way to unite, strengthen and democratise

⁸ See also Arts 11-15 of the 1969 Vienna Convention on the Law of the Treaties.

⁹ See Preamble, TEU.

¹⁰ See Commission, *White paper on the Future of Europe*, COM(2017) 2025 final of 1 March 2017.

the EU and make it a sovereign power in an ever more uncertain world.¹¹ In particular, drawing from the French experience of citizens' conventions,¹² President Macron recommended to convene "with the representatives of the European institutions and the Member States, a Conference for Europe in order to propose all the changes our political project needs, with an open mind, even to amending the treaties".¹³ After the EP elections – in light of the positive result of pro-European forces in the pan-European electoral process, and a rising enthusiasm for participation in EU affairs – France detailed its plan for a Conference on the Future of Europe and, building on the special relation with Germany,¹⁴ took the lead in outlining a common roadmap forward.

In particular, France and Germany put forward in November 2019 a joint non-paper on the Conference on the Future of Europe, outlining key guidelines on the project.¹⁵ In this document France and Germany indicated their belief that "a Conference on the Future of Europe is prompt and necessary"¹⁶ and clarified that it "should address all issues at stake to guide the future of Europe with a view to make the EU more united and sovereign".¹⁷ In terms of scope, as the Franco-German proposal clarified, "the Conference should focus on policies and identify [...] the main reforms to implement as a matter of priority, setting out the types of changes to be made (legal – incl. possible treaty change [...])".¹⁸ Moreover, the Franco-German proposal indicated that "Institutional issues could also be tackled as a cross-cutting issue, to promote democracy and European values and to ensure a more efficient functioning of the Union and its Institutions".¹⁹ Finally, in terms of scenarios, the Franco-German proposal stated that the Conference should work in phases – tackling institutional issues first, and conclude during the French Presidency of the Council in spring 2022 with final "recommendations [to] be presented to the [European Council] for debate and implementation".²⁰

The proposal in favour of a Conference on the Future of Europe was fully taken on board by the new European Commission President von der Leyen. As she pointed out when explaining her political guidelines for the 2019-2024 term before the EP on 16 July 2019 the Conference on the Future of Europe would represent "a new push for Europe-

¹¹ E. MACRON, *Speech at Université La Sorbonne*, cit.

¹² See also French Assemblée Nationale, Commission des Affaires Européennes, *Rapport d'information sur les conventions démocratique de refondation de l'Europe*, no. 482, 7 December 2017.

¹³ E. MACRON, *Lettre pour une renaissance européenne*, cit.

¹⁴ See Treaty on Franco-German Cooperation and Integration (Treaty of Aachen).

¹⁵ See Franco-German non-paper on key questions and guidelines: Conference on the Future of Europe, 25 November 2019, images.politico.eu.

¹⁶ *Ibid.*, p. 1.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 2.

an democracy".²¹ In particular, President von der Leyen stated that "The Conference should bring together citizens, [...], civil society and European institutions as equal partners [...and] should be well prepared with a clear scope and clear objectives, agreed between the Parliament, the Council and the Commission".²² Moreover she indicated her readiness to follow up on what is agreed, including via "Treaty change".²³ Subsequently, in her mission letter to the Commission Vice-President-designate for Democracy and Demography Dubravka Šuica, President von der Leyen emphasised the importance of agreeing "on the concept, structure, timing and scope of the Conference" and ensuring "the follow-up on what is agreed".²⁴ In fact, when speaking again in front of the EP on 27 November 2019, when the whole new Commission was subject to a consent vote,²⁵ President von der Leyen mentioned once more her ambition to "mobilise Europe's best energies from all parts of our Union, from all institutions, from all walks of life, to engage in the Conference on the future of Europe".²⁶ These views were subsequently outlined in a position paper of the Commission on the Conference on the Future of Europe, released on 22 January 2020.²⁷

Moreover, the proposal for a Conference on the Future of Europe was also strongly backed by the EP, which quickly started preparing its position on the matter.²⁸ To this end, the EP set up an *ad hoc* working group (WG), representing all political parties,²⁹ to prepare its position on the initiative which was embraced by the full chamber in a resolution adopted on 15 January 2020.³⁰ Here the EP underlined how "the number of significant crises that the Union has undergone demonstrates that reform processes are needed in multiple governance areas"³¹ and therefore welcomed the Conference as an opportunity "to increase [the EU] capacity to act and make it more democratic".³² In terms of structure, the EP proposed that the Conference should be based on a range of bodies, including a Conference Plenary, a Steering Committee, and an "Executive Coordination Board [to] be

²¹ U. VON DER LEYEN, *A Union that strives for more*, cit., p. 19.

²² *Ibid.*

²³ *Ibid.*

²⁴ U. VON DER LEYEN, Mission Letter to Dubravka Šuica, 10 September 2019, ec.europa.eu, p. 5.

²⁵ See European Parliament Decision P9_TA(2019)0067 of 27 November 2019 electing the Commission.

²⁶ U. VON DER LEYEN, *Speech at the European Parliament*, 27 November 2019, ec.europa.eu, p. 14.

²⁷ Communication COM(2020)27 final, cit.

²⁸ See also Chair of the EP Committee on Constitutional Affairs A. TAJANI, *Letter to the European Parliament President David Sassoli*, 15 October 2019 (indicating consensus that the EP should play a leading role in the Conference and reporting that AFCO as the competent committee of the EP stands ready to start working immediately to prepare the EP position on the matter).

²⁹ European Parliament Conference on the Future of Europe, *Main Outcome of the Working Group*, 19 December 2019, neweuropeans.net.

³⁰ European Parliament resolution (2020)0010, cit.

³¹ *Ibid.*, para. B.

³² *Ibid.*, para. 2.

composed of the three main EU institutions under Parliament's leadership".³³ In terms of scope, then, the EP stated that the Conference should address a "pre-defined but non-exhaustive" list of issues, including European values, democratic and institutional aspects of the EU and some crucial policy areas.³⁴ Nevertheless, the EP clarified that the Conference should "produce concrete recommendations that will need to be addressed by the institutions",³⁵ and called for "a general commitment from all participants in the Conference to ensure a proper follow-up of its outcomes",³⁶ including "initiating treaty change".³⁷

The proposal in favour of a Conference on the Future of Europe was also endorsed by the European Council, which on 12 December 2019 "considered the idea of a Conference on the Future of Europe starting in 2020 and ending in 2022"³⁸ and asked the incoming Croatian Presidency of the Council "to work towards defining a Council position on the content, scope, composition and functioning of such conference and to engage, on this basis, with the [EP] and the Commission".³⁹ The European Council also underlined that the need for the Conference to respect the inter-institutional balance, and to be "an inclusive process, with all Member States involved equally".⁴⁰ Moreover, while the European Council stated that "priority should be given to implementing the Strategic Agenda"⁴¹ and that the Conference should therefore "contribute to the developments of our policies",⁴² the new European Council President Charles Michel mentioned that the Conference should also serve as a way to change the EU by reforming it where needed.⁴³

On the basis of the mandate of the European Council, the Council of the EU on 3 February 2020 put forward a draft common position in favour of the Conference of the Future of Europe.⁴⁴ Here the Council recognised the need to "engaging in a wide reflection and debate on the challenges Europe is facing and on its long-term future"⁴⁵ and proposed the creation of a light institutional structure, focusing on policy priorities with a mandate to report to the European Council by 2022. Subsequently, under pressure from the EP,⁴⁶ the Council of the EU also eventually formalised on 24 June 2020 its posi-

³³ *Ibid.*, para. 24.

³⁴ *Ibid.*, para. 7.

³⁵ *Ibid.*, para. 29.

³⁶ *Ibid.*, para. 30.

³⁷ *Ibid.*, para. 31.

³⁸ European Council Conclusions of 12 December 2019, para. 14.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para. 16.

⁴¹ *Ibid.*, para. 15.

⁴² *Ibid.*

⁴³ See European Parliament press release, *Ten Years of the Lisbon Treaty and the Charter of Fundamental Rights*, 18 December 2019, www.europarl.europa.eu.

⁴⁴ See Council, Note from the Presidency of 3 February 2020, *Conference on the Future of Europe*, Council Document 6575/20, www.consilium.europa.eu.

⁴⁵ *Ibid.*, para. 1.

⁴⁶ See European Parliament resolution (2020)0153, cit.

tion on the Conference on the Future of Europe: here the Council acknowledged how “reflecting on the challenges the EU is facing and on its future has become all the more important following the outbreak of the Covid-19 pandemic”⁴⁷ and stated that “[t]he Conference does not fall within the scope of Article 48 TEU”.⁴⁸

In sum, all the EU institutions have progressively embraced the plan to establish a Conference on the Future of Europe. In fact, following the Franco-German non-paper, also several other Member States have thrown their support behind this initiative, seeing it as the way to let the EU leap forward a decade after the adoption of the Lisbon Treaty.⁴⁹ Admittedly, many issues concerning the institutional organization and the constitutional mandate of the Conference still have to be worked out. In fact, while the EP and several Member States individually or jointly have pushed for the Conference to have an ambitious remit, with a clear role to revise the EU Treaties, the Council and other Member States are more prudent, and would rather want the process to serve as a redo of the citizens’ dialogue the EU organised in 2017-2019.⁵⁰ For this reason, a joint resolution of the three main EU institutions is awaited to sort out these issues and set the ultimate mission of the Conference. However, the recent Covid-19 health crisis has had an impact on the Conference, because the explosion of a global pandemic delayed the adoption of this joint resolution. As a result, the originally envisioned date to launch the Conference on the Future of Europe, scheduled to take place on Europe’s Day, 9 May 2020, in Dubrovnik was postponed.

