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NATIONAL COURTS AND PRELIMINARY REFERENCE TO THE COURT OF JUSTI

Jasper Krommendijk

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To Abel, Rosa and Linde.

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Author biography

Jasper Krommendijk (1985) is an Associate Professor of International and European Law and Director of the Research Centre for State and Law, Radboud University, Nijmegen, the Netherlands. This monograph is the final result of a four-year project entitled 'It takes two to tango. The preliminary reference dance between the Court of Justice of the European Union and national courts', funded through a Veni grant by the Dutch Research Council. Beyond the preliminary ruling procedure, Jasper's research interests lie in EU institutional law, the EU Charter of Fundamental Rights and its relationship with the European Convention of Human Rights. Jasper completed his PhD on the effectiveness of international courts and committees and their judgments/recommendations, including the UN human rights committees, as well as some Council of Europe bodies. This empirical research was interdisciplinary in nature and was grounded in both law and international relations. Prior to starting his PhD research, Jasper worked at the Ministry of Justice in the field of EU criminal law, and on the development of an additional 'rule of law' evaluation mechanism to strengthen mutual trust between EU member states.

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Abbreviations

ABRvS	(Dutch) Administrative Division of the Council of State
AG	Advocate general
CBb	(Dutch) Trade and Industry Appeals Tribunal
CJEU	Court of Justice of the European Union
CRvB	(Dutch) Central Appeals Tribunal
CSIH	(Scottish) Court of Session Inner House
EAW	European arrest warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EIA	Environmental Impact Assessment
EU	European Union
EWHC	England and Wales High Court
Gh	*Gerechtshof* (Dutch) Court of Appeal
HRMC	Her Majesty's Revenue & Customs (UK)
IECA	Irish Court of Appeal
IEHC	Irish High Court
IESC	Irish Supreme Court
IP	intellectual property
PPU	*Procédure préjudicielle d'urgence*
QB	Queen's Bench
Rb	*Rechtbank* (Dutch) district court
SPC	Supplementary protection certificates
SSHD	Secretary of state for the Home Department (UK)
SSWP	Secretary of state for work and pensions

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UKAITUR	UK Upper Tribunal (Immigration and Asylum Chamber)
UKFTT	UK First-tier Tribunal
UKHL	UK House of Lords
UKSC	UK Supreme Court
UKUT	UK Upper Tribunal
VAT	value added tax

1. Introduction to *National Courts and Preliminary References to the Court of Justice*

1. SETTING THE SCENE

The ECJ[1] has been both applauded and criticized for being an essential protagonist of European integration and for shaping, transforming and constitutionalizing EU law.[2] The ECJ has primarily achieved this through its cooperation with national courts in the context of the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU).[3] Most of the major EU law principles were developed by the ECJ in response to questions from national courts acting, in the words of current President of the ECJ Lenaerts, as the 'arms of EU law'.[4] It is thus for good reason that the procedure has been referred to as the 'jewel in the crown' or the 'most fundamental element in the constitutional architecture' of the EU legal order.[5] The ECJ presents it as the 'keystone' of the judicial system in the EU.[6] However, the effectiveness of the preliminary reference procedure depends on the willingness of national courts to utilize it in practice.[7] National courts are thus indispensable 'lynchpins' of the system of EU judicial protection and important guarantors of the effectiveness of EU law and the rights of individuals.[8] Their ability to refer 'constitutes the very essence of the [EU] system of

[1] 'ECJ' is used to refer to the Court of Justice, one of the two courts of the Court of Justice of the European Union, in addition to the General Court. See Article 19(1) of the Treaty on European Union.

[2] Weiler 1994; Alter 2002; Stone Sweet 2004; Broberg and Fenger 2013, 488; Sarmiento and Weiler 2020; Vauchez 2010.

[3] Alter 2002, 227; Wind et al 2009, 64.

[4] Tridimas and Tridimas 2004, 127.

[5] Craig and de Búrca 2015, 464; Weiler 1987, 366.

[6] Opinion 2/13, EU:C:2014:2454, para 176; Craig 2001, 559.

[7] Arnull 2012, 119; Lenaerts 2019, 4.

[8] See also Case C-33/76 *Rewe* EU:C:1976:188, para 5; Case C-45/76 *Comet* EU:C:1976:191, para 12; Case C-224/01 *Köbler* EU:C:2003:513, para 35; Opinion 2/13, EU:C:2014:2454, para 175.

judicial protection'.[9] The ECJ underlined the importance of the preliminary reference procedure, which accounts for 66 per cent of all its cases, by noting that through this procedure, the ECJ and national courts 'form a network that brings EU law and rights to the citizen's doorstep'.[10]

The procedure has nonetheless come under significant pressure in the last decade. Some maintain that the procedure has become a victim of its own success, given the large influx of new cases since the mid-2000s.[11] It has even been argued that the system could collapse without intervention.[12] To date, however, the ECJ has managed to prevent this and has not (yet) buckled under the pressure of the growing backlog of cases – although this heavy caseload is not without consequences for the quality of the reasoning in the judgments.[13] There are signs that national courts have become more critical of their interaction with the ECJ.[14] Two problems stand out in this regard. First, national courts – and especially constitutional courts[15] – are frequently unwilling to refer or simply lack sufficient knowledge of EU law and the preliminary reference procedure.[16] This failure to refer could mean that national courts end up applying their own interpretation of EU law, thus diverging from that of the ECJ and resulting in a breach of EU law.[17] Second, the implementation of ECJ judgments is not straightforward. It is an often-told story that most constitutional courts fail to respect the primacy of EU law.[18] National courts also feel that they do not always receive helpful guidance because some ECJ judgments are insufficiently motivated or do not provide a clear answer to the questions posed.[19] This has also resulted in instances of non-compliance with EU law. Hofmann referred to a 'pushback' or 'backlash' against the ECJ, which has been more significant than is commonly understood.[20] The most obvious case is the follow-up judgment of the German Federal Constitutional Court

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9 Case C-300/99 P *Area Cova & Ors v Council* EU:C:2001:71, para 54.
10 LinkedIn message of the ECJ, 25 October 2020.
11 De la Mare and Donnelly 2011, 363–407; Davies 2006, 210–44.
12 Vink et al 2009, 23.
13 Sharpston 2014, 765; Weiler 2013, 235; Jacobs et al 2019, 1216; BVerfG 2 BvR 859/15, paras 116–18.
14 Micklitz 2005, 426; Pollack 2018; Gallo 2019; Dyevre 2013; Bobek 2014a; Pollicino 2014; Pérex 2014; Guastaferro 2017, 394.
15 Claes 2015; Bobíc 2017; Martinico 2010; Saurugger and Terpan 2017, 108–16. On the Belgian and Austrian Constitutional Courts, which have been relatively eager to refer and faithful in terms of compliance, see Burgorgue-Larsen 2015; Cloots 2010; Baraggia 2015.
16 Bobek 2013b, 212–13; Arnull 1989.
17 Tridimas 2003, 47.
18 Davies 2018, 323.
19 De Werd 2015b, 154; Arnull 2012, 131.
20 Hofmann 2018.

in *Weiss*, in which the ECJ ruling was found to be *ultra vires*.[21] *Weiss* shows that the earlier *Landtová* judgment, in which the Czech Constitutional Court reached a similar conclusion, was not an 'isolated incident'.[22] Other notable examples include the Danish Supreme Court's disobedience after *Dansk Industri*; and the rhetorical questions posed by the German Constitutional Court in *Gauweiler*, in which it threatened not to comply with the ECJ ruling if it diverged from its own interpretation.[23] One can also think of less explicit illustrations of a difficult (or absent) dialogue, such as in the Spanish case of *Melloni*.[24]

If these two problems (non-referral and non-compliance) are real and remain unaddressed, this could erode the authority of the ECJ and affect the application and hence the effectiveness of EU law, ultimately undermining the entire European integration project.[25] It is thus important to identify how national courts engage with the ECJ and how the preliminary reference procedure works in practice. Little is known, however, about this interaction and the different stages: question, answer and follow-up. This raises four specific research questions: why do national courts refer preliminary references to the ECJ (question)? How does the ECJ deal with and answer those questions, including from the perspective of the referring court (answer)? And what does the referring court subsequently do with those answers (follow-up)? The fourth research question relates to so-called feedback loops: to what extent is there a relationship between the motives of judges (not) to refer and their level of satisfaction with their interaction with the ECJ and the answers to their questions?

The academic relevance of this book is threefold, as will be revealed below. First, it fills an empirical gap (section 1.1). Second, it reflects on the (in)validity of dominant theoretical perspectives (section 1.2). In doing so, it offers new approaches and insights that also have practical relevance that goes beyond the three EU Member States studied (section 1.3).

1.1 Scientific Relevance: Filling Four Empirical Gaps

The first question, concerning the motives and factors behind references, has received a considerable degree of attention, albeit primarily in quantitative

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[21] Case C-493/17 *Weiss* EU:C:2018:1000; BVerfG 2 BvR 859/15.

[22] Case C-399/09 *Landtová* EU:C:2011:415; Dyevre 2016, 109.

[23] Case C-441/14 *Dansk Industri* EU:C:2016:278; Case C-62/14 *Gauweiler* EU:C:2015:400; Klinge 2016; Rask Madsen et al 2017; Šadl and Mair 2017; Mayer 2014; Tridimas and Xanthoulis 2016.

[24] Case C-399/11 *Melloni* EU:C:2013:107; Pérez 2014.

[25] Tridimas 2015, 404.

terms. Statistical studies have mainly tested structural factors at the Member State level in order to explain why the courts in some Member States refer more often than those in others. Such factors include the level of gross domestic product; the willingness to litigate; support for European integration; the existence of judicial review; and the monist or dualist nature of the legal system.[26] Despite ample research, there is still no consensus among these studies. This is also the case because the correlations between several structural factors and the number of preliminary references is 'not impressive', as several outliers or factors work in opposite directions.[27] For example, there is disagreement as to whether judges in smaller Member States are more eager to refer.[28] There is also no consensus as to whether references are less likely in majoritarian democracies than in constitutional democracies.[29] Another disadvantage of statistical studies relying on an aggregated number of references is that they ignore important dynamics.[30] Differences over time and within Member States – even within courts – are often overlooked.[31] Structural factors also do not account for differences across legal fields and policy areas.[32] The largely (quantitative) studies conducted so far have focused on explaining the determinants of European integration rather than the theme of judicial decision making.[33] This means that 'the most important puzzle confronting scholars' in the field of EU law has not yet been solved.[34] Rather than examining these aggregate-level factors, this book addresses the motives of individual judges as a way to fill the gaps in earlier research. It contributes to the growing literature on judicial decision making and engages with the findings of other empirical qualitative studies based on interviews with judges in Denmark, Poland and Spain, and more recently in Italy, Germany, France, Croatia, Slovenia and Sweden.[35] This literature will be presented in section 3.

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[26] Stone Sweet and Brunell 1998; Tridimas and Tridimas 2014; Nyikos 2003; Carruba and Murrah 2005; Wind et al 2009; Sigafoos 2012.

[27] Broberg and Fenger 2013, 500; Vink et al 2009, 22; Hornug and Voigt 2015, 293.

[28] Contrast, for example, Groenendijk 2015; Wind 2010, 1047; Wind et al 2009, 63 with Broberg and Fenger 2013; Vink et al 2009.

[29] Contrast, for example, Wind et al 2009, 63 with Groenendijk 2015; Fenger and Boberg 2013, 491; Lampach and Dyevre 2019.

[30] Leijon 2020.

[31] Cf Stone Sweet and Brunell 1998, 88; Dyevre 2013, 166; Kelemen and Pavone 2016, 1119.

[32] Golub 1996, 375.

[33] Lampach and Dyevre 2019.

[34] Stone Sweet and Brunell 1998, 73.

[35] Jaremba 2012; Mayoral 2013; Mayoral and Pérez 2018; Pavone 2018; Glavina 2019; Leijon 2020.

There have been fewer studies on the second question (answer), concerning the national courts' appraisals of their interaction with the ECJ and the resulting judgments. We therefore know surprisingly little about what national courts (truly) think of ECJ judgments or the perceived legitimacy of the ECJ.[36] The following observation of current Advocate General (AG) Bobek, dating from 2013, still holds true: 'very little or nothing at all is known ... whether or not national courts are satisfied with the Court's decision(s) once they receive them, whether they consider them authoritative, and whether the Court's case law is in fact followed'.[37] Pollack pointed to the absence of systematic information about the attitudes and beliefs of national judges regarding the ECJ's legitimacy, and noted that scholars have instead relied on indirect evidence – namely, the behaviour of judges in terms of referring and compliance.[38] This book will reveal that reliance on such evidence is problematic. The generally high level of follow-up actually camouflages the dissatisfaction among national judges as to the quality of their interaction with the ECJ and the resulting judgments. Van Gestel and de Poorter recently drew similar conclusions in relation to the ten highest administrative courts.[39]

There is little recent research on the third question, dealing with the follow-up to ECJ judgments, although some older studies found high rates of implementation of 90 to 92 per cent.[40] Little has changed since Nyikos observed that research on national court implementation is 'still in its infancy' and 'the silent elephant' in the room.[41] This can be explained by the difficulty in accessing such follow-up judgments, and the fact that such judgments are not collected by the ECJ or presented on the Curia website.[42] On the one hand, there is a pervasive belief that ECJ judgments are widely accepted and followed.[43] On the other hand, however, more recent – often rather anecdotal – work has found that implementation is not always achieved, and that many of the principles in the ECJ case law have not been acted upon by national courts.[44] Nyikos, for instance, pointed to outcomes other than the full application of the ECJ judgment, such as partial application; a reinterpretation of the facts so that the ECJ judgment does not apply; re-referral to the ECJ; and

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36 Cf Wallerman Ghavanini 2020a, 196.
37 Bobek 2013b, 212–13.
38 Pollack 2018.
39 Van Gestel and de Poorter 2019.
40 Older single country studies include Schwarze 1988; Korte 1991; Mayj 1993; Wils 1993.
41 Nyikos 2003, 402. Cf de Búrca 2020; Bobek 2014a; Hofmann 2018.
42 Van Gestel and de Poorter 2019, 99.
43 Weiler 2013, 235.
44 Bobek 2013b; Fierstra 2002; Van Harten 2013, 123; Davies 2012, 81 and 89.

concealed or open non-compliance.[45] Other scholars noted that judges often consider ECJ judgments to be complex, lengthy and unreadable, and difficult to apply to the facts of the national case.[46] Alter also argued against the assumption that ECJ judgments are easily accepted by national courts.[47] A few empirical studies have examined follow-up in particular legal areas, such as environmental law; but it is unclear whether these findings can be extrapolated to other fields.[48] This book thus acts upon the explicit request of Stone Sweet, who observed that:

> one of the most important, and largely uncharted, areas of research on legal integration concerns problems and inconsistencies in national application and adjustment to the Court's case law … We still desperately need comparative, contextually-rich case studies that blend the lawyer's concern with doctrinal evolution, and the social scientist's concern with explanation, in a sustained way.[49]

There has been even less work on the fourth question, about the feedback relationship between the motives of judges (not) to refer and their level of satisfaction. Scholars and judges alike have hinted at the existence of such an intuitively plausible relationship by noting that a judge who feels that s/he has not received helpful guidance might refrain from sending future references to the ECJ.[50] Alter pointed to a negative feedback loop in relation to litigants when they are subject to an unfavourable ECJ judgment, possibly increasing their reluctance to bring future disputes to court.[51]

This book thus provides insights into four questions that have received little attention to date – especially the last three questions on the appraisal of the ECJ's answer, the follow-up and feedback loops.

1.2 Offering a New, Truly Interdisciplinary Approach

This book combines two (qualitative) research methods that have not been employed frequently thus far. The legal literature to date has primarily relied on a legal-doctrinal analysis of national court and ECJ judgments, without

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45 Nyikos 2003, 399–401.
46 Jaremba 2013; Wallis 2008, 26; Nowak et al 2011; de Werd 2015b, 152.
47 Alter 1998, 233–34.
48 Recent exceptions are Squintani and Annink 2018; Squintani and Rakipi 2018; Squintani and Kalisvaart 2020.
49 Stone Sweet 2004, 197 and 241; Stone Sweet 2010, 32; Davies 2012, 78.
50 Vink et al 2009, 8; Norrgård 2016, 196; de Witte 2016, 25; de Werd 2015b, 154; Arnull 2012, 131; Tridimas 2011, 755; Jacobs et al 2019, 1218; Sharpston 2014, 766.
51 Alter 2000, 512.

paying much attention to extra-legal considerations.[52] The emphasis has also been on analysing the case law of the ECJ in isolation from the actual reference of the national court and the subsequent implementation by that same court.[53] This book shows that the understanding of the interaction between the ECJ and national courts cannot merely be based on the final judgments alone. Instead, we need to get 'into the heads and minds' of the key actors involved. Interviews are one of the best tools available to achieve this objective.

There have been a handful of (primarily social science) studies relying on interviews with judges in order to identify the motives and factors that inform the decision to refer.[54] Many of these empirical studies nonetheless relied extensively on interviews, without engaging substantively with legal considerations and the legal context. A clear appraisal of the law and the legal context is essential for a proper interpretation and triangulation of the interview data. Interviews have not been conducted with respect to the other three research questions: the national court's appraisal of the ECJ answers, follow-up and feedback loops.[55]

This book thus bridges two disciplines through an interdisciplinary approach. It complements the legal literature with a focus on the 'law in action'; and it adds to social science studies that have principally relied on quantitative research or on interviews without triangulating these findings with the actual judgments of both national courts and the ECJ. In doing so, it provides practical insights and examples, and enriches the rather abstract and theoretical literature.

Another novel aspect is that this book focuses on courts that have thus far received little in-depth attention, since the (legal) literature has primarily concentrated on just a handful of prominent constitutional courts (especially the German, Italian, Spanish and French courts) and their interaction with the ECJ.[56] Very little work has referred to other courts, especially the lower courts, until recently.[57] Attention has hitherto focused on high-profile cases, such as those discussed earlier in this chapter – *Weiss*, *Gauweiler*, *Dansk Industri*, *Taricco* and *Melloni* – while more routine, day-to-day cases have received limited, if any, attention.[58]

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52 Dyevre 2013, 142.
53 Castillo Ortiz 2017.
54 Jaremba 2012; Mayoral 2013; Mayoral and Pérez 2018; Pavone 2018; Glavina 2019; Leijon 2020.
55 An exception is the recent study of van Gestel and de Poorter 2019.
56 Cf van Gestel and de Poorter 2019, 3. Eg, Baraggia 2015; Dani 2017b, 786.
57 Cf Arnold 2020, 1087; Pavone 2018.
58 Cf Pollack 2017, 592.

This book provides original reflections on dominant (theoretical) perspectives that have thus far received limited attention. First, it shows that there are differences not only between EU Member States with respect to the use of the preliminary reference procedure, but also *within* Member States between different courts, and even among the judges within these courts. Second, the book reveals that the high implementation rate of ECJ judgments by the referring courts suggests satisfaction, but actually conceals some dissatisfaction with those judgments.[59] Even in the Netherlands, where the courts are traditionally compliant interlocutors, there has been considerable criticism with regard to the functioning of the procedure and the resulting ECJ judgments.

1.3 Practical Relevance

This book is obviously relevant to Dutch, Irish and (even) UK legal practice. It is worth mentioning that the UK courts will be able to refer questions about specific areas of EU law to the ECJ for at least a decade after the actual withdrawal of the UK from the EU following Brexit. However, the practical relevance extends beyond these three EU Member States because of the book's explicit grounding in existing theories and its engagement with recent empirical studies (section 3). The book also profits from a complementary PhD project carried out by Claassen involving the Netherlands, Austria and Germany.[60]

This book is relevant to legal practitioners, as well as judges and legal secretaries of national courts and the ECJ. The concluding Chapter 8 offers some suggestions for the ECJ and national courts to mutually improve their interaction. First, legal practitioners will benefit from the insights provided as to why courts decide (not) to refer. They will thus be better able to tailor to their strategies based on real examples of successful cases. The findings presented in this book have greatly benefited from discussions with legal practitioners, such as lawyers and representatives of non-governmental organizations (NGOs), and presentations given to a varied audience in past years. The interaction with these actors has also contributed significantly to the (interpretation of) data.

Second, the ECJ could learn from the perspectives and experiences of national court judges gained from their use of the procedure, their interaction and their follow-up to ECJ judgments. The findings, especially in Chapter 5, underscore the need for the ECJ to consider more carefully how it can maintain its legitimacy in a world in which not only its interlocutors, but also the wider

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[59] Cf Hofmann 2018.

[60] He examined the motives of courts (not) to refer in four specific legal areas: competition law, criminal law, consumer law and asylum law, Claassen 2021.

population and Member State governments, have become more critical.[61] The conclusion of this book offers several suggestions for improvements. These suggestions are also based on the practice and experience in the UK, which are presented as 'lessons learned' regarding the state of affairs of EU law and the functioning of the preliminary reference procedure and the ECJ.

Third, national courts can benefit from good practices revealed in the research concerning which questions they should (not) refer, and can learn how they could best formulate the order for reference. The book also holds up a mirror to national judges' (dis)satisfaction with the interaction by offering comparative impressions.

2. PRELIMINARY REFERENCE PROCEDURE: LEGAL FRAMEWORK

The preliminary reference procedure that is currently laid down in Article 267 TFEU was one of the first instances of cooperation between an international court and national courts.[62] Its design was based on similar reference systems in Italy and France, where lower courts can request a preliminary ruling from the constitutional court. The procedure, initially included in Article 41 of the Treaty establishing the European Coal and Steel Community, was rather limited in scope, allowing a reference only 'when the validity of acts of the High Authority or the Council is contested in litigation before a national tribunal'. Over the years, this scope was widened to include the validity of acts of a broader range of EU institutions, as well as the interpretation of the Treaties – including the Charter of Fundamental Rights – secondary EU law and even international agreements concluded by the EU. This means that the procedure currently covers the entire body of EU law, with the exception of the Common Foreign and Security Policy.[63]

Article 267 TFEU requires national courts or tribunals to refer to the ECJ if a question is raised about the interpretation or validity of EU law when 'there is no judicial remedy under national law', provided that 'a decision on the question is necessary to enable it to give judgment'. As will be discussed in Chapter 2, the latter delimitation is crucial because courts are not obliged to refer if they can decide the case on the basis of national law, or if the particular facts of the case are such that they do not require a reference. This obligation applies to the highest court or courts in Member States – a supreme (administrative)

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61 Kelemen 2016, 137 and 140.

62 Broberg and Fenger 2014, 2.

63 Art 275 TFEU; however, the ECJ broadened the possibilities to refer in Case C-72/15 *Rosneft* EU:C:2017:236.

court and/or a constitutional court. However, it could happen that a 'lower' court is obliged to refer in a particular case in which there is no remedy, even though it enjoys discretion in most other cases. The obligation to refer applies, for example, to sub-district court cases in the Netherlands because, pursuant to Article 332(1) of the Code of Civil Procedure, no appeal is possible against judgments in cases where the claim amounts to less than €1750 or in particular disputes about visas. The situation is different in the UK and Ireland, where the Supreme Court in principle always has the last word in all cases.[64]

The term 'lower court' is thus not entirely accurate, since the obligation in Article 267 TFEU does not concern the status of a court as such, but rather the stage of the proceedings. This book will nonetheless use the term 'lower court' and 'highest court' to refer to the position of the court in the judicial hierarchy. The former is used to refer to a court that only has discretion to refer, while the latter is used to refer a court that is obliged to refer unless otherwise stated. There is one exception to the discretion of lower courts to refer – namely, when the validity of (secondary) EU law is at stake. The ECJ made clear in *Foto-Frost* that courts are obliged to refer if they have doubts about the validity of EU law.[65] The coherence of the EU legal system and the uniformity of EU law require that the power to declare an EU act invalid be reserved to the ECJ.

There are two exceptions to the obligation of the highest courts, which are commonly referred to as the *CILFIT* exceptions. The highest courts are not obliged to refer where the ECJ has 'already dealt with the point of law in question' (*acte éclairé*), or where 'the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt' (*acte clair*).[66] The ECJ presented quite a strict framework for national courts in its *CILFIT* judgment of 1982. National courts 'must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice'.[67] Before reaching that conclusion, they must consider the characteristic features of EU law and compare, among other things, different language versions of the provision(s) of EU law.[68] As will be discussed in Chapters 2 and 8, there is

[64] Before the entry into force of the 33rd constitutional amendment in Ireland in 2014, the High Court was obliged to refer in particular areas of law, including planning and refugee law. Eg s 5(3) of the Illegal Immigrants Act 2000; s 50A(7) and s 50A(11) of the Planning and Development Act 2000. Article 34.5.3 of the Irish Constitution provides that the Supreme Court may grant leave if it is satisfied that the 'decision involves a matter of general public importance' or when it serves 'the interests of justice'.

[65] Case 314/85 *Foto-Frost* EU:C:1987:452.

[66] Case 283/81 *CILFIT* EU:C:1982:335, paras 14 and 16.

[67] *Ibid*, para 16.

[68] *Ibid*, paras 17–20.

a discussion in the literature, as well as among judges, as to the feasibility of the notions of 'convinced' and the specific *CILFIT* requirements.[69]

Two enforcement mechanisms can be invoked where a highest court fails to comply with its obligations under Article 267 TFEU. Their practical effects are limited, however. First, the European Commission can initiate an infringement procedure on the basis of Article 258 TFEU. In the 2018 case of *Commission v France*, for the first time ever, the ECJ determined that there was a violation of Article 267 TFEU due to the failure of the French Council of State to refer in an infringement procedure.[70] Previously, the ECJ had only found violations relating to the misapplication of EU law by national courts more indirectly. The first infringement mechanism can be seen in action in an infringement case against Italy, in which the ECJ established that there had been a breach of EU law because the legislature had failed to amend a particular law that had been misinterpreted and misapplied by the administration and a significant number of courts, including the Supreme Cassation Court.[71] Unlawful case law was thus one of the elements taken into account; but in the end, it was the legislature that was held responsible for its failure to take action. This also happened in a later procedure against Spain concerning the implementation of the Sixth Value Added Tax (VAT) Directive. In this case, Spain invoked the difficulty that the highest Spanish court had experienced in issuing judgments on which the policy was based as justification for the failure to fulfil its obligations under EU law.[72] In both cases, the actions of the judiciary were not assessed from the perspective of Article 267 TFEU and were taken into account only in a more indirect way when the ECJ had to determine whether the Member State had, as such, infringed EU law. This illustrates the Commission's reluctance to pursue an alleged breach of EU law by independent national judiciaries directly. In the past, the Commission took action only once in relation to Article 267 TFEU in the context of an infringement procedure. In 2004, it initiated proceedings against Sweden because of the low number of references and the lack of a statement of reasons for its refusals to refer. Following a change in Swedish law, the Commission dropped the case. As a result, the case was never brought before the ECJ.[73]

A second enforcement mechanism is an action for state liability, which can be started by natural or legal persons before a national court in case of the failure of the highest court to refer. The ECJ determined in *Köbler* that the principle of state liability, as developed by the ECJ since *Francovich*, also

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69 Broberg and Fenger 2014, 255; Tridimas 2003, 42–44.
70 Case C-416/17 *Commission v France* EU:C:2018:811, para 111; Turmo 2019.
71 Case C-379/10 *Commission v Italy* EU:C:2011:775.
72 Case C-154/08 *Commission v Spain* EU:C:2009:695.
73 Bernitz 2010.

applies to situations of non-referral by the highest court.[74] The practical effects of *Köbler* are limited because the ECJ set the bar relatively high, and because there is an aversion within the national legal culture in relation to the notion of judicial liability.[75] In this case, the Austrian Supreme Administrative Court withdrew questions that had previously been referred because they were no longer necessary for the settlement of the dispute. It did so after being asked by the ECJ registry whether it wished to uphold the questions in the light of an ECJ ruling on the same issue. Mr Köbler disagreed with the final decision of the ECJ and proceeded to claim damages before a lower court. The ECJ found that the Austrian court should not have withdrawn its reference and was instead obliged to uphold it, because the ECJ had not yet given its ruling on the matter and the Austrian court 'was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt'.[76] In spite of this, the ECJ did not consider the Austrian court's error to be sufficiently serious and found that it was not a 'manifest' violation. The ECJ substantiated this by pointing out that the disputed issue was not explicitly regulated by EU law. The question also had not been answered previously in other ECJ case law; nor was it an obvious violation. The ECJ concluded that state liability 'can be incurred only in the exceptional case where the court has manifestly infringed the applicable law'.[77] It pointed to essential factors that set the bar fairly high for a finding of an actionable violation, including the question of whether the violation was committed intentionally and how excusable the error of law was.

There is discussion in the literature as to whether the ECJ has relaxed the *CILFIT* requirements in recent years. The ECJ adopted a more pragmatic reading of *CILFIT* in the Dutch cases *X and Van Dijk*. It ruled that the highest court is not required to make a reference to the ECJ on the sole ground that a lower national court referred a case involving the same legal issue. In other words, the highest court can stick to its earlier determination of an *acte clair*, and the fact that a lower court may entertain doubts regarding the ruling does not change this.[78] However, the ECJ decided on the same day in *Ferreira da Silva* that the Portuguese Supreme Court could not have determined an *acte clair* because of conflicting decisions of lower Portuguese courts and because

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[74] C-224/01 *Köbler* EU:C:2003:513. Cf Case C-173/03, *Traghetti del Mediterraneo* EU:C:2006:391; Case C-379/10 *Commission v Italy* EU:C:2011:775.

[75] Dougan 2020, 55. However, see recently Case C-620/17 *Hochtief* EU:C:2019:630; Case C-362/18 *Hochtief* EU:C:2019:1100.

[76] C-224/01 *Köbler* EU:C:2003:513, para 118.

[77] *Ibid*, para 53.

[78] Joined Cases C-72/14 and C-197/14 *X and Van Dijk* EU:C:2015:564.

of difficulties of interpretation encountered in various other Member States.[79] The ECJ suggested that the Portuguese court's failure to refer might amount to a violation of Article 267 TFEU, (potentially) giving rise to *Köbler* state liability; but it left that matter for the referring court to decide in the end. Other recent ECJ judgments that indicate a strict approach to *CILFIT* include *AFNE* and especially *Commission v France* mentioned earlier.[80]

There is thus still no certainty as to the exact reach of the *CILFIT* exceptions. Some recent judgments, such as *X and Van Dijk*, suggest a relaxation of the requirements; whereas other cases imply an unchanged strict approach. Be that as it may, the legal consequences for national courts' unjustified decisions not to refer are limited in practice. *Köbler* liability is difficult to establish and the Commission is also reluctant to initiate infringement proceedings on the basis of Article 258 TFEU.[81] Nonetheless, additional pressure has been exerted on national courts by the European Court of Human Rights (ECtHR). The ECtHR has found a breach of Article 6 of the European Convention on Human Rights – the right to a fair trial – four times since *Dhahbi* in 2014 due to the failure of the highest courts in some Member States to give reasons for decisions not to refer.[82] Some EU Member States also provide for constitutional protection of the right to effective judicial protection and provide remedies to challenge decisions of the highest courts.[83]

3. AN OVERVIEW OF PREVIOUS RESEARCH ON MOTIVES TO REFER

This book reflects on several theoretical perspectives and tentative explanations that have been formulated in the literature to date, especially in relation to the motives of courts (not) to refer. As was made clear in section 1.1, the empirical research was limited until a few years ago. This book reflects on these explanations qualitatively, in a structured and comparative manner. In doing so, it sheds light on the complex interaction between these explanations.

There are three dominant perspectives in the Europeanization literature on the motives of national courts to refer, which primarily accentuate strategic

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[79] Case C-160/14 *Ferreira da Silva* EU:C:2015:565, paras 40–42.

[80] C-379/15 *Association France Nature Environment* EU:C:2016:603, paras 48–50.

[81] In the Netherlands, there have been six unsuccessful *Köbler* liability cases since 2014. Van Eijken and Verhoeven 2020, 331.

[82] *Dhahbi v Italy* CE:ECHR:2014:0408JUD001712009; *Schipani v Italy* CE:ECHR:2015:0721JUD003836909; *Baltic Master v Lithuania* CE:ECHR:2019:0416JUD005509216; *Sanofi Pasteur v France* CE:ECHR:2020:0213JUD002513716; Krommendijk 2017a; Broberg 2016.

[83] Lacchi 2015.

or 'extra-legal' factors and considerations.[84] First, based on neo-functionalist theories on European integration, the judicial empowerment hypothesis posits that national courts refer in order to compel the government to change its laws when they consider that a national measure violates EU law.[85] The procedure is hence used as a 'sword' *vis-à-vis* the legislature or executive. Requesting a preliminary reference increases the chances of government compliance with EU law or can be a way to constrain restrictive administrative decision making.[86] This hypothesis also implies that national courts follow a consequentialist logic and are interested in expanding their own powers and creating the possibility for a form of judicial review, especially in countries with no or a weak tradition of review.[87] A prominent example of 'sword' references are the Spanish consumer law references in relation to unfair terms in mortgage arrangements. The *Aziz* reference by Spanish judge and 'judicial entrepreneur' José María Fernández Seijo is a famous example, as he was critical of the financial difficulties that these arrangements caused for people who had failed to meet their mortgage obligations because of unemployment or divorce resulting from the 2008 financial crisis.[88] Spanish law did not prevent banks from initiating foreclosure, even in case of the nullity of unfair terms. Judge Seijo deliberately brought the case before the ECJ to bring about a change in Spanish law.[89] This case illustrates that the preliminary reference procedure can function as a sort of 'citizens' infringement procedure', whereby the ECJ acts as a 'court of last resort' for desperate litigants unable to seek legal protection solely at the national level.[90]

Second, neo-realist or intergovernmentalist theories take the opposite stance and argue that national courts have a strong incentive to 'shield' national legislation from the ECJ by withholding references. Courts prefer to shield national policy and legislation from the undesirable influence of the ECJ, especially in politically sensitive cases.[91] This preference may stem from the national court's loyalty towards the executive; a strong doctrine of parliamentary sovereignty and a weak culture of judicial review;[92] or the court's resistance to

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[84] Cf Epstein and Knight 2000; Stone Sweet and Brunell 1998, 69; Alter 1998, 232.

[85] Alter and Vargas 2000, 464; Weiler 1991; Weiler 1994, 523; Golub 1996, 379; Davies 2012, 85.

[86] Obermaier 2008; Tridimas and Tridimas 2004, 1215; Rameu 2006; Cornelisse and Moraru 2020, 18 and 35.

[87] Burley and Mattli 1993; Mattli and Slaughter 1998; Golub 1996, 376; Alter 1998, 238–41.

[88] Mayoral and Pérez 2018.

[89] Fernández Seijo 2013; Micklitz and Domurath 2015, 229–37; Cafaggi 2017.

[90] Pescatore 2010, 7; Micklitz and Reich 2014, 805.

[91] Golub 1996, 375–79; Wind et al 2009; Rameu 2002, 33.

[92] Wind et al 2009, 75–76.

the dynamic interpretation of the ECJ.[93] Some studies also suggest that there is a link between the reluctance of the courts to refer and popular sentiment. Volcansek, for example, argued that the negative sentiment towards the European Community in the 1980s under Thatcher explains the recalcitrance of UK judges to engage with the ECJ through the reference procedure.[94] Golub likewise concluded that the political climate of Euro-pessimism has affected UK judges in a similar way.[95]

Third, another model – primarily developed in the work of Alter addressing inter-court competition – implies that EU law is used in bureaucratic struggles among different levels of the judiciary.[96] It points out that lower courts in particular use the preliminary reference procedure to 'leapfrog' the national judicial hierarchy in order to seek support from the ECJ as protection against the reversal of their decisions by a higher court.[97] EU law can offer lower courts a 'privilege' that they do not necessarily enjoy domestically – namely, *de facto* judicial review.[98] AG Kokott, for example, revealed that the German lower labour courts used the ECJ against the highest court in order to deliver more employee-friendly judgments.[99] This theory explains why traditionally, most of the references were made by the lower courts in most EU Member States. However, this has changed over time. Recent studies indicate that today, most references are made by the highest courts, while the lower courts have become more reluctant to refer.[100] The highest courts have thus reclaimed control from the lower courts in relation to the application of EU law in national cases and references to the ECJ.[101] As will be made clear in section 5, in the Netherlands, the Dutch highest courts have taken the lead in making use of the reference procedure.[102]

The findings presented in this book demonstrate that the emphasis on politico-strategic reasons in the literature is not entirely justified.[103] The

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93 Wind 2010, 1053.
94 Volcansek 1986, 206 and 217.
95 Golub 1996, 377.
96 Alter 1998, 241–47; Burley and Mattli 1993.
97 Davies 2012, 86; 954; Tridimas and Tridimas 2004, 135.
98 Weiler 1991, 2426.
99 Kokott 1998, 128–29.
100 Pavone showed that only the lower courts in Italy have referred the majority of cases, while this is not the case in France, Belgium, the Netherlands or Luxembourg. Pavone 2018; Coutinho 2017, 358; Dyevre et al 2020; Kelemen and Pavone 2016.
101 Pavone 2018; Pavone and Kelemen 2019; Ovádek et al 2020.
102 In the Netherlands, 66 per cent of the references were made by the highest courts; while in 11 Member States, including Belgium, France, Spain and the UK, more than 70 per cent of the references were made by lower courts, Mak et al 2017, 1724.
103 Cf Pavone 2018; Mayoral and Pérez 2018, 723.

interaction between national courts and the ECJ is not only about 'power'.[104] Legal reasons are equally important as pragmatic reasons, and are sometimes even more important. Much of the earlier work portraying national courts as politico-strategic actors suggest that courts primarily refer in typical – and often high-profile, politically salient – judicial review cases in which national law is not in line with EU law. The majority of references, however, do not involve such questions, but rather boring and technical questions about, for example, the tariff classification of goods or undefined terms in EU legislation.[105] Five different types of non-politico-strategic considerations may be discerned.

First, there are the legal-formalist reasons: national courts refer because they want to comply with their obligations under the Treaties, most notably Article 267 TFEU. This 'compliance pull' motive, based on the 'power of the law', suggests that courts feel responsible for maximizing the correct application of EU law.[106] In addition, it presupposes that courts are convinced by legal arguments about, for example, the validity of the doctrine of the supremacy of EU law over national law. With respect to the actual decision to refer in specific cases, the legalistic perspective would point to courts adopting a legal assessment of the clarity of the question of EU law and strictly abiding by the *CILFIT* requirements, as discussed in section 2. Unjustified decisions not to refer are seen as unintended mistakes, based on a misunderstanding of limited information.[107]

Second, it has been observed that courts operate pragmatically and do not solely make legal assessments that adhere closely to the *CILFIT* requirements.[108] Micklitz argued that judges primarily refer simply because this is necessary for them in order to resolve a national dispute efficiently. If they are unable to interpret EU law on their own, the ECJ may possibly provide the requisite clarity.[109] Courts thus decide whether a reference is 'worth the effort' considering a variety of factors, such as the difficulty or importance of the question in the specific case.[110] Other efficiency reasons include the consequences of referring in terms of the delay in the specific case or other cases

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[104] Dyevre 2016, 142.

[105] De Werd 2015b; Chalmers and Barroso 2014, 123; Cafaggi 2017, 236. Of the 98 references of the Supreme Administrative Courts in ten Member States 36 involved compatibility questions, van Gestel and de Poorter 2019, 73–75.

[106] Weiler 1994, 520; Hübner 2018; Leijon and Glavina 2020.

[107] Alter 1998, 230.

[108] About 'pragmatic adjudication' more generally, see Posner 2008; Jaremba 2012; Rado 2020, 83; Epstein and Knight 1998; Lampach and Dyevre 2019.

[109] Micklitz 2005, 437. Cf Jaremba 2016, 67; Popelier and van de Heyning 2019.

[110] De la Mare and Donnelly 2011, 372; Sevenster 2011, 301 and 303; Davies 2006, 230.

involving the same issue of EU law.[111] From this perspective, it is unsurprising that courts are generally reluctant to refer and adopt a pragmatic reading of *CILFIT*.

Third, personal motives and psychological factors have also been put forward more broadly in the literature on judicial decision making. This reflects a recent emphasis on the micro level and the individual agency of judges.[112] This includes views as to the judge's judicial role and his or her professional attitude and beliefs, such as that only the highest courts should refer.[113] Such personal views are also affected by the wider culture of judicial review or the attitude towards European integration.[114] Recent literature has emphasized this factor by pointing to the difference between fact-finding courts, which are generally more reluctant to refer and leave this role to the highest courts, and those courts that have a 'law-finding' role.[115] Another important (personal) element affecting an individual's judge's inclination to refer is his or her knowledge of EU law and/or the preliminary reference procedure.[116] The literature has also – often in a rather anecdotal way – pointed to personal motives such as self-aggrandizement, prestige and increased visibility at the European level.[117] The flip-side is that some judges consider that a reference would be risky or negative for their reputation.[118] It has been suggested that some judges are afraid to ask a wrong question that would subsequently be declared inadmissible by the ECJ.[119] Other scholars have noted that judges might be discouraged from referring because they fear a negative response from their colleagues, other courts or the legislature.[120]

A fourth category of factors relates to the institutional and organizational dynamics of a particular court. These include, for example, the level of coordination and the knowledge basis in relation to EU law within a court; the court's capacity; and the case management system. With respect to the latter, it has been pointed out that the need to meet 'production targets' and

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[111] Wind 2009, 283; Jaremba 2012, 229.

[112] Posner 2008; Epstein et al 2013; Chehtman 2020; Rado 2020; Lampach and Dyevre 2020.

[113] Jaremba 2012, 229; Pavone 2018.

[114] Wind et al 2009; Dyevre 2013, 152.

[115] Glavina 2019 and 2020a; Rameu 2002, 12–13; Stone Sweet and Brunell 1998, 73.

[116] Nowak et al 2011, 49; Rytter and Wind 2011, 493; Glavina 2020b.

[117] Spanish judge in Burgorgue-Larsen 2015; Leijon and Glavina 2020.

[118] Wattel 2014, 893.

[119] Jaremba 2012, 229–30; Sevenster and Wissels 2016, 90; Groenendijk 2015, 302.

[120] Lampach and Dyevre 2019.

workload pressures have discouraged references.[121] Pavone concluded, based on thorough empirical research conducted in Italy, Germany and France, that (a lack of) references can be explained by path-dependent, everyday practices within national courts.[122]

Fifth, the literature has also noted that the parties involved in a national case and their requests to refer can influence the courts' willingness to refer.[123] More generally, the amount of litigation in a certain area can explain the likelihood of references being made.[124] This focus on the parties dovetails neatly with research on legal mobilization and strategic litigation on the basis of EU law.[125] It is an often-told story that the preliminary reference procedure, coupled with supremacy and direct effect, has stimulated an 'indirect alliance' between litigants and pro-integration forces such as the ECJ.[126] Older references in particular have been attributed to a small group of Euro-lawyers as 'legal entrepreneurs' with strong pro-EU views pushing for further integration and the development of EU law.[127] Pavone attributed 60 of the 89 Italian references in the period 1964–80 to the same four lawyers, including a former ECJ judge.[128]

This overview has shown that an abundance of factors and considerations feed into courts' decisions (not) to refer, including three extra-legal politico-strategic reasons and five non-politico considerations. The following chapters will discuss these explanations on a structured basis. In doing so, this book reveals that these considerations operate in tandem in an intricate and diverse way, which could explain the variations among and within Member States, over time and across policy areas.

4. RESEARCH DESIGN AND METHODOLOGY

This book goes beyond a merely descriptive and taxonomical account and also aims to provide explanations. A legal analysis of court decisions, as explained in section 4.2, is therefore insufficient.[129] Merely relying on (national) court

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[121] Groenendijk 2015; Nowak et al 2011, 54; Jaremba 2012, 229–30; Prechal et al 2005, 25; Glavina 2020b; Leijon and Glavina 2020.

[122] Pavone 2018. Cf Jaremba 2016, 49; Hübner 2018.

[123] Wind 2010, 1053; Wind et al 2009, 283; Passalacqua 2021.

[124] Hoevenaars 2018; Stone Sweet and Brunell 1998, 88; Cichowski 2007.

[125] Conant 2006; Conant et al 2018; Vauchez and de Witte 2013; Nicola and Davies 2017; Stone Sweet 2004; Kelemen 2011.

[126] Pollack 2017, 582; Dehousse 1998, 47.

[127] Vauchez 2015; Rasmussen and Martinsen 2019, 261–62; Pollack 2017, 583; van Leeuwen 2018.

[128] Pavone 2020.

[129] Cf Mak 2013.

judgments might give the impression that the procedure functions flawlessly and that national courts are satisfied with the ECJ. The combination of legal research and semi-structured interviews (section 4.3) makes it possible to identify what national court judges actually *do* and *think*. The qualitative research design is best suited to capture 'more fine-grained' processes at the micro level and find out *why* judges refer (or not) and whether they appreciate the resulting ECJ judgments.[130] This section will first provide a justification of the selection of three states (section 4.1), before the methodology regarding the case law analysis and interviews is explained.

4.1 Selection of the Netherlands, Ireland and the UK

To answer the four research questions, a small number of countries were systematically examined. Such a small-N study is the most prevalent method in social science and comparative public law.[131] A most different systems design was adopted and three countries with a different approach to referring were selected: the Netherlands, Ireland and the UK.[132]

The choice of these three countries was based on a preliminary categorization of three groups of Member States based on the relative number of references per EU Member State in the period 2009–15 – namely, the number of references per million inhabitants.[133] It should immediately be noted that a reliance on numbers and referral rates is problematic. The number of references tells us very little. First, a high number of references is not necessarily a sign of a cooperative attitude;[134] it could also suggest that national courts merely treat the ECJ as a 'helpdesk', without investing time and energy in considering EU law questions themselves. A reference can also be made to challenge the ECJ or the content of specific EU rules (Chapter 7, section 4).[135] Second, in some EU Member States, the courts submit similar cases jointly; while in others, they are referred separately, as a result of which the number of referred cases

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130 Bennett and Elman 2006; Hall and Wright 2008.

131 Mahoney 2000.

132 Hirschl 2014.

133 Croatia, Poland, the UK, France, the Czech Republic, Greece, Sweden, Spain, Italy, Romania, Slovakia and Slovenia were in the group with relatively few references (0–0.9); Germany, Malta, Portugal, Finland, Ireland, Denmark, Lithuania and Hungary were in the group with 1–1.5 references; and Cyprus, the Netherlands, Bulgaria, Estonia, Austria, Belgium, Latvia and Lithuania were in the group with more than 1.9 references.

134 Vink et al 2009, 6.

135 Eg references by the UK and Dutch Supreme Court in relation to the Brussels I Regulation in Case C-185/07 *West Tankers* EU:C:2009:69; Case C-681/13 *Diageo Brands* EU:C:2015:471; Kramer 2019.

increases quickly.[136] The relative number of references is thus nothing more than a rough indicator. These figures were thus complemented by (anecdotal) information about the acceptance of EU law and the level of engagement with the ECJ in particular Member States. The official language in Member States was also an important additional consideration, as solid language proficiency is necessary to carry out a detailed legal analysis of actual judgments as well as the interviews.[137]

The following can be said about the approach towards the preliminary reference procedure in the three selected countries. The UK courts have made relatively little use of the preliminary reference procedure. Golub observed back in 1996 that UK judges are loath to refer.[138] By contrast, the Dutch courts refer a significant number of questions, in both relative and absolute terms, and are eager to engage with EU law.[139] Ireland is positioned somewhere in between the two. Fahey observed in 2007 that the Irish courts had yet to begin a dialogue with the ECJ, but the numbers since then show that the Irish courts have caught up and now rank in the middle.[140] While only 44 cases were referred in Ireland's first 30 years of EU membership (1973–2003), 45 references were made in the six years between 2013–18.[141] The latter partly reflects the fact that the position of EU law within Irish courts has been characterized as 'pro-Communautaire' and cooperative.[142]

4.2 The Legal Analysis of Judgments

The first important part of this research is the case law search, coupled with a qualitative analysis of national court and ECJ judgments. In all three Member States, all decisions (not) to refer in the period from 1 January 2013 to 31 December 2016 were analysed.[143] This does not mean that relevant developments prior to 2013 and after 2016 were not considered; but they were not

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[136] Broberg and Fenger 2013, 501.

[137] Mak 2013; language barriers were reported as an obstacle by van Gestel and de Poorter 2019, 108.

[138] Golub 1996, 368. Cf Broberg and Fenger 2013, 500.

[139] Claes and de Witte 1998; Broberg and Fenger 2013, 492; van Leeuwen 2018; Rasmussen and Martinsen 2019, 264–65.

[140] Fahey 2007, 142–43.

[141] Krommendijk 2020.

[142] Fahey 2007, 2; Maher 2018, 177–78 and 185; Butler 2017, 108; Collins 2018, 12–13.

[143] This period was chosen to examine the most recent situation possible, while also enabling the analysis of the answers of the ECJ and their implementation by the referring court. Cf van Gestel and de Poorter 2019, 60.

examined on a structured basis. In order to find all decisions (not) to refer,[144] a systematic search of case law databases with published judgments was conducted using carefully selected search terms.[145] By using search terms such as '267 TFEU' and '*CILFIT*', decisions (not) to refer were found in which the court explicitly considered that there was (no) reason to refer (see Table 1.1).

The disadvantage of this approach is that so-called 'silent cases', in which the court did not engage with the question of whether to refer, could not be retrieved easily.[146] Such judgments are obviously equally or even more interesting to consider, especially when a reference was appropriate but the court intentionally avoided the matter. To find silent cases, two strategies were adopted. First, the literature and legal commentaries were used to identify cases that had been criticized by scholars for non-referral. Second, in cases in which a higher or highest court made a referral, the prior decisions of the lower courts were also examined.[147]

This case law search yielded a selection of judgments. All cases were closely scrutinized in terms of the reasoning employed by the courts in relation to the question of whether to refer. To answer the question on follow-up and satisfaction, the national court's follow-up judgment was compared with the requested ECJ ruling in order to establish whether and how that court applied the ECJ judgment. Secondary literature and commentaries were useful in conducting this analysis because they often revealed criticism regarding the reasoning and approach of the ECJ and/or follow-up by the referring court.

4.3 Interviews and Their Limitations

A doctrinal legal analysis alone would have been insufficient to answer the four research questions, since court judgments are often silent on other relevant considerations and calculations beyond purely legal (formalist) reasons. Semi-structured interviews thus played an important complementary role in

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[144] The website of the ECJ (https://curia.europa.eu/) was used as a complementary source, since not all decisions to refer or orders for reference are published as judgments in national court databases.

[145] Searches conducted on www.rechtspraak.nl for '*prejudiciële vragen*', 'CILFIT' and '267 VWEU'; and on www.bailii.org for 'preliminary ruling', 'preliminary reference', 'CILFIT', '267 TFEU' and 'article 267' for the period 1 January 2013 to 31 December 2016.

