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Reprinted from **European Law Review**
Issue 1 2021

Sweet & Maxwell
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)

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Black Box in Luxembourg: The Bewildering Experience of National Judges and Lawyers in the Context of the Preliminary Reference Procedure

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EU law; National courts; Preliminary rulings; References to European Court

Abstract

The interaction between national courts and the European Court of Justice (ECJ) in the context of the preliminary ruling procedure is often presented as a dialogue. Despite this being the dominant discourse, we know very little of how the ECJ's main interlocutors actually experience their interaction with it. This article reflects critically on the discourse of dialogue on the basis of interviews with two of the most important ECJ interlocutors: referring national judges and the parties and their lawyers. By juxtaposing the different roles assigned to these actors during the procedure, the article shows that referring judges may feel that they are not equal discussion partners in a dialogue and the parties and their lawyers are assigned a role that they feel unequipped to fulfil.

Introduction

We know surprisingly little about the experiences of two of the most important interlocutors of the European Court of Justice (ECJ) in the context of the preliminary ruling procedure, namely, national courts and parties to the case. This is remarkable given the importance of the preliminary reference procedure for European integration, the development of EU law, and the impact of EU law on domestic legal orders. This empirical gap stands in sharp contrast to the relatively extensive research on the question of why national courts decide to make a reference, or research on the way in which EU law has been used by parties at the national level.[1] Furthermore, this omission is surprising because there seems to be a wide

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[1] R.A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007); L. Conant et al., "Mobilizing European Law" (2017) 25 *Journal of European Public Policy* 1376; A. Vauchez and B. de Witte, *Lawyering Europe: European Law as a Transnational Social Field* (Oxford: Hart Publishing, 2013); F. Nicola and B. Davies, *EU Law Stories* (Cambridge: Cambridge University Press,

consensus in the literature and ECJ case law on the manner in which the procedure works. The ECJ has consistently referred to the interaction with national courts as "a dialogue".[2] In addition, it has also held consistently that "Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts".[3] The question is whether the procedure is most accurately characterised as a dialogue, and whether two of the most important interlocutors of the Court—the referring judges and the parties to the national proceedings—also experience their interaction in this way.

In order to lay bare the paradoxes and problems inherent in the design of the preliminary ruling procedure, this article takes stock of the way in which both the referring national courts and the parties to the case experience their involvement in it. The article argues that there are three main problems with the existing discourse about the preliminary reference procedure. Firstly, the characterisation of the procedure as a dialogue suggests that national courts have a strong position in it. Secondly, treating the procedure as entirely court-to-court leaves out the actors that are eventually affected most directly by the requested ECJ judgment, namely the parties. Thirdly, we know very little about how the Court's main interlocutors actually experience their interaction with the ECJ, and whether they share the ECJ's generally positive framing. Where the emphasis is on the co-operation between judicial bodies, parties to the cases that are the subject of a reference seem little more than mere passive spectators. However, nothing is what it seems. As will be made clear, even in preliminary reference cases where the national judge is the sole and ultimate decider, without any input from the parties to the national proceedings (which, in fact, is rarely the case), this division of roles paradoxically changes after the decision to refer has been made by the national court. The national court disappears from the scene until after the ECJ judgments, while the parties—together with other new actors such as the Member States and the European Commission—are given every opportunity to have their voices heard. This change casts a doubt upon the conventional wisdom of approaching the interaction as a court-to-court dialogue.

This article juxtaposes the different roles assigned to the referring court and the parties to the national proceedings, and critically analyses prevailing narratives about the procedure. It does so on the basis of empirical research conducted in the context of two distinct research projects on the use of the preliminary ruling procedure in the Netherlands and Ireland. The first project examined references for preliminary ruling by Dutch courts between 2008 and 2012 from the perspective of the litigants and legal counsel, following them from the start of the litigation up to the trial itself at the Court, and back again to the legal, social, and political consequences on the ground. A total of 28 lawyers and 11 litigants were interviewed about their experience with the procedure.[4] The second project examined the motives of courts to refer as well as the level of follow-up given to the subsequent ECJ judgments. During interviews with judges involved in references to the ECJ, questions were asked about their ideas as to the interaction with the ECJ, their experiences with the procedure including the hearing, and their ideas with respect to the answer of the ECJ and ECJ judgments in general. In total, 55 judges, Advocates-General, and law clerks were interviewed in the Netherlands, of which eight were not involved directly in a case in which a reference

2017); T.A. Börzel, "Participation Through Law Enforcement. The Case of the European Union" (2006) 39 *Comparative Political Studies* 22.

[2] *Commission v Poland* (C-619/18) EU:C:2019:531; [2020] 1 C.M.L.R. 6 at [45]; *Opinion 2/13* EU:C:2014:2454; [2015] 2 C.M.L.R. 21 at [176]; c.f. "close cooperation" in Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), para.2.

[3] E.g. *A.K.* (C-585/18, C-624/18 and C-625/18) EU:C:2019:982; [2020] 2 C.M.L.R. 10 at [69].

[4] J. Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation before the European Court of Justice* (The Hague: Eleven International Publishing, 2018).

had been made. Twenty out of 28 interviews were conducted in Ireland with persons who had had experience with references.[5]

This article especially addresses concerns from the perspective of "dialogue", both from the standpoint of national courts as well as from parties to the proceedings.[6] In doing so, it complements van Gestel and de Poorter's research on supreme administrative courts, and shows that concerns about the dialogical nature of the interaction between national courts and the ECJ in the context of the preliminary ruling procedure are shared by other—supreme and lower—courts as well.[7] Furthermore, it positions itself amidst a new wave of research that employs a set of new methodological approaches that have only rarely been employed in the study of the Court.[8] It underscores the benefit of qualitative data collection among actors insufficiently studied in the quest to understand the complex interaction between the ECJ and national courts. The structure is as follows. First, it provides a succinct overview of the current literature on the relationship between national courts and the ECJ as well as the involvement of other actors. Secondly, it presents the perspective of the litigating parties and their lawyers on this relationship. Thirdly, it discusses the views of national court judges on their interaction with Luxembourg and makes suggestions for improvement.

Narratives of monologues, dialogues, or trilogues

A horizontal dialogue or a vertical monologue?

The preliminary ruling procedure has an indispensable function in the current EU legal system. It connects the national systems to the authority of the ECJ, and contributes to the uniform interpretation and application of EU law by national courts and tribunals. It was one of the very first forms of co-operation between national courts and an international court.[9] Designed in a first iteration in the 1950s, the procedure was inspired by similar reference systems in the founding Member States where certain matters are referred to the constitutional courts for a preliminary ruling. However, the context in which the procedure first saw the light of day is very different from what the EU legal system looks like today. In its first form, based on art.41 of the Treaty establishing the European Coal and Steel Community, the procedure was intended to allow for the review by the Court "when the validity of acts of the High Authority or the Council is contested in litigation before a national tribunal." In the subsequent iterations of today's art.267 of the Treaty on the Functioning of the European Union (TFEU), the application of the procedure was expanded to cover the validity or interpretation of acts by all of the institutions, bodies, offices, or agencies of the Union, as well as questions about the interpretation of the Treaties. The scope of the preliminary ruling procedure today covers the entire—and significantly greater—body of EU law.[10] Suffice it to say that the procedure has taken on a function that is quite distinct from its early predecessors.

With its unique role in connecting national jurisdictions to the supranational authority of the ECJ, the focus in the study of the procedure has understandably been predominantly on the relationship and

[5] J. Krommendijk, "Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement" (2020) 5 *European Papers* 825; J. Krommendijk, "The Highest Dutch Courts and the Preliminary Ruling Procedure: Critically Obedient Interlocutors of the Court of Justice" (2019) 25 E.L.J. 394.

[6] It will not focus on all perceived problems with the preliminary ruling procedure, such as the length of the procedure or translation issues.

[7] R. van Gestel and J. de Poorter, "Supreme Administrative Courts' Preliminary Questions to the ECJ: Start of a Dialogue or Talking to Deaf Ears" (2017) 6 *Cambridge International Law Journal* 122.

[8] M. Madsen, F. Nicola and A. Vauchez, *Researching the European Court of Justice: New Approaches and Methodologies* (Cambridge: Cambridge University Press, forthcoming).