Yet, Covid-19 has actually made the need for the Conference on the Future of Europe more needed than ever. As the EP underlined on 17 April 2020 in a broad resolution outlining its position on the action needed at EU level to combat Covid-19 and its consequences, “the pandemic has shown the limits of the Union’s capacity to act decisively and exposed the lack of the Commission’s executive and budgetary powers”.⁵¹ As a result, the EP stressed that “the Union must be prepared to start an in-depth reflection on how to become more effective and democratic and that the current crisis only heightens the urgency thereof; believes that the planned Conference on the Future of Europe is the appropriate forum to do this; is therefore of the opinion that the Conference needs to be convened as soon as possible and that it has to come forward with clear proposals, including by engaging directly with citizens, to bring about a profound reform of the Union, making it more effective, united, democratic, sovereign and resili-

⁴⁷ Council Document 9102/20, cit., para. 2.

⁴⁸ *Ibid.*, para. 21.

⁴⁹ See e.g. Italian non-paper for the Conference on the Future of Europe, 14 February 2020.

⁵⁰ Commission, *Citizens’ Dialogues and Citizens’ Consultations: Key Conclusions*, 30 April 2019, ec.europa.eu.

⁵¹ European Parliament resolution P9_TA(2020)0054 of 17 April 2020 on EU coordinated action to combat the Covid-19 pandemic and its consequences, para. 69.

ent".⁵² Moreover, EU leaders celebrated Europe's Day in May 2020 reaffirming their conviction that the Conference on the Future of Europe, which "was only delayed due to the pandemic, will be essential in developing" ideas to make the EU more transparent and more democratic.⁵³ And the centrality of the Conference on the Future of Europe as the "opportunity to open a large democratic debate on the European project, its reforms and its priorities" was mentioned also in the joint Franco-German initiative for a European Recovery from the coronavirus crisis of 18 May 2020.⁵⁴ All this suggests that the Conference on the Future of Europe is being seen by policy-makers as an ambitious initiative which should renew in depth the architecture of the EU, like prior similar out-of-the-box initiatives of the past.

III. CHALLENGES TO REFORM: THE RULES ON EU TREATY AMENDMENT

Nevertheless, if the Conference on the Future of Europe aspires to achieve a relevant reform of the EU, it must deal with the rules on treaty change in the EU and the challenges they pose. This requires analysing the legal provisions and political options for treaty reform in the EU, with the aim to offer guideposts that policy-makers should consider in defining the shape and scope of the Conference. The rules on EU treaty reform are currently enshrined in Art. 48 TEU, as modified at last by the Treaty of Lisbon. This provision presents a number of innovative features.⁵⁵ Yet, the fundamentals of the treaty revision procedure in EU law have remained unchanged since the early stages of the process of integration: Member States must unanimously approve treaty changes and unanimously ratify them.⁵⁶ As put it today by Art. 48, para. 4, TEU: "A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements".

Formally, Art. 48 TEU foresees nowadays two mechanisms to amend the EU Treaties: an ordinary revision procedure, and a simplified one. In both cases, pursuant to Art. 48, para. 2, TEU "the Government of any Member State, the European Parliament or the Commission may submit proposals for the amendment of the Treaties to the Council", which shall forward these to the European Council. In some cases, however, a less burdensome, simplified procedure can be used. In particular, pursuant to Art. 48, para. 6, TEU, a simplified revision procedure can be resorted to "for revising all or part of the

⁵² *Ibid.*, para. 72.

⁵³ See D. SASSOLI, C. MICHEL, U. VON DER LEYEN, *Joint Op-ed*, 9 May 2020, ec.europa.eu.

⁵⁴ See French-German Initiative for the European Recovery from the Coronavirus Crisis, 18 May 2020, Pressmitteilung n. 173/20, www.diplomatie.gouv.fr.

⁵⁵ See S. PEERS, *The Future of EU Treaty Amendments*, in *Yearbook of European Law*, 2012, p. 17 *et seq.*

⁵⁶ See already Art. 96 of the Treaty Establishing the European Coal and Steel Community (ECSC).

provisions of Part Three of the Treaty on the Functioning of the European Union" relating to the internal policies and actions of the EU (including the internal market and competition, agriculture, the area of freedom security and justice and EMU). In this case, the European Council – acting by unanimity after consulting the EP and the Commission – may adopt a decision amending all or part of the provisions of Part Three of the TFEU, which "shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements". However, because Art. 48, para. 6, TEU explicitly affirms that the simplified revision procedure "shall not increase the competences conferred on the Union in the Treaties", effectively this mechanism can only be used in limited cases.⁵⁷

As a result, the main mechanism to reform the EU Treaties is the ordinary revision procedure, which has codified in EU primary law the so-called convention method, originally experimented in the process that led to the Treaty establishing a European Constitution.⁵⁸ According to Art. 48, para. 3, TEU, "if the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission". The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation which is then submitted for ultimate consideration to, and approval, by the IGC of Member States' governments. Pursuant to Art. 48, para. 3, TEU the European Council may decide by a simple majority "not to convene a Convention should this not be justified by the extent of the proposed amendments" – but it must obtain EP consent to do so: hence the EP can insist on calling a Convention to examine proposals for revisions to the EU Treaties.⁵⁹

Art. 48 TEU therefore puts in place a highly regulated process for amending the EU Treaties. Admittedly, other provisions permit changes to EU primary law.⁶⁰ Yet, Art. 48 TEU is the main route through which the EU Treaties can be modified. And while the

⁵⁷ But see European Council Decision 2011/199/EU of 25 March 2011, amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro (using the simplified revision procedure to amend Art. 136 TFEU by adding a paragraph that recognises "the Member States whose currency is the euro may establish a stability mechanism [...]").

⁵⁸ See J.-C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 104.

⁵⁹ But see European Parliament resolution P7_TA(2010)0148 of 6 May 2010 on the draft protocol amending Protocol No 36 on transitional provisions concerning the composition of the European Parliament for the rest of the 2009-2014 parliamentary term (giving its consent under Art. 48, para. 3, TEU to proceed with an IGC without a convention).

⁶⁰ See e.g. G. AMATO, *Future Prospects for a European Constitution*, in G. AMATO, H. BRIBOSIA, B. DE WITTE (eds), *Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, p. 1271 (discussing the potentials of the so-called passerelle clauses to revise the EU Treaties).

Lisbon Treaty has created a simplified revision procedure – which gives the European Council a direct treaty-making role – it is the ordinary revision procedure which overall remains paramount. At the same time, while the Lisbon Treaty has now constitutionalised the convention method – which entrusts the preparation of treaty reforms to a mixed body where representatives of national parliaments and EU institutions sit alongside representatives of national governments – ultimately Art. 48 TEU has reaffirmed the original arrangement dating to the early European integration's treaties and carried over as an almost natural state of affair: it is the EU Member States' governments, meeting in the IGC, that have the power to adopt changes to the treaties by common accord – and these amendments enter into force when they are ratified by *all* Member States in accordance with their domestic constitutional requirements.

As is well known, though, the unanimity requirement for treaty change has become a major constraint in reforming the EU. If the need to obtain unanimous consent from all EU Member States as a condition to change the EU Treaties could have been understandable in a Union of 6 members, the requirement is nowadays a powerful challenge for a Union of 27 (after Brexit). In fact, while arguably during the last 28 years, the EU Treaties have been subject to a “semi-permanent treaty revision process”,⁶¹ – with four major overhauls occurring in short sequence: the Treaty of Maastricht of 1992, the Treaty of Amsterdam of 1996, the Treaty of Nice of 2001, and the Treaty of Lisbon of 2007 – ratification crises spelled the process. Voters in France and the Netherlands sunk the Treaty establishing the European Constitution in 2005,⁶² and in Ireland they voted down the Treaty of Nice in 2001, and the Treaty of Lisbon in 2007 – requiring the European Council to come up with solutions, with additional reassurances added to the treaties that allowed in both cases a second, successful vote.⁶³ As Dermot Hodson and Imelda Maher have explained, national parliaments, courts and the people through referenda have become ever more important actors in the process of national ratification of EU Treaties, hence increasing the veto points against EU reforms.⁶⁴ In particular, a quantitative analysis shows that EU Member States’ “constitutional rules and norms underpinning the negotiation and consent stages [of EU treaty amendments] have shifted to provide a more prominent role to parliaments, the people and the courts”.⁶⁵

⁶¹ B. DE WITTE, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. BEAUMONT, C. LYONS, N. WALKER (eds), *Convergence and Divergence in European Public Law*, Oxford: Hart, 2002, p. 39 *et seq.*

⁶² See N. BARBER, M. CAHILL, R. EKINS (eds), *The Rise and Fall of the European Constitution*, Oxford: Hart, 2019.

⁶³ See G. DE BÚRCA, *If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, in *Fordham International Law Journal*, 2010, p. 1472 *et seq.*

⁶⁴ D. HODSON, I. MAHER, *The Transformation of EU Treaty Making: The Rise of Parliaments, Referendums and Courts since 1950*, Cambridge: Cambridge University Press, 2018.

⁶⁵ *Ibid.*, p. 16.

For this reason, a number of proposals have been put forward to amend Art. 48 TEU. After all, the requirement to obtain unanimous approval by all Member States to reform a treaty is actually exceptional from a comparative viewpoint.⁶⁶ Indeed, international organizations which are much less integrated than the EU allow its constituting treaty to be changed with a super-majority vote: for example, the United Nations allows its Charter to be amended by a vote of two-thirds of the members of the General Assembly provided changes are ratified in accordance with their constitutional requirements by two-thirds of its members, including all the five permanent members of the Security Council.⁶⁷ Considering that since the 1960s the EU has acquired features which are more typical of federal systems,⁶⁸ rather than traditional international organizations, thought should be given to the possibility of amending the EU foundational laws through procedures that require super-majority votes – as is typical of federal constitutional systems.