[146] As a result of the case law of the ECtHR mentioned earlier, the number of such 'silent' judgments seems to have reduced. It seems that the highest courts have been more willing in recent years to provide detailed reasons as to why a reference is not necessary where one of the parties requested a reference as a result of the case law of the ECtHR.

[147] Arnull 2010, 73.

Table 1.1 Number of references, decisions not to refer and silent cases (2013–16)

Dutch courts	Number of references[1]	Decisions not to refer/ silent cases[2]
Council of State	22	74
Central Appeals Tribunal	13	16
Trade and Industry Appeals Tribunal	10	22
Supreme Court (SC)	49	75
• Tax Chamber SC	36	23
• Civil Chamber SC	12	33
• Criminal Chamber SC	1	19
Internationale Rechtshulpkamer	7	11
Courts of appeal	9	90
District courts	19	192
Total	**129**	**480**
UK courts		
Supreme Court	7	20
Court of Appeal	14	52
High Court	21	46
• Chancery	6	17
• Administrative/Queen's Bench	13	24
• Commercial	0	4
• Family	2	1
Upper Tribunal	7	21
• Immigration and Asylum	2	10
• Tax and Chancery	5	11
First Tier Tribunal (tax)[3]	13	15
Scottish Court of Session	1	9
Other courts and tribunals	4[4]	10
• Employment Appeal Tribunal	0	8
Total	**67**	**173**
Irish courts		
Supreme Court	8	6
Court of Appeal (since October 2014)[5]	4	7
High Court	8	29
Circuit courts	0	*
District courts	1	*
Other statutory tribunals[6]	2	*

Dutch courts	Number of references[1]	Decisions not to refer/ silent cases[2]
• Labour Court	1	*
• Tax Appeals Commission	1	*
Total	**23**	**42**

Notes:
1. Similar cases referred by the same court that were later joined by the ECJ were counted as one. In addition, the moment at which the court decided to refer was determinative and not the date of registration at the ECJ. These decisions could explain why the numbers differ from those in the ECJ's annual report (eg, 142 for the Netherlands instead of 129 and 65 instead of 67 for the UK). 2. Judgments involving the same (legal) issue and containing (roughly) identical substantive reasoning, but involving different applicants, were counted as one. Eg NL:HR:2014:279; NL: HR:2014:327; NL:HR:2014:329. 3. The only non-tax decision to refer was [2014] UKFTT EA_2013_0037 (GRC). 4. Employment Tribunal Birmingham (Case C-219/14EU:C:2015:745); Supreme Court of Gibraltar (Case C-267/16EU:C:2018:26); Industrial Tribunals (Northern Ireland) (C-182/13EU:C:2015:317); Scottish Land Court (C-335/13EU:C:2014:2343). 5. The Court of Appeal commences operations on 28 October 2014 and sits between the High Court and the Supreme Court. It was created with the aim of reducing the backlogs at the Supreme Court. 6. Other statutory bodies include the International Protection Appeals Tribunal, the Employment Appeals Tribunal and the Equality Tribunal (currently the Workplace Relations Commission). The former two have never referred, while the latter referred CaseC-363/12EU:C:2014:159.

distilling the 'true' appraisal of the answers from the ECJ in the national courts' follow-up judgments. Interviews were conducted with judges (and sometimes AGs or legal assistants) who did and did not refer (see Table 1.2). Interviewees were chosen on the basis of their involvement in both cases in which a reference was made and cases in which the court decided not to refer. To select the interviewees, an overview was made of every judge's involvement in these cases. Interviewing judges with no experience in referring ensured that a representative picture was provided. This prevented a common omission in research, whereby only stakeholders who are generally positively disposed towards a certain phenomenon are interviewed – in this case, judges who have referred a lot and are generally positive about their experience with the ECJ.[148] In both the UK and Ireland, supplementary interviews were also conducted with legal practitioners, due to the importance of the litigants' legal teams in framing the questions referred. These Euro-laywers were also able to reflect on the referral practice of national courts.[149]

Approval for the interviews was obtained in advance from the president of the court or the council for the judiciary. No permission was granted to interview judges in the UK aside from a collective written response from the

[148] Cf Bobek 2013a.
[149] Cf Pavone 2018.

Table 1.2 Overview of interviewees

Dutch courts	Number of interviews
Council of State	6
Central Appeals Tribunal	5
Trade and Industry Appeals Tribunal	5
Supreme Court (SC)	15
• Tax Chamber SC	8[1]
• Civil Chamber SC	7
• Criminal Chamber SC	0[2]
Internationale Rechtshulpkamer	2
Courts of appeal	6 (2 no reference experience)
District courts	16 (8 no reference experience)
Total	**54**
Irish courts	
Supreme Court	5
Court of Appeal	3
High Court	11 (5 no reference experience)
Circuit courts	1 (1 no reference experience)
District courts	1
Other statutory tribunals	3 (1 no reference experience)
Practising lawyers and academics	3 & 1
Total	**28**
UK courts	
Supreme Court	3
Practising lawyers	3
Total	6

Notes:
1. One interviewee served in both chambers. 2. Four interviewees with no reference experience were interviewed by Claassen in the context of his PhD (forthcoming in 2022).

Supreme Court and interviews with three former Supreme Court judges.[150] The relatively low number of interviews in the UK was not problematic, however, since the judgments of UK courts are relatively transparent about (non-legal) reasons not to refer and judges have been open in extra-judicial speeches and writings.[151] Almost all judges and court clerks who were approached for an interview were willing to cooperate.[152] Interviews took place between September 2016 and January 2018 (the Netherlands), between September and December 2018 (Ireland) and in March 2020 (UK). In order to protect the anonymity of interviewees, their names and identities have not been disclosed.[153]

Questions during interviews (see Box 1.1) were raised in an open way and were initially phrased in general terms. Judges were thus encouraged to discuss specific cases on their own initiative. Interviewees were subsequently questioned about specific cases that were identified during the doctrinal analysis and that had not been mentioned by the interviewees themselves. Hence, interviewees had the freedom to come up with motives and factors on their own initiative without being directed too much. At a later stage of the interview, interviewees were asked to reflect on motives discussed in the literature (section 3). They were also asked about their reasons not to refer questions in the silent cases that were criticized in the literature or that were subsequently referred by a higher court. This interview set-up – starting with open-ended questions, followed by more closed questions and probing – is in line with established social science methods.[154]

BOX 1.1 INTERVIEW QUESTIONS

1. Question: Which considerations play a role in decisions (not) to refer to the ECJ? What reasons (not) to refer are given in particular cases? How are the *CILFIT* exceptions interpreted and applied?

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[150] The reasons given by the Judicial Research Requests Office were that interviews are not a good use of judicial resources due to the fact that much of the information can be found in the judgments of these cases. In addition, the narrowness of the judicial selection means that cases are too easily identified.

[151] Arden 2010, 2014 and 2015; Arnold 2020; Mance 2011, 2013a, 2013b and 2015; Neuberger 2016; Reed 2014.

[152] One Irish judge interviewed withdrew from the study; three Irish candidates could not be contacted or did not respond; and one was unable to meet.

[153] A number between 0 and 100 was randomly selected for the interviews. Note that references to interview numbers are omitted when specific cases are discussed, because this would make it possible to trace the identity of the interviewees on the basis of the published judgments.

[154] Cf Bos 2020, 34.

2. Answer: What is your appraisal of the requested ECJ judgments? Is the reasoning of the ECJ sufficiently clear? Can ECJ judgments be applied easily in the national court case in order to resolve the dispute?
3. Follow-up: How have the ECJ judgments been complied with? Are there cases of incomplete follow-up, and why?
4. Feedback loops: To what extent are the expected answers of the ECJ taken into account when deciding (not) to refer?

There are obviously limitations to interviews as a research method, especially when it comes to determining (personal) motives.[155] Answers often constitute retrospective *ex post* rationalizations and it is often unclear whether the considerations really played an (important) role at the time of the decision making.[156] It may also be the case that interviewees give socially desirable answers and/or exaggerate or minimize the relevance of certain reasons because this better corresponds to their own (desired) self-image. Judges may also be reluctant to acknowledge that politico-strategic reasons played a role in their decision (not) to refer and may conceal their engagement in such strategies. Such strategies could conflict with their self-perception or professional ethos as an independent judge who decides purely on the basis of the law. Despite the secrecy of judicial deliberations, interviewees were relatively open, seemed honest and were willing to discuss individual cases. This reflects the experience of van Gestel and de Poorter in interviewing judges in ten supreme administrative courts.[157] Questioning and probing interviewees about specific cases and judgments forced some judges to backtrack on their initial overly positive views.[158]

In order to mitigate these problems, the following strategies were adopted. First, a recent time period (2013–16) was chosen, to assist interviewees in accurately reconstructing the actual considerations at the time of decision making. Second, interviewees were encouraged not to reflect on motives in general and *in abstracto*, but always to give concrete examples and/or reflect on specific judgments that were identified during the legal analysis. Third, ideally, more than one judge involved in a particular important case was interviewed in order to cross-check certain pronouncements. This proved especially feasible for judgments of the highest courts with a chamber of five judges. Fourth, an attempt was made to 'triangulate' the data obtained from the

[155] 'Asking someone to identify his or her motive is one of the worst methods of measuring motives', Epstein and King 2002, 93.
[156] Cf Bos 2020, 43.
[157] Cf experience with interviewing judges in the Supreme Administrative Courts by van Gestel and de Poorter 2019, 107.
[158] Cf Bobek 2013a, 72.

interviews as much as possible with other sources, such as court judgments, extra-judicial speeches and writings of judges, and secondary literature.[159]

5. INTRODUCTION TO THE THREE SELECTED MEMBER STATES

Before delving into the practice in the three selected countries, it is important to provide some context and background regarding the legal systems in these countries. This short overview reveals that comparisons between them are often difficult to make. In the Netherlands, there are three levels within the judicial hierarchy: the Supreme Court and three different supreme administrative courts; four courts of appeal; and 11 district courts. The highest administrative courts are second-line courts of fact, while the Supreme Court is the third-instance cassation court, which examines questions of law only. The Dutch Supreme Court also functions differently from the UK and Irish Supreme Court, in that it grants permission to appeal only when a case involves 'an arguable point of law of general public importance'.[160]

The situation is more complicated and confusing in Ireland, and especially in the UK, as there are more court levels and a wide variety of courts and tribunals.[161] It is difficult to compare these multiple levels to the Dutch situation. In Ireland, there are at least five levels: the Supreme Court; the Court of Appeal; the High Court; eight circuit courts; and 23 district courts; plus several statutory tribunals that do not 'traditionally fit into the judiciary'.[162] The UK also has several lower courts – crown, magistrates, county and family courts, including highly specialized upper and first-tier tribunals – beyond the three superior or intermediate appellate courts (the Supreme Court; the Court of Appeal; and the High Court). What further complicates the UK system is that it does not have a single unified legal system, but consists of three systems: England and Wales, Scotland and Northern Ireland. The UK Supreme Court, which replaced the House of Lords as of 1 October 2009, sits above all three in most cases as the ultimate court of appeal.

There is a considerable difference between the Netherlands on the one hand and Ireland and the UK on the other, in terms of the ratio between references of the highest and lowest courts. Just 35 of 129 (27 per cent) Dutch references in the four-year period came from the lower courts. These figures suggest that the highest courts take the lead in the Netherlands. All of the four highest

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159 *Ibid*.
160 Feteris 2017, 157; Mak 2015.
161 www.judiciary.uk/about-the-judiciary/the-justice-system/court-structure.
162 Butler 2017, 109.

Dutch courts are repeat players in the preliminary reference procedure and have become important interlocutors of the ECJ. For all three of the highest administrative courts, EU law plays an important role in the areas over which they have jurisdiction: economic public law (the Trade and Industry Appeals Tribunal); migration (the Administrative Division of the Council of State); and social security (the Central Appeals Tribunal). The Tax Chamber of the Supreme Court is the most active Dutch court in terms of the absolute number of references and also refers frequently compared to other European tax courts. The Civil Chamber is also increasingly confronted with EU law, especially in the fields of intellectual property (IP), consumer law, competition law and private international law. The Criminal Chamber is the sole exception in this picture, given the limited number of references and, as will be discussed later, its reluctance to engage with the ECJ.

By contrast, 15 out of 23 (65 per cent) of Irish references and 60 out of 67 (90 per cent) UK references were made by 'lower' courts other than the highest Supreme Court, especially the Court of Appeal and the High Court and, in the case of the UK, also several specialized (tax) tribunals. The lower number of Supreme Court references in the UK and Ireland is unsurprising, considering the leave to appeal system and the relatively low number of cases that these courts handle on a yearly basis. In sum, one should be careful when comparing mere numbers, because the differences in these judicial systems as discussed above mean that one would quickly end up comparing apples and oranges.

2. Legal formalism versus pragmatism

1. INTRODUCTION

Many legal scholars would be unsurprised by the statement that in deciding whether to refer, courts are merely applying the law. For them, it is a given that courts refer to the ECJ in an effort to comply with their obligations under EU law as set out in the Treaties. Adopting a legal-formalist perspective, one would emphasize that courts conduct a legal assessment of the clarity of the question of EU law and aim to abide strictly by the *CILFIT* requirements. Most judges interviewed emphasized that a referral is made simply because there is uncertainty regarding the meaning of a particular provision – for example, because it is used in contradictory ways in the EU rules or has not yet been interpreted by the ECJ.[1] One example is the case of *Zh and O*, in which it was unclear whether there were differences in the interpretation of 'public order' for EU citizens and third-country nationals.[2] Much of the politically inspired research to date fails to acknowledge that most of the questions referred entail rather 'boring' legal technicalities – for example, the tariff classification of goods or undefined terms in EU legislation – instead of politically sensitive issues on which national law is not in line with EU law. The judges interviewed also emphasized this point. Many held that the main reason to refer is that it is too difficult for the national court to decide a legal question. One illustration of this legal-formalist logic is the reference made in *Nutricia.* The UK High Court held that there was real doubt as to the meaning of the term 'food for medical purposes'. It noted that the definition was very broad and imprecise, and was 'susceptible to a number of differing interpretations'. It subsequently pointed to more than a handful of terms with a multiplicity of meanings.[3] Another example is the technical case of *Nannoka Vulcanus Industries*, where the Dutch Council of State was confronted with a legally complex annex to Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations.

1 Interviews 10, 43, 66, 72, 83, 89, 91, 208. Cf Fusco 2015, 1535.
2 Case C-554/13 *Zh and O* EU:C:2015:377.
3 *Nutricia Ltd v The Secretary of State for Health* [2015] EWHC 2285 (Admin), paras 20 and 213; Case C-445/15 *Nutricia* EU:C:2016:106.

The legal questions about the meaning of, among other things, the concepts of 'time extension' and 'installation' were simply too difficult for the Council to grasp on its own.[4]

This legal view has been supported by scholars and judges alike, who have emphasized that courts are pragmatic and refer (or not) in order to solve a dispute efficiently. Several (lower) courts pay little attention to the question of whether they are obliged to refer and simply reason along the following lines: 'we are not able to reach a decision on this appeal without further guidance from the ECJ'.[5] Courts thus decide whether a reference is 'worth the effort' and weigh different considerations, including the importance of the question and expected delays. From this perspective, it is unsurprising that courts are generally reluctant to refer and adopt a pragmatic reading of *CILFIT*.

This chapter shows that there is a fine line between legal formalism and pragmatism. It is a spectrum across which courts and judges operate differently, depending on the case at hand. Chambers and judges within courts also have different perspectives; and it is a fiction that courts, as such, can be reduced to being purely formalist or pragmatic. This is nonetheless what this chapter will assume, not least for the sake of readability. Section 2 primarily focuses on courts that, overall, strictly adhere to the Article 267 framework and *CILFIT*, such as the Irish Supreme Court and the two Irish intermediate appellate courts (the Court of Appeal and the High Court), as well as the Dutch Supreme Court (except the Criminal Chamber). Section 3 discusses the lower courts in all three jurisdictions, as well as the UK Supreme Court and the Dutch highest administrative courts. This division implies that the situation is very much black and white among the various levels. In reality, there are obviously grey areas and nuances among the courts. The different courts have been chosen to highlight the differences and show that both perspectives inform various parts of the referral practice.

2. LEGAL FORMALISM: CONSCIENTIOUS COURTS

2.1 Natural Conscientiousness: Contributing to the Development of EU Law

One explanation for the differences in the number of references between EU Member States and the decisions of individual national courts to refer is the court's responsibility for the correct application of EU law, as well as the

[4] Case C-81/14 *Nannoka Vulcanus Industries* EU:C:2015:575; Interview 91.
[5] *Invamed Group Ltd & Ors v HMRC* [2015] UKFTT 113 (TC), para 223.

desire to contribute to the development of EU law.[6] Most Dutch Supreme Court judges mentioned the obligation to refer under Article 267 TFEU as an essential aspect of their decision to refer.[7] Dutch Supreme Court judges referred – sometimes multiple times in one interview – to the Supreme Court's '(natural) loyalty' and its 'conscientiousness'.[8] This responsibility was mentioned less often by some Dutch highest administrative court judges and especially UK judges. This is not to say that the latter disrespect their obligation to refer; but as will be discussed in section 3, these more pragmatic judges pointed to a 'natural reluctance' to refer.

Closely related to the conscientious application of EU law and Article 267 TFEU is the desire to contribute to the development of EU law. Several Dutch Supreme Court judges mentioned this as a general consideration in their decision to refer.[9] One judge, for example, noted: 'You are not here for yourself, but also for the rest of Europe.'[10] He/she mentioned that the Supreme Court judges widely share the view that it is important that EU law achieve its full potential. According to him/her, the delay of 1.5 years as a result of a reference should be taken for granted and is 'the price that is paid' for participation in the EU system.[11] Another interviewee referred to the 'sense of responsibility' and the role of the Supreme Court as a 'wheel in the gear chain' of the European legal order; while another stressed the importance of the uniformity of EU law and the need to avoid divergences in the interpretation of EU law across Member States ('one of the most severe sins').[12] A few Dutch highest administrative court judges also made similar remarks about the need to contribute to the development of EU law, but noted at the same time that the primary purpose of the procedure is to resolve disputes.[13] As will be outlined in section 3, most judges of the highest administrative courts tend to avoid making a reference and prefer to decide cases themselves.[14]

Compared to the Dutch and Irish Supreme Courts, the UK courts do not appear to be as anxious to contribute to the development of EU law so that it achieves its full potential. Instead, there are concerns about far-reaching intrusions by the EU into the common law system and a desire to preserve the national system (see Chapter 4, section 2). In addition, there is a strong

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6 Alter 2002, 230; Hübner 2018; Weiler 1994, 520.
7 Interviews 41, 45, 48, 59, 75 and 87.
8 Interviews 15, 27, 34, 41, 59, 75, 78 and 87.
9 Interviews 27, 41, 48, 59 and 87; Feteris 2017, 158.
10 Interviews 27 and 41.
11 Interview 27.
12 Interviews 59 and 41.
13 Interviews 10, 12 and 39.
14 Interviews 5, 10, 24, 44, 66, 77 and 89.

desire in the UK Supreme Court to interpret EU law by itself. Lord Reed, for example, pointed to the Supreme Court's 'own responsibility to uphold our constitution' and mentioned Article 4(2) of the Treaty on European Union (TEU) on national identities.[15] According to Reed, the fact that apex courts 'patrol' the limits of EU law is a good thing.[16] There is a desire to contribute to the EU legal system, but primarily as a way to exercise influence and preserve the UK legal system. Lady Justice Arden, for example, stressed the need for national courts to 'assert themselves if they are going to stand any chance of influencing the development' of EU law.[17] She added:

> [I]t is my firm view that in order to retain the integrity of our own legal system we must ensure that our domestic law is properly understood in Europe and that we are able to influence EU law's development. … English law is a valuable asset which we should use to best advantage.[18]

As will be discussed in section 3.4, the UK courts are aware of the importance of ensuring the uniformity of EU law, but primarily as a domestic commercial interest.

2.1.1 Highest courts: strict application of *CILFIT*

Those courts that feel a responsibility to ensure the correct application of EU law have, by and large, applied *CILFIT* strictly. This stands in contrast to the Dutch highest administrative courts and the UK Supreme Court, both of which applied a 'lighter test' than *CILFIT* and argued that it is not necessary to refer immediately if there is some doubt about the interpretation of EU law (section 3.2). Dutch and Irish Supreme Court interviewees did not agree and sometimes vehemently rejected this suggestion.[19]

The Irish Supreme Court has adhered strictly to *CILFIT* in recent years, as was acknowledged by Irish lower court judges and other interviewees.[20] One Irish Supreme Court judge stated that the Supreme Court is 'very, very cautious' in case of any doubt.[21] Another judge observed, '[B]y and large, when we think it is referable, off it goes' – even if the majority of judges think that a reference is not required.[22] This caution was attributed to some unanticipated replies by the ECJ that diverged from the (outvoted) majority which initially

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15 Reed 2014, 11 and 15.
16 *Ibid*, 15.
17 Arden 2015, para 20.
18 *Ibid*, paras 23 and 27.
19 Interviews 15, 34, 41, 48 and 78.
20 Interviews 106, 126, 136, 139, 144, 146, 148, 155 and 191.
21 Interviews 105. Cf Interviews 113, 128, 152 and 181.
22 Interview 113.

were against a reference.[23] When confronted with the pragmatic application of *CILFIT* by some of the Dutch highest administrative courts, one Supreme Court judge noted: '[W]e have to err on the side of caution.'[24] If one or two of the five judges think that a reference is necessary, the court tends to refer out of 'internal respect'.[25] It is perhaps unsurprising that one judge acknowledged that the court may well refer too often and argued: 'The European system cannot continue to insist that everyone is as loyal as we are, otherwise the ECJ would be swamped by cases.'[26]

One good illustration of the cautious approach of the Irish Supreme Court is *James Elliott Construction*, concerning the EU legal status of harmonized technical standards for construction products and their relevance in contractual relationships between two private parties. The Supreme Court discussed *CILFIT* extensively in its decision to refer.[27] The Court decided to refer in order to err on the side of caution.[28] There was a feeling that the Supreme Court could have decided the questions itself and would have reached the same conclusion as the CJEU. It nonetheless felt obliged to refer in the light of the *CILFIT* test, even though the delay caused by the referral had negative consequences for the housing company involved.[29] One interviewee explained that this case was referred because one learned academic ('who could not be dismissed as being simply extreme or provocative') had stated that there might be an incompatibility with EU law. This possibility could not be excluded altogether.

Dutch Supreme Court judges generally reasoned in the same way, with the exception of those in the Criminal Chamber. One Dutch Supreme Court interviewee cautioned: 'You should not think too quickly that we can decide ourselves with five sensible persons.'[30] The same judge held, in response to criticism of the referral of the relatively straightforward case of *Massar*, that the concern is that an EU law expert might subsequently criticize the Supreme Court for non-referral (see Chapter 4, section 3).[31] Another judge proposed a strict application and suggested, in line with *CILFIT*, that the Supreme Court

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[23] This happened in as least three cases – Case C-164/17 *Grace and Sweetman* EU:C:2018:593, Case C-413/15 *Farrell* EU:C:2017:745 and Case C-428/15 *D.* EU:C:2016:819; Interviews 152 and 181.

[24] Interviews 128 and 152. Cf Interview 105.

[25] Interview 152.

[26] Interview 113.

[27] *James Elliot Construction v Irish Asphalt Ltd* [2014] IESC 74, paras 154–59, 184; Case C-613/14 *James Elliott Construction* EU:C:2016:821.

[28] Interview 128.

[29] Interview 113.

[30] Interview 27.

[31] Case C-460/14 *Massar* EU:C:2016:216; Interview 27.

should be 'convinced' that there is no doubt about the interpretation of EU law. He/she rejected the logic of some highest administrative court judges that no reference is needed where the question is 80 per cent *clair* and argued that the *CILFIT* criterion is not whether the court can come up with a solution itself.[32] The Supreme Court hence prefers to play it safe. This strict application is also reflected in the generally low number of case law comments and articles criticizing the Dutch Supreme Court for non-referral.[33] The Tax Chamber is even more faithful to *CILFIT* than the Civil Chamber. The Tax Chamber does not necessarily first consider whether the case can be disposed of on other (national) grounds before applying the *CILFIT* test. One judge interviewed indicated that even if the question can be dealt with nationally, the court will still ask, 'Do we want that?' and 'How sure are we about our interpretation?'[34] The Tax Chamber also examines a wide variety of sources on its own initiative to establish whether there is doubt, such as the decisions of courts in other EU Member States, different language versions of EU legislation and German and French legal literature.[35] Examples of references on the side of caution involve customs classification cases such as *Sonos* and *Sprengen*, which respectively concerned standalone devices that stream and amplify sound and devices that store and reproduce multimedia files on a video monitor.[36] The Tax Chamber decided to refer both cases even though the two courts of first instance and the AG were aligned. One could thus argue that the answer to the legal question was clear. This was also suggested by a lower tax court judge, who mentioned that the ECJ subsequently responded with the implicit message, '[A]re you there already again?' because the ECJ handled the references with a three-judge formation without an AG Opinion.[37] There has recently been a slight change in the thinking of (some) tax law judges, who are advocating for a more pragmatic application of *CILFIT* and calling for more 'courage' in interpreting EU law themselves.[38]

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[32] Interview 82.

[33] The more faithful approach of the Supreme Court does not mean, however, that there are no cases which were not referred to the ECJ, but should have been. One example relates to litigation cost orders in IP cases, Vrendenbarg 2018, 220–223. Cf Interview 48; *Knooble/Staat and NNI* NL:PHR:2012:BW0393, para 5.10. Another exception relates to the distinction between 'infringements by object' and 'infringements by effect' in competition law, Case C-226/11 *Expedia* EU:C:2012:795; Claassen 2019.

[34] Interview 30. Cf Interview 34.

[35] Interviews 15, 30, 33, 34 and 82.

[36] Case C-84/15 *Sonos* EU:C:2016:184 and Case C-97/15 *Sprengen* EU:C:2016:556.

[37] Interviews 35 and 65.

[38] Interviews 30 and 78; Eg NL:HR:2018:862.

There are various explanations for the cautious approach and strict application of *CILFIT* by the Civil and Tax Chambers of the Dutch Supreme Court and the Irish Supreme Court. First, both courts handle a relatively small number of cases, an even smaller number of which involve EU law questions. For example, the judges interviewed from the Civil Chamber of the Dutch Supreme Court suggested that out of an average of 500 cases per year, an estimated 10 per cent have an EU law dimension. Even fewer cases raise the issue of whether to ask questions, because in many cases there are no ambiguities about the interpretation of EU law.[39] The relatively small case docket of these courts can be contrasted with the caseload of the Dutch Council of State and the Criminal Chamber of the Dutch Supreme Court. Some interviewees noted that the Council of State could potentially refer as many as five questions a week.[40] The Council of State is consequently forced to operate pragmatically and refer only when this is strictly necessary.

A second explanation for the strict application of *CILFIT* by the Dutch Supreme Court is the role of the AGs. It is obviously more difficult for a court to argue that a reference is not necessary where the AG determines that the matter is not *clair*. It is therefore unsurprising that interviewees acknowledged that the AG's conclusion that an issue should be referred plays an important role and is sometimes even more important than the submissions of the parties.[41] In nine of the 12 references of the Civil Chamber in 2013–16, the AG advised the court to refer. In two cases, the AGs advised the court not to refer, since these cases concerned interlocutory proceedings.[42] The Civil Chamber decided on only four occasions not to follow up on the advice to refer. All four decisions not to refer are rather uncontroversial and were not subject to (much) criticism in the legal literature. One was referred to the Benelux Court instead of the ECJ.[43] In two others, the question of EU law was not decisive or did not need to be addressed; while in another case the AG 'merely' recommended follow-up questions after the ECJ judgment in *Makro*.[44]

A third explanation as to why the Tax Chamber adheres to *CILFIT* so strictly is to prevent lower courts from being tempted to refer. This explanation is consistent with the inter-court competition model of Alter which posits that the highest courts have an interest in limiting references from lower courts

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39 Interviews 23, 27 and 75; Polak 2009, 103.

40 Interviews 27 and 59.

41 Cf Polak 2009, 107; Interviews 15, 27, 41 and 87.

42 *Connexxion Taxi Services* NL:PHR:2014:2001, para 5; *Synhton* NL:PHR:2016:866, para 4.29.

43 *Montis Design* NL:PHR:2013:1864, paras 5.20–5.23.

44 AG Verkade in NL:PHR:2013:114, para 4.15; Case C-324/08 *Makro* EU:C:2009:633.

(see Chapter 4, section 3).[45] There have been few references by Dutch lower court judges in the tax law area.[46] The caution of the Tax Chamber can be attributed to the famous *Van der Steen* incident. The Supreme Court failed to refer the question as to whether a natural person carrying out all work in the name and on behalf of a company is himself or herself a taxable person within the meaning of the Sixth VAT Directive. The Amsterdam Court of Appeal subsequently referred this question to the ECJ.[47] The fact that the 'lower' court of appeal had to make up for an error of the Supreme Court was widely seen as an embarrassing episode that should be avoided in future. This explanation coincides with recent studies which indicate that the highest courts have reclaimed control from the lowest courts in relation to the application of EU law and references to the ECJ.[48]

2.1.2 Lower courts: *de facto* obligation to refer

Lower courts are not obliged to refer on the basis of Article 267 TFEU, as discussed in Chapter 1, section 2. One would thus expect a discussion of their referral practice to take place in the following section on pragmatism. Nevertheless, in particular Irish intermediate appellate courts, such as the Court of Appeal and the High Court, have sometimes applied the *CILFIT* criteria in the same way as the Irish Supreme Court. The fact that they have merely discretion, and no obligation, to refer thus matters less to them. One High Court judge even suggested that where there is doubt about the interpretation of EU law, the High Court is obliged to refer, in order to avoid a unilateral and possibly incorrect interpretation.[49] There is a widely shared feeling among Court of Appeal judges that the court is *de facto* obliged to refer, regardless of the possibility to appeal to the Supreme Court.[50] The Court of Appeal regards itself as the final court in the sense of Article 267 TFEU, because of the very limited grounds to appeal in practice.[51] Two judges, for example, noted that the Court of Appeal 'must' make a reference because it cannot assume that

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45 Alter 1998, 242; Pavone and Kelemen 2019.

46 Lower courts made two tax law references in 2013–16 and seven references in the field of customs. Six of these seven questions dealt with the validity of EU law which gives rise to an obligation to refer on the basis of Case C-314/85 *Foto-Frost* EU:C:1987:452.

47 Case C-355/06 *Van der Steen* EU:C:2007:615.

48 Arnull likewise observed that the UK Supreme Court has engaged with the ECJ in order to prevent it from being marginalized by lower courts' direct dialogue with the ECJ. Arnull 2010, 80; Dyevre et al 2020; Pavone and Kelemen 2019.

49 Interview 161.

50 Interview 108.

51 Since the Court of Appeal commenced operations, the Supreme Court has increasingly become a true Court of Final Appeal with a low number of appeals,

the case will go to the Supreme Court, so the Court of Appeal will most likely be the final court of appeal.[52] One Court of Appeal judge argued that where there is a real question of EU law, 'we should go to get a definitive view'; while another acknowledged that 'we look with *CILFIT* eyes', even though the Court of Appeal is not bound to refer.[53] For example, the Irish Court of Appeal referred *Mahmood*, about delays in the processing of visa applications of family members of EU citizens. The court held that its question had 'not yet … been directly considered by the Court of Justice'. It also pointed to doubts as to the arguments given by the minister for justice and equality and the absence of an *acte clair*.[54]

The way in which the Dutch and UK lower courts have used their discretion to refer will be discussed in section 3.3, since they primarily highlighted their discretion to refer in judgments and interviews. There have been some UK judgments that tend towards the current position of the Irish Court of Appeal and High Court. The famous position of Sir Bingham in *ex parte Else* is exemplary. He limited the complete discretion for lower courts and determined:

> [I]f the facts have been found and the EU law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself, the national court must be fully mindful of the differences between national and EU legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the EU and of the great advantages enjoyed by the Court of Justice in construing EU instruments. If the national court has *any real doubt* it should ordinarily refer.[55]

The 'complete confidence' test is arguably more difficult to fulfil than the *acte clair* test in *CILFIT* ('so obvious as to leave no scope for any reasonable doubt'), and can thus be said to encourage lower courts to refer more quickly. One good illustration is the reference of the High Court in *Rosneft* on the basis that it could not be confident that all EU courts would adopt the same conclusions, especially because of the differing views of the authorities in various Member States.[56] UK (intermediate appellate) courts nonetheless do

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Geoghegan 2017, 28. A reference was 'required' in *Danqua v Minister for Justice* [2015] IECA 118 (Hogan J), para 43.

52 Interview 166, 174. Cf Interview 191.

53 Interview 108, 174.

54 *Mahmood & Anor v Minister for Justice* [2018] IECA 3 (Hogan J), para 61.

55 Sir Bingham in *R v International Stock Exchange ex parte Else Ltd* [1993] QB 534, 545D.

56 *PJSC Rosneft Oil Co v HMRC* [2015] EWHC 248 (Admin), paras 30–31. Cf *McCarthy & Ors, R (on the application of) v SSHD* [2012] EWHC 3368 (Admin), paras 110 and 112.

not go as far as their Irish counterparts in seeing themselves as *de facto* the highest courts and therefore obliged to refer, as will be further discussed in section 3.3.[57]

2.2 Pragmatism: Pragmatic Courts

The courts that have not applied *CILFIT* strictly – such as the Dutch highest administrative courts, the Dutch lower courts and (almost) all UK courts – have primarily observed pragmatic considerations in their decisions (not) to refer. The more pragmatic application of *CILFIT* also allows for other considerations to be taken into account and shifts the question of whether a reference is required to a question about whether it is appropriate to refer. Lady Justice Arden, for example, considered in *Sanneh* that it would not be 'right' to refer, even though the answers were not *acte clair*.[58] Lord Phillips reasoned similarly in *Abbey National* and found the issue not to be *clair*, but held that 'it would not be appropriate to refer'.[59] The decision on whether a reference is appropriate involves pragmatic considerations that act as a filtering mechanism which prevents those courts from referring all questions that may arise too quickly. These include, for example, case-specific reasons that relate to the importance of the questions concerned (section 3.4) and efficiency reasons concerning the consequences of referring in terms of the delay (section 3.5).

2.2.1 Natural reluctance

All national court judges exhibit a general initial reluctance to refer – even the 'conscientious' courts discussed in the previous section. This reluctance is strongest in the UK courts and the Dutch highest administrative courts.[60] The same holds true for most lower court judges in all three countries. Lord Neuberger, for example, noted in one case that had the issue been determinative, he would have 'very reluctantly' concluded that a reference was needed.[61] Lord Carloway, lord president of the Scottish Court of Session, similarly noted that his court was 'anxious, whenever possible, to resolve disputes which

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[57] However, 'if I had found the issue was not acte clair, the fact that I am considering the case at the level of the Upper Tribunal would not matter', *Lim v Malaysia* [2013] UKUT 437 (IAC), para 32.

[58] *Sanneh & Ors v SSWP* [2015] EWCA Civ 49, paras 125 and 172.

[59] *Office of Fair Trading (OFT) v Abbey National plc & Ors* [2009] UKSC 6, para 91 (Lord Phillips).

[60] Heyvaert et al 2014; Golub 1996.

[61] *Office of Fair Trading (OFT) v Abbey National plc & Ors* [2009] UKSC 6, para 120 (Lord Neuberger).

involve aspects of EU law without troubling the ECJ'.[62] Several of the Dutch highest administrative court judges have likewise held that there is no need to instantaneously refer in case of the slightest doubt about the interpretation of EU law. Otherwise, a reference would be made on a weekly basis, especially in fields such as migration.[63] Judges from the Dutch Trade and Industry Appeals Tribunal observed in a similar vein that an estimated 80 per cent of cases deal with EU law, and it would thus be unfeasible always to refer in case of doubt.[64]

There are several explanations for the reluctance of these courts to refer. First, the consequences of referring, in terms of the costs and the impact both on the parties and on other cases, are significant. Judges are aware that references are time consuming and expensive, as a result of which a reference is made only when really necessary.[65] One Dutch judge, for example, stated that formulating a preliminary reference is as difficult as answering it.[66] The UK Court of Appeal also applies a high threshold in order to justify 'an expensive and time consuming reference'.[67] There is a desire not to introduce an extra stage to the proceedings and impose delays on the parties, as well as to avoid other cases being put on hold (section 3.5).[68]

Second, referring a case to another higher international court can run counter to judges' professional attitudes. The first instinct of judges of the Dutch highest administrative courts is to resolve disputes and decide themselves. One UK judge suggested that it is 'frustrating to send it off for someone else to decide', not least because you are 'wasting' the time of the other court.[69] This was also noted by a UK barrister, who stated that the fundamental attitude of judges is to 'go for it' themselves.[70] He/she also suggested that the training of UK judges discourages them from asking for help unless they are absolutely unsure. He/she noted that this is strongly ingrained in the minds of UK judges, while continental judges might have more of a civil service mentality and a heightened sense of hierarchy.[71] Lord Mance reasoned, in a similar fashion, that 'judges are trained to make up their own mind', which 'can impart a beguilingly dangerous certainty'.[72]

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62 *Sanneh & Ors v The Secretary of State* [2018] CSIH 62, para 30. Cf Rodger 2017.
63 Interviews 5, 10, 18, 44, 66, 72, 77, 81 and 89. Cf Bobek 2020, 89.
64 Interviews 31, 32, 66, 69 and 89; Sevenster and Wissels 2016, 90.
65 Interviews 24, 39, 66, 81 and 264.
66 Sevenster 2011, 301.
67 *Bloy & Anor v Motor Insurers' Bureau* [2013] EWCA Civ 1543.
68 Interviews 14, 39, 83 and 264; Sevenster and Wissels 2016, 90.
69 Interview 231.
70 Interview 276.
71 *Ibid*.
72 Mance 2013a, para 25.

Third, there appears to be a general concern about the workload of the ECJ. However, the real question here is whether national judges are sincerely concerned about this issue or whether they are rather using it as a fig leaf to avoid a reference. It is likely that the answer is a combination of both. Some judges interviewed noted that a reluctance to refer is also in the interests of the ECJ itself.[73] One Dutch judge observed that if all judges in the EU were to make the same amount of references as Dutch judges, the ECJ would be overburdened.[74] The UK judges who were interviewed were also conscious of not overloading the ECJ and 'not wasting someone else's time'.[75] One UK judge suggested that the ECJ had sent an 'unofficial message' of 'only referring if you really have to'.[76] Another UK judge maintained that the ECJ would be surprised if *CILFIT* were taken literally; if the ECJ really meant what it said, this would lead to a huge amount of cases.[77] Lord Reed argued that a reference 'cannot be made whenever a point of EU law arises, without bringing the system to its knees'.[78] He considered it a 'mistake' to do so, even where it is not obvious how a case should be decided.[79] The workload of the ECJ was mentioned in several UK judgments as a reason not to refer.[80] A similar reason not to refer, which the High Court cited in *Tomanovic*, was the 'use of the Court's resources'.[81] Interviews conducted with Swedish judges likewise revealed that the fear of overburdening the ECJ discouraged references.[82]

There is a fourth explanation for the reluctance of UK courts in particular to refer: the rather negative views about the procedure as a result of (previous) references. As will be discussed further below, there has been a growing tendency to 'shield' references from the ECJ as a result of negative feedback loops (see Chapter 4, section 2 and Chapter 8, section 1.4). Lord Millett sees referring as 'a required duty rather than an attempt to achieve any meaningful understanding of EU law' – not least because he 'never quite knows what to ask' to get the details of EU law.[83] Other judges interviewed by Littlepage

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73 Interviews 5 and 18; Sevenster 2011, 299.
74 Interview 18.
75 Interviews 208 and 231 respectively.
76 Interview 231. Cf Arden 2015, para 16.
77 Interview 264.
78 Reed 2014, 2. Cf Mance 2013a, para 25.
79 Reed 2014, 6.
80 Eg *European Federation for Cosmetic Ingredients v The Secretary of State for Business, Innovation and Skills and Attorney General* [2014] EWHC 4222 (Admin), para 28; *Daimler AG v MOL (Europe Africa) Ltd & Ors* [2019] EWHC 3197 (Comm), para 132.
81 *Tomanovic & Ors v The European Union* [2019] EWHC 263 (QB), para 92.
82 Leijon 2020; Leijon and Glavina 2020.
83 Interviewed 10 December 2012 as quoted by Littlepage 2014, 205–06.

in 2012 discussed the procedure in similar terms.[84] That said, not all judges interviewed were or openly and overtly resistant to the ECJ; one UK judge ('an admirer') applauded the 'beauty of the system', which he/she considered 'first class'. He/she came to this realization as a result of several cases before the House of Lords about the Warsaw Convention and the liability of airline carriers, in relation to which there is no international court that could provide a definitive interpretation that would be binding all Member States.[85]

2.2.2 Highest courts: pragmatic reading of *CILFIT*

The reluctance to refer has resulted in two interrelated phenomena: a pragmatic or reasonable reading of *CILFIT*; and a preference for resolving the dispute on other (national) grounds in order to avoid a reference.

With respect to the former, the UK Supreme Court and the Dutch highest administrative courts have adopted a pragmatic reading of *CILFIT*. Several Dutch judges, for example, proposed a 'lighter test' than *CILFIT* and held that where the question is 75–80 per cent *clair*, there is no need to refer.[86] The question is not only whether there is doubt, but also whether the reference is 'worth the effort'.[87] Some highest administrative court judges even acknowledged that they (implicitly) apply the less strict *Köbler* 'test' in order to prevent a non-referral from giving rise to state liability 'in the exceptional case where the court has manifestly infringed the applicable law'.[88] Likewise, the UK Supreme Court recently stipulated that it does not adopt 'a mathematical approach to whether something is or is not *acte clair* or *acte éclairé*'.[89] It has sometimes held that where the court is unanimous, this means that the point is *clair*.[90] One former UK Supreme Court judge made similar arguments to

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[84] *Ibid*, 206.

[85] Interview 208.

[86] Council of State judges referred to the test of whether the matter is 'sufficiently, albeit not entirely but to a considerable extent, *clair* or *éclairé*', Interviews 44 and 72; Sevenster and Wissels 2016, 91. Eg NL:CBB:2017:179, para 4.7.

[87] Interviews 18, 44 and 72; Sevenster 2011, 297.

[88] Interviews 10 and 18; Case C-224/01 *Köbler* EU:C:2003:513, para 53. Note that some AGs of the Civil Chamber also rely on this test in some opinions. Eg *Stichting Brein* NL:PHR:2015:729, para 2.1.34.

[89] Written response 15 April 2020.

[90] *Office of Fair Trading (OFT) v Abbey National plc & Ors* [2009] UKSC 6, para 49; *A (Children), Re (Rev 1)* [2013] UKSC 60, para 94. There have been instances in which a minority regarded the matter as not *clair*, which caused the Supreme Court to refer. In *Aventis Pasteur*, it was the insistence of Lord Rodger that the matter was not clear that caused the reference. He was proven right by the ECJ judgment. *OB v Aventis Pasteur SA* [2008] UKHL 34, paras 23–25. See also *Dermod Patrick O'Brien v Ministry of Justice* [2017] UKSC 46, para 20; *SSHD v Franco Vomero* [2016] UKSC 49, para 27. Fusco 2015, 1535.

the Dutch administrative court judges and held that the question is 'whether it is a point in relation to which reasonable minds or courts might differ', and whether 'it is a runnable case in the ECJ'; thus, there is no need to refer 'when we are sufficiently confident that we know the answer that the ECJ adopts'.[91] Another judge pointed to the 'slightly imprecise and elusive' nature of the test and noted that it is essentially about 'testing our own confidence'.[92] *CILFIT* does not imply a guarantee, because if a judge needed a guarantee, he/she would have to refer every single case, since there is never certainty in law.[93] Given this pragmatic reading, it is perhaps unsurprising that the literature has criticized the UK Supreme Court (and previously the House of Lords) for concluding too easily that a matter is *clair* and for behaving as if it had the same discretion as the lower courts.[94] Arnull points to quite a few cases in which the issue of referral was not addressed, even though a reference was possible or even warranted.[95] This is true, for example, of *Zambrano*-type cases on social benefits[96] and unfair terms in consumer contracts.[97] Particularly debatable are cases in which the Supreme Court reversed the decision of the Court of Appeal on a point of EU law without a reference.[98] One recent example is *FMX Food*, concerning time limits for the payment of customs duties, in which the Supreme Court came up with two competing lines of ECJ case law, but argued that the correct interpretation was obvious and thereby reversed the decision of the Court of Appeal.[99]

Judges have been critical of the rigidity of the *CILFIT* requirements on paper and their application in practice. Some Dutch and especially UK judges have voiced their criticism of *CILFIT* quite openly. The current president of the UK Supreme Court, Lord Reed, held that it is difficult to apply the *acte clair* doctrine when the ECJ creatively interprets EU law beyond the intentions of the EU legislature.[100] Lord Mance also pointed to some practical problems, especially in light of not infrequently unclear ECJ judgments. He noted that an overliteral application would be undesirable given the workload of the

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91 Interview 264.
92 Interview 208.
93 Interview 231.
94 Dougan 2020, 56; Heyvaert et al 2014. Cf Interviews 231 and 233.
95 Arnull 2017, 332–35; Interview 243.
96 *Migra and Samin v SSWP* [2016] UKSC 1; Mantu and Minderhoud 2017; *HC v SSWP* [2017] UKSC 73; O'Brien 2019.
97 *Office of Fair Trading (OFT) v Abbey National plc & Ors* [2009] UKSC 6; Kenny 2012.
98 Interview 243.
99 *Ibid*; *FMX Food Merchants Import Export Co Ltd v HMRC* [2020] UKSC 1, para 18.
100 Reed 2014, 10–11.

ECJ, which has become even heavier since the expansion of the EU, requiring 'superhuman capacity'. In his view, 'the chimera of unseen language versions or unforeseeable future decisions by other national courts' does not constitute an obligation to refer. He thus disagreed with the argument that there can be no *acte clair* when courts at different levels or judges within the Supreme Court arrive at different interpretations.[101] This echoes speeches delivered by former UK AG Jacobs.[102]

The reluctance to refer thus translates into a preference for resolving the dispute on other (national) grounds to avoid a reference.[103] Article 267 TFEU prescribes that a reference is required where 'a decision on the question is necessary to enable it to give judgment'. Courts and judges, especially in the UK, have emphasized that the specific facts of the case should really necessitate a reference.[104] Lord Denning acknowledged in *Bulmer* that an early reference 'might save much time and expense', but noted that all facts must be ascertained first.[105] Sometimes judges decide not to refer and to wait for a case that lends itself better to referral and allows the court to present the full picture to the ECJ.[106] Another option to avoid referral is to assume that EU law applies without this being obvious. This happened, for example, in a series of cases concerning the provision of services, in which the Dutch Council of State assumed that the Services Directive was applicable and simply started to review against it. In doing so, it avoided the more fundamental preliminary question raised in 2014 in *Trijber and Harmsen* as to whether the Services Directive applies at all to internal situations.[107]

The UK courts in particular have applied the test of whether a reference is determinative for resolution of the dispute quite rigorously.[108] The UK Supreme Court itself held, in response to a written question: 'If, however the

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[101] Mance 2013a, paras 23–26.

[102] Jacobs 2014, 3.

[103] Interviews 10, 66, 72, 81, 89, 102, 136, 148, 155, 159, 161 and 162. Eg *Ullah, R (on the application of) v SSHD* [2017] EWHC 1999 (Admin); *Gaswise Ltd v Dublin City Council* [2014] IEHC 56, para 70; *SFA v Minister for Justice & Ors* [2016] IEHC 222, para 47; Sevenster and Wissels 2016, 90.

[104] Interviews 139 and 162; *Minister for Justice and Equality v Bailey* [2017] IEHC 482, para 44; *SSHD v Manjot Singh Dhami* EA036232015 [2017] UKAITUR, para 18.

[105] *HP Bulmer Ltd & Anor v J Bollinger SA & Ors* [1974] EWCA Civ 14. Cf *VIIV Healthcare UK Ltd v Teva UK Ltd* [2015] EWHC 1074 (Ch).

[106] Interview 10; Sevenster and Wissels 2016, 91.

[107] Interview 44. Eg NL:RVS:2011:BT2130, para 2.6.1; NL:RVS:2014:726, para 29.4.

[108] Interview 231. Eg *Asda Stores Ltd v Brierley & Ors* [2019] EWCA Civ 44, para 115; *Bancoult, R (on the application of) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708, paras 130 and 144.

unclear point of EU law does not need to be resolved in order to dispose of a case, a reference will not be made.' It pointed to *Aspen Underwriting* as an example. Article 7(2) of the Brussels Regulation Recast (1215/2012) was not considered by the Supreme Court because it was unnecessary to do so, given that Article 14 applied and disposed of the case. This was despite the fact that Articles 7(1)–(2), and the relationship between them, were not entirely clear.[109] The Supreme Court justified this approach by pointing to the similar approach of the ECJ in handling references by answering only the question necessary to resolve the dispute and leaving other questions unanswered.[110] The UK Court of Appeal held in *W Nagel* that a particular point was not an *acte clair*, and that although 'it might in other circumstances have been necessary' to refer, the case at hand could be resolved without ruling on this point.[111] In *The London Taxi Corporation* it likewise determined that 'these are questions on which, had they been critical to the decision, I would have sought the opinion of the ECJ on a preliminary reference'.[112] The High Court also refused a reference in *Canary Wharf* because the questions involved were not 'critical' to its final decision, since they were only 'stepping stones towards resolving a greater question'.[113]

Most judges in the three countries studied shared the view that it is preferable to resolve matters 'with good decency' on the basis of the jurisprudence of the ECJ, especially if there are other cases with 'enough similarities' or 'clear indications'.[114] The idea is that, from a study of the jurisprudence of the ECJ, a certain line can always be discerned. Some courts – especially the UK courts – are more eager to assume this responsibility and strictly observe the distinction between the interpretation of EU law (for the ECJ) and questions relating to the application of established principles of EU law to the national

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[109] *Aspen Underwriting Ltd & Ors v Credit Europe Bank NV* [2020] UKSC 11; written response 15 April 2020.

[110] Eg Case C-603/17 *Bosworth* EU:C:2019:310; written response 15 April 2020.

[111] *W Nagel (a Firm) v Pluczenik Diamond Co NV* [2018] EWCA Civ 2640, para 86. Cf *HMRC v The Open University* [2016] EWCA Civ 114, para 114; *SSHD v Vassallo* [2016] EWCA Civ 13 (Richard LJ); *Evans, R (On the application of) v The Information Comrs* [2014] EWCA Civ 254.

[112] *The London Taxi Corporation Ltd (t/a the London Taxi Co) v Frazer-Nash Research Ltd & Anor* [2017] EWCA Civ 1729. Cf *Shirley & Anor, R (on the application of) v The Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22, para 63.

[113] *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch), paras 116 and 122.

