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Marleen Kappé

Unveiling Reasons of Belgian Highest Court Judges and Law Clerks (not) to Refer Preliminary Questions to the Court of Justice of the European Union: A Nuanced Legalist Image

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Unveiling Reasons of Belgian Highest Court Judges and Law Clerks (not) to Refer Preliminary Questions to the Court of Justice of the European Union: A Nuanced Legalist Image

Marleen Kappé *

Abstract

The question what motivates judges to use the preliminary reference mechanism has been subject to academic debate for the past decades. More recently, a second wave of literature emerged which employs qualitative methodologies in an attempt to address this question. However, this empirical research only covers a few European legal systems and mostly focusses on the use of the preliminary reference mechanism by lower instance courts. Research on the reasons of highest national court judges to resort to the preliminary reference mechanism is however particularly interesting as many of the 'grand theories' on judges' participation in the mechanism primarily see incentives for lower instance courts to use the procedure, whereas they would expect last instance courts to be rather reluctant in doing so. Moreover, an inquiry into the reasons of highest national court judges to participate in the preliminary mechanism allows for a reflection on the role that the obligation to refer laid down in 267 TFEU and the CILFIT caselaw plays. The present working paper therefore inquires into the reasons of Belgian highest national court judges and law clerks (not) to make preliminary references to the ECJ about questions on the interpretation or validity of EU law and the role of the obligation to refer following from article 267 TFEU and the CILFIT case law in that decision. To answer this question, the paper builds on legal doctrinal and quantitative insights as well as on novel qualitative data gained through interviews with 10 judges and law clerks of Belgian highest national courts.

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* PhD Candidate at the Institute for European Law, KU Leuven, Leuven, Belgium. A further elaborated and revised article based on Working Paper has been published in German Law Journal; U Jaremba & M Kappé, 'The Unfolding Story of Judicial Dialogue in the EU: The Coercive and Persuasive Motives Behind the Participation of Belgian Highest Courts in the Preliminary Ruling Procedure' (2024) German Law Journal 1. The author would like to thank Urszula Jaremba and Elise Muir for their guidance and support.

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1. Introduction

Oftentimes referred to as the 'jewel in the crown', the preliminary reference mechanism holds that any national court or tribunal of a member state *may* refer a preliminary question to the European Court of Justice (ECJ) about the interpretation of the Treaties or the validity and interpretation of acts of EU institutions.[1] Moreover, any national court of last instance[2] *must* (besides exceptions)[3] request a preliminary ruling from the ECJ if it has questions regarding the interpretation of Union law or the validity of acts of EU institutions.[4] Article 267 of the Treaty on the Functioning of the European Union (hereafter: TFEU) sets out the content of the preliminary reference procedure in detail. It reads as follows:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."[5]

[1] Article 267 Treaty on the Functioning of the European Union.
[2] A national court of last instance is, as set out in article 267 of the Treaty on the Functioning of the European Union, a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law'.
[3] In case of *acte clair* or *acte éclairé,* see Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR-I 3415. These exceptions however do not apply where a national court seeks to declare a Union act invalid, since national courts do not have jurisdiction to so.
[4] Article 267 Treaty on the Function of the European Union.
[5] ibid.

This system of formalized dialogue between the ECJ and it's member states' national courts is widely considered as having been central to the construction of the European legal order.[6] As a response to national courts acting as the arms of EU law, the ECJ has been able to shape, transform and constitutionalize EU law.[7] Moreover, as the ECJ repeatedly put it, the EU judicial system has as its 'keystone' the preliminary reference mechanism which 'by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy [...]'.[8] The ECJ considers such full effect of EU law as instrumental to 'ensure judicial protection of the rights of individuals under [EU] law.'[9]

The functioning of this 'keystone' of the judicial system, however, fully depends on the willingness of national courts to utilize the preliminary reference mechanism.[10] Also in light of the inter- and intra-national disparities that can be found in the use of the preliminary reference mechanism between national courts, it is therefore crucial to understand what motivates national judges (not) to engage with the preliminary reference mechanism.

Already since the 1990's, academics from various disciplines have been puzzled by this question. The 'first wave' of research – primarily of quantitative nature – into what motivates domestic judges to engage into judicial dialogue with the ECJ and why such large disparities exist between the use of the preliminary reference mechanism produced four 'grand theories': *legalism*, *neo-functionalism*, *neo-realism* and the *inter-court competition* theory. However, as will become clear in chapter 3, although these studies have been informative and inventive in offering explanations into why national courts

[6] Arthur Dyevre, Monika Glavina & Angelina Antanasova, 'Who refers most? Institutional Incentives and judicial participation in the preliminary ruling system' (2020) 27 Journal of European Public Policy 912.
[7] Jasper Krommendijk, *National courts and preliminary references to the Court of Justice* (Edward Elgar Publishing 2021) 1.
[8] Opinion 2/13 of the ECJ [2014] ECLI:EU:C:2014:2454 para 176; Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:1581 para 37; Case C-234/17 *XC and others* [2018] ECLI:EU:C:2018:853 para 4; C-619/18 *European Commission v. Poland* [2019] ECLI:EU:C:2019:531 para 45.
[9] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:2018:117 para 33; Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:1581 para 36.
[10] Krommendijk (n 7).

participate in the preliminary ruling mechanism, there are several disadvantages connected to this type of research. Firstly, it can be considered problematic that this literature predominantly relies on aggregate statistics. That is because a focus on merely the number of references being sent to the ECJ, not taking into account the references that are *not* made, could create skewed results. Moreover, these studies mostly ignore important dynamics, such as differences within Member states and courts, differences over time and across legal fields and policy areas. Lastly, a disadvantage of the quantitative approach to research on what motivates judges to participate in European integration is that the factors that can be tested in the research are limited to those preconceived by the researcher.

Partially as a response to these shortcomings, a growing 'second wave' of literature emerged in which qualitative research methodologies – such as interviews – are used to understand why judges do (not) make a reference when confronted with questions about the interpretation or validity of EU law.[11] Such qualitative approaches help to gain a better understanding of which factors, according to judges themselves, motivate judges (not) to participate in judicial dialogue with the ECJ. So far, the qualitative research has covered the Polish, Spanish, Italian, Croatian, Slovenian, Swedish, British, Irish and Dutch legal systems.[12] Except for the recent contribution by Krommendijk,[13] all studies focus on lower instance courts.

With the aim of contributing to this qualitative stream of literature, this working paper will address the main question:

[11] Urszula Jaremba, Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes (diss. Erasmus University Rotterdam 2012); JA Mayoral, The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe (diss. Florence European University Institute 2013); JA Mayoral and A Torres Pérez, 'On Judicial Mobilization: Entrepreneuring for Policy Change at Times of Crisis' (2018) 40(6) Journal of European Integration 719; Tomasso Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' (2018) 6(1) Journal of Law and Courts 303; Monica Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia' in C Rauchegger and A Wallerman (eds), The Eurosceptic Challenge. National Implementation and Interpretation of EU Law (Hart Publshing 2019); Jasper Krommendijk, National Courts and preliminary references to the Court of Justice (Edward Elgar Publishing Limited 2021).
[12] ibid.
[13] Krommendijk (n 7).

What are the reasons of Belgian highest national court judges and law clerks (not) to make preliminary references about questions on the interpretation or validity of EU law to the ECJ and how does the obligation to refer following from article 267 TFEU and the CILFIT-caselaw play a role in the decision (not) to refer?

In doing so, this working paper aims to contribute to the second wave of literature regarding the reasons of judges to refer questions about the interpretation and/or validity of EU law in two main respects:

(1) The focus of this working paper will be on Belgian highest national court judges' and law clerks' motivation (not) to refer preliminary questions on the interpretation or validity of EU law. Qualitative research in connection to this question has not yet been conducted regarding the Belgian legal system. This working paper aims to contribute to filling this empirical gap. The focus on Belgian highest national courts is moreover interesting as it allows for an examination of what motivates one of Belgium's highest national courts, the Constitutional Court, to be among the most active users of the preliminary reference mechanism.[14] The said Court has made 40 preliminary references,[15] in which it has asked the ECJ more than 140 different preliminary questions in total. In doing so, the Belgian Constitutional Court has asked twice as much preliminary questions than all Constitutional Courts of the EU taken together.

(2) Whereas the vast majority of the second wave of literature focusses on lower instance courts, the aim of this working paper is to fill part of an empirical gap by further researching the incentives and disincentives of highest national court judges and law clerks to engage with the preliminary reference mechanism. Besides contributing to filling an empirical gap, the relevance of the focus on highest national court judges' motivation (not) to refer is further reinforced firstly by the fact that – as will become clear in Chapter 3 – many of the 'grand theories' primarily see incentives for lower instance courts to use the preliminary reference procedure, whereas they would expect last instance courts to be

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[14] André Alen and Willem Verrijdt, 'Le Dialogue Préjudiciel de la Cour Costitutionnelle Belge avec la Cour de Justice de l'Union Européenne' in P D'Argent, D Renders and M Verdussen (eds) *Les visages de l'État – Liber amicorum Yves Lejeune* (Bruylant 2017).

[15] See the page dedicated to preliminary references on the website of the Belgium Constitutional Court <https://www.const-court.be/en/judgments/preliminary-rulings-from-the-court-of-justice-of-the-european-union> last accessed 26 August 2022.

rather reluctant in doing so. What exactly drives highest national courts to refer is hence a piece of the puzzle that merits further research. Secondly, unlike most lower instance courts who *may* refer a question about the interpretation or validity of EU law,[16] highest national courts *must* do so on the basis of article 267 TFEU, except if the so-called CILFIT-criteria apply. Since this obligation most often does not play a role in lower instance courts' motivation (not) to refer, it will be interesting to examine in what way article 267 TFEU and the CILFIT caselaw play a role in highest national court judges' motivation (not) to refer.

In an attempt to answer its main question, the methodological approach of this working paper will firstly be explained in chapter 2. Subsequently, chapter 3 will examine what reasons for (non-)referral of judges and Courts have already been identified in previous literature. Having set out this theoretical framework, the legal framework with regard to the obligation of last instance courts to refer will be set out in chapter 4. Chapter 5 will provide some more context about the three Belgian last instance courts and their preliminary reference activity so far. Having provided the necessary contextual information, chapter 6 will then present the findings of the semi-structured interviews. In the last chapter, it will be discussed how those findings fit in the theoretical framework set out in chapter 3. This working paper ends with a conclusion.

[16] Sometimes, lower instance courts can also be under the obligation to refer following article 267 TFEU. That is because article 267 TFEU speaks of a national court or tribunal 'of last instance'. This group is mainly, but not exclusively, by the highest national courts.

2. Methodology

This working paper makes use of socio-legal research to answer its main research question regarding the reasons behind Belgian highest national court judges' and law clerks' decisions (not) to make preliminary references about questions on the interpretation or validity of EU law to the ECJ. Creutzfeldt defines socio-legal studies as the 'empirical studies of law, legal institutions, actors and legal processes', or, 'the gap between law in the books and law in action'.[17] In the same vein, this working paper is a research into how the duty to refer as laid down in article 267(3) TFEU ('law in the books') is interpreted, applied and experienced by those on whom that law *acts:* judges and law clerks of the highest last instance courts ('law in action').[18] Therefore, this working paper builds mainly upon two methodologies, which will be set out below.

2.1 'Law in the books' – Legal Doctrinal Research

A first method used in this working paper is the legal doctrinal methodology, which will be used in order to identify the duty to refer 'in the books'. Taekema decribes legal doctrinal research as the following:

> "The starting points for [doctrinal] research are the existing or proposed legislation and the decisions by the highest courts, which form the core of the positive law. What scholars do is systematize the rules into a coherent whole and evaluate trends in legislation and adjudication in terms of the doctrine they have reconstructed."[19]

In line with this description, the legal provisions as well as caselaw in connection to (exceptions to) the duty to make preliminary references will be analysed. Moreover, the discussions and critique in literature of the interpretation of the doctrine will be set out, specifically focusing on the 'CILFIT' criteria,[20] and the relevant post-CILFIT caselaw.

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[17] Naomi Creutzfeldt, 'Traditions of Studying the Social and the Legal. A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies' in N Creutzfeldt, M Mason and K McConnachie, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020) 8.
[18] Creutzfeldt (n 17) 8.
[19] Sanne Taekema, 'Relative Autonomy. A Characterisation of the Discipline of Law' in B van Klink and S Taekema (eds), *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011).
[20] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33.

2.2. 'Law in action'

2.2.1. A literature review on previous research on article 267 TFEU 'in action'

Besides identifying the legal framework as well as the main points of critique that have been made regarding the legal framework, this working paper will also examine the 'law in action'. As mentioned in the introduction, it will firstly set out the existing literature about what motivates judges (not) to make preliminary references to the ECJ. This helps to gain an understanding of the current state of the literature, as well as to discover the theoretical perspectives and concepts that can be used when trying to understand why Belgian last instance court judges and law clerks do (not) make preliminary references to the ECJ.[21] Due to the relatively limited scope of this working paper, and the large amount of literature on motivations (not) to refer, this working paper will not review the literature comprehensively and exhaustively. Rather, it will build on existing scholarship which identifies and describes the most important and prevalent theories.[22]

2.2.2. Statistics on the participation of the three Belgian last instance courts in the preliminary reference mechanism.

To provide some context on the general participation in the preliminary reference mechanism by Belgian last instance courts, chapter 5 will provide some statistics of the number of preliminary references in relation to the percentage of cases that contain an EU-element. These statistics were retrieved from online caselaw databases using targeted searches with carefully selected search terms to identify as completely as possible the cases with an EU-element.[23] The search terms that were used were (in Dutch) "hof van

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[21] Hennie Boeije, *Analysis in Qualitative Research* (Sage Publishing 2010), 5. As Boeije explains, this function of theory is typical for qualitative research.

[22] See e.g. Karen Alter, 'Explaining National Court Acceptance of ECJ: A Critical Evaluation of Theories of Legal Integration' in: A. Slaughter, A Stone Sweet and JHH Weiler, *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998); Urszula Jaremba, 'Polish civil judiciary vis-avis the preliminary ruling procedure: in search of a mid-range theory' in B de Witte, J Mayoral, U Jaremba, M Wind & K Podstawa (eds), National Courts and EU Law: New Issues, Theories and Methods (Edward Elgar Publishing 2016); Arthur Dyevre, 'Subnational disparities in EU law use: exploring the GEOCOURT dataset' (2021) 28 Journal of European Public Policy 615.

[23] Search terms that were used are "hof van justitie", "richtlijn", "verordening", "VWEU", "verdrag betreffende de europese unie", "VEU", "VWEU', "handvest van de grondrechten". Case law was retrieved from the websites of the last instance courts: http://www.raadvanstate.be/?page=caselaw&lang=nl

justitie" (Court of Justice), "richtlijn" (directive), "verordening" (regulation),[24] "VWEU" (TFEU), "VEU" (TEU), "verdrag betreffende de europese unie" (Treaty on the European Union), "handvest van de grondrechten" (Charter of Fundamental Rights). These search terms were used because they cover all sources of European legislation. Therefore, when a case contains an EU-element, it is likely that they contain at least one of the search terms. Where a multi-keyword search was supported, "OR" was placed between all keywords. The result was a list of cases that contained one or more of the keywords. This was possible in the search engines of the Council of State and the Constitutional Court. The search engine of the Court of Cassation did not support a multi-keyword search. Therefore, all keywords were searched separately and overlapping cases were only counted once. Given the fact that the Constitutional Court and the Court of Cassation translate all published cases, for those courts the search was conducted using Dutch search terms only. Given the high number of cases, the Council of State only translates part of its caselaw to all official languages of Belgium.[25] Since a part of the caselaw is only published in French, the search for the Council of State was hence also conducted in French.

To limit the scope, statistics will be presented for a span of 5 years (2017-2021). For the Court of Cassation and the Constitutional Court, the statistics were presented per year. For the Council of State, however, cases were presented in a separate table per judicial year, up to judicial year 2019-2020. The reason for this difference is that the annual reports from the Council of State only presented the total number of cases per

(Council of State); https://www.const-court.be/nl/search/judgment (Constitutional Court); https://juportal.be/zoekmachine/zoekformulier (Court of Cassation).

[24] The term "verordening" may also be used in 'non-EU context". For example, it may refer to a 'gemeentelijke verordening', a municipal regulation. Several techniques were applied to not include these results in the data. For the Constitutional Court and the Court of Cassation, the judgement were in which the term "verordening" was present were checked to see whether that term referred to an EU regulation or to a national regulation. Given the significantly higher number of cases from the Council of State, it was not possible to manually check whether the cases referred to an EU or a national regulation. Instead, search terms used were "verordening EU"/ "règlement UE" and "verordening EG"/ "règlement CE"

[25] 'De vertaling van de arresten' (*Raad van State*) accesed via: http://www.raadvst-consetat.be/?page=about_organisation_concord_page3&lang=nl. Cases of the Council of State are only published when: a) the case concerns a 'judgement deciding to suspend the execution or to annul a regulatory decree that was issued in both Dutch and French', b) the case is 'selected by a selection commission because of its usefulness for the general understanding of the jurisprudence of the Council of State', and c) when the judgement is pronounced by the General Assembly of the Administrative section of the Council of State.

‘judicial year’ (1 september – 31 august) up to judicial year 2019-2020.[26] While the documentary service of the Council of State was contacted for a total number of cases per year instead of per judicial year, this total number included cases that were published both in Dutch and in French twice, and were hence not completely accurate.

A note of caution in relation to these statistics is due. Firstly, not all case law of the Court of Cassation is published.[27] In an interview with a judge and law clerk at the Court of Cassation, it was clarified that

> “as far as the publication of our case law is concerned, we publish about 750 judgments on an annual basis. If we ask a preliminary question, either to Luxembourg or to our Constitutional Court, it is always going to be published. It could be, since we only publish 750 judgments out of 2600/ 2700 judgments on a yearly basis, that there are also judgments that are not published in which we refuse to ask a preliminary question to Luxembourg.”[28]

Hence, the statistics on the number of preliminary references of the Court of Cassation in relation to the percentage of its cases containing an EU-element must be interpreted with caution. Secondly, while the search terms were carefully selected to provide a result as comprehensive and precise as possible, it cannot be ruled out that there are certain which contain an EU law element but do not contain any of the used search terms. Thirdly, due to the limited scope of this research, this chapter does not consider to what extent the cases that contain an EU-element also contain a question about the interpretation or validity of EU law. The latter would give an even better indication of the proneness of the Belgian last instance courts to make preliminary references when confronted with a question about the interpretation or validity of EU law. However, it is rather time consuming to determine this, since it would require an analysis of every case containing an EU law element to determine whether there is also a question about the interpretation or validity of EU law in the particular case.

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[26] The annual report of the judicial year 2020-2021 has not yet been published, see Raad van State, ‘Activiteitenverslagen’ <http://www.raadvst-consetat.be/?page=about_annualreports&lang=nl> accessed 8 september 2022.
[27] Sarah van Veen, ‘Openbare databank voor Belgische rechtspraak: een stand van Zaken’ (*EY Law*) accessed 2 september 2022.
[28] Interview R5 and R6.

2.2.3. A qualitative research methodology using semi-structured interviews

Having set out the most prevalent literature, this working paper then presents the findings of the qualitative research, more specifically of the semi-structured interviews that were conducted over the summer of 2022 in order to understand the reasons of Belgian highest national court judges and law clerks to make preliminary references to the ECJ. A qualitative research approach is appropriate to answer this question because it allows us to better understand the individual experiences and considerations of judges and law clerks in their decision (not) to refer, as well as the meaning awarded to the obligation to refer in these considerations.[29] The aim of the qualitative research is *abductive*. Abductive research, in brief, combines both deductive and inductive approaches.[30] Unlike deductive research, which requires a comparison of the findings back to the initial theoretical framework and hence leads data falling outside this framework to be excluded from the analysis, abductive research allows the researcher to also take into account data that falls outside the initial theoretical framework.[31] This data falling outside of the initial theoretical framework may then be used to further develop the initial theory or for the formation of a new conceptual framework or theory.[32] The choice has been made to use semi-structured interviews since, as Galletta puts it, semi-structured interviews 'create openings for a narrative to unfold, while also including questions informed by theory'.[33] Semi-structured interviews thus fit nicely with the abductive aim of the research. There are, however, also some downsides to the use of

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[29] In this working paper, the definition that Boeije has given to qualitative research is used. She defines qualitative research as: "The purpose of qualitative research is to describe and understand social phenomena in terms of the meaning people bring to them. The research questions are studied through flexible methods enabling contact with the people involved to an extent that is necessary to grasp what is going on in the field. The methods produce rich, descriptive data that need to be interpreted through the identification and coding of themes and categories that can contribute to theoretical knowledge and practical use", in Boeije (n 21) 11.

[30] Anthony Mitchell, 'A Review of Mixed Methods, Pragmatism and Abduction Techniques' (2018) 16(3) The Electronic Journal of Business Research Methods 103.

[31] Samantha B Meyer and Belinda Lunnay, 'the Application of Abductive and Retroductive Inference for the Design and Analysis of Theory-Driven Sociological Research' (2012) Sociological Research Online 1 <http://www.socresonline.org.uk/18/1/12.html> accessed 21 March 2022.

[32] ibid.

[33] Anne Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* (New York University Press 2013) 2.

interviews. Firstly, the respondents may portray themselves more favorably and/ or may not reveal their true motivation for their actions (the decision (not) to refer).[34] Moreover, the selection of the respondents relies on the willingness of the judges to participate. As Leijon and Glavina have also pointed out, this may lead to a bias in the research since judges are more likely to participate when they possess certain characteristics, such as substantial knowledge of EU law or a positive attitude towards EU law.[35] The results of the interviews must therefore be interpreted with some caution.

2.2.4. Selection of the interviewees.

Interviewees were selected by using a non-probability sampling technique, heterogeneous purposive sampling more specifically. In purposive sampling, "the researcher decides what needs to be known and sets out to find people who can and are willing to provide the information by virtue of knowledge or experience."[36] Interviewees were chosen in light or their possessed qualities, namely being a judge or a law clerk at one of the Belgian highest national courts. Moreover, in heterogeneous sampling, the researcher looks at a sample from multiple available angles, with the aim of achieving a greater understanding of the full 'population' (which is in the case of this study the law clerks, and magistrates of Belgian last instance courts).[37] Thus, interviews were conducted with both judges as well as law clerks of all three Belgian last instance courts. The choice was made to also include law clerks in the qualitative research given their 'decisive' role in finding and formulating preliminary questions about the validity or interpretation of EU law.[38] The law clerks are the ones to analyse and summarise the procedural documents of the parties, as well as to write the draft judgement. Hence, they are closely involved in the decision (not) to refer preliminary references to the ECJ. The participants were approached via e-mail and one in real life after a lecture. To recruit more participants, the "snowballing" approach was

[34] See similarly Karin Leijon and Monika Glavina, 'Why passive? Exploring national judges' motives for not requesting preliminary rulings' (2022) 29(2) Maastricht Journal of European and Comparative Law 263, 272.
[35] ibid.
[36] Ilker Etikan, Sulaiman Abubakar Musa, Rukayya Sunusi Alkassim, 'Comparison of Convenience Sampling and Purposive Sampling' (2016) 5(1) American Journal of Theoretical and Applied Statistics 1, 2.
[37] Etikan, Musa and Alkassim (n 36) 4.
[38] R1.

also used: participants were asked whether they would know any Belgian last instance court law clerks or magistrates who might also be willing to participate in an interview.[39] At the Belgian Constitutional Court, two judges and two law clerks were interviewed. The same goes for the Court of Cassation. At the Council of State, two judges were interviewed. Since the Council of State does not employ legal secretaries, an Auditor was interviewed. The function of an Auditor is similar to that of an Advocate-General at, for example, the ECJ. Thus, they do research in the cases that come before the Council of State, but instead of writing a draft judgement like law clerks do, they have a more independent role and write an advice to the Council of State which can then either be followed or not. That makes a total of 10 interviews. The validity of the findings of this research would be strengthened by additional interviews with law clerks and magistrates of Belgian last instance courts. However, since the population of law clerks and magistrates of Belgian last instance courts is relatively small, 10 interviews do seem sufficient for valid empirical findings on last instance court judges' and law clerks' motivation to refer.

2.2.5. The conducting of interviews.

With the exception of one, all interviews that have been conducted were individual interviews. Four of those interviews were held in person, the rest online. The paired interview was conducted instead of the two separate interviews mainly in light of practical considerations in relation to the availability of the interviewees. The use of paired interviews has some benefits but also some weaknesses. A benefit of using paired interviews is firstly that information is shared and compared by the interviewees, which allows the researcher to hear similarities and differences in interviewees experiences.[40] Moreover, if the two interviewees already have a pre-established relationship, the interviewees can help each other in providing 'missing pieces to the puzzle' such as by filling in the other Interviewee's memory lapses. The result is that more complete data is

[39] Irving Seidman, *Interviewing as Qualitative Research. A guide for Researchers in Education and the Social Sciences* (4th edn Teachers College Press 2019).
[40] Angie D Wilson, Anthony J Onwuegbuzie and Lashondra P Manning, 'Using Paired Depth Interviews to Collect Qualitative Data' (2016) 21(9) The Qualitative Report 1549, 1555.

provided.[41] A downside to paired interviews that has been identified is that the interviewees might not be genuine, since they might feel that they should tell the same story, although their experiences and/ or interpretation of the situation are different.[42] However, research on the existence of this effect of paired interviews has not led to the conclusion that this leads to a paired interview not being as accurate as an individual interview.[43] The interviews were recorded so that transcriptions of the interviews could be made subsequently. The interviewees consented to their data being used via a consent form. Anonymity of the interviewees was ensured.

2.2.6. Analysis of the interviews

Having made the transcriptions, they were then analysed using the method of qualitative analysis described by Boeije.[44] Firstly, the interviews were analysed using 'open coding', the process of 'breaking down, examining, comparing, conceptualizing and categorizing data'.[45] The open coding was performed on paper, writing the codes in the margin of the transcripts of the interviews. The steps in the process of open coding as described by Boeije were followed.[46] Firstly, the whole transcription of the interview was read. Then, the text was re-read line by line to determine the fragments ('text which belongs together and deals mainly with one subject').[47] If those fragments were considered relevant to the research, a code was assigned to the fragment. After having coded all fragments using open coding, axial coding was employed. Axial coding refers to a 'set of procedures whereby data are put back together in new ways by making connections between categories'[48] It involved firstly the determination of whether the codes developed in the process of open coding cover the data sufficiently and the creation of new codes if that is not the case. It was also checked whether the fragments had been coded properly, and if not a new code was assigned. Then, the fragments assigned to a certain code were – if

[41] Wilson, Onwuegbuzie and Manning (n 40) 1554. For a recent publication evaluating benefits and challenges of paired interviews see Joanna Szulc and Nigel King, 'The Practice of Dyadic Interviewing: Strengths, Limitations and Key Decisions' (2022) 23(2) Forum Qualitative Sozialforschum/Forum.
[42] Wilson, Onwuegbuzie and Manning (n 41) 1555.
[43] ibid.
[44] Boeije (n 21).
[45] ibid 96.
[46] ibid 98.
[47] ibid.
[48] Boeije (n 21) 108.

necessary – subdivided. Lastly, the codes were placed in a coding tree, giving an overview of how the codes relate to each other. On the basis of this coding tree, the chapter setting out the findings was written.