[9] M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2014), p.2.

[10] With the exclusion of the EU Common Foreign and Security Policy on the basis of art.275 TFEU.

interaction between the Court and its national counterparts. Currently, there are two conflicting perspectives on the interaction and relationship between national courts and the ECJ in the context of the preliminary ruling procedure. On the one hand, one could depict this relationship as co-operative, heterarchical or horizontal. This is done not only by scholars who take a "constitutional pluralist" perspective[11] but also by the ECJ itself. The Court likes to describe in collaborative terms its interaction with national courts and the preliminary ruling procedure. In its judgments, it has repeatedly referred to art.267 TFEU as "an instrument of cooperation".[12] What is more, as mentioned in the introduction, the ECJ has referred to the interaction with national courts as "a dialogue", suggesting that both sides are equal. There are some obvious reasons why the Court itself stresses the cooperative nature of the procedure. First and foremost is the dependent position the Court finds itself in when it comes to receiving references from national courts. The constitutional pluralist literature emphasises that the working and primacy of EU law is based on national constitutional law rather than the autonomous EU legal order, as the ECJ has consistently emphasised since *Van Gend & Loos* (C-26/61) EU:C:1963:1; [1963] C.M.L.R. 105 and *Costa v ENEL* (C-6/64) EU:C:1964:66; [1964] C.M.L.R. 425. This literature does not problematise the fact that the highest—supreme or constitutional—courts are claiming final authority, as was recently illustrated by the reception of the ultra vires declaration of the ECJ judgment by the German Constitutional Court.[13] Based on this literature, it is not surprising that national courts are reluctant to refer, and readily exploit the discretion of the *CILFIT* exception to their obligation to refer. This puts the ECJ in a position of being "humble and thankful" for the referring courts' engagement with it.[14] In addition, the EU legal order lacks effective coercive enforcement mechanisms to ensure that national courts abide by the ruling of the ECJ.[15]

On the other hand, the relationship between the ECJ and national courts can also be construed as hierarchical and the preliminary reference procedure as a monologue.[16] State liability and infringement procedures are ways to ensure that national courts comply with their legal obligation to refer. Especially the ECJ's judgment in *Köbler* and, more recently, *Commission/France* demonstrate that the interaction is more than merely horizontal and cooperative.[17] The ECJ accepted in *Köbler* that Member States are liable for infringements of EU law by their courts of last instance.[18] In *Ferreira da Silva*, the ECJ relied on *Köbler*, and suggested, albeit not in crystal clear terms, that a refusal to refer could lead to state liability.[19] In *Commission/France*, the ECJ determined for the first time in the context of an infringement procedure

[11] M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012); N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 *The Modern Law Review* 317; for a discussion of the merits of this theory, see A. Bobíc, "Constitutional Pluralism is not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice" (2017) 18 *German Law Journal* 1395.

[12] E.g. *Criminal Proceedings against Petruhhin* (C-182/15) EU:C:2016:630; [2017] 1 C.M.L.R. 28 at [18].

[13] *Proceedings brought by Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11; 2 BvR 859/15 (5 May 2020); M. Avbelj, "The Right Question about the FCC ultra vires Decision", *Verfassungsblog* (6 May 2020), *https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/* [Accessed 4 January 2021].

[14] D. Sarmiento, "The Silent Lamb and the Deaf Wolves. Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law", in M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012), p.291.

[15] Sarmiento, "The Silent Lamb" in M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012), p.309; D. Sarmiento, "An Infringement Action against Germany after its Constitutional Court's Ruling in Weiss? The Long Term and the Short Term", *EU Law Live*, 12 May 2020.

[16] E.g. C. Timmermans, "The Magic World of Constitutional Pluralism" (2014) 10 *European Constitutional Law Review* 350.

[17] *Köbler v Austria* (C-224/01) EU:C:2003:513; [2003] 3 C.M.L.R. 28; *Commission v France* (C-416/17) EU:C:2018:811.

[18] *Köbler* (C-224/01) EU:C:2003:513 at [117]–[118]; see also *Traghetti del Mediterraneo* (C-173/03) EU:C:2006:391; [2006] 3 C.M.L.R. 19; *Commission v Italy* (C-379/10) EU:C:2011:775.

[19] *Ferreira da Silva e Brito v Portugal* (C-160/14) EU:C:2015:565; [2016] 1 C.M.L.R. 26 at [44]–[45].

a breach of art.267 TFEU for the failure of the French highest administrative court to refer.[20] This judgment also illustrates that the ECJ is serious in enforcing the duty to refer, and is in no way interested in relaxing the *CILFIT* exceptions to this duty, at least on paper.[21] With these judgments, the ECJ places itself at the top of the judicial hierarchy, which is further corroborated by the fact that ECJ judgments are binding.[22] From this more hierarchical perspective, the interaction is not so much a dialogue as a monologue. Several scholars have already argued that despite the ECJ's own discourse, the procedure has in practice functioned more in such a one-directional way.[23] Van Gestel and de Poorter likewise have pointed to the few possibilities "to talk back to the ECJ".[24]

One problem with the foregoing analysis and the two theories is that they essentially argue in opposite directions. The theories seem difficult to reconcile, especially when they are presented in such black and white terms. Nonetheless, in practice, both cooperative as well as hierarchical elements could be discerned in relation to the preliminary ruling procedure.[25] Moreover, given the aforementioned dependent position in which the Court finds itself, it could even be argued that the ECJ is using the language of co-operation to seduce national courts into following its more hierarchical approach.[26] In the light of these conflicting views, there is every reason to delve into the views of the Court's interlocutors: most notably the national courts and parties to these proceedings. The question remains whether national courts accept and follow this logic of co-operation, and what role parties to the national proceedings have in the procedure before the ECJ.

Trilogue, quadrilogue, or even a group discussion?

Designed in a manner similar to several constitutional courts (Italian, German) and to the Dutch Supreme Court procedures that allow for preliminary questions to be sent by lower courts, the preliminary ruling procedure follows the logic of asking the court with final jurisdiction over the applicable law to provide clarification about how that law is to be applied in a certain case. However, unlike the prototypical procedures within national jurisdictions, the European reference procedure features the added peculiarity of allowing the parties to the original procedure, EU Member States, the European Commission, and possibly other EU institutions to play a role in the process and to intervene in an attempt to influence the outcome.

A prominent blind spot in the previous discussion on whether the interaction is a dialogue or a monologue is, subsequently, that it fails to capture the contributions of other essential actors. These actors include the parties, to the proceedings as well as intervening parties such as the Member States and the European Commission, that play a pivotal role in the preliminary ruling procedure. Given their substantive contribution to the proceedings before the Court, it is possibly better to talk about a trilogue or a quadrilogue or possibly even a group discussion. These other actors also have more to say and a bigger role to play in the procedure

[20] *Commission v France* (C-416/17) EU:C:2018:81 at [111].

[21] The ECJ's new case law on acte clair is far from unambiguous, because some judgments such as *Van Dijk* suggest a relaxation of *CILFIT*. *X v Inspecteur van Rijksbelastingdienst* (C-72/14 and C-197/14) EU:C:2015:564; [2016] 1 C.M.L.R. 27.

[22] *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1 at [16].

[23] M. Claes and M. de Visser, "Are you Networked Yet? On Dialogues in European Judicial Networks" (2012) 8 *Utrecht Law Review* 100, 104; A. Torres Pérez, "Melloni in Three Acts: From Dialogue to Monologue" (2014) E.C.L.R. 308.

[24] R. van Gestel and J. de Poorter, "Supreme Administrative Courts" (2017) 6 *Cambridge International Law Journal* 122.

[25] T. Tridimas, "The ECJ and the National Courts: Dialogue, Cooperation, and Instability" in A. Arnull and D. Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), p.407.