[114] Interviews 58, 83, 89, 93, 108, 136, 139, 144, 148 and 162; eg *BAM PPP PGGM Infrastructure Cooperative UA v National Treasure Management Agency & Anor* [2016] IEHC 546; Maher 2018, 173 and 185.

legal and factual framework (for national courts).[115] UK courts have acted in line with AG Jacobs' call for 'self-restraint' in his Opinion in *Wiener*. He cautioned against national courts referring for 'further clarification' when the facts of the case differ only slightly from those in which the ECJ has already answered similar questions.[116] He noted that:

> in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this Court's case law. Experience has shown that that case law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference.[117]

Lord Reed underscored that there is no need to refer when it 'is simply a matter of applying established principles, even they are expressed in a way which leaves room for argument as to their application to the facts'.[118] The UK Supreme Court, for example, justified its conclusion in several cases that no reference was necessary since the decision was an application of established ECJ jurisprudence. The court based this finding on the fact that the ECJ had answered similar questions of the Court of Appeal without an AG Opinion.[119] The UK lower courts are also generally quite quick to conclude that it is just a matter of applying (established) principles to the facts (see section 3.3).[120] On quite a few occasions, a higher court decided to refer at a later stage, despite the confidence of the lower courts.[121]

One former UK Supreme Court judge noted that not all courts in the EU maintain this distinction between application and interpretation, and hence tend to 'over-refer'.[122] These courts 'look at the ECJ as if it is their godfather'

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[115] Cf BVerfG 1 BvR 276/17 and 1 BvR 16/13; Burchardt 2020, 16.

[116] Case C-338/95 *Wiener* EU:C:1997:352, para 15.

[117] *Ibid*, para 61.

[118] Reed 2014, 14.

[119] *HMRC v Frank A Smart and Son Ltd (Scotland)* [2019] UKSC 39, paras 59 and 64; Cf *Walton v Scottish Ministers* [2012] UKSC 44, paras 31 and 71; *Office of Fair Trading v Abbey National plc & Ors* [2009] UKSC 6, para 50; *HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor* [2014] UKSC 3, paras 53–55.

[120] *Coal Staff Superannuation Scheme Trustees Ltd v HMRC* [2017] UKUT 137 (TCC), paras 36–37; *Virgin Media Ltd & Anor v HMRC* [2020] UKFTT 30 (TC), para 431.

[121] *Davis & Ors, R (on the application of) v SSHD & Ors* [2015] EWHC 2092 (Admin), para 110; *Mercedes-Benz Financial Services UK Ltd v HRMC* [2014] UKUT 200 (TCC).

[122] Interview 264.

and 'as if they are still growing up'. By contrast, the UK Supreme Court feels that it is its role to apply EU law by itself. It considers that it is reasonably good at this, and thus that only the really 'difficult cases' need to be referred.[123] Two UK barristers noted that although the UK Supreme Court is sometimes 'cheating not to refer', it approaches its obligation to refer and to *CILFIT* in a 'fairly straight' way: '[I]f they need to refer, they do it.'[124] One barrister likewise noted that the references made by courts in other Member States explore the boundaries between interpretation and application, and frequently deal with proportionality questions that are for national courts themselves to handle. He/she observed that UK references are 'quite tough', and noted that the UK courts invest more time than other courts in the order for reference; while Italian references, for instance, are often 'crap' and should not have been made.[125]

One particular UK trait that explains why the UK courts, including the lower courts (section 3.3), have assumed the responsibility of applying established principles to new cases is their innate confidence in themselves. One Supreme Court judge noted:

> [W]e do not surrender our own responsibility…
>
> [W]e are quite a confident jurisdiction and we became competent European lawyers. We make up our own mind and we have a clear view of which we think that the ECJ would endorse.[126]

The UK courts are especially confident in the area of private international and commercial law, where the prevailing view is that the UK sets an example that Luxembourg can follow. This also relates to the ECJ's perceived lack of expertise in the area of (international) private law, which can translate into errors when applying common law doctrines.[127] There has been dissatisfaction

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[123] *Ibid*; 'We fulfilled our obligation to the letter' and applied *CILFIT* 'fairly rigorously', Interview 208. The Supreme Court held in April 2020:

> The Supreme Court's case law shows that it does not decline to make references just because it could be unhelpful or inconvenient to make a reference. If the *CILFIT* criteria require a reference, the Supreme Court will be bound to make a reference. If the parties share a view of EU law which the Supreme Court considers is not *acte clair*, and if decision of the point is necessary for the disposal of the appeal, the Supreme Court will still make a reference.

Written response 15 April 2020.

[124] Interviews 231 and 243.

[125] Interview 243. Only 42 per cent of the Italian references resulted in a ECJ judgment, while this figure is 61 per cent for all EU Member States in the period 1961–2006, Vink et al 2009, 7.

[126] Interview 264.

[127] Mance 2011; para 32; Arnull 2010, 81; Harris 2008, 375.

with several ECJ judgments in this area. Hartley even pointed to a 'crisis of confidence among English lawyers' and a view that the ECJ 'cannot be trusted to give reasonable decisions' in this field.[128] One former UK Supreme Court judge mentioned that initial conscientious references in relation to the Brussels I Regulation (44/2001) led to judgments that 'upset' the UK courts, but that were subsequently corrected in the EU legislation via the Brussels Recast Regulation. One example is the *West Tankers* case, which concerned anti-suit injunctions against firms that wrongfully start court proceedings in other Member States on the grounds that such proceedings would be contrary to an arbitration agreement. The House of Lords put forward quite a firm view in its reference, with the message 'please permit this under the Brussels Regulation'.[129] The ECJ nonetheless held that an order that hinders a person from commencing or continuing proceedings before the courts of another Member State is incompatible with the Regulation. This was considered an unwanted outcome, depriving 'us' of an important weapon to support English arbitration.[130]

One judge likewise attributed the relatively fewer UK references to the hypothesis that the UK courts are better at analysing ECJ case law and finding an answer on that basis. He/she attributed this to the superior training and experience of UK judges, as well as the high level of the bar and the fact that barristers often provide a full analysis and statement of the law.[131] The prevailing view is that Luxembourg would reach more or less the same conclusion as the UK Supreme Court by examining the case law.[132] 'Why would one need to refer when this can be done ourselves?' was also the argument of Lord Brown, who added: 'It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give.'[133] Implicit in this account is also the idea that a reference is a 'lazy' gesture of a national court, whereby difficulties are outsourced to another institution and the court does not fulfil its own responsibility to investigate. One example is the *Aimia* case, which Lord Reed maintained could have been decided by the House of Lords without a referral had it spent more time reflecting on possible answers to the questions.[134] As will be discussed later,

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[128] Hartley 2006, 183.

[129] Case C-185/07 *West Tankers* EU:C:2009:69. Cf Arnull 2010, 82; Harris 2008, 369 and 383.

[130] Interview 264.

[131] Interview 208.

[132] *Ibid*.

[133] *Morge v Hampshire County Council* [2011] UKSC 2, para 25. Cf *The Trustees of the BT Pension Scheme v HMRC* [2013] UKUT 105 (TCC), para 420.

[134] Reed 2014, 13.

there are several recent decisions in which the Supreme Court determined the scope and effect of EU law itself, such as *HS2* and *Stott v Thomas Cook* (see Chapter 4, section 2).[135]

A UK barrister confirmed this self-image of UK judges. He noted that the House of Lords and the Supreme Court have been more 'adventurous' than other EU courts in their dealings with EU law and have referred only the more 'extreme' cases to the ECJ. This barrister also highlighted the 'intellectual confidence' of individual judges in interpreting what EU law means, without voicing a strong normative opinion about it. The prevailing attitude is that 'we can understand EU law as well as the ECJ'. He/she observed that judges such as Lord Reed and Lord Mance have gained in confidence over the last decade. He/she further noted that judges with an academic background, such as Lord Reed, are generally more confident to argue that EU law requires a particular interpretation without a reference. Something similar was said about Lord Mance, a fluent German speaker who previously spent time practising at a German law firm. The barrister went on to observe that this intellectual confidence can be regarded as English arrogance, because English judges regard themselves as the intellectual elite. He/she would not be surprised if there were a view among Supreme Court judges that the judges appointed to the ECJ 'are not really up to much' and are not necessarily the top people in their countries – not least because of the political nature of the appointment process.[136] It is perhaps unsurprising that judges in common law countries are more self-conscious, given their important law-making roles compared to the civil law '*bouche de la loi*' judges.[137]

Summing up, this section has revealed that some highest courts have adopted a pragmatic reading of *CILFIT*. One reason behind the UK Supreme Court's approach is its confidence in its own ability to interpret EU law. This section has discussed this without passing judgement on the practice. However, one normative question is whether the practice is problematic from an EU law point of view. The concluding chapter of this book will present some reflections on this question.

2.2.3 Lower courts: discretion and self-restraint

Lower courts have been most explicit in their judgments about their reluctance to refer. Quite a number of UK judgments refer approvingly to the Opinion of former AG Jacobs in *Wiener* that a 'measure of self-restraint' is required from

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[135] *Ibid*, 14.
[136] Interview 211.
[137] Hornuf and Voigt 2015, 295.

national courts.[138] Irish High Court Judge Simons referred to the 'principle of judicial self-restraint' in his decision to refer.[139] Although most Irish lower court judges are in principle not opposed to referring at an early stage, they emphasized that they refer only if this will directly affect the outcome of the case.[140] For example, one Irish judge stated, 'We do not look for trouble', and argued that courts should not immediately 'run out to Luxembourg' and 'thrash out a reference'.[141] Judges also prefer to make their own judgments.[142] For example, one Dutch judge stated that it might be preferable to make a mistake in one case than to engage in unnecessary judicializing and refer in case of the slightest doubt.[143]

The Dutch lower courts, and to a lesser extent the UK courts, were particularly keen to emphasize their discretion to refer. The judges interviewed clearly indicated that the TFEU mandates them to decide themselves, even where there is doubt about the interpretation of EU law.[144] One judge admitted that he/she would have referred a particular case had he/she been the judge of final instance.[145] This reluctance is informed by judges' views of their positions in the judicial hierarchy and inclination to leave references to the highest courts (see Chapter 3, section 2.1). The position of the Dutch lower courts stands in sharp contrast to that of the Irish lower courts, which feel *de facto* obliged to refer (section 2.3) and frequently mentioned the advantages of an early, 'better-sooner-than-later' referral.[146] Two examples illustrate the approach of the Dutch lower courts. In an IP case about copyright licence fees, the Amsterdam Court of Appeal held that questions were not obvious because the law at issue had been amended. It nonetheless pointed out that the case dealt with a relatively limited period in the past, and that the material interest in referring was therefore limited.[147] A second example is *Lemnis Lighting*, which concerned the customs classification of light-emitting diode bulbs. The Dutch lower court had 'enormous' doubts because the Combined Nomenclature

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[138] Case C-338/95 *Wiener* EU:C:1997:352; *Tan v Choy* [2014] EWCA Civ 251; *Littlewoods Retail Ltd & Ors v HMRC* [2014] EWHC 868 (Ch), para 114.

[139] *Friends of the Irish Environment Ltd v Minister for Communications, Climate Action and Environment & Ors* [2019] IEHC 685, para 11. Cf *Sweetman v Environmental Protection Agency & Anor* [2019] IEHC 81, para 93.

[140] Interviews 102, 108, 139, 148, 161, 166 and 191.

[141] Interview 159.

[142] Interviews 16, 22, 39, 49, 51, 65, 74, 83 and 93.

[143] Interviews 22, 51 and 58.

[144] Interviews 39, 49 and 51. Eg *Stryker* NL:RBNHO:2016:3626.

[145] Interview 51.

[146] Interviews 144, 171, 174 and 187; *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd* [2019] IEHC 3, para 88.

[147] *Ziggo Services*, NL:GHAMS:2016:4183, ro 3.8.

was silent on this new technology. A final hearing discussing this matter lasted a day.[148] In the end, there was a reasonable solution to which all judges involved agreed and which was thought to be the only possible classification. The Tax Chamber of the Dutch Supreme Court nonetheless decided to refer. The lower court's interpretation turned out to be correct in retrospect, because the ECJ eventually arrived at the same classification as the lower court.[149]

It is more difficult to sketch a general picture of the approach of those UK courts that are not obliged to refer. Sometimes they are as reluctant to do so as the Dutch lower courts. Other times, those courts – especially the intermediate appellate courts and specialized tribunals – reason in a similar way to their Irish counterparts and apply *CILFIT* rather strictly. This explains why these courts have traditionally made a big deal of UK references.[150] The dichotomy reflects the discussion in the case law of the UK courts as to the position of the lower courts. Earlier, we saw that Sir Bingham limited the complete discretion of lower courts in *ex parte Else* (section 2.3). Lord Denning took the opposite stance and famously held in *Bulmer* in 1974 – very much in line with the general practice of the Dutch lower courts – that, except for the House of Lords, the UK courts have 'complete discretion'. A judge:

> need not refer it to the court at Luxembourg unless he wishes. He can say: 'It will be too costly', or 'it will take too long to get an answer', or 'I am well able to decide it myself.' If he does decide it himself, the European court cannot interfere.[151]

Lord Denning's discouragement is seen as an important reason why many UK (lower) courts have been reluctant to refer over the years.[152] *Bulmer* is still relied upon by courts in their decisions and especially those deciding *not* to refer.[153] Lord Justice Lewison held*:*

> if a national court is sure enough of its own interpretation to take the responsibility (and possibly the blame) for resolving a point of law without the assistance of the Court of Justice, it ought to be legally entitled to do so.[154]

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148 Interview 55.

149 C-600/15 *Lemnis Lighting* EU:C:2016:937.

150 *The Gibraltar Betting and Gaming Association Ltd and R (on the application of) v HMRC & Ors* [2015] EWHC 1863 (Admin), para 10; Arden 2010, 11; Dyevre et al 2019, 11.

151 *HP* Bulmer *Ltd & Anor v J* Bollinger *SA & Ors* [1974] EWCA Civ 14.

152 Craig 1998, 200–05; Arnull 2010, 59; Wind et al 2009, 77.

153 Eg *Abbotsley Ltd & Ors (t/a Cambridge Meridian Golf Club) v HMRC* [2015] UKFTT 662 (TC), para 139.

154 He relied on C-197/14 *X and Van Dijk* EU:C:2015:564 in *O'Brien v Ministry of Justice* [2015] EWCA Civ 1000.

Many UK judgments emphasize this discretion, reducing the question to refer to an issue of appropriateness.[155]

The (specialized) lower UK courts, just like the UK Supreme Court, are quite confident in their ability to interpret EU law themselves. The Court of Appeal, the High Court[156] and tribunals[157] are confident in declaring a question to be *clair* – even in cases which are subsequently referred by the Court of Appeal or the Supreme Court. The UK lower courts refer more frequently than the Dutch lower courts, which prefer the 'easy route' of concluding that an answer is not necessary or which stress their discretion to refer. Hence, it sometimes happens that the Court of Appeal concludes rather confidently that the issue is clear and is based, for example, on 'established principles', but the Supreme Court nonetheless decides to refer.[158] One example is the statement of Lord Justice Laws that there was no 'force whatever' to seek a preliminary reference on the term 'family member' in relation to a child's guardianship under the Algerian *kafala* system. He was later proven wrong about this term by the Grand Chamber judgment following the UK Supreme Court's reference in *SM*.[159] One barrister explained that it is easier for a court to say that a matter is *clair* than to leave it to the higher court and give permission to appeal, not least because appeal is 'a long and hard road'. It is considered institutionally inappropriate and questionable from the perspective of legal certainty to say, as the Dutch lower courts have done, that it is an uncertain point of law and just leave it at that.[160]

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[155] Eg *Simonis, R (on the application of) v Arts Council England (Rev 2)* [2020] EWCA Civ 374, para 111; *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665.

[156] Eg *United Biscuits (Pension Trustees) Ltd v HMRC* [2017] EWHC 2895 (Ch) (later referred in Case C-235/19 *United Biscuits (Pensions Trustees) and United Biscuits Pension Investments* EU:C:2020:801); *Glaxo Wellcome UK Ltd (t/a Allen and Hanburys) & Anor v Sandoz Ltd* [2016] EWHC 1537 (Ch), para 75; *Safeway Ltd v Newton & Anor* [2016] EWHC 377 (Ch) (later referred in Case C-171/18 *Safeway* EU:C:2019:839); *Stunt v Associated Newspapers Ltd* [2017] EWHC 695 (QB) (later referred in Case C-687/18 *Associated Newspapers* EU:C:2019:988).

[157] *BAT Industries plc & Ors v HMRC* [2017] UKFTT 558 (TC), para 259.

[158] *Volkswagen Financial Services (UK) Ltd v HMRC* [2015] EWCA Civ 832 (later referred in Case C-153/17 *Volkswagen Financial Services (UK)* EU:C:2018:845); *O'Brien v Ministry of Justice* [2015] EWCA Civ 1000 (later referred in Case C-432/17 *O'Brien* EU:C:2018:879); *The Association of Independent Meat Suppliers & Anor, R (on the application of) v The Food Standards Agency* [2017] EWCA Civ 431 (later referred in Case C-579/19 *Food Standards Agency*).

[159] *SM (Algeria) v Entry Clearance Officer, UK Visa Section* [2015] EWCA Civ 1109.

[160] Interview 112.

2.2.4 Importance of the question

Judges in all three countries, and especially lower court judges, take into account the importance of the question of EU law at issue.[161] A reference is more likely where the question plays a role in a considerable number of cases or where the financial or societal consequences are substantive.[162] Particularly illustrative is the guidance in AG Jacobs's Opinion in *Wiener*, which has been relied upon frequently by the UK courts:

> a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case law which could readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case.[163]

High Court Judge Mostyn justified his first-ever reference by pointing to the 'potential ramifications' of a particular interpretation that were 'potentially quite wide-ranging'.[164] Irish judges have also noted that the question should be more than just a local dispute, but of pan-European importance.[165] In its reference in *MM* the Irish Supreme Court mentioned the 'huge implications for current administrative practice' with regard to the system of subsidiary protection and noted that the outcome in this case would affect many other pending cases.[166] A reference has the advantage of resolving a particular legal question without further litigation in many cases.[167] Similar considerations guided the reference of the Dutch Council of State in *A, B, C*, on the review of the credibility of the declared sexual orientation of an asylum seeker.[168] The UK courts in particular have frequently referred to the broad impact and 'general public

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[161] Interviews 8, 16, 39 and 93.

[162] Interviews 8, 22, 55, 65 and 93; *De Staat der Nederlanden v Warner-Lambert Company LLC* NL:GHDHA:2017:567, para 4.2; *Veevoederbedrijf Alpuro BV* NL:GHARL:2016:3097, para 9.5.

[163] Case C-338/95 *Wiener* EU:C:1997:352; *Trinity Mirror plc v Customs and Excise Comrs* [2001] EWCA Civ 65; *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch), para 116.

[164] *S v S* [2014] EWHC 3613 (Fam), para 57.

[165] Interviews 187 and 191. Eg *Schrems v Data Protection Comr* [2014] IEHC 310 (Hogan J), para 71.

[166] *MM v Minister for Justice, Equality & Law Reform & Ors* [2011] IEHC 547 (Hogan J), para 32; *Mahmood & Anor v Minister for Justice* [2018] IECA 3 (Hogan J), para 61.

[167] *HID (A minor) & Anor v Refugee Applications Comr* [2013] IEHC 146 (Cooke J), para 32.

[168] Joined Cases C-148/13 until C-150/13 *A, B, C* EU:C:2014:2406.

importance' of a legal question, as well as the number of pending cases to which it relates, as additional considerations.[169] As will be discussed in Chapter 4, section 3, judges sometimes refer cases involving significant interests out of prudence. One example is the reference of the Trade and Industry Appeals Tribunal in *IMC Securities*, about the legality of a fine for price manipulation. The Tribunal considered the issue to be relatively *clair*, which is also reflected in the very concise judgment of the ECJ. However, a reference was nonetheless considered desirable because of the importance of the principle of legal certainty.[170]

Issues of minor importance, one-off cases and cases of 'semantic concern' are more easily decided without a referral.[171] Several Irish court decisions not to refer mention, for example, the 'theoretical interest' or the fact that the point of law is not 'one of exceptional importance'.[172] The same holds true for an issue that relates to legislation which has already been revised or which will be revised in the near future. Questions of academic or historic interest are avoided where a measure or law is repealed or replaced before an ECJ judgment is due.[173] A reference is more likely if a legal mechanism will continue to be relevant for another six years.[174] The Trade and Industry Appeals Tribunal was reluctant to refer a dispute concerning telephone call termination rates that would be valid for a period of three years only.[175] One exception to this reluctance to refer one-off or outdated cases is important matters of principle.[176] The Dutch Council of State, for instance, referred a case concerning registration certificates that affected only one person and had no further consequences for other cases. It concerned a single appellant who had never been able to drive

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[169] *HMRC v Brockenhurst College* [2015] EWCA Civ 1196, para 28; *Sky plc & Ors v Skykick UK Ltd & Anor* [2018] EWHC 155 (Ch), para 357; *HMRC v HD* [2018] UKUT 148 (AAC), para 40; *East Sussex County Council v IC* [2014] UKFTT EA_2013_0037 (GRC), para 1.

[170] *IMC Securities BV v Stichting Financiële Markten* NL:CBB:2009:BK2641; Case C-445/09 *IMC Securities BV* EU:C:2011:459; Interviews 31 and 69.

[171] *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch), para 120; *Shields & Sons Partnership v Revenue & Customs* [2016] UKUT 142 (TCC), para 37; *Lim v Malaysia* [2013] UKUT 437 (IAC), para 32.

[172] *SFA v Minister for Justice & Ors* [2016] IEHC 222, para 51; *A.A. (Nigeria) v Minister for Justice, Equality and Law Reforms & Ors* [2015] IEHC 210, para 12.

[173] *Dacis & Ors R (on the application of) v SSHD & Ors* [2015] EWHC 2092 (Admin), para 113; *Coal Staff Superannuation Scheme Trustees Ltd v HMRC* [2017] UKUT 137 (TCC), paras 34–35.

[174] *Merck Canada Inc v Sigma Pharmaceuticals plc* [2013] EWCA Civ 326, para 100.

[175] Interview 77.

[176] Interviews 12, 18, 24, 32, 44 and 66; Sevenster 2011, 301.

in his vintage car; but underlying this factual situation was an important matter of principle.[177]

Interestingly, the UK (lower) courts have been particularly concerned about the importance of questions from the perspective of the uniformity of EU law and the need for a level playing field for businesses and consumers.[178] This does not seem to be driven by a desire to contribute to the development of EU law, as was discussed in relation to the Dutch and Irish Supreme Courts (section 2.1), but rather by an economic and business logic.[179] In *Nutricia*, the High Court pointed to 'other reasons' than (legal) reasons – namely, the 'importance of the issues and the desirability of a common approach being applied across the EU which will afford greater and more consistent guidance both to Competent Authorities and to producers'. It pointed to the differences across Member States and to the negative effects for legal certainty and the integrity of the internal market.[180] Similar reasoning was employed in cases relating to supplementary protection certificates (SPCs) for medicinal products and the need for an authoritative ruling of the ECJ to avoid divergent interpretations of national courts.[181] The Upper Tribunal also underlined in its reference the need for a uniform interpretation of VAT rules with respect to the meaning of 'sport' and determined that 'it would in our view be of little value for us to add a further domestic view to the mix'.[182] Aside from business and tax law cases, the UK courts have also underlined the need for a uniform interpretation and an authoritative judgment of the ECJ in the area of family law.[183]

In sum, the importance of the issue matters. There is, however, a tipping point where the issue becomes so important, and the number of affected cases so great, that a reference is less likely, as the following section will outline.

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[177] Interview 72; *RDW* NL:RVS:2017:1370.

[178] *European Federation for Cosmetic Ingredients, R (on the application of) v The Secretary of State for Business, Innovation and Skills & Ors* [2014] EWHC 4222 (Admin), para 25; *The Gibraltar Betting and Gaming Association Ltd, R (on the application of) v HMRC* [2015] EWHC 1863 (Admin), paras 13–14.

[179] *Eli Lilly and Co v Genentech, Inc* [2019] EWHC 388 (Pat), paras 48 and 50.

[180] *Nutricia Ltd, R (on the application of) v The Secretary of State for Health* [2015] EWHC 2285 (Admin), paras 20 and 214.

[181] *Merck Sharp and Dohme Corporation v Comptroller-General of Patents, Designs And Trade Marks* [2016] EWHC 1896 (Pat), para 49; *Beverly Hills Teddy Bear Co v PMS International Group plc* [2019] EWHC 2419 (IPEC), para 60.

[182] *The English Bridge Union Ltd v HMRC* [2015] UKUT 401 (TCC), paras 17 and 23. Cf *Healthspan Ltd v HMRC* [2018] UKFTT 241 (TC), para 267.

[183] *Healthspan Ltd v HMRC* [2018] UKFTT 241 (TC), *MS v PS* [2016] EWHC 88 (Fam), paras 6 and 42.

2.2.5 Delays and consequences for the parties

It is no surprise that in deciding whether (not) to refer, courts – and especially lower courts – consider the consequences of a reference both for the specific case and the parties involved, and for other related cases. Some of the judges interviewed suggested that if the procedure lasted only one or three months, they would be quicker to make references.[184]

This notwithstanding, delay is in fact a more limited consideration for the courts than one might possibly expect. Relatively few Dutch[185] and Irish judgments explicitly mention delay; although the UK courts seem to attach more importance to this.[186] A good illustration is the UK Court of Appeal judgment in *Brownlie*, in which Lady Justice Arden recognized that the questions were 'clearly not *acte clair*', but noted that a reference 'would involve considerable delay and commit the parties irreversibly to that route without a clear result at this time to this appeal'.[187] (Former) UK Supreme Court judges, such as Lord Mance and Lord Walker, have openly admitted that the time and costs of a reference are taken into consideration.[188] The UK Supreme Court considered that the public interest in resolving the case quickly was more important than the need to refer in *Abbey National*, which concerned the fairness of bank charges.[189] Another example is the child custody case of *N (children)*. Lady Hale noted that the question as to whether Article 15 is capable of applying to public law proceedings was not an *acte clair*. The Supreme Court nonetheless proceeded on the assumption that Article 15 applies to public law proceedings because 'these proceedings have already taken far too long' and the children's 'best interests demand that their future should be decided as soon as possible'.[190] Likewise, the Supreme Court resolved the child abduction case *A (children)*, in the words of Arnull, to avoid a reference. It found that the matter was not *clair* with respect to the 'habitual residence' point, but avoided that issue by remitting the case to the High Court as 'a matter of urgency' in order to exercise its inherent jurisdiction.[191] Another example is the private international

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[184] Interviews 89, 106, 108, 136 and 181; Sevenster 2011, 301.

[185] One exception is NL:RVS:2011:BR3771, para 2.8.4; Sevenster and Wissels 2016, 92.

[186] *Jaspers (Treburley) Ltd & Ors, R (on the application of) v Food Standards Agency* [2013] EWHC 1788 (Admin).

[187] *B (A Child)* [2013] EWCA Civ 1434, paras 24 and 83.

[188] Mance 2013a, para 11; *Office of Fair Trading v Abbey National plc & Ors* [2009] UKSC 6 (Lord Walker), para 48.

[189] *Office of Fair Trading v Abbey National plc & Ors* [2009] UKSC 6 (Lord Walker), para 48.

[190] *Re N (Children)* [2016] UKSC 15 (Hale), paras 54–55; Arnull 2017; Interview 231.

[191] *A (Children) Re (Rev 1)* [2013] UKSC 60; Arnull 2017.

law case *Alexandros Tre*, which dealt with whether legal proceedings in the UK should be stayed in favour of proceedings in Greece involving the same cause of action in the light of Articles 27 and 28 of the Brussels I Regulation (44/2001). Lord Clarke held that the questions in relation to Article 27 were not an *acte clair* and noted that a reference was required if the appellants maintained their particular claims.[192] The UK Supreme Court gave the parties the option to drop that particular point because it was conscious that otherwise a relatively small part of the case would have to go off to Luxembourg, with consequent delay and costs.[193]

The extent to which delay is taken into consideration depends on the legal area at issue. Delay plays a bigger role in planning cases, where it has adverse (economic) consequences for companies.[194] The same holds true for family law cases involving child custody and foster cases.[195] Irish judges expressed a reluctance to refer when someone is not in custody and the case cannot benefit from treatment via the procedure *préjudicielle d'urgence* (PPU).[196] In one case the UK High Court held that even a PPU reference would be 'intolerable' and contrary to 'best interests', since the child had already been in foster care for three years.[197]

The role of delay in decisions not to refer should not be overstated. The Irish and Dutch judges interviewed rarely mentioned delay as a reason not to refer.[198] Several Irish appellate court judges vehemently rejected the idea that delay was a factor that influenced their decision – not least because Irish courts experience significant delays with or without referral.[199] They stated that delays are inevitable and can happen at any stage.[200] One judge observed, for instance: 'That's the way it is. So be it.'[201] Some noted that the delay in Luxembourg is short in comparison to the delays that can arise in Irish legal proceedings. It can two years (or more) to get a hearing date at the Court of Appeal, which means that the Luxembourg route can be faster.[202] Dutch Tax Chamber judges emphasized that the explicit consideration of delay does not fit within the

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192 *In the matter of 'The Alexandros T'* [2013] UKSC 70, para 72.
193 Interview 264.
194 Eg *Garner, R (on the application of) v Elmbridge Borough Council & Ors* [2010] EWCA Civ 1006; Interviews 5, 10, 69, 77 and 91.
195 *London Borough of Lambeth v JO & Ors* [2014] EWHC 3597 (Fam).
196 Interviews 102, 113, 148 and 162.
197 *The Child and Family Agency (Ireland) v M & Ors* [2018] EWHC 1581 (Fam).
198 Interviews 49 and 93.
199 Interviews 105, 136, 144, 146, 159, 166, 187 and 191.
200 Interviews 102, 144 and 159.
201 Interview 159. Cf Interview 191; *MA v The International Protection Appeals Tribunal & Ors* [2017] IEHC 677 (Humphreys J), para 141.
202 Interviews 108 and 153.

framework of Article 267 TFEU. They also held that in many cases, there is no rush at all – either because of a deferral of payment or because of an *ex post* claim.[203] Without giving the impression that processing times are unimportant, one interviewee stated: '[H]ere we have all the time in the world.'[204] It was also stated that the turnaround time in Luxembourg is not particularly long.[205] Even the UK Supreme Court does not shy away from referring a second (or even third) time (see Chapter 7, section 4). Prolonged litigation did not rule out a second reference in *Aventis*, even though Lord Hoffmann considered it 'particularly unfortunate' for the claimant.[206] Another example of a reference in which a delay was considered far from ideal is *O'Brien*, which concerned pensions for part-time judges. A reference was eventually made, even though the issue needed to be resolved quickly because some judges perhaps would not live long enough to see the result.[207] These examples indicate that delay seems to matter less at the Supreme Court stage in all three countries.[208]

Delays obviously matter more in summary or interlocutory proceedings. Judges in all three countries are reluctant to refer in interlocutory proceedings because of the required swiftness of a (provisional) judicial decision.[209] EU law affords them discretion to do so, because the highest courts are not obliged to refer in summary proceedings.[210] There is thus considerable room for pragmatic considerations. In interviews, Irish High Court judges suggested that a reference would be 'premature' and 'more appropriate for consideration at the substantive trial'.[211] While urgency is often absent in interlocutory proceedings before the Supreme Court, the Dutch judges interviewed indicated that there should still be 'something special' about a case before a reference is made.[212]

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[203] Interviews 15 and 78.

[204] *Ibid*.

[205] Interview 30.

[206] *OB v Aventis Pasteur SA* [2008] UKHL 34.

[207] Interview 208.

[208] One former Supreme Court judge (208) also noted that the delay does not obstruct a reference if it is not clear ('then it has to go'). Cf Interviews 231 and 264. The current Supreme Court subscribed to this logic in its written response by holding that it does not decline to make references just because it is 'inconvenient'. Written response 15 April 2020.

[209] Eg *Connexxion Taxi Services* NL:GHDHA:2013:3723, para 3.4; Interviews 8, 14 and 29; *Enterprise Holding Inc v Europcar Group UK Ltd & Anor* [2015] EWHC 300 (Ch), para 15. However, see *De Staat der Nederlanden v Warner-Lambert Company LLC* NL:GHDHA:2017:567, para 4.3.

[210] Joined Cases 35/82 and 36/82 *Morson* EU:C:1982:368, paras 8 and 9.

[211] *Dowling & Ors v Cook & Ors* [2013] IEHC 129, para 49; *Fitzpatrick & Anor v Minister for Agriculture, Food and the Marine & Anor* [2018] IEHC 77, para 88. Cf *Dowling & Ors v Minister for Finance* [2013] IESC 58 (Fennelly J), paras 64 and 66.

[212] Interviews 27, 45, 48, 59 and 87.

Civil Chamber judges, for instance, felt more compelled to refer where a case concerned a question on which there is very little ECJ jurisprudence or an area in which few cases reach the Supreme Court.[213] One example of the latter is procurement law: the referral in *Connexxion* was based on the idea that 'we have to grab the chance', as such cases rarely come before the ECJ.[214] By contrast, where the importance of the question is of limited practical relevance, the Civil Chamber is less eager to refer and 'dares' to decide itself.[215] The Civil Chamber also pays more attention to the wishes of the parties in summary proceedings and tends not to refer if the parties do not ask for or do not want a reference. An additional reason for the reference in *Synthon* was that both parties urged the Supreme Court to refer.[216]

Judges stated that they also consider the position of the affected person(s) and assess whether a reference would have negative consequences for the parties, including in terms of the costs involved.[217] If the parties – and especially the party that is likely to win – would be exposed to high costs as a result of the reference, it is even more important that it concerns a decisive point which could overturn the case.[218] Some Irish judges acknowledged that the consequences are given more weight where the parties are opposed to a referral.[219] This is even more relevant because the legal aid system in Ireland is considered to be limited.[220] One Irish judge observed that the court is conscious that where a person is funding the litigation himself or herself, a reference would add to the cost burden.[221] Another Irish judge likewise noted that if the parties could not afford a referral or did not want a referral, then he/she would not refer.[222] By contrast, it was easier for the Dutch Council of State to refer *Somvao*. The question in this case was whether the state secretary of justice was able to alter and recover – to the detriment of the beneficiary, Somvao – (part) of the grant awarded from the European Refugee Fund in the absence of

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213 Interviews 41, 59, 75 and 87.

214 *Connexxion Taxi Services* NL:HR:2015:757 (Case C-171/15 *Connexxion Taxi Services* EU:C:2016:948); Interviews 27, 48, 59 and 87.

215 Interviews 27 and 75; *Becton v Braun* NL:HR:2018:721, para 3.3.7.

216 *Synthon v Astellas Pharma Inc* NL:HR:2016:2643 (Case C-644/16 *Synthon* EU:C:2018:61); Interviews 27, 75 and 87.

217 Interviews 14, 22, 32, 35, 91 and 93; Maher 2018, 192.

218 Interview 27.

219 Interviews 136 and 152; Fahey 2004.

220 Interviews 159 and 136.

221 Interview 191. See the reference to 'the claimant is a voluntary organisation of modest means' as a reason to refer in first instance and promptly, *Western Sahara Campaign UK v HMRC and The Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2898 (Admin), para 5.

222 Interview 133.

a legal basis in Dutch law. A reference had no immediate consequences for the beneficiary, because Somvao would not suffer from the delay as the allegedly unlawfully awarded subsidy had not yet been recovered.[223] An additional reason to refer in *Daimler* was that costs 'would not be substantial', since the proceedings needed to be stayed in any case.[224] The UK High Court likewise rejected the argument against a reference as the procedure would not 'cause substantial hardship, or prejudice to the rights of anyone'.[225]

Two Dutch migration judges noted that they avoid using the applicant's case as an instrument to address a principled matter if there is a high probability that the applicant will eventually lose and thus will not personally benefit from it.[226] One lower court judge, for example, noted that judges should be careful in referring a legal question if this is not aimed at helping an asylum seeker. This judge suggested that he/she would never have referred *Ghezelbash*, which concerned the right to an effective legal remedy under the Dublin III Regulation.[227] The outcome was uncertain and could also run against the interests of the asylum seeker. Indeed, this ultimately happened after the reference and a Grand Chamber judgment that was generally welcomed by migration lawyers as providing a high(er) level of fundamental rights protection: the referring lower court ruled in favour of Ghezelbash, but the decision was annulled by the Council of State, leaving the applicant himself without a temporary asylum residence permit.[228]

In addition to a preference for avoiding delay, judges also consider the consequences of a reference for other pending cases. This was considered in particular by the Dutch highest administrative courts in relation to migration. Former President of the Aliens Chamber of the Council of State Verheij stated that a responsible judge will take into consideration the consequences of such a delay.[229] In the field of migration, there are often many – possibly hundreds – of cases in which the same question is discussed.[230] Dutch judges acknowledged that justice would grind to a halt if every question of EU law about which

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[223] Case C-599/13 *Somvao* EU:C:2014:2462; Interview 91.

[224] *Daimler AG v MOL (Europe Africa) Ltd & Ors* [2019] EWHC 3197 (Comm), para 132.

[225] *Wilkinson, R (on the application of) v South Hams District Council & Anor* [2016] EWHC 1860 (Admin). Cf *Hemming (t/a Simply Pleasure Ltd) & Ors, R (on the application of) v Westminster City Council (Rev 1)* [2013] EWCA Civ 591, para 66.

[226] Interviews 14 and 22. Cf Pollack 2017, 585.

[227] Case C-63/15 *Ghezelbash* EU:C:2016:409.

[228] NL:RVS:2017:1326; Interview 22.

[229] Verheij 2016, 83. Cf Storey et al 2014, 13.

[230] Interview 14. See also NL:RVS:2011:BR3771, para 2.8.4; Sevenster and Wissels 2016, 92; Groenendijk 2015.

there was some doubt were immediately referred to the ECJ.[231] The judges stated that it would be undesirable if so many cases were put on hold indefinitely while a reference was made.[232] For example, this consideration played a role in the cases on the intensity of review of the credibility assessment of asylum claims in relation to Article 46(3) of the Asylum Procedures Directive. The Council of State explicitly acknowledged that the text of Article 46(3) of the Procedures Directive did not provide a definitive answer, and noted that as yet there was no ECJ case law that clarified this provision.[233] Nonetheless, the Council deliberately decided not to refer because it would otherwise 'have to shut down', as these questions went to the core of its work and would imply that a very large number of cases would have to be put on hold.

The consequences for other pending cases also play a relatively important role in the criminal law sphere. One notorious decision of the Dutch Criminal Chamber not to refer is its post-*Salduz* judgment, regarding the right to legal assistance during a police interrogation. The Supreme Court explicitly stated, as a reason for its decision, that a reference precludes 'an effective and expeditious' criminal justice system, and would result in a 'long lasting and unacceptable' delay for many cases in which the same issue played a role.[234] Hence, the Criminal Chamber's relaxed approach to its obligation to refer stems from a robust perception that criminal proceedings do not allow for delays – not even of two to three months, as in the context of a PPU. One Supreme Court judge held that a reference inevitably infringes the right to a fair trial within a reasonable time, as a result of which the sentence must be reduced. As judges consider this difficult to explain to the wider public, criminal law judges exercise self-restraint when it comes to referring and instead take it upon themselves to apply (and sometimes interpret) EU law.[235]

This notwithstanding, however, a reference is sometimes unavoidable where the question of EU law cannot be answered by the national court itself. A good example is the Dutch Council of State's reference in relation to the so-called Nitrogen PAS programme, despite the major social and economic consequences that would result. This very complex and technical case dealt with the question of the compatibility of this programme with Article 6(3) of the Habitats Directive. The PAS allowed for the authorization of nitrogen deposits in Natura 2000 protected sites based on an 'appropriate assessment' carried out in advance in light of an overall amount of nitrogen deposits

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231 Interviews 10 and 18.
232 Interviews 14, 18, 39 and 83; Sevenster and Wissels 2016, 90.
233 NL:RVS:2016:890-891, para 5.2.
234 NL:HR:2015:3608.
235 Three Dutch Supreme Court judges interviewed by Claassen (PhD forthcoming in 2022).

deemed compatible, instead of an individual assessment.[236] It was problematic that the PAS anticipated the future positive effects of measures for protected nature areas and authorized deposits without any certainty that the planned measures would actually produce positive results. The Council of State eventually followed the ECJ judgment and concluded that the PAS was inconsistent with the Directive. The consequences of this judgment were significant and many building, farming and infrastructure projects had to be stopped.[237] Prime Minister Rutte referred to the 'Nitrogen crisis' as the biggest challenge in his ten-year tenure – at least before the COVID-19 pandemic.

In sum, this section shows that the decision (not) to refer often boils down to a complex balancing exercise which weighs the importance of the EU law question against the consequences of a reference both in the case at hand and for other pending cases. If the legal issue is too important, the courts are more reluctant to refer, in order to minimize the risk of other cases being affected.

2.2.6 Expected answer and pending cases

At times, in deciding whether (not) to refer, courts also consider what happens at the ECJ. Two issues may be identified here. The first is the expected answer of the ECJ and the possibility of framing the legal question in an intelligible way. Implicit in many decisions not to refer in light of the expected answer is the notion of feedback loops – the focus of the fourth research question in this book (Chapter 8, section 1.4). The decision not to refer may also be influenced by previous experience with the ECJ. Second, other pending references and cases before the ECJ also affect the decision (not) to refer.

At times, courts have decided not to refer because they found it difficult to formulate a good question to which a useful answer could be given. For example, the UK High Court declined to refer *Micula*, which concerned the enforcement of an international investment arbitral award against Romania. It noted, among other things, that 'the questions to be referred on such a reference are not straightforward to identify'.[238] A Dutch lower court judge recalled that he/she considered a reference about Article 15(c) of the Qualification Directive in relation to the notion of 'indiscriminate violence in situations of international or internal armed conflict' and the requisite level of violence necessary to establish subsidiary protection. He/she decided, however, that this question did not lend itself to a reference to the ECJ, because it would be almost impossible for the ECJ to come up with concrete and helpful guide-

[236] Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu* EU:C:2018:882.

[237] Interview 10; *Stichting Werkgroep Behoud de Peel v College van Gedeputeerde staten Noord-Brabant* NL:RVS:2017:1259, para 29.5.

[238] *Micula & Ors v Romania & Anor* [2017] EWHC 31 (Comm).

lines.[239] Judges sometimes considered whether they would be able to explain the legal problem clearly to the ECJ within the maximum 20 pages allowed for references, especially considering that ECJ judges are unfamiliar with their legal systems.[240] These considerations played a role in the cases discussed earlier about the intensity of review of the credibility assessment of asylum claims (section 3.5).[241] The judges interviewed held that it would be difficult for the ECJ to deal with such a principled issue relating to the relationship between the judiciary and the administration – even more so given the widely diverging views on this issue within the Netherlands itself, let alone within the EU, with its 28 different legal systems.

Similar considerations played a role in the *HS2* case before the UK Supreme Court, about a challenge to the government's plan for a high-speed rail network introduced by way of a Bill in Parliament without an environmental impact assessment (EIA).[242] The EIA Directive exempts projects adopted by a legislative act from the obligation to conduct an EIA; the question in this case was whether the requirements for this exemption had been met. The case thus touched on a delicate issue in the United Kingdom, where judicial review of legislative acts is not allowed, given the strong notion of parliamentary sovereignty. Lord Reed noted that, had a reference been made:

> it would have been essential to explain the constitutional issue as clearly as possible, not only because it would be largely peculiar to the United Kingdom, but also because the Court of Justice might be unwilling to make any allowance for the UK's difficulty unless the constitutional principle was understood to be truly fundamental.[243]

This case was also discussed during the interviews. One former Supreme Court judge noted: 'We did not like what the ECJ had done.' There were fears that the ECJ would endorse the suggestion of British AG Sharpston that there was a domestic duty to review the adequacy of the legislative process which had resulted in the planning permission. This would run counter to UK law and especially parliamentary sovereignty.[244] The UK Supreme Court was 'not

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[239] NL:RBDHA:2017:3443, para 5; NL:RBDHA:2017:5164.

[240] Interviews 10 and 18.

[241] NL:RVS:2016:890-891, para 5.2.

[242] *HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor* [2014] UKSC 3. Kokott and Sobotta 2019, 117–19.

[243] Reed 2014, 8–9. Lady Justice Arden subsequently demonstrated her approval for the Supreme Court's line of reasoning, which mirrored the approach of the German Constitutional Court in upholding the German Constitution and constitutional identity, Arden 2014, 34.

[244] Cf Wind et al 2009, 77.

enthusiastic' about this and certainly would not have wished to see the ECJ adopt this position.[245] Such an outcome would lead to a 'constitutional clash' whereby the Supreme Court would not follow the ECJ and would probably argue that the ECJ judgment did not fall within the scope of the European Community Act 1972.[246] The UK Supreme Court hence considered the legal issue *clair*, despite a feeling that the ECJ 'may have a different answer'. There was no doubt about the law, but only about what Luxembourg might say.[247] Another example is *Three Rivers*, on a depositor's right to compensation following the collapse of a bank, which was decided by the House of Lords in 2003. The House dealt extensively with EU law and eventually arrived at its own interpretation, which was subsequently adopted by the ECJ in a different German reference. Arnull noted that the House might have been reluctant to refer such a complex case dealing with questions that were far from being *clair* or *eclairé*. He thus commended the House for showing 'a remarkable grasp of Community law'.[248]

The previous account illustrates that courts – and once again, the UK and Dutch courts in particular – do not always consider it useful or time efficient to refer where they expect that the ECJ will respond only with criteria that are very general and already known.[249] This happens in particular in cases that touch on the proportionality of particular national measures in the light of EU law, since the ECJ often leaves such an assessment to the referring court.[250] One Dutch judge thus observed that questions about such issues lead only to a 'detour' through the ECJ that is of little practical use, and are thus a 'subscription to frustration'.[251] For example, the Tax Chamber of the Dutch Supreme Court decided not to refer partly because it expected an abstract answer ('no more than you already knew') in a case dealing with the abolition of a so-called 'exemption' from a tax on the import of coal used to generate electricity. The AG had recommended a reference on the question of whether the abolition of this exemption was contrary to Directive 2003/96 on the taxation of energy products and electricity, which allows for environmental policy considerations to be taken into account. The Supreme Court nonetheless expected that the ECJ would not provide any precise indications as to how serious environmental

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[245] Interview 264. One barrister (211) noted that Supreme Court sometimes does not refer out of concern for parliamentary supremacy.

[246] Interview 264.

[247] Interview 231.

[248] *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1; Arnull 2010, 77–79.

[249] Interviews 66, 72, 81 and 264.

[250] Case C-548/15 *De Lange* EU:C:2016:850; Interview 81.

[251] Interview 32.

policy considerations can be taken into account and would leave that to national courts.[252] It thus concluded that the abolition of the exemption was not contrary to the EU Directive. The Civil Chamber likewise considered a reference unnecessary in *Becton*, which concerned the reimbursement of legal costs and Article 14 of Directive 2004/48 on the enforcement of IP rights. There was a feeling that a reference would add little to the case law of the ECJ, and that the ECJ would simply say that the assessment was up to the national court. Hence, the judges decided not 'to sit around waiting for the ECJ like a bunch of anxious rabbits'.[253] In these recent cases, the Dutch courts exhibited the same self-assurance as the UK courts and confidently applied established EU law principles to new cases (section 3.2).

In deciding whether to refer, courts also consider pending cases before the ECJ. It is unsurprising that courts are generally reluctant to 'duplicate' references if similar questions are already pending before the ECJ.[254] In *Micula*, a pending annulment procedure was an additional reason for the High Court not to refer.[255] Likewise, the UK High Court refused to refer in a competition law case because it did not want to pre-empt the decision of the European Commission and the General Court.[256] Nonetheless, courts sometimes considered it desirable to refer questions even though similar questions were pending before the ECJ, preferring to do so rather than simply to await the outcome. The UK High Court found it 'appropriate' to refer *Rosneft*, even though an annulment case was already pending before the General Court challenging the Council's restrictive measures on access to the capital market for certain Russian entities operating in the oil sector, in view of Russia's actions which had destabilized the situation in the Ukraine.[257] The rationale was to ensure that the High Court would not await the outcome of these annulment proceedings in vain in case the ECJ declared them inadmissible on procedural grounds and thus did not rule upon the merits.[258] The UK High Court likewise decided to refer cartel damages case *Daimler* even though the same questions had

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[252] NL:HR:2018:862; Interviews 30 and 78.

[253] *Becton v Braun* NL:HR:2018:721; Interview 27.

[254] *JTI Ireland v Minister for Health* [2015] IEHC 481, paras 7–8; *Hutchinson v Mapfre Espana Compania De Seguros Y Reaseguaros SA & Anor* [2020] EWHC 178 (QB), para 29; *The National Council for Civil Liberties (Liberty), R (on the application of) v SSHD & Anor* [2018] EWHC 975 (Admin), paras 113–16; *SSHD v Watson & Ors* [2018] EWCA Civ 70, para 12.

[255] *Micula & Ors v Romania & Anor* [2017] EWHC 31 (Comm).

[256] *Roche Registration Ltd, R (on the application of) v The Secretary of State for Health (Rev 2)* [2014] EWHC 2256 (Admin).

[257] Case T-715/14 *NK Rosneft & Ors v Council* EU:T:2018:544.

[258] *PJSC Rosneft Oil Co v HMRC & Ors* [2015] EWHC 248 (Admin), paras 28 and 36. Cf *K And A* NL:RVS:2014:1196, para 27.

already been referred by the Amsterdam District Court. As in *Rosneft*, the High Court pointed to the risk of the case being settled, as a result of which the reference would be withdrawn and the questions would go unanswered, with 'highly undesirable trial management and costs implications'.[259] There was also another reason for the court to refer: the reference would enable the UK court (and authorities) to present their perspective on the issue and respond to allegations of the referring Amsterdam District Court that a previous UK Court of Appeal judgment was wrong as a matter of EU law.[260] The Dutch Council of State has also referred with the aim of 'feeding' its own view to the ECJ, even though similar cases were pending in Luxembourg. This happened, for example, in *Dow Benelux* on the Emissions Trading Scheme, in relation to which an Austrian court had already made a reference.[261] Another example is *G and R*, on the right to be heard in relation to the extension of the detention of illegally staying third-country nationals.[262] The Tax Chamber of the Dutch Supreme Court had already asked similar questions about the right to be heard and the consequences of breach of those rights from the perspective of the rights of defence.[263] The Council of State considered it necessary to refer this case to underline the differences between the context of the two different fields of law – customs and asylum. Moreover, the Council wanted a quick answer in *G and R* because the claimant was in detention. It therefore successfully submitted a question via the urgent preliminary ruling (PPU) procedure.