In the run-up to the Treaty establishing a European Constitution it was thus suggested to replace unanimity with a super-majority vote of five sixths of Member States as the rule for the entry into force of the reform treaty.⁶⁹ While the Convention did not itself consider this option,⁷⁰ the European Commission in a preliminary draft Constitution of the European Union promoted by then President Romano Prodi – and known as the Penelope project – embraced it.⁷¹ In particular, anticipating the problems that the unanimity rule would produce in the ratification process, the Commission proposed that the treaty establishing the European Constitution should ultimately enter into force if “by a given date, five sixths of the Member States have ratified this agreement”⁷² and that the “Member States which have not ratified are deemed to have decided to leave the Union”.⁷³ The Commission acknowledged that this represented “a break with Article 48 TEU”,⁷⁴ the then applicable rule on EU treaty change – but, it stated that this was “consistent with international law”⁷⁵ because sufficient guarantees applied to the hold-outs.

Yet, the Commission’s plan was criticised at the time from a strict legal point of view: as it was pointed out, the Commission’s proposal was illegal in light of EU law, because

⁶⁶ See also generally A. ROSAS, L. ARMATI, *EU Constitutional Law. An Introduction*, Oxford: Hart, 2012.

⁶⁷ Art. 108 of the UN Charter.

⁶⁸ See E. STEIN, *Lawyers, Judges and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.*

⁶⁹ See European University Institute Robert Schumann Centre for European Studies, *Reforming the Treaties’ Amendment Procedures*, report submitted to the European Commission, 31 July 2000, www.eui.eu.

⁷⁰ But see V. GISCARD D’ESTAING, *Interview*, in *Financial Times*, 11 November 2002, p. 4 (suggesting need to have the new treaty enter into force even without the consent of all the then 25 Member States).

⁷¹ See Commission, *Feasibility Study: Contribution to a Preliminary Draft Constitution of the European Union*, 4 December 2002, www.europarl.europa.eu.

⁷² *Ibid.*, p. XII.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

“under the current rules of Art. 48 TEU, all the Member States must give their agreement to the changes” of the rules of ratification.⁷⁶ Ultimately, the Commission’s proposal never made it into the final treaty text drafted by the Convention. Rather – precisely in light of the failure of the treaty establishing a European Constitution – Art. 48, para. 5, TEU now foresees that “[i]f, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”: but this effectively leaves the resolution of a future ratification crisis to the good will of the heads of state and government in the European Council.

IV. OPPORTUNITIES FOR REFORM: THE PRACTICE OF *INTER-SE* TREATIES OUTSIDE THE EU LEGAL ORDER

As a consequence of the difficulties of changing the EU Treaties, Member States have in very recent years explored with ever greater frequency other options to reform the EU. In particular – to overcome the disagreement characterising an ever more heterogeneous EU, and avoid the deadlock resulting from the unanimity rule – coalitions of Member States have increasingly concluded *inter-se* agreements outside the EU legal order, but closely connected to the functioning of the EU. Indeed, as Bruno De Witte pointed out, EU Member States remain subjects of international law and as such they are free to conclude international agreement between themselves – either all of them or just a group thereof.⁷⁷ This freedom is subject to several constraints. To begin with, *inter-se* agreements concluded between the Member States may not contain norms conflicting with EU law proper and cannot derogate from either primary or secondary law.⁷⁸ In fact, the CJEU has not hesitated to strike down bilateral agreements concluded between Member States as inconsistent with EU law.⁷⁹ Moreover, there are limits to how Member States can enlist the work of the EU institutions in agreements concluded outside the EU legal order.⁸⁰ In particular, as the CJEU ruled in *Pringle*, states are entitled, in areas which do not fall under the EU exclusive competence, to entrust tasks to the EU institutions, outside the frame-

⁷⁶ See B. DE WITTE, *Entry into Force and Ratification*, in B. DE WITTE (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, Florence: European University Institute, 2003, www.eui.eu, pp. 203 and 212.

⁷⁷ B. DE WITTE, *The European Union as an International Legal Experiment*, in G. DE BÚRCA, J.H.H. WEILER (eds), *The Words of European Constitutionalism*, Cambridge: Cambridge University Press, 2011, p. 19 *et seq.*

⁷⁸ See B. DE WITTE, *The Law as Tool and Constraint of Differentiated Integration*, EUI RSCAS Working Paper no. 47/2019, cadmus.eui.eu, p. 11.

⁷⁹ See e.g. Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC] (striking down a bilateral investment treaty between the Netherlands and Slovakia as incompatible with EU law).

⁸⁰ See S. PEERS, *Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework*, in *European Constitutional Law Review*, 2013, p. 37 *et seq.*

work of the EU, only provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU Treaties.⁸¹

Yet, besides these limitations, EU Member States have leeway to resort to international agreements concluded outside the EU legal order; and in concluding such agreements they can craft new rules governing ratification and entry into force. This is precisely what has happened in the context of the responses to the euro-crisis, with the adoption of the Fiscal Compact, the Treaty establishing the European Stability Mechanism (ESM) as well as the inter-governmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF).⁸² In 2012, 25 out of then 27 EU Member States signed up to the Fiscal Compact, which strengthened the rules of the EU Economic and Monetary Union (EMU), notably by requiring contracting parties to constitutionalise a balanced budget requirement.⁸³ In 2012, the then 17 Eurozone Member States also concluded the ESM, which endowed the EMU with a stabilization fund to support states facing fiscal crises.⁸⁴ And in 2014, 26 Member States also concluded an intergovernmental agreement which – in the framework of the nascent Banking Union, with its Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) – established a SRF to support credit institutions facing a banking crisis and set rules on the transfer and mutualisation of the national contributions to the SRF.⁸⁵

The Fiscal Compact, the ESM Treaty and the intergovernmental Agreement on the SRF had special rules on their entry into force. In particular, Art. 14, para. 2, of the Fiscal Compact foresaw that: “This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification”. Art. 48 of the ESM Treaty provided that: “This Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90 percent of the total subscriptions”. And Art. 11, para. 2, of the SRF Agreement stated that “This Agreement shall enter into force [...] when instruments of ratification, approval or acceptance have been deposited by signatories participating in the [SSM] and in the [SRM] that represent no less than 90 percent of the aggregate of the weighted votes of all Member States participating in the [SSM] and in the [SRM]” as determined according to Art. 3 of Protocol no. 36 on transitional provisions attached to the TEU, which assigned (until 2014) to each member state a number of weighted votes proportional to population for calculating majorities in the Council.

⁸¹ See Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*, para. 158.

⁸² See generally F. FABBRINI, *Economic Governance in Europe*, Oxford: Oxford University Press, 2016.

⁸³ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, www.consilium.europa.eu.

⁸⁴ See Treaty Establishing the European Stability Mechanism, 2 February 2012, www.esm.europa.eu.

⁸⁵ See Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 21 May 2014, register.consilium.europa.eu.

For the first time in the history of the EU, therefore, the Fiscal Compact, the ESM Treaty and the SRF Agreement bypassed the unanimity requirement for treaty change. In fact – while Art. 14, para. 3, of the Fiscal Compact clearly indicated that the treaty shall apply as from the date of its entry into force only to those states “which have ratified it” – by requiring ratification by just 12 Eurozone countries, it set approval by a *minority* of EU Member States as a condition for its entry into force.⁸⁶ Moreover, the overcoming of the unanimity requirement was even more striking in the case of the ESM: because Eurozone Member States contribute to the paid-in capital stock of the ESM *pro quota* – with each contracting party contributing on the basis of a proportional capital key distribution set in Annex II of the ESM Treaty – by subjecting entry into force of the treaty to the ratification, approval or acceptance of states representing 90 percent of the ESM capital, Art. 48 of the ESM Treaty essentially conditioned the operation of the ESM to the positive vote of just the largest Eurozone countries. Similarly, the SRF Agreement – while clarifying in Art. 12 that the treaty shall apply only “amongst the Contracting Parties that have deposited their instruments of ratification, approval or acceptance” – set a super-majority requirement for approval, connecting the importance of each member state’s ratification to its weighted vote in the Council.

The new ratification rules introduced in the Fiscal Compact, the ESM Treaty and the SRF Agreement were all designed to prevent a hold-out Member State from blocking a treaty from applying among the others. In fact, the explicit opposition by the UK to treaty change was the main reason why EU Member States decided to conclude the Fiscal Compact outside the EU legal order⁸⁷ – while admittedly reasons of German domestic politics played a larger role in pushing states to using an intergovernmental agreement, rather than an act of secondary EU law, for the SRF.⁸⁸ Be that as it may, the new rules on the entry into force of these EMU-related treaties profoundly changed the ratification game, because they shifted the costs of non-ratification to the hold-outs Member States.⁸⁹ In fact, the process of ratification of the Fiscal Compact in Ireland – the only Member State where a referendum was required – proved as much, as voters reluctantly endorsed the treaty, simply not to be left out from this initiative.⁹⁰ As a result, none of these EMU-related treaties faced issues in the national ratification procedures and they all entered into force as scheduled with all the Member States, including the reluctant ones, ultimately jumping aboard.

⁸⁶ See also F. FABBRINI, *The Fiscal Compact, the ‘Golden Rule’ and the Paradox of European Federalism*, in *Boston College International and Comparative Law Review*, 2013, p. 1 *et seq.*

⁸⁷ See M. GORDON, *The United Kingdom and the Fiscal Compact*, in *European Constitutional Law Review*, 2014, p. 28 *et seq.*

⁸⁸ See F. FABBRINI, *On Banks, Courts and International Law. The Intergovernmental Agreement on the Single Resolution Fund in Context*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 444 *et seq.*

⁸⁹ See C. CLOSA, *The Politics of Ratification of EU Treaties*, London: Routledge, 2013.