3. Theoretical framework on the use of the Preliminary Reference Mechanism: Literature Review

3.1 Introduction

What exactly motivates domestic judges to engage into judicial dialogue with the ECJ and why such large disparities exist between the use of the preliminary reference mechanism by national courts has generated a large body of multidisciplinary literature already since the 1990's.[49] This chapter will review the literature on the role of national courts in the process of European integration and the possible motives for the use of the preliminary reference mechanism by national courts. The aim of this chapter is twofold. Firstly, in setting out the existing literature on the topic, this chapter aims to provide theoretical context for the present working paper. Secondly, setting out the literature on the use of the preliminary reference mechanism by domestic courts will allow for the identification of the gap that remains in the literature and which this study partly intends to fill.[50] Due to the relatively limited scope of this study and the large amount of literature on (motivations for) domestic courts' dialogue with the ECJ, this chapter will not review the literature exhaustively. Rather, it will build on existing scholarship to identify and describe the most important and prevalent theories. Moreover, this chapter will pay detailed attention to the growing body of literature that uses qualitative research methods to gain an understanding of what motivates judges (not) to refer preliminary questions to the ECJ.

This chapter is structured as follows. In section 2, the 'first wave' of studies on the role of national domestic courts in European integration will be set out. The research in this wave has relied primarily on quantitative research methods. In section 3, the critiques on this first wave of literature that have been raised in subsequent literature will be presented. These critiques are relevant to understand why a 'second wave' of studies emerged and what this wave of research aimed contribute to the literature of the first wave. Section 4 then presents the 'second wave' of studies, which employs primarily

[49] See e.g. Arthur Dyevre, 'Subnational disparities in EU law use: exploring the GEOCOURT dataset' (2021) 28 Journal of European Public Policy 615 and authors cited there.

[50] Xiao and Watson refer to this type of literature review as a 'background review'. See Yu Xiao and Maria Watson, 'Guidance on Conducting a Systematic Literature Review' (2019) 39(1) Journal of Planning and Education and Research 93, 94.

qualitative approaches to gain understanding of motives of (non-)referral. A conclusion follows in section 5.

3.2 'First wave' of studies on the role of national domestic courts in European integration.

The literature trying to explain what drives national courts participation in European integration, for example through the use of the preliminary reference mechanism, has been classified traditionally into four main strands of explanation: the 'legalists' (or: formalist) explanation, the 'neo-functionalist' explanation, the 'neo-realist' explanation and the 'inter-court competition' explanation.[51] Moreover, structural factors to explain (variations in) the use of the preliminary reference procedure have been put forward. The content of each of these theories will be briefly set out below.

3.2.1. Legalism (or: 'formalism')

'Legalists', or 'formalists', explain judicial decision-making regarding European integration as based on legal logic and reasoning.[52] This strand of literature sees the ECJ as the 'motor' of European integration, as this European integration is fuelled by the ECJs jurisprudence. Legalists consider national courts to be convinced by the ECJs jurisprudence about, amongst others, the importance of national courts applying EU law in their case law given the authoritative and argumentative force of those judgements.[53] Therefore, properly informed national courts will dutifully refer cases and apply EU law.[54] Legalists explain refusal to apply ECJ jurisprudence as 'unintended mistakes': only misunderstandings or a lack of information by national courts would lead national courts to disregard for instance the CILFIT criteria.[55]

Besides this form of formal legalism, which solely uses legal logic and reasoning to explain national court behaviour, a more 'nuanced' form of the theory also exists. While

[51] Alter (n 22); Urszula Jaremba 2016 (n 22).
[52] Alter (n 22) 230.
[53] ibid.
[54] ibid and see also more recently Juan A Mayoral, 'Judicial empowerment expanded: Political determinants of national courts' cooperation with the CJEU' (2019) 25 European Law Journal 374, 376.
[55] Alter (n 22) 230.

recognising the central importance of legal arguments in national courts' participation in the process of European integration, these accounts submit that the legal arguments must be put in wider social and political context.[56] An example of such a nuanced form of legalism can be found in the writings of Joseph Weiler.[57] In trying to explain why national courts accepted European integration and participated in it through the preliminary reference procedure, Weiler relies first and foremost on a legalist argument.[58] Although being the 'most formal and hence the most naïve',[59] Weiler posits this legalist (or as he calls it: 'formalist') argument has considerable force: national courts are charged with upholding the law and they consider the interpretations of the treaties by the ECJ legitimate. This legitimacy derives, according to Weiler, from two sources. Firstly, from the fact that the ECJ is composed of senior jurists from each Member State (*authoritative* force).[60] Secondly, from the legal reasoning of the ECJ's judgements, which reflect the purposes of the Treaty,[61] and which use the same legal language (reasoned interpretation, logical deduction, systemic and temporal coherence) as the national courts would use to substantiate their own national judgements (*argumentative* force).[62] However, Weiler also recognizes that this legalist explanation forms just one aspect of the explanation for national courts' participation in European integration.[63] Besides the legalist argument, Weiler explains national courts' participation through two additional arguments. Firstly, the argument of 'judicial cross-fertilization'.[64] This argument posits that national courts look at what other courts are doing when deciding whether or not to participate in European integration. Refusing to participate in European integration where other courts have committed themselves to this participation might be seen to disadvantage their national interests or compromise their own professional pride and prestige as a

[56] Monica Claes, *The National Courts' Mandate in the European Constitution* (Diss. Hart Publishing 2006) 247; Alter (n 22) 231.
[57] Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2425; Joseph Weiler, 'A Quiet Revolution – the European Court of Justice and its Interlocutors' (1994) 26(4) Comparative Political Studies 510, 520.
[58] Weiler, 'The Tranformation of Europe' (n 57) 2425; Weiler, 'A Quiet Revolution' (n 57) 520.
[59] Weiler, 'A Quiet Revolution' (n 57) 520.
[60] Weiler, 'The Tranformation of Europe' (n 57) 2425; Weiler, 'A Quiet Revolution' (n 57) 520
[61] Weiler, 'The Tranformation of Europe' (n 57) 2425.
[62] Weiler, 'A Quiet Revolution' (n 57) 521.
[63] ibid.
[64] ibid 523.

recalcitrant court.[65] Contrastingly, where national courts feel like they are part of a broader trend, their behaviour might be more easily justified. Secondly, through the 'judicial empowerment thesis'.[66] This neo-functionalist arguments will be further set out in the next section, after having set out on what grounds the theory of legalism has been criticized.

Critiques of legalism/formalism

Political scientists and sociologists have long criticized legalism for being based on the naivety and short-sightedness of lawyers, who solely see the law in isolation of the influential social and political context.[67] While such a rejection may indeed hold true for 'formal' legalism, which *only* uses legal arguments to explain national courts' participation in European integration (and thus: the preliminary reference mechanism), the rejection of legalism is more difficult to maintain with regard to *nuanced* legalism. As Claes points out,

> "legal argument is not simply there just to cover up policy arguments. In most cases where a court sets aside national legislation in favour of directly effective [EU] law, it is not concerned with higher goals of European integration, with keeping down the Government or with controlling Parliament: it is simply applying 'the law' *as it interprets it*."[68]

Some years earlier, Alter set out why she remained unconvinced by the legalist theory of European integration, even in its 'nuanced' form. That being so because the variations among Member States in the acceptance of EU law supremacy and in national court behaviour in relation to ECJ doctrine could not be explained, according to Alter, even by a nuanced legalist perspective.[69] This made her conclude that this 'variation in itself implies that there are important extra-legal factors influencing legal integration and legal

[65] ibid.
[66] Weiler, 'The Tranformation of Europe' (n 57) 2426; Weiler, 'A Quiet Revolution' (n 57) 510, 521, 523.
[67] Claes (n 56) 247; Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41, 45.
[68] Claes (n 56) 247.
[69] Alter (n 22) 230.

integration in Europe which legalist analyses are not considering.'[70] Although Alter may have had a point that, especially in the early days of the literature, 'nuanced' legalism might not have considered the relevant extra-legal factors, it is unconvincing to argue that nuanced legalism should therefore be rejected altogether. After all, as Claes argues, '[l]egal arguments are at least as important, and, it is submitted, are even central, albeit that they must be put in a wider legal and political and social context'.[71] The mere fact that the extra-legal factors that were considered by the legalists could not at the time explain the variations in participation in European integration by national courts does not, in my view, diminish the validity of the *legal* argument itself. Rather, it emphasized the need for a continued search for the relevant extra-legal factors.

3.2.2. Neo-functionalism

The neo-functionalist model has been developed by political scientist Ernst Haas in the late 1950s, but has only been applied as a model explain the role of courts and other legal actors in European integration by Anne-Marie Burley and Walter Mattli in the early 90's.[72] Haas's model aims to explain how and why states voluntarily cease to be fully sovereign. It describes the process of integration, defined as the process 'whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new and larger centre, whose institutions possess or demand jurisdiction over the pre-existing national states.'[73] The neo-functionalist theory has three main characteristics.[74] Firstly, a core concept is *spillover*. This term refers to a situation where 'political cooperation with a specific goal in mind leads to the formulation of new goals in order to assure the achievement of the original goal'.[75] Secondly, neo-functionalism is characterized as an *elitist* approach to European integration, since integration is driven by a functional and technical process with little

[70] ibid 232.
[71] Claes (n 56) 247.
[72] Burley and Mattli (n 67) 41; Ernst B Haas, *The Uniting of Europe* (Stanford University Press 1958).
[73] Ernst B Haas, 'International Integration: The European and Universal Process' (1961) 15(3) International Integration 366 via Burley and Mattli (n 72) 53.
[74] Carsten Strøby Jensen, 'Neo-functionalism' in: M Cini & N Pérez-Solórzano Borragán, *European Union Politics* (5th edn. Oxford University Press 2016) 55.
[75] ibid 57.

role for democratic governance.[76] Lastly, the neo-functionalist model of Haas stresses the role of instrumental motives and self-interest of (political) actors in European integration.[77]

3.2.2.1. Legal Neo-Functionalism

In Mattli and Burley's (later Slaughter) theory, the role of instrumental motives and self-interest of actors is central in explaining participation in European integration.[78] Where their theory differs from earlier neo-functionalist work such as that of Haas, however, is that unlike the latter, Mattli and Burley pay specific attention to the role that *legal* actors play in European integration.[79] Their central argument is that the driving force behind European integration are the individual incentives and self-interest of actors within EU institutions and national legal systems to participate in European integration,[80] and that these incentives have been created in the ECJ's case law.[81] Through seemingly technical and apolitical legal arguments in cases such as *van Gend en Loos* and *Costa E.N.E.L*,[82] the ECJ constructed a system which several actors had an interest participating in.[83]

A first group of such actors are *individual litigants*.[84] Through the creation of the direct effect doctrine and the preliminary reference procedure, the ECJ created, a 'pro-[EU] constituency of private individuals by giving them a direct stake in the promulgation and implementation of community law'.[85] This constituency is pro-EU because those citizens who are the net losers of integrative decisions can only under the very limited circumstances of article 263 and 340 TFEU sue ultra vires or otherwise illegal actions of the Union,[86] while citizens who have to gain from EU law have a constant incentive to

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[76] ibid 54.
[77] Ernst B Haas, 'The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing' (1970) 24(4) International Organization 607, 627.
[78] Burley and Mattli (n 72) 53.
[79] ibid 42.
[80] ibid 60; Alter (n 22) 238.
[81] Burley and Mattli (n 72) 60, 73; Strøby Jensen (n 74) 62;
[82] C-6/64 *Flaminio Costa v. E.N.E.L* [1964] ECLI:EU:C:1964:66; C-26/62 *van Gend en Loos* ECLI:EU:C:1963:1.
[83] Burley and Mattli (n 72) 60.
[84] ibid 60.
[85] ibid.
[86] ibid 62; Urszula Jaremba, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes* (diss. Erasmus University Rotterdam 2012) 3.

push their governments to comply with EU law by arguing for a preliminary reference to be made before their national courts.[87]

Secondly, *European law academics and private practitioners*.[88] EU law practitioners had a motive to support European integration because it would result in the growth of EU law giving them more business. European law academics had in interest in supporting European integration through favourable academic writings since that would increase the demand for university professors to teach EU law. Moreover, supporting European integration enhanced individual career prospects in, for example, the legal services of the EU or even at the ECJ itself.[89]

Thirdly, *lower national courts*,[90] whose acceptance of and participation in European Integration is rooted in what Weiler describes as 'Judicial Empowerment'.[91] According to this thesis, lower national courts made wide and enthusiastic use of the preliminary reference procedure because it offered them the chance to, de facto, practice judicial review.[92] This possibility to practice judicial review allowed the lower national courts/judges to take on more interesting legal questions, to strengthen the position of the judicial branch vis-à-vis the other branches of government and, most importantly, it gave lower court judges the power to conduct the review that was (if at all possible) traditionally reserved to the highest or constitutional court judges.[93]

In her chapter on the critical evaluation of theories of legal integration, Alter sets out several points of critique with regards to the political neo-functionalist theory. Her main point of critique is that the neo-functionalism leaves some points unexplained. For example, the theory does not explain why many plaintiffs, lawyers and judges choose to not invoke European legal arguments when that would be in their interest.[94] Moreover, while some actors gain through European integration, there are also losers in the process,

[87] Burley and Mattli (n 72) 62.
[88] ibid 59.
[89] Burley and Mattli (n 72) 59; Alter (n 22) 239.
[90] Burley and Mattli (n 72) 63.
[91] Weiler, 'The Tranformation of Europe' (n 57) 2426; Weiler, 'A Quiet Revolution' (n 57).
[92] Weiler, 'A Quiet Revolution' (n 57) 2426.
[93] Weiler, 'The Tranformation of Europe' (n 57) 2426; Weiler, 'A Quiet Revolution' (n 57) 524; Alter (n 22) 239.
[94] Alter (n 22) 240.

such as last instance courts. The theory does not explain why those actors would accept further European integration.[95] Lastly, just like the legalist theory, political neo-functionalism is unable to explain variations in timing and degrees of acceptance of European integration within countries and cross-nationally.[96]

3.2.2.2. Economic Neo-Functionalism

The writings of Alec Stone Sweet and his co-authors offer an economic neo-functionalist account for the wide cross-national variation in the number of preliminary references.[97] This economic neo-functionalist account shares with other neo-functionalist theories its focus on interest groups and spillover effects as determinants of European integration.[98] However, economic neo-functionalism places more emphasis on the role of markets and economic factors in causing cross-national variations of the use of the preliminary reference mechanism.[99] The starting point of the integration process is, according to the theory, cross-border trade and the formation of transnational interest groups ('transnational transactions').[100] These transnational transactions create a demand for and hence increase of supranational legislation and dispute resolution.[101] This then results in the removal of barriers to exchange, which in turn reinforces greater transnational transactions, leading to even more demand for supra-national legislation and dispute resolution.[102] This feed-back loop has two important effects. Firstly, the positive feedback loop creates a self-sustaining expansionary dynamic of European

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[95] ibid.

[96] ibid.

[97] Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92(1) The American Political Science Review 63, 67; Alec Stone Sweet and Thomas L Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95' (1998) 5(1) Journal of European Public Policy 66; Alec Stone Sweet and James A Caporaso, 'From Free Trade to Supranational Polity: the European Court and Integration' in W Sandtholtz & A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press 1998).

[98] Arthur Dyevre and Nicolas Lampach, 'The origins of regional integration: Untangling the effect of trade on judicial cooperation' (2018) 56 International Review of Law and Economics 122, 123.

[99] ibid 124.

[100] Alec Stone Sweet and Wayne Sandholtz, 'European Integration and Supranational Governance' (1997) 4(3) Journal of European Public Policy 297, 306 via Dyevre & Lampach (n 98) 124.

[101] Alec Stone Sweet and Thomas A Brunell, 'The European Court and the national courts' (n 97) 66, 72 via Dyevre & Lampach (n 98) 124.

[102] Stone Sweet and Brunell. 'The European court and the national courts' (n 97) 72 via Dyevre & Lampach (n 98) 124.

integration.[103] Secondly, the dispute resolution removes hindrances to transnational transactions and in that process, new obstacles to integration are exposed which, subsequently, become target of litigation (a 'spillover' effect).[104] Hence, higher levels of cross-national activity creates more conflicts between national law and EU law and thus leads to more preliminary references.[105]

3.2.3. Neo-realism

According to the neo-realist theory, set out in its strongest form in the writings of Garrett and his co-authors,[106] judicial behaviour with regard to acceptance of and participation in European integration can be explained in terms of national (economic and political) interest calculations.[107] Such national interest calculations form an explanation for judicial behaviour as, according to the theory, national governments and politicians dispose of certain tools (e.g. definition of jurisdiction, manipulation of appointments of judges or ignoring case law) that they use to influence judicial behaviour.[108] The possibility of governments or politicians making use of these tools and courts wishing to preserve their independence and legitimacy limits the margin of appreciation regarding participation in European integration of a court. In view of the possible negative or critical reaction by governments, courts do not depart too much from national economic and political interests.[109]

A point of critique raised against the neo-realist theory is that national interests are not as unitarily defined as the theory seems to suggest.[110] Moreover, neo-realism often relies on ad hoc explanations and deductive reasoning of how judicial behaviour would be explained by national interest calculations. Therefore, it is argued that the theory lacks

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[103] Stone Sweet and Brunell, 'Constructing a Supranational Constitution' (n 97) 67.
[104] ibid 72 via Dyevre & Lampach (n 98) 124.
[105] ibid 67.
[106] Geoffey Garrett, 'The European Community's Internal Market' (1992) 46(2) International Organization 533; Geoffrey Garrett, 'The Politics of Legal Integration in the European Union' (1995) 49(1) International Organization 171; Geoffrey Garrett and Barry Weingast, 'Ideas, Interest and Institutions: Constructing the ECs Internal Market' in J Goldstein and R. Keohane (eds), *Ideas and Foreign Policy* (Cornell University Press 1993).
[107] Alter (n 22), 234.
[108] ibid.
[109] ibid 235.
[110] ibid 236.

predictive or explanatory power.[111] That doesn't mean, however, that the theory should be completely abandoned. On the basis of a statistical analysis of the number of references, Carruba and Murrah found that public opinion is positively related to the use of the preliminary reference mechanism. Citizen's opinions on how decisions should be made matter to a court. The stronger the public opinion is for or against a particular decision, the greater the costs of the courts legitimacy if it chooses to go against that public opinion. They therefore concluded that member state judges do operate under a legitimacy constraint.[112]

3.2.4. Inter-court competition

In order to explain when and why judges participate in European integration as well as cross- and sub-national variations in this participation, Karen Alter has put forward the *inter-court competition theory.*[113] This theory holds that national courts use EU law in their struggles between that court and other levels of the judiciary or between that court and other political bodies.[114] Importantly, how and whether courts participate in European integration varies per court, given they all have their own interests and bases of institutional support.[115] Hence, the inter-court competition theory forms a 'sub-national' explanation of why some courts participate readily in European integration, while others have shown to be more reluctant.[116]

Just like the neo-functionalist theory, the inter-court competition thesis acknowledges that some courts gain from European integration. However, Alter also identifies competing interests between lower and higher national courts regarding European integration.[117] For example, lower courts can use the preliminary reference mechanism to increase their influence and to bypass their higher courts' jurisprudence and reach their preferred (and legally binding, also on higher courts) legal outcome via

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[111] ibid 238.
[112] Clifford J Carruba and Lacey Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59 International Organization 399, 412.
[113] Alter (n 22), 241.
[114] ibid 241, 242.
[115] ibid.
[116] ibid.
[117] ibid; Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001) 48.

the ECJ.[118] According to Alter, lower courts will, however, only do so if it is relatively certain that it will like the outcome of the preliminary reference procedure before the ECJ.[119] Otherwise, Alter argues, the lower court will simply refrain from making a reference.[120] Unlike lower courts, highest courts have an interest in limiting (further) European integration and are therefore less likely to readily participate in the preliminary reference mechanism. That is because further expansion of doctrinal and substantive EU law will limit the highest court's own jurisdictional authority.[121]

3.2.5 Structural Factors (first and second wave)

In their contribution 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95', Stone Sweet and Brunell respond to neo-functionalism and the inter-court competition theory and offer an alternative argument to explain national courts' participation in European integration.[122] According to the authors, too much emphasis has been put on the logic of judicial empowerment.[123] Although the logic does operate, it only supplements other forces.[124] Moreover, the authors critiqued the inter-court competition theory for overlooking the division of labour that is inherent in national court systems. They argue that

> "[b]ecause a core function of appellate judging is to resolve disputes involving legal interpretation and conflict of law, we would expect the appellate courts to be far more involved in the construction of the legal system than Alter imagines them to be."[125]

As a response to these critiques of the neo-functionalist or inter-court competition theory, the authors come up with a 'more banal' explanation of judicial participation in European integration that may also explain better why some courts refer more than others (cross- or sub-nationally).[126] This explanation is captured well by the following quote:

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[118] ibid.
[119] ibid.
[120] ibid.
[121] Alter (n 22), 242.
[122] Stone Sweet and Brunell. 'The European court and the national courts' (n 97) 73.
[123] ibid.
[124] ibid 73.
[125] ibid 90.
[126] Stone Sweet and Brunell. 'The European court and the national courts' (n 97) 73.

> "judges who handle relatively more litigation in which E[U] law is material (such as disputes that arise out of transnational activity) will be more active consumers of E[U] law, and of preliminary rulings, than judges who are asked to resolve such disputes less frequently. We assume that national judges strongly prefer to dispose of their cases efficiently, that is, they would like to go home at the end of the day having disposed of more, rather than fewer, work-related problems."[127]

These 'banal' factors that Stone Sweet and Brunell refer to have been further elaborated in subsequent (mostly 'second wave') scholarship and are commonly referred to as 'structural' or 'technical' factors that describe the factors that may form non-behavioural constraints on judges' willingness to refer.[128]

Firstly, Stone Sweet and Brunell's idea that judges who handle more litigation which contains EU law will be more active consumers of the preliminary reference mechanism. This idea has been further elaborated by De la Mare who posited that, given the presupposition that specialized courts use EU law more extensively in their daily work, specialized courts have more reasons and opportunities to raise a preliminary reference. Therefore, specialized courts would be more active consumers of the preliminary reference mechanism.[129] Broberg and Fenger argue in a similar vein that certain specialized courts, such as courts for VAT or customs, deal almost exclusively with harmonized law. Therefore, their cases will often involve EU law, increasing the likelihood of a preliminary reference to be made by those courts.[130] Although this structural factor is often raised in literature as of influence on preliminary reference activity, recent studies

[127] ibid.
[128] Marten P Broberg and Niels Fenger, *Preliminary Reference to the European Court of Justice* (2nd edn Oxford University Press 2014) 47.
[129] T De la Mare, 'Article 177 in social and political context' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 215 via Dyevre, Glavina and Atanasova (n 6), 918.
[130] Broberg and Fenger (n 128) 56 and see also similarly Lisa Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries' in M Green Cowles, J Caporaso and T Risse, *Transforming Europe: Europeanisation and Domestic Change* (Cornell University Press 2001) 99.

of Glavina and Dyevre et al. have not found conclusive evidence that jurisdictional specialisation indeed leads to more references being made by those courts.[131]

Secondly, Stone Sweet and Brunell's idea bears affinity with the *team model of judicial adjudication*. This model suggests that a court system can be seen as a 'team' seeking to achieve as many correct outcomes as possible.[132] In order for as many correct outcomes as possible to be achieved, judicial systems have a judicial hierarchy in which lower courts focus on fact-finding and quick resolution of cases, whereas law-finding is done by appellate and last instance courts.[133] Moreover, appellate and last instance courts enjoy better access to resources and have a lower workload, allowing them to best identify and correct possible errors.[134] As Glavina has recently shown, this law-finding specialisation of appellate and last instance courts, as well as their better access to resources and lower workload, gives those courts more incentive to send preliminary references to the ECJ.[135] A closely related rationale, the *resource management model*, holds that judges seek to maximise various preferences such as job satisfaction, prestige and leisure.[136] However, judges are scarce in the time they can allocate to these pursuits. Therefore, trade-offs arise. Time spent on the preparation of a preliminary reference cannot be spend on leisure, education or the management of one's workload.[137] Glavina shows that these trade-offs have a direct influence on whether a judge will decide to send a preliminary reference to the ECJ. Firstly, her study shows heavy burdened judges are more reluctant to ask a preliminary question. Secondly, the study finds that the existence of an EU law research unit (which makes that judges will have to spend less time on

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[131] Dyevre, Glavina and Atanasova (n 6); Monika Glavina, 'To Refer or Not to Refer, That is The Preliminary Question: Exploring Factors Which Influence The Participation of National Judges in the Preliminary Ruling Procedure' (2020) 16 Croatian Yearbook of European Law and Policy 25, 51.
[132] Arthur Dyevre, 'Theories of European Legal Integration' in: *Oxford Encyclopedia of European Union Law* (forthcoming) accessed at: https://ssrn.com/abstract=4031808 (19 april 2022) 6 and see also Hans W Micklitz, *The Politics of Judicial Co-operation in the EU* (Cambridge University Press 2005) 433 who argues that 'it is not competition between the lower courts and the higher courts, but a desire to reach a resolution of disputes, which is the driving force behind the preliminary references made by the lower courts.'
[133] Glavina, 'To Refer or Not to Refer, That is The Preliminary Question' (n 131) 37.
[134] Glavina, 'To Refer or Not to Refer, That is The Preliminary Question' (n 131).
[135] ibid 48.
[136] Dyevre, 'Theories of European Legal Integration' (n 132) 7.
[137] Glavina, 'To Refer or Not to Refer, That is The Preliminary Question' (n 131) 38.

preparing a question) increases the likelihood of judges making a preliminary reference.[138]

3.3 A Critical Evaluation of the 'first wave of studies'

Despite the existence of the large body of literature on the use of the preliminary reference mechanism summarized above, empirical gaps remain. Until the late 1990's the theories relied mainly on non-random qualitative samples of domestic rulings,[139] and from the late 90's onwards the studies were primarily of quantitative nature: they used statistics of the aggregate number of references to assess the empirical validity of the theoretical propositions on why Member States' courts refer to the ECJ.[140] Although these studies have been inventive in offering explanations into why courts in some Member States refer more than others, there are also several disadvantages connected to this type of research.