The Irish High Court likewise submitted a PPU reference even though there were also pending questions of the Supreme Court in a non-PPU case. A High Court judge even felt 'invited' to refer by that Supreme Court reference, which had been made in an EAW case: the Supreme Court could not make a PPU referral, since the person concerned was not in custody, whereas the High Court was confronted with a case in which similar issues arose with the procedural advantage of someone in detention. Once again, the rationale behind the reference was 'the sooner the better', because there was a feeling that 'nothing could move in the courts'.[264] This 'double' reference was made in relation to the question of whether the notification of the UK's intention to withdraw from the EU on the basis of Article 50 TEU meant that the Irish authorities must

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[259] *Daimler AG v MOL (Europe Africa) Ltd & Ors* [2019] EWHC 3197 (Comm), para 132.

[260] Case C-819/19 *Stichting Cartel Compensation & Ors*; *Daimler AG v MOL (Europe Africa) Ltd & Ors* [2019] EWHC 3197 (Comm).

[261] Joined Cases C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14-C-393/14 *Dow Benelux* EU:C:2016:311.

[262] Case C-383/13 *PPU G. and R. EU:C:2013:533.*

[263] Case C-437/13 *Unitrading* EU:C:2014:2318.

[264] Interviews 152 and 155.

refuse or postpone the execution of an EAW from the UK given the alleged uncertainty as to whether the rights enjoyed by those surrendered would continue to be protected after Brexit (answer: no).[265] The Supreme Court hinted at a future referral in a PPU case and held:

> it seems inevitable that, in the very near future, and in particular in the absence of the Court of Justice adopting the expedited procedure, a further case will come before the Supreme Court which would also require to be referred to the Court of Justice but where the person concerned was in custody.[266]

This quote also illustrates the Supreme Court's critique of the reluctant use of the expedited procedure by the ECJ, which basically forces national courts to opt strategically for PPU referrals. As will be mentioned in Chapter 5, section 4, this issue was discussed during a meeting in Luxembourg between Irish Supreme Court and ECJ judges.

3. CONCLUSION

This chapter has shown that most judges operate in a pragmatic way and include pragmatic considerations in their decision (not) to refer. Pragmatism has also prevented courts from referring, especially where they believe that they themselves are equally well equipped to answer open questions of EU law or where they expect no useful answer from the ECJ. This sentiment is particularly strong among the confident UK Supreme Court judges. Other courts, such as the Dutch and Irish Supreme Courts, have adopted a more legal-formalist approach and are (more) faithful in adhering to the Article 267 TFEU and the *CILFIT* requirements. As will be further discussed in the next chapter, the Dutch lower courts are reluctant to refer because of their position as fact finders in the judicial hierarchy; whereas (most) of the Irish and UK lower courts apply a 'better sooner than later' logic to avoid unnecessary litigation.

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[265] Case C-327/18 PPU *R O* EU:C:2018:733; Case C-191/18 *KN* EU:C:2018:884.

[266] *Minister for Justice v O'Connor* [2018] IESC 19, para 4.5; *Minister for Justice v Dunne No 3* [2018] IEHC 283, para 16.

3. Other non-political considerations and factors

1. INTRODUCTION

The previous chapter primarily focused on the application of the legal framework of Article 267 TFEU and the *CILFIT* exceptions. It discussed legal-formalist considerations that point to a strict adherence of this framework and a looser, more pragmatic approach. The following two chapters focus on other considerations and factors that go beyond the judges' application of the law. Chapter 4 focuses on politico-strategic motives; whereas this chapter focuses on several non-political factors. First, it considers personal and psychological factors and the individual background of judges (section 2). These include views on the judge's judicial role; the judge's knowledge of EU law and/or the preliminary reference procedure; and personal motives, reputational concerns and career implications. Second, institutional and organizational factors are discussed, including capacity and case management issues. Third, the role of parties and their requests to refer are examined.

2. PERSONAL AND PSYCHOLOGICAL FACTORS

The focus in this section fits into a recent trend in socio-legal scholarship which focuses on the agency of judges.[1] As will be made clear, other empirical studies on national court references to the ECJ have also found that such factors play a major role.

2.1 Judicial Role: Law versus Fact-Finders

One of the most decisive factors behind the willingness of lower courts to refer is the judge's perspective on the court's judicial role as a court of first or second instance *vis-à-vis* the highest court(s), and more broadly, on the judge's role in the political system. Recent empirical studies of lower courts in Italy,

[1] Posner 2008; Epstein et al 2013; Chehtman 2020; Rado 2020; Lampach and Dyevre 2019.

Denmark, Slovenia and Croatia also emphasized this point as an important explanation for the reluctance of lower courts to refer.[2] These studies also noted that some of the highest courts, and in some cases even the executive, have discouraged references from lower courts.[3] There are notable differences between the Irish and Dutch courts in this respect, with UK courts sitting somewhere in between. One word of caution relates to the comparability of the three-layered Dutch legal system with the multi-layered court systems in the UK and Ireland, which have a wide variety of courts and tribunals, as discussed in Chapter 1. The Court of Appeal and High Court in the UK and Ireland are superior or intermediate appellate courts, and are therefore difficult to compare with the Dutch 'lower' courts (*gerechtshoven* and *rechtbanken*).

Several Dutch judges clearly indicated that references should primarily be made by the highest court(s), given the lower courts' more limited judicial law-making function and limited expertise and time. They generally consider referring to be the task of the highest court(s), even in case of doubt.[4] This reluctance also stems from a widely shared satisfaction with and trust in the Dutch highest courts, given their willingness to refer. One judge, for example, stated that the Supreme Court is a 'fantastic' court with respect to EU law, with excellent and well-trained judges.[5] According to most lower court judges, the role of the courts of first (and second) instance is to take decisions and resolve disputes.[6] One department of tax law within a court of appeal had an unofficial policy of not referring, even where a matter was not *clair* or *éclairé*.[7] The preference of the highest courts to refer is also laid down in a memo issued by the Committee of the Presidents of the Administrative Law Departments of District Courts and an instruction of a similar committee in the area of tax law.[8] These signals even led one court to abstain from referring even though the questions had already been finalized in draft.[9] The Dutch courts of appeal are slightly more inclined to refer, because there is more attention on law making

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[2] Glavina 2019, 2020a and b; Pavone 2018; Rameu 2002, 12–13; Stone Sweet and Brunell 1998, 73; Mayoral and Pérez 2018, 725.

[3] Leijon and Glavina 2020. Cf Wind et al, 76 and 78.

[4] Eg NL:GHARL:2014:2583, paras 4.8 and 10; Interviews 14, 29, 51, 55, 62, 58 and 74.

[5] Van Alphen 2017, 17 and 31.

[6] Interview 74. Eg NL:GHARL:2014:35, para 4.8; NL:RBNNE:2013:BZ6427, para 3.15.

[7] Interview 51.

[8] On file with the author: '*Werkwijze stellen van prejudiciële vragen*', 12 June 2013; '*Aanbeveling: Stellen van prejudiciële vragen aan het Hof van Justitie van de Europese Unie binnen het bestuursrecht*', undated; '*LOVBeL: Werkwijze stellen van prejudiciële vragen*', 16 March 2015. Cf Storey et al 2014, 18–19.

[9] Interview 25.

and unity at this level, and because the facts are usually more crystallized at second instance (see also Chapter 2, section 3.1).[10] Most Dutch lower civil and tax judges prefer to use the national preliminary ruling procedure introduced in private law in 2012 and in tax law in 2016. They choose to refer questions on the interpretation of EU law to the Supreme Court instead of referring directly to the ECJ themselves. One example is the questions submitted by the Zeeland-West Brabant District Court to the Supreme Court about whether a Latvian seafarer was obliged to pay social income tax and social security contributions in his state of residence.[11] The district court noted in its reference that it preferred to submit questions to the Supreme Court so that the highest court could enter into a 'dialogue' with the ECJ, taking into account the importance of informing the ECJ as optimally as possible.[12] A tax judge involved in this case also acknowledged that the reason for referring to the Supreme Court instead of the ECJ was mainly related to the idea that the Supreme Court would be better positioned to formulate good questions.[13] Aside from the greater amounts of experience, time and expertise available at the Supreme Court, two other lower court judges also noted that a reference from the Supreme Court has more authority and is taken more seriously by the ECJ than a lower court reference.[14] This example illustrates that the introduction of this national procedure reinforced the reluctance to refer to the ECJ. A similar phenomenon has been reported in other EU Member States, such as Spain.[15]

There are some exceptions to this general picture. Dutch judges with a specialized background in IP law, a few immigration law judges and judges of the Chamber for International Cooperation of the Amsterdam District Court are somewhat more eager to refer and do not feel restricted by this logic, often because of the highly specialized nature of the cases that they deal with. As will be discussed in section 2, this specialization has sometimes led to a culture that is more favourable to referral. The District Court of The Hague, for example, referred three IP cases in the studied period of 2013–16.[16] One of these was *Vereniging Openbare Bibliotheken*, which concerned the lending of e-books by public libraries.[17] The district court was eager to refer at first instance because it noted that a reference is the quickest way to obtain a definitive

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10 Interviews 25, 35, 58, 74 and 93.
11 C-631/17 *SF* EU:C:2019:381.
12 NL:RBZWB:2017:2454, para 4.18.
13 Van Alphen 2017, 30.
14 Interviews 51, 71.
15 Mayoral and Pérez 2018, 728.
16 C-163/16 *Louboutin* EU:C:2018:423; C-230/15 *Brite Strike* EU:C:2016:560.
17 C-174/15 *Vereniging Openbare Bibliotheken* EU:C:2016:856.

judicial opinion.[18] Some of the specialized judges have also been activists and have referred on the basis of politico-strategic calculations, as discussed in the following chapter.

By contrast, most Irish judges apply a 'better sooner than later' logic. Decisions of the Irish Court of Appeal and the High Court in particular mention the advantages of early referral. Very few judgments were found in which the Dutch logic of leaving references to the highest courts was mentioned.[19] Almost all High Court and Court of Appeal judges disagreed with the view that references should be left to the Supreme Court. There is a general idea that, if it is certain that a question must be referred at some point, it is beneficial that the first-instance court refers at an early stage.[20] Waiting for the higher courts to refer could mean that some questions of EU law are ultimately not submitted to the ECJ and are thus 'left in vain'.[21] This is even more so the case because, as some High Court judges noted, it can take up to two years to get a hearing at the Court of Appeal. High Court judges felt that they have more time to hear cases: 'I save them work when I refer myself when it is inevitable.'[22] It would seem unacceptable to most High Court judges to decide an unclear point of EU law themselves – possibly incorrectly – because they preferred the superior courts to refer. Judges argued along the lines of, 'It is not for me to guess what the ECJ would say', or 'Who am I to cook up the law?'[23] Likewise, one judge noted, 'I simply do not have the competence to make the decision', and hence decided to refer.[24] Meanwhile, Irish High Court Judge Cooke decided to refer because he found it to be in the interests of the parties to resolve the points of law in question before the initiation of a Supreme Court appeal.[25] High Court Judge Barrett also decided to refer the environmental case *People over Winds* and pointed to the risk of hoping that an appellate court would subsequently refer, while also mentioning the financial burden of an appeal.[26] High Court

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[18] *VOB* NL:RBDHA:2014:10962, para 4.11.

[19] One exception is *Lofinmakin & Ors v MJELR & Ors* [2011] IEHC 116 (Cooke J), para 6; *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Recources & Ors* [2017] IEHC 307 (Costello J), para 32.

[20] Interviews 148, 155 and 181. Cf *Minister for Justice and Equality v Dunne No 3* [2018] IEHC 283 (Donnelly J), para 17.

[21] Interview 148.

[22] *Ibid*; Fahey 2007, 20.

[23] Interviews 121, 133 and 181.

[24] Interview 161. Cf Interviews 108, 136, 139, 159, 166, 181 and 187.

[25] *HID (A minor) & Anor c Refugee Applications Comr* [2013] IEHC 146 (Cooke J), para 31 (Case C-175/11 *D en A* EU:C:2013:45).

[26] *People over Winds & Anor c Coillte Teoranta* [2017] IEHC 171 (Barrett J), para 21 (C-323/17). Cf *Aer Lingus v Minister for Finance & Ors* [2018] IEHC 198 (Barrett J), para 46.

Judge Humphreys highlighted another advantage for the appellate court where a reference was made by the High Court in *MA* about the transfer of a protection applicant under the Dublin III Regulation to the UK: one reason to refer at an early stage is to ensure that 'the reply from Luxembourg [is] digested and applied' before the case reaches the Court of Appeal or Supreme Court.[27]

The practice of the UK lower courts is more diverse. On the one hand, the relatively high number of 'lower' court references in the UK mirrors the Irish situation. Intermediate appellate courts have referred quite a lot because of their focus on law-finding and law creation.[28] Like the Irish courts, the UK courts (and tribunals) have frequently acted in line with the 'better sooner than later' approach, emphasizing the benefits of early referral where it is likely that the case will need to be referred in any case and where all relevant facts have been found.[29] The UK First Tier Tribunal, for example, held that a reference is cheaper, because 'onward appeals within the UK are likely to exceed the cost of a ECJ hearing'.[30] The UK High Court held in a family law case that 'the swiftest route to secure' authoritative determination is via Luxembourg.[31] The UK Supreme Court recently pointed to the advantage of 'discretionary references' of lower courts 'in circumstances where it is likely that the Supreme Court would be bound to make a reference in any event. In this way, a discretionary reference can save time and expense'.[32] On the other hand, however, numerous judgments reflect the Dutch logic of leaving a reference to the higher courts, even after concluding that the matter was not *clair*.[33] One UK barrister noted that the lower courts tend to avoid 'rocking the boat' and thus leave referring to the final court.[34] This is even more so the case

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[27] *MA v The International Protection Appeals Tribunal & Ors* [2017] IEHC 677 (Humphreys J), para 140 (Case C-661/17 *M.A.* EU:C:2019:53).

[28] Ovádek et al 2020, 142.

[29] Eg *Bookit Ltd v HMRC* [2014] UKFTT 856 (TC), para 115; *Sky plc & Ors v Skykick UK Ltd & Anor* [2018] EWHC 155 (Ch), para 357; *MG v Portugal* [2012] UKUT 268 (IAC), para 34; *HMRC v HD* [2018] UKUT 148 (AAC), para 40; *RP v SSWP* [2016] UKUT 422 (AAC), para 77; *O'Brien v Ministry of Justice* [2015] EWCA Civ 1000.

[30] *Healthspan Ltd v HMRC* [2018] UKFTT 241 (TC), para 267.

[31] *MS v PS* [2016] EWHC 88 (Fam), para 6.

[32] Written response 15 April 2020. Cf Interview 208.

[33] Eg *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch), para 27; *Safeway Ltd v Newton & Anor* [2016] EWHC 377 (Ch); *Buckinghamshire County Council & Ors, R (on the application of) v The Secretary of State for Transport* [2013] EWHC 481 (Admin); *The Trustees of the BT Pension Scheme HMRC FTC/91 and 92/2011* [2013] UKUT 105 (TCC), para 423 (later referred in Case C-628/15 *The Trustees of the BT Pension Scheme* EU:C:2017:687).

[34] Interview 211. Cf Interviews 208 and 264; Kochenov and Lindeboom as discussed in Pollack 2017, 586.

where the highest court has previously decided an issue without a reference. The lower courts are subsequently reluctant to second-guess such a decision out of respect for the judicial hierarchy (see further Chapter 4, section 4).

2.2 Knowledge and Specialization

A prerequisite for a reference is a certain level of knowledge about the procedure and EU law. Until 1990, most national court judges lacked the necessary knowledge to understand and apply EU law.[35] *Duke* is an example of a case in 1988 in which even the highest UK court, the House of Lords, made considerable errors from the perspective of EU law.[36] Today, knowledge seems to be less of a problem for the highest courts, especially in the older EU Member States.[37] This book confirms the importance of knowledge and attributes the increase of references in Ireland in recent years partly to a generational change within the courts. The findings show that training and legal education have an important impact.[38] Nonetheless, too much knowledge can discourage references, as was argued previously in relation to overconfident UK Supreme Court judges (see Chapter 2, section 3.2).

Limited knowledge may be a factor that hinders courts from referring. This is especially true of lower courts, which are sometimes 'nervous' to refer because they are not always well informed about the intricacies of EU law.[39] An empirical study of primarily civil law lower courts in Germany, the Netherlands, Poland and Spain also found that judges are sceptical about their own knowledge.[40] Surveys among national court judges found that the large majority of lower court judges lacked knowledge of how to make a reference.[41] The interviews revealed that lower court judges did not mind acknowledging deficiencies in their knowledge.[42] One Dutch civil law judge, for instance, stated that he/she was aware only of the key aspects of the procedure and that it was meant for the interpretation of EU law; otherwise, he/she knew very little.[43] One judge referred to the fear of the unknown.[44] Another Dutch tax law judge who had made several references noted that the reluctance of other tax

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35 Rasmussen and Martinsen 2019, 264–65.
36 *Duke v GEC Reliance Systems Ltd* [1988] AC 618 at 641; Arnull 2010, 70.
37 Leijon and Glavina 2020; Bobek 2015, 13; Geursen 2020; Tatham 2012.
38 Mayoral et al 2014, 1136–37.
39 Liz Barratt as quoted by Sigafoos 2012, 495.
40 Mayoral et al 2014. Cf interviews with the Dutch lower court judges in the fields of consumer and criminal law, Claassen (PhD forthcoming in 2022).
41 Eg Wallis 2008; Nowak et al 2011.
42 Mayoral et al 2014, 1122.
43 Interview 49.
44 Interview 14; Nowak et al 2011.

judges may stem from the idea that it takes a lot of time and effort (a 'whole tour') to ask questions for the first time.[45] A judge who had recently asked a question for the first time likewise said: 'You first have to clear the hurdle of overcoming the reluctance to refer.'[46] Dutch judges mentioned that a reference by a lower court judge is 'unique' and receives reactions such as 'Good that you dared to do it!'[47] One Irish High Court judge mentioned that his/her 'sole knowledge of the matter under consideration is a decade old memory of college lectures about Article 177!'[48] Another judge, who had never referred, still referred to Article 234 of the EC Treaty, which was replaced by the current Article 267 TFEU back in 2009. This judge was also unaware of the difference between the highest court's obligation to refer and the discretion of the lower courts.[49] Another judge continuously referred to 'EC law', instead of 'EU law', during the interview.[50] Likewise, one judge erroneously suggested that individuals can refer a case to the ECJ after exhausting all domestic remedies.[51] The situation seems even worse at the level of the Irish district and circuit courts. Irish interviewees mentioned that the ability of these courts to draft an order for reference is limited because they are not used to writing judgments.[52]

The limited knowledge of lower court judges is unsurprising, as most of them deal with cases in which references are potentially necessary only once or twice in their career.[53] This is even more so the case in areas of law where EU law plays a limited role. The low number of references in criminal law cases, except for EAW cases, can also be attributed to the limited awareness of lower court judges of the relevance of EU law and the possibility to refer.[54] By contrast, migration law is highly Europeanized, which means that judges are forced to become experts in EU law.

In recent years, however, a generational change has resulted in judges with more extensive knowledge of EU law and a different mindset with respect to referring. This has happened, for example, in the Dutch Council of State. The number of judges in the Dutch Council of State with a great deal of knowledge of EU law increased considerably after Mortelmans became a judge in 2005.[55] This has also resulted in a higher number of references. Something

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45 Interview 35.
46 Interview 49.
47 Interviews 16, 49 and 86.
48 Interview 102.
49 Interview 159.
50 Interview 139.
51 Interview 146.
52 Interview 155.
53 Interviews 16 and 74.
54 Claassen 2019.
55 Interview 44; Sevenster and Wissels 2016; Lubberdink and Polak 2015, 547.

similar happened in Ireland roughly a decade later. The growing number of Irish references can be partly attributed to new and younger judges replacing older judges whose legal education pre-dated Irish accession to the European Community in 1973.[56] According to some of the Irish judges interviewed, some of those older judges were 'dismayed' when EU law was introduced to Ireland, or saw referencing as 'a big step'.[57] Older judges were 'steeped in the common law' and tended to frown upon EU law. By contrast, new judges appointed in the past decade are more willing and comfortable with referring – not least because they have studied EU law at university, have practised EU law or have even appeared in Luxembourg as advocates.[58] EU law thus posed 'no fear' to them.[59] In recent years, several (relatively young and/or recently appointed) High Court judges have indeed made their first reference.[60] These quotes illustrate that a judge's attitude to referring is closely related to his or her amount of knowledge. Generational changes are natural and are certainly not restricted to Ireland and the Netherlands, as Mayoral and Pérez showed in relation to Spain.[61]

At a certain point, too much knowledge of EU law can also be a factor that can discourage references. This seems to be the case for the UK Supreme Court, whose judges are often 'confident' to interpret EU law themselves because they think that they understand the case law, as discussed earlier in Chapter 2, section 3.2.[62] One UK barrister noted that growing expertise and specialization in EU law have caused both the UK Supreme Court and other courts to refer less, because they (think they) know the answers themselves.[63] One example is the UK Competition Appeals Tribunal, which deals with EU law on a daily basis, but – ironically – referred for the first time only quite recently, in 2018.[64] A similar logic explains the relatively low number of references from the Irish Supreme Court when three judges with a Luxembourg

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56 Interviews 105 and 166.
57 Interviews 113, 128, 155, 159, 187 and 191.
58 Interviews 105, 118, 126, 133, 136, 148, 153, 155, 159, 166, 171, 174, 187 and 191.
59 Interview 166.
60 Eg Humphreys, Donnelly, Barrett, Keane, Costello and Simons. The reason why some High Court judges have not been involved in a reference often depends on the cases assigned to those judges and not so much to reluctance or hostility. References are confined to certain areas with a connection to EU law, while there are few references outside those areas, including personal injury, chancery, equity or domestic criminal law. Interviews 102, 105, 148, 152, 155, 188 and 191.
61 Mayoral and Pérez 2018, 728.
62 Interview 243; Arnull 2017, 355–56.
63 Interview 243.
64 Case C-307/18 *Generics* EU:C:2020:52; Interview 243.

background subsequently became Supreme Court judges: Fennelly (ECJ 1995–2000; Supreme Court 2000–13), Murray (ECJ 1992–99; Supreme Court 1999–2015) and Macken (ECJ 1999–2004; Supreme Court 2005–12).[65] Two interviewees noted that the three members knew the answers to questions of EU law and would consider matters to be *acte clair* quicker ('[W]e understand this stuff').[66] Likewise, one current Supreme Court judge observed: '[T]here is less confidence when we do not have people from Luxembourg on the court.'[67]

The foregoing suggests that the more judges know about EU law, the less likely they are to refer.[68] There are two caveats, however. First, considerable specialization in particular areas of EU law sometimes leads to a culture in which a reference is more likely.[69] Dutch customs cases, for instance, are dealt with only by the Noord-Holland District Court and the Amsterdam Court of Appeal; while almost all IP cases go to the District Court of The Hague.[70] Patent cases in England and Wales are dealt with by a specialized Panel Court on appeal from the UK Intellectual Property Office.[71] These specialized courts and departments are generally eager to refer. They spot the deficiencies and inadequacies in the ECJ case law and are thus better at 'teasing out the problem'. They are better at controlling their case dockets and can spot commonalities and identify issues that need to go to the ECJ. This has also happened in the UK in fields such as social security, employment and equal treatment, where the Upper Tribunal has traditionally been quite keen to refer.[72]

Second, individual judges and particular courts sometimes contradict the logic of reluctant referrers when they have a lot of EU law knowledge. One good illustration is former Irish High Court (2010–14) and Court of Appeal (2014–18) Judge Hogan, currently AG in the ECJ. As a High Court judge, he

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[65] The Supreme Court made nine references in the 1990s as opposed to six references in the 2000s. *Mallak v Minister for Justice, Equality & Law Reform* [2012] IESC 59 (Fennelly J), para 30; *Albatros Feeds v Minister for Agriculture and Foods & Ors* [2006] IESC 52 (Fennelly J).

[66] Interviews 152 and 166.

[67] Interview 152.

[68] Interview 108.

[69] See also the notion of 'hotspots' of references in particular legal areas, Kelemen and Pavone 2018; Stone Sweet and Brunell 1998, 91; Interview 58.

[70] This is not necessarily the case, because the Rotterdam District Court, for example, is the only court that deals with several areas of economic administrative law, but has made relatively few references. In addition, government tax cases are handled by just five of the 14 district courts, but this has not contributed to an increase in references.

[71] Arnold 2020, 1105.

[72] This barrister (243) nonetheless noted that tribunals have become less eager to refer in those fields and have left this to the higher courts.

made at least five references – including *Schrems*, about the invalidity of the US Safe Harbour decision.[73] In the Court of Appeal, he was also behind most of the references. His extensive knowledge of EU law did not prevent him from referring. On the contrary, according to the judges interviewed, he was as 'an enthusiast' who allegedly saw referencing as 'an intellectual challenge'.[74] This illustrates that judges and courts with a lot of (specialized) expertise in EU law can have the desire to actively contribute to the development of EU law and/or to challenge the compatibility of national law with EU law.

Another example that is discussed further in Chapter 4 is the references of the Chamber for International Cooperation of the Amsterdam District Court in the context of EAWs. The legal secretary of this Chamber wrote a dissertation on the Dutch law on extradition in relation to EU law. This dissertation hinted at several tensions and possible questions for the ECJ that were subsequently referred by the Chamber.[75] These examples indicate that personal motives such as prestige or intellectual stimulation can also be a factor, as will be discussed in the following section.

2.3 Personal Motives

Closely related to knowledge of EU law and procedure is the attitude and judicial identity of judges in relation to the ECJ and the use of the preliminary reference procedure, as the previous examples of Hogan and the legal secretary of the Dutch Chamber for International Cooperation illustrate.[76] Another well-known judge who fits the picture of an enthusiastic referrer is Judge Seijo in Spain, who referred the consumer law case *Aziz* about mortgage foreclosures discussed in Chapter 1. He is a 'repeat player' and was involved in at least seven references prior to *Aziz*. He is a Europeanist with an interest in the 'more advanced' system of EU law, and has many contacts with EU law scholars and (former) ECJ judges and AGs.[77]

These examples confirm that the backgrounds and attitudes of judges matter. One Dutch interviewee suggested that judges with an academic or governmental background have a more positive attitude towards the ECJ and are more interested in contributing to the development of EU law. They are also more accustomed to working with a supranational court as the highest authority. By contrast, career judges find it more annoying to refer, since this disturbs their

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73 Case C-362/14 *Schrems* EU:C:2015:650.
74 Interviews 187 and 191.
75 Glerum 2013.
76 Dyevre 2016, 116; Mayoral and Pérez 2018, 725.
77 Mayoral and Pérez 2018, 729.

autonomy in deciding on disputes, as well as the national judicial process.[78] Judges with a lifelong career in the judiciary who have made it to the highest court do not suddenly devote themselves completely to the ECJ; instead, they have a more sceptical attitude, asking, 'Is it up to the ECJ to determine this?'[79] Van Gestel and de Poorter reported similar findings based on interviews with judges of supreme administrative courts in ten EU Member States. They found that career judges are more pragmatic and results oriented, and are primarily interested in dispute resolution and reducing their caseload.[80]

Individual judges can shape a particular culture within a court and sometimes even beyond that court, especially in small jurisdictions such as Ireland.[81] The previously mentioned judge of the Council of State, Mortelmans (2005–16), was 'a fervent advocate' of the reference procedure and internally promoted the need to make (good) references.[82] The current Irish Chief Justice Clarke was said to be more willing to refer than his predecessors and allegedly does not subscribe to the notion that the ECJ 'should not be telling us what to do'.[83] This attitude is markedly different from that which prevailed a decade earlier, when the Irish Supreme Court was more 'hostile' towards referring, as in the *Masterfoods* case regarding parallel competition proceedings before the national and EU courts.[84] Back then, references were not necessarily signs of true engagement with EU law and were primarily made to have Luxembourg sort out complex and delicate issues for the national court.[85] A positive dynamic was also observed in relation to the Irish Court of Appeal when Hogan and Finlay Geoghegan served as judges (2014–17).[86] When one of them proposed a reference, the other judges would normally defer to them and they would prepare the order for reference.[87] Several of these references, and the prominent references of Hogan as a High Court judge, have also inspired other (High Court) judges to refer. In relation to this, one can think especially

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78 Interviews 10 and 44.

79 Interview 10.

80 Van Gestel and de Poorter 2019, 112 and 117.

81 Interviews 108, 113, 148, 166 and 187.

82 Wissels 2015, 550.

83 Interviews 113, 133 and 187.

84 Case C-344/98 *Masterfoods* EU:C:2000:689; Interview 113.

85 Eg Case C-221/05, *McCauley Chemists* EU:C:2006:474; Fahey 2006, 401; One interviewee (188) referred to the equal treatment case of *Kenny* (C-427/11 EU:C:2013:122) as an example of a case in which the (criminal law) judge referred an equal treatment case to the ECJ 'to get it off his plate so that he did not have to worry about it'.

86 *Metock & Ors v MJELR* [2008] IEHC 77 (Finlay Geoghegan J), para 53.

87 Interviews 113 and 166. These views are corroborated by the actual references made. There was only one reference in which neither of the two were involved – Case C-640/15 *Vilkas* EU:C:2017:39.

of *Schrems*, concerning the invalidity of the US Safe Harbour decision. A similar phenomenon may be observed in relation to the Spanish consumer law references that followed the famous *Aziz* case on mortgage foreclosures. *Aziz* promoted 'a new repertoire of judicial tactics' and inspired other judges with less EU law experience to mobilize EU law and refer.[88]

Aside from their attitude towards the ECJ, judges also differ from a more psychological angle in terms of their eagerness to utilize the procedure. Some judges are driven by fear for their reputation; while others derive satisfaction from referring and see this as a way to gain prestige. Some Dutch lower court judges in particular mentioned the risk that the ECJ would dismiss the question too easily or answer it in a way that gave the impression that the referring court did not understand EU law or had overlooked particular ECJ judgments. They expressed the fear that they might miss essential points in their reference and hence preferred not to refer at all.[89] This suggests that such a fear stems from insufficient knowledge to a large extent.[90] Judges in Italy, Croatia, Slovenia and Sweden voiced similar concerns.[91] Pavone quotes from an interview with a judge in Milan: 'It's very risky to refer because your reference could be declared inadmissible. And this becomes known.'[92] However, almost all Irish judges rejected fear as a relevant consideration.[93] One judge insisted: 'Once it goes, you have to be happy. One should not look over the shoulder all the time.'[94] One reason why fear seems to play less of a role in Ireland is a heavy reliance on litigants.[95] One judge held that he/she was not afraid to refer because experienced and 'very good' legal teams from both sides worked out the written reference.[96] Another judge stated: 'If the reference would make a fool, primarily the parties would make a fool of themselves.'[97] When the ECJ answered the questions by way of order in *MH*, meaning that the answer could be 'clearly deduced from existing case law', this was not seen as a rap on the knuckles of the referring court. Above all, the order was considered a rebuke to the parties, which had failed to refer to the relevant ECJ precedent.[98]

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88 Mayoral and Pérez 2018, 730 and 732.
89 Interviews 14, 49, 51, 55 and 74. Some judges (16, 54, 93) downplayed this fear. Šadl et al 2020.
90 Pavone 2018.
91 Leijon and Glavina 2020. Cf Pavone 2018.
92 Pavone 2018.
93 Interview 139.
94 Interview 159. Cf Interview 139.
95 Interviews 102 and 144.
96 Interview 121.
97 Interview 102.
98 Interview 166; Case C-173/16 *MH* EU:C:2016:542; *MH v MH* [2017] IECA 18 (Finlay Geoghegan J), para 18.

A contrasting personal motivation to refer is that a reference can gain the judge or the court a certain status or prestige at the European level.[99] Judges were not generally quick to admit this; but one acknowledged that 'it feels very nice' to refer a case that has a significant impact. This judge said that his/her referred case was 'one of the nicest things of the last years', because he/she normally just did 'home, garden and kitchen matters'; a referral is much more demanding.[100] Enthusiastic judges derive satisfaction from referring and seek to shine by making a reference out of self-assertion.[101] This also holds true for a few 'activist' judges who consider they have a responsibility to contribute to the development of (EU) law and who use the preliminary reference procedure to leapfrog the judicial hierarchy and seek support from the ECJ.[102] As will be discussed in the following chapter, this has played a particularly influential role in the field of migration law, where emotions and moral or ethical considerations matter – at least for some judges. Several other Irish and Dutch interviewees mentioned that they liked drafting references because of the intellectual endeavour required.[103] One Irish judge mentioned that as a young and new judge, he/she was 'prepared to take on extra' in the first year.[104] Another observed that 'some judges are only too willing to refer. At least they appear so'.[105] A recent Dutch example that seems to fit into this category is the reference by a single district court judge in *Varkens in nood* about the compatibility of Article 6:13 of the Dutch General Administrative Law with Article 9(2) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The referring judge was also employed as a university associate professor. In his decision to refer, the judge noted that he considered the admissibility question, which formed the reason for this reference, from his own motion. He explicitly cast doubt on the case law and approach of the highest administrative court, the Council of State, with respect to Article 6:13.[106] The ECJ eventually held that the provision indeed breached EU law because it restricted the admissibility of judicial proceedings to NGOs and other interested persons who had participated in the procedure preparatory to the contested decision.[107] It would appear

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[99] Weiler 1994.
[100] Interview 86.
[101] Interview 25 and 51.
[102] Interviews 29, 55, 83 and 93.
[103] Interviews 39 and 86.
[104] Interview 187.
[105] Interview 136.
[106] René Seerden is an associate professor of environmental law at Maastricht University; *Varkens in nood* NL:RBLIM:2018:12159, paras 10 and 10.5.
[107] Case C-826/18 *Varkens in nood* EU:C:2021:7.

that UK judges do not see referencing as a way to shine – albeit that it is difficult to conclude this based on the limited number of interviews conducted.[108] One notable exception is Justice Arnold, who made a considerable number of references in the field of IP law.[109]

Another question is whether career considerations play a role in judges' decisions to refer. Empirical studies in Slovenia and Croatia concluded that negative career prospects could sometimes discourage (lower) courts from referring.[110] It seems in particular that judges are more wary of upsetting higher court judges through a legally flawed or activist reference in judicially centralized states such as France, where the recruitment, appointment and promotion of judges are centralized.[111] The analysis of judgments and interviews with judges in the three countries does not suggest that career prospects play a (substantial) role. This can possibly be explained by the strong independent and autonomous status of judges in the three countries and the absence of centralized disciplinary measures.[112]

3. INSTITUTIONAL

The previous section pointed to a certain culture in particular courts and the ability of individual judges to shape that culture. Institutional or managerial factors are closely related to the functioning of departments of and within courts.[113] One first institutional element is coordination. Enhanced coordination of EU law partly explains why the Dutch Council of State has paid more attention to EU law and referred more often in the past decade. EU law questions are now coordinated better because of the creation of a committee on EU law and a documentation service that keeps close track of EU law developments.[114] This committee consists of members of different chambers of the court. It discusses EU law developments and cases that are likely to be referred.[115] It also tries to bundle cases to be referred jointly, as happened in *Willems* regarding biometric data and passports.[116] In Spain, an EU law

[108] Interview 231.
[109] Eg *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2016] EWHC 50 (Ch), Arnold 2020.
[110] Leijon and Glavina 2020.
[111] Pavone and Kelemen 2019; van Gestel and de Poorter 2019, 123.
[112] Cf Germany, Pavone and Kelemen 2019; Alter 1998, 238.
[113] Cf meso-level determinants, Dyevre 2016, 116; Bobek 2013a, 67.
[114] Interviews 18, 44, 81 and 89.
[115] The Dutch Administrative High Court also holds such meetings, Interviews 24, 66 and 89.
[116] Van Gestel and de Poorter 2019, 5.

network with judges specialized in EU law has also had a positive impact in terms of the coordination of references.[117]

A second institutional aspect affecting the decision to refer is the case management system within courts. This has played a strong role at the level of the Dutch lower courts. In the Netherlands, references are discouraged by a financial system which rewards judges based on the number of cases they decide. There is increased pressure on the capacity of courts and there is a tendency among lower court judges to favour the resolution of disputes without referring.[118] Dutch district courts are 'decision-making machines'; there is no time to 'go into the study and answer legal questions'.[119] Recent work on the Slovenian and Croatian (lower) courts also pointed to such time and numerical targets; while research on the Italian lower courts highlighted pressures due to their high caseload.[120] Pavone refers to the 'economy of everyday judging', with judges who simply 'don't have the time', and points to 'institutional path-dependencies' that have prevented EU law from becoming embedded within general day-to-day routines in the lower courts.[121] The pressure to make a decision on time, in combination with holiday periods, can mean that an initial intention to refer is not realized. One judge pointed to such logistical issues, which eventually prevented a referral. He/she noted that a reference 'messes up your normal workflow' and leads to 'backlogs' and 'extra work'.[122] There are considerable differences among the Member States. However, Irish judges were adamant in rejecting the notion of production targets. One judge stated: 'Gosh no! That can never be a factor.'[123] Irish judges do not factor in delays in judicial decision making, as was discussed in Chapter 2, section 3.5. Judges want to do things correctly and the merits are all that matter.[124] One judge, however, noted that it is not 'us', the judges, who are under pressure, but rather the system, for which the state is responsible. He/she mentioned the judge's 'selfish point of view' that it is not his or her fault that referring takes 15 months extra where necessary.[125] The fact that Ireland has the lowest number of judges per capita in the EU, as several interviewees highlighted, does not affect judges in their actual decision making or willingness to refer.[126]

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[117] *Ibid*, 122.
[118] Interviews 14 and 20.
[119] Interviews 58, 74 and 93.
[120] Glavina 2020b; Leijon and Glavina 2020; Pavone 2018.
[121] Pavone 2018.
[122] Interview 93. Almost all judges who have experience with drafting a reference acknowledged that it requires a lot of work, Interviews 8, 16, 39, 55 and 93.
[123] Interviews 139, 136, 144, 146 and 181.
[124] Interviews 139 and 187.
[125] Interview 144.
[126] Interviews 108, 113, 146, 159 and 187; Fahey 2004, 12.

This confirms that the independence of individual judges is guarded very carefully.[127]

A third related institutional aspect is the available capacity within a court.[128] A Dutch district court judge noted that district courts decide 90 per cent of all court cases with a relatively low number of judges: '[J]udges who might harbour the desire to refer, have the manpower dictating against that.'[129] This view was shared by other judges, who noted that the level of back-up and support staff is limited in the lower courts.[130] The relevance of capacity is illustrated by the four references made by the Den Bosch Court of Appeal in 2012 within a six-week period; whereas the same court made no references in the following four years. This was attributed to the availability of extra time and capacity during that particular period. Recent empirical studies have also suggested that a heavy workload and limited resources militate against references being made, especially by the lower courts.[131] The higher resource/workload ratio of the highest courts thus positively affects their ability to refer.[132] The highest courts are better equipped to refer in terms of the level of support staff, the greater number of judges involved and the preceding opinion of the AG at the level of the Supreme Court.[133] This is also the perception of the lower courts, which further encourages them to avoid making references to the highest courts (section 2.1). In their view, the highest courts are better able to provide the optimal questions and information to the ECJ. This was one reason why the Zeeland-West-Brabant District Court used the national preliminary ruling procedure and referred a question about the interpretation of EU law to the Supreme Court instead of referring directly to the ECJ.[134]

In short, institutional and organizational aspects impact the willingness and ability of judges to refer. These include the coordination of EU law; case management and production targets; and capacity and resource/workload ratio.

4. THE ROLE OF THE PARTIES

Another factor that influences courts' willingness to refer is the role of the parties and their requests to refer. The parties have a particularly strong influence on the decisions of UK and Irish courts (not) to refer, primarily due to

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127 Interviews 136, 139, 144 and 177.
128 Interview 22.
129 Interview 146.
130 Interviews 135, 155 and 191.
131 Leijon and Glavina 2020; Pavone 2018; Mayoral and Pérez 2018, 731.
132 Dyevre et al 2020.
133 Interviews 35, 51, 58, 74 and 93.
134 NL:RBZWB:2017:2454, para 4.18.

the adversarial nature of the legal system. The courts in these two common law countries decide on the basis of the submissions of the parties and rely to a great extent on those submissions.[135] One Irish judge mentioned that judges do not always conduct their own research, especially if their instinct is that the parties are right and if the parties have good barristers.[136] There is thus great trust in the (lawyers of the) parties. UK judges attributed this to the high standard of the bar and the idea that informed lawyers will always bring up issues of EU law.[137] This reliance on the parties would be unthinkable in the Netherlands. The important role of the parties is obscured by the fact that judgments in all three countries rarely explicitly refer to requests in the decision to refer or the orders for reference. For example, only one of the 15 decisions to refer made by the UK Supreme Court since 2013 mentioned a draft reference proposed by the parties – *ClientEarth.*[138] The interviews and the analysis of court proceedings confirm that there have been more requests in other cases.[139]

The Irish and UK courts, as well as the Dutch lower courts, would rarely refer without a request.[140] Pavone reached a similar conclusion in relation to the Italian lower courts.[141] Only in a small number of cases was a reference made by the Irish and UK lower courts without a request from the parties.[142] One Irish judge, for example, held: '[I]t is a rare event that I take it upon myself.'[143] Another stated: '[I]f the parties do not articulate the need for a reference with some clarity, than I am not in a position to refer … they cannot have

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[135] Interviews 113, 148, 155, 159 and 276; Maher 2018, 180; Fahey 2007, 19. Cf Danish judges; Rytter and Wind 2011, 493.

[136] Interview 174.

[137] Interview 231 and 276.

[138] Two of the 15 Supreme Court decisions to refer/orders for reference were not retrieved, *ClientEarth, R (on the application of) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25, para 40.

[139] Interview 264. One example is *C-430/15 Tolley* EU:C:2017:74. This can be derived from the decision of the Upper Tribunal, which refers to a request of de la Mare, who also acted as a barrister before the Supreme Court, *SSWP v LT* (DLA) [2012] UKUT 282 (AAC), para 52. There was also a request in *SSHD v Franco Vomero* [2016] UKSC 49; Interview 276.

[140] A reference can also be the result of the judge 'probing the parties' without a specific request from either side. Interview 136, 153, 166, 191, 231 and 264; Heyvaert et al, 2014. One example given is *Boggis, R (on the application) v Natural England* [2009] EWCA Civ 1061.

[141] Pavone 2018.

[142] Eg *Schrems v Data Protection Comr* [2014] IEHC 310 (Hogan J; C-362/14 *Schrems* EU:C:2015:650); *Wilson & Anor v McNamara & Ors* [2020] EWHC 98 (Ch), para 118; *AMS v SSWP* [2017] UKUT 48 (AAC) (Ward J), para 1; TG *v SSWP* [2015] UKUT 50 (AAC), para 68; *Euro Trade and Finance Ltd v HMRC* [2016] UKFTT 279 (TC), para 230.

[143] Interview 159. Cf Interviews 133, 148, 153, 155, 162 174 and 191.

me dream something up.'[144] This also holds true for the Irish Supreme Court, even though it seems to be slightly quicker to refer on its own initiative than other Irish courts.[145] Courts are also generally unwilling to refer unless both parties are in favour.[146] One former Supreme Court judge stated: 'We do not want to give the parties unnecessary trouble.'[147] And where the government is opposed, 'as a rule of thumb', the chance of a reference is very slim.[148] The UK courts in particular have been open about this in their judgments. In *Bulmer*, Lord Denning determined that courts 'should hesitate before making a reference against the wishes of one of the parties, seeing the expense and delay which it involves'.[149] This quote, and variants thereof, have been repeated by other courts.[150]

Where both parties want a reference, this does make a difference and the court is more likely to refer – even though courts emphasize that they are in no way obliged to do so.[151] Two UK barristers likewise observed that where the government is in favour of a reference in public or tax law cases, this will almost always happen.[152] Where both parties want a reference, judges 'are more inclined to think that it is an arguable point of law'.[153] One example is the reference in *Brockenhurst College*, where the parties jointly submitted a letter

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[144] Interview 144.

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

[146] Interviews 211 and 276; *Shirley & Anor, R (on the application of) v The Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22, para 63; *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665.

[147] Interview 264. The current UK Supreme Court nonetheless noted: 'Parties will often not want a matter to be referred, given the extra delay and expense that will cause. That, however, does not impact on the court's obligation to refer.' Written response 15 April 2020. One former Supreme Court judge (208) likewise noted that the court does not depend on the parties and that it is obliged to apply the test in any case.

[148] Nonetheless, it does not need to be difficult to convince the government to refer, because a reference can also be used tactically as a strategy to 'delay a loss' and to create 'breathing space', Interview 243.

[149] *HP* Bulmer *Ltd & Anor v J* Bollinger *SA & Ors* [1974] EWCA Civ 14.

[150] Eg Arnold would have made a reference 'had it not been for the applicant's opposition'. *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2014] EWHC 16 (Ch), para 48; *X v Kuoni Travel Ltd* [2018] EWCA Civ 938 (later referred in Case C-578/19 *Kuoni Travel*).

[151] Interviews 231 and 264. Eg *Actavis Group PTC EHF & Anor v Boehringer Ingelheim Pharma GmbH and Co, KG* [2013] EWHC 2927 (Pat), paras 7 and 18; *GlaxoSmithKline Biologicals SA v Comptroller-General of Patents, Designs and Trade* Marks [2013] EWHC 619 (Pat), para 82.

[152] Interviews 211 and 243.

[153] Interview 264.

in which they argued that a reference was necessary. A draft of the questions was attached to the letter.[154]

At times, intervening parties have also had an impact on the decision to refer. The involvement of specialist legal charity the Advice on Individual Rights in Europe (AIRE) Centre is said to have an impact, because the organization is regarded highly by the UK courts.[155] A UK barrister observed that the AIRE Centre's interventions highlighting points of general importance and requests for a reference are frequently heeded, even where the government or the parties are opposed.[156] One recent example was *SM*, about a child's guardianship under the Algerian *kafala* system.[157] As a matter of fact, the AIRE Centre has been involved in eight references in the field of asylum, migration and social policy over the past decade.

Requests of the parties have had less of an impact on the Dutch highest courts. Most decisions to refer were actually made by the courts on their own initiative.[158] Pavone also found something similar in relation to the Italian highest courts.[159] Usually, a request is merely one of many factors that play a role.[160] Supreme Court judges emphasized that they take requests into consideration, but they themselves make autonomous decisions.[161] Interviewees indicated that a request makes little difference in the case of a Supreme Court 'that takes its task seriously', because the question always comes up, regardless of whether the parties have made a request.[162] In fact, even if nothing has been argued by the parties, the court will look 'with a slanted eye' to determine whether there is a question about EU law and whether it is *clair or éclairé*.[163] It is not the case that the Supreme Court suddenly discovers through the request of a party that different interpretations of EU law are possible.[164] More often than not, the Supreme Court itself flags the disputed point of EU law. For instance, a preliminary reference was made in *Gemeente Woerden* about VAT reduction even though the legal question referred was not raised in the (written) pleas of the parties.[165] In *De Lange*, the Dutch Tax Chamber

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154 *HMRC v Brockenhurst College* [2015] EWCA Civ 1196, para 9.
155 www.airecentre.org/the-aire-centre.
156 Interview 211; Cf Sigafoos 2012.
157 Case C-129/18 *SM* EU:C:2019:248.
158 Interviews 10, 12, 19 and 43.
159 Pavone 2018.
160 Interviews 41 and 59.
161 Interviews 33, 41 and 78.
162 Interviews 30, 33, 41, 48 and 82.
163 Interviews 15 and 33.
164 Interview 30.
165 *Gemeente Woerden* NL:HR:2015:1355 (Case C-267/15 *Gemeente Woerden* EU:C:2016:466); Interview 33.

referred questions about the conformity of a tax deduction scheme of study costs for people below 30 years with the prohibition against age discrimination in the Equal Treatment Directive 2000/78.[166] The parties had not raised this point, except for a rather general reference to the prohibition of discrimination in international treaties. Supreme Court judges noted that a request is seldom made by the parties, because they generally want legal certainty and a quick decision.[167] Dutch lower court judges attach more importance to the parties' requests.[168] They argued, in line with the UK and Irish courts, that a reference without a request from one of the parties is rare.[169]

In all three countries, the frequency of requests has increased in recent years. Interviewees observed that there has also been a growing number of requests by (one of) the parties – especially on migration law issues, such as in free movement and asylum cases.[170] Both the Irish and UK leave to appeal forms mention the preliminary reference procedure and ask whether the applicant wishes to make a reference. With the exception of the UK Supreme Court and the Civil Chamber of the Dutch Supreme Court, judges were generally critical of the quality of requests, noting that most are badly substantiated or irrelevant.[171] Most requests are made as an alternative submission, whereby the parties are not as such interested in a reference.[172] The parties frequently request a reference if the court does not accept their substantive arguments.[173] Some judges see this as a 'sign of weakness' and state that the parties could perhaps better defend their point beyond doubt, without a need for referral.[174]

Irish and UK judges also involve the parties more closely in drafting the order for reference. They 'heavily rely' on the parties to get a potential question for a preliminary reference right.[175] The parties are almost always asked

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[166] *De Lange* NL:HR:2015:3022 (Case C-548/15 *De Lange* EU:C:2016:850); Interview 30.

[167] Interviews 23, 27, 41, 48, 59, 79 and 87.

[168] Interviews 35 and 93.

[169] Interviews 22, 83 and 86.

[170] Interviews 30, 33, 34, 82, 105, 108, 113, 144, 148, 152 and 161.

[171] Interviews 8, 10, 12, 24, 25, 29, 25, 35, 72, 74, 93, 102, 105, 108, 136, 139, 144, 161, 162, 181 and 187.

[172] Interview 264; *Simonis, R (on the application of) v Arts Council England (Rev 2)* [2020] EWCA Civ 374, para 7.

[173] Interviews 15, 30, 33, 78, 82, 211 and 231. Eg *Leeds City Council v HMRC* [2015] EWCA Civ 1293, para 51; *Air Canada & Ors v Emerald Supplies Ltd & Ors* [2015] EWCA Civ 1024; *Chester, R (on the application of) v The Secretary of State for Justice (Rev 1)* [2013] UKSC 63, para 20.

[174] Interviews 15, 30, 33, 78 and 82.