[26] T. de la Mare and C. Donnelly, "Preliminary Rulings and EU Legal Integration: Evolution and Stasis" in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 2015), p.377.

than the national court, which is the mere initiator of the procedure. Article 23(2) of the Statute of the ECJ enables,

> "the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute"[27]

to submit their written observations. Article 32 of the Statute makes it possible for the ECJ to examine the parties to the case during the oral hearing, through their representatives.[28]

The possibility for other such actors to intervene in the proceedings before the ECJ gives the procedure a decidedly political undertone. In fact, it is precisely this aspect that has caught the attention of political scientists trying to get a handle on the political battles that are fought out before the Court among Member States that are defending their interpretation of EU law against that of other Member States and between Member States and the European Commission, which acts as the guardian of the Treaties, and ostensibly serves as an amicus of the Court.[29] The latter confrontations are an especially relevant topic of investigation in the quest towards understanding the dynamics of law and politics in Europe. This is because preliminary references can be used by the Commission as a less overtly political alternative to the infringement procedure it has at its disposal to get Member States to comply with and fulfil their obligations under the Treaties.

There are three main actors that have the possibility of influencing the ECJ after the reference has been made. Previous research suggests that they have been highly successful in doing so. As we shall see later on, these interventions can be so successful that when the ECJ renders its judgments, the case has been given a certain twist beyond the original dispute. As a result, there is a certain disconnect between the ECJ judgment and the case at the national level, which causes difficulties for the referring court.

First, Member States have become "repeat players" because of their privileged access to the ECJ. Since they act via specialised lawyers ("legal agents"), it is not surprising that they are often more successful and wield more influence than "one-shotters", such as the parties to the case.[30] The Member States are not mere neutral *amici curiae* facilitating dialogue, contributing to the development of EU law, or just informing the ECJ about the domestic consequences of a particular interpretation beyond the state where the reference originates.[31] Instead, governmental strategies are aimed at defending more immediate national policy and political preferences as well as "sectoral, corporate or parochial interests".[32] They try to put their stamp on the interpretation of EU law, and tend to put forward narrow interpretations or refer to policy consequences of an expansive interpretation.[33] Work inspired by social science primarily interprets observations submitted to the Court by intervening Member States as being implicit threats of non-compliance in the event that the ECJ rules differently than the Member State's intervention, or as a

[27] Statute of the Court of Justice of the European Union, available at *https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf* [Accessed 11 January 2021].

[28] Statute of the Court of Justice of the European Union.

[29] D. Chalmers, G. Davies and G. Monti, *European Union Law: Cases and Materials*, 2nd edn (Cambridge: Cambridge University Press, 2010), p.318; A. Hofmann, "Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union" (2018) 40 *Journal of European Integration* 737.

[30] M.-P. Granger, "When Governments go to Luxembourg: The Influence of Governments on the Court of Justice" (2005) 29 E.L. Rev. 3.

[31] M. Jacobs, M. Münder and B. Richter, "Subject Matter Specialization of European Union Jurisdiction in the Preliminary Ruling Procedure" (2019) 20 *German Law Journal* 1219.

[32] J. Dederke and D. Naurin, "Friends of the Court? Why EU Governments File Observations before the Court of Justice" (2018) 57 *European Journal of Political Research* 867, 879.

[33] M. Baumgärtel, "Part of the Game: Government Strategies Against European Litigation Concerning Migrant Rights", in T. Gammeltoft-Hansen and T. Aalberts (eds), *The Changing Practices of International Law* (Cambridge: Cambridge University Press, 2018).

signal indicating whether the Member State is likely to legislatively override the eventual ECJ judgment.[34] A limited empirical study on the practice of the Netherlands and Sweden, including ten interviews with government officials, confirmed the thesis that Member States submit observations to protect national legislation, policy, and practice.[35] This also stems from the way in which the legal agents see themselves: namely, as "barristers" that need to "win" their case.[36] It is thus not unexpected that Member States sometimes "frustrate" the process by claiming inadmissibility of the reference order or by arguing that the referring court has misinterpreted national law. Several studies have found that governmental interventions have significantly influenced the decision of the ECJ.[37]

Secondly, according to the same studies, the European Commission has had even more influence than Member States.[38] The Commission's intervention often goes in a different direction than the Member State(s) concerned, since the Commission has the formal task of safeguarding the timely implementation of new EU legislation and the effective application of EU law. This also explains why—in contrast to Member States—the Commission intervenes in every case. Stone Sweet and Brunell show how in situations where the Commission takes a position on how a legal question should be decided "the court tends to comfort [the Commission's] position, in a statistically significant way, even when the [Member State Governments] prefer the opposite outcome".[39] Empirical research and interviews with Commission officials show that the Commission submits its observations, not as the literature suggested, to set out Member State's preferences on the course of legal integration but to contribute to the development of EU law and arrive at a particular outcome.[40] One Commission official held:

> "In a way, you could see the preliminary ruling procedure as way to obtain what could not be obtained during the negotiations of the Directive … a request for a preliminary ruling is a bit like a gift from heaven when it arrives".[41]

As will be shown later, the intervention of the Commission in the Dutch Supreme Court's reference in *Diageo Brands*[42] was given a twist as a result of a disputed intervention of the Commission.

[34] C.J. Carruba, M. Gabel and C. Hanka, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice" (2015) 102 *American Political Science Review* 435; O. Larsson and D. Naurin: "Judicial Independence and Political Uncertainty: How the Risk of Override Impacts on the Court of Justice of the EU" (2016) 70 *International Organization* 377.

[35] F. van Stralen, "The Member State and the Court of Justice: Why do Member States Participate in Preliminary Reference Proceedings?" (2015) Masters Thesis, available at *https://gupea.ub.gu.se/handle/2077/41199* [Accessed 4 January 2021].

[36] F. van Stralen, "The Member State and the Court of Justice" (2015) Masters Thesis.

[37] M.-P. Granger, "When Governments go to Luxembourg" (2005) 29 E.L. Rev. 3; C.J. Carruba, M. Gabel and C. Hanka, "Judicial Behavior under Political Constraints" (2015) 102 *American Political Science Review* 435; O. Larsson and D. Naurin: "Judicial Independence and Political Uncertainty" (2016) 70 *International Organization* 377; J. Frankenreiter, "The Politics of Citations at the ECJ—Policy Preferences of EU Member State Governments and the Citation Behavior of Judges at the European Court of Justice" (2017) 14 *Journal of Empirical Legal Studies* 813.

[38] A.Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); C.J. Carruba, M. Gabel and C. Hanka, "Judicial Behavior under Political Constraints" (2015) 102 *American Political Science Review* 435.

[39] A.Stone Sweet and T. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override" (2012) 106 *American Political Science Review* 204.

[40] E.g. A-M. Burley and W. Mattli, "Europe before the Court: A Political Theory of Legal Integration" (1993) 47 *International Organization* 41.

[41] Commission official 2 as interviewed by M. Gustafsson, "A Political Bellwether? The European Commission's Interaction with the Court of Justice of the European Union under the Preliminary Ruling Procedure", Masters Thesis, available at *https://gupea.ub.gu.se/handle/2077/37783* [Accessed 4 January 2021].

[42] *Diageo Brands BV v Simiramida-04 EOOD* (C-681/13) EU:C:2015:471.

Thirdly, arguably the most overlooked actors in a discussion of the reference procedure and the development of EU law are the parties to the proceedings. A large body of research into the integration of Europe has given special weight to the role of private litigation in activating the preliminary reference system and, by extension, fostering integration dynamics in Europe.[43] Private parties are seen to play an integral role in this equation, in that they are expected to activate this system by bringing cases that trigger questions of EU law in national courts. However, while private litigants are seen as central actors in the integration dynamics, there has been only sporadic empirical investigation into the role they play in pushing for references as well as the influence they have on a case after a reference is made.[44] Subsequently, we have very little insight into how cases reach the Court and the role played by different actors involved in the process. From the perspective of the litigating parties, "Euro-litigation" remains something of a black box.[45] Given the relatively privileged role parties play in the proceedings—in being one of the actors allowed to make their case before the ECJ and potentially steer the judgments of the Court—this is a remarkable blind spot in the literature.

The involvement of these three actors leads us to the formulation of two paradoxes. First, the ostensible primary conversation partner of the ECJ—namely, the referring national court—is almost completely excluded from the process after the reference is made. This is surprising in light of the earlier sketched discourse of dialogue. Secondly, after the reference is made, the parties to the case, the Commission and Member States, while supposedly not part of the conversation between courts, are given every opportunity to steer the case, and can submit written observations and appear and plea in Luxembourg before the ECJ.[46] This raises the question how the procedure is viewed by the two main interlocutors: the litigants and the referring court.