Firstly, as Broberg and Fenger point out, it is problematic that the quantitative literature relies on the statistics of number of preliminary references per Member State. That is because a preliminary reference presupposes not only that a judge must be willing to decide to make a reference to the ECJ about questions on the interpretation and validity of EU law, but also that there must be a case containing an issue of EU law that may form the basis for a reference by giving rise to a question on the interpretation or validity of EU law in the first place.[141] The latter may be influenced by numerous factors which vary among member states, such as population size and litigation rates.[142] Conducting exclusively quantitative research using aggregate statistics of the number of reference made per member state could hence be problematic since it does not consider how the ability to make references may vary between (specific courts of) member states, while this ability may partially explain disparities in the use of the preliminary reference mechanism.[143] Therefore, it would be misleading to simply make a comparison based on

[138] ibid.
[139] Burley and Mattli (n 67); Alter (n 22) 230; Weiler, 'The Tranformation of Europe' (n 57) 2426; Weiler, 'A Quiet Revolution' (n 57). For a critical evaluation of the early qualitative literature, see Stone Sweet and Brunell. 'The European court and the national courts' (n 97).
[140] Krommendijk (n 14) 4; Dyevre 'Theories of European Legal Integration' (n 132) 8.
[141] Broberg & Fenger (n 34) 36.
[142] ibid 37, 39.
[143] ibid 59.

the number of preliminary references per member state (or even per court). Rather, the comparison must rely on numbers of references relative to the number of court cases giving rise to EU law issues and which contain a question about the interpretation or validity of EU law.[144] However, no comprehensive data has yet been produced on the number of national court proceedings giving rise to questions about the validity or interpretation of EU law.[145]

Secondly, by relying on aggregate numbers of references, the statistical studies mostly ignore important dynamics, such as differences within member states and courts, differences over time and across legal fields and policy areas.[146] Kelemen and Pavone moreover point out that, in light of the subnational heterogeneity in reference activity, using the aggregate number of references per nation can generate skewed results.[147]

Thirdly, the studies seek to understand why courts or judges refer preliminary questions to the ECJ, and hope to gain this understanding using primarily statistics. Approaching the question from this angle has, however, the disadvantages that the factors that can be tested using this type of quantitative research are limited to those having been preconceived as relevant by the researchers. This is where qualitative research could be useful, since the information that can be gained from such research is not limited to preconceived categories and can hence provide rich data in which certain factors might be identified that had not yet been thought of in quantitative research.[148]

Given these shortcomings of the quantitative research using aggregate statistics that has been used to explain why judges make preliminary references, a growing body of literature using qualitative methods has emerged.[149] This body of literature uses

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[144] Broberg & Fenger (n 34) 36.
[145] ibid.
[146] Krommendijk (n 14) 4.
[147] Daniel R Kelemen and Tommaso Pavone, 'Mapping European Law' (2016) 23(8) Journal of European Public Policy 1118.
[148] Boeije (n 21) 32.
[149] Urszula Jaremba, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes* (diss. Erasmus University Rotterdam 2012); JA Mayoral, *The Politics of Judging EU Law: A New Approach to National Courts in the Legal Integration of Europe* (diss. Florence European University Institute 2013); JA Mayoral and A Torres Pérez, 'On Judicial Mobilization: Entrepreneuring for Policy Change at Times of Crisis' (2018) 40(6) Journal of European Integration 719; Tomasso Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' (2018) 6(1) Journal of Law and Courts 303; Monica Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia' in C Rauchegger and A Wallerman (eds), *The Eurosceptic Challenge. National Implementation and Interpretation of EU Law*

qualitative research, primarily interviews, to examine the judicial decision-making regarding preliminary reference procedure, aiming to uncover what motives individual judges have (not) to refer a preliminary question to the ECJ. So far, studies based on interviews with judges have been conducted in Poland, Spain, Italy, Croatia, Slovenia, Sweden, the UK, Ireland and the Netherlands.[150] The findings of these studies will be set out in the following paragraph.

3.4 Qualitative approaches to gaining understanding of motives of (non-)referral

This paragraph sets out the findings of the studies that have employed qualitative methodologies, primarily interviews, with the aim of uncovering the reasons of judges' participation in European integration and, more specifically, the preliminary reference mechanism. Qualitative research has been conducted for the Polish, Spanish, Italian, Croatian, Slovenian, Swedish, British, Irish and Dutch legal systems. As will become clear below, most of this research concerns lower instance judges. However, this research can still be considered of relevance since it shows what factors *could* play a role in last instance court judges' decision (not to) refer. The fact that most research concerns lower instance judges' motivations for (non-)referral also lays bare an empirical gap and highlights the relevance of research into last instance court judges' motivations for (non-) referral. The findings of the qualitative research into judges' participation in European Integration will be set out below.

3.4.1 Qualitative approaches to judges' participation in European Integration in Poland

Among one of the first to employ qualitative methodology (in combination with quantitative methodology) is Jaremba. Focusing on the lower instance Polish lower civil judiciary, she examined in her dissertation to what extent the model of the EU law judge was attainable in practice and whether the Polish civil judge is willing to participate or is

(Hart Publshing 2019); Jasper Krommendijk, *National Courts and preliminary references to the Court of Justice* (Edward Elgar Publishing Limited 2021.

[150] ibid.

already participating in the process of European integration.[151] Her study found that the functioning of judges as EU law judge is affected by a broad set of factors, including the level of knowledge of EU law among national judges,[152] the experience with EU law in the daily judicial practice and the wish to efficiently handle cases in an environment with high caseloads.[153] Moreover, Jaremba found that personal attributes of the judge may influence their stance towards the preliminary reference mechanism.[154] A judge with a sense of responsibility for ensuring the effectiveness of the EU legal order may be prompted to resort to the usage of the preliminary reference mechanism.[155] However, judges' decision to engage in a dialogue with the ECJ may also be negatively affected by personal attributes of the judges, for example by their wish to maintain prestige, authority and good name. Judges may feel their prestige is at stake when engaging with the preliminary reference procedure, for example because they fear an incorrect formulation of a preliminary question or referring a question which is in fact an *acte clair* or an *acte éclairé*.[156]

Reflecting on how her empirical findings relate to the most prevalent theories on European integration, Jaremba holds that the *neo-realist* theory does not find sufficient support: from the empirical data it appeared that in the judges' view, political preferences are to be put aside and this wish to stay out of political discourse implies that promoting national political concerns through the preliminary reference mechanism would not be in the judiciary's interest.[157] The *judicial empowerment* thesis only finds restrained support in the context of the lower Polish civil judiciary. While Jaremba recognizes that from a theoretical point of view, participation in European integration could indeed empower judges, her empirical findings show that relevance of the judicial empowerment thesis is, in practice, limited. Firstly, her results suggest that there is generally no desire to conduct judicial review among Polish judges.[158] They merely want to apply the law and dispose of

[151] Urszula Jaremba 2012 (n 149) 317.
[152] ibid 320.
[153] ibid 325.
[154] ibid 331.
[155] ibid.
[156] ibid.
[157] ibid 340.
[158] ibid.

cases efficiently.[159] Secondly, the use of the preliminary reference mechanism may often have an effect contrary to self-empowerment. According to Jaremba,

> 'there are no 'carrots' (incentives or personal advantages) that could encourage judges to engage with EU law but there are in fact many 'sticks' (disincentives) present which will dishearten a judge from engagement with EU law.'[160]

The *inter-court competition* theory neither finds support in the Polish context. Rather than competition or strategic actions, judges seem more concerned with maintaining a uniform and coherent jurisprudence and handling cases efficiently.[161] Moreover, it is not clear how lower instance judge would improve their position vis-à-vis higher instance courts through the use of the preliminary reference mechanism.[162] Jaremba finds that the *nuanced legalist* approach to participation in legal integration is of most relevance in the context of the Polish civil judiciary. Judges engage with the preliminary reference procedure given the coercive nature of EU law and its logic. This engagement is moreover informed by personal merits and skills of the judge, as well as their working environment and wish to be perceived as being capable of their work. The legalist approach is thus 'nuanced' by extra-legal factors such as from the *team model of adjudication*.[163] Moreover, the role of private litigants in furthering European integration as highlighted in the *economic neo-functionalist* theory of Stone Sweet and his co-authors is supported by Jaremba's findings: without private litigants putting pressure on judges to resort to the preliminary ruling procedure, the preliminary reference procedure would remain a rather empty notion.[164]

Jaremba also indicates that these findings cannot be generalized to other member states or jurisdictions in the same member state, since each have their own characteristics and judicial culture and might therefore operate differently.[165] Therefore, qualitative research to judges' decision-making with regard to European integration has also been

[159] ibid.
[160] ibid 328.
[161] Urszula Jaremba 2012 (n 149) 341.
[162] Urszula Jaremba 2016 (n 22).
[163] Jaremba 2012 (n 149) 342; Jaremba 2016 (n 22) 64.
[164] Urszula Jaremba 2012 (n 149) 342.
[165] ibid 285.

conducted for different Member States. This research will be discussed in the following sections.

3.4.2 Qualitative approaches to judges' participation in European Integration in Spain

Another example of qualitative approaches to understanding judicial decision-making with regard to European Integration is the 2018 contribution of Mayoral and Torres Pérez, looking at the Spanish legal system. Mayoral and Torres Pérez use a case study and interviews to discern a set of factors that explain the process of 'judicial mobilization of EU law', which they define as '*the process through which national courts engage with EU law, making preliminary references or applying the CJEU jurisprudence to induce policy change*.'[166] The authors recognize that the judicial empowerment thesis already offers a persuasive explanation of how judges may use the preliminary reference mechanism for reasons to challenge higher courts and political powers. The authors argue, however, that due to the focus on the politics of judicial hierarchies, the original judicial empowerment underexplores contextual and individual factors that also influence judges' use of EU law.[167] Building on socio-legal scholarship on legal mobilization and on scholarship on the implication of personal attributes of judges on the application of EU law,[168] the authors develop a set of macro-, meso- and micro-level factors that encourage or hinder the use of EU law by domestic lower courts in Spain.[169]

As macro-factors encouraging the use of EU law by national courts Mayoral and Torres Pérez identify a favorable EU legal framework (case law and legislation).[170]

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[166] Juan A Mayoral, Aida Torres Pérez, 'On Judicial Mobilization: Entrepreneuring for Policy Change at Times of Crisis' (2018) 40(6) Journal of European Integration 719, 723.

[167] ibid 723.

[168] Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizational in the United Kingdom, France, Finland, and Italy' (2018) 51(3) Comparative Political Studies 380; Lisa Conant, Andreas Hofmann, Dagmar Soennecken and Lisa Vanhala, 'Mobilizing EU law' (2017) 25(9) Journal of European Public Policy 1376; Juan A Mayoral, Urszula Jaremba and Tobias Nowak, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assesment regarding EU Law Knowledge' (2014) 21(8) Journal of European Public Policy 1120; Urszula Jaremba 2012 (n 149); Urszula Jaremba and Tobias Nowak, 'The Role of EU Legal Education and Training in the Functioning of National Courts as Decentralized EU Courts. An Empirical Investigation into the Polish and German Civil Judiciary' (2014) 21(8) Journal of European Public Policy 1120.

[169] Mayoral & Torres Pérez 2018 (n 166) 724.

[170] Mayoral & Torres Pérez 2018 (n 166) 726.

However, this factor must be regarded as a precondition and is not enough to explain the judicial mobilization of EU law by national judges.[171] The authors therefore turn to the meso-factors of influence on judicial mobilization of EU law. Unlike suggested in the neo-realist theory, the authors did not find that national courts are less likely to mobilize EU law in an unfavorable national political environment. On the contrary, it was found that even in a highly Eurosceptic national political environment, judges use the preliminary reference procedure to respond to rising concerns about social problems as it allows for exploring new legal solutions at the supra-national level.[172] The main factors hindering or encouraging judges to mobilize EU law are, according to the authors, to be found on the micro-level.[173] The authors consider the ideological judicial politics dynamics and the identity of national judges as EU judges as particularly relevant micro-level factors.[174] During the interviews, the judges also pointed out that the workload and time needed to write a preliminary reference was a discouraging element.[175] These findings overlap with those of Jaremba, who also found the personal attributes of the judge as well as the wish to efficiently handle cases in an environment with high caseloads of relevance.[176]

3.4.3 Qualitative approaches to judges' participation in European Integration Italy, confirming findings in Poland and Spain

In his 2018 article, Pavone considers 'the ways in which European integration unfolds within the everyday work environment of lower courts'.[177] Unlike Weiler's judicial empowerment thesis would suggest, he finds that lower court judges in Italy are much less likely to refer cases to the ECJ than courts of last instance.[178] To uncover the logic of this apparent resistance to dialogue with the ECJ, Pavone drew from interviews with judges and legal professionals.[179] He found that in contrast to courts of last instance, who

[171] ibid.
[172] ibid 727.
[173] ibid 732.
[174] ibid.
[175] ibid 731.
[176] Urszula Jaremba 2012 (n 149) 325, 331.
[177] Tomasso Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' (2018) 6(1) Journal of Law and Courts 303, 306.
[178] ibid 307.
[179] ibid.

are more structured to make preliminary references on their own, the institutional logistics of lower instance courts makes them resistant to collaborate with the ECJ.[180] In particular, Pavone traces the resistance back to three factors. Firstly, many judges have insufficient knowledge of EU law (also found to be a relevant factor in the Polish civil judiciary).[181] Hence, they often have to rely on lawyers as 'carriers of EU knowledge'.[182] However, judges are reluctant in doing so given they might be manipulated into serving the interest of the lawyer's client.[183] Secondly, time constraints and workload explain the Italian lower judiciaries resistance to engagement in judicial dialogue with the ECJ.[184] Due to the high workload, the mind-set of judges is to process as much cases as possible rather than to creatively search for contact between national law and EU law.[185] This is in line with the findings by Jaremba and Mayoral and Torres Pérez in connection to the Polish and Spanish legal system.[186] Moreover, the focus of the legislative on the efficiency of justice created a fear amongst judges that a delay in a case (due to a preliminary reference) will cause them to be held disciplinary responsible or negatively impact their career prospects. In that sense, referring a preliminary reference would not positively influence judges' career prospects as the judicial empowerment thesis suggests, but would rather have the opposite effect. Lastly, the lower Italian judiciary's cultural aversion to the invocation of supranational rules to review national legislation is found to play a role.[187] This is in line with the study by Jaremba, it which it was found that the Polish legal culture rendered the integration of EU law into judicial practice difficult.[188]

3.4.5 Qualitative approaches to judges' participation in European Integration in the Netherlands, the UK and Ireland

In Krommendijk's book, an attempt is made to fill four empirical gaps, one of those being the limited but growing literature on judicial decision making and the motives of

[180] ibid 314.
[181] Urszula Jaremba 2012 (n 149) 320.
[182] Pavone (n 177) 316.
[183] ibid 316.
[184] ibid 317.
[185] Pavone (n 177) 316.
[186] Jaremba 2012 (n 149) 320; Tomasso Pavone (n 177) 316.
[187] ibid.
[188] Jaremba 2012 (n 149) 330.

individual judges in participating in European integration.[189] By employing a mix of legal doctrinal methods (case law analysis) and interviewing, Krommendijk aims to give insight of motives of (non-)referral of lower and highest court judges in the Netherlands, the UK and Ireland.[190] He concludes that the decision (not) to refer is affected by a variety of factors, which he places at the micro, meso and macro level.[191]

On the micro level (motives of the individual judge), a first and according to Krommendijk under-estimated factor is *legalism*: judges refer out of faithfulness in the adherence to article 267 TFEU and apply the CILFIT requirements strictly.[192] Krommendijk found this to be particularly the case for the Dutch and Irish Supreme Courts.[193] Three explanations are put forward for these courts' strict application of the CILFIT criteria. Firstly, both courts handle a small number of cases and an even smaller number of cases involving EU law questions.[194] Secondly, both courts have Advocate Generals (AG) who make it more difficult to argue that the CILFIT criteria apply when an AG has determined the matter not to be *clair*.[195] Thirdly, an explanation of the strict adherence to the CILFIT criteria is to prevent lower courts from being inclined to refer.[196] In contrast to the Dutch and Irish Supreme Court, the UK Supreme court and the Dutch lower courts were more reluctant and pragmatic in their decision (not) to refer.[197] These courts have not applied the CILFIT criteria strictly, and primarily employ pragmatic considerations in their decision (not) to refer.[198] Such pragmatic considerations concern for example the delays and consequences of a reference for the parties,[199] the answer expected from the ECJ and the possibility of framing the question in an intelligible manner,[200] and the existence of a similar question already pending before the ECJ.[201] Such pragmatist considerations are especially

[189] Krommendijk (n 7) 4.
[190] ibid 158.
[191] ibid.
[192] ibid 66. This is in line with the findings of Jaremba 2012 (n 149) 342.
[193] ibid.
[194] ibid 35.
[195] ibid.
[196] ibid.
[197] ibid 160.
[198] ibid 38.
[199] ibid 55-61.
[200] Krommendijk (n 7) 61-66.
[201] ibid.

prevalent when a court believes that they are well equipped enough to answer the question of EU law themselves and/or when they believe that the ECJ will not provide them with a useful answer.[202]

A third group of micro-level factors relate to personal and psychological factors and the background of judges.[203] These comprise for example judges' knowledge of EU law and procedure,[204] judges' background (with judges with a governmental or academic background often being more open to use the preliminary reference mechanism than 'career judges'),[205] as well as feelings of fear (to ask the wrong question) or enjoyment/ satisfaction (from engaging with the ECJ).[206]

Lastly, politico-strategic considerations are among the micro-level factor considered to play a role.[207] According to Krommendijk the emphasis of the literature on European Integration on politico-strategic considerations is not entirely justified: the majority of reference involve purely legal considerations.[208] However, politico-strategic motives should also not be discounted all to easily. Four politico-strategic perspectives were identified. Firstly, courts may *shield* national cases from the ECJ to protect national legislation against the expansion of EU law or from the ECJ interfering into sensitive legal and political issues.[209] Secondly, however, the study also found (limited) support that the preliminary reference procedure may be used as a *sword*.[210] In this case, courts refer to secure the support of the ECJ in order to challenge national legislation and to increase the likelihood of the government complying with the eventual national court ruling.[211] Yet, from Krommendijk's interviews appeared that judges did not feel they really needed the 'sword' function of the preliminary reference procedure: they already felt in the position to strike down national legislation because of their independence.[212] Thirdly, but of less relevance to last instance courts, the preliminary ruling procedure was at times used to

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[202] ibid 66.
[203] ibid 67.
[204] ibid 161. See similarly Jaremba 2012 (n 149) 320 and Pavone (n 177) 316.
[205] ibid.
[206] ibid.
[207] ibid 89-109.
[208] ibid 89.
[209] ibid 162.
[210] ibid 97.
[211] ibid.
[212] ibid.

'leapfrog' the national judicial hierarchy, in line with Alter's inter-court competition theory.[213] Finally, the preliminary reference mechanism has been used to resolve or prevent trans-national conflicts with other courts and to ensure uniformity of EU law.[214]

On the meso level, Krommendijk firstly found institutional factors of influence on judges' decision (not) to refer. These institutional factors of influence identified are: 'the coordination of EU law cases within a court; the case management system; and the available capacity'.[215] Moreover, the level of specialization and culture within a court plays a role, as well as the availability of EU law education.[216] Similarly to Pavone,[217] Krommendijk also found the role of the parties and their request to refer of influence on courts' willingness to refer, especially with regard to the Irish and UK highest Courts.[218] Lastly, in relation to the 'leapfrog' function that the preliminary reference mechanism may be used for, the position of the court in the judicial hierarchy is a meso level factor of relevance.[219] Macro level factors, lastly, include; the independence of the judiciary; organization of the judiciary (e.g. rules relating to the recruitment, appointment and promotion); the position of EU law in the national legal order; the adversarial or inquisitorial nature of the legal system; as well as the culture of judicial review.[220]

3.4.6. Qualitative approaches to judges' participation in European Integration in Slovenia, Croatia and Sweden

Similarly to Pavone, Glavina also addresses national judges' resistance to the use of the preliminary reference mechanism,[221] using interviews among Slovenian and Croatian national judges of first and second instance to answer this question.[222] Similarly to

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[213] ibid 102.
[214] ibid 105.
[215] ibid 161. See similarly also Jaremba 2012 (n 149) 325 and Pavone (n 177) 316.
[216] ibid 159. See similarly also Jaremba 2012 (n 149) 320 and Pavone (n 177) 318.
[217] Tomasso Pavone (n 177) 303.
[218] Krommendijk (n 7) 82, 83; Tomasso Pavone (n 177) 303.
[219] Krommendijk (n 7) 159.
[220] ibid 159.
[221] Monica Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia' in C Rauchegger and A Wallerman (eds), The Eurosceptic Challenge. National Implementation and Interpretation of EU Law (Hart Publshing 2019). Available at SSRN at: https://ssrn.com/abstract=3313325 2.
[222] ibid.

previously mentioned authors, Glavina argues that there is no one single factor that can explain referral behavior of judges, but that rather national judges are motivated and constrained by various factors.[223] The main factors highlighted in her chapter are (1) individual profile of the judge, (2) factors deriving from the institutional setting and (3) litigation rates and litigant's behavior.[224] Firstly, with regard to the individual profile of the judge, Glavina sets out that:

> "When deciding whether or not to submit a preliminary question, judges are motivated and constrained by (a) policy outcomes consistent with their ideological point [of view], (b) knowledge considerations, (c) their experience with the procedure, (d) reputational costs, (e) fear of criticism, and (f) legal rules."[225]

Secondly, Glavina describes how institutional factors motivate or constrain lower instance judges in their use of the preliminary reference procedure. In almost all interviews conducted by Glavina, judges referred to institutional factors. Hence, they can be considered to carry quite some weight. The institutional factors comprise (a) workload, (b) quotas that need to be fulfilled, (c) court resources, (d) education on/ knowledge of EU law, (e) initiative from last instance courts and (f) recognition or reward of additional effort invested into the drafting of a preliminary reference.[226]

Lastly, litigation rates are found of influence for referral behavior. The judges interviewed pointed out that situations requiring preliminary references were in fact very rare. Moreover, it was found that judges believe EU lawyers and parties have a big role in pointing towards an issue of EU law or the need to refer a preliminary question. Many judges believed that it was not them, but the parties or EU lawyers who were the ones to invoke the need for a preliminary reference.[227]

In a recent article by Leijon and Glavina, the reasons for not requesting preliminary rulings from the ECJ of Slovenian and judges were compared with the reasons for

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[223] ibid 6.
[224] ibid 8.
[225] ibid 9.
[226] ibid 8. See similarly Krommendijk (n 7) 161, Jaremba 2012 (n 149) 325 and Pavone (n 177) 316.
[227] ibid 17.

passiveness given by Swedish judges.[228] Their results reveal that judges from the three Member States share the following reasons for passiveness: referrals are not required by the formal rules (procedural normative motivation); referrals are not made to protect the parties to the case (substantive normative motivation); and referrals are not made to protect judges' reputations (instrumental motivation).[229] Besides these shared reasons of Slovenian, Swedish and Croatian judges not to refer, there are also some reasons put forward by judges in only one or two of the inspected member states. Firstly, Swedish judges reasoned that they did not refer cases in light of the (limited) capacity of the preliminary ruling procedure.[230] Secondly, only the Croatian and Slovenian judges indicated that they did not refer out of fear for sanctions and because of a lack of knowledge and resources.[231] Besides shedding more light on why national judges remain passive on EU legal integration, this article also reiterates that findings on judicial decision making in one member state may not necessarily apply similarly in other Member States. This underlines the relevance of research into judicial decision making with regard to the use of the preliminary reference mechanism in Member States that have not yet been explored in qualitative research, such as, for instance, Belgium.

3.4. Conclusion

This chapter has reviewed the main streams in the literature on what motivates judges to participate in the process of European (legal) integration. It was found that in the first wave of studies, which relied primarily on studies of quantitative nature or non-random sampling of domestic rulings,[232] courts/ judges' participation in European integration was explained mainly through *legalism*, *neo-functionalism*, *neo-realism* and the *inter-court competition* theory. Moreover, the 'more banal' explanations for judges' participation in European integration that were found in the literature using quantitative methods, the structural factors, were set out.

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[228] Karin Leijon and Monika Glavina, 'Why passive? Exploring national judges' motives for not requesting preliminary rulings' (2022) 29(2) Maastricht Journal of European and Comparative Law 263.
[229] ibid 263. See similarly Jaremba 2012 (n 149) , Krommendijk, Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law' (n 221).
[230] Leijon and Glavina (n 228) 276.
[231] ibid 276.
[232] Burley and Mattli (n 67); Alter (n 22) 230; Weiler, 'The Tranformation of Europe' (n 57) 2426; Weiler, 'A Quiet Revolution' (n 57); Stone Sweet and Brunell, 'The European court and the national courts' (n 97).

Although these studies have been inventive in offering explanations into why courts in some Member States refer more than others, several disadvantages connected to this type of research were set out. Firstly, it was considered problematic that the quantitative literature relies on aggregate statistics, for two reasons: (1) it does not allow one to take into account the fact that besides judges having to be willing to make a reference, there must also be a case before those judges which contains a question of EU law. Therefore, a comparison based solely on the number of references being sent to the ECJ could create skewed results; (2) the statistical studies mostly ignore important dynamics, such as differences within Member states and courts, differences over time and across legal fields and policy areas. Another disadvantage of the quantitative approach to research on what motivates judges to participate in European integration is that the factors that can be tested in the research are limited to those preconceived by the researcher. A qualitative approach, in contrast, would allow for perhaps less obvious reasons for judges' participation in European integration to be uncovered as well as to gain a better understanding of which factors, according to judges themselves, motivate judges (not) to participate in judicial dialogue with the ECJ.

Consequently, a growing body of literature has emerged which has qualitatively researched why judges do (not) participate in EU integration, *inter alia* through the use of the preliminary reference procedure. Both Jaremba and Krommendijk found that the (nuanced) legalist approach is of great relevance in explaining why judges refer questions to the ECJ.[233] Although politico-strategic considerations may also play a role, their importance is over-estimated, as recently again confirmed by Krommendijk.[234] Moreover, the theories putting forward politico-strategic considerations (inter-court competition, neo-functionalism and neo-realism) have, according to Mayoral and Perez underexplored the contextual and individual factors that influence and often restrain judges in their use of the preliminary reference mechanism.[235] All other qualitative studies have also recognized the importance of such factors, which they have often placed at either the macro-, meso- or micro-level. The figure underneath lists the macro-, meso- and micro-level factors put forward.