⁹⁰ See R. O’GORMAN, *An Analysis of the Method and Efficacy of Ireland’s Incorporation of the Fiscal Compact*, in M. ADAMS, F. FABBRINI, P. LAROCHE (eds), *The Constitutionalization of European Budgetary Constraints*, Oxford: Hart, 2014, p. 273 *et seq.*

In sum, by going outside the legal order of the EU – provided they did not do anything in breach of EU law proper – Member States have been able to reform the EU, and specifically EMU. In fact, by resorting to *inter-se* agreements Member States have overcome the strictures of Art. 48 TEU, finding a solution to EU reform which is more consonant to a Union with more than two dozen members. In particular, by introducing *ad hoc* rules on the entry into force of the Fiscal Compact, the ESM Treaty and the SRF Agreement, Member States have overcome the veto that inheres to the EU treaty amendment rule, and thus ultimately guaranteed the speedy entry into force of these new *inter-se* agreements. Needless to say, the specific ratification rules set by these treaties are questionable. In particular, the veto power given only to the largest and wealthiest Member States in the ESM Treaty has raised eyebrows.⁹¹ Moreover, it was a matter of concern that recital 5 in the preamble of the ESM Treaty conditioned the granting of ESM financial assistance to the ratification of the Fiscal Compact – effectively putting countries in financial difficulties under duress to sign up to the Fiscal Compact as a *quid pro quo* to get ESM support. However, there is no doubt that the overcoming of the unanimity rule of ratification in these agreements is an important precedent, which opens new options also for the Conference on the Future of Europe.

V. REFORMING THE EU THROUGH A POLITICAL COMPACT?

As explained in section II the ambition of the Conference on the Future of Europe is to renew the EU at a critical time in its history. However, as underlined in section III, if the Conference were to propose a change to the Treaties this would run into the challenge of Art. 48 TEU – which is a formidable obstacle to success given the unanimity requirement embedded in it. As pointed out in section IV, this is why after all EU Member States have increasingly resorted to *inter-se* agreements outside the EU legal order, where they have codified special rules on approval and entry into force of these new treaties overcoming the unanimity rule. The analysis of the legal rules and political options for treaty reform in the EU, however, provides an important lesson that should be taken into account by policy-makers engaging in the nascent Conference on the Future of Europe.⁹²

First among these is the awareness that the rules on the entry into force of any reform treaty resulting from the Conference on the Future of Europe will have a major impact on the success of the initiative. Because of the veto-points embedded in Art. 48 TEU, any major reform plan that may emerge from the Conference on the Future of Europe risks foundering on the rocks of the unanimity requirement. After all, this is pre-

⁹¹ See C. GINTER, R. NARITS, *The Perspective of a Small Member State to the Democratic Deficiency of the ESM*, in *Review of Central and Eastern European Law*, 2013, p. 54 et seq.

⁹² See F. FABBRINI, *Possible Avenues for Further Political Integration in Europe*, cit., as well as C. CLOSA, *Looking Ahead: Pathways of Future Constitutional Evolution of the EU*, study commissioned by the European Parliament Constitutional Affairs Committee, PE 510.005, November 2014.

cisely a reason why EU Member States have opted not to use the standard EU amendment procedure to respond to the euro-crisis – but have rather acted outside the EU legal framework, adopting new intergovernmental treaties in the field of EMU which did not require approval by all the Member States to enter into force. Precisely the precedents set by the Fiscal Compact, the ESM Treaty and the Agreement on the SRF, however, offer a roadmap that institutional players in the Conference on the Future of Europe can use. To avoid the fate of prior treaties amendment that failed because of the need for unanimous state ratification, the Conference on the Future of Europe should resolve to channel the outcome of its process into a new treaty with new rules on the entry into force of the treaty itself, which do away with the unanimity requirement and thus change the dynamics of the ratification game in the 27 Member States.

Specifically, to overcome a complacency that the EU can ill afford at this stage, the Conference on the Future of Europe could propose the drafting of a new treaty – call it Political Compact.⁹³ Like the EMU-related treaties analysed above, the Political Compact would be an international agreement struck outside the EU legal order, which does not replace it but rather is functionally and institutionally connected to it. Moreover, the Political Compact would be subject to new rules on its entry into force, which do away with the unanimity requirement. In particular, the Political Compact could foresee its entry into force when ratified by a super-majority of e.g. 19 EU Member States, which corresponds circa to three fourths of the now 27 EU Member States. Just like the Fiscal Compact – and unlike the ESM Treaty and the SRF Agreement – the ratification of each Member State would count the same, consistent with the principle of the international equality of states. Yet, unlike the Fiscal Compact, both the ratification of Eurozone and non-Eurozone Member States would equally weight towards its entry into force.

The proposal put forward here resembles the one advanced at the time of the Convention by the European Commission in its Penelope project mentioned above – but, it differs from it in one essential way. The Penelope project proposal sought to amend the EU Treaties with a procedure that by its own admission broke the rules of the TEU itself. On the contrary, the proposal advanced here would be consistent with the TEU, as it would not surreptitiously amend Art. 48 TEU, but rather set a new ratification rule for a new, *inter-se* treaty. In fact, by being drafted as a separate interstate agreement – and provided this would not introduce any measure explicitly inconsistent with EU law – the Political Compact could meet the criteria of legality set by the CJEU notably in *Pringle* when reviewing *inter-se* agreements concluded between groups of Member States. Moreover, while the overcoming of the unanimity rule in the ratification process was unheard of, and revolutionary, in 2002, today the practice has now become real, and indeed quite ordinary – with the Fiscal Compact, the ESM Treaty and the SRF Agreement.

⁹³ See already S. FABBRINI, *Which European Union?*, Cambridge: Cambridge University Press, 2015.

Needless to say, in order to be legally water-proof the Political Compact would need to meet two criteria. First, from an international law perspective, the Political Compact should not apply to the non-ratifying states, guaranteeing them the free choice whether to join or not the treaty. From this point of view, therefore, the proposal advanced here differs from prior academic proposals to overcome unanimity in EU treaty revisions, which envisioned forcing the non-ratifying states into abiding by the new treaty against their will.⁹⁴ Second, from an EU law perspective, the Political Compact must comply with the conditions set by the CJEU in *Pringle*, which regulated the use of *inter-se* treaties outside the EU legal order – hence its content cannot violate EU laws. Yet, as the example of the EMU-related treaties adopted in response to the euro-crisis shows, there are a number of important new substantive and institutional reforms that Member States can legally implement outside the EU Treaties to expand EU powers or enhance EU decision-making procedures.⁹⁵ It is not difficult therefore to see how the Political Compact could improve the effectiveness and legitimacy of the EU without infringing the existing EU Treaties.

At the same time, the option to conclude a separate Political Compact treaty as the outcome of the Conference would mitigate many of the criticisms that have been raised during the negotiations of the EMU intergovernmental agreements. In fact, the processes of drafting the Fiscal Compact, the ESM Treaty and the Agreement on the SRF were purely diplomatic and secretive negotiations, which left out the EP, save for the pro-forma involvement of the Chairman of the Economic and Monetary Affairs (ECON) Committee.⁹⁶ On the contrary, the Conference on the Future of Europe would be a much more open, transparent and participatory process – and with full input from, and involvement by, the EP, which in fact would likely play a leading role in the steering of the Conference. Therefore, one could expect the Conference to steer away from the perils of intergovernmental decision-making, and that its output would rather resemble the features of the Treaty establishing the European Constitution produced by the European Convention. For these reasons, it seems likely that the Political Compact would

⁹⁴ See H. BRIBOSIA, *Revising European Treaties: A Plea in Favor of Abolishing the Veto*, Notre Europe Policy Paper no. 37/2009, spire.sciencespo.fr, p. 17 (stating that a reform treaty approved by a super-majority of states “would enter into force *erga omnes*, meaning that it would also bind the States which have not ratified the Treaty”).

⁹⁵ See e.g. ESM Treaty, Art. 3 (stating that the purpose of the ESM is to “provide stability support” to Eurozone Member States “if indispensable to safeguard the financial stability of euro area”); or Fiscal Compact, Art. 7 (stating that signatory Member States, “while fully respecting the procedural requirements of the Treaties on which the European Union is founded”, commit “to supporting the proposals or recommendations submitted by the European Commission” in the excessive deficit procedure, unless a reversed qualified majority opposes this).

⁹⁶ See V. KREILINGER, *The Making of a New Treaty: Six Rounds of Political Bargaining*, Notre Europe Policy Brief no. 32/2012, institutdelors.eu.

have greater legitimacy than the EMU-related treaties adopted during the euro-crisis:⁹⁷ as such, if subject to CJEU review, it could be looked at even more approvingly than the ESM Treaty, if this represents the way to allow the project of EU integration to move forward, on a more solid basis, between those who want it.⁹⁸

In fact, from a constitutional point of view, there is a major precedent for what is suggested here – namely the adoption of the oldest and most revered basic law in the world: the Constitution of the United States of America (US). While after the War of Independence in 1782 the 13 North American colonies had come together and established a union under the Articles of Confederation, this first constitution proved unable to serve well the interests of the nascent US.⁹⁹ As a result, in 1787 a convention of states' delegates was called in Philadelphia to propose amendments to the Articles.¹⁰⁰ However, this Convention reinterpreted its mandate and drafted a brand new document: the Constitution of the US.¹⁰¹ Crucially, though, the framers set into the Constitution itself the rule that ratification by 9 (out of 13) states would suffice for its entry into force.¹⁰² As explained by Michael Klarman, this was technically a breach of the Article of Confederation,¹⁰³ which required unanimous consent by the 13 states to amend the Articles themselves.¹⁰⁴ However, by replacing the Articles' unanimity requirement with a super-majority one for the entry into force of the Constitution – and by requiring the new Constitution to be approved by special states' ratifying conventions, set-up exclusively for this task – the framers were able to circumvent the opposition of some states, which otherwise would have doomed the whole constitutional endeavour.¹⁰⁵

Needless to say, if the Conference on the Future of Europe were to foresee a new ratification rule for the entry into force of a treaty resulting from its works, this could sanction the path toward a decoupling of the EU.¹⁰⁶ Indeed, Member States which

⁹⁷ See also L. PAPADOPOULOU, I. PERNICE, J.H.H. WEILER (eds), *Legitimacy Issues of the European Union in the Face of the Crisis*, Baden-Baden: Nomos, 2017.