Lawyers' and litigants' perspectives

In striking contrast to the role given to the referring national judge, whose input is effectively stifled once the reference is sent to the ECJ, parties to the national proceedings are given a central role in the procedure in Luxembourg. The current section uses insights from semi-structured interviews with lawyers and parties who have participated in these proceedings to sketch out the peculiar contrast of their role in the procedure with that of the national judge.

Before the reference: who gets the credit for a reference?

In discussions about preliminary references, it is often stressed that the ultimate responsibility for a reference lies with the national judge. The ECJ construes the procedure as a mechanism of inter-judicial co-operation, and has consistently held that art.267 TFEU "does not constitute a means of redress available

[43] For an overview, see L. Conant, "Review Article: The Politics of Legal Integration" (2007) 45 J.C.M.S. 45.

[44] In 1980, Harding pioneered an approach to the ECJ's case law by not only focusing on the legal significance of adjudication and its transformative power within the legal sphere but also by looking at who actually gives *acte de presence* in Luxembourg. Harding in 1992 and Rawlings in 1993 later showed the usefulness of a focus on litigants and strategies in explaining litigation before the ECJ. However, Harding's work was not met at the time with much subsequent in-depth research. For notable exceptions focusing on socio-legal dynamics, see C. Harding "The Private Interest in Challenging Community Action" (1980) 5 E.L. Rev. 354; C. Harding, "Who Goes to Court in Europe?: An Analysis of Litigation against the European Community" (1992) 17 E.L. Rev. 104; C. Harlow and R. Rawlings, *Pressure Through Law* (London: Routledge, 1992); D. Chalmers "The Positioning of EU Judicial Politics within the United Kingdom" (2000) 23 *West European Politics* 169.

[45] R.D. Kelemen and S.K. Schmidt, "Introduction—The European Court of Justice and Legal Integration: A Perpetual Momentum?" (2012) 19 *Journal of European Public Policy* 1, 2.

[46] At least when an oral hearing is scheduled. When the Court does not schedule a hearing, parties may file a "duly reasoned request" for a hearing with the Court.

to the parties to a case".[47] In *Cartesio*, the ECJ held that art.267 is entirely a court-to-court procedure, which is "completely independent of any initiative by the parties".[48] The initiative to refer is thus "exercised exclusively" by national courts, irrespective of the wish of the parties.[49] Individuals cannot exert any influence on whether questions are posed to the ECJ or on how the questions are actually formulated.[50] National courts therefore enjoy the "widest discretion", and have a "monopoly" on determining the relevance of the questions and the need for a preliminary ruling.[51] At the same time, the European Court of Human Rights (ECtHR) has ruled four times that the failure of national courts to provide proper reasons for their decision not to refer infringes art.6 ECHR.[52] By pushing for a reference, parties can indeed play an important role in a national judge's decisions as to whether or not to refer. In that respect, literature dealing with the relationship between the reference procedure and European integration presents the preliminary reference as a powerful tool in the hands of strategic actors that use it to push for certain outcomes at the ECJ level.[53]

In practice, the degree to which parties have an active role in the decision to refer varies considerably, ranging from the relatively rare instances of parties actively pushing for a reference, through to many instances where national judges involve the parties in the process of formulating questions, as well as to instances where references are made completely at the discretion of the judge, without any consultation with the parties. While practice seems to differ between Member States[54]—and likely within jurisdictions as well—interviews in the Netherlands reveal quite a significant trend regarding unexpected references. As one tax lawyer involved in a preliminary reference case declared, he had "no idea that referral was even a possibility", while others were "unpleasantly surprised by the further delay of the case". In the Dutch cases studied, around two thirds of the references occurred without the parties pushing them, and with references being made by courts on their own motion.[55]

There are instances in which the parties are taken completely by surprise by the court's decision to refer or in which courts refer even though the parties to the case argued against it.[56] As a result, the parties are not always happy to suddenly be given such a prominent role in a procedure with which, up to that point, they had had no experience. As one lawyer described, he felt that he "really had no business [at the Court]" and he "did his best, but it was totally pointless". This is somewhat ironic, because the parties can in this

[47] *CILFIT* (283/81) EU:C:1982:335; [1983] 1 C.M.L.R. 472 at [9].

[48] *Cartesio Oktato es Szolgaltato bt* (C-210/06) EU:C:2008:723; [2009] 1 C.M.L.R. 50 at [90]; *Consiglio nazionale dei geologi* (C-136/12) EU:C:2013:489 at [28]; M.P. Broberg, "Preliminary References as a Right—But for Whom? The Extent to Which Preliminary Reference Decisions can be Subject to Appeal" (2011) 36 E.L. Rev. 276.

[49] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01) at [3].

[50] *Hessische Knappschaft v Maison Singer et fils* (44/65) EU:C:1965:122; [1966] C.M.L.R. 82.

[51] *Elchinov v Natsionalna Zdravnoosiguritelna Kasa* (C-173/09) EU:C:2010:581; [2011] 1 C.M.L.R. 2 at [25]; *Krizan v Slovenska inspekcia zivotneho prostredia* (C-416/10) EU:C:2013:8 at [64]; *X. and T.A. van Dijk* (C-72/14 and C-197/14) EU:C:2015:564 at [58].

[52] See most recently *Sanofi Pasteur v France* (25137/16)13 February 2020 ECtHR. J. Krommendijk, "'Open Sesame!' Improving Access to the CJEU by Obliging National Courts to Reason their Refusals to Refer" (2017) 42 E.L. Rev. 46.

[53] See in particular, Stone Sweet, *The Judicial Construction of Europe* (2004).

[54] In more adversarial common law systems such as Ireland and England and Wales, the parties seem to play a far bigger role. See J. Krommendijk, "Irish Courts and the European Court of Justice" (2020) *European Papers* (forthcoming); D. Chalmers and M. Chaves, "The Reference Points of EU Judicial Politics" (2011) *Journal of European Public Policy* 25.

[55] For more on this, see Hoevenaars, *A People's Court?* (2018), pp.76–78.

[56] *Minister voor Vreemdelingenzaken en Integratie v Sahin* (C-242/06) EU:C:2009:554; [2010] 1 C.M.L.R. 8 is an example of how even in a case of parties strategically using EU law to push for national policy changes, they may argue against making a reference to the ECJ because of the unwanted delay associated with such a decision. For a more in-depth description, see Hoevenaars, *A People's Court?* (2018), pp.179–198.

manner be excluded from the decision to make the reference, and are therefore sometimes forced against their will to play an important part in proceedings after an unwanted reference. Of course, the nature of the reference—whether it was intentional and pushed for or, conversely, came as a surprise to the litigating parties and their counsel—has an impact on the way the rest of the proceedings play out, and on the degree to which lawyers are prepared for and equipped to fulfil the role they are assigned in proceedings before the ECJ, as will be discussed next.

After reference: An obscure procedure

The parties to the national proceedings are requested to send in their observations in writing, outlining how, in their view, the questions sent by the national judge should be answered by the Court. After this written part of the procedure, in which the European Commission and other intervening parties—mainly other Member States—also send in their observations, as was discussed above, a hearing may be scheduled. Litigants tend to have trouble understanding the nature of the procedure, and lawyers tend to emphasise their inexperience with the procedure and their uneasiness with the role they are assigned during these proceedings. This is in distinct contrast to the powerlessness some referring judges feel with regard to their inability to respond to interventions by third parties to the proceedings before the ECJ, as will be discussed below.

A telling illustration that underlines the perception of the reference procedure in the eyes of litigants is the trouble lawyers have in explaining the function and significance of a reference to their clients. As one lawyer explains:

> "What I try to explain to them is that the Dutch judge is basically asking for clarification. That is always difficult to get across. Clients always have the idea that the Court of Justice is a higher appeal body."

The perceived obscurity of these proceedings has resulted in some remarkable misunderstandings among litigants, most notably concerning the intervention of the European Commission and other Member States. As one litigant recalls:

> "Some strange things happened at the Court of Justice. The Court asked for advice from other Member States. And which countries did they choose? Finland and the Czech Republic and France. And they all disagreed with us and said we must participate in national solidarity. … I think simply by choosing these countries, they can steer the case in a certain direction. I have the impression that they influence it and that we are manipulated that way."