[175] Interviews 102 and 187; Fahey 2007, 20.

to propose draft questions and a draft reference.[176] A good illustration is the order drafted by the parties in *Philip Morris*, which was referred subject to one small amendment by the judge.[177] Some UK judges are more in control. High Court Judge Arnold (now Lord Justice), who has immense experience with references, has formulated drafts and has consulted counsel regarding the precise wording of their questions.[178] One UK barrister clearly rejected the notion that courts are lazy in allowing the parties to draft the order for reference to a significant extent. He/she held that when the order is the result of an argument between the parties, this enhances the quality of the order for reference.[179] A UK judge also reasoned that the involvement of the parties in the formulation of the questions is considered helpful and necessary, especially given that the parties will eventually have to debate them in Luxembourg.[180] Lord Reed pointed to the House of Lords' reference in *Aimia Coalition*, which was drafted by one of the parties without a hearing and with the limited involvement of the other party and the House of Lords.[181] This resulted in a 'disastrous' and 'shambolic' outcome, as will be discussed later. According to Reed, the practice of the Supreme Court since his accession to the bench in 2012 has been to refer only after hearing the parties and with substantial input from the parties in the drafting of the order for reference.[182] Some of the Dutch highest courts have also started to present a draft of the questions to the parties before referral, but this is certainly not a consistent practice.[183]

In conclusion, the parties' requests to refer are an essential factor in courts' decision to refer, especially in adversarial systems, where the courts are unlikely to refer on their own initiative. This suggests that increased knowledge of EU law among lawyers has an impact on EU law-related litigation, resulting in more requests to refer. Previous research underscores this. The two lawyers of Mr Francovich, for instance, received their EU law education from the former *référendaire* of the ECJ, Judge Trabucchi.[184] The high level

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[176] Eg *International Stem Cell Corporation v Comptroller General of Patents* [2013] EWHC 807 (Ch), para 59; Interview 211. One notable exception is Case C-621/18 *Wightman* EU:C:2018:999.

[177] *Philip Morris Brands SARL & Ors v The Secretary of State for Health* [2014] EWHC 3669 (Admin), para 11. Cf *MS v PS* [2016] EWHC 88 (Fam), para 43.

[178] Eg *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2014] EWHC 16 (Ch), para 77.

[179] Interview 243.

[180] Interview 208.

[181] Reed 2014, 12.

[182] *Ibid*, 13.

[183] Eg *Synthon v Astellas Pharma Inc* NL:HR:2016:2643 (Case C-644/16 *Synthon* EU:C:2018:61); Interview 27.

[184] Bartolini and Guerrieri as discussed by Pollack 2017, 586.

of litigation in relation to EU law in Genoa was also attributed to the work of one law firm.[185] Differing rates of litigation and mobilization thus explain the variations among the Member States, as well as the differences across legal areas and over time within each Member State.[186] Kelemen and Pavone found that domestic litigiousness explains the disparity in Italian references since 1997.[187] Increased litigation and knowledge of EU law among lawyers have helped to drive the increase in Irish references, and it is thus not surprising that Dublin has become a true 'hub' for EU law, with specialized Euro-lawyers and major law firms.[188] In some areas, such as criminal law, the parties have yet to discover the potential of EU law.[189]

5. CONCLUSION

This chapter has demonstrated that several individual and organizational factors affect judges' decisions (not) to refer. Three personal and psychological considerations in particular play a role: the judge's perspective on the court's role as a court of first or second instance *vis-à-vis* the country's highest court(s); knowledge of EU law; and the identity, background and attitude of judges. There are also three important institutional factors: coordination of EU law; the case management system; and available capacity. The parties and their lawyers also influence the decision (not) to refer, at least for lower courts and courts in adversarial systems such as the UK and Ireland.

185 Kelemen and Pavone 2016, 1127.

186 The level of mobilization depends on the amount of court fees, the availability of legal aid, requirements as to representation by a lawyer, the direct effect of EU law provisions and national standing rules; see Kelemen and Pavone 2016, 2017; Conant et al 2018; Cichowski 2007, 245–51; Dougan 2020, 52; Passalacqua 2021.

187 Kelemen and Pavone 2018.

188 Krommendijk 2020. Cf Hoevenaars 2020.

189 Claassen 2022.

4. Politico-strategic reasons

1. INTRODUCTION

This chapter examines the politico-strategic reasons that inform decisions (not) to refer, which have been given considerable attention in the Europeanization literature. However, the empirical results reveal that this emphasis on politico-strategic reasons is not entirely justified. These reasons account only for a small number of references. The majority of references do not involve strategic motives, but rather involve purely legal considerations and deal with often rather boring and technical legal questions. The findings presented in this chapter corroborate recent empirical studies that downplay strategic explanations. Almost all of the judges interviewed in the three countries did not mention spontaneously that politico-strategic reasons play a role in the decision (not) to refer.[1] Dutch Supreme Court judges insisted that there are 'no hidden agendas' and 'no strategies', because of the court's neutrality.[2] One judge stated that 'judges are not politicians; you don't see strategies' – not least because the judiciary is too serious for that.[3] An Irish judge likewise noted that the courts present their own view of the law and do not engage in politics or hope that a law will be changed as a result of their actions.[4] Another Irish judge referred to such considerations as cynical.[5] The limited importance of politico-strategic reasons is unsurprising, given that many legal areas are fairly technical and do not conflict with the essence of the rule of law. Judges noted that most cases do not involve issues of conscience.[6] One UK judge, for instance, reported that 'we are not too worried' about most cases.[7] The Dutch highest administrative court judges also maintained that they have no interest in particular outcomes.[8] Most tax cases, for instance, deal only with money.

1 Interviews 14, 22, 41, 59, 75, 105, 136, 152, 155, 166 and 191.
2 Interviews 33, 41, 59 and 82.
3 Interview 75.
4 Interview 155.
5 Interviews 105, 136, 152, 155, 166 and 191.
6 Interviews 15, 78 and 82.
7 Interview 264.
8 Interviews 5 and 32.

One tax law judge noted that the substance of cases does not affect him/her emotionally: 'I sleep no less at night.'[9] Judges observed that cases seldom involve emotions, as migration or family law cases do.[10]

This chapter confirms that politico-strategic reasons continue to be relevant, but that their importance differs across courts and Member States. Some Dutch judges in particular acknowledged that politico-considerations may have played a (minor) role in the background when questioned more specifically about particular 'easy' cases during the interviews. The courts referred such relatively simple or *clair* cases to ask the ECJ to confirm what they already knew.[11] The ECJ often does so by disposing of the reference in a three-judge formation without an AG opinion. This chapter will discuss the three dominant politico-strategic perspectives on the reference procedure: the shield (section 2), the sword (section 3) and leapfrogging (section 4). It will complement this with two explanations that have received little attention in the literature to date: the instrumental use of the ECJ as a transnational arbiter (section 5) and the desire to put a particular issue on the EU agenda through a reference (section 6).

2. REFERENCE PROCEDURE AS SHIELD

The research found limited support for the theory that courts deliberately shield cases from the ECJ and protect national legislation against the (further) expansion of EU law.[12] There are two notable exceptions. First, the Criminal Chamber of the Dutch Supreme Court takes a reserved approach to the reference procedure. Second, a similar feeling among UK courts partly accounts for several decisions not to refer. A recent empirical study also found some support for the reluctance of judges to send 'unnecessary cases' in order to prevent the ECJ from expanding the reach of EU law.[13] Mayoral and Pérez reported similar 'europhobia' among Spanish civil judges, who place great value on the ancient Spanish Civil Code.[14] The previously discussed phenomenon of feedback loops plays a role in shield cases (Chapter 8, section 1.4): the reluctance of national courts to refer the cases discussed in this section was partly based on previous negative experiences with the ECJ and frustration about its heavily teleological approach.

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9 Interview 51.
10 Interviews 78 and 82.
11 Cf van Gestel and de Poorter 2019, 75.
12 Alter 1998, 242.
13 Interview with a Swedish judge, Leijon and Glavina 2020.
14 Mayoral and Pérez 2018, 728.

The Criminal Chamber of the Dutch Supreme Court is the first exception to the rule that the shield logic does not really guide the courts. Claassen found that criminal judges of the Supreme Court are wary of the growing influence of EU legislation and the ECJ. They consider criminal law a sovereign issue that should be regulated nationally – not least because the EU legislature and the ECJ are considered unable to oversee the practical consequences of their decisions. One judge suggested that bringing criminal procedural law within the EU's competence opens up a Pandora's box. Another judge noted the limited competence of the ECJ in relation to criminal law as a hindering factor.[15] One example of this reluctance is the decision not to refer a question about the right to legal assistance during a police interrogation discussed in Chapter 2 (section 3.5). The Supreme Court explicitly stated, as a reason for this decision, that a reference precludes 'an effective and expeditious' criminal justice system.[16] The limited use of the preliminary reference procedure by the Criminal Chamber is also a reason why the Dutch Chamber for International Cooperation frequently refers questions on the Framework Decision on the EAW (section 4.3).

The shield logic in the UK essentially boils down to feelings among judges that the ECJ is 'an unacceptable source of jurisprudence' and 'not one of us'.[17] Earlier research by Littlepage based on interviews with UK judges found that several UK judges hold such views. UK judges have been critical of the sometimes activist and intrusive nature of ECJ case law.[18] Some UK judges even pointed to a 'systematic dismantling' of the common law of conflict of laws.[19] Lord Mance observed that English common law is 'treading a path of its own, losing touch with that of its old pupils'; while some even questioned whether common law can survive at all.[20] One UK judge pointed out that *Factortame* received a lot of criticism, not least because it suggested that the EU legal system is 'stronger than our own'.[21] Lady Justice Arden criticized the ECJ for producing judgments which require profound changes to UK law and practice, thus increasing the workload for institutions and courts.[22] She pointed to the 'ever-more pervasive' jurisprudence of the ECJ that 'does not sit easily with

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15 Three interviewed judges, Claassen 2022.
16 *Salduz* NL:HR:2015:3608.
17 Littlepage 2014, 204; Interview 276.
18 George 1990; Jupile and Caporaso 2009; Barnard 2019.
19 Cf Hartley's article entitled 'The European Union and the systematic dismantling of the common law of conflict of laws' as referred to by Mance 2013b.
20 Littlepage 2014, 222–23.
21 Interview 208.
22 Arden 2010, 9.

our own domestic law', and criticized 'some ill-fitting and largely unnecessary principles … [which are] superimposed on' the UK legal system.[23]

Implicit in much of this criticism are misgivings about the ECJ's heavily teleological approach. The reliance on principles in particular upsets common law lawyers, who attach significant weight to the view of the legislature.[24] One UK judge criticized the ECJ's interpretation methods and dealings with *travaux préparatoires*, and cautioned that 'purposive construction is a dangerous beast'.[25] Another UK judge pointed out that the ECJ is more 'politically driven' than would be acceptable to UK judges, since it acts almost as a federal court and pushes for greater integration.[26] A UK barrister voiced concern over 'an overexpansive interpretation' of the Citizens' Rights Directive.[27] It is unsurprising that such concerns have been voiced in the UK, given the strong doctrine of parliamentary sovereignty and the strong adherence and faithfulness to the intention of the legislature.[28] Ignoring this – as the ECJ has 'inappropriately' done in cases such as *Mangold* (on the applicability of general principles of EU law) and *Sturgeon* (on air passenger rights) – has upset UK common law lawyers.[29] Lord Mance mentioned other problematic areas where this has happened, such as the development of criminal jurisdiction in relation to the environment and the case law on the Brussels I Regulation.[30]

These views of UK judges are not entirely unjustified. Danish academic Rasmussen pointed to a 'strong and bold pro-Community policy preference' back in 1986.[31] Empirical research has also shown that ECJ judges not only 'speak the law', but also include considerations of policy, strategy and power in their decision making.[32] The ECJ has not been slow to rule in way that is a diametrically opposed to the financial or political interests of Member States, and has used indeterminate provisions of EU law to deliver pro-integration judgments.[33] Scholars have warned of the negative effects of this integration bias and heavily teleological approach on the perceived independence and impartiality, and hence the legitimacy, of the ECJ.[34] Rasmussen highlighted

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[23] *Ibid*, 4–5.
[24] *Ibid*, 9; Mance 2013b; Laws 2014, 63.
[25] Interview 264.
[26] Interview 231; Sarmiento and Weiler 2020.
[27] Interview 243. Cf Martinsen 2011.
[28] Wind et al 2009, 77.
[29] Interview 264. Cf Schmidt 2006; Schriek 2006.
[30] Mance 2011, paras 2–4; Mance 2013a, paras 50–52, 55 and 57.
[31] Rasmussen 1986, 17.
[32] Mancini 1989; Garrett et al 1998; Alter 1998; de Waele 2009; Martinsen 2011; Malecki 2012; Solanke 2011; Frankenreiter 2018; Ovádek 2020.
[33] Cichowski 2007, 246.
[34] Arnull 2013; Pollack 2018.

the 'revolting judicial behaviour' and 'goal oriented' judgment of *Van Gend en Loos*, declaring that the direct effect of EU law had negative implications for the legitimacy of the ECJ.[35] This criticism is voiced much less frequently in the Netherlands and Ireland;[36] although some Dutch judges nonetheless recognize the problem. For example, in the interviews, one Dutch Supreme Court judge observed that the ECJ continually strives to opt for 'maximum options' and the supremacy of EU law principles, even in cases where less far-reaching options were also available.[37]

Concerns about the ECJ's handling of references have made the UK courts less eager to refer and have sometimes led to a desire to shield particular cases from the ECJ.[38] One former UK Supreme Court judge pointed to the difficulty of being obliged to refer while not liking the anticipated answer. He/she admitted that this had happened once or twice in quite principled cases, without mentioning further details of those cases.[39] One UK barrister also discussed a case in which he/she spent four days in court poring through the case law of the ECJ. There was a consensus among the Court of Appeal judges and the parties that a reference should be avoided, given the low quality of the ECJ case law. The ECJ was said to have 'made stuff up' and 'invent[ed] what is not in the Directive'.[40] Golub has also pointed out that the UK courts withheld references in the area of planning in the 1990s because references would lead to much stricter environmental standards.[41]

A prime illustration of this is the Supreme Court's decision not to refer in *HS2*, about a high-speed rail network (Chapter 2, section 3.6). This case essentially touched on the primacy of the UK Parliament and the possibility to review acts of the legislature. One factor that dissuaded a reference in *HS2* was past experience of the ECJ overstepping the jurisdictional limits laid down in the EU Treaties.[42] Lord Neuberger and Lord Mance voiced explicit criticisms of the ECJ's creative interpretation, which diverged from the intentions of the

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[35] Rasmussen 1986, 12–13.

[36] However, one Irish judge (128) was critical of the growing importance of the Charter and cases such as *Bauer* (C-569/16 *Bauer* EU:C:2018:871) from the perspective of the separation of and democratic legitimacy.

[37] Interview 41.

[38] Cf Arnull 2010, 79 and 81.

[39] Interview 231.

[40] Interview 243. Cf *Bayer plc & Anor v NHS Darlington CCG & Ors* [2020] EWCA Civ 449, para 283.

[41] Golub 1996, 378–79.

[42] Lord Mance in *Pham v SSHD* [2015] UKSC 19, para 90.

EU legislature, thus damaging the democratic legitimacy of EU law and the principle of legal certainty.[43] The Supreme Court held in rather bold terms:

> Where the legislature has agreed a clearly expressed measure, reflecting the legislators' choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or 'improve' it in respects which the legislator clearly did not intend.[44]

A second case that was deliberately withheld from the ECJ is *Miller*. The UK Supreme Court decided that the UK government can trigger Article 50 TEU upon withdrawal from the EU on the basis of a parliamentary act. Arnull observed rather aptly that it was obviously not very attractive to involve a supranational institution of an organization that the UK intended to leave.[45] One barrister interviewed likewise suggested that not a single Supreme Court in the EU would refer such a case, because it was 'too close to home'.[46] Another decision not to refer that can be explained on the basis of the shield logic is *Chester*, which concerned the voting rights of prisoners.[47] One barrister thought that the Supreme Court deliberately decided not to refer because the case was too political in nature, exemplified by the heated political discussions following the famous judgments of the ECtHR in *Hirst*.[48] The Supreme Court delivered *Chester* shortly before the ECJ ruled in *Delvigne* that EU law and the Charter apply to elections for the European Parliament. The Supreme Court nonetheless held that it was *clair* that EU law did not apply, since this was a matter for national parliaments. This barrister thought that the Supreme Court knew what the answer would be, but did not wish to have this answer because it would be counterproductive to have the ECJ make a decision that was contrary to the wish of the UK Parliament, especially at times when Euroscepticism was on the rise.[49] A fourth prominent example is *Stott*, in which disagreement with the ECJ case law on the Montreal Convention 1999 dissuaded the Supreme Court from referring.[50] The UK Supreme Court refused to accept a passenger's claim for damages for breach of violations under the Disability Regulation (1107/2006) because this would contravene the

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[43] Reed 2014, 10.

[44] *HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor* [2014] UKSC 3, para 171.

[45] Arnull 2017, 335.

[46] Interview 243.

[47] *Chester, R (on the application of) v The Secretary of State for Justice (Rev 1*) [2013] UKSC 63, para 69. Konstadinides and Karatzia 2020, 505–06.

[48] *Hirst v United Kingdom (No. 2)* CE:ECHR:2005:1006JUD007402501.

[49] Interview 211.

[50] Arnull 2017, 332.

Montreal Convention. According to one judge, the ECJ had gone 'mad' and was 'seriously wrong' in construing the Montreal Convention as being part of EU law. This judge referred to this as 'ridiculous and absurd'. The Supreme Court thus determined the scope and effect of EU law itself and emphasized that the Montreal Convention does not form part of EU law 'merely because the Convention takes effect via the Montreal Regulation'.[51] Other UK courts have at times adopted a similar shield logic. Lady Justice Arden seemed to hint at disagreement with the ECJ over the *Zambrano* case law about the rights of residence of third-country nationals with minor children who are EU citizens as a reason for non-referral in *Sanneh.* She underlined that it is up to the Member States, and not the ECJ, to determine the level of social assistance for *Zambrano* carers who are in need and unable to work. She suggested that another reference would be pointless, because the ECJ had already 'declined a clear invitation' to reconsider its approach to reverse discrimination in *Zambrano*.[52]

One explanation for the shield logic adopted by some UK judges, as Lady Justice Arden argued, is the absence of constitutional review in the UK. This leads to an impression that 'constitutional decisions' are imposed from the outside, without any consideration by a national court.[53] This explanation fits nicely with Wind's work on Scandinavian courts and their reluctance to refer because a culture of judicial review is largely absent from the region.[54] By contrast, Ireland has a solid 'home-grown' constitutional and fundamental rights tradition, with the possibility for judicial review dating back to 1937.[55] Court decisions were responsible for seven of the 29 constitutional amendments.[56] While constitutional review is prohibited in the Netherlands, there is a rich and extensive practice of review on the basis of international treaties because of the open, monist constitutional system.[57]

A second possible explanation for shield behaviour is the pressure of public opinion and domestic politics.[58] At first sight, it seems plausible that the

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51 *Stott v Thomas Cook Tour Operators Ltd* [2014] UKSC 15, para 50; Reed 2014.
52 *Sanneh & Ors v SSWP* [2015] EWCA Civ 49, paras 128–29 and 131.
53 Arden 2010, 19. Cf Fusco 2015, 1531.
54 Wind 2010.
55 Interviews 159 and 162.
56 Egie et al 2018, 88.
57 Article 94 of the Dutch Constitution provides: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' Article 120: 'The constitutionality of Acts of parliament and treaties shall not be reviewed by the courts.'
58 Golub 1996, 377; Alter 1998, 236.

reluctance of UK courts can be attributed to popular sentiment.[59] However, it is difficult to find solid empirical support for this supposition based on a legal analysis of UK judgments. No judgments were found in which this was mentioned as a factor. The UK judges interviewed also argued that popular sentiment makes no difference to their behaviour; one stated that 'we simply have a duty to apply the law'.[60] An exception mentioned in the interviews was the *Chester* case on prisoner voting rights: one judge noted that it is always possible, albeit necessarily difficult, to say that public opinion may have a subconscious impact on judicial thinking when deciding whether to refer.[61] There is also an awareness among (some) UK judges of the popular sentiment *vis-à-vis* European courts. Lord Mance, for example, noted in a speech that 'European courts and law seem to become a target of sections of the press'.[62]

Nor has the 2016 Brexit referendum had a major impact, despite allegations to this effect in the literature.[63] The Supreme Court judges interviewed rejected the suggestion that Brexit was a factor in decisions (not) to refer. One judge insisted that the UK courts remain willing to refer.[64] Another noted that the Supreme Court has tried to avoid the implications of Brexit ('we just jumped around it').[65] These views are confirmed by the fact that the UK Supreme Court referred a VAT case on 1 April 2020 without considering the appropriateness to refer in light of the UK's departure from the EU on 31 January 2020.[66] Furthermore, the Westminster Magistrates Court that deals with EAW cases submitted its first-ever reference in November 2020.[67] The High Court saw Brexit as a reason to refer quickly in some cases, because the Court of Appeal would no longer be in a position to refer after Brexit.[68] Only one High Court

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[59] Volcansek 1986, 206 and 217; Golub 1996, 377.

[60] Interviews 231 and 264.

[61] Interview 264.

[62] Mance 2013b.

[63] Dyevre et al 2019 found on the basis of a quantitative analysis that UK courts made 22 per cent fewer references after the Brexit referendum in 2016. One barrister (243) nonetheless mentioned that the drop in references in recent years was a 'Brexit thing', but noted at the same time that this has been a trend over the last ten years.

[64] Interview 264. Cf *Coal Staff Superannuation Scheme Trustees Ltd v HMRC* [2017] UKUT 137 (TCC), para 26.

[65] Interview 231.

[66] *Zipvit Ltd v HMRC* [2020] UKSC 15.

[67] https://crucible.law/news/laura-herbert-secures-first-ever-reference-to-the-ECJ-from-magistrates-court.

[68] *Eli Lilly and Co v Genentech, Inc* [2019] EWHC 388 (Pat), paras 47 and 50. The ECJ declared this 'pre-emptive' request inadmissible because of the hypothetical nature of the reference, C-239/19 *Eli Lilly and Company* EU:C:2019:687, para 26. *Beverly Hills Teddy Bear Co v PMS International Group plc* [2019] EWHC 2419 (IPEC), para 61.

decision was found in which the fact that the UK would no longer be a Member State at the time of the ECJ judgment was cited as a factor not to refer.[69]

In sum, this section has shown that, in addition to the Criminal Chamber of the Dutch Supreme Court, the UK courts have likewise been reluctant to refer and have shielded particular cases from ECJ interference. This can be attributed to a strong commitment to upholding the intention of the legislature and the doctrine of parliamentary sovereignty, as well as resistance to the dynamic interpretations of the ECJ. The UK courts' reluctance to refer is also based on their negative experiences with the ECJ – an issue that will be further discussed in Chapters 5 and 6.

3. REFERENCE PROCEDURE AS SWORD

Another politico-strategic motivation for decisions to refer is the empowerment thesis: courts refer in order to challenge a national law or practice, with the aim of securing the support of the ECJ to increase the chance of government compliance with an eventual court ruling. There have been very few sword references in the three countries studied since 2013. This corresponds to the findings of Pavone, who showed that sword references are also rare in the Italian (lower) courts.[70] One exception documented in the literature, and mentioned in Chapter 1, is the field of consumer law, where the lower Spanish, Slovak and Hungarian courts have been particularly eager to promote legislative change.[71] Spanish Judge Seijo, who referred *Aziz*, saw no other alternative than to become an activist and provide a lifeline to stricken consumers during the economic crisis. The reference was a deliberate strategy: Seijo had been awaiting a suitable case that would allow him to take steps to address the interplay between Spanish law and the housing crisis.[72]

In interviews, Dutch, Irish and UK judges insisted that they did not need support from Luxembourg and could persuade the domestic authorities based on their own judgments. They would 'dare' to strike down provisions of national law themselves, because of their independence.[73] Irish and UK judges in particular vehemently rejected the notion of a sword reference. This is somewhat surprising, given that this reasoning is evident in the older literature on the UK.[74] One UK judge considered the sword thesis to be a 'very timid view

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[69] *Tomanovic & Ors v The European Union* [2019] EWHC 263 (QB), para 93.
[70] Pavone 2018.
[71] Cafaggi 2017, 237–38.
[72] Mayoral and Pérez 2018, 730 and 732.
[73] Interviews 15, 23, 30, 41, 51, 59, 75, 87, 231.
[74] According to scholars, the option of referring has – in the past at least – been used by the UK courts as an 'escape-valve' to avoid having to exercise a policy-making

of judicial activity'. He/she held that it is unthinkable that the UK Supreme Court 'lacks authority' and is 'frightened' to declare legislation incompatible with EU or human rights law.[75] The current UK Supreme Court also rejected the suggestion that the empowerment logic plays a role, stating in response to this question: '[T]here is no basis in the Supreme Court's case law for the suggestion that it has used the reference procedure, or been more likely to use the reference procedure, in order to "force" the legislature to do anything.'[76] One Irish judge similarly insisted: 'I am prepared to make hard decisions… I am not a slimy little bug: it is not up to the ECJ to do my job.' Another asserted: 'I do not need cover or a fig leaf.'[77] The Irish courts are unafraid to determine that Irish law is in breach of the Constitution; finding that there has been a violation of the EU Treaties is little different.[78] The Irish judiciary is considered to be among the most activist judiciaries in the world; court decisions were found to have prompted seven of the 29 amendments to the Irish Constitution.[79]

Some sword references have been made, however, especially in the Netherlands. Two types of 'sword' references may be discerned. First, 'pure' sword references aim to bring about legislative change or secure support from the ECJ for a particular interpretation of EU law. Second, references are made out of precaution due to the far-reaching societal, economic or political consequences of a particular judgment; courts are generally more cautious in such cases.[80] One UK judge mentioned, on his/her own initiative, the case of *O'Brien*, which concerned the pensions of part-time, fee-paid judges. He/she noted that this case was also politically sensitive because it involved a great deal of public money. This was one factor that played a role in the decision to refer.[81] For the Dutch Supreme Court, the considerable consequences for pharmaceutical companies and consumers constituted an additional reason to refer in *Antroposana* and *ACI Adam*.[82] The Central Appeals Tribunal referred questions with notable financial consequences about the exportability of particular

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role that would deviate from their traditional respect for parliamentary sovereignty. Levitsky 1994, 360 and 363; Nicola 2017, 1534; King 2015.

75 Interview 264.

76 Written response 15 April 2020.

77 Interviews 136 and 144. Cf Interviews 108, 128, 148 and 187.

78 Interviews 128, 152, 155 and 159. Eg *Ryanair Ltd v Terravision Londen Finance Ltd* [2011] IEHC 244 (Hogan J); see also recently *Friends of the Irish Environment v The Government of Ireland & Ors* [2020] IESC 49.

79 Egie et al 2018.

80 Interviews 44, 87 and 243.

81 Interview 208.

82 *De Staat v Antroposana* NL:HR:2006:AU5271 (Case C-84/06 *Antroposana and Others* EU:C:2007:535); *ACI ADAM v Stichting de Thuiskopie* NL:HR:2012:BW5879 (Case C-435/12 *ACI Adam and Others* EU:C:2014:254).

social allowances.[83] The dividing line between the first and second category of sword references is not easy to make. The main difference relates to the way in which judges spoke about those cases. With respect to the first category, aimed at bringing about legislative change, judges spoke in terms of 'support' and 'shifting the blame'; whereas with respect to the second category, of precautionary references, judges primarily relied on legal and pragmatic arguments.[84]

The Dutch Chamber for International Cooperation of the Amsterdam District Court has made several 'pure' sword references. This Chamber is responsible for the execution of EAWs. One judge and legal secretary of the Chamber openly admitted that some references clearly aimed to bring about changes to the Dutch Surrender Act. They argued that the answers to several of the questions posed to the ECJ were clear, but that the Dutch legislature had a different perspective and that the Act was in breach of EAW Framework Decision (2002/584). In their view, a reference has clear added value because an ECJ judgment cannot be ignored.[85] The Chamber, for example, asked the ECJ about the conformity of a provision in the Dutch Surrender Act that makes surrender pursuant to an EAW subject to the condition that the act for which the arrest warrant was issued be punishable by a custodial sentence of at least 12 months in the Netherlands.[86] The underlying idea of this provision is to prevent surrender in 'small' cases with a low level of punishment. The Chamber decided to refer even though it was more or less *clair* that this requirement was inconsistent with EU law.[87] This is illustrated by the fact that the ECJ decided the issue by way of an Order in just 23 days. As this example illustrates, sword references often aim to elicit the ECJ's confirmation of what the referring court already knows with respect to an issue that is in fact *clair*.[88]

In other sword references that have been made by the Dutch highest administrative courts, the Council of State was essentially 'hiding behind the back' of the ECJ and asking the ECJ to 'pull the chestnuts out of the fire'.[89] In *Betfair*, the Council of State entertained doubts about the conformity of the closed licensing system for gambling with EU law.[90] Infringement proceedings in this regard were pending against the Netherlands and it was felt that the

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[83] Eg NL:CRVB:2005:AT9540 (Case C-287/05 *Hendrix* EU:C:2007:494); NL:CRVB:2007:BB7475 (Case C-485/07 *Akdas and Others* EU:C:2011:346); Interview 66.

[84] Interviews 59 and 87.

[85] Glerum and Klomp 2019.

[86] Case C-463/15 PPU *A.* EU:C:2015:634.

[87] NL:RBAMS:2015:5422, para 5.4; Glerum 2013, 317–22 and 357.

[88] Cf van Gestel and de Poorter 2019, 75.

[89] Interviews 10, 12, 18 and 44.

[90] Case C-203/08 *Betfair* EU:C:2010:307.

Council would find itself in a difficult position if the ECJ found a violation without any reference having been made. A similar example is the *Chakroun* case, which concerned the requirement for family reunification that sponsors have an income equal to at least 120 per cent of the minimum wage in order to be able to maintain their families.[91] It was quite clear to the Council of State that this requirement violated the Family Reunification Directive. Indeed, the field of migration law has given rise to several strategic references. A more recent example concerned a reference of the District Court of The Hague on the conformity of the Dutch return policy for unaccompanied minors with the Return Directive and the protection of the best interests of the child as laid down in Article 24 of the Charter of Fundamental Rights.[92] The single judge who referred this case pointed to the vulnerability of unaccompanied minors and stated that the discriminatory treatment on the basis of age for minors under the age of 15 was not allowed on the basis of EU law. She also implicitly criticized the Council of State for not having referred a question about this earlier, because the matter was definitively not *clair* or *éclairé* in her view.[93]

A reference provides support from Luxembourg not only towards the legislature, but also towards the executive. *Wagenborg* is a good illustration of this. The case concerned the grant of a concession for ferry services to the Dutch Wadden Islands without a competitive award procedure. Some judges of the Trade and Industry Appeals Tribunal were quite certain about the interpretation of EU law, but they sought a 'helping hand' from the ECJ because the responsible minister had taken a firm position during the proceedings to justify the grant of the concession.[94] In a similar vein, the Central Appeals Tribunal felt forced to refer in *Fischer-Lintjens*.[95] The Dutch authority responsible for health insurance had 'rigidly' adhered to its cancellation of healthcare insurance resulting from the retroactive withdrawal of the certificate of non-insurance. In its order for reference, the Tribunal hinted at the undesirability of this policy in light of the principle of legal certainty. One judge interviewed admitted that the Tribunal had 'used' the ECJ to say what it wanted to say itself, but with more authority.

It is perhaps unsurprising that administrative courts have made most of these sword references. The judges in these courts generally think more in political terms and are more focused on the legislature and the executive.[96] One private law exception is *Massar*, in which the Supreme Court asked whether

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91 Case C-578/08 *Chakroun* EU:C:2010:117.
92 Case C-441/19 *TQ* EU:C:2021:9.
93 NL:RBDHA:2019:5967, paras 39–41.
94 NL:CBB:2013:BZ6922, para 5.2.
95 Case C-543/13 *Fischer-Lintjens* EU:C:2015:359.
96 Interviews 41, 43, 59 and 66.

the Legal Expenses Insurance Directive also applied to procedures before the Employee Insurance Agency in which an employer requests authorization to dismiss an employee.[97] The Supreme Court order for reference explicitly mentioned the considerable financial consequences of a positive answer to this question.[98] One judge acknowledged that the Supreme Court already knew the answer – namely, that the costs are covered – and was simply asking the ECJ to 'tick the box'.[99] The ECJ did so, more or less, because it handled the case in a three-judge formation without an AG opinion. The Dutch judges considered it better to have the ECJ decide the matter and 'take the consequences' or provide 'an alibi', because they were aware that insurance policy costs would rise if the answer were positive. The following quote is illustrative: '[I]f that's what the EU wants, then it should be the EU that says it. That way, it wasn't us who came up with it.'[100] It was thus wise to ask a preliminary question in order to 'make a potential time bomb harmless in advance', as one judge put it.[101]

However, too much value should not be attached to these *ex-post* rationalizations, which were not brought up by interviewees on their own initiative. Criticisms could be made about a strategic reading of several of these referrals. The decisions to refer in these cases could equally have a purely legal explanation, as some judges suggested: for example, some Dutch judges argued that in cases where there is considerable substantive 'counteraction' from the executive or the legislature, this simply confirms that there is doubt over the interpretation of EU law and there is no *acte clair*.[102] Some judges noted that, in the case of democratically adopted laws, a judge should not make decisions light-heartedly, but only after careful deliberation, including in the light of the principle of the separation of powers.[103] One Dutch Supreme Court judge disagreed with the strategic reading of *Massar* and simply held that doubt existed in this case as it concerned a disputed matter on which interpretations could reasonably differ.[104] One UK judge likewise held that when an issue is politically contested, this simply shows that there a divergence of views, and that the legal issues involved are not as clear as one may think.[105]

This section has shown that the UK and Irish courts see no need to make sword references to obtain the ECJ's support *vis-à-vis* the legislature

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97 Case C-460/14 *Massar* EU:C:2016:216.
98 *Massar* NL:HR:2014:2901, para 3.7.4.
99 Interview 27.
100 Interview 87.
101 Interview 41.
102 Interviews 49, 51 and 208.
103 Interviews 18 and 72.
104 Interview 57.
105 Interview 231.

and executive. However, the Dutch highest administrative courts and the Chamber for International Cooperation have sometimes done so. This section highlighted another category of sword reference employed by other courts, whereby far-reaching societal, economic or political consequences serve as an additional driver for courts to refer, in order to be on the safe side.

4. LEAPFROGGING THE JUDICIAL HIERARCHY

The third politico-strategic perspective, on leapfrogging, posits that (lower) courts refer in order to bypass the national judicial hierarchy and secure support from the ECJ as protection against the reversal of their decisions by a higher court. The prevalence of leapfrog cases mirrors the situation described in the previous section regarding sword references. While leapfrog cases are almost non-existent in the UK and Ireland, there have been some instances of such cases in the Netherlands, especially in the area of migration law.

The leapfrog thesis has been discredited by judges in Ireland and the UK as 'very unusual', not least because lower courts feel bound by the decisions of the highest court (Chapter 3, section 2.1).[106] Arnull observed that the UK Supreme Court is not subject to inter-court competition.[107] The current UK Supreme Court also subscribed to this view and stated, in response to a question:

> The case law of other UK courts in making references to the ECJ does not support the view that they have done so with the motive of leapfrogging the national judicial hierarchy in order to secure support from the ECJ for a particular outcome.[108]

One former UK Supreme Court judge noted that this is very much an Italian, German or French phenomenon – jurisdictions in which the lower courts tend to disagree more often with the highest court(s). By contrast, the UK system is considered homogeneous and coherent, and does not suffer from any distrust among the lower courts – not least due to the strong doctrine of precedent. The same judge further observed that there is a voluntary element to this: that is, a strong feeling that courts think in a similar way.[109] Two UK barristers agreed and suggested that the strong system of precedent makes the lower courts reluctant to change the law; instead, they leave this to the higher or highest courts.[110] Another barrister likewise noted that the lower courts adhere firmly to the judicial hierarchy. He/she attributed this to career considerations

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106 Interviews 208 and 231.
107 Arnull 2017, 355.
108 Written response 15 April 2020.
109 Interview 264.
110 Interview 243, 276.

– that is, judges are anxious to 'not [rock] the boat' and avoid being seen as 'radical' in order to enhance their prospects of promotion. According to him/her, all judges harbour ambitions of an appointment to the Supreme Court, where the brightest of judges end up. They would thus prefer to showcase their intellectual rigour rather than undermining the Supreme Court. In addition, he/she pointed out that in the UK, there is no 'Germanic' division between a Constitutional and Supreme Court; or competition between the highest courts, as in France with the Cassation Court and the Council of State.[111]

The interviews are corroborated by the legal analysis, which confirmed the lower courts' adherence to the system of precedent and respect for the judicial hierarchy. In Ireland and the UK, no leapfrog cases were found in which a lower court bypassed the Supreme Court. Only very rarely has a lower court determined explicitly that another (higher) court wrongfully failed to refer.[112] By contrast, quite a few judgments were found in which courts declined to refer because another (higher) court had previously decided not to refer similar questions.[113] Judges feel bound by Supreme Court judgments in which a point of EU law was decided without a reference. The Irish Court of Appeal, for example, held:

> having regard to the hierarchical system of our legal system and the importance of precedent in that legal system, it would be inappropriate for this Court to take a step which might be thought indirectly to impeach the authority of *Olsson* by making an Article 267 reference to the Court of Justice.[114]

The UK Court of Appeal also reasoned along similar lines and held that it was not justifiable to refer where the Supreme Court had very recently decided against referral in relation to the same question.[115]

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[111] Interview 211.

[112] The Upper Tribunal noted in its reference that the Court of Appeal had incorrectly determined that there was an *acte clair*, C-544/18 *Dakneviciute* EU:C:2019:761; *HMRC v HD* [2018] UKUT 148 (AAC); *Hrabkova v SSWP* [2017] EWCA Civ 794.

[113] Eg *Catt, R (on the application of) v Brighton and Hove City Council & Ors* [2009] EWHC 1639 (Admin), para 14; *Teshome v The Lord President of the Council* [2014] EWHC 1468 (Admin); *SET Select Energy GmbH v F and M Bunkering Ltd* [2014] EWHC 192 (Comm); *L v M (Rev 1)* [2019] EWHC 219 (Fam); *Megantic Services Ltd v HMRC* [2015] UKFTT 120 (TC), para 27; *Ewart, Re Application for Judicial Review* [2019] NIQB 88 (Keegan J), para 71.

[114] Cf Interview 102: 'If there was no previous Supreme Court decision not to refer, I would have sent it away'. *Minister for Justice and Equality v O'Connor* [2015] IECA 227 (Ryan P), para 34; *T v L* [2015] IECA 363, para 47.

[115] Eg *Tolley (Deceased) v SSWP* [2013] EWCA Civ 1471; *Sanneh & Ors v SSWP* [2015] EWCA Civ 49 (Arden LJ), paras 125–26.

The situation is different in the Netherlands, albeit only slightly. Some Dutch lower courts have made references in order to 'leapfrog' the national legal hierarchy and have the ECJ correct the jurisprudence of the highest court, particularly in the field of migration, as well as for EAWs. However, there have been (almost) no leapfrog references in other areas of law.[116] A judge and legal secretary of the Chamber for International Cooperation dealing exclusively with EAWs even stated explicitly that all references to the ECJ aim to secure 'back cover' from the ECJ *vis-à-vis* the Supreme Court, preventing the latter from quashing judgments of the Chamber.[117] The Chamber is well aware of the risk that the Criminal Chamber of the Supreme Court could decide a case without a reference, given its reluctance to refer (section 2). By referring earlier, the ECJ instead of the Supreme Court has the last word.

Four of the five migration law references of the Dutch lower courts in the period 2013–16 can be (partly) explained from this perspective.[118] The Middelburg District Court, for example, challenged the Council of State's interpretation of Article 27(2) of the Citizens' Rights Directive with its reference in *K*.[119] An older example is *YS*, which concerned the right of access of asylum seekers to the minutes of the Immigration and Naturalization Service. The single-judge section of the Middelburg District Court explicitly questioned the Council's restrictive interpretation of 'personal data' in the sense of the Data Protection Directive.[120] The prevalence of leapfrogging in migration cases can be attributed to the more limited trust and confrontational relationship between the lower migration courts and the Council of State.[121] It also relates to the influence of moral or ethical considerations in migration law. One 'activist' judge, for example, acknowledged that his/her need to refer would be less significant if the highest court were 'good'. This judge opined of the Council of State: 'For a long time I have had a bad taste of what it is doing in relation to EU law. That is why I would like to refer.'[122] Another judge stated: 'We did not want an answer from the Council of State. The Council has been consciously passed over.' He/she added that the latter would be a 'dead-end route'.[123] The Council of State has been challenged not only by the lower

[116] One tax law exception is Joined Cases C-72/14 and C-197/14 *X and Van Dijk* EU:C:2015:564.
[117] Glerum and Klomp 2019.
[118] Case C-550/16 *A and S* EU:C:2018:248; Case C-331/16 *K* EU:C:2018:296; Case C-63/15 *Ghezelbash* EU:C:2016:409; C-158/13 *Rajaby* EU:C:2013:455.
[119] NL:RBDHA:2016:6389, para 19.
[120] NL:RBMID:2012:BV8942, para 9.
[121] Interview 51.
[122] Interview 39.
[123] Van Alphen 2017, 21.

courts, but also by its administrative counterpart, the Tribunal, albeit more indirectly. In *Chavez Vilchez*, the Tribunal questioned the Council's restrictive reading of *Zambrano*, giving mothers a right of residence derived from the right of residence of their children.[124] The Council applied *Zambrano* only to situations in which the father was not in a position to care for the child.[125]

In conclusion, the Dutch lower migration courts and the Chamber for International Cooperation handling EAWs have at times used the preliminary reference procedure to leapfrog the hierarchy and to challenge a(n expected) restrictive interpretation of EU law by the highest court. By contrast, there is considerably more respect for the judicial hierarchy in the UK and Ireland. This section has confirmed that the importance of the leapfrog phenomenon should not be exaggerated.[126]

5. USING THE ECJ AS A TRANSNATIONAL ARBITER

The ECJ's authority is not only sought in internal conflicts with the legislature, executive or other courts; in other scenarios, it is sought to resolve a transnational conflict with other courts or to prevent conflicts from arising – not least with a view to ensuring the uniformity of EU law. The Tax Chamber of the Dutch Supreme Court has referred several customs cases for this reason. The question in these cases was frequently under which tariff heading of the Combined Nomenclature a particular product was to be classified. One example is *Sonos*, which concerned a wireless music system. Some interviewees questioned whether a reference was necessary in this case because the district and appeal court had reached the same conclusion regarding the tariff heading, which was further supported by the AG of the Supreme Court.[127] These references are often dealt with by the ECJ in a three-judge chamber formation without the Opinion of an AG, suggesting that the questions are relatively straightforward or even *clair*. The Supreme Court judges interviewed nonetheless dismissed the suggestion that the court did not 'dare' to decide these cases itself.[128] The problem is that if the Supreme Court answers

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[124] NL:CRVB:2015:665, para 4.2; Case C-133/15 *Chavez-Vilchez* EU:C:2017:354; Case C-34/09 *Zambrano* EU:C:2011:124.

[125] NL:RVS:2013:2837.

[126] A French Supreme Administrative Court judge stated that the French lower courts look to the case law of the Council of State and are not likely to disregard this when they expect the ECJ to rule differently. Van Gestel and de Poorter 2019, 123.

[127] Interview 35; NL:HR:2015:285 (C-84/15 *Sonos* EU:C:2016:184); NL:HR:2015:221 (C-97/15 *Sprengen* EU:C:2016:556).

[128] Interview 30.

the question itself and classifies the product, it may do so in a different way from the courts in other EU Member States. Where it chooses a more disadvantageous classification for the undertaking(s) concerned, this could end up disrupting trade flows and distorting competition.[129] The Supreme Court is thus careful in its approach to customs cases and prefers to refer to Luxembourg so that 'the whole of Europe knows where we stand', thereby guaranteeing the uniform application of EU law.[130] Interviewees realized that the law-making character is limited in most of these cases, and that they do not pertain to fundamental aspects of the EU legal order.[131] This explained, in their view, why most of these references are handled by the ECJ without an AG Opinion.[132]

Several references of the Chamber for International Cooperation responsible for the execution of EAWs were also made with this objective in mind. One judge and legal secretary acknowledged that the Chamber referred some questions where the answer was clear to it; a reference was nonetheless considered necessary given the differing interpretations in other EU Member States. Such judicial authorities would not (easily) accept the Chamber's interpretation of EU law; they would be more likely to do so on the basis of an ECJ judgment. This could also explain why there have been many similar references by various courts – including Irish and UK courts – on the notion of 'issuing judicial authority' in the EAW Framework Decision.[133] The Central Appeals Tribunal also used the preliminary reference procedure to resolve a difference in opinion with a German court in *Mertens.*[134] This case concerned Mertens' right to unemployment benefits. He had worked in Germany while living just across the border in the Netherlands. The Tribunal had tried to contact the German court before which Mertens had appealed the German refusal to grant unemployment benefits, with the aim of arriving at a coordinated solution. However, the German judge declined to do so and was unwilling to discuss individual pending cases because of privacy considerations.[135] According to some interviewees, the case was fairly simple from a legal perspective. The Tribunal also stated clearly in its order for reference that it was obvious that Germany was obliged to grant the benefits.[136] The ECJ decided accordingly in a three-judge formation without an AG opinion. It needed only 15 paragraphs

[129] Interviews 15, 33, 78 and 82.
[130] Interview 78.
[131] Interviews 15, 30 and 33.
[132] *Ibid*.
[133] Eg Joined Cases C-508/18 and C-82/19 PPU *OG and PI* EU:C:2019:456; Case C-206/20 *VA v Bulgaria*.
[134] Case C-655/13 *Mertens* EU:C:2015:62.
[135] NL:CRVB:2013:2665, para 3.10.
[136] *Ibid*, paras 3.8–3.9.

to do so, in which it referred extensively to its previous case law, thereby suggesting that the matter was *clair*. The Central Appeals Tribunal thus secured the desired ECJ authority.

There are also examples of the transnational arbiter phenomenon in Ireland and the UK. As discussed in Chapter 2, section 3.4, the UK courts in particular have referred some cases to the ECJ to ensure the uniformity of EU law and hence to prevent transnational conflicts with the authorities in other EU Member States. In the copyright case of *Public Relations Consultants Association*, Lord Sumption seemed to recognize that 'sufficient guidance is available', but noted that a reference was nonetheless desirable. He pointed to 'a transnational dimension' and held that copyright law in relation to internet use has consequences for virtually everyone in the EU, warranting the involvement of the ECJ so that the outcome would apply uniformly across the EU.[137] Just as in the Dutch customs cases, the ECJ answered without an AG opinion, thus suggesting that the answer to the question was indeed relatively *clair*. The referral of the Irish Court of Appeal in the child abduction case of *Hampshire County Council* also falls into this category. Rather than issuing an order against the UK public authority, the problem was 'passed' to Luxembourg, because it would have greater impact 'to have Europe adjudicate' it than an Irish court.[138] The ECJ 'gives comfort' in such a situation.[139]

6. PUTTING AN ISSUE ON THE EUROPEAN AGENDA

Another politico-strategic consideration that has sometimes played a role is the wish to put a particular issue or concern on the European agenda.[140] Interviewed judges admitted that the reference of the Civil Chamber of the Dutch Supreme Court in *Diageo Brands* had a 'political undertone'.[141] In this case, the Supreme Court wondered whether it was obliged to enforce a Bulgarian judgment on the basis of the principle of mutual trust if there was reason to assume that the judgment was in breach of EU law. One judge held that, by referring this case to Luxembourg, attention was drawn to the problem of the limited independence of the judiciary in some Member States. The referral might thus contribute to the rule of law and thus even to peace and security

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[137] *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* [2013] UKSC 18 (Sumption LJ), para 39.

[138] Interview 148; Joined Cases C-325/18 PPU and C-375/18 PPU *Hampshire County Council* EU:C:2018:739.

[139] Interview 166.

[140] Bogojevíc 2017, 273; Thym 2012, 212.

[141] *Diageo Brands* NL:HR:2013:2062; Interview 27.

in Europe.[142] The Dutch Tax Chamber similarly referred questions about the conformity of a tax deduction scheme of study costs for people under the age of 30 with the prohibition against age discrimination in the Equal Treatment Directive (2000/78).[143] An additional motivation was to put a broader question on the agenda – that is, the extent to which the directive applies to all kinds of tax regulations. Before this point was raised, this Directive had barely featured in tax practice.[144] Another Dutch Supreme Court judge noted that the issue of whether to refer in the *Holterman Ferho* case arose partly from a 'legal gut feeling' that employee protection should prevail.[145]

An Irish judge also acknowledged that his/her reference regarding the EAW system aimed to put this issue on the agenda and ultimately to simplify the system. He/she expressed his/her 'disappointment' and 'extreme frustration' that since its introduction in 2004, the EAW process had become 'turgid', with 'a huge amount of delays'. He/she stated:

> if you can clarify one issue common to a number of cases that are likely to recur, than you assist the processes. Maybe it also informs the Commission. Or it is a reason to look at the Framework Decision again. … it is about improving knowledge… let's get it sorted out.[146]

Several references of UK High Court Judge Birss also seem to fall within this category. He made three references in six months about the Regulation concerning SPCs for medicinal products. In one reference, Judge Birss pointed to 'the dysfunctional state of the SPC system' flowing from the 'poor drafting' of the Regulation and the failure of the EU legislature to address these problems.[147] Nine of the 14 references made by former UK High Court Judge Arnold also concerned the SPC. He attributed this to the simplistic drafting of EU legislation in relation to SPCs.[148]

7. CONCLUSION

This chapter has downplayed the relevance of politico-strategic considerations, but has shown that these motives play a role in particular areas of law or for some courts, such as the Dutch lower migration courts and the Dutch Chamber

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142 Interview 59.
143 Case C-548/15 *De Lange* EU:C:2016:850.
144 Interview 30.
145 *Holterman Ferho* NL:HR:2014:164; Interview 27.
146 Interview 187.
147 *GlaxoSmithKline Biologicals SA v Comptroller-General of Patents, Designs and Trade Marks* [2013] EWHC 619 (Pat) (Birss J), para 86.
148 Arnold 2020, 1105.

for International Cooperation in relation to EAWs. What most of these cases have in common is that they were often decided by the ECJ with a three-judge formation and without an AG Opinion. This suggests that the legal issue was relatively *clair*, and that the referring court simply asked the ECJ to confirm what it already knew itself. The sword and leapfrog logic have been almost absent from the UK and Ireland; while the Criminal Chamber of the Dutch Supreme Court and the UK courts have sometimes shielded references from the ECJ. The logic behind the unwillingness to refer particular cases is to prevent a too far-reaching interpretation of EU law from affecting the constitutional set-up and parliamentary sovereignty. This chapter has pointed to two other categories of politico-strategically inspired references that have received limited attention in the literature: the desire to involve the ECJ as a transnational arbiter to resolve particular conflicts or to ensure the uniform application of EU law; and the desire to bring particular problems in EU legislation and its application to the attention of the ECJ or the EU legislature.