⁹⁸ See also *ceteris paribus* Court of Justice, judgment of 10 December 2018, case C-621/18, *Wightman* (holding that the ultimate goal enshrined in the Treaties is to achieve ever closer union).

⁹⁹ See D. SMITH, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, in *San Diego Law Review*, 1997, p. 249 *et seq.*

¹⁰⁰ See G. WOOD, *The Creation of the American Republic: 1776-1787*, New York: Norton, 1993.

¹⁰¹ See M. FARRAND, *Records of the Federal Convention*, Vol. 1, New Haven: Yale University Press, 1911.

¹⁰² See Art. VII of the US Constitution.

¹⁰³ M. KLARMAN, *The Framers' Coup. The Making of the United States Constitution*, Oxford: Oxford University Press, 2016.

¹⁰⁴ See Art. XIII of the Articles of Confederation.

¹⁰⁵ See also B. ACKERMAN, N. KATYAL, *Our Unconventional Founding*, in *University of Chicago Law Review*, 1995, p. 475 *et seq.* (explaining that the last state – Rhode Island – only ratified the US Constitution in 1790, two years after it has already entered into force for the other states, and when a new federal government was already in place).

¹⁰⁶ See S. FABBRINI, *Europe's Future: Decoupling and Reforming*, Cambridge: Cambridge University Press, 2019.

would not ratify the Political Compact would be left out from this new treaty, with all the consequences that follow. Nevertheless, one should not underestimate the pressuring effect that this would have on states which are *prima facie* reluctant to ratify a treaty – a dynamic which as mentioned was visible e.g. in Ireland where the Fiscal Compact was approved in a referendum in 2012. Moreover, one must acknowledge that the process of EU differentiation has been going on for a while – particularly in the context of the Eurozone, which has increasingly acquired features of its own.¹⁰⁷ And the recent crises that the EU has weathered have further divided, rather than united the EU27.¹⁰⁸ For this reasons, a Political Compact could be seen as a positive step to relaunch European integration among the Member States that are willing to build a strong and sovereign political union, circumventing the opposition that could come e.g. from countries which are increasingly at odds with the EU founding principles and values.¹⁰⁹

VI. CONCLUSION

The Conference on the Future of Europe represents an innovative model to reform the EU – although to this day many details of the Conference's mission and structure remain to be sorted out. However, as this contribution has pointed out, while the EU institutions and the Member States still tease out the constitutional mandate and institutional organization of the Conference, it is important they bear in mind the constraints of treaty reform. Art. 48 TEU foresees a cumbersome process of treaty amendment, which is why Member States have increasingly resorted to *inter-se* agreements outside the EU legal order – notably in the context of the responses to the euro-crisis. If it wants to succeed, the Conference on the Future of Europe could thus draw lessons from these precedents. Much like in Messina in 1955, or in Laeken in 2001, the EU needs new initiatives to relaunch the project of integration – and the Conference on the Future of Europe is an original, out-of-the-box idea to renew the EU. Much like in Philadelphia in 1787, however, the Conference on the Future of Europe must also come up with courageous inventions to make sure that reform efforts are not sacrificed on the altar of the unanimity requirement for treaty change. In the end, therefore, the Conference on the Future of Europe will succeed in

¹⁰⁷ See C. CALLIESS, *The Governance Framework of the Eurozone and the Need for a Treaty Reform*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart, 2015, p. 37 *et seq.*

¹⁰⁸ See F. FABBRINI, *Brexit and the Future of the European Union: The Case for Constitutional Reforms*, Oxford: Oxford University Press, 2020.

¹⁰⁹ See in particular European Commission reasoned proposal in accordance with Article 7(1) of the Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final of 20 December 2017, and European Parliament resolution P8_TA(2018)0340 of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

proposing “all the changes our [European] political project needs”¹¹⁰ only if it combines forward-looking political ambition with cleaver legal expertise – and this suggests considering the drafting of a Political Compact, *i.e.* a separate treaty subject to ratification rules which do not require the unanimous approval of all Member States.

¹¹⁰ E. MACRON, *Lettre pour une renaissance européenne*, cit.



DIALOGUES

CONFERENCE ON THE FUTURE OF EUROPE

OVERCOMING THE SINGLE COUNTRY VETO IN EU REFORM?

BRUNO DE WITTE*

ABSTRACT: This contribution to the *Dialogue* discusses the contribution by Federico Fabbrini, in which he proposes an innovative way forward for the reform of the European Union (F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming). Given the extreme difficulty of reaching a unanimous agreement among all the Member States on a formal revision of the European Treaties, he proposes the use of international agreements among “willing” States to take forward an ambitious reform. This would take the form of a “Political Compact” among those States, whereas the other States would not participate in it and would not be bound by its content. This contribution discusses the legal feasibility of this “Political Compact” option.

KEYWORDS: revision of the European treaties – *inter se* agreements between EU States – differentiated integration – enhanced cooperation – unanimity rule – primacy of EU law.

In his contribution to this *Dialogue*, Federico Fabbrini discusses the upcoming Conference on the Future of Europe and focuses, in particular, on a shadow looming over that Conference: to the extent that the Conference will discuss and propose ambitious changes to the current operation of the European Union, it will face the need for revision of the current EU Treaties, and such revision seems all but impossible in the current circumstances.¹ The reason for this is that Treaty changes still require the unanimous agreement of all the 27 Member States and, in most cases, also a separate ratification procedure in every single State. Given the current divisions among the Member States on all kinds of questions, including on the overall direction of the integration process, Treaty revision seems unfeasible, thereby drastically reducing the potential ambi-

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¹ F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and its Options*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 963 *et seq.*



tion of the Conference. As Fabbrini rightly puts it: “any major reform plan that may emerge from the Conference on the Future of Europe risks foundering on the rocks of the unanimity requirement”. Fabbrini does not stop at that sad conclusion but proposes a way forward, namely the adoption of a “Political Compact” among the “willing” Member States that would move forward the European integration project despite the lack of an overall agreement among all the Member States. In this way, the single country veto hurdle could be overcome.

It is, no doubt, possible for a group of Member States to conclude an agreement of international law among themselves, which is formally situated outside the EU legal order, but very much connected to the European Union in substantial terms. The model for this “variable geometry” approach used to be the Schengen Convention and is nowadays the European Stability Mechanism (ESM). In a sense, one could say that this form of flexibility exists since the early days of the European integration process. Such agreements typically occur in areas in which the European Union has no law-making competence at all, but also in areas in which the EU possesses shared law-making competence but where a set of Member States prefer to use their “share” in order to conclude an agreement among themselves rather than acting in the framework of the European Union. These “*inter se* agreements”² may indeed allow a group of Member States to move European integration forward in the face of the opposition of other Member States. In this respect, the Schengen experience is still referred to, in current discussions, as a positive model; it offers an example of both the potential of such agreements to overcome a blockage within the Union’s decision-making system (because, at the time, the UK refused to agree to the abolition of internal borders), and the possibility for their later re-integration within the EU legal system.

In the post-Lisbon years, the EU Member States have reiterated the practice of concluding international treaties among themselves, even when the subject matter of their agreement is close to European Union policies. This happened, in particular, in the domain of Economic and Monetary Union. In the *Pringle* case, the Court of Justice gave its blessing to the creation of the European Stability Mechanism as a separate international organisation of which only the euro area States are members.³ The Court did not mind that the ESM relies, in its operation, on the contribution of various EU institutions and is strongly embedded in the EU’s economic governance regime. Currently, negotiations are under way to entrust additional tasks to the ESM. A provisional agreement was reached on a revised text of the ESM Treaty at the Eurogroup meeting of 14 June 2019,⁴

² This is an expression from international law. It refers to the case where some, but not all, parties to a first international treaty (in this case, the EU Treaties) conclude a second international treaty among themselves that complements the first one.

³ Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

⁴ Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019.

but this text still needs to be signed by the governments of the euro States, and then ratified by their parliaments, before it will enter into force. Among the new tasks given to the ESM, we find the creation of a backstop facility to support the operations of the Single Resolution Board (SRB), if the SRB would run out of funds to undertake banking resolution operations. This new task ties in the ESM even more closely with the operation of the European Union.

In light of this recent practice, we can indeed see the attraction of such a recourse to *inter se* agreements for advancing the European integration project. The main advantage is that the participants to the cooperation project can freely choose their partners to the agreement: a self-proclaimed core group can indeed decide to act together without having to wait for the agreement of all EU Member States. Furthermore, States can conclude separate international agreements on matters that fall outside the current scope of EU competences and can therefore extend the integration project beyond the existing EU policies without the need for a prior revision of the EU Treaties.