Such misunderstandings underline the obscurity of the procedure for lay persons as well as the apparent trouble lawyers have in explaining the nature and function of a procedure that tends to extend the duration of a case by 15 months on average.

As to the initial written part of the procedure, many lawyers feel overwhelmed and unequipped to argue a case at the ECJ level. As one migration lawyer summarised:

> "I do think the majority [of us lawyers] know what's in those directives. Most can recite what is in Article 33 or whatever. But I feel we really lack knowledge about the principles of effectiveness and proportionality, and how you work with those kinds of principles."

One social security lawyer underlined the lack of support from colleagues:

> "You don't have many people you can spar with. You can't even call a colleague about how they see it. You have to read all those ECJ judgements to know what the Court says about the subject,

> how to interpret it, how you should use it, and whether it is not immediately settled to the contrary. Because you often miss the nuance."

As a result of their inexperience, lawyers tend to scramble to find outside assistance, such as from academics.

As for the oral part of the proceedings, the often highly technical legal nature of procedures before the ECJ leads some lawyers to conclude that the oral proceedings do not matter a great deal to the outcome of a case, since "everything has already been said in the written part". Apart from practical considerations—such as the costs involving traveling to Luxembourg—the idea of its relatively diminished usefulness, or "nothing more than a ritual", as one lawyer put it, can play a role in practitioners' decision not to request and attend the hearing in Luxembourg. In a little under half of the Dutch cases studied (18 out of 39), parties decided to forego the option for a hearing.

Underdogs in a supranational law game

Legal representatives are not necessarily equipped to plead a case at the ECJ level. Assuming they are actually present to do so, they can certainly not be expected to correct misinterpretations or misunderstandings of national law in the submissions of the intervening parties (as was discussed above). As such, the design of the procedure, and the possibility for other actors to intervene, may lead to an imbalance in the way different positions are presented before the Court. The European Commission, filing an observation in every preliminary reference case, has at its disposal a battalion of EU law experts with regular experience in writing observations and with sometimes even weekly appearances before the Court. Most Member States employ similar experts that represent the states before the Court on a regular basis. There is then quite a contrast between these experts who have both substantial and practical expertise in litigating in Luxembourg and the average lawyer who finds him/herself before the highest court in the EU having to take on these well-equipped opponents.[57] As one tax lawyer explains, the practice of the proceedings, and the time allotted to the different parties present, can result in an uphill battle:

> "[The Member States] had divided their speech into say ten pieces or so, and they had coordinated it. Every Member State will receive twenty minutes of talking time. So, they have not twenty but two hundred minutes. And we only had twenty minutes to respond to every argument, so that's done very cleverly."

Moreover, the oral stage of the proceedings provides parties with the only possibility to respond to observations filed by both the European Commission and intervening Member States. Especially at a hearing, parties have the opportunity to provide and clarify "pure facts or aspects of national law".[58] Member States usually intervene in order to provide their viewpoint when they have an interest in a certain outcome of a case. As discussed above, these viewpoints are clearly not devoid of strategic considerations with regard to national policy and economic interests.[59] In the division of roles before the Court, the European Commission ostensibly serves as an amicus of the Court and somewhat of an expert opinion when it comes to interpreting EU law.[60] However, what representatives of the Commission will have in expertise regarding EU law, they may lack when it comes to the minutia of national law and policy, as

[57] Not all Member States will be opponents in every case. In many instances, due to the nature of preliminary references dealing with potential discrepancies between EU law and national implementation, the parties may find the Commission largely on their side.

[58] D. Edward, "How the Court of Justice Works" (1995) 20 E.L. Rev. 545. See also D. Vaughan and M. Gray, "Litigating in Luxembourg" (2007) 11 *Jersey & Guernsey Law Review* 1.

[59] See fnn.26–34 above.

[60] Chalmers, Davies and Monti, *European Union Law: Cases and Materials* (2010).

well as the interaction between EU law and national practise. Since the national judge—who would arguably be the best neutral arbiter of matters related to national law and policy—is not part of the proceedings before the ECJ, and since Member State representatives have an interest in a certain outcome of the case, lawyers representing parties in the national proceedings are the only ones to provide a counterbalance to possible misrepresentations by the Member States. As such, when uncertainty about the national implementation of EU rules occurs during the oral stage, these lawyers are given the curious responsibility of informing the Court about national law and procedure.

In summary, when a reference is not the result of purposeful actions by parties in the national proceedings, and lawyers are not actively engaging in arguments about the relationship between national and EU law, they are not necessarily prepared for or equipped to take on the important task that is bestowed upon them. Especially if there exists ambiguity regarding national law and where Member States may try and influence the Courts' interpretation, these lawyers may be the only ones present to counter such attempts. Being able to do so effectively requires lawyers to be well versed in both national practice and the interaction between national and EU rules. Given the large number of unexpected references,[61] it is no surprise that many lawyers do not feel up to this task. [62]

National judges' perspectives

The previous account demonstrated that actors other than the referring court—including the litigating parties and their lawyers—have an influence on ECJ judgments. The result could be that the reference undergoes a make-over in Luxembourg and no longer fits the original reference of the national court. This raises the question as to what the referring court thinks of this process in Luxembourg. The present section aims to answer this question primarily on the basis of interviews with national judges. It should be stressed from the outset that almost all judges were generally satisfied with most of the answers of the ECJ and found them clear and useful. Most judges also put their criticism in context, and showed an understanding of the difficult context in which the ECJ operates, with 27 different Member States and 24 official languages as well as many different legal fields and specialisations.[63] Those judges with more extensive experience noted an improvement on the part of the ECJ in comparison to older cases. One Dutch lower court judge, for example, noted that the ECJ has begun to pay careful attention to the preferred answers of the referring court, and addresses the arguments in a serious manner. It is possibly not a surprise that some—especially Dutch—highest administrative courts, with an obligation to refer, have been more critical. They are "repeat players", and have simply referred more cases and, as a result, had more extensive interaction with the ECJ.

[61] When a reference is expected, lawyers tend to be more prepared for and versed in relevant legislation and jurisprudence, and tend to be (or at least have the support of) EU law specialists.

[62] See also J. Hoevenaars, "Advocaten in Europa: vertegenwoordiging op het hoogste niveau?" (2019) 3 *Recht der Werkelijkheid* 7.

[63] See also J. Krommendijk, "The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration" (2018) *European Journal of Legal Studies* 101.

A vertical relationship and a monologue

The responses of the Irish and Dutch judges who were interviewed made clear that they primarily see their relationship with the ECJ as vertical.[64] Judges attributed this to the legal duty to comply with ECJ judgments.[65] Court of Appeal judge Hogan argued in his follow-up judgment in *Danqua*:

> "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."[66]

Even though judges have not been questioned directly about this, it seems that national judges do not really subscribe to the non-committal, more heterarchical, co-operation discourse of the ECJ. At the end of the day, national courts have to abide by ECJ rulings.

Irish and Dutch judges also postulate that interaction with the ECJ should not be seen as a genuine dialogue. Dutch judge and scholar de Werd, for example, referred to the preliminary ruling procedure as "a one-way Q&A procedure that lacks timely exchange of new relevant information".[67] One Dutch judge also mentioned the "one directional" nature of the interaction, and referred to a "presumed" dialogue. Another Dutch judge likewise argued that for a dialogue it should be more "dynamic". Late Council of State judge Mortelmans used a ferry metaphor to point to the fact that the two activities are largely apart from each other: back (the reference) and forth (the ECJ's answer).[68] Other judges pointed to the "distance" between national courts and the ECJ, and the limited nature of the interaction as a result of purely written communication. The views of Dutch and Irish courts are not isolated phenomena, and reflect findings in the literature.