5. The interaction: dialogue or monologue?

1. INTRODUCTION

Having discussed the first stage in the interaction between national courts and the ECJ (the national court's question), we now turn to examine the second phase of the preliminary reference procedure from the perspective of the referring court: the ECJ's answer. This chapter assesses the views of national court judges on the procedure leading up to the answer; while the following chapter examines their appraisals of the actual answers. Together, these chapters offer fresh empirical data on an issue that we know very little about. Few studies have examined the true thoughts of national court judges on their interaction with the ECJ.[1] One recent exception is the research conducted by van Gestel and de Poorter,[2] who report similar findings on the basis of interviews with judges of supreme administrative courts in ten EU Member States. This chapter will corroborate those findings and will show that judges generally share most of the views expressed by scholars about the preliminary reference procedure, their interaction and the judgments of the ECJ.

This chapter starts with a brief overview of two different narratives on the interaction between the ECJ and national courts: a 'constitutional pluralist' perspective, which emphasizes heterarchical and horizontal dynamics, versus a more hierarchical depiction of the interaction (section 2).[3] It subsequently presents the perspectives of national judges (section 3), while also paying attention to informal contacts beyond the formal procedure (section 4).

1 Cf Wallerman Ghavanini 2020c, 19; Pollack 2018.

2 Van Gestel and de Poorter 2017 and 2019.

3 Parts of this chapter focusing on Ireland and the Netherlands have already been published in Hoevenaars and Krommendijk 2021.

2. NARRATIVES OF MONOLOGUES AND DIALOGUES

The literature broadly distinguishes two perspectives on the relationship between national courts and the ECJ.[4] The ECJ itself refers to 'an instrument of cooperation'[5] and even uses the term 'dialogue', implying that there is a shared responsibility and a large degree of equality between both sides.[6] The ECJ's reliance on these cooperative elements fits within a 'constitutional pluralist' perspective which construes this interaction as cooperative, heterarchical or horizontal, because an overarching legal hierarchy is lacking.[7] The highest national courts and the ECJ function on the basis of different constitutional foundations and are ultimate only in relation to their own legal system. The EU sphere is inherently more limited than the national sphere.[8] This strand of literature underscores the dependency of the primacy of EU law on national constitutional law rather than the autonomous EU legal order. In addition, close cooperation is simply unavoidable, because the ECJ cannot set aside national court judgments and thus depends on national courts for compliance with its rulings.[9] From this perspective, it is unsurprising that national courts at times fail to comply with the rulings of the ECJ, given that truly effective coercive enforcement mechanisms are lacking.[10] The *Weiss* judgment of the German Federal Constitutional Court illustrates this point.[11] From a normative perspective, some scholars have also argued that it is not problematic in the multi-level EU legal order that the highest (supreme or constitutional) courts claim (final) authority.[12]

Other EU law scholars, as well as the ECJ itself, have emphasized the relationship between the ECJ and national courts as hierarchical.[13] They suggest

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4 With respect to dialogue, see more broadly Slaughter 1994; Meuwese and Snel 2013.

5 Eg, Case C-182/15 *Petruhhin* EU:C:2016:630, para 18; *Opinion 2/13* EU:C:2014:2454, para 176. Cf 'close cooperation' in 2019/C 380/01 *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, para 2.

6 Joined Cases C-558/18 and C-563/18 Case C-619/18 *Miasto Łowicz* EU:C:2020:234, para 55; *Commission v Poland* EU:C:2019:531, para 45; van Gestel and de Poorter 2019, 142.

7 Avbelj and Komárek 2012; Walker 2002; Davies and Avbelj 2018.

8 Arden 2014, 22.

9 Weiler 1991, 2403; Dyevre 2016, 109; van Gestel and de Poorter 2019, 18.

10 Sarmiento 2012a, 309.

11 Cf Burchardt 2020.

12 Bobíc 2017; Cartabia 2015.

13 Eg Timmermans 2014a.

that the principle of the primacy of EU law leaves little room for dialogue.[14] Luxembourg sits at the top of the hierarchy and has the final word, because ECJ judgments are binding.[15] Procedures such as state liability (*Köbler*) and the infringement procedure are last-resort mechanisms that can be utilized by (legal) persons or the European Commission to prevent national courts from deviating from what Luxembourg has stipulated (see Chapter 1, section 2).[16] The ECJ judgment in *Commission v France* illustrates that the Commission and the ECJ are increasingly willing to protect the autonomous operation of the EU legal order. For the first time, the ECJ held an EU Member State liable for the failure of its highest administrative court to refer.[17] This more hierarchical perspective does not sit easily with the way in which the preliminary reference procedure is often depicted – including by the ECJ itself. It leaves little room for dialogue based on equality; and it is therefore unsurprising that scholars have instead used the term 'monologue' to refer to the interaction between national courts and the ECJ.[18]

The two theories or perspectives are at opposite ends of the spectrum. As this overview shows, both cooperative and hierarchical elements can be identified when examining the preliminary reference procedure.[19] This raises the question as to why the ECJ has used constitutional pluralist language at all. Da la Mare and Donnelly rightly observe that the ECJ has used this language of cooperation to 'seduce' national courts into accepting its more hierarchical approach – not least because it ultimately relies on the willingness of national courts to engage with it.[20]

3. THE PERSPECTIVES OF NATIONAL COURT JUDGES: A VERTICAL MONOLOGUE

The previous section hinted at a gap between the rhetoric of dialogue and cooperation and the reality.[21] The Dutch, Irish and UK judges interviewed confirmed this view and construed their relationship with the ECJ as a vertical

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14 Fabbrini 2015; Lindeboom 2020; van Gestel and de Poorter 2019, 49.
15 Case C-62/14 *Gauweile*r EU:C:2015:400, para 16.
16 Case C-224/01 *Köbler* EU:C:2003:513.
17 Case C-416/17 *Commission v France* EU:C:2018:811, para 111.
18 Cf Claes and de Visser 2012; Pérez 2014; van Gestel and de Poorter 2019; Kochenov 2020, 17.
19 Tridimas 2015, 407.
20 De la Mare and Donnelly 2011, 377.
21 Van Gestel and de Poorter 2019, 143.

one.[22] Their perspectives in this regard are further corroborated by recent empirical studies.[23]

National judges did not subscribe to the notion of a rather non-committal, more heterarchical discourse of cooperation with the ECJ, simply because they have a legal duty to comply with its judgments.[24] Former President of the Council of State Polak considered the term 'dialogue' to be misleading, because the referring court is bound by the subsequent ECJ judgment.[25] Lady Justice Arden held that the idea of mutual cooperation is in practice 'much more like an obligation of obedience' – not least because the ECJ has taken a centralizing role 'and has built up its own power', and thus stands 'at the top of a hierarchy of national courts'.[26] Lord Mance also lamented that the relationship has become 'increasingly hierarchical' and does not always reflect the concepts of dialogue and mutual trust.[27]

National court judges were also unanimous in dismissing the suggestion that their interaction with the ECJ is a genuine dialogue of reciprocity and instead pointed to the unidirectional nature of this interaction.[28] Late Council of State judge Mortelmans used the metaphor of a ferry to highlight that the two activities – the national court reference (back) and the ECJ's answer (forth) – are largely separate from each other.[29] A Dutch judge called the preliminary reference procedure 'a one-way Q&A procedure that lacks timely exchange of new relevant information'.[30] UK judges have been most critical – both in their judgments and in extra-judicial writings and speeches – about their interaction with the ECJ. This criticism is also based on a comparison of the ECJ with the more common law-inspired ECtHR, which publishes dissenting and concurring opinions of judges and allows for *amicus curiae* interventions. Lord Reed claimed that it is 'a challenge' to establish a successful working relationship with the ECJ.[31] Another UK judge also noted that the dialogue with Strasbourg is easier because the ECtHR is more 'outgoing' – and because

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[22] Loth 2017; Feteris 2017.

[23] Wallerman Ghavanini 2020c; van Gestel and de Poorter 2019; Eliantonio and Favilli 2020.

[24] Interviews 5, 15, 18, 27, 30, 34, 41, 72, 77, 78, 89, 91, 146, 159, 162 and 166; Clarke 2019; *Evelyn Danqua v Minister for Justice and Equality* [2017] IECA 20, para 36.

[25] Polak 2015, 16.

[26] Arden 2015; Arden 2010, 6.

[27] Mance 2013a, paras 29 and 43.

[28] Rosas 2007; Interviews 10, 22, 24, 31, 35, 44, 66, 81, 86, 89, 91, 208, 231 and 264.

[29] Mortelmans 2011, 235.

[30] De Werd 2015b, 152.

[31] Reed 2014, 1.

of the number of UK judges serving on the ECtHR.[32] Interviewees suggested that the ECJ remains at a 'much greater distance', despite occasional meetings with its judges.[33] The current UK Supreme Court also made a comparison with the ECtHR in its written response to interview questions:

> Given that the status of EU law in the United Kingdom generally mandates adherence to the ECJ's rulings, there is perhaps less scope for effective dialogue with that court than with, for example, the European Court of Human Rights, the decisions of which domestic courts in the United Kingdom are required only to "take into account" pursuant to the Human Rights Act 1998.[34]

Both in their judgments and in interviews, judges cited several reasons for the absence of a genuine dialogue with the ECJ. The first of these concerns the attitude of the ECJ. For a true dialogue to take place, there should be a degree of equality in the positions of the interlocutors. This equality is absent from the hierarchical legal set-up of Article 267 TFEU, as well as from the subjective perceptions of judges. Some judges suggested that the ECJ at times acts pedantically like a 'know-it-all', reducing the role of the national courts to that of a mere observer.[35] One Dutch judge referred to 'an ivory tower at the Kirchberg scattering its wisdom over us'; while one Irish judge claimed that the ECJ presents itself as an 'oracle'.[36] Another Dutch judge pointed to the 'arrogance' of the ECJ and suggested that it treats the preliminary reference procedure like 'a high mass with the devotees at a distance'.[37] A Dutch higher court judge reported that he/she had felt during a visit to Luxembourg that the attitude of the ECJ judges was: 'You come to us; we determine the rules.'[38] Another Dutch highest administrative court judge noted that while the ECJ would likely insist that its cooperation with national courts is incredibly successful, national judges would not share this view.[39] One judge also highlighted the defensive reaction of ECJ judges when he/she flagged up shortcomings in the ECJ case law.[40] Interviewees suggested that this 'know-it-all' attitude of 'telling us what we should be doing' is also reflected

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[32] Interview 208.
[33] *Ibid*.
[34] Written response 15 April 2020; Amos 2012. Cf, on the German Constitutional Court and the ECtHR, Peters 2012.
[35] Interviews 44, 48, 89 and 231.
[36] Interviews 18 and 144.
[37] Interview 16.
[38] Interview 44.
[39] Interview 24.
[40] Interviews 12. Cf Weiler's comments on the first chapter of an edited volume written by the current ECJ President Lenaerts, in which Lenaerts easily discredited criticism of the ECJ as being based on misunderstandings, Weiler 2013.

in the ECJ's judgments.[41] Indeed, the 'pejorative tone' of one ECJ judgment was even explicitly mentioned in a UK High Court decision.[42] An Irish judge further noted that ECJ judgments often present what appear to amount to mere magic formulas, without clarifying why the ECJ has decided in a certain way.[43] A Dutch tax law judge likewise mentioned the 'apocalyptic' tone of customs decisions, in which the ECJ presents a particular tariff classification as a matter of fact: 'This is it.'[44] One UK judge noted that *Sturgeon* was rendered without hearing the parties, against the advice of AG Sharpston. According to him/her, this tarnished the reputation of the ECJ and seemed to confirm that the ECJ is 'not good at changing its mind'.[45] These views of Dutch, UK and Irish judges have been echoed by other commentators. For example, Weiler has criticized the ECJ's authoritarian and oracular approach, and its 'pretence of logical reasoning and inevitability of results'; while Lasser has observed that the ECJ 'boldly steps in to resolve the controversy with almost imperial confidence, speaking as if the case admits of only one correct answer … in coldly superior terms … and appearing self-assured'.[46] Interviews with judges of the supreme administrative courts in ten EU Member States further reflect these views: one German judge, for example, suggested that the ECJ has lost touch with what is happening on the ground.[47]

A second reason why the interaction between the ECJ and national courts falls short of a dialogue is the exclusion of national courts from the process between submission of a reference and issue of the ECJ's judgment. Some judges described this period as a 'black hole' or 'black box', and suggested that the distance between national courts and the ECJ results from the fact that the process largely takes place through written communications.[48] Van Gestel and de Poorter found that judges in other Member States – including France, Germany and the Czech Republic – are also critical of this 'radio silence' and the limited supply of information throughout the process.[49] It is difficult for referring courts to obtain the submissions of the (intervening) parties, which in turn makes it difficult for them to get a good overview of the case.[50] One UK

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41 Interview 231.

42 *Newby Foods Ltd, R (on the application of) v Food Standards Agency* [2016] EWHC 408 (Admin), para 62.

43 Interview 144. Cf Interview 155.

44 Interview 93.

45 Interview 264. Cf Harris 2008, 376.

46 'It is so, because we say it is so. And what it means – well you will find out', Weiler 2001, 225 and 249; Lasser 2009, 107. Cf de Waele 2009, 370.

47 Van Gestel and de Poorter 2019, 135 and 138–39.

48 Interviews 5, 10, 22, 33, 35, 44, 65, 89 and 91. Cf Pollack 2017, 602.

49 Van Gestel and de Poorter 2019, 130–31.

50 Interview 35.

barrister suggested that UK lawyers are 'dismayed' about the ECJ's attitude towards the solemnity of the proceedings and their near-inability to obtain copies of the pleadings of the parties.[51] The UK High Court pointed out in *Newby* that due to these difficulties, it was unable to verify whether a certain point had been raised in the submissions to the ECJ.[52] One Czech judge interviewed by van Gestel and de Poorter also highlighted the unavailability of transcripts of the oral hearings in Luxembourg.[53] Some judges went further and voiced feelings of exclusion. They lamented the absence of the referring court from the procedure once the reference has been made and contrasted this powerlessness with other stakeholders, whose involvement can 'take off' following a reference.[54] Some Dutch judges in particular criticized this situation and noted that other parties without the necessary (case-specific) expertise have a greater say during this period than the referring court.[55] The national court also cannot reply to or correct 'bullshit' submissions made by the parties, intervening Member States or the Commission.[56]

A third reason for the absence of a genuine dialogue is the limited transparency as to how the ECJ addresses the views of national courts. UK judges were particularly critical of this. Lord Mance vividly highlighted the problem when he argued that the ECJ:

> does not in its committee style approach overtly engage with national jurisprudence (save in Advocate Generals' opinions, which are however neither binding nor decisive). That is a pity. Good fences build good neighbours, but so does good open conversation over the fences.[57]

The UK judges interviewed noted the contrast between the ECtHR and the ECJ, and observed that Strasbourg pays more attention and respect to what the UK Supreme Court has to say. They also pointed to the reluctance of the ECJ to engage with and refer to national courts. This was attributed to the ECJ's desire to respect the idea of equal treatment of all national courts: the expectation was that the courts in the most prominent Member States would be relied on more often, thus putting them on a higher footing than the courts in smaller jurisdictions.[58] ECJ judges attributed this lack of engagement with the arguments of

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51 Interview 243. Cf Alemanno and Stefan 2014, 124.

52 *Newby Foods Ltd, R (on the application of) v Food Standards Agency* [2016] EWHC 408 (Admin), para 80.

53 Van Gestel and de Poorter 2019, 132.

54 Interviews 4, 54, 66 and 91.

55 Interview 66. Cf Langer 2015.

56 Interviews 5, 66 and 91; Langer 2015, 13; Wattel 2015.

57 Mance 2013b. Cf Arden 2015, para 17.

58 Interviews 231 and 264.

national courts (and with the Opinions of the AG) to a desire not to be impolite and not to embarrass the referring court should it deviate from the latter's stance.[59]

4. INFORMAL CONTACTS

One important element (or even prerequisite) for effective interaction or dialogue between the ECJ and national courts is trust.[60] One Irish Supreme Court judge, for example, mentioned that the current Irish Supreme Court judges know their counterparts at the ECJ, which 'creates an atmosphere of trust'.[61] There have also been regular meetings between the highest national courts and the ECJ: the Irish Supreme Court, for example, visited Luxembourg in early 2018. During the visit, the PPU procedure was discussed, as well as the ECJ's practice of reformulating questions (see Chapter 6, section 2.3).[62] Dutch Supreme Court judges referred to a visit to Luxembourg as a 'school trip'.[63] Judges of the Tax Chamber of the Dutch Supreme Court discussed the problem of ECJ judgments engaging too much with the facts of the case, as in *Sonos* (see Chapter 6, section 3.2).[64] At the same time, Lord Reed held in 2014 that such meetings with the ECJ 'have not always been as productive'. This view is unsurprising, given that the earlier mentioned *HS2* judgment was discussed between the UK Supreme Court and the ECJ in November 2014 (Chapter 4, section 2).[65]

Potentially even more important than these official visits are personal relationships and more informal encounters between national court and ECJ judges at conferences and other events.[66] Lord Mance, for example, noted that on a personal level, relations are 'extremely good' and friendly.[67] One judge interviewed also stated that UK Supreme Court judges have good personal relationships with their counterparts at the ECJ.[68] Dutch Council of State judges also have informal contact with ECJ judges and the court registry.[69] Several ECJ judges were previously Dutch government agents before their

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[59] Interviews with judges and AGs at the ECJ as reported by van Gestel and de Poorter 2019, 137. Cf de Búrca 2020.
[60] De Visser 2017; Rado 2020, 84.
[61] Interview 128.
[62] Interviews 152, 174 and 231; Mance 2013a, para 7.
[63] Interviews 33 and 37.
[64] Interview 15.
[65] Reed 2014, 11.
[66] Interview 33.
[67] Mance 2013a, para 62; Mance 2015, para 7.
[68] Interview 231.
[69] Interview 72.

appointment to the ECJ and several court clerks spent time on secondment in Luxembourg.[70] These connections and insights into ECJ procedures are considered helpful, because judges sometimes learn informally about particular steps during the period after referral.[71] These informal contacts also assist judges in composing their orders for reference. One judge mentioned that he/she had been informed by a Dutch ECJ judge that an order for reference will not be translated beyond 20 pages.[72] Lord Millett contacted an ECJ judge when he and his colleagues were unsure about the meaning of a particular ECJ judgment.[73] UK Supreme Court judges have also contacted AGs from time to time when they were unsure as to whether to refer – not least where similar questions had been raised in other pending cases.[74]

5. CONCLUSION

This chapter has addressed the deficiencies in the operation of the preliminary reference procedure. It has shown that the ECJ does not approach this procedure as a (horizontal) dialogue or as a cooperative endeavour, even though it consistently employs this language. Judges in the Netherlands and the UK in particular were critical of the 'ivory tower' mentality of the ECJ, and noted that in practice, interaction with it more closely resembles a vertical monologue. Several problematic features – such as the limited involvement of national courts after the referral – were highlighted. In recent years, however, official visits and informal contacts have created a more positive dynamic and helped to build trust. This suggests that the interaction between national courts and the ECJ beyond written judgments should be carefully considered. That said, this positive impact of informal contacts has not fundamentally changed the largely critical views of national judges in relation to the quality of their interaction with the ECJ. The following chapter will discuss the judges' perspectives on the outcome of this interaction – namely, the requested ECJ rulings.

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70 Interview 10
71 Interviews 10, 72 and 89.
72 Interview 66.
73 Littlepage 2014, 205.
74 Two judges interviewed by van Gestel and de Poorter 2019, 131.

6. Perspectives on the answers of the ECJ

1. INTRODUCTION: GENERAL SATISFACTION

The previous chapter focused on the views of national judges on the quality of their interaction with the ECJ. It revealed that judges do not feel that this interaction is a genuine dialogue. This chapter focuses on judges' perspectives on the requested rulings. The national court judges interviewed were generally satisfied with the judgments of the ECJ: almost all considered them to be useful and of a high quality.[1] At the same time, however, almost all judges could point to some problematic judgments. A similar sentiment was reported by van Gestel and de Poorter based on interviews with judges of the supreme administrative courts in ten EU Member States.[2]

The Irish judges were the most positive and emphasized that they were dissatisfied with only a small minority of ECJ judgments.[3] The Dutch highest administrative courts and the UK courts were slightly more negative on the whole and highlighted the varying quality of ECJ judgments.[4] The UK courts have frequently expressed their frustration in this regard in rather explicit terms in their judgments. Part of this frustration is due to a feeling that their tradition is alien to the ECJ and that ECJ judgments are not written for them.[5] UK judges expressed concerns about the civil law nature of the EU legal system as well as the brevity of ECJ judgments.[6] Similar feelings were voiced by Irish judges, but this did not significantly influence their overall appraisal of the judgments of the ECJ. Even the UK judges interviewed pointed to many high-quality and

[1] Interviews 10, 12, 15, 18, 24, 27, 30, 33, 34, 41, 44, 45, 66, 72, 77, 78, 82, 87, 91, 105, 108, 113, 133, 136, 139, 144, 152, 166, 181, 187 and 191.

[2] Van Gestel and de Poorter 2019, 135. Cf Eliantonio and Favilli 2020.

[3] Interviews 113, 171 and 181.

[4] Interviews 18, 24 and 89.

[5] Interviews 139, 144, 152, 181, 187, 191, 211 and 231; Lord Mackay as quoted by Littlepage 2014, 207. Cf Arden 2010, 16 and 19; Mance 2013a, para 23.

[6] Interviews 139, 144, 152, 181, 187, 191, 211 and 231; Arden 2010, 16 and 19; Mance 2013a, para 23; *HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor* [2014] UKSC 3, para 128 (Lord Sumption).

well-argued ECJ judgments.[7] One Dutch judge suggested that, on average, 80 per cent of ECJ judgments are satisfactory; while another judge was slightly more negative and put this figure at 70 per cent.[8] Some tax judges of the Dutch Supreme Court were cautious in voicing criticism, suggesting that ECJ judgments should not be dismissed as the utterings of an 'oracle' and that national court judges should not speak 'sharply and unpleasantly' about ECJ judgments.[9] One judge noted that, from a legal dogmatic perspective, the ECJ cannot issue a wrong judgment, since ECJ judgments are by definition law. He/she added that if a judge were to say that the applicable law was wrong, this would be the same as an astronomer saying that the moon is wrong. That said, he/she admitted that judges sometimes have reservations about ECJ rulings in a personal capacity.[10]

The judges interviewed contextualized the criticisms discussed in the rest of this chapter in three ways. First, they noted that judgments are never unanimously applauded.[11] One former UK Supreme Court judge observed that it is human nature to complain about problems and emphasized that no court is perfect – even the 'thin-skinned' Supreme Court.[12] Lady Justice Arden acknowledged that Luxembourg, 'like any other court, do[es] not always get it right'.[13] Dutch judges similarly stated that they themselves are often subject to criticism and reasoned that the ECJ is 'just a court', like any other.[14]

Second, judges pointed to the difficult task of the ECJ, which must take into account 28 different legal systems and 23 official languages.[15] Given the challenges of accommodating many different legal areas and specializations, they suggested, the ECJ 'is doing a damn good job'.[16] One Dutch Supreme Court judge even expressed 'admiration' for the ECJ, having learned from his/her experience as a judge in the Benelux Court – which covers three neighbouring countries and two languages – how difficult the task of an international court is.[17] An Irish judge similarly cautioned that 'none of the tasks of the ECJ are

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7 Interviews 208 and 231. Many ECJ judgments 'can readily be absorbed'. Arden 2010, 9.
8 Interviews 10 and 91.
9 Interview 15.
10 Interview 15.
11 Mance 2015, para 3.
12 Interview 231.
13 Arden 2014, 7.
14 Interviews 10, 15, 30, 34, 44, 59 and 82.
15 Interviews 15, 18, 32, 34, 41, 43, 44, 87, 91 and 231. Cf van Gestel and de Poorter 2019, 136.
16 Interview 15. Cf Interview 34.
17 Interview 87.

easy', and that not everything goes smoothly.[18] Another Irish interviewee remarked that it is 'almost unavoidable' that judgments are sometimes unclear. He/she noted that this is unsurprising because only one Irish judge, who understands the Irish system, serves on the ECJ.[19] Hence, 'cultural misunderstandings' can happen and 'difficulties of communication between different legal systems' are unavoidable.[20]

Third, referring courts were also critical of themselves, suggesting that 'it takes two to tango'.[21] As will be made clear throughout this chapter, it is often the referring court that is to blame for ill-formulated or overly general questions, which are thus not sufficiently well understood in Luxembourg.

The rest of this chapter focuses on two specific perceived problems with ECJ judgments: the ECJ's inability to answer the questions satisfactorily, if at all (section 2); and the ECJ's failure to appreciate the facts of the case, the national legal framework or the underlying concerns of the referring court (section 3).

2. NO (CLEAR) ANSWER

There are various ways in which the ECJ fails to answer (some) questions of the referring national courts.[22] In some cases, the ECJ does not answer (some of) the questions and declares them inadmissible, or avoids answering them on procedural or substantive grounds (section 2.1). In other cases, the ECJ's answers raise further questions because of deficient reasoning (section 2.2). The ECJ sometimes reformulates the questions of the referring court to such an extent that it fails to address the points raised (section 2.3). Another problem highlighted by the judges interviewed is a lack of consistency in the ECJ case law (section 2.4).

2.1 Failure to Answer the Question

On occasion, the ECJ has declared a question inadmissible or has dodged it on – sometimes dubious – procedural or substantive grounds. Former UK Supreme Court President Neuberger noted that ECJ judgments 'occasionally evade the legal question actually raised in order to arrive at a mutually

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[18] Interview 155.

[19] Interview 113. Cf Interview 155.

[20] Interview 181; *MM v Minister for Justice* [2018] IESC 10 (O'Donnell), paras 315 and 1.

[21] Prechal 2014; Timmermans 2015, 114–18.

[22] Cf Langer 2015; de Werd 2015a and b; de Witte 2016, 24–25; Eliantonio and Favilli 2020.

acceptable product'.[23] However, the significance of this problem should not be exaggerated: it seems to be confined largely to cases referred by two of the Dutch highest administrative courts and a few references of the Dutch and UK Supreme Court; and no such recent Irish cases were found.[24]

In *Servatius*, the ECJ declared inadmissible the seventh question, about services of general economic interest, and limited itself to considering the free movement of capital. This was upsetting to the Council of State, which felt 'downright embarrassed', since the question had been carefully formulated.[25] In *Trijber and Harmsen*, the ECJ did not answer the Council of State's question on whether the Services Directive applies to purely internal situations.[26] The ECJ evaded this key question simply by briefly identifying cross-border elements, even though the Council of State had clearly indicated that both cases concerned purely internal situations and despite the strong warning of AG Szpunar not to dodge the question. The ECJ's initial silence prompted the Council to repeat its question again in *Visser Vastgoed*.[27] Once again, however, the ECJ failed to answer a question on the application of the Services Directive in *X*, which concerned the fee levied by the municipality of Amersfoort for the construction of a fibre-optic network. The Supreme Court reasoned carefully why it considered that the Services Directive applied, rather than the Directive on the authorization of electronic communications networks and services; but the ECJ nonetheless answered the question on the basis of the Authorization Directive.[28] Some interviewees wondered whether this was a wise move and questioned whether the ECJ had properly addressed all the arguments of the Supreme Court.[29]

Something similar happened in *Nolan*, which was referred by the UK Supreme Court. The ECJ determined that it did not have jurisdiction because the situation did not fall within the scope of Directive 98/95 on collective

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[23] Neuberger 2016, para 37.

[24] The ECJ did not answer the essential first question of the Central Appeals Tribunal in *Martens*, about the continued grant of funding for higher education outside the Netherlands, and a case dealing with biometrics, Case C-359/13 *Martens* EU:C:2015:118; Joined cases C-446/12 until C-449/12 *Willems* EU:C:2015:238; Gill-Pedro 2015; Krommendijk 2019b.

[25] Case C-567/07 *Servatius* EU:C:2009:593.

[26] Joined Cases C-340/14 and C-341/14 *Trijber and Harmsen* EU:C:2015:641; *Visser Vastgoed* NL:RVS:2016:75, para 20.1.

[27] Joined Cases C-360/15 and C-31/16 *X and Visser Vastgoed* EU:C:2018:44. Cf a repetition of the partly unanswered questions in Case C-189/09 *Zuid-Chemie* EU:C:2009:475; Case C-12/15 *Universal Music* EU:C:2016:449; *Universal Music* NL:HR:2015:36, para 4.4; Interview 27.

[28] Joined Cases C-360/15 and C-31/16 *X and Visser Vastgoed* EU:C:2018:44.

[29] Interviews 15 and 30.

redundancies, since it dealt with the termination of an employment relationship between a UK national and a non-Member State.[30] The Court of Appeal noted in its follow-up judgment that the 'the case took an unexpected turn' before the ECJ, which adopted a 'curious' line and ignored the AG's Opinion. The ECJ raised the issue of the applicability of EU law on its own initiative, following an observation by the European Commission. As a result, the Court of Appeal had to decide an issue that had not arisen in earlier stages of the case.[31] The ECJ also based its decision on an incorrect premise in *Vomero* that was not even a point of discussion before the UK Supreme Court – possibly because of the observations of AG Szpunar. It assumed that the applicant did not, at the time, have a right of permanent residence.[32] Partly because of this, the ECJ judgment was surprising to the Supreme Court judges. It left scope for further arguments, since the ECJ avoided answering particular questions on how to calculate the ten-year period to qualify for enhanced protection against expulsion and how to deal with the interruption of continuity of residence.[33]

However, the silence of the ECJ is sometimes due to the order for reference drafted by the referring court, as certain questions or aspects of the case may not have been formulated sufficiently clearly and accurately. The ECJ gave the UK Supreme Court a rap on the knuckles when it failed to include all the necessary information in its reference in *Vomero*.[34] Another example is the reference of the Dutch Civil Chamber in *Préservatrice Foncière.* The ECJ focused exclusively on the liability of the state on the basis of a private law guarantee contract, even though the issue of joint and several liability also required consideration; but the latter had not featured prominently in the order for reference.[35] There is also room to doubt the conclusion of the Dutch Supreme Court in *X (municipality Amersfoort)*, because it paid little attention to the applicability of Article 13 of the Authorization Directive. Supreme Court judges wondered as a result whether they had formulated the questions sufficiently clearly.[36]

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30 Case C-583/10 *Nolan* EU:C:2012:638. Cf Arnull 2017, 350.

31 *The United States of America v Nolan* [2014] EWCA Civ 71, para 1.

32 *SSHD v Franco Vomero* [2019] UKSC 35, paras 33–34.

33 Interview 264.

34 Joined Cases C-316/16 and C-424/16 *B and Vomero* EU:C:2018:256, paras 41–42.

35 Case C-266/01 *Préservatrice Foncière Tiard* EU:C:2003:282; Polak 2009, 110–11.

36 Joined Cases C-360/15 and C-31/16 *X and Visser Vastgoed* EU:C:2018:44, paras 55–56; Interview 34.

2.2 No Clarity

A frequent complaint both in the literature and among judges is that ECJ judgments often raise more questions than they answer.[37] This reflects the abundant criticisms of the ECJ's Cartesian 'French-style' reasoning.[38] Luxembourg insiders share these views. Former ECJ judge Edward pointed to the difficulty in issuing clear decisions due to the nature of collegiate decision making in the ECJ.[39] AG Sharpston pointed to 'gaps in the reasoning' and 'bland opacity in key passages'.[40] Dutch and UK judges have been more critical than their Irish counterparts with respect to the clarity of ECJ judgments.[41] While Dutch judges noted the generality and the deferential nature of ECJ judgments, UK judges primarily criticized their brevity and limited reasoning.

On the latter point, UK judges freely admit that they sometimes struggle to understand ECJ judgments.[42] One UK judge pointed to 'muddied answers that keep everyone happy'; while another noted that it is not uncommon for both parties to claim they have won or for the court to be split.[43] The sparse reasoning of ECJ judgments was considered particularly problematic. Lord Mance noted that 'the Committee style of its judgments restricts the Court's ability to introduce nuance or to express itself always with absolute clarity'; while Lord Reed held that 'it is unrealistic to expect preliminary rulings always to set out a precise rule'.[44] Lord Carnwath stated that in one case, the Supreme Court argued for hours about the meaning of the ECJ's judgment without reaching agreement; the Supreme Court eventually gave up and asked AG Sharpston for clarification.[45] Former Supreme Court President Neuberger stated in a public lecture that ECJ judgments are 'not infrequently internally inconsistent'.[46] One example is *Newby*, in which the UK High Court struggled with the meaning

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37 Cf ECJ judgment generated 'a cacophony of questions', Parish 2020.

38 Weiler 2001, 225; Weiler 2013, 235; Jacobs et al 2019, 1216; Pollack 2018; Lasser 2009, 104; BVerfG 2 BvR 859/15, 5, paras 116–18; van Gestel and de Poorter 2019, 9.

39 Edward 1995, 557.

40 Sharpston 2014, 765.

41 The interviews and legal analysis led to only one case: Case C-470/16 *North East Pylon* EU:C:2018:185. The ECJ used three different notions about the requirement that judicial environmental procedures are not prohibitively expensive. One Irish judge held that this lack of clarity might have required a second reference. Cf Kokott and Sobotta 2019, 121.

42 Littlepage 2014, 200; Micklitz 2005, 440–41.

43 Interviews 231 and 264.

44 Mance 2013a, para 23; Reed 2014, 6; Arden 2010, 8.

45 Littlepage 2014, 206.

46 Neuberger 2016, para 37.

of the term 'cutting point' and identified three possible readings of the ECJ judgment.[47]

The UK courts are especially critical of brief ECJ judgments that deviate from the AG's Opinion without a clear explanation.[48] In *Patmalniece*, the UK Supreme Court pointed to the profound contrast between the 'lengthy, scholarly and closely-reasoned discussion' of the AG, which concluded that the case dealt with a form of direct discrimination; while the Grand Chamber found that it dealt with a form of indirect discrimination, without any reference to the discussion of these issues by the AG.[49] Lord Neuberger voiced similar criticisms with respect to another Grand Chamber judgment (*Maruko*), dismissing it as 'an unreasoned assertion' and contrasting it with the different conclusion in the 'fully reasoned analysis' of the AG.[50] The UK courts in particular have shown a clear preference for the more discursive AG Opinions. They have even used these Opinions to fill 'lacunae' in ECJ judgments or to understand the 'sparse reasoning' of the ECJ, because of the Opinions' 'fuller discussion of the principles and their practical application'.[51] In the consumer law case *Cavendish Square Holding*, the UK Supreme Court relied on the AG's Opinion instead of the ECJ judgment. It noted that the AG's analysis was 'in the nature of things more expansive than the court's [and] repays careful study'. Partly on the basis of this study, the Supreme Court arrived – according to the dissenting opinion of Toulson – at a doubtful (not *clair*) test that watered down the approach of the ECJ.[52] In other cases, the UK courts have preferred to rely on judgments from other common law countries rather than ECJ judgments, even in fields affected by EU law.[53]

The UK courts are thus particularly critical of ECJ judgments rendered without the help of an AG Opinion. In *ClientEarth*, both ClientEarth and the

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[47] *Newby Foods Ltd, R (on the application of) v Food Standards Agency* [2016] EWHC 408 (Admin), para 66.

[48] *HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor* [2014] UKSC 3, para 188.

[49] *Patmalniece v The Secretary of Work and Pensions* [2011] UKSC 11, para 33 (Lord Hope) and 63 (Lord Walker).

[50] *Bull & Anor v Hall & Anor* [2013] UKSC 73, para 81; Case C-267/06 *Maruko* EU:C:2008:179.

[51] *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, paras 87 and 130. Cf *Tele2 Nederland and Others v Autoriteit Consument en Markt* NL:CBB:2017:213, para 7.2.3; Case C-28/15 *KPN* EU:C:2016:692; Interviews 108, 139 and 152; Mance 2013a, para 29; Littlepage 2014, 200.

[52] *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, paras 107 and 315.

[53] For example, the Supreme Court relied on Australian jurisprudence in a consumer law case concerning the display of cigarettes, *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61; Littlepage 2014, 201–03.

secretary of state claimed victory as a result of the judgment's ambiguity, which resulted from the reformulation of the questions. The UK Supreme Court held that there was no AG Opinion 'to provide background to the court's characteristically sparse reasoning', so it relied on the submission of the European Commission to 'fill the gap', as it had given 'a much clearer answer' than the ECJ.[54]

This critical attitude of UK judges is perhaps unsurprising, because judges in common law jurisdictions 'cannot be loose with language' and primarily examine the reasoning in a judgment.[55] A UK barrister confirmed this while suggesting that judges have become more critical of the style and reasoning of ECJ judgments, which are not considered intellectually rigorous.[56] The barrister condemned the 'poverty of reasoning' in past ECJ judgments, but observed that under Lenaerts, some Grand Chamber judgments have shown higher regard for reasoning and greater intellectual rigour.[57] Such criticisms were voiced less frequently in Ireland and the Netherlands.[58] Dutch and Irish judges had fewer problems with the brevity of ECJ rulings. One judge noted that it is almost always possible to interpret a brief ECJ judgment further on the basis of earlier rulings.[59] Other interviewees emphasized that the ECJ need not go into all points in the order if the referring court has already highlighted all sides of the case. They considered it a compliment to the referring court when the ECJ deals with the question in such a (brief) way.[60]

For Dutch judges, it is not the brevity of ECJ judgments that is problematic so much as their abstract and ambiguous nature: they often contain general criteria for the referring court to assess, instead of a clear-cut, yes-or-no answer that practically disposes of the case.[61] Some Dutch judges felt that the number of such deference judgments has increased in recent years.[62] A good example is *A, B, C*, about a court's assessment of the credibility of the declared homosexual orientation of an asylum seeker. According to some judges, the ECJ

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[54] Barritt 2015; 370. *ClientEarth, R (on the application of) v The Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (Lord Carnwath), paras 6 and 10.

[55] Interview 133. Cf Interview 155; Arnull 2010, 81.

[56] UK courts seem to consider ECtHR judgments of better quality because of the option of dissenting judgments, Interview 211. Cf Nicola 2017, 1509.

[57] Interview 211.

[58] One Dutch Supreme Court judge (41) held that 'in terms of workmanship, sharp editing is less highly regarded' at the ECJ than the Supreme Court.

[59] Interview 34.

[60] Interviews 33 and 82.

[61] Judges also criticized Case C-579/13 *P and S* EU:C:2015:369; Interviews 66, 72, 81 and 89.

[62] Interviews 43, 48, 66, 81 and 89.

mentioned only what the courts could *not* do – that is, submit the asylum seeker to questioning based on stereotypical notions or sexual practices, or to some kind of 'test' aimed at establishing his or her homosexuality. The ECJ provided no indications as to what is allowed in order to establish the credibility of the assertion.[63] One judge even asked whether the reference was ultimately useful, because of the time lost as a result and the fact that the ECJ left it completely up to the national court to resolve the case on the basis of considerations that the Council of State had already identified and discussed before the reference. Dutch Supreme Court judges voiced similar concerns over the questions in *Commerz*, on whether the arbitrary and unlawful actions of the sole director of the Port of Rotterdam Authority could be attributed to the municipality. In its reference, the Supreme Court presented two options: no attribution, because the municipality was not really involved in the specific case; or attribution, based on the municipality's general involvement in the port authority. The judges noted that the ECJ failed to choose between the two options identified in the order for reference, and instead left it to the Supreme Court to decide 'in the light of all the relevant evidence'. The judges interviewed noted that they had already done so, and thus the reference left them no wiser on this point.[64] Another example is *Martens*, which considered a requirement to qualify for the continued grant of funding for higher education outside the Netherlands that the applicant have resided in the Netherlands in at least three of the six years preceding enrolment. The ECJ stated that this rule was not consistent with EU law, but provided little clarity on the factors that the Central Appeals Tribunal should consider to find a genuine link with the Netherlands.[65] In *Residex*, the Dutch Supreme Court asked whether it had the power – or even the obligation – to annul a guarantee given to a lender where this constituted unlawful state aid.[66] According to one interviewee, the Supreme Court asked a general question and received a very general answer, from which it 'had not progressed any further'. One example of an ambiguous deference judgment resulting from a UK reference is the environmental case of *Edwards*, which concerned the requirement that the costs of litigation not be 'prohibitively expensive' within the meaning of Article 9(4) of the Aarhus Convention.[67] Lord Carnwath noted rather grumpily that the ECJ did not provide 'a simple or straightforward

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[63] Joined Cases C-148/13 to C-150/13 *A, B, C* EU:C:2014:2406; van Gestel and de Poorter 2019, 87.

[64] Case C-242/13 *Commerz* EU:C:2014:2224; Interview 27.

[65] Case C-359/13 *Martens* EU:C:2015:118.

[66] Case C-275/10 *Residex* EU:C:2011:814.

[67] Another example is *Watson*, which was 'lacking in clarity' and led to disputes between the parties. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige and Watson* EU:C:2016:970; *SSHD v Watson & Ors* [2018] EWCA Civ 70.

answer' as to whether there is an objectively determined lower limit and, if so, how it should be assessed, even though this was one of the main issues raised by the House of Lords in its reference.[68] One might question, however, whether it is possible – or desirable – for the ECJ to do more than interpret EU law at a general and abstract level, especially when there are significant differences between EU Member States in relation to such a procedural issue.[69]

Judges thus generally prefer outcome judgments that give a very specific answer, leaving the national court no margin for manoeuvre.[70] The advantage of such judgments is that they limit the discussion between the parties after the ECJ judgment has been delivered, and may preclude the need for another hearing and a follow-up judgment from the referring court.[71] Dutch Supreme Court judges, for example, were quite satisfied with *GS Media*, in which the ECJ applied its interpretation of 'communication to the public' and concluded that it appeared, 'subject to the checks to be made by the referring court', that hyperlinks to websites with leaked nude photographs constituted such a communication.[72] Dutch tax judges were also content with concrete judgments that were criticized in the literature for being too interventionist. They considered that such judgments are unavoidable where the interpretation could lead to only one outcome.[73] Hence, most judges disagreed with the observation that national courts are wary of overly detailed or interventionist judgments that reduce their own latitude and room for manoeuvre.[74] The only judgment that was criticized for this reason was *Josemans*, about the Maastricht 'weed pass', which prohibits the admission of Dutch non-residents to coffee shops. The ECJ went quite far in its judgment and applied its interpretation of the freedom to provide services (currently Article 56 TFEU) to the local rule. After conducting a proportionality assessment, the ECJ concluded that the rule could be justified by the objective of combating drug tourism and the accompanying public nuisance, and found that the rules did not go beyond what was necessary to achieve this objective. One interviewee was critical of this decision, noting that

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[68] *Edwards & Anor, R (on the application of) v Environment Agency & Ors* (No 2) [2013] UKSC 78, para 31. Cf Kokott and Sobotta 2019, 121.

[69] Heyvaert et al 2014.

[70] Mance 2013a, para 23. Cf Nicola 2017, 1530; van Gestel and de Poorter 2019, 72.

[71] Interviews 69 and 77.

[72] Case C-160/15 *GS Media* EU:C:2016:644, para 54; Interviews 27, 45 and 87.

[73] Interviews 15 and 34. For example, Case C-59/16 *The Shirtmakers* EU:C:2017:362; Case C-520/14 *Gemeente Borsele* EU:C:2016:334.

[74] Davies 2006, 232; Komárek 2007, 467; Tridimas 2011, 754; de la Mare and Donnelly 2011, 391.

the ECJ had restricted the referring court's room for manoeuvre and simply left it to 'tick the box'.[75]

That said, however, it is unfair to blame the ECJ alone for ambiguous answers. It is the responsibility of the referring court to draft the questions as concretely as possible. It is the referring court that determines the kinds of questions that will be answered. General or unclear questions often lead to general or vague answers – which, in the words of one Dutch judge, can be a 'subscription to frustration'.[76] For example, the judges suggested that the Supreme Court should 'put its hand on its heart' and assume responsibility for the outcome in the *Residex* case, as it should have provided more detail on the Dutch private law context and its subtleties in its order for reference.[77]

2.3 Reformulation of Questions

It is a common practice of the ECJ to reformulate the questions of the referring court. Most of these reformulations are not substantive; the ECJ simply rephrases the questions in the language of EU law, which can be understood in all EU Member States.[78] Judges appreciate that the ECJ will frame the questions as European issues and will 'dislocate' them from the domestic context – especially where the questions have been badly worded.[79] Judges nonetheless considered reformulations to be problematic where the original questions remain unanswered and the ECJ takes a different direction – especially if the referring court had initially formulated the questions 'with precision'.[80] The judges interviewed also found it annoying when the ECJ neglects the suggestions of the referring court, but fails to provide clear reasons for doing so.[81] One Irish judge noted the 'problem of getting the ECJ to answer the question you want them to answer and not to avoid the hard question'.[82] Van Gestel and de Poorter confirm that these sentiments are shared by judges of the supreme

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[75] Case C-137/09 *Josemans* EU:C:2010:774, para 83.

[76] Interviews 32 and 83.

[77] Cf Sieburgh, attributed to the poor explanation of the modalities in Dutch civil law, Sieburgh 2011, 239; Loth 2014, 22.

[78] Šadl and Wallerman 2019.

[79] Interview 113. Cf van Gestel and de Poorter 2019, 81.

[80] Interviews 12, 24, 65, 66, 89, 108, 113, 152, 161, 162, 166 and 174; Langer 2015, 12; Garcia Antón 2015; van Gestel and de Poorter 2019, 8 and 81; *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2016] EWHC 50 (Ch) paras 11 and 45.

[81] One example is *Unal*, on the withdrawal of the residence permit of a Turkish worker with retroactive effect. The Council of State explicitly held that there was no fraud, but that did not prevent the ECJ from dealing with this matter, Case C-187/10 *Unal* EU:C:2011:623, paras 45–48; Wissels 2015, 551.

[82] Interview 174.

administrative courts in other Member States, including France, Germany, the Czech Republic and Poland.[83]

Substantive and allegedly incorrect reformulations arose quite a few times in relation to Dutch references in the five-year period under review; but this happened less frequently in relation to Irish and UK references.[84] In *Danqua*, the Irish Court of Appeal referred a question on the 15-day time limit for applications for subsidiary (asylum) protection in relation to the principle of equivalence.[85] The ECJ considered this question 'irrelevant' and reformulated it ('must be understood') to a question of whether the principle of effectiveness precluded the Irish procedural rule (answer: yes).[86] The referring judge, Hogan, was very critical of the ECJ answering questions that had not been raised in the order for reference, especially because the principle of equivalence was not a point of discussion in the domestic proceedings.[87] Similarly, the well-known and slightly older UK case of *Aimia Coalition*[88] had, in the words of one UK Supreme Court judge, a 'disastrous' and 'shambolic' outcome.[89] Instead of answering the questions of the House of Lords on the interpretation of the VAT Directive, the ECJ reformulated the questions and examined the VAT treatment of the payments in the particular case. In doing so, the ECJ failed to understand the actual point of contention and all the relevant facts.[90] The ECJ also combined this case with another reference of the House of Lords, which made the answer 'difficult to unravel' in the absence of an AG Opinion.[91] Another UK example is *Nestlé*, referred by High Court judge Arnold, who has extensive experience of the preliminary reference procedure. He entertained doubts as to whether the ECJ had understood the (reformulated) question, given the 'translation issues', and pointed to the resulting lack of clarity of its answers.[92] Another UK case in which the ECJ did not reformulate the

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[83] Van Gestel and de Poorter 2019, 127.

[84] Interviews 22, 108, 161, 166 and 174.

[85] *Evelyn Danqua v Minister for Justice* [2015] IECA 118 (Hogan J); Interview 166.

[86] Case C-429/15 *Danqua* EU:C:2016:789, paras 35–36 and 38.

[87] *Evelyn Danqua v Minister for Justice* [2017] IECA 20 (Hogan J), paras 1, 3, 15 and 19.

[88] Another case in which the ECJ 'sought to rephrase the question but in doing so asked a different question which it then went on to decide' is Case C-115/15 *NA* EU:C:2016:487; *Pokuah v SSHD* [2017] UKAITUR EA112612016, para 27.

[89] Interview 208.

[90] Reed 2014, 12.

[91] Para 49; *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15 (Lord Hope), para 88.

[92] *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2016] EWHC 50 (Ch), paras 9–11, 22 and 45.

question, but added an element that the UK Supreme Court had intentionally left out, is *Alemo-Herron.* This ECJ judgment has been criticized by scholars as 'downright odd' for placing too much emphasis on the freedom to conduct business over the rights of employees and collective bargaining. The ECJ, on its own initiative, asserted the right to conduct business as laid down in Article 16 of the Charter, even though the Supreme Court had held that the right to freedom of association was not an issue and domestic law was consistent with the common law principles of freedom of contract.[93]

One Dutch example is *Franzen*, in which the Dutch Central Appeals Tribunal asked whether a social security allowance 'must' be provided on the basis of EU law; the ECJ determined only that this was at the discretion of the authorities ('may'). Dutch judges complained that the reference was a useless exercise, because they already knew that answer.[94] The Supreme Court thus found it necessary to refer the question a second time on appeal.[95] Another slightly different case is *T-Mobile*: one interviewee was offended that the ECJ had assigned a certain point of view to the Trade and Industry Appeals Tribunal, which it did not in fact have. The Tribunal asked an open question, proposing different options for possible answers; but the ECJ seemed to suggest that the Tribunal wanted to 'push down the throat' a particular interpretation.[96]

Once again, however, it is frequently not only the ECJ that must shoulder the blame in such scenarios. One judge interviewed expressed sympathy for the ECJ, because it can only deal with what it is presented with.[97] In *Danqua*, the Court of Appeal insufficiently set out the national legal framework in its order of reference, as AG Bot also noted.[98] In *Aimia Coalition*, the ECJ went wrong at an early stage due to the minimal and deficient reference made by the House of Lords, which failed to identify the central issues and relevant facts clearly, as Lord Reed highlighted.[99]

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[93] Case C-426/11 *Alemo-Herron* EU:C:2013:521, para 31; *Parkwood Leisure Ltd v Alemo-Herron & Ors* [2011] UKSC 26, para 9; Gill-Pedro 2017; Weatherill 2014.

[94] Case C-382/13 *Franzen* EU:C:2015:261, paras 56 and 67; *Franzen* NL:CRVB: 2013:783, paras 4.18 and 10.8.

[95] Joined Cases C-95/18 and C-96/18 *Van den Berg, Giesen and Franzen* EU:C: 2019:767.

[96] Case C-8/08 *T-Mobile* EU:C:2009:343.

[97] Interview 208.

[98] Case C-429/15 *Danqua* EU:C:2016:485, paras 21 and 26.

[99] Reed 2014, 12; Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* EU:C:2010:590, paras 31–32.