The constraints that limit recourse to separate international agreements cannot be found in the Treaty text; they rather result from the inherent primacy of EU law over the national law of the Member States. Indeed, it has always been clear that a group of EU States cannot resort to the conclusion of a separate *inter se* treaty in order to escape from their obligations under EU law. Such “satellite” agreements may not contain norms conflicting with EU law proper; they cannot derogate from either primary or secondary EU law. As Fabbrini notes, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more Member States, which must be disapplied by national courts if they are inconsistent with EU law. Similarly, in direct actions for infringement, the Court has not distinguished between infringements caused by a State acting on its own and infringements caused by a bi- or multilateral agreement concluded between several Member States.⁵ This is entirely logical. It would otherwise be easy for the Member States to escape from their EU law obligations by concluding a separate treaty with each other. The recent *Achmea* judgment, in which the Court held that a bilateral investment treaty (BIT) between the Netherlands and Slovakia was contrary to EU law,⁶ was a clear reminder that the EU Member States are not at all free to engage in *à la carte* cooperation with each other. They must refrain from agreeing anything that could undermine the integrity of the EU legal order.

In view of this, can the conclusion of an *inter se* agreement between a group of “will-ing” Member States be an appropriate vehicle for major reforms of the Union, as Fabbrini suggests in his contribution? He reminds us that Jean-Claude Piris, the former director

⁵ See, for judgments of the Court of Justice in this sense: judgment of 31 January 2006, case C-503/03, *Commission v. Spain* [GC], particularly the paras 33-35, and judgment of 21 January 2010, case C-546/07, *Commission v. Germany*, paras 42-44.

⁶ Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC].

general of the Council's legal service, developed a concrete legal model for this, in a study published in 2012.⁷ Piris envisaged a Eurozone-based avant-garde that would break away from the rest and create its own organisation with new institutions, namely a Council, an "administrative authority" (parallel to the Commission) and a "parliamentary organ" (parallel to the EP), running together a number of policies. This model had a distinctly pre-Brexit flavour, as the author had openly designed it to overcome the blockage by the UK government of further deepening of European integration. Despite the concrete explanations on the legal mechanisms that were envisaged, this model seems hardly feasible in practice, not least because it would create an "EU-*bis*" alongside the "old EU", with each of the two organisations having its own complete institutional framework.⁸ Maybe the "vanguard group" could decide to withdraw from the European Union, using the withdrawal clause of Art. 50 TEU, leaving the other States within a "rump EU". Yet, it is really difficult to see how this could work. The existing EU institutions would remain in existence and would presumably keep their buildings and their civil servants, and the EU-*bis* would have to find new accommodation and new personnel.

In fact, though, Fabbrini does not advocate such an adventurous institutional duplication as Piris had envisaged in his book. Rather, in his view, "the Political Compact would be an international agreement struck outside the EU legal order, which does not replace it but rather is functionally and institutionally connected to it", and he adds that this could only work if the Compact "would not introduce any measure explicitly inconsistent with EU law". But is this not precisely the problem? How could the Conference propose an ambitious reform of the European Union which would at the same time respect all the existing rules of primary and secondary EU law? For one thing, that condition would exclude any changes to the composition and powers of the EU institutions, and to the decision-making rules for the adoption of EU legislation, the EU budget and EU agreements with third countries. This means that the Political Compact would have to speculate on the willingness of the EU institutions (specifically, the Commission and the European Parliament) to abandon the EU legislative and executive arena in a number of policy domains. That is, the Commission would have to refrain from making legislative proposals in those domains, and/or the European Parliament would have to refuse to discuss them, so as to leave room for the operation of the Political Compact in those domains. This seems rather unlikely, except if a quasi-Commission and a quasi-European Parliament were created under the Political Compact, but this would raise the issue of institutional duplication noted in relation to the Piris plan. The resulting institu-

⁷ J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012, p. 121 *et seq.*

⁸ See the criticism by P. CRAIG, *Two-Speed, Multi-Speed and Europe's Future: A Review of Jean-Claude Piris on the Future of Europe*, in *European Law Review*, 2012, p. 800.

tional landscape would be chaotic and the European citizens would likely fail to understand what the European integration project means and how it functions.

Having said this, I do not wish to deny that a number of European policy reforms could be envisaged and adopted in a variable geometry mode. They might take the form of either intra-EU enhanced cooperation or extra-EU international agreements, the choice among these two instruments depending mainly, though not exclusively, on the competence resources offered by the European Treaties. The European Parliament, in its recent resolution on this subject,⁹ expresses considerable reluctance to move towards more differentiated integration, and is particularly hostile towards the conclusion of separate international treaties in which parliamentary participation seems, almost by definition, to be limited or inexistent. However, faced with the impossibility of formal treaty reforms, and given the limits of EU competence under the current Treaties, the conclusion of a separate international agreement among a group of “willing and able” Member States may, in certain cases, be an appropriate solution of last resort.

The argument I would like to make here, in counterpoint to Fabbrini’s high hopes for a Political Compact, is that such a solution cannot lead to an overall reform of the way the European Union operates, but only to the adoption of piecemeal projects in particular policy domains. Such projects could very well happen in other areas than that of EMU law and economic governance. Indeed, the Commission scenario of “[t]hose who want more do more”¹⁰ lists a number of other areas in which new projects of differentiated integration could be experimented, such as defence, justice and security, taxation and social policy. For areas such as taxation, migration and criminal justice, where the TFEU provides clear and rather broad legal bases, enhanced cooperation would seem the most appropriate tool. It would allow for the circumvention of the unanimity requirement where it is still in place (especially for taxation), and more generally would allow like-minded States to take forward their cooperation, using the instruments of EU law and side lining the acrimonious resistance of other States. In the field of social law, the scope for enhanced cooperation is more problematic, as some of the most frequently invoked reform measures, such as the creation of a European minimum wage system, or of a European minimum income benefit, possibly fall outside the scope of EU competences. In that case, the tool of enhanced cooperation would not be available, and the conclusion of a separate international agreement by “socially minded” States would be the only available option.

In conclusion, whereas future “policy-specific compacts” seem perfectly possible from an EU law perspective, they can only *add* to existing EU law and policy, but not

⁹ European Parliament resolution P8_TA-PROV(2019)0044 of 17 January 2019 on differentiated integration.

¹⁰ Commission, *White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025*, COM(2017) 2025 final.

modify them. The adoption of an ambitious reform instrument such as Fabbrini's "Political Compact", inspired on the historical model of the Philadelphia Convention, would necessarily imply a reform of the way in which the EU currently operates. Such a reform can, unfortunately, only take place by following the excessively rigid rules on the revision of the European Treaties. An institutional transformation of the Union requires, now more than ever, a willingness to reform EU treaty-making,¹¹ including a painful reconsideration of the "taboo" rule that European treaty revision requires the unanimous agreement of all the Member States.

¹¹ See e.g. D. HODSON, I. MAHER, *The Transformation of EU Treaty Making. The Rise of Parliaments, Referendums and Courts since 1950*, Cambridge: Cambridge University Press, 2018, chapter 9, p. 246 *et seq.*, entitled "Eight Ideas for Reforming EU Treaty Making". Note that these authors do not think that the unanimity requirement should be replaced.



DIALOGUES

CONFERENCE ON THE FUTURE OF EUROPE

THE CONFERENCE ON THE FUTURE OF EUROPE AND EU REFORM: LIMITS OF DIFFERENTIATED INTEGRATION

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ABSTRACT: There is considerable uncertainty about the outcome of the planned Conference on the Future of Europe, especially regarding possible treaty change. This contribution to the *Dialogue* comments on the possibility of an intergovernmental agreement outside the EU treaty framework on the basis of theoretical and empirical knowledge about differentiated integration. It argues that such an agreement would deviate from the traditional logic of differentiated integration venues, and that differentiated integration is generally of limited value for overcoming decision-making blockades on constitutional and redistributive issues.

KEYWORDS: Conference on the Future of Europe – differentiated integration – European Union – institutional reform – ratification – treaty revision.

I. INTRODUCTION

In his letter to the “Citizens of Europe” ahead of the 2019 European elections, French President Emmanuel Macron proposed a Conference for Europe involving representatives of the Member States, the EU institutions, citizens and stakeholders to promote and turn into action his agenda for a “European renewal”. This conference was to “propose all the changes our political project needs, with an open mind, even to amending the treaties”.¹ In their November 2019 “non-paper”, the French and German governments reiterated that the Conference “should address all issues at stake” with a focus on policies, but also including institutional issues, and “produce tangible and concrete results”.² In the meantime, the European Commission, the European Parliament and

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¹ E. MACRON, *For European Renewal*, 4 March 2019, www.elysee.fr.

² Franco-German non-paper on key questions and guidelines: Conference on the Future of Europe, 25 November 2019, images.politico.eu.



the Council have signed up to the Conference, which was supposed to start in 2020 but has been postponed indefinitely.