Dialogue also presupposes a certain equality between the interlocutors. This is absent, however, not only from a more formal legal perspective as was set out in Section 2 but also from the subjective perception of judges. Some judges observed that the ECJ sometimes presents itself as a "know-it-all", and they lamented the "pedantic" attitude. One Dutch judge spoke about "an ivory tower at the Kirchberg scattering its wisdom over us". Another Dutch judge held that there is a certain degree of "arrogance" and the notion of "a high mass with the devotees at a distance". A Dutch higher court judge held that he/she had the feeling during a visit to Luxembourg that the attitude of ECJ judges was: "You come to us, we determine the rules." One judge noted the defensive reaction of ECJ judges when he/she raised shortcomings in ECJ case law.[69] Another highest administrative court judge argued that the ECJ considers that the co-operation with national courts is fantastic, but that the national judge does not share that experience. Van Gestel and

[64] See also former Dutch Supreme Court judge Loth in M. Loth, "De Hoge Raad in dialoog: Over rechtsvorming in een gelaagde rechtsorde" (2014), inaugural lecture at Tilburg University, *https://pure.uvt.nl/ws/portalfiles/portal/10370770/De_Hoge_Raad_in_dialoog.pdf* [Accessed 4 January 2021], p.21; Former President of the Dutch Council of State in J.E.M. Polak, *Samenwerking van hoogste rechters van rechtseenheid* (Oisterwijk: Wolf Legal Publishers, 2015), p.16.

[65] See also Clarke, "Appex court dialogue: the view from Dublin", a speech during the annual conference of the Irish Supreme Court Review, 6 October 2018, p.2.

[66] *Danqua v Minister for Justice and Equality* (C-429/15) EU:C:2016:789 at [36].

[67] M. de Werd, "Dynamics at Play in the EU Preliminary Ruling Procedure" (2015) 22 *Maastricht Journal of European and Comparative Law* 149, 152.

[68] K.J.M. Mortelmans, "Opmerkingen in prejudiciële zaken: lidstaat Nederland en het bestuursorgaan als partij in het hoofdgeding" in T. Baumé et al. (eds), *Today's Multi-layered Legal Order: Current Issues and Perspectives: Liber amicorum in Honour of Arjen W.H. Meij* (Zutphen: Paris Legal Publishers, 2011), p.235.

[69] C.f. Weiler's comments about 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. J.H.H. Weiler, "Epilogue: Judging the Judges—Apology and Critique" in M. Adams et al. (eds), *Judging Europe's Judges: the Legitimacy of the European Court of Justice Examined* (Oxford: Hart Publishing, 2013), p.235, 236.

de Poorter also discuss how a number of Supreme Administrative Courts do not see themselves as "equal partners to the ECJ".[70]

The "know-it-all" attitude has also been observed in relation to ECJ judgments. One Irish judge stated that the ECJ presents itself as an "oracle" or uses mere magic formulas without making clear why it has spoken in a certain way.[71] In a similar vein, a Dutch tax law judge pointed to the "apocalyptic" nature of customs cases, in which the ECJ merely presents a particular tariff classification as a matter of fact: "This is it." One Irish judge argued that "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". Judges also criticised a particular aspect of the perceived ivory tower mentality. Some wondered whether ECJ judges are sufficiently in touch with reality and society at large. This was because the ECJ, in the view of the national judges, paid insufficient attention to societal concerns and questions related to the consequences and feasibility of the implementation of ECJ judgments, especially in the area of migration. One judge wondered: "Does the ECJ ever go outside?"

In summary, this subsection has demonstrated that national court judges construe their relationship with the ECJ as being vertical. What is more, they are critical of the lack of a true dialogical nature and lament the know-it-all attitude of the ECJ.

A far-away black box

One dimension of the absence of a dialogue is the idea among some, especially Dutch judges, that the period after the reference and before the ECJ judgment is a "black hole" or "black box", during which the referring court does not hear anything. One Dutch interviewee remarked: "Everything happens very far away". Some judges complained that you hardly hear anything from Luxembourg in terms of the procedure, how long it will take, and when the judgment is due. It can happen that judges hear informally during a conference or from the parties to the case whether a hearing will take place or when judgment is expected. Some judges held that it is difficult to obtain an overview of what is happening within a case, also because no copies of the interventions of the Commission and Member States are sent. These views, however, are not necessarily shared among all judges. Other judges were more content, and generally held that they were well informed about the procedure, stating that they received copies of all relevant moments and dates. It is indeed common ECJ practice to inform the referring court of the observations.[72] The views of some judges are therefore somewhat surprising. It could be that, as one judge acknowledged, copies with relevant details from the ECJ were lost internally.

This silence and uncertainty have been particularly difficult for Dutch lower court judges. One lower court judge mentioned that they hardly knew how things were going in Luxembourg. A visit to the ECJ remedied this lack of knowledge. This judge also held that this distance is inherent in any legal system, also nationally, but noted that lower and higher judges within one country "talk to each other" and know each other. Another judge labelled the procedure as "stiff" and "treacly" and mentioned that he/she, for

[70] Van Gestel and de Poorter, "Supreme Administrative Courts" (2017) 6 *Cambridge International Law Journal* 122, 138.

[71] Another Irish judge held that judgments are not Delphic, and they are not as clear as crystal. The ECJ would do well to anticipate that what they are saying is opaque and can be seen in different ways. One Dutch judge said that the ECJ used a kind of incantation formula, and it stated with great ease that there is no ambiguity regarding the term market manipulation on the basis of different language versions, which had already been pointed out by the Trade and Industry Appeals Tribunal as well in its order for reference. *IMC Securities BV* (C-445/09) EU:C:2011:459 at [26].

[72] Question 13 in *General Report: ACA Europe Seminar on the preliminary ruling procedure*, The Hague, 7 November 2016, *http://www.aca-europe.eu/images/media_kit/seminars/2016_TheHague/General-Report-ENG.pdf* [Accessed 5 January 2021], pp.20–21; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), para.30.

example, received unclear questions from the ECJ registry that were difficult to interpret, even though communication was in Dutch. For higher court judges, this black hole has been less of a problem, also because they have generally more informal contacts with ECJ judges and the Court registry. Court clerks of one of the highest administrative courts, the Council of State, have for example spent a particular seconded period in Luxembourg. In addition, there are several former Dutch government agents who are now judges in the Council of State. These connections and insights into the procedures are considered helpful, because judges sometimes hear about particular intermediary steps. Such informal contacts help judges in composing their orders for reference. One judge mentioned that he/she was alerted by the Dutch ECJ judge that the order would not be translated beyond 20 pages.

The procedure becomes less of a black box when judges attend the oral hearing in Luxembourg, as was also noted in relation to the parties. Judges who did so were positive about this experience. One Dutch lower court judge held that it was "impressive" and "awesome". According to another judge, being present during the hearing in Luxembourg helps to interpret the eventual ECJ judgment, because you know what has been stated and asked during the hearing. When the ECJ judgment touches upon a particular point—or not—the referring court "knows where that comes from".[73] The practice of one of the highest Dutch administrative courts is that usually a court clerk goes to Luxembourg. This is also considered valuable to see whether the ECJ posed the right questions or whether the Dutch government stated something "strange'.[74] Across the EU, it seems an exception that national court judges attend the hearing, since it is not felt to be necessary or useful.[75] The practice has also been less common in Ireland, also considering the relatively longer distance to Luxembourg. Given the concerns sketched in this section, national courts should be encouraged to attend these hearings. An easier and realistic alternative would be for the ECJ to livestream its hearings.[76]

An inability to steer

The most problematic aspect of the period after the reference is the absence of the referring court in this period, while others are involved and "take off" with this reference. One judge spoke about their "powerlessness". Others who do not necessarily have the required case-specific expertise are involved to a greater extent.[77] The intervention of Member States in particular can give rise to mistakes. The national court judge cannot, in the words of several interviewed judges, correct a wrong or pointless intervention of a third party. Langer, a Dutch government agent before the ECJ, admitted that it is attractive for Member States, which have an interest in a particular outcome, to argue that the national court has misinterpreted national law. He recognised that it is frustrating for such national courts, because they cannot reply to such an intervention or to the submissions of the parties or the Commission. According to him, but also Wattel, AG at the Dutch Supreme Court, this precludes an effective dialogue.[78]

[73] See also J. Langer, "The preliminary ruling procedure: old problems or new challenges" (2016), inaugural lecture at Groningen University, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885256* [Accessed 5 January 2021], p.14.

[74] C.f. Langer, "The preliminary ruling procedure" (2016), inaugural lecture at Groningen University, p.14.

[75] Question 10 in *General Report: ACA Europe*, [Accessed 5 January 2021], pp.20–21.