[233] Jaremba 2012 (n 149); Krommendijk (n 7)
[234] Krommendijk (n 7)
[235] Mayoral & Torres Pérez (n 169) 723.

Level	*Factor*
Macro	- *Favourable EU legal framework (Mayoral & Torres Pérez 2019)* - *Independence of the judiciary (Krommendijk, 2021)* - *(De)centralized organization of the judiciary (Krommendijk, 2021)* - *Position of EU law in the national legal order (Krommendijk, 2021)* - *Adversarial/ inquisitorial nature of the legal system (Krommendijk, 2021; Jaremba 2014)* - *Culture of judicial review (Krommendijk, 2021; Jaremba, 2014)*
Meso	- *The existence of social problems that necessitate new legal solutions at the supranational level (Mayoral & Torres Pérez, 2019)* - *Factors related to judges' capability to efficiently handle cases in an environment with high caseloads (workload, quotas, court resources) EU law section, (Jaremba, 2014; Glavina, 2019; Krommendijk, 2021)* - *Recognition or reward of additional effort invested into drafting preliminary reference (Glavina, 2019)* - *Level of specialization and culture within courts (Krommendijk, 2021; Pavone, 2018)* - *Availability of EU law training and education in (post) university curricula (Jaremba, 2014; Krommendijk, 2021; Glavina, 2020)* - *Opportunity structures for parties (Jaremba, 2014; Krommendijk, 2021; Pavone, 2018)*

Micro	- *Knowledge of EU law (Jaremba, 2014; Pavone, 2018; Glavina, 2019)* - *Experience with EU law in daily practice (Jaremba, 2014; Glavina, 2019)* - *Wish to efficiently handle cases in an environment with high caseloads (Jaremba, 2014; Mayoral and Torres Pérez, 2019 Pavone, 2018)* - *Legalist considerations (Jaremba, 2014; Krommendijk, 2021; Glavina, 2019; Glavina and Leijon, 2022)* - *Substantive normative motivations: fear of delay in a specific case (Jaremba, 2014; Krommendijk, 2021; Glavina and Leijon, 2022)* - *Concerns about capacity of the ECJ to process preliminary references (Krommendijk, 2021; Glavina and Leijon, 2022)* - *Concerns about judges' reputation (Jaremba, 2014; Krommendijk, 2021; Glavina, 2019; Glavina and Leijon, 2022)* - *Concerns about sanctions (Pavone, 2018; Glavina, 2019; Glavina and Leijon, 2022; Jaremba, 2014; Pavone, 2018)*

Figure 1 contextual and individual factors of influence on judges' decision (not) to refer.

Although all qualitative studies except for the one by Krommendijk focus on lower instance courts, they are still relevant for the current research, given they provide context on what factors may influence judicial decision-making with regard to the use of the preliminary reference mechanism more generally. The fact that almost all studies focus on lower-instance courts underlines the importance of qualitative research into what motivates judges of last instance courts (not) to refer to fill this empirical gap. The

necessity of further qualitative research into incentives and disincentives of last instance court judges in participation in European integration is also strengthened by the fact that many of the mentioned 'grand theories' of European integration (neo-functionalism and judicial empowerment, inter-court competition) would expect last instance courts to be very reluctant in using the preliminary reference procedure. For instance, last instance courts would not be 'empowered' by the use of the preliminary reference procedure since they often already have the power of judicial review. The 'inter-court competition' theory similarly primarily sees incentives for lower-instance courts to participate in European Integration. What drives specifically last instance courts to participate in European integration is hence a topic that could still further be explored.

Besides a focus on what factors influences *last instance court* judges in their decision (not) to refer being relevant, the several scholars have highlighted findings on judicial decision making in one member state may not necessarily apply similarly in other Member States.[236] This underlines the relevance of research into judicial decision making with regard to the use of the preliminary reference mechanism in Member States that have not yet been explored in qualitative research. One of these unexplored legal systems is Belgium. Hence, the main question of this research partially fills an empirical gap in the current state of academic literature.

[236] Leijon and Glavina (n 228) 276; Jaremba 2012 (n 149).

4. Last instance courts' obligation to make preliminary references to the ECJ: legal framework

This chapter sets out the legal framework of last instance courts' obligation to refer a preliminary question to the ECJ, as well as the discussions and critique in literature about the interpretation thereof, specifically focusing on the 'CILFIT' criteria,[237] and the relevant post-CILFIT case law.

4.1. Legal Framework

Article 19(3)(b) Treaty on the European Union (TEU),[238] in conjunction with article 267 of the TFEU lay down the legal framework for the preliminary reference procedure.[239] Article 19(3)(b) TEU grants the ECJ jurisdiction to 'give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions'.[240] As mentioned in the introduction, article 267 TFEU sets out the content of the preliminary reference procedure in more detail. It clarifies what type of questions may be referred, namely questions of interpretation of the Treaties and of acts of the institutions, bodies, offices or agencies of the EU, as well as questions relating to the validity of acts of those EU institutions.[241] In case of a question on the interpretation of EU law, the national courts asks the ECJ how a provision of EU law is to be interpreted with a view to the compatibility of national law with that provision of EU law.[242] Where a question concerning the validity of an act of an EU institution is raised, the national court asks whether a Union act on which a national decision is based, is compatible with EU law (e.g. the Treaties or a general principle of EU law).[243] It follows from the case *Foto-Frost* that national courts may not declare acts of

[237] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33.
[238] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).
[239] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU).
[240] Article 19(3)(b) TEU.
[241] Article 267(1)(a) TFEU, Article 267(1)(b) TFEU, Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials* (7th edn, Oxford University Press) 498.
[242] Rolf Ortlep and Rob JGM Widdershoven, 'Judicial Protection' in: JH Jans, S Prechal and RJGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015) 351.
[243] ibid.

the EU invalid. Therefore, they may consider the validity of EU law, and if they consider that the grounds put forward by the parties in support of the invalidity unfounded they may reject them and conclude that the measure is valid, but if they think the EU act is invalid they must refer the matter to the ECJ.[244]

The text of article 267 TFEU also clarifies that when a question on the interpretation or validity of EU law is raised in a case pending before a national court against whose decision there is no judicial remedy (a court of last instance) the court of last instance does not only have the *power* to refer but is also *required* to do so.[245] The rationale behind this duty to refer is to prevent the establishment of a national body of case law in discordance with EU law.[246] However, the ECJ has established in its case law several limits on last instance courts' duty to refer. These limits will be elaborated on below.

4.2. Limits placed on last instance courts' duty to request a preliminary ruling

This sub-section will elaborate on the ECJ's case law in which it has set out certain limits to the duty of national courts of last instance to refer. Firstly, national courts of last instance do not have to refer when a question is irrelevant in the dispute at hand. Secondly, this chapter will also treat the ECJ's case law in which it has made exceptions to refer with respect to relevant questions: ex-officio application of EU law and the so-called *acte éclairé* and *acte clair*.[247] These will be further elaborated on below. It is important to note, however, that since national courts have no jurisdiction to declare acts of Community institutions themselves invalid and in light of the uniformity of Union law, these CILFIT-exceptions cannot be extended to questions relating to the validity of EU

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[244] Case C-314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452 para 14, 15.
[245] Article 267 TFEU.
[246] Case C-107/76 *Hoffmann-Laroche* [1977] ECLI:EU:C:1977:89 para 5; Case C-393/98 Ministerio Publico and Gomes Valente v Fazenda Publica [2001] ECR I-1327 para 17.
[247] Koen Lenaerts, Ignace Maselis, Kathleen Gutman and Janek Thomas Nowak, *EU Procedural Law* (Oxford University Press 2014) 97.

acts but only apply to questions about the interpretation of EU law.[248] This follows from the case *Foto-Frost* and was clarified by the ECJ in the case *Gaston Schul.*[249]

4.2.1. Limits on last instance courts' duty to refer: irrelevant questions

According to the text of article 267(1)(a) TFEU, national courts only have to ask a question 'if they consider that a decision on the question is necessary to enable it to give judgment'.[250] When looking at the wording of article 267(1)(b) TFEU, it seems that there is no such requirement of the question being necessary to give judgement for last instance courts.[251] However, the ECJ clarified in the *CILFIT* case that

> "it follows from the relationship between the second and third paragraphs of [article 267 TFEU] that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of [Union] law is necessary to enable them to give judgement. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of [Union] law [or the validity of an act of a Union institution, body, office or agency] raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case."[252]

It is thus for the national court (of last instance) to determine whether a preliminary ruling would be necessary to enable them to give judgement. When a last instance court does decide to refer a preliminary question to the ECJ, the reference enjoys a presumption of relevance. However, in light of the limits of the ECJ's own jurisdiction, which is not that of 'delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States',[253] this presumption may be

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[248] Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECLI:EU:C:2005:742 para 19.
[249] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452; Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECLI:EU:C:2005:742 para 19.
[250] Article 267 TFEU.
[251] Broberg and Fenger (n 130) 156.
[252] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 10 via Lenaerts, Maselis, Gutman and Nowak (n 254) 98.
[253] Case C-244/80 *Foglia v Novello II* [1981] ECLI:EU:C:1981:302 para 18.

rebutted.[254] That is because the limits of the ECJ's jurisdiction would be exceeded if the preliminary ruling could in no way contribute to the resolution of the dispute pending before the national court.[255] According to the case law of the ECJ, a preliminary ruling would not contribute to the resolution of the dispute where (a) a question is of hypothetical nature, (b) the question bears no relation to the dispute before the national court, (c) there is an absence of a cross-border element in the national dispute and (d) where the dispute is of spurious nature.[256] These categories thus give further shape to which questions may be considered of (ir)relevant nature. They will be briefly elaborated upon below.

Firstly, the ECJ has rebutted the presumption of relevance in case of a *hypothetical question.*[257] A hypothetical question is a question that will 'result in the Court delivering an advisory opinion on certain points of Union law, rather than providing an interpretation of Union law that is useful to solve the dispute pending before the referring national court.'[258] A question may be hypothetical from the outset or may become hypothetical in the course of the proceedings. The latter is the case when the context of the case pending before the national court has changed, e.g. when the national legislation under consideration in the context of the request for the preliminary ruling has been annulled or where the dispute to which the preliminary reference relates has already been ended.[259]

Secondly and sometimes overlapping with the former, a question will be considered irrelevant when it *bears no relation to the dispute before the national court.* That is the case when the interpretation of Union law or assessment of the validity of a rule of law sought by the national court in fact bears no relation to subject matter of the main action or the actual nature of the case.[260] Examples of this are when a question concerns a side-issue of a dispute that does not have any impact on the outcome of the

[254] Lenaerts, Maselis, Gutman and Nowak (n 254) 87.
[255] ibid 85.
[256] Lenaerts, Maselis, Gutman and Nowak (n 254) 87-94.
[257] ibid 87.
[258] ibid 87.
[259] Case C-241/09 *Fluxys* [2010] ECLI:EU:C:2010:753 para 33-34; Rolf Ortlep and Rob JGM Widdershoven, 'Judicial Protection' in: JH Jans, S Prechal and RJGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015) 352.
[260] See e.g. Case C-126/80 *Salonia* [1981] ECLI:EU:1981:136 para 6.

proceedings,[261] when the question does not have the purpose of solving the case in the main action,[262] or when it is not clear how the national rule related to the interpretation of Union law sought is applicable to the facts in the main proceedings.[263]

Thirdly, a preliminary reference will not be relevant when the provision of Union law invoked will be incapable of applying due to a *purely internal situation.*[264] This situation occurs when all the elements of a case are confined within a single Member State and a cross-border element is thus lacking. These situations are outside the scope of EU law,[265] and since provisions of EU law are therefore incapable of applying, the ECJ will most often decline jurisdiction.[266] However, the Court has made several exceptions to this general rule. Firstly, a question relating to the fundamental freedoms is still useful despite the existence of a purely internal situation where 'national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law'.[267] Secondly and not confined to fundamental freedoms, a question concerning a purely internal situation will still be relevant and within the ECJs jurisdiction where the facts of the case are outside the scope of EU law but where a provision of EU law has been made directly and unconditionally applicable by national legislation or even merely by virtue of terms in a contract.[268] Thirdly, despite the existence of a purely internal situation, the ECJ has regarded requests for preliminary rulings relating to the fundamental freedoms admissible when the answer to the question could bear *potential* consequences for cross-

[261] See e.g. Joined Cases C-92/09 and C-93/09 *Volker und Schecke and Eifert* [2010] ECLI:EU:C:2010:662 para 38-42.
[262] See e.g. Case C-286/88 *Falciola* [1990] ECLI:EU:C:1990:33.
[263] See e.g. Case C-393/09 *Bezpečnostní softwarová asociace* [2010] ECLI:EU:C:2010:816 para 26.
[264] Case C-245/09 *Omalet* [2010] ECLI:EU:C:2010:808; Rolf Ortlep and Rob JGM Widdershoven, 'Judicial Protection' in: JH Jans, S Prechal and RJGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015) 352; Lenaerts, Maselis, Gutman and Nowak (n 254) 81.
[265] Sara Iglesias Sánchez, 'Purely Internal Situation and the Limits of EU law: A Consolidated Case Law or a Notion to be Abandoned? (2018) 14(1) European Constitutional Law Review 7, 10.
[266] See e.g. Case C-464/15 *Admiral Casinos & Entertainment* [2016] ECLI:EU:C:2016:500; Case C-567/07 *Woningstichting Sint Servatius* [2009] ECLI:EU:C:2009:593.
[267] Case C-268/15 *Ullens de Schooten* [2016] ECLI:EU:C:2016:874 para 52; Case 448-98 *Guimont* [2000] ECLI:EU:C:2000:663 para 23.
[268] Case C-268/15 *Ullens de Schooten* [2016] ECLI:EU:C:2016:874 para 53; Case C-297/88 *Dzodzi* [1990] ECLI:EU:C:1990:360 para 36, 37 and 41; Case C-346/93 *Kleinwort Benson* [1995] ECLI:EU:C:1995:85 para 16; C-28/95 *Leur-Bloem* [1997] ECLI:EU:C:1997:369 para 27, 32.

border situations.[269] Lastly, the ECJ will answer a preliminary reference despite the dispute being confined within a single member state where a request for a preliminary ruling is made in a proceeding regarding the annulment of a national provision which not only applies to its own national but also those of other Member States.[270]

A fourth and last situation in which a preliminary question would be irrelevant is when the dispute is of spurious nature.[271] Such is the case when the preliminary reference procedure is being misused and is only being resorted to in order to evoke a ruling from the ECJ in a spurious (fictitious) dispute.[272] The ECJ does not come to this decision quickly: a preliminary reference is only inadmissible where it is 'manifestly apparent from the facts set out in the order of reference that the dispute is in fact fictitious.'[273]

4.2.2. Limits on last instance courts' duty to refer with respect to relevant questions

4.2.2.1 Exceptions to the obligation to apply EU law Ex-Officio

A first exception to the duty of last instance courts to refer relevant questions on the interpretation and/or validity of EU law could be found in the exception to last instance courts' duty to raise EU law of its own motion ('*ex officio*'). *Ex officio* application may arise when the parties in a dispute have failed to invoke a relevant provision of EU law, and the court decides to apply EU law of its own motion. However, an obligation to apply EU law *ex officio* might require a national court to have to abandon the passive role assigned to it.[274] That is because the national court would have to go beyond the ambit of the dispute as defined by the parties themselves, and/ or would have to rely on facts and circumstances other than those on which the parties have based their claim.[275] The ECJ held in the case *Van Schijndel* that national courts are not required to raise (problems of) EU law *ex officio* if that would mean they would have to abandon the passive role assigned

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[269] Case C-159/12 to C-161/12 *Venturini and Others* ECLI:EU:C:2013:791 para 25, 26; Case C-268/15 *Ullens de Schooten* [2016] ECLI:EU:C:2016:874 para 50; Iglesias Sánchez (n 265) 16.
[270] Case C-268/15 *Ullens de Schooten* [2016] ECLI:EU:C:2016:874 para 51; Cases C-197/11 and C-203/11 *Libert and Others* [2013] ECLI:EU:C:2013:288 para 35.
[271] Lenaerts, Maselis, Gutman and Nowak (n 254) 92-93.
[272] Case C-231/89 *Gmurzynska-Bscher* [1990] ECLI:EU:C:1990:386 para 23.
[273] Case C-267/86 *Van Eycke* [1988] ECLI:EU:C:1988:427 para 23; C-118/94 *Associazione Italiana per il WWF and Others* [1996] ECLI:EU:C:1996:86 para 15; Case C-129/94 *Bernáldez* [1996] ECLI:EU:C:1996:143 para 7.
[274] Joined Cases C-430/93 and C -431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441 para 16.
[275] ibid.

to them.[276] Hence, the situation could arise that a last instance court judge does not apply EU law *ex officio* and therefore 'misses' a relevant question on the interpretation or validity of EU law present in the case at hand. In *Van Schijndel*, the ECJ did however also hold that such national rules of procedural law preventing *ex officio* application may only apply if they fulfill the requirements of equivalence and effectiveness. Following the principle of equivalence, the national rules regarding *ex officio* application of EU law 'must not be less favourable than those governing similar domestic actions'.[277] Moreover, pursuant to the principle of loyal cooperation, where a national court has a *discretion* to apply national rules *ex officio*, it has an *obligation* to do so with regard to EU law.[278] The principle of effectiveness furthermore requires that the national procedural rule assigning a passive role to the judge must not 'render virtually impossible or excessively difficult the exercise of right conferred by [EU] law'.[279] Whether the latter is the case must, according to the ECJ, be analyzed 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.'[280] An example of a case where it was found that the national legal rule preventing *ex officio* application did not comply with the principle of effectiveness is the case *Peterbroeck*.[281] In this case, the ECJ held that the procedural rule was incompatible with EU law:

> "the [national] court was the first judicial authority to have cognizance of the case and to be able to request a preliminary ruling, the fact that another judicial authority in a further hearing was precluded from raising the question of compatibility with [EU] law of its own motion, and the fact that the impossibility for national courts to raise points of [EU] law of their motion did not appear to be reasonably justifiable by principles such as the requirement of legal certainty or proper conduct of the procedure."[282]

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[276] ibid para 22; Lenaerts, Maselis, Gutman and Nowak (n 254) 133.
[277] Joined Cases C-430/93 and C -431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441 para 17.
[278] Joined Cases C-430/93 and C -431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441 para 14.
[279] ibid 14.
[280] ibid para 19.
[281] Case C-312/93 *Peterbroack* [1995] ECLI:EU:C:1995:437.
[282] Lenaerts, Maselis, Gutman and Nowak (n 254) 133.

4.2.2.1 The CILFIT-criteria

In the famous case *CILFIT,* the ECJ has made three important exceptions to the obligation of last instance courts to refer with respect to relevant questions.[283] These exceptions are commonly referred to as the *CILFIT-exceptions*, or the *CILFIT-criteria*.

Firstly, last instance courts are not under an obligation to make a preliminary reference when the question raised is materially identical with a question that had already been the subject of a preliminary ruling in a similar case.[284] Secondly, an exception to the obligation of last instance courts to refer preliminary rulings is made when previous decisions of the ECJ have already dealt with the point of law in question, despite the questions in the two cases not being strictly identical.[285] These two situations are commonly referred to as *acte éclairé*.[286]

Thirdly, the ECJ clarified in the case CILFIT that last instance courts are not obliged to refer in case of an *acte clair.* An *acte clair* may be established when the correct application of EU law is 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.'[287] Before a national court comes to the conclusion that such is the case, it must be 'convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.'[288] When assessing whether a question raised qualifies as an *acte clair*, national courts must therefore take into account the specific characteristics of EU law, namely the existence of authentic versions of judgements in several languages and the fact that EU law uses terminology that is peculiar to it. Taking into account these two characteristics implies, according to the Court, that the establishment of an *acte clair* involves a comparison of all the different language versions of judgements as well as an awareness of the fact that legal concepts do not necessarily have a similar meaning in EU law as in the national law

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[283] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 and see also Case C-28-30/62 *Da Costa en Schaake NV and Others v. Administratie der Belastingen* [1963] ECR 31.
[284] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 13; Case C-28-30/62 *Da Costa en Schaake NV and Others v. Administratie der Belastingen* [1963] ECR 31.
[285] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 14.
[286] See e.g. Rolf Ortlep and Rob JGM Widdershoven, 'Judicial Protection' in: JH Jans, S Prechal and RJGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015) 355.
[287] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 16.
[288] ibid.

of the Member State.[289] In addition, every provision of EU law must be placed in its broader context and must be interpreted 'in the light of the provisions of [Union] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'[290] Based on the case CIFLIT, national courts of last instance should therefore not be too quick to assume that a matter is an *acte clair*.[291]

4.3. Post-CILFIT case law

Over the years, the ECJ has further elaborated on the application of CILFIT. Particularly worth mentioning are the cases *Intermodal Transport*[292] and the more recent cases *Van Dijk*,[293] *Ferreira*,[294] and *Consorzio Italian Management*,[295] in which the Court seemed to somewhat loosen the strict approach toward the duty of last instance courts to refer taken in CILFIT.[296] This section will briefly elaborate on these cases, as well as on the case *Commission v. France* which seemed to rather confirm a strict reading of CILFIT.[297]

Firstly, in the 2005 case *Intermodal Transport*, the ECJ clarified that a decision of an *administrative* authority of one Member State that the highest court of *another* Member State considered contrary to EU law did not trigger article 267 TFEU. While national courts in their assessment of whether something is so obvious as to leave no scope for any reasonable doubt must be convinced that the matter is equally obvious to courts of other member states, this requirement does not also extend to bodies of non-judicial nature, such as administrative authorities.[298]

A less strict reading of CILFIT can similarly be found in the 2015 cases *Van Dijk* and *Ferreira*. In *Van Dijk*, the ECJ held that although last instance courts must bear it in mind in their assessment of the CILFIT criteria if a case is pending in which a lower court

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[289] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 16.
[290] ibid para 20.
[291] Ortlep and Widdershoven (n 286) 356.
[292] Case C-495/03 *Intermodal Transports BV* [2005] ECLI:EU:C:2005:215.
[293] Joined Cases C-72/14 and C-197/14 *Van Dijk* [2015] ECLI:EU:C:2015:564.
[294] Case C-160/14 *Ferreira* [2015] ECLI:EU:C:2015:565.
[295] Case C-561/19 *Consorzio Italian Management* [2018] ECLI:EU:C:2021:799.
[296] Jurian Langer and Jasper Krommendijk, 'De verwijzingsplicht van de hoofste rechters in Nederland en de *Cilfit*-controverse: prejudicieel verwijzen of niet?' (2019) Ars Aequi 469, 470.
[297] Case C-416/17 *Commission v France* [2018] ECLI:EU:C:2018:811.
[298] Case C-495/03 *Intermodal Transports BV* [2005] ECLI:EU:C:2005:215 para 39.

has referred a question to the ECJ on the same legal issue, this latter fact does not preclude last instance courts from concluding that the case before it involves an *acte clair*.[299] In the case *Ferreira*, pronounced on the same day as *Van Dijk*, the ECJ was asked whether a national court of last instance was in principle obliged to refer when lower national courts had given conflicting decisions concerning the interpretation of an EU law concept.[300] In its answer, the court held that in itself, the fact that other national courts or tribunals have given contradictory decisions on the interpretation of an EU law concept is not as such a conclusive factor capable of triggering an obligation to refer.[301] In line with *Van Dijk*, The Court here seems to put more emphasis on the *subjective* experience of a 'reasonable doubt' instead of the strict and objective CILFIT criteria in which a doubt is only taken away when the last instance courts is convinced that 'the matter is equally obvious to the courts of other Member States and to the Court of Justice'.[302] However, the ECJ also makes clear in *Ferreira* that the freedom of last instance courts to follow their subjective experience is limited and that last instance courts should hence employ caution before deciding that an act is *clair*. The ECJ specifically held that when a concept frequently gives rise to difficulties of interpretation in the various Member States and to conflicting lines of case law at the national level, a national court of last instance must comply with its obligation to make a reference to the ECJ in order to avoid the risk of incorrect application of EU law.[303]

While the cases *Van Dijk* and *Ferreira* hint towards a less strict and more 'subjective' understanding of CILFIT, the 2018 case *Commission v. France* seemed to imply that the ECJ stuck to a strict reading of CILFIT.[304] In this case, the Court found for the first time in history in an infringement procedure that a member state did not comply with its obligation to refer.[305] The criteria used by the Court to come to such conclusion

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[299] Joined Cases C-72/14 and C-197/14 *Van Dijk* [2015] ECLI:EU:C:2015:564 para 60.
[300] Case C-160/14 *Ferreira* [2015] ECLI:EU:C:2015:565 para 36.
[301] ibid para 41.
[302] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 16; Langer and Krommendijk (n 304) 470.
[303] Case C-160/14 *Ferreira* [2015] ECLI:EU:C:2015:565 para 44.
[304] Langer and Krommendijk (n 304) 470. See also the case C-379/15 *Association France Nature Environnement* [2016] ECLI:EU:C:2016:603 in which the court also stuck to a stringent or 'traditional' reading of the CILFIT caselaw.
[305] Jasper Krommendijk, 'Case C-416/17 *Commission v. France* [2018] ECLI:EU:C:2018:811' (2018) Jurisprudentie Bestuursrecht para 1.

pointed towards a strict reading of CILFIT. That is firstly because the Court held that the *Conseil d'État* could not have been certain that its interpretation of the EU law concept at hand would be equally obvious to the ECJ.[306] Secondly, the ECJ held that the fact that the *Conseil d'État* adopted an interpretation at variance with the interpretation the ECJ put forward in its case *Commision v. France* implied that the existence of a reasonable doubt could not have been ruled out when the *Conseil d'État* delivered its ruling.[307] However, the recent case *Consorzio Italian Management* shows that the strict reading of CILFIT in *Commission v. France* should be seen as an exception rather than the rule. Although the ECJ did not follow Advocate General Bobeks advice to revise the CILFIT-criteria, it did further refine and relax the requirements for the establishment of an *acte clair*.[308] Firstly, the ECJ held that while the divergences between the various language versions of which a national court of last instance is aware must be borne in mind (especially when raised by the parties and verified), a national court of last instance cannot be required to examine each language version of a provision of EU law in question.[309] Secondly, it ruled that the mere fact that a provision of EU law may be interpreted in (an) other way(s) is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that EU law provision.[310] In their assessment of a reasonable doubt, the national last instance courts are to take into account the purpose of the preliminary reference procedure, namely the uniform interpretation of EU law.[311] Moreover, a novelty introduced in *Consorzio Italian Management* is that national last instance courts must provide a statements of reasons to justify their decision not to refer.[312] The ECJ held that it follows from article 267 TFEU read in light of article 47 of the Charter that:

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[306] Case C-416/17 *Commission v France* [2018] ECLI:EU:C:2018:811 para 110.
[307] ibid para 111.
[308] Jasper Krommendijk, 'Case C-561/19 *Consorzio Italian Management* [2021] ECLI:EU:C:2021:799' (2021) Jurisprudentie Bestuursrecht.
[309] Case C-416/17 *Commission v France* [2018] ECLI:EU:C:2018:811 para 44 via Jasper Krommendijk, 'Case C-561/19 *Consorzio Italian Management* [2018] ECLI:EU:C:2021:799' (2021) Jurisprudentie Bestuursrecht para 3.
[310] Case C-416/17 *Commission v France* [2018] ECLI:EU:C:2018:811 para 48.
[311] ibid para 49.
[312] Giulia Gentile and Matteo Bonelli, 'La jurisprudence des petits pas: C-561/19, Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA' (*REALaw*, 30 November 2021).