The Covid-19 pandemic is not the only obstacle to blame. The preparatory stage has also revealed diverging positions of the institutions and the Member States on the scope and ambition of the Conference. At the time of writing, there still is no interinstitutional agreement on the Conference. Instead, discussions have focused on who will be chairing the Conference.³ These developments create considerable uncertainty about the “tangible” and “concrete” results of the Conference and cast doubt on whether the proposed changes will ever make it into “amending the treaties”. In this regard, the most important statement in the Council position on the Conference is a brief sentence at the end of the document: “The Conference does not fall within the scope of Article 48 TEU”.⁴ It implies that whatever comes out of the Conference on the Future of Europe will not directly feed into a process of treaty revision. Rather, the Conference is expected to present a report to the European Council. In other words, the Member State governments have made it clear that they will not cede the European Council's gatekeeper position on treaty change or give up their individual veto positions on treaty revisions. This also means that reforms – e.g. on the consolidation of the Eurozone, the European asylum regime or the rule-of-law mechanism – that governments have not been able to agree on are unlikely to be unblocked by the Conference. In this context, the Conference on the Future of Europe risks turning into a Great European Palaver, reviving the European public sphere and deliberating political ideas, but falling short of producing political results. It is questionable whether such an exercise would “underpin the democratic legitimacy and functioning of the European project” and “uphold the EU citizens support for our common goals and values”, as envisaged by the Council.⁵

In this context, any thoughts and suggestions on how to work around intergovernmental gatekeeping and national vetoes are highly relevant. In this *Dialogue*, Federico Fabbrini made the original proposal for the Conference to prepare a treaty – a “Political Compact” – that would take the legal form of an “inter-se agreement” outside the EU – and thus independent of its formal requirement for unanimous intergovernmental agreement and national ratification. In addition, the Political Compact could introduce less demanding entry-into-force thresholds, with which the EU has recently experimented in other intergovernmental agreements.⁶ Because such a treaty would only be binding on those

³ E. SÁNCHEZ NICOLÁS, *Future of Europe: EU Council Urged to Propose a Chair*, in *EUobserver*, 14 October 2020, euobserver.com.

⁴ Council, Note from the Presidency of 24 June 2020, Conference on the Future of Europe: Council Position, Council Document 9102/20, www.consilium.europa.eu.

⁵ *Ibid.*

⁶ See F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and its Options*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 963 et seq.

Member States that agree to and ratify it, it would produce differentiated integration – a situation, in which integrated policies are not legally valid in all Member States.

This contribution to the *Dialogue* discusses ideas to conclude new agreements between existing EU Member States from a political (science) perspective, drawing on current theoretical and empirical scholarship on differentiated integration in the EU, in order to assess its novelty and feasibility.⁷ First, I look at how the proposal fits with traditional venues of differentiated integration. Then I examine whether it would serve to promote EU reform. In my assessment, such a Political Compact would be problematic both institutionally and materially. Outside intergovernmental agreements are hardly compatible with the integrationist ambition of the Political Compact. Moreover, differentiated integration is unlikely to overcome the conflict on constitutional and redistributive issues on the EU reform agenda.

II. VENUES OF DIFFERENTIATED INTEGRATION: DIFFERENTIATED TREATY REVISIONS V. EXCLUSIVE OUTSIDE AGREEMENTS

At its core, differentiated integration is an instrument to increase the chances of reaching agreement under the dual constraints of heterogeneous state preferences and capacities, on the one hand, and the unanimity rule, on the other. It is clear that the prospects of EU reform currently suffer from both constraints. In the face of a series of deep crises, EU policymakers and academic observers have identified a number of policy areas that require major reforms to overcome dysfunctional policies and consolidate the Union. Prominent examples include the completion of the banking union (above all the European deposit insurance scheme, EDIS), the overhaul of European asylum policy after the migration crisis, an effective rule-of-law mechanism to protect the independence of national judiciaries, a shift to qualified majority decision-making in foreign policy, and a solution to the conflict between Parliament and European Council on the election of the Commission President. In all of these areas, divergent preferences of the Member States and fundamental intergovernmental conflict have led to protracted reform impasses. And whereas these issues could be settled formally in principle without a new round of revisions of the EU Treaties, both *de iure* and *de facto* decision-making rules have prevented the EU from overcoming these impasses. Even in those cases, in which qualified majority decisions are foreseen, such majorities are either not available or regarded as unworkable. For instance, after the refusal of Central and Eastern European Member States to implement

⁷ See F. SCHIMMELFENNIG, T. WINZEN, *Ever Looser Union? Differentiated European Integration*, Oxford: Oxford University Press, 2020. The contribution further draws on F. SCHIMMELFENNIG, *EU Crisis and Reform: Is Differentiated Integration the Answer?*, in *Le Grand Continent*, Working Paper 4, June 2020, legrandcontinent.eu. For a legal comment, see B. DE WITTE, *Overcoming the Single Country Veto in EU Reform?*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 983 *et seq.*

the Council decision on the relocation of refugees,⁸ taken by qualified majority, it is now generally understood that reforms of the Common European Asylum System need to be based on intergovernmental consensus. It is equally taken for granted that a regulation on EDIS could not be taken by a qualified majority against Germany.

Differentiated integration offers a way out of these impasses without abolishing the *de iure* or *de facto* decision-making rules: it exempts or excludes those Member States from a common policy who lack either the willingness or the capacity to participate. It thereby reduces the number of participating Member States up to the point at which their preferences and capacities become sufficiently homogenous to accept a reform unanimously.

At the treaty level, the EU can essentially use two venues to differentiated integration: differentiated treaty revision and exclusive outside agreements.⁹ On the one hand, it can use a revision of the EU Treaties that grants opt-outs to countries that disagree with a new EU policy or are unwilling to meet the requirements for participation. Such treaty revisions can also specify conditions that Member States have to fulfil before being allowed to participate in an EU policy. Under these conditions, all Member States accept and ratify a new treaty, which is then also binding for all of them. Economic and Monetary Union (EMU) is the prototypical example. The Treaty of Maastricht not only granted opt-outs to Denmark and the UK (to secure the consent and ratification of Member States that were unwilling to participate) but also specified convergence criteria that States would have to meet to join the Eurozone (to facilitate the consent and ratification of hard-currency and fiscally rigid Member States that were sceptical about the participation of Member States with a looser macroeconomic policy). Treaty differentiation on EMU has also trickled down into secondary legislation, such as on the banking union. Differentiated treaty revisions often combine differentiations in a variety of policy domains, commensurate with the scope of the treaty. The four Danish opt-outs from the Maastricht Treaty, covering EMU, Justice and Home Affairs, defence and union citizenship are a telling example.

On the other hand, States can use exclusive outside agreements to achieve differentiated reform. In this case, the integrationist members exclude or exempt unwilling or incapable States from the entire agreement rather than from specific treaty rules. Correspondingly, outside agreements do not depend on the consent of, and do not bind, non-participating Member States. The Schengen Agreement and Convention are the prototypical examples. The Prüm Convention, the ESM Treaty, the Treaty on Stability, Coordination and Governance including the Fiscal Compact and the Intergovernmental Agreement on the Single Resolution Fund (SRF) are additional cases. In contrast

⁸ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁹ I leave aside the special case of differentiated legislation, either in regular legislation or according to the enhanced cooperation procedure. The logic is similar to differentiated treaty revisions.

to differentiated treaty revisions, these agreements typically have a narrow policy scope, remain within a single policy domain and often address specific issues within this domain – such as national transfers to the SRF or the exchange of data and personnel in law enforcement in the Prüm Convention. The earlier cases used the same requirements of unanimous agreement and national ratification as the EU Treaties. It is only in the context of the Eurozone crisis that the related intergovernmental agreements started to deviate from this rule and envisaged entry into force after ratification by a subset of the contracting parties.¹⁰

States choose exclusive outside agreements rather than differentiated treaty revisions for several functional and political reasons alone or in combination. First, they may prefer an intergovernmental governance structure without the constraints imposed by supranational institutions, which would be difficult to achieve in a treaty revision if the relevant policy domain operates according to the “Community method”. Second, the agreement may be so limited in scope that a regular treaty revision procedure seems disproportionate. Both reasons are unrelated to Member State heterogeneity. Third, there are issue-specific reasons to limit the participation to a sub-group of the Member States. For instance, it was clear from the beginning that the ESM would be an exclusive arrangement for Eurozone countries. Fourth, the integrationist group of States may be forced to move outside the treaty framework because non-participating Member States are intent on preventing them from deeper integration, or demand conditions for their consent that are unacceptable to the integrationists. For instance, the Fiscal Compact was transformed into an intergovernmental treaty when the British Cameron government threatened to veto it unless it obtained concessions and additional exemptions on several financial market issues.

This brief review shows that the Political Compact is a novel proposal, indeed, but runs against the established logic of venue choice. The Political Compact aims at an ambitious reform of the EU potentially covering a variety of policy domains and deepening supranational integration. This is a feature of differentiated treaty revisions, however, that contrasts with the narrow policy scope and intergovernmental governance of exclusive outside agreements. It is problematic for two reasons.

First, unless the intergovernmental constellation of preferences and capacities is the same for all issues it covers, an agreement with a large issue scope would produce different patterns of membership across policies. For each issue covered in the Political Compact, there may be a different set of members unwilling or unable to participate. Whereas this hurdle can be overcome in principle, it produces complex negotiations. If Member States decide to go the outside-agreement route in the first place, it makes more sense for them to conclude a separate agreement for every policy issue, each of which would command the unanimous agreement of all participating States. This would

¹⁰ F. FABBRINI, *Reforming the EU Outside the EU?*, cit.

also be the functional solution in the case of reforms limited to already differentiated policy areas such as the Eurozone.

Second, outside agreements are difficult to reconcile with supranational governance. It is not coincidental that the treaty integration of the Schengen agreements went hand in hand with the shift of migration policies from intergovernmental to supranational ("first-pillar") institutionalization. If the Political Compact aims at supranational governance, it needs either to find a way to enlist the support of the EU's supranational institutions or to create its own supranational institutions. The first route might be resisted by EU members not participating in the outside agreement; otherwise it might require complicated rules safeguarding the respective autonomy of insiders and outsiders. The introduction of the banking union is instructive in this respect. It triggered strong British concerns and a change in the decision-making rules of the European Banking Authority to a double-majority requirement in order to make sure that the banking-union bloc would not structurally outvote Member States not participating in the banking union. The second route would resemble ideas for a Eurozone Parliament and would lead to institutional fragmentation and duplication. Differentiated integration in the EU has therefore generally avoided creating differentiated supranational institutions.