[76] A. Alemanno and N. Petit, "Open letter to the President of the European Court of Justice asking for public hearings to be live streamed", February 2020, *https://thegoodlobby.eu/campaigns/open-letter-to-the-president-of-the-court-of-justice-of-the-european-union-asking-for-eu-courts-to-live-stream-their-public-hearings/* [Accessed 5 January 2021]. See more generally A. Alemanno and L. Pech, "Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System" (2017) 54 C.M.L.R. 129.

[77] C.f. Langer, "The preliminary ruling procedure" (2016), inaugural lecture at Groningen University.

[78] Langer, "The preliminary ruling procedure" (2016), inaugural lecture at Groningen University, p.13; c.f. P.J. Wattel, "Prejudiciële samenwerking en dialoog" (2015) *Nederlands Juristenblad* 2056.

One way in which the referring court can be involved to a greater extent is if the ECJ uses art.101 of the Rules of Procedure to request clarification from the referring court. Judges noted that the ECJ has hardly ever made use of this possibility, and that this type of more dialogical communication has been absent. This perception is confirmed by ECJ statistics, which show that the ECJ has used this procedure on an average of seven times on an annual basis.[79] One Dutch judge noted that the ECJ should have made use of this possibility from the beginning, because when it does so nowadays it is interpreted by the referring judge as being a "reprimand". Another judge had experienced that the ECJ asked for additional information about the characteristics of a particular good. He/she wondered why that had not happened in other cases in order to ensure that the ECJ judgment would fit in the national legal order "down to the details".

National courts sometimes find creative informal ways to reach the ECJ and to ensure useful and correct answers. The Council of State was afraid that the ECJ would provide a strange or incorrect answer based on the AG Opinion that showed a misunderstanding of the national context. The Council of State asked the Dutch legal agents to request the reopening of the oral hearing. Even though the Council knew that this request would never be formally granted, the idea was to inform the ECJ about the misunderstandings. These informal possibilities are obviously far from optimal, and a more extensive use of the formal possibility of entering into a dialogue via art.101 seems a better route, also with a view to avoiding unsatisfactory answers.

Answers that are unsatisfactory from a dialogical perspective

From a dialogical perspective, there are three types of problematic ECJ answers. The first problem occurs when the ECJ reformulates the questions. Judges do not object to "mere" stylistic reformulations that do not affect the content of the questions asked.[80] They understand that the preliminary ruling procedure inherently implies that the ECJ frames the question as a European issue, and to a certain extent "dislocates" it from the domestic dispute. Reformulation is nonetheless considered problematic when the case undergoes an unexpected twist, and when the original question asked is not answered or the ECJ misunderstands the question. One Irish judge, for example, held that there can be a "problem in getting the CJEU to answer the question you want them to answer". Another Dutch judge also considered this annoying because of the amount of careful work put into the formulation of the questions. The prevalence of this problem should, however, not be exaggerated. Not all substantive reformulations are problematic.[81] There have been a handful of instances in the Netherlands in the last five years or so where a substantive reformulation also created difficulties, while there has been only one case in Ireland. In *Danqua*, the Court of Appeal asked about the 15-day time limit for applications for subsidiary protection in relation to the principle of *equivalence*.[82] The ECJ considered this question "irrelevant" and reformulated it ("must be understood") to a question asking whether the principle of *effectiveness* precludes the Irish procedural rule (answer:

[79] In the 7.5 years between 1 January 2009 and 30 April 2016, this happened in 56 cases. Questions 12 and 19 in *General Report: ACA Europe*, p.29.

[80] See also U. Šadl and A. Wallerman, "The Referring Court Asks, in Essence: is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-making Approach" (2019) E.L.J. 416.

[81] In *Schrems*, the ECJ reformulated the question as being about the validity of the Safe Harbour Decision in light of the Charter of Fundamental Rights, even though referring High Court Judge Hogan clearly decided against this in his order for reference. *Schrems v Data Protection Commissioner* [2014] IEHC 351; [2014] 3 C.M.L.R. 38 at [37]–[39]; *Schrems v Data Protection Commissioner* (C-362/14) EU:C:2015:650; [2016] 2 C.M.L.R. 2. By contrast, the ECJ did not deal with the validity in *Aramex*, although the question asked explicitly about it. The ECJ just mentioned very briefly that there was no reason to doubt the validity. *Aramex Nederland BV v Inspecteur van de Belastingdienst/Douane* (C-145/16) EU:C:2017:130.

[82] *Danqua v Minister for Justice and Equality* [2015] IECA 118.

yes).[83] It is not surprising that the referring judge, Hogan J, was highly critical of the ECJ's answering of questions not posed, especially because this issue was not raised in the domestic proceedings.[84] In *Franzen*, the Dutch Central Appeals Tribunal asked whether a social security allowance "must" be provided on the basis of EU law, but the ECJ only determined that this was at the discretion of the authorities ("may"). Again, judges were critical in this regard, and argued that it was a useless exercise because they already knew that.[85]

A second problem from the perspective of dialogue arises when the ECJ does not answer the question, because it declares—from the perspective of the referring court unfairly—the question inadmissible or it dodges the question on "dubious" procedural or substantive grounds.[86] Again, the occurrence of this problem should not be overstated, and seems to have been confined largely to cases referred by two of the highest Dutch administrative courts; the Council of State and the Central Appeals Tribunal. In *Servatius*, the ECJ declared the seventh question about services of general economic interest inadmissible, and limited itself to the free movement of capital. This was very much an affront to the Council of State, who felt "downright embarrassed", since the formulation of the question had been carefully considered.[87] The Council has been in similar situations in a case dealing with biometric data (*Willems*) and the Services Directive (*Trijber and Harmsen*).[88] Likewise, 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 that State.[89]

A third problem for national courts emerges when the ECJ does not take the concerns of the referring court seriously.[90] The previous account and the interviews with primarily Dutch judges illustrate that judges consider it particularly annoying when the ECJ gives the impression that it has casually disregarded the considerations or concerns of the referring court. This is especially so when without any reasoning the ECJ ignores the considerations and opts for a different approach.[91] In doing so, the ECJ fails to appreciate that the decision to refer and the formulation of the order and the questions is based on careful deliberation. One good example is *Diageo Brands*, referred by the civil chamber of the Dutch Supreme Court. Judges were frustrated with the "startling" handling of this reference by the ECJ that led to a "breakdown of two systems". The Supreme Court asked whether it was required to recognise the judgment of a Bulgarian lower court that was based on a Bulgarian Supreme Court judgment that "manifestly misapplied EU law", also in the view of the Commission.[92] In its order for reference, the Supreme Court implicitly showed its preference for non-recognition by stating that there are good reasons for refusing the execution of such an erroneous judgment. The ECJ did not go along with the Supreme Court and favoured the principles of

[83] *Danqua v Minister for Justice and Equality* (C-429/15) EU:C:2016:789 at [35]–[36] and [38].

[84] *Danqua v Minister for Justice and Equality (No.2)* [2017] IECA 20 at [1], [3], [15] and [19].

[85] *Franzen v Raad van bestuur van de Sociale verzekeringsbank* (C-382/13) EU:C:2015:261; [2015] 3 C.M.L.R. 29 at [56] and [67].

[86] See also M. Eliantonio and C. Favilli, "When Two Preliminary Questions Result in One and Half Answers: A 'Constitutional Tragedy' in Four Acts" (2020) 5 *European Papers* 911.

[87] *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius* (C-567/07) EU:C:2009:593; [2010] 1 C.M.L.R. 17.

[88] For a discussion, see Krommendijk, "The Highest Dutch Courts and the Preliminary Ruling Procedure" (2019) 25 E.L.J. 394; *Willems v Burgemeester van Nuth* (C-446/12 to C-449/12) EU:C:2015:238; [2015] 3 C.M.L.R. 26; *Trijber (t/a Amstelboats) v College van burgemeester en wethouders van Amsterdam* (C-340/14 and C-341/14) EU:C:2015:641; [2016] 1 C.M.L.R. 38.

[89] *Martens v Minister van Onderwijs, Cultuur en Wetenschap* (C-359/13) EU:C:2015:118; [2015] 3 C.M.L.R. 3.

[90] See more extensively about the ECJ's strategies when rejecting the view taken by a referring court: A. Wallerman Ghavanini, "Power Talk: Effects of Inter-court Disagreement on Legal Reasoning in the Preliminary Reference Procedure" (2020) 5 *European Papers* 887.