2.4 Lack of Consistency

Dutch and UK Supreme Court judges are especially critical of the lack of consistency in the ECJ case law, and even of mutual inconsistencies within a judgment as a result of the required unanimity among the judges and the absence of dissenting and concurring opinions.[100] Lord Carnwath observed that 'a search for logical coherence in the Luxembourg case-law is probably doomed to failure'.[101] One Dutch judge held that the ECJ pays insufficient attention to the position of a judgment within the 'edifice' of its case law, which stands in contrast to the strong focus on judicial law making of the Dutch Supreme Court.[102] One Irish judge argued: 'There is a pretence that the law is a continuous march. Major changes in the jurisprudence are camouflaged and not even admitted when there are contradictory judgments.'[103] Lady Justice Arden likewise mentioned that the ECJ fails to explain why it has deviated from its own jurisprudence.[104]

Dutch and UK judges were unanimous in their criticisms of judgments in patent and trademark cases, and especially the ECJ's casuistic and 'not entirely consistent' case law on 'communication to the public' and 'the essential function of a trade mark'.[105] One judge interviewed suggested: 'There's neither rhyme nor reason to it.'[106] Interviewees attributed these inconsistencies to the (increasingly) fact-oriented approach of the ECJ, resulting in a casuistic case law that leads to more questions in subsequent cases in which the facts are (slightly) different.[107] Former High Court judge Arnold, who has made several IP references, observed that – unhelpfully – the ECJ does not explicitly make clear when earlier judgments are no longer considered authoritative or are restricted to their own facts.[108] The inconsistent jurisprudence in the field of IP law was also attributed to a lack of specialist expertise at the ECJ.[109] Arnold, for example, stated extra-judicially: 'Given its lack of experience in the highly specialised field of patent law, it is not surprising that the ECJ has had difficulty

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[100] Interviews 27, 30, 41, 45, 87 and 231. Cf Jacobs et al 2019, 1215.

[101] *Oss Group Ltd, R (on the application of) v Environment Agency & Ors* [2007] EWCA Civ 611, para 55.

[102] Interviews 33, 78 and 87.

[103] Interview 139. Cf Interviews 136 and 144.

[104] Arden 2010, 8 and 19.

[105] *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24 (Kitchin LJ), para 179; Interviews 27, 87 and 231.

[106] Interviews 45 and 87.

[107] Cf Bobek 2020, 87–88.

[108] *Abraxis Bioscience Llc v The Comptroller-General of Patents* [2017] EWHC 14 (Pat), para 44. Cf Arnold 2020, 1105–06.

[109] Cf Favale et al 2016; Oliver and Stothers 2017, 564–65.

in understanding the complex background to many of these issues and in devising workable solutions.'[110] One Dutch judge observed that the ECJ is full of judges with a competition law background.[111] Another stated that there is 'an occasional sigh' that there are so many (economic) administrative lawyers at the ECJ, who are not sufficiently familiar with private law.[112] Lord Mance also lamented the lack of expertise in the area of private law more generally.[113] The UK courts have been critical of inconsistences in the ECJ case law both on the principle of proportionality and on the SPC Regulation.[114]

There have also been complaints about inconstancies in the case law on direct taxes for natural persons. One former Dutch Supreme Court tax judge stated that he sometimes had 'to grit my teeth' over occasional ECJ judgments that failed to pay attention to the wider case law.[115] For example, some interviewees suggested that it is difficult to square *Schumacker* with subsequent ECJ judgments.[116] The *Schumacker* doctrine implies that Member States cannot withhold tax advantages linked to personal and family circumstances, such as the deduction of maintenance or medical expenses, from non-residents working in the relevant Member State if they are also granted to residents.[117] The ECJ did not apply *Schumacker* on a time-proportional basis in *Kieback*, despite the clear preference of the Dutch Supreme Court, the Dutch lower courts and AG Sharpston.[118] Shortly thereafter, the ECJ nonetheless decided that tax deductions can be made in proportion to income if the person has worked in multiple EU Member States.[119] Several tax law judges, scholars and legal practitioners criticized the inconsistencies between these two judgments. AG Wattel, for example, lamented that the case law is difficult to comprehend.[120] Again, the judges interviewed attributed the inconsistencies to a lack of specialist knowledge of tax and VAT law at the ECJ.[121] As a result, EU law

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110 Arnold 2020, 1105.
111 Interview 87.
112 Interview 27.
113 Mance 2011, para 32.
114 *Lumsdon & Ors, R (on the application of) v Legal Services Board* [2015] UKSC 41; *Glaxosmithkline Biologicals SA v Comptroller-General of Patents, Designs and Trade Marks* [2013] EWHC 619 (Pat) (Birss J), para 86.
115 Bergman and Van Zadelhoff 2017.
116 Interviews 30 and 78.
117 Case C-279/93 *Schumacker* EU:C:1995:31.
118 Case C-9/14 *Kieback* EU:C:2015:406; *Kieback* NL:HR:2013:167, para 3.5.6.
119 Case C-283/15 *X.* EU:C:2017:102
120 Interview 30; NL:PHR:2016:118.
121 Interviews 37 and 78.

lawyers may find an ECJ ruling logical, while tax lawyers wonder, 'How could they do that?'[122]

3. INSUFFICIENT APPRECIATION OF THE NATIONAL CONTEXT

Also problematic are judgments in which the ECJ applies the national legal framework (section 3.1) or the facts (section 3.2) incorrectly, or does not take the concerns of the referring court seriously (section 3.3).[123] There are fewer judgments in this category than in the previously discussed category of silent or unclear judgments. As with many of these judgments, national courts are responsible for clearly outlining the domestic legal and factual framework in the order for reference, which means that the referring court must also shoulder some of the blame in the cases discussed below.

3.1 Incorrect Reading of National Law

The ECJ traditionally abstains from interpreting national legal frameworks. Nonetheless, however, in a small number of cases the ECJ has misconstrued the applicable provisions of national law.[124] This occurred in the *Franzen* social security case: the ECJ did not answer the third question because it wrongly assumed that the Central Appeals Tribunal was not obliged, but merely allowed, to apply the hardship clause in order to remedy unacceptable unfairness.[125] The ECJ also seemed to assume that this was left to the discretion of the referring court instead of the administrative authorities. Dutch judges found this ECJ judgment 'annoying' and pointed to the lack of communication on this point; in particular, they suggested that the ECJ gave the impression that it did not understand the importance of the question(s) at issue. The judges also wondered whether the ECJ understood the functioning of the Dutch social security system at all – not least because this was the second time that it had made a mistake in relation to the hardship clause.[126] One interviewee did not want to play the blame game, but noted that the answers of the ECJ caused problems and did not allow the Supreme Court to resolve the case; the Tax

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[122] Interview 37.
[123] Cf Jacobs et al 2019, 1217.
[124] Cf Eliantonio and Favilli 2020.
[125] Case C-382/13 *Franzen* EU:C:2015:261, paras 56 and 67; *Franzen* NL:CRVB:2013:783, paras 4.18 and 10.8.
[126] The hardship clause was only introduced in 2002, but the ECJ assumed that the clause applied to Hendrix even though the facts of the case pre-dated the entry into force, C-287/05 *Hendrix* EU:C:2007:494.

Chamber consequently decided to refer follow-up questions.[127] Once again, however, one might ask whether the ECJ should exclusively be blamed here, as the Central Appeals Tribunal had provided minimal information on Dutch law. One Dutch judge recognized this and indicated that the Dutch courts should pay extra attention to the formulation of questions and the drafting of the order for reference in future cases. The option of re-referral was also recently discussed in two joined cases on corporation tax and a single tax entity after an ECJ judgment based on a misunderstanding of Dutch tax law.[128] AG Wattel noted that the Supreme Court could also be blamed for these 'blunders', since it had not asked the right questions. He nonetheless advised against re-referral, because the case could be resolved based on ECJ case law.[129]

Only one Irish case – albeit a prominent one – was found in this category: the 'long-running drama' of *MM*, which played out over 11 years.[130] Like *Danqua*, this case dealt with the Irish subsidiary asylum protection scheme. While most EU Member States have a single procedure for asylum and subsidiary protection claims, Ireland has a system whereby applicants whose application for refugee status is refused can subsequently apply for subsidiary protection. *MM* was referred twice: first by the High Court in 2011 and later by the Supreme Court in 2014. 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 was rejected. The ECJ determined that there is no such obligation.[131] To Hogan's dismay, the ECJ 'went beyond the scope of the referred question' and examined 'the more general question of fair procedures' and the right to a hearing.[132] The ECJ concluded that the fact that the applicant had already been duly heard in the (first) refugee procedure did not mean that the right to be heard could be dispensed with in the second subsidiary protection procedure. Hogan lamented that this point was never argued before the High Court. He also pointed to another 'complicating issue': the ECJ had incorrectly 'ascribed certain views' to the referring court,[133] and seemed to assume that procedural safeguards were lacking and that there was

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[127] Joined Cases C-95/18 and C-96/18 *Van den Berg, Giesen and Franzen* EU:C:2019:767.

[128] Joined cases C-398/16 and C-399/16 *X* EU:C:2018:110, paras 14-17.

[129] NL:PHR:2018:624, paras 1.7, 1.9 and 1.13; NL:PHR:2018:687.

[130] Interviews 113, 128, 144, 152, 159, 171 and 181; *MM v Minister for Justice* [2018] IESC 10 (O'Donnell J), para 31.

[131] Case C-277/11 *M.M.* EU:C:2012:744.

[132] *MR & Anor v An t-Ard Claraitheoir & Ors* [2013] IEHC 91 (Hogan J), paras 6 and 22. Cf *MM v Minister for Justice* [2018] IESC 10 (O'Donnell), para 10.

[133] *Evelyn Danqua v Minister for Justice* [2017] IECA 20 (Hogan J), paras 34–35.

no possibility at all to make submissions.[134] Several interviewees noted that the ECJ had 'fundamentally misunderstood' the context of the case and offered its views on the subsidiary protection system without having all the details.[135] One interviewee suggested that the ECJ should not have dived into the national context in this way.[136] The case reached the Supreme Court in 2014. The court basically asked whether the ECJ had truly understood the Irish procedure and whether Hogan's inference in fact went too far.[137] It asked whether the right to be heard requires an *oral* hearing. This time, the ECJ answered clearly and noted that a personal interview is not always required.[138] The *MM* saga is a perfect example of 'lost in translation', with the courts talking across each other, as the Irish Supreme Court observed in its follow-up judgment.[139]

Yet again, however, it not only the ECJ that can be blamed here. From a national perspective, it is easy to argue that the ECJ has simply failed to understand the domestic context.[140] But if the ECJ has failed to understand national law, this is due mainly to the referring court's failure to provide a sufficient explanation.[141] The 'lost in translation' situation in *MM* partly resulted from the order for reference: it discussed a bifurcated system, implying a choice between the two procedures (asylum and subsidiary), when in reality this is more of a two-step system.[142] The order did not provide sufficient information on the procedure and the High Court should have stated what would be obvious to every Irish lawyer – namely, that a hearing implies an *oral* hearing in common law jurisdictions.[143] The previous account also revealed that the information provided by the referring Dutch court on Dutch social security law in *Franzen* was too limited.

3.2 Incorrect Reading of the Facts

Judges in all three countries also considered it problematic when the ECJ 'descends' into the national arena and applies its interpretation to the facts of the case. This is especially true when the ECJ bases its decision on the wrong facts or when the facts were not a point of discussion in the domestic proceed-

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134 Interviews 144 and 152.
135 Interviews 113, 144 and 181.
136 Interview 113.
137 Interviews 128 and 181.
138 Case C-560/14 *MM* EU:C:2017:101; *MM v Minister for Justice* [2018] IESC 10 (O'Donnell J), para 10.
139 Interview 152; *MM v Minister for Justice* [2018] IESC 10 (O'Donnell), para 8.
140 Interviews 30 and 82.
141 Interviews 30 and 78; Wattel 2015.
142 Interview 144.
143 Interviews 144, 152 and 159.

ings.[144] One classic example is the disapproval expressed in the follow-up judgment of the UK House of Lords in *Factortame*, which concerned the notion of state liability for sufficiently serious breaches of EU law. The House of Lords emphasized that it is the 'sole jurisdiction' of national courts to identify the facts and determine whether breaches of EU law are sufficiently serious, and expressed its displeasure with the ECJ's 'blunt' characterization of the nature of the breach. Lord Hope was thus not 'inclined to attach much importance to these expressions of opinion'.[145]

Factual 'interference' in itself was not viewed as problematic.[146] In fact, it is sometimes even helpful when the ECJ shines further light on how it views the resolution of the case, as this can 'elucidate the abstract statement of law'.[147] *GS Media* was previously cited as an example of this. In that case, the ECJ applied its interpretation of 'communication to the public' and concluded that a hyperlink to a website with leaked nude photographs constituted such a communication.[148] A factually oriented outcome judgment is also inevitable in cases where the interpretation of the ECJ can lead only to one outcome.[149] It is difficult for a court to deliver a judgment without considering the facts, especially where the referring court has referred a very specific and detailed question, or where the legal area is highly fact sensitive – as is the case, for example, with VAT.[150]

However, some Dutch interviewees noted that the ECJ should avoid such factual determinations where the facts are established and can no longer be the subject of judicial review at the stage of cassation before the Supreme Court.[151] This issue has been the subject of discussions between the Dutch Supreme Court and the ECJ (Chapter 5, section 4).[152] One example of a factually oriented ECJ judgment is that in *Ladbrokes*, on online games of chance. The Dutch Supreme Court had stated explicitly in its order for reference that it had been established in cassation that the betting activities were limited in

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144 Mance 2013a, para 15; Interviews 27, 41, 48, 59 and 87.

145 *R v The Secretary of State for Transport, ex parte Factortame Ltd (No 5)* [2000] 1 AC 524, paras 542 and 550.

146 *R (on the application of Newby Foods Ltd) v Food Standards Agency* [2019] UKSC 18, para 69.

147 *Newby Foods Ltd, R (on the application of) v Food Standards Agency* [2017] EWCA Civ 400, para 49; Interview 33, 82.

148 Case C-160/15 *GS Media* EU:C:2016:644, para 54; Interviews 27, 45 and 87.

149 Interview 15.

150 Interviews 30, 34 and 59; Reed 2014, 12; Case C-520/14 *Gemeente Borsele* EU:C:2016:334.

151 Interviews 15, 27, 30, 41, 48, 59, 82 and 87.

152 Interview 15.

a consistent and systematic manner.[153] The ECJ, however, examined whether this was indeed the case and ultimately concluded that it was not, contrary to the Supreme Court's finding.[154] According to one interviewee, this resulted in 'an enormous struggle' for the Supreme Court.[155]

The Tax Chamber of the Dutch Supreme Court was confronted with a similar problem in a customs case about the tariff classification of standalone music devices (*Sonos*). The ECJ had itself consulted the manufacturer's website in order to verify how the product was presented to consumers.[156] Several interviewees noted that the ECJ should not have done this, because the facts had already been established for the court of cassation and were not subject to review. However, this determination did not prove too problematic for the Supreme Court in delivering its final judgment. As we shall see in Chapter 7, section 3, the Dutch and UK courts have found a way around the difficulties caused by factual determinations of the ECJ by concluding that they are not bound by ECJ rulings on the facts.

Of course, national courts can prevent such factual determinations by the ECJ to a certain extent by doing their utmost to set out all the relevant factual circumstances in the order for reference. In addition, the referring court should not be too quick to disregard parts of an ECJ ruling on the grounds of an allegedly wrongful appraisal of the facts. One such example is *Newby*, which concerned EU food hygiene rules for meat products. The UK High Court was critical of the ECJ's mistaken findings of fact: according to the High Court, the ECJ had wrongly relied on the intervention of the French government and held that certain chicken and pork products were obtained from bone scrapings. By contrast, the High Court had previously found that the products in fact comprised fresh meat. Both the High Court and the Court of Appeal considered that the referring court was not bound by the ECJ's determination of facts in that particular case, relying on the *Aimia* precedent of the UK Supreme Court.[157] The UK Supreme Court eventually sided with the ECJ and noted that the ECJ had accurately summarized the position of the referring court in its reference judgment and was entitled to pronounce on the application of its interpretation to the case.[158]

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[153] *Ladbrokes* NL:HR:2008:BC8970, para 4.16.

[154] Case C-258/08 *Ladbrokes* EU:C:2010:308, paras 21–38.

[155] *Ladbrokes* NL:HR:2012:BT6689, para 2.9.4.

[156] Case C-84/15 *Sonos* EU:C:2016:184; see the subtle reference to the ECJ's intervention in *Sonos* NL:HR:2016:1347, para 2.3.

[157] *Newby Foods Ltd, R (on the application of) v Food Standards Agency* [2016] EWHC 408 (Admin), paras 39, 84 and 89; [2017] EWCA Civ 400, para 54.

[158] *Newby Foods Ltd, R (on the application of) v Food Standards Agency* [2019] UKSC 18, para 70.

3.3 Concerns Not Taken Seriously

Underlying many of the cases discussed in this chapter was a feeling among judges that the ECJ had not taken their concerns seriously and had disregarded their carefully prepared questions.[159] This coincides with Weiler's argument that the ECJ should clearly show that national sensitivities have been considered.[160]

Some mentioned *Trijber and Harmsen* as an example, because the ECJ avoided the Council of State's question about the application of the Services Directive in purely internal situations.[161] The ECJ did not adequately recognize that the referred issue was an important problem for the Netherlands. It did not reflect on the possible negative consequence that anyone could challenge national measures before the court if mere hypothetical cross-border elements were sufficient grounds to do so. It seems that the ECJ listened the second time round and took the reference in *Visser Vastgoed* more seriously, because of the Grand Chamber formation assigned to that case.

Something similar had occurred a few years earlier, in *ESF/Somvao.* According to several judges, the ECJ came up with a rather unconvincing answer in *ESF* concerning subsidies from the European Social Fund. Dutch legal practitioners and academics were dissatisfied with this ruling because the ECJ required full recovery of the granted subsidies. This was at odds with the principle of the protection of legitimate expectations.[162] The Council of State felt that it had not been taken seriously, and that the ECJ had insufficiently understood that this was an important issue in the Netherlands. The Council of State was thus required to ask a follow-up question in *Somvao*, this time about the recovery of wrongfully granted subsidies from the European Refugee Fund.

Cases in which the ECJ has ignored the explicit considerations of the referring court and opted for a different approach without substantive reasoning are even more problematic.[163] One famous example is *Melloni*, which was referred by the Spanish Constitutional Court. The ECJ disregarded the provisional answers proposed by the referring court without elaborating on the arguments presented. It adhered closely to the primacy and effectiveness of EU law, and upheld the validity of the Framework Decision on the EAW. This left little room for the Constitutional Court to achieve a reconciliatory solution

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159 Interviews 10, 12, 89 and 91.
160 Weiler 2001, 225.
161 Joined Cases C-340/14 and C-341/14 *Trijber and Harmsen* EU:C:2015:641.
162 Case C-383/06 *ESF* EU:C:2008:165; Case C-599/13 *Somvao* EU:C:2014:2462; Wissels 2015, 551.
163 Case C-187/10 *Unal* EU:C:2011:623; Wissels 2015, 551.

by interpreting the decision and the Charter in conformity with the higher level of protection of the right to a fair trial of persons convicted *in absentia* under the Spanish Constitution.[164] Another such case is *Diageo Brands*, referred by the Civil Chamber of the Dutch Supreme Court. Judges were frustrated by the 'startling' handling of this reference by the ECJ, which led to the 'breakdown of two systems'. The Supreme Court asked whether it was required to recognize the judgment of a Bulgarian court which was based on a Bulgarian Supreme Court ruling that had 'manifestly misapplied EU law', including in the view of the European Commission.[165] In its order for reference, the Supreme Court implicitly presented its preference for non-recognition by mentioning that there were good reasons to refuse execution of such an erroneous judgment. The ECJ disagreed with the Supreme Court, and instead favoured the principles of mutual recognition and mutual trust. The judges interviewed criticized the ECJ's 'political manipulation' by the Commission, which had subsequently withdrawn its earlier determination of a breach and concluded that the Bulgarian court decisions were consistent with EU law; they spoke of a 'political deal' with Bulgaria. In agreeing with the Commission and AG Szpunar, the ECJ did not address the underlying concerns of the Supreme Court and its 'conviction' that there had been a serious breach.[166] This incident also confirms that other players can sometimes have more influence than the referring court and frustrate the process, as discussed in Chapter 5, section 3.

4. CONCLUSION

This chapter has discussed two specific perceived problems with ECJ judgments: the ECJ's inability to answer the questions satisfactorily, if at all; and its failure to appreciate the facts of the case, the national legal framework or the underlying concerns of the referring court. It should be stressed at the outset that these are exceptions that prove the rule of general satisfaction with ECJ judgments. The question is how much importance should be attached to them. One UK judge noted that individual cases 'stick in the minds of judges'.[167] In the interviews, judges tended to focus on these outliers, suggesting that one problematic case has a greater impact than several good rulings. This leads to the question of whether the criticisms of national court judges deserve wider

[164] Case C-399/11 *Melloni* EU:C:2013:107; Pérez 2014; van Gestel and de Poorter 2019, 51.

[165] The Supreme Court based this conclusion on a letter of the Commission in which the Commission held that lower courts cannot follow the Bulgarian Supreme Court, *Diago Brands* NL:HR:2013:2062, paras 5.2.2, 5.3.2; Interviews 27 and 87.

[166] Case C-681/13 *Diageo Brands* EU:C:2015:471, paras 54–55; Loth 2017, 65.

[167] Interview 264.

dissemination, especially at a time when the European legal order and the ECJ are under fire. The aim of this overview is not to condemn the ECJ, but rather to provide constructive criticism and highlight deficiencies that could be addressed in order to improve the functioning of both the preliminary reference procedure and the ECJ (see Chapter 8, section 2).[168]

The cases discussed in this chapter also prompt the question of why the Irish courts and – to a lesser extent – the Dutch Supreme Court are more positive than the UK courts and the Dutch highest administrative courts about the answers of the ECJ. The positive views of the Irish courts can perhaps be attributed to their reference of mostly closed questions. These questions more frequently result in outcome judgments in which the ECJ *de facto* decides the case on the merits, because it gives very specific answers that leave the national court with no margin for manoeuvre.[169] Hence, very few ECJ rulings referred by Irish courts generated an argument during the hearing.[170] By contrast, the more positive outlook of the Dutch Supreme Court seems related to its more apolitical nature. The Dutch highest administrative court judges generally thought more in political terms, not least because of the types of cases in which they are involved. They had more ideas about the outcome of a case and the desired interpretation than Supreme Court judges. Because of these ideas and expectations, they were more dissatisfied when the ECJ took a different direction.[171]

Having discussed the satisfaction of the national courts with the answers of the ECJ, we can now consider what the referring courts do with the ECJ ruling in their follow-up judgments. Does dissatisfaction result in non-compliance?

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[168] Cf 'Constructive criticism is part of a dialogue which is to be encouraged and which can lead to better and more harmonious understanding', Mance 2013a, para 65.

[169] Tridimas 2011, 737.

[170] Interviews 148, 152, 153, 155 and 181.

[171] Interview 30.

7. Follow-up: strict adherence or divergence?

1. INTRODUCTION

The previous two chapters revealed that some judges – especially Dutch and UK judges – are critical of their interaction with the ECJ. The judges interviewed pointed to the gap between the rhetoric of a horizontal dialogue and the reality of a vertical monologue. Judges also lamented the 'ivory tower' or 'oracle' mentality of the ECJ, and their exclusion from the preliminary reference process after a referral has been submitted. Although judges were satisfied with the vast majority of the requested answers, they were critical about specific judgments. In light of this feedback, one might expect that national courts do not always follow up on ECJ judgments. However, this chapter will reveal the somewhat surprising conclusion that the national courts almost always implement the ECJ's answer in full. This conclusion is perhaps less surprising if one considers the logic of a UK High Court judge: 'National courts do not make references to the ECJ with the intention of ignoring the result.'[1]

This chapter will show that there is a difference between the three countries studied in terms of the extent to which the referring court ends the procedure with a written follow-up judgment (section 2). This notwithstanding, national courts and judges adhere strictly to the binding nature of ECJ judgments and implement the rulings automatically and in full (section 3). One exception to this situation is where additional follow-up questions are issued, with the aim of indicating the referring court's dissatisfaction with the ECJ judgment (section 4). However, most follow-up references are aimed not at avoiding compliance, but rather at raising points that either were not put before the ECJ in the initial reference or were evaded by the ECJ itself.

[1] Case C-206/01 *Arsenal* EU:C:2002:651; *Arsenal Football Club plc v Reed* [2002] EWHC 2695 (Ch) (Laddie J), paras 27–29.

2. NO (WRITTEN) FOLLOW-UP JUDGMENT IN ECJ OUTCOME JUDGMENTS

There is some divergence in how national courts follow up on ECJ judgments. While relatively few written follow-up judgments were found in the UK and Ireland, written follow-up judgments are almost the rule in the Netherlands. In the UK and Ireland, the parties normally reach agreement after the ECJ judgment and submit an agreed order for the court to sign. Referring courts often close the case through an oral order that is not published; or sometimes through a very short, one-page follow-up judgment which merely mentions that 'it is common ground between the parties…'.[2] The practice of the UK courts is a good illustration of this: only one written Court of Appeal judgment was found following 18 ECJ judgments issued since 2013; and a written UK Supreme Court judgment disposing of the case was made in only three of the 12 cases referred to the ECJ since 2013. The most recent was *Vomero*, which was discussed in the previous chapter as a relatively problematic ECJ judgment (Chapter 6, section 2.1).[3] A further hearing and written judgment are considered necessary only if the parties are unable to agree.[4] This happened in *Teva*, where both parties argued that they had won on the basis of the ECJ judgment.[5] The previously discussed case of *Newby* also led to further litigation before the High Court, the Court of Appeal and the Supreme Court, because of problematic aspects in the answer of the ECJ (Chapter 6, section 3.2). The same can be said of the extensive follow-up judgment of 1000 paragraphs in *British American Tobacco*.[6]

These figures confirm that ECJ judgments often dispose of the case because of the highly specified nature of the ECJ's answers. This happens, for example, where the ECJ finds that EU law is not invalid.[7] In *MB*, for example, the ECJ held unequivocally that the UK law constituted direct discrimination on the

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[2] *Shields and Sons Partnership v HMRC* [2017] UKUT 504 (TCC). The Irish Supreme Court explicitly noted in its follow-up judgment that it is not necessary 'to repeat the clarification provided by the decision of the ECJ', *Nawaz v Minister for Justice* [2014] IESC 30 (O'Donnell J), para 14; Interviews 121, 133, 136, 152, 166, 174, 188, 231 and 276.

[3] De Búrca found follow-up judgments in 26 of the 113 UK cases referred between 2008 and 2018. De Búrca 2020; *SSHDs v Franco Vomero* (Italy) [2019] UKSC 35.

[4] *Trustees of The P Panayi Accumulation and Maintenance Trusts Nos 1–4 v HMRC* [2019] UKFTT 622 (TC), para 1. Cf Arnold 2020.

[5] *Teva UK Ltd & Ors v Gilead Sciences, Inc* [2019] EWCA Civ 2272, para 6.

[6] *British American Tobacco (UK) Ltd & Ors, R (On the application of) v The Secretary of State for Health* [2016] EWHC 1169 (Admin).

[7] Eg Case C-134/13 *Raytek and Fluke Europe* EU:C:2015:82.

grounds of sex and was prohibited.[8] Another example is the outcome judgment of the ECJ in *The English Bridge Union*, in which the ECJ determined that duplicate bridge is not a 'sport' in the sense of the VAT Directive because of the limited physical elements involved.[9] Faced with such unequivocal outcome judgments, it often happens that one of the parties withdraws the case after the ECJ judgment or a settlement is reached. One UK judge noted, on the basis of this practice, that apparently most ECJ judgments are sufficiently clear.[10]

The practice in the Netherlands is different: the answers of the ECJ are almost always followed up with a written follow-up judgment from the referring court. The 13 references of the Civil Chamber of the Supreme Court are a good illustration of this: a written follow-up judgment was issued in ten of the 12 references that resulted in a ECJ judgment. In most of these cases, the follow-up judgment was even preceded by an AG Opinion – often the second opinion in the case.[11] The court even referred five cases back to the court of appeal to decide on points of fact.[12] One exception is the earlier discussed outcome judgment in *GS Media*, about a hyperlink to a website that contained leaked nude photographs (Chapter 6, section 3.2). The ECJ judgment disposed of the case and made further litigation unnecessary, since it was clear which party was successful.[13]

The contrast between the Irish and UK practice on the one hand, and the Dutch situation on the other, can partly be attributed to the types of questions asked. As the previous discussion suggests, outcome judgments often require less from the referring court in terms of follow-up. Both the Irish and UK courts have primarily referred clearly delimited questions, resulting in concrete outcome judgments that generate limited discussion.[14]

3. BINDING ECJ JUDGMENTS AND AUTOMATIC FOLLOW-UP

There is a significant – and unsurprising, from an EU law point of view – consensus among courts in the three countries that ECJ judgments are binding.

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8 Case C-451/16 *MB* EU:C:2018:492.

9 Case C-90/16 *The English Bridge Union* EU:C:2017:814.

10 Interview 231.

11 Eg Case C-610/15 *Stichting Brein* EU:C:2017:456; *Stichting Brein v Ziggo and XS4ALL* NL:PHR:2018:202; *Stichting Brein v Ziggo and XS4ALL* NL:HR:2018:1046.

12 *Commerz* NL:HR:2016:994; *Hauck* NL:HR:2015:3394; *Ryanair* NL:HR:2016:390; *Stichting Brein v Ziggo and XS4ALL* NL:HR:2018:1046; *Diageo Brands* NL:HR:2016:1431.

13 Case C-160/15 *GS Media* EU:C:2016:644, para 54; Interviews 27, 45 and 87. Cf C-419/13 *Art and Allposters International* EU:C:2015:27.

14 Interviews 148, 152, 153, 155, 181 and 231.

Courts have reaffirmed the binding nature of ECJ judgments in their decisions and the judges interviewed cast no doubt on this absolute obligation.[15] Dutch Supreme Court judges observed that ECJ judgments simply constitute law and cannot be disputed.[16] One judge even stated that what the ECJ says is true and compared it – somewhat jokingly – to a papal bull; while another suggested that the Supreme Court's conscientious approach involves simply adhering to ECJ judgments without a second thought.[17]

Courts have upheld this strict obligation even in several of the problematic cases that were previously discussed. For example, in *Patmalniece*, Lord Walker noted that the UK Supreme Court must follow the ECJ, 'even if some of us do not fully understand its reasoning'.[18] The UK Supreme Court likewise stated in its written response to an interview question: 'regardless of the clarity or otherwise of the reasoning of a decision, the Supreme Court will do its best to follow and apply the decision.'[19] An older illustration is the House of Lords' compliance with the ECJ's landmark judgment in *Factortame* by suspending the application of the Merchant Shipping Act 1988 and holding the UK government liable, despite criticisms regarding the ECJ's factual interference and notwithstanding the significant financial consequences for the government.[20] Hogan – who was involved in the earlier discussed problematic cases of *MM* and *Danqua* – stated:

> 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.[21]

Meanwhile, one Irish judge observed: 'If Irish law turns out to be deficient, so be it. If the ECJ arrives at a different interpretation, so be it.'[22]

The legal (and perceived) binding nature of ECJ judgments thus translates into almost complete follow-up. In the analysis of national courts' follow-up judgments in light of the requested ECJ judgment, no case was found in which a referring court departed from or ruled contrary to the interpretation of the

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15 Interviews 15, 27, 34, 41, 146, 159 and 162; Clarke 2019; *SSHD v Davis MP & Ors* [2015] EWCA Civ 1185, para 102.

16 Interviews 15, 30, 34, 41 and 78.

17 Interviews 78 and 27 respectively.

18 *Patmalniece v SSWP* [2011] UKSC 11 (Lord Walker), para 73. Cf UK courts in relation to the ECJ's private international law case law. Harris 2008, 349.

19 Written response 15 April 2020.

20 Arnull 2010, 67.

21 [2017] IECA 20, para 36. Cf Interview 166.

22 Interview 159.

ECJ.[23] Most of the examined follow-up judgments failed to mention any of the dissatisfactions outlined in the previous chapter,[24] or did so only in rather implicit terms. One Irish example is the child protection case *JD*,[25] in which one Supreme Court judge 'respectfully disagreed' with the ECJ on some issues. The Supreme Court 'made a grumpy judgment afterwards', albeit that it did not deviate from the ECJ's interpretation.[26]

In light of the previous account, it is unsurprising that most of the judges interviewed approached follow-up as an automatic exercise, even in cases that demanded a shift in their own position.[27] They accepted that such full compliance is 'just the way it is' or 'part of the game'.[28] Legal certainty, including with regard to the execution of ECJ judgments, is considered more important than judges' own ideas about the state of the law.[29] As previously discussed, this pragmatic approach to follow-up can also be attributed to the fact that judges usually have no clear preferences or agendas, and seldom care about the outcome of a particular case.[30] A difference of opinion 'does not matter' and the national courts will thus comply with the ECJ judgment notwithstanding.[31] Judges found it more annoying when no (clear) answer was provided by the ECJ than when the ECJ took a different, but well-reasoned approach from the referring court.[32] Dutch tax law judges had no 'hard feelings' and did not feel repudiated when the ECJ diverged from the preferred answer of the referring court, as in *Kieback:* 'That is just the way it is.'[33] With respect to the previously discussed inconsistencies in the *Schumacker* tax cases, Dutch judges reasoned: 'This happens. We simply execute it.'[34] A similar reasoning ('business as usual') was applied to the Amersfoort fees case (*X*), in which there was a suspicion that the ECJ had misunderstood the Supreme Court.[35] Even in *Diageo Brands*, on the execution of a Bulgarian judgment that was (allegedly) in breach of EU law, the Supreme Court held that despite its considerable

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23 Interviews 27 and 166. Cf about the UK, de Búrca 2020.
24 Eg *Sopora* NL:HR:2016:360.
25 Case C-428/15 *JD* EU:C:2016:819.
26 The Supreme Court judgment also notes that 'these conclusions were at variance from those I expressed' in the order for reference. [2017] IESC 56 (Charleton J); interview 128.
27 Cf Schwarze 1988.
28 Interviews 5, 15, 18, 34, 72, 77, 82, 89 and 91; Sevenster and Wissels 2016, 93.
29 Interviews 15 and 34.
30 Interviews 15, 34 and 82.
31 Interview 133. Cf Interview 121 and 188.
32 Interviews 12, 18, 72 and 91.
33 Case C-9/14 *Kieback* EU:C:2015:406; Interviews 33 and 82.
34 Case C-279/93 *Schumacker* EU:C:1995:31; Interview 78.
35 Interview 15.

frustration, it could not examine the correctness of the ECJ judgment.[36] The Central Appeals Tribunal even 'defended' the ECJ in *Franzen*, in which the latter had incorrectly interpreted the Dutch law.[37] The Council of State likewise complied without demur with the ECJ's requirement in *Zh and O* that an individual assessment be conducted of the risk posed to public security or national security by third-country nationals and EU citizens alike, contrary to what the Council of State had initially thought.[38] The council also changed its approach after *JN*, which confirmed that its more fundamental-rights-friendly approach deviated from the requirement under the Reception Conditions Directive that removals be carried out as soon as possible.[39] Another Irish example is the previously discussed 'lost in translation' case of *MM*, which concerned the right to a hearing. Despite the problems discussed in Chapter 6, section 3.1, Hogan's follow-up decision was fully in line with the ECJ judgment and he noted that he 'must naturally apply the judgment'.[40] However, this faithful application was subsequently criticized by other judges, as the introduction of personal interviews for subsidiary protection and a broadened scope of appeal rights caused gridlock in the system.[41] One interviewee, for example, noted that Hogan had reasoned along the lines: 'I cannot really say that the ECJ has failed to understand. There must be something wrong with the Irish procedure. I have to condemn the procedure, even though I am not quite sure how.' Hogan thus made an 'informed guess' as to what the ECJ might have meant, on the basis that the ECJ was 'evidently troubled' in making its decision.[42]

National judges are thus pragmatic not only regarding the decision to refer, but also in relation to follow-up and compliance. What is important to them is whether the ECJ judgment helps them to resolve the case at hand.[43] Hence, even problematic judgments can ultimately be adequate or useful, despite frustrations over the deficient reasoning of the ECJ or the incorrect reformulation of the question. One example of such a judgment is *Essent*. In this case, the Council of State asked a question on the EEC-Turkey Association Agreement

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[36] Case C-681/13 *Diageo Brands* EU:C:2015:471; *Diego Brands* NL:HR:2016:1431, para 4.2.1.

[37] Case C-382/13 *Franzen* EU:C:2015:261; *Franzen* NL:CRVB:2016:2144, para 4.13

[38] Case C-554/13 *Zh and O* EU:C:2015:377; Interviews 10 and 89; NL:RVS:2015:3579, para 7.

[39] Case C-601/15 PPU *JN* EU:C:2016:84, paras 75–76; NL:RVS:2016:959, para 3.2.

[40] *MR & Anor v An t-Ard Claraitheoir & Ors* [2013] IEHC 91 (Hogan J), para 50; Interview 144 and 181.

[41] Interviews 113, 144, 171 and 181.

[42] Interview 144.

[43] Micklitz 2005, 433; Interviews 10, 18 and 91.

(1/80), but the ECJ did not consider this agreement and instead focused on the free movement rules set out in the TFEU. One judge considered this frustrating, but another made clear that the ECJ judgment was nonetheless useful: it disposed of the case and resulted in a relatively short follow-up judgment.[44]

In some cases, such as *Newby* (Chapter 6, section 3.2), the UK lower courts initially decided not to follow the ECJ, but were subsequently corrected by a higher court. This also happened in the famous *Arsenal* case, which concerned the sale of scarves marked in large lettering with the word 'Arsenal' – a sign which is registered as a trademark by Arsenal Football Club.[45] The referring High Court judge, Justice Laddie, took offence with the alleged finding of fact by the ECJ. He held that the ECJ had exceeded its jurisdiction in disagreeing with the High Court's earlier findings of fact that the use of the 'Arsenal' sign by Mr Reed did not indicate trade origin. The High Court did not consider itself bound by this and applied the ECJ's interpretation of EU law to its own factual findings, as a result of which the defendant, Mr Reed, prevailed.[46] The Court of Appeal quashed this decision and held that the ECJ judgment should have been followed and decided in Arsenal's favour. The court found that the ECJ had not disregarded the High Court's conclusions of fact and held that the outcome was inevitable in light of the interpretation of the ECJ.[47] Fifteen years later, the Upper Tribunal corrected the First-Tier Tribunal in a customs classification case. The First-Tier Tribunal had determined that the ECJ's classification was 'guidance only and not binding', as it was based on a factual conclusion with which the tribunal disagreed, given the evidence before it.[48] The Upper Tribunal overturned this decision and found that the First-Tier Tribunal had applied the ECJ judgment incorrectly.[49]

There are two exceptions to this full compliance record. First, courts have maintained the effects of ECJ judgments.[50] Second, Dutch and UK courts have found a way around the difficulties presented by factual determinations of the ECJ by concluding that they are not bound by an ECJ ruling on the facts. With regard to this latter exception, the Dutch Supreme Court stipulated that Dutch procedural law did not allow it to take into consideration the facts as determined by the ECJ in *Ten Kate Holding Musselkanaal*.[51] One interviewee declared

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44 Case C-91/13 *Essent* EU:C:2014:2206; NL:RVS:2014:4028; Interview 89.
45 C-206/01 *Arsenal* EU:C:2002:651, para 61.
46 *Arsenal Football Club plc v Reed* [2002] EWHC 2695 (Ch) (Laddie J), paras 27–29.
47 *Arsenal Football Club plc v Reed* [2003] EWCA Civ 696.
48 *Invamed Group Ltd & Ors v HMRC* [2016] UKFTT 775 (TC), para 47.
49 *HMRC v Invamed Group Ltd & Ors* [2018] UKUT 305 (TCC).
50 Conant 2002.
51 *Staat v Ten Kate Holding Musselkanaal* NL:HR:2006:AZ3083, para 2.2.2.

himself/herself flabbergasted by this judgment, in which the ECJ had relied on the intervention of the Commission and the Dutch government, and which had come as a complete surprise.[52] In the previously discussed case of *Aimia*, Lord Hope emphasized that it is the responsibility of the UK Supreme Court to apply the principles to the facts of the case.[53] One interviewee revealed that the UK Supreme Court was divided on the question of compliance. Two judges contended that Luxembourg had spoken and that the UK Supreme Court had to apply its judgment; while three judges did not entirely agree with this. The UK Supreme Court ultimately 'struggled through' and made no second follow-up reference.[54] It took account of factual elements and arguments that were not reflected in the ECJ judgment.[55] Previously, the House of Lords deviated from 'the duty of this House to give effect to the law as declared in Luxembourg' in *North Wales Training and Enterprise Council*, which concerned a transfer of undertakings. One interviewee noted that this was a 'very unsatisfactory' ECJ judgment, with rather factual answers regarding the date of effective transfer. The House of Lords thus 'happily disagreed' and refused to follow it.[56] It stuck to the facts as 'long accepted', because 'the facts cannot be changed because an unforeseen legal argument makes them damaging to' the applicants.[57]

The referring courts have also 'contained' the effects of ECJ judgments while avoiding clear situations of non-compliance – either by not awarding the full amount of claimed damages or even by awarding no damages at all.[58] In a few cases, the referring court reinterpreted the facts so that the ECJ judgment did not apply.[59] One UK example is *The Scotch Whisky Association*, which concerned minimum pricing of alcohol in light of the free movement of goods. The UK Supreme Court followed the Court of Appeal and allegedly considered it inappropriate to overturn a flagship policy of the government. It did not as such overturn the general principles set out by the ECJ, but availed of the degree of deference left to it in the ECJ judgment. By applying the proportionality analysis differently, the Supreme Court avoided finding a breach of

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52 Case C-511/03 *Ten Kate Holding Musselkanaal* EU:C:2005:625.

53 *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, para 103.

54 Interview 208.

55 Reed 2014, 13–14.

56 Interview 264.

57 *North Wales Training and Enterprise Council Ltd v Astley & Ors.* [2006] UKHL 29, paras 8 and 9.

58 Eg the follow-up judgment in Case C-6/90 *Francovich* EU:C:1991:428 as discussed by Pollack 2017, 592.

59 One old example is Case C-131/79 *Regina* EU:C:1980:131. The UK High Court held that 'guidance is expressed in general terms and it is our duty to apply it to the facts of the case', Nyikos 2003, 399.

EU law.[60] Together with *North Wales Training* and *Aimia*, this case illustrates that the UK Supreme Court has followed the example of other apex courts and has become increasingly assertive in limiting the effects to be given to ECJ judgments due to a certain feeling of discontent.[61] Another famous instance of a more subtle 'containment' is *Melloni*. The Spanish Constitutional Court did not really engage with the answers of the ECJ in its follow-up judgment and seemed to suggest that it reached its conclusions by itself.[62] In other cases, the referring courts have ignored the vague standards and limited operational guidance contained in the ECJ judgment by adopting a seemingly different interpretation.[63]

One interesting Swedish case sheds further light on the growing assertiveness of some national courts, including the UK Supreme Court. The Swedish Supreme Court did not comply with the ECJ's judgment in *Billerud*, which focused on greenhouse gas emissions trading and fines. It held that a national court may disregard the ECJ's interpretation of EU law if it constitutes a serious and unequivocal breach of the European Convention on Human Rights (ECHR).[64] The court's non-compliance was attributed to Sweden's strong national environmental law tradition, which is distinct from mainstream EU environmental law. Sweden has a specialized court that deals with environmental matters, with technical judges who are not lawyers, but ecologists. This suggests that specialization is not a factor that exclusively favours (positive) engagement with EU law; it can also be a negative factor. The more specialized the court, the greater its ability to spot deficiencies in its interaction with a supranational court that allegedly lacks such technical and specialized knowledge.[65] UK Supreme Court judges have likewise been critical of the private law expertise of the ECJ (Chapter 2, section 3.2). It is thus unsurprising that such ideas can affect the courts' eagerness to comply with ECJ judgments.

In sum, aside from a handful of exceptions, national courts have almost always complied with the requested ECJ rulings. This corroborates the findings from earlier studies, including Nyikos' conclusion in 2003 that there is 'a habit of obedience'.[66] Several studies on environmental law similarly found that ECJ judgments were all adhered to by referring courts in Belgium, the

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60 Case C-333/14 *The Scotch Whisky Association* EU:C:2015:845; *Scotch Whisky Association & Ors v The Lord Advocate & Anor (Scotland)* [2017] UKSC 76, para 63; Interview 211, 231; Dunne 2018.

61 Arnull 2017, 315; Harris 2009, 383; Interviews 211 and 231.

62 Case C-399/11 *Melloni* EU:C:2013:107; Pérez 2014, 322–23.

63 Eliantonio and Favilli 2020.

64 Case C-203/12 *Billerud* EU:C:2013:664; Bogojevíc 2017, 274–76.

65 Squintani and Kalisvaart 2020.

66 Nyikos 2003, 398; Mestmäcker 1994, 623.

Netherlands and the UK.[67] The practice in the three countries studied stands in sharp contrast to a handful of pronouncements of courts in other EU Member States – most notably, the recent declaration of an ECJ judgment as *ultra vires* by the German Constitutional Court in *Weiss*. Other well-known instances of national court rebellions include *Dansk Industri* and *Landtová*. The Danish Supreme Court refused to comply with the ECJ judgment and held that an unwritten general principle of EU law prohibiting age discrimination could not set aside Danish law in a horizontal dispute.[68] The Czech Constitutional Court declared the ECJ judgment *ultra vires* because the ECJ had wrongly applied EU Regulation 1408/71 on the coordination of social security schemes to a situation that lacked cross-border elements.[69]

4. FOLLOW-UP REFERENCES

As the previous section has shown, the national court almost always adheres to the requested ruling of the ECJ. One exception is where additional follow-up questions are submitted to the ECJ.[70] However, most of these follow-up references have different objectives from merely avoiding compliance or challenging the ECJ – the aim instead is to submit new questions that were not put to the ECJ in the initial reference or to address points that the ECJ itself avoided. This section will discuss such follow-up questions. Before doing so, however, it is important to emphasize that national courts are generally reluctant to make additional references. They are pragmatic and try to 'struggle' through with the ECJ judgment. If the ECJ judgment does not give a (satisfactory) answer on all points, there is a tendency not to 'push through' on specific points.[71] Lord Reed noted that the approach of the UK Supreme Court is to apply the ECJ's interpretation rather than to make additional references. Even where the ECJ has come up with an ambiguous principle of interpretation, the prevailing feeling is that another reference would 'add little or nothing'.[72] In several cases the AG recommended that the Dutch Supreme Court submit follow-up references, but to no avail.[73] One judge interviewed referred to cases in which

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67 Squintani and Kalisvaart 2020; Arnull 2010, 81.

68 Case C-441/14 *Dansk Industri* EU:C:2016:278. Previously, the Danish Supreme Court held in its judgment on the constitutionality of the Lisbon Treaty that interpretation of EU law of the ECJ 'must not result in a widening of the scope of Union powers'. *Lisbon* Danish Supreme Court Case 199/2012; Krunke 2014; Šadl and Mair 2017, 359.

69 Case C-399/09 *Landtová* EU:C:2011:415.

70 Dani 2017b, 799.

71 Interview 18.

72 Reed 2014, 6.

73 Interviews 30 and 33. Eg A-G Verkade in NL:PHR:2013:114, para 4.15; Case C-324/08 *Makro* EU:C:2009:633.

the AG suggested that the ECJ's decision was 'nonsense', but the Supreme Court was reluctant to follow the AG's position given its sense of loyalty to the court ('It is Luxembourg that has spoken').[74] One Irish judge also noted that if a follow-up question is necessary, it should ideally be made by a higher court.[75] Although he was tempted to do so, High Court judge Arnold also decided against making a follow-up reference in the *Nestlé* case – a trademark dispute over Kit-Kat's four-finger chocolate bar. He did not expect that another reference would lead to a different outcome. He consequently tried to understand and apply the ECJ's answer as best as he could.[76] Likewise, the UK Supreme Court considered it unnecessary to make a further reference in relation to the much-contested ECJ judgment in *Aimia*, because the relevant principles were known and the case could be decided in light of the guidance given.[77] This reasoning was also applied by other UK courts, with reference to the ECJ case law. The UK Court of Appeal, for example, observed that the ECJ has discouraged courts from making a second reference in relation to a legal issue or provision considered in the initial reference.[78] The Court of Appeal dismissed the need to make a second reference following the ECJ decision in *NA* because there was 'sufficient guidance on the correct approach'.[79]

The first category of follow-up questions comprises those made by higher courts on points that were not put before the ECJ in the initial reference. Several of these follow-up references resulted from a deficient initial reference, often due to a lower court providing insufficient clarity on, for example, the national legal framework. The most prominent Irish example is the *MM* saga on subsidiary protection, discussed in Chapter 6, section 3.1. The ECJ went beyond the scope of the questions submitted by the High Court and made some factual pronouncements on the (right to a) hearing. This was attributed to the limited information provided in the order for reference about the subsidiary protection procedure and the scope of the hearings.[80] Hence, a second referral by the Supreme Court was needed to compensate for these omissions and clarify the concept of a 'hearing'. The Irish case of *Farrell* – on direct effect,

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[74] Interview 30.

[75] Interview 139.

[76] *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2014] EWHC 16 (Ch), paras 45 and 48.

[77] Reed 2014, 13–14.

[78] *British American Tobacco UK Ltd & Ors, R (on the application of) v The Secretary of State for Health* [2016] EWCA Civ 1182. Cf Case C-338/95 *Wiener* EU:C:1997:352.

[79] *Baigazieva v SSHD* [2018] EWCA Civ 1088. Cf *British American Tobacco UK Ltd & Ors, R (on the application of) v The Secretary of State for Health* [2016] EWCA Civ 1182.

[80] Interviews 144, 152 and 159.

the concept of an emanation of the state and the possibility to rely on EU law provisions against a private law body – was referred twice due to the 'fault' of the High Court, which had (probably) not referred all necessary questions.[81] The Dutch Supreme Court gave a sub-district court (*kantonrechter*) a rap on the knuckles in relation to the reference it submitted in *Smallsteps* about the safeguarding of employees' rights in a transfer of undertakings via a 'pre-pack' that is prepared before the declaration of insolvency and put into effect immediately after the declaration. The initial reference was made by a single judge who had never made a reference before.[82] Three years after the ECJ judgment, the Supreme Court decided to refer additional questions because it felt that the sub-district court had not provided sufficient details about Dutch insolvency law and the purpose and organization of the pre-pack, and the ECJ was thus unable to consider those aspects in its judgment.[83]

The UK Court of Appeal also made a second reference – with some regret – in the copyright case of *ITV Broadcasting*, which concerned the notion of 'communication to the public'. This was necessary because the issues on which the appeal turned were never fully developed before the High Court.[84] The VAT case of *Marks and Spencer* was referred again by the House of Lords because the initial reference of the Court of Appeal was 'not sharp enough'.[85] This case concerned the repayment of VAT that had been wrongly paid in respect of the sale of gift vouchers, and its relationship to the principles of effectiveness and the protection of legitimate expectations. The second reference resolved the case and confirmed that sometimes a 'second shot is helpful'. There was no feeling of unease at the House of Lords or the ECJ, because everyone understood that this was a difficult case.[86] Another UK example is *Test Claimants* – a protracted litigation that resulted in three references to the ECJ. This very complex and technical case is still before the UK Supreme Court after an initial reference was made by the High Court back in 2004. It concerns tax paid by UK resident parent companies on dividends received from their foreign subsidiaries, and an alleged difference of treatment between UK resident and non-UK resident companies. The case involves intricate issues of

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[81] *Farrell* was referred twice, once by the High Court in Case C-356/05 (*Farrell* EU:C:2007:229) and ten years later by the Supreme Court in Case C-413/15 (*Farrell* EU:C:2017:745); Interview 152.