> "if a national court or tribunal against whose decisions there is no judicial remedy under national law takes the view, because the case before it involves one of the three situations [set out in CILFIT], that it is relieved of its obligation to make a reference to the Court under the third paragraph of Article 267 TFEU, the statement of reasons for its decision must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case-law or, in the absence of such case-law, that the interpretation of EU law was so obvious to the national court or tribunal of last instance as to leave no scope for any reasonable doubt."[313]

Thus, national last instance courts have a duty to state their reason for not referring and must also be *specific* in doing so: they must refer to one of the three CILFIT-exceptions. With this judgement, the ECJ has arguably aligned its case law with that of the ECtHR which held that it follows from article 6 ECHR that last instance courts have a duty to state reasons when deciding not to refer.[314]

4.3. Critiques of the CILFIT *acte clair* criterion

Particularly the *acte clair*, has been subject to quite some criticism in academic literature,[315] as well as by the ECJs own Advocates General.[316] Advocate General Bobek has recently placed the problems with CILFIT into four categories, (1) *conceptual* problems inherent to the CILIT criteria, (2) problems relating to the *feasibility* of the criteria, (3) *systemic inconsistency* of the CILFIT criteria with other types of proceedings and remedies, and (4) problems with CILFIT that have arisen due to subsequent *evolution* of EU law and the EU judicial system.[317] They will be briefly elaborated on below.

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[313] Case C-561/19 *Consorzio Italian Management* [2021] ECLI:EU:C:2021:799 para 51.
[314] Gentile and Bonelli (n 312).
[315] See e.g. Langer and Krommendijk (n 304) 470; D. Edward, 'CILFIT and Foto-Frost in their Historical and Procedural Context' in: M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 2010* (Hart Publishing 2010).
[316] Davor Petrić, 'How to Make a Unicorn or 'There Never Was an "*Acte Clair"* in EU Law': Some Remarks About Case C-561/19 *Consorzio Italian Management* (2021) 17 Croatian Yearbook of European Law and Policy 307.
[317] Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291 para 88.

4.3.1 Conceptual problems regarding CILFIT criteria

In his recent opinion in the case *Consorzio Italian Management*, Advocate General Bobek sets out three conceptual problems regarding the CILFIT criteria. Firstly, he argues that there is a "Hoffmann-Laroche-CILFIT mismatch" because the logic of the CILFIT exceptions do not correspond with the nature of the Hoffmann-Laroche duty to refer.[318] In *Hoffmann-Laroche* the ECJ clarified that the purpose of the duty to refer is to prevent a body of case law being established that deviates from that of another Member State or from the ECJ.[319] The CILFIT criteria are not constructed around that same logic, but rather concern the *individual* and *specific* case. Bobek argues that therefore, the exceptions to the duty to refer do not correspond to the overall logic and purpose of that duty.[320] Secondly, the *acte clair* is a transplant from the French legal doctrine and it is questionable, according to Bobek, to what extent the French legal doctrine is really transplantable to the European level.[321] Thirdly, Bobek points out that the CILFIT exceptions have the tendency of blurring the line between application and interpretation of EU law and therefore the boundary between the tasks of the ECJ (interpretation) and the national last instance courts (application).[322]

4.3.2. Feasibility problems

Next to conceptual problems, concerns were raised in relation to the feasibility and viability of the *acte clair* criteria: Advocate General Jacobs for instance criticized the requirement to perform a comparison of all linguistic versions of the relevant provision of EU law.[323] He argued that an examination of all the different language versions of a provision of EU law was rarely applied even by the ECJ itself, despite the Court having much better resources to do so.[324] The very existence of the many language versions of provisions of EU law was, according to Jacobs, a reason for not adopting a very literal approach to the interpretations of those provisions but rather to put more weight on the

[318] ibid para 90.
[319] ibid para 91.
[320] ibid para 93.
[321] ibid para 95.
[322] ibid para 98.
[323] Opinion of Advocate General Jacobs in Case C-338/95 *Weiner* [1997] ECLI:EU:C:2005:742.
[324] ibid.

context, general scheme, object, and purpose of provisions of EU law.[325] AG Jacobs and also AG Tizzano in the case *Lyckeskog* argued that therefore the CILFIT criteria must be interpreted rather as a recommendation to national last instance courts to be cautious. Before national last instance courts interpret a provision EU law in a certain way, they must be sure that they are not doing so for reasons associated with the wording of the provision alone.[326]

Along the same lines, AG Stix-Hackl takes the view that the requirements for establishing an *acte clair*

> "cannot be regarded as a type of instruction manual on decision-making for national courts of last instance which is to be rigidly adhered to [...]. Those requirements cannot be used as a benchmark for establishing "objectively" when the meaning of a [EU] law provision is so obvious as to leave no scope for any reasonable doubt as to its interpretation."[327]

According to Bobek, the reasonable doubt criteria amounting to a checklist or a tool kit are either way problematic. If the criteria for reasonable doubt amount to a checklist, they are impossible to complete.[328] AG Colomerto concluded similarly that "there is absolutely no possibility of adopting the *Cilfit* approach".[329] Along the same line, Advocate General Wahl concluded in the case *Van Dijk* that "coming across a 'true' *acte clair* situation would, at best, seem just as likely as encountering a unicorn."[330] If the criteria for reasonable doubt must be understood rather as a tool kit, problems also arise: according to Bobek, there would be a problem of selectivity as to which tool should be used.[331]

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[325] ibid.
[326] Opinion of Advocate General Jacobs in Case C-338/95 *Weiner* [1997] ECLI:EU:C:2005:742; Case C-99/00 *Lyckeskog* [2002] ECLI:EU:C:2002:108 para 75.
[327] Opinion of Advocate General Stix-Hackl in Case C-495/03 *Intermodal Transports BV* [2005] ECLI:EU:C:2005:215 para 100; recently endorsed in the Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291.
[328] Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291 para 99.
[329] ibid para 53.
[330] Opinion of Advocate General Wahl in Case C-72/14 and C-197/14 *X and van Dijk* [2015] ECLI:EU:C:2015:319 para 62 via Petrić (n 316).
[331] Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291 para 99.

Besides consistent criticism of the Advocates General, the unfeasibility of the *acte clair* criteria are, according to Bobek, also visible in the manner in which national last instance courts and the European Court of Human Rights (ECtHR) apply or review that obligation. National last instance courts hardly apply the criteria for *acte clair* in a consistent and systematic manner and come up with their own criteria and standards.[332] In member states where the compliance with the duty to refer is checked by their constitutional courts, the yardstick is often far lighter than the CILFIT-criteria.[333] Where the ECtHR reviews last instance court's failure to refer the focus is on the reasoning behind the national decision rather than on a detailed examination of the CILFIT criteria.[334] This underlines according to Bobek "the lack of any reasonable guidance as to the logic or application of the CILFIT criteria."[335]

4.3.3. Problems of systemic coherence of EU law remedies

A third category of critique of the CILFIT criteria Bobek describes as problems relating to the systemic coherence of the criteria with the system of EU law remedies. Bobek points out that 'the CILFIT criteria are even oddly disconnected from EU law's own means of enforcing the obligation to make a reference under the third paragraph of article 267 TFEU.'[336] As there is no 'direct' EU law remedy available to parties if they believe that last instance courts did not fulfill their duty to refer, the enforcement of that duty is a matter of state liability or infringement proceedings.[337] However, the Court's own case law on the scope of the duty seems to be inconsistent with the enforcement of the duty of last instance courts to refer, in particular in relation to infringement proceedings. Whereas one would expect the enforcement of the duty to refer to be a facet of the CILFIT criteria, the infringement procedure against France for a failure of a last instance court to refer suggest otherwise. In *Commission v. France*,[338] the ECJ did not review any of the specific

[332] ibid para 105.
[333] ibid para 106.
[334] Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291 para 109.
[335] ibid para 110.
[336] ibid para 111.
[337] ibid para 113.
[338] Case C-416/17 *Commission v. France* [2018] ECLI:EU:C:2018:811.

criteria that national courts of last instance should according to CILFIT consider before coming to the conclusion that a provision of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.[339]

4.3.4. Evolution of EU law and the judicial system

A last category of critique relates to the evolution of the judicial system and EU law in the forty years after CILFIT has been pronounced. Firstly, the preliminary reference mechanism has, according to Bobek, developed to place greater emphasis on precedent building for the purpose of systemic uniformity.[340] As a result, there is a greater emphasis on the macro purpose of litigation and therefore the focus has shifted beyond the specific case.[341] Moreover, Bobek argues that national courts have become more familiar with EU law and the preliminary reference procedure. Paradoxically illustrated by the fact that national last instance courts are not following the CILFIT criteria, Bobek maintains that national last instance course in fact display very good understanding of the nature of the system of EU law. Moreover, if they were to strictly apply the CILFIT criteria, according to Bobek the "annual docket of the Court of Justice would suddenly have more zeros attached at the end and the entire system would collapse within a short period."[342]

4.5. Conclusion

This chapter set out the legal framework of last instance courts' duty to refer a preliminary reference to the ECJ in case of questions about the interpretation or validity of EU law, laid down in article 267 TFEU. The rationale behind this duty is to prevent the establishment of a national body of case law not in accordance with EU law.[343] The ECJ has established several rules and limits on last instance courts' duty to refer questions on the interpretation of EU law. Firstly, with regard to questions about the validity of acts of EU law, the ECJ held in *Foto-Frost* that national courts may not declare acts of the EU

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[339] Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291 para 111-121.
[340] ibid para 124.
[341] ibid para 125.
[342] ibid para 128.
[343] Case C-107/76 *Hoffmann-Laroche* [1977] ECLI:EU:C:1977:89 para 5; Case C-393/98 *Ministerio Publico and Gomes Valente v Fazenda Publica* [2001] ECR I-1327 para 17.

invalid. Therefore, they may consider the validity of EU law, and if they consider that the grounds put forward by the parties in support of the invalidity unfounded they may reject them and conclude that the measure is valid, but if they think the EU act is invalid they must refer the matter to the ECJ.[344] Concerning questions about the interpretation of EU law, the ECJ has laid down exceptions to the obligation of last instance courts to refer in the case CILFIT. According to this case, national courts of last instance do not have to refer when (a) a question is irrelevant in the dispute at hand, (b) when the question raised is materially identical with a question that had already been the subject of a preliminary ruling in a similar case,[345] or when previous decisions of the ECJ have already dealt with the point of law in question *(acte éclairé)*,[346] and (c) when the correct application of EU law is 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' *(acte clair)*.[347] In CILFIT, the Court set out rather strict criteria to be met before a national court of last instance could decide that a matter is an *acte clair*: the national court must be "convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice",[348] and the establishment of an *acte clair* involved a comparison of all the different language versions of the EU.[349] The strict CILFIT criteria have been subject of fierce critique, most notably by the ECJs own Advocates General. This critique can be divided into four categories: (1) *conceptual* problems inherent to the CILIT criteria, (2) problems relating to the *feasibility* of the criteria, (3) *systemic inconsistency* of the CILFIT criteria with other types of proceedings and remedies, and (4) problems with CILFIT that have arisen due to subsequent *evolution* of EU law and the EU judicial system.[350] An analysis of the post-CILFIT case law found that the ECJ has in recent rulings somewhat eased it's traditionally

[344] Case C-314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452.
[345] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 13; Case C-28-30/62 *Da Costa en Schaake NV and Others v. Administratie der Belastingen* [1963] ECR 31.
[346] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 14.
[347] ibid para 16.
[348] ibid.
[349] ibid para 16.
[350] Opinion of Advocate General Bobek in Case C-561/19 *Consorczio Italian Management* [2021] ECLI:EU:C:2021:291 para 88.

strict reading of CILFIT, most notably in the case *Consorzio Italian Management*, otherwise know as *CILFIT-II* .[351]

[351] Case C-495/03 *Intermodal Transports BV* [2005] ECLI:EU:C:2005:215; Joined Cases C-72/14 and C-197/14 *Van Dijk* [2015] ECLI:EU:C:2015:564; Case C-160/14 *Ferreira* [2015] ECLI:EU:C:2015:565; Case C-561/19 *Consorzio Italian Management* [2018] ECLI:EU:C:2021:799.

5. Use of the preliminary reference mechanism by the Constitutional Court, Court of Cassation and the Council of State.

5.1 Introduction

This chapter will provide some more context on the use of the preliminary reference mechanism by Belgian last instance courts. To that end, it will firstly in section 2 shortly introduce the judiciary system in Belgium. In section 3, a look will be taken at the statistics of the number of preliminary references in relation to the percentage of cases that contain an EU-element. The statistics will give a better image of the general participation of the three Belgian last instance courts in the preliminary reference mechanism, and will be able to place the findings of the interviews that will be presented in the next chapter into context.

Having presented the statistics of the number of preliminary references in relation to the percentage of the cases of the three last instance courts containing an EU law element, section 4 of this chapter will then turn to a case law analysis of cases in which CILFIT was applied. Without being comprehensive of all applications of the CILFIT case law in the jurisprudence of the three courts, this section will shed light on and how the obligation to refer following from article 267 TFEU and the CILFIT-case law plays a role in the motivation of the decision (not) to refer in the case law of the three last instance courts. Brief attention will also be paid to the application of the recent case *Consorzio Italian Management* given the fact that this case was often brought up in the interviews and was even referred to as 'CILFIT-II'. It will therefore be of interest to see whether and how the last instance courts understand and apply that case in their case law.

5.2. The Belgian System of Last Instance Courts

It follows from Article 40 of the Belgian Constitution that judicial power in Belgium is exercised by the "courts and tribunals", which are the "ordinary courts" or the courts expressly mentioned in the Constitution.[352] What constitute the "ordinary courts" is further specified in articles 147, 150, 151, 156 and 157 of the Belgian Constitution.[353] The

[352] André Alen and Koen Muylle, *Handboek van het Belgisch Staatsrecht* (Kluwer 2011) 599.
[353] ibid.

"ordinary courts" can be divided into four levels. On the first level are the courts that resolve the most frequent disputes. At the second level are the courts that resolve less common or more difficult disputes. At the third level one finds the appellate level: five courts of appeal for civil, commercial and criminal courts and labor courts. At the fourth and highest level is the Court of Cassation.[354] Moreover, the Belgian Constitution mentions the Constitutional Court in article 142 and the Council of State in article 160 of the Constitution. This section will briefly set out the function and competences of those three last instance courts.

5.2.1. The Court of Cassation

Article 147 of the Belgian Constitution holds that:

> "There is a Court of Cassation for the whole of Belgium.
>
> This Court does not intervene in the assessment of the cases themselves."

The latter entails that the Court of Cassation only rules on questions of law and does not itself rules on facts or on the merits of the case.[355] It follows from article 608 of the Judicial Code that judgments may be challenged before the Supreme Court only for "violation of the law or for violation of substantial or prescribed forms under penalty of nullity."[356] Since 1961, the Court of Cassation also allows judgements to be challenged on the basis of the violation of general principles of law. Moreover, it follows from the 1971 case *Smeerkaas*, that the Court of Cassation has the competence to review judgements against directly applicable international treaties.[357] This latter competence of the Court of Cassation has in the past been the source of friction with the Constitutional Court in cases where a binding treaty provision has a (partly) analogous scope to that of a binding treaty provision. This will be touched upon shortly below.

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[354] Godelieve Craenen and Patricia Popelier, 'Het Koninkrijk België' in L Prakke and CAJM Kortmann (eds), *Het staatsrecht van 15 landen van de Europese Unie* (7th edn. Kluwer 2009) 57.
[355] Alen and Muylle (n 352) 603.
[356] Artikel 608 Gerechtelijk Wetboek.
[357] Patricia Popelier, 'Prejudiciële vragen bij samenloop van grondrechten. Prioriteit voor bescherming van grondrechten of voor bescherming van de wet?' (2009) 2 Rechtskundig Weekblad 50.

5.2.2. The Council of State

Article 160 of the Belgian Constitution holds that:

> "There exists for all Belgium a Council of State, the composition, competence and functioning of which are determined by the law. The law may, however, confer on the King the power to regulate the administration of justice in accordance with the principles that it establishes.
>
> The Council of State pronounces by way of judgment as an administrative court and gives its opinion in the cases determined by the law. [...]"

The Council of State is made up of a legislative section and a judicial section. To the judicial competences of the Council of State belong firstly the annulment of administrative acts on the grounds of abuse or exceeding of power and/or failure to comply with certain rules.[358] Secondly, it is competent to rule on disputes concerning administrative acts of legislative bodies, of the Court of Auditors, the Constitutional Court, bodies of the judiciary and of the High Council of Justice, in relation to public procurement and staff. Thirdly, the Council of State has competence to rule on conflicts of competence between administrative authorities.[359] Fourthly, it can rule on disputes relating for instance to the application of the electoral law or the legislation to public social welfare centers.[360] Lastly, it rules on disputes concerning exceptional damage resulting from a decision of a Belgian administrative authority.[361]

5.2.3. The Constitutional Court

Article 142 of the Belgian Constitution lays down the following:

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[358] Article 14 Wetten op de Raad van State.
[359] Article 12 Wetten op de Raad van State.
[360] See for a complete enumeration of the disputes on which the Council of State can rule article 16 Wetten op de Raad van State.
[361] Article 11 Wetten op de Raad van State.

> "There is for all Belgium a Constitutional Court, the composition, competences and functioning of which are established by the law.
>
> This Court rules by means of judgments on:
> 1. those conflicts referred to in Article 141;
> 2. the violation of Articles 10, 11 and 24 by a law, a federate law or a rule as referred to in Article 134;
> 3. the violation of constitutional articles that the law determines by a law, a federate law or by a rule as referred to in Article 134.
>
> A matter may be referred to the Court by any authority designated by the law, by any person that can prove an interest or, pre-judicially, by any court.
>
> The Court pronounces by a ruling, under the conditions and according to the terms specified by the law, on every referendum described in Article 39*bis* before it is organised.
>
> The law can, under the conditions and according to the terms that it specifies, give the Court competence to pronounce by a judgment on appeals lodged against decisions made by legislative assemblies or bodies thereof regarding the control of electoral expenditure incurred in the elections for the House of Representatives. [...]"

Via Articles 10 and 11 of the Constitution, which enshrine the principles of equality and non-discrimination, the Constitutional Court also examines other constitutional provisions laid down in Title II of the Belgian Constitution ('on Belgians and their Rights'), rules of unwritten constitutional law, and rules of international and European law.[362] As specified in the abovementioned article, the Constitutional Court also has the power to answer questions referred to the Constitutional Court for a preliminary ruling by any courts. It follows from article 26 of the Special Act on the Constitutional Court that the Constitutional Court can answer questions on:

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[362] See also article 1 Special Act on the Constitutional Court; Thomas Vandamme, 'Prochain Arret: La Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court' (2008) 4 European Constitutional Law Review 127.

> “1. infringement by a statute, decree or rule referred to in Article 134 of the Constitution of the rules that have been established by or in pursuance of the Constitution to determine the respective powers of the State, the Communities and the Regions;
>
> 2. without prejudice to 1°, any conflict between decrees or between rules referred to in Article 134 of the Constitution that are enacted by different legislative bodies and insofar as the conflict has arisen from their respective scope of action;
>
> 3. infringement by a statute, decree or rule referred to in Article 134 of the Constitution of the articles of Title II, “The Belgians and their Rights”, and Articles 170, 172 and 191 of the Constitution.
>
> 4. infringement by a statute, decree or rule referred to in Article 134 of the Constitution of article 143, §1, of the Constitution.”

Some friction between the Court of Cassation and the Constitutional Court has emerged in the past given the fact that the Court of Cassation, ever since the case *Smeerkaas*, and the Constitutional Court, via articles 10 and 11 of the Constitution, both have the competence to review provisions against rules fundamental rights, laid down in the constitution and analogously in sources of international and European law. This friction mainly existed in the question of whether the Court of Cassation should refer a preliminary question to the Constitutional Court to have the statute reviewed in the light of a constitutional fundamental right, when the Court of Cassation could also resolve the legal question themselves by reviewing the treaty provision analogous to that constitutional fundamental right.[363] Although both the Council of State and the Court of Cassation have always referred preliminary questions to the Constitutional Court when it concerned the violation of the principle of equality, the Court of Cassation had refused to do so when the question concerned other fundamental rights.[364] To “restore judicial peace”,[365] article 26 of the Special act of 6 January 1989 on the Constitutional court was

[363] Patricia Popelier, ‘Prejudiciële vragen bij samenloop van grondrechten. Prioriteit voor bescherming van grondrechten of voor bescherming van de wet?’ (2009) 2 Rechtskundig Weekblad 50.
[364] ibid 51.
[365] Verslag, Parl. St. Senaat 2007-2008, nr 4-12/4, 9 via Popelier (n 363) 51.

amended.[366] It since follows from article 26 of the Special Act on the Constitutional Court that if it is raised before a court that a statute, decree or ordonnance violates a fundamental right both guaranteed (in full or in part) in a provision of Title II of the Belgian Constitution *and* in an analogous treaty provision, that court is in principle obliged to refer a preliminary question to the Constitutional Court. This obligation is subject to several exceptions, also laid down in article 26 of the Special Act on the Constitutional Court, such as that a question does not have to be referred when it is manifestly clear that the provision of Title II has not been violated,[367] or when the Constitutional Court already ruled on a question or appeal with an identical subject.[368]It follows from the case *Melki* in which the ECJ judged on a similar French rule,[369] that such rules are allowed to the extent that judges remain free

> "to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary; to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law."[370]

5.2. Statistics on the participation of the three Belgian last instance courts in the preliminary reference mechanism.

The table underneath presents the findings of a targeted search on the Belgian online databases of judicial decisions.[371] It shows the percentage of the total number of cases that contain an EU law element, as well as the percentage of cases with an EU law element in

[366] Special Act of 12 July 2009 amending article 26 of the Special Act of 6 january 1989 on the Constitutional Court.
[367] Article 26, paragraph 4 (1) Special Act on the Constitutional Court.
[368] Article 26, paragraph 4 (1) Special Act on the Constitutional Court.
[369] Joined Cases C-188/10 and C-189/10, *Melki and Abdeli* ECLI:EU:C:2010:363.
[370] ibid para 57.
[371] http://www.raadvanstate.be/?page=caselaw&lang=nl (Council of State); https://www.const-court.be/nl/search/judgment (Constitutional Court); https://juportal.be/zoekmachine/zoekformulier (Court of Cassation).

which a preliminary reference was made over the past 5 years.[372] As explained in the methodological section of this working paper, the annual reports from the Council of State only presented the total number of cases per 'judicial year' (1 september – 31 august) up to judicial year 2019-2020.[373] Therefore, the data of the Council of State was classified per judicial year and is presented in a separate table.

	Constitutional Court			**Court of Cassation**[374]		
	Total cases	% EU element	PR	Total cases	% EU element	PR
2017	151	28.5 %	4.7% (2)	794	7,6%	0% (0)
2018	183	33.9 %	6.5% (4)	782	7,9%	0% (0)
2019	206	33.0 %	5.9% (4)	735	6,4%	2.1% (1)
2020	169	37.9 %	3.1% (2)	849	8,0%	1.5% (1)
2021	193	39.9 %	1.2% (1)	874	4,0%	14.3% (5)

Table 1. Statistics of the percentage of cases with an EU law element ('% EU element) and the percentage of cases with an EU law element in which a preliminary reference was made ('PR') of the Constitutional Court and the Court of Cassation.

	Council of State		
	Total cases	% EU element	Preliminary references
2016-2017	3553	11,4%	0.7% (3)

[372] The number of preliminary references of the Council of State were retrieved from the GEOCOURT dataset (up to 2018), see see Arthur Dyevre and Nicolas Lamach, 'Subnational disparities in EU law use: exploring the GEOCOURT dataset' (2021) 28(4) Journal of European Public Policy 615, supplemental material, and the website of the Council of State www.juridict.raadvst-consetat.be algemeen deel > prejudiciële vragen > Hof van Justitie > Gestelde vragen. For the Court of Cassation, number of preliminary references made were found in the GEOCOURT dataset and the Annual Reports, see: I Couwenberg et al., 'Hof van Cassatie van België. Jaarverslag 2019' 22; I Couwenberg, 'Hof van Cassatie van België. Jaarverslag 2020' 32; I Couwenberg et al., 'Hof van Cassatie van België. Jaarverslag 2021' 36. For the Constitutional Court, the number of preliminary reference were found on the website of the Constitutional Court, see https://www.const-court.be/nl/judgments/preliminary-rulings-from-the-court-of-justice-of-the-european-union.

[373] The annual report of the judicial year 2020-2021 has not yet been published, see Raad van State, 'Activiteitenverslagen' <http://www.raadvst-consetat.be/?page=about_annualreports&lang=nl> accessed 8 september 2022.

[374] As mentioned in the introduction to this section, not all caselaw of the Court of Cassation is published. Therefore, these numbers must be interpreted with caution.

2017-2018	3239	11,2%	0.5% (2)
2018-2019	2095	17,3%	0.8% (3)
2019-2020	2850	9,2%	1.1% (3)

Table 2. Statistics of the percentage of cases with an EU law element ('% EU element) and the percentage of cases with an EU law element in which a preliminary reference was made ('PR') of the Council of State.

As can be seen in the two tables above, from the three courts of last instance, the Belgian Constitutional Court is confronted most often with cases with an EU element. The percentage of cases with an EU law element ranges from 28.5% - 39.9% (average 34%), in comparison to 4.0% - 8.0% (average 6.8%) for the Court of Cassation and 9.2% - 11.4% (average 12.3%) for the Council of State. The Constitutional Court also has the highest percentage of preliminary references in cases with an EU law element compared to the Court of Cassation and the Council of State. The average percentage of preliminary references made in cases with an EU law element over the past five years is 4,3% for the Constitutional Court and 3,6% for the cases published by the Court of Cassation. In reality the latter number may however be lower given the fact that only about 1/3 of all judgements are published by the Court of Cassation and cases in which a preliminary reference is made will always be published. Over the period of 1 September 2016 to 31 August 2020, on average the Council of State has made 3 preliminary references a year (amounting to 0.8 % of all cases with EU law element).