[91] *Baris Unal v Staatssecretaris van Justitie* (C-187/10) EU:C:2011:623.

[92] 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. *Diageo Brands* NL:HR:2013:2062, para. 5.2.2, 5.3.2.

mutual recognition and mutual trust. Interviewed judges especially criticised the ECJ for easily following the "political manipulation" of the Commission, which—according to interviewees—had withdrawn its earlier determination of a breach because it had concluded a "political deal" with Bulgaria.[93] In joining 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.[94] This incident shows that actors other than the referring court can sometimes have more influence and frustrate the process, as discussed above.

Judges' suggestions for improvement

Given the absence of the national court judge in the period after the reference and before the ECJ answer, several judges held that they should be given a bigger role in order to prevent the ECJ from wrongly interpreting the national legal framework. This would also enable the judge to correct or complement the intervening actors, and would thereby reduce the ill-placed and onerous responsibilities put on the parties, as set out above.

Dutch judge and academic de Werd also held that not allowing for the national judge to intervene in the event of misunderstandings "is a missed opportunity in terms of the efficiency and effectiveness of both the procedures at the Court and at home."[95] Bobek likewise noted "pedagogical and legitimacy-enhancing" advantages when national courts obtain "direct voice and participation".[96] Several Irish and Dutch judges reasoned in a similar way. Such views are not limited to Ireland and the Netherlands. A report of the European Association of Councils of State and Supreme Administrative Courts (ACA) on the preliminary ruling procedure mentions that a considerable number of Supreme Administrative Courts recognised the benefits of "alternative forms of communication" after the reference and before the ECJ judgment.[97] There are various options. First, the national court could respond in writing to the written observations of the intervening parties.[98] A second, more far-reaching, possibility is that in some cases the referring judge(s) is/are invited to Luxembourg to explain a particular reference.[99] This shortens the "distance" between the ECJ and national courts, and creates a more dynamic interaction. There are, however, also principled arguments against submitting additional written observations or participation in the oral hearing. The ACA report, for example, argued that this leads to tension regarding the impartiality of judges, and has a negative effect on the position of the parties.[100] It could also be argued that the order for reference is the "best representation" containing a detailed and reasoned overview of all relevant aspects making additional observations redundant and undesirable.

Given these concerns, a more realistic option is, as some Dutch and Irish judges have also noted, a more extensive use of art.101 of the Rules of Procedure.[101] This enables the ECJ to ask additional questions: for example, about the purpose of particular questions or about the national legal framework or facts. It could

[93] *Diageo Brands BV v Simiramida-04 EOOD* (C-681/13) EU:C:2015:471 at [54]–[55].

[94] AG Szpunar in *Diageo Brands* (C-681/13) EU:C:2015:137 at [32]; M. Loth, "De Hoge Raad in dialoog" (2014), inaugural lecture at Tilburg University, *https://pure.uvt.nl/ws/portalfiles/portal/10370770/De_Hoge_Raad_in_dialoog.pdf* [Accessed 4 January 2021], p.65.

[95] De Werd, "Dynamics at Play" (2015) 22 *Maastricht Journal of European and Comparative Law* 149.

[96] M. Bobek, "Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts" in M. Adams et al. (eds), *Judging Europe's Judges: the Legitimacy of the European Court of Justice Examined* (Oxford: Hart Publishing, 2013), pp.197, 212–213.

[97] Question 10 in *General Report: ACA Europe*, p.14.

[98] Mortelmans, "Opmerkingen in prejudiciële zaken" in Baumé et al. (eds), *Today's Multi-layered Legal Order: Current Issues and Perspectives: Liber amicorum in Honour of Arjen W.H. Meij* (2011), pp.239–240; Question 13 in *General Report: ACA Europe*, pp.20–21.

[99] P.J. Wattel, "Prejudiciële samenwerking en dialoog" (2015) *Nederlands Juristenblad* 2056.

[100] Question 14 in *General Report: ACA Europe*.

[101] C.f. Langer, "The preliminary ruling procedure" (2016), inaugural lecture at Groningen University, p.15.

even enable the ECJ to consult the referring court when it reformulates questions in such a way that this changes their content. One Dutch lower court judge spoke about "an intermediate round" whereby the reformulated questions are submitted to the referring court.[102] Irish Supreme Court judges have even brought this issue to the attention of the ECJ during a bilateral meeting with the ECJ, also because recasting questions is considered to do more harm than good, as outlined above. The ECJ nonetheless cautioned that using art.101 may entail significant delays, also because some national systems require courts to hear the parties on it.[103] Both Irish and Dutch Judges guessed that the reluctance of the ECJ could also be explained by the perceived need—and associated costs—of translating the clarifications of the national court. Translation is required on the basis of art.101(2) Rules of Procedure with respect to the interested persons referred to in art.23 of the Court's Statute.[104] It would be regrettable if these procedural obstacles prevented a more fruitful and genuine dialogue. The ECJ and EU Member States should, therefore, examine whether these obstacles can be alleviated.

By way of conclusion, the previous account shows particular problematic aspects in the functioning of the preliminary ruling procedure from the perspective of the referring court, especially when juxtaposed with the role assigned to the parties in correcting for misinterpretations of national law. Given the growing number of references and the indications that national courts are becoming more critical, as illustrated by the *Weiss* judgment of the German Constitutional Court,[105] it would be wise for the ECJ to seriously consider broadening the possibilities of the referring court to become involved after the reference has been made.[106] This could reduce some of the ill-placed responsibilities imposed on the parties.

Conclusion

By means of interviews with referring judges and parties to the national proceedings, we have been able to take stock of the way in which two of the ECJ's main interlocutors experienced their involvement in the preliminary ruling procedure. Our findings call into question the added value of prevailing narratives about the procedure. In addition to a general lack of insight into the way these actors experience the procedure, we identified two problems with prevailing notions of the procedure as a dialogue. First, the characterisation of the procedure as a dialogue erroneously suggests that national courts have a strong position in the procedure. Secondly, treating the procedure as entirely court-to-court fails to capture the contributions of other essential actors. Our data, therefore, calls into question the added value of maintaining the term "dialogue" when discussing the preliminary ruling procedure. Opening up the debate about interactions with the ECJ to include the Court's other interlocutors that have thus far largely been excluded from the discourse will improve not only our understanding of the dynamics that occur during the procedure but will also reveal the extent to which the procedure fulfils its own purpose.

The analysis of how national judges and parties to the proceedings experience and evaluate the procedure reveals a mismatch between them in terms of the assignment of roles. On the one hand, the large number of lawyers who were caught off guard by the reference to the ECJ, and their general lack of experience and expertise, paints a different picture, and it stands in stark contrast to the idea of well-equipped strategic actors pushing for certain outcomes. Instead, while parties are given a central role in the preliminary reference procedure, they tend to be underdogs in a supranational legal game for which they lack the necessary skills and experience, especially when it comes to correcting possible misinterpretations of national law. On the other hand, national judges express discontent with the limited means they have for

[102] Another interviewee stated jokingly that the ECJ should send a draft of its judgement first to the national court.
[103] Question 19 in *General Report: ACA Europe*, p.29.
[104] Question 19 in *General Report: ACA Europe*, p.29.
[105] *Proceedings Brought by Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11.
[106] C.f. Bobek, "Of Feasibility and Silent Elephants" in Adams et al. (eds), *Judging Europe's Judges: the Legitimacy of the European Court of Justice Examined* (2013), p.233.

participating in the process after the reference. Through the intervention of other actors, predominantly Member States, they may receive an ECJ judgment that is far removed from the questions they sent to Luxembourg. In summary, while referring judges may feel that they are not equal discussion partners in a dialogue, the parties and their lawyers participate in a discussion in which they emerge as an underdog. This being the case, speaking of a dialogue fails to capture the reality of the procedure in both directions.

Calls by national judges to be given a more prominent role after the reference only underscore this point. While carving out a role for the referring judge in the procedure is an unlikely prospect, the increased use of art.101 of the Rules of Procedure by the ECJ is a relatively easy measure to more actively engage the national judge. It could simultaneously improve the collaborative nature of the preliminary ruling procedure as well as take away some of the pressure put on parties when it comes to clarifying matters of national law with regard to the ECJ.