For these reasons, it would be more productive for the Conference on the Future of Europe to propose a differentiated treaty revision – to the extent that its proposals could not be implemented without treaty change. It is true, however, that its differentiations would need to address the opt-out requests of all Member States to find unanimous support. Moreover, the treaty revision might still need to be transformed into outside agreements if a single Member State is intent on denying the integrationist group deeper integration or wielding its bargaining power to demand far-reaching concessions. Even in an EU without the UK, such a scenario cannot be excluded.

It should be noted, in addition, that the above-mentioned proposal by Fabbrini for outside agreements with majoritarian entry-into-force thresholds combines two safeguards against Member State vetoes that are partly substitutable and serve different purposes. In principle, outside inter-se agreements pave the way to consensus quasi-automatically because they bring together only those Member States that support integration. Veto threats disappear if opposed governments are either free to abstain or excluded from participation. The only reason to furnish outside agreements with non-consensual entry into force is uncertainty about national ratification, in particular in cases of ratification by referendum. This is why the Eurozone countries introduced novel entry-into-force rules in the outside agreements concluded during the euro crisis: given the time constraints and massive stakes of reform in the crisis, they could ill afford to make the rescue of the Eurozone dependent on the uncertain approval of individual Member State electorates (concretely, Irish voters). Put differently, majoritarian entry-into-force rules in outside agreements are not necessary to overcome veto

threats of governmental negotiators but constitute a technocratic device to circumvent domestic non-ratification threats.

III. ISSUE TYPES AND DIFFERENTIATED INTEGRATION

The previous section focused on procedural and institutional issues. Yet material reasons may prove an even higher hurdle for effective EU reform pursued through differentiated integration. Two types of issues are particularly intractable for a differentiated approach to reform: constitutional and redistributive issues.

Constitutional issues concern the fundamental values and norms as well as the basic organizational set-up and institutional rules of a polity. The EU considers itself a community of liberal-democratic states sharing constitutional principles such as human rights, democracy and the rule-of-law and common values such as freedom, equality and non-discrimination.¹¹ To the extent that such values and norms pertain to the domestic institutions and behaviour of Member States, the differentiated integration of such issues is functionally feasible. Technically, the EU could grant its Member States opt-outs from non-discrimination, such as LGBT-free zones in Poland, or from fair elections in Hungary. In a narrow sense, such differentiations do not create externalities for other Member States. LGBT-free zones in Poland do not affect non-discrimination policies elsewhere, and unfair elections in Hungary do not make it any easier or more difficult for other Member States to hold fair elections.¹² Yet because Member State democracy is a foundational value of the EU, and human rights are considered “indivisible”, differentiated integration would be inappropriate even if it were feasible.

When the EU's own institutional order and rules are at stake, issues of externalities and feasibility loom large in addition. If individual Member States were granted the right to rig European Parliament elections or ignore CJEU decisions, differentiated integration would create inequality among States (and citizens) and undermine the proper functioning of the institutional system. For these reasons, divergent preferences and capacities of the Member States regarding constitutional issues do not lend themselves to differentiated integration.

They also explain why differentiations in these domains are rare and limited. Differentiations are absent from the general and institutional provisions of the EU Treaties. Accession treaties, which are otherwise a major source of differentiation in the European integration, do not exempt new Member States from political and institutional obligations. And the only differentiations in the domain of constitutional issues, the UK and

¹¹ Art. 2 TEU.

¹² In a wider sense, however, discriminatory policies in one Member State may affect the freedom of movement of persons in the internal market and thus create externalities that are problematic for differentiated integration.

Polish “opt-outs” from the Charter of Fundamental Rights, are generally seen as declaratory and having little practical effect.¹³

Redistributive issues concern burden-sharing and material transfers between the Member States. In general, the EU is a predominantly “regulatory” polity, which codifies and enforces rules that regulate which Member State behaviours are permitted or prohibited.¹⁴ By contrast, redistribution is limited to a small share of public finances: inter-personal transfers in a narrow sector – agriculture – and inter-regional cohesion.

Just as in the case of common values and institutions, differentiated integration would be technically feasible in redistributive policies. It would be possible to exempt Member States with tiny agricultural sectors from participation in the Common Agricultural Policy (CAP) or the richest countries from contributing to the cohesion funds. It is also possible to exclude the poorest and most agricultural regions from receiving transfers. To a limited extent, the EU budget rebates and the phasing in of agricultural subsidies for new Member States work exactly in this way.

Yet, differentiated integration in redistributive policies tends to be self-defeating. For instance, risk-sharing arrangements are most efficient if they consist of a large number of participants with a high diversity of risk profiles. If they bundle very low risks only, they are unnecessary. If they bundle only a few participants with extremely high risks, they are unsustainable. Likewise, burden-sharing arrangements need to join low-capacity and high-burden members with those that have high capacity or a lower burden so that redistribution produces manageable burdens for all participants. Voluntary arrangements that allow Member States to opt out inevitably lead to the exit of the countries with the lowest risks, lightest burdens and highest capacity, or to a significant reduction of their contributions. As a consequence, differentiation undermines the purpose of integration aimed at the social sharing of risks, burdens and wealth. In such areas, integration is typically either (almost) uniform or does not happen at all.

The problem with differentiated integration to reform the EU is that many of the most pressing issues currently are either constitutional or redistributive. Take three of the institutional issues on the agenda: transnational lists in European Parliament elections, the lead candidate system for the appointment of the Commission president, and qualified majority decisions in foreign policy. None of these could be solved through differentiated integration. This is obvious in the case of interinstitutional relations and EU-level decision-making rules. Yet transnational lists also require uniform rules across the EU (whereas national rules can vary to some extent in the current system based on national party lists).

Nor would differentiated integration help in the rule-of-law crisis of the EU, in which the threat of national vetoes by the perpetrators has so far paralysed the Art. 7 proce-

¹³ See P. CRAIG, G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford: Oxford University Press, 2015, p. 395.

¹⁴ See. G. MAJONE, *The Rise of the Regulatory State in Europe*, in *West European Politics*, 1994, p. 77 *et seq.*

dures and prevented consensus on effective procedures of rule-of-law conditionality for EU financial transfers. Because the line between opt-in and opt-out countries would run between good-governance and bad-governance Member States, differentiated integration would neither improve the rule of law where it is under pressure most nor find the support of Member States and institutions aiming to defend this fundamental EU norm.

Reforms of the other two crisis-ridden policies of the EU – monetary and migration policies – are stuck on redistributive issues. Risk-sharing arrangements in EMU such as the EDIS, Eurobonds or common unemployment insurance, which would increase the overall stability and resilience of the monetary union, are resisted by the fiscally and financially strongest Member States concerned about higher interest rates and incalculable transfers to high-risk Eurozone countries. If such risk-sharing arrangements were differentiated, the “frugals” would either opt out or only join on the condition that participation was conditional on the fulfilment of certain stability criteria. Either way, differentiated integration would likely divide fiscally healthy northern and fiscally vulnerable southern Eurozone countries and thus defeat the purpose of risk sharing. It is therefore small wonder that proposals for differentiated fiscal integration have remained absent from the policy debate.

In migration policy reform, the big divisive issue is the relocation of asylum-seekers that would alleviate the burden of the Mediterranean frontline States and of the final destination countries such as Germany and Sweden. Yet a reform of the Dublin rules or *ad hoc* relocation arrangements have been opposed so far – most vocally and uncompromisingly by a group of mainly Central and Eastern European Member States, not only because they are either unaffected by migration or mere transit countries, but also because they are ideologically and culturally opposed to extra-European migration. As in the EMU case, differentiated integration would undermine redistribution. A reformed asylum system would most likely bring together only those heavily burdened frontline and destination countries that would benefit from reallocation. Whereas it might provide for a fairer and more orderly distribution of migrants across the most affected countries, it would not lower their collective burden, however, if transit and bystander countries remain outside. What is more, differentiated reform would likely generate positive externalities. An improved asylum regime might make it even more attractive for migrants to seek asylum in one of the integrationist countries. A differentiated arrangement would thus not only institutionalize the free-riding behaviour of the current non-affected countries, it would also create incentives for the insiders to defect.

In sum, in the EU policy domains most affected by the crisis, most in need of reform and most paralyzed by national vetoes and veto threats, differentiated integration – in the format of either differentiated treaty revisions or exclusive outside agreements – would not be productive.

IV. CONCLUSIONS

At this point, there is much uncertainty about the institutional arrangements and the starting point of the Conference on the Future of Europe, let alone its likely results and their potential effects. Based on theoretical considerations and past experience with differentiated integration in the EU, I have argued that new agreements between EU Member States to overcome problems of unanimity or to exclude certain Member States are not the most suitable format for reforming treaties covering a broad policy agenda and deepening supranational governance – or at least have not been used for this purpose in the past. Moreover, lower entry-into-force thresholds in such inter-se agreements serve the purpose of protecting the agreements against national referendums rather than governmental vetoes.

In addition, we cannot abstract from substantive policy characteristics when assessing the chances of achieving meaningful reform through differentiated integration. Regardless of the institutional setting and procedural rules, differentiated agreements are generally of limited use when the policy issue in question is either constitutional or redistributive. Unfortunately, however, many of the most pressing issues on the EU reform agenda fall in these categories.

Under certain conditions, inter-se agreements could still play a useful role in EU reform and as an outcome of the Conference on the Future of Europe: as issue-specific agreements in areas of low integration (intergovernmental governance) that are unlikely to be supported by all Member States. Defence policy is such an area. The integration of health policy in response to the Covid-19 pandemic could also be facilitated by such an agreement. In important areas of reform, however, there is no meaningful way around the arduous search for consensus and compromise within the decision-making and ratification rules of the current Treaties.



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