5.3. Application of the CILFIT-criteria in the case law of the Belgian last instance Courts

In this section, the application of the CILFIT case law in the case law of the three Belgian last instance courts will be examined. In doing so, this section will primarily build on the 2019 research note of the ECJs Directorate-General for Library Research and Documentation. This note was drafted with the aim of examining how the CILFIT case law is applied by all national last instance courts and, in particular, to find out about their

interpretation of the concept of 'any reasonable doubt'.[375] It contains an elaborate description of the ways the *acte clair* and *acte éclairé* were applied in the case law of the Belgian Constitutional Court, the Court of Cassation and the Council of State,[376] and is hence very instrumental to the aim of this section: to shed light on de manner in which the obligation to refer following from article 267 TFEU and the CILFIT-case law is applied in the motivation of the decision (not) to refer in the case law of the three last instance courts. Where possible, additional literature on the application of the CILFIT-criteria by the last instance courts was used to supplement the research note.

5.3.1. Application of the acte éclairé theory

5.3.1.1. Application of the *acte éclairé* theory by the Council of State

The decisions in which the Council of State does not make a preliminary reference on the basis of the application of the *acte éclairé* theory mostly contain a thorough analysis of EU law.[377] According to the research note, decisions in which the *acte éclairé* theory is applied do not do so manifestly incorrectly in such a way that a preliminary reference would have actually been necessary.[378] However, the ECJ has in two cases answered a preliminary reference by the Council of State by means of an order.[379] This suggests that in some cases, the Council of State has made a preliminary reference where it in fact could have derived the answer itself using case law of the ECJ.[380] Moreover, in its case law, the Council of State does not always clearly distinguish between the application of theory of *acte clair* and of *acte éclairé*. For example, it concluded in a 2017 case after an analysis of

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[375] Directorate-General for Library, Research and Documentation, 'Note de Recherche. Application de la jurisprudence Cilfit par les juridictions nationales dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne' (2019) < https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit-fr.pdf>.
[376] ibid 43 – 64.
[377] ibid 60. See e.g. Council of State case of 28 January 2008 n 179058 [2008]; Council of State case of 21 March 2007 n 237723 [2007].
[378] ibid 60.
[379] Council of State case of 29 April 2004 n 130865 [2004] and the ECJs answer in case C-208/04 *Inter-Environnement Wallonie* [2005] ECLI:EU:C:2005:71; Council of State case of 2 April 2009 n 192192 and 192193 [2009] and the ECJs answer in case C-177/09-179/09 *Le Poumon vert de la Hulpe* [2011] ECLI:EU:C:2011:739.
[380] Directorate-General for Library, Research and Documentation (n 375) 61.

the ECJ's case law that the clarifications of the ECJ were enough to eliminate any reasonable doubt.[381]

5.3.1.2. Application of the *acte éclairé* theory by the Constitutional Court

Just like the Council of State, the Constitutional Court also thoroughly analyses EU case law when using the theory of *acte éclairé* to justify the absence of a preliminary reference.[382] From the fact that the ECJ has never answered a preliminary reference that was based on the conviction that the provision of EU law in question was not *clarified* with an order, the research note concludes that in the cases these references were made the provisions of EU law were indeed not sufficiently clarified.[383] Verrijdt and Alen hold in their contribution that "the exception of *acte éclairé* can be identified with more certainty [than the *acte clair*], since the Constitutional Court is able to refer in this case to the judgment by which the Court of Justice has already interpreted the relevant provision on the point in question."[384] However, they also hold that "caution is needed if the review is carried out with regard to the free movement of persons, goods, services and capital: a reference to the basic rulings on free movement is not sufficient in this case: instead, the court should refer to specific case law [...]"[385] A note of critique set out in the research note is that the Constitutional Court sometimes seems to confuse the theories of *acte clair* and *acte éclairé*.[386] This happens when the Constitutional Court applies the theory of *acte éclairé* to conclude that a reference to the ECJ is not necessary because, in light of the clarifications by the ECJ, the acte is *clair*.[387]

5.3.1.3. Application of the *acte éclairé* theory by the Court of Cassation

The application of the theory of *acte éclairé* by the Court of Cassation is a bit ambivalent. In contrast to the Council of State and the Constitutional Court, the Court of Cassation

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[381] ibid. See Council of State case of 21 March 2017 n 237721 [2017] 15; Council of State case of 8 June 2006 n 159793 [2006] 13.
[382] ibid 48; Constitutional Court case of 20 December 2012 n 161/2012
[383] ibid 48.
[384] André Alen and Willem Verrijdt (n 14) 47.
[385] André Alen and Willem Verrijdt (n 14) 47.
[386] See for example Constitutional Court case of 26 November 2003 n 151/2003 [2003] and Constitutional Court case of 21 May 2015 n 66/2015 [2015]
[387] Directorate-General for Library, Research and Documentation (n 375) 49.

sometimes justifies the absence of a preliminary reference on the basis of the theory of *acte éclairé* after a very short analysis of the case law of the ECJ.[388] In other cases however, the Court of Cassation does proceed with a detailed analysis of the case law of the ECJ.[389] Moreover, the research note concludes that the Court of Cassation may sometimes be a bit overly confident in its ability to determine the correct application of EU law: in some cases, the Court of Cassation has decided not to refer on the basis of the theory of *acte éclairé* where a lower instance court came to the conclusion in the same case that an *acte éclairé* was not present.[390] The latter indicates, according to the research note, that EU law was not objectively 'clarified'.[391] In addition it has occurred that the Court of Cassation refused to refer a question to the ECJ because it deemed the question to be clarified, but that it's interpretation subsequently appeared to be incorrect after the ECJ gave judgement on the issue in a different case.[392] While the application of the *acte éclairé* theory by the Court of Cassation is thus sometimes to 'loose', the Court of Cassation also sometimes interprets the *acte éclairé* theory too strictly. In 5 cases, the ECJ has answered a request for a preliminary reference with an order because the answer could be clearly deduced from its case law.[393] Lastly, just like the Council of State and the Constitutional Court, the Court of Cassation sometimes confuses the theory of *acte clair* and that of *acte éclairé*.[394]

5.3.2. Application of the acte clair theory

All three Belgian last instance courts regularly resort to the application of *acte clair*. However, as the research note also concludes, there is a certain gradation as to the usage

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[388] ibid 53. See for example Court of Cassation case of 4 November 2016 n F.15.0074.N [2016] 2, 3.
[389] ibid. See for example Court of Cassation case of 7 November 2016 n C.15.0206.N [2016] 2-5; Court of Cassation case of 25 September 2009 n F.08.0009.F [2009], 6; Court of Cassation case of 26 April 2018 n C.16.0192.N [2018] 2-4.
[390] ibid. See Court of Cassation case of 26 February 2006 n F.09.0007.F [2006] 16-17; Court of Cassation case of 7 May 2012 n S.10.0085.N [2012] 12-13.
[391] ibid.
[392] ibid. See Court of Cassation case of 18 May 2015 n S.13.0024.F [2015]; C-518/15 *Matzak* [2018] ECLI:EU:C:2018:82.
[393] ibid 55; C-172-02 *Bourgard* [2004] ECLI:EU:C:2004:283; C-23/02 *Alami* [2003] ECLI:EU:C:2003:89; C-435/05 *Leroy* [2006] ECLI:EU:C:2006:347; C-126/11 *INNO* [2011] ECLI:EU:C:2011:851; C-333/11 *Febetra* [2012] ECLI:EU:C:2012:134.
[394] ibid. Court of Cassation case of 28 February 2019 n F.17.0162.F [2019] 17, 18.

of the *acte clair* theory by the three Courts.[395] The use of the *acte clair* theory will be further set out per Belgian last instance court below.

5.3.2.1. Application of the *acte clair* theory by the Council of State

Although the previous section shows that the Council of State has the smallest percentage of preliminary references in cases with an EU law element, the research note concludes that of the three last instance courts, the Council of State seems most reluctant to utilize the *acte clair* theory.[396] These findings are somewhat contradictory, as the latter means that in case of doubt, the Council of State might prefer to make a preliminary reference instead of to conclude that an act is *clair*.[397] A possible reason for the fact that the Council of State still has the smallest percentage of preliminary references in cases with an EU law element could be that these cases do contain an EU element, but contain to a lesser extent than the other last instance courts also a question about the interpretation or validity of EU law. However, this reason is somewhat speculative and have not yet been confirmed by hard data.

The reluctance by the Council of State to utilize the *acte clair* theory can be seen firstly in the fact that the Council of State limits any application of the *acte clair* theory to cases in which the simple reading of a text suffices for the understanding and application of the text.[398] The method of interpretation used in order to establish whether there is a case of an *acte clair* is therefore almost always purely textual.[399] Contextual or teleological methods of interpretation are, according to the research note, more uncommon.[400] A recent example of contextual interpretation in the case law of the Council of State can however be found. In a 2020 case, the request of a party to refer a question to the ECJ about an article of a directive was not granted because "having regard to the clear purpose and scope of the [...] directive [...] it [was] impossible to see what other insights a

[395] ibid 66.
[396] See for all cases in Dutch in which application of the *acte clair* was made juridict.raadvst-consetat.be > Algemeen deel > Prejudiciële vragen > Hof van Justitie Redenen tot (niet) stellen > Geen twijfel over juiste toepassing http://juridict.raadvst-consetat.be/index.php?lang=nl#arbA:0:1:5579:5583:5621:5629.
[397] Directorate-General for Library, Research and Documentation (n 375) 56.
[398] ibid 57.
[399] ibid 58. See for example Council of State case of 14 September 2015 n 232.181[2015].
[400] ibid.

preliminary question to the Court of Justice might yield".[401] When concluding that an act is *not* clair, the Council of State often does not make explicit the elements or reasoning that forms the basis for that conclusion.[402] Rather, it often simply proceeded with the formulation of the preliminary question,[403] sometimes preceded with an account of the positions of the parties.[404]

Although the Council of State proves to be quite reluctant in establishing an *acte clair* and rather seems to be more inclined to refer the preliminary question to the ECJ, a point where it seems to deviate from the requirements established in the CILFIT case law regards the requirement of a conviction of the national last instance court that "the matter is equally obvious to the courts of the other Member States and to the Court of Justice."[405] The research note only reports of one case in which the Council of State (implicitly) referred to the requirement.[406] Another point the research note makes is that it is not exactly clear what level of doubt is enough to constitute a *reasonable* doubt and hence to conclude the act to be insufficiently *clair*.[407] The Council of State does not seem to have a set formula it uses to establish whether there is a reasonable doubt and hence the necessity to make a preliminary reference but rather expresses doubt in variable formulations.[408] Occasionally, the Council of State refers to an *acte clair* as the absence of 'any doubt', omitting the adjective 'reasonable'.[409] This suggest a very high threshold for the establishment of an *acte clair*.

[401] Council of State case of 25 June 2020 n 247907 [2020] 16.
[402] Directorate-General for Library, Research and Documentation (n 375) 57.
[403] ibid. See for example Council of State, case of 28 September 2018 n 242487 [2018].
[404] ibid 58. See for example Council of State, case of 25 February 2004 n 128507 [2004].
[405] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 16.
[406] Directorate-General for Library, Research and Documentation (n 375) 59; Council of State case of 11 December 2014 n 229527 [2014].
[407] ibid 60.
[408] See e.g. Council of State case of 8 December 2003 n 126156 and 126157 [2003] 5; Council of State case of 28 January 2008 n 179054 [2008] 16; Council of State case of 26 February 2010 n 201373 [2010] 8; Council of State case of 3 February 2011 n 211023 [2011] 15; Council of State case of 15 October 2007 n 175776 [2007]; Council of State case of 28 June 2016 n 175776 [2016] 16.
[409] Directorate-General for Library, Research and Documentation (n 375).

5.3.2.2. Application of the *acte clair* theory by the Belgian Constitutional Court

The Constitutional Court regularly applies the theory of *acte clair* to exempt itself from the obligation to make a preliminary reference.[410] Before 2006 the Constitutional Court made a more abundant application of the *acte clair* theory.[411] Van Nuffel criticized this practice, noting that the Constitutional Court dealt sparingly with the possibility of submitting preliminary questions to the ECJ,[412] and highlighting cases in which a preliminary reference would have been appropriate to ensure the uniform application of EU law.[413] The Constitutional Court seems to have taken this criticism seriously: the research note concludes that after 2006, for the most part, the cases in which a preliminary reference was not made on the basis of the *acte clair* theory concern interpretations that were indeed evident.[414] The methods of interpretation used by the Constitutional Court are the literal,[415] contextual and/ or teleological interpretation method.[416] When the Constitutional Court subsequently establishes an *acte clair*, it often uses established formulas such as: "the correct application of European law is so evident that it *reasonably leaves no room for doubt*",[417] "with regard the correct application of article […], *no reasonable doubt can exist*",[418] "in light of the *clear text* of the aforementioned article",[419] or, more condensed, "it cannot reasonably be inferred that"[420] or "[the directive] cannot be interpreted as […]"[421].

However, the Constitutional Court does not clarify the criteria it uses to determine a reasonable doubt. In some cases, divergence of the parties' views suffices for a

[410] ibid 44.
[411] ibid.
[412] Piet van Nuffel, 'Het Europees recht in de rechtspraak van het Arbitragehof. Prejudiciële vragen, te veel gevraagd? (2005) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 246, 255.
[413] Constitutional Court case of 2 February 1995 n 7/95 [1995]; Constitutional Court case of 1 March 1995 n 8/95 [1995]; Constitutional Court case of 1 December 2004 n 195/2004 [2004] via van Nuffel (n 412) 249, 250.
[414] Directorate-General for Library, Research and Documentation (n 375) 44.
[415] See e.g. Constitutional Court case of 7 June 2006 n 92/2006 [2006]; Constitutional Court case of 26 June 2008 n 95/2008 [2008].
[416] Directorate-General for Library, Research and Documentation (n 375) 45. See e.g. Constitutional Court case of 28 February 2019 n 39/2019 [2019]; Constitutional Court case of 27 April 2017 n 48/2017 [2017].
[417] Constitutional Court case of 7 June 2006 n 92/2006 [2006] 26 (quote translated by author).
[418] Constitutional Court case of 26 November 2003 n 151/2003[2003] 32 (quote translated by author).
[419] Constitutional Court case of 26 June 2008 n 95/2008 [2008] 77 (quote translated by author).
[420] Constitutional Court case of 12 March 2015 n 32/2015 [2015] 26 (quote translated by author).
[421] Constitutional Court case of 27 April 2017 n 48/2017 [2017] 35 (quote translated by author).

reasonable doubt to be established,[422] whereas in others a possibility of multiple interpretations,[423] or simply doubts as to the interpretation suffice.[424] In their contribution, Alen and Verrijdt, (former) judges at the Constitutional Court, however do give some indication on when they consider an act *clair*.[425] With regard to proportionality control, which the ECJ requires national judges execute, they hold that

> "the interpretation of the free movement of persons, goods, services and capital is sufficiently clear if it is established that a legislative provision falls within the scope of these rights and that the Constitutional Court has already rejected a plea against this provision, which presupposes that it has already carried out a proportionality review of this provision."[426]

Another point of critique that is made in the research note is that the Constitutional Court has not yet made reference to the requirement of the conviction of the Constitutional Court that 'the matter is equally obvious to the courts of the other Member States and to the Court of Justice.'[427] Alen and Verrijdt moreover conclude in a different contribution that the Constitutional Court does not always explicitly refer to one of the CILFIT-exceptions when it refuses to refer a preliminary reference.[428] For example, in a 2011 case the Constitutional Court limited itself to holding that "in the light of the foregoing, there are no grounds for granting the applicant's request for a preliminary ruling from the Court of Justice of the European Union".[429]

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[422] Constitutional Court case of 6 April 2011 n 49/2011 [2011].
[423] Constitutional Court case of 10 October 2012 n 116/2012 [2012] 27.
[424] Constitutional Court case of 28 September 2017 n 106/2017 [2017] 47.
[425] Alen and Verrijdt (n 14) 45.
[426] ibid 46.
[427] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 16; Directorate-General for Library, Research and Documentation (n 375) 46.
[428] André Alen and Willem Verrijdt (n 14) 45.
[429] Constitutional Court case of 16 June 2011 n 105/2011 [2011] B.17. See also similarly Constitutional Court case of 2 July 2003 n 94/2003 [2003] B.34.3 via André Alen and Willem Verrijdt (n 14) 45, 46.

5.3.2.3. Application of the *acte clair* theory by the Court of Cassation

While the Council of State proves to be quite reluctant before establishing an *acte clair*, the Court of Cassation uses the doctrine regularly.[430] First of all, the Court of Cassation has pronounced itself on questions of EU law without clarifying that it considered that the rules were sufficiently clear.[431] When it does consider whether the rules were sufficiently clear or not, it most often does so without explicit reference to the CILFIT case law.[432] The methods of interpretation used by the Court of Cassation to establish whether an act is (in)sufficiently *clair* are the literal/ textual,[433] teleological,[434] and the contextual method of interpretation.[435] As the research note sets out, the Court of Cassation rarely expresses the level of doubt that has led it to conclude a(n absence of) a 'reasonable doubt'.[436] Moreover, the Court of Cassation only very exceptionally refers to the CILFIT case law and its formula on the basis of which an *acte clair* may be established.[437] Rather, the Court of Cassation often uses terms such as 'manifestly' (e.g. "in light of the manifest character of the rule"),[438] or simply indicates that the interpretation is 'evident'.[439] Notably, in one of the cases in which the Court of Cassation deemed the interpretation of a provision EU law evident,[440] the ECJ came to an opposite interpretation with regard to that same provision of EU law.[441] The interpretation of the provision of EU law was thus not *clair* in that case after all. Opposite to the conclusion of an *acte clair* where in fact a

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[430] Directorate-General for Library, Research and Documentation (n 375) 50.
[431] Court of Cassation case of 11 June 2013 P.13.0780.N [2013]; Frédéric Lugentz, 'de bijdrage van het Hof van Cassatie aan de tenuitvoerlegging van het Europees recht in strafzaken: Invloed van de rechtspraak van het Hof van Justitie van de Europese Unie en aanpassing van de rechtspraak van het Hof van Cassatie' in Hof van Cassatie van België, 'Jaarverslag 2019' accesed via <https://www.courdecassation.be/Jaarverslag/Startpagina.html>.
[432] ibid. See for example Court of Cassation case of 6 June 2013 n C110507F [2013]; Court of Cassation case of 11 March 2015 n P141677F [2015] 4, 5.
[433] ibid 52. See for example Court of Cassation case of 15 January 2016 n C140566F [2016] 8, 9.
[434] ibid. See for example Court of Cassation case of 25 February 2013 n F120008N [2013] 2,3; Court of Cassation case of 11 February 2014 n P131473N [2014] 4.
[435] ibid 52. See for example Court of Cassation of 25 April 2017 n P160449N [2017] 3-5.
[436] ibid.
[437] ibid. See for an exceptional case in which the Court of Cassation does refer to the CILFIT-formula Court of Cassation case of 11 March 2015 n P141677F [2015] 3.
[438] Court of Cassation case of 30 September 2016 n C140045N-C140217N [2016] 6. See also Court of Cassation, case of 6 June 2013 n C110507F [2013] 5.
[439] Court of Cassation, case of 7 January 2011, n C090275N [2011] 3; Court of Cassation case of 15 January 2016 n C140566F [2016].
[440] Court of Cassation case of 15 January 2016 n C140566F [2016].
[441] Case C-511/14 *Pebros Servizi* [2016] ECLI:EU:C:2016:448.

reasonable doubt was present, the referrals made by the Court of Cassation on the basis of an act insufficiently *clair* have on three occasions resulted in an order of the ECJ.[442] In doing so the ECJ suggests that in these cases, the Court of Cassation could have given the answer to the question posed itself.[443]

5.3.3. Application of the case Consorzio Italian Management

On 27 October 2022, the Belgian Constitutional Court referred to the *Consorzio Italian Management* case for the first time when setting out the exceptions to the obligation to refer. Under reference to paragraph 21 of CILFIT and paragraph 33 of *Consorzio Italian Management*, it held that a reference is not necessary when one of the three CILFIT exceptions apply.[444] In line with *Consorzio Italian Management*, it then held that:

> "Those reasons must, in light of Article 47 of the Charter of Fundamental Rights of the European Union, be sufficiently apparent from the reasoning of the judgment by which the court refused to refer the question for a preliminary ruling (ECJ, Grand Chamber, 6 October 2021, C-561/19, Consorzio Italian Management e Catania Multiservizi, paragraph 51)."[445]

The Constitutional Court subsequently set out when the CILFIT exceptions apply. When setting out what the *acte clair* entails, the Constitutional Court again referred to another novelty introduced in the case *Consorzio Italian Management*. The Constitutional Court namely held that:

> "[the last instance court] shall also have regard to any differences between the language versions of the provision in question of which it is aware, particularly where those differences have been put forward by the parties and substantiated."[446]

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[442] Case C-82/02 *Lalemant and Tivoli* [2003] ECLI:EU:C:2003:122; Case 172/02 *Bourgard* [2004] ECLI:EU:C:2004:283; Case C-62/08 *UDV North America* ECLI:EU:C:2009:111 [2009].
[443] Directorate-General for Library, Research and Documentation (n 375) 51.
[444] Constitutional Court case of 27 October 2022 n 138/2022.
[445] ibid B.54 (translation by author).
[446] ibid.

The Council of State has referred on two occasions explicitly but succinctly to the case *Consorzio Italian Management.*[447] When analysing it's post-*Consorzio Italian Management* case law it could be noticed that the Council of State is somewhat more elaborate in stating it's reasons not to refer questions about the interpretation of EU law to the ECJ and also indicates specifically on which CILFIT exception it is relying.[448] The Court of Cassation has not yet made explicit reference to the *Consorzio Italian Management* case law.

5.4. Conclusion

The aim of this chapter was to shed some light on the use of the preliminary reference mechanism by Belgian last instance courts and on their application of the CILFIT-case law. To that end, firstly the statistics of the number of preliminary references in relation to the percentages of cases that contain an EU-element were analysed. It was found that of the three last instance courts, the Constitutional Court is most often confronted with cases with an EU law element: an average of 34% of all cases before the Constitutional Court during the period 2017-2021 had an EU-element. For the Court of Cassation, this was an average of 12.3%. The Council of State had the smallest percentage of cases with an EU-element over the judicial years of 2016-2017 to 2019-2020: 6.8%. Of those cases with an EU-element, the Constitutional Court made a preliminary reference in 4,3% of the cases. The Council of State did so in 0.8% of those cases. The Court of Cassation made a reference in 3,6% of the cases published by the Court of Cassation. In reality, the latter figure may however be lower given the fact that only about 1/3 of all judgements are published by the Court of Cassation and cases in which a preliminary reference is made will always be published.

Having shed light on the statistics of the use of the preliminary reference mechanism by the Belgian last instance courts, section three examined the application of the CILFIT case law by the Belgian last instance courts.[449] Regarding the application of the *acte clair* theory, it was found that there exists a certain gradation in the use of the

[447] Council of State case of 28 December 2021 n 252557; Council of State case of 21 September 2022 n 254571.
[448] See e.g. Council of State case of 21 September 2022 n 254552.
[449] Directorate-General for Library, Research and Documentation (n 375) 62.

theory: where the Council of State is quite hesitant to apply it, the Constitutional Court and the Court of Cassation are less reluctant in doing so. All three last instance courts however do not have transparent criteria that allows for one to foresee whether, in case of a potential *acte clair*, it will decide to either make a preliminary reference or choose not to do so.[450] All three last instance courts also make application of the *acte éclairé* theory, most often on the basis of a thorough analysis of the case law of the ECJ. However, the three last instance courts do sometimes seem to confuse the *acte clair* and the *acte éclairé* by applying the theory of *acte éclairé* to in the end conclude that the act is *clair*.[451]

With regard to the recent case *Consorzio Italian Management*, the Constitutional Court has made most elaborate reference to the case in its case law. The Council of State has referred to the case on two occasions explicitly but succinctly. When analysing the post-*Consorzio Italian Management* case law of the Council of State, it could be noticed that the Council of State is somewhat more elaborate in stating its reasons not to refer questions about the interpretation of EU law to the ECJ and also indicates specifically on which CILFIT exception it is relying. The Court of Cassation has not yet made explicit reference to the Consorzio Italian Management case law.

[450] ibid.
[451] ibid 63.

6. Belgian last instance courts' reasons (not) to refer. Insights from the empirical study

6.1. Introduction

This chapter will present the results of the interviews with judges and law clerks of the three Belgian last instance courts carried out in the summer of 2022. It sheds light on the reasons for the Belgian last instance courts (not) to refer a question on the interpretation or validity of EU law to the ECJ, as well as the role the legal obligation to refer plays in this decision. Section 2 will present the primary factor judges and law clerks mentioned as their reasons (not) to refer: article 267 TFEU and the CILFIT criteria. It appears from the interviews that the judges and law clerks see quite some room for interpretation in the application of the CILFIT-criteria, for example in establishing whether there is a 'reasonable doubt' as to the manner in which a provision of EU law should be interpreted. The width of this 'margin of appreciation' seems to be determined by supplemental legal and extra-legal motivations (not) to refer. Moreover, these legal and extra-legal considerations may also constitute a motivation (not) to refer as such. Finally, Section 3 will describe what those (extra-)legal motivations are.

6.2. Primary reason (not) to refer: article 267 TFEU and the CILFIT-criteria.

6.2.1. Weight of the legal reasons in the decision (not) to refer

This section sheds light on the manner in which the obligation to refer following from article 267 TFEU and the CILFIT-case law plays a role in the decision (not) to refer. Shared by all judges and law clerks interviewed is their view that the primary reason (not) to refer is a legal one: article 267(3) TFEU and the CILFIT-criteria. For example, a law clerk at the Constitutional Court held that

> "In asking or not asking questions, for me it is actually mainly about applying EU law, so to see whether or not, based on applying the criteria, a question should be asked. [...] If we think a question should be asked, we will ask it. If we do not think a question should be asked, we will not."[452]

[452] R2.