[82] *FNV v Smallsteps* NL:RBMNE:2016:954.

[83] *FNV v Heiploeg-concern* NL:HR:2020:954, para -3.11.3.

[84] Case C-607/11 *ITV Broadcasting* EU:C:2013:147; *ITV Broadcasting Ltd & Ors v TVCatchup Ltd & Ors* [2015] EWCA Civ 204, para 89.

[85] Case C-62/00 *Marks and Spencer* EU:C:2002:435; Case C-309/06 *Marks and Spencer* EU:C:2008:211.

[86] Interview 208.

restitution and damages; points that were left to the referring court regarding liability and limitation periods by the ECJ required further references.[87] Both *Test Claimants* and *Marks and Spencer* suggest that additional references are sometimes unavoidable due to the complexity of the proceedings and the legal framework.

A second category of follow-up questions comprises those that are due to an omission of the ECJ in its judgment, rather than an omission of the national court in its order for reference. A follow-up reference is sometimes necessary to address the lack of clarity in the initial ECJ judgment.[88] This can happen in particular with rather deferential ECJ judgments that leave considerable room to the referring court, which can also lead to additional questions. One example is *O'Byrne v Aventis*, a product liability case concerning brain damage caused by a vaccine. The ECJ left it to the national court to determine the conditions under which one party may be substituted for another in an action brought against a company that was mistakenly considered to be the producer, whereas in fact the product had been manufactured by another company. The referring High Court had to ensure that due regard was paid to the personal scope of the Product Liability Directive (85/374). In the second reference, the House of Lords asked the ECJ about the ten-year limitation period and the consistency of the UK procedural rules with EU law.[89] The UK Supreme Court concluded in its follow-up judgment that: 'Happily … this time the core answer could not be clearer.'[90] The Dutch Central Appeals Tribunal considered making a second reference after the ECJ judgment in *Akdas*, which concerned the portability of social security allowances for migrant workers from Turkey, because the ruling was unclear in several respects.[91] Instead, these question were raised in a later case (*Demirci*), in which – unlike in *Akdas* – the Turkish workers had acquired Dutch nationality.

Follow-up references can also be necessary if the ECJ has dodged the initial questions. One Dutch example is the previously discussed Council of State reference in *Visser Vastgoed*, which was made after the ECJ had failed to address the applicability of the Services Directive in purely internal situations

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[87] Arnull 2017, 328–31; Case C-446/04 *Test Claimants in the FII Group Litigation* EU:C:2006:774; Case C-35/11 *Test Claimants in the FII Group Litigation* EU:C:2012:707; C-362/12 *Test Claimants in the FII Group Litigation* EU:C:2013:834; For a good overview, see *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2016] EWCA Civ 1180, paras 7–21.

[88] Arnull 2017, 331; Jacobs et al 2019, 1218.

[89] Case C-127/04 *O'Byrne* EU:C:2006:93; Case C-358/08 *Aventis Pasteur* EU:C:2009:744.

[90] *OB (by his mother and litigation friend) (FC) v Aventis Pasteur SA* [2010] UKSC 23, para 10.

[91] Case C-485/07 *Akdas* EU:C:2011:346; Case C-171/13 *Demirci* EU:C:2015:8.

in *Trijber and Harmsen*.[92] Another UK High Court judge, Justice Arnold, simply repeated the question he had initially raised in *Actavis v Sanofi* on the criteria for deciding whether a product is protected by a basic patent in force in the sense of the SPC Regulation. In the order for reference, he expressed his 'hope that finally a clear answer will be given' and that 'further and better guidance' would be provided.[93]

A third category of additional follow-up references is those that aim to express the referring court's dissatisfaction and substantively challenge the ECJ judgment. Through these references, the referring court is basically asking the ECJ whether it is really sure about its initial ruling. Nyikos has described such follow-up references as 'evasion' or 'non-implementation'.[94] One prominent Italian example is the second reference of the Italian Constitutional Court following *Taricco*, in which the ECJ prioritized tackling VAT fraud over the principle of legality.[95] The Irish and Dutch courts are generally reluctant to make this type of reference.[96] One of the few Dutch exceptions is the Council of State's second reference on the recovery of wrongfully granted subsidies in *Somvao*, as its discontent with the earlier *ESF* ruling resulted in tension with the principle of the protection of legitimate expectations.[97]

More of these follow-up references have been made in the UK. UK judges seem to find it less problematic to make a second reference in order to express their disagreement.[98] One pertinent example is *Kaba*, which was referred twice by the immigration adjudicator two decades ago. In its second reference, the adjudicator cast doubt on the factual basis of the ECJ's ruling. The party to the case, Mr Kaba, had informed the ECJ of his doubts as to the accuracy of the factual basis of the AG's Opinion, not least because of the submissions of the UK government; and had unsuccessfully requested that the oral procedure be reopened. The main substantive point of contention was that the ECJ had incorrectly treated the status of third-country nationals with indefinite leave to remain in the UK as being significantly more secure than the status of EU nationals in the UK. The adjudicator asked the ECJ whether its initial reply in *Kaba* would have been different had the ECJ taken

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92 Joined Cases C-360/15 and C-31/16 *X and Visser Vastgoed* EU:C:2018:44.

93 *Teva UK Ltd & Ors v Gilead Sciences Inc* [2017] EWHC 13 (Pat), paras 91 and 95.

94 Nyikos 2003, 399; Jacobs et al 2019, 1219.

95 Case C-105/14 *Taricco* EU:C:2015:555; Case C-42/17 *MAS and MB* EU:C:2017:936; Garner 2017; Repetto 2015; Timmerman 2016; Bassini and Pollicino 2017; Billis 2016; Giuffrida 2016.

96 Interviews 27 and 45. Cf A-G Hammerstein in NL:PHR:2014:1736, para 2.5.

97 Case C-383/06 *ESF* EU:C:2008:165; Case C-599/13 *Somvao* EU:C:2014:2462.

98 Interview 208.

account of the correct facts, and whether the procedure followed by the ECJ in response to the first reference complied with Article 6 ECHR.[99] Another classic example is the Sunday trading saga, on UK legislation that prohibited retailers from opening their premises on Sundays. In *Council of the City of Stoke-on-Trent*, the House of Lords asked the ECJ for further guidance following its rather deferential answers in *Torfaen Borough Council*.[100] The ECJ had initially determined that the current Article 34 TFEU on the free movement of goods did not apply to Sunday trading rules where the restrictive effects on trade did not exceed the effects intrinsic to the free movement rules.[101] In its answer to the House of Lords, the ECJ unequivocally made clear that Article 34 TFEU did not apply to the rules. Another UK example is *Privacy International*, in which the Investigatory Powers Tribunal challenged *Digital Rights Ireland*, which had been referred by an Irish court. It questioned whether the ECJ had truly intended to provide compulsory requirements and suggested that the ECJ's interpretation went beyond the scope of EU law because it was only 'incidentally relevant' to the retention regime. The tribunal also doubted whether the ECJ intended to go beyond the case law of the ECtHR.[102] This second reference was ultimately to no avail, as the Grand Chamber of the ECJ confirmed that state authorities cannot require electronic communications providers to transmit traffic and location data to security and intelligence agencies for the purpose of safeguarding national security.[103]

5. CONCLUSION

This chapter has shown that the courts in the three countries studied generally comply diligently – and almost automatically – with ECJ rulings, even in the problematic and dissatisfactory cases discussed in Chapter 6. The UK – and to a lesser extent Dutch – courts have found a way around the difficulties presented by factual determinations of the ECJ by concluding that they are not bound by an ECJ ruling on the facts. The UK courts have also been more upfront in challenging the ECJ through a second reference, although the

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[99] Case C-466/00 *Kaba* EU:C:2003:127; Case C-356/98 *Kaba* EU:C:2000:200, paras 29 and 57–58.

[100] Case C-169/91 *Council of the City of Stoke-on-Trent* EU:C:1992:519; Micklitz 2005.

[101] Case C-145/88 *Torfaen BC v B and Q plc* EU:C:1989:693, para 17.

[102] Case C-293/12 *Digital Rights Ireland* EU:C:2014:238; *Privacy International v The Secretary of State for Foreign and Commonwealth Affairs* [2018] UKIP Trib IPT 15 110 CH, paras 102–03 and 111.

[103] Case C-623/17 *Privacy International* EU:C:2020:790.

number of such references should not be exaggerated. The relatively straightforward follow-up thus camouflages the dissatisfaction of some courts with their interaction with the ECJ and with the quality of some ECJ judgments.

8. Conclusions to *National Courts and Preliminary References to the Court of Justice*

1. KEY FINDINGS

This book has attempted to answer four questions relating to the different phases in the interaction between national courts and the ECJ in the context of the preliminary ruling procedure: question, answer and follow-up. The fourth question concerned the relationship between the answer (ie, the satisfaction of national judges with their interaction with the ECJ and the answers) and the question (ie, the motives of judges (not) to refer).

1.1 Question: National Judges' Motives (Not) to Refer

With respect to the first question on the decision to submit a question to the ECJ, this book has highlighted the intricate interplay of various motives and factors that affect judicial decision making. These motives and factors can be placed at different levels of analysis: the micro, meso and macro levels (see Table 8.1).[1]

This book's findings show that legal formalist explanations deserve more recognition in the social science literature, because judges are simply required to follow and apply legal norms. Much of the literature seems to overlook the fact that many references deal with rather unexciting legal details about customs tariffs or undefined terms in EU legislation, instead of politically sensitive national laws and policies that conflict with EU law. Chapter 2 revealed that some courts adopt a legal formalist approach and faithfully apply Article 267 TFEU while abiding strictly by the *CILFIT* exceptions – that is, the Civil and Tax Chambers of the Dutch Supreme Court and the Irish Supreme Court, Court of Appeal and High Court. Good illustrations include the customs classification cases of *Sonos* and *Sprengen*: the Dutch Tax Chamber decided to refer questions even though the two courts of first instance and the AG were

[1] Dyevre 2016, 11.

Table 8.1 Overview of the different levels of analysis and relevant motives and factors

Level of analysis	Variables
Macro level	• Independence of the judiciary (Chapter 3, sections 2.3 and 3.3; and Chapter 4, section 3). • (De)centralized organization of the judiciary (recruitment, appointment and promotion) (Chapter 3, section 2.3). • Position of EU law in the national legal order (Chapter 1, section 4.1). • Adversarial/inquisitorial nature of the legal system (Chapter 3, section 4). • Culture of judicial review (Chapter 4, section 2).
Meso level	• Institutional court-related factors (coordination, case management, capacity) (Chapter 3, section 3). • Level of specialization and culture within courts (Chapter 3, section 2.2). • Availability of EU law training and education in (post) university curricula (Chapter 3, section 2.2). • Opportunity structures for parties: court fees, the availability of legal aid, requirements as to representation by a lawyer, national standing rules (Chapter 3, section 4). • Position in judicial hierarchy (Chapter 3, section 2.1; Chapter 4, section 4).
Micro level	Motives of the individual judge: • legalist (Chapter 2, section 2) • pragmatist (Chapter 2, section 3) • personal (Chapter 3, section 2) • politico-strategic (Chapter 4)

aligned, allegedly suggesting the matter to be largely *clair*. The Irish Supreme Court likewise referred *James Elliott Construction* even though it felt that it could have decided the questions itself and would have reached the same conclusion as the ECJ. The cautious approach of both courts was attributed to past instances in which they had wrongfully not referred or had referred only with great reluctance. The Tax Chamber failed to refer questions that were subsequently referred by the Amsterdam Court of Appeal in *Van der Steen.* The Irish Supreme Court became more cautious following unanticipated replies by the ECJ in cases in which only a minority had been in favour of a reference: the ECJ adopted a position that diverged from the majority – which had seen no reason to refer – in *Grace and Sweetman*, *Farrell* and *D.*

At the same time, many lawyers still fail to acknowledge that courts are more than robotic legal 'machines' that apply the law in a straightforward fashion. Even the conscientious legal-formalist courts entertain pragmatic considerations, such as the importance of the question and the consequences of referral in terms of delays. Such pragmatic considerations play an important role and the courts in all three countries take them on board, albeit to varying degrees.

The Dutch highest administrative courts, the UK Supreme Court and the UK and Dutch lower courts are especially pragmatic and reluctant to refer, following a reasonable reading of *CILFIT*. The Dutch Council of State, for instance, decided not to refer questions about the intensity of review of the credibility assessment of the asylum claim in relation to Article 46(3) of the Asylum Procedures Directive, even though the answer was not *clair*. Otherwise, a very large number of cases would have had to be put on hold and it would more or less 'have to shut down' the handling of asylum cases. For similar reasons, the Dutch Criminal Chamber decided not to refer questions about the right to legal assistance during a police interrogation. It stated that a reference would preclude 'an effective and expeditious' criminal justice system and would cause a 'long lasting and unacceptable' delay for many cases.[2] The UK Supreme Court likewise acknowledged that there was no *acte clair* in the child custody case of *N (children)*, but decided to forgo a reference because the proceedings had 'already taken far too long' and the children's 'best interests demand[ed] that their future should be decided as soon as possible'.[3]

At times, courts – and especially the more pragmatic courts – have also taken into account the expected answers from the ECJ, and have not referred where they believed that they themselves were equally well equipped to answer the question or expected no useful answer from the ECJ. For example, judges of the Dutch Council of State entertained such thoughts in the credibility review case discussed above. They claimed that it would be difficult for the ECJ to examine such a principled issue involving the relationship between the judiciary and the administration. They also wondered whether they would be able to explain the legal problem clearly to the ECJ within the 20-page limit for an order of reference. Similar considerations played a role in *HS2* before the UK Supreme Court, which concerned a judicial review of a parliamentary act about a high-speed rail network that had been introduced without an environmental impact assessment.

Chapter 3 highlighted other extra-legal factors and considerations that affect the decision (not) to refer. For example, personal and psychological considerations play an essential role. Three different factors can be discerned in this regard. The first factor is one of the most decisive in terms of the willingness of lower courts to refer – that is, the judge's perspective on the court's judicial role as a court of first or second instance *vis-à-vis* the highest court(s) and, more broadly, on his or her role in the political system. Dutch lower court judges generally see referral as the task of the highest court(s), given their more limited judicial law-making function and their limited expertise and time.

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2 NL:HR:2015:3608

3 *Re N (Children)* [2016] UKSC 15 (Hale), paras 54–55.

Intermediate courts, such as the Irish Court of Appeal and High Court, are less guided by such considerations and apply a 'better sooner than later' logic. Chapter 3, section 2.1 contrasted Irish High Court referrals in migration cases (*HID* and *MA*) and environmental cases (*People over Winds*) to resolve the points of law quickly and before a Supreme Court appeal with the reluctance of the Dutch lower courts to avail of the EU preliminary reference procedure. In recent years, the Dutch courts have preferred to refer questions of EU law to the Dutch Supreme Court instead of directly to the ECJ. One example is the social security case of *SF*, involving a Latvian seafarer, in which the questions of the district court were simply passed on by the Supreme Court to the ECJ. Some Dutch lower court judges not only consider referring to be the task of the highest court, but are also of the opinion that the Supreme Court or Council of State is best equipped to refer.

A second personal factor concerns knowledge of EU law and procedure. This is obviously an important prerequisite and a determining factor. However, too much knowledge can also dissuade courts from referring and lead to overconfidence. The latter (partly) explains the reluctance of the UK Supreme Court and the Irish Supreme Court to refer when they had three judges with a Luxembourg background on the bench. The UK Supreme Court is particularly confident in certain areas of law, such as private international and commercial law; the prevailing belief is that the UK sets an example in these areas, while the ECJ lacks sufficient expertise. As a result, the court was generally reluctant to refer in cases where it was sufficiently confident as to the answer that the ECJ would adopt.

A third group of personal and psychological factors concerns the identity, background and attitude of judges. Judges with an academic or governmental background are generally more open to referral than career judges. Feelings of fear and enjoyment may also play a role: some lower court judges are afraid to refer the wrong questions; whereas some enthusiast or activist judges derive satisfaction from engaging with EU law and the ECJ. Examples of the latter are the many references of former Irish High Court and Court of Appeal judge (and current AG) Hogan, such as *Schrems*, *MM* and *Danqua*. UK High Court and (now) Court of Appeal judge Arnold has also made a substantial amount of references in the field of intellectual property law.

There are also three institutional or organizational factors that influence the referral practice of courts and judges: the coordination of EU law cases within a court; the case management system; and the available capacity. Better coordination and more resources obviously favour a reference. One reason for the growing number of references of the Council of State over the past decade was the creation of a committee on EU law and a documentation service that keeps close track of EU law developments. The Den Bosch Court of Appeal made no references in the period 2013–16, but made four references within a six-week

period in 2012 during which judges were thought to have had more time available to them. By contrast, production targets can be a dissuading factor, as is the case for the Dutch lower courts.

The parties and their lawyers also affect the decision (not) to refer. In more adversarial systems, such as those in the UK and Ireland, courts are unlikely to refer on their own initiative or if the parties are opposed to a referral. By contrast, most of the references of the Dutch highest courts are made without any request of the parties for a referral. One example is the Dutch Supreme Court's reference in *De Lange*, on whether a tax deduction scheme of study costs for people under the age of 30 conformed with the prohibition against age discrimination in the Equal Treatment Directive (2000/78). Aside from a rather general reference to the prohibition of discrimination in international treaties, no reference to EU law or even the possibility to refer was made by the parties.

Politico-strategic motives should not be discounted too easily, even though much of the social science literature exaggerates their importance. Chapter 4 revealed that such motives play a role in particular areas of law or for some courts. For example, the Dutch Chamber for International Cooperation, dealing with EAWs, has sometimes used the reference procedure as a sword *vis-à-vis* the legislature, because it considered several provisions of the Dutch Surrender Act to be in breach of EU law. Chapter 4, section 3 also presented several Dutch migration law references as examples, such as *Chakroun*, which concerned the minimum wage requirement for family reunification; and *TQ*, on the Dutch return policy for unaccompanied minors. The referring courts called into question overly restrictive migration law and policy through such references.

The shield logic stipulates that courts withhold references from the ECJ in order to prevent Luxembourg from interfering in sensitive political and legal issues. This logic explains several decisions the Dutch Criminal Chamber of the Supreme Court and the UK Supreme Court. Guiding those decisions was a wish to prevent a far-reaching interpretation of EU law that would negatively affect the constitutional set-up or intrude in the national legal system. Chapter 4, section 2 presented several UK examples, including *Miller*, on Article 50 TEU and UK withdrawal from the EU; *Chester*, on the voting rights of prisoners; *Stott*, on the rights of air passengers and the Montreal Convention; and *Sanneh*, on the rights of residence of third-country nationals with minor children. The Dutch Criminal Chamber's decision not to refer questions on the right to legal assistance during a police interrogation also falls within this category.

Chapter 4 additionally highlighted two other categories of politico-strategically inspired references that have received limited attention in the literature. The first is motivated by a desire to involve the ECJ as a transnational arbiter to resolve particular conflicts or ensure the uniform application

of EU law. The Tax Chamber of the Dutch Supreme Court preferred to refer customs classification questions, such as in *Sonos* and *Sprengen*, even though it already knew the answer itself. This is because a determination by the ECJ has a pan-European effect and guarantees the uniform application of EU law better than a pronouncement by a national court only. Second, some courts have made a reference to highlight particular problems within the ambit of EU legislation and to bring its application to the attention of the ECJ or the EU legislature, such as the SPC Regulation or the EAW system. One good illustration of a reference with a political undertone is *Diageo Brands*. The Dutch Supreme Court addressed the problem of the limited independence of the judiciary in some Member States and cast doubt on the obligation to automatically enforce a Bulgarian judgment on the basis of the principle of mutual trust.

1.2 Answer: National Judges' Satisfaction with the ECJ

The second question considered the views of the referring courts on the ECJ's answers. Chapter 5 examined the assessments of national judges of the procedure leading up to the answer; while Chapter 6 focused on their appraisal of the actual answers. While most judges were generally positive about the ECJ's answers, they were extremely critical of the procedure, as well as some specific answers. Judges did not recognize themselves in the discourse employed by the ECJ, which consistently portrays the preliminary reference procedure as a (horizontal) dialogue or as a cooperative endeavour. In particular, judges in the Netherlands and the UK were critical of the 'ivory tower' mentality of the ECJ. Several problematic features of the procedure – such as the limited involvement of national courts after submission of the referral – were also highlighted.

In addition, most UK and Dutch judges criticized individual judgments. During the interviews, they tended to focus on these outliers, suggesting that one problematic case has a greater impact than several good rulings. Although judges were satisfied with most ECJ judgments, the handful of deficient judgments really stuck in their minds. However, the ECJ cannot be blamed alone for these judgments: the referring court must often shoulder some responsibility for submitting a deficient, vague or incoherent order for reference. Although problematic judgments are in the minority, the interviews revealed that these negative experiences stick in the minds of judges and have a more significant impact on their perceptions than the majority of good ECJ judgments.

Two problems stand out in this regard. The first is the ECJ's inability to answer questions satisfactorily, if at all. One example discussed was *Trijber and Harmsen*, in which the ECJ failed to answer the Council of State's central and principled question as to whether the Services Directive applies to purely internal situations. Some Council of State judges were equally disappointed

with the deferential, open answers of the ECJ in *A, B, C*, on the intensity of judicial review of the credibility of the homosexual orientation of asylum seekers. The UK Supreme Court was also critical of gaps in the reasoning of the ECJ and relied on the AG Opinion to fill them in cases such as *Patmalniece* and *Cavendish Square Holding*. The ECJ's failure to answer the questions referred sometimes resulted from its (substantive) reformulation of those questions. The ECJ's reformulation in *Danqua* posed problems for the referring Irish court because the ECJ examined the 15-day time limit for applications for subsidiary (asylum) protection in relation to the principle of equivalence instead of effectiveness, which had never been discussed in the Irish proceedings. UK judges were also critical of the 'disastrous' and 'shambolic' answers in *Aimia Coalition.* Instead of answering the questions of the House of Lords on the interpretation of the VAT Directive, the ECJ reformulated the questions and examined the VAT treatment of the payments in the particular case.

The second problem concerns the ECJ's failure to appreciate the facts of the case, the national legal framework or the underlying concerns of the referring court. In *Franzen*, the ECJ wrongly assumed that the referring Dutch tribunal was not obliged to apply the hardship clause in order to remedy unacceptable unfairness. Another exceptional Irish case was the 'long-running drama' of *MM*, which – like *Danqua* – dealt with the Irish subsidiary protection system.[4] There was a misunderstanding about the notion of the 'right to a hearing' and whether that required an *oral* hearing, as is standard practice in common law jurisdictions. Overly factual judgments have proved particularly problematic for the Dutch Supreme Court because facts can no longer be the subject of judicial review at the stage of cassation. The court thus was faced with a challenge when the ECJ diverged from its position in *Ladbrokes* and *Sonos*.

1.3 Follow-up

Chapter 7 presented an intriguing finding in light of the criticisms of national judges of the preliminary reference procedure and some ECJ judgments. In general, the courts in the three countries studied have diligently – and often almost automatically – complied with the requested ECJ rulings, even in problematic and dissatisfactory cases. They emphasized their strict obligation to follow the ECJ 'even if some of us do not fully understand its reasoning', as the UK Supreme Court held in *Patmalniece*.[5] The Irish High Court and Court of Appeal reasoned similarly in *MM* and *Danqua*. Despite tremendous frustration, the Dutch Supreme Court held that it could not examine the correctness

[4] *MM v Minister for Justice* [2018] IESC 10 (O'Donnell J), para 31.
[5] *Patmalniece v SSWP* [2011] UKSC 11 (Lord Walker), para 73.

of the ECJ's answer in *Diageo Brands*. Interviews with judges confirmed this pragmatic approach to follow-up. Even in cases where a change in their own position was required, they generally underlined the importance of full compliance and simply stated that the required change was 'just the way it is' or 'part of the game'.

However, the UK and Dutch courts have avoided full compliance by concluding that they are not bound by a ECJ ruling on the facts, as happened in *Aimia Coalition*. Another strategy to avoid follow-up is to submit a second reference in order to challenge the earlier ECJ judgment, as happened in the UK migration case of *Kaba*, the Sunday trading saga in *Council of the City of Stoke-on-Trent* and *Privacy International*, which concerned the data retention regime. Most follow-up references had a friendlier, more dialogical character – especially second references by a higher court on points that were not put before the ECJ in the lower court's initial reference. Examples include the Dutch insolvency case of *Smallsteps* and *MM*, on the right to a hearing in the Irish subsidiary protection procedure. In some cases, a second reference has been made to address the lack of clarity in the first ECJ ruling, as in *Visser Vastgoed*, after the ECJ failed to consider the applicability of the Services Directive in purely internal situations.

1.4 Feedback Loops

The fourth research question in this book concerns whether there is a relationship between the motives of judges (not) to refer and their perceptions of the ECJ and its judgments. Scholars and judges alike have suggested such an intuitively plausible relationship, noting that a judge who feels that he or she has not received helpful guidance might refrain from sending future references to the ECJ. Very few (empirical) studies have considered these feedback loops, not least because of the difficulties in identifying them. National judges were asked about such loops during interviews and generally denied that they play a role in their decisions (not) to refer; although some UK judges acknowledged that previous negative experiences with the ECJ did loom in the background.

Feedback loops can nonetheless be traced by examining two related phenomena which suggest that judges rely on previous experiences or certain expectations in their decision-making process. First, pragmatic courts sometimes take into account the expected answer from the ECJ (Chapter 2, section 3.6). Courts are more reluctant to refer where they expect the ECJ to give very general answers or where they find it difficult to present a complex issue in an order for reference that is limited to the permitted 20 pages. Second, feedback loops are also implicit when courts strategically follow the shield logic and withhold references from the ECJ to prevent an unwanted outcome. Chapter 4, section 2 demonstrated that frustration over the ECJ's strongly teleological

approach was a factor in several decisions not to refer, including *HS2*, on a judicial review of parliamentary acts; *Stott*, on the Montreal Convention; and *Chester*, on prisoner voting rights.

It seems safe to say that the reluctance to refer in both types of cases relates to previous experiences with the ECJ. Unlike in the UK, negative feedback loops have not discouraged courts from referring in the Netherlands and in Ireland. On the contrary, one can perhaps discern a positive feedback loop in Ireland: Chapter 6 demonstrated that Irish judges, in particular, are more satisfied with ECJ rulings than their UK and Dutch counterparts, not least because many of the references result in helpful outcome judgments. Previous references of other judges – especially prominent ones such as *Schrems* and *LM/Celmer*, on EAW surrender to Poland – also inspired other judges to refer.[6] Although Dutch judges were critical of the ECJ and some of its judgments, this made them no less inclined to refer future cases. Judges seldom took their previous experiences into account when deciding whether to refer; and the Dutch highest courts have continued to refer despite their criticisms of the procedure and some problematic ECJ judgments.

In the UK, however, the feedback loops seem to operate in the opposite direction compared to Ireland. Arnull suggested that 'a general view of the helpfulness of the procedure based on previous experience' informs the decision on whether to refer.[7] When this quote was presented to the current UK Supreme Court, however, the suggestion was denied:

> The question involves a high degree of speculation. Whilst the Supreme Court has, on occasion, been critical of a lack of clarity in the answers provided by the ECJ, there is no evidence in any of the case law to support the view that such criticism has led the Supreme Court to ignore its obligations under Article 267 TFEU.[8]

That said, the extra-judicial speeches and writings of judges would suggest that the situation is more complex. Lord Mance observed that the 'not entirely infrequent uncertainty about what the Court of Justice's answers mean and how to apply them' is a factor that is taken into consideration in the decision (not) to refer.[9] Likewise, Lord Carnwath suggested in his decision not to refer that no useful answer from the ECJ could be expected, given how it had dealt with previous references.[10] In interviews, two former UK Supreme

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6 Case C-216/18 *LM/Celmer* EU:C:2018:586.

7 Arnull 2017, 345.

8 Written response 15 April 2020.

9 Even though he mentioned this in relation to references in gold-plated areas, Mance 2013a, para 11.

10 *Oss Group Ltd, R (on the application of) v Environment Agency & Ors* [2007] EWCA Civ 611, para 69.

Court judges acknowledged that judges might be 'psychologically less eager' to refer, but maintained that this is not a significant factor and plays a role only 'subconsciously'.[11] One UK barrister likewise attributed the drop in UK references in the last ten years to dissatisfaction with the end product. He/she pointed to dismissive appraisals of judges on the clarity and consistency of ECJ judgments not only in private, but also in open court.[12] ECJ judgments are not considered to be of high quality and the ECJ is viewed as a 'merits court' that reasons from the facts and is driven by sympathies, especially in the field of social security and citizenship.[13] This was thought to contrast sharply with the UK courts, which are more focused on black-letter law. However, this critique has not precluded some individual UK judges from referring extensively, despite the disappointing answers received. Former High Court judge Arnold has made a large number of references in the field of intellectual property law, despite being critical of the case law of the ECJ (see Chapter 6).

This warrants the question: what affects these feedback loops – primarily ECJ-related factors, or the motives and attitudes of judges towards referral? Dutch and UK judges are both critical of the ECJ, but the former have not let these negative sentiments influence their decision making; while UK judges have been more critical towards the ECJ and EU law from the outset. This suggests that the (predetermined) attitudes of judges are more important than ECJ-related factors. The question is thus whether it is possible for the ECJ to change the way in which national courts engage with it. To what extent can it prevent courts from following the UK logic of shielding cases from the ECJ because of the expectation that no clarity or an unwanted outcome will follow? It is difficult to give a definitive answer to this question based on the current research, which covers only three countries. Despite this uncertainty, however, the ECJ should nonetheless attempt to improve its engagement with national courts. Section 2 will sketch out several suggestions on how the ECJ can improve that dialogue.

1.5 Lessons Learned

The main findings from the three countries studied in this book raise questions as to whether generalizations can be made from them. The book provides a near-exhaustive overview of the motives, considerations and factors that can play a role in the decision (not) to refer, at the different levels of analysis. This is not to say, however, that they all play the same role in every Member State.

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[11] Interviews 231 and 264, respectively.
[12] Interview 243.
[13] *Ibid*.

Table 8.2 Overview of findings on the motives to refer

	Netherlands	Ireland	UK
Politico-strategic reasons			
Shield	+ (Criminal Chamber of the Supreme Court)	0	++
Sword	+	0	0
Leapfrogging	+	0	0
Transnational arbiter	++	+	+
Agenda setting	+	+	+
Non-political considerations			
Legal formalism	+ (Civil and Tax Chambers of the Supreme Court)	++	-
Pragmatism	++	+	++
Personal and psychological	++	++	++
Institutional	+	0	0
Role of the parties	0	++	++

The exhaustiveness of this myriad of motives stems from the book's combined deductive and inductive approach. It relies heavily on both theoretical and empirical studies, which means that it has included all factors previously discussed in the literature. Its inductive nature has been used as a safety valve. Open-ended interviews allowed national judges and other interviewees to propose motives that have not featured prominently in the literature thus far, such as the two politico-strategic considerations relating to agenda setting and the role of the ECJ as transnational arbiter.

No generalizations can be made on the extent to which these different motives, considerations and factors play out in practice. As Table 8.2 shows, the three Member States score differently in this regard; and even within the individual Member States themselves, there is considerable divergence between and within courts. Particular factors also play a more or less significant role in other Member States. Chapter 3 revealed that fears about potential negative career prospects played almost no role in the three countries studied; whereas Slovenian and Croatian judges do consider this possibility.[14] Hence, for example, particular motives could play a different role in more judicially centralized states, where the recruitment, appointment and promotion of judges are organized at a central level; or in states that lack a culture of judicial

[14] Leijon and Glavina 2020.

review, such as the Scandinavian countries.[15] The dynamic can be even more different in Member States where the rule of law is backsliding and where judges refer out of self-defence, in order to protect their constitutional position and judicial independence.[16] It seems that although the Netherlands diverges from Ireland and the UK in the sense that it is a civil law country, the three countries share an important underlying feature: the relatively independent position of courts and judges in relation to politics and the wider judiciary. Macro-level factors should thus not be neglected. These factors also affect the variables at the meso and micro levels of analysis.

It would seem further that generalizations can be drawn beyond the three countries studied from the findings on the satisfaction of national judges with the ECJ and follow-up. They confirm the findings of older studies that revealed high rates of implementation and support the widely shared belief that ECJ judgments are generally accepted and followed.[17] This means that instances of non-compliance in other EU Member States – such as *Weiss*, *Billerud*, *Dansk Industri* and *Landtová* – are exceptions that prove the rule. However, the limited number of such cases should not be taken as an indication that the preliminary reference procedure is functioning optimally, as is especially illustrated by the discontent expressed by national judges in Chapters 5 and 6. Recent (empirical) research suggests that their critical views on the quality of dialogue with the ECJ and its judgments are shared by courts in other Member States.[18] In order to avoid a repeat of the situation in the UK, where negative feedback loops have played a role in recent years (section 1.4), steps should be taken to improve this interaction (section 2).

The findings also have theoretical and empirical implications. Theoretically, this book shows that multiple theoretical perspectives account for the decisions of courts to refer and the total number of references from each Member State. There is no single explanation for the referral practice in a particular Member State. This multi-causal nature explains the variations among and within Member States, both over time and across policy areas (see Table 8.2).[19] This finding is hardly surprising as such, but is worth emphasizing in light of the scholarly literature, which often tries to single out one key factor. The findings also support the importance of a nuanced approach which leaves room for the

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[15] Wind 2010.

[16] Case C-487/19 *WŻ (Chambre de contrôle extraordinaire de la Cour suprême – Nomination)*; Case C-508/19 *Prokurator Generalny (Chambre disciplinaire de la Cour suprême – Nomination)*; Jaremba 2020.

[17] Schwarze 1988; Korte 1991; Meij 1993; Wils 1993; Weiler 2013, 235.

[18] Van Gestel and de Poorter 2019.

[19] Stone Sweet 2004, 240; Carrubba and Murrah 2005, 414; Alter 2002; Stone Sweet 2010, 31.

operation of several theories and perspectives at the same time. The findings downplay the role of politico-strategic motives, which have dominated the early social and political science literature in particular. They also show that legal formalist reasons, which have often been overlooked by social and political scientists, should be given due consideration. What is more, the book corroborates that the recent emphasis on the micro level and the individual agency of judges is justified and deserves further attention.[20]

Empirically, the book demonstrates that the mere examination of judgments alone is not enough to appreciate what is really going on in terms of the actual motives of national court judges to refer and their appraisal of the dialogue with and judgments of the ECJ. Semi-structured interviews with judges, AGs and law clerks revealed the true thoughts of judicial decision makers in this regard. Mere reliance on follow-up judgments gives a false impression that the dialogue or interaction is functioning optionally, because national courts almost always comply fully and automatically with ECJ judgments. This relatively straightforward follow-up camouflages their dissatisfaction with their interaction with the ECJ and the quality of some ECJ judgments. As will be argued in section 2, it is of utmost importance for the functioning of the preliminary reference procedure in the EU legal order that these concerns be addressed.

2. THE WAY FORWARD: IMPROVING INTERACTION WITH THE ECJ

Chapters 6 and 7 revealed an urgent need for improvement in two regards. First, there is a need to improve the quality of interaction between the ECJ and national courts and strengthen the dialogical features of the preliminary reference procedure. The findings confirm the allegations raised in the introductory chapter that both the ECJ and the procedure have come under significant pressure in recent years. Recent (empirical) studies likewise suggest that the legitimacy of the ECJ is 'more fragile and contested' and rests on a 'very thin basis'.[21] The research of van Gestel and de Poorter in particular demonstrates the importance of improving the dialogical features of the procedure in order to avoid non-compliance and to maintain the legitimacy of ECJ judgments.[22] The findings in Chapters 5 and 6 underscore the need to involve the referring

[20] Posner 2008; Epstein et al 2013; Chehtman 2020; Rado 2020; Lampach and Dyevre 2019.
[21] Pollack 2018.
[22] Van Gestel and de Poorter 2019, 18.

court once the reference has been made.[23] Dutch judge and academic de Werd also argued that not allowing the national judge to intervene in the event of misunderstandings 'is a missed opportunity in terms of the efficiency and effectiveness' of the procedure.[24] Bobek likewise noted the 'pedagogical and legitimacy-enhancing' advantages to be gained should national courts obtain a 'direct voice and participation' in the procedure.[25] A second related aspect is the workload of the ECJ. While its docket continues to grow each year, the ECJ has managed to keep the average duration of proceedings to an acceptable level (15.5 months at the time of writing) – albeit not without consequences for the quality of the reasoning in its judgments, as noted both by scholars and by the judges interviewed (Chapter 6).[26] There are thus grounds for both the ECJ and the national courts to adjust the way in which they currently operate in the context of the preliminary ruling procedure.

2.1 Suggestions for the ECJ: Clarification Requests, *CILFIT* 2.0 and Specialization

First, the ECJ should overcome its reluctance to seek clarification from the referring court where necessary.[27] Article 101 of the Rules of Procedure allows the ECJ to ask for additional information on the purpose of particular questions, the national legal framework or the facts of the case. The ECJ could even consult the referring court where it reformulates the questions in such a way that changes their content.[28] Irish Supreme Court judges brought this issue to the attention of the ECJ during a bilateral meeting with ECJ judges, because the recasting of questions is considered to do more harm than good, as discussed in Chapter 6, section 2.3. Fears that this could result in significant delays because some national systems would require the courts to hear the parties' views on the request should not be over-exaggerated.[29] The ECJ should also examine whether it can creatively deal with the perceived need – and associated costs – of translating the clarifications of the national court. To

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[23] A considerable number of supreme administrative courts recognized the benefits of 'alternative forms of communication' after the reference and before the ECJ judgement. Van de Gronden et al 2016, 14.

[24] De Werd 2015b, 153.

[25] Bobek 2013b, 212–13.

[26] ECJ annual report 2019, 15; Bobek 2020, 87; Sharpston 2014, 765; Weiler 2013, 235; Jacobs et al 2019, 1216.

[27] The ECJ has done this on an average of seven times on an annual basis. In the 7.5 years between 1 January 2009 and 30 April 2016, this happened in 56 cases; van de Gronden et al 2016, 29. Cf Langer 2015, 15; van Gestel and de Poorter 2019, 84.

[28] Van Gestel and de Poorter 2019, 127.

[29] Van de Gronden et al 2016, 29.

what extent is it truly necessary to translate everything, as Article 101(2) of the Rules of Procedure seems to suggest?[30]

Second, the ECJ should seek to explain more clearly its treatment of the arguments of the national courts, especially where it deviates from certain assumptions, preferred interpretations or provisional answers.[31] The same applies in situations in which the ECJ diverges from the approach of the AG or from earlier decisions.[32] As shown recently by de Búrca, the ECJ acknowledged that it had considered the referring court's view in just four of the 46 references made by the UK higher courts. She argues that, given the increasing scepticism towards the ECJ, there is more reason than ever for it to be more responsive and practise what it preaches in terms of dialogue.[33]

Third, the ECJ should relax the *CILFIT* requirements and should not be afraid to issue a '*CILFIT* 2.0' that reflects the current realities on the ground. It is often lamented that it is more difficult to conduct a *CILFIT* assessment in today's EU, with 27 Member States and 24 official working languages, than when *CILFIT* was rendered in 1982, when the EU had just ten Member States and seven working languages. How can a national court be convinced that a particular interpretation is 'equally obvious' to courts in (all, most or only a couple of) Member States, and to the ECJ? It is unsurprising that AG Wahl noted: 'If one were to adhere to a rigid reading of the case-law, coming across a "true" *acte clair* situation would, at best, seem just as likely as encountering a unicorn.'[34] Chapter 2, section 3.2 showed that the Dutch highest administrative courts and the UK Supreme court have adopted a pragmatic reading of *CILFIT*. In particular, the UK Supreme Court has reserved the right to apply established principles itself to new cases. The Dutch Council of State, and more recently the Tax and Civil Chambers of the Dutch Supreme Court, have also taken a more proactive and autonomous stance, and given themselves room for a more independent interpretation of EU law (Chapter 2, section 3.6).[35] The Council, for instance, applied different interpretation methods in line with the *CILFIT* requirements in a structured and transparent way.[36] There should be room for this approach in cases where there is already some ECJ jurisprudence.

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30 *Ibid*.
31 Arnold 2020, 1105–06; van Gestel and de Poorter 2019, 18.
32 Harris 2008, 376–77.
33 De Búrca 2020.
34 AG Wahl in Joined Cases C-72/14 and C-197/14 *X and Van Dijk* EU:C:2015:319, para 62.
35 *Becton v Braun* NL:HR:2018:721; NL:HR:2018:862.
36 Eg NL:RVS:2019:2486, para 4; *Stichting Greenpeace Nederland v Minister van LNV* NL:RVS:2020:2571, para 7.2.1.

Giving more room to national courts to act as co-interpreters would reflect the maturity of the EU legal order and recognize that the ECJ does not have exclusive expertise over all areas of EU law across a diverse array of policy fields, which often involve complex, sensitive and political choices.[37] There is especially reason to broaden the role of national courts in relation to the 'factual jurisprudence' of the ECJ, dealing with the application of the established principles of EU law to new cases (Chapter 2, section 3.2 and Chapter 6, section 2.4). Bobek criticized the 'factual jurisprudence' of the ECJ and the court's implicit desire to have the last word in every single application of a legal interpretation by national courts. He held that the ECJ should accept some diversity in this regard and called on the ECJ to revisit *CILFIT*.[38] This mirrors AG Jacobs' call for 'self-restraint' in his Opinion in *Wiener*. He cautioned against national courts referring for 'further clarification' when the facts of cases differ (only slightly) from those in which the ECJ had answered similar questions.[39] There is also a more pragmatic argument for relaxing *CILFIT* with respect to the application of established principles to new cases – namely, the ever-expanding workload of the ECJ.

Admittedly, relaxing *CILFIT* could have consequences for the uniform application of EU law in Member States. However, complete uniformity is a fiction, just like a true *acte clair*. Dougan noted recently that:

> it is surely misleading to speak of Union law as if it were a single and uniform being: there are in fact 28 versions of EU law – that of the Union legal order and those constructed within each and every Member State.[40]

The losses that might result from a more relaxed *CILFIT* standard are thus smaller than the gains – namely, alleviating the burden on the ECJ so that it can concentrate on the difficult cases and improve its reasoning with a view to enhancing the dialogical features of its judgments. Sufficient checks are in place to empower natural and legal persons, and the European Commission, to monitor national courts' compliance with their obligations under Article 267 TFEU, and to prevent or act upon at least the most egregious breaches. These enforcement mechanisms exist both at the domestic level (*Köbler*), the EU level (infringement procedures) and the ECHR level (complaints to Strasbourg) (Chapter 1, section 2).

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[37] Davies 2014, 1606.

[38] Bobek 2020, 88; AG Bobek in C-561/19 *Consorzio Italian Management e Catania Multiservizi* ECLI:EU:C:2021:291.

[39] Case C-338/95 *Wiener* EU:C:1997:352, para 15.

[40] Dougan 2020, 58. Cf Langer 2019.

Fourth, if the ECJ's case docket continues to grow and eventually becomes unmanageable, more far-ranging structural measures may be needed. With a more sizeable General Court, the option of transferring part of the jurisdiction over preliminary references to the General Court in line with Article 256(3) TFEU could (again) be put on the table, despite the reluctance of the ECJ and EU Member States to pursue this option.[41] Legal and policy areas such as customs, VAT and trademarks are often mentioned as suitable candidates for transfer to the General Court.[42] Another related measure that could help to reduce the ECJ's workload by increasing the efficiency of case handling is the creation of specialized chambers. This would facilitate the systematic development of the law and thus enhance consistency and legal certainty, while also facilitating more extensive legal reasoning. Such specialization could be particularly valuable in the areas that have been the focus of criticism from national judges, such as tax law, private international law and trademark and patent law (Chapter 6, section 2.4).[43]

2.2 Suggestions for National Courts: Better Referrals, Provisional Answers and Follow-up References

Chapter 6 argued that it is unfair to blame the ECJ exclusively for problematic judgments in which it fails to answer the questions satisfactorily or in which it misunderstands the facts, the national legal framework or the underlying concerns of the referring court. Part of the responsibility for deficient answers must lie with the referring court and its order for reference – including questions that are ill formulated, too implicit or too general. General or unclear questions often lead to general or vague answers. In addition, a suboptimal answer may result from an insufficient or minimal description of the national legal framework, the central issues and the relevant facts. The analysis of problematic judgments would thus lead to the following recommendations for referring courts. They are far from revolutionary, because most of them are addressed in the recommendations drafted by the ECJ for national courts.[44] However, as the previous chapters have shown, not all orders for reference meet these recommendations. Implicit in these suggestions is the notion that the referring national court must remember that the ECJ lacks 'inside information'

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[41] Leppo 2020, 7; Report of the Court of Justice on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU, 15995/17, 21 December 2017.

[42] Leppo 2020, 8.

[43] Arnold 2020, 1105; Jacobs et al 2019, 1222; Harris 2008.

[44] Cf 2019/C 380/01 *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*.

about both the case and the applicable national law. The order for reference should thus provide sufficient context and all necessary details about the national legal framework and the facts of the case. It is also essential that the referring court clearly explains why the questions are relevant and how they contribute to the resolution of the dispute. In addition, to facilitate the translation of the order for reference into all other official languages, the referring court should use simple language; clearly distinguish between the most relevant parts of its decision and more minor points; and avoid expressions that are difficult to translate.[45] It is further worth emphasizing the following additional suggestions.

First, the referring court should clearly consider the purpose of the reference and make this explicit in its request for a preliminary ruling.[46] This book has underlined the usefulness of the preliminary reference procedure: it not only helps the referring court to resolve difficult disputes and complex legal puzzles, but can also empower the court to actively influence the development of EU law or put a particular issue on the political or legislative agenda. In doing so, the referring court can push the ECJ in a desired direction that also fits with the national legal order.[47] In responding to the reference, the ECJ can also offer the national court a helping hand *vis-à-vis* its national legislature, executive or other courts in the same or another Member State.

The purpose of a reference also affects the structure of the order for reference. If the purpose of the referral is to inform or to verify, and to obtain legal clarity, a neutral exposition of the factual and legal context may suffice. However, if the reference has a different purpose – such as voicing criticisms on particular legal issues or earlier ECJ case law, or setting the political or legislative agenda – the order for reference should take a more discursive form and should be well reasoned and convincing. This difference is also important in shaping the judgment of the ECJ and in determining the extent to which the ECJ should take into account the views of the referring court and its response to those views. The findings in Chapter 6 suggest that one of the most frustrating results of a reference is a feeling that the ECJ did not take the concerns of the referring court seriously. The more explicit the referring court is about the purpose of the reference and what it expects the ECJ to address, the greater the chance of that being realized. This is especially so where courts refer a relatively easy question that is (almost) *clair*. The ECJ generally disposes of such case without an AG Opinion and in a three-judge composition.

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45 Coumans 2017.
46 Cf Arnold 2020, 1105.
47 Langer 2019; Rytter and Wind 2011.

In doing so, however, it could miss the implicit objective of the referring court, as happened in *Diageo Brands*.

Second, the consequences of a particular interpretation should be sketched out more forcefully. This concerns not only the implications for the legal framework or the judicial system, but also wider societal, political or financial implications. One good Dutch example is *Massar*, in which the Supreme Court sketched out the considerable financial consequences that would ensue if the ECJ were to find that the EU Directive on legal expenses insurance also applied to more administrative procedures before the Employee Insurance Agency.[48]

Third, referring courts should also be more upfront in providing a provisional answer. The ECJ encourages national courts to do so in Article 107(2) of the Rules of Procedure, as well as in its recommendations. However, very few courts actually provide a genuine provisional answer in the form of a ready-made *dictum*.[49] Providing a provisional answer is attractive where the court is referring for politico-strategic reasons. The Dutch Supreme Court could easily have done this in *Massar*, but judges are generally reluctant to do so out of caution and the fear of getting 'a clip around the ear'.[50] A provisional answer seems particularly warranted in cases where the national court refers simply to have the ECJ confirm what it could have determined itself – for example, in relatively easy customs tariff cases in which an authoritative determination of the ECJ is sought to guarantee the uniform application of EU law. The use of provisional answers in this way, which would enable the ECJ to dispose of the case relatively easily, mirrors the 'green light procedure' proposed by former AG Jacobs, among others.[51]

Fourth, national courts should not hesitate to submit follow-up questions where an answer is unclear or missing, or where they disagree with the ECJ's judgment. It is understandable that courts are reluctant to go back to Luxembourg, especially from the perspective of the parties and the resulting delays that will ensue from a second reference; but where the case lends itself to re-referral or where a new case involving similar problems arises, national courts should not 'turn off', but should rather engage with the ECJ again. The repeated questions of the Dutch Council of State on the applicability of the Services Directive in purely internal situations (*Trijber and Harmsen* and later *Visser Vastgoed*) show that the underlying concerns were taken seriously after the second reference: when the case was brought to Luxembourg for a second

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48 Case C-460/14 *Massar* EU:C:2016:216.

49 *The Minister for Justice, Equality and Law Reform v RO No* 4 [2018] IEHC 284; Case C-327/18 PPU *R O* EU:C:2018:733.

50 Interviews 45, 75 and 87.

51 Meij 2004; Jacobs 2004; Jacobs 2014.

time, a Grand Chamber formation addressed the questions head-on. Something similar happened when the Italian Constitutional Court submitted the *Taricco* case once again; the Constitutional Court gave the ECJ a chance to reconsider the priority it had afforded to the obligation to effectively tackle VAT fraud (Article 325 TFEU) over the principle of legality enshrined in Article 25(II) of the Italian Constitution.[52] Another recent example is the Grand Chamber judgment issued after the Belgian Council invited it to reconsider its consistent line of case law in relation to the concept of 'plans and programmes' in the Environmental Impact Assessment Directive.[53] One option for the ECJ is to fast-track follow-up references in a similar way to the French preliminary ruling system, which provides for a *service-après-vente* – namely, the possibility to ask the French Council of State for a clarification of its judgment.[54]

[52] Joined Cases C-360/15 and C-31/16 *X and Visser Vastgoed* EU:C:2018:44; Case C-42/17 *MAS and MB* EU:C:2017:936.

[53] Case C-24/19 *A and Others* EU:C:2020:503, para 29.

[54] R 931-1 of the *Code de justice administrative*; van Gestel and de Poorter 2019, 140.

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