For few respondents, the decision to refer is based *exclusively* on those legal considerations. An Auditeur at the Council of State (a function similar to that of Advocate-General) for instance held that

> "both for the Auditor to propose [to make a preliminary reference] and for the judges of the Council of State, *it is a solely legal decision* based on Article 267 of the Treaty of the Functioning of the European Union and the CILFIT case law."[453]

It also appears from the interviews that most respondents see the obligation to refer and the CILFIT-criteria as the "most important, and decisive elements."[454] At the same time, however, most respondents also recognize that in the interpretation of the CILFIT-criteria, (extra-)legal considerations play a role. This view is illustrated well by the following quote of a judge at the Court of Cassation:

> "We do rely on those CILFIT criteria, and we apply them faithfully as well. The only thing of course is that you do have some leeway there in determining whether there is more reasonable certainty, and you use that. And so there you leave some of the motives that we have mentioned here already [...]. But we do go by the CILFIT criteria, we apply them faithfully."[455]

While most respondents stressed the role of (extra-)legal considerations *in the interpretation of the CILFIT criteria*, one respondent also indicated that in the decision to refer, (extra-)legal considerations and the CILFIT criteria form a whole. He held that:

> "[...] the question is: do we ask the preliminary question or not. And we do look at those CILFIT criteria, which are of course very guiding. But we are not going to answer those literally now either, not always literally anyway. I think the answer to the question will already have been given before we start giving reasons why we did or did not go to the ECJ. [...] I do think it's a rational consideration, but not specifically about those criteria per se.

[453] R7 and similarly R8.
[454] R1 and similarly R2, R4, R7, R8 and R9.
[455] Respondent 5 and similarly R2, R4, R8 and R9.

> You did invoke that yourself because you asked me about other motivations and so on. Other elements come into play. It is a whole."[456]

The remainder of this section will pay attention to the different ways in which this 'leeway' in determining whether the CILFIT criteria apply is filled in. It will do so by focusing on the way the CILFIT criteria are understood and applied by the courts of last instance, and in particular the way they arrive at the conclusion of presence or absence of a 'reasonable doubt'.

6.2.2. Application/ interpretation of the CILFIT-criteria in the motivation of the decision (not) to refer

6.2.2.1. Legal-formalist reading of the CILFIT-criteria

Interestingly, it appeared from the interviews that there was quite some variation in the reading of the CILFIT-criteria *within* the Belgian last instance courts. Even though the majority of the respondents adopted some form of a pragmatic interpretation of the CILFIT-criteria, two respondents (one from the Council of State and one from the Court of Cassation) indicated that they adhere to and apply the CILFIT-criteria strictly.[457] Hence, they seem to adopt a more legal-formalist reading of CILFIT, in which the existence of even a light doubt is sufficient to trigger the obligation to refer and in which the decision to refer is "a solely legal consideration."[458] For example, a judge at the Court of Cassation held that he was "very reluctant" with the establishment of an *acte clair* and was "more inclined, if [he had] doubts, even if there is a slight doubt, to ask the question."[459] With regard to the *acte clair*, an Auditor at the Council of State held that "it is certainly not easy to establish an [acte clair]. I think it is always a safer course to effectively ask the question."[460]

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[456] R9.
[457] R7, R8.
[458] R7. See also Krommendrijk (n 7) 32 for further examples of legal-formalist judges.
[459] R8.
[460] R7.

Multiple reasons were given for this strict interpretation of CILFIT. Firstly, a legal-formalist approach was adopted because of a reluctance to expose Belgium to the risk of state liability. Secondly, a strict interpretation was also maintained out of loyalty to the system. This loyalty stems from the wish to respect the democratically legitimate system, which can only function well if judges exercise self-discipline.[461]

6.2.2.2. 'Pragmatic' or 'Reasonable' reading of the CILFIT-criteria

The majority of the respondents indicated during the interviews that they assume a 'pragmatic'[462] or 'reasonable'[463] reading of the CILFIT-criteria.[464] In this view, whether or not a preliminary reference is made depends on whether the provision of EU law is deemed *sufficiently* clear. For instance, a law clerk at the Constitutional Court held:

> "I think the term *acte clair* in itself actually says what it means: is it sufficiently clear? And if it is sufficiently clear, for us, here, internally, do we then have to get the whole machinery going of a preliminary ruling procedure before the court in Luxembourg?"[465]

In a similar vein, a judge at the Court of Cassation stated that

> "If we are convinced for ourselves that a certain interpretation of Union law is the correct one, then we are actually going to assume that there is an *acte clair* or an *acte éclairé*, if there are certain precedents that point in a certain direction. I must say that those criteria are used a bit interchangeably."[466]

Noteworthy of these readings of the CILFIT-criteria is firstly that, as was also described in the section above, the theory of *acte clair* and *acte éclairé* are often used somewhat interchangeably. This view seems to be shared among about half of the respondents.[467] A

[461] R8.
[462] R2, R3.
[463] R4.
[464] Similarly although not having used the wording 'pragmatic' or 'reasonable' R5, R6 and R9.
[465] R3.
[466] R5.
[467] R9, R5, R4, R3.

judge at the Council of State was most explicit about this. He held that "the *acte clair* may exist on its own, but an *acte clair* is primarily *clair* when it is *clarified*".[468]

Secondly, it appears from the interviews that the majority of the judges and law clerks do not seem to interpret the CILFIT-criteria in a rather strict or legal-formalistic way according to which a reference is made "in case of any doubt".[469] Rather, an act is considered *clair* when the judges or law clerks are convinced of the correct interpretation of a provision of EU law. In some cases, an "internal"[470] conviction of the correct interpretation of EU law was enough for the CILFIT-exceptions to apply.[471] This was also confirmed by a law clerk at the Constitutional Court, who held that "it is of course the aim of the Court's criteria to objectify, but yes, it always remains a subjective assessment."[472] In these cases, the applicability of the *acte clair* theory seems to be established more subjectively than the ECJ seems to have originally envisioned in CILFIT, where it held that before last instance courts come to the conclusion that an act is *clair*, they must be convinced that "the matter is equally obvious to the courts of other Member States and to the Court of Justice."[473] However, a respondent also stressed that the decision whether the interpretation of a provision is sufficiently clear is not completely subjective either. Rather than speaking of an *individual* subjectivity, one should see the subjectivity rather as of *collective* nature because of the many judges and law clerks who are involved in the drafting and review of the draft judgement.[474] Nonetheless, a pragmatic reading of the CILFIT criteria does not in all cases exclude a more objective approach. A judge at the Council of State held in connection to the requirement that the correct application of EU law "must be so obvious as to leave no scope for any reasonable doubt":

> "We are trying to interpret that in a reasonable way. It has to be very clear to us what the solution is. And we must think: the ECJ will not decide the case differently. Do we find

[468] R9.
[469] See for an example of a court adopting this legal-formalistic approach Krommendijk (n 7) 33.
[470] R3, R5.
[471] R2, R3, R5.
[472] R3.
[473] Case C-283/81 *CILFIT and others* [1982] ECLI:EU:C:1982:33 para 16.
[474] R3.

> enough in the case law of the ECJ and with a sufficient degree of certainty to allow us to apply EU law ourselves?"[475]

This more objectified pragmatic interpretation of the CILFIT criteria seems to be in line with the understanding of the CILFIT criteria of Advocate General Wahl in the opinion in *X and van Dijk*.[476] In his opinion, Wahl sought to emphasize the importance of the inherent discretion last instance courts must have in determining whether a duty to refer was present in the case before them. He held that

> "if a national court of last instance is sure enough of its own interpretation to take upon itself the responsibility (and possibly the blame) for resolving a point of EU law without the aid of the Court of Justice, it ought to be legally entitled to do so."[477]

With regard to the *acte clair* he specified that this "should be understood as meaning that the judges of final appeal ruling upon the matter must be convinced, *in their minds*, that other judges would agree with them."[478]

Lastly, when asked about the *acte clair*-criterion of comparison of languages, most respondents maintaining a pragmatic reading of the CILFIT criteria indicated not to engage in such comparison before establishing an *acte clair*.[479] Where languages were compared, this was done so only for the languages understood by the judges/ law clerks.[480]

6.3. Reasons to refer

This section sets out the legal and extra-legal reasons that were mentioned during the interview as a reason to refer. This section will be structured as follows: first, legal motivations to refer will be set out in subsection 1. Then, subsection 2 will shed light on

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[475] R9.
[476] Opinion A-G Wahl in *X and van Dijk* (n 330).
[477] ibid para 69.
[478] ibid para.
[479] R1, R2, R3 out of 5 respondents asked (one of which maintained a legal-formalist reading of CILFIT).
[480] R4 and R7 (the latter had a legal-formalist reading of CILFIT). The comparison only of languages understood by the judges of law clerks is in line with the recent case *Consorzio Management Italiano* (n 295) 44.

the extra-legal reasons respondents indicated to be of influence on their decision to refer. As also already indicated in the previous section, it appears from the interviews that these factors mainly play a role as to the manner in which the margin of appreciation the CILFIT criteria leave national courts is filled in. However, some respondents also gave examples of cases in which a reference was made despite the applicability of (one of) the CILFIT exceptions. This respondent held that:

> "yes on important matters if one and the same rule is interpreted totally differently in different countries and those rules have a serious impact on sectors, [...] that can be a reason, even though you may consider yourself that something is sufficiently clear, to still ask the question."[481]

Situations where a reference is made despite the lack of pertinence or the presence of *acte clair* or *acte éclairé* thus seem to be rather exceptional.

6.3.1 Legal reasons to refer (and beyond)

A first legal motivation to refer is, as also became apparent in the previous sections, the obligation to refer of article 267(3) TFEU and the CILFIT-criteria. The vast majority of the respondents indicated that receiving clarification of EU (case)law of the ECJ constitutes a reason to refer, also in light of the fact that it resolves or avoids legal uncertainty about the interpretation or validity of certain provisions of EU law.[482] Moreover, respondents indicated to be loyal to the system, for reasons related to its democratic legitimacy and the loyalty being necessary in order to let the system function.[483] Other underlying reasons for the loyalty to the system mentioned were "that it is one of the basic principles of the rule of law that one applies the law" and that the last instance court wanted to set the right example for lower courts in not placing themselves above rules of law.[484]

[481] R4.
[482] R1, R2, R3, R5, R6.
[483] R8.
[484] R2.

A few respondents, all from the Constitutional Court, also mentioned questioning EU law or a certain line of case law of the ECJ as a motivation to refer.[485] An example of this is a 2018 referral on data-retention by the Constitutional Court.[486] As a judge of the Constitutional Court explained, this referral was made because in earlier case law, the ECJ interpreted the data retention directive too harsh. He held that:

> "the terrorists, terrorist organizations and organized crime, they are high-tech themselves. If the intelligence services themselves do not have the permission to make use of the possibilities offered by technology, then they are not playing on an equal footing and then it is impossible to avoid the next terror attack or to fight the mafia"[487]

Hence, the judge made a preliminary reference to question the rather strict line of case law of the ECJ "because of crime-fighting and counter-terrorism interests".[488] This quote also shows how legal and extra-legal considerations may sometimes intertwine. In this case, the legal reason of questioning a certain line of case law goes together with a more extra-legal, neo-realist, reason of making a reference because it would be in the interest of Belgium (fighting crime and terror) to obtain a less strict interpretation by the ECJ.

In connection to this motive of questioning EU (case)law, one respondent indicated that it strictly applied the CILFIT-criteria and abided by the obligation to refer set out in article 267(3) TFEU in order to "speak the ECJs language" and "create goodwill", enabling the Constitutional Court to maintain a true, sometimes critical, dialogue with the ECJ.[489] This motive of 'questioning the case law of the ECJ' was however not recognized by all respondents. Two respondents from the Court of Cassation indicated that they had no experience with such motives.[490]

A last court-specific legal reason to refer mentioned by respondents of the Constitutional Court is that the judicial dialogue with the ECJ allows the Belgian

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[485] R1, R4.
[486] Constitutional Court case of 19 july 2018 nr 96/2018 [2018].
[487] R1.
[488] R1.
[489] R11
[490] R5 and R6

Constitution's obsolete fundamental rights catalogue to be updated.[491] This was considered both a motive for the general openness to EU law, as for more specifically their willingness to engage in the judicial dialogue with the ECJ.[492]

6.3.2. Extra-legal reasons to refer

During the interviews, the respondents mentioned various extra-legal motivations to refer. As indicated above, these extra-legal reasons mainly seem to play a role in the strict or broad interpretation of the CILFIT-criteria, and do not constitute an 'autonomous' reason to make a preliminary reference. In the latter case, a reference would for instance be made despite the applicability of one of the 'CILFIT' exceptions.

A first extra-legal reason to refer mentioned is a fear of "costs and loss of face"[493] that would follow from the conviction of Belgium by the ECJ in an infringement procedure for incorrect transposition or violation of EU law,[494] or for the refusal to comply with the obligation to request a preliminary reference.[495] Secondly, the same wish to avoid costs and loss of face by a Belgian conviction before the European Court of Human Rights for violation of the right to a fair trial (article 6 ECHR, case *Dhahbi v. Italy*) was indicated to play a role.[496] Moreover, some respondents indicated that the risk of state liability was a reason to abide by the obligation to refer and the CILFIT-criteria,[497] although it was sometimes unclear whether the respondents referred to an infringement procedure such as that in the case of *Commission v. France*, or to the *Köbler* state liability.[498] In relation to *Köbler* liability, one respondent also stressed the role of the parties. It was explained that oftentimes, parties request a preliminary reference and hold that if the last instance court does not make the preliminary reference to the ECJ, state liability proceedings will be started.[499] When asked about whether the threat of a state liability procedure hence

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[491] R1, R2.
[492] R1.
[493] R1. See similarly R8.
[494] R1.
[495] Case C-416/17 *Commission v. France* [2018] ECLI:EU:C:2018:811. R1.
[496] R1. European Court of Human Rights *Dhahbi v. Italy* [2014] no. 17120/09.
[497] R3, R5, R8.
[498] Case C-416/17 *Commission v. France* [2018] ECLI:EU:C:2018:811; Case C-224/01 *Köbler* ECLI:EU:C:2003:513.
[499] R8.

formed a reason to refer a question to the ECJ, the respondent held that the threat of a state liability procedure was not an autonomous reason to refer, but rather that:

> "if only out of a human reflex, that is an element that comes into play when it comes to big interests, very big interests. And if there is a party that threatens with liability proceedings, one might be quicker to say: yes, there is a sufficient doubt that justifies referring questions to the Court in Luxemburg."[500]

Respondents also indicated the role of the parties of relevance in relation to the extent to which they insist on a preliminary reference.[501] This is illustrated well by the following quote:

> "Reasons to ask a question are first: how strongly do the parties insist? That plays into it. Sometimes, the parties do ask for a reference but actually do not insist very strongly, so then maybe we should not hang too much weight on that. However, sometimes you see that in the pleadings of the parties they elaborate on it at length. That is then a reason, perhaps a motive, to ask a preliminary question"[502]

A second extra-legal motivation to refer that was brought up by four of the respondents is the *impact of the case*. As one respondent from the Council of State indicated, "[y]ou are not [going to make a preliminary reference] in an insignificant case, *but rather in a case where many interests are at stake* and where, yes, we also want to be sure that we give the right solution to the dispute."[503] In the same vein, two respondents from the Court of Cassation indicated that the economic impact/interests of the parties, as well as the economic impact of the case on society plays a role in their decision to refer.[504] Lastly, a judge at the Constitutional Court indicated that he was more inclined to refer when the impact of the case on the development of EU law is high.[505]

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[500] R8.
[501] R3, R5, R6, R9.
[502] R9.
[503] R9.
[504] R5, R6.
[505] R4.

A third motivation for referring a preliminary question mentioned by several respondents is out of a wish to have a certain interpretation apply for the whole of the EU.[506] One respondent of the Constitutional Court indicated that this was for reasons of uniform application of EU law.[507] Another respondent from the Constitutional Court indicated a more neo-realist reason. He held that sometimes, to have a certain interpretation apply for the whole of the EU would protect the Belgian state or Belgian citizens. With regard to protection of the Belgian state he held that:

> "We protect the Belgian government [by making a preliminary reference to the ECJ], because if we ourselves, as the Belgian Constitutional Court, were to give a very far-reaching interpretation of European law that was very detrimental, financially or administratively, to the Belgian state, only Belgium would be bound by that, because we do not bind the other Member States. Whereas if we let the Court of Justice give that interpretation, then every Member State suffers equally. Then we do not disadvantage Belgium in relation to the other Member States."[508]

Concerning Belgian citizens, the Constitutional Court judge held that:

> "Conversely, of course, we also protect Belgian citizens. It could just as well be that all the other Member States have transposed a directive correctly and Belgium has not. Then Belgian citizens or companies wishing to establish themselves in Belgium are at a disadvantage compared to nationals and companies from all the other Member States."[509]

Fourthly, besides letting the ECJ decide on a point of law in order to have a certain interpretation apply for the whole of the EU, three respondents indicated that in some situations, they would rather have the ECJ decide on a certain issue.[510] One respondent, a law clerk at the Constitutional Court, indicated that he thought sometimes a preliminary reference would be made because of reasons related to *blame avoidance*. He held that when a norm stands a good chance of being declared unconstitutional,

[506] R1, R4.
[507] R4.
[508] R1.
[509] R1.
[510] R3, R9, R10.

> "[T]he Court wants to cover itself when Union law is at stake, so to speak, by putting the balls to the Court of Justice and then saying 'yes but we had no choice but to declare that regulation unconstitutional or annul that regulation' […] sort of to not have to take the responsibility entirely on its own shoulders in relation to the government. Yes I do think that happens"[511]

However, when the other respondents were asked about whether they employed any strategic motivations in their decision (not) to refer, no further respondents indicated this *blame avoidance strategy* to play a role, nor did they indicate to pertain any other strategic considerations.

Secondly, a judge at the Council of State explained that a reason to refer was also that an answer from the ECJ could settle a dispute within the national last instance court.[512] He indicated that:

> "the route via another body, such as the Court of Justice […], can also be there to settle a discussion within the national court. You cannot get it resolved, there are different opinions, yes you can always resolve the discussion of course, majority against minority, but that is not a very elegant solution. […] Sometimes it can be good to then say: we are going to ask the Court of Justice."[513]

Contrastingly, one judge at the Constitutional Court explicated that he did not agree with the suggestion in literature that the Constitutional Court sometimes asks a preliminary reference in order to not have to resolve sensitive cases themselves.[514] A third motive to have the ECJ decide on a certain issue indicated is the view that, on certain delicate topics, it can be useful to make a preliminary reference to give more weight to the judgement.[515]

A fifth motive that can be deduced from the interviews relates more to the personality of the judge, more specifically their openness to EU law and their willingness

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[511] R3.
[512] R9.
[513] R9.
[514] R9.
[515] R10.

to refer.[516] Some judges indicated that they "had a European reflex"[517] or that they "tried to be a good student in the European class."[518] When asked about the underlying reason behind their openness to EU law, respondents indicated several structural factors to be of influence. Firstly, a judge from the Constitutional Court indicated that the law clerks at the Constitutional Court were often very well able to recognize problems of EU law and – if necessary – formulate preliminary questions regarding those problems because they are quite young (often under 35) and have hence been well-educated in European law.[519] Another respondent also indicated knowledge to be a factor of influence.[520] Moreover, it was indicated that the existence of certain data-bases with, for example, EU case law analyses or with summaries of case law from other highest national courts, allowed judges and law clerks to adopt a certain openness towards EU law and the making of references.[521] Lastly, one Auditor at the Council of State indicated that her two-week internship at the ECJ had "lowered the threshold" for cooperation between the Council of State and the ECJ.[522]

Other structural factors that were indicated to constitute reasons to refer are, for instance, when judges are often confronted with questions on the interpretation or validity of EU law. At the Constitutional Court, one respondent indicated that given the low standing criteria and their open attitude towards the dialogue with the Court of Justice, "applicants from all over Europe have now discovered [the Belgian Constitutional Court] as a mechanism to bring their problem of European Union law before the Court of Justice."[523] Moreover, some respondents indicated that the sector of law they worked in was mostly regulated by EU law (e.g. VAT or customs,[524] public procurement,[525] or environmental law[526]), and that they were therefore more often confronted with cases with an EU law element. One respondent indicated that in these areas, the role of the

516 R1, R2, R4, R9.
517 R4.
518 R9.
519 R1.
520 R2.
521 R2, R9.
522 R7.
523 R1.
524 R5.
525 R7, R9.
526 R10.

lawyers in identifying a question about the interpretation or validity of EU law was significant. The respondent held that:

> "I would say that the role of the lawyers is very important in the matter of public procurement. I would almost say that if the lawyers don't identify the problem, then there probably won't be anything to identify."[527]

According to the respondent, that had to do with the quality of the lawyers in these sectors. He held that due to the very technical nature of public procurement, and similarly tax law, the quality of the lawyers is high and they follow very closely the new developments in EU law.[528]

6.4. Reasons not to refer

This section sets out the legal and extra-legal reasons that were mentioned during the interview as a reason *not* to refer. Similar to the previous section about reasons to refer, this section will be structured as follows: first, *legal* reasons not to refer will be set out in subsection 1. Then, subsection 2 will shed light on the extra-legal reasons respondents indicated to be of influence on their decision not to refer. Again, these extra-legal factors mainly play a role in the manner in which the margin appreciation of the CILFIT criteria is filled in. However, one respondent also gave an example of a case in which a reference was not made, despite none of the CILFIT exceptions being applicable. This was because of reasons of legal certainty: in that specific case, the judge preferred "not to leave two years of uncertainty [caused by the duration of the preliminary reference procedure], because that would have actually made the whole system unstable."[529]

6.4.1. Legal reasons not to refer

Multiple legal reasons not to make a preliminary reference to the ECJ can be deduced from the interviews. A first and perhaps obvious reason not to make a preliminary reference to the ECJ is the applicability of the CILFIT-criteria. This legal reason was

[527] R9.
[528] R9.
[529] R4.

mentioned by all respondents. Secondly, a(n autonomous) legal reason not to refer mentioned by respondents from the Council of State is that of timing in relation to "extremely urgent" interlocutory procedures in the field of public procurement.[530] As explained by one respondent,

> "In such cases, the Council of State has to pronounce a judgement within 45 days of the administrative decision. Now beware, there does exist an urgent procedure before the ECJ, which also applies in case of preliminary reference, but even with that timing it is not evident. Among other things, I think there is a minimum period of 15 days to be left to the parties. So within the Belgian picture of extremely urgent procedure, it is very difficult to then make a preliminary reference. However, there is also no obligation to refer as such, because it is assumed that it is an interlocutory case and that the case can be continued on the merits anyway."[531]

A last legal reason that can play a role in the decision not to refer is the passive role of the judge at the Court of Cassation in civil cases. As a judge from the Court of Cassation indicated, their motto is "nothing but the plea".[532] Hence, a preliminary reference will almost exclusively be made when requested by the party. If no preliminary reference would be requested by the parties, an ex-officio preliminary reference would be difficult because the judge would very easily go outside the scope of the ground of appeal.[533]

6.4.2. Extra-legal reasons not to refer

A first extra-legal reason, or 'obstacle' not to refer a preliminary question to the ECJ mentioned by the majority of the respondents is related to the often quite lengthy duration of the preliminary reference procedure and the wish to have efficiency of the administration of justice for the parties involved.[534] As indicated by a respondent from the Constitutional Court:

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[530] R9, R7.
[531] R7. Similarly R9.
[532] R8.
[533] R8.
[534] R1, R2, R3, R4, R7.

> "another consideration [for not referring] is also, of course, time. In some cases, a judgement has to be pronounced quickly, and that that might take precedence over giving a very broad interpretation to the CILFIT criteria."[535]

One respondent even held that the duration of the preliminary reference procedure was the most important extra-legal element of influence on his decision not to refer. He held that:

> "an important element that comes into play is the length of the process. Knowing that if you put the question to Luxembourg, you are easily a year, two years further before you can finally make a judgment and that the process takes that much longer. That's surely a consideration to stick to that line, of not asking the question at the slightest doubt and maintaining a somewhat broader and flexible [interpretation of the CILFIT-criteria]. That's certainly an important consideration. I think maybe the most important one actually."[536]

Secondly, respondents also stressed that an obstacle in making a preliminary reference could be the timing of the preliminary reference procedure and consequently the extra workload that would result in.[537] For example, one judge from the Council of State explained that:

> "you are working on a case, you would like to get it resolved, and a preliminary question means that you have to put it away for a while and afterwards you have to get back into the case completely. If that's a complicated case, that can be a reason for trying to resolve the case just by yourself."[538]

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[535] R2.
[536] R5.
[537] R3, R9, R10.
[538] R9.

Moreover, the costs of a preliminary reference for the parties, such as lawyers costs, was indicated to be taken into account in the decision whether or not a reference should be made.[539]

Thirdly, respondents also mentioned workload of the Court of Justice as a reason to be somewhat more reluctant in making preliminary references, especially when it concerns cases that are "not very interesting" for the ECJ.[540] In the same vein, it was indicated that where the interest at stake is very minor,[541] or where the question of law is highly specific,[542] judges and law clerks are less inclined to make a reference.

Fourthly, the quality of the judicial dialogue was mentioned as a possible obstacle to refer.[543] One respondent explained that:

> "another obstacle is of course if in the judicial dialogue there is little response or that the arguments we raise are not really interacted with. [...] So if, in that area, there is little interaction with the arguments that are raised, that might be a reason to be a bit more cautious in the interpretation of the [CILFIT] criteria. So not to disregard the criteria, but perhaps to be a little more cautious in asking the question."[544]

In relation to this latter obstacle, one respondent from the Constitutional Court also indicated that he in one case refrained from resorting to the 'questioning the ECJ's case law' function of the judicial dialogue because of a disagreement with the development of the ECJ's case law and therefore also the expected answer to a preliminary question. This case concerned a directive which the ECJ had given a very broad interpretation to. In a previous case, another court had already questioned this interpretation and asked the ECJ to 'calm down' a little bit and to interpret the directive less broadly. As a response, however, the ECJ had interpreted the directive even more broadly. In this context, the respondent held that referring a question "in the sense of we don't agree, so please calm

[539] R3.
[540] R9 and also R3.
[541] R4, R5, R6.
[542] R5, R6.
[543] R2.
[544] R2.

down a little bit" to the ECJ had made no sense.[545] In a similar vein, a judge at the Council of State held that he was sometimes more reluctant to refer because:

> "you have a particular problem and you can then ask the ECJ a question, and you know what you put in but god knows what comes out and what the consequences are. And we think about that a lot anyway."[546]

A fifth reason not to make a reference mentioned in two of the interviews is that, when a reference is not strictly necessary, some judges would rather solve the case themselves immediately. One Council of State judge held, for instance, that:

> "If you have a problem that you would possibly ask a question about, but you don't have to, the judge's core business is solving cases. So if you can solve them, you solve them immediately."[547]

Another Council of State judge similarly indicated that:

> "If everything points to the fact that we should not actually ask a preliminary question, [...] why should we? Because by doing so we lose the case, we must hand it over and so on."[548]

Lastly, it was mentioned by a judge of a Council of State that concerns about judges' reputation formed an obstacle to the making of preliminary references. The judge held that:

> "I see that that is with me and with the people with I have always worked, and I suppose with every judge: we don't want to lose face with the Court of Justice because of a silly question either."[549]

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[545] R1.
[546] R10.
[547] R10.
[548] R9.
[549] R9.

6.5. Conclusion

Shared by all judges and law clerks interviewed is that their primary motivation (not) to refer is a legal one: art. 267(3) TFEU and the *CILFIT* and *Foto-Frost*-criteria. For some respondents, the decision (not) to refer was based exclusively on these legal considerations. However, although the legal motivation is seen as most important and decisive, most respondents also indicate that (extra-)legal considerations play a role in the strict or broad interpretation of the CILFIT-criteria. These considerations however rarely constitute an 'autonomous' reason to make a preliminary reference.

A first legal motivation to make a reference that appeared from the interviews connect to the function of the judicial dialogue: receiving clarification and (although less often mentioned) questioning certain case law of the ECJ. Secondly, respondents indicated to be loyal to the preliminary reference system for reasons related to its functioning and democratic legitimacy. Thirdly, respondents indicated that a reason to make a preliminary reference to the ECJ was a fear of infringement procedures, a conviction before the ECtHR for violation of the right to a fair trial and/or the threat of *Köbler* liability. Lastly, a court-specific motive mentioned by a judge and a law clerk of the Constitutional Court is that preliminary references allow the Belgian Constitution's obsolete fundamental rights catalogue to be updated.

Extra-legal motivations to refer that came back in the interviews are firstly the impact of the case. Secondly, the role of the parties was stressed: the insistence of parties on a preliminary reference functions as a motivation to refer. Moreover, it followed from one interview that parties may use the threat of state liability proceedings as a "stick" to compel judges to make a preliminary reference in their courts. Thirdly, respondents indicated that they were sometimes motivated to refer because they wished to have a certain interpretation apply for the whole of the EU. This was either motivated by the wish to see uniform application of EU law, or the more neo-realist reason that doing so would protect the Belgian state or Belgian citizens. Fourthly, judges and law clerks mentioned that they were sometimes motivated to make a preliminary reference because they would rather have the ECJ decide on the issue than the national last instance court to avoid blame, settle a dispute within the court or to give the judgement more weight. Fifthly, personal openness to EU law and a willingness to refer was indicated to play a role.

Regarding motivations not to refer, a first and most important legal motivations mentioned is the applicability of the CILFIT-criteria. Secondly, the length of the preliminary reference procedure in extremely urgent interlocutory proceedings constitutes a legal reason not to refer. Lastly, the passive role of the judge in civil cases at the Court of Cassation constitutes a legal motivation not to refer.

Extra-legal motivations that were mentioned as additional reasons not to refer in case of applicability of the CILFIT criteria are firstly the duration of the preliminary reference procedure, which could result in extra workload and slow down the efficiency of the administration of justice. Secondly, costs of preliminary reference for the parties were indicated to be taken into account in the decision (not) to refer. Thirdly, respondents indicated that the workload of the ECJ formed a reason for a reluctance to refer questions. Fourthly, the quality of the judicial dialogue was mentioned as a possible obstacle to refer. A last reason not to refer brought up in the interviews is that, when not strictly necessary, some judges would rather solve the case themselves.

7. Back to the theoretical framework: a nuanced legalist image.

7.1. Introduction

This chapter will discuss how the empirical findings fit the theory as discussed in chapter 3. This chapter reviewed the main streams in the literature on what motivates judges to participate in the process of European (legal) integration. In these theories, courts'/ judges' participation in European integration was explained mainly through *legalism*, *neo-functionalism*, *neo-realism* and the *inter-court competition* theory. In the above chapter, the reasons of Belgian last instance court judges and law clerks to make or propose a preliminary reference were analyzed. It will now be analyzed to what extent these empirical findings fit these four main theories. During the interviews, respondents were also asked specifically about whether they recognized the motivations put forward in these theories. The analysis of these answers will help to distinguish deductively whether and to what extent the reasons for (non-)referral of judges and courts identified in the literature are also reasons employed by Belgian last instance court judges and law clerks. Section 2 will do so for the legalist theory, section 3 for the neo-functionalist theory, at least to the extent that this theory is applicable to last instance courts, section 4 for the inter-court competition and section 5 will finally consider to what extent the reasons put forward in the neo-realist theory are being employed by Belgian last instance court judges and law clerks. Section 6 will place the empirical findings in the context of the existing literature employing qualitative approaches to gaining understanding of the reasons for (non-)referral.

7.2. Nuanced Legalism. Strong support.

As set out in Chapter 3, the formal legalists explain judicial decision-making regarding European integration as based solely on legal logic and reasoning. Nuanced legalism, on the other hand, stresses the central importance of legal arguments but also recognizes that those legal arguments must be put in the wider social and political context.

The empirical results of the interviews conducted with Belgian last instance court judges and law clerks strongly fit into this nuanced legalist framework. As set out in the previous chapter, all judges and law clerk interviewed shared as their primary motivation

(not) to refer a legal one: article 267(3) TFEU and the CILFIT-criteria. Some respondents indicated that the decision (not) to refer was based exclusively on these considerations, confirming the formal legalist theory. The majority, however, indicated that the legal reasons (not) to refer were of central importance, but also recognized several non-legal reasons to play a role. This confirms the nuanced legalist theory about judicial decision-making in relation to European integration as first put forward by Joseph Weiler.[550]

7.3. Neo-functionalism. Support.

According to the neo-functionalist theory, put forward in the writings of Mattli and Burley (later Slaughter),[551] the driving force behind European integration are the individual incentives and self-interest of actors to participate in European integration. The groups identified as having a self-interest in European integration are: European law academics and private practitioners, lower national courts, and individual litigants. With regard to individual litigants, it is argued that a pro-EU constituency of private individuals was created through the direct effect doctrine and the preliminary reference procedure.[552] This constituency is pro-EU because those citizens who are the net losers of integrative decisions can only under the very limited circumstances of article 263 and 340 TFEU sue ultra vires or otherwise illegal actions of the Union,[553] while citizens who have to gain from EU law have a constant incentive to push their governments to comply with EU law by arguing for a preliminary reference to be made before their national courts. [554]

The role of the parties in pushing for preliminary references finds support in the empirical results. One respondent stressed that oftentimes, parties request a preliminary reference and hold that if the last instance court does not make the preliminary reference to the ECJ, it will start state liability proceedings.[555] The respondent held that such a threat might lead it to be quicker to conclude that there is indeed a sufficient doubt that justifies referring a question to the ECJ.[556] Another respondent held that the extent to

[550] Weiler, 'The transformation of Europe' (n 57).
[551] Burley and Mattli (n 72).
[552] Burley and Mattli (n 72) 60.
[553] Burley and Mattli (n 72) 62; Jaremba 2012 (n 149) 3.
[554] Burley and Mattli (n 72) 62.
[555] R8.
[556] R8.

which parties insist on a preliminary reference influenced his decision on whether or not to refer a question to the ECJ.[557] Lastly, a respondent indicated that the parties' lawyers had a big role in flagging questions on the interpretation or validity of EU law in cases in technical and EU-law heavy areas such as public procurement or tax law.[558]

7.4. Inter-Court competition. Restrained support.

According to the inter-court competition theory, national courts use their struggles between that court and other levels of the judiciary or between that court and other political bodies in their decision to refer. Alter points out that unlike lower courts, last instance courts have an interest in limiting (further) European integration because further expansion of doctrinal and substantive EU law will limit the last instance court's own jurisdictional authority.

The inter-court competition finds restrained support in the empirical results. One respondent indicated that he thought sometimes a preliminary reference would be made because of reasons related to blame avoidance in relation to the government. As mentioned in the above chapter, a judge also indicated that he would rather not 'hand over' the case but rather solve the case themselves if a reference is not strictly necessary.[559] In the same vein, a law clerk at the Constitutional Court indicated that he thought that

> 'no court or judge voluntarily likes to see its power limited, or its discretion limited. Unless it's within the framework of when it has to. Because then the power is already limited because Union law itself limits it, limits that discretion and imposes the obligation to ask the question. But if that obligation is not there and you risk thereby limiting your discretion, I think many judges are not going to do that.'[560]

Lastly, a judge at the Council of State indicated that he tried to avoid asking a preliminary question when it was not strictly necessary because of the sometimes far-reaching consequences of a preliminary reference on the scope of EU law.[561] However, when asked

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[557] R9.
[558] R9.
[559] R9.
[560] R3.
[561] R10.

about why this would be problematic, the respondent did not indicate that he thought this was a problem because it limits the courts own jurisdictional authority, but rather that it further complicates solving cases. In the other interviews conducted, the reasons put forward by the inter-court competition were indicated not to be recognized as playing a role in the decision (not) to refer.

7.5. Neo-realism. Restrained support

The neo-realist theory holds that judicial decision-making on acceptance of and participation in European integration can be explained in terms of national (economic and political) interest calculations. According to the theory, national governments and politicians use tools such as the definition of jurisdiction, manipulation of appointments of judges or ignoring case law to influence judicial behavior. The possible use of these tools limits the margin of appreciation regarding participation in European integration of a court. In view of the possible critical reaction by governments, courts do not depart too much from national economic and political interests.

This theory finds restrained support in the empirical results. As set out in the above chapter, several respondents indicated that they would make a preliminary reference to have a certain interpretation apply for the whole of the EU. One respondent indicated that this was for reasons of protection of the Belgian state and/or Belgian citizens. Moreover, the use of the preliminary reference mechanism to question the ECJs case law may also sometimes be motivated by neo-realist reasons. For example, a respondent indicated that he referred a preliminary question to question the ECJs case law in the field of data retention in light of the national interest of the fight against terrorism and organized crime. However, none of the respondents indicated to be afraid of national governments or politicians using certain tools to limit the margin of appreciation regarding participation in European integration. It was also not indicated that judges and law clerks fear to depart too much from national economic and political interests considering the possible critical reaction by their governments.

7.6. Evaluation of the findings in light of the qualitative approaches to gaining understanding of the reasons of (non-)referral

As described in the sections above, the legalist approach to participation in legal integration seems to be of most relevance in the context of the Belgian last instance court judges and law clerks. This is in line with the findings of Jaremba (in the context of the Polish civil judiciary), who found that the 'nuanced' legalist approach was of most relevance in explaining judges' participation in European integration.[562] This conclusion also partially overlaps with that of Krommendijk. According to Krommendijk, his findings

> "support the importance of a nuanced approach which leaves room for the 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."[563]

In their recent article on reasons not to refer, Glavina and Leijon have also recognized the importance of legal reasons in lower court judges' decision not to refer. They found that "almost all respondents mention the formal rules prescribed by Article 267(3) TFEU or the CILFIT criteria when describing their decision not to refer EU law cases to the ECJ."[564] However, in line with the nuanced legalist perspective, they also recognized other (extra-legal) factors to be of relevance.

The extra-legal findings that this legalism is 'nuanced' by also partially overlap with those put forward by the authors having conducted qualitative research to gain understanding of judges' motives of (non-)referral. The empirical findings show strong support that the duration of the preliminary reference procedure, which could result in extra workload and

[562] Jaremba 2012 (n 149) 342; Jaremba 2016 (n 22) 64.
[563] Krommendijk (n 7) 170.
[564] Glavina and Leijon (n 34) 272.

slow down the efficiency of the administration of justice, detrimental to the parties,[565] is a factor that judges and law clerks take into account in the decision (not) to refer. This factor has also been found of relevance by Jaremba,[566] Pavone,[567] Krommendijk,[568] and Glavina and Leijon.[569] In contrast to the findings of Krommendijk, who stated that "the role of delay in decisions to refer should not be overstated",[570] the role of delay in the decision (not) to refer was mentioned by the majority of respondents. It can therefore be considered an important factor in Belgian last instance court judges' and law clerks' decision (not) to refer.

Moreover, as also described by Krommendijk[571] and by Glavina and Leijon,[572] concerns about the capacity of the ECJ to process preliminary references proved to be of relevance. According to Glavina and Leijon, this previously untheorized motive is "an attempt to abide by one of the most important professional responsibilities of a judge to safeguard the proper functioning of the legal system."[573] Furthermore, this working paper finds that the impact of the case is taken into account in the decision (not) to refer. This finding overlaps with that of Krommendijk, who found that especially in the lower judiciary "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."[574] This working paper confirms that the importance of the case is also a factor taken into account by last instance courts.

The insistence of parties on a preliminary reference is another factor found to be of influence on the decision to refer. This is in line with the findings of Krommendijk,[575] and Pavone,[576] according to whom opportunity structures for parties are a relevant contextual factor in the decision (not) to refer. Another factor that was found of influence

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[565] As found relevant by Glavina and Leijon (n 34) 263.
[566] Jaremba 2012 (n 149) 208, 230.
[567] Pavone (n 177) 318.
[568] Krommendijk (n 7) 39.
[569] Glavina and Leijon (n 34) 274.
[570] Krommendijk (n 7) 56.
[571] ibid 42, 43.
[572] Glavina and Leijon (n 34) 276.
[573] ibid 281.
[574] Krommendijk (n 7) 52.
[575] ibid 58.
[576] Pavone (n 177) 313.

on judges' and law clerks' willingness to refer which finds support in previous literature relates to the necessity to find new legal solutions at the EU level:[577] it was indicated by respondents from the Constitutional Court that engaging in judicial dialogue with the ECJ allows the Belgian Constitution's obsolete fundamental rights catalogue to be updated. In addition, the personality of the judge was found to be a relevant factor. As also found by Jaremba, judges with a sense of responsibility for ensuring the effectiveness of the EU legal order may be prompted to more easily resort to the usage of the preliminary reference mechanism. In that context, Jaremba's, Krommendijk's, and Glavina, and Leijon's finding that the wish to maintain prestige influences judges' willingness to refer is also confirmed in the present study.[578]

[577] Mayoral & Torres Pérez (n 166).
[578] Jaremba 2012 (n 149); Krommendijk (n 7); Glavina and Leijon (n 34).

8. Conclusion

The question central to this working paper was: *what are the reasons of Belgian highest national court judges and law clerks (not) to make preliminary references about questions on the interpretation or validity of EU law to the ECJ and how does the obligation to refer following from article 267 TFEU and the CILFIT-case law play a role in the decision (not) to refer?* This question is of societal relevance because the preliminary reference mechanism is the keystone of the EU judicial system, serves the consistency, full effect and autonomy of European law and is instrumental in ensuring the judicial protection of the rights individuals derive from EU law. The functioning of the preliminary reference mechanism is, however, dependent on the willingness of national courts to utilize the mechanism. The findings of this working paper help to better understand why judges and law clerks decide (not) to enter into judicial dialogue with the ECJ. As such, they help to comprehend where the strengths and weaknesses of the preliminary reference mechanism lie, providing a steppingstone for further research on how the preliminary reference might be improved to let the judicial dialogue blossom further. Besides being of societal relevance, this question is also of relevance academically because qualitative research on last instance court judges' and law clerks' reasons (not) to refer had not yet been conducted in connection to the Belgian legal system. Moreover, the vast majority of the literature on judges' use of the preliminary reference mechanism focusses on lower instance courts. This working paper examined what the reasons (not) to refer of judges and law clerks of the *highest national courts* in Belgium are. An examination of reasons (not) to refer of highest national courts is particularly interesting because most theories on judicial participation in European Integration primarily see incentives for lower instance courts to use the preliminary reference procedure, whereas they would expect last instance courts to be rather reluctant in doing so. Moreover, most often in contrast to lower courts, highest national courts have an obligation to refer. Since this obligation does not play a role in most lower instance courts' motivations (not) to refer, this working paper provides relevant insights on the way in which article 267 TFEU and the CILFIT case law play a role in highest national court judges' motivation (not) to refer.

In order to answer the research question, various methods were applied. On the one hand, a legal doctrinal methodology was used to identify the legal rules and case law on the duty to refer of last instance courts and to analyze the application of the (exceptions to) the duty to refer by the three last instance courts in Belgium. It was found that there are differences among the three courts in the use of the CILFIT exceptions. Regarding the *acte clair*, the Council of State proved most hesitant to apply it, whereas the Constitutional Court and the Court of Cassation were found to be less reluctant in doing so. It was also deduced that none of the three courts are transparent about the criteria on the basis of which they decide that acts are (not) sufficiently *clair*. All three last instance courts also make application of the *acte éclairé* theory, most often on the basis of a thorough analysis of the case law of the ECJ. However, the three last instance courts do sometimes seem to confuse the *acte clair* and the *acte éclairé* by applying the theory of *acte éclairé* to conclude in the end that the act is *clair*.

These findings were extended upon using both quantitative and qualitative insights. The quantitative insights provide a clearer picture on the participation of the Belgian highest national courts in the preliminary reference mechanism. It was found that of all three Belgian last instance courts, the Constitutional Court is confronted most often with cases with an EU element (an average of 34% of the cases), and has also made the most references in cases with an EU law element (in 4.3% of the cases). Followed by the Constitutional Court is the Court of Cassation, confronted with cases with an EU element in an average of 6.8% of the cases, in 3.6% of which it had also made a preliminary reference.[579] It was concluded that the Council of State was the least active user of the preliminary reference mechanism, which had only made 3 references a year (0.8 %) where it was confronted with cases with an EU law element in an average of 12.3% of the cases over the years 2016 to 2020.

Qualitative insights were then used to shed light on the reasons of judges and law clerks for the (non-)participation in the preliminary reference mechanism, as well as on their interpretation of the CILFIT criteria. To that end, a total 10 semi-structured interviews with judges, law clerks and one auditor of the Constitutional Court, the Court

[579] As also mentioned in Chapter 5, these findings regarding the Court of Cassation must be interpreted with particular caution.

of Cassation, and the Council of State were conducted during the summer of 2022. Based on the interviews, it appears that the majority of the judges and law clerks do not interpret the CILFIT criteria in a strict or legal-formalistic way according to which a reference is made "in case of any doubt", but rather consider an act to be *clair* when the judges or law clerks are convinced of the correct interpretation of a provision of EU law. Regarding the reasons of judges and law clerks for the (non-)participation in the preliminary reference mechanism, the qualitative study shows that the primary reason of the Belgian last instance court judges and law clerks (not) to refer is a legal one: article 267(3) TFEU and the CILFIT and Foto-Frost criteria. Some respondents indicated that the decision (not) to refer was based *exclusively* on these legal considerations, giving some support to formal legalism. However, the majority indicated that the legal reasons (not) to refer were of central importance, but also recognized that several extra-legal reasons played a role in the interpretation of this legal obligation to refer. This confirms the nuanced legalist theory about judicial decision-making in relation to European integration. This finding is in line with previous qualitative research about judges' reasons (not) to refer in other Member States, as concluded by Jaremba,[580] Krommendijk,[581] and Glavina and Leijon.[582] In addition, support was found for the neo-functionalist theory, in particular regarding the role of the parties in pushing for preliminary references. Moreover, this working paper found restrained support for the inter-court competition theory and the neo-realist theory.

This working paper identified a variety of factors which nuance the legalist approach, both of a legal and of an extra-legal nature. Legal reasons to refer identified were firstly the clarification or questioning of ECJ case law. Secondly, references were made because of a loyalty to the preliminary reference system for reasons of its functioning and democratic legitimacy. Thirdly, infringement procedures, a conviction before the ECtHR for violation of the right to a fair trial and/or *Köbler* liability were indicated to form a reason to refer. Lastly, in the context of the Belgian Constitutional Court, the search for new legal solutions on the EU level was found to constitute a reason to refer. Besides legal reasons,

[580] Jaremba 2012 (n 149) 342; Jaremba 2016 (n 22) 64.
[581] Krommendijk (n 7) 170.
[582] Glavina and Leijon (n 34) 263.

extra-legal reasons to refer were also identified. A first extra-legal reason to refer that was found to be of relevance is the impact of the case: respondents indicated a greater willingness to refer when the impact of the case on the parties, on society or on the development of EU law was particularly high. Secondly, the role of the parties was found of relevance. It was indicated that when parties insist strongly on a preliminary reference, this forms a reason to ask a preliminary question. Moreover, it was held by one of the respondents that if there is a party that threatens that it will start liability proceedings in case a reference requested is not made, it would be quicker to conclude that there is a sufficient doubt that justifies a reference to the ECJ. This is a good example of how parties may use a 'stick' (the liability proceedings) to compel judges to make a preliminary reference. Thirdly, an extra-legal reason to refer found to be of relevance is the fear of costs and loss of face that may result from not making a preliminary reference, for instance because of the start of an infringement procedure or a conviction before the ECtHR for a violation of the right to a fair trial. Fourthly, the wish to have uniform interpretation constitutes an (extra-)legal reason to refer. This was either motivated by the wish to see uniform application of EU law (a legal reason), or the more neo-realist reason that uniform application of EU law would protect the Belgian state or Belgian citizens (an extra-legal reason). Judges and law clerks also mentioned that a reason to refer would be that they would rather have the ECJ decide on a certain issue so as to either avoid taking the blame for the decision themselves, to give a judgement more weight or to settle disputes within a court formed reasons to refer. Lastly, personal openness to EU law and a willingness to refer were indicated to play a role.

Besides reasons to refer, this working paper also investigated legal and extra-legal reasons (or 'obstacles') *not* to refer. Legal motives not to refer identified in the Belgian context are firstly and most importantly the applicability of the CILFIT-criteria. Secondly, the length of the preliminary reference procedure constitutes a legal reason not to refer in extremely urgent interlocutory proceedings. In such cases a judgement needs to be pronounced within 45 days, leaving very little room for a preliminary reference. In such cases, given their interlocutory nature and as the case can be continued on the merits, judges do not have an obligation to refer. Thirdly, the passive role of the judge in civil cases at the Court of Cassation and the exception to the obligation to apply EU law *ex officio* constitutes a legal motivation not to refer.

This research also identified extra-legal reasons not to refer. According to Glavina and Leijon, extra-legal reasons not to refer are of particular relevance, because the existence of extra-legal reasons are problematic in light of the functioning of the preliminary reference procedure.[583] Especially in the context of last instance courts, the absence of dialogue in specific cases may lead the integration process to "run into conflicts and misunderstandings".[584] Perhaps reassuringly, it was found in this working paper, however, that these motivations mainly play a role when one of the CILFIT-criteria is already applicable. Hence, these extra-legal motivations rarely constitute an autonomous reason unconnected to legal motivations not to refer. Extra-legal motives not to refer identified were firstly the duration of the preliminary reference procedure, which could result in extra workload for the judges and law clerks and slow down the administration of justice for the parties. Secondly, respondents indicated that the costs of the preliminary reference for the parties, such as court and lawyers' fees, were taken into account. Thirdly, respondents indicated that the high workload of the ECJ formed a reason for a reluctance to refer. Fourthly, dissatisfaction with the quality of the judicial dialogue was mentioned as a possible extra-legal reason not to refer. A last reason not to refer brought up in the interviews is that, when not strictly necessary, some judges would rather solve the case themselves. These findings provide useful information for policy makers wishing to let the judicial dialogue flourish. A suggestion to better the preliminary reference mechanism could for instance be to increase the staffing at the ECJ. This would allow the duration of a response to a preliminary question to be shortened and would hence solve part of judges' reluctance to make preliminary references. Secondly, it would possibly resolve concerns about the workload of the ECJ that were indicated to prevent judges from referring,

As already indicated by Jaremba,[585] the findings that result from this type of research on what motivates last instance court judges and law clerks to refer in Belgium cannot be extrapolated to other Member States. A first suggestion for further research would therefore be to conduct research on reasons of last instance court judges (not) to refer in Member States not yet covered. This would mean all Member States other than Poland,

[583] ibid 282.
[584] ibid.
[585] Jaremba 2012 (n 149) 285.

Spain, Italy, the Netherlands, the UK, Ireland, Slovenia, Croatia, Sweden and Belgium. Within Belgium, further empirical research could be conducted on the reasons (not) to refer of judges in lower levels of the judiciary. Future research could also attempt to provide more detailed statistics on the participation of the three last instance courts in the preliminary reference mechanism. In the Belgian context, the entry into force of the amendment to the Belgian Judicial Code and the Code of Criminal Procedure as regards to the publication of judgments and sentences, adopted early 2019 but whose entry into force has so far been postponed, will allow such more accurate data, in particular for the Court of Cassation.[586] Unlike the Court of Cassation's current practice, this law provides that, in principle, the integral text of judicial decisions must be published on a publicly accessible electronic data base of judgements. Moreover, rather than focusing on cases with an EU law element, future research could attempt to produce statistics on the percentage of cases *containing a question on the interpretation and validity of EU law* in which references to the ECJ were (not) made. Such data would provide a better image on the proneness of the Belgian last instance courts to make preliminary references when confronted with a question about the interpretation or validity of EU law. Another interesting new direction for future research might be judges' reasons (not) to use the newly introduced option to request advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the European Convention on Human Rights. This option has been introduced for "High courts and tribunals of High Contracting Part[ies]".[587] This protocol shares a number of similarities (as well as some differences) with the preliminary reference procedure.[588] During the interviews on the preliminary reference mechanism, protocol 16 was brought up by several respondents. One respondent from the Court of Cassation held that

> "The problem that arises [in the context of protocol 16], and there is difference of view of highest Belgian courts on this question, is whether we can go to Strasbourg with a request

[586] Act of 5 May 2019 amending the Code of Criminal Procedure and the Judicial Code regarding the publication of judgments and sentences, nr. 54 3489/001.
[587] Article 1(1) Protocol no. 16 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.
[588] See on the topic e.g. Nikos Vogiatis, 'The Second Advisory Opinion by the Strasbourg Court under Protocol 16. A Contextual Analysis' (2022) 3 European Convention on Human Rights Law 135.

> for an opinion, before we go to the Constitutional Court? Or should we do that together? Yes, there is some discussion about that, but from the point of view of the Court of Cassation we want to avoid any possibility that we could not address requests for an opinion to Strasbourg, that we would first have to refer the case to the Constitutional Court, and that they would then de facto be the only body that could address requests for an opinion to Strasbourg. And there you do see what we call in French: *la guerre des juges*."[589]

This quote seems to suggest that the inter-court competition theory on the use of the preliminary reference mechanism might be applicable to requests for advisory opinions of the ECtHR. Further research could shed light on the extent to which theories on the use of the preliminary reference mechanism, in particular the inter-court competition theory, are transposable to the requests for an advisory opinion of the ECtHR.

[589] R6.

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